CHAPTER 1

INTRODUCTION TO FLRA STRUCTURE AND JURISDICTION

I. FEDERAL LABOR RELATIONS AUTHORITY

A. PURPOSE

A product of many compromises, embracing many ambiguities, the Civil Service Reform Act of 1978 (CSRA) created for federal sector labor relations a foundation resting on statute rather than Executive Order. The Reform Act established the Federal Labor Relations Authority (FLRA) and the Federal Service Impasses Panel (FSIP) as the agencies responsible for administering the labor relations program through regulation and guidance, adjudication, and training. The statute provided judicial review of FLRA decisions resolving disputes over negotiability of bargaining proposals and unfair labor practices.

In the preliminary provisions of the labor relations sections of the Reform Act, Congress identified several goals to be achieved through the labor relations program: collective bargaining, effective and efficient government, and the right of employees to participate in or refrain from labor relations activities. The Statute made explicit the legislative goals:

> 5 U.S.C. § 7101. *Findings and purpose*
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> (a) The Congress finds that—
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> (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—
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> (A) safeguards the public interest,
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> (B) contributes to the effective conduct of public business, and
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> (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and
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> (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.
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> Therefore, labor organizations and collective bargaining in the civil service are in the public interest.
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> (b) 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.
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> 5 U.S.C. § 7102. *Employees' rights*
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> 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—
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> (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
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> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

The Supreme Court stated in its first case involving the Reform Act's labor relations provisions, *BATF v. FLRA*, 464 U.S. 89, 104 S. Ct. 439 (1983):

> Title VII of the Civil Service Reform Act, part of a comprehensive revision of the laws governing the rights and obligations of civil servants, contains the first statutory scheme governing labor relations between federal agencies and their employees. Prior to enactment of Title VII, labor-management relations in the federal sector were governed by a program established in a 1962 Executive Order. The Executive Order regime, under which federal employees had limited rights to engage in concerted activity, was most recently administered by the Federal Labor Relations Council, a body composed of three Executive Branch management officials whose decisions were not subject to judicial review.
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> The new Act, declaring that "labor organizations and collective bargaining in the civil service are in the public interest," 5 USC 7101(a), significantly strengthened the position of public employee unions while carefully preserving the ability of federal managers to maintain "an effective and efficient Government," 7101(b). Title VII expressly protects the rights of federal employees "to form, join, or assist any labor organization, or to refrain from any such activity," 7102, and imposes on federal agencies and labor organizations a duty to bargain collectively and in good faith, 7116(a)(5) and (b)(5). The Act excludes certain management prerogatives from the scope of negotiations, although an agency must bargain over the procedures by which these management rights are exercised. *See* 7106. In general, unions and federal agencies must negotiate over terms and conditions of employment, unless a bargaining proposal is inconsistent with existing federal law, rule, or regulation. *See* 7103(a), 7114, 7116, and 7117(a). Strikes and certain other forms of concerted activities by federal employees are illegal and constitute unfair labor practices under the Act. 7116(b)(7)(A).
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> The Act replaced the management-controlled Federal Labor Relations Council with the FLRA, a three-member independent and bipartisan body within the Executive Branch with responsibility for supervising the collective-bargaining process and administering other aspects of federal labor relations established by Title VII. 7104. The Authority, the role of which in the public sector is analogous to that of the National Labor Relations Board in the private sector…adjudicates negotiability disputes, unfair labor practice complaints, bargaining unit issues, arbitration exceptions, and conflicts over the conduct of representational elections. *See* 7105(a)(2)(A)–(I). In addition to its adjudicatory functions, the Authority may engage in formal rulemaking, 7134, and is specifically required to "provide leadership in establishing policies and guidance relating to matters" arising under the Act. 7105(a)(1). The FLRA may seek enforcement of its adjudicatory orders in the United States Courts of Appeals, 7123(b), and persons, including federal agencies, aggrieved by any final FLRA decision may also seek judicial review in those courts. 7123(a).

DOD, AAFES v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), elaborated on the purposes served by Title VII of the Reform Act:

> It was intended to serve a variety of purposes. Congress sought at least in part to strengthen the authority of federal management to hire and to discipline employees.… But the Reform Act was also aimed to strengthen the position of employee unions in the federal service. The statutory statement of congressional purpose asserts that "protection of the right of employees to organize [and] bargain collectively""safeguards the public interest," "contributes to the effective conduct of public business," and "facilitates and encourages the amicable settlements of disputes…." Consistent with this view, the Reform Act replaced the Federal Labor Relations Council, which had been criticized as "defective" because its members "come exclusively from the ranks of management," with an independent and bipartisan FLRA. There was no suggestion that employee unions might not seek procedural protections against arbitrary or mistaken employee discharges. On the contrary, Representative Udall stressed that he intended his amendment "to meet some of the legitimate concerns of the Federal employee unions as an integral part of what is basically a bill to give management the power to manage and the flexibility that it needs." Other members articulated nearly identical sentiments during the floor debate. Endorsing the Udall amendment, Representative Ford agreed that "while considering the increased powers for management, we always had in mind that we would put together a totality here…that we hoped would represent a fair package of balanced authority for management, balanced with a fair protection for at least the existing rights the employees have."

Discussion of the legislative history of Title VII of the Reform Act may also be found in *AFGE v. FLRA*, 944 F.2d 922, 925–26 (D.C. Cir. 1991); *see IAM Lodge 2135 and Dept. of Treasury, Bureau of Engraving & Printing*, 50 FLRA 677, 683–84 n.9 (1995) (considering the Udall substitute that became the final House bill leading to Title VII of the 1978 Reform Act). The FLRA provides organizational and historical information in its "Introduction to FLRA" http://www.flra.gov/introduction-flra, statement of mission http://www.flra.gov/content/mission, and "A Short History of the Statute" http://www.flra.gov/statute_history.

Throughout this *Guide*, our discussion pertains to almost every agency or activity of the executive branch. The foreign service has its own labor relations program. The Postal Service labor relations program is governed by the National Labor Relations Act and the National Labor Relations Board (NLRB). *See McCandless v. MSPB*, 996 F.2d 1193, 1198 (Fed. Cir. 1993). The labor relations system for legislative employees is briefly described in *Morris v. Office of Compliance*, 608 F.3d 1344, 1346 (Fed. Cir. 2010). [Other agencies statutorily defined out of the FLRA's jurisdiction are listed at 5 USC 7103(a)(3) and in Executive Order 12171 and other Executive Orders discussed in the section on "Security Exclusions" in Chapter 2.]

B. FUNCTIONS

Specific powers and duties of the Authority are outlined at 5 USC 7105. Principally, the Authority is to "provide leadership in establishing policies and guidance relating to matters under this chapter, and, except, as otherwise provided, shall be responsible for carrying out the purpose of this chapter." 5 USC 7105(a)(1). Specific duties are assigned to the Authority, at 5 USC 7105(a)(2), including license to issue implementing regulations:

> A. determine the appropriateness of units for labor organization representation under section 7112 of this title;
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> B. supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;
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> C. prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;
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> D. prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;
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> E. resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;
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> F. prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;
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> G. conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;
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> H. resolve exceptions to arbitrator's awards under section 7122 of this title; and
>
> I. take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

Title VII of the CSRA created the FLRA to carry out the purposes of labor relations provisions of the Reform Act, Title VII of the statute. *United States v. PATCO*, 653 F.2d 1134, 1137 (7th Cir. 1981). The FLRA was first enabled under Reorganization Plan 2 of 1978, and it was continued under the labor relations section of the CSRA, Title VII, and it administers that section. The CSRA vests in the Authority both rulemaking and adjudicatory responsibilities. Final orders of the Authority—other than those involving representation proceedings and those reviewing exceptions to routine arbitration awards—are subject to review in the federal courts of appeal. The Authority may petition any appropriate circuit court of appeal for enforcement of its orders. *DOD, AAFES v. FLRA*, 659 F.2d 1140, 1144 (D.C. Cir. 1981); *NTEU v. FLRA*, 691 F.2d 553, 555 (D.C. Cir. 1982) (brief summary of the functions of the FLRA). The Authority also has the responsibility for reviewing and enforcing decisions of the Assistant Secretary of Labor for Employment Standards relating to financial reporting requirements imposed on federal sector unions by Labor Department regulations. *See Dept. of Labor, Ass't Sec'y for Employment Standards and AFGE Local 2562*, 60 FLRA 223 (2004). [Refer to Chapter 10 for discussion of judicial review.]

Title VII of the Reform Act has not been subjected to a broad constitutional challenge. As to constitutional implications of limitations on negotiability of various subjects, *ACT, Montana Air Chap. v. FLRA*, 756 F.2d 172, 176 (D.C. Cir. 1985):

> While the First Amendment guarantees the rights of public employees to speak freely and to associate with others, and "protects the right of associations to engage in advocacy on behalf of their members," it imposes no "affirmative obligation on the government…to recognize [such an] association and bargain with it." Because the government is under no constitutional duty to bargain collectively with labor organizations, it retains the authority to provide that such bargaining shall be limited to a particular class of subjects.

