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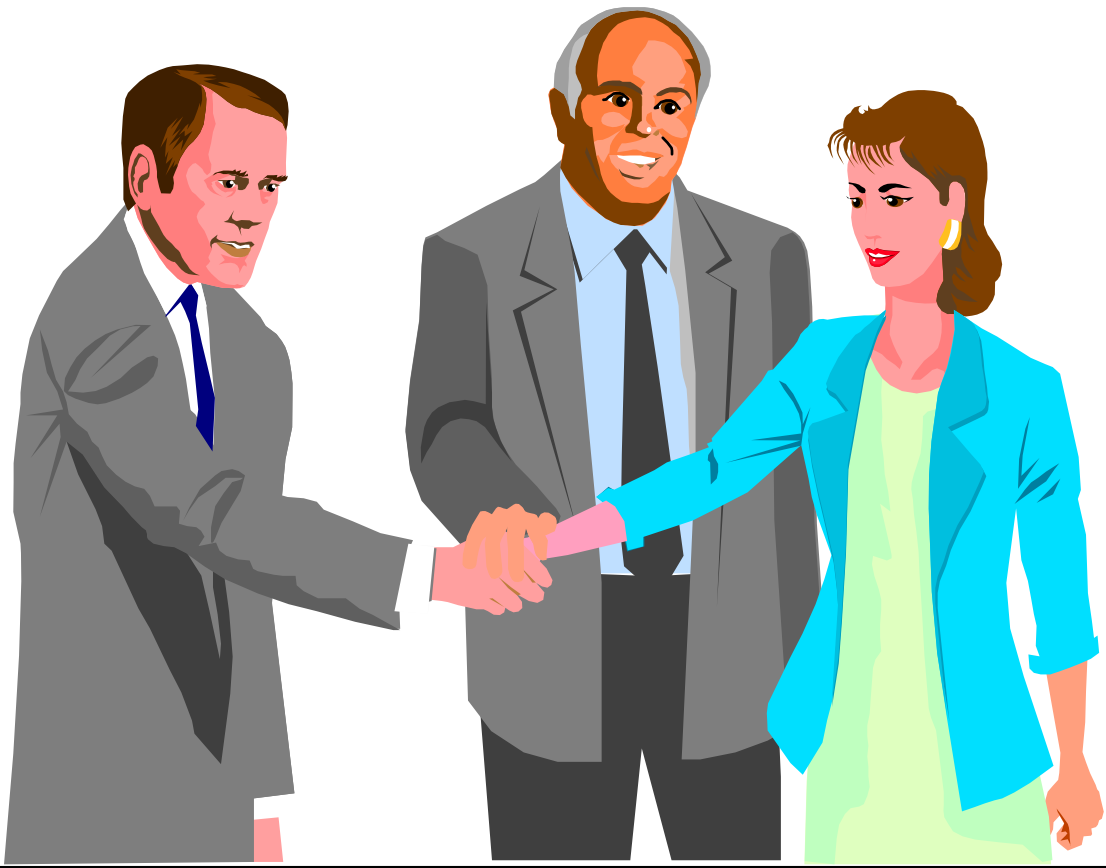
The Law of Federal Labor-Management Relations



Administrative and Civil Law Department
The Judge Advocate General's School
United States Army
Charlottesville, Virginia

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PREFACE

This compilation of cases and materials on labor-management relations is designed to provide primary source materials for students in the Graduate Course and those attending Continuing Legal Education courses in Administrative and Civil Law at The Judge Advocate General's School, U.S. Army.

The casebook contains eight chapters, the first providing an introduction to the practice of Federal sector labor law, and the remaining seven chapters dealing with a major area of Federal sector labor law. Chapter 2 addresses the process by which a union becomes an exclusive representative of a group of employees. Chapter 3 deals with representational rights. Chapter 4 deals with collective bargaining. This includes matters which are not negotiable, matters which may be negotiated at management's option, and matters management must negotiate. Chapter 5 deals with the procedures to be followed when management and the union cannot agree on a matter which is negotiable (impasse procedures). Chapter 6 deals with unfair labor practices. Chapter 7 deals with grievances and arbitration. Chapter 8 addresses judicial review.

This casebook does not purport to promulgate Department of the Army policy or to be in any sense directory. The organization and development of legal materials are the work products of the members of The Judge Advocate General's School faculty and do not necessarily reflect the views of The Judge Advocate General or any governmental agency. The words "he," "him," and "his" when used in this publication represent both the masculine and feminine genders unless otherwise specifically stated.

Contact the Administrative and Civil Law Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, at (804) 972-6350 with questions or recommended changes. An electronic address for the appropriate professor will be provided.

THE LAW OF FEDERAL LABOR-MANAGEMENT RELATIONS

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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

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[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 Co-Operation 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

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[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.

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[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.

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[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.

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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]

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[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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CHAPTER 2

THE REPRESENTATION PROCESS

2-1. Introduction.

a. Recognition. Under the Federal Service Labor-Management Relations Statute, (5 U.S.C. §§ 7101 - 7135) (FSLMRS) labor organizations may represent Federal employees in four situations:

(1) exclusive recognition §§ 7103(a)(16) and 7111;

(2) national consultation rights § 7113;

(3) consultation rights on government-wide rules or regulations § 7117(d); and

(4) dues allotment recognition § 7115(c).

The first two varieties of recognition are carried over from EO 11491; the latter two were created by FSLMRS. Because most labor counselors do not become involved with the latter three, this text will merely define them. It will address in detail the exclusive recognition form of representation.

b. National consultation rights (NCR). A union accorded NCR by an agency or a primary national subdivision of an agency is entitled (1) to be informed of any substantive change in conditions of employment proposed by the agency, (2) to be permitted a reasonable amount of time to present its views and recommendations regarding the proposed changes, (3) to have its views and recommendations considered by the agency before the agency acts, and (4) to receive from the agency a written statement of the reasons for the action taken. 5 U.S.C. § 7113(b). To qualify, the union must hold exclusive recognition either for at least 10% or for 3,500 of the civilian employees of the agency or the primary national subdivision (PNS), provided that the union does not already hold national exclusive recognition. 5 C.F.R. § 2426.1

c. Consultation rights on government-wide rules or regulations. Under this form of recognition, the rights of a union accorded consultation rights are comparable to those under national consultation rights. The chief difference is that only agencies issuing government-wide rules and regulations can grant such recognition. 5 U.S.C. § 7117(d)(1). To qualify, the union must hold exclusive recognition for at least 3,500 employees, government-wide. 5 C.F.R. § 2426.11(a)(2).

d. Dues allotment recognition. A union qualifies for dues allotment recognition if it can show that at least 10% of the employees in an appropriate unit for which no union holds exclusive recognition are members of the union. 5 U.S.C. §

7115(c)(1). A union accorded dues allotment recognition can negotiate on only one matter: the withholding of union dues from the pay of the employees who are members of the union. The dues withholding and official time provisions of 5 U.S.C. §§ 7115(a) and 7131(a), applicable only to unions holding exclusive recognition, do not apply to a union with only dues allotment recognition.

e. Exclusive Recognition. The most common type of recognition for the installation labor counselor is that of exclusive representation of a labor organization. The Federal Labor Relations Authority and its General Counsel, through the Regional Director, supervise the process by which labor organizations obtain exclusive representation.

To obtain "exclusive recognition" a labor organization must receive a majority of the valid votes cast in a secret ballot election held among employees in an appropriate unit. A labor organization may "force" the required secret ballot election by filing a petition seeking an election with the appropriate Regional Director. The Regional Director will review the petition to insure that it is timely filed, that there is the requisite showing of interest, and that the bargaining unit is appropriate. If it satisfies the above requirements, the Regional Director will schedule a secret ballot election. The Authority certifies a union if the union receives the requisite number of employee votes.

A union accorded exclusive recognition is entitled to a number of rights and benefits to include: the right to negotiate the conditions of employment of the employees it represents (5 U.S.C. §§ 7114 and 7117); the right to be given an opportunity to be represented at "formal discussions" and "investigatory examinations" (5 U.S.C. § 77114(a)(2)); the right to receive official time to negotiate collective bargaining agreements (5 U.S.C. § 7131(a)); and the right to receive dues allotments at no cost to the union (5 U.S.C. § 7115(a)). The union also has a number of obligations, including a general duty to represent the interests of all bargaining unit employees without regard to union membership (5 U.S.C. § 7114(a)(1).)

2-2. Solicitation of Employees.

A union must receive a majority of the valid votes cast in the representation election before it is certified as the exclusive representative. To obtain this support, it must communicate with the employees. Labor union organizers can communicate with employees off the installation but it is difficult to assemble them off-post and during off-duty hours. They prefer to contact employees at their places of employment. But to allow such may disrupt work. The labor counselor may be expected to advise commanders as to the right of employee and nonemployee union organizers to solicit employees on the installation. The Federal sector has borrowed its solicitation rules from the private sector. The following materials address these rules.

a. Solicitation by nonemployees.

The cases below discuss the rules management may use in restricting nonemployee labor organizers from entry on the installation. These are normally persons paid by the national office. As a general rule, management need not allow professional labor organizers on the activity premises to solicit support. There are exceptions such as when the organizers show they cannot reasonably communicate with the proposed bargaining unit employees on a direct basis outside the activities premises (employee inaccessibility). A second exception is when management decides to allow one union to use its services and facilities. It would then be required to furnish equal services and facilities to other unions that have equivalent status to the first union.

To understand the rules regarding management's obligation to permit unions to solicit members on installation premises, it may be helpful to consider the practice in the private sector. The Supreme Court held that an employer may deny access to his property to nonemployee union organizers, provided (1) the union is reasonably able to communicate with the employers by other means, and (2) the employer's denial does not discriminate against the union by permitting other non-employee solicitors (including other unions) to solicit or distribute literature. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). The Supreme Court recently reaffirmed the rules set out in Babcock. *See* Lechmere, Inc v. NLRB, 502 U.S. 527 (1992).

In National Treasury Employees Union v. King, 798 F.Supp. 780 (D.D.C. 1992) the National Treasury Employees Union (NTEU) successfully raised a constitutional challenge to the limitation of outside union solicitation in public areas under the control of a federal agency, when that agency has treated the location as a public forum. NTEU requested permission to solicit membership at a Social Security Administrative facility. The agency denied permission on the grounds that allowing such access would be an unlawful assistance of a rival union. This position was supported by the FLRA. Social Security Administration and National Treasury Employees Union and American Federation of Government Employees, 45 FLRA 303 (1992). The D.C. Circuit, however, found this restriction constituted a violation of the First Amendment of the Constitution since the agency had allowed charitable organizations to conduct solicitations at the same spot. By allowing charitable organizations to use the sidewalk, the agency had converted the location into a public forum and could no longer limit the union expression at that location.

In a related case, National Treasury Employees Union v. FLRA, 986 F.2d 537 (D.C. Cir. 1993), the FLRA was directed to consider the constitutional (First Amendment) implications of its statutory analysis. The case also involved NTEU's attempt to solicit members at the Social Security Administration. The FLRA upheld the agency's denial of access on the basis of the statute, 5 U.S.C. § 7116(a)(1) and (3). The FLRA expressly refused to consider the constitutional issues when interpreting the statute. The court remanded the case to the FLRA for reconsideration of the statutory provisions in light of the constitutional issues raised. The FLRA in turn remanded to the Regional Director to develop the factual record. Social Security Administration and

NTEU, 47 FLRA 1376 (1993). NTEU then requested reconsideration of the remand, which was denied. SSA and NTEU, 48 FLRA 539 (1993).

Based upon this series of decisions, the Authority, in 1997, revised its framework for determining how to apply the rules concerning nonemployee organizers' access to federal premises. Social Security Administration and NTEU and AFGE, 52 FLRA 1159 (1997), aff'd in part and remanded in part sub nom., NTEU v. FLRA, 139 F.3d 214 (D.C. Cir. 1998). Under the new approach, the agency must first determine whether its action of denying or authorizing access sponsors, controls, or assists a labor organization by failing to maintain an arms-length relationship with the union involved in violation of 5 U.S.C. § 7116(a)(3). In addition the agency must consider the relationship between 5 U.S.C. § 7116(a)(3) and 5 U.S.C. § 7116(a)(1), which has been interpreted as requiring the agency to consider the availability of other means of communication and to maintain a nondiscrimination policy between unions. So, even if a rival union has not obtained equivalent status, the agency will be obligated to grant access when to do otherwise would violate 5 U.S.C. § 7116(a)(1) because other means of communication are not available. In NTEU v. FLRA, 139 F.3d 214 (D.C. Cir. 1998), the D.C. Circuit held that the FLRA's reliance on the Babcock framework was appropriate in deciding whether a violation of 5 U.S.C.§7116(a)(1) had occurred. The court, however, disagreed with the FLRA's application of Babcock, and held that the SSA had violated 5 U.S.C. § 7116(a)(1).[1] Id. at 219. On remand, the Authority applied Babcock and found that the SSA violated 5 U.S.C. § 7116(a)(1) in denying NTEU access to the SSA's premises. SSA and NTEU, 55 FLRA No. 158 (1999).

The two cases excerpted below will discuss the above points. The first case deals with the exception for organizers who cannot reasonably communicate with the proposed bargaining unit employees. Management frequently violates the statute by failing to hold the outside organizers to the high standard of proof required by the case law.

The second case deals with the question of when a challenging labor organization obtains equivalent status. Again, management must be careful in determining when a union is entitled to equivalent status. Both cases reinforce a point (discussed later) that management must remain neutral during the process of selecting employee representatives.

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[1] In ruling in favor of the SSA, the FLRA had relied on an exception to the Babcock rule for "isolated beneficent acts," which allowed an employer to maintain a "no-solicitation rule" while granting access to a few charitable organizations. Because the SSA did not have a no-solicitation rule, the court held that the "isolated beneficent acts" exception did not apply. Id. at 218.

BARKSDALE AIR FORCE BASE and
NATIONAL FEDERATION OF FEDERAL EMPLOYEES LOCAL 1953

45 FLRA 659 (1992)

(Extract)

Facts

This unfair labor practice case is before the Authority in accordance with section 2429.1(a) of the Authority's Rules and Regulations based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. The General Counsel and the Respondent filed briefs with the Authority.

The complaint alleges that the Respondent violated section 7116(a)(1) and (3) of the Federal Service Labor-Management Relations Statute (the Statute) by permitting a non-employee organizer of the American Federation of Government Employees (AFGE) access to its facilities for the purpose of organizing a campaign to represent its employees at a time when those employees were represented by the Charging Party.

The Respondent is an Air Force base in Louisiana. The Charging Party, National Federation of Federal Employees, Local 1953 (NFFE), is the exclusive bargaining representative for a unit of the Respondent's professional and non-professional civilian employees who are paid from appropriated funds. At all times material to this case, NFFE and the Respondent were parties to a collective bargaining agreement that expired on April 13, 1991.

On December 11, 1990, the National Organizer for AFGE sent a letter to the Commander of the base, stating in part as follows:

> By way of this letter, [AFGE] is requesting access to the employees of Barksdale Air Force Base. The purpose of this request is for representational recognition.
>
> It is understood that non-recognized labor organizations must first demonstrate that the targeted unit employees are inaccessible to alternate means of communication, as we do not have the home phone and mailing addresses to these employees our communication has been ineffective, therefore, we are requesting your permission to contact the employees at their work site.

> The campaigning activities would be restricted to the entrance and/or exit of the employees['] work areas and would not in any way interfere with their job.
>
> We would also like to request a roster containing the breakdown on the number of employees and the location in which they work. The period for which this request is made, to begin, December 17, 1990 through March 1991.

By letter dated December 17, 1990, the Respondent responded to the request, stating in part:

> Normally, non-employee representatives of unions that do not have exclusive representative status for agency employees have no right of access to the agency premises to campaign; however, you have provided sufficient justification that will allow your permission. Therefore your request . . . is approved.

From December 17, 1990, through March 31, 1991, a nonemployee organizer for AFGE had access to the base for the purpose of organizing for representational recognition by AFGE. At that time, no petition for representation had been filed with the Authority by AFGE, but the Respondent was unaware of this fact.

The parties stipulated that at a hearing the Respondent would have produced testimony to show that during the period from August 1990 to April 1991, the base was under a heightened state of security due to the Desert Shield and Desert Storm actions and that the base was under a threat of anti-terrorist[sic] activity against its installations and personnel. According to the stipulation, the Respondent would have argued that the base is not an open base even during normal times; that during this period the AFGE organizers would not have been allowed to campaign directly outside the gate due to security reasons; that one bargaining unit employee was engaged in campaigning for AFGE, but that management would not have provided that employee, AFGE, or the incumbent Union with the names and home addresses of unit employees; and that, therefore, the bargaining unit employees were essentially inaccessible to AFGE. Accordingly, the Respondent would have argued that it permitted the nonemployee on the base to conduct an organizing campaign on behalf of AFGE in accordance with the Department of Defense Civilian Personnel Manual.

Where the employees involved are covered by exclusive recognition, permission will not be granted for on-station organizing or campaigning activities by nonemployee representatives of labor organizations other than the incumbent exclusive union except where (1) a valid question concerning representation has been raised with respect to the employees involved, or

(2) the employees involved are inaccessible to reasonable attempts by a labor organization other than the incumbent to communicate with them outside the activity's premises.

In January 1991, the Respondent and the Union began negotiations for a new collective bargaining agreement covering the unit employees, which was effective from May 8, 1991, to May 8, 1994.

Positions of the Parties

The Respondent

The Respondent concedes that an agency violates the Statute if it provides a labor organization with services or the use of its facilities at a time when that union does not have equivalent status with the exclusive representative of the agency's employees. The Respondent argues, however, that the situation in this case falls within the exception to that rule, which was articulated in Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts, 3 A/SMLR 193 (1973) (Natick).

The Respondent contends that, under Natick, it lawfully granted access to the AFGE organizer because it is required under paragraph 3.5 of the Civilian Personnel Manual to allow a rival union some means of communicating with employees if the rival union makes a diligent effort to contact employees and fails to do so because the employees are inaccessible. The Respondent argues that in the circumstances of this case, AFGE had no reasonable alternative means of communication with the employees. It notes that AFGE does not have the home telephone or mailing addresses of the employees and that the Respondent "is prohibited from releasing these under a series of Circuit Court decisions." Respondent's Brief at 9. It also describes the situation on the base during the military operations of Desert Shield and Desert Storm, when it "was under a heightened state of security" and "an anti-terrorist threat condition." Id. It argues that under Authority precedent it may "reasonably control . . . unions which are involved in elections campaigns from creating internal security risks to agency personnel or equipment[.]" Id. at 10. It asserts, therefore, that it properly allowed the organizer to solicit on base, adding that it was totally unaware that AFGE had failed to file a petition for representation with the Authority.

B. General Counsel

The General Counsel points to the fact that AFGE never obtained equivalent status with the incumbent Union, and argues that, as there were no extraordinary circumstances that prevented AFGE from reaching the Respondent's employees through other means, the Respondent violated

section 7116(a)(3) by allowing AFGE access to the base to conduct its organizing campaign.

The General Counsel disputes the Respondent's defense that AFGE had no alternative means of reaching the employees....

The General Counsel also argues that in the Respondent's letter granting access to AFGE, the Respondent made no mention of any constraints resulting from the military operations or any heightened security. The General Counsel suggests that the use of such a defense at this point is "merely an attempt to justify actions that cannot be justified."

Finally, the General Counsel argues that the Civilian Personnel Manual cannot sanction the Respondent's failure to follow the Statute because the Respondent summarily granted AFGE access without determining whether AFGE had in fact made a diligent effort to contact the employees, as required by the Manual.

Analysis and Conclusions

Under section 7116(a)(3) of the Statute, an agency unlawfully assists a labor organization when it grants a rival union without equivalent status access to its facilities for the purpose of organizing its employees. See, for example, Gallup Indian Medical Center 44 FLRA 217 (1992). As an exception to this rule the Authority has held that a union lacking equivalent status "'may obtain access to an agency's facilities if it demonstrates to the agency that, after diligent effort, it has been unable to reach the agency's employees through reasonable, alternative means of communication.'" Social Security Administration, 45 FLRA 303 at 318 (1992) (quoting American Federation of Government Employees v. FLRA, 793 F.2d 333, 337 n.9 (D.C. Cir. 1986)).

This exception was first applied in Natick by the Assistant Secretary of Labor for Labor-Management Relations (Assistant Secretary) under Executive Order 11491, the predecessor to the Statute. Natick involved a facility that was guarded and enclosed by a high fence. Although the evidence established that the employees were difficult to reach entering and exiting the facility, the Assistant Secretary concluded that nonemployee organizers for a rival union that did not have equivalent status could not gain access outside its premises. In reaching this conclusion, the Assistant Secretary examined whether the rival union had "made a diligent, but unsuccessful, effort to contact the employees away from the [employer's] premises and [whether] its failure to communicate with the employees was based on their inaccessibility." 3 A/SLMR at 196. Finding insufficient evidence of inaccessibility under this analysis, the Assistant Secretary found that the agency had violated the Executive Order by permitting access to its premises to nonemployee organizers for the rival union . . ..

In this case there is no evidence that the Respondent inquired as to the measures taken by AFGE to contact the employees on the Respondent's premises without using nonemployee organizers to do so. Significantly, there is evidence that one employee already is engaged in campaigning for AFGE. It is established Authority law that the Respondent may not interfere with that employee's right to distribute materials for AFGE on its premises if the distribution takes place in non-work areas during non-work times. (cite omitted) Nonetheless, there is no evidence that the Respondent took into account that employee's efforts on behalf of AFGE when determining that its employees were inaccessible to AFGE's organizing campaign.

Moreover, there is no evidence whatsoever to indicate whether the Respondent attempted to ascertain measures taken by AFGE to contact the employees off the base other than AFGE's unsuccessful attempt to obtain the home telephone numbers and addresses of the employees. For example, the Respondent did not inquire as to whether AFGE had made any effort to reach the employees through the media or by distributing leaflets on or near public transportation or in popular gathering spots, such as malls where employees are known to congregate. In the absence of such information regarding AFGE's organizational efforts, the Respondent had no basis on which to grant access to a labor organization without equivalent status. In this regard, the Respondent appears to defend its decision to grant access to AFGE by stating only that it is unable to furnish the incumbent Union with the addresses of its employees, and, therefore, that it could not provide that information to any other union. As we have shown above, contact with employees at their homes is not the only way by which a rival union can attempt to communicate with employees away from the workplace. Whether the Respondent fulfills its obligations under the Statute with regard to the incumbent Union should have no bearing on the rights of a rival union to organize on the Respondent's premises.

Finally, we conclude that it is not relevant to the disposition of this case that the Respondent assertedly did not know that AFGE had not filed a petition for an election when the Respondent permitted the AFGE organizer access to the base. An agency has a statutory obligation under section 7116(a)(3) to ensure that it does not provide unlawful assistance to a union without equivalent status. Therefore, before granting access to its employees and facilities to nonemployee organizers for a rival union, the agency is obligated to determine whether that union has achieved equivalent status and, if it has not, whether its failure to communicate with the employees was based on their inaccessibility. If an agency does not make such inquiries, it acts at its peril.

Accordingly, we conclude that the Respondent violated section 7116(a)(3) of the Statute by granting access to its premises to a

nonemployee organizer for AFGE at a time when AFGE did not have equivalent status with the incumbent union and had not established that its failure to communicate with the Respondent's employees was based on their inaccessibility.

Order

{The Air Force was ordered to cease and desist from providing assistance to AFGE when it did not have equivalent status and to post a notice provided by the Authority.}

The Supreme Court ruled that release of home addresses and telephone numbers of federal employees, in a bargaining unit, to a union violates the Privacy Act. DOD v. FLRA, 510 U.S. 487 (1994).

U.S. DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOL PANAMA REGION
44 FLRA 419 (1992)

(Extract)

This case is before the Authority on an application for review filed by the Panama Canal Federation of Teachers, Local 29 (PCFT) pursuant to section 2422.17(a) of the Authority's Rules and Regulations. The Education Association of Panama (EAP) filed an opposition to the application for review.

The Regional Director conducted an election in a unit of Activity employees in which PCFT was the certified exclusive representative. A majority of the valid votes counted was cast for PCFT. Timely objections to the election were filed by EAP.

In her Decision and Order on Objections to Election, the Acting Regional Director (ARD) set aside the election and directed that another be conducted on the ground that the Activity had improperly denied EAP access to certain Activity facilities and services. PCFT seeks review of the ARD's decision on this issue.

For the following reasons, we grant the application for review because we find that a substantial question of law and/or policy is raised because of an absence of Authority precedent on the issue involved in this case and, for reasons which differ in part from those of the ARD, we will set aside the election.

Background

On January 3, 1991, EAP filed a petition seeking an election in a unit of employees represented by PCFT. By letter to the Activity dated January 28, 1991, EAP asserted that it had achieved "equivalent status" with PCFT and, as a result, was entitled to "equivalent bulletin board space at each school and the right to use the internal mail system." Letter of January 28, 1991. EAP renewed its requests for access to the bulletin board space and internal mail system by letters dated February 1 and February 7, 1991. The Activity refused the requests and asserted, among other things, that granting EAP access to the disputed facilities and services at that time would constitute an unfair labor practice under section 7116(a)(3) of the Statute.

By letter dated February 6, 1991, the Authority's Regional Office directed the Activity to post a notice of the petition. After examining a list of unit employees provided by the Activity and comparing EAP's showing of interest to that list, the Regional Office determined, on March 12, 1991, that the showing of interest was adequate and so notified the Activity. On that date, the Activity granted EAP's request for access to the requested facilities and services. Pursuant to the parties' agreement, a representation election was held on May 9, 1991. A majority of the valid votes counted was cast for PCFT. EAP then filed objections to the election.

Acting Regional Director's Decision

Before the ARD, EAP contended, as relevant here, that it achieved equivalent status with PCFT on January 3, 1991, the date on which it filed the representation petition. Accordingly, EAP argued that, as of that date, it should have been granted access to bulletin boards in various locations as well as the Activity's internal mail system.

The ARD agreed with EAP. [T]he ARD determined that "[a] labor organization acquires equivalent status when it has raised a question concerning representation by filing a representation petition or becoming an intervenor in such a pending representation petition." (cites omitted). [T]he ARD further determined that "EAP acquired equivalent status when it filed the petition and was thereafter entitled under [s]ection 7116(a)(3) of the Statute to the same and customary and routine services and facilities that DoDDS had granted to the incumbent Union, PCFT." (Cites omitted). Based on these findings, the ARD sustained EAP's objection to the election and directed that the election be set aside and another be conducted.

* * *

Analysis and Conclusions

* * *

PCFT argues that its application for review should be granted because the ARD's decision departs from Authority precedent. We disagree and conclude, instead, that there is an absence of Authority precedent on the issue of when a petitioning union acquires equivalent status, within the meaning of section 7116(a)(3) of the Statute, so as to be entitled to be furnished customary and routine facilities and services.

* * *

In none of these cases did the Authority address the issue of when a petitioning union acquires equivalent status. Accordingly, as no case in which such issue was addressed has been cited or is apparent to us, we conclude that there is an absence of Authority precedent on this issue and we grant PCFT's application for review.

We note that although section 7116(a)(3) of the Statute refers to "labor organizations having equivalent status[,]" and although the legislative history of the Statute contains an example of equivalent status, the Statute does not define that term. Consistent with the plain wording of section 7116(a)(3), our task is to determine when, for the purposes of that section, two or more unions have the same status under the Statute. In the case before us, one of those unions is an incumbent exclusive representative. Accordingly, the question is when, or how, a petitioning union acquires a status which is equivalent to that of an incumbent for the purposes of section 7116(a)(3) of the Statute.

Section 7111 of the Statute sets forth the process by which unions are certified as exclusive representatives. As relevant here, under that section, a union seeking exclusive recognition must file with the Authority a petition alleging that 30 percent of the employees in an appropriate unit wish to be represented by the union. Section 7111(f) provides that exclusive recognition may not be accorded a union if, among other things, there is not credible evidence that at least 30 percent of the employees in the relevant unit wish to be represented by the union.

Section 7111(b) provides that the Authority shall investigate a representation petition and, if there is reasonable cause to believe that a question concerning representation exists, shall provide an opportunity for a hearing or supervise and conduct an election. In conducting such investigation, the appropriate Regional Director determines, among other things, the adequacy of a showing of interest. 5 C.F.R. § 2422.2.(f)(1). After the Regional Director determines that a petition establishes a prima facie showing of interest, the Regional Director so notifies the affected activity and requests the activity to post copies of a notice of petition in certain places and furnish the Regional Director a current list of employees included in or excluded from the unit described in the petition. 5 C.F.R. §

2422.4 . . .. A party may challenge the validity of a showing of interest and/or may intervene by filing its challenge or intervention with the Regional Director within 10 days after the posting. 5 C.F.R. § 2422.2(f)(2).

It is clear from the foregoing that certain statutory and regulatory requirements are applicable to representation petitions. It is clear also that such petitions must be investigated to determine whether the requirements have been satisfied. As such, we are not persuaded that the mere filing of a representation petition automatically confers on the filing party a status equivalent to that of an incumbent. Instead, we conclude that a petitioning union acquires equivalent status for the purposes of section 7116(a)(3) when an appropriate Regional Director determines, and notifies the parties, that the petition includes a prima facie showing of interest and merits further processing. Therefore, consistent with the Authority's Rules and Regulations, we conclude that a petitioning union acquires equivalent status with an incumbent at such time as the Regional Director determines, and notifies the appropriate parties, that a notice of the petition will be posted.

In our view, this approach protects the rights of all parties. It protects the rights of an incumbent union by assuring that a petitioning union will not have access to an agency's facilities and services for campaign purposes based on a facially invalid petition or showing of interest. We note that, consistent with section 205.025 of the General Counsel Case Handling Manual, "[a]ll authorization material must be checked completely in determining the existence of a prima facie showing of interest." As such, this approach would not, as alleged by PCFT with respect to the principle applied by the ARD, "encourage labor organizations to file frivolous representation petitions without an adequate showing of interest in the hope of gaining equivalent status and organizing at the expense of incumbent labor organizations." Application for Review at 8. At the same time, this approach assures a petitioning union that it will be furnished with customary and routine facilities and services at the same time - when notices are posted - that unit employees are made aware of a petition and are, therefore, likely also to be aware of the relative status of a petitioner and an incumbent. Finally, this approach enables agencies and activities easily to determine whether a labor organization is entitled, on request, to be furnished facilities and services under section 7116(a)(3) of the Statute.

* * *

In this case . . . it is not clear precisely when the parties received the notification or otherwise were made aware by the Regional Office that EAP's petition was facially sufficient and the notices would be posted. We find it unnecessary to determine that date, however, because it is clear that the notification and the parties' receipt of it substantially preceded March 12, 1991, the date on which EAP was granted access to the disputed facilities and services. Therefore, in agreement with the ARD's conclusion

but for reasons which differ from the ARD, we find that EAP's objection to the election has merit. Accordingly, we sustain the ARD's decision to set aside the election and direct that another election be conducted in accordance with the Authority's Rules and Regulations.

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b. Solicitation by Employees.

Employees who work on the installation are treated differently from non-employee organizers. They may not be excluded from the installation as the nonemployee may be. However, they may be restricted in their activities. Generally, management may limit oral communications between employees to non-duty time and the distribution of literature to non-duty time and non-work areas. In addition, solicitation cannot interfere with work. The following decision discusses the restrictions that may be imposed.

OKLAHOMA CITY AIR LOGISTICS CENTER (AFLC)
TINKER AIR FORCE BASE, OKLAHOMA and AFGE
6 FLRA 159 (1981)

(Extract)

* * *

Pursuant to section 2423.29 of the Authority's Rules and Regulations (5 C.F.R. § 2423.29) and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Recommended Decision and Order and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommendations including his recommended order, except for those portions of the Recommended Decision and Order specifically discussed herein.

* * *

At the hearing, the complaint was amended at the request of the General Counsel to include an allegation that Respondent maintained a no-solicitation rule that prohibited all paid-time solicitation in violation of section 7116(a)(1) of the Statute. Specifically, the General Counsel argued that

Respondent's prohibition of solicitation during an employee's free or nonduty time, albeit paid-time, was violative of the Statute. The Respondent concedes that such a rule was maintained and that the prohibition of solicitation was extended to include employees' paid break and lunch periods. Moreover, probationary employee Beasley was admonished for his break-time solicitation activities; indeed, his alleged improper solicitation was given by the Activity as a reason for his termination.

The Judge found that the Respondent's maintenance of the rule prohibiting solicitation of membership by the Union during all paid breaks and its discipline of probationary employee Beasley for violation of this rule constituted violations of section 7116(a)(1) of the Statute. In so finding, the Judge noted the basic difference between duty time (clock time) and working time, and noted further that no-solicitation rules which seek to prohibit solicitation during all duty time violate the rights of employees.

The Authority adopts the Judge's conclusion in this regard. We note that the Respondent has granted designated rest breaks and paid lunch breaks pursuant to Department of Air Force Regulation 40-610 and that section 7131(b) of the Statute requires that 'solicitation of membership . . . be performed during the time the employee is in a nonduty status.' However where, as here, it has been determined that employees, at the discretion of management, have been assigned periods of time during which the performance of job functions is not required (i.e., paid free time), the Authority finds that such time falls within the meaning of the term 'nonduty status' as used in section 7131(b). Thus, solicitation of membership during such time is permissible. Accordingly, as concluded by the Judge, the Respondent's conduct in maintaining a rule prohibiting solicitation of membership during such breaks and in disciplining employee Beasley for violation such an unlawful rule, violated the Statute . . . .

In a series of cases involving a census employee named Hanlon, the Authority outlined the rules concerning solicitation in the work place by employees. In Department of Commerce, Bureau of Census and Edward Hanlon, 26 FLRA 311 (1986), the authority summarized the existing rules:

The FLRA has held that employees have a right, protected by Section 7102 of the Statute, to solicit membership and distribute literature on behalf of labor organizations during non-work time in non-work areas. (Cites omitted). The FLRA has further held that an employee has the right to solicit membership on behalf of a labor organization while in non-duty status in work areas where the employees being solicited are also in non-duty status, absent disruption of the activity's operations. (Cites omitted) . . . . [A]n agency policy or rule prohibiting solicitation by employees, on work premises, during non-duty time is presumptively invalid (citing Tinker).

The Authority then found it to be an unfair labor practice for the Bureau of Census to prohibit employees from soliciting membership in a labor organization during non-work time in work areas where there is no disruption of work.

In General Services Administration and Edward Hanlon, 26 FLRA 719 (1987), The Authority found an unfair labor practice in the GSA's refusal to allow Hanlon to show a film or video, during non-work times in non-work areas of the federal building, including the lobby. In GSA and Edward Hanlon, *et. al.*, 29 FLRA 684 (1987), the Authority found unfair labor practices in the agency's attempt to limit the times Hanlon could use the lobby and to limit the content of the union materials. The materials included information on commercial products available to union members. (There are numerous other decisions in which Mr. Hanlon is a named party. The most recent appears at 41 FLRA 436 (1991).)

2-3. The Representation Petition.

NOTE: In 1996, the FLRA amended its rules relating to Representation Proceedings. The new rules provide for one type of petition where the party describes the purpose for the petition. Previously, the FLRA had numerous types of petitions, each with a single function. These new rules, amending 5 C.F.R. parts 2421, 2422 and 2429, were effective 15 March 1996.

a. Petition Seeking Election.

A union that desires a secret ballot election to determine whether employees desire it as their exclusive representative files a petition with the Regional Office of the Authority. Instructions relating to the filing of petitions are in 5 C.F.R. §2422.

b. Showing of Interest.

The petition must be accompanied by a 30% showing of interest. 5 U.S.C. § 7111(b)(1) and 5 C.F.R. § 2422.3. The "showing of interest" is a list of employees who have indicated they support a particular labor organization's request for an election. Such indication may be in many different forms, such as: evidence of membership in a labor organization; employees' signed authorization cards or petitions authorizing a labor organization to represent them for purposes of exclusive recognition; unaltered allotment of dues forms executed by the employee and the labor organization's authorized official; current dues records; an existing or recently expired agreement; current exclusive recognition or certification. The original representation petition "showing of interest" list must number at least 30 percent of the eligible employees in the proposed bargaining unit. Those on the list are not necessarily union members nor are they required to vote for the union. They only need to have indicated they would support the union's request for an election.

Section 7111(b) provides:

(b) If a petition is filed with the Authority--

(1) by any person alleging--

(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative . . . .

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot. . . .

In North Carolina Army National Guard, Raleigh, North Carolina and Association of Civilian Technicians, 34 FLRA 377 (1990), the Authority spelled out the extent to which it will review a Regional Director's ruling regarding the sufficiency of the showing of interest. A Regional Director's determination of the adequacy of the showing of interest is administrative in nature and is not subject to collateral attack at a unit or representation hearing. 5 C.F.R. § 2422.[9]. However, if a Regional Director dismisses a petition based on an insufficient showing of interest, an application for review may be filed with the Authority in accordance with procedures set forth in section 2422.[31]. *Id*. *See also,* U.S. Coast Guard Finance Center, 34 FLRA 946 (1990).

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c. Timeliness.

The original petitioner and subsequent intervenors must file their petitions within certain time limits or the Regional Director will dismiss the petitions (FSLMRS § 7111 (f)). These time limit rules are known as the "election bar," the "certification bar," and the "contract or agreement bar."

(1) Election Bar.

FSLMRS § 7111(b). "If a petition is filed with the Authority . . . (A) in the case of an appropriate unit for which there is no exclusive representative, . . . an election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which in the preceding 12 calendar months a valid election under the subsection has been held."

> 5 C.F.R. § 2422.12(a) Election Bar. "Where there is no certified exclusive representative, a petition seeking an election will not be considered timely if filed within twelve (12) months of a valid election involving the same unit or a subdivision of the same unit."

A petition will be dismissed if the unit petitioned for is a subdivision of a unit in which an election had been held within the preceding 12 months. However it will be accepted if the petitioned for unit contains a smaller unit which had an election within the previous 12 months.

(2) Certification Bar.

> FSLMRS § 7111(f)(4). Exclusive recognition shall not be accorded ". . . if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative."

> 5 C.F.R. § 2422.12(b). "Where there is a certified exclusive representative of employees, a petition seeking an election will not be considered timely if filed within twelve (12) months after the certification . . . ."

The Regional Director will not hold a representation election if a union was certified as the exclusive representative within the last twelve (12) months. The rationale for the certification bar is "to afford an agency or activity and a certified incumbent labor organization a reasonable period of time in which to initiate and develop their bargaining relationship free of rival claims." Department of the Army, U.S. Army Engineer District, Mobile, Ala., A/SLMR No. 206 (Sept. 27, 1972).

A signed collective bargaining agreement ends application of this bar and triggers the contract or agreement bar provisions discussed below.

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(3) Agreement Bar.

A valid contract covering part of the employees in the proposed unit bars a petition filed by another union. The statute provides:

> 5 U.S.C. § 7111(f)(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization

seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless--

(A) the collective bargaining agreement has been in effect for more than 3 years, or

(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement;"

5 C.F.R. § 2422.12(c) Bar during . . . agency head review. A petition seeking an election will not be considered timely if filed during the period of agency head review under 5 U.S.C. § 7114(c). This bar expires upon either the passage of thirty (30) days absent agency head action, or upon the date of any timely agency head action.

5 C.F.R. § 2422.12(d) Contract bar where the contract is for three (3) years or less. Where a collective bargaining agreement is in effect covering the claimed unit and has a term of three (3) years or less from the date it becomes effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days prior to the expiration of the agreement.

5 C.F.R. § 2422.12(e) Contract bar where the contract is for more than three (3) years. Where a collective bargaining agreement is in effect covering the claimed unit and has a term of more than three (3) years from the date it became effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days prior to the expiration of the initial three (3) year period, and any time after the expiration of the initial three (3) year period.

In North Carolina Army National Guard, Raleigh, North Carolina and Association of Civilian Technicians, 34 FLRA 377 (1990) the FLRA discussed the requirements for filing representation petitions and the time for submitting the petition. The Authority held that the appropriate Regional Director must receive a petition for certification of representative during the open period. The petition must be accompanied by an adequate showing of interest. When authorization cards are submitted as evidence of a showing of interest, the cards must be signed and dated. 5 C.F.R. § 2421.16.

The Authority also discussed the timing of additional showings of interest when there is a dispute as to the number of employees in the proposed bargaining unit. The Union may file an additional showing of interest once the unit size is determined. However, this additional showing of interest must have been signed and dated before the expiration of the open period.

A petition may be filed during the window period before the termination date or the automatic renewal date. If a contract has been extended prior to sixty (60) before the termination or automatic renewal date, the extension or renewal does not bar a petition filed during the window period. 5 C.F.R. § 2422.13(g).

Similarly, an agreement between the parties to extend the terms of the collective bargaining agreement during renegotiations does not bar a petition. Army National Guard, Camp Keyes, Augusta, Maine, 34 FLRA 59 (1989) citing, Department of the Army, Corpus Christi Army Depot, 16 FLRA 281 (1984).

The sixty day period prior to the termination date or automatic renewal date is the insulated period and is intended to protect the incumbent union from raiding unions and to stabilize bargaining relationships.

If a contract is of more than three years duration and has a definite termination or automatic renewal date, it bars an election only for the first three years. If there is no termination or automatic renewal date, the contract does not bar a petition anytime.

There are a variety of issues associated with the application of an agreement bar. Several issues are discussed below.

1. For purposes of the agreement bar, a negotiated agreement must contain a clear and unambiguous effective date and language setting forth its duration. 5 C.F.R. § 2422.12(h). Watervliet Arsenal v. NFFE, 34 FLRA 98 (1989); U.S. Army Recruiting Command, Concord N. H. and AFGE, 14 FLRA 73 (1984). In U.S. Department of the Interior, Redwood National Park, 48 FLRA 666 (1993) the Authority held that a smudge or extra mark on reproduced copies of the collective bargaining agreement could render the effective date ambiguous and prevent the agreement from acting as a bar.

2. An agreement that goes into effect automatically and that does not contain the date on which the agreement becomes effective does not constitute a bar to an election petition. 5 C.F.R. § 2422.12(h). *See* Watervliet Arsenal.

3. In determining the open period, the effective date rather than its execution date is used. IRS, North Atlantic Service Center, 3 FLRA 385 (1980).

4. For an agreement subject to automatic renewal the Authority held that a request to negotiate modifications in an existing agreement serves to prevent the automatic renewal. Office of the Secretary, Headquarters, Department of Health and Human Services, 11 FLRA 681 (1983).

5. Settlement of an ULP charge that required the parties to reopen the existing collective bargaining agreement did not remove the collective bargaining agreement as a bar. The settlement agreement expressly provided that the present agreement shall be extended in its entirety until a new agreement is reached and

approved. *See,* Department of Housing and Urban Development, Newark Office, 37 FLRA 1122 (1990).

2-4. Posting of Notice. [5 C.F.R. § 2422.7].

a. After a petition has been filed, the Regional Director will furnish the activity with copies of notices which must be posted where employee notices are normally posted. The notice contains information as to the name of the petitioner and a description of the unit involved. The unit description will specify both included and excluded personnel.

b. The notice not only advises the employees that an election petition has been filed, but also puts potential union intervenors on notice that they have an opportunity to intervene in the election.

2-5. Intervention [FSLMRS § 7111(c) and 5 C.F.R. § 2422.8].

> 5 U.S.C. § 7111(c) "A labor organization which--
>
> (1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section (10% showing of interest);
>
> (2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or
>
> (3) has submitted other evidence that it is the exclusive representative of the employees involved;
>
> may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition."

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5 C.F.R. § 2422.8(d) provides that "An incumbent exclusive representative . . . will be considered a party in any representation proceeding raising issues that affect employees the incumbent represents, unless it serves the Regional Director with a written disclaimer of any representation interest for the claimed unit." For a discussion of disclaimers, *see*, HHS and AFGE and NTEU, 11 FLRA 681 (1983). The effect of the incumbent union's rejecting its intervention rights is to be placed in a lower status than the petitioner union. It will not be on the ballot and may not be given as many opportunities to solicit employees to reject the petitioner union.

2-6. Consent to Elections. 5 C.F.R. § 2422.16.

After the notice is posted and the 10 day period for a union to intervene has expired, the parties will meet and attempt to agree on the conduct of the election. They will attempt to agree to a mutually satisfactory date, place, and time of the election. It is policy to hold the election at the worksite so that it will be convenient for employees to vote and there will be a minimum of disruption to work. They will also attempt to agree upon the designations on the ballot, the use and number of observers, provisions for notice posting, custody of the ballot box, the time and place for counting ballots, and the rules for electioneering. The Regional Director will unilaterally resolve those matters to which the parties cannot agree.

In addition to agreeing to the conduct of the elections, many installations will negotiate campaign ground rules with the petitioning union(s). They will address where, when, and how the union may campaign on the installation. For instance, they may allow bulletin board space for union memoranda, use of the distribution system, conference rooms for union speakers, prohibition of solicitation during duty time, and whatever other rules the parties feel should be enunciated in writing.

The Authority discussed pre-election ground rules in Fort Campbell Dependent School, 46 FLRA 219 (1992). The issue concerned the enforcement of an agreement between the parties that was contained in an agency prepared memorandum of phone calls which the union refused to sign. The Authority indicated that unsigned agreements may be enforceable. However, it had no trouble finding that the parties in this case had not reached an agreement.

2-7. Bargaining Unit Determination.

a. Introduction. One area which frequently creates controversy concerns which employees should be represented by the union, i.e., what is an appropriate bargaining unit.

A bargaining unit is a group of employees with certain common interests who are represented by a labor union in their dealings with management. It is the group of employees the union desires to represent. Typically, the union will propose a bargaining unit and management will agree or disagree with it. If there is disagreement, the Authority will make the final determination as to what is appropriate; with or without a hearing. The Authority may also disapprove a bargaining unit that the parties have agreed to.

> 5 U.S.C. § 7112. "Determination of appropriate units for labor organization representation.
>
> (a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this

chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of, the agency involved."

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b. General Criteria. The criteria for determining whether a grouping of employees constitutes an appropriate unit are the same as they were under EO 11491: the unit must (1) ensure a clear and identifiable community of interest among the employees in the unit, and (2) will promote effective dealings with, and efficiency of the operations of the agency involved. 5 U.S.C. § 7112(a).

The statutory criteria (community of interest, promoting effective dealings, and efficiency of operations) are, theoretically, given equal weight in analyzing the appropriateness of the unit. Effective dealing and efficiency of operations are generally considered together. The Authority examines the totality of the circumstances in each case in making appropriate unit determinations under section 7112(a)(1) of the Statute. *See* U.S. DoD, Nat'l Guard Bureau and Association of Civilian Technicians, 55 FLRA No. 115 (1999) (concluding that a proposed consolidation of existing bargaining units in 39 states and representing about 53% of eligible National Guard technicians nationwide was not appropriate); Naval Fleet and Industrial Supply Center, Norfolk and AFGE Local 53, 52 FLRA 950 (1997) (finding that bargaining unit employees who transferred to a new installation had accreted to existing units at the new location); DOJ, Office of the Chief Immigration Judge, Chicago, and AFGE, 48 FLRA 620, (1993); Office of Personnel Management, Atlanta Regional Office and AFGE, 48 FLRA 1228, 1233 (1993).

Community of Interest. The Authority has not specified individual factors or the number of factors required to determine that employees share a community of interest. Health and Human Services, Region II, and NTEU, 43 FLRA 1245 (1992). Among the factors considered when determining if a community of interest exists are: the work performed, skills, training and education of the employees, geographic proximity of work sites, relationship of the work, common supervisors, organizational relationships, common applicability of personal practices and working conditions, and bargaining histories. *See* Redstone Arsenal, Alabama and AFGE, 14 FLRA 150 (1984). *See also*, DOJ, Office of the Chief Immigration Judge, Chicago, 48 FLRA 620 (1993).

Effective Dealings With the Agency. Among the factors considered when determining whether or not a given unit will promote effective dealings are: the level at which negotiations will take place, at what point grievances will be processed, whether substantial authority exists at the level of the unit sought, and bargaining history. *See* DOJ, Office of the Chief Immigration Judge, Chicago, 48 FLRA at 637; Defense Logistics Agency, Defense Plant Representative Office-Thiokol, and NFFE, 41 FLRA 316, 328-329 (1991). *See e.g.,* Naval Fleet, 52 FLRA 950 (1997).

Efficiency of Agency Operations. Among the factors to consider in determining whether a unit will promote the efficiency of the agency operations are: the degree to which there is interchange outside the unit sought, the extent of differences with other groups of employees outside the unit sought, whether negotiations would cover problems common to employees in the unit, and bargaining history. *See, e.g.,* U.S. DoD, Nat'l Guard Bureau and Association of Civilian Technicians, 55 FLRA No. 115 (1999).

In Defense Logistics Agency, Defense Plant Representative Office (DPRO)-Thiokol, and AFFE, 41 FLRA 316, 330 (1991), the Authority discussed efficiency of agency operations and identified several factors that would counter a finding of improved efficiency.

> [W]e conclude that the petitioned-for unit would neither cause undue fragmentation nor hinder the efficiency of the Activity's operation. In this regard, DPRO Thiokol is a separate organizational component of the Activity, a secondary level field activity, with its own commander, performing contract administration functions at a separate manufacturer, which is geographically remote . . . The local commander has certain authority within the organizational component to administer the day-to-day mission of the organization . . Thus we find that DPRO Thiokol is not so functionally integrated with the other organizational components of the District that the petitioned-for unit would artificially fragment or cross the Activity's organizational line structure in a significant manner.

The Statute contains a preference for unit organization "on an agency plant, installation, functional, or other basis." 5 U.S.C. § 7112(a)(1). In OPM, Atlanta Regional Office and AFGE, 48 FLRA 1228 (1993), the Authority stated, "A proposed unit may meet the statutory criteria of effective dealings and efficiency of operations if it is structured around a functional grouping of employees who possess characteristics and concerns limited to that group." *Id. at* 1236.

The size of the proposed unit is a factor to be considered. It does not automatically disqualify a unit from being found appropriate. Size is a factor to be considered in the context of all relevant facts and circumstances. Edwards Air Force Base and Sport Air Traffic Controllers Organization, 35 FLRA 1311, 1314 (1990)(fifteen member unit).

It should be noted that there is a substantial overlap of factors with all three criteria. Satisfaction of one criteria will often satisfy all three. Only a union that has been elected as the exclusive representative for a particular bargaining unit may file a petition to reflect a change in union affiliation. U.S. Army Reserve Command, 88th Regional Support Command and AFGE Local 2144, 53 FLRA No. 93 (1998) (dismissing a petition for a change in union affiliation filed by a union wanting to represent

employees from another union). Questions as to the appropriate unit and related issues may be referred to the Regional Office for advice.

Although the Authority, in its unit determinations, refers to all three criteria, it appears that, apart from unit consolidation cases, greater reliance is placed on indicia of community of interest than on indicia of effective dealings and efficiency of agency operations. Such emphasis on community of interest indicia was also true of Assistant Secretary decisions. This is probably due to the influence of private sector case law under the National Labor Relations Act in which community of interest is the sole criterion of the appropriateness of units.

U.S. Dep't of Defense, Nat'l Guard Bureau
and Association of Civilian Technicians
and Washington Nat'l Guard, et al.
55 FLRA No. 115 (1999)

(Extract)

Background and the Regional Director's (RD's) Decision

The petition seeks to consolidate existing bargaining units in 39 states, the District of Columbia, Puerto Rico and the Virgin Islands, representing approximately 53 percent of eligible National Guard technicians nationwide.

National Guard technicians are a "hybrid class" of employee -- federal civilians who work in a military environment and under the immediate control of state officers. State of Nebraska, Military Department, Office of the Adjutant General v. FLRA, 705 F.2d 945, 946 (8th Cir. 1983); *see* New Jersey Air National Guard v. FLRA, 677 F.2d 276, 279-80 (3d Cir. 1982) (NJ National Guard). As a condition of their civilian employment, technicians must become and remain members of the National Guard, maintaining the particular military grade specified for their civilian positions. 32 U.S.C. § 709(b),(d),(e) (the Technician Act).

The hybrid nature of technician service reflects, in part, the unique federal-state character of the National Guard. *See generally*, Perpich v. Department of Defense, 496 U.S. 334, 340-51 (1990) (describing the history of the National Guard and the competing themes of federal and state control over guard units). Each state National Guard activity is headed by an Adjutant General, who is usually appointed by the governor. Department of Defense, National Guard Bureau and National Federation of Federal Employees, Independent and Department of Defense, National Guard Bureau and National Association of Government Employees, 13 FLRA 232, 234 (1983) (National Guard). The federal NGB is "a joint Bureau" of the Department of the Army (Army) and the Department of the Air Force (Air Force), and a liaison in coordinating the activities of the state officers, the

Army, and the Air Force. Id. The NGB is headed by a chief who reports on National Guard matters to the Chiefs of Staff of the Army and Air Force. RD's Decision at 7.

The Technician Act provides that technicians are considered "employees" of either the Army or the Air Force. 32 U.S.C. §709(d). The Secretary of either Department is required, however, to "designate" the Adjutants General of the states to "employ and administer" the technicians. 32 U.S.C. §709(c). In National Guard, the Authority described the joint federal-state management of technicians, stating that the NGB does not employ technicians or "exercise command over any state activity[,]" but it issues regulations pertaining to technicians' conditions of employment and work life. National Guard, 13 FLRA at 234. These regulations are administered by a personnel officer in each state who reports directly to the Adjutant General. Labor and personnel policies are administered by each state's Adjutant General.

Analysis and Conclusions

Under section 7112(d) of the Statute, two or more bargaining units represented by the same union may be consolidated "if the Authority considers the larger unit to be appropriate." See AFMC, 55 FLRA at 361. The reference in section 7112(d) to the consolidation of "appropriate" units incorporates the appropriate unit criteria established in section 7112(a). Those criteria provide that a unit may be determined to be appropriate if it will: (1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency involved; and (3) promote efficiency of the operations of the agency involved. 5 U.S.C.§ 7112(a); AFMC, 55 FLRA at 361-62. The Authority has identified a number of factors that indicate whether these statutory criteria are met, see generally, FISC, 52 FLRA at 960-61, and has consistently applied these factors on a case-by-case basis. See Department of Justice, 17 FLRA at 62; Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, AFL-CIO, 5 FLRA 657, 660-61 (1981) (AAFES).

The Petitioner asserts that the RD's decision misapplied the statutory criteria and erred particularly in holding that, under the Technicians Act, the states have a role in labor and employment relations. For the reasons explained below, we conclude that the RD properly construed the provisions of the Technicians Act and properly applied the appropriate unit test.

The RD properly applied established law in determining that the proposed consolidated unit is not appropriate.

1. The RD properly evaluated the community of interest criteria.

The Petitioner asserts that, contrary to the RD's decision, the proposed consolidated unit has a clear and identifiable community of interest

under section 7112(a). The RD relied on the factors set out in Department of Justice for determining whether employees share a community of interest, which are: the degree of commonality and integration of the mission and function of the components involved; the distribution of the employees involved throughout the organizational and geographical components of the agency; the degree of similarity in the occupational undertakings of the employees in the proposed unit; and the locus and scope of personnel and labor relations authority and functions. Department of Justice, 17 FLRA at 62; see also Naval Submarine Base, New London Naval Submarine School, Naval Submarine Support Facility New London, Personnel Support Activity New London and Naval Hospital Groton and National Association of Government Employees, Local R1-100, SEIU, AFL-CIO, 46 FLRA 1354, 1360-61 (1993). These factors are applied on a case-by-case basis, and the Authority has not specified the number of factors needed to find a clear and identifiable community of interest. See FISC, 52 FLRA at 960.

As stated above, the RD acknowledged that two of the Department of Justice criteria had been met. He based his finding that the proposed consolidated unit lacks a community of interest on the two remaining factors.

a. Similarity and integration of National Guard mission and function

With respect to the degree of commonality and integration of the mission and function of the components involved, the Authority has held that the separate missions of each component need only "bear a relationship" to one another, and the functions need only be "similar or supportive" to one another, to satisfy this appropriate unit criteria. See AFMC (citing Department of the Navy, U.S. Marine Corps and American Federation of Government Employees, AFL-CIO , 8 FLRA 15, 22 (1982)). See also AAFES, 5 FLRA at 661. Examining this factor in National Guard, the Authority stated that, "while the technicians are all working for the common mission of maintaining National Guard materiel, training its personnel, and administering its program, the employees are also subject to the unique missions established at the state level." National Guard, 13 FLRA at 237.

Here, the RD found that no meaningful changes had occurred to alter the conclusions reached in National Guard, stating that the "missions of the State Activities is significant in determining whether an appropriate unit may be established that crosses state lines" because of "the uniqueness of the [states] separate missions . . . ." RD's Decision at 13.

The Petitioner asserts that there is a "commonality of mission" within the proposed unit that would be no different than the commonality found in existing units. According to the Petitioner, "current bargaining units already span the greatest degree of diversity and separation in missions and functions that exists within the National Guard" -- those separating Army and Air Force components. Application at 15. However, the Petitioner's assertion is misdirected. The RD's decision, and the Authority's decision in National Guard, is based on a lack of commonality between the different missions of

the state components, not the Army and Air Force components. Any similarity between the Army and Air Force components does not bridge the wholly different issue of diversity between states in terms of their varied missions.

The Petitioner does not dispute the RD's conclusion that state units have separate military missions. The Petitioner argues, instead, that these missions are irrelevant to our determination, because these missions are performed in military, rather than civilian status. The Petitioner does not, however, offer any reason or evidence to contradict the RD's finding that technicians prepare for state military missions while in federal civilian status.

Under our case law, the mission and function of various agency components sought to be placed in a consolidated unit is evaluated not only to determine whether these features are "similar," but also whether the mission and function are "integrated." Department of Justice, 17 FLRA at 62. The separate authority exercised by the states over their respective military missions indicates a lack of integration of mission and function across state lines that outweighs any similarity in the actual duties that the technicians perform while preparing for and performing these responsibilities. We thus find that the Petitioner has not demonstrated that the RD misapplied this aspect of the community of interest test.

b. Labor Relations and Personnel Authority

In determining whether a community of interest has been established, the Authority evaluates the "locus and scope of personnel and labor relations authority and functions." Department of Justice, 17 FLRA at 62; AAFES, 5 FLRA at 661. Under this factor, the Authority "looks to whether policy-making authority over personnel and labor relations policy is consistent with the proposed consolidation[.]" AFMC, 55 FLRA at 363.

Consistent with National Guard, 13 FLRA at 235, the RD found that the states set labor relations and personnel policies through their respective adjutants general. The Petitioner disagrees, asserting that the Technician Act grants "plenary authority to regulate the employment of technicians" in the Secretaries of the Army and Air Force and limits the Adjutants General to the role of "designated . . . employers and administrators." Application at 20 (brackets in original) (quoting 5 U.S.C. §709(c)).

The Petitioner has not established any basis to reject the Authority's holding in National Guard. As we explained, the Petitioner's assertion that state authority is subordinate to federal authority in this respect ignores the hybrid authority set out in the Technician Act. A consolidation that ignored this hybrid authority would establish lines of authority for labor relations at odds with the lines of authority governing the employment of technicians in their work.

The authority of federal officials to issue regulations governing technician employment is necessarily accompanied by policy-making authority. However, the specific and irrevocable designations of authority to state officials contained in the Technician Act necessarily confers policy-making authority as well. The authority of state officials is greater than mere delegated, operational authority over day-to-day decision-making. *Cf*. AFMC, 54 FLRA at 363 (finding that the delegation of day-to-day operation of personnel and labor relations functions does not preclude consolidation). Rather, they exercise specific authority granted by the Technicians Act. Thus, the RD's conclusion is consistent with Authority precedent.

c. The Impact of Expanded Bargaining Rights.

The Petitioner asserts that RD should have considered the impact of expanded bargaining rights under section 7117(a) of the Statute in determining whether a community of interest had been established. The RD rejected this argument, stating that such a consideration is not a factor in determining a unit's appropriateness under section 7112(a).

As a matter of statutory construction, the RD's conclusion is sound. The bargaining rights discussed in Section 7117(a)(3), according to the provision's plain wording, apply only to "an exclusive representative [that] represents an appropriate unit." Thus, section 7117(a)(3) rights extended to a petitioning party only if separate bases have been satisfied and a unit determined to be appropriate.

Limitations on consolidation necessitated by the Technicians Act may have the effect of limiting the bargaining rights of these employees. However, nothing in the Statute guarantees that every group of employees will be able to avail themselves of all aspects of the Statute. A separate statutory scheme that applies to one group of employees may place limitations on their collective bargaining rights. See Phoenix Area Indian Health Service, Sacaton Service Unit, Hu Hu Kam Memorial Hospital, Sacaton, Arizona and Southwest Native American Health Care Employees, Local 1386, LIUNA, AFL-CIO, 53 FLRA 1200, 1219 (1998) (noting that technicians serve under a statutory scheme that places many working conditions that are ordinarily negotiated outside the scope of bargaining).

In sum, the RD did not err in determining that the proposed consolidated unit did not share a community of interest.

2**. The RD properly applied established law in determining that consolidation would not promote effective dealings or the efficiency of the agency operations**.

In determining whether consolidation would promote effective dealings and efficient agency operations, the Authority examines a number of factors, including: whether personnel and labor relations authority is centralized and broad operating polices exist at the national level; whether consolidation will

reduce bargaining unit fragmentation, thereby, "promoting a more effective, comprehensive bargaining unit structure to effectuate the purposes of the Statute" (AAFES, 5 FLRA at 661-62); and whether the unit would adequately reflect the agency's organizational structure or would require creating a new agency structure. National Guard, 13 FLRA at 237. As a general matter, the Authority also considers the past collective bargaining experience of the parties in making "effective dealings" determinations. FISC, 52 FLRA at 961; AFMC, 55 FLRA at 364.

The Petitioner argues that consolidation would end the duplicative acts of negotiating separate contracts at the local level. The RD's conclusion that this criteria was not met is based, however, on his determination that the NGB is without authority to engage in collective bargaining on behalf of the states and on his determination that effective bargaining relationships currently exist. Although acknowledging that the proposed consolidated unit "represents more employees in units better distributed geographically and organizationally than the unions involved in National Guard," the RD relied on the retention of labor relations authority at the state level as indicating that consolidation would not be effective and would not promote efficient operations because the proposed consolidated unit would extend across state lines. RD's Decision at 14.

Essentially, the RD determined that the proposed consolidated unit would require a structuring of the National Guard inconsistent with the dictates of the Technicians Act. This determination, along with the RD's consideration that effective bargaining relationships already exist at the state level, is consistent with Authority precedent, see AFMC, 55 FLRA at 364, FISC, 52 FLRA at 961, and is also consistent with the Authority's holding in National Guard.

Based on the foregoing, the Authority finds that there is no basis for granting review of the RD's determination that the proposed consolidated unit would not promote effective dealings and the efficiency of agency operations.

3. The RD properly concluded that consolidation of the bargaining units was not appropriate.

In sum, the Petitioner has not established grounds warranting review of the RD's determination that a community of interest among employees was not established and that the proposed consolidated unit would not promote effective dealings and the efficiency of the National Guard's operations. Since all three section 7112(a) criteria must be met for a unit to be found appropriate, see U.S. Department of Housing and Urban Development and National Federation of Federal Employees, Independent, 15 FLRA 497, 500 n.6 (1984), the proposed unit is not appropriate under section 7112(a) of the Statute, and the RD properly dismissed the petition.

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c. How Appropriate Units Are Determined.

(1) Agreement by Parties. Subsequent to the notice being posted, management will consider whether the unit is appropriate. Management and the union will meet and, hopefully, agree on an appropriate unit (consent agreement). This consent agreement, along with other relevant matters (such as objections based upon certification, election, and agreement bars; challenges to the union's status, etc.) will be forwarded to the Regional Director.

(2) Determination by the Regional Director and the Authority.

(a) If management objects to the appropriateness of the bargaining unit, it should file an objection with the Regional Director. Further, the Regional Director will review the appropriateness of a unit even when the parties have agreed to insure it is consistent with the policies of Title VII and precedent decisions.

(b) Even when both parties strongly agree upon the composition of a unit, the Regional Director may nevertheless refuse to certify as a result of his independent evaluation of the unit.

d. Persons/Units Specifically Excluded or Distinguished.

There are certain classes of employees who are not allowed, by Title VII, to organize and be represented by an exclusive representative. Often there is an objection by management because these personnel are included in the proposed unit. 5 U.S.C. § 7112(b) and (c) provide:

> (b) A unit shall not be determined to be appropriate . . . if it includes--
>
> (1) except as provided under section 7135 (a)(2) of this title, any management official or supervisor;
>
> (2) a confidential employee;
>
> (3) an employee engaged in personnel work in other than a purely clerical capacity;
>
> (4) an employee engaged in administering the provisions of this chapter;
>
> (5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;
>
> (6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or
>
> (7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency

whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization--

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

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1. Supervisors.

FSLMRS § 7103(a)(10). "'Supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority;"

NAVAL EDUCATION AND TRAINING CENTER,
NEWPORT, RHODE ISLAND AND
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS

3 FLRA 325 (1980)

(Extract)

The Petitioner seeks to clarify an existing exclusively recognized unit of the civilian personnel of the Fire Protection Branch of the Naval Education and Training Center to include ten employees currently classified as Supervisory Firefighter, GS-6 (hereinafter referred to as Fire Captain), contending that these employees are not supervisors within the meaning of § 7103(a)(10) of the Statute. The Activity contends that the incumbents in the subject classification are supervisors within the meaning of § 7103(a)(10) of the Statute and, on this basis, opposes their inclusion in the certified unit. Section 7103(a)(10) defines supervisor . . .

The Fire Protection Branch is composed of one Fire Chief, two Assistant Fire Chiefs, ten Fire Captains (GS-6), 40 Firefighters (GS-5), and 12 employees who perform various functions ranging from inspectors to alarm operators. The Fire Protection Branch occupies four stations and a headquarters building in the geographical area for which it is responsible. The Headquarters is staffed by the Fire Chief and the two Assistant Fire Chiefs. Fire Station No. One is manned by eight Firefighters and two Captains, No. Three, by six Firefighters, two Captains, No. Six being two separate shifts manned each by seven Firefighters and two Captains (a total of 14 Firefighters and four Captains), plus two Firefighters who stand duty on Gould Island, and Station No. Nine staffed by ten Firefighters and two Captains.

The Fire Chief is the primary supervisory official and is responsible for directing the administrative operation of the Fire Protection Branch. He works a standard 8:00 a.m. to 5:00 a.m. shift, Monday through Friday. The two Assistant Chiefs are supervisors, responsible for overseeing and directing the actual work-force. Their hours correspond with the 24 hour shifts which the Fire Captains and Firefighters work.

Although the Assistant Fire Chiefs are located at Headquarters, their job functions are integrally related to the activities occurring in and about the fire stations. The Assistant Chief is in charge of all firefighting operations once he arrives on the scene of the fire. In most cases, the Assistant Chief will appear from three to five minutes after the arrival of the fire crew led by the Fire Captain. In addition, the Assistant Fire Chief makes at least one daily visit to every fire station; the time spent on the visit ranges between 15 minutes and one hour. The visits may increase depending upon the nature of the problems being experienced by the particular station. The purpose of the visits is to discuss with the station's Fire Captain problems which may have arisen concerning personnel, equipment, building conditions, supplies, and/or departmental procedures. The Assistant Fire Chief is also responsible for training personnel and conducting drills in firefighting technique. The Assistant Fire Chief also officially reviews all the Performance Appraisals submitted by the Fire Captains.

The record reveals that the Fire Captains do have additional duties, responsibilities, and authority in the fire station as compared with the other Firefighters. Their authority is, however, limited. Fire Captains <u>do not</u> hire, promote, suspend, remove, transfer, furlough, layoff, or recall employees. However, Fire Captains assign tasks set out in the Daily Work Assignments, which is, in fact, a directive from Headquarters. The Daily Work Assignments designates the duties to be accomplished by the station crew as a whole on a day to day basis (washing trucks, cleaning equipment and the station). The Captain may order the Firefighter he wishes to the job. Additionally, he does not have to abide by the daily schedule, so long

as the daily work assignments are completed within the week. The record discloses that the assignment of personnel to perform the daily tasks is considered a routine procedure taken directly from a long-standing and established rotation system designated to make each Firefighter share equally in all of the work.

The record further reveals that Fire Captains direct the Firefighters to a limited extent. Captains are the supervisory officer at most fires prior to the arrival of the Assistant Fire Chief (about a three to five minute period). Assistant Fire Chiefs direct all operations once they arrive. All responses to fire are predetermined in a pre-fire plan program. More specifically, drills are conducted for specific alarms, and in case of an actual fire, the fire crew responds exactly as they had previously done in the drill. The instructions for these drills come from the Assistant Fire Chiefs.

Fire Captains do undertake annual performance evaluations of employees. Evidence indicates that not much time is devoted to this responsibility. These evaluations apparently have some impact in rating the employees in determining the order of RIF's. Captains are also responsible for approving within-grade increases to employees, but cannot award quality step increases.

The record discloses that Fire Captains do have limited authority to discipline employees. They can issue oral and written reprimands. They cannot, however, unilaterally suspend employees and the evidence indicates that their recommendations carry little, if any, weight. The Captains also have a limited authority to award employees. In evaluating employees, the ratings may be such as to gain additional seniority for the employee and/or a small monetary award. Apparently, the Captain may also submit a recommendation for an award outside of the performance evaluation. Recommendations for promotion by Captains also appear to have little influence on Activity promotional decisions.

Fire Captains do have the authority to adjust minor grievances if the settlements are satisfactory to the employee. They do not participate once a formal grievance is filed. Fire Captains do not have official contact with shop stewards. The Captains are responsible for maintaining order within the work place.

As previously indicated the Federal Labor-Management Relations Statute, § 7103(a)(10), provides that in determining the supervisory status of a firefighter, a more particular standard of assessment will be applied as compared to other employees. Section 7103(a)(10) states:

with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such (supervisory) authority;

The record reveals, as detailed above, that although certain aspects of the Fire Captains' job function may involve the exercise of supervisory authority, their overall employment time is spent in either routinely administering Activity directives, performing routine and clerical duties, or waiting to respond to an alarm.

The Authority thus finds that the evidence contained in the record supports the Petitioner's contention that the Fire Captains, GS-6, are not supervisors under § 7103(a)(10) of the Statute, in that they do not devote a preponderance of their employment time to supervisory functions. Accordingly, the Authority finds Fire Captains serving at fire houses at the Naval Education and Training Center, Newport, Rhode Island, are not supervisors within the meaning of the Statute, and will be included within the bargaining unit.

IT IS HEREBY ORDERED that the unit sought to be clarified, in which exclusive recognition was granted to the International Association of Firefighters, Local F-100, on July 8, 1974, at the Naval Education and Training Center, Newport, Rhode Island, be and hereby is, clarified by including in said unit the position of Supervisory Firefighter, GS-6 (Fire Captain).

The statute requires the employee to consistently exercise independent judgment in order to be considered a supervisor. A WG-11 electrician who headed the evening shift, handed out preexisting work assignments, and directed the work of other shift employees was not a supervisor. The directing and assigning of work the electrician did was routine and did not require the consistent exercise of independent judgment, U.S. Army Armor Center, Fort Knox, KY, 4 FLRA 20 (1980). *See e.g.,* U.S. Army, Dugway Proving Ground, Dugway, Utah, 8 FLRA 684 (1982) (the Authority sometimes refers to these as "leader" positions).