C. STRUCTURE

FLRA structure was summarized, *Turgeon v. FLRA*, 677 F.2d 937, 938 n.4 (D.C. Cir. 1982):

> To administer the program the Act established an independent agency in the executive branch, the Federal Labor Relations Authority, intended to play a role in Federal sector labor-management relations analogous to that of the National Labor Relations Board (NLRB) in the private sector….
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> The Act also provides for a General Counsel who is appointed by the President, with Senate approval, independent of the Authority members, and serves at the pleasure of the President.… The General Counsel has separate authority to promulgate regulations in furtherance of his statutory duties.… The principal duties of the General Counsel are to investigate unfair labor practice charges, and issue and prosecute unfair labor practice complaints before the Authority.… The General Counsel is the only person given authority to issue unfair labor practice complaints….

The basic organization of the FLRA is established at 5 USC 7104. It is an agency composed of three members, not more than two of whom may adhere to the same political party. The members are prohibited from engaging in any other employment or business, or from holding any other office or position in the federal government, unless allowed by law. The members are appointed by the President, subject to Senate confirmation. They are removable by the President only upon notice and hearing, and only for inefficiency, neglect of duty, or malfeasance in office. One member is designated by the President as the Authority Chairman. The members are appointed for terms of five years, with provisions for variation of the terms under unusual circumstances described in the Statute.

In carrying out its functions, § 7105 authorizes the Authority to hold hearings, administer oaths, take the testimony or deposition of any person under oath, issue subpoenas, issue cease and desist orders, and take "such actions as are necessary to effectively administer the provisions" of the labor relations chapter. The Authority may obtain advisory opinions from the Office of Personnel Management (OPM) as to interpretation of OPM's rules, regulations, or policy directives. The Authority also may seek advisory opinions from other agencies, e.g., the Justice Department, when the meaning of laws enforced by those agencies are unclear. *See Dept. of Army, Corps of Eng'rs, Memphis and NFFE Local 259*, 52 FLRA 920, 931–2 n.12 (1997) (criminal statute sufficiently clear; DOJ interpretation not required); *cf. NTEU v. OPM*, CB-1205-11-0017-U-1 (MSPB NP 1/8/2013) (recounting the unsuccessful effort by the union to have MSPB overturn as a "rule" an advisory opinion from OPM to FLRA). [Refer to the FLRA website, www.flra.gov for information on FLRA members, staff, and FLRA organizational structure.]

Under § 7104, the Authority has a General Counsel. appointed by the President, with Senate confirmation, for a five-year term. The General Counsel may be removed at any time by the President. He or she is precluded from holding any other office or position in the government, unless authorized by law. The duties of the General Counsel are to investigate unfair labor practice (ULP) allegations, to file and prosecute ULP complaints, and to exercise "such other powers of the Authority as the Authority may prescribe." The General Counsel has direct authority over and responsibility for all employees in the office of the General Counsel, including employees of the General Counsel in the seven regional offices of the Authority in: Atlanta (404–331–5300), Boston (617–565–5100), Chicago (312–886–3465), Dallas (214–767–6266), Denver (303–844–5224), San Francisco (415–356–5000), and Washington, D.C. (202–357–6029).

To fulfill its responsibilities, under § 7105 the Authority is granted the power to appoint and delegate functions to an executive director, regional directors, administrative law judges, and all its other employees. The statute permits the Authority to delegate to regional directors the power to determine whether a group of employees is an appropriate unit, to conduct investigations and provide for hearings, to determine whether a question concerning representation exists, to direct an election, and to supervise or conduct secret ballot elections and certify their results. The Authority is authorized to delegate to administrative law judges its authority, under § 7118, to determine whether any agency or labor organization engaged in or is engaging in an unfair labor practice. Regional representational determinations are reviewed through requests for reconsideration by the Authority. ULP decisions are reviewed through the filing of exceptions.

An Office of Case Intake and Publications operates as the Authority's "clerk of the court." That organization dockets documents received in the course of litigation before the Authority. If a case is clearly untimely or beyond the Authority's jurisdiction, the Director of the Office may dismiss the case with notice to the parties. That dismissal may be addressed through a request to the Authority for reconsideration. *See NTEU and DHHS, Region X*, 46 FLRA 814, 816 (1992).

An inspector general keeps business regular, and the Authority's solicitor provides representation of the Authority when it is a party to a court case involving enforcement or defense of an Authority decision.

FLRA is located at 1400 K Street, N.W., Washington, D.C., 20424. The Office of Case Intake and Publication can be reached for case status information at 202–218–7740. For other problems call the FLRA general number at 202–218–7770, or the General Counsel at 202–218–7910. Other telephone, fax numbers, and email addresses are at the Authority's website at www.flra.gov.

1. Requests for Interpretation and Guidance

FLRA grants to itself, but rarely employs, the authority to offer advisory opinions requested by the head of an agency, the national president of a labor organization, or the president of a labor organization not affiliated with a national organization. The request must be in writing and, pursuant to 5 CFR 2427.3(a) (2017), include:

> (1) A concise statement of the question with respect to which a general statement of policy or guidance is requested together with background information necessary to an understanding of the question;
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> (2) A statement of the standards under § 2427.5 upon which the request is based;
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> (3) A full and detailed statement of the position or positions of the requesting party or parties;

(4) Identification of any cases or other proceedings known to bear on the question which are pending under chapter 71 of title 5 of the United States Code; and

(5) Identification of other known interested parties.

5 CFR 2427.5 (2017) supplies the criteria governing the process:

Standards governing issuance of general statements of policy or guidance.

In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:

(a) Whether the question presented can more appropriately be resolved by other means;

(b) Where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar question;

(c) Whether the resolution of the question presented would have general applicability under the Federal Service Labor-Management Relations Statute;

(d) Whether the question currently confronts parties in the context of a labor-management relationship;

(e) Whether the question is presented jointly by the parties involved; and

(f) Whether the issuance by the Authority of a general statement of policy or guidance on the question would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the Federal Service Labor-Management Relations Statute.

The Authority will not normally consider a request for a statement pf policy or guidance concerning any matter pending before the Authority, the General Counsel, Panel, or the Assistant Secretary of Labor for Labor-Management Relations. 5 CFR 2427.2(b) (2017). More often than not, FLRA declines to provide guidance in response to a request for interpretation. Law is generally made through negotiability or ULP decisions. A few cases illustrate the Authority's approach to requests for guidance. FLRA declined to provide guidance on whether Federal Mediation and Conciliation Service mediators were precluded from organizing under 5 USC 7112(b)(4) because, under § 7119, mediators were involved in the administration of the FSLMRS. The question was more appropriate for a unit determination resolution; the request presented a unique situation that would not prevent the proliferation of similar cases. *Case 0-PS-7*, 1 FLRA 1010, 1010–11 (1979). A problem concerning recoupment by agencies of amounts equal to union dues erroneously deducted from the pay of supervisors did not rise to the level of formal interpretation and guidance. It was more appropriate for resolution under ULP procedures, given the likely need to resolve factual issues. *IRS and NFFE*, 3 FLRA 233, 234 (1980). Another issue of statutory interpretation was deferred for resolution through a negotiability proceeding rather than through a policy ruling in *Case 0-PS-33*, 51 FLRA 409, 412 (1995). The Authority has decided several sets of issues through interpretation and guidance, and those decisions are scattered through the text of this *Guide*.

2. Advisory Opinions

The Authority may furnish advisory opinions to its General Counsel, the Federal Service Impasses Panel (FSIP), and the Assistant Secretary of Labor for Labor Management Relations under 5 CFR 2429.4 (2017):

> Notwithstanding the procedures set forth in this subchapter, the General Counsel, the Assistant Secretary, or the Panel may refer for review and decision or general ruling by the Authority any case involving a major policy issue that arises in a proceeding before any of them. Any such referral shall be in writing and a copy of such referral shall be served on all parties to the proceeding. Before decision or general ruling, the Authority shall obtain the views of the parties and other interested persons, orally or in writing, as it deems necessary and appropriate.

Unless there is a "major policy" issue under § 2429.4 of the regulations, the Authority will not issue general rulings on issues of an interlocutory nature, e.g., jurisdiction, brought to it by the General Counsel. *Order Denying Request for Gen. Ruling*, 12 FLRA 74, 75 (1983).

In a representation case, if an individual is excluded from the unit as a supervisor based on one criterion, the Authority may decline to rule on a second criterion advanced by the agency, suggesting in *USDA, Rural Housing Serv. and AFGE Local 3354*, 67 FLRA 207, 208 (2014), that a ruling not necessary to the disposition of the employee's unit status was an advisory opinion.

3. Regulations

Changes in the procedural rules of the Authority are effective at the time the new rules become effective, as long as there is no hardship or injustice in a particular case. *Dept. of Transp., FAA and PASS*, 4 FLRA 722, 725 (1980).

II. LABOR-MANAGEMENT FORUMS

On December 9, 2009, President Obama issued Executive Order 13522:

> Creating Labor-Management Forums To Improve Delivery of Government Services.

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish a cooperative and productive form of labor-management relations throughout the executive branch, it is hereby ordered as follows:

Sec. 1. *Policy.* Federal employees and their union representatives are an essential source of front-line ideas and information about the realities of delivering Government services to the American people. A nonadversarial forum for managers, employees, and employees' union representatives to discuss Government operations will promote satisfactory labor relations and improve the productivity and effectiveness of the Federal Government. Labor-management forums, as complements to the existing collective bargaining process, will allow managers and employees to collaborate in continuing to deliver the highest quality services to the American people. Management should discuss workplace challenges and problems with labor and endeavor to develop solutions jointly, rather than advise union representatives of predetermined solutions to problems and then engage in bargaining over the impact and implementation of the predetermined solutions.

The purpose of this order is to establish a cooperative and productive form of labor-management relations throughout the executive branch.

Sec. *2. The National Council on Federal Labor-Management Relations.* There is established the National Council on Federal Labor-Management Relations (Council).

(a) *Membership.* The Council shall be composed of the following members appointed or designated by the President:

(i) the Director of the Office of Personnel Management (OPM) and Deputy Director for Management of the Office of Management and Budget (OMB), who shall serve as Co-Chairs of the Council;

(ii) the Chair of the Federal Labor Relations Authority;

(iii) a Deputy Secretary or other officer with department- or agency-wide authority from each of five executive departments or agencies not otherwise represented on the Council, who shall serve for terms of 2 years;

(iv) the President of the American Federation of Government Employees, AFL-CIO;

(v) the President of the National Federation of Federal Employees;

(vi) the President of the National Treasury Employees Union;

(vii) the President of the International Federation of Professional and Technical Engineers, AFL-CIO;

(viii) the heads of three other labor unions that represent Federal employees and are not otherwise represented on the Council, who shall serve for terms of 2 years;

(ix) the President of the Senior Executives Association; and

(x) the President of the Federal Managers Association.

(b) *Responsibilities and Functions.* The Council shall advise the President on matters involving labor-management relations in the executive branch. Its activities shall include, to the extent permitted by law:

(i) supporting the creation of department- or agency-level labor-management forums and promoting partnership efforts between labor and management in the executive branch;

(ii) developing suggested measurements and metrics for the evaluation of the effectiveness of the Council and department or agency labor-management forums in order to promote consistent, appropriate, and administratively efficient measurement and evaluation processes across departments and agencies;

(iii) collecting and disseminating information about, and providing guidance on, labor-management relations improvement efforts in the executive branch, including results achieved;

(iv) utilizing the expertise of individuals both within and outside the Federal Government to foster successful labor-management relations, including through training of department and agency personnel in methods of dispute resolution and cooperative methods of labor-management relations;

(v) developing recommendations for innovative ways to improve delivery of services and products to the public while cutting costs and advancing employee interests;

(vi) serving as a venue for addressing systemic failures of department- or agency-level forums established pursuant to section 3 of this order; and

(vii) providing recommendations to the President for the implementation of several pilot programs within the executive branch, described in section 4 of this order, for bargaining over subjects set forth in 5 U.S.C. 7106(b)(1).

(c) *Administration.*

(i) The Co-Chairs shall convene and preside at meetings of the Council, determine its agenda, and direct its work.

(ii) The Council shall seek input from nonmember executive departments and agencies, particularly smaller agencies. It also may, from time to time, invite persons from the private and public sectors to submit information. The Council shall also seek input from Federal manager and professional associations, companies, nonprofit organizations, State and local governments, Federal employees, and customers of Federal services, as needed.

(iii) To the extent permitted by law and subject to the availability of appropriations, OPM shall provide such facilities, support, and administrative services to the Council as the Director of OPM deems appropriate.

(iv) Members of the Council shall serve without compensation for their work on the Council, but may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in Government service (5 U.S.C. 5701-5707), consistent with the availability of funds.

(v) The heads of executive departments and agencies shall, to the extent permitted by law, provide to the Council such assistance, information, and advice as the Council may require for purposes of carrying out its functions.

(vi) Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.), may apply to the Council, any functions of the President under that Act, except that of reporting to the Congress, shall be performed by the Director of OPM in accordance with the guidelines that have been issued by the Administrator of General Services.

(d) *Termination.* The Council shall terminate 2 years after the date of this order unless extended by the President.

Sec. 3. *Implementation of Labor-Management Forums Throughout the Executive Branch.*

(a) The head of each executive department or agency that is subject to the provisions of the Federal Service Labor-Management Relations Act (5 U.S.C. 7101 *et seq.),* or any other authority permitting employees of such department or agency to select an exclusive representative shall, to the extent permitted by law:

(i) establish department- or agency-level labor-management forums by creating labor-management committees or councils at the levels of recognition and other appropriate levels agreed to by labor and management, or adapting existing councils or committees if such groups exist, to help identify problems and propose solutions to better serve the public and agency missions;

(ii) allow employees and their union representatives to have pre-decisional involvement in all workplace matters to the fullest extent practicable, without regard to whether those matters are negotiable subjects of bargaining under 5 U.S.C. 7106; provide adequate information on such matters expeditiously to union representatives where not prohibited by law; and make a good-faith attempt to resolve issues concerning proposed changes in conditions of employment, including those involving the subjects set forth in 5 U.S.C. 7106(b)(1), through discussions in its labor-management forums; and

(iii) evaluate and document, in consultation with union representatives and consistent with the purposes of this order and any further guidance provided by the Council, changes in employee satisfaction, manager satisfaction, and organizational performance resulting from the labor-management forums.

(b) Each head of an executive department or agency in which there exists one or more exclusive representatives shall, in consultation with union representatives, prepare and submit for approval, within 90 days of the date of this order, a written implementation plan to the Council. The plan shall:

(i) describe how the department or agency will conduct a baseline assessment of the current state of labor relations within the department or agency;

(ii) report the extent to which the department or agency has established labor-management forums, as set forth in subsection (a)(i) of this section, or may participate in the pilot projects described in section 4 of this order;

(iii) address how the department or agency will work with the exclusive representatives of its employees through its labor-management forums to develop department-, agency-, or bargaining unit-specific metrics to monitor improvements in areas such as labor-management satisfaction, productivity gains, cost savings, and other areas as identified by the relevant labor-management forum's participants; and

(iv) explain the department's or agency's plan for devoting sufficient resources to the implementation of the plan.

(c) The Council shall review each executive department or agency implementation plan within 30 days of receipt and provide a recommendation to the Co-Chairs as to whether to certify that the plan satisfies all requirements of this order. Plans that are determined by the Co-Chairs to be insufficient will be returned to the department or agency with guidance for improvement and resubmission within 30 days. Each department or agency covered by subsection (b) of this section must have a certified implementation plan in place no later than 150 days after the date of this order, unless the Co-Chairs of the Council authorize an extension of the deadline.

Sec. 4. *Negotiation over Permissive Subjects of Bargaining.*

(a) In order to evaluate the impact of bargaining over permissive subjects, several pilot projects of specified duration shall be established in which some executive departments or agencies elect to bargain over some or all of the subjects set forth in 5 U.S.C. 7106(b)(1) and waive any objection to participating in impasse procedures set forth in 5 U.S.C. 7119 that is based on the subjects being permissive. The Council shall develop recommendations for establishing the pilot projects, including (i) recommendations for evaluating such pilot projects on the basis, among other things, of their impacts on organizational performance, employee satisfaction, and labor relations of the affected departments or agencies; (ii) recommended methods for evaluating the effectiveness of dispute resolution procedures adopted and followed in the course of the pilot projects; and (iii) a recommended timeline for expeditious implementation of the pilot programs.

(b) The Council shall present its recommendations to the President within 150 days after the date of this order.

(c) No later than 18 months after implementation of the pilot projects, the Council shall submit a report to the President evaluating the results of the pilots and recommending appropriate next steps with respect to agency bargaining over the subjects set forth in 5 U.S.C. 7106(b)(1).

Sec. 5. *General Provisions.*

(a) Nothing in this order shall abrogate any collective bargaining agreements in effect on the date of this order.

(b) Nothing in this order shall be construed to limit, preclude, or prohibit any head of an executive department or agency from electing to negotiate over any or all of the subjects set forth in 5 U.S.C. 7106(b)(1) in any negotiation.

(c) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(d) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(e) This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The activities, successes, or failures of these forums are beyond the scope of this *Guide*, and their activity has not resulted in Authority decisions. Nor will it likely produce much by way of decisional law. Executive Order 13522 was revoked by President Trump's Executive Order 13812 on September 29, 2017.

A. LABOR RELATIONS GROUP

By Executive Order 13,836 of May 25, 2018, President Trump directed formation of a group of representatives of agency heads responsible for formulating approaches to federal collective bargaining. The "Executive Order Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining" also establishes government-wide standards for the conduct of collective bargaining. The Order provides:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to assist executive departments and agencies (agencies) in developing efficient, effective, and cost-reducing collective bargaining agreements (CBAs), as described in chapter 71 of title 5, United States Code, it is hereby ordered as follows:
>
> Section 1. Policy.
>
> (a) Section 7101(b) of title 5, United States Code, requires the Federal Service Labor-Management Relations Statute (the Statute) to be interpreted in a manner consistent with the requirement of an effective and efficient Government. Unfortunately, implementation of the Statute has fallen short of these goals. CBAs, and other agency agreements with collective bargaining representatives, often make it harder for agencies to reward high performers, hold low-performers accountable, or flexibly respond to operational needs. Many agencies and collective bargaining representatives spend years renegotiating CBAs, with taxpayers paying

for both sides' negotiators. Agencies must also engage in prolonged negotiations before making even minor operational changes, like relocating office space.