The Authority has held that the employee is a supervisor if the employee consistently exercises one of the supervisory indicia set forth in 5 U.S.C. § 7103(a)(10). Department of Veterans Affairs, VA Medical Center, Allen Park, Michigan, 35 FLRA 1206 (1990).

In Department of the Interior, BIA, Navajo Area Office, Gallup, New Mexico and American Federation of Teachers, 45 FLRA 646 (1992), the Authority adopted the principles used by the private sector (National Labor Relations Board) in determining

whether a person is a supervisor. The Authority found that the employee's evaluations of other employees, which would affect hiring decisions and were based on the employee's own independent judgment, made him a supervisor.

The temporary detail of a supervisor to an unclassified position pending the outcome of an investigation does not justify including him in the bargaining unit. The union argued that since employees temporarily detailed as supervisors were excluded from the unit, employees temporarily detailed from supervisory positions should become part of the unit. The FLRA disagreed and found that the employee lacked a community of interest with those in the bargaining unit. Federal Aviation Technical Center, Atlantic City Airport, 44 FLRA 1238 (1992)(the temporary detail had been for over one year when the union filed the request to include the employee in the unit).

To be classified as a supervisor, the supervisor must exercise authority over individuals who are "employees" as defined in section 7103(a)(2). If the supervisor has authority only over aliens, non-US citizens or military personnel, he is not a supervisor. Section 7103(a)(10) provides that "supervisor" means an individual having authority over "employees," who are defined, in pertinent part, as individuals employed in an agency, but does not include an alien, or noncitizen who occupies a position outside the United States or a member of the uniformed services. *See* Interpretation and Guidance, 4 FLRA 754 (1980), and New York, N.Y., 9 FLRA 16 (1982).

A supervisor or management official may join a union, but may not participate in management of the union or be a member of the union leadership. *See* Department of Labor and Susan Wuchinich, 20 FLRA 296 (1985); Nuclear Regulatory Commission and NTEU, 44 FLRA 370 (1992)(Both these cases began as unfair labor practice cases under 5 U.S.C. § 7116(a)(3), alleging management interference with a labor organization.)

5 U.S.C. § 7135(a) contains an exception (grandfathering in several existing units) which allows initial or continued recognition of a bargaining unit containing only management officials or supervisors. In such cases, the issue of union leadership creates several interesting questions.

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2. Confidential Employees.

"'[C]onfidential employee' means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations". 5 U.S.C. § 7103(a)(13).

Social Security Administration
and American Federation of Government Employees
56 FLRA No. 176 (2000)

(Extract)

The Legal Assistant positions in dispute in this proceeding are in the Activity's Office of the Regional Chief Counsel, Region III, Philadelphia, Pennsylvania. These positions were created and filled in 1998. Three of the four employees selected for the Legal Assistant positions had previously been employed as Legal Technicians for the Activity, and their previous positions were included in the bargaining unit.

The Office of the Regional Chief Counsel handles three types of legal activity: (1) representing the Activity in the program law area; (2) providing legal advice; and (3) representing the Activity in the general law area, including personnel law issues. The program law work is not at issue here, because these assignments do not involve internal labor-management relations issues or personnel matters.

The Legal Assistants work directly with the attorneys assigned to EEOC or MSPB cases and assist the attorneys in various ways--administratively, clerically and technically. The work includes formatting briefs and other documents, making copies, sending material to the parties, keeping the attorney appraised of calendar dates, and compiling documents. Other duties performed by the Legal Assistants are proofreading, checking citations, checking punctuation, spelling and grammar, and reviewing format. The Legal Assistants also create and maintain case files. On occasion the attorneys have discussed the merits or strategies of a case with the Legal Assistants. The Legal Assistants may also have sat in on settlement discussions or interviews and taken notes. Nothing in the record showed that the Legal Assistants' presence at these meetings was in any capacity other than observer or note taker. The Legal Assistants have not been present at depositions or hearings.

The RD (Regional Director) found that the incumbents of the Legal Assistant positions at issue are not confidential employees within the meaning of the Statute. He concluded that while the Legal Assistants act in a confidential capacity to the attorneys, the record failed to establish either that they do so with respect to individuals who formulate or effectuate management policies in the field of labor-management relations, or that there is a confidential relationship between these employees and the individuals they work for when the latter are performing duties in the labor-management relations field. The RD found that although attorneys in the Office of the Regional Chief Counsel effectuate management's policies in internal labor-management relations, that involvement is limited to providing advice to the employee and labor relations staff and to managers. While the attorneys do provide legal advice in the field of labor-management relations, the Legal Assistants do not act in a confidential capacity to them when they are performing this function.

Analysis and Conclusions

Section 7103(a)(13) of the Statute defines a "confidential employee" as an employee "who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations." An employee is confidential if: (1) there is evidence of a confidential working relationship between an employee and the employee's supervisor; and (2) the supervisor is significantly involved in labor-management relations. An employee is not confidential in the absence of either of these requirements. United States Dep't of Labor, Office of the Solicitor, Arlington Field Office, 37 FLRA 1371, 1376-77, 1383 (1990) (DoL Solicitor).

The Activity has not supported its assertion that there is a lack of precedent, or that the RD's decision conflicts with precedent, regarding whether the Legal Assistants should be excluded as confidential employees based on their relationship with the attorneys in the Office of the Regional Chief Counsel. The attorneys' duties, on which the Activity relies to support its claim, do not constitute the type of responsibilities that the Authority has found are aspects of the formulation or effectuation of management policies in labor relations. The responsibilities identified by the Authority as being in that category include advising management on or developing negotiating positions and proposals, preparing arbitration cases for hearing, and consulting with management regarding the handling of unfair labor practice cases. See, e.g., United States Dep't of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Ariz., 37 FLRA 239, 240-41 (1990); Red River Army Depot, Texarkana, Tex., 2 FLRA 659, 660 (1980) (Red River). The record supports the RD's conclusion that the attorneys are not significantly involved in formulating or effectuating management policies in the field of labor-management relations. See, e.g., United States Dep't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Marion, Ill., 55 FLRA 1243, 1246-47 (2000) (Bureau of Prisons, Marion); Dep't of Veterans Affairs, Reg'l Office, Waco, Tex., 50 FLRA 109, 111-12 (1995).

The Authority bases bargaining unit eligibility determinations on testimony as to an employee's actual duties at the time of the hearing rather than on duties that may exist in the future. DoL Solicitor, 37 FLRA at 1377; United States Dep't of Hous. and Urban Dev., Washington, D.C., 35 FLRA 1249, 1256-57 (1990) (HUD). Bargaining unit eligibility determinations are not based on evidence such as written position descriptions or testimony as to what duties had been or would be performed by an employee occupying a certain position, because such evidence might not reflect the employee's actual duties. Contrary to the Activity's assertion that the RD's decision is not consistent with Authority precedent, the RD's decision follows and applies Authority precedent. The Authority's only exception to the well-established principle that bargaining unit eligibility is based on an employee's actual duties at the time of the hearing, arises in cases where an employee has recently encumbered a position. In that circumstance, the Authority considers duties to have been actually assigned where: (1) it has been demonstrated that, apart from a position description, an employee has been informed that

he or she will be performing the duties; (2) the nature of the job clearly requires those duties; and (3) an employee is not performing them at the time of the hearing solely because of lack of experience on the job. See DoL Solicitor, 37 FLRA at 1378. That situation is not present here and the Activity's reliance on DoL Solicitor is misplaced.

Moreover, contrary to the Activity's assertion, there is no absence of precedent concerning whether a law office's ethical obligations are appropriately considered in determining an employee's bargaining unit status. For example, the Authority has stated that, in making bargaining unit determinations, ethical requirements governing the legal profession are not considered. See, e.g. id. at 1381, citing United States Dep't of the Treasury, Office of Reg'l Counsel, W. Region, 1 F.L.R.C. 258, 260 (1973) (American Bar Association's Model Canons of Professional Responsibility restrictions upon the conduct of its members do not control unit determinations and qualifications of a labor organization for exclusive recognition under Executive Order 11491).

The record demonstrates that the Legal Assistants help the attorneys with cases before the EEOC and the MSPB. While information involved in such cases may be personal or sensitive, it does not constitute confidential material within the meaning of §7103(a)(13) of the Statute because the information is not related to the labor-management relations program. Under the Authority's well-established precedent, employees performing duties such as those performed by the Legal Assistants are not confidential employees within the meaning of the Statute. For the reasons set forth above, the Activity has not demonstrated that there is an absence of applicable precedent.

Accordingly, we find that there is no absence of or departure from applicable precedent and no basis for review of the RD's decision that the Legal Assistants should not be excluded from the bargaining unit as confidential employees.

Further, as to the Activity's contention that the Legal Assistants act in a confidential capacity to the attorneys in the Office of the Regional Chief Counsel, the Authority has determined that an employee's "confidential" status to management does not compel a conclusion that the employee is "confidential" within the meaning of §7103(a)(13) of the Statute. See United States Dep't of Hous. and Urban Dev. Headquarters, 41 FLRA 1226, 1237 (1991), reconsideration denied, 42 FLRA 220 (1991). Moreover, regarding the Legal Assistants' access to confidential documents regarding cases, the Authority has long held that mere access to material related to internal labor-management relations is not sufficient to establish confidential capacity within the meaning of the Statute. See, e.g., Red River, 2 FLRA at 661.

As cited in the case above, the Authority summarized the rules for determining if an employee is confidential as follows: "An employee is confidential if: (1) there is evidence of a confidential relationship between an employee and the employee's supervisor; and (2) the supervisor is significantly involved in labor-management relations. An employee is not confidential in the absence of either of these requirements." Department of Housing and Urban Development Headquarters and AFGE, 41 FLRA 1226, 1234 (1991) *citing* Department of Labor, Office of the Solicitor, Arlington Field Office and AFGE, 37 FLRA 1371 (1990) (excluding ten General Attorney positions from the bargaining unit because the attorneys were confidential employees).

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3. Management Officials.

"'[M]anagement official' means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency." 5 U.S.C. § 7103(a)(11).

U.S. Dep't of Justice and National Association of Immigration Judges

56 FLRA No. 97 (2000)

(Extract)

Background

The Agency filed a petition seeking a determination as to whether employees who encumber the position of Immigration Judge are management officials within the meaning of section 7103(a)(11) of the Federal Service Labor-Management Relations Statute (Statute). n1 The Agency maintained that changes in the duties and responsibilities of its Immigration Judges have occurred since the bargaining unit was initially certified and, as a result, that these employees are now management officials. Consistent with this claim, the Agency further maintained that the unit is no longer appropriate.

n1 Section 7103(a)(11) provides:

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine or influence the policies of the agency[.]

The RD observed that the Union was certified in 1979 as the exclusive representative of a unit of Immigration Judges employed by the Immigration and Naturalization Service (INS). n2 Four years later, in 1983, the Executive Office for Immigration Review (EOIR) was created through an internal

reorganization in which the Immigration Judge function, previously performed by employees of the INS, was combined with the Board of Immigration Review. The primary function of the Board is to hear appeals of the Judges' decisions. n3

n2 The unit is described as:

INCLUDED: All Immigration Judges employed by the Immigration and Naturalization Service throughout the United States.

EXCLUDED: All other professional and nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. RD's Decision at 2.

Immigration Judges are appointed by the U.S. Attorney General for the purpose of conducting formal, quasi-judicial proceedings involving the rights of aliens to enter or remain in the United States. It is undisputed that these duties have remained essentially unchanged since the early 1970s when the position was titled "Special Inquiry Officer" and located in the INS. Pursuant to a regulatory change in 1973, incumbents of this position were formally authorized to use the title "Immigration Judge." By 1979, when the unit was certified, all of the Judges were, and have continued to be, attorneys.

Organizationally, Immigration Judges serve in 52 courts located throughout the country. The Office of the Chief Immigration Judge, which is also located within the EOIR, is responsible for providing overall policy direction, as well as operational and administrative support, to the Immigration Courts. Two Deputy Chief Immigration Judges assist the Chief Judge in providing program direction and establishing priorities for the Immigration Judges. Supervisory responsibility for the Judges, however, is directly delegated to eight Assistant Chief Immigration Judges, who serve as the principal liaison between the Office of the Chief Judge and the Immigration Courts. Although the Assistant Chief Immigration Judges serve as first-line supervisors for the Immigration Judges, they do not evaluate the Immigration Judges or review their decisions. Rather, in their ad judicatory role, the Judges are independent.

The daily activities of the Immigration Courts are managed by the court administrators who, like the Judges, are supervised by an Assistant Chief Immigration Judge. It is the responsibility of the court administrators to hire, supervise, and evaluate the court's support staff, including language clerks, language specialists, legal technicians, and clerk/typists. Court administrators, however, "[do] not share the supervisory responsibility with [the] Immigration Judges, who have no supervisory responsibility or authority." RD's Decision at 4.

The daily routine of an Immigration Judge involves hearing and deciding cases that arise from the operation of the INS. A court's jurisdiction to decide these cases is determined at the time a case is filed. After filing, the cases are randomly assigned by the court administrator to an individual Judge and placed on a Judge's calendar on his or her master calendar day. At that time, the Judge hears presentations from the parties and their attorneys, identifies the issues, and advises individuals as to their right to representation. The Judge also sets time frames and briefing schedules, as well as the date for trial.

During a trial, the parties are represented by counsel and the rules of evidence are observed. Thereafter, in arriving at their decisions, Immigration Judges are required to apply immigration statutes, applicable regulations, published decisions of the Board of Immigration Appeals and federal appellate courts, and other foreign and state laws. After the trial, the Judge issues his or her decision, almost always orally, and advises the parties of their appeal rights. Oral decisions are not transcribed unless they are appealed; are not published; and are final and binding only with respect to the parties to the case. With limited exception, decisions of the Immigration Judges may be appealed to the Board of Immigration Appeals and review of their decisions is de novo. Certain cases may also be appealed to the appropriate U.S. circuit court.

RD's Decision

The RD found that under section 7103(a)(11) of the Statute, a management official is defined as "an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency." Id. at 8. The RD additionally found that in Department of the Navy, Automatic Data Processing Selection Office, 7 FLRA 172, 177 (1981) (Navy/ADP), the Authority held that management officials are individuals who: (1) create, establish or prescribe general principles, plans or courses of action for an agency; (2) decide upon or settle upon general principles, plans or courses of action for an agency; or (3)bring about or obtain a result as to the adoption of general principles, plans or courses of action for an agency.

Applying the definition set forth in Navy/ADP to the facts of this case, the RD concluded that Immigration Judges are not management officials within the meaning of the Statute. In reaching this result, the RD first rejected the Agency's claim, based upon U.S. Department of Justice, Board of Immigration Appeals, 47 FLRA 505 (1993) (BIA), that Immigration Judges make policy through the issuance of their decisions. In this connection, the RD observed that the nature and effect of the Judges' decisions has not changed since the unit was certified in 1979. The RD further observed that the definition of a management official has also remained unchanged during this period of time. Next, the RD observed that in arriving at their decisions, Immigration Judges are required to apply immigration laws and regulations,

that their decisions are not published and do not constitute precedent. Finally, the RD observed that the decisions are binding only on the parties to the case, are "routinely" appealed, and are subject to de novo review. RD's Decision at 9. Based on these factors, the RD found that the role of an Immigration Judge can be readily distinguished from that of a member of the Board of Immigration Appeals. According to the RD, unlike decisions of an Immigration Judge, decisions of the Board of Immigration Appeals constitute a final administrative ruling, are binding on the Judges below and, consequently, influence and determine immigration policy.

As concerns the Agency's assertion that Immigration Judges make policy on both the local and national levels through their involvement in other Agency activities, the RD observed that the Agency principally relied on the development of local rules governing the practice in some courts. According to the RD, these rules govern such matters as filing procedures, motion practice, attorney withdrawal or substitution procedures, and other details of practice in a particular court. As such, the RD found that "they constitute rules for the conduct of parties in the courts, [and] not Agency policy." Id. at 10. In this connection, the RD observed that these rules are "necessarily established within the framework of the Code of Federal Regulations and must be approved by the [Office of the Chief Immigration Judge]." Id. The RD further observed that not all courts have developed them, and in some courts such rules are merely discretionary. The RD accordingly determined, based on precedent such as U.S. Department of Energy, Headquarters, Washington, D.C., 40 FLRA 264 (1991) (DOE, Headquarters), that the Agency had failed to establish that such activities involved the formulation, determination, or influencing of agency policy.

The RD also found that other activities cited by the Agency failed to establish that Immigration Judges are now management officials. These activities included, inter alia, participation of some Judges on advisory committees to the Office of the Chief Immigration Judge; the opportunity for Judges to review and comment on OPPMs; and participation in the court evaluation system. In the RD's view, while these activities "appear to be commendable efforts to utilize the professional expertise of the [Agency's] employees and to seek input from those on the front-lines, employees who perform such ad hoc tasks and lend their expertise and assistance are not establishing agency policy[.]" RD's Decision at 11.

Finally, the RD found no merit in the Agency's contention that Immigration Judges are management officials by virtue of their judicial independence, professional stature and qualifications, the formal amenities of the courtroom and other similar factors. According to the RD, the record establishes that over the years, the professional status of the Immigration Judge has been recognized and increasingly supported by OPM, Congress, the Department of Justice, and by the Office of the Chief Immigration Judge itself. In particular, the RD noted that in a 1996 memoranda entitled

"Clarification of Organizational Structure and Supervisory Responsibilities," the current Chief Judge stated:

> This organizational structure and supervisory delegation was established so that the Immigration Judges are unencumbered by any supervisory and management obligations and are free to concentrate on hearings. The Immigration Judges [function] in an independent decision-making capacity determining the facts in each case, applying the law, and rendering a decision.

Id. at 11-12. Moreover, the RD further noted that when asked at the hearing whether these statements were true at the time they were written, and whether they continued to be true, the Chief Judge replied "yes" to both questions. Based on these circumstances the RD determined:

> While the Judges have some authority to control practice in their own courtrooms, they have no authority to set overall policy as to how the courts as a whole will operate. Nor do they have the authority to direct or commit the Agency to any policy or course of action. They are highly trained professionals with the extremely important job of adjudicating cases.

The RD, accordingly, concluded that Immigration Judges are not management officials and that the bargaining unit continues to be appropriate.

As discussed in National Association of Immigration Judges above, the Authority, in Department of the Navy, Automatic Data Processing Selection Office, 7 FLRA 172 (1981), interpreted the definition of management official as, "[T]hose individuals who: (1) create, establish or prescribe general principles, plans or courses of action for an agency; (2) decide upon or settle upon general principles, plans or courses of action for an agency; or (3) bring about or obtain a result as to the adoption of general principles, plans or courses of action for an agency." *Id.,* at 177.

In United States v. Army Communications Command, Fort Monmouth, N.J. and NFFE, 4 FLRA 83 (1980), the Authority looked at numerous positions and held that auditors, electronics engineers and project officers were management officials. Communication specialists, data management officers, financial management officers, general engineers, procurement analysts, program analysts, public information officers, and traffic managers were not management officials. The rationale for each determination was linked to the duties performed, not the title of the position.

In Department of Agriculture, Food and Nutrition Service and NTEU, 34 FLRA 143 (1989) the Authority held that a computer specialist was not a management official since in the event there was a problem, the employee would only be an advisor to the decision maker. The Authority distinguished this case from Environmental Protection Agency, Research Triangle Park, North Carolina, 12 FLRA 358 (1983) where an ADP Security Specialist was found to be a management official because he developed

security policy and had the authority to shut down the facility in the event of a security breach.

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4. Professionals.

FSLMRS § 7103a(15). ". . . 'professional employee' means-

(A) an employee engaged in the performance of work-

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;"

5 U.S.C. § 7112(b) prevents professionals from being included in a unit with nonprofessional employees "unless a majority of the professional employees vote for inclusion in the unit." *See* Department of Defense, U.S. MEPCOM, Headquarters, Western Sector, Oakland Army Base and AFGE, 5 FLRA 3 (1980).

The professional will consider two matters when he votes in the secret ballot representation election. The first is whether or not she desires to be part of the proposed bargaining unit with nonprofessional employees. The second is whether he wants to be represented by one of the unions on the ballot. *Id.*, at 6.

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5. Work directly affecting national security.

Although the President has authority to exclude organizations from the coverage of the statute for national security reasons, authority to exclude a particular individual engaged in national security work is vested in the Authority. 5 U.S.C. § 7112(b)(6). With respect to national security exclusions, there is no need to establish that the employee is primarily engaged in such work. DOE, Oak Ridge, 4 FLRA 627 (1980); Defense Mapping Agency, West Warwick, Rhode Island and AFGE, 13 FLRA 128 (1983). 5 U.S.C. § 7112(b)(6) is not limited to individuals primarily engaged in National Security work. The test is (1) the individual employee is engaged in the designated work, and (2) the work affects national security. The Authority indicated an intent to narrowly interpret the term "national security" to include "only those sensitive activities of government that are directly related to the protection and preservation of the military, economic, and productive strength of the United States. . . " Oak Ridge, 4 FLRA at 655-656.

In Department of the Navy, U.S. Naval Station, Panama and AFSCME, 7 FLRA 489 (1981) the Authority held that a Classified Material Systems Custodian should be excluded because he reviews and logs in all classified material. The fact that he handles highly classified communications directly affecting national security was a sufficient basis for excluding him from the unit.

6. Employees Engaged in Internal Security.

The Authority may also exclude employees who investigate and audit others whose duties affect the internal security of the agency. 5 U.S.C. § 7112(b)(7). The language of section 7112(b)(7) requires that only employees "primarily" engaged in investigating and auditing employees whose work directly affects the internal security of an agency are to be excluded from units. DOL, Office of the Inspector General, Boston, 7 FLRA 834 (1981).

e. Other Excluded or Distinguished Employees. There are other classes of employees who are excluded or distinguished from the bargaining unit employees. *See* 5 U.S.C. § 7112(b). Though normally excluded, intermittent employees, who are otherwise eligible for union membership, and who have a reasonable expectation of continued employment, may be included in a prospective bargaining unit. Ft. Buchanan Installation, Club Management System, 9 FLRA 143 (1982).

2-8. The Representation Election.

a. General.

5 U.S.C. § 7111(a).

An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot

election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

The election is conducted by the agency under the supervision of the Regional Director. The parties will agree as to the conduct of the election or, where they cannot agree, the Regional Director will dictate the procedures to be followed. Matters often addressed in the "consent agreement" are: the procedures to be used for challenged ballots, provisions for observers, period for posting the "notice of election," procedures for checking the eligibility list and for mail balloting, positions on the ballot, custody of the ballots, runoff procedures, and wording on the ballot.

Each party will be designated an equal number of observers who are to insure the election is conducted fairly, the integrity of the secret ballot is maintained, and all eligible voters are given the opportunity to vote.

Note that merely a majority of the valid votes cast (not a majority of employees in the unit) is needed by the labor organization to win as the exclusive representative. *See* Department of Interior, 34 FLRA 67 (1989) (only 3 of 17 eligible voters actually cast ballots, yet the union was certified as the exclusive representative).

b. Results of the Election.

(1) Certification. (5 C.F.R. § 2422.32). If a union receives a majority of the votes cast, it is certified as the bargaining representative for the unit of employees. If the union loses the election, a certification of results is issued by the Regional Director.

(2) Runoff Elections. (5 C.F.R. § 2422.28). A runoff election will be conducted when there were at least three choices on the ballot, i.e., at least two unions and a "neither" or "none," and no choice received a majority of the votes. The election will be between the choices who received the highest and second highest number of votes in the original election.

(3) Inconclusive Election. (5 C.F.R. § 2422.29). An inconclusive election is one in which no choices received a majority of the votes, and there are at least three choices. A new election is held when all choices received the same number of votes, or two received the same number of votes and the third received more but not a majority; or, in a runoff election, both selections received the same number of votes.

2-9. Objections to Elections and Challenged Ballots; Neutrality Doctrine.

a. Procedures (5 C.F.R. § 2422.26).

A dissatisfied party (normally a union which loses an election) may file an objection to the election within five days after the tally of ballots has been furnished, seeking a new election. The objection may be to the procedural conduct of the election or to conduct which may have improperly affected the results of the election. The objections must be specific, not conclusory. Within ten days after filing the objection, the objecting party shall file with the Regional Director statements, documents and other materials supporting the objections.

Failure to file the objections within five days will result in a denial of the application for review. In Department of Veterans Affairs, Chattanooga National Cemetery and AFGE, 45 FLRA 263 (1992), the activity filed objections to an election seven days after the tally of votes. The application for review was denied.

The Regional Director conducts an investigation. The facts are gathered, arguments heard, and a decision made whether to sustain the objections and order a new election, overrule the objections, or, if a substantial issue exists which cannot be summarily resolved, to issue a notice of Hearing on Objections.

The Hearing on Objections is held before an Administrative Law Judge (ALJ) with the objecting party bearing the burden of proof. All necessary witnesses are considered in a duty status. The ALJ files a report and recommendations with the Authority.

In the following case, several employees filed an objection to the election.

DEPARTMENT OF VETERANS AFFAIRS JOHN J. PERSHING MEDICAL CENTER, POPLAR BLUFF, MISSOURI and AFGE
45 FLRA 326 (1992)

(Extract)

I. Statement of the Case

This case is before the Authority on an application for review filed by three employees under section 2422.17(a) of the Authority's Rules and Regulations. The employees seek review of the Acting Regional Director's (ARD) report and findings dismissing their objection to the conduct of a representation election. Neither the Activity nor the Petitioner filed an opposition to the employees' application.

For the following reasons, we deny the application for review.

II. Background and Regional Director's Decision

The ARD conducted a mail ballot election in a unit of five employees. The ARD received and counted two ballots, which were cast for the Union. No additional ballots were received by the ARD. Subsequently, the ARD

received a letter from three employees, James E. Akers, Dennis R. Fowler, and Charles E. Moon, who asserted that they voted against Union representation and mailed their ballots according to the election requirements. They requested the ARD to rerun the election.

The ARD construed the employees' letter as an objection to the procedural conduct of the election. However, the ARD found that none of the employees was a party to the case and concluded that none had standing to object to the conduct of the election. Accordingly, the ARD dismissed the objection.

III. Application for Review

Employees Akers, Fowler, and Moon argue that they properly and timely mailed their ballots casting votes against Union representation. They assert that the election should not stand because it "does not represent the wishes of the majority." Application at 1.

IV. Analysis and Conclusions

We conclude, for the following reasons, that no compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations for granting the application for review.

Section 2422.[31] of the Authority's Rules and Regulations provides, in pertinent part, that a "party" may object to the conduct of an election. As relevant here, "party" is defined in section 2421.11(a) as a person: (1) filing or named in a charge, petition, or request; or (2) whose intervention in a proceeding has been permitted or directed by the Authority.

We find no compelling reasons to review the ARD's determination that none of the employees is a party to this case. It is undisputed that, as found by the ARD, none of the employees: was a party in the filing of the original representation petition in this case; none were granted intervention at any time; none participated in the election arrangements or signed, either individually or on behalf of other employees, the Election Agreement in this case. ARD Report at 3.

As review of the ARD's finding that none of the employees is a party is not warranted, review of the ARD's dismissal of the objection to the election also is not warranted. For example, General Services Administration Regional Office, Region 4, 2 Rulings on Requests for Review of the Assistant Secretary 379 (1976) (finding employees did not have standing, individually or collectively, to file objections to an election); Clarence E. Clapp, 279 NLRB 330 (1986) (in dismissing objection to election filed by eligible voter, the National Labor Relations Board noted

that it "has long held that individual employees are not 'parties' within the definition of 'party'" in the Board's regulations).

The employees have not demonstrated that review of the ARD's decision is warranted under the standards set forth in section 2422.17(c) of the Authority's Rules and Regulations. Accordingly, we will deny the application for review.

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b. <u>Improper Management Conduct</u> [The Neutrality Doctrine, 5 U.S.C. §§ 7102, 7116(a)(1), (2) and (3)].

Agency supervisors and managers are required to adhere to a position of neutrality concerning the employees' selection of a bargaining representative. Agencies may not become involved in the pros and cons of the selection of a bargaining representative nor which particular labor organization should be chosen.

Employees have a right to reject a labor organization and have a right to espouse their opposition. This fact is the basis for the inclusion of the "No Union," "None" or "Neither" choice on the ballot.

The restriction on the agency's right to become involved in the employees' selection of a bargaining representative does not mean that the agency is restricted from urging all employees to participate in the election. A program designed to provide maximum employee participation in the election through the use of posters, employee bulletins, loud speakers, or any other device is not only proper, but may be construed as an obligation of agency management. Agencies should be concerned with the maximum exercise of the franchise by employees to insure that, regardless of the outcome of the election, it reflects the choice of all or an optimum number of employees. See Labor Relations Bulletin No. 219 (DA, DCSPER, 8 Oct 85).

The campaigns conducted by participating labor organizations should be free from any management involvement. There are instances in which management may become involved. Section 7116(e) provides:

> "The expression of any personal view, argument, opinion or the making of any statement which--
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> "(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,
>
> "(2) corrects the record with respect to any false or misleading statement made by any person, or
>
> "(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

It may become necessary to police the electioneering material because it is scurrilous, inflammatory, or libelous. Where the agency is the subject of attack, it may become necessary in some extreme and rare instances to respond. However, such response should be confined to establishing the facts and not engaging in a partisan campaign. Any response should be considered carefully to insure that it is not a partisan approach; is designed solely to protect the image of the agency or to correct scurrilous, libelous, or inflammatory matters; and is not designed to oppose any of the labor organizations, urge a "No" vote, or exhibit favoritism to any of the labor organizations. Where the agency goes beyond this, as it did in Air Force Plant Representative Office, 5 FLRA 492 (1981), it may violate 5 U.S.C. § 7116(a)(1). In that case, the activity posted and distributed, shortly before a scheduled election, a "message implying that unions were unnecessary, undesirable, and difficult to remove once the employees voted in favor of exclusive recognition." Nevertheless, the activity spokesman may be critical of the union in the process of correcting the record, so long as the corrections are noncoercive, and do not threaten or promise benefits. AANG, Tucson and AFGE, Local 2924, 18 FLRA 583 (1985).

Department of the Army committed an unfair labor practice (ULP) by assisting a challenging union (Teamsters) prior to an election at Fort Sill, Oklahoma. DA, Fort Sill, Oklahoma, 29 FLRA 1110 (1987). In that case, DA officials, White House officials and Teamsters' representatives held a meeting in Washington, D.C., shortly before an election at Fort Sill prompted by the Teamsters challenge to the incumbent union (NFFE) for representation of a 2,500 member bargaining unit. The parties met to discuss the commercial activities program at Fort Sill. The Teamsters subsequently publicized this meeting in flyers distributed to bargaining unit members prior to the election. After the election, won by the Teamsters, NFFE filed a ULP against the Army for a breach of neutrality. The authority ultimately agreed, finding that the meeting interfered with employees' rights to freely choose their exclusive representative, and that the flyer distribution interfered with the conduct of a fair election. As a remedy the Authority ordered a new election.

Violations of campaign ground rules governing electioneering will not, as a general rule, be considered as a basis for objections to the election. The question to be considered in objections is not whether the agreement has been violated, but whether the alleged objectionable conduct "had an independent improper effect on the conduct of an election or the results of the election." It should be noted that an electioneering agreement may not restrain employees in the exercise of their rights under the statute.

In Department of the Navy, Naval Station Ingleside, Texas and NFFE, 46 FLRA 1011 (1992) the activity and the two rival unions entered into an Agreement for Consent Election. No one received a majority of the votes cast and one of the unions filed six objections to the election. The Regional Director found the objection to be without merit and dismissed them. The Authority affirmed. The issue was whether the alleged conduct interfered with the employees right to free choice or improperly affected the outcome of the election. The agency had investigated any complaints made prior to the election and had taken corrective action. This made it much easier for the Authority to find that any objectionable conduct was isolated and did not affect the outcome of the election.

Because supervisors and managerial employees are considered part of agency management, any action of a supervisor or managerial employee becomes the action of the agency. As such, supervisors and managerial employees must be made aware of their responsibilities in election campaigns. However, it is important to distinguish between management and supervisors and actions of other employees. In Department of Justice, Immigration and Naturalization Service, 9 FLRA 253 (1982), a Border Patrol Academy instructor made statements to his students favoring the International Brotherhood of Police Officers over AFGE. This occurred during a representation election campaign. The Authority disagreed with the ALJ and dismissed this portion of a ULP complaint. "Although § 7116(e) limits the types of statements that may be made by agency management during an election campaign, § 7102 protects the expression of personal views by employees during an election campaign." (Emphasis added.)

Unions with "equal status" must be given equivalent solicitation rights, whereas those with lower status normally are not given equivalent solicitation rights. The problem is defining the status of unions and, secondly, what equivalent solicitation rights are. See Gallup Indian Medical Center, Gallup, New Mexico, 44 FLRA 217 (1992), for a discussion of equivalent status and the rights associated with such status.

The incumbent exclusive representative, if there is one, will already have access to employees and may have negotiated in the collective bargaining agreement for the use of agency services and facilities such as an office, a telephone, and use of management distribution systems. The "no status" union is one which does not have a formal relationship with the unit employees. As discussed previously, management is not permitted to allow it on the installation to solicit employees. The exception would be if the union can make an affirmative showing that it cannot effectively contact the employees off the installation (*see* Barksdale Air Force Base).

Once the Regional Director notifies the parties that a notice of petition will be posted, the union is elevated to a higher status. DOD and Education Association of Panama, 44 FLRA 419 (1992). Management should give it some limited access to the employees. If an exclusive representative already represents the petitioned for employees, it is deemed to be a party to the election automatically (as discussed previously). The incumbent must be afforded the same access rights as the petitioning union, plus it will have its negotiated rights to services and facilities. Clearly, the challenging union even if it has achieved equivalent status, is only entitled to "customary

and routine" facilities. Section 7116(a)(3). If the incumbent has successfully negotiated the use of a building on the installation, for example, management is not required to provide a similar facility to the challenger. U.S. Army Air Defense Center, Fort Bliss, Texas, 29 FLRA 362 (1987).

See Pierce, The Neutrality Doctrine in Federal Sector Labor Relations, The Army Lawyer, July 1983, at 18, for a detailed discussion of the neutrality doctrine.

c. Challenged Ballots (5 C.F.R. § 2422.24).

Either party may challenge ballots; i.e., the right of an employee to vote. For instance, it may be alleged that an employee is not in the bargaining unit or is a supervisor. The challenged ballots are set aside and if the result of the count is so close that the challenged ballots could affect the outcome of the election, the Regional Director will investigate. If there is no relevant question of fact, the Regional Director will issue a report and findings, which may be appealed to the Authority.

If a question of fact exists, a hearing will be ordered and a decision made by an administrative law judge. This decision will be sent to the Authority, who will provide the final decision.

If the Regional Director determines that a substantial question of interpretation or policy exists, the case will be transferred to the Authority for a decision.

2-10. Purposes of a Petitions [5 C.F.R. § 2422.1].

In March 1996, the FLRA amended its rules relating to Representation Proceedings. The new rules provide for one type of petition where the party describes the purpose for the petition. Under the new rules, a petition may be filed for the following purposes: elections or eligibility for dues allotments, clarification or amendment of elections, or consolidation of two or more bargaining units.

Petition forms may be obtained from the Regional Office. The completed form is sent, with the supporting documents, to the FLRA Regional Office. The purposes for petitions are discussed more fully below.

a. An election to determine if employees in a unit no longer wish to be represented by an exclusive representative [5 C.F.R. § 2422.1(a)(2). .

The petition is filed by one or more employees or by an individual filing on their behalf. 5 C.F.R.§ 2422.2(b). It requires an election to determine if an

incumbent union should lose its exclusive representative status because it no longer represents a majority of employees in an existing union.

A decertification election must ordinarily be in the same unit as was certified. The petition must be accompanied by a showing of interest of not less than thirty percent of the employees indicating that the employees no longer desire to be represented by the currently recognized labor organization (5 C.F.R. §2422.1(c). The petition is subject to the timeliness requirements of 5 C.F.R. § 2422.12, and can only result in an election when there is a 30% showing of interest. 5 C.F.R. §2422.3(c). The election bar rule applies in those cases in which a union has been decertified and a petition for an election has been filed within 12 months of the decertification election. *See* Sacramento Army Depot and Michael M. Burnett, 49 FLRA 1648 (1994)(the Authority refused to order an election because the showing of interest did not clearly indicate a desire to decertify the union) **(Note: Although this case was decided prior to the adoption to the new rules in 1996, it is still persuasive authority on this issue).**

b. To Clarify or Amend a Recognition or Certification Then in Effect or Any Other Matter Relating to Representation. [5 C.F.R. §2422.1(b)].

A petition to clarify a unit is filed when a change has occurred in the unit composition as the result of a reorganization or the addition of new functions to a previously recognized unit. Its purpose is to clarify what the bargaining unit is and what employees are in it. It may be filed by an agency or a labor organization. . Because of the statutory changes in definitions of supervisors and management officials and because of reorganizations and transfers of functions, this is one of the most common representation petitions filed under the statute. A common example of the use of this petition is to determine whether an employee is in one of the categories excluded by 5 U.S.C. § 7112(b), such as a supervisor or manager. If so, the employee is not in a bargaining unit. *See e.g.*, Department of Agriculture, Forest Service, Chattahoochee-Oconee National Forests, Oconee Ranger Station, 43 FLRA 911 (1991); Norfolk Naval Shipyard, Portsmouth Virginia, 47 FLRA 129 (1993).

A petition may be filed to conform the recognition to existing circumstances resulting from nominal or technical changes, such as a change in the name of the union or in the name or location of the agency or activity. This petition may be filed at any time because it does not raise a question concerning representation. The petitioner merely wants to update the identity of the parties to the exclusive relationship. For example, the Authority changed the existing recognition to reflect the fact that the Civil Service Commission had been superseded by the Office of Personnel Management. OPM, 5 FLRA 238 (1981). For other examples of the use of this type of petition *see* Department of the Army, Rock Island Arsenal, 46 FLRA 76 (1992); Department of Health and Human Services, Administration for Children and Families, 47 FLRA 247 (1993).

c. Petition for Consolidation 5 C.F.R. § 2422.1(c).

An agency or exclusive representative may file a consolidation petition to consolidate previously existing bargaining units. 5 C.F.R. § 2422.2(c). The Authority has held that the revised rules do not allow a non-incumbent labor organization to act on behalf of the incumbent. U.S. Army Reserve Command 88th Regional Support Command Fort Snelling Minnesota and American Federation of Government Employees Local 2q144, AFL-CIO, et. al, 53 FLRA 1174 (1998).

Although it is has not been explicitly stated by the Authority, consolidation procedures will likely be similar to the procedures under the old rules. Under the former rules, there was a presumption favoring consolidation. *See* VA, 2 FLRA 224 (1979).

Under the old rules, once a union was certified as the exclusive representative of a consolidated unit, a new bargaining obligation was created that supersedes bargaining obligations that existed prior to the consolidation. HHS, SSA, 6 FLRA 202 (1981).

Precedent under the old rules established criteria for determining whether the consolidated unit is appropriate: community of interest, and effective dealings and efficiency of agency operations. *Compare* Department of the Navy, U.S. Marine Corps, 8 FLRA 15 (1982)(ordering consolidation of 22 units within the Marine Corps) *with* U.S. Army Training and Doctrine Command, 11 FLRA 105 (1983)(finding consolidation of 11 units inappropriate).

Recognition for the purpose of negotiating a dues allotment agreement was one of two new forms of recognition created by the FSLMRS. 5 C.F.R. § 2422.(a)(1)(ii) provides for filing a petition for such recognition. The unit petitioned for must satisfy the same criteria of appropriateness as a unit for which a union seeks exclusive recognition. However, unlike the 30% showing of interest requirement attaching to representation petitions, the union filing this petition must show that 10% of the employees in the proposed unit are members of the petitioning union. 5 C.F.R. § 2422.3(d). There can be no dues allotment recognition for a unit for which a union holds exclusive recognition.

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CHAPTER 3

REPRESENTATIONAL RIGHTS

3-1. Introduction. This chapter will look at several rights available to the union and the employees based on the union's status as the exclusive representative.

3-2. Right of Exclusive Representatives to Attend Formal Meetings/ Investigatory Examinations Between Management and Employees.

a. Statutory Provision.

5 U.S.C. § 7114, establishes an exclusive representative's right to represent unit employees. This includes granting the exclusive representative the right to attend certain formal meetings and investigatory examinations between management and unit employees. Section 7114(a)(2) provides as follows:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at:
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representative concerning any grievance or any personnel policy or practices or other general condition of employment; or
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee and
>
> (ii) the employee requests representation.
>
> (3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

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b. Formal Discussions.

The above section specifically requires an agency to afford the exclusive representative an opportunity to be represented at any formal discussion[1] between

[1] Inspectors general ARE agency representatives when they conduct an employee examination covered by §7114(a). NASA v. FLRA, 119 S. Ct. 1979 (1999) (finding that while Congress intended that OIGs would enjoy a great deal of autonomy, the OIG investigative office still performs on behalf of the particular agency in which it is stationed and therefore acts as an agency representative when it conducts examinations covered by §7114(a)).

management and an employee concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. The intent is to provide the exclusive representative with the opportunity to safeguard the interests of unit employees at formal meetings held by management. It requires management to give the union reasonable advance notification of the time, place and general subject of the meeting and an opportunity to attend the meeting. If the union has been properly notified and does not appear at the meeting, it has waived the right to be represented and the meeting may be held without the union. "Represented" includes not only the right to be present at the meeting but the right to fully participate in the discussion. The mere inadvertent presence of union officials is insufficient to satisfy management's duty under the Statute. That is, management must actually notify the union of the time and place of the meeting so that it might choose its own representative. McClellan AFB, 29 FLRA 594 (1987).

There is no right of representation at nonformal meetings or interviews held by management; thus, the problem is one of defining "formal" and "nonformal." A "formal discussion" is determined by the composition of the persons in attendance and the content of the discussions.

Personnel policies or practices, or other general conditions of employment are those subjects which affect employees in the unit generally, as opposed to individually. Meetings discussing changes in personnel policies or practices or general working conditions clearly require that the union be given an opportunity to be represented. The union also has the right to be represented at meetings discussing existing personnel policies, practices and general working conditions.

"Grievance" is any matter in which an employee is seeking redress from management to include redress sought through third parties such as the Merit Systems Protection Board. VA Medical Center, Denver, Colorado v. FLRA, 44 FLRA 408 (1992). This is more than a gripe. The exclusive representative has a right to be present at any grievance discussion affecting unit employees. This right exists at all stages of the grievance procedure and includes the so-called "informal" stage in which an employee is initially discussing the grievance with the supervisor. (Note: a pre-disciplinary oral reply of an employee is not considered a formal discussion and the exclusive representative has no right to be present. DOJ v. AFGE, 29 FLRA 52 (1987)). It also includes a meeting with any management representative and any unit employee involving an adjustment of the grievance, or meetings to interview employee witnesses for third-party proceedings, such as MSPB hearings or EEOC hearings. NTEU v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985); McClellan AFB, supra. This right exists even if the employee does not want the union present because the union represents the interests of all bargaining unit employees, and any grievance could impact on other employees.

Several meetings between an employee and management representatives on individual employee matters have been found not to fall within the definition of this term. They include counseling sessions, SSA and AFGE, 14 FLRA 28 (1984); meetings at which an employee is disciplined, discussion of individual job performance and

meetings to deliver work instructions or to discuss work assignments. IRS Brookhaven and NTEU, 9 FLRA 930 (1982).

The FLRA will look at the totality of circumstances to determine if a meeting is formal. Some of the factors considered are: where the meeting was held, how long it lasted, who was present, the agenda, and whether notes were taken. The following case addresses factors determining the "formality" of a discussion:

SSA, SAN FRANCISCO
and
AFGE
10 FLRA 115 (1982)

(Summary)

According to the parties' stipulation of facts, the operations supervisor at one of the activity's branch offices, following the 60-day detail of a unit employee to another city, held individual discussions with unit employees in which she solicited comments and suggestions regarding the assignment and distribution of work. The union was given no notice of these discussions.

The General Counsel contended that the individual meetings constituted direct dealings with unit employees concerning conditions of employment and therefore constituted an unlawful bypass of the union. It was also contended that the meetings were formal discussions within the meaning of 5 U.S.C. 7114(a)(2)(A). The activity argued that there was no duty to notify the union because management had the right, under the negotiated agreement, to hold discussions on the day-to-day operations of the activity. It further argued that the meetings were permissible informal contacts for the purpose of obtaining input from the employees. Besides, a union representative was present at a staff meeting at which he did not express his views: hence the union constructively waived its right to "consult" on the matter.

The Authority dismissed both the "bypass" and "formal discussion" allegations because, based on the stipulated facts, the General Counsel did not meet his burden of proving that the individual meetings were either formal discussions or a bypass of the union. The bypass allegation was dismissed because there was no evidence in the record concerning the specific content of the communications. All it showed was that the supervisor initiated the conversations "solely to gather information to assist the Respondent in making a non-negotiable management determination concerning the assignment of work."

The central issue of the case, the Authority noted, was whether the discussions were formal or informal. However, it was unable to determine whether the meetings were formal because

> . . . the stipulated facts do not reveal (1) whether the individual who held the discussions is merely a first-level supervisor or is higher in the management hierarchy; (2) whether any other management representatives attended; (3) where the individual meetings took place (i.e., in the supervisor's office, at each employee's desk, or elsewhere); (4) how long the meetings lasted; (5) how the meetings were called (i.e., with formal advance written notice or more spontaneously and informally); (6) whether a formal agenda was established for the meetings; (7) whether each employee's attendance was mandatory; or (8) the manner in which the meetings were conducted (i.e., whether the employee's identity and comments were noted or transcribed).

Let's consider each of the factors mentioned by the Authority. It is not clear why it would want to know whether the individual holding the discussion is "merely a first-level supervisor or is higher in the management hierarchy," for certainly a first-level supervisor can conduct a formal discussion. Our guess is that the Authority recognizes that discussions held by first-level supervisors are often informal, involving shoptalk and counseling sessions about an individual's conduct. (*See* 124 Cong. Rec. H 9650, daily ed., Sept. 13, 1978, where Congressman Ford said the following: "The compromise inserts the word 'formal' before discussions merely in order to make clear that this subsection does not require that an exclusive representative be present during highly personal, informal meetings between a first-line supervisor and an employee.") These meetings are apt to be routine, held at the desks or workstations of the employees, and of brief duration. In short, a large proportion of the discussions between a first-line supervisor and employees under his supervision are going to be "informal." In making the distinction between discussions held by "merely a first-line supervisor" and officials higher in the management hierarchy, the Authority is perhaps sending a signal to the agents of the General Counsel to take an especially critical look at alleged formal discussions held solely by first-line supervisors.

The second factor, whether more than one management representative attended, seems an obvious test of formality. (*See*, in this connection, the <u>IRS, Fresno Service Center</u> case, 7 FLRA 371, where an EEO precomplaint meeting called and chaired by a supervisor and attended by an EEO Officer and an EEO Counselor was found to be a

formal discussion.) FLRA also may have mentioned this factor because section 7114(a)(2)(A) itself defines a formal discussion, in part, in terms of "one or more representatives of the agency."

The third factor, involving the location of the discussion, is somewhat elaborated on by the Authority in its parenthetical remarks. The implication seems to be that discussions held away from the employee's desk or work station are more likely to be formal than discussions held at the employee's desk. (*See* SSA, San Francisco, 9 FLRA 48 (1982), where FLRA held that unscheduled and brief meetings held by the branch manager at the desks of individual employees were not formal discussions. Contrast this case with IRS, Fresno, where the precomplaint meeting was held in an office away from the employee's normal work station.)

The duration factor is also captured in the SSA, San Francisco case mentioned above. The briefness of the conversations held by the branch manager in the case is one of the factors cited in supporting the conclusion that the meetings were not formal discussions.

The fifth factor, how the meetings were called, also is elaborated on by the Authority in its parenthetical comments. Presumably, written notice of a meeting tends to indicate "formality." (In EPA, 8 FLRA 471 (1982), the ALJ found that a discussion that was not prearranged but based on a spur-of-the-moment request by the branch chief that her secretary enter her office to sign a written assurance concerning the employee's acceptance of a permanent job at another agency was not a formal discussion.)

The "agenda" factor is illustrated by the Authority's decision in the HEW, Atlanta case, 5 FLRA 458, where it held that new employee orientation sessions were formal discussions because, among other things, an agenda had been established by management to discuss a number of matters involving general conditions of employment.

The HEW, Atlanta case also illustrates the "mandatory attendance" factor--the seventh listed by the Authority. That case should be contrasted with the IRS, Brookhaven Service Center case, 9 FLRA 930 (1982), where the Authority held that noncoercive interviews of unit employees in preparation for third-party proceedings do not constitute formal discussions provided that certain precautions, such as obtaining the employee's participation on a voluntary basis, are taken. In subsequent cases, the Authority recognized that an interview of a bargaining unit employee concerning a grievance could also be a formal discussion, triggering the union's right to notice and opportunity to attend. Warren Air Force Base and AFGE, 31 FLRA 541 (1988).

The eighth and final factor, whether a record or notes of the meeting were kept, is a rather obvious indicator of formality. But there are exceptions. For example, the management representative conducting a Brookhaven pre-hearing interview almost certainly will take notes. However, the note-taking indicator of formality is nullified by, among other things, the fact that employee participation is voluntary--an indicator, as suggested above, that a meeting is not a formal discussion.

Although the Authority's checklist of factors to consider should be of some help in determining whether a meeting is "formal," it is hardly a formula. There is no suggestion that a certain number of the criteria must be satisfied before a meeting can be regarded as "formal" Nor is there any indication as to the relative importance of each criterion.

Note: For a good discussion on formal discussion and Brookhaven Warnings, *see* Marine Corps Logistic Base and AFGE, 45 FLRA 1332 (1992); and GSA and NFFE, 50 FLRA 401 (1995). Additionally, Brookhaven Warnings are discussed in detail at the end of this chapter.

The following case provides a good summary of the law in this area.

The DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER,
LONG BEACH, CALIFORNIA,
Petitioner,
v.
FEDERAL LABOR RELATIONS AUTHORITY, Respondent;
American Federation of Government Employees Council 33, AFL-CIO
Local 1061,
Respondent-Intervenor.
FEDERAL LABOR RELATIONS AUTHORITY, Petitioner,
v.
The DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER,
LONG BEACH, CALIFORNIA,
Respondent.

16 F.3d 1526

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted April 8, 1993.
Decided Feb. 25, 1994.

Appeal for the Federal Labor Relations Authority.

Before FARRIS, NORRIS and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

A Department of Veterans Affairs medical center challenges two determinations by the Federal Labor Relations Authority ("FLRA") that it committed unfair labor practices. We uphold both determinations.

In preparation for the Merit Systems Protection Board ("Board") hearing of a member of Local 1061 of the American Federation of Government Employees ("the Union"), an attorney representing the Department of Veterans Affairs Medical Center of Long Beach, California ("the Hospital") interviewed, by telephone, several Union members who were potential witnesses at the Board hearing. Although the Union was representing the employee whose case the Board was to consider, the Hospital did not give the Union any notice of the interviews. One of the bargaining unit employees interviewed told her supervisor that she did not wish to be questioned, and was told that she had no choice. She was not told that she could refuse to answer the Hospital attorney's questions without penalty of reprisal.

In a decision and order dated August 27, 1991, (41 FLRA 1370) the FLRA concluded that the Hospital committed an unfair labor practice under 5 U.S.C. § 7114(a)(2)(A) when it failed to give the Union notice of the interviews, and committed a second unfair labor practice under 5 U.S.C. § 7116(a)(1) when it failed to advise the reluctant employee that she could refuse to be questioned. We hold that the FLRA did not act arbitrarily or capriciously with respect to either conclusion, deny the Hospital's petition to review its order, and grant the Union's and the FLRA's cross-application to enforce the FLRA's order.

I.

In January, 1988, the Hospital fired Gary Dekoekkoek, a Union member, for failing to keep his medical supplies cart clean and for being late to work. He appealed his termination to the Board. The Union represented him throughout the discharge proceedings. The Hospital was represented by staff attorney Patricia Geffner.

Geffner prepared for the Board hearing by conducting telephonic interviews with several Union employees concerning the events that led to Dekoekkoek's termination. She spoke in all to seven employees, some for up to an hour. The conversations concerned Dekoekkoek, his immediate supervisor, and the incident that led to his termination. Two employees spoke to her from the office of their supervisors. The record does not reveal the circumstances in which the other employees were asked to speak to Geffner. No Union representative was notified or invited to be present at any interview.

One of the employees Geffner spoke to was Stella Smith, who worked in the same department as Dekoekkoek. Smith was called to the office of her second-level supervisor, who asked her whether she wanted to be questioned about Dekoekkoek. She told the supervisor that she did not want to become involved, and was excused. Later that day, however, the supervisor called her in again and told her that she was required to answer Geffner's questions. The supervisor telephoned Geffner from his office, handed the receiver to Smith, and left the room. Geffner spoke with Smith about Dekoekkoek for approximately five minutes.

Before the Board hearing, Geffner called Dekoekkoek's Union representative, told him of her interviews, and furnished him with the names of the employees with whom she had spoken. The Union filed charges with the FLRA, which issued a complaint alleging that: 1) the failure to give the Union representative the opportunity to be present at the interviews violated 5 U.S.C. § 7114(a)(2)(A), which expressly calls for such representation during formal discussions concerning a grievance; and 2) the Hospital's failure to assure Smith that she would not be subject to reprisal if she refused to participate in the interviews violated 5 U.S.C. § 7116(a)(1), which declares an unfair labor practice an agency's actions in coercing an employee in the exercise of his or her rights under the Federal Service Labor-Management Relations Statute ("the Statute").

A hearing was held on the charges before an Administrative Law Judge ("ALJ"). The ALJ decided in favor of the Union on the first issue and in favor of the Hospital on the second. Both parties appealed the ALJ's decision. On appeal, the FLRA ruled in favor of the Union on both issues. The Hospital now petitions for review of the judgment, and the FLRA and the Union cross-apply for enforcement of the order.

II.

Congress enacted the Statute, 5 U.S.C. § 7101 et seq., to grant public employees the right to "organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them." 5 U.S.C. § 7101(a)(1). It created the FLRA to administer the Statute. *See* 5 U.S.C. § 7105. We have jurisdiction to review the FLRA's decisions under 5 U.S.C. § 7123. That provision directs us to conduct our review in accordance with 5 U.S.C. § 706, which in turn permits us to set aside the agency's action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Bureau of Land Management v. FLRA, 864 F.2d 89 (9th Cir.1988) (*citing* American Fed'n of Gov't Employees v. FLRA, 802 F.2d 1159, 1161 (9th Cir.1986)). If the agency's action is " 'none of the above,' " we must affirm the FLRA's decision and order. Department of Veteran's Affairs Medical Center, Denver, Colorado v. FLRA & Am. Federation of Gov't

Employees, Local 2241, 3 F.3d 1386, 1389 (10th Cir.1993) ("Local 2241 ") (*citing* United States Dep't of Energy v. FLRA, 880 F.2d 1163, 1165 (10th Cir.1989)).

III.

We begin our analysis by considering the statutory framework in which this case arose. The Statute seeks to balance the interests of management against those of labor. It gives the edge to management during investigations of alleged misconduct on the part of bargaining unit employees. During that time, employees have a duty to account for their performance and conduct, Portsmouth Fed. Employees Metal Trades Council and Portsmouth Naval Shipyard, 34 FLRA 1150, 1990 WL 123977 (FLRA) (1990), and management need not notify the union of the interviews it conducts with union members and offer its representative an opportunity to be present. Cf. 5 U.S.C. § 7114(a)(2)(A) (giving the union the right to be present at formal discussions concerning a grievance).

When management decides that it knows all the necessary facts, however, it ends its investigation. It may then decide to discipline the union member whom it investigated. If, after the employee is notified that he is being disciplined, he files a grievance, the balance of interests shifts. At that point, the Statute gives the union the right to be present at all formal discussions concerning the grievance. Id.

Sound policies support shifting the balance at that point. Before disciplinary action is taken, the employer must be given an opportunity to uncover the facts. Only after a thorough investigation can the employer know whether disciplinary action is warranted. For that reason, the Statute gives the employer the advantage at the investigatory stage--although even at that stage the employee under investigation may have a union representative present if he so wishes. In any event, it is assumed under the statute that the employer will complete the investigation before deciding to discipline an employee, and that when it does so it will have determined the relevant facts. Such an assumption is reasonable. If the employer has not determined the facts, disciplinary action is certainly unjustified. This is true with respect even to minor disciplinary matters, but it is particularly true with respect to termination, the disciplinary action at issue in this case. An employee who is fired from his or her job is subjected to economic capital punishment. The discharged employee may have to explain to a second employer that a first employer found him undesirable. His chances of finding work again are problematic, especially where, as here, he performs unskilled or semi-skilled labor. After the employer's investigation is complete, therefore, and the decision to discipline the employee has been made, the reason for affording the employer a procedural advantage disappears. For that reason, once the employee has filed a grievance, the Statute affords the union the right to

be present at all formal discussions regarding the grievance. This requirement allows the union to protect its members against intimidation and coercion, and allows it to participate fully in a proceeding that may affect all bargaining unit employees, not just the one being disciplined. *See* Nat'l Treasury Employees Union v. Fed. Labor Relations Authority, 774 F.2d 1181, 1188 (D.C.Cir.1985) ("NTEU I ").

Some may argue that Congress did not choose the best point at which to shift the balance between the interests of management and those of labor. That argument is irrelevant here. Our task is not to rewrite the Statute, but rather to determine whether the FLRA interpreted it in an arbitrary and capricious manner.

IV.

We now consider whether the FLRA acted arbitrarily and capriciously in determining that the Union had the right under § 7114(a)(2)(A) of the Statute to be present during Geffner's telephonic interviews of Union employees.[2]

Section 7114(a)(2)(A) grants a union the right to be represented "at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment." 5 U.S.C. § 7114(a)(2)(A). The Hospital contends that the interviews in this case were not "formal discussions" and did not concern a "grievance" within the meaning of the statute.

A. Formal Discussion

[2] The Hospital contends that our review should be de novo, because the FLRA's current interpretation of 5 U.S.C. § 7114(a)(2) is based on an out-of-circuit case, NTEU I, and because, before NTEU I was decided, the FLRA interpreted the statute differently. Compare Internal Revenue Svc. and Brookhaven Svc. Center, 9 FLRA 930 (1982) ("Brookhaven"), with Dep't of Air Force, McClellan Air Force Base v. Am. Federation of Gov't Employees, Local 1857, 35 FLRA 594 (1990) ("McClellan"). We find this argument unpersuasive. The FLRA is free to change its interpretation of the Statute after reweighing competing statutory policies. *See* New York Council, Ass'n of Civilian Technicians v. FLRA, 757 F.2d 502, 508 (2d Cir.1985), *cert. denied*, 474 U.S. 846, 106 S.Ct. 137, 88 L.Ed.2d 113 (1985). The FLRA's current position is both carefully-reasoned and well-established. See, e.g., McClellan, at *8-9 (explaining the FLRA's current interpretation of 5 U.S.C. § 7114(a)(2)). Furthermore, to review de novo any changed agency position is, in effect, to force an agency to adhere to what may be an erroneous view simply to protect the deference it should be accorded in any case. Finally, under NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 124 n. 20, 108 S.Ct. 413, 421 n. 20, 98 L.Ed.2d 429 (1987), the consistency of an agency's interpretation is only one factor to be considered in deciding upon the degree of deference of appellate review. Even if we were to agree that the FLRA's changed interpretation should change the scrutiny with which we review its actions, we would not necessarily agree that we owe no deference at all to the agency's decision. In any event, because NTEU I is well-reasoned and because the FLRA's adoption of it is persuasive, we attach no significance to the FLRA's earlier lack of consistency in interpreting this provision of the Statute.

Generally speaking, the scope of formality within the meaning of the Statute is extremely broad. A meeting is formal unless it is a "casual conversation or a conversation that followed from an impromptu meeting." McClellan at * 9. See also Local 2241, 3 F.3d at 1389 (a meeting is formal unless it is a "spontaneous or chance meeting [ ] in the workplace"); NTEU I, 774 F.2d at 1190 (to escape formality, a meeting must be an "impromptu gathering"). Within that broad compass, whether a discussion is "formal" depends on the totality of the circumstances. The FLRA has commonly looked to a number of specific factors to determine formality, such as the level in the management hierarchy of the person who called the discussion; whether other management representatives attended the discussion; where the discussion took place; how long it lasted; how the employee was summoned to it; whether there was a formal agenda; whether the employee was required to attend; and whether the employee's name and comments were transcribed. United States Dep't of Labor, Chicago, Ill. v. Am. Federation of Gov't Employees, Local 648, 32 FLRA 69, 1988 WL 212939 (FLRA) at * 4-5 (1988) ("Chicago ").[3]

The Hospital contends that the interviews at issue here were not formal because they were conducted by telephone, because there was no advance announcement or scheduling, and because the employees were left alone in their supervisors' offices while they talked to the Hospital's counsel. The FLRA disagreed, and we affirm.

We note at the outset that these interviews were not impromptu or spontaneous gatherings. Rather, they were planned question-and-answer sessions that the employees were required to attend. Therefore, they fall within the broad meaning of "formality" for the purpose of the Statute. Our inquiry into their formality could end here. However, because the FLRA considers formality under a totality test, we will review the importance of the factors on which the Hospital relies.

The FLRA considered in McClellan whether the fact that an interview is conducted over the telephone removes it from the scope of the Statute. It concluded that it does not. McClellan at * 9. To construe the Statute to exclude telephonic questioning, no matter what other indicia of formality the discussion may have, would be to give the Statute a reading at odds with its plain language, the FLRA's decisions, and our obligation to affirm those decisions unless they are arbitrary and capricious. An interview "involves questioning to secure information; obviously, it can be done in an number of different ways by a variety of different people." Nat'l Treasury Employees Union v. Fed. Labor Relations Authority, 835 F.2d 1446, 1450 (D.C.Cir.1987) ("NTEU II ") (discussing the term "examination"). Indeed, the fact that an interview is conducted over the telephone may even increase its formal nature. An interviewer's facial

[3] The agency has emphasized that its list is not exhaustive and that other factors may be applied if they are appropriate to a particular case. Id.

expressions are not visible over telephone, and any silences during questioning are more obvious during a telephonic interview, where the entire focus is on sound, than they might be face-to-face.

The indicia of formality in this case were strong. The interviews were conducted in a supervisor's or second-level supervisor's office, an area removed from the employee's normal work environment. The staff attorney represented a high level of management. The interviews lasted between five minutes and more than an hour. They were planned in advance and concerned only one topic, Dekoekkoek's upcoming Board hearing. Under these circumstances, we do not find arbitrary and capricious the FLRA's determination that the interviews were formal. The lack of advance notice to the employees, and the fact that the employees were left alone in their supervisors' offices while they were interviewed, in no way serve to overcome either the deference we owe to the FLRA's determination on this point, or the indicia of formality present in this case. Those indicia strongly rebut any inference of spontaneity that might be raised by the lack of notice and the absence of the supervisors. *See* NTEU I, 774 F.2d at 1190.

In the alternative, the Hospital, relying on IRS, Fresno Svc. Ctr. v. FLRA, 706 F.2d 1019 (9th Cir.1983), argues that we should ignore the FLRA's indicia of formality and look instead to what it calls the "informal purpose" of the interviews. [Blue Brief at 13-14 & n. 7]. We decline this invitation for three reasons. First, the FLRA's indicia of formality provide a method to assess a meeting's formal or informal purpose. Therefore, our discussion above has already carried out the Hospital's request. Second, we are unable to look to the "informal purpose" of the interviews, because their purpose was not informal. Even according to the Hospital's account, the staff attorney "was attempting to gather information as to what potential non-party fact witnesses would say at a [Board] hearing." [Blue Brief at 14]. Preparation for a Board hearing is not an informal goal, and assessing the testimony of potentially adverse witnesses is not an informal undertaking. Finally, the Hospital's reliance on IRS, Fresno is misplaced. In that case, we found the meetings informal only because the EEOC regulatory framework that governed the case explicitly characterized them in that way. Under that framework, the employee was required to try to resolve a complaint on an informal basis before filing a formal complaint. IRS, Fresno at 1023-24. Here, however, no comparable regulatory scheme exists. The record reflects no statutory or regulatory framework that either encourages or requires an employee to attempt to resolve complaints informally. Certainly, here, no Board regulation explicitly or implicitly defines the interviews as informal rather than as formal discussions. To the contrary, the interviews were part of the formal grievance procedure. They were not an effort to preempt the formal process, but a step towards, and a part of, the culmination of that process.

For these reasons, we find that the FLRA acted within its authority in ruling that the interviews were formal within the meaning of the Statute.

In addition, the Hospital contends that no "discussions" took place. It argues that, under the Statute, "discussion" must be "reasonably understood [to mean] . . . negotiation, 'give-and-take,' . . . [an] attempt to reconcile a complaint or to otherwise change the status quo." [Blue Brief at 14]. It contends that, because the interviews here were intended merely to gather facts, they were not discussions.[4]

Under the Statute, however, "meeting" and "discussion" are synonymous. Dept. of Air Force Warren Air Force Base, Cheyenne, Wyoming & Am. Federation of Gov't Employees, Local 2354, 1988 WL 212811 at * 7 (1990) *citing* Dep't of Defense, Nat'l Guard Bur., Tex. Adjutant Gen.'s Dep't, 149th TAC Fighter Group, Kelly Air Force Base, 15 FLRA 529, 1984 WL 35145 (FLRA) (1984) ("Kelly Air Force Base ") at *3. Accord, Local 2241, 3 F.3d at 1389 (citing Kelly Air Force Base, *supra*). Indeed, the FLRA has ruled that even announcements presented by management at gatherings at which union members are not invited to speak are "discussions" within the meaning of the Statute. Kelly Air Force Base, 1984 WL 35145 at * 3. Such an interpretation comports with the statutory goal of vindicating a union's independent right to be present so that it may safeguard the interests of all union employees. *Id*.

Under the Hospital's definition, the Statute would not include an interview of any type--whether of a witness or a principal. Management could exclude union representatives merely by structuring its meetings in a question-and-answer format. We reject the Hospital's attempt to limit the rights of labor under the Statute. The FLRA's implicit finding that the interviews in this case were "discussions" within the meaning of the Statute was neither arbitrary nor capricious.

B. Grievance

The Statute defines "grievance" extremely broadly. It provides that a grievance is "any complaint--

> (A) by any employee concerning any matter relating to the employment of the employee;
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
> (C) by any employee, labor organization, or agency concerning

[4] The Hospital did not raise this argument before the ALJ or the FLRA. It is therefore precluded from raising the issue on appeal unless its "failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c). The Hospital calls no such circumstances to our attention. Even had the Hospital preserved this issue for appeal, however, we would have rejected its cramped construction.

> (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. § 7103(a)(9). In conformance with the language of the Statute, the FLRA reads "grievance" broadly, as encompassing statutory appeals, including appeals to the Board. Chicago, 1988 WL 212939 at * 5. *See also* NTEU I, 774 F.2d at 1188 (referring to "the 'all-inclusive' definition of 'grievance' in § 7103(a)(9) and § 7114(a)(2)(A)") (*quoting* H.R.Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978)).

The Hospital contends that the interviews at issue here did not concern a "grievance" because they pertained to a Board hearing rather than to a procedure within the contractual grievance process. Relying on IRS Fresno, it argues that, like the EEOC procedure at issue in that case, the Board hearing here "did not involve any aspect of the collective bargaining agreement." IRS Fresno, 706 F.2d at 1025. [Blue Brief at 15].

IRS Fresno, however, concerned a charge filed under Title VII, a Congressional enactment unconnected to the Statute. The EEOC regulation in IRS Fresno established a procedure for handling such charges unconnected to those established by the Statute. In fact, the collective bargaining agreement in IRS Fresno explicitly excluded from the grievance procedure claims covered by the EEOC. *Id*. at 1024-25. Here, by contrast, we consider a statute that Congress enacted to implement its finding that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. § 7101(a). Here, there is no suggestion that the Union's collective bargaining agreement excludes grievances of the type filed by Dekoekkoek, or proceedings such as those established by the Board.

Moreover, the Board hearing in this case did "involve [an] aspect of the collective bargaining agreement." Dekoekkoek initially brought his grievance pursuant to the procedures established in the collective bargaining agreement. [Tr. at 49-50]. Under the Statute, he was permitted to appeal his removal either under that agreement or to the Board. 5 U.S.C. § 7121(e)(1). He chose to appeal to the Board. Thus, unlike IRS Fresno, this case concerns a dispute intimately connected with the Union's collective bargaining agreement.

The language of the Statute is plain: a grievance is "any complaint by any employee concerning any matter relating to the employment of the employee." 5 U.S.C. § 7103(a)(9)(A) (emphasis added). Certainly that applies to any matter arising under the Statute. In IRS Fresno, the question was whether the protections of the Statute apply to proceedings conducted by the EEOC. We concluded that they do not, finding that an

employee's rights as to EEOC proceedings are established by the EEO statute and accompanying regulations. The question here--whether the protections of the Statute apply to proceedings before the Board--is entirely different. It has been answered in the affirmative by the Tenth and District of Columbia circuits.[5] Local 2241, 3 F.3d at 1390-91; NTEU I, 774 F.2d at 1184-89. We now join them.[6]

V.

We turn now to the issue whether the FLRA acted arbitrarily and capriciously in concluding that the Hospital committed an unfair labor practice under § 7116(a)(1) of the Statute when it failed to advise Stella Smith, the employee who did not wish to be questioned, that she could refuse to be interviewed without penalty of reprisal.

When management interviews employees "to ascertain necessary facts" in preparation for third-party proceedings, it must provide certain safeguards to protect the employees' rights under § 7102 of the Statute.[7] Brookhaven, 1982 WL 23283 at. These safeguards are as follows:

> (1) management must inform the employee who is to be questioned of the purpose of the questioning, assure the employee that no reprisal will take place if he or she refuses, and obtain the employee's participation on a voluntary basis; (2) the questioning must occur in a context which is not coercive in nature; and (3) the questions must not exceed the scope of the legitimate purpose of the inquiry or otherwise interfere with the employee's statutory rights.

Id. The FLRA does not require an employer to give the Brookhaven assurances in every case. Instead, it looks to the circumstances of each case to determine whether the employee submitted to questioning voluntarily. Warren, 1988 WL 212811. In this way, it can better determine

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[5] While IRS Fresno is not applicable here, we note that the reasoning of the District of Columbia circuit in NTEU I, rejecting the IRS Fresno analysis, is more persuasive.

[6] The Hospital additionally argues that a union has no right to be present while management discusses an upcoming Board hearing with an employee because it has no obligation to represent the employee before the Board. We reject this argument. The right of the union is independent of that of the employee, whether or not the employee is represented by the union. As long as no conflict exists between the union's right and that of the employee, the union may not be barred.

[7] Section 7102 provides, in part:
Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty of reprisal, and each employee shall be protected in the exercise of such right.

whether the circumstances in which formal discussions occur are coercive. Id.