(b) The Federal Government must do more to apply the Statute in a manner consistent with effective and efficient Government. To fulfill this obligation, agencies should secure CBAs that: promote an effective and efficient means of accomplishing agency missions; encourage the highest levels of employee performance and ethical conduct; ensure employees are accountable for their conduct and performance on the job; expand agency flexibility to address operational needs; reduce the cost of agency operations, including with respect to the use of taxpayer-funded union time; are consistent with applicable laws, rules, and regulations; do not cover matters that are not, by law, subject to bargaining; and preserve management rights under section 7106(a) of title 5, United States Code (management rights). Further, agencies that form part of an effective and efficient Government should not take more than a year to renegotiate CBAs.

Sec. 2. Definitions.

For purposes of this order:

(a) The phrase "term CBA" means a CBA of a fixed or indefinite duration reached through substantive bargaining, as opposed to (i) agreements reached through impact and implementation bargaining pursuant to sections 7106(b)(2) and 7106(b)(3) of title 5, United States Code, or (ii) mid-term agreements, negotiated while the basic comprehensive labor contract is in effect, about subjects not included in such contract.

(b) The phrase "taxpayer-funded union time" means time granted to a Federal employee to perform non-agency business during duty hours pursuant to section 7131 of title 5, United States Code.

Sec. 3. Interagency Labor Relations Working Group.

(a) There is hereby established an Interagency Labor Relations Working Group (Labor Relations Group).

(b) Organization. The Labor Relations Group shall consist of the Director of the Office of Personnel Management (OPM Director), representatives of participating agencies determined by their agency head in consultation with the OPM Director, and OPM staff assigned by the OPM Director. The OPM Director shall chair the Labor Relations Group and, subject to the availability of appropriations and to the extent permitted by law, provide administrative support for the Labor Relations Group.

(c) Agencies. Agencies with at least 1,000 employees represented by a collective bargaining representative pursuant to chapter 71 of title 5, United States Code, shall participate in the Labor Relations Group. Agencies with a smaller number of employees represented by a collective bargaining representative may, at the election of their agency head and with the concurrence of the OPM Director, participate in the Labor Relations Group. Agencies participating in the Labor Relations Group shall provide assistance helpful in carrying out the responsibilities outlined in subsection (d) of this section. Such assistance shall include designating an agency employee to serve as a point of contact with OPM responsible for providing the Labor Relations Group with sample language for proposals and counter-proposals on significant matters proposed for inclusion in term CBAs, as well as for analyzing and discussing with OPM and the Labor Relations Group the effects of significant CBA provisions on agency effectiveness and efficiency. Participating agencies should provide other assistance as necessary to support the Labor Relations Group in its mission.

(d) Responsibilities and Functions. The Labor Relations Group shall assist the OPM Director on matters involving labor-management relations in the executive branch. To the extent permitted by law, its responsibilities shall include the following:

(i) Gathering information to support agency negotiating efforts, including the submissions required under section 8 of this order, and creating an inventory of language on significant subjects of bargaining that have relevance to more than one agency and that have been proposed for inclusion in at least one term CBA;

(ii) Developing model ground rules for negotiations that, if implemented, would minimize delay, set reasonable limits for good-faith negotiations, call for Federal Mediation and Conciliation Service (FMCS) to mediate disputed issues not resolved within a reasonable time, and, as appropriate, promptly bring remaining unresolved issues to the Federal Service Impasses Panel (the Panel) for resolution;

(iii) Analyzing provisions of term CBAs on subjects of bargaining that have relevance to more than one agency, particularly those that may infringe on, or otherwise affect, reserved management rights. Such analysis should include an assessment of term CBA provisions that cover comparable subjects, without infringing, or otherwise affecting, reserved management rights. The analysis should also assess the consequences of such CBA provisions on Federal effectiveness, efficiency, cost of operations, and employee accountability and performance. The analysis should take particular note of how certain provisions may impede the policies set forth in section 1 of this order or the orderly implementation of laws, rules, or regulations. The Labor Relations Group may examine general trends and commonalities across term CBAs, and their effects on bargaining-unit operations, but need not separately analyze every provision of each CBA in every Federal bargaining unit;

(iv) Sharing information and analysis, as appropriate and permitted by law, including significant proposals and counter-proposals offered in bargaining, in order to reduce duplication of efforts and encourage common approaches across agencies, as appropriate;

(v) Establishing ongoing communications among agencies engaging with the same labor organizations in order to facilitate common solutions to common bargaining initiatives; and

(vi) Assisting the OPM Director in developing, where appropriate, Government-wide approaches to bargaining issues that advance the policies set forth in section 1 of this order.

(e) Within 18 months of the first meeting of the Labor Relations Group, the OPM Director, as the Chair of the group, shall submit to the President, through the Office of Management and Budget (OMB), a report proposing recommendations for meeting the goals set forth in section 1 of this order and for improving the organization, structure, and functioning of labor relations programs across agencies.

Sec. 4. Collective Bargaining Objectives.

(a) The head of each agency that engages in collective bargaining under chapter 71 of title 5, United States Code, shall direct appropriate officials within each agency to prepare a report on all operative term CBAs at least 1 year before their expiration or renewal date. The report shall recommend new or revised CBA language the agency could seek to include in a renegotiated agreement that would better support the objectives of section 1 of this order. The officials preparing the report shall consider the analysis and advice of the Labor Relations Group in making recommendations for revisions. To the extent permitted by law, these reports shall be deemed guidance and advice for agency management related to collective bargaining under section 7114(b)(4)(C) of title 5, United States Code, and thus not subject to disclosure to the exclusive representative or its authorized representative.

(b) Consistent with the requirements and provisions of chapter 71 of title 5, United States Code, and other applicable laws and regulations, an agency, when negotiating with a collective bargaining representative, shall:

(i) establish collective bargaining objectives that advance the policies of section 1 of this order, with such objectives informed, as appropriate, by the reports required by subsection (a) of this section;

(ii) consider the analysis and advice of the Labor Relations Group in establishing these collective bargaining objectives and when evaluating collective bargaining representative proposals;

(iii) make every effort to secure a CBA that meets these objectives; and

(iv) ensure management and supervisor participation in the negotiating team representing the agency.

Sec. 5. Collective Bargaining Procedures.

(a) To achieve the purposes of this order, agencies shall begin collective bargaining negotiations by making their best effort to negotiate ground rules that minimize delay, set reasonable time limits for good-faith negotiations, call for FMCS mediation of disputed issues not resolved within those time limits, and, as appropriate, promptly bring remaining unresolved issues to the Panel for resolution. For collective bargaining negotiations, a negotiating period of 6 weeks or less to achieve ground rules, and a negotiating period of between 4 and 6 months for a term CBA under those ground rules, should ordinarily be considered reasonable and to satisfy the "effective and efficient" goal set forth in section 1 of this order. Agencies shall commit the time and resources necessary to satisfy these temporal objectives and to fulfill their obligation to bargain in good faith. Any negotiations to establish ground rules that do not conclude after a reasonable period should, to the extent permitted by law, be expeditiously advanced to mediation and, as necessary, to the Panel.

(b) During any collective bargaining negotiations under chapter 71 of title 5, United States Code, and consistent with section 7114(b) of that chapter, the agency shall negotiate in good faith to reach agreement on a term CBA, memorandum of understanding (MOU), or any other type of binding agreement that promotes the policies outlined in section 1 of this order. If such negotiations last longer than the period established by the CBA ground rules—or, absent a pre-set deadline, a reasonable time—the agency shall consider whether requesting assistance from the FMCS and, as appropriate, the Panel, would better promote

effective and efficient Government than would continuing negotiations. Such consideration should evaluate the likelihood that continuing negotiations without FMCS assistance or referral to the Panel would produce an agreement consistent with the goals of section 1 of this order, as well as the cost to the public of continuing to pay for both agency and collective bargaining representative negotiating teams. Upon the conclusion of the sixth month of any negotiation, the agency head shall receive notice from appropriate agency staff and shall receive monthly notifications thereafter regarding the status of negotiations until they are complete. The agency head shall notify the President through OPM of any negotiations that have lasted longer than 9 months, in which the assistance of the FMCS either has not been requested or, if requested, has not resulted in agreement or advancement to the Panel.