Here, the FLRA examined all of the circumstances and found that the reluctant employee, Stella Smith, did not submit voluntarily to Geffner's questioning. It found that Smith initially refused to be questioned, consenting to be interviewed only after her supervisor told her that she "had no choice, that [she] had to be [questioned]." [Tr. 63]. It found that other surrounding circumstances added to the coercive nature of the interview. Smith was not interviewed by her own supervisor, but by Geffner, an attorney who worked at a high level of management and who was based in the Hospital's district office.[8] Although Smith's supervisor was not present during the interview, the FLRA ruled that this did no more than "temper [ ] . . . the coerciveness inherent in the unfamiliar surroundings." [FLRA Decision at 14]. The FLRA concluded that, under these circumstances, the Brookhaven safeguards were not met and that the Hospital therefore violated § 7116(a) of the Statute. The FLRA's finding is supported by the record. It is therefore neither arbitrary nor capricious, and we accordingly affirm it.

The Hospital contends that, Brookhaven safeguards notwithstanding, 38 C.F.R. § 0.735-21(f), a Veterans Administration regulation, required Smith to submit to questioning. That regulation requires employees to

> furnish information and testify freely and honestly in cases respecting employment and disciplinary matters. Refusal to testify, concealment of material facts, or willfully inaccurate testimony in connection with an investigation or hearing may be grounds for disciplinary action.[9]

38 C.F.R. § 0.735-21(f). The FLRA determined that the regulation is not applicable here. As it pointed out, the Hospital's regulation subjects an employee to discipline for a refusal to provide information in two circumstances: in connection with an investigation, and in connection with a hearing. Discipline may be imposed if an employee refuses to testify, testifies inaccurately, or conceals material facts. We will examine the two aspects of the regulation in turn.

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[8] In addition, Smith was asked to speak to Geffner not by her own supervisor, but by a higher-level supervisor. This can only have added to the coerciveness of the surrounding circumstances.

[9] "An employee, however, will not be required to give testimony against himself or herself in any matter in which there is indication that he or she may be involved in a violation of law wherein there is a possibility of self-incrimination." 38 C.F.R. § 0.735-21(f).

The first aspect proscribes certain conduct in connection with disciplinary investigations. The Hospital suggests that because employees are required to "testify" they must provide answers to questions asked by investigators at any time during the course of an investigation. We need not consider whether that argument is correct because, as the FLRA noted, by the time Geffner asked to interview Smith the Hospital's investigation was complete. In seeking to question Smith, the Hospital was not conducting an investigation but preparing for a third-party hearing. As we explained above, we must presume that an employer investigates an employee's alleged disciplinary infractions before it fires the employee, not afterwards. *See supra* Part III. Thus, we agree with the FLRA's conclusion that the investigative aspect of the regulation is inapplicable.

The FLRA also ruled that the part of the Hospital's regulation governing employees' responsibilities with respect to hearings does not apply. Again, we agree. The effort to interview Smith did not involve an attempt to obtain her "testimony." Smith did not refuse to testify, either by way of deposition or as an actual witness; she did not testify falsely; nor did she "conceal" material facts. She merely declined to assist a lawyer in the preparation of a case. Smith was not requested to perform any act at, or as a part of, a "hearing." The employees who were questioned by Geffner were not placed under oath, cross-examined, or made subject to penalty of perjury. They were simply asked to provide information to Geffner which might assist her when she presented the hospital's case at a subsequent proceeding. Smith declined to do so. Such a refusal, as the FLRA pointed out, does not subject an employee to discipline under the regulation.

The FLRA's determination is not arbitrary or capricious. Moreover, it avoids a conflict between the Hospital's regulation and the agency's Brookhaven safeguards. Indeed, Brookhaven itself arose in precisely the circumstances of the case before us. There, as here, the employer sought to interview witnesses between the conclusion of its investigation and the commencement of a hearing. Brookhaven, 1982 WL 23283 at *1-2.[10] Brookhaven held that such a pre-hearing interview may not be achieved through coercion.[11]

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[10] Because the Hospital's regulation is not incompatible with Brookhaven in this case, we need not decide which would override the other if they conflicted--for example, if the FLRA asserted that Brookhaven applied during the investigative stage or in connection with the taking of discovery depositions in preparation for a hearing.

[11] The FLRA has also held, under Brookhaven, that an employer may not coerce union members into discussing upcoming third-party hearings that involve complaints of unfair labor practices brought by the union against the employer. *See, e.g.,* United States Dep't of the Air Force, Griffiss Air Force Base, Rome, New York, and Am. Fed'n of Gov't Employees, Local 2612, AFL-CIO, 38 FLRA 1552, 1991 WL 8399 FLRA (1991) (interview of chief steward in connection with hearing on unfair labor practice involving

Accordingly, notwithstanding the Hospital's regulation, we affirm the FLRA.

The Hospital's final contention is that the FLRA's interpretation of the regulation is incompatible with Navy Public Works Center, Pearl Harbor v. FLRA, 678 F.2d 97, 101 (9th Cir.1982) ("Pearl Harbor"). Under Pearl Harbor, it argues, an employer has a nonnegotiable right to enforce an employee's duty to account to supervisors for his or her performance.

We note, first, that, in Pearl Harbor, "the issue before us [was] whether the FLRA's holding that a proposal . . . is procedural under [5 U.S.C. § 7106] (b)(2) is 'reasoned and supportable.' " *Id*. at 100 (footnote omitted). That question, and therefore, Pearl Harbor's holding, bears no relation to the issue here.

Moreover, Pearl Harbor involved the question whether an employee suspected of misconduct could be compelled to cooperate in an investigation of that misconduct. 678 F.2d at 99 n. 2. *See also Id*. at 101 (stating that the case concerns a targeted employee's "duty to account, whether generally or in disciplinary investigations") (emphasis added). Here, however, the issue is whether a witness can be compelled to provide information at the post- investigatory third-party stage, in order to help the employer prepare for a third-party hearing. Pearl Harbor 's discussion regarding the duties of an employee to cooperate when suspected of an improper act tells us little about the obligations of a prospective witness to cooperate, and certainly nothing about a witness's obligations after the investigation into the improper act has been completed and the government has already taken the disciplinary action it deems appropriate. Whatever the merits of Pearl Harbor, therefore, it is of little assistance to us here.

Conclusion

For the above reasons, we uphold the determinations of the FLRA. As to the first issue, we find that the record fully supports the FLRA's findings that the interviews at issue here were formal discussions that concerned a grievance within the meaning of § 7114(a)(2)(A) of the Statute. Furthermore, the record supports the FLRA's finding that one employee, Stella Smith, did not submit voluntarily to questioning. The cases and regulations on which the Hospital relies pertain to circumstances different than those found here. We accordingly deny the Hospital's petition for review, and grant the cross- applications of the Union and the FLRA for enforcement of the FLRA's order.

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relocation of union office); Warren, 1988 WL 212811 (FLRA) (interview of bargaining unit employee in connection with hearing on union complaint that management interfered with its right to picket).

PETITION DENIED; CROSS-APPLICATION GRANTED.

c. Investigatory Examinations.

Section 7114(a)(2)(B) gives the exclusive representative a right to be present at "any examination of an employee in the unit by a representative of the agency in connection with an investigation if:

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

This right is generally called the "Weingarten Right," that being the case which gave the right to employees in the private sector. *See* NLRB v. Weingarten, 420 U.S. 251 (1975).

Understanding key terms is important. To qualify as an investigatory examination, the meeting must involve questioning of an employee as part of a searching inquiry to ascertain facts. "Agency representative" includes supervisors, management officials, personnel specialists, internal agency auditors, and inspectors general.[12] The term is broadly defined and applied. Defense Logistics Agency, 28 FLRA 1145 (1987). The term "examination" is also broadly construed. It need not be confrontational. A request to provide a written statement regarding an incident has been found to be an examination. INS, Del Rio, Texas and NAGE Local 2366, 46 FLRA 363 (1992).

The right of the union to be present is triggered only by the employee's request. If the employee does not request representation, management may hold the meeting without union notification. Management is not required to notify the employee of this right at the meeting. Management's obligation to notify the employee consists of an annual notification to all employees. § 7114(a)(3). If union representation is requested, management has three alternatives: allow a representative to attend; end the interview; or give the employee the option (in a non-threatening manner) of either answering the questions without the representative or having no interview. Bureau of Prisons, Leavenworth, 46 FLRA 820 (1992).

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[12] An inspector general is a “representative” of an agency when he conducts an employee examination covered by § 7114(a). NASA v. FLRA, 119 S. Ct. 1979 (1999) (finding that while Congress intended that OIGs would enjoy a great deal of autonomy, the OIG investigative office still performs on behalf of the particular agency in which it is stationed and therefore acts as an agency representative when it conducts examinations covered by § 7114(a).)

In Navy Public Works Center, 4 FLRA 217 (1980), the Authority held that a union proposal giving employees the right to remain silent during discussions with supervisors which might lead to disciplinary action, was bargainable. The Ninth Circuit Court of Appeals refused to enforce this ruling. While recognizing the requirement for impact bargaining, the court believed this union proposal would severely erode, if not destroy, management's nonnegotiable authority to discipline under the statute. IBEW, Local 1186 v. Navy Public Works Center, Pearl Harbor, 678 F.2d 97 (9th Cir. 1982).

Agency negotiators should generally avoid giving greater rights in the form of warnings prior to interviews than those required by the CSRA. Miguel v. Department of the Army, 727 F.2d 1081 (Fed. Cir. 1984), involved the appeal of an MSPB decision that upheld the discharge of an employee for theft. One of three bases cited by the court for overturning the discharge, was the agency's failure to provide the employee with all the warnings required by the collective bargaining agreement.

The remedy for violation of the Weingarten rights is the revocation of any disciplinary actions that flow from the examination. In Dept of Navy v. FEMTC, 32 FLRA 222 (1988), the Authority ruled that if disciplinary action is taken against an employee for engaging in protected activity a make whole remedy is appropriate. However, a make whole remedy will not be ordered where the disciplinary action taken relates solely to an employee's misconduct independent of the examination itself. *See also* DOJ, Bureau of Prisons, 35 FLRA 431 (1990), *rev'd on other grounds*, DOJ v. FLRA, 939 F.2d 1170 (5th Cir. 1991).

d. Fact-Gathering Sessions.

A “fact-gathering” session is an interview between an agency representative and a bargaining unit employee to ascertain facts in preparation for third party proceedings. Sacramento Air Logistics Base and AFGE, 29 FLRA 594 (1987). Whenever such a meeting takes place, management must inform the employee who is to be questioned of the purpose of the questioning. Additionally, the management representative must obtain the employee’s participation in the interview on a voluntary basis, and assure the employee that no reprisal will take place if he or she refuses to participate in the questioning. These are called Brookhaven warnings after the case from which they were taken.

Internal Revenue Service and Brookhaven Service Center, 9 FLRA 930 (1982) consolidated two separate cases. In both, the unions had alleged violations of the formal discussion rules when agency counsel were speaking with witnesses for third party proceedings. In one case the attorney was questioning a witness in an unfair labor practice case. In the other the attorney was preparing for arbitration. In both cases the attorneys informed the employees that the interviews were voluntary, and that no reprisal would occur if they refused to be interviewed. However, neither time did the attorney give the union advance notice and an opportunity to attend the sessions.

The FLRA found that these were not automatically formal discussions, so no unfair labor practice was committed. The FLRA did recognize, however, that there was a need to guard against coercion and intimidation in these types of cases. It held, therefore, that not only must the employee be given the warnings mentioned above when they are asked to participate in fact-gathering sessions. Additionally, the questioning must occur in a context that is not coercive in nature, and must not exceed the scope of the legitimate purpose of the inquiry.

Brookhaven warnings must be given at all fact-gathering sessions, even if the discussion is formal and the union has been given advance notice and an opportunity to attend. Veterans Administration and AFGE, 41 FLRA 1370 (1991). Further, failure to give the warnings is an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1).

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CHAPTER 4

COLLECTIVE BARGAINING

4-1. Introduction.

a. Collective Bargaining.

Once certified as an exclusive representative, the union will want to negotiate a collective bargaining agreement (CBA). A CBA is a contract negotiated by representatives of management and the exclusive representative. The contract is binding upon all parties: management, union, and employees. It signifies that management and the union have agreed upon terms and conditions of employment for employees in the bargaining unit.

b. Typical Clauses Contained in Bargaining Agreements.

While there is wide variation in the number, size, and wording of contract clauses, there are some similarities in their scope and content. The following examples illustrate a few matters frequently contained in agreements negotiated in the federal government. Of course, a CBA addresses many more matters. These are included merely to familiarize a reader who has never seen one with matters that they contain.

Parties. The first clause appearing in most collective bargaining agreements identifies the parties to the contract. For the union, the agreement may be signed by representatives of the national union, the local union or both. Management may prefer that both the national and the local unions sign so that both may be liable for contract violations. The agency may sign as a single employer or as a group representative of several government employers.

Recognition and Scope. In most contracts, an acknowledgment is included that the union is the exclusive and sole collective bargaining agent for all employees in the unit.

Management Rights. A statement of management rights is contained in contracts. This clause delineates the areas reserved solely to management by law. Management rights will be discussed in greater detail later in this chapter.

Grievance and Arbitration. All agreements must include a negotiated grievance procedure, applicable only to the bargaining unit. The parties to the agreement negotiate the scope and coverage of the negotiated grievance procedure.

c. Negotiation of the Collective Bargaining Agreement.

Most installations have negotiation teams that consist of management personnel from the various installation staffs. Often the labor counselor is a member of the negotiation team. Even if not a member, the labor counselor is frequently called upon to render legal opinions concerning the requirement of management to negotiate various union proposals. The union will normally submit its proposals to management prior to negotiating. The team will discuss them and decide their positions with respect to each proposal. They may agree to some, others they will not agree to as proposed, others may be acceptable and they will agree to them if it becomes advantageous during the "give and take" of negotiations, and others they may feel are nonnegotiable and so won't discuss.

The subject matter of the first session with the union will be the establishment of the ground rules for the negotiations. This may include agreeing upon the time, date, and place of negotiations; whether or not the session will be open or closed; the order of business, who will be on the negotiation teams and who will be spokespersons; how often proposals will be tabled before impasse procedures are utilized; and whether the contract will be implemented while negotiability disputes are being decided by third parties. After the ground rules are agreed upon, the parties generally complete a memorandum of understanding (MOU) containing the provisions.

The parties then negotiate over their proposals and counter proposals. Neither side need agree to a proposal, but each must discuss it in good faith unless it falls outside the scope of bargaining. Section 7114(b) provides:

> (b) The duty of any agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--
>
> (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;
>
> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;
>
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and

negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

Section 7103(a)(12) further defines collective bargaining as:

> . . . the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession (emphasis added).

The Federal Sector Labor-Management Relations Statute (FSLMRS), 5 U.S.C. §§ 7101-7135, imposes upon both unions and employers the obligation to bargain in good faith concerning conditions of employment. This obligation persists throughout the period of exclusive representation, not just when a collective bargaining agreement is being negotiated or renegotiated. Thus, if management wants to change a condition of employment, such as the working hours, it must give the unions notice of the projected change and an opportunity to negotiate. This is addressed in more detail later in this chapter.

d. Official time, travel, and per diem for union negotiators.

5 U.S.C. § 7131 clearly provides that employees representing an exclusive representative in the negotiation of a collective bargaining agreement and other representational functions shall be authorized official time, that is, time away from their normal job, to accomplish these functions. Functions for which official time have been mandated by the FLRA include, but are not limited to: negotiating a collective bargaining agreement, impasse proceedings, midterm and impact and implementation negotiations, grievance proceedings and EEO complaints. Employees negotiating local supplements to national master agreements are also entitled to official time. American

Federation of Government Employees v. Federal Labor Relations Authority, 750 F.2d 143 (D.C. Cir. 1984).

Activities performed by employees relating to internal union business of a labor organization shall be performed during the time the employee is in a non-duty status. Internal union business, under section 7131, is construed to include little more than solicitation of union membership, election of labor organization officials, and collection of union dues. Also, official time may not be granted an employee during other than normal duty hours. This means that no overtime will be paid to allow employees to perform representational activities, because the FSLMRS limits official time to those times the employee would otherwise be in a duty status. Finally, official time may not be allowed for employees outside the bargaining unit for which a CBA is being negotiated. National Oceanic and Atmospheric Administration, 15 FLRA 43 (1984); AFGE v. FLRA, 744 F.2d 73 (10th Cir. 1984).

One area of dispute is over which employees are covered by Section 7131(a). The statute defines those covered as "any employee representing an exclusive representative in the negotiation of a collective bargaining agreement . . . ." Understandably, unions have attempted to expand the categories of employees covered. In Naval Surface Weapons Center, 9 FLRA 193 (1982), *reconsidered*, 12 FLRA 731 (1983), *aff'd*, AFGE, Local 2090 v. FLRA, 738 F.2d 633 (4th Cir. 1984), the union was the exclusive representative at two separate activities located at the Naval Center in Dahlgren, Virginia. The two activities, U.S. Naval Space Surveillance Systems (USNSSS) and U.S. Naval Surface Weapons Center (Weapons Center), held separate contract negotiations with the union. In a negotiation with USNSSS, the union Executive Vice President, an employee of the Weapons Center, served as Chief Negotiator.

USNSSS refused to grant to the union representative official time during the collective bargaining negotiations, arguing the representative was not a bargaining unit employee. The FLRA agreed with USNSSS, denying the union representative official time. The FLRA determined the official time entitlement under section 7131(a) accrues only to an employee who is within the bargaining unit involved in the negotiation. The union challenged the decision in the Court of Appeals for the Fourth Circuit, asserting that under Section 7131(a), any employee representing the union was entitled to official time. Seizing on the word "any," the union claimed the union representative was entitled to official time, even though he was not a bargaining unit employee. The court, however, affirmed the decision and reasoning of the FLRA. An employee is only entitled to official time if he is a member of the bargaining unit he is negotiating for and an employee of the agency he is negotiating with.

In HHS, Social Security Administration, 46 FLRA 1118 (1993), the agency challenged an arbitrator's decision granting union representatives official time for attendance at a national conference. The arbitrator granted official time for convention activities that were related to general labor relations matters. The FLRA upheld the arbitrator's decision, finding union officials attendance in meetings regarding general

labor relations matters was not internal union business but representational activities. Consequently, official time was authorized for some of the activities at the convention.

Section 7131(a) equalizes the number of union negotiators on official time to the same number of management negotiators. In the Authority's judgment, however, this section does not absolutely limit the union to the same number of negotiators, but in fact allows them to bargain for additional negotiators on official time. Such bargaining is allowed because, according to the FLRA, section 7131(d) expressly provides that official time must be granted by an agency for any employee representing a union in any amount the parties agree to be reasonable, necessary, and in the public interest. EPA and AFGE, 15 FLRA 461 (1984). The Office of Personnel Management (OPM) and Department of the Army did not agree with this holding or its rationale. OPM's position was set forth in FPM Bulletin 711-93, December 19, 1984, SUBJECT: Negotiability of Number of Union Negotiators on Official Time [the FPM was sunset on 31 Dec. 1993, including this letter], and it cites AFGE Local 2090 v. FLRA, 738 F.2d 633 (4th Cir. 1984) in support of its view. In this case, the Fourth Circuit held that sections 7131(a) (b) and (c) deal with official time for employee contract negotiators, while section 7131(d) allows the employer to negotiate for other types of official time allowances (e.g., grievance processing or investigation).

OPM also required that employers record the time and cost involved in employee representational functions. FPM Letter 711-161, July 31, 1981, SUBJECT: Recording the Use of Official Time by Union and Other Employee Representatives for Representational Functions, required agencies to initiate methods to record or account for the use of official time. The purpose of this requirement was to record travel and per diem costs when payable, assess the impact on agency operations of official time, and to determine changes that should be sought concerning official time in future negotiated contracts. While agencies cannot intimidate, harass or take other adverse action against union representatives for their use of official time to perform representational functions, agencies can and should monitor the use of official time to insure it is only being granted for proper purposes. Defense General Supply Center, 15 FLRA 932 (1984); Air Force Logistics Command, 14 FLRA 311 (1984). Although the FPM was sunset on 31 Dec 1993, policies provided for in the FPM prior to sunset may now appear in agency regulations.

Prior to 1983, the FLRA had always maintained that employees on official time away from their normal place of duty were entitled to payment of travel and per diem because labor-management negotiations qualify as "official business" within the meaning of the Travel Expense Act, 5 U.S.C. § 5702. This position was unanimously rejected by the Supreme Court in Bureau of Alcohol, Tobacco, and Firearms v. FLRA, 464 U.S. 89 (1983).

(1) Payment of per diem. Since BATF, the Authority has ordered agencies to pay travel and per diem for employee representatives appearing before the FLRA. *See* Dep't of the Air Force, Sacramento Air Logistics Center, 26 FLRA 674 (1987). The FLRA opined it had authority to order such payments pursuant to 5 U.S.C. § 1731(c) and the implementing regulation, 5 C.F.R. § 2429.13 (1988). In 1989, the Air

Force challenged the Authority's ability to order such payments. Dep't of the Air Force v. FLRA, 877 F.2d 1036 (D.C. Cir. 1989).

The FLRA asserted that a review of the previous executive orders and legislative history of the Act indicated that Congress intended such payment. Additionally, the appearance of employee before the FLRA was necessary for the Authority to carry out its Congressional mandate. Consequently, the employee was performing a "public function" and should be granted travel and per diem.

In rejecting the FLRA's arguments, the Court stated: "If anything, the fact that the Authority called the witness might suggest that it ought to bear his expenses, a practice apparently followed by the National Labor Relations Board in unfair labor practice proceedings . . ." *Id.*, at 1041. The Court found that the regulation was without statutory basis, reversing the Authority's decision and practice.

(2) Bargaining of per diem. While the FLRA cannot order an agency to pay travel and per diem under Sections 7131(a) or (c), the authority can require agencies to bargain over such payments. The scope of this bargaining, however, is limited.

The FLRA held that travel and per diem expenses for union negotiators is a mandatory topic of bargaining. NTEU and Customs Service, 21 FLRA 6 (1986). This position was sustained by the D.C. Cir. in U.S. Customs Service v. FLRA, 836 F.2d 1381 (D.C. Cir. 1988). The Court deferred to the Authority regarding the scope of bargaining. The Authority opined that because the determination of "official business" is highly discretionary, a union should be permitted to negotiate a provision regarding the exercise of that discretion. *See also*, AFGE and DOL Mine Safety & Health Admin., 39 FLRA 546 (1991).

Pursuant to the Travel Expense Act (TEA)(1975 Amendments, 89 Stat. 84, PL 94-22 May 19, 1975) and Federal Travel Regulations (FTR), travel and per diem may only be awarded when the travel is due to official business - that is for the "convenience" or "primary interest" of the government. Consequently, an agency cannot negotiate a provision that would authorize payment in cases where the travel is not for official business. A union could negotiate a provision requiring the agency to give the benefit of doubt to the employee, resulting in more determinations of "official business." Such a provision would not violate either the TEA or FTR.

(3) Other Official Time

Unions have unsuccessfully attempted to expand the coverage of 5 U.S.C. 7131(a) to grievances hearings and statutory appeals. If successful, a union could insist the number of union representatives present at a hearing equal the number of management representatives. Moreover, a union member would be entitled to official time for its representatives.

In Dept. of the Air Force, Randolph Air Force Base and AFGE, 45 FLRA 727 (1992), the union argued it was entitled to two representatives on official time at an arbitration hearing because management had two representatives. In support of this argument, the union cited 7131(a). The FLRA rejected the union's interpretation of the statute, finding the provision clear on its face. The FLRA declined to expand the requirement for equal representation beyond the words of the statute - "negotiation of a collective bargaining agreement." Because arbitration is not part of the collective bargaining procedure, the FLRA found the union was not entitled to official time or equal representation. The FLRA noted that such representation and official time is negotiable under Section 7131(d). In this case, the union had negotiated official time for one representative. If the union wanted to increase that number, it would have to renegotiate the collective bargaining agreement.

In I.N.S. v. FLRA, 4 F.3d 268 (4th Cir. 1993), INS attempted to limit Section 7131(d) to the two circumstances enumerated in the statute: (1) an employee representing an exclusive representative; and, (2) an employee acting in connection with any matter covered by Chapter 71. The court rejected that narrow reading of the statute, finding proposals to authorize official time for statutory appeals and preparing unfair labor practices negotiable.

In VA Regional Office, Atlanta, GA, 47 F.L.R.A. 1118 (1993), the FLRA found a proposal authorizing official time for lobbying Congress negotiable. The Authority determined because Congress had the power to regulate wages and benefits of federal employees, the unions lobbying actions were in their representational capacity. Therefore, the agency must negotiate the official time proposal for lobbying under Section 7131(d). However, this rule does not apply in the Department of Defense. Relying on a provision in the 1996 DoD Appropriation Act, the FLRA found no unfair labor practice when a DoD agency refused to allow union representatives to use paid official time to lobby Congress in support of or in opposition to pending or desired legislation. Office of the Adjutant General, Georgia Department of Defense and Georgia State Chapter Associations of Civilian Technicians, 54 FLRA No. 70 (1998); Georgia State Chapter of Civilian Technicians v. FLRA, 184 F.3d 889 (D.C. Cir. 1999) (denying the petition for judicial review because the union failed to counter the Defense Department's contention that the Appropriations Act rendered the contractual provisions unenforceable in its case before the FLRA). *See also* Granite State Chapter, Association of Civilian Technicians v. FLRA, 173 F.3d 25 (1st Cir. 1999) (finding that DoD Appropriation Act was a clear and manifest expression of Congress' intent to repeal union's right to lobby).

4-2. Scope of Bargaining.

There has been substantial resistance to negotiation of collective bargaining agreements by public employees.

President Franklin D. Roosevelt declared:

> All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussion with government employee organizations. The employer is the whole people who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many cases, restricted, by laws that establish policies, procedures, or rules in personnel matters. *See* Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt, 1937, Vol. 1, p. 325 (1941).

President Roosevelt felt collective bargaining had no place in the public sector. Although collective bargaining does take place, it is restricted because it is recognized that public employees provide essential services and that there should be no bargaining over matters that go to the heart of providing these services.

Management is required to bargain only over conditions of employment. They are defined in section 7103(a)(14):

> conditions of employment mean personnel policies, practices, and matters, whether established by rule, regulations, or otherwise, affecting working conditions . . . .

There are certain conditions of employment which management may not negotiate. These are known generally as "management rights." Section 7106(a) defines some of the management rights as prohibited subjects of bargaining:

> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
>
> (2) in accordance with applicable laws--
>
> > (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
> >
> > (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
> >
> > (C) with respect to filling positions, to make selections for appointments from--
> >
> > > (i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

Management has no authority to negotiate the above areas. If a provision in the agreement deals with them, it will generally be given no effect, regardless of when discovered.

Section 7106(b)(1) enumerates several areas which management may, under the statute, choose to negotiate or may decline to negotiate. It is management's discretion. These permissive/ optional areas are:

> On the numbers, types, and grades of employees or positions assigned to any organization subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

Finally, sections 7106(b)(2) and (3) provide an exception to the management rights for proposals which address how management officials will exercise any authority reserved to them under the Statute, or appropriate arrangements for employees adversely affected by the exercise of any such authority. This is known as impact and implementation bargaining.

The FSLMRS often leaves the scope of bargaining unclear, so negotiability disputes arise. If management declares the proposal nonnegotiable, the exclusive representative may file an unfair labor practice for failure to bargain in good faith. As an alternative to filing an unfair labor practice, the exclusive representative may appeal management's non-negotiability declaration to the Authority, asking for a negotiability determination. This latter procedure is preferred. If the complainant should choose the wrong procedure, negotiability determination vs. unfair labor practice, the Authority will refuse jurisdiction and direct the complainant to the proper forum. *See* OPM, 6 FLRA 44 (1981).

New rules went into effect on 1 April 1999 to determine issues of negotiability. *See* 5 CFR 2424. Under these new procedures, a union must first submit an actual proposal (contract language not yet agreed on) to the agency or receive an unrequested written allegation concerning the duty to bargain from the agency before the Authority will undertake a negotiability determination. Within 15 days of receipt of the agency head's disapproval of a proposal or receipt of an agency's written allegation that a proposal is not within the duty to bargain, the exclusive representative may file a petition for review with the FLRA. Only an exclusive representative that is a party to the negotiations may file such a petition. In filing a petition for review, the union is placing the agency on notice that it is requesting the FLRA to hold that the proposal is either within the duty to bargain or not contrary to law.

On receipt of the petition for review, the FLRA may schedule a post-petition conference. All reasonable efforts will be made to schedule the conference within 10 days of receipt of the petition. Such a conference may be conducted in person or via the telephone. Within 30 days from the receipt of the union's petition, the agency must submit its response to the FLRA. Generally, the purpose of the agency response is to inform the FLRA and the exclusive representative why a proposal or provision is not within the duty to bargain or contrary to law. The exclusive representative may file a brief rebuttal to the agency's response within 15 days of receipt. The agency may file an additional reply to the union's rebuttal, also within 15 days of receipt. Following all submissions, and after a hearing (if deemed necessary by the Authority), the FLRA renders its decision. If the FLRA determines something to be legal and within the duty to bargain, it will issue an order to bargain over the proposal or an order to rescind an agency head's disapproval of the provision. However, should the FLRA determine that a proposal or provision is not negotiable because it's illegal or there is not otherwise a duty to bargain, it will dismiss the petition. Either party may appeal the decision to a U.S. court of appeals within 60 days from the date the order was issued. *See* Guide to the FLRA Negotiability Appeals Process, http://www.flra.gov/reports/ng_guide.html.

If there is no dispute as to the negotiability of the proposal, but the parties cannot reach agreement, impasse procedures are utilized. These are discussed in Chapter 5.

The duty to negotiate is continuous and does not end when the collective bargaining agreement (CBA) is signed. If management desires to change a provision of the CBA, the union's consent is required. If a decision is to be made which falls within the scope of the bargaining but is not addressed in the agreement, the union must be given notice and an opportunity to negotiate. If the union indicates its does not desire to negotiate the matter or fails to respond within a reasonable time, management may implement the decision. If the union desires to negotiate the matter, there must be agreement or negotiation to impasse must result.

When a proposal or decision deals with an area which appears to be nonnegotiable but is not obviously so, the labor counselor will be expected to render a legal opinion as to its negotiability.[1] Consult the FSLMRS, decisions of federal courts, and the FLRA to determine if the issue has been addressed and a precedent exists, realizing that these decisions are very much fact specific.

The following cases and materials consider the subject-matter scope of collective bargaining in the Federal sector. What the parties must do to fulfill their obligation to negotiate will be considered in an unfair labor practice context in Chapter Five. In deciding negotiability cases, the Authority looks to the express terms of the FSLMRS, its legislative history, its prior decisions and, most importantly, to the facts of the case.

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1 Major Holly O'Grady Cook, Labor and Employment Law Note, *To Talk or Not to Talk: How Do You Know Whether an Issue is Negotiable?,* ARMY LAW., Mar. 2000, at 21.

4-3. Negotiability of Particular Subjects.

a. Conditions of Employment.

As previously discussed, management need only negotiate conditions of employment affecting bargaining unit employees to the extent consistent with Federal law, government-wide regulations, and agency regulations for which a compelling need exists. The labor counselor's first inquiry should be whether or not the proposal has a direct and substantial impact on a condition of employment. If it does not, the matter need not be negotiated. Of course, management may negotiate the matter if it so desires provided it is not a section 7106(a) prohibited subject of bargaining (discussed infra). The following case is illustrative of several of these provisions.

ANTILLES CONSOLIDATED EDUCATION ASSOCIATION Union and ANTILLES CONSOLIDATED SCHOOL SYSTEM Agency

22 FLRA 335 (1986)

(Extract)

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute), concerning the negotiability of one five-part Union proposal.

II. Union Proposal

Article 36. BASE/POST PRIVILEGES

1. All unit employees will be granted the use of the following base/post facilities:

A. Base/Post Exchanges at the site to which the employee is assigned.

B. All retail food outlets operated by the Navy Exchange, AAFES, or Coast Guard Exchange at the site to which the employee is assigned, or

C. Access to the nearest exchange system and its retail food outlets in any case in which an employee is assigned to a site at which the facilities described in subsection A and B are not operated.

D. Base/post/station/fort special services recreation and morale support facilities at the site to which the employee is assigned.

E. Hospital facilities on a paid basis.

A. Position of the Parties

The Agency asserts that the proposal is nonnegotiable for four reasons: (1) it does not concern matters affecting working conditions of bargaining unit employees, within the meaning of section 7103(a)(14) of the Statute; (2) the Agency is without authority to bargain over the proposed benefits; (3) bargaining on the proposal is barred by regulations for which a compelling need exists; (4) negotiation on parts D and E of the proposal is foreclosed by applicable law.

The Union did not provide any arguments in its petition for review supporting the negotiability of the proposal, nor did it file a reply brief.

We will examine the Agency's contentions, in turn.

B. Analysis

1. Conditions of Employment of Bargaining Unit Employees

Under the statutory scheme established by sections 7103(a)(12), 7106, 7114 and 7117 a matter proposed to be bargained which is consistent with Federal law, including the Statute, Government-wide regulations or agency regulations is, nonetheless, outside the duty to bargain unless such matter directly affects the conditions of employment of bargaining unit employees. The term "conditions of employment" is defined in section 7103(a)(14) as "personnel policies, practices, and matters whether established by rule, regulation, or otherwise, affecting working conditions . . ."

In deciding whether a proposal involves a condition of employment of bargaining unit employees the Authority considers two basic factors:

(1) Whether the matter proposed to be bargained pertains to bargaining unit employees; and

(2) The nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees.

For example, as to the first factor, the question of whether the proposal pertains to bargaining unit employees, a proposal which is principally focused on nonbargaining unit positions or employees does not directly affect the work situations or employment relationship of bargaining

unit employees. *See* National Federation of Federal Employees, Local 1451 and Naval Training Center, Orlando, Florida, 3 FLRA 88 (1980) *aff'd sub nom.* National Federation of Federal Employees v. FLRA, 652 F.2d 191 (D.C. Cir. 1981) (Proposal requiring management to designate a particular number of representatives to negotiations was held to be outside the duty to bargain). But, a proposal which is principally focused on bargaining unit positions or employees and which is otherwise consistent with applicable laws and regulations is not rendered nonnegotiable merely because it also would have some impact on employees outside the bargaining unit. *See* Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1982) (Union Proposal 1 defining the competitive area for reduction-in-force as coextensive with the bargaining unit was held to be within the duty to bargain even though it had an impact on nonbargaining unit employees).

Part 1 of the Appendix to this decision references other Authority decisions concerning the nature and extent of the affect of a proposal on bargaining unit employees.

As to the second factor, relating to the effect of a proposal on working conditions, the question is whether the record establishes that there is a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees. For example, a proposal concerning off-duty hour activities of employees was found to be outside the duty to bargain where no such connection was established. *See* International Association of Fire Fighters, AFL-CIO, CLC, Local F-116 and Department of the Air Force, Vandenberg Air Force Base, California, 7 FLRA 123 (1981) (Proposal to permit employees to utilize on-base recreational facilities during off-duty hours found not to concern personnel policies, practices, or matters affecting working conditions of bargaining unit employees).

On the other hand, a proposal concerning off-duty hour activities of employees was held to affect working conditions of bargaining unit employees where the requisite connection was established. National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Yongsan, Korea, 4 FLRA 139 (1980) (Proposal to revise the agency's "ration control" policy was found to concern standards of health and decency which were conditions of employment under agency regulations).

Part 2 of the Appendix to this decision references other Authority decisions concerning the nature and effect of a proposal on bargaining unit employees' working conditions.

Applying the first factor to the disputed proposal we find that the proposal expressly pertains only to bargaining unit employees. No claim is made that the proposal has any impact on nonbargaining unit employees. However, we must also assess the nature and effect of the proposal on bargaining unit employees' working conditions under the second factor. Here the Agency argues without contravention that access to the retail, recreational and medical facilities denoted in the proposal would occur primarily during the employees' non-duty hours. Further, the Union has provided no evidence, whatever, and the record does not otherwise establish that access to the facilities in question is in any manner related to the work situation or employment relationship or is otherwise linked to the employees' assignments within the school system in Puerto Rico. As a result we find the disputed proposal is to the same effect as the proposal permitting employees to use on-base recreational facilities during off-duty hours found outside the agency's obligation to bargain in Vandenberg Air Force Base, 7 FLRA 123 (1981). Thus, the disputed proposal also does not directly affect working conditions of bargaining unit employees and is outside the Agency's obligation to bargain.

2. Matters within the Agency's Authority to Bargain

It is well established that the duty of an agency under the Statute is to negotiate with an exclusive representative of an appropriate unit of its employees concerning conditions of employment affecting them to the extent of its discretion, that is, except as provided otherwise by Federal law including the Statute, or by Government-wide rule or regulation or by an agency regulation for which a compelling need exists. For example, *see* National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), *aff'd sub nom.*, National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982).

It is also well established that an agency may not foreclose bargaining on an otherwise negotiable matter by delegating authority as to that matter only to an organizational level within the agency different from the organizational level of recognition. Rather, under section 7114(b)(2) of the Statute, an agency is obligated to provide representatives who are empowered to negotiate and enter into agreement on all matters within the statutorily prescribed scope of negotiations. American Federation of Government Employees, AFL-CIO, Local 3525 and United States Department of Justice, Board of Immigration Appeals, 10 FLRA 61 (1982) (Union Proposal 1). Thus, the Agency's claim that the Superintendent of the Department of Navy Antilles School System is without authority to bargain on access to Navy retail, recreational or medical facilities because such facilities are in separate chains of command within the Department of Navy from the school system cannot be sustained. *See* American Federation of Government Employees, AFL-CIO, Local 1409 and U.S.

Adjutant General Publications Center, Baltimore, Maryland, 18 FLRA No. 68 (1985). Similarly, the Agency's argument that the Superintendent is without authority to bargain on access to Army facilities, which are under the jurisdiction of a separate subdivision of DOD, also cannot be sustained. *See* Defense Contract Administration Services Region, Boston, Massachusetts, 15 FLRA 750 (1984).

As to Coast Guard facilities, there is nothing in the record in this case which indicates that the Agency lacks the discretion to at least request the Department of Transportation to extend access to such Coast Guard facilities to Antilles School System employees. Thus, the Agency is obligated to bargain on access to Coast Guard facilities to this extent. *See* American Federation of State, County and Municipal Employees, AFL-CIO and Library of Congress, Washington, D.C., 7 FLRA 578 (1982) (Union proposals XI-XVI), *enf'd sub nom.*, Library of Congress v. FLRA, 699 F.2d 1280 (D.C. Cir. 1983).

3. Compelling Need (omitted)

4. Consistency with law of Parts D and E of the Proposal

a. Part D of the Proposal

According to the record this part of the proposal would permit the Antilles School System employees to patronize on-post retail liquor stores. While the Agency's claims that Puerto Rico law precludes the sale of Commonwealth tax-free alcoholic beverages to these civilian employees we find such claim unsupported in the record. That is, the DOD regulations, which were included in the record by the Agency, specifically permit patronage of on-post retail liquor stores by other categories of persons, such as dependents of military personnel, who, like the civilian employees in this case, are not expressly listed as exempt under the Puerto Rico Statute. *See* Puerto Rico Laws Annotated tit. 13 § 6019 (1976). Thus, we do not find that the Agency has established that Part D of the proposal is inconsistent with law.

b. Part E of the Proposal

Part E of the proposal would permit employees to use the local Navy hospital on a paid basis. However, under 24 U.S.C. § 34 Federal employees located outside the continental limits of the United States and in Alaska may receive medical care at a naval hospital only "where facilities are not otherwise available in reasonably accessible and appropriate non-Federal hospitals." Also, under 24 U.S.C. § 35, such employees may be hospitalized in a naval hospital "only for acute medical and surgical conditions . . . ." Since Part E of the proposal contains no

limitations on access to the local naval hospital, it is inconsistent with the express statutory provisions governing such access.

C. Conclusion

The Authority finds, for the reasons set forth in the preceding analysis, that the entire proposal in this case concerns matters which are not conditions of employment of bargaining unit employees. Consequently, it is not within the duty to bargain although the Agency could negotiate on the proposal if it chose to do so, except for Part E.

Further, the Authority concludes that as Part E of the proposal is inconsistent with Federal law, it is outside the scope of the duty to bargain pursuant to section 7117(a)(1) of the Statute.

III. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

APPENDIX

Part 1

The following cases involve examples of proposals found outside the duty to bargain because of the impact on individuals or positions outside the bargaining unit.

National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO and U.S. Department of Labor, Washington, D.C., 3 FLRA 290 (1980) (Proposal I establishing the method management will use in filling supervisory and management positions found not to affect working conditions of bargaining unit employees).

American Federation of Government Employees, National Council of EEOC Locals No. 216, AFL-CIO and Equal Employment Opportunity Commission, Washington, D.C., 3 FLRA 504 (1980) (Proposal relating to the assessment and training of supervisors found not to affect working conditions of bargaining unit employees).

National Treasury Employees Union and Internal Revenue Service, 6 FLRA 522 (1981) (Proposal VI requiring management to notify individuals who telephone the agency for tax information that such calls are subject to monitoring found not to affect working conditions of bargaining unit employees).

National Association of Government Employees, Local R7-23 and Headquarters, 375th Air Base Group, Scott Air Force Base, Illinois, 7 FLRA 710 (1982) (Proposal concerning discipline of management officials and supervisors found not to affect working conditions of bargaining unit employees).

American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia, 9 FLRA 1004 (1982) (The portion of Proposal 5 which required management to prosecute private citizens who file false reports found not to affect working conditions of bargaining unit employees).

Association of Civilian Technicians, State of New York, Division of Military and Naval Affairs, Albany, New York, 11 FLRA 475 (1983) (Proposal 2 concerning procedures for filling military positions found not to affect the working conditions of bargaining unit employees).

American Federation of Government Employees, AFL-CIO, Local 2302 and U.S. Army Armor Center and Fort Knox, Fort Knox, Kentucky, 19 FLRA 778 (1985) (Proposal 4 prescribing the content of certain management records relating to employees, the manner in which such records are maintained and restrictions on management access to such records found not to affect working conditions of bargaining unit employees).

Part 2

A. The following cases involve examples of proposals found outside the duty to bargain because of the absence of a direct affect on bargaining unit employees' working conditions.

National Association of Air Traffic Specialists and Department of Transportation, Federal Aviation Administration, 6 FLRA 588 (1981) (Proposal IV permitting employee allotments from pay for "Political Action Fund" to be used in "political efforts to improve working conditions" found to affect working conditions in only a remote and speculative manner).

National Federation of Federal Employees, Council of Consolidated Social Security Administration Locals and Social Security Administration, 13 FLRA 422 (1983) (Proposals 3 and 4 requiring management to utilize recycled paper products and to provide the union with such recycled paper products upon request found not to directly affect bargaining unit employees' working conditions as there was no demonstration in the record of any such effect).

Maritime Metal Trades Council and Panama Canal Commission, 17 FLRA 890 (1985) (Proposals 1 and 2 permitting employees to cash personal checks at the agency's treasury found not to directly affect working conditions of bargaining unit employees).

B. The following cases involve examples of proposals found to directly affect working conditions of bargaining unit employees.

American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980) (Union Proposal 1), *enf'd as to other matters sub nom.,* Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom.,* AFGE v. FLRA, 455 U.S. 945 (1982) (A proposal to establish a union operated day care facility on agency property was found to directly affect bargaining unit employees by enhancing an individual's ability to accept employment or to continue employment with the agency and to promote workforce stability and prevent tardiness and absenteeism).

National Treasury Employees Union and Internal Revenue Service, 3 FLRA 693 (1980) (Union Proposal I establishing criteria for approval of outside employment was found to directly affect working conditions of unit employees because agency regulations which set forth policies governing outside employment were determinative of employee eligibility for certain positions and even prescribed whether employees could continue to be employed).

Planners, Estimators and Progressmen Association, Local No. 8 and Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 13 FLRA 455 (1983) (A proposal to permit bargaining unit employees to record their time and attendance manually instead of mechanically through use of a time clock found to directly concern working conditions of such employees).

United States Department of Justice, United States Immigration and Naturalization Service and American Federation of Government Employees, AFL-CIO, Local 2509, 14 FLRA 578 (1984) (Assignment of Government-owned housing to employees was found to directly affect working conditions of bargaining unit employees in circumstances where there was a lack of adequate housing in the geographic area and the Government-owned housing in question was constructed for the benefit and use of employees stationed at the hardship location).

American Federation of Government Employees, AFL-CIO, Local 1770 and Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 17 FLRA 752 (1985) (Proposal 4 requiring the agency to provide lockers or other secure areas

for employees' personal items during working hours found to directly affect working conditions of unit employees).

The FLRA has followed the definition of "conditions of employment" set out in the above case. *See* AFGE and VA, 41 FLRA 73 (1991), and VA Medical Center, Leavenworth, Kansas, 40 FLRA 592 (1991).

b. Negotiating Matters Which Are Contrary to Federal Law, Government-wide Regulations or Agency Regulations-Prohibited Subjects (proposals which are not negotiable). Section 7117(a).

(1) Negotiating Proposals Which Contradict Federal Law.

A union proposal that is contrary to a statute is nonnegotiable. Management has no discretion to change the statute.

Examples include:

See the discussion of Part 4. of the Antilles case above.

In AFGE, Local 1547 and 56th Fighter Wing, Luke Air Force Base, 55 FLRA No. 121 (1999), the Authority held that a union proposal to require an agency to spend appropriated funds for motorcycle safety equipment was outside the duty to bargain because it violated federal statute.

In Fort Shafter, Hawaii, 1 FLRA 563 (1979), the Authority held that an agency shop proposal conflicts with 5 U.S.C. § 7102, which assures employees the right to form, join, or assist any labor organization, or to refrain from any such activity. The same result was reached in AFGE and McClellan Air Force Base, 44 FLRA 98 (1992).

Official time to prepare for "interface" activities does not constitute "internal union business," and conflict with 5 U.S.C. § 7131(b), the Authority held in Mather AFB, 3 FLRA 304 (1980) and ARRACOM, 3 FLRA 316 (1980). Consequently, proposals dealing with official time for preparing for negotiations, impasse proceedings, and counterproposals, are negotiable matters under section 7131(d). *See* Social Security Administration and AFGE, 13 FLRA 112 (1983).

In VA, Minneapolis and Farmers Home Administration, 3 FLRA 310 and 320 (1980), respectively, the Authority held that there was no requirement to expressly exclude from negotiated grievance procedures matters which, under provisions of law, may not be grieved under such procedures.

> [S]ection 7121 . . . already provides that negotiated grievance procedures cover, at a maximum, matters which under the provisions of law could be submitted to the procedures.

Veterans Administration was not required to bargain over union proposals creating grievance and arbitration procedures for medical professionals regarding allegations of inaptitude, inefficiency, or misconduct. 38 U.S.C. § 4110 provides exclusive disciplinary procedures to be followed. Veterans Admin. Med. Cntr., Minneapolis v. F.L.R.A., 705 F.2d 953 (8th Cir., 1983)(rehearing en banc denied). In Colorado Nurses Assoc. and VA Med. Center., Ft. Lyons, 25 F.L.R.A. 803 (1987) the Authority held that a union proposal to create a grievance and arbitration system, for matters not excluded by 38 U.S.C. § 4110, were bargainable.

The National Guard was not required to negotiate regarding union proposals that would allow binding arbitration of matters reserved for the exclusive review of the state adjutants general by the National Guard Technicians Act. State of Neb., Military Dept. v. F.L.R.A., 705 F.2d 945 (8th Cir., 1983).

A union proposal to require an agency to waive collection of interest and penalties on debts owed the government was held nonnegotiable in NFFE and Engineer District, Kansas City, 21 FLRA 101 (1986). The FLRA determined that the Federal Debt Collection Act of 1982 required such collections and did not grant agencies such discretionary authority.

In NFFE and DA, Moncrief Army Community Hosp., 40 FLRA 1181 (1991), the Authority held that the agency was not required to bargain over a union proposal that was inconsistent with federal law.

(2) Negotiating Proposals Which Contradict Executive Orders or Government-Wide Regulations.

If a proposal conflicts with an executive order or government-wide regulation, it is nonnegotiable. The rationale is that the agency cannot change these provisions. A government-wide regulation is one which is applicable to the Federal work force as a whole. Most of them (for Department of Defense) are regulations promulgated by the Office of Personnel Management or the General Services Administration.

The following case illustrates this rule.

N.T.E.U. and I.R.S.

3 FLRA 675 (1980)

(Extract)

Union Proposal

Pre-paid parking spaces for bargaining unit employees' private vehicles, at the New Orleans, Baton Rouge, Shreveport, Lake Charles, and Houma posts of duty, will not be released to the General Services Administration.

Question Here Before the Authority

The questions are, first of all, whether the union's proposal is inconsistent with applicable Government-wide regulations under section 7117(a) of the Statute; or secondly, whether the union's proposal concerns a matter which is negotiable at the election of the agency under section 7106(b)(1) of the Statute; or finally, whether the union's proposal violates sections 7106(a)(1) of the Statute.

Opinion

Conclusion: The union's proposal, insofar as it requires the agency to retain the disputed parking spaces, is consistent with applicable Government-wide regulations under section 7117(a) of the Statute, does not concern a matter which may be negotiated at the election of the agency within the meaning of section 7106(b)(1) of the Statute, and does not violate the agency's rights under section 7106(a)(1) of the Statute. However, to the extent that the proposal implicitly requires the agency to provide the parking spaces so retained free of charge to employees, it is inconsistent with applicable Government-wide regulations under section 7117(a) of the Statute. Accordingly, . . . the agency's allegation that the disputed proposal is not within the duty to bargain is sustained in part and set aside in part.

Reasons: Under the Statute, the duty of an agency to negotiate with an exclusive representative extends to the conditions of employment affecting employees in an appropriate unit except as provided otherwise by Federal law and regulation, including Government-wide regulation. That is, under the Statute, if a proposed matter relates to the conditions of employment of an appropriate unit of employees in an agency and is not inconsistent with law or regulation--i.e., is within the discretion of an agency--it is within the scope of bargaining which is required of that agency. In this case, the agency alleges, first of all, that the union's proposal is not within the duty to bargain because it is contrary to applicable Government-wide regulations. Specifically, the agency alleges that retention of the employee parking spaces which are the subject of the instant dispute conflicts with provisions of the Federal Property Management Regulations (FPMR).

The initial question is whether the provision of the FPMR (41 C.F.R. Subchapter D) at issue herein constitute a "Government-wide rule or regulation" within the meaning of the Statute. The phrase "Government-wide rule or regulation" is used in two different subsections of section 7117 of the Statute. First of all, as here in issue, it is used in section 7117(a) to state a limitation on the scope of bargaining; i.e., matters that are inconsistent with Government-wide rule or regulation are not within the duty to bargain. Secondly, it is used in section 7117(d) to state the right of an exclusive representative, in certain circumstances, to consult with respect to the issuance of such rules and regulations effecting any substantive change in any condition of employment. In neither of these contexts does the Statute precisely define what constitutes a "Government-wide rule or regulation" within the meaning of section 7117.

[The Authority discusses the legislative history of this section of the CSRA.]

Thus, Congress intended the term "Government-wide regulation" to include those regulations and official declarations of policy which apply to the Federal civilian work force as a whole and are binding on the Federal agencies and officials to which they apply.

However, while the legislative history of the term "Government-wide" indicates Congress intended that regulations which only apply to a limited segment of the Federal civilian work force not serve to limit the duty to bargain, it does not precisely define the outer limits of the reach required of a regulation in order for that regulation to be a "Government-wide" regulation within the meaning of section 7117. That is, it is unclear, for example, whether Congress intended that a regulation must apply to all employees in the Federal civilian work force in order to constitute a "Government-wide" regulation. In this regard, it is a basic rule of statutory construction that legislative enactments are to be construed so as to give them meaning. A requirement that a regulation apply to all Federal civilian employees in order to constitute a "Government-wide" regulation under section 7117 would render that provision meaningless, since it does not appear that there is any regulation which literally affects every civilian employee of the Federal Government. Furthermore, such a literal definition of the term would also render meaningless the concomitant right of a labor organization under section 7117(d) of the Statute in appropriate circumstances to consult with the issuing agency on Government-wide rules or regulations effecting substantive changes in any conditions of employment. In this regard, the legislative history of the Statute indicates that Congress intended the consultation rights provided in section 7117(d) to be substantial union rights.

* * *

The issue then becomes whether the union proposal in dispute herein is inconsistent with the provisions of the FPMR cited by the agency. In this regard, since GSA has primary responsibility for the issuance and interpretation of these regulations, the Authority requested an advisory opinion from GSA regarding whether any part of current FPMR would prevent an agency from providing free parking spaces for employee personally owned vehicles that are not used for official business.

* * *

In summary, GSA interprets applicable provisions of the FPMR, specifically, 41 C.F.R. § 101-17.2, as imposing upon an agency the obligation to relinquish space to GSA, including space for parking, after the agency determines that such space is no longer needed or is under-utilized. GSA also stated that this duty of an agency to relinquish space is contingent upon a determination by the agency that the space is no longer needed or is under-utilized. That is, according to GSA, under the FPMR, an agency has discretion to determine whether it needs, or is able to utilize, a given space. GSA then concluded, without citing any provision of the FPMR in support, that the agency could not make the requisite determination, i.e., exercise its discretion under the FPMR, through negotiations as provided by the union's proposal.

The Authority, for purposes of this decision, adopts GSA's conclusion that an agency is obligated to relinquish space to GSA, including space for parking, once the agency determines in its discretion, that such space is no longer needed or utilized. However, GSA's further conclusion that the agency could not exercise its discretion in this regard through negotiations with a union is without support. As stated at the outset of this decision, Congress, in enacting the Federal Service Labor-Management Relations Statute, established a requirement that an agency negotiate with the exclusive representative of an appropriate unit of its employees over the conditions of employment affecting those employees, except to the extent provided otherwise by law or regulation. That is, to the extent that an agency has discretion with respect to a matter affecting the conditions of employment of its employees, that matter is within the duty to bargain of the agency.

* * *

GSA also states, however, that even if the agency's decision to relinquish space is subject to the duty to bargain under the Statute, the agency would be precluded from agreeing to provide those spaces free of charge by provision of FPMR Temporary Regulation D-65 (Temp. Reg. D-65), 44 Fed. Reg. 53161 (1979). Specifically, under section 11 of this regulation, Federal employees utilizing government-controlled parking spaces shall be assessed a charge at a rate which is the same as the commercial equivalent value of those parking spaces. (Between

November 1, 1979, and September 30, 1981, however, the charge will be one-half of the full rate to be charged.) This regulation is presently in effect and applies to the parking spaces here in dispute. Further, based upon the analysis stated above, this regulation, which is generally applicable throughout the executive branch, is a Government-wide regulation within the meaning of section 7117 of the Statute and precludes negotiation on a conflicting union proposal. Thus, since the union proposal would require the agency to provide the disputed parking spaces free of charge to employees, it is inconsistent with FPMR Temporary Regulation D-65 and, to that extent, is outside the agency's duty to bargain under the Statute.

* * *

In summary, consideration of each of the grounds for nonnegotiability alleged by the agency leads to the conclusion that, for the foregoing reasons, the union's proposal, insofar as it would require the agency to retain the disputed parking spaces for employee parking is within the agency's duty to bargain under the Statute; but to the extent that it would require the agency to provide those spaces free of charge to employees, it conflicts with the currently applicable Government-wide regulation, namely, FPMR Temporary Regulation D-65 44 Fed. Reg. 53161 (1979), under section 7117(a) of the Statute, and thus, in that respect, is outside the agency's duty to bargain.

In NFFE and Dep't of the Army, U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois, 33 FLRA 436 (1988), the Authority determined that the Mandatory Guidelines for Federal Workplace Drug Testing, issued by HHS, are a government-wide regulation. The Guidelines were issued in accordance with Executive Order No. 12564 and the 1987 Supplemental Appropriations Act. The Guidelines are binding on executive agencies, uniformed services and any other federal employing unit except the Postal Service and the legislative and judicial branches. *Remanded on other grounds* Dep't of the Army v. FLRA, 890 F.2d 467 (D.C. Cir. 1989), *decision on remand*, 35 FLRA 936 (1990).

Numerous union proposals have been found to be nonnegotiable because they are contrary to the provisions of the Mandatory Guidelines. In AFGE and Sierra Army Depot, 37 FLRA 1439 (1990) the union proposed (proposal 4) that employees who are unable to provide a sufficient amount of urine on the appointed day be allowed to return the next day for testing. The Authority found the proposal inconsistent with the Mandatory Guidelines and, therefore, nonnegotiable under section 7117(a)(1). The same result was reached in International Federation of Professional and Technical Engineers, Local 89 and Bureau of Reclamation, Grand Coulee Project Office, 48 FLRA 516, 530 (1993)(proposal IV.E.4). A union proposal to freeze any samples not tested

on the day collected was also found to be inconsistent with the government-wide regulation. *Id.,* at 529 (Proposal IV.E.2).

Effective date for Government-wide regulations.

> Under section 7117 of the Statute, Government-wide rules and regulations bar negotiation over and agreement to union proposals that conflict with them. Except for Government-wide rules or regulations implementing 5 U.S.C. § 2302, however, Government-wide rules or regulations do not control over conflicting provisions in a collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed. *See* 5 U.S.C. § 7116(a)(7). (citations omitted).

DA, Headquarters III Corps and Fort Hood and AFGE, 40 FLRA 636, 641 (1991). The Authority went on to say that the Government-wide regulations become enforceable, by operation of law, when the agreement expires. Negotiations or renewal of the CBA will not prevent the regulation or rule from coming into force.

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(3) Negotiating Proposals Which Contradict Agency Regulations-Compelling Need.

If the Union should advance a proposal which contradicts an agency's or its primary national subdivision's regulation or rule, management may assert that the proposal is nonnegotiable because there is a compelling need for the rule or regulation. The union may then petition the Authority, requesting that a compelling need determination be made. The Authority will review the facts and the parties' arguments, and apply its compelling need criteria to make a ruling.

5 U.S.C. § 7117 provides:

> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.
>
> (2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation . . . only if the Authority has determined under subsection (b) of this section that no compelling need exists for the rule or regulation.
>
> (3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency,. . .

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if--

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist."

The proper forum to address the question of compelling need is in a negotiability proceeding and not an ULP proceeding. FLRA v. Aberdeen Proving Ground, 485 U.S. 409 (1988). To demonstrate that a proposal falls outside the duty to bargain based on conflict with an agency regulation for which there is a compelling need, an agency must: (1) identify a specific agency regulation; (2) show that there is a conflict between the regulation and the proposal; and (3) demonstrate that the regulation is supported by a compelling need within the meaning of 5 C.F.R. § 2424.50. Association of Civilian Technicians, Montana Air Chapter No. 29 and Dep't. of Defense, 56 FLRA No. 111 (2000). *See also* American Federation of Government Employees, Locals 3807 and 3824 and U.S. Dep't. of Energy, Western Area Power Administration, 55 FLRA 1,3 (1998).

The compelling need criteria are located at 5 C.F.R. § 2424.50:

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria;

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to insure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

In NFFE and Alabama Air National Guard, 16 FLRA 1094 (1984), the agency argued that its regulation, requiring an appeal of a RIF action be filed 30 days before the effective date of the action, was essential to its operation. Because the union proposal would prolong the time for appeal until after the effective date of the RIF, it could require corrective action after the RIF, and potentially require the agency to undo the RIF. The FLRA opined that while adhering to the agency time limits would be helpful to the agency's mission and the execution of its functions, the regulation was not essential to these agency objectives. In so deciding the FLRA noted that the agency regulation provided that the appeal time limit could be extended, and also recognized that corrective action might be necessary even after a RIF was effectuated, which was exactly the sort of disruption the agency was then arguing that the regulation was essential to prevent.

In Lexington-Bluegrass Army Depot, 24 FLRA 50 (1986), the Authority examined an appeal of an arbitration award which conflicted with agency regulations for which a compelling need had been found. The matter grieved involved an installation holiday closure to conserve energy, which forced employees to take annual leave or be placed on leave without pay. The FLRA found that there was no compelling need for the base closure regulations; that is, a showing of monetary saving alone is insufficient to establish that a regulation is essential, as opposed to merely desirable. In summary Lexington-Bluegrass held that although the decision to close all or part of an installation is nonnegotiable, the determination as to employee leave status during the closure period is mandatorily negotiable.

In Fort Leonard Wood, 26 FLRA 593 (1987), the Authority ordered the command to negotiate on four union proposals made in response to implementation of a smoking policy. Despite the Army's assertion to the contrary, the Authority found the union proposals involved conditions of employment and had only a limited effect on non-bargaining unit members. Most importantly, the Authority decided that the Army had not established a "compelling need" for its regulations governing smoking in workplaces. While smoking restrictions might generally relate to mission accomplishment, the Army had failed to demonstrate that the restrictions were essential to this purpose. Therefore, union proposals to allow smoking in corridors, lobbies, restrooms, and military vehicles, as well as eating facilities and child care centers with certain restrictions, were negotiable.

In AFGE and General Services Administration, 47 FLRA 576, 580 (1993), the Authority restated its position that "collective bargaining agreements, rather than agency regulations, govern the disposition of matters to which they both apply."(citation omitted).

c. Negotiating Matters Which Are Contrary to Statute - Management Rights - Prohibited Subjects (proposals which are not negotiable). Section 7106(a).

Most of the proposals which are contrary to a statute are contrary to the management rights provisions of 5 U.S.C. § 7106. They are those subjects that Congress has decreed will not be negotiated because they go to the heart of managing effectively and efficiently.

(1) Mission, Budget, Organization, Number of Employees, and Agency Internal Security Practices**.** Section 7106(a)(1).

(a) Mission. "[T]he mission of the agency," the Authority said in Air Force Logistics Command (AFLC), 2 FLRA 604 (1980), is "those particular objectives which the agency was established to accomplish." The mission of the Air Force Logistics Command, for example, is the providing "of logistical support to the Air Force." Not all of any agency's programs are part of its mission. An EEO program was held not to be directly or integrally related to the mission of the Air Force Logistics Command. *See also* West Point Teacher's Assoc. v. FLRA, 855 2d. 236 (2d. Cir. 1988); where court held negotiations over school calendar interferes with management's right to determine its mission.

In NLRB Union Local 21 and NLRB, 36 FLRA 853 (1990) the Authority held a union proposal that the Agency change the hours it was open to the public to be nonnegotiable. The Authority found this proposal to be a direct interference with management's right to determine its mission, *i.e.* when it would be open to the public.

(b) Budget. The meaning of budget is not defined in the FSLMRS. In the AFLC case, the agency contended that a proposal requiring the activity to provide space and facilities for union-operated day care centers interfered with the agency's right to determine its budget. In rejecting this contention, the Authority said that a proposal does not infringe on an agency's right to determine its budget unless (a) the proposal expressly prescribed either the programs or operations the agency would include in its budget or the amounts to be allocated in the budget for the programs or operations, or (b) the agency "makes a substantial demonstration that an increase in costs is significant and avoidable and not offset by compensating benefits." Department of the Air Force, Elgin AFB, 24 FLRA 377 (1986), where the FLRA discussed in detail the two-prong test set out in AFLC.

AF LOGISTICS COMMAND, WRIGHT-PATTERSON AFB, OHIO

2 FLRA 604 (1980)

(Extract)

[The Union submitted the following proposal:]

ARTICLE 36 DAY CARE FACILITIES

The employer will provide adequate space and facilities for a day care center at each ALC. The union agrees to operate the day care center in a fair and equitable manner. The use of the facilities to be available to all base employees under the terms and conditions of the constitution and by-laws of such facility. The day care center will be self-supporting, exclusive of the services and facilities provided by the employer.

* * *

The agency next alleges that Union Proposal I violates its right to determine its budget under section 7106(a)(1) of the Statute because it would require the agency to bear the cost of the space and facilities provided for the day care center. The underlying assumption of this position appears to be that a proposal is inconsistent with the authority of the agency to determine its budget within the meaning of section 7106(a)(1) if it imposes a cost upon the agency which requires the expenditure of appropriated agency funds. Such a construction of the Statute, however, could preclude negotiation on virtually all otherwise negotiable proposals, since, to one extent or another, most proposals would have the effect of imposing costs upon the agency which would require the expenditure of appropriated agency funds. Nothing in the relevant legislative history indicates that Congress intended the right of management to determine its budget to be so inclusive as to negate in this manner the obligation to bargain.

There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation. Whether a proposal directly affects the agency's determination of its budget depends upon the definition of "budget" as used in the Statute. The Statute and legislative history do not contain such a definition. In the absence of a clearly stated legislative intent, it is appropriate to give the term its common or dictionary definition.[3] As defined by the dictionary, "budget" means a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the periods and proposals for financing them. In this sense, the agency's authority to determine its budget extends to the determination of the programs and the determination of the amounts required to fund them. Under the Statute, therefore, an agency cannot be required to negotiate those particular budgetary determinations. That is, a union proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in

the budget for them would infringe upon the agency's right to determine its budget under section 7106(a)(1) of the Statute.

Moreover, where a proposal which does not by its terms prescribe the particular programs or amounts to be included in an agency's budget, nevertheless is alleged to violate the agency's right to determine its budget because of increased cost, consideration must be given to all the factors involved. That is, rather than basing a determination as to the negotiability of the proposal on increased cost alone, that one factor must be weighed against such factors as the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances, and the like. Only where an agency makes a substantial demonstration that an increase in cost is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute.

Union Proposal I does not on its face prescribe that the agency's budget will include a specific provision for space and facilities for a day care center or a specific monetary amount to fund them. Furthermore, the agency has not demonstrated that Union Proposal I will in fact result in increased costs. On the contrary, the record is that the matter of the cost to the union for space and facilities is subject to further negotiation. It is not necessary, therefore, to reach the issue of whether the alleged costs are outweighed by compensating benefits. Consequently, Union Proposal I does not violate the right of the agency to determine its budget under section 7106(a) of the Statute.

Finally, it is noted that the agency has not adverted to problems which might arise in connection with implementation and administration of an agreement, should it include Union Proposal I, *vis a vis* provisions of applicable law and Government-wide rule or regulation governing, e.g., the use or allocation of space. There, the Authority makes no ruling as to whether Union Proposal I is consistent with such law or regulation.

* * *

In Fort Stewart Schools v. FLRA, 495 U.S. 461 (1990), the Supreme Court ruled that Fort Stewart had to bargain with the union over pay and certain fringe benefits where these items are not set by law and are within the discretion of the agency. The Court rejected the agency's argument that the proposals were not negotiable because they violated management's right to establish its budget. The Court found that the agency failed to prove that the proposals would result in "significant and unavoidable increases" in the budget.

(c) Organization. In the following case, it was held that a union proposal to implement management's reorganization plan through attrition rather than as management desires would unduly delay management and violate management's right to determine its organization.

NAGE and U.S. Dep't of Veterans Affairs, Johnson Medical Center, 55 FLRA No. 120 (1999)

(Extract)

* * *

The [case] before the Authority on petition for review of negotiability issues filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) . . . . The proposal . . . proposes to phase in an Agency reorganization through attrition.

* * *

Proposals that preclude an agency from exercising a management right unless or until other events occur are generally not within the duty to bargain. . . . Management's right to determine its organization under section 7106(a)(1) of the Statute encompasses the right to determine the administrative and functional structure of the agency, including the relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties. In other words, this right includes the authority to determine how an agency will structure itself to accomplish its mission and functions. *See e.g., American Federation of Government Employees, Local 3807 and U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 54 FLRA 642, 647 (1998) (*WAPA*).

The proposal delays the Agency from fully implementing its reorganization until, through attrition, existing clerks no longer encumber any ward and lead medical clerk positions. As such, the proposal affects the Agency's right to determine its organization. *See id.* (proposal that would require management to alter a reorganization plan affects management's right to determine its organization).

* * *

As noted above with respect to the proposal …under existing case precedent, proposals that preclude an agency from exercising a management right unless or until other events occur are generally not within the duty to bargain . . . . [Thus,] we conclude that the proposed arrangement

is not appropriate under the second inquiry in that analysis because it excessively interferes with management's right to determine its organization.

For additional discussion, *see* Congressional Research Employees Association And The Library Of Congress, 3 FLRA 737 (1980) (holding that a union proposal which would require an agency to create four, instead of two, sections in its American Law Division and mandate that each section be assigned a Section Coordinator, violates management's right to determine its organization).

In NTEU and IRS, 35 FLRA 398, 409-410 (1990), the Authority discussed the meaning of the term "determine its organization".

> The right of an agency under section 7106(a)(1) to determine its organization refers to the administrative and functional structure of an agency, including the relationships of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties. (citations omitted). This right encompasses the determination of how an agency will structure itself to accomplish its mission and functions. This determination includes such matter as the geographic locations in which an agency will provide services or otherwise conduct its operations, and how various responsibilities will be distributed among the agency's organizational subdivisions, how an agency's organizational grade level structure will be designed, and how the agency will be divided into organizational entities such as sections.(footnotes omitted).

In DOD, NGB, Washington Army National Guard, Tacoma, and NAGE, 45 FLRA 782, 786 (1992), the Authority relied on the definition from NTEU and IRS to dismiss a union challenge to a decision by the National Guard to fill certain positions with military personnel rather than with civilians. The Authority determined that filling the position with military personnel went to the right to determine how an agency's grade level organizational structure will be designed. A similar result was reached in DOD, NGB, Michigan Air National Guard, 48 FLRA 755 (1993).

(d) Number of Employees. In E.O. 11491, section 11(b) covered "the number of employees" and "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty." Because both concepts (*i.e,* "the number of employees" and "the numbers . . . of employees assigned to an organizational unit, work project, or tour of duty") were embodied in section 11(b), cases did not distinguish between them. The August 1969, Study Committee Report which led to the issuance of E.O. 11491 did indicate the differences it had in mind. According to the Study Committee, there would be no obligation to bargain on:

> an agency's right to establish staffing patterns for its organization and the accomplishment of its work - the number of employees in the agency and the number, types, and grades of positions or employees assigned in the various segments of its organization and to work projects and tours of duty. (Emphasis supplied)

Thus, "the number of employees" in § 7106(a) which is now a prohibited subject of bargaining, refers to the total number of employees in an agency, including its personnel ceiling, and/or managerial determinations of how many positions are to be filled within the ceiling. The activity or field installation is prohibited from negotiating on these matters within the activity or field installation. The prohibition applies to the total number of employees within a distinct organizational entity.

The "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty," found in section 7106(b)(1) refers to the number of employees in an organizational subdivision. It is a permissive subject and will be discussed later.

A proposal which provided for a seven-day work period for unit employees for the purpose of computing overtime under section 7(k) of the Fair Labor Standards Act, did not violate management's right to determine the number of employees assigned, since nothing in the proposal required a change in either the number of unit employees assigned or a change in the already established work schedule. International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard, 3 FLRA 437 (1980).

(e) Internal Security Practices. In AFGE and Dep't of Veterans Affairs Medical Center Boston, Mass., 48 FLRA 41 (1993) the Authority discussed internal security practices.

> An agency's right to determine its internal security practices under section 7106(a)(1) of the Statute includes the right to determine the policies and practices which are part of its plan to secure or safeguard its personnel, physical property, and operations against internal and external risks. (citations omitted). Where an agency shows a link or reasonable connection between its goal of safeguarding personnel or property and protecting its operations, and its practice or decision designed to implement that goal, a proposal which directly interferes with or negates the agency's practice or decision conflicts with the agency's right to determine internal security practices. (citations omitted).
>
> To establish the necessary link, an agency must show a reasonable connection between its goal of safeguarding personnel or property and its practice designed to implement that goal. (citation omitted). Once a link has been established, the Authority will not review the merits of the agency's plan in the course of resolving a negotiability dispute. (citations omitted).

Id., at 44. (The Authority found a single union proposal relating to the use of rotating shifts for police officers to be nonnegotiable.)