(c) If the commencement or any other stage of bargaining is delayed or impeded because of a collective bargaining representative's failure to comply with the duty to negotiate in good faith pursuant to section 7114(b) of title 5, United States Code, the agency shall, consistent with applicable law consider whether to:

(i) file an unfair labor practice (ULP) complaint under section 7118 of title 5, United States Code, after considering evidence of bad-faith negotiating, including refusal to meet to bargain, refusal to meet as frequently as necessary, refusal to submit proposals or counterproposals, undue delays in bargaining, undue delays in submission of proposals or counterproposals, inadequate preparation for bargaining, and other conduct that constitutes bad-faith negotiating; or

(ii) propose a new contract, memorandum, or other change in agency policy and implement that proposal if the collective bargaining representative does not offer counter-proposals in a timely manner.

(d) An agency's filing of a ULP complaint against a collective bargaining representative shall not further delay negotiations. Agencies shall negotiate in good faith or request assistance from the FMCS and, as appropriate, the Panel, while a ULP complaint is pending.

(e) In developing proposed ground rules, and during any negotiations, agency negotiators shall request the exchange of written proposals, so as to facilitate resolution of negotiability issues and assess the likely effect of specific proposals on agency operations and management rights. To the extent that an agency's CBAs, ground rules, or other agreements contain requirements for a bargaining approach other than the exchange of written proposals addressing specific issues, the agency should, at the soonest opportunity, take steps to eliminate them. If such requirements are based on now-revoked Executive Orders, including Executive Order 12871 of October 1, 1993 (Labor-Management Partnerships) and Executive Order 13522 of December 9, 2009 (Creating Labor-Management Forums to Improve Delivery of Government Services), agencies shall take action, consistent with applicable law, to rescind these requirements.

(f) Pursuant to section 7114(c)(2) of title 5, United States Code, the agency head shall review all binding agreements with collective bargaining representatives to ensure that all their provisions are consistent with all applicable laws, rules, and regulations. When conducting this review, the agency head shall ascertain whether the agreement contains any provisions concerning subjects that are non-negotiable, including provisions that violate Government-wide requirements set forth in any applicable Executive Order or any other applicable Presidential directive. If an agreement contains any such provisions, the agency head shall disapprove such provisions, consistent with applicable law. The agency head shall take all practicable steps to render the determinations required by this subsection within 30 days of the date the agreement is executed, in accordance with section 7114(c) of title 5, United States Code, so as not to permit any part of an agreement to become effective that is contrary to applicable law, rule, or regulation.

Sec. 6. Permissive Bargaining.

The heads of agencies subject to the provisions of chapter 71 of title 5, United States Code, may not negotiate over the substance of the subjects set forth in section 7106(b)(1) of title 5, United States Code, and shall instruct subordinate officials that they may not negotiate over those same subjects.

Sec. 7. Efficient Bargaining over Procedures and Appropriate Arrangements.

(a) Before beginning negotiations during a term CBA over matters addressed by sections 7106(b)(2) or 7106(b)(3) of title 5, United States Code, agencies shall evaluate whether or not such matters are already covered by the term CBA and therefore are not subject to the duty to bargain. If such matters are already covered by a term CBA, the agency shall not bargain over such matters.

(b) Consistent with section 1 of this order, agencies that engage in bargaining over procedures pursuant to section 7106(b)(2) of title 5, United States Code, shall, consistent with their obligation to negotiate in good faith, bargain over only those items that constitute procedures associated with the exercise of management rights, which do not include measures that excessively interfere with the exercise of such rights. Likewise, consistent with section 1 of this order, agencies that engage in bargaining over appropriate arrangements pursuant to section 7106(b)(3) of title 5, United States Code, shall, consistent with their obligation to negotiate in good faith, bargain over only those items that constitute appropriate arrangements for employees adversely affected by the exercise of management rights. In such negotiations, agencies shall ensure that a resulting appropriate arrangement does not excessively interfere with the exercise of management rights.

Sec. 8. Public Accessibility.

(a) Each agency subject to chapter 71 of title 5, United States Code, that engages in any negotiation with a collective bargaining representative, as defined therein, shall submit to the OPM Director each term CBA currently in effect and its expiration date. Such agency shall also submit any new term CBA and its expiration date to the OPM Director within 30 days of its effective date, and submit new arbitral awards to the OPM Director within 10 business days of receipt. The OPM Director shall make each term CBA publicly accessible on the Internet as soon as practicable.

(b) Within 90 days of the date of this order, the OPM Director shall prescribe a reporting format for submissions required by subsection (a) of this section. Within 30 days of the OPM Director's having prescribed the reporting format, agencies shall use this reporting format and make the submissions required under subsection (a) of this section.

Sec. 9. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the OMB Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) Nothing in this order shall abrogate any CBA in effect on the date of this order.

(d) The failure to produce a report for the agency head prior to the termination or renewal of a CBA under section 4(a) of this order shall not prevent an agency from opening a CBA for renegotiation.

(e) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

III. SPECIALIZED LABOR RELATIONS SYSTEMS

Complicating a complex endeavor, the federal sector labor relations program, dominated for 25 years by the Federal Labor Relations Authority, was modified in 2002 and 2003 through legislation establishing agency-specific law, procedures, and authorizing unique labor relations tribunals for the Department of Homeland Security—the Homeland Security Labor Relations Board; and for the Department of Defense—the National Security Labor Relations Board. As of the Spring of 2007, Homeland Security and Defense both published final regulations and both sets of regulations were partially successfully challenged by a consortium of unions in the federal courts. In 2008 legislation essentially disestablished or defunded the newly-formed labor relation systems for each agency, returning them to the *status quo* and FLRA's care.

A. HOMELAND SECURITY—HUMAN RESOURCES MANAGEMENT SYSTEM

The Homeland Security Act of 2002, Pub. L. No. 107–296, established the Department of Homeland Security, an entity that integrated into its organization personnel from many other agencies and departments of government. The Act did not provide the precise contours of the personnel system or the labor relations program of the new Department. Section 841 of the statute amended Title 5 of the U.S. Code by adding Chapter 97 and, in particular, 5 USC 9701(a), permitting the Secretary of Homeland Security, "in regulations prescribed jointly with the Director of the Office of Personnel Management, establish, and from time to time adjust, a human resources management system for some or all of the organizational units" of the department. Section 9701(b) required that system both preserve merit system principles at 5 USC 2302 and preserve protections provided by 5 USC 2302 relating to prohibited personnel practices and provisions of 5 USC 2302(b)(1), (8), and (9) relating to affirmative action as well as rights or remedies to employees and applicants for employment under those statutory provisions. Provisions adopted by the Department concerning appeals by employees were, according to the "Sense of Congress" referenced at § 9701(f), to provide fair treatment, due process, and expeditious determinations. Homeland

Security was to consult with the Merit Systems Protection Board as it created its procedures. The Act included provisions for consultation, collaboration, and mediation with employee representatives, as well as provisions governing relations with units of recognition transferred into the Department.

In 2006, DHS implementing regulations were challenged in litigation in the federal courts. On October 1, 2008, DHS rescinded application of those regulations, 5 CFR 9701, Subparts A-G, of the DHS Human Resources Management System. [73 FR 58435] The rescission occurred because the Consolidated Security, Disaster Assistance and Continuing Appropriations Act, 2009, Public Law 110-329 (2008) (the "FY 09 DHS Appropriations Act"), barred DHS from using funds appropriated in that act or any other appropriations act for "the development, testing, deployment, or operation of any portion" of the DHS personnel system. The result was that the labor relations provisions of the DHS regulations, 5 CFR 9701 Part F, were rescinded in October of 2008, meaning that the DHS labor relations program reverted to the customary labor relations program operated under the Reform Act under the auspices of the FLRA. The DHS rulemaking notice stated [73 Fed. Reg. 58435 (Oct. 7, 2008)]:

> On February 1, 2005, the Department of Homeland Security (DHS) and the Office of Personnel Management (OPM) jointly issued final regulations at 5 CFR Part 9701 establishing a Department of Homeland Security Human Resources Management System (the "System"). Pursuant to 5 CFR 9701.102(b)(2), Subpart A of the System became applicable to eligible DHS employees on March 3, 2005. Thereafter, DHS extended coverage of Subparts D (Performance Management), F (Adverse Actions) and G (Appeals) of the regulations to certain eligible DHS employees within some DHS components. DHS phased in coverage to certain employees under Subpart D (Performance Management) beginning April 1, 2007 and, similarly, coverage under Subpart F (Adverse Actions) and G (Appeals) beginning May 1, 2007. The provisions ultimately covered more than 35,000 eligible DHS employees.
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> On September 30, 2008, the President signed the Consolidated Security, Disaster Assistance and Continuing Appropriations Act, 2009, Public Law 110-329 (2008) (the "FY 09 DHS Appropriations Act"). Congress provided in the FY 09 DHS Appropriations Act at Section 522(a), "None of the funds provided by this or any other Act may be obligated for the development, testing, deployment, or operation of any portion of a human resources management system authorized by 5 U.S.C. 9701(a), or by regulations prescribed pursuant to such section, for an employee as defined in 5 U.S.C. 7103(a)(2)."
>
> As a result of this enactment, and pursuant to 5 CFR 9701.102(e), effective October 1, 2008, the Department is rescinding application of 5 CFR 9701, Subparts A-G, as to all eligible, covered employees Department-wide. DHS components will convert employees covered by these subparts to coverage under applicable Title 5 provisions. Rescinding application also rescinds the waivers made in 5 CFR part 9701, including waivers of Title 5 Chapters 43, 75, and 77. The Department has coordinated these actions with the Office of Personnel Management and has provided separate advance notice to affected employees and labor organizations, as well as to the Merit System Protection Board.