Polygraph tests and similar investigative techniques may not be prohibited in collective bargaining agreement language because, said the FLRA, such practices relate to agencies' internal security and therefore are outside the duty to bargain. AFGE Local 1858 and Army Missile Command, Redstone Arsenal Alabama, 10 FLRA 440 (1982).

An agency's decision to implement a drug-testing program is an exercise of the agency's right under 5 U.S.C.A. § 7106(a)(1) to establish internal security practices. AFGE and Department of Education, 38 FLRA 1068 (1990).

A proposal preventing the agency from towing any illegally parked car until efforts are made to locate the driver was found nonnegotiable in Ft. Ben, Harrison, 32 FLRA 990 (1988).

In NFFE and Army, 21 FLRA 233, the Authority found that a proposal concerning the financial liability of an employee for loss, damage, or destruction of property does not interfere with management's right to determine its internal security.

National Federation Of Federal Employees, Local 29 and DA, Kansas City District, Corps Of Engineers,

21 FLRA 233 (1986)

(Extract)

I. Statement of the Case

This case is before the Authority because of a negotiability appeal under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of three Union proposals.

II. Union Proposal 1

The Employer recognizes that all employees have a statutorily created right to their pay, retirement fund and annuities derived therefrom. The Employer further recognizes that charges/allegations of pecuniary liability shall not be construed to be indebtedness or arrears to the United States until the affected employee has had the opportunity to fully exercise his/her rights of due process; wherein due process shall provide equal protection to all employees and shall require a hearing before an unbiased, unprejudiced and impartial tribunal, free from any command pressure or influence. All claims by the Government for pecuniary liability

shall be capped at a maximum of $150.00. (Only the underlined portion is in dispute.)

A. Positions of the Parties

Union Proposal 1 would limit an employee's liability for the loss, damage to or destruction of government property to $150.00, whereas, under the Agency's existing regulations, an employee's liability is now limited to an employee's basic monthly pay. The Agency has refused to negotiate over the proposal contending that the proposal is inconsistent with the Federal Claims Collection Act of 1966 ("Claims Act"), Pub. L. No. 89-508, 80 Stat. 309 (1966) and violates its management right to determine its internal security practices pursuant to section 7106(a)(1) of the Statute.

The Union disputes the Agency's contentions.

B. Analysis

1. Management Rights

In agreement with the Agency, the Authority finds that the proposal violates the Agency's right to establish its internal security practices pursuant to section 7106(a)(1) of the Statute. An agency's right to determine its internal security practices includes those policies and actions which are part of the agency's plan to secure or safeguard its physical property against internal or external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the agency's activities. *See* American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 14 FLRA 6 (1984) (Union Proposal 2), *appeal docketed sub nom*. Federal Labor Relations Authority v. Office of Personnel Management, No. 84-1325 (D.C. Cir. July 18, 1984). The Agency's plan as set forth in its regulation provides that an employee's pecuniary liability will be one month's pay or the amount of the loss to the Government, whichever is less. The Agency contends that this regulation acts as a deterrent and encourages employees to exercise due care when dealing with government property. Hence, it constitutes a management plan which is intended to eliminate or minimize risks to government property by making clear the consequences of property destruction, loss or damage, and is within the Agency's right to determine its internal security practices.

Even if, as the Union argues, the Agency's plan is designed primarily as a means of recouping government loss, in the Authority's view the Agency's statutory authority includes determining that the plan has, also, the effect of minimizing the risk of the loss occurring in the first place. Similarly, the Union's argument that the Agency's plan is not an effective

deterrent is beside the point. It is not appropriate for the Authority to adjudge the relative merits of the Agency's determination to adopt one from among various possible internal security practices, where the Statute vests the Agency with authority to make that choice. In this regard, the Union's contention that its proposal limiting liability to $150.00 is merely a procedural proposal under section 7106(b)(2) of the Statute is not persuasive. The proposal directly impinges on management's right to establish its internal security practices.

2. Inconsistent with Federal Law

The Claims Act specifically states that the Act does not diminish the existing authority of a head of an agency to litigate, settle, compromise or close claims. Pursuant to 10 U.S.C. § 4831, *et seq*., the Secretary of the Army was vested with the existing authority to compromise, settle or close claims when the Claims Act was enacted.

There is no provision in 10 U.S.C. § 4831 which limits the Secretary's right to settle, compromise or close claims in fulfilling his responsibilities under the Act. We find that insofar as the Secretary has unrestricted authority to close, settle and compromise on claims for destroyed or damaged property, the Union's proposal is not inconsistent with the Claims Act.

C. Conclusion

Based on the arguments of the parties, the Authority finds that Union Proposal 1 violates section 7106(a)(1) of the Statute and, thus, is outside the duty to bargain. We also find that the proposal is not inconsistent with the Federal Claims Collection Act.

[Discussion of Union Proposal II omitted. The Authority found that the provision, which would force the agency to choose between holding the employee liable or disciplining the employee, directly interfered with management's right to discipline employees under section 7106(a)(2)(A) and was outside the Agency's duty to bargain.]

The Army's civilian drug testing program, embodied in AR 600-85, directly affects its internal security.2 After considering a number of negotiability issues and appeals concerning drug testing, the Authority issued its lead opinion on the matter in 1988.

2 The Army changed the Civilian Drug Abuse Testing Program in 1999. See change 3 to Dep't of the Army Reg. 600-85, Alcohol and Drug Abuse Prevention and Control Program para. 5-14 (1999) (AR 600-85). *See also* Dep't of the Army Memo 600-3, Civilian Personnel, Headquarters Department of the Army Civilian Drug Testing (2000). These changes do not affect the negotiability of the drug testing program; it

NFFE, Local 15, And U.S. Army Armament, Munitions and Chemical Command Rock Island, Illinois

30 FLRA 1046 (1988)

(Extract)

I. Statement of the Case.

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute). It presents issues relating to the negotiability of proposals concerning the Agency's testing of certain selected categories of civilian employees for drug abuse. For the reasons set forth below, we find that three proposals are within the duty to bargain and nine proposals are outside the duty to bargain.

Specifically, we find that Proposal 1, which provides for drug testing of employees only on the basis of probable cause or reasonable suspicion, is outside the duty to bargain under section 7105(a)(1) of the Statute because it directly interferes with management's right to determine its internal security practices and is not a negotiable appropriate arrangement under section 7106(b)(3). Proposal 2, providing that tests and equipment used for drug testing be the most reliable available, we find to be nonnegotiable under section 7106(a)(1) of the Statute because it directly interferes with management's right to determine its internal security practices and is not an appropriate arrangement under section 7106(b)(3). . . .

II. Background

A. The Army Drug Testing Program.

On April 8, 1985, the Department of Defense issued DOD Directive 1010.9, "DOD Civilian Employees Drug Abuse Testing Program." On February 10, 1986, the Department of the Army promulgated regulations implementing the DOD Directive. Interim Change No. 3 to Army Regulation 600-85, Alcohol and Drug Abuse Prevention and Control Program ("Interim Change to AR 600-85" or "amended regulation"). The proposals in dispute in this case arose in connection with impact and implementation bargaining over paragraph 5-14 of the Interim Change to AR 600-85.

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is still an internal security matter subject only to impact and implementation bargaining. AR 600-85, para. 5-10.

Paragraph 5-14 states that the Army has established a drug abuse testing program for civilian employees in critical jobs.

* * *

[C]ivilian employees in jobs designated as critical, as well as prospective employees being considered for critical jobs, will be screened under the civilian drug testing program. Id. at paragraph 5-14c(1). Current employees in these critical positions are subject to urinalysis testing in three situations: (1) on a periodic, random basis; (2) when there is probable cause to believe that an employee is under the influence of a controlled substance while on duty; and (3) as part of an accident or safety investigation. Id. at paragraph 5-14e. Prospective employees for selection to critical positions will be tested "prior to accession." Id. These requirements are considered to be a condition of employment. Id. . . .

The National Federation of Federal Employees, Local 15 (the Union) represents a bargaining unit of civilian employees at the U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois (the Agency). The Union submitted collective bargaining proposals regarding the implementation of the amended regulation as to unit employees. The Agency alleged that 12 of the proposals are outside the duty to bargain under the Statute. On May 2, 1986, the Union filed with the Authority a petition for review of the Agency's allegation of nonnegotiability.

B. Events Subsequent to the Filing of the Instant Petition for Review

1. Executive Branch and Congressional Actions

* * *

On September 15, 1986, President Reagan issued Executive Order 12564, entitled "Drug-Free Federal Workplace." See 51 Fed. Reg. 32889 (Sept. 17, 1986). Section 3 of the Executive Order directs the head of each Executive agency to establish mandatory and voluntary drug testing programs for agency employees and applicants in sensitive positions. Section 4(d) authorizes the Secretary of Health and Human Services (HHS) to promulgate scientific and technical guidelines for drug testing programs, and requires agencies to conduct their drug testing programs in accordance with these guidelines once promulgated. Section 6(a)(1) states that the Director of the Office of Personnel Management (OPM) shall issue "government-wide guidance to agencies on the implementation of the terms of [the] Order[.]" Section 6(b) provides that "[t]he Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order."

On November 28, 1986, OPM issued Federal Personnel Manual (FPM) Letter 792-16, "Establishing a Drug-Free Federal Workplace." Section 2(c) of the letter states: "Agencies shall ensure that drug testing programs in existence as of September 15, 1986, are brought into conformance with E.O. 12564." Sections 3, 4, and 5 of the FPM Letter are entitled, respectively, "Agency Drug Testing Programs," "Drug Testing Procedures," and "Agency Action Upon Finding that an Employee Uses Illegal Drugs."

* * *

On February 13, 1987, HHS issued "Scientific and Technical Guidelines for Drug Testing Programs" (Guidelines) as directed in the Executive Order. Thereafter, the Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, 101 Stat. 391, 468 (July 11, 1987) was enacted. Section 503 of that Act required notice of the Guidelines to be publicized in the Federal Register. Notice of the Guidelines was published on August 14, 1987, and interested persons were invited to submit comments. *See* 52 Fed. Reg. 30638 (Aug. 14, 1987). As of the date of this decision, final regulations have not been published in the Federal Register.

* * *

III. Proposal 1.

Section II - Frequency of Testing

The parties agree that employees in sensitive positions defined by AR 600-85 may be directed to submit to urinalysis testing to detect presence of drugs only when there is probable cause to suspect the employees have engaged in illegal drug abuse.

A. Positions of the Parties

The Agency contends that this proposal conflicts with its right to determine its internal security practices under section 7106(a)(1) of the Statute. According to the Agency, it has determined that as part of its program to test employees in certain critical positions, these tests must be conducted periodically without prior announcement to employees. The Agency contends that the proposal would expressly limit the Agency's right to randomly test employees and would impermissible place a condition of "probable cause" on the Agency before the right could be exercised.

* * *

The Union contends that the proposal involves conditions of employment and that the Agency has failed to provide any evidence linking testing for off-duty drug use to internal security. The Union also argues that the Agency has not adequately shown that it has a compelling need for the amended regulation. Finally, the Union asserts that even if

the proposal infringes on an internal security practice, it is negotiable as an appropriate arrangement. The Union contends that this proposal is intended to address the harms that employees will suffer, such as invasion of privacy and the introduction of an element of fear into the workplace, by eliminating the random nature of the testing and substituting a test based on probable cause.

In its supplemental submission, the Union contends that proposals stating that there should be testing of civilian employees for drug use only when there is probable cause do not conflict with Executive Order 12564. The Union also argues that its proposals are consistent with section 3(a) of the Executive Order, which provides that the extent to which employees are tested should be determined based on "the efficient use of agency resources," among other considerations. Union's Supplemental Submission of September 18, 1987, at 2.

B. Discussion

* * *

2. Whether Proposal 1 Directly Interferes with Management's Right to Determine its Internal Security Practices under section 7106(a)(1)

In our view, the proposal directly interferes with management's right to determine its internal security practices under section 7106(a)(1) of the Statute. By restricting the circumstances in which employees will be subject to the drug testing program, the proposal has the same effect as Proposal 2 in National Association of Government Employees, SEIU, AFL-CIO and Department of the Air Force, Scott Air Force Base, Illinois, 16 FLRA No. 57 (1984). The proposal in that case prohibited management from inspecting articles in the possession of employees unless there were reasonable grounds to suspect that the employee had stolen something and was intending to leave the premises with it. The Authority concluded that by restricting management's ability to conduct unannounced searches of employees and articles in their possession, the proposal directly interfered with management's plan to safeguard its property.

Similarly, by limiting management's ability to conduct random testing for employee use of illegal drugs, Proposal 1 directly interferes with management's internal security practices. As the Agency indicated in issuing the Interim Change to AR 600-85, one purpose for instituting the drug testing program is to identify "individuals whose drug abuse could cause disruption in operations, destruction of property, threats to safety for themselves and others, or the potential for unwarranted disclosure of classified information through drug-related blackmail." Interim Change to AR 600-85, Paragraph 5-14a(3). Clearly, the drug testing program set forth in the Agency regulation, including the provision for unannounced

random tests, Interim Change to AR 600-85, Paragraph 5-14e(1)(b), concerns the policies and actions which are a part of the Agency's plan to secure or safeguard its physical property against internal and external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the Agency's activities.

The Agency has decided, in the Interim Change to AR 600-85, Paragraph 5-14e(1)(b), to use random testing as a part of its plan to achieve those purposes because such testing by its very nature contributes to that objective. Unannounced random testing has a deterrent effect on drug users and makes it difficult for drug users to take action to cover up their use or otherwise evade the tests. *See, for example*, Agency's Supplemental Statement of Position of June 30, 1986 at 2. As such, the use of random testing constitutes an exercise of management's right to determine its internal security practices. *See also* National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, U.S. Army Corps of Engineers, Kansas City, Missouri, 21 FLRA 233, 234 (1986), *vacated and remanded as to other matters sub nom.* NFFE, Local 29 v. FLRA, No. 86-1308 (D.C. Cir. Order Mar. 6, 1987), Decision on Remand, 27 FLRA No. 56 (1987).

We will not review the Agency's determination that the establishment of a drug testing program involving random tests for the positions which it has identified as sensitive positions is necessary to protect the security of its installations. As indicated above, the purpose of the Interim Change to AR 600-85 is to prevent the increased risk to security that the Agency has identified as resulting from drug use by employees in those sensitive positions. That is a judgment which is committed to management under section 7106(a)(1) of the Statute. Where a link has been established between an agency's action--in this case random drug testing--and its expressed security concerns, we will not review the merits of that action. We find that such a linkage is present in this case. *See also* the Preamble to Executive Order 12564 and section 1 of FPM Letter 792-16.

This case is not like Department of Defense v. FLRA, 685 F.2d 641 (D.C. Cir. 1982). In that case, the court concluded that there was no "connection" between the proposal at issue and the agency's determination of the internal security practices. Rather, this case is similar to Defense Logistics Council v. FLRA, 810 F.2d 234 (D.C. Cir. 1987). In that case, the Authority found that proposals pertaining to the agency's program to prevent drunk driving were nonnegotiable because they directly interfered with management's right to determine its internal security practices under section 7106(a)(1). In upholding that decision, the U.S. Court of Appeals for the District of Columbia Circuit rejected the claim that the drunk driving program did not involve internal security practices. The court concluded that the Authority's interpretation of the

term "internal security practices" to include preventive measures designed to guard against harm to property and personnel caused by drunk drivers was a reasonable disposition of that issue. In reaching that conclusion, the court specifically distinguished the Department of Defense decision. We see no material difference between the Agency's drug testing program and the drunk driving program.

* * *

IV. Proposal 2

Section III.A - Testing Methods and Procedures

A. The parties agree that methods and equipment used to test employee urine samples for drugs be the most reliable that can be obtained.

A. Positions of the Parties

The Agency asserts that the proposal concerns the methods, means, or technology of performing its work, within the definition of section 7106(b)(1) of the Statute, of assuring, through random drug testing, the fitness of certain employees in critical positions. The Agency contends that by restricting and qualifying the methods and equipment used by the Agency in performing its work, the proposal interferes with the Agency's right under section 7106(b)(1). The Agency also contends that the proposal is not negotiable because it concerns techniques used by the Agency in conducting an investigation relating to internal security and therefore falls within management's right to determine internal security practices under section 7106(a)(1). Finally, the Agency contends that the proposal is not a negotiable appropriate arrangement.

The Union contends that the proposal concerns the methods and equipment used to test employee urine samples, and does not concern the technology, methods, and means of performing work within section 7106(b)(1) because drug testing is not the work of the Agency. The Union also argues that the proposal does not concern the Agency's internal security practices since urinalysis testing bears no relationship to employee performance or conduct at the workplace. Finally, the Union argues that the proposal is an appropriate arrangement because the proposal assures that the most accurate testing methods and equipment will be used.

B. Discussion

1. Whether Proposal 2 Directly Interferes with Management's Right to Determine its Internal Security Practices under section 7106(a)(1)

An integral part of management's decision to adopt a particular plan for protecting its internal security as its determination of the manner in which it will implement and enforce that plan. For example, where management establishes limitations on access to various parts of its operations, it may use particular methods and equipment to determine who may and who may not be given access, such as coded cards and card reading equipment. Polygraph tests may be used as part of management's plan to investigate and deter threats to its property and operations. *See* American Federation of Government Employees, Local 32 and Office of Personnel Management, 16 FLRA 40 (1984); American Federation of Government Employees, AFL-CIO, Local 1858 and Department of the Army, U.S. Army Missile Command, Redstone Arsenal, Alabama, 10 FLRA 440, 444-45 (1982). Similarly, an integral aspect of establishing its drug testing program is management's decision as to the methods and equipment it will use to determine whether employees have used illegal drugs. Put differently, it is not possible to have a program of testing for illegal drugs use by employees without determining how the proposed tests are to be conducted. Management's determination of the methods and equipment to be used in drug testing is an exercise of its right to determine its internal security practices under section 7106(a)(1) of the Statute.

Proposal 2 requires management to use the most reliable testing methods and equipment in the implementation of its drug testing program. The proposal establishes a criterion governing management's selection of the methods and the equipment to be used in any and all aspects of the testing program. It is broadly worded and does not distinguish between the particular parts or stages of the program or the purposes for which the tests and equipment would be used. The effect of the proposal is to confine management's selection of methods and equipment for use at any stage of the testing procedure only to those that are the most reliable. In short, management would be precluded from selecting equipment or methods that are reliable for a particular purpose if there are equipment and methods that were more reliable for that purpose.

By limiting the range of management's choices as to the methods and equipment it may use to conduct drug tests--regardless of the particular phase of the testing process or the purpose of the test--Proposal 2 establishes a substantive criterion governing the exercise of management's determination of its internal security practices. Generally speaking, the most accurate and reliable test at this time for confirming the presence of cocaine, marijuana, opiates, amphetamines, and phencyclidine (PCP) is the gas chromatography/mass spectrometry

(GC/MS) test. *See* the proposed Guidelines, 52 Fed. Reg. 30640. As indicated above, the plain wording of Proposal 2 would therefore appear to require the use of that test at all stages of the drug testing program. *See* Union Response to Agency Statement of Position at 9. It would preclude the use, for example, of the less reliable immunoassay test at any stage or for any purpose, including as an initial screening test. We find, therefore, that the proposal directly interferes with management's rights under section 7106(a)(1) of the Statute and is outside the duty to bargain unless, as claimed by the Union, it is an appropriate arrangement under section 7106(b)(3).

* * *

A narrow majority of Supreme Court Justices approved the drug testing of custom service employees seeking jobs in drug interdiction or which require the use of firearms. The Justices held that the test did not violate the 4th amendment prohibition against unreasonable government search and seizure, despite an absence of "individual suspicion." NTEU vs. Von Raab, 489 U.S. 656 (1989). Also, in a companion case, the court held that drug and alcohol testing of railway train crew members involved in accidents is legal. This case holds that general rules requiring testing "supply an effective means of deterring employees engaged in safely-sensitive task from using controlled substance or alcohol in the first place," Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989). The Army's drug testing program was sustained in Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989). The court relied upon the Supreme Court's decisions in Skinner and Von Raab. In Aberdeen Proving Ground v. FLRA, 890 F.2d 467 (D.C. Cir. 1989) the D.C. Circuit held that proposals concerning split samples are not negotiable.

In International Federation of Professional and Technical Engineers and Norfolk Naval Shipyard, 49 FLRA 225 (1994), the FLRA held that a union proposal to provide one hour advance notice to employees of upcoming drug tests was nonnegotiable because it interferes with management's right to determine internal security practices.

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(2) In Accordance with Applicable Laws - To Hire, Assign, Direct, Lay Off, and Retain Employees in the Agency, or To Suspend, Remove, Reduce in Grade or Pay, or Take Other Disciplinary Action Against Such Employees (5 U.S.C. § 7106(a)(2)(A)).

(a) To Hire Employees. In Internal Revenue Service, 2 FLRA 280 (1979), the Authority held that the portion of an upward mobility proposal requiring that a certain percentage of positions be filled was violative of section 7106(a)(2)(A). The FLRA said:

> This requirement would violate management's reserved authority under section 7106(a)(2)(A) ... to "hire" and "assign" employees or to decide not to take such actions.

The decision whether to fill vacant positions is encompassed within the agency's right to hire. *See* AFGE Local 3354 and U.S. Dep't of Agriculture Farm Service Agency, Kansas City, 54 FLRA No. 81 (1998). However, in Internal Revenue Service, the Authority ruled that the portion of the proposal requiring management to announce a certain percentage of its vacancies as upward mobility positions was found to be a negotiable procedure. The agency had argued that the proposal would require it to perform a potentially useless act, thereby causing unreasonable delay when the agency decided to fill the positions as other than upward mobility positions or decided not to fill them at all. The Authority, invoking the "acting at all" doctrine it employed in Fort Dix, 2 FLRA 152 (1979), found the "unreasonable delay" argument without dispositive significance.

In Fort Bragg Ass'n of Educators v. FLRA, 870 F.2d 698 (D.C. Cir. 1989), the court looked at the negotiability of a union proposal that teachers in DODDS not be required to sign personal service contracts (PSC) as a condition of employment. The court overturned the FLRA's ruling that the proposal was nonnegotiable because it interfered with management's right to hire under § 7106(a)(2)(A). The court said that the PSC was not an interference with the decision to hire, it was only the procedure that the Army used to record the terms of the appointment. Procedures are subject to bargaining under § 7106(b)(2). The court also cited a Second Circuit decision that held that the use of PSC was unlawful. If the use of PSC is unlawful, then the Army was not hiring in accordance with applicable law as required by § 7106(a)(2). (On remand, the Authority ordered the Army to bargain. NEA and Fort Bragg Schools, 34 FLRA 18 (1989)).

(b) To Assign Employees. The right to "assign employees" applies to moving employees to particular positions and locations. AFGE Local 3354 and U.S. Dep't of Agriculture Farm Service Agency, Kansas City, 54 FLRA No. 81 (1998).

AFGE, Local 987 and
Air Force Logistics Center, Robins AFB, Georgia

35 F.L.R.A. 265 (1990)

(Extract)

I. Statement of the Case

This case is before the Authority based upon a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It concerns the negotiability

of three proposals which require the Agency to make reassignments based on volunteers or, in the event that there is an insufficient number of volunteers, inverse order of seniority. A section of one of the proposals also permits employees who are involuntarily reassigned to transfer back to their previous positions after 120 days. The Agency filed a Statement of Position in support of its contention that the proposals are nonnegotiable. The Union did not file a Response to the Agency's Statement of Position, although the Authority granted the Union's request for an extension of time to file a response. For the reasons which follow, we find that the proposals are nonnegotiable because they interfere with management's rights to assign employees and assign work under section 7106(a)(2)(A) of the Statute.

II. Background

The Warner Robins Air Force Logistics Center, Directorate of Maintenance, employs 7,000 employees in 6 divisions. This case involves three proposals submitted in response to three "planned reassignments/reorganizations within the Aircraft, Industrial Products, and Electronics Divisions," as described below. Agency Statement of Position at 2.

First, to accommodate "a decrease in workload in the Electronics Division and an increase in workload in the Aircraft Division," management "proposed the reassignment of 47 employees from the Production Branch of the Electronics Division (MAI) to the Production Branch of the Aircraft Division (MAB)." Id. The reassignment involved relocation to a new building, new position descriptions and different work, performance standards and supervisors. Id. According to the Agency, the selections of employees for these positions were based on "qualifications, the need for services in the gaining/losing organizations, and other standard managerial considerations." Id.

Second, to shift "only the responsibility for the work" from the Aircraft Division to the Industrial Products Division, management proposed the reassignment of approximately 80 employees from the Production Branch of the Aircraft Division to the Production Branch of the Industrial Products Division. There was no physical move and there were "no significant changes in the employees' duties and responsibilities, supervisors, etc." Id. at 3. [Emphasis in original.]

Third, "to more efficiently organize the workload to enhance the utilization of some 66 employees," management proposed reorganization of the Scheduling Branch in the Aircraft Division. Id. at 2. "The employees did not physically move nor was there any change in duty, hours, title, grade, or series, etc. The only significant change was in supervisory assignments and the flow of the workload." Id.

III. Proposals

Proposal 1

MAI PERSONNEL FILLING MAB AIRCRAFT ELECTRICIAN POSITIONS

With respect to the MAI employees that are to fill the Aircraft Electrician slots in MAB, it is agreed that the positions will first be offered to volunteers. In the event that there are more volunteers than slots available in MAB, the volunteers with the most seniority (SCD) Service Computation Date, will be permitted the slots. In the event that there are insufficient volunteers to fill the MAB slots, the MAI employees with the least seniority (SCD) will fill the slots.

Proposal 2 . . .

(4) After 120 days a drafted employee will be permitted a lateral transfer back to the MAB Division.

Proposal 3

It is agreed by the parties that the staffing of both Material Support Unit (MSU) and Production Support Unit (PSU) will be done in the following manner:

(1) Solicit Volunteers from all the employees involved.

(2) If more volunteers are obtained than actual available positions, the volunteers will fill the slots in order of seniority.

(3) If not enough volunteers are obtained the positions will be filled by drafting in inverse order of seniority until all required positions are filled.

It is further agreed that staffing of multiple shifts will be staffed IAW Article 1 of the Local Supplement to the MLA and overtime assignments will be filled IAW Article 5 of the Local Supplement to the MLA.

IV. Positions of the Parties

The Union states that the intent of the proposals is to apply the procedures established in the parties' master labor agreement governing the assignment to overtime, details, loans and temporary duty (TDY) to the reassignments and reorganization proposed by the Agency. Union's Petition for Review at 4. The Union claims that it "has no interest in determining the qualifications; whether or not the [Agency] uses competitive procedures; which positions to fill, if any; the numbers, grades

or types; or any other management right provided by 5 U.S.C. § 7106." Id. The Union further argues that the proposals are consistent with law and regulation because they would apply within the context of the parties' master labor agreement and local supplemental agreement, which require compliance with all applicable laws and regulations. Id. The Union further argues that if the proposals are found to interfere with management's rights, they constitute appropriate arrangements, and/or negotiable procedures for employees affected by the exercise of those rights. *Id*.

* * *

The Agency argues that the proposals are nonnegotiable because they conflict with management's rights to assign employees and to assign work. It asserts that the proposals interfere with the Agency's right to determine: (1) which employee will be assigned; (2) the skills and qualifications needed for the position; and (3) whether employees possess the necessary skills and qualifications. The Agency argues that Proposal 2 also interferes with management's right to assign work because it interferes with management's right to determine the duration of the assignment. Agency Statement of Position at 9-10. Lastly, the Agency argues that Proposal 3 concerns the duties the "[A]gency will assign to an employee and under whose supervision the employees will work, matters within the province of the Agency." Agency Statement of Position at 11.

V. Analysis and Conclusions

The right to assign employees under section 7106(a)(2)(A) encompasses the right to make assignments of employees to positions. For example, *see* American Federation of Government Employees, AFL-CIO, Local 738 and Department of the Army, Combined Arms Center and Fort Leavenworth, Fort Leavenworth, Kansas, 33 FLRA 380 (1988) (Combined Arms Center); and Fort Knox Teachers Association and Fort Knox Dependent Schools, 25 FLRA 1119 (1987) (Fort Knox Dependent Schools), *reversed as to other matters sub nom.* Fort Knox Dependent Schools v. FLRA, 875 F.2d 1179 (6th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3353 (U.S. Nov. 7, 1989) (No. 89-736). This right includes: (1) making reassignments as well as "initial" assignments; (2) determining the particular qualifications and skills needed to perform the work of the position, including such job-related individual characteristics as judgment and reliability; and (3) determining whether employees meet those qualifications. *Id*.

In Combined Arms Center, the Authority held that a proposal which required the agency to reassign either a volunteer or the least senior employee from among those in positions affected by a realignment of an engineering technician position from one division to another was nonnegotiable. The Authority found that the proposal directly interfered with management's right to assign employees because it did "not allow the

Agency to make any judgment on the qualifications of those employees, relative to each other or to other employees, to perform the work of the position in [the gaining division]." 33 FLRA at 382. *See also* Naval Air Rework Facility, Jacksonville, Florida and National Association of Government Inspectors and Quality Assurance Personnel, 27 FLRA 318 (1987) (arbitration award could not properly enforce a collective bargaining agreement so as to deny an agency the authority to assign employees to different shifts for cross-training purposes).

In some circumstances, there is a duty to bargain over the procedure for determining which one of two or more employees who perform the same work will be selected for an assignment or reassignment. Such a procedure is negotiable only to the extent that it applies "when management finds that two or more employees are equally qualified for an assignment." [Emphasis in original.] Combined Arms Center, 33 FLRA at 383 *citing* Overseas Education Association, Inc. and Department of Defense Dependents Schools, 29 FLRA 734, 793 (1987) (proposal to use seniority as a tie breaker where two or more employees are equally qualified and capable of performing held negotiable), *aff'd mem. as to other matters sub nom.* Overseas Education Association, Inc. v. FLRA, 872 F.2d 1032 (D.C. Cir. 1988).

For example, where management establishes more than one shift during which the same work is performed and the employees have the required qualifications and skills to perform the duties, a proposal concerning which employees will be assigned to various shifts is negotiable. Laborers' International Union of North America, AFL-CIO-CLC, Local 1267 and Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 686, 687 (1984) (proposal to offer vacancies on Monday through Friday shift to most senior "otherwise qualified" employees on irregular shifts held negotiable). Similarly, where management determines that it is necessary for some employees to perform the duties of their positions at a different location, and that the employees management determines have the required qualifications and skills, a proposal concerning which of those employees who are assigned to the positions will do the work does not conflict with an agency's right to assign employees. National Treasury Employees Union and Internal Revenue Service, 28 FLRA 40, 43 (1987) (proposal to assign certain home office rather than field-located work to union officials held negotiable); American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA 83 (1981) (proposal to assign temporary duty in a different geographical area based on seniority held negotiable).

In the present case, Proposals 1, 2, and 3 require the Agency to reassign volunteers or, if there are too many or not enough volunteers, to use seniority as the criterion for reassignment. Management has not

determined that the employees involved are equally qualified for the assignments as discussed above. To the contrary, the Agency asserts that the proposals require it to reassign the employees "without regard for the skills and qualifications needed to do the work as well as such job related characteristics as judgment and reliability." Agency Statement of Position at 8-9.

By requiring volunteers or seniority to be determinative of which employees will be reassigned, Proposals 1, 2, and 3 prevent the Agency from exercising its judgment concerning the qualifications of the reassigned employees to perform the work of the new positions. Therefore, we find that Proposals 1, 2, and 3 directly interfere with the Agency's right to assign employees by preventing the Agency from assigning only employees whom it determines possess the qualifications and skills needed for the "planned reassignment/reorganizations within the Aircraft, Industrial Products, and Electronic Divisions." Agency Statement of Position at 2. See, for example, Combined Arms Center; and Fort Knox Dependent Schools.

The wording in Proposal 2, which restricts employees who volunteer to those who possess "the desired grades and skills," does not render the proposal negotiable. By requiring the Agency to reassign volunteers from other sections within the MAB Division who possess "the desired grades and skills," the proposal precludes the Agency from taking into consideration the particular needs of the various sections and divisions within the Agency. Proposals which have the effect of forcing an agency to reassign employees to certain positions irrespective of organizational or mission requirements directly interfere with management's right to assign employees under the Statute and are outside the duty to bargain. *See e.g.,* International Brotherhood of Electrical Workers, Local 2080 and Department of the Army, U.S. Army Engineer District, Nashville, Tennessee, 32 FLRA 347, 357 (1988) (Provisions 3 and 4, which required management to fill vacancies with internal candidates from organizational units or classifications having a surplus of employees, directly interfered with management's right to assign employees); American Federation of Government Employees, Local 85 and Veterans Administration Medical Center, Leavenworth, Kansas, 32 FLRA 210, 217 (1988) (Proposal 11, which required the agency to assign either all or none of several particular employees to certain positions, directly interfered with management's right to assign employees under the Statute).

In addition, Section 4 of Proposal 2 interferes with management's rights to assign employees and assign work because it prevents the Agency from determining the duration of assignments. Deciding when an assignment begins and ends is inherent in the right to assign employees under section 7106(a)(2)(A). *See* American Federation of Government

Employees, AFL-CIO, Local 916 and Tinker Air Force Base, Oklahoma, 7 FLRA 292 (1981) (Provision II, restricting certain details to 60 days, found nonnegotiable). *See also* Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO and Norfolk Naval Shipyard, 31 FLRA 131, 139-40 (1988) (provision restricting agency's ability to assign an employee to a detail for more than 90 days in a calendar year held nonnegotiable). Section 4 of Proposal 2 permits employees to transfer back to their former position after 120 days. This section prevents the Agency from determining the duration of a particular assignment and, thereby, directly interferes with management's rights to assign employees and assign work.

* * *

Accordingly, we find that Proposals 1, 2, and 3 directly interfere with management's rights to assign employees and assign work and that the Union has not provided a basis for determining that any of these proposals are negotiable as appropriate arrangements. Therefore, Proposals 1, 2, and 3 are outside the duty to bargain.

VI. Order

The petition is dismissed.

The right to assign employees encompasses the right to determine the skills and qualifications necessary to perform the job, as well as other job-related characteristics, such as judgment and reliability, and the right to determine whether individual employees meet those qualifications. American Federation of Gov't. Employees, Local 3295 and U.S. Dep't of the Treasury, Office of Thrift Supervision, 47 FLRA 884, 907 (1993), aff'd 46 F3d 73 (D.C. Cir. 1995). Further, the right to assign employees includes the right to decide among qualified employees in filling a position, not just to determine whether the minimum qualifications are met. American Federation of Gov't. Employees, Local 3172 and U.S. Dep't of Health and Human Services, Social Security Administration, Modesto, CA, 48 FLRA 489,496 (1993).

Given the Authority's interpretation of management's right to assign employees, the Authority found a number of proposals requiring that seniority be used in determining which employee is to be assigned to a position violative of Section 7106(a)(2)(A). They included a requirement that seniority be used in detailing employees to lower-graded positions, in detailing employees to positions outside the unit, and reassigning employees to other duty stations.

On the other hand, the Authority held that a proposal which required management to use seniority in detailing employees to higher- or equal-graded positions, when management elects not to use competitive procedures, was negotiable.

Other proposals found to interfere with management's right to assign employees to positions include:

1. Requiring that an employee be granted administrative leave four times to the extent necessary to sit for any bar or CPA examination. NTEU and Dep't of Treasury, 39 FLRA 27 (1991).

2. Requiring appraiser to be at least one grade level above the employee to be appraised and to have consistently monitored the employee's work performance. Professional Airways Systems Specialist and Dep't of Navy, 38 FLRA 149 (1990).

3. Requiring the length of an assignment to phone duty be for no more than one day. AFGE and Dep't of Labor, 37 FLRA 828 (1990).

(c) To Direct Employees.

> The right to direct employees in the agency is not defined in the statute, is not specifically discussed in the legislative history and has not been applied in prior decisions of the Authority. Therefore, consistent with the main purpose and meaning of the Statute and in the absence of any indication the phrase as used in the Statute has a meaning other than its ordinary meaning, the right "to direct . . . employees in the agency" means to supervise and guide them in the performance of their duties on the job. NTEU and Dep't of the Treasury, Bureau of Public Debt, 3 FLRA 769, 775 (1980).

The Authority held that a proposal to establish a particular critical element and performance standard would directly interfere with the exercise of management's rights to direct employees and to assign work under section 7106(a)(2)(A) and (B) of the Statute and, therefore, was not within the duty to bargain. *Id.*

A number of cases have addressed a variety of similar proposals concerning the criteria management uses to determine job critical elements and performance standards. In all these cases, the FLRA has held that these proposals are not negotiable because they would curtail management's unlimited right to assign and direct work. *See* NTEU and Dept. of HHS, 7 FLRA 727 (1983); AFGE Local 1968 and DOT St. Lawrence Seaway, 5 FLRA 70 (1981), *aff'd sub. nom*. AFGE v. FLRA, 691 F.2d 565 (D.C. Cir. 1982). But, union proposals that mandate discussions between managers and employees of performance appraisals before the evaluations go to a reviewing official are negotiable. Such advance discussions do not interfere with management's decision making processes or any other aspect of its reserved right to direct employees and assign work. NFFE and Dept. of the Army, Fort Monmouth, N.J., 13 FLRA 426 (1983).

The Authority recently reiterated these rules in AFGE and HHS, SSA District Office, Worchester, Mass., 49 FLRA 1408, (1994).

(d) To Suspend, remove, reduce in grade or pay, or take other disciplinary action.

National Federation Of Federal Employees, Local 1438 and U.S. Department Of Commerce, Bureau Of The Census, Jeffersonville, Indiana

47 FLRA 812 (1993)

(Extract)

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The appeal concerns the negotiability of one provision of a collective bargaining agreement that was disapproved by the Agency head under section 7114(c) of the Statute. The provision concerns the timeliness with which management effectuates disciplinary actions against employees. For the following reasons, we find that the provision is negotiable.

II. Provision

Article 17, Section 17.4, second paragraph

The employee will be given up to 3 workdays to respond to the charge(s). If discipline is not warranted, the record of infraction will be destroyed and the employee or representative, if any, will be notified immediately. If discipline is warranted, branch management will make a timely decision following the employee's response and return a copy of the record of infraction to the employee or representative, if any. In the case of oral admonishments, they will be decided upon at the branch level. All remaining actions listed in 17.1 and 17.2 above will be forwarded to the Personnel Management Staff where an expeditious recommendation for appropriate discipline will be made. [Only the underscored portions are in dispute.]

III. Positions of the Parties

A. Agency

The Agency interprets the provision as requiring that management's initial decision that discipline is warranted be timely and that the recommendation by the Personnel Management Staff for appropriate discipline be expeditious. According to the Agency, under the provision, if an arbitrator concluded that management did not timely decide that discipline was warranted or that a recommendation of appropriate discipline was not expeditious, the arbitrator could revoke the discipline. The Agency claims that such an arbitrator's award would have the effect of establishing a statute of limitations and would directly interfere with management's right under section 7106(a)(2)(A) of the Statute to take disciplinary action against employees.

The Agency asserts that a contractual statute of limitations on the initiation of disciplinary action is nonnegotiable because it precludes management from exercising its right to discipline employees under section 7106(a)(2)(A) of the Statute. The Agency cites, among others, the Authority's decisions in Antilles Consolidated Education Association and Department of Defense, Office of Dependents Schools, Antilles Consolidated School System, Fort Buchanan, Puerto Rico, 45 FLRA 989 (1992) (Antilles) and American Federation of Government Employees, AFL-CIO, Local 3732 and U.S. Department of Transportation, United States Merchant Marine Academy, Kings Point, New York, 39 FLRA 187, 201 (1991) (Merchant Marine Academy). Specifically, the Agency notes that, in Merchant Marine Academy, the Authority rejected "a [u]nion's explanation that a contractual provision was merely intended to assure timely notice to employees and that untimeliness would not require that the action be set aside, unless there was 'harmful error'[.]" Statement at 6. The Agency states that, notwithstanding the union's explanation, the Authority found that the provision imposed a statute of limitations on discipline and, therefore, was nonnegotiable.

The Agency acknowledges that, in National Treasury Employees Union and U.S. Department of Agriculture, Food and Nutrition Service, Western Region, 42 FLRA 964, 988-90 (1991) (Food and Nutrition Service), the Authority found that a provision containing a timeliness limitation on management's right to discipline that was phrased in general terms, rather than specifying a specific number of days, was negotiable. The Agency also notes that the decision in Food and Nutrition Service cited National Federation of Federal Employees, Local 1853 and U.S. Attorney's Office, Eastern District of New York, Brooklyn, N.Y., 29 FLRA 94 (1987) (Eastern District) (Provision 1), in which the Authority found that a provision requiring that disciplinary action be taken within a reasonable period of time did not directly interfere with management's right to discipline. The Agency argues, however, that Eastern District concerned application of the harmful error rule and did not constitute a repudiation of the "principle that a contractual statute of limitations was nonnegotiable[.]" Statement at 9.

The Agency argues that the Authority's rationale in Food and Nutrition Service "flies in the face of reality." *Id.* at 7. According to the Agency, the only reason for an employee in a grievance challenging discipline to assert the "procedural defense of untimeliness" is to demonstrate that he or she should not be disciplined because of the untimeliness. *Id.* at 8. The Agency also argues that Food and Nutrition Service is inconsistent with Antilles and Merchant Marine Academy. The Agency states that the only difference between the Antilles and Merchant Marine Academy cases and the Food and Nutrition Service case is that, in Antilles and Merchant Marine Academy, the proposals themselves specified the limitations on management and, under Food and Nutrition Service, an arbitrator would be allowed to specify the limitations. The Agency maintains that this "is a distinction without significance" and contends that the effect of the provision in dispute "remains as a direct interference with management's right to discipline by creating contractual time limits enforceable via arbitration." *Id.* at 11.

B. Union

The Union argues, citing Immigration and Naturalization Service and American Federation of Government Employees, Local 505, 22 FLRA 643 (1986) (INS) and United States Customs Service and National Treasury Employees Union, 22 FLRA 607 (1986), that "an arbitrator can reverse or mitigate a disciplinary action because of management's dilatoriness." Response at 4. The Union states that in INS the Authority held that an arbitrator could find that an agency's delay in initiating disciplinary action "does not actually promote the efficiency of the service." *Id.* at 5. The Union claims that the Agency "makes no effort to show that it may, in accordance with 5 U.S.C. Chapter 75, proceed dilatorily and effect untimely disciplinary actions." *Id.*

The Union states that "[a]s the [A]gency concedes, the Authority has found that proposals essentially identical to the [provision] in dispute here do not affect the authority of management officials to take disciplinary actions within the meaning of 5 U.S.C. § 7106(a)(2)(A)." *Id.* Citing Food and Nutrition Service and Eastern District, the Union asserts that the Agency "makes no persuasive case for abandoning these precedents." *Id.*

The Union claims that the provision "is obviously a procedure which management officials would observe in exercising their right to discipline" under section 7106(a)(2)(A) of the Statute. *Id.* The Union claims that, "[b]y the plain terms of [section] 7106(b)(2)," proposals that establish procedures governing the exercise of management's rights under section 7106(a) are negotiable. *Id.* at 6. The Union also asserts that "[a]bsent a showing that the [provision] is procedural in form only," the provision

cannot be found to be nonnegotiable under section 7106(a)(2)(A). *Id.* (footnote omitted). The Union contends, in this connection, that the Agency has not "identif[ied] a single hypothetical situation in which compliance with the [provision] would be tantamount to rendering meaningless [the Agency's] authority, in accordance with applicable law, to take disciplinary action." *Id.* The Union states that the provision is intended to "reduce the number of stale, untimely disciplinary actions management successfully takes." *Id.* at 5-6.

IV. Analysis and Conclusions

For the following reasons, we find that the provision is negotiable as a procedure under section 7106(b)(2) of the Statute.

A. The Meaning of the Provision

The provision prescribes the steps that management will take after it notifies an employee that the employee is subject to discipline. Once an employee has had an opportunity to respond to disciplinary charges, the provision requires the Agency to timely decide that discipline is warranted and to expeditiously recommend an appropriate penalty. The provision does not prescribe the consequences that would result from management's failure to timely decide that discipline is warranted or to expeditiously recommend an appropriate penalty. Rather, the proposal simply establishes a standard of timeliness governing the Agency's completion of the steps of the disciplinary process.

B. The Provision Does Not Directly Interfere with Management's Right to Discipline Employees under Section 7106(a)(2)(A) of the Statute.

In Merchant Marine Academy, we found that Provision 4, which required that a written decision be provided to an employee subject to disciplinary charges within 45 days after receipt of the employee's response to the notice of proposed discipline, was negotiable. Specifically, we found that the provision was incorrectly characterized as a "statute of limitations" on disciplinary action. We noted that the Authority had held proposed contractual time limits on disciplinary actions to be nonnegotiable "where failure to meet those limits would result in an agency's inability to take any action at all with respect to a potential disciplinary matter." Merchant Marine Academy, 39 FLRA at 203.

We found that Provision 4 in Merchant Marine Academy did not state that the untimely delivery of the written decision would bar the imposition of disciplinary action. We also found that Provision 4 was distinguishable from Provisions 3 and 8, which were found to be nonnegotiable, because expiration of the time limits in Provisions 3 and 8 barred disciplinary action based on the incident involved, while the time

limit in Provision 4 did not bar disciplinary action. We found that Provision 4 did not directly interfere with management's right to discipline employees under section 7106(a)(2)(A) of the Statute and concluded, therefore, that Provision 4 was a negotiable procedure under section 7106(b)(2) of the Statute.

Nothing in the provision at issue in this case provides that the proposed disciplinary action will be barred if management fails to comply with the timeliness standards prescribed in the provision. The Union states that the provision is intended to reduce the number of "stale, untimely" disciplinary actions. Response at 5. This statement is consistent with the wording of the provision. Based on the Union's statement, we reject the Agency's argument that the only reason for grievants to assert the untimeliness of the Agency's action is to demonstrate that they should not be disciplined. Rather, we find that the provision ensures that, once the employee has responded to a proposed disciplinary action, processing of the discipline will be completed while the relevant evidence is fresh and available.

Consequently, we find that, under the provision in this case, as with Provision 4 in Merchant Marine Academy, failure to meet the prescribed time limit does not prevent the Agency from acting on the underlying disciplinary matter. Accordingly, we find, consistent with Provision 4 in Merchant Marine Academy, that the provision does not directly interfere with management's right to discipline employees under section 7106(a)(2)(A) of the Statute. We conclude, therefore, that the provision is a negotiable procedure under section 7106(b)(2) of the Statute. *See also* Food and Nutrition Service, 42 FLRA at 989; Eastern District, 29 FLRA at 96.

We reject the Agency's contention that our holdings in Food and Nutrition Service and Eastern District are inconsistent with our holdings as to Provisions 3 and 8 in Merchant Marine Academy and the proposal in Antilles. Provisions 3 and 8 in Merchant Marine Academy and the proposal in Antilles established contractual statutes of limitation that prevented management from disciplining employees after the prescribed time limits had expired. The provisions in Food and Nutrition Service and Eastern District established contractual standards for judging the timeliness of an agency's disciplinary actions that did not prevent the agency from taking disciplinary action. As we made clear in our disposition of Provision 4 in Merchant Marine Academy, proposals that would bar an underlying disciplinary action upon the expiration of specified time limits are nonnegotiable; proposals that establish timeliness standards governing completion of the various stages of the disciplinary process, but do not preclude management from imposing discipline, are negotiable as procedures under section 7106(b)(2) of the Statute. Nothing in the Agency's argument has persuaded us to abandon that distinction.

Consequently, we conclude that our decisions in Food and Nutrition Service and Eastern District are consistent with our holdings as to Provisions 3 and 8 in Merchant Marine Academy and in Antilles.

* * *

Accordingly, we conclude that the provision is negotiable as a procedure under section 7106(b)(2) of the Statute.

V. Order

The Agency shall rescind its disapproval of the provision.

In NFFE, Local 29 and Corps of Engineers, Kansas City, 21 FLRA 233 (1986), the Authority found a proposal that provided an employee the right to remain silent during a Report of Survey investigation was not negotiable because it interfered with the right to discipline employees.

See also Tidewater Virginia Federal Employees Metal Trades Council and Navy Public Works Center, Norfolk, Virginia, 15 FLRA 343 (1984). In the Tidewater case, the Authority, in agreement with the 1982 decision of the 9th Circuit Court of Appeals in Navy Public Works Center, Honolulu, Hawaii, found that a proposed contract provision concerning an employee's right to remain silent during any discussion with management in which the employee believed disciplinary action may be taken against him or her was outside the duty to bargain, as the provision prevented management from acting at all with regard to its substantive rights under section 7106(a)(2)(A) and (B) of the Statute to take disciplinary action against employees and to direct employees and assign work by having employees account for their conduct and work performance.

Union proposals to limit the type and age of evidence used to support disciplinary action have been found to violate management's right to discipline employees. *See* AFGE and Naval Air Warfare Center, Patuxent River, Maryland, 47 FLRA 311 (1993) (proposal to limit use of supervisor's personal notes); NAGE and DVA Medical Center, Brockton and West Roxbury, Massachusetts, 41 FLRA 529 (1991) (proposal to limit use of supervisor's notes relating to performance evaluation); AFGE, Local 3732 and DOT, U.S. Merchant Marine Academy, Kings Point, New York, 39 FLRA 187 (1991) (proposal to prevent use of supervisor's notes older than 18 months).

Proposals which require progressive discipline have been held to interfere with management's right to remove or take other disciplinary action as they restrict the agency's right to choose a specific penalty. NTEU and Customs Service, Washington, D.C., 46 FLRA 696, 767-769 (1992); Merchant Marine Academy, 39 FLRA 187.

(e) To layoff or retain.

In NAGE, Local R1-144 and Naval Underwater Systems Center, 29 FLRA 471 (1987) the Authority defined the term layoff while discussing a proposal that would require the agency to place employees on administrative leave rather than furlough during brief periods of curtailed agency operations. "[W]hile the term 'to lay off' is not defined in the statute it generally involves the placing employees in a temporary status without duties for nondisciplinary reasons." (p. 477). The Authority went on to hold that the proposal was negotiable since employees could be laid off in a paid or nonpaid status and therefore, the proposal did not interfere with management's right to lay off employees.

Proposals designed to minimize the impacts of RIFs on bargaining unit employees are frequently challenged as an interference with management's right to layoff. In Federal Union of Scientists and Engineers, NAGE Local R1-144 and Naval Underwater Systems Center, 25 FLRA 964 (1987) a proposal which required termination of all temporary, part-time and other similar categories of employees before taking RIF action against full-time employees was found to be nonnegotiable.

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(3) To Assign Work, To Make Determinations With Respect To Contracting Out, and To Determine the Personnel By Which Agency Operations Shall Be Conducted.

(a) To Assign Work. This refers to the assignment of work tasks or functions to employees. The right to assign duties to positions or employees has also been construed broadly by the Authority. Proposals aimed at placing limitations on the right to assign work have consistently been found nonnegotiable. Although management has broad authority to assign work, it can be required to bargain on proposals that would require the updating of position descriptions so that they accurately reflect the duties assigned.

In Georgia National Guard, 2 FLRA 580 (1979), the Authority held that a proposal prohibiting the assignment of grounds maintenance or other non-job related duties to technicians and preventing management from assigning such work, regardless of whether reflected in position descriptions, without employee consent, violated section 7106(a)(2)(B). FLRA distinguished this proposal from that in dispute in the Fort Dix case (infra) by noting that the proposal in Fort Dix, while it required management to amend position descriptions, did not prevent management from assigning additional duties. The first paragraph of the Georgia National Guard proposal, on the other hand, prevented the agency from assigning certain duties to technicians even if their position descriptions include, or were amended to include, such duties.

AFGE, Local 199 and
Army - Air Force Exchange Service, Fort Dix, New Jersey

2 FLRA 16 (1979)

(Extract)

* * *

Union Proposal II

Article 13, Section 2

The phrase "other related duties as assigned," as used in job descriptions, means duties related to the basic job. This phrase will not be used to regularly assign work to an employee which is not reasonably related to his basic job description. [Only the underlined portion is in dispute.]

Question Here Before the Authority

The question is whether the union's proposal would violate section 7106(a)(2)(B) of the Statute.

Opinion

Conclusion: The subject proposal does not conflict with section 7106(a)(2)(B) of the Statute. Accordingly, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), the agency's allegation that the disputed proposal is not within the duty to bargain, is set aside.

Reason. The union's proposal would prevent the agency from using the term "other related duties as assigned" in an employee's position description to assign the employee, on a regular basis, duties which are not reasonably related to his or her position description. The agency alleges that this proposal would affect its authority to assign work in violation of the Statute. However, it would appear, both from the language of the proposal and the union's intent as stated in the record, that the agency has misunderstood the effect of the proposal. That is, the plain language of the union's proposal concerns agency management's use of employee position descriptions in connection with the assignment of work, not, as the agency argues, the assignment of work itself.

Under Federal personnel regulations, a position description is a written statement of the duties and responsibilities assigned to a position. It is the official record of, among other things, the work that is to be performed by the incumbent of the position, the level of supervision required, and the qualifications needed to perform the work. From the standpoint of the employee, the position description defines the kinds and the range of duties he or she may expect to perform during the time he or

she remains in the position. In the actual job situation, however, an employee might never be assigned the full range of work comprised within the position description. That is, the position description merely describes work which it is expected would be assigned, but is not itself an assignment of work.

In addition, the position description is the basis of the classification and pay systems for Federal employees. The validity of the classification of employee's position, and, derivatively, of an employee's rate of pay, is thus dependent on the accuracy of an employee's position description. Changes in the kinds and the level of responsibility of the duties assigned an employee may necessitate changes in the position description and, correlatively, depending on the circumstances, changes in the classification and the rate of pay of the position.

It is in this context that the intent of the union's proposal must be understood. Both the language of the proposal and the record in this case support the conclusion, briefly stated, that the subject proposal is designed to insure the accuracy of employee position descriptions. That is, the intended effect of the proposal is to prevent the agency from expanding the work regularly required of the incumbent of a position by assigning work which is not reasonably related to the duties spelled out in the position description under the guise of the general phrase "other related duties as assigned." This does not mean, however, that the proposal would foreclose the agency from adding such unrelated duties to a position. Nothing in the language of the proposal or the record indicates that it is intended to shield the employee from being assigned additional "unrelated" duties, *i.e.* duties which are not within those described in his or her existing position description in order to do so. The proposal would in no way preclude the agency from including additional, though related, duties in the position description. Thus, in the circumstances of this case, the right of the agency to assign work remains unaffected, while the employee is assured that his or her position description accurately reflects the work assigned to the position.

As indicated at the outset, therefore, the agency has misunderstood the intended effect of the union's proposal. The subject matter of that proposal is not the assignment of work, as alleged by the agency, but the application of the phrase "other related duties as assigned" when used in a position description. The agency has failed to support its allegation that such a proposal is nonnegotiable under section 7106. Accordingly, the agency's allegation is hereby set aside.

* * *

Although proposals concerning work assignment are nonnegotiable, proposals dealing with overtime are often negotiable. Management must be prepared to negotiate who will be assigned overtime but need not negotiate how much overtime is to be assigned or if it is necessary at all. *See* AFGE and Dep't of Agriculture, 22 FLRA 496 (1986); NFFE and VA, 27 FLRA 239 (1987); Nat'l Assoc. of Agriculture Employees and Dep't of Agriculture Animal and Plant Health Inspection Service, Elizabeth, N.J., 49 FLRA 319 (1994).

The right to assign duties was elaborated upon in the Denver Mint case, 3 FLRA 42 (1980), where the Authority, in addition to finding that a requirement that management rotate employees among positions violated Section 7106(a)(2)(A), found that a requirement that an employee be rotated through the duties of his position on a weekly basis violated Section 7106(a)(2)(B).

> [E]ven if the union intended only that employees be rotated to the various duties within their own position description, the specific language of the proposal at issue would require all employees to be rotated each week regardless whether any work were available which required the performance of such duties or whether the work previously assigned had been completed. In other words, the manager would be restricted to making new assignments, or in modifying, terminating, or continuing existing ones as deemed necessary or desirable. Accordingly, the specific proposal at issue herein is outside the duty to bargain under the Statute. [Emphasis added.]

Proposals which restrict an agency's right to determine the content of performance standards and critical elements directly interfere with management's rights to direct employees and assign work under section 7106(a)(2)(A) and (B). Patent Office Professional Assoc. and Patent and Trademark Office, Washington, D.C., 47 FLRA 10 (1993); Nat'l Assoc. of Agriculture Employees and Animal and Plant Health Inspection Service, 49 FLRA 319 (1994). Proposals or Provisions that concern the assignment of specific duties to particular individuals also interfere with management's right to assign work. Patent and Trademark Office, 47 FLRA 10, 23 (1993).

For other cases involving management's right to assign work, *see* MTC and Navy, 38 FLRA 10 (1990); AFGE and Department of Labor, 26 FLRA 273 (1987); Int'l Fed. of Prof. and Tech. Engineers and Norfolk Naval Shipyard, 49 FLRA 225 (1994)(a proposal to require removal of any employee who tests positive for illegal drugs from the chain of custody of drug testing specimens found to interfere with management's right to assign work).

(b) Contracting Out. The right of unions to bring action under the Administrative Procedure Act (APA) challenging the agency's contracting out decision was denied in AFGE v. Brown, 680 F.2d 722 (11th Cir. 1982), *cert. denied*, 103 U.S. 728 (1983); *see also* NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989). However,

the Sixth Circuit found that a contracting out decision was subject to judicial review under the APA. Diebold v. United States, 947 F.2d 787 (6th Cir. 1991), *petition for rehearing and rehearing en banc denied*, 961 F. 2d 97 (6th Cir. 1992).

The following case discusses the negotiability of proposals concerning contracting out.

NFFE Local 1214 and
U.S. Army Training Center and Fort Jackson, Fort Jackson, South Carolina

45 FLRA 1222 (1992)

(Extract)

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The appeal concerns the negotiability of one proposal which provides that, when feasible, the Agency will contract out only when it would be economically efficient, effective to the Agency's mission, or in the best interests of the Government. For the following reasons, we find that the proposal is nonnegotiable.

II. Proposal

The Employer agrees that, when feasible, contracting out of its functions and/or missions should only occur when it is demonstrated that such contracting out would be economically efficient, effective to the mission, or in the best interest of the Federal Government.

III. Positions of the Parties

A. Agency

The Agency contends that the proposal directly and excessively interferes with its right under section 7106(a)(2)(B) to contract out. The Agency argues that the proposal does not merely require the Agency to comply with Office of Management and Budget (OMB) Circular A-76 but that the proposal "would remain in effect even if the OMB Circular is modified." Statement of Position at 3. According to the Agency, inclusion of the term "when feasible" does not render the proposal negotiable because, in the Agency's view, every contracting out decision "must comply with the proposal's requirement[s]. . . ." *Id.*

The Agency also contends that the proposal is not intended as an arrangement "to lessen the adverse affects" of a decision to contract out. *Id.* at 4. According to the Agency, the proposal "negates management's right to contract out and does not concern any arrangements for employees affected by the implementation of that right." *Id.* Moreover, the Agency argues that the proposal excessively interferes with management's right to contract out because it would "completely prohibit[] the [Agency] from contracting out work unless i[t] can be shown that doing so meets the restrictions contained in the proposal." *Id.*

B. Union

The Union contends that the Agency's right to contract out is restricted by applicable law and regulation, including OMB Circular A-76, and that, based on the Authority's decision in National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service, 42 FLRA 377 (1991) (IRS), *petition for review filed sub nom.* Department of the Treasury, Internal Revenue Service v. FLRA, No. 91-1573 (D.C. Cir. Nov. 25, 1991), such law and regulation may be enforced through arbitration. The Union claims that as OMB Circular A-76 requires that "all contracting-out . . . must be in the public interest[,] . . . efforts of this nature cannot be in the public interest when contracting-out is not found to be economically efficient, effective, or in the best interest of the Federal Government." Petition for Review at 2. According to the Union, "the proposal [does] not introduce or impose any limitation or restriction that is not already imposed upon the [A]gency through [applicable regulations]. . . ." Reply Brief at 3.

Finally, the Union states that the proposal is "not intended to address the specific or adverse impact associated with contracting out decisions[.]" *Id.* at 4. Rather, the Union states that it "possesses a number of options that have been negotiated, and are presently under negotiation, that are designed to address specific or adverse impact, or redress adverse impact suffered by employees when management applies or executes its 7106 rights in a legal, extraordinary, or extralegal manner." *Id.*

IV. Analysis and Conclusions

Proposals that establish substantive criteria governing the exercise of a management right directly interfere with that right. *See e.g.,* National Federation of Federal Employees, Local 2050 and Environmental Protection Agency, 36 FLRA 618, 625-27 (1990). However, insofar as management rights under section 7106(a) (2) are concerned, proposals that merely require compliance with applicable laws do not directly interfere with the exercise of such rights. IRS. The term "applicable laws" in section 7106(a) (2) includes, among other things, rules and regulations, including OMB Circular A-76, which have the force and effect of law. *Id.*

Consequently, proposals merely requiring compliance with OMB Circular A-76 do not directly interfere with management's right to contract out. American Federation on Government Employees, AFL-CIO, Department of Education Council of AFGE Locals and Department of Education, 42 FLRA 1351, 1361-63 (1991) (Department of Education); AFSCME Local 3097 and Department of Justice, Justice Management Division, 42 FLRA 587 (1991), *petition for review filed sub nom.* Department of Justice, Justice Management Division v. FLRA, No. 91-1574 (D.C. Cir. Nov. 25, 1991).

In this case, the disputed proposal permits the Agency to contract out only if the Agency can demonstrate that such action "would be economically efficient, effective to the mission, or in the best interest of the Federal Government." In this regard, we reject the Union's contention that, based on IRS, the proposal does not directly interfere with the Agency's right to contract out because it merely implements OMB Circular A-76. Nothing in the wording of the disputed proposal refers to or cites OMB Circular A-76 and we have no basis on which to conclude that the proposal constitutes a restatement of any provisions in the Circular. *Compare* Department of Education, 42 FLRA at 1361-63 (a proposal which obligated the agency to conform to a particular requirement of OMB Circular A-76 found not to directly interfere with the agency's right to contract out in circumstances where the proposal merely restated the requirement of the Circular and where the union stated that the proposal would no longer have any effect if the Circular were modified to remove the requirement in question). We find the Union's explanation of the proposal inconsistent with its plain wording and, as a result, we do not adopt the Union's explanation. *See e.g.,* National Association of Government Employees, Federal Union of Scientists and Engineers, Local R1-144 and U.S. Department of the Navy, Naval Underwater System Center, Newport, Rhode Island, 42 FLRA 730, 734 (1991).

We conclude that, by incorporating the standards of economic efficiency, mission effectiveness, and the best interests of the Government, the disputed proposal establishes substantive criteria governing the exercise of the Agency's right to contract out. Therefore, the proposal directly interferes with the Agency's right to contract out under section 7106(a)(2)(B) of the Statute. In reaching this conclusion we reject the Union's contention that inclusion of the phrase "when feasible" renders the proposal negotiable. The inclusion of such wording does not change the fact that management's discretion to contract out is restricted. *See* International Federation of Professional and Technical Engineers, Local 4 and Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 35 FLRA 31, 37-38 (1990).

Finally, it is clear that the disputed proposal is not intended to be an appropriate arrangement under section 7106(b) (3) of the Statute. In this

regard, the Union expressly states that its proposal is "not intended to address the specific or adverse impact associated with contracting out decisions[.]" Reply Brief at 4. According to the Union, it "possesses a number of options that have been negotiated, and are presently under negotiation, that are designed to address specific or adverse impact, or redress adverse impact suffered by employees when management applies or executes its 7106 rights in a legal, extraordinary, or extralegal manner." *Id.*

As the disputed proposal directly interferes with the Agency's right to contract out under section 7106(a)(2)(B) of the Statute, it is nonnegotiable. Accordingly, we will dismiss the Union's petition.

V. Order

The Union's petition for review is dismissed.

The Supreme Court was involved in resolving some of the issues relating to contracting out. The Court granted cert. in IRS v. FLRA, 862 F.2d 880 (D.C. Cir. 1989). The issue in this case concerned the union's ability to negotiate or grieve management's decision to contract out federal work. The proposal submitted by the union would have established the grievance and arbitration provision of the union's master labor agreement as the union's internal administrative appeal for disputed contracting out cases. The Court held the proposal was not negotiable. It stated that a union cannot try to enforce a rule or regulation through negotiated grievance procedures if the attempt affects the exercise of a management right unless the rule or regulation is "an applicable law." The Court remanded the case back to the D.C. Circuit. IRS v. FLRA, 110 S. Ct. 1623 (1990). The D.C. Circuit promptly remanded the case back to the FLRA, stating that the determination of whether Circular A-76 is an "applicable law" must be performed in the first instance by the FLRA. IRS v. FLRA, 901 F.2d 1130 (D.C. Cir. 1990).

On remand, the FLRA ruled that Circular A-76 is an "applicable law" and hence unions can challenge contracting out decisions through arbitration. NTEU and IRS, 42 FLRA 377 (1991). On review, the D.C. Circuit initially found that OMB Circular A-76 was an "applicable law" within the meaning of § 7106 and also found that the proposal was negotiable. IRS v. FLRA, 901 F.2d 1130 (D.C. Cir. 1990). As with the 4th Circuit case, this opinion was short lived. The court, meeting *en banc*, reversed its position and held that the provision was not negotiable. The court found that it was unnecessary to decide whether the Circular was an "applicable law" in order to determine whether it was negotiable. The court found the Circular to be a government wide regulation under § 7117(a) that specifically excluded the use of grievance and arbitration procedures. The court held,

> We hold that if a government-wide regulation under section 7117(a) is itself the only basis for a union grievance--that is, if there is no pre-existing legal right upon which the grievance can be based--and the regulation precludes bargaining over its implementation of prohibits grievances concerning alleged violations, the Authority may not require a government agency to bargain over grievance procedures directed at implementation of the regulation. When the government promulgates such a regulation, it will not be hoisted on its own petard.

IRS v. FLRA, 996 F.2d 880 (D.C. Cir. 1993).

(c) Personnel by Which Operations Are Accomplished. In Marine Corps Development and Education Command, 2 FLRA 422 (1980), the union proposed union representatives be made members of wage survey teams collecting data to be used in determining the wages of Nonappropriated Fund (NAF) administrative support and patron service employees. Although the agency had extended the right to participate on wage survey teams to unions representing crafts and trades employees, the right to participate on wage survey teams gathering wage data to be used in determining the pay of administrative support and patron service employees was not similarly extended. The agency argued that the union's proposal interfered with management's right, under Section 7106(a)(2)(B), to determine the personnel by which its operations were conducted; that is, the agency was contending that the wage survey team constituted an operation of the agency. The Authority disagreed.

> [I]rrespective of whether the use of such wage survey teams constitute a part of the operation of the agency or is a procedure by which the pay determination operation is carried out, nothing in the disputed provision would interfere with the agency's right to determine the personnel who will represent the agency's interests on such wage survey teams. The union's proposal merely provides that there will be union representation on such already established wage survey teams. [Emphasis in original.]

The Authority added that the disputed provision was consistent with the public policy, as expressed in 5 U.S.C. § 53(c)(2), of providing for unions a direct role in the determination of pay for certain hourly-paid employees.

(4) With respect to filling positions, to make selections for appointments from--(i) among properly ranked and certified candidates for promotions; or (ii) any other appropriate source--Section 7106(a)(2)(C).

In VA, Perry Point, 2 FLRA 427 (1980), the union proposal in dispute read as follows:

> It is agreed that an employer will utilize, to the maximum extent possible the skills and talents of its employees. Therefore, consideration will be

> given in filling vacant positions to employees within the bargaining unit. Management will not solicit applications from outside the minimum area of consideration or call for a Civil Service Register of candidates if three or more highly qualified candidates can be identified within the minimum area of consideration. This will not prevent applicants from other VA field units applying provided they specifically apply for the vacancy being filled, and that they are ranked and rated with the same merit promotion panel as local employees.

The Authority concluded that the proposal, despite express language to the contrary, would not prevent management from expanding the area of consideration once the minimum area was "considered and exhausted as the source of a sufficient number of highly qualified candidates."

In Navy Exchange, Orlando, 3 FLRA 391 (1980), the Authority was faced with another proposal seeking to restrict management's ability to consider outside applicants. The disputed proposal provided that management could consider outside applicants only when less than three minimally qualified internal applicants were being considered. It also provided that management could engage in external recruitment only when it was determined that none of the internal applicants were qualified.

The agency argued that the proposal would negate management's right, under 5 U.S.C. § 7106(a)(2)(C), to select from among properly ranked and certified candidates for promotion or from any other appropriate source. The agency also argued that the proposal would require the promotion of an internal unit employee if three minimally qualified employees were available. This interpretation was adopted by the Authority for the purpose of its decision. The FLRA held that the proposal violated section 7106(a)(2)(C).

> The proposal here involved, which would restrict management's right to consider properly ranked and certified candidates for promotion or outside applicants . . . would infringe upon the right to select.

The Authority distinguished this case from Perry Point by noting that the Perry Point proposal, in requiring only that consideration be given to unit employees, did not prevent management from exercising its reserved right to select. The Authority added that, to the extent the proposal required selection of unit employees if there were three minimally qualified employees, it, like the CSA case, would conflict with 5 U.S.C. § 7106(a)(2)(C).

A union proposal to include one union member on a three member promotion-rating panel for specific unit vacancies was held non-negotiable in AFGE, Mint Council 157 and Bureau of the Mint, 19 FLRA 640 (1985). The FLRA reasoned that the provision would interject the union into the determination of which employees would be selected for promotion, thus interfering with management's right to select under section 7106(a)(2)(c).

In ACT New York State Council and State of New York, Division of Military and Naval Affairs, 45 FLRA 17 (1992), the FLRA found that a union proposal which "substantively limits the Agency's right to determine the extent to which experience as a part-time military member of the National Guard satisfies qualification requirements for civilian position" was not negotiable. *Id.* at 20.

(5) Right to take actions necessary to carrying out agency mission during emergencies--section 7106(a)(2)(D).

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 350 and ARMY CORPS OF ENGINEERS, ST. LOUIS, MISSOURI
1999 FLRA LEXIS 40; 55 FLRA No. 243 (1999)

(Summary of the Case)

This case went before the FLRA on a petition for review of negotiability issues filed by the union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute. The petition concerns one provision that was disapproved by the Agency. That provision defines the circumstances under which an emergency exists for the purposes of determining when the parties may temporarily circumvent compliance with other provisions of their collective bargaining agreement. For the purpose of the agreement, the word “emergency” was defined as “a temporary condition posing a threat to human life or property including the reliability and integrity of the Cannon Power Plant.”

Consistent with existing precedent, the Army Corps of Engineers argued that any provision or proposal that defines the word “emergency”, other than its plain meaning, unlawfully affects management’s right to determine how to carry out the agency’s mission in an emergency. According to the Army, such a provision would violate section 7106(b)(2)(D) of the Federal Service Labor-Management Relations Statute.

The union asserted that the purpose of the provision was to define the type of emergency situations in which the parties could “temporarily circumvent other provisions of the agreement.”