The statutory and regulatory bases for the DHS labor relations program, along with court decisions challenging the program, are in prior editions of this *Guide*.

B. DEPARTMENT OF DEFENSE—NATIONAL SECURITY PERSONNEL SYSTEM

The 2003 National Defense Authorization Act, Pub. L. 108–136, authorized creation of the National Security Personnel System (NSPS). That legislation established the basis for a DOD-wide labor relations system that redefined traditional collective bargaining, established a system unique to DOD for resolution of labor relations disputes, and provided for limited oversight and involvement by FLRA. Regulations to implement the legislation were issued for comment in early 2005, they became final in 2006, and in 2006 the final regulations were challenged in federal court. Then, in late January of 2008, the President signed Pub. L. 110–181, the National Defense Authorization Act for Fiscal Year 2008, with the purpose and effect of generally restoring DOD labor relations and collective bargaining to the status that predated the 2003 statute, that is, restoring labor relations for DOD to the ordinary operation of Title VII of the Reform Act.

The statutory and regulatory bases for the NSPS, along with summaries of court decisions interpreting the legislation, are in prior editions of this *Guide*.

CHAPTER 2
UNIT DETERMINATIONS AND ELECTIONS

I. UNIT DETERMINATIONS

The unit of recognition, referred to as a bargaining unit, is the central focus of labor relations. Once the unit is defined, eligible voters determine whether they desire representation. Recognition and representation lead to collective bargaining. Unit determinations are made as part of representation proceedings governed by Authority regulations at 5 CFR Part 2422. The regulations vest in the Authority's regional directors responsibility for receiving and processing petitions concerning exclusive recognition, clarification of units, amendment of recognition, determination of eligibility for dues allotments, and consolidation of units. The FLRA Form 21, "Petition," is used to initiate FLRA representation proceedings. Although acronyms or titles are used in the discussion that follows, e.g., RO (representation petition), CU (unit clarification petition), the Form 21 requires the filing party only to provide a general description of the purpose of the petition and the issues raised in the issue. FLRA guidance on representation matters includes a 2013 "Representation Case Law Outline" (updated in 2017) https://www.flra.gov/system/files/webfm/OGC/Rep%20Case%20Law%20Outline/REP%20Case%20Law%20Outline%20nov%202015.pdf, a 2000 "Representation Case Handling Manual" https://www.flra.gov/system/files/webfm/OGC/Manuals/REP%20Proceedings%20CHM.pdf, a 2000 guide to the FLRA representation hearing procedures, "Hearing Officer's Guide" https://www.flra.gov/system/files/webfm/OGC/Manuals/Rep%20Case%20Handling%20Manual/hearing%20officer%27s%20guide%20-%20one%20document_compressed.pdf, a group of "Representation Frequently Asked Questions" https://www.flra.gov/resources-training/resources/information-case-type/representation-resources/representation, and a form "Petition" http://www.flra.gov/webfm_send/2.

The regulations allow for consent elections or, if there is no consent election, the regional director conducts a hearing on the appropriateness of the unit or other matters pertaining to the petition. At the close of the hearing, or on a stipulation of facts, the regional director issues a decision and order determining the appropriate unit, directing an election or dismissing the petition, or otherwise disposing of the matters before the regional director. The decision of the regional director is final except that, under 5 USC 7105(f) and 5 CFR 2422.31, a party may file an application for review with the Authority. Under 5 USC 7105:

> (f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of—
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> (1) the date of the action; or
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> (2) the date of the filing of any application under this subsection for review of the action;
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> the action shall become the action of the Authority at the end of such 60-day period.

5 CFR 2422.31(c) (2017) sets regulatory review criteria:

> (a) *Filing an application for review*. A party must file an application for review with the Authority within sixty (60) days of the Regional Director's Decision and Order. The sixty (60) day time limit under 5 U.S.C. 7105(f) may not be extended or waived. The filing party must serve a copy on the Regional Director and all other parties, and must also file a statement of service with the Authority.
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> (b) *Contents*. An application for review must be sufficient for the Authority to rule on the application without looking at the record. However, the Authority may, in its discretion, examine the record in evaluating the application. An application must specify the matters and rulings to which exception(s) is taken, include a summary of evidence relating to any issue raised in the application, and make specific references to page citations in the transcript if a hearing was held. An application may not raise any issue or rely on any facts not timely presented to the Hearing Officer or Regional Director.
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> (c) *Review*. The Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds:
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> (1) The decision raises an issue for which there is an absence of precedent;
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> (2) Established law or policy warrants reconsideration; or,
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> (3) There is a genuine issue over whether the Regional Director has:
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> (i) Failed to apply established law;
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> (ii) Committed a prejudicial procedural error; or
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> (iii) Committed a clear and prejudicial error concerning a substantial factual matter.

See, e.g., Dept. of Transp., FAA and AFSCME Council 26, 62 FLRA 207 (2007) (remanding to regional director because of clear and prejudicial error arising out of the description of bargaining units involved in unit consolidation and accretion of some employees into the consolidated unit); *Dept. of Interior, Nat'l Park Serv. and U.S. Ranger Alliance*, 55 FLRA 311, 315 (1999) (the union "does not show the RD failed to apply established law or committed clear and prejudicial error concerning substantial factual matters regarding the weight, importance, or significance ascribed by the RD to various matters in the record").

Under *Dept. of Navy, Portsmouth Naval Shipyard and AFGE Local 2024*, 38 FLRA 764, 769 (1990), Authority review of a regional decision is limited:

> [W]e emphasize that our Regulations provide that the Authority "may grant an application for review [of a Regional Director's Decision and Order] only where it appears that compelling reasons exist therefore." 5 CFR 2422.17(c) [currently codified at 5 CFR 2422.31(c)]. The Regulations provide four narrow grounds on which an application for review may be granted. *Id*. In considering whether to grant an application for review, the issue before the Authority is not whether the Authority would have made the same determinations that the Regional Director made but rather, whether the application meets any of the grounds set forth in the Regulations.

If the Authority does not grant review of a regional decision and order within the 60-day period established in § 7105(f), the decision of the region becomes the final action of the Authority. *Dept. of Air Force, 437th ABG and Int'l Ass'n of Firefighters*, 33 FLRA 839, 839–40 (1988). *Compare Maine Army Nat'l Guard Camp and AFGE Local 3012* (Interim Order of Dec. 27, 1988) (the Authority Chairman acts to defer the application of a review pending the appointment of members sufficient to form a quorum of the Authority), *with FDIC and NTEU*, 68 FLRA 260 (2015) (vacating prior decision issued to review regional director's decision that became final when the Authority was without a quorum), and *Dept. of Air Force, Fairchild AFB and Fairchild Fed. Employees' Union*, 68 FLRA 268 (2015) (same holding as *FDIC*), *recon. den.*, *Dept. of Air Force, Fairchild AFB and Fairchild Fed. Employees' Union*, 68 FLRA 366 (2015); *DOD, Pentagon Force Protection Agency and AFGE*, 68 FLRA 266 (2015) (same holding as *FDIC*), *recon. den.*, *DOD, Pentagon Force Protection Agency and AFGE*, 68 FLRA 371 (2015).

The unit determination proceedings discussed in this chapter are the exclusive means of determining who is in and out of a unit. Bargaining proposals seeking to define unit coverage are nonnegotiable. *See NFFE Local 15 and Dept. of Army, Rock Island Arsenal*, 43 FLRA 1165, 1170 (1992). FLRA case law, not OPM regulations, defines how unit determinations are made. Although parties' agreements may be considered by the Authority in deciding representation case issues, the Authority is not bound by those agreements on legal or policy issues and does not defer to those agreements in deciding representation issues. *See AFGE Local 3529 and DOD, DCAA*, 57 FLRA 633, 636 & n.8 (2001) (distinguishing pre-election agreements approved by the FLRA regional director to exclude certain employees from the unit as a bar to the subsequent clarification of the unit to include those employees, unless there are changed circumstances). Authority case law is developed on a case-by-case basis. *See DHUD, Hq. and AFGE Local 476*, 41 FLRA 1226 (1991) (discussed, *post*, as to the unit status of Schedule C appointees). The Statute does not require that the proposed unit be the only or the most appropriate unit, only that it be an appropriate unit. That the unit proposed by the agency is likely appropriate does not mean that the unit sought by the union is inappropriate. *Mississippi Army Nat'l Guard and ACT*, 57 FLRA 337, 341 (2001); *see Dept. of Navy and IAF Local F-121*, 60 FLRA 469, 473 (2004) ("Authority precedent holds that a proposed unit need not be the 'most appropriate' or the 'only appropriate' unit in order to be an appropriate unit under the Statute.").