The FLRA reversed its earlier precedent, holding:

> Both parties interpret the foregoing precedent as establishing that *any* definition of the term "emergency" affects the right to take action during an emergency. Our examination of these decisions confirms this interpretation. *See, e.g.*, National Guard

> Bureau, 49 FLRA at 876 (Authority stated that "Provisions that define 'emergency' [affect] management's right under section 7106(a)(2)(D) to take whatever actions may be necessary to carry out the agency mission during emergencies"). That is, Authority precedent finds that definitions of "emergency" affect management's right without regard to the content of the definition.
>
> The Union requests the Authority to reconsider this precedent. On reconsideration, we find no basis in the wording of the Statute, and no expressed rationale in the Authority precedent, on which to conclude that all definitions of "emergency" -- whatever their content -- affect management's right. Instead, the same inquiry used to resolve management-rights-based negotiability disputes regarding other provisions, i.e., whether the provision is contrary to the management right at issue, should be employed. Insofar as previous precedent holds to the contrary, it will no longer be followed.

This is the first case in which the Authority ruled that the term “emergency” is now negotiable and that previous FLRA decisions holding that defining the word “emergency” per se affects a management right would no longer be followed.

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d. Permissive/Optional Areas of Negotiation. Numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work.

This section is the successor to section 11(b) of E.O. 11491. Management may refuse to discuss a permissive subject of bargaining, or it may negotiate on such a matter at its discretion, § 7106(b)(1). Management may terminate negotiations on a permissive subject any time short of agreement, National Park Service, 24 FLRA 56 (1986). In this regard, certain excerpts from the floor debate in the House may be helpful:

> Mr. Ford of Michigan . . . I might say that not only are they [Management] under no obligation to bargain [on a permissive subject], but in fact they can start bargaining and change their minds and decide they do not want to talk about it any more, and pull it off the table. It is completely within the control of the agency to begin discussing the matter or terminate the discussion at any point they wish without conclusion, and

there is no appeal or reaction possible from the parties on the other side of the table.

It is completely, if you will, at the pleasure and the will of the agency.

. . . .

Once agreement has been reached on a permissive subject, the agency head may not refuse to approve the agreement provision on the basis that there was no obligation to bargain on the subject. *See* National Park Service, 24 FLRA 56 (1986);

Activities renegotiating a collective bargaining agreement may attempt to eliminate provisions found in the earlier contract. The union may be reluctant to give up rights they have already obtained and will often assert that management may not declare those provisions which address permissive subjects nonnegotiable. The Federal Labor Relations Authority has stated that management is under no obligation to negotiate permissive subjects even if it has done so in earlier agreements. FAA, Los Angeles and PASS, Local 503, 15 FLRA 100 (1984).

On 1 October 1993, President Clinton issued an executive order directing the heads of each agency to, "negotiate over the subjects set forth in 5 U.S.C. § 7106(b)(1), and instruct subordinate officials to do the same . . . ." Exec. Order No. 12,871, 58 Fed. Reg. 522201 (1993). However, on 17 February 2001, President Bush issued Executive Order 13,203[3] which revoked Executive Order 12,871. OPM guidance states that Executive Order 13,203[4] abolished both the requirement to form labor-management partnerships and the previous mandate to bargain on matters covered by 5 U.S.C. §7106(b)(1).[5]

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(1) The Numbers, Types, and Grades of Employees or Positions Assigned to Any Organizational Subdivision, Work Project, or Tour of Duty (commonly called "Staffing Patterns").

The Authority has defined this phrase to mean "the establishment of staffing patterns, or allocation of staff, for the purpose of an agency's organization and the accomplishment of its work." National Association of Government Employees, Local R5-184 and U.S. Department of Veterans Affairs, Medical Center, Lexington, Kentucky, 52 FLRA 1024, 1030-31 (1997).

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[3] *Available at* www.whitehouse.gov/news/releases/2001/02/2001.htm.

[4] *Available at www.whitehouse.gov*/news/releases/2001/02/2001.htm.

[5] *Available at* www1.opm.gov/lmr/guide413203.htm. *See also* Field Advisory Service Memorandum, Executive Order 13203 – Revocation of Executive Order 12871 and Presidential Memorandum Concerning Labor-Management Partnerships, undated.

This permissive subject area involves the distribution and composition of the work force within the overall employee complement. Generally, if the proposal addresses the number of employees in an organizational subdivision, it falls within this section. Proposals that address the types or grades of employees within a subdivision are likewise not negotiable. The following case is helpful in understanding how proposals relating to the types and grades of employees can arise during negotiations.

OVERSEAS EDUCATION ASSOCIATION and
U.S. DEPARTMENT OF DEFENSE OFFICE OF DEPENDENTS SCHOOLS
45 FLRA 1185 (1992)

(Extract)

* * *

IV. Proposal 6

7.A. In the event a local hire employee meets the criteria of 1400.25m and the JTR Volume II (i.e., death, legal separation, divorce, etc.) an excepted appointment with condition shall be retroactively granted to the beginning of the school year.

Proposal 7

7.B. If a local hire employee is employed on or before November 1 of each year, he/she shall be retroactively given an excepted appointment with condition unless eligible for without condition.

A. Positions of the Parties

1. Agency

The Agency states that locally hired employees initially are hired on a temporary basis. The Agency asserts that their "temporary appointments have a 'not to exceed' date upon which the appointment expires, normally at the end of the school year." Statement at 13. The Agency further asserts that at the end of the temporary appointment, the Agency may: (1) terminate the temporary appointment; (2) reappoint the employee to another "temporary appointment not to exceed"; or (3) convert the employee to an excepted (permanent) appointment with condition providing that a continuing permanent position exists and the employee's performance is satisfactory. *Id.* at 13-14.

The Agency contends that Proposal 6 would "require management to convert (that is, appoint) locally hired temporary employees to permanent positions, and to make these appointments retroactive to the beginning [of] the school year." Id. at 14. The Agency asserts that the proposal would "dictate to the [A]gency the type of positions and/or employees (temporary v. permanent) necessary to accomplish its mission." *Id*. The Agency contends that proposals which concern the numbers, types and grades of positions and/or employees assigned to an organization are negotiable under section 7106(b)(1) of the Statute only at the election of the Agency. The Agency asserts that it has elected not to negotiate on Proposal 6 and, therefore, the proposal is nonnegotiable.

The Agency asserts that Proposal 7 is nonnegotiable for the same reasons as Proposal 6. Additionally, the Agency contends that Proposal 7 is contrary to Federal Personnel Manual (FPM) chapter 296, subchapter 1, which provides "that no personnel action can be made effective prior to the date on which the appointing officer approves the action." Id. at 15. According to the Agency, FPM chapter 296, subchapter 2 outlines the exceptions to this requirement. The Agency contends that because Proposal 7 would require it to make "an appointment retroactive" absent the exceptions identified in the FPM, the proposal is inconsistent with the FPM chapter 296, subchapter 1, which is a Government-wide regulation. Id.

2. Union

In its petition, the Union asserted that Proposals 6 and 7 "would establish the process for determining when an appointment management has decided to make would become effective." Petition at 3. Subsequently, in its response, the Union explains that Proposals 6 and 7 "provide for additional times when an appointment to a temporary position may be converted to an Excepted Appointment-Conditional." Response at 8. According to the Union, DODD Number 1400.13 "covers when a fully qualified educator who has been appointed to a temporary position with [the Agency] will be converted to an Excepted Appointment-Conditional." Id. The Union states that "[c]onversion of fully qualified appointed employees under these regulations occurs as a result of specific triggering events and the passage of specified amounts of time." *Id.* at 8-9. The Union asserts that the proposals "provide for additional triggering events and periods of time for when conversion of a temporary appointment to an Excepted Appointment-Conditional would be permitted." *Id*. at 9. The Union contends that the appointment procedures for teachers are not "so specifically provided for" in 20 U.S.C. s 902 as to be excluded from the definition of conditions of employment under section 7103(a)(14)(C) of the Statute. *Id.*

B. Analysis and Conclusions

We find that Proposals 6 and 7 are nonnegotiable.

We note that Proposal 6 refers to "the criteria of 1400.25m and the JTR Volume II...." However, the record does not contain a copy of DODD Number 1400.25m or an appropriate reference to JTR Volume II. The Union provided only a copy of DODD Number 1400.13. Noting that DODD Number 1400.13 covers when a fully qualified educator who has been appointed to a temporary position will be converted to a permanent-conditional position, the Union explains that Proposals 6 and 7 provide for additional situations and time periods that would "trigger[ ]" the conversion of a temporary appointment to a permanent- conditional appointment. Union's Response at 9. The Agency asserts that the proposals require management to convert locally hired temporary employees to permanent positions, and to make these appointments retroactive to the beginning of the school year. Locally hired employees are educators appointed in an overseas area. Based on the parties' positions and the wording of Proposals 6 and 7, it is our view that the proposals are intended to: (1) establish additional criteria requiring the conversion of locally hired employees on temporary appointments to permanent-conditional positions; and (2) make such appointments retroactive to the beginning of the school year.

Under section 7106(b)(1) of the Statute, an agency has the right to determine the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty. In our view, determinations as to whether an employee holding a temporary appointment should be converted to or granted a permanent position in the Agency are matters directly related to the numbers, types and grades of employees or positions assigned to its organizational subdivisions, work projects, or tours of duty. *See, for example*, National Treasury Employees Union and Department of Health and Human Services, Region X, 25 FLRA 1041, 1051-52 (1987) (proposal requiring an agency, in certain circumstances, to convert full-time employees to part-time status found nonnegotiable because the determination as to use of part- time employees to perform the work of the agency is a matter directly related to the numbers, types, and grades of employees or positions assigned to an agency's organizational subdivisions, work projects, and tours of duty); National Federation of Federal Employees, Local 1650 and U.S. Forest Service, Angeles National Forest, 12 FLRA 611, 613 (1983) (proposal requiring an agency "to attempt to work all WAE employees for as many of non-guaranteed pay periods as available financing will allow" held nonnegotiable because it concerned the agency's right under section 7106(b)(1) of the Statute to determine the numbers, types, and grades of employees). *See also* American Federation of Government Employees, Local 1923 and U.S. Department of Health and Human Services, Health

Care Financing Administration, Baltimore, Maryland, 44 FLRA 1405, 1457-58 (1992), *petition for review filed*, No. 92-1307 (D.C. Cir. July 24, 1992).

Under Proposals 6 and 7, if a temporary employee meets the specified criteria, management would be obligated to convert the employee's status from a temporary appointment to a permanent-conditional position, even if management decided that to do so would make its staffing patterns incompatible with its operational needs. The proposals would restrict management's decision as to the mix of specific types of employees, namely, temporary and permanent, that it will assign to various organizational subdivisions, in this case, local schools. Accordingly, we conclude that the proposals directly interfere with management's right to determine the numbers, types, and grades of employees or positions assigned to an organizational subdivision under section 7106(b)(1) of the Statute. In view of this determination, we need not reach the Agency's contention that Proposal 7 conflicts with a Government-wide regulation.

We further note that the Union has not asserted that Proposals 6 and 7 constitute appropriate arrangements under section 7106(b)(3) of the Statute.

Accordingly, based on the above, we conclude that Proposals 6 and 7 are nonnegotiable.

V. Order

The petition for review is dismissed.

In determining whether a matter concerning changes in employees' hours of work is within the scope of section 7106(b)(1), the Authority previously made distinctions between: (1) changes in employees' hours of work which were integrally related to and consequently determinative of the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty (*see e.g.,* National Federation of Federal Employees, Local 1461 and Department of the Navy, U.S. Naval Observatory, 16 FLRA 995 (1984); U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116, 117 (1982)); and (2) changes which permit "a modicum of flexibility within the range of starting and quitting times for [an] existing tour of duty" National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 FLRA 927, 930 (1979); *see also* U.S. Customs Service, Region V, 9 FLRA at 118-19. As to the former category of cases, the changes in employees' hours of work were found to be outside the duty to bargain; as to the latter category, the changes in hours were found to be within the duty to bargain. It has been noted that these distinctions are subtle ones. *See* Veterans Administration Medical

Center, Leavenworth, Kansas, 32 FLRA 124, Judge's Decision at 842 (1988); National Treasury Employees Union v. FLRA, 732 F.2d 703 (9th Cir. 1984).

In Scott Air Force Base v. FLRA, 33 FLRA 532 (1988), the authority clarified the bargaining obligations with respect to changes in employees' hours of work. The authorities founded that the distinctions previously used are not supported by the relevant statutory and regulatory provisions.

An employee's daily tour of duty, stated the Authority, consists of the hours that the employee works; that is, from the time when the employee starts work until he or she ends work. A decision as to what will constitute an employee's tour of duty is a decision by management as to when and where an employee's services can best be used. When an agency changes an employee's hours, that change, under applicable statutory and regulatory provisions, results in a new tour of duty for the employee. The degree of the change--whether it is a 1-hour change or an 8-hour change--does not alter the fact that the change results in a new tour of duty for the employee. A change in employees' starting and quitting times is a change in their tours of duty.

Changes in employees' tours of duty affect the "numbers, types, and grades of employee . . . assigned to . . . [a] tour of duty" within the meaning of section 7106(b)(1) of the Statute. To the extent that previous decisions of the Authority are to the contrary, they will no longer be followed.

Consistent with the statutory and regulatory provisions discussed above, agencies must generally give appropriate notice to employees of changes in their tours of duty. Further, the fact that an agency's decision to change employees' tours of duty is negotiable only at the agency's election should not be viewed as encouraging agencies not to bargain over these changes. Moreover, even where an agency exercises its right under section 7106(b)(1) not to bargain over the change itself, an agency has an obligation to bargain over the matters set forth in section 7106(b)(2) and (3) of the Statue: procedures to be observed by management in exercising its authority and appropriate arrangements for employees adversely affected by management's exercise of its authority.

In some instances, bargaining over flexible work schedules has been specifically authorized by statute. *See e.g.,* American Federation of Government Employees, Local 1934 and Department of the Air Force, 3415 ABG, Lowry AFB, Colorado, 23 FLRA 872 (1986). Those instances are not affected by the decision in 33 FLRA 532 (1988).

(2) Technology, Methods and Means of Performing Work.

(a) Technology. Technology is the method of execution of the technical details of accomplishing a goal or standard.

(b) Methods and Means of Performing Work. These were previously prohibited subjects of bargaining under the Executive Order.

> Method "The Authority has construed 'method' as referring to the way in which an agency performs its work." NTEU Chapter 83 and IRS, 35 FLRA 398, 406 (1990)..
>
> Means "[I]n the context of section 7106(b)(1), [means] refers to any instrumentality, including an agent, tool, device, measure, plan, or policy used by the agency for the accomplishing or the furthering of the performance of its work." NTEU and Customs Service, Region VIII, 2 FLRA 255, 258 (1979).

In Customs Region 8, 2 FLRA 254 (1979), the Authority agreed with the agency's contention that "the activity's requirement that uniformed employees wear nameplates while performing duties as customs officers is a decision as to the means of performing the agency's work." It further held that a proposal making the wearing of nameplates voluntary was not a bargainable appropriate arrangement because such an arrangement "would, in effect, empower employees to nullify the [nameplate] experiment."

The report of the House and Senate conferees states that while there might be circumstances when it would be desirable to negotiate on an issue in the methods and means area, it is not intended that agencies will discuss general policy questions determining how an agency does its work. The language must be construed in light of the paramount right of the public to an effective and efficient Government as possible. For example, the phrase "methods and means" is not intended to authorize IRS to negotiate with a labor organization over how tax returns should be selected for audit, or how thorough the audit of the returns should be.

The conferees went on to give other examples: EPA may not negotiate about how it would select recipients for environmental grants, nor may the Energy Department bargain over which of its research and development projects should receive top priority. OPM considers the intent of Congress to be that these examples are so closely related to agency "mission" as to be prohibited from bargaining.

In Oklahoma City Air Logistic Center, 8 FLRA 740 (1982), management committed a ULP by unilaterally changing existing conditions of employment regarding a policy on facial hair and respirator use without giving notice and opportunity to bargain to the union on the change. The Authority rejected management's contention that the change involved "technology, methods, and means of performing work" within the meaning of section 7106(b)(1). The issue was not about respirator use per se, but rather the effect of a change in facial hair policy on unit employees required to use the respirator. On a remand from the 9th Circuit, the Authority likewise found a union proposal on agency pay check distribution procedure to be a mandatory topic of

bargaining, in spite of precedent holding it was a permissive matter because it involved a method or means of performing work. Mare Island Naval Shipyard, 25 FLRA 465 (1987).

Distinguishing between "mission" (prohibited) and "methods and means" (permissive) may be quite difficult in some cases. However, management should never consider negotiating whenever a permissive proposal involves basic policy choices with respect to priorities and overall efficiency and effectiveness. "Methods and means" are removed from basic policy; they relate more to the techniques, procedures, plans, tools, etc., used to accomplish policy goals.

Once an agreement is reached on a proposal that is both a prohibited topic of negotiation under § 7106(a) and a permissive topic under § 7106(b)(1), the rules governing permissive topics will control and the proposal may not be declared non-negotiable. Assoc. of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA, 22 F.3d 1150 (D.C. Cir., 1994) This case resolved a long standing dispute about the interaction between the two sections of 7106. The court said the clear language in 7106(a) "Subject to subsection (b) of this section" established that § 7106(b) was an exception to the management rights provisions. *See also* NAGE and DVA Medical Center, Lexington, Kentucky, 51 FLRA 386 (1995).

If the proposal concerns matters that are governed by both § 7106(a) and § 7106(b)(1), and the proposal's provisions or requirements are inseparable, the Authority will determine which of the proposal's requirements is dominant. The dominant requirement in a proposal is the requirement upon which the rest of the proposal depends for its viability. Negotiability is determined based upon that dominant requirement. AFGE Local 1336 and SSA, Mid-America Program Service Center, 52 FLRA 794 (1996).

e. Mid-Contract Bargaining/Unilateral Changes.

(1) Overview. The obligation to negotiate does not end when the collective bargaining agreement is signed. Whenever management is to make a change concerning a matter which falls within the scope of bargaining, the exclusive representative must be given notice of the proposed change and given an opportunity to negotiate if the change results in an impact on unit employees, or such impact was reasonably foreseeable. U.S. Government Printing Office, 13 FLRA 39 (1983).

If the matter is not addressed in the collective bargaining agreement, the union must be given reasonable notice of the proposed change and an opportunity to negotiate. If the union indicates it does not desire to negotiate the matter or fails to respond within a reasonable time, the decision may be implemented. If the union desires to negotiate the matter the parties must negotiate and reach agreement or initiate impasse procedures. *See* Scott AFB and NAGE, 5 FLRA 9 (1981).

On 28 February 2000, the FLRA issued an opinion that now requires the agency to collectively bargain a union-initiated proposal if the parties did not negotiate the issue when forming the existing collective bargaining agreement. United States Department of the Interior and National Federation of Federal Employees, Local 1309, 56 FLRA 45 (2000), request for reconsideration denied, 56 FLRA No. 38 (2000). An excerpt from the case is reproduced below.

U.S. DEPARTMENT OF THE INTERIOR WASHINGTON, D.C. AND U.S. GEOLOGICAL SURVEY RESTON, VIRGINIA and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

56 FLRA 45 (2000)

FEDERAL LABOR RELATIONS AUTHORITY

OPINION:

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IV. Analysis and Conclusions

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B. Proposals Requiring Union-Initiated Midterm Bargaining Are Within the Duty to Bargain under the Statute

The litigation of this case has focused on the question of whether proposals requiring midterm bargaining in certain situations are within an agency's obligation to bargain. The Supreme Court concluded that Congress has delegated to the Authority the power to determine the extent to which midterm bargaining (or bargaining over midterm bargaining, as specifically at issue here) is required under the Statute. NFFE and FLRA v. Interior, 119 S. Ct. at 1007. For the reasons explained below, we find that the Union's proposal is negotiable for two reasons. First, we conclude that under the Statute, agencies are obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters that are not "contained in or covered by" the term agreement, unless the union has waived its right to bargain about the subject matter involved; thus, the Union's proposal is within the duty to bargain because it restates a statutory obligation. Second, the proposal is not otherwise inconsistent with federal

law or government-wide regulation, and is therefore within the Survey's duty to bargain.

1. Agencies Are Required to Bargain over Union-Initiated Midterm Proposals

a. Requiring Agencies to Bargain over Union-Initiated Midterm Proposals Is Consistent with Congress's Commitment to Collective Bargaining in the Federal Sector

. . . Congress has unambiguously concluded that collective bargaining in the public sector "safeguards the public interest," "contributes to the effective conduct of public business," and "facilitates and encourages the amicable settlements of disputes." 5 U.S.C. § 7101(a)(1). Nothing in the plain wording of the Statute supports the inference that these conclusions are not as applicable to midterm bargaining as they are to term bargaining. In that regard, the Supreme Court has noted that "collective bargaining is a continuing process" involving, among other things, "resolution of new problems not covered by existing agreements." Conley v. Gibson, 355 U.S. 41, 46 (1957).

As argued by the General Counsel, the Charging Party and a number of amici, matters appropriate for resolution through collective bargaining are sometimes unforeseen and unforeseeable at the time of term negotiations. These matters include not only problems that might arise because of a change in workplace environment, but also new areas of agency discretion occasioned by changes in law or regulations. For example, when agencies were authorized to provide a portion of premiums for employee liability insurance, the National Treasury Employees Union was able to raise the issue midterm rather than have to wait for either management to initiate action or for the next round of term negotiations. Charging Party Brief, Affidavit of Director of Negotiations for the National Treasury Employees Union at 2. Such bargaining furthers the Statute's goal of enabling employees, "through labor organizations of their own choosing" to more timely participate in "decisions which affect them" and in cooperatively resolving disputes. 5 U.S.C. § 7101(a)(1). Moreover, the negotiation of such workplace issues is preferable to addressing them through the more adversarial grievance/arbitration process, as suggested by one amicus. Brief of William C. Owen at 9.

. . . Further, the Supreme Court has recognized that "in passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions and make the collective-bargaining process a more effective instrument of the public interest . . . ." Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 107 (1983); *see also* AFGE v. FLRA, 750 F.2d at 148 ("equalizing the positions of labor and management at the bargaining table" is a primary goal of the Statute). Consistent with those

goals, Congress has defined the obligation to bargain as "mutual." U.S.C. § 7103(a)(12). It is undisputed that the parties must bargain over an agency employer's proposed changes in conditions of employment midterm, whether the proposed change involves the exercise of the management rights set forth in section 7106(a) of the Statute, or matters that are fully negotiable. Requiring an agency, during the term of an agreement, to bargain over a union's proposed changes in negotiable conditions of employment thus maintains the mutuality of the bargaining obligation prescribed in the Statute. Because this requirement serves to equalize the positions of the parties, we disagree with our dissenting colleague's determination that "a counterbalance ... is appropriate" to the union's right to engage in midterm bargaining. Dissent at 31. With respect to negotiable conditions of employment, the rights and obligations of the unions and the agencies already are equivalent. And as the D.C. Circuit has recognized, collective bargaining, including midterm bargaining, is in the public interest because it "contributes to stability in federal labor- management relations and effective government." NTEU v. FLRA, 810 F.2d at 300.

. . . In addition, permitting unions to raise issues at the time they arise or become a priority for the parties serves the public interest in a more efficient Government because it will likely lead to more focused negotiations. As noted above, the ability to bargain over such issues in a timely manner is preferable to the alternative of leaving potentially important concerns unaddressed for perhaps a period of years until term negotiations on the basic contract commence again. Moreover, requiring unions to raise matters that do not currently present problems, but might do so in the future, could unnecessarily and inefficiently broaden and prolong term negotiations. That is, by permitting unions to raise certain matters midterm, the term negotiations will, in our view, proceed more efficiently in addressing existing and primary problems, and there will be no requirement to bargain over remote and secondary issues that do not appear to raise immediate concerns.

For all these reasons, we find that requiring agencies to bargain over union-initiated midterm proposals furthers Congress's goal of promoting and strengthening collective bargaining in the federal workplace.

b. Union-Initiated Midterm Bargaining Will Not Cause Inefficiency in Government

Mindful of Congress's admonition in section 7101(b) that the Statute should be interpreted in a manner consistent with an effective and efficient government, it is appropriate that we consider whether the benefits for collective bargaining found above are outweighed by potential costs and disruptions to government operations. In that regard, amici, relying on and replicating arguments addressed with approval by the Fourth Circuit in SSA v. FLRA, assert that: unions will attempt to gain a tactical advantage by

withholding proposals during term contract negotiations and then later pressing matters piecemeal during the term of the basic contract (Brief for Pension Benefit Guaranty Corporation at 2; Brief for Social Security Administration at 6-7); there will be a significant number of midterm negotiations involving less important issues that will ultimately have to be resolved by the Panel (Brief for Pension Benefit Guaranty Corporation at 2); and this dispersal of the collective bargaining process will destabilize labor relations and increase costs as a result of rolling or continuous bargaining (Brief for the Department of the Navy at 4; Brief for Kansas National Guard at 1; Brief for Pension Benefit Guaranty Corporation at 1; Brief for Social Security Administration at 3-4).

. . . For the reasons that follow, we find that the evidence in the record before us supports the conclusion that requiring agencies to bargain over union-initiated midterm proposals will not result in significant costs or disruptions that would outweigh the benefits of such bargaining. This evidence includes the lack of litigation over midterm bargaining issues, the actual experience of the parties, and the legal constraints on the scope of midterm bargaining.

With regard to litigation, review of Authority decisions reveals that only a few agencies have resisted the Authority's established position on the obligation to bargain midterm. Specifically, since 1987, when the Authority issued its decision in IRS II establishing that agencies are obligated to bargain over union-initiated midterm proposals, the Authority has been presented with only three cases, outside of the geographical confines of the Fourth Circuit, where agencies have been found to have violated the Statute by refusing to engage in midterm bargaining. These three cases comprise substantially less than one percent of the unfair labor practice cases resolved by the Authority during the same period. Further, during this same 12-year period, there have been only seven reported instances (approximately one percent of the Panel's reported decisions during that period) where the Panel has been obliged to resolve union-initiated midterm disputes. In addition, according to the General Counsel, midterm bargaining is a dispositive issue in less than one percent of unfair labor practice charges filed. General Counsel Brief at 11. We agree with the General Counsel's assertion that the lack of litigation suggests that union-initiated midterm bargaining is either infrequent or that it is not a significant area of concern for the parties.

. . . Further, although the reported experience with union-initiated midterm bargaining is limited, it supports the conclusion that such bargaining has not and will not lead to continuous bargaining. According to NTEU's Director of Negotiations, in a nationwide bargaining unit of approximately 98,000 employees, the union has initiated midterm bargaining on 12 occasions in the past 10 years. Charging Party Brief, Affidavit of Director of Negotiations for the National Treasury Employees Union at 1.

On the other hand, the record is devoid of probative evidence of excessive

costs or disruption to agency operations as a result of union-initiated midterm bargaining. To establish the significant costs of bargaining on official time, Amicus Social Security Administration submitted the Office of Personnel Management's Report on the use of official time for the first six months of 1998. However, that report sheds no light on the costs associated with midterm bargaining because the report only shows the amount of official time involved in "negotiations." There is no way of extracting from that data any information on the use of official time for midterm bargaining, let alone union-initiated midterm bargaining.

In addition, constraints on union-initiated midterm bargaining make it unlikely that it will lead to continuous issue-by-issue bargaining. First, an agency is not required to bargain during the term of a collective bargaining agreement on matters that are "contained in or covered by" an agreement. IRS II, 29 FLRA at 166. The framework to determine whether a matter is "contained in or covered by" an agreement is established in SSA, Baltimore, 47 FLRA at 1018 (examining "whether the matter is expressly contained in" or "'inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract'" (citations omitted)). And, as the Authority noted in SSA, Baltimore, the "contained in or covered by test" balances the need for stability and the flexibility to address new matters. Id. at 1016-18. Some amici, agreeing with the Fourth Circuit's analysis, have suggested that unions will evade the "contained in or covered-by" limitation by withholding matters from term negotiations. These suggestions rely on the incorrect premise that unions have the ability unilaterally to control the breadth and scope of matters that will be included in a basic labor contract. Rather, during term negotiations either party has the ability and the right to bargain over any condition of employment, and it is an unfair labor practice for the other to refuse to engage in bargaining over such negotiable matters. *See* American Federation of Government Employees, Interdepartmental Local 3723, AFL-CIO, 9 FLRA 744, 754-55 (1982), *aff'd*, 712 F.2d 640 (D.C. Cir. 1983) (union commits unfair labor practice when it refuses to bargain over mandatory subject of bargaining).

. . . Second, an agency is not required to bargain midterm where the union has waived its right to bargain over the subject matter involved. Waivers of bargaining rights may be established by express agreement or by bargaining history. IRS II, 29 FLRA at 166. The test to analyze whether there has been a waiver by bargaining history is set out in Selfridge National Guard Base, 46 FLRA at 585 (examining whether matter has been "fully discussed and consciously explored during negotiations" and whether union has "consciously yielded or otherwise clearly and unmistakably waived its interest in the matter"). The conclusion that the covered-by and waiver doctrines have heretofore adequately regulated midterm bargaining is supported by the infrequency of midterm bargaining-related litigation.

In sum, arguments that union-initiated midterm bargaining has been or will be

harmful to the federal sector labor relations program in general, or individual labor and management relationships in particular, are unsupported and speculative. Finding that midterm bargaining is consistent with Congress's commitment to collective bargaining in the federal sector, we hold that agencies are obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters not "contained in or covered by" the existing agreement unless the union has waived its right to bargain about the subject matter involved.

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(2) Notice Requirements. Management has a duty to give adequate prior notice to the union of changes in conditions of employment. Failure to do so is, by itself, an unfair labor practice. In Newark Air Force Logistics Command, 4 FLRA 512 (1980), the FLRA ruled that even though the union had actual knowledge of a proposed change, the activity did not give appropriate advance notice of the change to the union, as a union. This was the result of the presence of a union steward as an employee, not as a union representative, at a meeting discussing a proposed change in working conditions. This ruling was overturned by the Sixth Circuit Court of Appeals. According to the court, the Authority's apparent attempt to prevent employers from changing working conditions before the unions have a chance to react may be valid. But, the court stated that the FLRA should take this action through a policy statement or regulation, not through a case decision where the facts show that the employer provided adequate notice. The court further stated that "labor statutes such as the one at issue here are designed, in part, to smooth labor-management relations by providing informal mechanisms to guide the operation of the workplace and the resolution of disputes. The Authority's decision appears to inject needless formality into that process." Air Force Logistics Command, Aerospace Guidance and Metrology Center, Newark, Ohio v. Federal Labor Relations Authority, 681 F.2d 466 (6th Cir. 1982).

Notice of proposed changes in conditions of employment must be "adequate." What constitutes "adequate" prior notice will vary depending on the nature of the proposed change. The probable impact of a major reorganization, for instance, is greater than the probable impact of a decision to schedule the downgrading of two positions after they are vacated. The former warrants earlier notice than the latter. One should distinguish between the notice given the union of a proposed change in working conditions and a notice given a bargaining unit at impasse of intent to implement management's last best offer. The latter notice must be adequate to give the union an opportunity to invoke the services of the Impasses Panel, should the union elect to do so. It takes little time for the union to do this. In the AFLC case, 5 FLRA 288 (1981), the Authority concluded that eight days' notice of intent to implement management's impasse position was sufficient.

It is customary for the parties to establish steward districts and for the union to designate those of its officials who are entitled to act as agents of the union in the

established districts. Where a proposed change in conditions of employment is limited to employees in a particular steward district, it is reasonable, in absence of negotiated arrangements and established practices to the contrary, to notify the steward servicing the district.

There is no requirement that the notice be in writing. Many proposed changes are quite straight forward, limited in impact (although nonetheless meeting the "substantial" impact test), and need to be implemented with dispatch. Notice and bargaining, if any, can be accomplished by means of a telephone call or a meeting--either a meeting called for the purpose or at a regularly scheduled union-management meeting. The greater the degree of formality in day-to-day transactions with the union, the longer it takes to complete the notice/bargaining process. Whether the parties find such informal dealings acceptable depends, in part, on the character of the relationships. Where there is mutual trust and where oral understandings are treated with the same deference as written agreements, the parties are apt to prefer informal dealings.

Once adequate notice is given to an appropriate union agent, the burden is on the union to request bargaining. *See* IRS, 2 FLRA 586 (1980). Union bargaining requests need not be accompanied by specific proposals. However, a general bargaining request should promptly be followed up with specific union proposals that directly relate to the proposed change. 5 FLRA 817 and 823 (1981).

(3) Bargaining Impasses. Management can unilaterally implement its last best offer provided that it gives the union notice of its intent to implement and union does not timely invoke the services of the Impasses Panel. (*See* Air Force Logistics Command, 5 FLRA 288 (1981).) The Authority will review the conduct of the parties to determine whether both parties negotiated in good faith to impasse and whether the union's failure to seek assistance constituted a clear and unmistakable waiver. Compare Michigan National Guard, 46 FLRA 582 (1992) with Lowry Air Force Base and AFGE Local 1974, 22 FLRA 171 (1986). Although the Panel, in 5 C.F.R. § 2470.2(e), defines an impasse as "that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement," one should not infer that mediation is necessary. In this connection, *see* DOT, Denver, 5 FLRA 817 (1981), where the ALJ found that the parties had bargained to impasse after a brief discussion. In that case no reference was made to mediation. Nor can one say how long the parties must bargain before a bona fide impasse is reached. This will vary, depending on the number and nature of the items being negotiated. In DOT, Denver, a discussion taking less than an hour was sufficient. In SSA, Birmingham, 5 FLRA 389 (1981), the ALJ found that the parties had not bargained to impasse because they had only one bargaining session and there was no other evidence in the record indicating that the parties had exhausted bargaining.

It is OPM's position that management, in the context of impact and implementation bargaining, has the right to implement after bargaining in good faith to a

bona fide impasse, regardless of whether the services of the Impasses Panel are timely invoked, in order to comply with law or appropriate regulation and in order to exercise a retained management right in a timely fashion to meet mission requirements. For example, an agency may have determined it is necessary to relocate part or all of its work force geographically. If the parties reached impasse on impact and implementation matters, management should not be required to delay the moves pending Panel action, which could involve many months with its attendant costs. Such a position is bound to be controversial. In taking the position that management's rights include the right to implement without unreasonable delay when such delay can adversely affect mission accomplishment (as opposed to the delay of an individual disciplinary action), it must be emphasized that management has certain obligations. It has the duty to provide the union with the adequate notice and to afford it sufficient time to bargain on procedures and appropriate arrangements.

If a unilateral decision is made (one in which the union is not given notice or an opportunity to negotiate), the union frequently files an unfair labor practice charge for failure to negotiate in good faith [§ 7116(a)(5)]. Philadelphia Naval Shipyard, 15 FLRA 26 (1984).

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f. Impact and Implementation Bargaining.

Although certain agency decisions are not subject to bargaining, they may have a substantial impact on bargaining unit employees. As such, procedures for implementing these agency actions and arrangements for employees adversely affected are bargainable, even if the decision to take a specific course of action is not.

> *"Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency . . . [to exercise the listed management rights]". (5 U.S.C. § 7106(a)).*

> *Nothing in this section shall preclude any agency and any labor organization from negotiating--*
>
> *(1) [permissive topics];*
> *(2) procedures which management officials of the agency will observe in exercising any [management right]; or*
> *(3) appropriate arrangements for employees adversely affected by the exercise of any [management right] by such management officials. 5 U.S.C. § 7106(b)(2) and (3).*

The decisions themselves are not subject to bargaining because they involve the exercise of rights reserved to management by 5 U.S.C. § 7106. Moreover, the impact and implementation, or procedures and arrangements bargaining obligation arises only as the result of a management initiative -- *i.e.,* of a proposed action that has a substantial impact on the conditions of employment of bargaining unit employees. The difficulty arises because the distinction between procedure and substance is not always clear.

In Department of Health and Human Services, SSA, Chicago, 19 FLRA 827 (1985), the FLRA reiterated the rule that no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than de minimus. To aid in determining whether exercise of a right has only a de minimus impact several factors must be considered:

> . . . . the nature of the change (*e.g.,* the extent of the change in work duties, location, office space, hours, loss of benefits or wages and the like); the temporary, recurring or permanent nature of the change (*i.e.,* duration and frequency of the change affecting unit employees); the number of employees affected or foreseeably affected by the change; the size of the bargaining unit; and the extent to which the parties may have established through negotiation or past practice procedures and appropriate arrangements concerning analogous changes in the past . . . .

The Authority modified the de minimus test in HHS, Northeastern Program Service Center, 24 FLRA 403 (1986). In that case it held that the primary emphasis in applying the test would be placed on the nature and extent, or reasonably foreseeable effect, of the change on employees' conditions of employment. Further, the FLRA stated that it now considers the size of the bargaining unit irrelevant, and that it would consider the number of employees affected and the bargaining history only with a view toward expanding, not limiting, the number of situations in which bargaining would be required.

(1) Procedures to be observed by management in exercising its retained right -- Section 7106(b)(2). Limitations on Management Rights.

The "Implementation" area of negotiation -- Proposals Concerning "Procedures." Union proposals concerning the procedures which management officials will observe in exercising their management rights under § 7106(a) are negotiable. 5 U.S.C. § 7106(b)(2); DOD v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981) (proposal that no removals will be effected until all grievances completed was negotiable); AFGE and AAFES, 2 FLRA 153 (1979)(union proposal that no employee be removed or suspended before completion of review was negotiable).

The problem lies in determining which proposals deal with procedures affecting the exercise of a management right and which are substantive infringements on the management right.

Where the proposals are "purely procedural," the Authority applies the "Acting at All" test. Department of Interior v. FLRA, 873 F.2d 1505 (D.C. Cir. 1989) (proposal to delay suspensions for 10 days). AFGE and Department of Education, 36 FLRA 130 (1990) (proposal to delay adverse action until all appeals have been exhausted). The issue is: Does the proposal prevent management from acting at all?

In those cases where the proposal is not as clearly procedural in nature, the Authority applies the "Direct Interference" test. Aberdeen Proving Ground v. FLRA, 890 F.2d 467 (D.C. Cir. 1989) (union proposal concerning procedure for establishing legitimate drug use in employees who test positive for drugs was found to be a negotiable procedure). The issue is: Does the proposal directly interfere with the agency's exercise of a management right?

History. This exception to management rights was found in the Executive Orders leading up to the Civil Service Reform Act. Although management, under E.O. 11491, retained its decision making and action authority respecting certain rights, it nonetheless had to bargain on procedures it would follow in exercising its rights. There was, however, an important caveat; the procedures could not be such as to "have the effect of negating the authority reserved." (*See* VA Research Hospital, 1 FLRC 227, 230, where the Council held that a proposed promotion procedure was negotiable because it did not "appear that the procedure proposed would unreasonably delay or impede promotion selections." The "unreasonable delay" standard was forcefully restated in the Blaine Air Force Station case, 3 FLRC 75, 79, where the Council said that a right reserved to management "includes the right . . . to accomplish such personnel actions promptly, or stated otherwise, without unreasonable delay." [Emphasis in original.]

The Order's "unreasonable delay" standard was challenged in the IRS, New Orleans case, 1 FLRA 896 (1979)--the second negotiability decision issued under the Statute. In that case a provision outlining a procedure management would follow in deciding whether to permit revenue officers to work from their homes was disapproved by the agency on the ground it came into conflict with section 7106(a). The Authority, relying upon a joint explanatory statement of the House-Senate Conference Committee, concluded that "procedures" were fully bargainable except where they prevented management from "acting at all." Finding nothing in the disputed provision preventing management from "acting at all," the Authority set aside the agency's allegation.

The following case discusses the issues that arise under the current statute.

AFGE, COUNCIL OF PRISON LOCALS, LOCAL 3974 and FEDERAL BUREAU OF PRISONS, MCKEAN, PENNSYLVANIA

48 F.L.R.A. 225; (1993)

(Extract)

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The appeal concerns the negotiability of a proposal that requires the Agency to give employees preference in filling vacancies before hiring from any other source. We find that the proposal is nonnegotiable because it directly interferes with management's right under section 7106(a)(2)(C) of the Statute to make selections for appointments and it does not constitute an arrangement within the meaning of section 7106(b)(3).

* * *

III. The Proposal

In order to enhance career advancement opportunities for Federal Bureau of Prisons employees, the parties agree that current employees will be given first consideration for all vacancies. In addition to being first consideration [sic] the parties agree that where all qualifications are relatively equal the Federal Bureau of Prisons employee will be given preference before hiring from any other source.

IV. Positions of the Parties

The Agency contends that this proposal directly interferes with its management right to make selections from any appropriate source under section 7106(a)(2)(C)(ii) of the Statute. The Agency argues that the proposal would require consideration of Bureau of Prisons employees before outside applicants could be considered for vacancies at the Federal Correctional Institution, McKean, Pennsylvania. According to the Agency, under the proposal it could select an outside candidate only when the qualifications of that candidate were more than "relatively equal" to any Bureau of Prisons applicant. The Agency asserts that under Authority precedent, proposals that prevent an agency from giving concurrent consideration to outside applicants directly interfere with management's right to select from any appropriate source.

The Agency also contends that this proposal does not constitute a negotiable arrangement under section 7106(b)(3) of the Statute. The Agency maintains that the proposal is not an "arrangement" because it

does not address adverse effects flowing from the exercise of a management right, but, rather, seeks to create a benefit for employees. The Agency contends that, even assuming that the proposal were an arrangement, it is not "appropriate" because it excessively interferes with the exercise of management's right to make selections for appointments from any appropriate source. In this regard, the Agency argues that this proposal would prevent it from selecting an outside candidate for a vacancy except in narrow circumstances and that this limitation would serve to discourage the Agency from surveying appropriate sources for the most qualified candidate. In particular, the Agency contends that this proposal would inhibit its ability to recruit candidates from underrepresented groups pursuant to affirmative action plans. Relying on Nuclear Regulatory Commission v. FLRA, 895 F.2d 152 (4th Cir. 1990) and American Federation of Government Employees, Local 1923 and U.S. Department of Health and Human Services, Health Care Financing Administration, Baltimore, Maryland, 44 FLRA 1405, 1488 (1992) (Health Care Financing Administration), the Agency asserts that this proposal is not negotiable under section 7106(b)(3) of the Statute.

The Union concedes that this proposal directly interferes with management's right to select from any appropriate source under section 7106(a)(2)(C) of the Statute. However, the Union contends that the proposal does not excessively interfere with that right and is negotiable under section 7106(b)(3) as an appropriate arrangement. The Union states that under the proposal, the Agency may select from an "outside" source "at anytime" [sic] as long as the outside candidate has better qualifications than candidates who are already employed by the Bureau of Prisons. Response at 2. According to the Union, this proposal benefits current employees by providing them with increased career advancement opportunities. The Union argues that denial of the proposed benefit would adversely affect current Bureau of Prisons employees by restricting their "upward mobility." Id. at 3. In response to the Agency's argument concerning its ability to hire candidates from underrepresented groups, the Union contends that the proposal would present no impediment to such recruitment because the qualifications of internal candidates would not be "relatively equal" to that of the candidate from an underrepresented group. Id.

V. Analysis and Conclusions

As the Union acknowledges, this proposal directly interferes with management's right to select employees for appointments in filling positions under section 7106(a)(2)(C) of the Statute. That management right reserves to the agency the discretion to determine the source from which it will make a selection. *See, for example*, Defense Mapping Agency, Louisville, 45 FLRA at 78. It also reserves to the agency the discretion to determine which candidates are better qualified than others

when considering candidates for selection when filling a vacancy. *Id*. Thus, a tie-breaking procedure is negotiable if management is able to determine the source from which it will select and whether candidates are equally qualified for the position. *See, for example*, Overseas Education Association, Inc. and Department of Defense Dependents Schools, 29 FLRA 734, 793 (1987) (proposal that required the agency to use seniority as a tie-breaker if management determined that two or more employees were equally qualified and where management had determined to make the selection from one source, found negotiable because it did not interfere with management's right under section 7106(a)(2)(C) of the Statute), *aff'd as to other matters*, 872 F.2d 1032 (D.C. Cir. 1988). This proposal would prevent the selection of an outside candidate for a vacancy unless that candidate was better qualified than any candidates who were currently Bureau of Prisons employees. Consequently, it directly interferes with management's right to make selections for appointments in filling positions.

Now we turn to the question of whether this proposal is negotiable under section 7106(b)(3) as an appropriate arrangement notwithstanding the fact that it directly interferes with a management right. In National Association of Government Employees, R14-87 and Kansas Army National Guard, 21 FLRA 24, 29-33 (1986) (Kansas Army National Guard), the Authority developed a framework to determine whether a proposal constitutes an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute. Under that framework, we determine whether the proposal is intended as an arrangement for employees who may be adversely affected by the exercise of management's rights. If we find that the proposal is intended as an arrangement, we determine whether that arrangement is appropriate or whether it excessively interferes with the exercise of management's right to make selections for appointments in filling positions.

Applying the framework established in Kansas Army National Guard, we find that this proposal does not constitute an arrangement within the meaning of section 7106(b)(3) of the Statute. In order for us to conclude that a proposal is intended as an arrangement under section 7106(b)(3), the record must demonstrate that the proposal seeks to mitigate the adverse effects on employees of the exercise of a management right. . . . *Id*. at 31. Thus, a proposal is not an arrangement merely because employees would be adversely affected by the denial of a benefit provided by the proposal. *See* Border Patrol, 46 FLRA at 960; National Treasury Employees Union and U.S. Department of the Treasury, Office of Chief Counsel, Internal Revenue Service, 45 FLRA 1256, 1258-59 (1992).

This proposal seeks a benefit for employees. The adverse effects that the Union identifies in support of its claim that this proposal

constitutes an appropriate arrangement flow from the denial of the benefit sought. It is not apparent from the record that the proposal otherwise seeks to ameliorate adverse effects that flow from the exercise of a management right. Compare, for example, Kansas Army National Guard (the Authority concluded that a provision requiring that when filling specified vacancies management must select an employee who had been demoted through reduction-in-force and, thus, adversely affected by the exercise of a management right constituted an appropriate arrangement under section 7106(b)(3)). Consequently, we conclude that this proposal is not an arrangement for employees adversely affected by the exercise of a management right within the meaning of section 7106(b)(3) of the Statute. In view of this conclusion, it is not necessary to determine whether the proposal excessively interferes with management's right to make selections under section 7106(a)(2)(C) of the Statute.

Accordingly, the proposal is nonnegotiable.

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(2) Appropriate arrangements for employees adversely affected--Section 7106(b)(3).

The prior case ends with a discussion of whether the union proposal constitutes an appropriate arrangement. The FLRA adopted the "excessive interference" test to determine the negotiability of a proposed appropriate arrangement which interferes with the exercise of a management right. *See* Kansas Army National Guard, 21 FLRA 24 (1986). The test and important factors are listed below:

(1) Does the union proposal concern an arrangement for employees detrimentally affected by management's actions? If not, then the proposal is not an appropriate arrangement within the meaning of section 7106(b)(3). *See* AFGE and. Alaska NG, 33 FLRA 99 (1988).

(2) If so, the FLRA will then determine whether the arrangement is appropriate, or inappropriate because it excessively interferes with management rights. Some factors to consider:

(a) What conditions of employment are affected and to what degree?

(b) To what extent are the circumstances giving rise to the adverse affects within the employees' control?

(c) What is the nature and extent of impact upon management's ability to deliberate and act pursuant to its statutory rights?

(d) Does the negative impact on management rights outweigh any benefits to be derived from the proposed arrangement?

(e) What is the effect on effective and efficient government operations?

If, after applying this test, implementation of the union proposal would excessively interfere with the exercise of management's reserved rights, the proposal is nonnegotiable.

The excessive interference test may not normally be applied to government-wide regulations. An exception would be when government-wide regulations restate section 7106 rights. OPM v. FLRA, 864 F.2d 165 (D.C. Cir. 1988).

Management must carefully examine union allegations to ensure that the union has articulated an adverse effect. In IRS v. FLRA, 960 F.2d 1068 (D.C. Cir. 1992) the agency and union had entered into an agreement that employees would be paid extra if detailed to a higher graded position for more than one pay period. When management regularly assigned employees to temporary details of less then one period, the union proposed a provision that would prevent details for less than one pay period to avoid paying the higher wages. When the FLRA found this was not excessive interference, the court reversed, finding that the detail was a benefit and that the mere denial of a benefit was not an adverse affect warranting application of the excessive interference test.

In those instances when an adverse effect is found, the appropriate arrangement must be tailored to redress only the employees affected. In Interior Minerals Management Service v. FLRA, 969 F.2d 1158 (D.C. Cir. 1992) the court found union proposals concerning implementation of a drug testing program to be inappropriate. The proposals dealt with all employees when the only employees adversely affected were the few who would test positive for drugs.

4.4 Approval of the Collective Bargaining Agreement.

Upon completion of negotiations, both parties will sign the agreement and it will be forwarded to higher headquarters for review. Section 7114(c) provides:

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable,

law, rule or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representation subject to the provisions of this chapter and any other applicable law, rule, or regulation.

The purpose of the statutory provision is to ensure the effective time of the new contract is not held in abeyance pending higher headquarters' approval. The review of the contract could continue indefinitely so that without this statutory provision, implementation of the contract could be unreasonably delayed. With it, the contract becomes effective on the 31st day after execution regardless of the promptness of the higher headquarters' review of the CBA.

Can the head of the agency disapprove <u>any and all</u> provisions of the contract and force the parties to return to the bargaining table to renegotiate the discovered clauses? The answer is "no." Once the contract is signed at the installation, all provisions, with the exception discussed below, become effective upon the agency head's approval or on the 31st day after execution, whichever is sooner.

However, if a contract clause is contrary to statute (to include the management rights section or any other section of the CSRA), rule or government-wide regulation, the clause is void. The remainder of the contract will go into effect and those clauses will be renegotiated or deleted.

Higher headquarters power to review collective bargaining agreements for compliance with law and appropriate level regulations extends to contract provisions imposed by the Federal Service Impasses Panel, <u>Interpretation and Guidance</u>, 15 FLRA 564 (1984). *See also* <u>Pacific Missile Test Center, Point Mugu, California</u>, 8 FLRA 389 (1982).

CHAPTER 5

IMPASSE RESOLUTION

5-1. Introduction.

During the course of negotiating a collective bargaining agreement, certain union proposals may be unacceptable to management, so management will refuse to agree to the proposals. If the union feels strongly about the proposals, it will pursue them further. In the private sector, the strike serves as an incentive for the resolution of negotiation impasses. Because strikes are illegal in the federal sector (5 U.S.C. § 7311), there must be some other means of impasse resolution if collective bargaining is to be meaningful. The Federal Mediation and Conciliation Service and Federal Service Impasses Panel serve as this means. Impasse resolution in general is merely an extension of the collective bargaining process.

5 U.S.C. § 7119 authorizes the use of the Federal Service Impasses Panel (hereinafter referred to as the Panel) and the Federal Mediation and Conciliation Service (hereinafter referred to as the FMCS). Both existed under the Executive Order, the latter operating through regional offices located throughout the country.

5-2. The Federal Mediation and Conciliation Service.

The FMCS is an independent agency of the federal government created by Congress with a Director appointed by the President. Federal mediators, known as commissioners, are stationed throughout the country.

FMCS rules require that parties to a labor agreement file a dispute notice if they do not agree to a new collective bargaining agreement at least 30 days in advance of a contract termination or reopening date. The notice must be filed with the FMCS and the appropriate state or local mediation agency. The notice alerts FMCS to possible bargaining problems. If an impasse evolves, either party may request the services of the FMCS.

While methods and circumstances vary, the mediator will generally confer first with one of the parties involved and then with the other to get their versions of the pending difficulties. Then he will usually call joint conferences with the employer and the union representative to try to get them to agree. If this fails to resolve the impasse, either or both parties, or the FMCS on its own, may request the Panel to become involved by considering the issue itself or approving the use of binding arbitration.

5-3. Federal Service Impasses Panel.

The Panel consists of a chairman and at least six members, all of whom serve part-time to the extent dictated by caseload. The Panel meets monthly in Washington, D.C. with three members constituting a forum. The Chairman is responsible for overall leadership and direction of its operations. An Executive Secretary, assisted by a professional staff of several associates, is responsible for the day to day administration of the Panel's responsibilities.

The Panel attempts to avoid actions which might inhibit the growth of the bargaining process by constantly seeking to prevent its service from being used as a substitute for the parties' own efforts. With this in mind, an impasse has been defined as that point at which the parties are unable to reach full agreement, notwithstanding their having made earnest efforts to reach agreement by direct negotiations and by the use of mediation or other voluntary arrangements for settlement. 5 C.F.R. § 2470.2(e). The Panel will not take jurisdiction of a suit until these requirements have been met.

The Panel's involvement is a two-tiered system. It will first attempt to mediate the impasse, just as the FMCS does. As the Panel can impose a settlement, the parties are often willing to settle at this stage. The second stage is the imposition of a settlement.

Request for Panel consideration of a negotiation impasse must include information about the issues at impasse and the extent of negotiation and mediation efforts. An investigator will be appointed, and a preliminary investigation of the request will be made, to include consultation with the national office of FMCS whose evaluation of mediation efforts is a critical element in the Panel's determination whether it will take jurisdiction. The Panel may decline to assert jurisdiction if it finds that no impasse exists or for other good reason.

If it has determined, however, that voluntary efforts have been exhausted, the Panel normally recommends procedures for the resolution of the impasse or assists the parties in resolving the impasse through whatever methods it considers appropriate. If a hearing to ascertain the positions of the parties is deemed necessary, it is conducted by a designee of the Panel who may also conduct a prehearing conference to inform the parties about the hearing, obtain stipulations of fact, clarify the issues to be heard, and discuss other relevant matters. Basically a formal, but nonadversary proceeding, the hearing gives the parties an opportunity to present evidence relating to the impasse through the testimony of witnesses and the introduction of exhibits. An official transcript is made of the proceeding.

It is the duty of the factfinder to develop a complete record upon which he will base his report to the Panel. The report includes findings of fact on such matters as the history of the current negotiations, the unresolved issues and negotiation efforts with respect to them, justification for the proposals made on the impasse issues, and prevailing practices in comparable public sector bargaining units. These posthearing reports of the factfinder or other designee of the Panel may contain the factfinder's recommendations for settlement, if authorized by the Panel. Absent such authorization,

the report goes directly to the Panel which has the authority to take whatever action it considers appropriate at that point of its procedures. The Panel will normally take one of three actions: (1) require both parties to submit written submissions stating their positions and rebuttals, (2) require both parties to submit a final offer and the Panel will pick one of them, or (3) approve a request to have the matter arbitrated. With the former two alternatives, the Panel will give the parties its "recommendation."

The parties have 30 days to accept the recommendations of the Panel or its designee, or otherwise reach a settlement, or notify the Panel why the dispute remains unresolved. If there is no settlement at this stage despite the Panel's efforts, it can take whatever action it considers appropriate, such as imposing the previously issued recommendations or ordering binding arbitration. The regulations underline the fact that such "final action" is binding upon the parties. Failure to comply at this stage may result in an unfair labor practice (5 U.S.C. § 7116).

In those cases when the parties request approval of outside binding arbitration, the parties must furnish information about the bargaining history, issues to be submitted to the arbitrator, negotiability of the proposals, and details of the arbitration procedure to be used. After consideration of such data, the Panel will either approve or disapprove the request.

5-4. Decisions of the Impasses Panel.

Panel decisions were published under the Executive Order and are presently published under Title VII. As each case before the Panel generally turns on its own unique factual situation and is not considered precedent for subsequent cases, it would not be useful to include a multitude of Panel cases in this chapter. The following two cases are included merely to offer an illustrative example of the types of factors which the Panel considers in reaching its recommendations and demonstrates the procedures involved.

In the Matter of
DEPARTMENT OF THE ARMY, ARMY RESERVE PERSONNEL CENTER
ST. LOUIS, MISSOURI

and

LOCAL 900, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 93 FSIP 124 (1993)

DECISION AND ORDER

Local 900, American Federation of Government Employees, AFL-CIO (Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of the Army, Army Reserve Personnel Center, St. Louis, Missouri (Employer).

After investigation of the request for assistance, the Panel determined that the dispute, which concerns a change in smoking policy, should be resolved through an informal conference with a Panel representative. The parties were advised that if no settlement were reached, the Panel's representative would notify the Panel of the status of the dispute, including the final offers of the parties, and would make recommendations for resolving the impasse. After considering this information, the Panel would take whatever action it deemed appropriate to resolve the impasse, including the issuance of a binding decision.

The parties met with Panel Member Charles A. Kothe on July 20, 1993, in St. Louis, Missouri. During the informal conference, the parties were unable to resolve the issue in dispute. He has reported to the Panel based on the record developed by the parties, and it has now considered the entire record.

BACKGROUND

The Employer's primary mission is to plan and implement the mobilization of the U.S. Army Reserves should such action become necessary. The bargaining unit represented by the Union consists of approximately 1,200 nonprofessional employees who hold positions such as file clerk and secretary. The parties' collective bargaining agreement has expired but continues to be honored until a successor agreement is

implemented. The dispute arose during negotiations over smoking policy of Building 100 and 101, and the newly-constructed Prevedal Building; the new building is near completion and the older building is being renovated. The parties have already reached agreement in permitting smoking in certain areas. However, the Union wants more indoor smoking areas as well an enclosed ventilated outside area which will provide protection from the elements. The Employer wants smoking to be prohibited indoors, except for areas already agreed to, but contends it will provide adequate outside protection from the elements.

ISSUE AT IMPASSE

The parties primarily disagree over whether smoking should be permitted in certain indoor areas, and whether the Employer should construct an enclosed, ventilated area in the courtyard for smokers.

POSITIONS OF THE PARTIES

1. The Employer's Position

In essence, the Employer proposes that smoking be prohibited, except in areas already agreed to. In this regard, the dangers of second-hand smoke is well documented, and its prohibition will serve to protect nonsmokers from its risks. However, there will be an overhang in the courtyard to protect smokers from the elements. Additionally, a tent will be erected, with plastic sides capable of being rolled up or down, depending on the weather. Therefore, smokers will be adequately protected while nonsmokers will not suffer the detriments of second-hand smoke.

2. The Union's Position

The Union proposes that smoking be permitted in the following areas: (1) restroom on the second, fourth and fifth floors in Building 100; (2) the Union office; (3) Room 4150 or that the Agency build a smoking room on the fourth floor of building 100; and (4) that the Agency construct an enclosed area in the courtyard for smokers with proper ventilation. It is appropriate to permit smoking in these areas because it is in accordance with Federal regulations. In this regard, it permits the designation of those areas for smoking. Also, permitting smoking in the Union office would help alleviate the high level of stress and tension employees may have when they come into the office to register a complaint. Further, an enclosed area in the courtyard would protect employees from weather hazards.

CONCLUSIONS

Having considered the evidence and arguments presented, we conclude that a compromise solution should be adopted. Due to the increasing evidence of the detrimental effects of second-hand smoke, we believe that the Union is not justified in its attempts to seek further indoor smoking areas. In our view, its reliance on Federal regulations to justify indoor smoking demonstrates that it fails to grasp the significance of the health hazards involved. Furthermore, the regulations state that "nothing in these regulations precludes an agency from establishing more stringent guidelines." However, the Employer's proposal does not go as far as it should in establishing a smoke-free workplace. Therefore, although the parties may have reached an earlier agreement concerning where smoking will be permitted, we find it necessary that smoking be prohibited in all indoor areas of the buildings in question. However, since construction and renovation are not as of yet fully completed, we shall order that smoking be allowed to continue in the areas previously agreed to by the parties, including the vending machine area,[(4)] until such time as only construction at the facility is completed and the buildings are declared smoke free. There will be no smoke breaks, rather smoking will be permitted in the designated outdoor areas during the regular breaks only.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted pursuant to the Panel's regulations, 5 C.F.R. § 2471.6 (a)(2), the Federal Service Impasses Panel under § 2471.11(a) of its regulations hereby orders the following:

Smoking will be permitted in the following areas until construction at the facility is complete:

Cafeteria in the east end of Building 101; east entrance of Building 100; loading dock in Building 100 (exclusive of areas where smoking is prohibited); main entrance to the Prevedel Building; courtyard; and the vending machine area.

When construction is completed and the buildings are declared smoke free, only outdoor areas provided for smokers will be used. There will be no smoke breaks; rather smoking will be permitted in the designated outdoor areas during the regular breaks only.

By direction of the Panel.

Linda A. Lafferty

Executive Director

August , 1993

Washington, D.C.

1. / This case was consolidated with Case No. 93 FSIP 126, which involved the same parties and pertained to the issue of which form employees would have to fill out for internal promotion purposes. The parties resolved that issue when the Employer withdrew its proposal.

2. / The parties have agreed that smoking will be permitted in the following areas:

In the east end of the cafeteria in Building 101; east entrance of Building 100; loading docks of Building 100 (exclusive of areas where smoking is prohibited); the main entrance of the Prevedel building; and in the courtyard.

3. / 41 C.F.R. 101-20.105-3.

4. / The parties had previously agreed that smoking in the vending machine area would be prohibited. However, an inspection by Member Kothe indicated that it was not being enforced.

In the Matter of
DEPARTMENT OF THE ARMY, HEADQUARTERS 10TH MOUNTAIN DIVISION AND FORT DRUM,
FORT DRUM, NEW YORK

and

LOCAL R2-61, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES, SEIU,AFL-CIO

Case No. 95 FSIP 95 (1995)

AND

,

DEPARTMENT OF THE ARMY, HEADQUARTERS 10TH MOUNTAIN DIVISION AND FORT DRUM,
FORT DRUM, NEW YORK

and

LOCAL 400, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO

Case No. 95 FSIP 117 (1995)

AND

DEPARTMENT OF THE ARMY, HEADQUARTERS 10TH MOUNTAIN DIVISION AND FORT DRUM, FORT DRUM, NEW YORK

and

LOCAL F-105, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO

Case Nos. 95 FSIP 114 (1995) and 95 FSIP 132 (1995)

DECISION AND ORDER

The Department of the Army, Headquarters 10th Mountain Division and Fort Drum, Fort Drum, New York (Employer); Local R2-61, National Association of Government Employees, SEIU, AFL-CIO (NAGE); Local 400, American Federation of Government Employees, AFL-CIO; and Local F-105, International Association of Firefighters, AFL-CIO (IAFF), each filed separate requests for assistance with the Federal Service Impasses Panel (Panel) to consider negotiation impasses under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119. After investigation of the requests for assistance, the Panel consolidated the cases and determined that the dispute, which concerns the smoking policy at Fort Drum, should be resolved on the basis of the parties' written responses to an order to show cause.(1) Following consideration of those responses, the Panel would take whatever action it deemed appropriate to resolve the impasses. Pursuant to this procedural directive, only NAGE, AFGE, and the Employer submitted responses. The record is now closed, and the Panel has considered all relevant information contained therein.

BACKGROUND

Fort Drum is home to over 10,000 troops who serve in combat and peacekeeping missions. The installation is located near Watertown, New York, which is approximately 70 miles north of Syracuse and 30 miles from the Canadian border. NAGE represents two separate units at the installation. One consists of approximately 400 blue collar employees who work primarily

in skilled trades positions, with the other unit consisting of approximately 200 nonappropriated fund employees who work in the child care center, the recreation centers, and the guest-housing facilities; each unit is covered by a separate collective-bargaining agreement. The AFGE unit consists of approximately 400 administrative and clerical employees who are covered by a collective-bargaining agreement which expired on June 22, 1995; the parties are currently bargaining over ground rules for a successor agreement. The IAFF unit consists of approximately 45 employees, most of whom are firefighters; the IAFF contract expired in March 1995, but is currently being renegotiated.

In each of these cases, the parties have reached impasse following mid-term negotiations over the Employer's proposed revised smoking policy. The issue was originally discussed in the joint partnership council and a recommendation to deviate from DOD policy was sent forward to the commander. After that recommendation was rejected, formal negotiations began between the Employer and each union.

ISSUE

Whether provisions similar to those adopted by the Panel in Malmstrom AFB should be ordered to resolve the instant dispute over smoking policy.

POSITIONS OF THE PARTIES

1. The Employer's Position

The Employer agrees in principle with the Panel's proposed wording, with the following modifications:

1. Smoking is prohibited in any Government vehicle, building, or entryway, with the exception of in Military Family Housing and the designated areas in the following places: Fort Drum clubs (Officer's Club, Mountaineer Club (NCO Club), Spinners Club, Pennants Club); the following AAFES snack bars: Bonnie's Snack Bar and Emma's Snack Bar; the Bowling Center; and soldiers' barracks.

2. For Case No. 95 FSIP 95: Smoke breaks will be provided in accordance with the collective-bargaining agreements, except that employees may make arrangements with their supervisors to divide the breaks into two or three break periods.

For Case Nos. 95 FSIP 114 and 132: Breaks, for smoking and other purposes, will be provided in accordance with the collective-bargaining agreement.

For Case No. 95 FSIP 117: Reasonable smoke breaks will be allowed, not to exceed 15 minutes per four hour work period. This may be broken into two or three break periods subject to work requirements.

3. Current employees may attend one smoking cessation class at no cost to them and on duty time.

4. The terms of this order will be effective 30 days after the date of the order to allow for dissemination of the new requirements to the workforce.

5. In the 120-day period following the effective date of the new policy, those who violate the policy will be given a verbal warning prior to initiation of progressive disciplinary action.

Adopting a resolution similar to the one in Malmstrom AFB is appropriate, as the climates at the two installations are "essentially the same." Moreover, Fort Drum has already implemented a total ban on smoking in some buildings, which is comparable to the situation at Malmstrom.

The modifications that it proposes in paragraph 1 reflect the specific names of facilities at Fort Drum. That paragraph also clarifies, for purposes of Case Nos. 95 FSIP 114 and 132, that the firefighters' sleeping area is not considered living quarters, but is, instead, a work area. The proposed changes to paragraph 2 are consistent with the provisions of the parties' respective collective-bargaining agreements, as well as agreements reached on some collateral items during negotiations. The Employer's paragraph 3 reflects its commitment to cessation programs, but only for current employees. Paragraph 4 of the proposal reflects its view that a 30-day phase-in period is sufficient given that the revised DOD policy has already received considerable publicity. Finally, the proposed changes to paragraph 5 should clarify that once the 120-day grace period is over, progressive discipline will be used whenever violations of the smoking policy are detected.

2. NAGE's Position

NAGE proposes the retention of those areas currently designated as indoor smoking areas with the installation of ventilation systems, where necessary, to ensure circulation of fresh air. In the alternative, it proposes that any one of the following options be adopted:

1. Provide outdoor sheltered smoking areas that are protected from the elements, that are lighted, heated, and ventilated, and that are sufficient in size to accommodate, and to be furnished with, a table and six chairs. The shelters are to be located in close proximity to where bargaining-unit employees are assigned.

2. a. The Employer shall designate one entrance to each facility as being the common point of entrance into the facility. Employees who choose to smoke may not smoke within 50 feet of the designated entrance. Employees may smoke at all other entrances to the facility, including loading docks, porches, and pavilions.

b. The Employer shall provide an indoor smoking area in each facility that bargaining-unit employees who smoke are assigned for use between 1 November and 30 April.

3. a. The Employer shall designate one entrance to each facility as being the common point of entrance into the facility. Employees who choose to smoke may not smoke within 50 feet of the designated entrance. Employees may smoke at all other entrances to the facility, including loading docks, porches, and pavilions.

b. The Employer shall provide an indoor smoking area in each facility that bargaining-unit employees who smoke are assigned for use when the temperature is 32°F or below and during periods of inclement weather.

4. a. The Employer shall designate one entrance to each facility as being the common point of entrance into the facility. Employees who choose to smoke may not smoke within 50 feet of the designated entrance. Employees may smoke at all other entrances to the facility, including loading docks, porches, and pavilions.

b. The Employer shall provide at one entrance to each facility a smoking area that is covered and protected from the elements.

5. a. The Employer shall designate one entrance to each facility as being the common point of entrance into the facility. Employees who choose to smoke

may not smoke within 50 feet of the designated entrance. Employees may smoke at all other entrances to the facility, including loading docks, porches, and pavilions.

b. The Employer shall provide sheltered smoking areas in close proximity to each facility in which unit employees are assigned. The shelters shall provide protection from the elements.

The facts of this case are significantly different from those in Malmstrom AFB and, therefore, the provisions set forth in the show cause order should not serve as a basis for resolving this dispute. First, since the Panel's Decision and Order in Malmstrom AFB was issued, Department of Defense Instruction No. 1010.15 (March 7, 1994) was promulgated. That instruction establishes a department-wide smoking policy which requires "the designation of outdoor smoking areas, when possible, which are reasonably accessible to employees and provide a measure of protection from the elements." Second, the installation's Labor-Management Partnership Council thoroughly discussed the smoking issue and reached consensus that the existing policy ought to be maintained; overturning this consensus would undermine the integrity of the partnership council and could have a negative impact on its ability to function successfully. Third, the winter weather conditions (including temperature, wind chill, and snowfall) at Fort Drum are "a significant and material fact that distinguishes this case from Malmstrom AFB." Finally, the Employer in this case can afford to fund the construction of smoking shelters as evidenced by its expenditure of "tremendous amounts of tax dollars" on less worthy projects.[(2)] For these reasons, the Panel ought to reject the approach taken in Malmstrom AFB and adopt one of the Union's proposed solutions.

3. AFGE's Position [(3)]

AFGE apparently would have the Panel adopt the same approach as it did in Department of the Air Force, Griffiss Air Force Base, Griffiss Air Force Base, New York and Local 2612, American Federation of Government Employees, AFL-CIO, Case No. 89 FSIP 214 (January 24, 1990), Panel Release No. 290. In that case, the Panel ordered the adoption of the following modified version of the employer's proposal:

Effective on the first day of the month following the signing of this agreement, or within 2 weeks after the signing of this agreement, whichever is longer, the Employer will implement its smoke-free policy with certain outdoor-condition exceptions. Therefore, when the weather is not suitable for outdoor smoking, employees will be allowed to use those designated

smoking areas (DSAs) in existence on May 12, 1989, the date these negotiations began.

The following conditions shall be considered unsuitable for purposes of permitting smoking in DSAs:

a. temperatures lower than 35 degrees;

b. precipitation and no outside area with an overhead shelter;

c. gusting winds such that it would make conditions incompatible and smoking impractical outside.

Recreational areas such as clubs and the bowling center will continue to maintain DSAs.

Management shall consider exceptions to this policy in cases of hardship.

Smoking cessation classes will continue to be made available under the provisions of the November 1987 negotiated agreement.

If management decides to terminate this agreement, the base shall return to the smoking policy in effect at the signing of this agreement.

Any subsequent initiative to alter the smoking policy is subject but not limited to sections 7114 and 7117 of the Federal Service Labor-Management Relations Statute.

AFGE maintains that the approach set forth in Griffiss AFB, is more reasonable and humane for unit employees, given the extreme weather conditions that exist in the area. In addition, Fort Drum is dissimilar from Malmstrom Air Force Base in that it is an open post which is not secure; requiring employees to smoke outdoors at night or on weekends could expose them to injury or foul play. Finally, while a uniform smoking policy may have been appropriate at Malmstrom, it is not appropriate for this installation because of the diverse nature of the workforce.

CONCLUSIONS

Having carefully reviewed the record in these cases, we conclude that the dispute over smoking should be resolved on the basis of a modified version of the provision we adopted in Malmstrom AFB. This approach strikes an appropriate balance between the competing interests of smokers and nonsmokers by coupling the elimination of indoor smoking with some accommodation for those who continue to smoke. Moreover, because our solution will require the parties jointly to identify outdoor areas which are appropriate for smoking, it should, in the long run, serve their respective interests better than any attempt by the Panel to identify outdoor areas without benefit of an on-site inspection. Finally, this provision recognizes that there are facilities and practices at Fort Drum which are unique to that installation; we shall, therefore, tailor our Order accordingly.