Although the Authority establishes factors for assessing each criterion for unit determinations, it does not specify the weight of individual factors or a particular number of factors necessary to establish an appropriate unit. *SEC and NTEU*, 56 FLRA 312, 314–15 (2000). Subject to special rules concerning accretions to the unit, discussed below, "[n]ew employees are automatically included in an existing bargaining unit where their positions fall within the express terms of a bargaining certificate and where their inclusion does not render the bargaining unit inappropriate." *Dept. of Army, Hq., Ft. Dix and IBPO, NAGE, SEIU*, 53 FLRA 287, 294 (1997). [Refer to the subheading "Unit Clarification" in this chapter for a discussion of the role of arbitration awards and ULP cases on unit issues; refer also to the section of Chapter 9 on "Bifurcated Cases; Issues of Jurisdiction or Arbitrability; Plausible Jurisdiction Defect; Unit Issues."] In this chapter we first treat unit questions; the second portion of the chapter discusses election procedures and other matters affecting established units.

We note the distinction between a bargaining unit and a union. A union is an organization with a leadership and membership devoted to enhancement of working conditions. The union negotiates with an employer or interacts with the employer on behalf of employees in the federal sector when it is certified to represent a unit of employees or when the law provides consultation rights, subsequently discussed. Because federal sector union membership is voluntary, there will often be more employees in the bargaining unit than employees who are members of the union that represents unit employees. Individuals may be members of the union but not the unit, for example, retired employees or individuals who hold an associate membership in the union to obtain benefits offered through the union, for example, health insurance or other benefit plans.

A. STATUTORY AND REGULATORY CRITERIA

Two essential matters are resolved through unit determinations. First, there must be decided the appropriate unit, i.e., the organizational and geographical boundaries of the unit. Second, there must be decided the positions to be included in and excluded from the unit. All proposed units, whether established through election or consolidation petitions, must meet the same criteria. *SEC and NTEU*, 56 FLRA 312, 315 n.3 (2000).

5 USC 7112, establishes unit determination criteria:

> (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.
>
> (b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—
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> (1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;
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> (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;
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> (5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;
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> (6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or
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> (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.
>
> (d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

The statutory definitions are augmented by 5 USC 7103:

> (a) For the purpose of this chapter—
>
> …
>
> (2) "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;
>
> (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 Communications 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.
>
> (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, the Government Printing Office, and the Smithsonian Institution, 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; or
>
> (G) the Federal Service Impasses Panel.
>
> …
>
> (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;
>
> (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;
>
> …
>
> (13) "confidential employee" means an individual who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;
>
> …
>
> (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.

For the first few years of its existence, until unit issues were delegated to regional directors, the Authority spent much time deliberating on who was in and out of units. Many unit clarification petitions were decided each year to determine the status of a few people whose supervisory or managerial status was disputed. Early on, FLRA wrote some elaborate justifications for its decisions. In time, the decisions became more result oriented than analytical. The parties were identified, the contentions noted, the result announced. Research is probably best performed with a basic understanding of FLRA's case law defining the requisites of the various exempt categories of employees. Then particular types of positions within an agency can be checked for Authority analysis and, lacking clear precedent, positions can be located in the

same agencies having had prior summary adjudications. If that does not work, decisions can be searched for cases involving other agencies with comparable positions.

1. Actual Duties Control

To determine whether employees are in or out of a unit under the statutory criteria, the Authority examines their duties. *Dept. of Labor, Office of the Solicitor, Arlington Field Office and AFGE Local 12*, 37 FLRA 1371, 1377 (1990), summarized how to assess employees' duties for unit determinations:

> We base 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.… 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….

See Dept. of Air Force, Aberdeen Proving Ground and IAM Dist. Lodge 12, 57 FLRA 154, 157 (2001) (actual duties at time of hearing, rather than testimony as to what duties were or would be performed by employee occupying certain position, control unit eligibility determinations).

In making determinations of exemption status, the Authority looks to actual duties rather than position titles or classifications. *See VAMC, Prescott and AFGE Local 2401*, 29 FLRA 1313, 1315 (1987) (restating the analytical focus on testimony and evidence concerning current duties). "OPM's position-classification decisions do not determine bargaining-unit eligibility under the Statute," *Dept. of Air Force, Air Force Materiel Command and IAF*, 67 FLRA 117, 119 (2013) (citing *DHS, C&BP and AFGE,* 61 FLRA 485 (2006): no error in RD's refusal to consider or defer to OPM classification guidelines to determine whether agriculture specialists were "professional employees," within the meaning of § 7103(a)(15)).

The Authority's reliance on current, rather than projected, job responsibilities was reaffirmed in *Army Plant Representative Office, Mesa, Ariz. and AFGE Local 3973*, 35 FLRA 181, 186 (1990), denying a petition for unit clarification sought on the basis of a clerical employee's duties during future contract negotiations. *See Dept. of Interior, Bureau of Reclamation, Yuma and NFFE Local 1487*, 37 FLRA 239, 241 (1990) (considering detailed description of employees' present, rather than potential future, work activities). The Authority will likely decline to examine posthearing developments in an employee's duties, particularly if the agency statements "only show increased activity" by the employee rather than "activity of a different nature than that shown by the record." *DHUD and AFGE Local 476*, 35 FLRA 1249, 1257 (1990).

FLRA shows some flexibility when positions subject to unit determinations are subject to imminent change, *USDA, FSIS and Nat'l Joint Council of Food Inspection Locals*, 61 FLRA 397, 400 (2005):

> The Authority repeatedly has held that it bases unit determinations on duties actually assigned to employees at the time of a representation hearing, rather than on plans to assign the duties in the future. *See United States Dep't of the Air Force, 82nd Training Wing, 361st Training Squadron, Aberdeen Proving Ground, Md.*, 57 FLRA 154, 157 (2001) (*Aberdeen Proving Ground*); *United States Army Plant Representative Office, Mesa, Ariz.*, 35 FLRA 181, 186 (1990); *VAMC Prescott*, 29 FLRA at 1315; *United States Army Eng'r Topographic Labs., Fort Belvoir, Va.*, 10 FLRA 125, 127 n.3 (1982). Nevertheless, in *Yuma*, the Authority also held that, for an employee newly assigned to a position, duties that have not yet actually been assigned to the employee will be considered assigned duties where: (1) it has been demonstrated that, apart from a position description, the employee has been informed that he or she will be performing the duties; (2) the nature of the job clearly requires the duties; and (3) the employee is not performing the duties at the time of the hearing solely because of lack of experience on the job. *See Yuma,* 37 FLRA at 245. By contrast, the Authority will not consider the duties to have been actually assigned to a new incumbent where: (1) the assignment of duties is speculative because the nature of the job may change or the nature of the job does not require such duties; or (2) although the duties may be included in a written position description, it is not clear that the duties will actually be assigned to the employee or that the employee has been informed that he or she will perform the duties. *See id.*
>
> Subsequent to *Yuma*, the Authority stated that unit determinations must reflect the conditions of employment at the time of the hearing, "unless there are definite and imminent changes planned by the agency." *Def. Logistics Agency, Def. Contract Mgmt. Command, Def. Contract Mgmt. Dist., N. Cent. Def. Plant Representative Office-Thiokol, Brigham City, Utah*, 41 FLRA 316, 327 (1991) (*DLA*). In *DLA*, the Authority declined to consider future changes because it was not clear "whether or when those changes would take place." *Id.* at 328. *Accord United States Dep't of the Navy, Fleet & Indus. Supply Ctr., Norfolk, Va.*, 52 FLRA 950, 968 (1997) (citing *DLA* and "noting particularly that there is no evidence to establish that any other reorganizations are imminent[ ]").

a. Newly Encumbered Positions

As to the evaluation of employees who recently encumber positions, *Dept. of Interior, Bureau of Reclamation, Yuma and NFFE Local 1487*, 37 FLRA 239, 245 (1990):

> In this and future cases involving a determination as to the bargaining unit status of an employee who has recently encumbered a position, we will consider 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. On the other hand, we will consider duties not yet performed by a new incumbent not to have been actually assigned where: (1) the assignment of duties is speculative because the nature of the job may change or the nature of the job does not require such duties; or (2) although duties may be included in a written position description, it is not clear that the duties actually will be assigned to an employee or that an employee has been informed that he or she will perform those duties.

We now turn to decisions defining the scope of positions found appropriate or inappropriate for unit inclusion. [Refer to the discussion below in this chapter on "New or Newly Acquired Employees."]

B. STATUTORILY EXCLUDED POSITIONS

Under 5 USC 7112:

> (b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit 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.

5 USC 7112(b) establishes the bases for excluding employees from units. Nothing in 5 USC 7112(b) suggests or requires that the Authority consider or apply the appropriate unit criteria under 5 USC 7112(a) in determining solely whether employees satisfy the statutory exclusions under § 7112(b). *AFGE Local 3529 and DOD, DCAA*, 57 FLRA 633, 637 (2001). Under 5 USC 7112(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.

1. Managers; 5 USC 7112(b)(1)

Management officials are defined by § 7103(a)(11):

> …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.

Section 7112(b)(1) provides that a unit will not be appropriate for labor organization representation if it includes a managerial employee. A management official is not defined as an employee and is outside of an appropriate unit. *IRS, Seattle Dist. and NTEU*, 12 FLRA 324, 337 (1983) (ALJ Decision).