ORDER

Pursuant to the authority vested in it by section 7119 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their disputes during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel under § 2471.11(a) of its regulations hereby orders the parties to adopt the following:

1. Smoking is prohibited in any Government vehicle, building, or entryway, with the exception of in Military Family Housing and the designated areas in the following places: Fort Drum clubs (Officer's Club, Mountaineer Club (NCO Club), Spinners Club, Pennants Club); the following AAFES snack bars: Bonnie's Snack Bar and Emma's Snack Bar; the Bowling Center; and soldiers' barracks.

2. The parties shall jointly identify existing outdoor areas where employees may smoke. The areas shall meet the following criteria: they shall provide overhead coverings; they shall be reasonably accessible to employees' worksites; and they shall meet safety, health, and security concerns. Any disagreements as to the areas identified should be resolved through grievance arbitration.

3. Case No. 95 FSIP 95: Smoke breaks will be provided in accordance with the collective-bargaining agreements, except that employees may make arrangements with their supervisors to divide the breaks into two or three break periods.

Case Nos. 95 FSIP 114 and 132: Breaks, for smoking and other purposes, will be provided in accordance with the collective-bargaining agreement.

Case No. 95 FSIP 117: Reasonable smoke breaks will be allowed, not to exceed 15 minutes per 4-hour work period. This may be broken into two or three break periods subject to work requirements.

4. Current employees may attend one smoking cessation class at no cost to them and on duty time.

5. A 90-day accommodation period will follow implementation of the no-indoor smoking policy; and

6. In the 120-day period following the effective date of the new policy, those who violate the policy will be given a verbal warning prior to initiation of progressive disciplinary action.

By direction of the Panel.

Linda A. Lafferty

Executive Director

September 27, 1995

Washington, D.C.

1. More specifically, the parties were directed to show cause why wording similar to that ordered in Department of the Air Force, Malmstrom Air Force Base, Malmstrom AFB, Montana and Local 2609, American Federation of Government Employees, AFL-CIO, (Case No. 92 FSIP 32, October 27, 1992)(Malmstrom AFB), should not be imposed. The Panel provided the following wording to the parties:

1. Smoking is prohibited in any Government vehicle, building, or entryway, with the exception of the designated areas in the NCO Mess, Bowling Center, Military Family Housing, and designated dormitory areas;

2. Smoke breaks will be provided in accordance with Air Force Regulation 40-610;

3. Employees may attend one smoking cessation class at no cost to them and on duty time;

4. A 90-day accommodation period will follow implementation of the no-indoor smoking policy; and

5. Smokers will be subject to a 120-day period of gradual and progressive discipline, with those who violate the no-smoking policy to be given verbal warnings prior to any disciplinary actions.

2. The following examples of "questionable" projects were submitted by NAGE: construction of a new officers' club; construction of a new skeet range; resodding of the golf driving range; the addition of a fountain and a stained glass window in Building P-10000; the remodeling of the LeRay Mansion; Mountain Fest; remodeling jobs at Buildings T-7 and T-13; hydroseed for the parade field for the Change of Command ceremony in 1993; and the construction of tree stands, used for hunting.

3. AFGE's written response does not contain actual typewritten proposals clearly identifiable as its final offer on the issue of smoking policy.

NOTE 1: As the preceding case indicates, the Panel first recommends a resolution to the parties. Usually, the parties either adopt that recommendation or resolve the impasse in some other way. However, the Panel has occasionally ordered the parties to write prescribed terms into their next agreement. *See e.g.*, AFGE (National Border Patrol Council) v. Immigration & Naturalization Service, 73 FSIP 14 (March 19, 1975); American Federation of Government Employees Local 2151 v. General Services Administration Region III (Washington), 73 FSIP 18 (July 11, 1974).

NOTE 2: The Panel's rules and regulations can be found at 5 C.F.R. §2470.01 et. seq.. These should be consulted to ascertain the specific procedures to be used when the Panel's services are needed. In addition, the Panel's "Guide to Dispute Resolution Procedures" is available online line *at* http://www.flra.gov/fsip/fsip_drp.html.

NOTE 3: There is no statutory provision permitting direct review of an imposed adverse Panel decision. Parties have, therefore, occasionally refused to cooperate with an FSIP order, thereby voluntarily submitting themselves to a ULP proceeding. This lays the groundwork for review by the Authority and possibly the courts. Council of Prison Locals v. Brewer, 735 F.2d 1497 (D.C. Cir. 1984); Florida National Guard and National Association of Government Employees, 9 FLRA 347 (1982).

NOTE 4: FSIP may use a variety of methods to resolve an impasse, but it cannot resolve the underlying obligation to bargain. NTEU, 11 FLRA 626 (1953). The panel can resolve an impasse relating to a proposal concerning a duty to bargain if it applies to existing (Authority) case law. Canswell AF Base v. AFGE, 31 FLRA 620 (1988).

NOTE 5: The Authority ruled in Patent and Professional Association and Department of Commerce, 41 FLRA 795 (1991), that impasses resolved by the FSIP under the provisions of § 7119(b)(1) are subject to Agency Head review under § 7114(c). Impasses resolved through outside arbitration agreed to by both parties under § 7119(b)(2) are not subject to Agency Head review under § 7114(c), but are reviewable by the FLRA under § 7122.

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CHAPTER 6

UNFAIR LABOR PRACTICES

6-1. Procedures (5 U.S.C. § 7116; 5 C.F.R. § 2423).

An unfair labor practice is a means by which either management, a labor organization, or an employee can effect compliance with the FSLMRS, and is a means to obtain a remedy against a violator of the statute. If one party acts in a manner inconsistent with the statute, the other party may file an unfair labor practice charge with the Regional Director, who will investigate and file a complaint if the allegation has substance. The Regional Director, acting for the General Counsel, will prosecute the complaint before an administrative law judge (ALJ). If the ALJ sustains the ULP, his report and recommendation, with exceptions by the parties, will be forwarded to the Authority who will issue an order requiring the wrongdoer to cease and desist from the complained of acts. It will be posted in the work area of the employees for 60 days. Failure to comply with the order may result in Federal court involvement and harsher sanctions.

Section 7116, FSLMRS, lists the unfair labor practices. The statute incorporates the unfair labor practice provisions of Executive Order 11491, with a few additional ones. The unfair labor practice procedures are located at Title 5, Code of Federal Regulations 2423.

One major change to the regulation is in its organization. Part 2423 of the CFR is now divided into four subparts which reflect the chronological flow of the ULP process. In addition, the ULP subpoena and appeal procedures have been moved from Part 2429 of the CFR into Part 2423 with the rest of the ULP procedures.

Informal Procedures. The Authority encourages the parties to resolve disputes informally. 5 C.F.R. Part 2423.7 attempts to effectuate this policy by delaying the investigation of a ULP complaint for fifteen days after filing of the charge, to allow the parties to attempt to informally resolve the complaint. The Authority also encourages the parties to include informal procedures in the collective bargaining agreement.

The Charge. The charge is an allegation of an unfair labor practice filed directly with the appropriate Authority regional office within six months of the wrong. The rules set forth the procedural requirements for filing an ULP charge. The charge is an informal allegation, as opposed to a complaint which is akin to a formal, legal indictment. Any "person" (an individual, labor organization or agency) may file a charge against an activity, agency, or labor organization.

Unfair labor practice charges must be submitted on forms supplied by the regional office. Aside from the required identifying information (e.g., name, address, telephone number, etc.), the form must contain a clear and concise statement of the facts constituting the alleged ULP, including the date and place of the occurrence. The

charging party must submit any supporting evidence and documents along with the charge.

The Investigation. When the charge is received in the regional office, it will be docketed, assigned a case number, and investigated to the extent deemed necessary by the Regional Director. All involved parties will have an opportunity to present evidence. All persons are expected to cooperate. Statements and information supplied to the regional office will be held in confidence.

Extent of Investigation. The regional office will conduct some form of investigation for almost every charge received. It may range from as little as a telephone conversation to an extensive, on-site search for information. Both the charging party and the Respondent may recommend that the regional office look into certain matters. The Regional Director will have the final say in this regard. Experience to date demonstrates that the parties can expect an on-site investigation only if the Authority has adequate funds. In the recent past these funds were not always available.

Role of the Regional Office. During the investigative stage, it is the General Counsel's policy for the regional office to assume an impartial fact-finder role. The objective is to gather the facts and arguments on both sides of the issue so that a decision as to the merits of the charge may be made by the Regional Director. Some managers have expressed displeasure with the approach taken by some investigators from regional offices, feeling that the investigators are biased in favor of the charging party.

Regional Director's Options. After the regional office receives and investigates an ULP charge, it has some options as to what to do with it. It may refuse to issue a complaint, may request the charging party withdraw or to amend it, or it may issue a complaint and notice of hearing.

Withdrawals. Only the charging party may withdraw a charge, and then only with the approval of the Regional Director. ULP charges are matters dealing with public rights, as opposed to private rights, and the General Counsel is responsible for enforcing these rights. Hence the requirement for the Regional Director's approval. The only time a Regional Director's approval may be difficult to obtain is when individual employee's rights are involved and the agreed-upon settlement does not serve to remedy violations which affect employees.

Withdrawals arise under a number of different circumstances. First, the charging party may decide unilaterally to withdraw the charge for reasons unknown. More often, the regional office will complete its investigation, find no merit in the ULP charge, and suggest to the charging party that it withdraw the charge or face dismissal. Finally, management and the union, with or without the regional office's assistance, may agree to a settlement which is conditioned upon the union's withdrawal of the charge.

Dismissals. A dismissal by the Regional Director is disposition of an ULP charge with prejudice and without the concurrence of the charging party. The dismissal letter

from the Regional Director will state the reason(s) for the action and is subject to review on appeal within 25 days to the General Counsel's office in Washington, DC. The decision of the General Counsel is final and not subject to further review. Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982).

Dismissals may occur for a number of reasons. If the regional office investigates and finds no merit, and the charging party refuses to withdraw, the Regional Director may dismiss the charge. Dismissals may also occur for procedural or jurisdictional reasons. For instance, if the charge is untimely filed or the Regional Director determines that the issue has been raised under a grievance or appeals procedure pursuant to Section 7116(d) of the statute, the charge should be dismissed. It is also possible for the Respondent and the Regional Director to enter into a settlement of the charge without concurrence of the charging party. In this case, the Regional Director will dismiss the charge.

Timeliness of the Charge. The Authority's regulations provide that a charge must be filed within six months of the occurrence of the unfair labor practice (with some exceptions). When a charge is filed more than six months after the event in question, the respondent should assert that the charge is not timely filed.

Defects in the Charge. If there has been a failure to follow the regulations with respect to the contents, service, or filing of the charge, such should be asserted. The failure to follow filing procedures constitutes prejudice to the respondent if it is more than a mere technical defect. The Authority will permit the defect to be corrected by the charging party if it is a mere technical defect.

Wrong Appeal Route. Section 7116(d) provides that issues "which can properly be raised under an appeals procedure may not be raised as an unfair labor practice." When grievants raised the issue of non-production of requested information in connection with disciplinary actions taken against them, thus exercising their option to raise the issue under a grievance procedure or by unfair labor practice complaint under section 7116(d) of the Statute, the union could not thereafter independently raise the same issue in an unfair labor practice complaint. IRS, Chicago, Illinois and NTEU, NTEU Chapter 10, 3 FLRA 478 (1980).

Amendments to Charges. The rules state that the charging party may amend the charge at any time prior to issuance of a complaint. Oftentimes, the regional office, upon completion of its investigation, will recommend to the charging party that it amend the charge. The charge will then accurately cite the alleged incident(s) and violations so that any complaint (which is issued later) will not contain surprises for the parties.

Issuance of Complaints. The Regional Director will issue a complaint if there appears to be merit in the ULP charge and the case remains unsettled. The General Counsel has also expressed an interest in issuing complaints in those cases he categorizes as "elucidating," i.e., cases which raise issues under a statute that have not been tested before the Authority. The issuance of a complaint by a Regional Director

cannot be appealed by the Respondent to the General Counsel for review. (Refusal to issue a complaint may be appealed to the General Counsel.)

Answer. The Respondent has twenty days after service of the complaint to answer it. He serves the answer on the Chief Administrative Law Judge and on all parties.

Settlements. If there is some substance to the allegation, the Regional Director will exert considerable pressure upon the parties to reach a settlement agreement. Management will settle when it is advantageous. For instance, if it is clear an unfair labor practice has been committed, a settlement will result in termination of the proceedings and a saving in the use of resources. Often management will settle those cases in which a "nonadmission of guilt" is part of the settlement agreement. ("It is understood that this does not constitute an admission of a violation of the statute.")

NOTE: Prior settlement offers are not admissible at ALJ hearings on unfair labor practices. *See* 56th CSG, MacDill AFB and NFFE Local 153, 44 FLRA 1098 (1992).

The Hearing. The date, time, and place of the hearing are contained in the complaint. Typically, the hearing will be conducted at or near the activity involved in the case. An administrative law judge will preside at the hearing. The Federal Rules of Civil Procedure do not apply to ULP hearings; rather the proceedings are generally governed by the Administrative Procedures Act contained in Chapter 5 of Title 5 of the U.S. Code. These rules assure that the basic tenets of due process will apply to ULP hearings. The ALJ is empowered to make rulings on motions, objections, and to otherwise control and conduct the hearing. Either party may call witnesses and has the right to examine or cross-examine all witnesses. The General Counsel has the burden of proving the allegations of the complaint by a preponderance of the evidence.

Motions. Motions may be made in writing prior to the hearing, or in writing or orally after the hearing opens. Responses to motions must be made within five days after service of the motion. Interlocutory appeals are not permitted for motion rulings. Rather, motion rulings are considered by the Authority if the case is appealed.

ALJ Decision and Exceptions. Upon receipt of briefs, if any, the ALJ will prepare his decision expeditiously and transmit it to the FLRA while serving copies on the parties. Any party may file exceptions to the Authority decision, in writing, with the Authority. The rules set forth a 25-day time limit from the date of service of the ALJ decision in which to file exceptions.

FLRA Decision and Order. The rules outline the Authority's role in making the final ULP decision and in fashioning a remedy. If exceptions to the ALJ decision are filed with the Authority, it will provide a decision complete with discussion and its rationale for affirming, reversing, or modifying the ALJ's decision. If exceptions have not been filed, the Authority simply adopts the ALJ's decision without discussion. In either case, the Authority ruling serves as the final administrative decision on the matter.

These decisions are published by the Authority and may be obtained from the Government Printing Office.

The Federal Labor Relations Authority has broad remedial power in ULP cases. The most common remedy is for the losing party to sign a notice promising not to engage in violative conduct in the future (Cease and Desist Order). If the circumstances of the case warrant, the Authority may award back pay to affected employees or order the losing party to revert to the status quo ante by taking any other affirmative action which is deemed appropriate.

Judicial Review. Within 60 days of the date of the Authority's decision and order, any aggrieved party may initiate an action for judicial review in the appropriate U.S. Circuit Court of Appeals. Section 7123 of the statute sets forth the requirements and procedures for judicial review. To file a petition for judicial review of an Authority decision, Federal agencies must work through the appellate division of the Department of Justice. The Justice Department has the final say as to whether or not court action will be initiated.

Strikes. There is a special provision in Title VII governing enforcement of the "no strike" provision for unions (Federal employees and their unions are not allowed to engage in work slowdowns or strikes). If the Authority should find the exclusive representative violated Section 7116(b)(7), FSLMRS, the following sanctions may be taken:

(1) Revoke the exclusive recognition status of the labor organization (decertification), and

(2) Take any other appropriate disciplinary action.

See PATCO v. FLRA, 685 F.2d 547 (D.C. Cir. 1982).

Temporary Relief. Section 7123(d), FSLMRS, sets forth a procedure through which the Authority may seek temporary relief in an unfair labor practice case. Upon issuance of an unfair labor practice complaint, the Authority may petition a District Court for appropriate temporary relief, to include a restraining order. This is used in those cases where the unfair labor practice continues, in spite of the filing of a charge and issuance of a complaint.

Unfair Labor Practices: Section 7116, FSLMRS defines the unfair labor practices:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this Title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure--

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

Most ULPs have been filed by unions against management. The remainder of the chapter discusses the specific unfair labor practices and includes illustrative cases of different types of unfair labor practices.

6-2. Interference with Employee Rights.

Section 7116(a)(1) provides it shall be an unfair labor practice for an agency:

to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

Title VII sets forth employee rights in § 7102 as follows:

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

When management interferes with, restrains, or coerces an employee in the exercise of these rights, it violates §7116(a)(1).

FORT BRAGG SCHOOLS and
N.C. FEDERATION OF TEACHERS

3 FLRA 363 (1980)

(Extract)

* * *

Surveillance

The next issue is whether the attendance of school principals at several union informational meetings held for the teachers constituted a violation of 5 U.S.C. §7116(a)(1).

During the first few months of 1979, Virginia D. Ryan, State Director of the North Carolina Federation of Teachers, AFT, AFL-CIO, ("AFT") contacted Dr. Haywood Davis, the Superintendent of the Fort Bragg Schools. Her purpose was to get permission to use school mailboxes, bulletin boards, and rooms in order to organize a new AFT chapter and solicit membership among the teachers.[6] On April 19, Davis granted her request and told her that meetings could be held in the various schools at 3:30 p.m..[7]

[6] The Fort Bragg Federation of Teachers, Local 3976, was chartered on July 1, 1979.

[7] Children were expected to be off school grounds by that time and the teachers' "normal" duty day was over at 3:45 p.m. (G.C. Ex. 4, p. 32-33).

On April 24, 1979, Ryan contacted Davis H. Orr, principal of the Irwin Junior High School. She scheduled a meeting with the Irwin teachers for May 2 and told Orr that he should not attend union informational meetings. She explained the history and objectives of AFT to Orr at an informal gathering on April 24.

Ryan met with Superintendent Davis on May 2 and requested that he ask the school principals not to attend AFT informational meetings. Davis immediately got a legal opinion on the matter by telephone and informed her that he could not prevent their attendance. Subsequently, at 3:30 p.m., Ryan held the scheduled meeting at Irwin School with about 12 teachers. Principal Orr and his assistant were in attendance. Ryan discussed the history of AFT and some of the benefits, goals and objectives of the organization; she also discussed the rights granted to employees and explained how AFT could help the Fort Bragg teachers in this regard. AFT literature and membership applications were made available to the teachers at the meeting. The meeting included a question and answer period.

Subsequently, Ryan held identical meetings with seven to 10 teachers at the McNair Elementary School (May 3), Bowley Elementary School (May 8), and Butner Elementary School (May 10). The May 3 meeting was attended by Principal Richard M. Ensley, the May 8 meeting by Principal Forrest H. Deshields, and the May 10 meeting by Principal Stahle H. Leonard, Jr. In each case the principal was sitting in full view of all teachers attending. Deshields attended in spite of Ryan's specific request to him just before the May 8 meeting that he not attend and her warning that she might have to file a charge against him if he did.

Counsel for the General Counsel argues that the presence of the principals at the four above-mentioned informational and organizational meetings constituted a violation of 5 U.S.C. §7116(a)(1) because, in each case, it interfered with, restrained, or coerced the employees in the exercise of their §7102 rights to form, join, or assist a labor organization. It is well settled in the private sector that overt surveillance by management supervisors of employees while the latter are attending union organizational meetings is prohibited by §8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) because it interferes with comparable protected rights. National Labor Relations Board v. Collins & Aikman Corp., 146 F.2d 454 (4th Cir. 1944); N.L.R.B. v. M & B Headwear Co., 349 F.2d 170, 172 (4th Cir. 1965).

Respondents argue that the employees in the instant case were not shown to be affected by the presence of the school principals. However, this is not a necessary element of proof to sustain a violation. The test is whether the action by the supervisors "tended" to have a chilling effect on

the exercise by the employees of their protected rights. N.L.R.B. v. Huntsville Manufacturing Co., 514 F.2d 723, 724 (5th Cir. 1975). In the instant case the teachers were aware that their immediate supervisor was watching them and, for example, was in a position to take note of any indication during the question and answer period of an employee's interest in how working conditions could be improved by means of collective bargaining. It is reasonable to infer that some employees might have felt inhibited by the presence of their supervisor from showing an interest and asking questions. Some may have been concerned that their supervisor even knew that they attended the meeting for fear of subsequent reprisal.[8] The meetings in question were designed and advertised for teachers, not principals; therefore, the awkward presence of the principals tended to highlight their anxiety about union organization.[9] Accordingly, it is held that the presence of the principals tended to interfere with, restrain, or coerce the teachers in the exercise of their rights to form, join, or assist a labor organization.

The Superintendent's Statement

The final issue is whether Respondent violated section 7116(a)(1) of the statute when the Superintendent of Fort Bragg Schools made a statement to a group of employee teachers.

On May 14, 1979, the North Carolina Association of Educators ("NCAE") held a meeting at the Irwin School for the purpose of enlightening the teachers at Fort Bragg about collective bargaining. The speaker was a representative from the state office of NCAE. The meeting was attended by about 50 or 60 teachers and the Superintendent of the Fort Bragg Schools, Dr. Haywood Davis.

At one point during the question and answer period after the lecture, the speaker was in the process of explaining the process by which the teachers could obtain collective bargaining. He noted that it would be necessary for a certain number of teachers to request it. At this point Superintendent Davis walked up to the podium and made a statement to the audience. The intent and effect of Davis' statement was to discourage the teachers from filing a petition with the Authority for collective bargaining. He told the teachers that although he supported the right of any teacher to join any labor organization, he did not want to see collective bargaining in his school system because it would put

[8] In an analogous case it was held that management cannot interrogate an employee concerning the names and number of employees who had signed a representation petition. Federal Energy Administration, Region IV, Atlanta, Georgia, A/SLMR No. 541, 5 A/SLMR 509 (1975).

[9] Respondent argues that the principals had a right to attend the meetings since they were on federal property. However, management authorized the use of certain rooms for the meetings and there is no evidence that any appropriate function of management was served by the attendance of principals.

administrators and teachers "on opposite sides of the table." He prefaced his remarks by acknowledging that it might be improper for him to make such a statement, but that he wished all of his teachers were there to hear it.[10]

The General Counsel and the Charging Party both argue that the above statement violated 5 U.S.C. §7116(a)(1) because it interferes with, restrained, or coerced the employee teachers in the exercise of their rights under the statute. Section 7102 gives each employee the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal. This right specifically includes the right to engage in collective bargaining with respect to conditions of employment through chosen representatives. 5 U.S.C. §7102(2). The Superintendent's statement at the May 14 meeting clearly interfered with and restrained the Fort Bragg teachers from exercising their protected right to engage in collective bargaining. The charging party, AFT, only a few days earlier, had conducted several meetings with the teachers to explain collective bargaining and solicit membership. Davis' statement had the effect of discouraging this effort. Moreover, Davis' remarks were particularly coercive since he was in charge of the entire Fort Bragg school system, including the discipline and annual rehiring of the teachers. It is irrelevant that Davis did not specifically threaten the employees with reprisal if they did not act in accordance with his wishes.[11] Accordingly, it is held that Respondent violated section 7116(a)(1) of the statute.

* * *

The wearing of union insignia generally may not be prohibited unless there is a legitimate business reason such as it interferes with work or creates a safety hazard. The activity did not violate Section 7116(a)(1) of the Statute when it prohibited two hotel service employees from wearing union stewards' badges while dealing with the public, particularly in view of the size and conspicuous nature of the badges, where (1) restriction is pursuant to and consistent with activity's long-standing policy of enforcing its prescribed uniform requirement, (2) there is no evidence of a discriminatory purpose, and (3) uniformed employees are allowed to wear union stewards' badges when they are not serving the public. United States Army Support Command, Fort Shafter, Hawaii and Service Employees International Union, Local 556, AFL-CIO, 3 FLRA 795 (1980).

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[10] Findings with respect to Davis' statement are based on the credible testimony of three teachers; I do not credit Davis' testimony that he was merely trying to say that it is possible to have exclusive representation without collective bargaining.

[11] A contrary result may have been obtained under one unenacted bill which provided that the expression of any personal views would not constitute an unfair labor practice if it did not contain a "threat of reprisal or force or promise of benefit or undue coercive conditions." S. 2640, 95th Cong., 2d Sess., § 7216(g). This subsection was ultimately modified to provide for limited freedom of expression in three instances not applicable herein. 5 U.S.C. § 7116(e).

See also DOJ v. FLRA, 955 F.2d 998 (5th Cir. 1992) (INS policy banning on-duty employees from wearing union pins on their uniforms did not violate FSLMRS or First Amendment).

AIR FORCE PLANT REPRESENTATIVE OFFICE
and NFFE

5 FLRA 492 (1981)

(Extract)

. . . Upon consideration of the entire record in the subject cases, including the Regional Director's Report and Findings on Objections in Case No. 6-RO-7 and the parties' stipulation and respective briefs in Case No. 6-CA-233, the Authority finds:

In May 1979, the National Federation of Federal Employees, Local 1958 (NFFE) filed a petition seeking to represent a unit consisting of all the Activity's General Schedule professional and nonprofessional employees, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135). The American Federation of Government Employees, AFL-CIO, Local 1361 (AFGE) became an Intervenor in that proceeding. In June 1979, the parties entered into an approved Agreement for Consent or Directed Election pursuant to which a representation election was scheduled to be conducted on July 12, 1979. A few days before the election, on or about July 10, 1979, the Activity published a newsletter entitled "Talley-Ho ! Gram," dated July 10, 1979 signed by the Activity's chief management official. The newsletter was published in the Activity's eleven divisions by being posted on bulletin board located approximately 90 feet from the voting booth in the prospective election and in a direction from which the majority of the employees would pass on their way to vote. The "Talley-Ho ! Gram," which remained posted on the bulletin boards through July 12, 1979, the date of the election, stated as follows:

10 July 1979
POST ON ALL BULLETIN BOARDS

1. NOTICES HAVE BEEN POSTED AND DISTRIBUTED ON THE UNION ELECTION TO BE HELD THURSDAY, 12 JULY, BETWEEN 1345 AND 1545. EMPLOYEES ON THE PAYROLL AS OF CLOSE OF BUSINESS 2 JUNE 1979 WILL BE ELIGIBLE TO CAST THEIR VOTE FOR:

   * NO UNION

* AFGE
* NFFE

YOUR DECISION WILL BE BINDING OVER THE YEARS TO COME SHOULD YOU VOTE FOR A UNION TO REPRESENT YOU.

2. YOU ALL HAVE REPRESENTATIVES IN CONGRESS. A 15 CENT STAMP WILL ALLOW YOU TO COMMUNICATE WITH THEM. WHEN WRITING TO YOUR CONGRESSMAN, I SUGGEST ONLY ONE TOPIC OR SUBJECT TO A LETTER.

3. THE UPCOMING ELECTION WILL BE MONITORED BY THE FEDERAL LABOR RELATIONS AUTHORITY. ALL PARTIES CONCERNED WILL HAVE AN OBSERVER PRESENT AT THE VOTING LOCATION (MIC). VOTES WILL BE TALLIED BY THE OBSERVER AND CERTIFIED TO BY THE FEDERAL LABOR RELATIONS AUTHORITY.

4. BETWEEN NOW AND THURSDAY AFGE AND NFFE WILL HAVE REPRESENTATIVES IN THE AFPRO BETWEEN 1100 AND 1300. VIRGINIA SCHMIDT, CPR, HAS SENT OUT NOTICES CITING WHERE THESE REPRESENTATIVES WILL MEET WITH EMPLOYEES. BE CANDID WITH THESE REPRESENTATIVES. ASK THEM WHAT THEY CAN DO FOR YOU THAT YOUR CONGRESSMAN CANNOT DO. I HAVE TALKED TO EACH REPRESENTATIVE. - NOW IT IS YOUR TURN. VOTE ACCORDINGLY.

DORSEY J. TALLEY, COLONEL, USAF
COMMANDER

In the secret ballot election conducted on July 12, 1980, a majority of the valid votes counted (50 of 90 nonprofessionals and 10 of 18 professionals) were cast against exclusive recognition.

AFGE thereafter filed timely objections to conduct alleged to have improperly affected the results of the election (Case No. 6-RO-7), contending that the contents of the "Talley-Ho ! Gram" posted by the Activity a few days before the election interfered with the free choice of eligible voters in the election. Additionally, AFGE later filed an unfair labor practice charge alleging that, by such conduct, the Activity also violated section 7116(a)(1) of the Statute (Case No. 6-CA-233).[1]

[1] On March 27, 1980, the General Counsel issued a Complaint and Notice of Hearing in 6-CA-233 based upon AFGE's unfair labor practice charge. Thereafter, on July 28, 1980, pursuant to the terms of a

In Case No. 6-RO-7, the Regional Director issued his Report and Findings on Objections in which he found, based upon an investigation and the positions of the parties, that no question of fact existed with regard to the content of the Activity's newsletter and that portions of the newsletter violated the Activity's duty of neutrality and/or contained misrepresentations of fact. More specifically, the Regional Director found that the last sentence of item 1 in the "Talley-Ho ! Gram," i.e., "Your decision will be binding over the years to come should you vote for a union to represent you," was factually incorrect and violated the statutory requirement of agency neutrality by clearly implying the employees would be "burdened with the union for many years if they voted for exclusive recognition. He further found that item 4 of the "Tally-Ho ! Gram," which advises employees to question both labor organizations on the ballot regarding what union representation could do for them that their Congressman could not do, clearly implied that the unit employees did not need a union at all and therefore constituted a violation of agency neutrality. In so finding, the Regional Director rejected the Activity's contention that the message contained in the newsletter was factual and neutral and was an expression protected by section 7116(e) of the Statute. Accordingly, he concluded that improper conduct occurred which affected the results of the election and required the election to be set aside and rerun as soon as possible after resolution of the issues in the related unfair labor practice case (6-CA-233). The Activity thereafter filed a request for review seeking reversal of the Regional Director's Report and Findings on Objections, contending that the "Talley-Ho ! Gram" did not violate agency neutrality and, in any event, was an expression protected by section 7116(e) of the Statute.

In Case No. 6-CA-233, the Activity essentially restated the foregoing arguments in its brief to the Authority, arguing that the issues in both cases were the same. AFGE and the General Counsel, in their respective briefs, contended in effect that the statements contained in the "Talley-Ho ! Gram" were not an expression of "personal views" but contained an implied anti-union attitude on the part of management and therefore were unprotected by section 7116(e) of the Statute.

As previously stated, the questions before the Authority are (1) whether certain statements contained in the "Talley-Ho ! Gram" constitute sufficient basis for setting aside the election in Case No. 6-RO-7, and (2) whether such statements further constitute a violation of section 7116(a)(1) of the Statute as alleged in Case No. 6-CA-233. For the

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stipulation reached by the parties therein and section 2429.1 of the Authority's rules, the Regional Director ordered the case transferred directly to the Authority for decision.

Some footnotes deleted.

reasons set forth below, the Authority concludes that both questions must be answered in the affirmative.

Section 7116(e) of the Statute, as finally enacted and signed into law, incorporates a number of amendments which were added by the Senate-House Conference Committee to the provision contained in the bill passed by the Senate. The Joint Explanatory Statement of the Committee on Conference indicates the following with respect thereto:

EXPRESSION OF PERSONAL VIEWS

> Senate section 7216(g) states that the expression of
>
> * * * any personal views, argument, opinion, or the making of any statement shall not constitute an unfair labor practice or invalidate an election if the expression contains no threat of reprisal or force or promise of benefit or undue coercive conditions.
>
> The House bill contains no comparable provision.
>
> The House recedes to the Senate with an amendment specifying in greater detail the types of statements that may be made under this section. <u>The provision authorizes statements encouraging employees to vote in elections, to correct the record where false or misleading statements are made, or to convey the Government's view on labor-management relations. The wording of the conference report is intended to reflect the current policy of the Civil Service Commission when advising agencies on what statements they may make during an election, and to codify case law under Executive Order 11491, as amended, on the use of statements in any unfair labor practice proceeding</u>. [Emphasis added.]

Thus, section 7116(e) provides that:

> The expression of any personal view, argument, opinion . . . shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions . . . constitute an unfair labor practice. . . .

As to representation elections, section 7116(e) provides that:

> [T]he making of any statement which--
>
> (1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions . . . constitute an unfair labor practice . . . or . . . constitute grounds for the setting aside of any election. . . .

Accordingly, while section 7216(g) of the Senate bill permitted the expressing of personal view during an election campaign, section 7116(e) of the Statute specifies those statements which are authorized--i.e., statements encouraging employees to vote in elections, correcting the record where false or misleading statements are made, or conveying the Government's views on labor-management relations.

While Executive Order 11491, as amended, did not contain a specific provision such as section 7116(e) of the Statute, a policy was established thereunder that agency management was required to maintain a posture of neutrality in any representation election campaign.[5] Where management deviated from its required posture of neutrality and thereby interfered with the free and untrammeled expression of the employees' choice in the election, such election would be set aside and a new election ordered.[6] Moreover, management's breach of neutrality during an election campaign was also found to violate section 19(a)(1) of Executive Order 11491, as amended,[7] by interfering with, restraining and coercing employees in the exercise of their protected rights to determine whether to choose or reject union representation.[8] We now turn to the application of the foregoing policy and case law to the facts and circumstances of the

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[5] *See, e.g.*, Charleston Naval Shipyard, A/SLMR No. 1, 1 A/SLMR 27 (1970), at n.17; and Antilles Consolidated Schools, Roosevelt Roads, Ceiba, Puerto Rico, A/SLMR No. 349, 4 A/SLMR 114 (1974). See also Robert E. Hampton, Chairman, United States Civil Service Commission, "Federal Labor-Management Relations: A Program in Evolution," 21 Catholic University Law Review 493, 502 (1972).

[6] *See, e.g.*, Antilles Consolidated Schools, 4 A/SLMR 114, *supra* n.5.

[7] Section 19(a)(1) provided as follows:

Section 19. Unfair labor practices. Agency management shall not--

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order. . . .

[8] *See, e.g.*, Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, A/SLMR No. 523, 5 A/SLMR 377 (1975), review denied by the Federal Labor Relations Council, 5 FLRC 75 (1977).

subject cases, in accordance with the stated intent of Congress in enacting section 7116(e) of the Statute (*supra* n.2).

In Case No. 6-RO-7, as previously stated, the Regional Director found that portions of the "Talley-Ho! Gram," as posted on the Activity's bulletin boards and distributed to the employees shortly before the election, violated the requirements of neutrality and/or contained misrepresentations of fact which required the election to be set aside. The Authority concludes, in agreement with the Regional Director, that those statements in the "Talley-Ho ! Gram" to the effect that the employees' "decision will be binding over the years to come should you vote for a union to represent you" and urging the employees to "[a]sk [the unions] what they can do for you that your Congressman cannot do" violated the requirements of management neutrality during an election campaign. Such statements clearly could be interpreted by the unit employees as implying that they did not need and would not benefit from union representation, and would be unable to rid themselves of union representation for years to come if they were to vote in favor of exclusive recognition in the forthcoming election. In the Authority's view, such statements interfered with the employee's freedom of choice in the election and therefore the election to be set aside.

In so concluding, the Authority rejects the Activity's contention that the foregoing statements contained in the "Talley-Ho ! Gram" were protected by section 7116(e) of the Statute. At the outset, the Authority rejects the Activity's assertion that the "Talley-Ho ! Gram" was merely the "expression of [a] personal view, argument, [or] opinion within the meaning of section 7116(e) of the Statute. Rather, where (as here) written statements by the head of an Activity are posted on all bulletin boards and circulated to unit employees, they are not merely the expression of personal views but may reasonably be interpreted as the Activity's official position with regard to the matters addressed in such statements. In addition, as previously stated (*supra* p. 6), section 7116(e) authorizes statements encouraging employees to vote in elections, correcting the record where false or misleading statements are made, or conveying the Government's views on labor-management relations. While the "Talley-Ho ! Gram," in part, publicized the forthcoming representation election and encouraged employees to vote in such election, and to that extent fell within the protection of section 7116(e), other portions of the "Talley-Ho ! Gram" set forth above went beyond the scope of permissible statements thereunder and did not require protected status merely because they were contained in the same document which properly publicized and encouraged employees to vote in the election. Moreover, as found by the Regional Director, "there was no evidence that the publication was intended to correct the record with respect to any false or misleading statements made by the party." Finally, such statements did not "convey the Government's views on labor-management relations." As indicated

above, the Government's views are that employees should be free to choose or reject union representation while management maintains a posture of neutrality, and, as further stated by Congress in section 7101 of the Statute, that "labor organizations and collective bargaining are in the public interest."[9] To the extent that the "Tally-Ho ! Gram" implied that union representation was unnecessary and undesirable, therefore, such statements were directly contrary to the Government's views on labor-management relations.

Turning next to the question raised in Case No. 6-CA-233, the Authority concludes that, in the circumstances presented, the same statements which caused the election to be set aside in Case No. 6-RO-7 also constitute a violation of section 7116(a)(1) of the Statute which provides that "it shall be an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter." Consistent with the findings and purpose of Congress as set forth in section 7101 (*supra* n.9), section 7102 of the Statute (entitled "Employees' rights") provides in part that "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." Under Executive Order 11491, as amended, which established and protected identical employee rights,[10] management's breach of neutrality during an election campaign was found to constitute unlawful interference with such protected rights in violation of section 19(a)(1) of the Order (*supra* n. 7).[11] Consistent with the stated intent of

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[9] Section 7101(a) of the Statute provides:

§ 7101. Findings and Purpose.

(a) The Congress finds that –

(1) experience in both private and public employment indicates that the 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,

(C) facilitates and encourages the amicable settlements 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.

[10] Section 1(a) of Executive Order 11491, as amended, provided, in pertinent part, as follows:

Section 1. Policy. (a) Each employee of the executive branch of the Federal government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in this right.

[11] *Supra* n.8.

Congress, the Authority concludes that management's breach of neutrality during an election campaign similarly interferes with the same protected rights of employees under the Statute and therefore violates section 7116(a)(1) of the Statute.

In the instant case, as found above with respect to Case No. 6-RO-7, the Activity breached its obligation to remain neutral during the election campaign by posting on all bulletin boards and distributing to unit employees--shortly before the scheduled election--a message signed by the head of the Activity which strongly implied that unions were unnecessary, undesirable, and difficult to remove once the employees voted in favor of exclusive recognition. Such violation of neutrality interfered with the employees' protected right under section 7102 of the Statute to "form, join, or assist any labor organization, or to refrain from any such activity," and therefore violated section 7116(a)(1) of the Statute in the circumstances of this case.

In view of the foregoing, the Respondent in Case No. 6-CA-233 shall take the action set forth in the following Order; and the election conducted on July 12, 1979, in Case No. 6-RO-7, is hereby set aside and a second election shall be conducted as directed below.

* * *

In light of subsequent cases, Colonel Talley's statements seem less dangerous. In Arizona Air National Guard, Tucson and AFGE, 18 FLRA 583 (1985), the Authority confirmed the propriety of commanders and their staffs speaking out on union representation matters, so long as it is within the bounds of the law. The agency issued a memorandum to all employees containing a series of questions and answers concerning the implications of a pending election. Although the union argued that the memo, "by inference, suggested the negative aspects of unionism and interfered with the employee's freedom of choice in a representation election," the Authority held the agency had not violated . 7116(a)(1). It reasoned that, as the memo was correct as to law and Government policy, and did not promise benefits to or threaten employees, it did not interfere with their freedom of choice.

In IRS, Louisville, 20 FLRA 660 (1985), the Authority found that a supervisor's threat to sue a bargaining unit employee and the union did not constitute an ULP. The libel suit was threatened by the supervisor personally, not the agency, and was in response to the employee's rash allegations made in conjunction with a grievance, not in retaliation for her filing the grievance. Therefore, there was no violation of § 7116(a)(1), FSLMRS.

The Authority found that the agency committed an unfair labor practice when an employee was told that there is no union representation on weekends and when the agency imposed overly broad rules prohibiting any union activity on weekends. Naval Air Station Alameda and IAMAW, Lodge 739, 38 FLRA 567 (1990).

What right does a union have to disparage supervisors and managers? In IRS and NTEU, 7 FLRA 596 (1981), the union printed a leaflet in which a supervisor was awarded the "Holiday Turkey" award. It enumerated working practices with which the union was unhappy. The leaflet was distributed at a cafeteria table which was generally used for distribution of union literature. An unfair labor practice was sustained against management when it confiscated the literature. The Authority stated that employees may distribute union literature in nonwork areas during nonworking time, provided there is not a personal attack on management's officers. Epithets such as "scab," "liar," and "unfair" have been an insufficient basis for removal.

6-2A Robust Communication VS. Flagrant Misconduct

Frequently supervisors and employees engage in "robust communication" including heated language. The Federal sector has generally followed the private sector's moderate response to such problems: "The employee's right to engage in concerted activity may permit some leeway for impulsive behavior," *e.g.,* calling a superintendent a "horse's ass" at a grievance hearing. N.L.R.B. v. Thor Power Tool Co., 351 F.2d 584, 586-87 (7th Cir. 1965). Moreover, when there is unplanned, spontaneous physical contact between a supervisor and a union steward during a heated exchange, no ULP lies against management even if the supervisor initiated the assault. DOL and AFGE, 20 FLRA 568 (1985). The use of racial slurs by a union representative has been held to be beyond the protection of "robust debate." AFGE v. FLRA, 878 F.2d 460 (D.C. Cir. 1989).

Moreover, a union representative has the right to use “intemperate, abusive, or insulting language without fear of restraint or penalty” if he or she believes such rhetoric to be an effective manner of making the union’s point. Dep’t of the Air Force, Grissom Air Force Base and American Federation of Gov’t Employees, 51 FLRA 7 (1995)(holding that the union representatives profane and insulting remarks to the management representative was not flagrant misconduct). *See also,* Air Force Flight Test Center Edwards Air Force Base and American Federation of Government Employees, Local 1406, AFL-CIO, 53 FLRA 1455 (1998)(union representative leaning over the supervisor’s desk and pointing finger at his supervisor was not “beyond the limits of acceptable behavior”). However, an Agency has the right to discipline an employee who is engaged in otherwise protected activity for actions that “exceed the boundaries of protected activity such as flagrant misconduct.” Dep’t. of Agriculture Food Safety and Inspection Service and Nat’l Joint Council of Food Inspection Locals, 55 FLRA 877 (1999).

Management violates § 7116(a)(1) derivatively whenever it violates any of the other provisions of section 7116. The rationale is that when management violates any of the other ULP provisions it violates the employee's rights as enunciated in section 7102. The authority of the union and its reasons for existence are undermined. *See* DLA, 5 FLRA 126 (1981).

A supervisor recommended to an employee that she drop a grievance. The supervisor explained that even if she should succeed in having her evaluation changed she would not gain anything in the long run. The Authority adopted the ALJ's finding that this is a coercive or intimidating statement implying adverse consequences and an implied threat, and thus constituted a violation of § 7116(a)(1). Further, the statement was so phrased that it implied that the career of any employee who complained of management action by processing grievances would suffer. United States Dept. of Treasury Bureau of Alcohol, Tobacco and Firearms, Chicago IL, and NTEU Chapter 94, 3 FLRA 723 (1980).

In Navy Resale System Commissary, 5 FLRA 311 (1981), the Authority adopted the ALJ's finding that a statement by an employee's supervisor angrily reminding the employee that he was the boss, that things would go more smoothly if problems were brought to him, and that the union president should be left out of such matters is a violation of § 7116(a)(1) as it is coercive of the statutory right of employees to request their union's representation.

When an Agency's Area Director said he would keep a list of employees who "fought him" by going to a union and there would be adverse consequences for them, the FLRA found the statements to be unlawful. The Authority found the standard to be an objective one, not based on the subjective perception of the employees or the intent of the supervisor. The issue was whether, under the circumstances, the statement tends to coerce or intimidate the employees, or whether the employees could reasonably have drawn a coercive inference from the statement. EEOC, San Diego and AFGE, 48 FLRA 1098 (1993).

6-3. Discrimination to Encourage or Discourage Union Membership.

Section 7116(a)(2) provides that it is an unfair labor practice for an agency:

> to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment; . . .

This ULP often can arise when management improperly treats a union representative differently from other employees. The following case illustrates a legitimate basis for treating a union member differently.

Warner Robbins Air Force Base
And
American Federation of Government Employees,
Local 987

52 FLRA 602 (1996)
(Extract)

OPINION:
DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge filed by the Respondent. The General Counsel filed an opposition to the exceptions.

The complaint alleges that the Respondent violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute) by denying a temporary promotion to the Union President because he was on 100 percent official time for Union business.

Upon consideration of the Judge's decision and the entire record, we conclude for the reasons discussed below that the Respondent did not commit the unfair labor practices alleged in the complaint. Accordingly, we dismiss the complaint.

II. Background and Judge's Decision

In November 1992, Jim Davis, a WG-8 sheet metal mechanic, was elected President of the Union for a 3-year term and designated himself as a full-time **[*2]** representative. Since then, Davis has been on 100 percent official time and has not worked, or been available to work, for the Respondent.

In February 1994, in order to meet increased workload, the Respondent hired about 550 temporary WG-8 aircraft workers, and received permission to temporarily promote 96 WG-8 mechanics to WG-10, journeyman-level mechanic, for 1 year to oversee the temporary WG-8s. The personnel office supplied a list of about 105 employees, including Davis, who met the qualifications for temporary promotion to WG-10. The Respondent selected 96 employees for temporary promotion, including four Union stewards, but not Davis. The Judge made a credibility determination that the manager who made the selections told Davis that he "would have selected him if he had been available." Judge's Decision at 7.

The Judge found that: (1) Davis was not selected because he was not available to perform agency work; (2) Davis was engaged in protected activity, but this activity was not a motivating factor "unless it is to be inferred as the inherent result of absence on official time for a promotion broadly granted to members of the qualified group" (id. at 9); (3) the record was devoid of union animus; (4) the Respondent promoted no employee who was not available to work; and (5) the Respondent's justification for not promoting Davis was not pretextual.

Relying on Social Security Administration, Inland Empire Area, 46 FLRA 161 (1992) (Inland Empire), the Judge stated that "the Authority has rejected an agency's showing of a legitimate justification and that it would have taken the same action in the absence of protected activity and has inferred that protected activity was a motivating factor where a benefit broadly granted is denied an employee solely because of absence on official time." Judge's Decision at 9. The Judge stated that Inland Empire "teaches that 'official time' is equivalent to work time" and concluded that by denying Davis a temporary promotion to WG-10, the Respondent discriminated against him because of his protected activity. Id. at 11. The Judge further found that Davis was entitled to a retroactive promotion with backpay.

III. Exceptions

A. Respondent's Contentions

Relying on Letterkenny Army Depot, 35 FLRA 113,118 (1990) (Letterkenny), the Respondent argues that the General Counsel has not met its threshold burden of proof and that the Judge found that Davis's protected activity was not a motivating factor in his nonselection for temporary promotion. The Respondent asserts that it did not promote Davis because he was not available to work, but that if he had been available, he would have been temporarily promoted. The Respondent also argues that the temporary promotion of four Union stewards demonstrates the Respondent's lack of animus.

The Respondent also contends that the application of Inland Empire to the facts of this case is erroneous, because that case involved a situation where all employees in an organization shared a group bonus, without regard to individual contribution to the effort. The Respondent argues that individual qualifications and, in particular, availability to serve, controlled the selection of the 96 employees for temporary promotion, and that this was not a group promotion for all the WG-8 mechanics.

B. General Counsel's Opposition

The General Counsel argues that the facts in this case are similar to those in Inland Empire. The General Counsel contends that the Judge found

that the mass promotion action in this case was unrelated to any individual's specific work effort or linkage to agency benefit. The General Counsel argues that the mass promotion action in this case "was more along the lines of a reward for good performance (as was the case in Inland Empire) rather than the filling of job openings to perform specific tasks." Opposition at 5.

The General Counsel also argues that the Respondent's asserted reasons for not promoting Davis are pretextual. In this regard, the General Counsel contrasts the Respondent's failure to temporarily promote Davis with its actions regarding other employees. According to the General Counsel, the Respondent allowed a few employees who were restricted to light duty work or on maternity leave to return to work and obtain medical clearances and then gave them temporary promotions, even though, like Davis, they were not immediately available to work. In addition, noting that the Respondent did not replace one employee who was selected for, but declined, a promotion and another employee who was selected for a promotion but was found to have a disability that prevented him from performing the work, the General Counsel disputes the Respondent's claim that it did not offer Davis a temporary promotion because it needed to fill the WG-10 positions.

IV. Analysis and Conclusions

Under the Authority's analytical framework for resolving complaints of alleged discrimination under section 7116(a) (2) of the Statute, the General Counsel has, at all times, the overall burden to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. Letterkenny, 35 FLRA at 118. *See also* Federal Emergency Management Agency, 52 FLRA No. 47, slip op. at 5 n.2. As a threshold matter, the General Counsel must offer sufficient evidence on these two elements to withstand a motion to dismiss. Letterkenny, 35 FLRA at 118. However, satisfying this threshold burden also establishes a violation of the Statute only if the respondent offers no evidence that it took the disputed action for legitimate reasons. See id. The respondent has the burden to establish, by a preponderance of the evidence, as an affirmative defense that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity.

In this case, even assuming, without deciding, that the General Counsel satisfied the threshold burden, we find that the Respondent established an affirmative defense for its actions. The Respondent had a legitimate justification for its action--it needed WG-10 mechanics to oversee the work of the temporary WG-8s that had been hired, and Davis was not available to perform that work. The Respondent also demonstrated that it

would have taken the same action even in the absence of protected activity--the record establishes that the Respondent gave temporary promotions to four Union stewards who were available to work and would have given Davis a temporary promotion if he had been available to work. As the Judge found, there was no foreseeable chance that Davis would have been available to work at least until November 1995. The Respondent's reasons for its actions towards other employees do not demonstrate that the Respondent's asserted reason for not promoting Davis--that he was not available to work--was pretextual

The Respondent waited a short time for a few employees on light duty to receive medical clearances, and it waited about 1 month for one employee to return from maternity leave before giving her the temporary promotion. By contrast, Davis would not have been available during the entire year-long period the temporary promotion was to be in effect. None of the examples relied on by the General Counsel involve employees unavailable to perform work during the entire year. In addition, we reject the General Counsel's contention that the Respondent's decision not to replace one employee who was selected for, but declined, a promotion and another employee who was selected for a promotion but was found to have a disability that prevented him from performing the work demonstrates that the Respondent's asserted reason for not promoting Davis was pretextual. The Respondent's action regarding these two selections, out of a total of 96 positions, does not establish that the Respondent did not have a need to have WG-10 Mechanics oversee the temporarily hired WG-8 employees. Therefore, the Respondent has established the affirmative defense that it had a legitimate justification for its action and it would have taken the same action even in the absence of an exercise of protected activity.

In addition, this case is distinguishable from Inland Empire. In Inland Empire, the Authority found that an agency committed an unfair labor practice when it denied two union representatives a full share of a group monetary award, based on the composite results of the group's work, and reduced their share based on the amount of time spent on protected activities. By contrast, this case deals with a temporary promotion for only some, not all, qualified employees for work to be performed over a 1-year period, rather than an award for past group efforts. Moreover, in this case, four stewards were given temporary promotions and the Judge found that Davis's protected activity was not a motivating factor in his nonselection for temporary promotion. For these reasons, the Judge's reliance on Inland Empire is misplaced.

Consistent with the foregoing, there is no basis on which to conclude that the Respondent violated section 7116(a) (1) and (2) of the Statute, as alleged, and the complaint must be dismissed.

V. Decision

The complaint is dismissed.

The Statute does not offer any protection to employees participating in concerted activities unrelated to membership in, or activities on behalf of, a labor organization. VA, 4 FLRA 76 (1980).

IRS, Washington, D.C. and NTEU, 6 FLRA 96 (1981). The FLRA reversed the ALJ who, in finding a violation of 5 U.S.C. § 7116(a)(1) and (2), held that it is sufficient to establish that the union or protected activity played a part in management's decision not to promote. In cases involving an allegation of discrimination for engaging in protected activity, the test to be applied is as follows:

> [T]he burden is on the General Counsel to make a *prima facie* showing that the employee had engaged in protected activity and that this conduct was a motivating factor in agency management's decision not to promote. Once this is established, the agency must show by a preponderance of the evidence that it would have reached the same decision as to the promotion even in the absence of the protected conduct.

Finding that the agency established by a preponderance of the evidence that the employee would not have been selected even if she had not engaged in protected activity, the Authority dismissed the complaint. *See also* SSA, San Francisco and AFGE, 9 FLRA 73 (1982).

6-4. Assistance to Labor Organizations.

Section 7116(a)(3) provides that it is an unfair labor practice for an agency:

> to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status; . . .

The provision is intended to prevent "company" unions. It is rarely violated. When this ULP is sustained, it is usually because management, either intentionally or inadvertently, has aided one union to the detriment of another.

UNITED STATES ARMY AIR DEFENSE CENTER
FORT BLISS TEXAS
and NFFE

29 FLRA 362 (1987)

(Extract)

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent and the National Association of Government Employees, Local R14-89 (NAGE) to the attached decision of the Administrative Law Judge. The General Counsel filed an opposition to the exceptions. The issued is whether the Respondent violated section 7116(a)(2) and (3) of the Federal Service Labor-Management Relations statute (the Statute) by refusing to provide the Charging Party, National Federation of Federal Employees, Local 2068, Independent (NFFE) with a building for NFFE's use during a representation election campaign. For the reasons stated below, we find, contrary to the Administrative Law Judge, that the Respondent was not required to provide NFFE with a building similar to the one used by NAGE and that the Respondent satisfied the requirements of section 7116(a)(3) of the Statute by offering NFFE the use of customary and routine facilities for use in the campaign.

II. Background

On May 25, 1984, NFFE filed a petition for an election in a bargaining unit of certain employees of the Respondent. At that time, the unit was represented by NAGE. Until on or about October 16, 1984, the Respondent and NAGE were parties to a collective bargaining agreement. After October 16, 1984, and during the pendency of the representation case, the Respondent and NAGE continued to give effect to their agreement. On February 28,1985, the Regional Director of the Authority approved an agreement for a consent election. On May 8 and 9, 1985, an election was conducted. The results of that election were inconclusive because neither NAGE nor NFFE received a majority of the valid votes cast in the election. The petition for election is presently pending the outcome of a run-off election to determine the exclusive bargaining representative.

Under the collective bargaining agreement between the Respondent and NAGE, the Respondent agreed to provide a building to NAGE for use as a "Union Hall." The building provided for NAGE's use was a one-story, wooden, barracks-type building in the middle of a heavily populated part of the Base. Beginning on or about April 17, 1985, NFFE representatives observed NAGE using the building in connection with its

election campaign efforts. In that regard, about 2 weeks before the election, a large banner which read "VOTE NAGE" was placed on the side of the building.

The matter of NAGE's use of the building for campaign purposes was initially raised by NFFE at the consent election meeting in February 1985. Subsequently, and prior to the election, NFFE asked the Respondent to provide it with a building for its campaign. NFFE also asked the Respondent to stop NAGE from using the building in question for campaign activities. The Respondent denied both requests. The Respondent advised NFFE that NAGE had obtained the use of the building through negotiations and that the building was provided by the collective bargaining agreement. The Respondent maintained that it could not restrict NAGE's use of the building for campaign purposes. Additionally, the Respondent advised NFFE that it would not provide NFFE with a building because a building "is not in keeping with what the Statute defines as customary and routine services and facilities." The Respondent did, however, offer NFFE the use of various meeting facilities, including a theater and conference rooms, to use in its campaign effort. NFFE did not avail itself of the offered facilities. NFFE rented an office off Base for its campaign headquarters.

III. Administrative Law Judge's Decision

The Judge concluded that the Respondent violated section 7116(a)(1) and (3) of the Statute when it refused to provide NFFE with a building to use during the election campaign. In reaching that conclusion, the Judge found that NFFE acquired "equivalent status" within the meaning of section 7116(a)(3) of the Statute when it filed its representation petition and, therefore, that it was entitled to the same "customary and routine services and facilities" the Respondent had furnished NAGE. The Judge noted that the legislative history of section 7116(a)(3) described as an example of customary and routine services and facilities, "providing equal bulletin board space to two labor organizations which will be on the ballot in an exclusive representation election." He concluded that if both unions would be equally entitled to bulletin board space, they were both equally entitled to a building for campaign purposes. The Judge reasoned that the Respondent's contract obligation to provide NAGE with a building was in accordance with its section 7116(a)(3) permission to provide customary and routine services and facilities and that 7116(a)(3) required that NFFE receive the same facilities and services.

The Judge concluded that the Respondent's refusal to provide NFFE with a building violated section 7116(a)(1) and (3) of the Statute. Further in that regard, the Judge rejected the Respondent's contention

that the Authority's Regional Office was responsible for any violation because the Region was responsible for supervising the election.

IV. Positions of the Parties

In its exceptions, the Respondent essentially contends that an agency does not have a duty under section 7116(a)(3) of the Statute to provide an equivalent status union the same facilities that an incumbent exclusive representative has acquired through collective bargaining. The Respondent maintains that its obligation was only to provide "customary and routine" facilities. The Respondent argues that the building in dispute in this case was obtained by NAGE through negotiation as the exclusive representative and was provided for under the collective bargaining agreement between itself and NAGE. The Respondent argues that it did not provide NFFE with a building because it did not consider a building a "customary and routine" facility under section 7116(a)(3). The Respondent further contends that it offered NFFE the use of numerous meeting places, but that NFFE never availed itself of any of the offered facilities.

In its exceptions, NAGE also contends that its use of a building as a union hall was obtained through negotiations and maintains that there is no basis in section 7116(a)(3) for giving an intervenor the same rights that an incumbent exclusive representative has gained through bargaining. NAGE also argues that NFFE was not disadvantaged in this case because the Respondent gave or offered NFFE extensive access to various facilities on the Base and that NFFE had vans with campaign signs displayed riding around the Base 8 to 10 hours a day.

In its exceptions, the General Counsel contends that the Judge correctly found that the Respondent violated the Statute.

V. Discussion

The significant part of the complaint in this case is that the Respondent committed an unfair labor practice by failing to (1) provide NFFE with a building similar to the one used by NAGE or (2) to stop NAGE from using its building for other than representational purposes. The Judge decided this narrow issue, as do we. We find, contrary to the Judge and the General Counsel, that the Respondent did not violate section 7116(a)(1) and (3) of the Statute as alleged in the complaint.

Section 7116(a)(3) provides that an agency may, upon request, furnish a labor organization with customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status. Thus, under section 7116(a)(3), if an agency grants a union's request for customary

and routine services or facilities in a representation proceeding, the agency must, upon request, provide such services or facilities to another union having equivalent status.

We agree with the Judge that NFFE had equivalent status with NAGE in the representation proceeding. However, NAGE did not request and the Respondent did not grant NAGE the use of a building as a "customary and routine" facility during that proceeding. Rather, the Respondent provided NAGE with the building through the give and take of negotiations with NAGE as the exclusive representative of the unit involved before NFFE filed its representation petition. NAGE's right to use the building as a "Union Hall" was expressly established in NAGE's collective bargaining agreement with the Respondent before NFFE became a union "having equivalent status."

We can find no compelling indication in the plain language or legislative history of section 7116(a)(3) that an agency is required to furnish a labor organization that has achieved equivalent status with an incumbent union in a representation proceeding with the exact same services and facilities that the incumbent obtained through collective bargaining before the proceeding. On the contrary, it is reasonable to expect that an incumbent labor organization will have acquired some advantages in agency services and facilities over a rival union through collective bargaining. The Statute does not require that an agency equalize their positions upon request of the rival.

The example from the legislative history of section 7116(a)(3) cited by the Judge does not compel a different conclusion. That example, "providing equal bulletin board space to two labor organizations which will be on the ballot in an exclusive representation election[,]" was used to illustrate the kind of customary and routine services and facilities an agency may furnish "when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status[.]" H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 49 (1978), reprinted in Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 178, Committee Print No. 96-7, at 695 (1979).

We do not believe that a building is the kind of "customary and routine" facility contemplated by Congress in fashioning section 7116(a)(3). But even assuming that a barracks-type building is a customary and routine facility at Fort Bliss, we reemphasize that NAGE did not request and the Respondent did not gratuitously provide NAGE with the building in question during the representation proceeding. NAGE's right to sue the building was established by the previously negotiated agreement. Therefore, the Respondent was under no duty to

> grant NFFE's request for a similar building. Additionally, we note that the Respondent specifically advised NFFE that it was prepared to provide, upon request, NFFE and NAGE with various meeting facilities for use in their election campaigns.
>
> Accordingly, we conclude that the Respondent did not violate section 7116(a)(1) and (3) of the Statute as alleged in the complaint.

Unions frequently allege violations of the neutrality doctrine as ULPs under § 7116(a)(3). *See* Fort Sill, Oklahoma, 29 FLRA 1110 (1987); Barksdale Air Force Base and NFFE, 45 FLRA 659 (1992).

6-5. Discrimination Against an Employee Because of His Filing a Complaint or Giving Information.

Section 7116(a)(4) provides that it is an unfair labor practice for an agency:

> to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter; . . .

In Naval Air Station Alameda and IAMAW, Lodge 739, 38 FLRA 567 (1990), the Authority found an unfair labor practice where an employee was disciplined shortly after a ULP was filed.

6-6. Refusal to Bargain.

> Under Section 7116(a)(5), it is an unfair labor practice for an agency:
>
> "to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . .

This is the most violated ULP. Usually it is because management did not realize it had a duty to negotiate, or refused to concede that the exclusive representative could usurp what the commander/manager felt was his traditional decision-making powers as a commander/manager.

FEDERAL AVIATION ADMINISTRATION NORTHWEST MOUNTAIN REGION and NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION 51 FLRA 35 (1995)

(Extract)

I. Statement of the Case

The Administrative Law Judge issued the attached decision, finding that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by selecting and installing certain interior design features at the Denver International Airport's Terminal Radar Approach Control (TRACON) and Tower facilities without providing the Union notice or the opportunity to bargain over the substance, impact or implementation of the matters insofar as they constituted changes in bargaining unit employees' conditions of employment.

The General Counsel filed exceptions to the Judge's recommended remedy. The Respondent did not file an opposition to the General Counsel's exceptions.

Upon consideration of the Judge's decision and the entire record, we adopt the Judge's findings, conclusions, and recommended Order.

II. Judge's Decision and Recommended Order

The facts are fully set forth in the Judge's decision and are only briefly summarized here. The Judge concluded that the Respondent violated the Statute by not providing the Union appropriate notice and an opportunity to bargain over the selection and installation of certain interior design features of the TRACON and Tower facilities. The Judge rejected the General Counsel's request for a status quo ante remedy, which would require the Respondent to remove the various design features and bargain over the selection and installation of those items. In so doing, the Judge relied on testimony of Union representative Gary Molen who, according to the Judge, "described the new building as 'very pretty, beautiful.'" Judge's Decision at 4. The Judge ordered the Respondent to bargain over the selection and installation of the design features and to do so "without regard to the present conditions." *Id.* at 5. As the Judge explained this remedy, "if the collective bargaining process results in an agreement on selections that are different from the existing ones, they should be installed upon request." *Id.*

III. Positions of the Parties

The General Counsel argues that the Judge erred by failing to apply the standard set forth in Department of Health and Human Services, Region IV, Office of Civil Rights, Atlanta, Georgia, 46 FLRA 396 (1992), to remedy the unfair labor practice. According to the General Counsel, that standard requires "that any appropriate bargaining remedy must place the parties on equal footing." Exceptions at 5. The General Counsel asserts that in order to guarantee the Union's right to bargain without regard to the present conditions at the TRACON and Tower facilities, the Authority should order the Respondent not to present before the Federal Mediation and Conciliation Service (FMCS) any proposal related to design features currently in place. The General Counsel also asks the Authority to order the Federal Service Impasses Panel (Panel) to disregard any of the Respondent's proposals related to existing design features as well as any aesthetics and economic waste arguments and to accept "any and all of NATCA's proposals" without regard to current conditions. *Id.* at 8. Finally, the General Counsel requests the Authority to attach strict time frames to the bargaining order to produce a negotiated agreement prior to the projected opening of the new airport.

* * *

IV. Analysis and Conclusions

We agree with the Judge that, to remedy the violation, the Respondent should be required to bargain, at the request of the Union, and, if requested and necessary to implement the results of any agreement reached, to replace the existing design features.[1] Essentially, this constitutes a retroactive bargaining order, a remedy that is within the Authority's broad remedial discretion. *See generally* National Treasury Employees Union v. FLRA, 910 F.2d 964 (D.C. Cir. 1990) (en banc). This remedy is appropriate where a respondent's unlawful conduct has deprived the exclusive representative of an opportunity to bargain in a timely manner over negotiable conditions of employment affecting bargaining unit employees. U.S. Department of Energy. Western Area Power Administration, Golden, Colorado, 22 FLRA 758 (1986), *rev'd on other grounds*, 880 F.2d 1163 (10th Cir. 1989). In this case, the bargaining order recommended by the Judge will effectuate the purposes and policies of the Statute by ensuring the substitution of any design features negotiated by the parties or imposed by the Panel, thereby approximating the situation that would have existed had the Respondent fulfilled its statutory obligations.

[1] Generally, when management changes a condition of employment without fulfilling its obligation to bargain over the decision to make the change, the Authority orders a status quo ante remedy, in the absence of special circumstances. For example, Federal Deposit Insurance Corporation, 41 FLRA 272, 279 (1991) enforced, 977 F.2d 1493 (D.C. Cir. 1992). However, in this case the Judge did not recommend a status quo remedy and there are no exceptions to that determination.

We reject the General Counsel's request that the Authority limit the arguments the Respondent may make during the collective bargaining process, including during any mediation efforts by the FMCS. We leave it to the parties to bargain in good faith to the fullest extent consonant with law and regulation. Any assertion that either party failed to meet its duty to bargain would be appropriately raised at the compliance stage of this proceeding.

We also reject the General Counsel's request for additional modifications to the remedy. With regard to the request for the imposition of time limits on the various stages of bargaining, we note that the TRACON and Tower are now open and, therefore, that the expressed reason for the General Counsel's request no longer exists. We also note the difficulty in imposing effective time limits on collective bargaining in the Federal sector. *Cf.* U.S. Department of Transportation and Federal Aviation Administration, 48 FLRA 1211, 1215 (1993), *petition for review denied*, No. 94-1136 (D.C. Cir. Apr. 5, 1995) (negotiability disputes and impasse resolution proceedings could significantly lengthen any imposed time limits on bargaining). In addition, there is nothing in this record to indicate that the Respondent is unwilling to bargain expeditiously. With regard to the General Counsel's request that we direct the Panel to disregard the Respondent's arguments regarding aesthetic and economic waste and all of its proposals related to the design features currently in place, such direction would intrude on the Panel's discretion under section 7119(c)(5)(B)(iii) of the Statute to take whatever action is necessary and not inconsistent with the Statute to resolve impasses. *See* National Treasury Employees Union, Chapter 83 and Department of the Treasury, Internal Revenue Service, 35 FLRA 398, 415 (1990).[2]

V. Order

Pursuant to section 2423.29 of the Authority's Regulations and section 7118 of the Statute, the Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, shall:

1. Cease and desist from:

(a) Unilaterally changing working conditions of unit employees in the bargaining unit represented by the National Air Traffic Controllers Association (NATCA), including the selection and installation of carpeting, carpet tile, wall finishes, and related design features at the Denver International Airport's TRACON and Tower facilities, without first

[2] Because the Judge's use of Molen's statement is not relevant to our decision in this case, we deny the General Counsel's request that we "find as a matter of fact that Molen's description 'very pretty, beautiful' applied to his impression of the size of the TRACON, not the interior design features of both the TRACON and the Tower." Exceptions at 5.

notifying NATCA and affording it the opportunity to bargain to the extent consonant with law and regulation.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of NATCA, bargain to the extent consonant with law and regulation concerning the selection and installation of carpeting, carpet tile, wall finishes, and related design features at the Denver International Airport's TRACON and Tower facilities, and, if requested and necessary to implement the results of any agreement reached, replace existing design features.

(b) Post at its TRACON and Tower facilities, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Air Traffic Division Manager, Northwest Mountain Region, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Regulations, notify the Regional director, Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

Recall that notice or opportunity to bargain must be given to the union if the change to be instituted has more than de minimis impact on the bargaining unit employees. SSA and AFGE, 19 FLRA 827 (1985). In VA Medical Center, Prescott and AFGE, 46 FLRA 471 (1992), the Authority found that changing the schedule of two housekeeping aides had more than a de minimis impact. The Authority looked at the impact of the decision on the employees and found that employee's concerns about child care and family obligations created an impact that was more than de minimis.

The activity violated sections 7116(a)(1) and (5) of the Statute when it unilaterally changed the existing time frame for processing cases within its Estate and Gift Tax Group without giving prior notice to the union and affording it an opportunity to consult or negotiate concerning impact and implementation of the change when the change had a substantial impact on the employees' working conditions. The fact that the completion dates were easily changed and that none of the attorneys were subjected to meetings with the Chief of the Branch is of no import as the absence of enforcement bears solely on the remedy and

not on the change. Department of Treasury IRS, Jacksonville District and NTEU, 3 FLRA 630 (1980).

The Past Practices Doctrine.

Often a local employment-related practice is established informally (known as a "past practice") and a management action changes the past practice without affording the union an opportunity to negotiate

Negotiations. This doctrine requires local management to negotiate within the recognized scope of bargaining on changes in informally established personnel policies, practices and working conditions which may be (1) covered by ambiguous language in the contract; or (2) not covered at all by the contract. The obligation to bargain on such changes is enforceable as an unfair labor practice under §§ 7116(a)(1) and (5). Thus, where local management wants to change an established personnel practice, it must offer to negotiate with the union. The extent of negotiation required varies according to the following:

If the change by management concerns matters that are mandatorily negotiable, management must negotiate to the full extent of its discretion, whether to have the change and how to make the change.

If the change sought by management is an attempt to enforce management rights that have been afforded employees which were optionally negotiable, management must also negotiate fully but only as to the impact and implementation of the change but need not negotiate the decision whether to continue the practice.

If the change by management is in response to a requirement of law or an assertion of prohibited negotiable rights (for which there is no authority to allow the concession), management should revoke the illegal practice immediately, giving notice concurrently to the union that it stands ready to negotiate the impact and implementation which local management can control. *See* Navy and AFGE, 34 FLRA 635, (1990).

The doctrine does not apply to negotiations:

if there is no exclusive representative; or

if there is a specific CBA provision which gives management the right to the unilateral change. *See* Border Patrol, El Paso ad AFGE, 48 FLRA 61 (1993); or

where the subject is not negotiable.

The past practices doctrine does not render permissive nor prohibited matters negotiable. Further, negotiation is required only to the extent that the change is controlled by local management. But management's decision to adopt a higher headquarters' policy or regulation, which changes a past practice, triggers the obligation to notify the union. See

DODDS and OEA, 50 FLRA 197, 206 (1995)(DODDS decision to implement the revised DOD JTR triggered requirement to notify union).

The Authority found that the agency violated §§ 7116(a)(1) and (5) when it unilaterally eliminated an established past practice by issuing an instruction stating that leave without pay (LWOP) will not be granted to employees who had reached the maximum allowable earnings for a pay period, and then failing to bargain in good faith over this change and its impact on unit employees. The Authority found that a past practice of granting LWOP at the discretion of supervisors existed and rejected the agency's argument that it was effectively discontinued. Whatever attempt made by the activity to end the practice was not communicated to the union, nor was it ever made clear to management's own supervisors. Portsmouth Naval Shipyard, 5 FLRA 352 (1981). Similarly, the Authority found that the Agency committed a ULP when it terminated the practice of permitting employees to smoke inside fire stations without discussing the change with the union in Air Force Materiel Command, Wright Patterson AFB and Int'l Ass'n of Firefighters, 56 FLRA No. 118 (2000). *See also,* GSA and AFGE, Local 2431, 55 FLRA No. 84 (1999) (Agency unilaterally reduced the amount of performance awards after ten years of using the same standard); U.S. Customs Service and NTEU, 55 FLRA No. 16 (1998) (holding that a unilateral change to videotaping employee interview was a ULP if there was no reasonable connection between the change and a security practice).

Annual picnic and Post Exchange privileges as past practices. *See* AG Publications Center, 24 FLRA 695 (1986); AFGE v. FLRA, 866 F.2d. 1443 (D.C. Cir. 1989).

The FLRA has ruled that a past practice is irrelevant when it does not affect bargaining unit employees or is within management's exclusive authority. AFGE Local 2761 v. FLRA, 866 F.2d 1443 (1989).

The duty to bargain also includes an obligation to provide information under 5 U.S.C. § 7114((b)(4). This provision states that the agency must "furnish to the exclusive representative, or its authorized representative, upon request and, *to the extent not prohibited by law*, data which is *normally maintained* by the agency in the regular course of business; which is *reasonably available* and *necessary* for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . . . 5 U.S.C. § 7114((b)(4) emphasis added). Further, the agency's statutory duty to furnish information to the exclusive representative extends to a full range of representational activity, not just in the context of pending negotiations between labor and management. FAA and National Air Traffic Controllers, 55 FLRA No. 44 (1999)(finding the agency committed an ULP by not giving the exclusive representative of bargaining unit employees information that was necessary for it to determine seniority under the parties' collective bargaining agreement).

Privacy Act Information: If sanitized information will serve the purpose and protect Privacy Act concerns, that information must be provided to the exclusive representative. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota v. FLRA, 144 F.3d 90 (D.C. Cir. 1998) (holding the agency violated the

FSLMRS by failing to provide the union with copies of sanitized disciplinary actions taken against employees).

Reasonably Available: Failing to provide information in a timely manner is an unfair labor practice. HQDA, 90th Regional Support Command and AFGE, Local 1017, 1999 FLRA LEXIS 200, FLRA ALJ Dec. No. 144 (1999) (finding the agency committed an ULP when it did not give the union documents when it asked for them and instead told the union it could have official time to make copies itself). Further, the FLRA held that failing to inform the union that the requested information no longer exists is also an unfair labor practice. DOJ, INS Northern Region, Twin Cities, and National Boarder Patrol Council, AFGE, 52 FLRA 1323 (1997); SSA, Dallas and AFGE, AFL-CIO, Local 1336, 51 FLRA 1219, 1226-1227 (1996).

Necessary: It is an ULP to refuse to provide documentation when the union has shown a particularized need for the information and no countervailing interests outweigh the need. AFGE Local 2343 v. FLRA, 144 F.3d 85 (D.C. Cir 1998) (rejecting union's claim that particularized need is automatically established when requested documents discuss a specific incident); DOJ, INS v. FLRA, 144 F.3d 90 (D.C. Cir. 1998) (agency committed ULP when it failed to give union a copy of an investigatory file for which the union showed it had a particularized need; Air Force v. FLRA, 104 F.3d 1396 (D.C. Cir 1997) (agency violated the FSLMRS when, after the union showed a particularized need for information concerning disciplinary action taken against a supervisor who allegedly used physical force against a BU member, the agency failed to provide the requested documentation).

DOD v. FLRA,
114 S.Ct. 1006 (1994).
(Summary)

Analysis of this issue involves a number of statutes. The Federal Service Labor-Management Relations Statute provides that information may only be released to the union if release is not otherwise prohibited by law. 5 U.S.C. § 7114(B)(4). The Privacy Act prohibits release of information in systems of records, such as civilian personnel records, unless an exception applies. 5 U.S.C. § 552a(b). The only applicable exceptions are where a published routine use allows release, or where the Freedom of Information Act (FOIA) requires release. 5 U.S.C. § 552a(b)(3), 5 U.S.C. § 552a(b)(2).

(The Office of Personnel Management has published a routine use that allows the release of names and home addresses to unions where the unions do not have any other way to reach employees. Guidance for Agencies in Disclosing Information to Labor Organizations Certified as Exclusive Representatives Under 5 U.S.C. Chapter 71, FPM Letter 711-164 (September 17, 1992); List of OPM Privacy Act Systems of Records, Federal Register, August 10, 1992. Here the union has access to the employees at work so the routine use does not apply.)

The Privacy Act allows release of information if the FOIA requires release. 5 U.S.C. § 552a(b)(2). FOIA, however, never requires release if, balancing the personal interest in privacy against the public interest in ensuring that government activities are open to public scrutiny, the release would result in a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). When the Supreme Court affirmed that the public interest in union activity was not a public interest in relation to the FOIA, there remained no public interest to weigh against the private interest in privacy.

Release of this information, absent consent by the subject of the record or a valid Privacy Act exemption, is a violation of the Privacy Act.

FAA, New York Tracon, Westbury, NY and National Air Traffic Controllers Assoc.,

51 FLRA No. 12 (1995)(Tracon II)

The Union alleged that the FAA violated section 7116(a)(1), (5) and (8) of the Statute by refusing to provide the Union with a copy of an EEO settlement agreement requested under section 7114(b)(4) of the Statute. The Authority found that the FAA did not violate the Statute because disclosure of the requested information was prohibited by the Privacy Act.

In arriving at this result, the Authority applied the framework announced in FAA, New York TRACON, 50 FLRA 338 (1995)(Yes, it was the same agency and union).

In New York TRACON, the union requested unsanitized copies of all bargaining unit employee performance appraisals. When the agency refused to provide the information, the union filed an unfair labor practice charge. The Administrative Law Judge ruled against the agency and the agency filed exceptions to the decision with the FLRA. While the case was pending before the FLRA, the Supreme Court decided DOD v. FLRA. The FLRA adopted the Supreme Court's holding in DOD v. FLRA.

The framework announced by the FLRA is the same as that used in determining the release of information under the Freedom of Information Act (FOIA). The agency seeking to withhold information in reliance on the Privacy Act "bears the burden of demonstrating:

(1) that the information requested is contained in a system of records under the Privacy Act;

(2) that disclosure of the information would implicate employee privacy interests; and

(3) the nature and significance of those privacy interests."

If the agency makes the required showing, the burden shifts to the General Counsel of the FLRA (on behalf of the union) to:

"(1) identify a public interest that is cognizable under the FOIA; and

(2) demonstrate how disclosure of the requested information will serve the public interest."

Once the respective interests are identified, the FLRA then balances the respective interests to determine releasability.

In New York TRACON, the FLRA began by reciting the federal labor union's statutory right to information contained in the FSLMRS and the "to the extent not prohibited by law" limitation it contains. The FLRA determined that this limitation brings requests for information under the FSLMRS within the protections of the Privacy Act. In past decisions, the FLRA used the statutory right to information contained in the FSLMRS to find a public interest that justifies releasing information. As a result of the Supreme Court's decision in DOD v. FLRA, the FLRA no longer considers this statutory right to information in determining the applicable public interest to be weighed against the individual's privacy concern. Rather, the FLRA only considers how the information sheds light on the agency's performance of its statutory duties or informs the public about what the Government is doing.

Two other interests used by the FLRA in past cases to tip the balance in favor of disclosure of information were rejected in this case. The FLRA no longer considers the early resolution of grievances in defining the public interest. Early resolution of grievances does not shed light on how the agency functions. Similarly, the FLRA no longer considers "the proper administration of a collective bargaining agreement" as a public interest to be used in the balancing process, absent a showing that the disclosure would permit an assessment of how the agency administers its labor contract. Taking these statutory weights out of the balancing process makes it much more difficult for unions to overcome the employee's privacy interests.

The FLRA rejected the argument that the Supreme Court's decision in DOD v. FLRA was limited to requests for names and home addresses. The FLRA could find no basis for defining public interest differently in cases involving other kinds of information requested by a union. Under the FSLMRS, unions have a variety of statutory rights and responsibilities.

These interests are unique to the union and the FLRA will not consider them in assessing public interest under the Privacy Act.

Applying the new framework to the requested information in New York TRACON, the FLRA found a significant privacy interest in information that reveals how a supervisor assesses an employee's work performance. Favorable information in an employee evaluation report, if released, might embarrass an employee or incite jealousy among co-workers. Releasing unfavorable information in an employee evaluation report, if released, could lead to embarrassment and injury to the reputation of the employees concerned. In New York TRACON, the FLRA balanced this privacy interest in an employee's appraisal against the public interest in knowing that the agency was carrying out its personnel functions fairly and in accordance with the law. After balancing the private and public interests, the FLRA found the public interest in release was outweighed by the substantial invasion of employee privacy.

In Tracon II, the Authority found a public interest in knowing how an agency dealt with discrimination complaints. However, this public interest was insufficient to overcome the privacy interest of the employee. The Authority also noted that a redacted document would not protect the privacy interests of the employee since the settlement applied to one employee and was requested by the employee's name.

NOTE: The FLRA has consistently upheld the agencies' refusal to release unredacted copies of documents to unions since FAA, New York Tracon was decided. However, that does not relieve the obligation to provide documents with the private information redacted, where redaction will protect the privacy interests.

Refusal to honor an agreement is also an unfair labor practice.

Agency's refusal to honor "the unambiguous terms of the settlement agreement by which it was bound . . . constituted repudiation and, as such, violated section 7116(a)(1) and (5) of the Statute." DODDS and OEA, 50 FLRA 424 (I1995).

6-7. Failure to Cooperate in Impasse Procedures.

It is an unfair labor practice for an agency to fail or refuse to cooperate in impasse procedures and impasse decisions (Section 7116(a)(6)).

U.S. ARMY AEROMEDICAL CENTER FORT RUCKER, & HQ, U.S. ARMY HEALTH SERVICES COMMAND FORT SAM HOUSTON, and AFGE LOCAL 1815

49 F.L.R.A. 361 (1994)

(Extract)

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge.

The complaint alleged that the U.S. Army Aeromedical Center, Fort Rucker, Alabama (Respondent Fort Rucker) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by engaging in a course of conduct that constituted bad faith bargaining concerning the Charging Party's efforts to bargain over on-call procedures and its attempts to invoke the services of the Federal Service Impasses Panel (the Panel). The complaint further alleged that the Headquarters, U.S. Army Health Services Command, Fort Sam Houston, Texas (Respondent Fort Sam Houston) violated section 7116(a)(1) and (6) of the Statute by refusing to approve, and declaring nonnegotiable, provisions that the Panel ordered Respondent Fort Rucker to adopt.[1] The Respondents did not file an answer to the complaint within 20 days after it was served on them, as prescribed in section 2423.13(a) of the Authority's Rules and Regulations. When no answer was filed, the General Counsel filed a motion for summary judgment under section 2423.13(b) of the Rules and Regulations.[2] In their response to the General Counsel's motion, the Respondents included an answer to the complaint, in which they admitted the factual allegations of the complaint and denied the legal allegations.

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[1] The Panel issued its decision in 91 FSIP 115 (May 30, 1991), directing the parties to adopt the Union's proposal regarding procedures to be followed by employees who are on call. The proposal is set forth in an Appendix to this decision.

[2] Section 2423.13(b) of the Rules and Regulations provides, in relevant part:

> Failure to file an answer or to plead specifically to or explain any allegation [of the complaint] shall constitute an admission of such allegation and shall be so found by the Authority, unless good cause to the contrary is shown.

The Judge granted the motion for summary judgment as to Respondent Fort Rucker. The Judge found that there was no good cause for the Respondents' failure to timely file an answer to the complaint. Therefore, in accordance with section 2423.13(b) of the Rules and Regulations, the Judge found that the failure to timely answer the complaint constituted an admission that Fort Rucker had violated section 7116(a)(1) and (5) of the Statute. No exceptions were filed to this portion of the Judge's decision.

The Judge denied the motion for summary judgment as to Respondent Fort Sam Houston on the basis that summary judgment was inappropriate in the circumstances of this case. The Judge also recommended that the portion of the complaint alleging a violation of the Statute by Respondent Fort Sam Houston be dismissed. The General Counsel filed exceptions to the Judge's findings and conclusions with respect to Respondent Fort Sam Houston.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, we have reviewed the Judge's decision and find that no prejudicial error was committed. Upon consideration of the Judge's decision and the entire record, and noting that no exceptions were filed in this regard, we adopt the Judge's findings and conclusion that Respondent Fort Rucker violated section 7116(a)(1) and (5) of the Statute. We further adopt the Judge's denial of the motion for summary judgment with respect to Respondent Fort Sam Houston and we agree, for the reasons set forth below, that the complaint against Respondent Fort Sam Houston must be dismissed.

In denying the motion for summary judgment, the Judge found that the failure to timely answer the complaint did not establish that Respondent Fort Sam Houston violated section 7116(a)(1) and (6) of the Statute. The Judge reasoned that, absent a determination by the Authority that the matter was negotiable, Respondent Fort Sam Houston "retained the right to contest the negotiability of the proposal ordered adopted by the [Panel]." Judge's decision at 7. The Judge noted that the complaint did not allege that there had been a prior negotiability determination on the same or substantially similar provision or that the Panel had "treated the negotiability of the Union's proposal." Id. at 8. According to the Judge, in these circumstances, a finding of negotiability is necessary in order to sustain a violation of the Statute, and, therefore, "admission of the factual allegations set forth in the Complaint does not support a legal conclusion that the Union's proposal was negotiable." *Id*.

The General Counsel excepts to the partial denial of the motion for summary judgment and the dismissal of the complaint against Respondent Fort Sam Houston. The General Counsel asserts that under section 2423.13(b)(2) of the Authority's Rules and Regulations, the failure to respond to the complaint constituted an admission of the allegations

contained therein and the Authority is required to find the violations, as alleged, unless good cause to the contrary is shown. The General Counsel contends that because the Judge found that the Respondents' failure to timely answer the complaint was not for good cause, all the facts of the complaint, including the allegation concerning Respondent Fort Sam Houston, were deemed admitted as true. Therefore, the General Counsel asserts that it is entitled to summary judgment as a matter of law.

The General Counsel further maintains that the Judge incorrectly applied Authority precedent in concluding that a finding of negotiability was required before a violation of section 7116(a)(1) and (6) could be found. Rather, the General Counsel argues that in cases in which there has been no prior negotiability finding by the Authority, it is the responsibility of the Judge to make the necessary negotiability determination. In this regard, the General Counsel asserts that the Judge erroneously "appears to conclude[] that the complaint did not allege sufficient facts to show that the provision in question . . . was negotiable." Exceptions at 7. In the General Counsel's view, "the admitted facts and pleadings are sufficient, as a matter of law, to support the alleged violation of the Statute." *Id.* at 9.

The General Counsel also objects to what it views as the Judge's implication that the General Counsel should have specifically alleged that the Panel-imposed provision was negotiable. According to the General Counsel, the Judge was required to make a negotiability determination and the burden was on the Respondents to show that the Panel-imposed provision was nonnegotiable. However, even assuming that it bore the burden of proving the proposal's negotiability, the General Counsel claims that the admitted facts, as well as the Panel's decision and Authority case law, clearly establish that the proposal is negotiable.

Alternatively, the General Counsel argues that if the Authority concludes that the pleadings are insufficient to support the conclusion that the Panel-imposed provision was negotiable, the Judge erred in dismissing the complaint against Fort Sam Houston. According to the General Counsel, the Judge should have "remand[ed] the complaint to the Atlanta Region for a trial on the facts[.]" *Id.* at 3.

Initially, we find, contrary to the General Counsel's assertions, that the Judge correctly concluded that the Respondents' failure to timely answer the complaint is insufficient to support a conclusion that Respondent Fort Sam Houston violated section 7116(a)(1) and (6) of the Statute. As the Judge noted, the General Counsel did not allege in its complaint that the provision was negotiable or that the Authority previously had found a substantially similar provision negotiable. Therefore, the Respondents' failure to timely answer the complaint does not constitute an admission that the provision is, in fact, negotiable. Absent such an admission, a finding by the Authority that the Panel-imposed provision is

negotiable is a prerequisite to a finding that Respondent Fort Sam Houston violated the Statute by disapproving the provision.

In this connection, the Authority previously has stated that the mere act of reviewing provisions imposed by the Panel does not constitute a violation of the Statute. *See* U.S. Department of the Army, Headquarters, and DARCOM HQ, 17 FLRA 84 (1985), *aff'd in relevant part sub nom*. National Federation of Federal Employees v. FLRA, 789 F.2d 944 (D.C. Cir. 1986). Rather, as relevant here, an agency commits an unfair labor practice by disapproving a provision imposed by the Panel that is not materially different from one previously found negotiable by the Authority or that the Authority finds, in either an unfair labor practice or a negotiability proceeding, is not contrary to the Statute or any other law, rule, or regulation. *See* U.S. Department of Health and Human Services, Public Health Service and Centers for Disease Control, National Institute for Occupational Safety and Health, Appalachian Laboratory for Occupational Safety and Health, 39 FLRA 1306, 1311 (1991); Department of the Treasury and Internal Revenue Service, 22 FLRA 821, 828 (1986). The General Counsel concedes that it "did not present [the Judge] with a case in which the Authority had already deemed a proposal negotiable." Exceptions at 7. Absent such a finding, it would be incorrect to conclude that Respondent Fort Sam Houston's conduct in disapproving the Panel-imposed provision violated section 7116(a)(1) and (6) of the Statute.

We also reject the General Counsel's assertions with respect to which party bears the burden of establishing the negotiability of the provision. In order for the Authority to determine that the provision is negotiable and, therefore, that Respondent Fort Sam Houston violated section 7116(a)(1) and (6) of the Statute, the General Counsel was required to allege and demonstrate that the matter was negotiable. As we noted, the General Counsel did not allege, let alone establish, that the provision is negotiable. As a result, the General Counsel has not met its burden of proof solely as a result of the Respondents' untimely answer to the complaint.

However, we agree with the General Counsel that the Judge erred in dismissing the complaint with respect to Respondent Fort Sam Houston, absent a finding that the Panel-imposed provision is nonnegotiable and, therefore, was properly disapproved. In other words, our conclusion that the General Counsel was not entitled to summary judgment as to this allegation of the complaint does not resolve the underlying issue of whether, in disapproving the Panel-imposed provision, Respondent Fort Sam Houston violated section 7116(a)(1) and (6) of the Statute. As noted, such a finding is contingent on whether the provision is negotiable.

Both the General Counsel, in its exceptions, and Respondent Fort Sam Houston, in its response to the motion for summary judgment,

maintain that the Authority should remand this case for a determination as to the negotiability of the provision. Such a remand would be appropriate if the record contained insufficient evidence on which to resolve the issue. However, we find that the record provides a sufficient basis on which to assess the negotiability of the provision. In their pleadings filed with the Authority, as well as the supporting documentation, the parties presented sufficient arguments with respect to the merits of the provision to enable the Authority to resolve the matter. Consequently, in light of the Authority's role in resolving negotiability disputes, set forth in section 7105(a)(2)(E) of the Statute and the cases cited above, and in order to provide an expeditious resolution of this case, we will now address the negotiability of the Panel-imposed provision in order to determine whether Respondent Fort Sam Houston's conduct in disapproving the provision violated section 7116(a)(1) and (6) of the Statute.

The provision, fully set forth in the Appendix, relates to civilian nurses who work in an operating room and who are on call to return to duty. Among other things, the provision prescribes the length of time that these employees have to return to work. Specifically, the employees are provided 25 minutes to prepare themselves to start their drive to work and a reasonable amount of driving time to arrive at their duty location. The provision also states that the employees will not be required to meet stricter standards than those contained in the provision. For the following reasons, we conclude that the provision is nonnegotiable because it would excessively interfere with the right to assign work under section 7106(a)(2)(B) of the Statute.

The Authority previously has held that proposals or provisions that determine when work will be performed directly interfere with the right to assign work. *See, for example*, American Federation of Government Employees, AFL-CIO, Local 3769 and U.S. Department of Agriculture, Federal Grain Inspection Service, League City Field Office, Texas, 45 FLRA 92, 94-95 (1992) (portion of proposal guaranteeing 10 consecutive hours off duty between certain work assignments found to directly interfere with management's right to determine when certain work assignments would occur). *See also* National Association of Government Employees, Local R12-33 and U.S. Department of the Navy, Pacific Missile Test Center, Point Mugu, California, 40 FLRA 479, 486 (1991) (elimination of overlap between shifts found to directly interfere with the right to assign work by preventing the agency from determining when the duties of the shift would be performed). The provision here would impermissibly affect management's ability to determine when work will be performed by preventing management from calling the nurses back to duty in a lesser period of time than allowed by the provision. For example, if there were an emergency situation necessitating the nurses' presence in the operating room, management would not be able to require the nurses to reduce their preparation time in order to arrive at work to perform their

assigned duties. Accordingly, the provision directly interferes with the right to assign work.

The provision may nonetheless be negotiable if it constitutes an appropriate arrangement under section 7106(b)(3) of the Statute. In National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA 24, 31-33 (1986) (KANG), the Authority established an analytical framework for determining whether a proposal constitutes an appropriate arrangement. First, we determine whether the proposal constitutes an arrangement for employees adversely affected by the exercise of a management right. To do this, we ascertain whether the proposal in question seeks to address, compensate for, or prevent adverse effects on employees produced by the exercise of management's rights. *See* National Treasury Employees Union, Chapter 243 and U.S. Department of Commerce, Patent and Trademark Office, 49 FLRA No. 24 (1994) (Member Armendariz, concurring in part and dissenting in relevant part). Second, if we conclude that the proposal is an arrangement, we then determine whether the proposal is appropriate, or inappropriate because it excessively interferes with the exercise of a management right. We make this determination by weighing "the competing practical needs of employees and managers" to ascertain whether the benefit to employees flowing from the proposal outweighs the proposal's burden on the exercise of the management right or rights involved. KANG, 21 FLRA at 31-32.

Even assuming that the provision constitutes an arrangement for adversely affected employees, we find that the provision is nonnegotiable because it would excessively interfere with management's right to assign work. In reaching this result, we note that the provision would benefit employees by providing them a sufficient amount of time in which to make whatever adjustments are necessary to their schedules before reporting back to work. The provision would also provide employees with a reasonable driving time beyond that which the employees would have for preparation purposes. We view such benefits as significant. At the same time, however, the provision mandates that the employees can never be held to stricter requirements than the allowance of 25 minutes preparation time followed by a reasonable driving time. The provision thus contains an absolute prohibition against the assignment of duties in any lesser period of time than is authorized under the provision. As we stated above, the employees involved here are operating room nurses who may be called upon to respond to emergency situations. Management's inability to require the nurses to comply with a shorter response time would, in our view, seriously impair management's ability to meet patient care needs and provide quality medical care. On balance, therefore, we conclude that the provision would excessively interfere with management's right to assign work under section 7106(a)(2)(B) of the Statute.

Insofar as the provision excessively interferes with the exercise of a management right, we find that Respondent Fort Sam Houston properly disapproved the provision. Consequently, its conduct in disapproving the Panel-imposed provision did not violate section 7116(a)(1) and (6) of the Statute. *See* Department of Defense Dependents Schools (Alexandria, Virginia), 33 FLRA 659, 662-64 (1988) (agency's disapproval of provision pertaining to academic freedom did not violate the Statute because the provision was inconsistent with section 7106(a)(2)(A) and (B) of the Statute). Accordingly, we will dismiss the allegations of the complaint with respect to Respondent Fort Sam Houston.

Finally, we agree with the Judge that a bargaining order is appropriate to remedy the violation of section 7116(a)(1) and (5) of the Statute by Respondent Fort Rucker for engaging in a course of bad faith bargaining. Such a remedy is also consistent with our view that where a provision is found to be nonnegotiable and properly disapproved by an agency head, the parties are obligated to return to the bargaining table with a sincere resolve to reach agreement. Department of Defense Dependents Schools (Alexandria, Virginia), 27 FLRA 586, 595 (1987), *rev'd and remanded as to other matters sub nom*. DODDS v. FLRA, 852 F.2d 779 (4th Cir. 1988), *decision on remand*, 33 FLRA 659.

* * *

APPENDIX

The employee on call agrees to make himself or herself available for duty at his or her duty station as quickly as possible; however, employees will not be required to meet more stringent requirements than stated below;

a. Employees will have 25 minutes to prepare themselves to start the drive to their duty location.

b. Employees will be allowed a reasonable driving time to their duty location, considering traffic laws and the location of residence or area from which the notification was received. This expected driving time will be communicated in writing to each employee by the Employer at the time they are placed in a position that will require them to be in an on-call status.

Agencies must maintain the *status quo* while an issue is pending before the FSIP. Any failure or refusal to maintain the *status quo* would, except where inconsistent with the necessary functioning of the agency, be a violation of section 7116(a)(1) (a derivative violation), (5) (avoiding the bargaining obligation), and (6) (failure to cooperate in impasse procedures). BATF and NTEU, 18 FLRA 466 (1985); EEOC and National Council of EEOC Locals #216, 48 FLRA 306 (1993).

6-8. Regulations in Conflict with CBA.

Section 7116a(7) provides that it is an unfair labor practice for an agency:

> to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed.

DEPARTMENT OF THE TREASURY
and NTEU

9 FLRA 983 (1982)

(Extract)

* * *.

The first issue before the Authority concerns the negotiability of those portions of Article 2 sections 1A and B, Article 32 section 10A and Article 40 section 3 which establish that whenever provisions contained in the negotiated agreement conflict with Government-wide or agency-wide rules or regulations issued after the date the agreement became effective, the agreement provisions will prevail. The Authority, in agreement with the Union, concludes that these provisions are consistent with the language of the Statute and its legislative history. In this regard, section 7116(a) provides, in relevant part, as follows:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

* * *

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed. . . .

The conference committee report concerning this section stated as follows:[12]
The conference report authorizes, as in the Senate bill, the issuance of government-wide rules or regulations which may restrict the scope of

[12] H. Rep. No. 95-1717, 95th Cong., 2d Sess. 155 (1978).

collective bargaining which might otherwise be permissible under the provisions of this title. As in the House, however, the Act generally prohibits such government-wide rule or regulation from nullifying the effect of an existing collective bargaining agreement. The exception to this is the issuance of rules or regulations implementing section 2302. Rules or regulations issued under section 2302 may have the effect of requiring negotiation of a revision of the terms of a collective bargaining agreement to the extent that the new rule or regulation increases the protection of the rights of employees.

Consequently, while the duty to bargain under section 7117 of the Statute[13] does not extend to matters which are inconsistent with existing Government-wide rules or regulations or agency-wide rules or regulations for which a compelling need is found to exist, once a collective bargaining agreement becomes effective, subsequently issued rules or regulations, with the exception of Government-wide rules or regulations issued under 5 U.S.C. § 2302 (relating to prohibited personnel practices), cannot nullify the terms of such a collective bargaining agreement. Thus, the provisions here in dispute are within the duty to bargain under the Statute.

* * *

6-9. Catch-all Provision.

Section 7116a(8) provides that it is an unfair labor for an agency:

to otherwise fail or refuse to comply with any provision of this chapter.

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[13] Section 7117 of the Statute provides, in pertinent part, as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation . . . only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

DEPARTMENT OF DEFENSE
DEFENSE CRIMINAL INVESTIGATIVE SERVICE
and AFGE, LOCAL 2567

28 FLRA 1145 (1987)

(Extract)

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Decision of the Administrative Law Judge filed by the General Counsel. An opposition to the exceptions was filed by the Defense Criminal Investigative Service (DCIS).[14] The issue is whether the Respondents violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by denying employees their right under section 7114(a)(2)(B) of the Statute to union representation at investigatory examinations. For the reasons discussed below, we find that DCIS violated section 7116(a)(1) and (8) of the Statute by interfering with the right of employees to union representation under section 7114(a)(2)(B). We also find that no further violation was committed by DCIS or the other Respondents.

II. Background

The facts are fully set forth in the Judge's Decision. Briefly, they indicate that the American Federation of Government Employees is the exclusive representative of a consolidated unit of employees of the Defense Logistics Agency (DLA). The Defense Contract Administration Services Region, New York (DCASR NY) is a field component of DLA. Within DCASR NY is the Defense Contract Administration Services Management Area, Springfield, New Jersey (DCASMA), at which the Charging Party, AFGE Local 2567, is the local representative. Organizationally, at all times relevant to this case, DLA was "a separate [a]gency of the Department of Defense under the direction of the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics)." Post-hearing Brief of DLA and DCASR NY at 17.

DCIS is the criminal investigative component of the Office of Inspector General in the Department of Defense (DOD). Organizationally, DCIS is within the Office of the Assistant Inspector General for Investigations who, together with other Assistant Inspectors General, reports to the Inspector General. The latter, in turn, reports to the Secretary of Defense.

[14] An opposition to the General Counsel's exceptions filed by the Respondents Defense Logistics Agency and Defense Contract Administration Services Region, New York was untimely filed and therefore has not been considered.

The functions of the Inspector General and DCIS are more fully described by the Judge in his Decision. We note here that DCIS has various responsibilities within DOD, including the authority to investigate alleged criminal incidents involving DLA employees in connection with their official duties. Once DCIS decides to conduct an investigation, no one within DOD may interfere with the investigation except the Secretary of Defense and then only on matters affecting national security.

An incident occurred in January 1985, involving an alleged gun shot at the home of a DCASMA supervisor. The incident was reported to the local police as well as to the Deputy Director of DCASMA. The latter, in turn, notified DCASR NY which then referred the matter to DCIS. As a part of its investigation, DCIS separately interviewed two employees employed at DCASMA. One of the employees was named as a possible suspect by the supervisor at whose home the shooting occurred. The other employee was thought to own a vehicle matching the description of one observed in the vicinity of the supervisor's home. Both employees were interviewed at their place of employment by an investigator from DCIS and a member of the local police force. The Deputy Director of DCASMA provided a room for the interviews and had the employees summoned to the interview.

Prior to the interview with the first employee, the Deputy Director informed the DCAS investigator that the DLA-AFGE collective bargaining agreement provided that a union representative was entitled to be present during the questioning of an employee, if the employee requested representation and if the employee reasonably believed that the questioning could lead to disciplinary action. The DCIS investigator informed the Deputy Director that DCIS was not bound by the parties' agreement and that the so-called "Weingarten rule" did not apply to DCIS investigations. In each of the interviews, the employees requested and were denied union representation by DCIS and the local police. No request for union representation was made to DCASMA and no one from DCASMA, DCASR NY or DLA was present at either of the interviews.

III. Judge's Decision

The Judge concluded that neither DLA nor DCASR NY violated the Statute as alleged. In reaching that conclusion, he found that if the interviews had been conducted by DLA, DCASR NY, or DCASMA, the employees would have had a right to union representation under section 7114(a)(2)(B) of the Statute and denial of their requests for representation would have violated section 7116(a)(1) and (8). However, the Judge further found that in this case neither DLA nor any of its constituent components questioned or examined the employees.

The Judge also found no violation by DCIS which, with the local police, refused the employees' request for union representation. The Judge found that DCIS was independent of DLA and was not acting as an agent or representative of DLA. The Judge further found that DCIS itself was not obligated to afford the employees union representation under section 7114(a)(2)(B) since DCIS has no collective bargaining relationship with the Union.

In reaching his conclusions, the Judge found it unnecessary to determine whether use of DCIS reports by DLA to justify disciplining employees would have violated the Statute.

IV. Positions of the Parties

The General Counsel filed exceptions to numerous portions of the Judge's Decision including the Judge's finding that it was not necessary to reach any question regarding DCIS reports and their potential uses. The General Counsel argues that DCIS is a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. Essentially, the General Counsel's position is that DCIS acted as an agent of DLA in conducting the interviews and, therefore, that both DCIS and DLA violated section 7114(a)(2)(B) of the Statute by failing to afford the employees their right to union representation. To remedy the alleged unlawful conduct, the General Counsel requests that any documents, reports, and references to the interviews be expunged from the official personnel folders of the two employees, and that the Respondents be ordered to refrain from using the information obtained or derived from the interviews in any disciplinary action initiated against either employee subsequent to the date of the interviews.

In its opposition, DCIS argues that the Judge was correct in not making findings regarding the DCIS reports and was also correct in finding that no violation was committed by DLA, DCASR NY, or DCIS. More specifically, as to the reports, DCIS noted that no reports had been provided to DLA concerning the investigation and no disciplinary action had been taken against any employees as a result of the investigation.

V. Analysis

Under section 7114(a)(2)(B) of the Statute, in any examination of a unit employee by a representative of an agency in connection with an investigation, the employee has the right to have a union representative present if the employee reasonably believes that the examination may result in disciplinary action and the employee requests representation. United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA 874 (1987); Department of the Treasury, Internal Revenue Service, Jacksonville District and Department of the Treasury, Internal Revenue Service, Southeast Regional Office of

Inspection, 23 FLRA 876 (1986). There is no question here that the employees had a reasonable belief that disciplinary action might result from the examinations and that the employees requested union representation. The Judge noted that the employees were each advised prior to the examination that a criminal investigation was being conducted and that both employees made their requests for union representation to DCIS. The parties disagree, however, as to whether the examinations were conducted by a "representative of the agency" within the meaning of section 7114(a)(2)(B).

As to that point of disagreement, we agree with the Judge's finding that DCIS, which conducted the examination with the local police, was not acting as an agent or representative of DLA. As described above, DCIS and DLA are organizationally separate from each other. DCIS is empowered to conduct criminal investigations within DOD and reports to the Secretary of Defense. However, we find that DCIS, as an organizational component of the Department of Defense was acting as a "representative of the agency," that is, DOD, within the meaning of section 7114(a)(2)(B). Clearly, DOD is an "agency" within the definition of the term in section 7103(a)(3) of the Statute as the parties have acknowledged in the complain and answers in this case. As the investigative arm of DOD, DCIS was conducting an investigation into alleged criminal activity involving DLA employees. That a criminal investigation may constitute an "examination in connection with an investigation" was recognized by the Authority in the Internal Revenue Service case cited above, and is not in dispute in this case. Accordingly, we find that each of the interviews with the employees constituted an examination in connection with an investigation within the meaning of section 7114(a)(2)(B) of the Statute at which the employees were entitled to union representation, upon request.

We have previously noted that the purpose of Congress in enacting section 7114(a)(2)(B) of the Statute was to create a right to representation in investigatory interviews for Federal employees similar to the right of private sector employees as described by the Supreme Court in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). For example, *see* Bureau of Prisons, 27 FLRA 874, slip op. at 5-6. Under Weingarten, when an employee makes a valid request for union representation in an investigatory interview, the employer must: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview. *Id.* at 6.

In this case, although DCIS was not the employing entity of the employees, once it was aware of the employees' statutory right to union

representation in the interview, it could not act in such a manner so as to unlawfully interfere with that right.[15]

DCIS was informed by the Deputy Director of DCASMA that the employees were entitled to union representation upon request.[16] When the employees requested representation, DCIS should have (1) granted their request, (2) discontinued the interview, or (3) offered the employees the choice between continuing the interview unaccompanied by a union representative or having no interview.

However, DCIS failed to properly act on the requests and instead denied the requests and continued with the examinations. DCIS therefore interfered with the statutory right of the employees to have union representation at the examinations. Accordingly, we find that DCIS violated section 7116(a)(1) and (8) of the Statute.

As noted above, the General Counsel disagreed with the Judge's finding that it was not necessary to reach any questions regarding reports prepared by DCIS. We find that the matter of DCIS' reports is not properly before us. The complaint in this case contained no allegation that the reports were in any way violative of the Statute. Also, as noted by DCIS, no reports were submitted to DLA following the investigation and no employee was disciplined as a result of the investigation.

To remedy DCIS' violation of the Statute, we shall order that DCIS cease and desist from unlawfully interfering with the statutory rights of employees represented by the Charging Party to union representation at examinations in connection with investigations. We find no basis on which to grant the General Counsel's request that the Respondents be ordered to expunge any documents referring to the examinations from the official personnel folders of the two employees interviewed and to refrain from using information from the interviews in any action initiated against the employees. The record before us does not indicate that any documents were placed in the employees' official personnel folders or that any action was initiated against the employees.

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[15] An organizational entity of an agency not in the same "chain of command" as the entity at the level of exclusive recognition violates section 7116 of the Statute by unlawfully interfering with the rights of employees other than its own. *See* Headquarters, Defense Logistics Agency, Washington, D.C., 22 FLRA 875 (1986).

[16] Although not alleged as a violation of the Statute, we note that the conduct of DCASMA Deputy Director in providing a room and having the employees summoned for the interviews did not constitute a violation in the circumstances presented. As previously stated, no one within DOD may interfere with a DCIS investigation except the Secretary of Defense, and then only in limited circumstances. For DCASMA to have refused to provide a room or to summon the employees for the interviews arguably would have interfered with the investigation.

Finally, we believe that it would be appropriate for the Secretary of Defense, the Inspector General, or other officials with administrative responsibility for DCIS, to advise DCIS investigators of the pertinent rights and obligations established by Congress in enacting the Federal Labor-Management Relations Statute. More particularly as to matters raised in this case, DCIS investigators should be advised that they may not engage in conduct which unlawfully interferes with the rights of employees under the Statute.

In Customs Service, 5 FLRA 297 (1981), the Authority adopted the ALJ's finding that the agency violated §§ 7116(a)(1) and (8) by failing to provide an employee an opportunity to be represented by a union representative at an investigatory interview of that employee. Although the representative was afforded full opportunity to assist the employee at the initial interview, in the subsequent taped interview, where the form of the questions was different from the initial interview, the representative was admonished not to speak out or make statements.

An agency's obligation to deduct dues is based not upon a contractual obligation but rather upon an obligation imposed by the Statute. The failure to comply with this mandatory obligation constitutes a violation of section 7116(a)(8) of the Statute. DLA, 5 FLRA 126 (1981). *See* AFGE v. FLRA, 835 F.2d 1458, (D.C. Cir. 1987).

6-10. Management/Employee Complaints Against Unions.

Department of Army managers rarely file an ULP. Management, in other agencies of the Federal sector, has filed ULPs on a more frequent basis. Regardless, very few cases are reported.

Section 7116(b) provides:

For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause, or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) (A) to call, or participate in a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Section 7114 provides:

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

The following case illustrates the current interpretation of this provision.

NATIONAL TREASURY EMPLOYEES UNION v. FLRA

800 F.2d 1165 (D.C. Cir. 1986)

(Extract)

BORK, Circuit Judge:

The National Treasury Employees Union petitions for review of a decision and order of the Federal Labor Relations Authority and the Authority cross-applies for enforcement of its order. The Authority held that the union committed an unfair labor practice by refusing to provide attorneys to represent employees who were not members of the union on the same basis

as it provided attorneys to members. The attorney representation sought related to a statutory procedure to challenge a removal action and not to a grievance or other procedure growing out of a collective bargaining agreement.

The question before us is whether the distinction between procedures that arise out of the collective bargaining agreement and those that do not is dispositive or irrelevant under the pertinent provision of the Federal Service Labor-Management Relations Statute. The union contends that it is dispositive because the statute enacts the private-sector duty of fair representation, a duty that is limited to those matters as to which the union is the exclusive representation of the employees. Since the NTEU was not the exclusive representative as to the statutory appeal involved here, the duty of fair representation did not attach, and, the union contends, it was free to provide representation to members that it denied to non-members. The Authority, on the other hand, argues that the statute enforces a duty of nondiscrimination broader than that of private-sector fair representation, a duty that extends to all matters related to employment.

The facts being undisputed, we have before us a single, clearly-defined issue of statutory construction. We think the statute does not admit of the Authority's interpretation and therefore reverse.

I.

NTEU is the exclusive representative of all non-professional employees of the regional offices of the Bureau of Alcohol, Tobacco and Firearms, Department of Treasury. In August, 1979, BATF gave notice of its intention to institute an adverse action against Carter Wright, a BATF inspector in Denver, Colorado. The action would, if successful, result in Wright's discharge. Wright, who was not an NTEU member, telephoned Jeanette Green, president of NTEU chapter representing his bargaining unit, and asked whether non-members were eligible to obtain an NTEU attorney. He did not tell Green what kind of a case was involved. She replied that it was NTEU's "policy generally not to furnish legal counsel to non-members." Green suggested that Wright call an NTEU staff attorney in Austin, Texas, for more information, but Wright instead telephoned NTEU National Vice-President Robert Tobias in Washington, D.C. They discussed the details of Wright's case, and Tobias said he would consult the union's national president. Wright called back a few days later and Tobias said the president had decided it "wouldn't be advisable" for the union to provide an attorney. He and the president thought Wright's case not a good one. Tobias said they handled cases for union members automatically but that non-members with poor cases did not necessarily receive representation.

Several weeks later the national president of NTEU sent a memorandum to all local chapter presidents stating that NTEU would continue its policy of refusing to supply attorneys to non-members. This

policy applied across the board, to procedures related to the collective bargaining agreement as well as to those not so related. This court, as will be seen, has held that the discrimination between members and non-members with respect to procedures of the former type violates the statute.

BATF proceeded against Wright and ordered him removed. Wright hired private counsel, pursued the statutory appeals procedure created by the Civil Service Reform Act, *See* 5 U.S.C.§§ 7512, 7513, and 7701 (1982), and ultimately prevailed when the Merit System Protection Board overturned the agency's removal decision.

II.

BATF filed an unfair labor practice charge against NTEU and its Denver chapter. FLRA's General Counsel then issued a complaint alleging that the union violated 5 U.S.C. § 7114(a)(1) (1982), a provision of the Federal Service Labor-Management Relations Statute, by following a policy of discrimination between union members and non-members in the provision of attorney representation. The violation of section 7114(a)(1) meant, it was charged, that the union had committed unfair labor practices in violation of section 7116(b)(1) and (8) of the statute.[17] The union was also charged with a separate unfair labor practice under section 7116(b)(1) for violating section 7102.[18]

The Administrative Law Judge found that both the Denver chapter and the NTEU had committed the unfair labor practices charged. The ALJ assumed without deciding that the NTEU had no duty to represent any employee before the MSPB but held that, if the NTEU provided representation to union members, it must provide equal representation to non-members. *See* Joint Appendix ("J.A.") at 109.

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[17] The charges under these sections depend upon a finding that § 7114(a)(1) was violated. Section 7116(b)(1) provides that it is an unfair labor practice for a union "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter." 5 U.S.C. § 7116(b)(1) (1982). Section 7116(b)(8) makes it an unfair labor practice for a union "to otherwise fail or refuse to comply with any provision of this chapter."

[18] That section provides:

> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--
>
> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to the heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
>
> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C.§ 7102 (1982).]

The Authority held that the Denver chapter violated the statute but adopted the ALJ's other findings, conclusions, and recommendations. J.A. at 103. The NTEU petitioned this court for review and the FLRA cross-applied for enforcement of its order.

III.

The scope of the NTEU's duty depends upon the meaning of the second sentence of section 7114(a)(1) of the statute. That section provides:

> A labor organization which as been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representation is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership. 5 U.S.C. § 7114(a)(1) (1982).

Each party contends that its position is compelled by the plain language of the second sentence: the union, that the statute embodies only the private-sector duty of fair representation; the Authority, that the statute states a flat duty of nondiscrimination in all matters related to employment. We, on the other hand, find nothing particularly plain or compelling about the text, standing alone.

The statute requires the union to act evenhandedly with respect to the "interests" of employees. Adopting the ALJ's analysis, the FLRA found that Wright had an "interest," within the meaning of section 7114(a)(1)'s second sentence, in pursuing his appeal under the Civil Service Reform Act and so must be furnished counsel by the union for that purpose if the union furnishes counsel for the same purpose to union members. The difficulty with this analysis is that the meaning of "interests" is not given by the statute and is not self-evident. Unless the word is taken to mean all things that employees might like to have--a meaning that neither party attributes to the word--"interests" requires further definition. While deference is owed the Authority's statutory construction, we think the circumstances of this case--the structure of the statute, and, more particularly, the history against which section 7114(a)(1) was written--establish Congress' intent to enact for the public sector the duty of fair representation that had been implied under the private sector statute and therefore preclude the Authority's interpretation. *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778, 2782 n.9, 81 L.Ed.2d 694 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

The structure of section 7114(a)(1) supports the union's position--that the "interests" protected are only those created by the collective bargaining agreement and as to which the union is the exclusive representative. Thus, the first sentence establishes the union as the "exclusive representative" and states what the union is entitled to do in that capacity: "act for, and negotiate collective bargaining agreements covering, all employees in the unit." The second sentence of a discrete provision such as this might reasonably be expected to relate to the same subject as the first. A natural, though not necessarily conclusive, inference, therefore, is that the duty of representing all employees relates to the union's role as exclusive representative.

This inference is reinforced by the way the statute deals with representation in procedures of various sorts.

Section 7114(a)(5) provides:

> The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--
>
> (A) being represented by an attorney or other representative, of the employee's own choosing in any grievance or appeal action; or
>
> (B) exercising grievance or appellate rights established by law, rule, or regulation;
>
> except in the case of grievance or appeal procedures negotiated under this chapter.

5 U.S.C. § 7114(a)(5) (1982).

The statute itself thus distinguishes between the employees' procedural and representational rights by drawing the line the union urges here, the line between matters arising out of a collective bargaining agreement and other matters. Section 7114(a)(5) does not address the precise question before us but it employs a distinction that is familiar from private sector cases and thus suggests that section 7114(a)(1) may similarly be drawn form private sector case law with which Congress certainly was familiar.

These observations bear upon a line of argument the FLRA apparently found persuasive. The ALJ, whose rulings were affirmed and whose findings and conclusions were adopted by the Authority, reasoned that the Federal Service Labor-Management Relations Statute imposes a broader duty of fair representation upon unions than courts have implied in the private sector under the National Labor Relations Act.

The doctrine of fair representation developed in the private sector is applicable under the Statute; but with an important and significant difference: § 14(a)(1) specifically provides that "An exclusive representative is

responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership". . . . The first sentence of § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), is substantially similar to the first sentence of § 14(a)(1) of the Statute; but the language of the second sentence of § 14(a)(1) . . . is wholly absent in § 9(a) of the NLRA. . . . Consequently, under the Statute that statutory command of § 14(a)(1), i.e., a specific non-discrimination provision, must be enforced, not merely the concept of fair representation developed in the private sector as flowing from the right of exclusive representation. J.A. at 119. This is the only reasoning offered and it is unpersuasive in light of the history of, and the rationale for, the duty of fair representation. The ALJ, and hence the Authority, reason that the private-sector duty of fair representation cannot have been intended because Congress added to this statute a sentence about unions' duties that is not found in the NLRA. The quick answer is that the duty of fair representation was imposed upon the NLRA by courts reasoning from the NLRA's equivalent to the first sentence of section 7114(a)(1). Subsequently, Congress wrote the Federal Service statute and added a second sentence that capsulates the duty the courts had created for the private sector. The inference to be drawn from Congress' use of the language of the judicial rule of fair representation is not that Congress wished to avoid that rule. To the contrary, the inference can hardly be avoided that Congress wished to enact the rule.

The duty of fair representation was first formulated by the Supreme Court in Steele v. Louisville & Nashville R.R., 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (1944). The Court found the duty to be inferred from the union's status as exclusive representative of the employees in the bargaining unit. Thus, the Court said, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it also imposed on the representative a corresponding duty." *Id.* at 202, 65 S. Ct. at 232 (citation omitted). The Court stated it was "the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against the." *Id.* at 202-03, 65 S. Ct. at 231-32.

So long as a labor union assumes to act as the statutory representative of a craft, it cannot refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its members, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. *Id*. at 204, 65 S. Ct. at 233.

It will be observed that the Court, in the case creating the duty of fair representation, repeatedly rooted the duty in the powers conferred upon the union by statute, the powers belonging to the union as exclusive representative.[19] The duty was thus co-extensive with the power; the duty is certainly not narrower than the power, and this formulation indicates that it is also not broader.

This view of the duty as arising from the power and hence coterminous with it is expressed again and again in the case law:

> Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," Vaca v. Sipes, 386 U.S. 171, 182 [87 S. Ct. 903, 912, 17 L.Ed.2d 842] (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, "the responsibility of fair representation." Humphrey v. Moore, [375 U.S. 335] at 342 [84 S. Ct. 363, 368, 11 L.Ed.2d 370 (1964)]. . . . Since Steel v. Louisville & N.R. Co, 323 U.S. 192 [65 S. Ct. 226, 89 L. Ed. 173] (1944), . . . the duty of fair representation has served as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." Vaca v. Sipes, *supra*, 386 U.S. at 182, 87 S. Ct. at 912.

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564, 96 S. Ct. 1048, 1056, 74 L.Ed.2d 231 (1976).[20]

If this were a private sector case, it would seem clear that the union has not violated its duty of fair representation because the rationale that gives rise to that duty does not apply here. In the case before us the union's authority as exclusive representative did not strip Wright of redress as an

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[19] Of course, a minority union has never been held to act under a duty of fair representation. A minority union cannot be recognized as the exclusive bargaining representative without violating the NLRA. *See* International Ladies' Garment Workers' Union, AFL-CIO v. NLRB, 366 U.S. 731, 81 S. Ct. 1603, 6 L.Ed.2d 762 (1961). This provides additional support for the view that the duty arises from, and its contours are defined by, a union's status as exclusive representative.

[20] *See* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB, 587 F.2d 1176, 1181 (D.C. Cir. 1978); 1199 DC, National Union of Hospital and Health Care Employees v. National Union of Hospital and Health Care Employees, 533 F.2d 1205, 1208 (D.C. Cir. 1976); Truck Drivers and Helpers, Local Union 568 v., NLRB, 379 F.2d 137, 141 & n.2 (D.C. Cir. 1967); *see generally* H. Wellington, Labor and the Legal Process 129-84 (1968). For a recent statement and application of the duty of fair representation, *see, e.g.*, Kolinske v. Lubbers, 712 F.2d 471, 481-82 (D.C. Cir. 1983).

individual. To the contrary, Wright actively pursued his statutory appeal rights and won. He did not do that by the union's suffrage but as a matter of right. Not only was that appeal procedure open to him but the union was forbidden by section 7114(a)(5) from attempting to control it.

The NTEU position thus runs along the line established by the private-sector case law and suggested by the structure of the relevant statutory provisions. The Authority's position adopts a new line that is not to be found in the case law antedating the statute or in the statute's structure. Counsel for the FLRA was asked at oral argument whether, on the Authority's reasoning, a union that provided probate advice to its members would thereby be obligated to provide the same advice to non-members. Counsel replied that the union would not have that duty, the distinction being that the provision of probate services does not relate directly to the members' or non-members' employment. Of course, the statute does not even imply that distinction, nor does the pre-existing case law.

The ambiguity that will often exist in determining whether a service is or is not directly related to the employment relationship may be a reason to be wary of the Authority's proffered test. It is easier to determine whether the service provided grows out of the collective bargaining relationship. There is, moreover, a clear and articulated policy reason for confining the scope of the union's duty to the scope of its exclusive power: the individual, having been deprived by statute of the right to protect himself must receive in return fair representation by the union. Rights are shifted from the individual to the union and a corresponding duty is imposed upon the union. No such policy supports the additional line drawn by the Authority. The FLRA's position depends not upon the reciprocal relationship of the union's rights and duties but upon a demand for equality of services when the employment relationship is involved. Yet the distinction between services that are employment-related and those that are not seems arbitrary. All services provided by the union are employment-related in the sense that they are provided to employees only. When, as here, the individual retains the right to protect himself in the employment relationship, it is by no means obvious why the union's provision of an attorney to assist in a statutory appear action is more valuable than the union's provision of an attorney to draft a will. Both are services employees will value, both would cost the individual money, so that it is not apparent why it is discrimination to provide one service to union members only but not discrimination to provide the other in that restricted fashion.

Thus, we cannot accept as reasonable the Authority's claim that, in including the second sentence in section 7114(a)(1), Congress intended to impose a duty broader than that implied in the private sector. The Supreme Court in Steele and subsequent cases drew from the first sentence of section 9(a) of the NLRA an implication of a duty that is substantially expressed in the second sentence of 5 U.S.C. § 7114(a)(1) (1982), the federal sector

provision. The logical, and we think (in light of the history and the rationale for the duty of fair representation) conclusive, inference is that when Congress came to write section 7114(a)(1) it included a first sentence very like the first sentence of section 9(a) and then added a second sentence which summarized the duty the Court had found implicit in the first sentence. In short, Congress adopted for government employee unions the private sector duty of fair representation.

Two additional factors persuade us that this is the correct inference. First, if Congress were changing rather than adopting a well-known body of case law, one would expect mention of that intention somewhere in the legislative history. The Authority has referred us to, and we are aware of, nothing of that sort. Second, if the union's duty had been broadened beyond the scope of its right of exclusive representation, one would expect the range of the new duty to be delineated, or at least suggested, probably by some indication in the statute or its legislative history of what the term "interests" means. It is conceded that the word does not cover everything an employee might like to have, which would mean that the union may not differentiate between members and non-members in any way whatever. But that is not the case, the statute gives no direction of any sort unless it adopts the private sector equation of the scope of the union's right and its duty.[21]

This leaves only the Authority's argument that our decision in NTEU v. FLRA, 721 F.2d 1402 (D.C. Cir. 1983), is "dispositive" of this case. The FLRA contends that we affirmed its decision that "discrimination based on union membership in any representational activity relating to working conditions which an exclusive representative undertakes to provide unit employees is violative of the Statute. . . . At no point did this court in its decision in 721 F.2d 1402 intimate that it was reaching its decision only in connection with discrimination in grievance arbitration or other contractually created proceedings." Brief for the Federal Labor Relations Authority at 17-18 (emphasis in original). It is instructive to compare that representation by counsel for the Authority with the case counsel is discussing.

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[21] The ALJ found that NTEU's failure to provide Wright with an attorney constitute not only a violation of § 7114(a)(1), but also "an independent violation of section 7116(b)(1) of the Statute by interfering with the employees' protected right under section 7102 of the Statute to refrain from joining a labor organization." J.A. at 103. The Authority appears to have adopted these conclusions: "[T]he Authority finds that NTEU has failed and refused to comply with section 7114(a)(1) of the Statute, and therefore has violated section 7116(b)(1) and (8) of the Statute." J.A. at 104.

It follows from our holding that the Union did not violate § 7114(a)(1) that there was no independent violation of § 7102. The latter section provides in pertinent part: "Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." 5 U.S.C. § 7102 (1982). Were we to conclude that although a union's provision of counsel to members but not to non-members concerning matters unrelated to the collective bargaining agreement doe not violate § 7102. Not even the Authority contends that the statute compels this result. Accordingly, our conclusion that the Union has not violated § 7114(a)(1) requires the same conclusion with respect to § 7102.]

This court stated the practice under review in 721 F.2d 1402 as follows:

> Under a policy adopted and implemented by the Union, only Union members are furnished assistance of counsel, in addition to representation by local chapter officials and Union stewards, with respect to grievances or other matters affecting unit employees in the context of collective bargaining. Non-members, however, are limited to representation by chapter officials and stewards, and are expressly denied the assistance of counsel in matters pertaining to collective bargaining.
> 721 F.2d at 1403 (emphasis added and omitted).

These discrepant policies framed the issue the court thought it was deciding. The court stated that the duty of fair representation "applies whenever a union is representing bargaining unit employees either in contract negotiations or in enforcement of the resulting collective bargaining agreement." *Id*. at 1406. This court thus stated the duty of fair representation as the NTEU states it here, not as the Authority states it, as extending to all matters relating to employment.

> To put a cap on it, the court stated: [T]he Union is incorrect in suggesting that the challenged policy merely reflects an internal Union benefit that is not subject to the duty of fair representation. Attorney representation here pertain directly to enforcement of the fruits of collective bargaining. Therefore, as exclusive bargaining agent, the Union may not provide such a benefit exclusively for Union members.
> *Id*. at 1406-07 (emphasis added).

It is difficult to know what could have prompted counsel to say that the case stands for the proposition that a union may not differentiate between members and non-members as to any representational function and that at no point did the opinion intimate that the decision rested on the fact that the representation related to contractually created proceedings. We would have thought that no one could read the case in that fashion. This court's opinion in 721 F.2d 1402 clearly proceeds on a rationale that supports the position here of the NTEU, not that of the FLRA.[22] So clear is this that, if we had

[22] The Authority states that its construction of the statute is "fully consistent with private sector precedent" and cites Del Casal v. Eastern Airlines, 634 F.2d 295 (5th Cir.), *cert. denied*, 454 U.S. 892, 102 S. Ct. 386, 70 L.Ed.2d 206 (1981), and Bowman v. Tennessee Valley Authority, 744 F.2d 1207 (6th Cir. 1984), *cert. denied*, *470 U.S. 1084,* 105 S. Ct. 1843, 85 L.Ed.2d 142 (1985). Brief for the Federal Labor Relations Authority's position at 15 n.10. Neither case supports the Authority's position here. Del Casal involved the union's refusal to represent an employee in a grievance procedure governed by the collective bargaining agreement on the ground that he was not a union member. That was held breach of the duty of fair representation. Bowman made a similar holding where the union had negotiated a collective bargaining agreement giving members preferential transfer rights. The court linked the duty of fair representation to the right of exclusive representation. Since both cases involved discrimination against non-members as to matters within the union's role as exclusive representative, neither provides any support for the Authority's position here. If these

before us only the precedent of that case, and nothing more, we would have difficulty holding for the Authority.

For the foregoing reasons, the Authority's decision is hereby Reversed.

At least one other Circuit Court of Appeals and the FLRA have agreed with the D.C. Circuit's interpretation. *See* AFGE v. FLRA, 812 F.2d 1326 (10th Cir. 1987); DODDS, 28 FLRA 908 (1987).

In AFGE, Local 2000, 14 FLRA 617 (1984), the president of a local union stated to the most vocal of the nonmembers that the nonmember was a "troublemaker" and that she would "get" him. The statement constituted a threat and, made in the presence of other nonmembers, also had a chilling effect upon the right of other employees to refrain from joining or assisting any labor organization "freely and without fear of penalty or reprisal." Accordingly, the union violated § 7116(b)(1).

Unions have a duty of fair representation to all union members. *See* FLRA General Counsel Memorandum to Regional Directors, subject: The Duty of Fair Representation, January 27, 1997, *available at* www.flra.gov/gc/dfr_mem.html. However, federal employees do not have a private right of action against their unions for breach of the duty of fair representation. *See* Karahalios v. NFFE, 489 U.S. 527 (1989).

Strikes and Picketing

A unanimous panel of the U.S. Court of Appeals for the District of Columbia Circuit held that the FLRA did not abuse its discretion by stripping PATCO of exclusive representation rights for striking the FAA in 1981. It upheld the FLRA finding that PATCO "willfully and intentionally" ignored federal laws prohibiting federal employee strikes. Section 7120(f) of the FSLMRS says that when the FLRA finds that a union has committed the ULP of striking, it shall revoke the union's status as bargaining representative or "take any other appropriate disciplinary action." This seems to suggest that the FLRA has discretion in strike cases. But presumably such discretion would only be exercised to take action short of decertification if a strike were proved to be a wildcat. *See* Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547 (D.C. Cir. 1982).

FSLMRS § 7116(b) provides: "Nothing in paragraph (7) of this subsection [which prohibits work stoppages/slowdowns] shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice." The Department of Army still prohibits picketing on the installation except in "rare instances." *See* Department of Army message, Subject: Clarification of Department of

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cases are "fully consistent" with the FLRA's position, that can be so only in the sense that they are not explicitly inconsistent.

Army Policy on Informational Picketing, 24 February 1979. The rationale is that picketing always interferes with the mission. The installation, however, must be prepared to articulate how the picketing interferes with the agency mission. Fort Ben Harrison and AFGE, 40 FLRA 558 (1991).

Although Section 7116(b)(7) contains a general prohibition against picketing if it interferes with the agency's mission, Section 7116(b) further provides that

> Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

Thus, when an agency (Social Security Administration) filed an ULP charge against a union (AFGE) for picketing the lobby of its building and a complaint issued on the charge, the Authority dismissed the complaint because there was no interference with the agency's operations. Social Security Administration and AFGE, 22 FLRA 63 (1986). Because there were only 11 pickets, the picketing lasted only 10 minutes, and the pickets were silent, there was no disruption of the mission.

CHAPTER 7

GRIEVANCES AND ARBITRATION

7-1. Introduction.

Labor counselors are involved with grievance resolution and arbitration. The management team depends upon the labor counselor to perform these functions in a professional and competent manner. This requires a basic knowledge of the FSLMRS's provisions and private sector principles. It also requires the ability to perform as an accomplished advocate.

This chapter provides a basic analysis of the grievance and arbitration provisions of the FSLMRS.

7-2. Negotiated Grievance Procedures Under the FSLMRS.

Sections 7121(a)-(b) of the FSLMRS set out the statutory requirements for the public sector grievance process. Each collective bargaining agreement must have a grievance process which is fair, simple and expeditious. Additionally, the procedure must allow grievances by the exclusive representative and by employee on his own behalf. Finally, it must allow for invocation of binding arbitration by either the exclusive representative or the agency if the grievance is not settled satisfactorily. By these requirements, the FSLMRS has struck a balance between the sometimes competing or conflicting interests of the exclusive representative and the employee in the presentation and processing of grievances.

This procedure assures that the exclusive representative has the right to present and process grievances on its own behalf, or on behalf of any bargaining unit member. At the same time, it assures the employee the right to personally present a grievance without the assistance of the exclusive representative, although the exclusive representative still has the right to be present during any hearings on a grievance presented by an employee.

Black's Law Dictionary defines a grievance as "a complaint filed by an employee regarding working conditions and for resolution of which there is procedural machinery provided in the union contract." Black's Law Dictionary 632 (5th ed. 1979). The FSLMRS expands that definition. Instead of limiting grievances to complaints filed by employees, it also includes complaints filed by labor organizations and agencies concerning matters related to the employment of any employee, the effect or interpretation of a collective bargaining agreement, or any violation of law, rule, or regulation affecting conditions of employment. 5 U.S.C § 7103(a)(9).

Black's Law Dictionary also defines arbitration. It is "the reference of a dispute to an impartial [third] person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard." Black's Law Dictionary 96 (5th ed. 1979). The FSLMRS does not define arbitration, so in the federal sector we fall back on the common usage definition. Arbitration, therefore, is referring a dispute to someone who will hear both sides and make a decision by which the parties agree to be bound.

Putting those definitions together, grievance arbitration is a procedure or proceeding resulting from the voluntary contractual agreement of labor and management. Under this procedure, the parties submit unresolved disputes to an impartial third party for resolution. The parties have agreed in advance to accept this decision as final and binding. This is the process that is followed when a dispute goes to arbitration in the federal sector.

7-3. Public Sector v. Private Sector Arbitration.

As the proceeding definitions make clear, grievance arbitration in the federal sector is concerned with enforcing compliance with law and regulation as well as enforcing compliance with the collective bargaining agreement. In other words, all matters under law that could be submitted to the negotiated grievance procedure are included within the coverage of that procedure unless the parties negotiate specific exclusions.

These provisions are in significant contrast to private sector labor relations and collective bargaining, particularly in the structuring of what subjects are open to negotiation. In the private sector, organizations and unions negotiate matters <u>into</u> the grievance procedure. All matters not specifically addressed as being included under the procedure are excluded. In the public sector, the parties negotiate all matters not prohibited by law, unless they have been specifically negotiated <u>out</u> of coverage.

7-4. Matters Excluded from the Negotiated Grievance Procedure.

There are five matters excluded from coverage by sections 7121(c)(1)-(5) of the FSLMRS. They are (1) prohibited political activities; (2) retirement, life insurance, or health insurance; (3) a suspension or removal for national security reasons; (4) examination, certification, or appointment;[1] and (5) the classification of any position which does not result in the reduction-in-grade or pay of an employee. The parties, therefore, may negotiate any other matter unless it is specifically excluded through their negotiations, or otherwise excluded by law.[2]

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[1] *See* <u>NFFE Local 1636 and NGB, Albuquerque</u>, 48 FLRA 511 (1993).

[2] In addition to the matters mentioned in §7121(c), other matters which the have been found not subject to grievance and arbitration by the Authority or the Courts include:

The last area, the classification of any position which does not result in the reduction-in-grade or pay of an employee, has resulted in the most Authority decisions. The Authority has specifically advised that, where the substance of a dispute concerns the grade level of duties assigned and performed by the grievant, the grievance concerns the classification of a position within the meaning of the exclusion. FAA, 8 FLRA 532 (1988). Similarly, the Authority has held that actions concerning an employee's entitlement to grade and pay retention benefits are not grievable. For instance, reductions in grade made pursuant to position reclassifications are precluded

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(1) Grade and pay retention matters under § 5366(b). AFGE Local 3369 and SSA, New York, 16 FLRA 866 (1984) (When employees retain their grade and pay following certain reduction-in-force or reduction-in-grade actions, grievances are precluded over the action that was the basis for the grade and pay retention and over the termination of such benefits).

(2) Management rights and scope of the negotiated grievance procedure. AFGE Local 1345 and Fort Carson, 48 FLRA 168, 205 (1993)(The decision to contract out is a management right governed by OMB Circular A-76, a government-wide regulation. Grievances concerning the decision to contract out or claiming a failure to follow A-76 are barred); Newark Air Force Station and AFGE Local 2221, 30 FLRA 616 (1987) (Management rights are considered in connection with resolution of the grievance on the merits).

(3) Matters for exclusive resolution by the Authority. Duty to bargain. AFGE and Dep't of Education, 42 FLRA 1351 (1991) (Negotiability disputes over the extent of the duty to bargain must be resolved by the Authority. They may not be resolved by arbitrators); Bargaining-unit status. AAFES and AFGE, 37 FLRA 71 (1990) (An arbitrator is precluded from addressing the merits of a grievance whenever a grievability question has been raised regarding the bargaining-unit status of the grievant).

(4) Separation of probationary employees. Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983); Nellis Air Force Base and AFGE Local 1199, 46 FLRA 1323 (1993).

(5) Discipline of a National Guard civilian technician under § 709(e) of the Civilian Technicians Act of 1968: grievances are prohibited. NFFE Local 1623 and SCNG, 28 FLRA 633 (1987); ACT and Penn. AANG 14 FLRA 38 (1984).

(6) Discipline of a professional employee of the Department of Medicine & Surgery of the Department of Veterans Affairs: grievances are prohibited. NFFE and Veterans Admin., 31 FLRA 360, 364 (1988).

(7) An arbitrator may not review merits of an agency's security-clearance determination. Department of the Navy v. Egan, 484 U.S. 518 (1988); AFGE and Dep't of Education, 42 FLRA 527, 533 (1991).

(8) Where the substance of a grievance concerns whether the grievant is entitled to a temporary promotion by reason of having performed duties of a higher-graded position, the grievance does not concern the classification within the meaning of §7121(c)(5). SSA Office of Hearings and Appeals and AFGE Local 3627, 55 FLRA No. 131 (1999) (denying an agency's exceptions because the grievance concerned a claim that the employees had worked in a higher grade position and the issue was therefore arbitrable); AFGE Local 1617 and Kelly Air Force Base, 55 FLRA No. 55 (1999) (setting aside an arbitrator's award and finding that a grievance concerning an employee's entitlement to a temporary promotion based on the performance of higher level work was arbitrable.); Laborers Int'l Union of North America Local and Fort Sam Houston, 56 FLRA 324 (2000).

from grievance and arbitration. Social Security Administration, 16 FLRA 866 (1984); VA Medical Center, 16 FLRA 869 (1984). Finally, where the substance of the grievance concerns the grade level of duties performed by the grievant and the grievant has not been reduced in grade or pay, the grievance is precluded. MCAS, Cherry Point and IAMAW, Local 2297, 42 FLRA 795 (1991).

7-5. The Grievance/Arbitration Procedure.

The negotiated grievance procedure normally consists of three or four steps, depending upon how many levels of supervisors or appeal the employee or union has. A "typical" four-step employee grievance procedure is illustrated as follows:

Step 1. The aggrieved employee will informally discuss the grievance orally with his or her immediate supervisor within a specified number of days from the complained-of act. A decision will be rendered within a few days of the discussion. (This step is usually omitted when the agency or management files the grievance).

Step 2. If no satisfactory solution is reached, the employee may pursue the grievance by submitting the matter, in writing, within a specified number of days, to the activity head. The activity head will meet with the employee and union representative, discuss the matter, and render a written decision.

Step 3. If relief is denied, the grievant may pursue the matter further by submitting within a specified number of days, the written grievance and the Step 2 supervisor's decision to the Deputy Installation Commander for a decision. The Deputy Installation Commander will meet with the employee, his union representative, and the Civilian Personnel Officer to discuss the matter. A written decision will be rendered within a specified number of days.

Step 4. If the matter is still not resolved, the exclusive representative or management may refer the matter to binding arbitration. The employee cannot invoke binding arbitration on his own behalf. 5 U.S.C. § 7121(b)(3)(C).

Grievances should be disposed of at the lowest level possible. Complaints and disputes should be resolved at the grievance stage if at all possible. Unjustified resort to arbitration will add unnecessary cost, delay and uncertainty to the case, and may have an adverse effect on morale. Arbitration should be the rare exception rather than the rule.

Arbitration does have a cost associated with it. Arbitrators must be paid. Who pays those costs is determined by the collective bargaining agreement. As a part of negotiating the agreement, management and the exclusive representative should ensure that there is a payment provision. Normally, this is in the form of a cost sharing formula where each party pays a percentage.

7-6. Variety of Arbitrator Arrangements.

The collective bargaining agreement will contain the arbitration arrangement(s) agreed to by the parties. This may include the use of: (1) ad hoc arbitrators; (2) a permanent umpire; (3) tri-party boards; or (4) expedited procedures.

The use of ad hoc arbitrators is the mostly widely used arrangement in both the private and public sector. The ad hoc arbitrators are appointed to arbitrate particular cases between the parties. Upon completion of his office, the relationship with the parties ceases. While the parties may select an arbitrator from those that are personally known and acceptable to them, most likely the selection will be from a list of experienced labor arbitrators supplied by the Federal Mediation and Conciliation Service (FMCS) or the American Arbitration Association (AAA).

If an installation generates a large number of arbitrations or if there is need for arbitrators who are acquainted with special needs or complexities, a permanent umpire or permanent panel of arbitrators may be provided for in the collective bargaining agreement. The appointment process will be greatly shortened. The presentation of cases will be expedited since the permanent arbitrator will not have to be "educated" about many of the standard details concerning the parties, and their operations and practices. Also the decisions of permanent umpires/arbitrators can be expected to be more consistent and sensitive to the particular circumstances of the parties.

Tri-party arbitration boards consist of a management member, a union member and a neutral member (usually an arbitrator selected through the FMCS or the AAA). Permanent tri-party panels have the advantages of the permanent umpire systems. They also provide each party direct participation in the decision process, with neutral member in the position of tiebreaker.

Expedited procedures are designed for the rapid processing of the "routine," minor disciplinary action grievances whose validity will turn on facts that can be proved, or other kinds of grievances which do not require any significant interpretation of the collective bargaining agreement. A rotating panel of selected arbitrators is used. The arbitrator at the top of the list is notified and is expected to be able to hear the case within a stipulated period. If this cannot be done, the next arbitrator will be called. Two or more short cases may be considered at a single hearing. The arbitrator will be required to issue a bench decision or decide the case within a few days. The award need not be accompanied by an opinion. Any opinion, if rendered, must be brief. Awards in expedited proceedings carry no precedential value and will not be released for publication.

7-7. Selection of the Arbitrator.

The selection of an ad hoc arbitrator, and the selection of initial or replacement members of the panel, should be done on the best information available to the parties. The FMCS and the AAA both keep lists of arbitrators. If all of the parties listed are

strangers to your organization, the agencies which provide the lists will provide biographical sketches. You should also check published opinions written by the various arbitrators on the lists to see if they address points in a manner which seems fair and reasonable. Finally, you should talk with other agencies that have recently been through arbitration proceedings for recommendations.

The actual process of picking an arbitrator is a lot like voir dire. The negotiating teams will first review the lists of arbitrators. When the parties meet, each side will take turns striking names until you have a list remaining of those arbitrators who are mutually acceptable. The parties will then rank order the remaining arbitrators. The arbitrators will be contacted in that order of preference until one is available.

7-8. The Hearing.

The parties are generally responsible for the arrangements for the arbitration hearing. If an official transcript is to be made, you must schedule a court reporter. Unless the collective bargaining agreement provides otherwise, an official transcript should only be taken if it is justified by the seriousness of the case. Usually, even complicated cases may be adequately handled by making an informal tape recording and providing the tape to the arbitrator.

The location of the hearing will normally be left to the discretion of the parties. Usually it will take place in a room on the premises of the agency or in the union hall, but it may be scheduled at some "neutral" location, such as a public courtroom, library or a motel conference room. The hearing room must provide a quiet, adequate and comfortable environment for a proceeding that may last for a number of hours.

Arrangements for assuring the attendance of witnesses should be made. It is likely that the bulk of witnesses will be government employees. These persons should be identified and the parties should assure that they will be present at the hearing place or that they can be expected to respond promptly when called from their work place. If witnesses are to be sequestered, a comfortable place for them to wait should be provided.

Discovery for arbitration hearings is not addressed in the statute, but the record of a candid and thorough processing of the case through all stages of the grievance procedure should be an adequate substitute for discovery.

The arbitrator is in charge of the hearing and will make determinations such as whether witnesses will be sworn or unsworn, if witnesses will be allowed to stay in the room after their testimony, and what evidence will be allowed. Normally, all relevant evidence is allowed, including hearsay. However, evidence concerning settlement offers and negotiations will be excluded. If classified evidence is an essential part of an arbitration case, the parties should ensure that the arbitrator selected has a security clearance sufficient to receive such information.

Ordinarily the burden of persuasion will lie with the grievant. Discipline cases are the exception to the rule. In those cases, management will bear the burden of justifying the disciplinary action that was taken. Once the party with the burden of proof has established a prima facie case, the burden "shifts" to the other party to rebut, mitigate or otherwise defend as they are able. Unless otherwise expressly provided, the arbitrator may fix the standard of proof. *See* Department of Defense, Dependents Schools, 4 FLRA 412 (1980). In most instances the quantum of proof will be "preponderance of the evidence."

Arbitration hearings will seldom last more than one day. Continuances or adjournments for good cause should be granted at the request of either party. An improper refusal may provide the basis for vacating the award, require a reopening of the case, or affect the weight that will be given the award in a collateral proceeding.

7-9. Remedies.

In the federal sector it is recognized that arbitrators have broad remedial powers. *See* Veterans Administration Hospital, Newington CN, 5 FLRA 64 (1981). The arbitrator may order parties to conform their conduct to the requirements of the collective bargaining agreement, either in general terms or in detail, or the arbitrator may prohibit conduct which violates the collective bargaining agreement. In non-disciplinary cases, a "make whole" remedy may be ordered which could include payment for lost economic opportunities, compensatory overtime opportunities, promotion or promotion preferences.

For a promotion remedy to be sustained, it is necessary to prove that an unwarranted action was taken and that "but for" that action the grieving employee would have received the promotion. *See* National Bureau of Standards, Washington, DC, 3 FLRA 614 (1980). When no causal connection is proven the appropriate remedy is priority consideration at the next promotion opportunity. *See* Naval Mine Engineering Facility, 5 FLRA 452 (1981). Similarly, although retroactive promotion may be a proper remedy under certain circumstances, it cannot be made if the grievant was not qualified for the position at the time of the improper action, Adjutant General of Michigan, 11 FLRA 13 (1983), or if the position was not established at that time, SEIU Local 200, 10 FLRA 49 (1982). It is proper in those circumstances for the arbitrator to order that a grievant receive "special consideration" during the next round of promotions. ACTION, 11 FLRA 514 (1983). Also, if the arbitrator orders a promotion re-run, he may not restrict the candidates to the original group considered. Defense Contract Administration, 10 FLRA 547 (1982).

In disciplinary cases the remedy may include reinstatement (absolute or conditional), with or without back pay, or a reduction of the discipline that was assessed. The arbitrator is not required to compute the exact amount of economic damages that are to be awarded. The award will be considered complete and final if a formula is provided for the parties to follow. On rare occasions, an additional hearing may be

necessary to implement the award. An award that requires the performance of a useless act may not be enforced.

7-10. Review of Arbitration Awards by the FLRA Under 5 U.S.C. § 7122(a).

Unlike the private sector, where arbitration awards are submitted for judicial review, review of most cases in the federal sector is by filing exceptions to the award with the FLRA under 5 U.S.C. § 7122(a). Section 7122(a) to the FSLMRS provides:

> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient-
>
> (1) because it is contrary to any law, rule, or regulation; or
>
> (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;
>
> the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

a. "Either Party."

The introductory language states that "either party" may file an exception to the award. Party is defined in the Authority's rules as any person who participated in a matter where the award of an arbitrator was issued. This means that generally only the union and the agency are entitled to file exceptions because they were the only parties to arbitration proceeding. Remember that the employee cannot invoke arbitration on his own, and is not a party. Therefore, the employee may not take exception. In those cases where a grieving employee files an exception, the Authority will dismiss the exception. Oklahoma Air Logistics Center and AFGE, 49 FLRA 1068 (1994), request for reconsideration denied 50 FLRA 5 (1994).

An agency is not precluded from filing exceptions with the Authority when it does not attend the arbitration hearing. Dep't of Navy, Mare Island and Federal Employees Metal Trades Council, 53 FLRA 390 (1997); Golden Gate Nat'l Recreation Area and Laborers' Int'l Union of North America, Local 1276, 55 FLRA 193 (1999); I.R.S., 56 FLRA 393 (2000). Generally, however, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. 5 C.F.R. § 2429.5. *See* Panama Area Maritime Metal Trades Council and Panama Canal Commission, 55 FLRA No. 193

(1999) (Authority dismissed union's exceptions to the award because those exceptions related to the agency's last best offer which the union did not raise at the arbitration); SSA Office of Hearings and Appeals and AFGE Local 3627, 55 FLRA No. 131 (1999).

b. "Other Than An Award Relating To A Matter Described In Section 7121(f) Of This Title."

The next important provision is the parenthetical stating "other than an award relating to a matter described in § 7121(f)." Pursuant to this provision, arbitration awards relating to a matter described in that section are not subject to review by the Authority and exceptions filed to such awards will be dismissed for lack of jurisdiction. Those matters primarily covered by § 7121(f) are those matters covered by §§ 4303 and 7512 of the CSRA.

Section 7121(f) provides for review of § 4303 (unacceptable performance) and § 7512 (misconduct) matters, and similar matters that arise under other personnel systems. These matters can involve an arbitration award because the employee has an option of filing an appeal with MSPB, or other agency, or of filing a grievance.
Review of awards relating to § 7121(f) matters.

When a § 4303 or a § 7512 action takes place, the aggrieved employee has the option of filing an appeal to the Merit Systems Protection Board (MSPB) or filing a grievance under the negotiated grievance procedure. If the grievance option is selected and the grievance goes to arbitration, two things differ from other arbitrations.

First, even though the arbitrator makes the decision rather than the MSPB or Equal Employment Opportunity Commission (EEOC), he must still apply the same statutory standards as applied by the MSPB. This includes the evidentiary standards and harmful error rule of § 7701(c) used by the MSPB, as well as the prohibitions of § 7701(c)(2) that an agency decision may not be sustained if based on a prohibited personnel practice or if not in accordance with the law. Cornelius v. Nutt, 472 U.S. 648 (1985) (harmful-error rule in arbitration).

Second, appeal is not to the FLRA as with other arbitration decisions.[3] Judicial review is available in the same manner and under the same conditions as if the matter

[3] Notwithstanding the rule that these decisions are not subject to review by the FLRA, twice in 1996 the Authority reviewed such actions. In both cases they reversed the arbitrator's decision granting back pay. On appeal to the United States Court of Appeals for the D.C. Circuit, both cases were dismissed for lack of jurisdiction under 5 U.S.C. § 7123. AFGE, Local 2986 and U.S. DoD, National Guard Bureau, Oregon, 51 FLRA 1549 (1996) (Petition for judicial review dismissed, AFGE, Local 2986 v. FLRA, 130 F.3d 450 (D.C. Cir. 1997)); U.S. DoD, National Guard Bureau, Idaho and AFGE, Local 3006, 51 FLRA 1693 (1996) (Petition for judicial review dismissed AFGE, Local 3006 v. FLRA, 130 F.3d 450 (D.C. Cir. 1997)).*But see* FAA v. Nat'l Assoc. of Air Traffic Specialists, 54 FLRA 235 (1998) (stating that the Authority lacked jurisdiction to hear such actions).

had been decided by the MSPB. For an MSPB type case, appeal is to the U.S. Court of Appeals for the Federal Circuit, and for an EEO type case appeal is to the Federal Circuit Court of Appeals.

Agencies have no right of appeal in these cases, but the Director of OPM may obtain review of arbitrators' decisions in limited circumstances. The Director must establish that the award misinterpreted civil service law or regulation and that the error will have a substantial impact on civil service law and regulation. 5 U.S.C. § 7703(d); Devine v. Nutt, 718 F.2d 1048 (Fed. Cir. 1983), rev'd as to other matters sub nom. Cornelius v. Nutt, 472 U.S. 648 (1985); Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983).

c. Time Limits.

One provision that is critical to the review of arbitration awards is the thirty-day filing period. If no exception is filed within that period, the award becomes final and binding. 5 U.S.C. § 7122(b). The thirty-day period begins on the day the award is served. 5 C.F.R. § 2425.1(b). It is jurisdictional and cannot be waived or extended. 5 C.F.R. § 2429.23(d); Dept of Interior, BIA Billings Area Office and NFFE LOCAL 478, 38 FLRA 256 (1990); Dep't of Transportation Federal Aviation Administration and Nat'l Air Traffic Controllers Ass'n, 55 FLRA 293 (1999), petition for review filed sub nom. Department of Transportation, Federal Aviation Admin., Northwest Mountain Region, Renton, Washington v. FLRA, No. 99-1165 (D.C. Cir. Apr. 29, 1999).

This provision is modified if the thirtieth day is a Saturday, Sunday, or federal holiday, or unless the award was served by mail. If the thirtieth day is a Saturday, Sunday, or federal holiday, the exception must be filed by the next day that is not a Saturday, Sunday, or federal holiday. 5 C.F.R. § 2429.21(a). If the award was served by mail, five days are added to the filing period after the thirty-day period is first computed taking into account weekends and holidays. The additional five-day period is also extended if the 5th day falls on a weekend or holiday. 5 C.F.R. § 2429.22.

If the exception is filed by mail, the date of the postmark is the day of filing. 5 C.F.R. § 2429.21(b). In the absence of a postmark, the date of filing is determined to be the date of receipt minus five days. VA Medical Center, 29 FLRA 51(1987) (Authority would not consider proof that the letter had been filed more than five days earlier).

Filing by personal delivery is accomplished the day that the Authority receives the documents.

d. Compliance.

Another provision contained in § 7122(b) that is critical is the compliance provision. The provision provides that if an exception is not timely filed, the award is binding and that the parties must take the action required by the award. In other words,

compliance with final awards is required, and failure to comply is an unfair labor practice. The Authority has reviewed this provision in three types of cases.

(1) Awards as to which no timely exceptions are filed. In this type of case the Authority has held that the award became final, and compliance with the award was required, when the thirty-day period for filing exceptions expired. Therefore, they will not review any exceptions filed after the time period expires. The Authority has also interpreted § 7122(b) as prohibiting a challenge to the award in a ULP proceeding where the ULP was refusal to implement the award. Review in these ULP proceedings will focus solely on whether or not there has been compliance with the award. They will not address exceptions to the arbitrator's decision. Wright Patterson AFB and AFGE, 15 FLRA 151 (1984), *aff'd* Department of the Air Force v. FLRA, 775 F.2d 727 (6th Cir. 1985).

(2) Awards as to which exceptions have been denied by the Authority. In these cases, the award becomes final when the exceptions are denied. The Authority will not, therefore, re-litigate in a ULP the denial of the exceptions. That is because the Authority views these proceedings as an attempt to obtain judicial review of the Authority's decision by an indirect path since direct judicial review is limited.[4] Bureau of Prisons and AFGE, 20 FLRA 39 (1985), *enforced* Bureau of Prisons v. FLRA, 792 F.2d 25 (2d Cir. 1986); U.S. Marshals Service and AFGE, 13 FLRA 351 (1983), *enforced* Marshals Service v. FLRA, 778 F.2d 1432 (9th Cir. 1985).

(3) Awards as to which timely exceptions have been filed and are pending. The obligation to comply with a final arbitration award has also been addressed in cases when timely exceptions have been filed and are pending before the Authority, but no stay of the arbitration award has been requested. *See* U.S. Soldier's and Airmen's Home and AFGE, 15 FLRA 139 (1984), *vacated and remanded* AFGE Local 3090 v. FLRA, 777 F.2d 751 (D.C. Cir. 1985). When timely exceptions are filed the award, by definition, is not final while the exceptions are pending. Therefore, compliance is not required under section 7122(b). In order to clarify this rule, the Authority, in 1985, revoked the provisions for requesting a stay of an arbitration award in conjunction with the filing exceptions. 52 Fed. Reg. 45754.

e. Scope of Review.

Although Congress specifically provided for review of arbitration awards in § 7122(a), at the same time, Congress expressly made clear that the scope of that review is very limited. The Conference Report that accompanied the CSRA when it was signed into law indicated that the Authority would be authorized to review an arbitrator's awards on very narrow grounds, similar to those used in the private sector. Thus, the Authority's approach is to presume that the award is proper, and only when it is expressly established that the award is deficient on one of the specific grounds set forth in § 7122(a) will it be vacated or modified by the Authority.

[4] *See* paragraph 7-12 of this text for a discussion of judicial review of arbitration decisions.

f. Grounds for Review.

(1) Awards Contrary to Law, Rule or Regulation. 5 U.S.C. § 7122(a)(1).

Section 7122(a) specifies the grounds on which the Authority may review arbitration awards. The most common ground for review is that the award is contrary to a law, rule, or regulation. In this respect, the Authority has indicated that an arbitrator in the federal sector cannot ignore the application of law and regulation. There is a framework that governs the relationship between federal employees and the federal government. The arbitrator in the federal sector, unlike the private sector, cannot limit consideration solely to the collective bargaining agreement. The federal sector arbitrator must look to any provisions of law or regulation which govern the matter in dispute.

Some common provisions of the FSLMRS which impact upon arbitration are §§ 7106(a), 7116(d), and 7121(d). Section 7106(a) makes it clear that no arbitration award may improperly deny the authority of an agency to exercise any of its rights. 5 U.S.C. § 7106(a); SSA and AFGE, 55 FLRA No. 173 (1999) (denying agency exception because it elected to bargain permissive topics in the CBA and the arbitrator enforced that election); NLRB and NLRB Professional Assoc., 50 FLRA 88 (1995); IRS v. FLRA, 110 S. Ct. 1623 (1990). Additionally, when, in the discretion of the aggrieved party, an issue has been raised under the ULP procedures, the issue may not be raised subsequently as a grievance. 5 U.S.C. § 7116(d); EEOC and AFGE, 48 FLRA 822 (1993); *but see* Point Arena Air Force Station and NAGE Local R12-85, 51 FLRA 797 (1996)(Same facts may support both ULP and grievance where different legal theories apply). Finally, when an employee affected by prohibited EEO discrimination has timely raised the matter under an applicable statutory procedure, the matter subsequently may not be raised as a grievance. 5 U.S.C. § 7121(d); INS, El Paso and AFGE, Local 1929, 40 FLRA 43 (1991).

Another statute which is frequently raised in these decisions is the Back Pay Act, 5 U.S.C. § 5596. Any back pay remedy subject to the Act must satisfy its requirements. In this regard, the Authority has consistently stated that the Act requires, not only a determination that the aggrieved employee was affected by an unjustified or unwarranted personnel action, but also a determination that the action directly resulted in the loss of pay. HHS, Family Support Administration, 42 FLRA 347, 357 (1991); VA Medical Center Kansas City and AFGE Local 2663, 51 FLRA 762 (1996); Alabama Ass'n of Civilian Technicians and Alabama Nat'l Guard, 54 FLRA 229 (1998); HHS and NTEU, 54 FLRA 1210 (1998). In other words, but for the complained of action, the grievant would not have suffered a pay loss. As a result of a 1999 interim regulation, back pay awards now have a six-year statute of limitations. *See* 64 Fed. Reg. 72,457 (28 Dec. 1999) (implementing section 1104 of Public Law 105-261, the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999).

Further, the employee is entitled, upon correction of a back pay action, to receive reasonable attorney's fees. HHS, Public Health Service, Region IV and NTEU, 34

FLRA 823 (1990); U.S. Dep't of Defense & Federal Ed. Assoc., 54 FLRA No. 79 (1998). These fees will be awarded in accordance with the standards set forth in § 7701 that the award of fees be in the interest of justice and the result of a fully articulated, reasoned decision. Finally, parties are not required to request, and arbitrator is not required to decide requests for, attorney fees before award of back pay becomes final. Customs Service, Nogales, Arizona and NTEU Chapter 116, 48 FLRA 938 (1993); U.S. Dep't of Veterans Affairs & Nat'l Assoc. of Gov't Employees, 53 FLRA 1426 (1998).

A third law that has been the basis for review of arbitration decisions is the Privacy Act. Federal Correctional Facility, El Reno, Oklahoma and AFGE Local 171, 51 FLRA 584 (1995).

Similar to awards contrary to law, awards that conflict with regulations that govern the matter in dispute will be found deficient. DODDS and OEA, 48 FLRA 979 (1993); Dep't of Army and AFGE, 37 FLRA 186 (1990). Sometimes, however, the regulation at issue will not govern the matter. When both a regulation and the collective bargaining agreement address a matter, and the two conflict, you must look to the level of the regulation to see whether it governs the matter in dispute.

Government-wide regulations govern a matter in dispute even if the same matter is covered by a collective bargaining agreement. Agency regulations govern a matter in dispute only when the matter is not covered by a collective bargaining agreement. In other words, an arbitration award may never conflict with government-wide regulations, but may conflict with agency regulations if the matter is also covered by the CBA, and the CBA supports the arbitrator's ruling.

In a similar issue, the Authority has denied a union's exceptions to an arbitrator's award in an Environmental Differential Pay dispute when the arbitrator properly applied the OSHA asbestos standards which the parties had previously negotiated as the appropriate standard. AFGE Local 2004 and Defense Logistics Agency, 55 FLRA No. 2 (1998).

(2) On other grounds similar to those applied by Federal courts in private sector labor-management relations. 5 U.S.C. § 7122(a)(2).

Arbitration awards may also be reviewed on grounds similar those applied by the federal courts in private sector disputes. These grounds include:

(a) The arbitrator failed to conduct a fair hearing. The Authority has held that an arbitrator has considerable latitude in the conduct of a hearing and that a claim that the hearing was conducted in a manner objectionable to the grievant will not support an allegation that the hearing was unfair. An arbitrator's refusal to hear relevant and material evidence may constitute denial of a fair hearing. *See* DA, Fort Campbell and AFGE Local 2022, 39 FLRA 994 (1991); Carswell AFB and AFGE Local 1364, 31 FLRA 620, 629-630 (1988); DHHS and AFGE, 24 FLRA 959 (1986).

(b) The arbitrator was biased or partial; the arbitrator was guilty of misconduct which prejudiced the rights of a party; or the award was obtained by fraud or undue means. Arbitrators are under an obligation to disclose any circumstances, associations, or relationships which might reasonably raise doubt about their partiality or technical qualifications in any case. If either party declines to waive a presumptive disqualification, the arbitrator should withdraw from the case. Impartiality or bias, preexisting or that which may occur subsequent to appointment, may provide the basis to vacate the award. *See* AFLC Hill AFB and AFGE Local 1592, 34 FLRA 986 (1990).

(c) The award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. In order to find an award deficient on this ground there must be a showing that it was so unclear or uncertain that it cannot be implemented. Currently, no appealing party has met this burden and all such exceptions have been denied. *See* Delaware National Guard and Association of Civilian Technicians, 5 FLRA 50 (1981).

(d) The arbitrator exceeded his authority. Arbitrators exceed their authority if they resolve an issue that was not submitted by the parties for resolution. *See* Dep't. of Navy, Puget Sound Shipyard and AFGE Local 48, 53 FLRA 1445 (1998); Bremerton Metal Trades Council and Puget Sound Naval Shipyard, 47 FLRA 406 (1993); VA and AFGE, 24 FLRA 447 (1986). They may also exceed their authority by extending an award to cover employees outside of the bargaining unit (Bureau of Indian Affairs and NFFE, 25 FLRA 902 (1987)); ordering agencies to take actions outside of their authority, (Academy of Health Sciences Fort Sam Houston and NFFE Local 28, 34 FLRA 598 (1990)); or extending the awards to cover employees who did not file grievances SSA and AFGE Local 3509, 53 FLRA 43 (1997); Tinker AFB and AFGE Local 916, 42 FLRA 680 (1991)). Finally, the Authority will find an award deficient when the arbitrator rendered the award in disregard of a plain and specific limitation on the arbitrator's authority. McGuire AFB and AFGE Local 1778, 3 FLRA 253 (1980).

(e) The award is based on a non-fact. An award is based on a non-fact when the central fact underlying the award is clearly erroneous. *See* U.S. Dep't of Defense and AFGE Local 916, 53 FLRA 460 (1997); Fort Richardson and AFGE Local 1834, 35 FLRA 42 (1990); Redstone Arsenal and AFGE, 18 FLRA 374 (1985); Kelly AFB and AFGE, 6 FLRA 292 (1981). To find an award deficient on this grounds, it must be shown that the alleged non-fact was central to the result of the award, the information was clearly erroneous, and that but for the arbitrator's misapprehension, the arbitrator would have reached a different result. It must also be shown that the arbitrator not only erred in his view of the facts, but that the sole articulated basis for the award was clearly in error. Finally, it must be shown that the evidence discloses a clear mistake of fact, but for which, in accordance with the expressed rationale of the arbitrator, a different result would have been reached. Redstone Arsenal, 18 FLRA at 375.

(f) The award is contrary to public policy. This ground is extremely narrow. In order to find an award deficient the public policy in question must be explicit, well defined, and dominate. In addition, the policy must be ascertained by reference to legal precedents, not general considerations of supposed public interest. *See* Long Beach Naval Shipyard and FEMTC, 48 FLRA 612 (1993).

(g) The award does not draw its essence from CBA. This has been described as an award which is so confounded in reason or fact, or so unconnected with the wording or purposes of the CBA, that it manifests a disregard for the agreement or does not present a plausible interpretation of it. Naval Mine Warfare Engineering Activity, Yorktown, Virginia and NAGE, 39 FLRA 1207 (1991). This is such a stringent standard that these exceptions are rarely sustained.

7-11. Appeal Of Grievances Under § 7121(d).

This section of the FSLMRS involves review of mixed cases and equal employment opportunity matters. Mixed cases are those in which the agency takes an action against the employee that is appealable to the MSPB, and the employee asserts that the action was taken on the basis of discrimination. Common examples are removal or demotion for unacceptable performance or a serious adverse actin alleged by the employee to have been based on his race, gender, or some other improper reason. Equal employment cases are those involve pure discrimination. These are allegations of employment discrimination within the jurisdiction of the EEOC that do not involve matters appealable to the MSPB. This type of case commonly involves a claim of discrimination as a result of a failure to be promoted.

An aggrieved employee affected by either of these types of actions may raise the matter under a statutory procedure or under the negotiated grievance procedure, but not under both avenues. If he selects the negotiated grievance procedure, he may still select appeal the to MSPB or EEOC if that review procedure would have been available under the statutory procedure. In other words, the employee doesn't lose his appeal rights by going to the negotiated grievance procedure.

7-12. Judicial Review of FLRA Arbitration Decisions.

In contrast to most other decisions of the Authority, the Authority's arbitration decisions are generally not subject to judicial review. 5 U.S.C. § 7123(a). This is because the Authority's review is so limited that subsequent review by the courts of appeals would be inappropriate.

a. Arbitration Awards that Involve ULPs.

An exception to the rule is found in 5 U.S.C. § 7123(a). A circuit court can review a final decision of the FLRA involving an arbitrator's award if an unfair labor practice is involved. NTEU v. FLRA 112 F.3d 402 (9th Cir. 1997). Although the precise meaning

of § 7123(a) is still uncertain, the courts have generally construed the provision narrowly. Circuit courts have held that there is no jurisdiction in these cases unless a ULP is either a necessary or explicit grounds for the final order of the FLRA. There is no jurisdiction where the CBA was the basis for the arbitration award and the Authority's review, because to grant judicial review whenever a CBA dispute can also be viewed as an ULP would give too little scope and effect to the arbitration process. It would also thwart the final review function of the Authority which Congress made central to the FSLMRS. *See* Overseas Education Association v. FLRA, 824 F.2d 61 (D.C. Cir. 1987); U.S. Marshals Service v. FLRA, 708 F.2d 1417 (9th Cir. 1983).

There is a recent split in the circuits, however, on this issue. In U.S. Customs Service v. FLRA, 43 F.3d 682 (D.C. Cir. 1994), the customs service appealed an FLRA decision[5] upholding a decision by an arbitrator concerning the application of a statute concerning the boarding of ships. The D.C. Circuit held that, even in the absence of a ULP, it could review the decision of the Authority concerning an arbitration decision for the limited purpose of determining whether the Authority exceeded its jurisdiction. The FLRA followed the D.C. Circuit's reasoning in reviewing exceptions to an arbitrator's award concerning the same statute in U.S. Customs Service v. NTEU, 50 FLRA 656 (1995). This time the case was appealed to the 9th Circuit. It refused to hear the case finding, in disagreement with the D.C. Circuit and in affirmation of previous precedent, that it lacked jurisdiction to review an Authority decision concerning an arbitration exception that did not involve an unfair labor practice.

b. Review of Arbitration Awards Under 5 U.S.C. § 7121(f).[6]

[5] U.S. Customs Service and NTEU, 46 FLRA 1433 (1993).

[6] *See* paragraph 7-10.b. of this text.

CHAPTER 8

JUDICIAL REVIEW

8-1. Introduction.

Under section 7123(a) of the Statute, any person aggrieved by any final order of the Federal Labor Relations Authority, with two exceptions, may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the U.S. Court of Appeals in the circuit in which the person resides or transacts business, or in the U.S. Court of Appeals for the D.C. Circuit. Section 7123(a) excludes from judicial review orders under section 7112 of the Statute, which involve an appropriate unit determination, and orders under section 7122, which involve decisions resolving exceptions to arbitration awards, unless the order of the Authority under section 7122 involves an unfair labor practice. Consequently, an order of the Authority resolving exceptions to an arbitration award would be subject to judicial review when the Authority's order involves an unfair labor practice.

Concurrently, under section 7123(b), the Authority may petition an appropriate U.S. Court of Appeals for the enforcement of any of its orders, for appropriate temporary relief, or for a restraining order.

Parties may request the General Counsel of the Authority to seek appropriate temporary relief (including a restraining order) in a U.S. district court under section 7123(d). The General Counsel will initiate and prosecute injunction proceedings only on the approval of the Authority. A determination by the General Counsel not to seek approval of the Authority for temporary relief is final and may not be appealed to the Authority.

Upon the issuance of a complaint and when seeking such relief is approved by the Authority, a regional attorney of the Authority or other designated agent may petition any U.S. district court, within any district in which the unfair labor practice is alleged to have occurred or the respondent resides or transacts business, for appropriate temporary relief. Section 7123(d) directs that the district court shall not grant any temporary relief when it would interfere with the ability of the agency to carry out its essential functions, or when the Authority fails to establish probable cause that an unfair labor practice was committed.

8-2. Standard of Review.

The standard of review of the decisions of the Authority is narrow. *E.g.,* U.S. Naval Ordnance Station v. FLRA, 818 F.2d 545, 547 (6th Cir. 1987). Section 7123(c) of the Statute provides that review of an order of the Authority shall be conducted on the record in accordance with the Administrative Procedures Act, 5 U.S.C. § 706. Section 706(2)(A) of the Act requires the reviewing court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The reviewing courts must, however, give deference to the decisions of the Authority. In Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97 (1983), the U.S. Supreme Court noted that the Statute intends the Authority to develop specialized expertise in the field of labor relations and to use that expertise to give content to the principles and goals set forth in the Statute. Consequently, the Court ruled that the Authority is entitled to "considerable deference when it exercises its 'special function of applying the general provisions of the Statute to the complexities' of federal labor relations." *Id*. (citations omitted). Accordingly, reviewing courts recognize that in order to sustain the Authority's application of the Statute, the court does not need to find that the Authority's construction is the only reasonable one or that the Authority's result is the result that the court, itself, would have reached. Instead, the courts adopt the Authority's construction when it is reasonably defensible and there is no compelling indication of error. *See e.g.,* AFGE Local 3748 v. FLRA, 797 F.2d 612, 615 (8th Cir. 1986). The U.S. Court of Appeals for the D.C. Circuit specifically explained the constraints of judicial review as follows:

> We are not members of Congress, with the power to rewrite the terms of a law which may have revealed infirmities in its implementation. Nor are we members of the FLRA, to whom Congress delegated the primary authority to fill in interpretative voids in the [Statute]. . . . [T]he dissent's main theme is that the Authority's interpretation should be reversed because it is not the best, or the most reasonable one. We view our task, in contrast, as simply deciding, whether, given the existence of competing considerations that might justify either interpretation, the Authority's interpretation is clearly contrary to statute or is an unreasonable one.
>
> AFGE v. FLRA, 778 F.2d 850, 861 (D.C. Cir. 1985).

Thus, an interpretation of the Statute by the Authority, when reasonable and coherent, commands respect. The courts are not positioned to choose from plausible readings the interpretation the courts think best. Their task, instead, is to inquire whether the Authority's reading of the Statute is sufficiently plausible and reasonable to stand as governing law. *See e.g.,* AFGE Local 225 v. FLRA, 712 F.2d 640, 643-44 (D.C. Cir. 1983). A court is not to disturb the Authority's reasonable accommodation of conflicting policies that were committed to the Authority by the Statute. AFGE v. FLRA, 778 F.2d at 856.

At the same time, the Supreme Court in Bureau of Alcohol, Tobacco, and Firearms, 464 U.S. at 97, cautioned that deference due an expert tribunal "cannot be allowed to slip into a judicial inertia." Accordingly, the Court stated that while courts should uphold reasonable and defensible interpretations of an agency's enabling act, they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id*. (citations omitted). The Court also advised that when an agency's decision is premised on an understanding of a specific congressional intent, the agency is engaging in the "quintessential judicial function of deciding what a statute means." *Id*. at 98 n.8. In such a case, the agency's interpretation may be influential, but it cannot bind a court. *Id*.

The standard of review accorded Authority decisions that involve an examination of law other than the Statute or regulations other than its own is generally broader than the standard of review accorded their decisions interpreting and applying the Statute. *See e.g.,* California National Guard v. FLRA, 697 F.2d 874, 879 (9th Cir. 1983). For example, one court has stated that the Authority is due "respect," but not "deference," when interpreting or applying statutes and regulations other than its own. Professional Airways System Specialists v. FLRA, 809 F.2d 855, 857 n.6 (D.C. Cir. 1987). However, deference has been granted the Authority's rulings involving the interpretation of law other than the Statute when the court perceived that the interpretation "bears directly on the 'complexities' of federal labor relations." Health and Human Services v. FLRA, 833 F.2d 1129, 1135 (4th Cir. 1987) (quoting Bureau of Alcohol, Tobacco, and Firearms, 464 U.S. at 97).

In sum, these pronouncements reaffirm the general principle that courts will give great weight to an interpretation of a statute by the agency entrusted with its administration. In other words, the courts will follow the construction of the Statute by the Authority unless there are compelling indications that it is wrong. *E.g.,* NFFE Local 1745 v. FLRA, 828 F.2d 834, 838 (D.C. Cir. 1987).

8-3. Court Review of Issues Not Raised Before the Authority.

Section 7121(c) of the Statute provides that absent extraordinary circumstances, no objection which has not been urged before the Authority shall be considered by a reviewing court. The meaning of this provision has been explained as effectively designating the Authority as the sole factfinder and as the first-line decision maker, and designating the courts as reviewers. Treasury v. FLRA, 707 F.2d 574, 579-80 (D.C. Cir. 1983). Thus, in Treasury v. FLRA, the court ruled that it could not review issues that an agency never placed before the Authority. In the view of the court, such action would in large measure transfer the initial adjudicatory role Congress gave the Authority to the courts in clear departure from the statutory plan. *Id*.

The U.S. Supreme Court has explained that the plain language of section 7123(c) evidences an intent that the Authority shall pass on issues arising under the Statute and shall bring its expertise to bear on the resolution of those issues. Consequently, in EEOC v. FLRA, 476 U.S. 19 (1986), the Court dismissed a writ of certiorari as having been improvidently granted when the agency failed to excuse its failure to raise before the Authority the same principal objections it raised in its petition for certiorari.

8-4. Review of Specific Categories of Cases.

a. Decisions of the Authority Resolving Exceptions to Arbitration Awards.

Section 7123(a) excludes from judicial review orders under section 7122 of the Statute, which pertain to decisions resolving exceptions to arbitration awards, unless the order of the Authority under section 7122 involves an unfair labor practice. In other words, decisions of the Authority resolving exceptions to arbitration awards are only judicially reviewable when the decision involves an unfair labor practice. Consistent with the

legislative history to the Statute, the courts have narrowly construed the provision for judicial review of Authority decisions in this area.

The Conference Report which accompanied the bill that was enacted and signed into law stated: "The conferees, in light of the limited nature of the Authority's review, determined that it would be inappropriate for there to be subsequent review by the court of appeals in such matters." Consistent with this congressional intent, the U.S. Courts of Appeals for the 4th, 9th, and 11th Circuits have all concluded that there was no jurisdiction to consider a petition for review of such Authority decisions. Tonetti v. FLRA, 776 F.2d 929 (11th Cir. 1985); U.S. Marshals Service v. FLRA, 708 F.2d 1417 (9th Cir. 1983); AFGE Local 1923 v. FLRA, 675 F.2d 612 (4th Cir. 1982). For instance, in U.S. Marshals Service, the 9th Circuit believed that there is no jurisdiction unless an unfair labor practice is either an explicit or a necessary ground for the final order issued by the Authority. In particular, the court stated that there would be no jurisdiction in the common case where the collective bargaining agreement is the basis for the arbitration award and the Authority's review. The court explained that to grant judicial review whenever a collective bargaining dispute can also be viewed as an unfair labor practice would give too little scope and effect to the arbitration process and to the final review function of the Authority, both of which Congress made a central part of the Statute. The D.C. Circuit, in consolidated cases, found that it lacked jurisdiction in one case, but reviewed and remanded the other case. Overseas Education Association v. FLRA, 824 F.2d 61 (D.C. Cir. 1987). In both cases, the court followed the narrow construction of section 7123 by the 9th Circuit in U.S. Marshals Service, but determined in the one case that it had jurisdiction to review the decision of the Authority because an unfair labor practice was involved or necessarily implicated.

The effect of this provision of section 7123 generally precluding judicial review has also been addressed in the context of judicial review of an Authority decision finding an unfair labor practice for refusing to comply with an arbitration award as to which exceptions to the award were denied by the Authority. In the unfair labor practice cases before the Authority, the Authority has held that the arbitration award became final and compliance was required when the exceptions to the arbitration award were denied; and that the Authority would not relitigate the denial in the unfair labor practice proceeding.

In such cases, the courts have likewise declined review of the underlying Authority decision denying exceptions. The courts have refused to attribute to Congress the intent of allowing the courts to do indirectly what Congress specifically prevented courts from doing directly under section 7123(a). Department of Justice v. FLRA, 792 F.2d 25 (2d Cir. 1986). In DOJ v. FLRA, the court concluded that in order for judicial review to be available, the unfair labor practice must be part of the underlying controversy that was subject to arbitration and not some "after the fact" outgrowth of the refusal to abide by the arbitrator's award. 792 F.2d at 28. To the U.S. Court of Appeals for the 9th Circuit, this "roundabout way of obtaining appellate review of a nonreviewable arbitration award has little to commend it in terms of judicial economy" and "flies in the face of legislative intent." U.S. Marshals Service v. FLRA, 778 F.2d 1432, 1436 (9th Cir. 1985). In agreeing with the Authority's method of disposing of these cases, the court stated that it would review the award only to determine whether an unfair labor practice was committed by refusing to comply. *Id*. at 1437. A U.S. district court has reviewed an Authority decision resolving

exceptions to an arbitration award on the ground that the Authority's decision deprived an employee of a property interest in violation of the Fifth Amendment due process clause. The U.S. Court of Appeals for the D.C. Circuit ruled that neither the Statute nor the legislative history to the Statute was sufficient to preclude judicial review of a constitutional claim in U.S. district court. Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988). Citing the case of Leedom v. Kyne, 358 U.S. 154 (1958), the court also indicated that judicial review would be available in U.S. district court where the Authority had acted in excess of its delegated powers and contrary to a specific provision of the Statute. The court explained, however, that the Leedom v. Kyne exception is intended to be of extremely limited scope and that the action is not one to review a decision of the Authority made within its jurisdiction. Rather, the action is one to strike down a decision of the Authority made in excess of its delegated powers.

b. Authority Decisions in Representation Proceedings.

In addition to the specific provision of section 7123(a) precluding judicial review of Authority determinations of appropriate units under section 7112 of the Statute, the U.S. Court of Appeals for the D.C. Circuit has held that Congress intended that Authority decisions in representation cases would not be reviewable because they were not final orders. Department of Justice v. FLRA, 727 F.2d 481 (D.C. Cir. 1984). Specifically, the court held that an Authority decision under section 7111 setting aside an election and directing another election was not final and consequently was not reviewable. The court concluded that Congress made it clear that the provisions of the Statute concerning court review of representation proceedings were based on established practices of the National Labor Relations Board. 727 F.2d at 492. In this respect, the court noted that NLRB orders directing elections have consistently been found not to be final. In addition, the court noted similar treatment by the courts of "any type of order by the Board during representation proceedings, which include the determination of an appropriate bargaining unit, the direction of an election, ruling on possible election objections, and the certification of a bargaining representative." *Id*. (citations omitted).

c. Decisions of the Federal Service Impasses Panel.

In Council of Prison Locals v. Brewer, 735 F.2d 1497 (D.C. Cir. 1984), the court affirmed the dismissal by the U.S. district court for lack of jurisdiction of an appeal from a decision of the Federal Services Impasses Panel. The court held that Congress clearly precluded direct judicial review of decisions and order of the Panel. The court explained that instead, Panel decisions and orders are reviewable through unfair labor practice proceedings for refusing to comply, first by the Authority and then by the courts in an appeal from the Authority's decision and order in an unfair labor practice case under section 7123 of the Statute. The court emphasized that in such an appeal, it may review the validity of the Panel decision and order as to which compliance was refused. 735 F.2d at 1500. The court indicated, however, that a U.S. district court may exercise Leedom v. Kyne jurisdiction to invalidate a Panel decision and order when the extraordinary circumstances required under Leedom are presented.

d. Authority Statements of Policy or Guidance.

APPENDIX A

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
200 STOVALL STREET
ALEXANDRIA, VIRGINIA 22332-0300

October 7, 1996

MEMORANDUM FOR LABOR RELATIONS SPECIALISTS AT MACOMS,
OPERATING CIVILIAN PERSONNEL OFFICES,
CIVILIAN PERSONNEL ADVISORY CENTERS,
INDEPENDENT REPORTING ACTIVITIES AND
CIVILIAN PERSONNEL OPERATIONS CENTERS

SUBJECT: Cancellation of Army's Labor Relations Regulation--Labor Relations Bulletin #395

The attached bulletin discusses the cancellation of Army Regulation 690-700, Chapter 711, Labor-Management Relations. Also addressed are the requirements contained in the DoD Civilian Personnel Manual (CPM), 1400.25-M. Subchapter 711, Labor-Management Relations.

Please share this bulletin with your civilian personnel officer, your labor attorney and all other interested management officials.

///////signed///////
Elizabeth B. Throckmorton
Chief, Policy and Program
Development Division

Attachment

Labor Relations Bulletin

No. 395 October 7, 1996

Cancellation of Army's Labor Relations Regulation

With the publication of the Department of Defense's Civilian Personnel Manual (CPM), 1400.25-M, Subchapter 711, Labor-Management Relations, together with our desire to reduce regulatory restrictions, this office has canceled Army Regulation (AR)690-700, Chapter 711, Labor-Management Relations.

Following is a list of previous Army requirements contained in AR 690-700.711 that have been eliminated with the cancellation of the AR. (Only those sections with no corresponding DoD requirement are identified.) Also included is general guidance to be considered before locally terminating these practices.

* **Activities will record and maintain data on the use of official time.** (Para 3-1c.) While this is no longer a requirement, activities should give careful consideration to maintaining this practice. While the use of official time may not be a current problem at your installation, this situation can change overnight. For example, a change in union leadership where the new union official's job assignment requires greater time on the job. There may also be a decrease in unit strength, grievances and complaints. Under these or other conditions, management may seek to curtail the amount of official time. Without a benchmark level of usage, though, negotiating a reduction of official time may be impossible.

*** Chief negotiator of management's team must have authority to commit command to binding agreement.** (Para 3-3b(2).) While no longer a regulatory requirement, it remains a Statutory one--see 5 USC 7114(b)(2).

*** Activities must consult with MACOMs before filing petition to decertify exclusive representatives.** (Para 4-1.) While no longer an HQDA imposed requirement, it's still a good idea and your MACOM may continue to want to be kept informed.

*** Negotiation Impasses.** (Para 4-3c and d.) The AR required installations to provide their MACOMS copies of all referrals to the Panel and to consult with them prior to referring negotiation impasses to arbitration. MACOMs will have to decide whether this information is still needed from their installations. Notwithstanding the above, this office continues to discourage voluntary use of arbitration to resolve impasses because of the limited avenues of appeal. Should management want to challenge a decision of an interest arbitrator, the avenue of appeal is dictated by the method used in seeking the arbitration. If the Panel assigns an arbitrator to hear an impasse in response to a joint management-union request, the only avenue of appeal is to file an exception to the arbitrator's award. If the use of an arbitrator is directed by the Panel, a negotiability appeal would be filed to challenge the arbitrator's award. Negotiability appeals ultimately provide for judicial review while arbitration exceptions do not.

NOTE: It is still DoD policy that Army activities notify HQDA when going to the Panel on permissive topics.

*** ULPs.** (Para 4-5a(3)&(5).) Installations were required to notify their MACOM upon receipt of a ULP complaint. Further, MACOMs needed to be consulted with prior to an activity filing a ULP charge against a union. This is no longer an HQDA regulatory requirement; however, your MACOM may want to continue this practice.

* **Planning for possible job actions.** (Appendix B.) This provision required a job action contingency plan be maintained. That is no longer a regulatory requirement. However, we believe it is still good program management to keep an up to date job action contingency plan ready and available. Installations should already have a plan; it wouldn't be too much of a burden to keep it up to date. If there ever is a job action by the employees and/or their unions, the command will look towards the labor relations office for guidance and strategy. It would be terribly difficult to develop a plan at that time. Activities may also want to keep a copy of Appendix B in their files since it contains guidance on preventing job actions and for dealing with them should they occur.

Activities should keep in mind that while the above requirements are no longer regulated by Army, MACOMs may still want to maintain their past practices.

DoD Regulatory Requirements

Other matters no longer regulated by Headquarters, Department of the Army but covered by the DoD regulation are:

* **An overall labor relations policy.** The DoD policy is:

> . . . to establish labor management relationships focused on supporting and enhancing the Department's national security mission and creating and maintaining a high performance workplace which delivers the highest quality products and services to the American public at the lowest possible cost. Such relationships should be committed to pursuing solutions that promote increased quality and productivity, customer service, mission accomplishment, efficiency, quality of work life, employee empowerment, organizational performance, and military readiness. DoD activities should seek to use consensual means of resolving disputes that may arise in a labor-management relationship.

* **Agreement review.** Activities will:

- Provide CPMS (which is the parent organization of the Field Advisory Service) one copy of agreements once negotiations are completed, but prior to execution.

- Forward one copy of executed agreement to CPMS indicating date agreement executed, name and address of union representative and name and phone number of agency POC.

- Upon publication, send CPMS two copies of agreement with completed OPM Form 913B. Activities will also provide copy of agreement to HQDA. (CPMS will provide OPM copies.)

- Provide HQDA and CPMS copies of OPM Form 913-B concerning changes in agreement expiration dates. (CPMS will provide OPM copies.)

* **Exclusions from coverage.** Requests to exclude organizational entities from coverage under the Statute or to suspend any of its provisions should be sent by activities through command channels to the Deputy Assistant Secretary of Defense (Civilian Personnel Policy).

* **Representation cases.**

- Proposed units which encompass employees in two or more DoD components or employees in different personnel systems are generally not appropriate. If a union petitions for such a unit, a copy of the petition, and a copy of the subsequent Regional Director's decision, will be sent by activities to HQDA and CPMS. Any agency application for review of such a decision will be coordinated with HQDA and CPMS.

- Copies of FLRA Regional Director decisions and orders on new or revised units, as well as information on new, revised or terminated units (using OPM Form 913-B), will be sent by activities to CPMS and HQDA.

* **Unfair labor practices.** Activities will:

- Provide HQDA and CPMS copies of all exceptions filed to ALJ decisions, along with the decisions and any subsequently filed documents.

- Notify HQDA and CPMS when employees engage in strikes, work stoppages, slowdowns or picketing which interfere with an agency's operations.

* **Negotiability issues.**

- After receiving a written request for a negotiability determination, activities will coordinate with HQDA and CPMS prior to issuing a written response.

- Activities will provide a written declaration of nonnegotiability to the union within 10 days of receipt of its request.

- HQDA or CPMS will prepare the agency's response to a negotiability appeal

* **Review of arbitration awards (except those involving performance-based or adverse actions).** Activities will:

- Immediately contact HQDA and CPMS if they believe an exception should be filed to an arbitrator's award.

- Forward a copy of the award, the grievance file, the address of the arbitrator, and the name and address of the union representative in the proceeding to HQDA and CPMS where there appears to be a basis for an exception. The exception will be filed by HQDA or CPMS.

- Furnish HQDA and CPMS a copy of the exception, the award and the activity's position on the exception within 5 calendar days of receipt of a union-filed exception. HQDA or CPMS will file the opposition.

* **General statements of policy.** Activities seeking a general statement of policy from the FLRA will elevate the request through command channels to OSD.

* **Arbitration awards relating to matters described in 5 USC 7121(f) (performance-based and adverse actions.)**

- Management representatives in these cases should instruct the arbitrator at the hearing to prepare an administrative record and maintain it for at least 45 days from the date of the award.

- Activities must immediately notify Headquarters, Department of the Army, Office of The Judge Advocate General, Labor and Employment Law Division (hereinafter referred to as DAJA-LE), if they want to seek review of the arbitrator's award.

- Activities will submit requests for judicial review though command legal channels to the Director of OPM. A copy of the request will be sent to CPMS.

* **Judicial review.** Activities will:

- Send requests for judicial review of Authority decisions or requests to intervene in judicial proceedings through legal channels to the Office of the Deputy General Counsel, Personnel and Health Policy (ODGC (P&HP)), DoD. Immediately notify DAJA-LE of the request.

- Notify the DAJA-LE and ODGC (P&HP), through legal channels, upon learning that a union has initiated court action in a matter arising out of its relationship with the activity.

* **Reports.** Activities will provide two copies of arbitration awards to OPM.

Attachments

Attached is a copy of the DoD Civilian Personnel Manual 1400.25-M, Subchapter 711, Labor-Management Relations. Also attached are checklists we developed from the DoD regulation for the various labor relations actions addressed therein. If they're helpful, that's great. If not, throw them out.

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SUBCHAPTER 711

LABOR-MANAGEMENT RELATIONS

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SUBCHAPTER 711

LABOR-MANAGEMENT RELATIONS

References: (a) DoD Directive 1400.25, "DoD Civilian Personnel Management System", Xxx xx, xxx
(b) Chapter 71 of title 5, United States Code, "Labor-Management Relations"
(c) Executive Order 12871, "Labor-Management Partnerships," October 1, 1993
(d) Public Law 96-70, "The Panama Canal Act of 1979," September 27, 1979
(e) Executive Order 12171, "Exclusions From the Federal Labor-Management Relations Program," as amended, November 19, 1979
(f) DoD Instruction 1400.10, "Employment of Foreign Nationals in Foreign Areas," December 5, 1980
(g) Executive Order 12391, "Partial Suspension of Federal Service Labor-Management Relations," November 4, 1982
(h) Volume 8, "Civilian Pay Policy and Procedures," DoD 7000.14-R, "Department of Defense Financial Management Regulation," June 1994
(i) 5, Code of Federal Regulations, Chapter XIV, "Regulations of the Federal Labor Relations Authority (FLRA), General Counsel of the Federal Labor Relations Authority, and Federal Service Impasses Panel (FSIP)"
(j) Chapter 73 of title 5, United States Code, "Suitability, Security, and Conduct"
(k) Section 1918 of title 18, United States Code
(l) 29, Code of Federal Regulations, Parts 1404 and 1425, "Regulations of the Federal Mediation and Conciliation Service (FMCS)"
(m) Chapter 77 of title 5, United States Code, "Appeals"
(n) 29, Code of Federal Regulations, Parts 457-459, "Regulations of the Assistant Secretary of Labor for the American Workplace"

A. PURPOSE

This subchapter implements policies under references (a) through (n), prescribes procedures, delegates authority, and assigns responsibility for the Federal labor-management relations program within the Department of Defense (DoD).

B. POLICY

It is DoD policy under (reference (a)) to establish labor management relationships focused on supporting and enhancing the Department's national security mission and creating and maintaining a high performance workplace which delivers the highest quality products and services to the American public at the lowest possible cost. Such relationships should be committed to pursuing solutions that promote increased quality and productivity, customer service, mission accomplishment, efficiency, quality of work life, employee empowerment,

organizational performance, and military readiness. DoD activities should seek to use consensual means of resolving disputes that may arise in a labor-management relationship.

C. RESPONSIBILITIES

1. The Deputy Assistant Secretary of Defense (Civilian Personnel Policy) (DASD)(CPP) shall issue labor relations policies and procedures, coordinate labor-management relations programs and activities throughout the Department, and provide guidance on labor-management relations issues. The DASD(CPP) shall be the Department's primary point of contact with the Federal Labor Relations Authority (FLRA) and shall authorize the submission of documents to the Authority as provided for in this subchapter (see paragraphs F.6.c., d. and f., below).

2. The Heads of the DoD Components shall ensure the labor-management relations program is implemented in their organizations.

D. DEFINITIONS

The terms defined in Section 7103 of reference (b) have the same definitions when used in this Subchapter.

1. **Employee.** The definition of employee in Section 7103(a)(2) of reference (b) includes civilian employees paid from nonappropriated fund instrumentalities (NAFIs), including off-duty military personnel with respect to employment with a DoD NAFI, when such employment is civilian in nature and separate from any military assignment. Military personnel are not "employees" for purposes of this Subchapter with respect to any matter related to their military status or assignment. Contractor personnel also are not covered by the definition of employee. Pursuant to Section 1271(a) of Pub. L. 96-70 (reference (d)), the definition of employee includes non-U.S. citizen employees of the DoD in the Panama Canal area.

2. **Primary National Subdivisions.** DoD primary national subdivisions are the Office of the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, the Military Departments, the Defense Agencies (except the National Security Agency and those that the President has excluded from coverage by E.O. 12171 (reference (e))), the National Guard Bureau, the Army and Air Force Exchange Service, and the Department of Defense Education Activity.

E. COVERAGE

The Federal labor-management relations program and this Subchapter apply to all the DoD Components, including nonappropriated fund instrumentalities under their jurisdiction, except for the following:

1. The National Security Agency (see 5 U.S.C. 7103(a)(3)(D) (reference (b)));

2. Those DoD functional or organizational entities the President has excluded from coverage under E.O. 12171 (reference (e)); and,

3. Non-U.S. citizen personnel employed at DoD activities except for those in the Republic of Panama. Relationships with unions representing such non-U.S. citizens shall be consistent with pertinent intergovernmental agreements, local practices, customs, and DoD Instruction 1400.10 (reference (f)).

Provisions of reference (b) shall not apply to any DoD entities located outside the 50 States and the District of Columbia where the President has suspended them under E.O. 12391 (reference (g)). This Subchapter shall be applied consistent with such suspensions.

F. PROCEDURES

1. **Dues Withholding.** DoD activities shall withhold union dues by allotment consistent with the requirements of Section 7115 of reference (b) and DoD 7000.14-R, Vol. 8 (reference (h)).

2. **Right of Representation.** As required by Section 7114(a)(3) of reference (b), DoD activities shall inform bargaining unit employees annually of their right to union representation under Section 7114(a)(2)(B) of reference (b).

3. **Agreement Review**

a. The Defense Civilian Personnel Management Service (CPMS) shall review and approve or disapprove agreements pursuant to Section 7114(c) of reference (b).

b. DoD activities should provide CPMS with one copy of agreements, or supplements to agreements, once negotiations are completed in order to facilitate the review and provide CPMS an opportunity to address issues prior to execution of the agreement.

c. Activities shall forward one copy of executed agreements, or supplements to agreements, to CPMS immediately upon execution. The transmittal letter shall indicate the specific date the agreement was executed, the name and address of the labor organization's designated representative, and the name and phone number of an activity point of contact.

d. Immediately upon publication, DoD activities shall provide CPMS with two copies of published agreements, or supplements to agreements, together with Office of Personnel Management (OPM) Form 913-B. CPMS will provide one copy to OPM (see paragraph F.10., below, regarding this reporting requirement). Activities shall also provide a copy to their appropriate Component headquarters.

e. Local agreements subject to a national or other controlling agreement at a higher organizational level shall be approved under the procedures of the controlling agreement. Where no such procedures exist, a local agreement shall be reviewed under the procedures in this subsection.

f. DoD activities shall provide CPMS and their appropriate Component headquarters with OPM Forms 913-B concerning changes in agreement expiration dates. CPMS will forward this information to OPM (see paragraph F.10., below, regarding this reporting requirement).

4. **Exclusions from Coverage of the Federal Labor-Management Relations Program.**

a. The President may issue an order under 5 U.S.C. 7103(b)(1) (reference (b)) excluding DoD functional or organizational entities from coverage under the Federal labor-management relations program if the President determines:

a. They have as a primary function intelligence, counterintelligence, investigative, or national security work; and

b. The provisions of the program cannot be applied to them in a manner consistent with national security requirements and considerations.

b. DoD activities shall forward requests for such exclusions, with fully developed supporting rationale, through channels to the DASD(CPP) for appropriate action. Requests shall include information on the numbers, types and grades of civilian employees involved and on whether they are represented by a union.

5. **Suspension of Provisions of the Federal Labor-Management Relations Program**

a. Under Section 7103(b)(2) of reference (b), the President may issue an order suspending any provision of the Federal labor-management relations program with respect to DoD functional or organization entities outside the 50 States and the District of Columbia if the President determines the suspension is necessary in the interest of national security. Under this authority, the President issued E.O. 12391 (reference (g)) which prohibits dealings on labor relations matters that would substantially impair DoD's implementation of any treaty or agreement and allied minutes or understandings between the United States and host nations.

b. DoD activities shall direct requests to effect a suspension under reference (g) through channels to the Secretary of Defense through the Under Secretary of Defense (Personnel and Readiness) (USD(P&R)). The appropriate Under Secretary of Defense or Assistant Secretary of Defense shall endorse requests for suspensions in the Office of the Secretary of Defense. Component Heads shall sign requests from their organizations. Each request shall fully document the collective bargaining issue or dispute involved, identify the bargaining unit, and demonstrate how the labor relations matter would substantially impair implementation of a specific treaty or international agreement. The Secretary of Defense, after consultation with the Secretary of State, or designee, shall make the final decision on the suspension.

6. **Processing Cases under the 5 CFR Chapter XIV Regulations of the Federal Labor Relations Authority (FLRA), the FLRA General Counsel and the Federal Service Impasses Panel (FSIP) (reference (i))**

a. **Representation Cases**

(1) DoD activities shall follow the procedures in the regulations of the FLRA governing representation proceedings (Part 2422 of reference (i)).

(2) Proposed units that would encompass employees in two or more DoD Components or employees under different personnel systems generally are not appropriate. Where a union files a representation petition involving the creation of such a bargaining unit, the DoD activity involved shall immediately provide CPMS and the appropriate Component headquarters with a copy of the petition. The DoD activity shall also provide those offices with the subsequent Regional Director's decision on the petition immediately upon receipt. The DoD activity shall coordinate with CPMS through their appropriate Component headquarters any application for review of a FLRA Regional Director's decision involving such a petition.

(3) DoD activities shall provide copies of FLRA Regional Director Decisions and Orders on new or revised units to CPMS and the appropriate Component headquarters.

(4) DoD activities shall provide CPMS with two copies of information on new, revised, or terminated units. Activities shall also provide a copy to the appropriate Component headquarters. OPM Form 913B shall be used to submit this data (see paragraph F.10., below, regarding this reporting requirement). CPMS will provide a copy to OPM.

b. **Unfair Labor Practice Proceedings**

(1) DoD activities shall follow the procedures in the regulations of the FLRA governing unfair labor practice proceedings (Part 2423 of reference (i)). Where exceptions to an Administrative Law Judge (ALJ) decision are filed with the FLRA, the DoD activity will provide CPMS and the appropriate Component headquarters with a copy of the decision, the exceptions to the decision, and any subsequently filed documents. Documents shall be forwarded to those offices at the time they are filed with the FLRA or when they are received by the DoD activity.

(2) 5 U.S.C. 7311 (reference (j)) and 18 U.S.C. 1918 (reference (k)) prohibit Federal employees from striking against the Government of the United States. Employees can be disciplined for engaging in such action. 5 U.S.C. 7116(b)(7) (reference (b)) proscribes strikes, work stoppages, slowdowns, and picketing that interferes with an agency's operations by unions representing DoD employees. Informational picketing, which does not disrupt agency operations or prevent public access to a facility, is not prohibited. CPMS and the appropriate Component headquarters shall be immediately notified when prohibited acts take place.

c. **Review of Negotiability Issues**

(1) DoD activities shall follow the procedures in the regulations of the FLRA governing the review of negotiability issues (5 CFR 2424 (reference (i)). Under these procedures, unions are required to request in writing an allegation that a proposal is outside the duty to bargain, and the agency is required to respond in writing within 10 days from receipt of the union's request. Before making such a response, a DoD activity will consult with CPMS and its appropriate Component headquarters. If a union subsequently files a negotiability appeal with the FLRA, the appeal must be filed within 15 days after the date the allegation is served on the union, meet the other requirements in the FLRA's regulations, and be served on the Director, Workforce Relations, Office of the Deputy Assistant Secretary of Defense (Civilian Personnel Policy), 4000 Defense Pentagon, Room 3D269, Washington, D.C., 20301-4000. The Director shall immediately provide a copy to CPMS and the affected DoD Component if they have not been served with a copy.

(2) CPMS shall develop an agency statement of position or shall coordinate on the agency statement of position when a DoD Component elects to prepare it. DoD Components shall immediately advise CPMS of their decision regarding preparation of the agency's statement of position.

d. **Review of Arbitration Awards (except those involving performance-based or adverse actions)**

(1) DoD activities shall follow the procedures in the regulations of the FLRA governing the review of arbitration awards (Part 2425 of reference (i)).

(2) DoD activities shall contact CPMS and their appropriate Component headquarters when they believe an exception to an arbitration award should be filed with the FLRA. Where there appears to be a basis for filing an exception, an activity shall forward the award, the
grievance file, the address of the arbitrator, and the name and address of the union representative in the proceeding to CPMS and the appropriate Component headquarters within 5 calendar days of receipt of the award. The activity shall forward the postmarked envelope in which the award was mailed (if delivered by mail) to CPMS. If the award is served by personal delivery, the date of receipt shall be stamped on the document. Where CPMS determines that an exception shall be filed, it shall develop and file the exception or shall coordinate on the exception when a DoD Component elects to develop it. The DoD Components shall immediately advise CPMS of their decision regarding preparation of the agency's exception to the award.

(3) DoD activities shall forward a union-filed request for an exception to an arbitration award, together with the award and their position on the exception, to CPMS and their appropriate Component headquarters within 5 calendar days from receipt of the exception. When CPMS determines that an opposition shall be filed, it shall prepare the opposition or shall coordinate on the opposition when a DoD Component elects to prepare it. DoD Components shall immediately advise CPMS of their decision regarding preparation of the agency's opposition to the exception to the award.

e. **National Consultation Rights**

(1) The DoD and DoD primary national subdivisions shall follow the procedures in the regulations of the FLRA governing the granting and termination of national consultation rights (5 CFR 2426 (reference (i))).

(2) Upon written request by a union, the DoD or a DoD primary national subdivision shall grant national consultation rights to the union when it meets the criteria in the regulations of the FLRA. The DoD or a DoD primary national subdivision shall terminate national consultation rights where a union no longer qualifies for such rights. The organization taking the action shall first serve the union with a notice of intent to terminate national consultation rights, together with a statement of reasons, not less than 30 days before the intended termination date.

(3) DoD primary national subdivisions shall provide CPMS with a copy of any letter granting or denying a union's request for national consultation rights or notifying a union of its intent to terminate national consultation rights.

f. **General Statements of Policy or Guidance.** DoD activities shall forward any recommendation that DoD seek a general statement of policy or guidance from FLRA as provided for by the FLRA's regulations (Part 2427 of reference (i)) through channels to the DASD(CPP) for appropriate action. DoD activities shall immediately notify the DASD(CPP) of any referrals to FLRA for review and decision or general rulings under Section 2429.4 of reference (i).

g. **Negotiation Impasses.** DoD activities shall follow the procedures in the regulations of the FSIP (Part 2470 of reference (i)) and the FMCS (29 CFR 1404 and 1425 (reference (l))) governing resolving negotiation impasses.

7. **Arbitration Awards Relating to Matters Described in 5 U.S.C. 7121(f) (reference (b))**

a. Under 5 U.S.C. 7121(f) (reference (b)), exceptions to arbitration awards involving certain adverse actions or unacceptable performance actions may not be filed with the FLRA. However, such awards are subject to judicial review in the same manner and on the same basis as if those matters had been decided by the Merit Systems Protection Board (MSPB).

b. The grounds and procedures for judicial review of a decision of the Board are set forth in 5 U.S.C. 7703 (reference (m)). Under that section, only the Director of the Office of Personnel Management (OPM) may seek judicial review of such matters. Where the Director did not intervene in the matter before the arbitrator, the Director must first petition the arbitrator for reconsideration of the award. To facilitate the Director's involvement, individuals representing DoD activities in an arbitration proceeding should instruct the arbitrator at the hearing to prepare an administrative record. The record should be maintained for at least 45 days from the date of the award.

c. DoD activities shall expeditiously submit requests for judicial review through channels to the Director of OPM for appropriate action. CPMS shall be provided a copy of any requests.

8. **Standards of Conduct.** The regulations of the Assistant Secretary of Labor for the American Workplace (29 CFR 457-459 (reference n)) implement 5 U.S.C. 7120 (reference (b)) which relates to the standards of conduct for labor organizations under reference (b). Parties involved in such proceedings are responsible for following those regulations.

9. **Judicial Review**

a. Many final orders of the FLRA may be appealed to an appropriate United States Court of Appeals pursuant to 5 U.S.C. 7123 (reference (b)). To ensure consistency of interpretation and full consideration of the policy and program implications of such appeals, DoD activities shall forward requests for judicial review of decisions of the Authority, or requests to intervene in judicial proceedings, through channels to the Office of the Deputy General Counsel, Personnel and Health Policy (ODGC)(P&HP), DoD, for review and approval in coordination with CPP.

b. A DoD activity shall promptly notify the ODGC (P&HP) through channels upon learning that a union has initiated court action in a matter arising out of its relationship with the activity.

10. **Reports.** OPM requires that agencies provide two copies of arbitration awards and certain information concerning changes in exclusive bargaining units and collective bargaining agreements to: Office of Personnel Management; Chief, Labor-Management Relations Division, 1900 E Street, N.W., Washington, D.C. 20415-0001. OPM Form 913-B, which is used to report the information on units and agreements, is available from that Office. The assigned number for these reporting requirements is Interagency Report Control Number 1060-OPM-BI. DoD activities shall forward two copies of arbitration awards to that address. CPMS will provide the other information required by OPM (see paragraphs F.3.d. and f. and F.6.a.(4), above).

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Agreement Review Checklist

** Notify CPMS (specifically, Field Advisory Services) when negotiations commence. (OPTIONAL)

** Forward to CPMS management and union proposals for review/discussion. (OPTIONAL)

** Provide CPMS one copy of agreement, or supplement to agreement, once negotiations are completed, but prior to execution.

** Forward one copy of executed agreement or supplement to agreement to CPMS immediately upon execution. Transmittal letter must include:

(1) specific date agreement was executed;

(2) name and address of union's designated representative

(3) name and phone number of activity point of contact

** If agreement is subject to national or other higher level controlling agreement, it is approved under the procedure of the controlling agreement.

** Provide HQDA one copy of approved agreement.

** Provide CPMS two copies of approved agreement and OPM Form 913-B. CPMS will provide copy to OPM.

Representation Cases Checklist

** If proposed unit encompasses employees in two or more DoD components or employees under different personnel systems, provide HQDA and CPMS (specifically, FAS) copy of petition.

** Provide HQDA and CPMS copy of Regional Director's (RD's) decision on the above petition immediately upon receipt.

** Coordinate with CPMS, through HQDA, application for review of RD's decision involving the above described petition.

** Provide HQDA and CPMS copies of RD's Decisions and Orders for all new or revised units.

** Provide HQDA one copy, and CPMS two copies, of all changes to bargaining units as certified on OPM Form 913-B. CPMS will provide copy of the form to OPM.

Unfair Labor Practice and Job Action Checklist

For ULPs

** Where a local exception is filed to an ALJ decision, provide HQDA and CPMS (specifically, FAS) a copy of the ALJ decision, the exception and any subsequently filed documents. Provide documentation upon receipt or when filing with the Authority.

For Work Stoppages

** Immediately notify HQDA and CPMS when employees engage in a strike, work stoppage, slowdown or picketing that interferes with agency operations.

Negotiability Disputes Checklist

** Under Authority procedures, union must request allegation of nonnegotiability in writing.

** Upon receipt of union request, consult with HQDA and CPMS (specifically, FAS) to determine agency position.

** Respond, in writing, within 10 days of receipt of union request. (Written responses are only provided to written union requests.)

** Agency response to negotiability appeal is prepared by either HQDA or CPMS.

NOTE: See new negotiability proceedings information (effective 1 April 1999) on page 4-9.

Exceptions to Arbitration Awards Checklist

Agency Exception

** Immediately contact HQDA and CPMS if it is believed an exception should be filed.

** If HQDA/CPMS supports the activity's position, forward to HQDA and CPMS, within 5 days of receipt of the award:

(1) a copy of the award;
(2) the grievance file;
(3) the arbitrator's address; and
(4) the name and address of the union representative in the proceeding.

** If the date of the award differs from the postmarked envelope within which it was mailed, forward the envelope to CPMS.

** If the award is served by personal delivery, the date of receipt should be stamped on the document.

** HQDA or CPMS is responsible for filing the exception.

Union Exception

** Within 5 days of receipt of the union exception, send HQDA and CPMS a copy of:

(1) the union filed exception;
(2) the award; and
(3) the agency's position on the exception

** HQDA or CPMS is responsible for filing the opposition.

Arbitration Awards Relating to 5 USC 7121(f) (Adverse and Performance Based Actions) Checklist

** Agency representative in these types of arbitrations should instruct the arbitrator at the hearing to prepare an administrative record. The record should be maintained for 45 days from the date of the award.

** Immediately contact DAJA-LE if your activity wants to seek review of the arbitrator's award.

** Request for judicial review of these awards should be expeditiously submitted through legal channels to OPM.

** A copy of the request shall be sent to CPMS (specifically, FAS.)

Judicial Review of Authority Decisions Checklist

** Requests for judicial review, or requests to intervene in judicial proceedings, will be submitted through legal channels to the Office of the Deputy General Counsel, Personnel and Health Policy (ODGC(P&HP)), DoD. Immediately notify DAJA-LE of the request.

** Immediately notify the ODGC(P&HP) and DAJA-LE, through legal channels, upon learning that a union has initiated court action arising out of its relationship with the activity.

Reports Checklist

Arbitration Awards

** Provide two copies of arbitration awards to:

Office of Personnel Management
Chief, Labor-Management Relations Division
1900 E Street, N.W.
Washington, D.C. 20415-0001.

Representation Changes

** Send duplicate copies of completed OPM Form 913-B to CPMS indicating changes in exclusive bargaining units and collective bargaining agreements. CPMS will furnish copies to OPM.

In AFGE v. FLRA, 750 F.2d 143 (D.C. Cir. 1984), the court held that Authority issuances on general statements of policy or guidance were judicially reviewable under section 7123(a). The court determined that Authority's statement on policy or guidance was final and was encompassed by the term "order" as used in section 7123(a). The court also determined that the Authority's statement was ripe for review. The court concluded that the issue was solely one of law, and the impact of the Authority's statement on the union was definite and concrete.

e. Refusals by the General Counsel to Issue a Complaint.

In Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982), the court held that Congress clearly intended the General Counsel of the Authority to have unreviewable discretion to decline to issue unfair labor practice complaints. The court noted that the legislative history to the Statute makes clear that the role and functions of the General Counsel were closely patterned after the General Counsel of the NLRB. In this respect, the court emphasized that it is clear under the National Labor Relations Act that a decision of the NLRB General Counsel declining to issue an unfair labor practice complaint is not a final order of the NLRB and consequently is not judicially reviewable. Thus, the court ruled that the General Counsel of the Authority must be accorded the same discretion with respect to the issuance of complaints as the NLRB General Counsel.

8-5. Temporary Relief in U.S. District Court.

As noted, section 7123(d) of the Statute authorizes the Authority to seek appropriate temporary relief (including a restraining order) in U.S. district court. The injunctive proceedings are initiated and prosecuted by the General Counsel only on the approval of the Authority. As noted by the court in U.S. v. PATCO, 653 F.2d 1134 (7th Cir. 1981), before relief can be sought, there must be an unfair labor practice charge filed and there must be a determination to issue a complaint. Section 7123(d) directs that a court shall not grant any temporary relief if the Authority fails to establish probable cause to believe that an unfair labor practice is being committed. Section 7123(d) also directs that a court shall not grant any temporary relief if such relief will interfere with an agency's ability to carry out its essential functions.