The Authority interprets 5 USC 7103(a)(11) to include as managers "those 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." *Navy Automatic Data Processing Selection Office and AFGE Local 1*, 7 FLRA 172, 177 (1981) (*Navy ADP*"). A factor to be considered in determining whether an individual is a manager is whether that person's work is subject to higher level review or approval. *USDA, Food and Nutrition Serv. and NTEU*, 34 FLRA 143, 147 (1990).

The distinctions between those who are and those who are not managers can be indistinct. An individual was not a manager under *Navy ADP* because he was a professional whose actions assisted in implementing rather than in shaping the Activity's policies. *See Eglin AFB and NFFE Local 1940*, 10 FLRA 402, 404 (1982). The performance of duties as an expert or professional rendering resource information or recommendations as to policies does not justify classification as a management official; there must be a finding that the duties and responsibilities involved extend to the point of active participation in the ultimate determination of policy. *Naval Material Command and NFFE*, 12 FLRA 122, 131 (1983) (ALJ Decision). [Refer to the discussion later in this chapter, heading "Confidential Employees; 5 USC 7112(b)(2)," and subheading "Schedule C Appointees," concerned with the unit exclusion of confidential employees.]

During the period that a government-wide "Merit Pay" system was in effect, questions arose whether inclusion of individuals in that pay system established them as managers. Under *Interpretation and Guidance*, 4 FLRA 754, 756–57 (1980), it was not the role of FLRA to determine if an individual was a supervisor or manager for merit pay purposes, and designation of a unit employee as a merit pay employee was not improper; but an agency acted at its peril by removing an employee from an established unit because the individual was placed within the merit pay system. *See Naval Material Command and NFFE*, 12 FLRA 122, 122–23 (1983) (ALJ Decision). Restraint by the agency of union activities of a merit pay employee improperly classified as a supervisor was an unfair labor practice under *Navy Material Command*.

Managers are not entirely devoid of representational or organizational rights. 5 CFR Part 251 (2017) provides a structure for "Agency Relationships with Organizations Representing Federal Employees and Other Organizations." 5 CFR 251.103 (2017), defines the regulatory coverage:

> (a) *Organization representing Federal employees and other organizations* means an organization other than a labor organization that can provide information, views, and services which will contribute to improved agency operations, personnel management, and employee effectiveness. Such an organization may be an association of Federal management officials and/or supervisors, a group representing minorities, women or persons with disabilities in connection with the agencies' EEO programs and action plans, a professional association, a civic or consumer group, and organization concerned with special social interests, and the like.
>
> (b) *Association of management officials and/or supervisors* means an association comprised primarily of Federal management officials and/or supervisors, which is not eligible for recognition under Chapter 71 of title 5 of the U.S. Code or comparable provisions of other laws, and which is not affiliated with a labor organization or federation of labor organizations.
>
> (c) *Labor organization* means an organization as defined in 5 U.S.C. 7103(a)(4), which is in compliance with 5 U.S.C. 7120, or as defined in comparable provisions of other laws.

5 CFR 251.201 (2017) describes the consultative relation between agencies and associations of managers and supervisors:

> *Associations of management officials and/or supervisors*.
>
> (a) As part of agency management, supervisors and managers should be included in the decision-making process and notified of executive-level decisions on a timely basis. Each agency must establish and maintain a system for intra-management communication and consultation with its supervisors and managers. Agencies must also establish consultative relationships with associations whose membership is primarily composed of Federal supervisory and/or managerial personnel, provided that such associations are not affiliated with any labor organization and that they have sufficient agency membership to assure a worthwhile dialogue with executive management. Consultative relationships with other non-labor organizations representing Federal employees are discretionary.
>
> (b) Consultations should have as their objectives the improvement of managerial effectiveness and the working conditions of supervisors and managers, as well as the identification and resolution of problems affecting agency operations and employees, including supervisors and managers.
>
> (c) The system of communication and consultation should be designed so that individual supervisors and managers are able to participate if they are not affiliated with an association of management officials and/or supervisors. At the same time, the voluntary joining together of supervisory and management personnel in groups of associations shall not be precluded or discouraged.

See OPM Memorandum for Heads of Executive Departments and Agencies. "Relationships with Management Organizations" (July 20, 2011).

a. Technical and Research Directors

A GS-15 Electronics Engineer, serving as the technical director for the activity and a member of the activity "command group" responsible for the oversight of civilian personnel career planning, was a management official. He influenced the policies of the activity. His role extended beyond that of an expert or professional rendering information or recommendations to the active participation in policy determination. He was a chief advisor on technical and civilian matters. *Army Communications Sys. Agency, Ft. Monmouth, N.J. and NFFE Local 476*, 4 FLRA 627, 628–29 (1980).

A GS-14 assistant to a research director was a manager. He shared responsibility for, and participated in, all technical and administrative functions, as well as in management of all facility activities. He made independent decisions within broad agency guidelines. His actions were reviewed by the research director solely to check for consistency with established programs. He planned research projects, monitored projects by evaluating reports and meeting with supervisors, and served as a technical advisor. His recommendations and findings were accepted as authoritative, and they were frequently implemented; his judgments directly influenced formulation and development of programs and policies. He had authority to act for the research director to commit funds and facilities. He brought about and obtained results as to adoption of plans or courses of action for the Bureau. His functions went beyond the role of an expert or professional rendering information as to policies and extended to effective participation in ultimate determination of agency policy concerning administrative and technical programs. *Dept. of Interior, Bureau of Mines, Twin Cities Research Ctr. and AFGE Local 2249*, 9 FLRA 109, 112–13 (1982). Under *AFGE Local 2249*, a GS-14 Staff Engineer was a manager. He surveyed technology developed at the installation and exercised independent judgment and discretion in planning, budgeting, scheduling, and implementing research and development programs. He directed the work of others to ensure that programs were completed in accordance with program objectives. His recommendations carried considerable weight and were generally implemented. As a result of his recommendations, policy decisions were made having an effect on working conditions of agency employees.

b. Expert Advisors

Under *Dept. of Interior, Fish and Wildlife Serv., Patuxent Wildlife Research Ctr. and AFGE*, 7 FLRA 643, 648–49 (1982), employees who served as experts or professionals rendering resource information concerning agency policies, specifically, national hunting regulations, were not managers. They did not make independent decisions on what agency policy would be or what recommendations would be made to the agency regulations committee. Those recommendations were formed through discussions between the employees and their supervisors. A GS-14 Operations Research Analyst, the activity cost analysis expert, made recommendations based on expertise in cost analysis. As an expert or professional rendering resource information or recommendations, he was in the unit. *Army Communications Sys. Agency, Ft. Monmouth, N.J. and NFFE Local 476*, 4 FLRA 627, 629 (1980). A GS-13 Data Management Officer, the activity expert on data acquisition, was a professional rendering resource information or recommendations working within broad policies and directives set at higher levels. Because he was not involved in determining policy, he was a unit member, not a manager. The same was true of a GS-13 Procurement Analyst, GS-13 Communications Specialist, and GS-12 Public Information Officer: they were subject matter experts who did not fashion policy. Employees who developed and implemented communication systems by developing manuals and procedures for operation, maintenance, and repair of systems, who developed criteria for contract work, defined the direction and mode of future development of telecommunications systems, and worked with minimal supervision, making technical recommendations generally accepted by the command, were skilled experts or professionals, but not managers with the responsibility for formulation, determination, and influence of agency policies. Those individuals held positions as GS-13 to GS-15 Electronic Engineers, Communications Specialists, Electrical Engineers, Industrial Engineers, Mechanical Engineers, and Computer Scientists. *Defense Communications Eng'g Ctr., Reston and AFGE Local 2*, 8 FLRA 702, 705 (1982).

A safety officer was not a manager. He inspected shops and work areas to ensure that no unsafe conditions existed and, if they did, to ensure their correction. He could suggest to the executive officer changes or improvements in safety procedures, but he had no unilateral authority to implement them. He did not formulate, determine, or influence activity policies. *Dept. of Navy, U.S. Naval Station, Panama and AFSCME Local 907*, 7 FLRA 489, 494 (1981).

c. Auditors

A GS-13 Auditor was a manager. He was responsible for the internal and regulatory review of financial management, procurement, logistical, and other management responsibilities. He reviewed internal procedures, made

recommendations for policy changes, and was responsible for IG audits and for determining the need for internal audits at the activity. A GS-12 Auditor, who made recommendations for policy changes, but who was not involved in policy determinations, was not a management official. *Army Communications Sys. Agency, Ft. Monmouth, N.J. and NFFE Local 476*, 4 FLRA 627, 631, 636 (1980). Examiners who used software and an examination guide to evaluate compliance of credit unions with statutory and regulatory requirements were experts or professionals, but they were not managers charged with setting or influencing agency policies. *NCUA and NTEU*, 59 FLRA 858, 861–62 (2004).

d. Program Analysts and Program Managers

An individual responsible for agency ADP facilities and equipment was a manager. He set standards and policies for the activity concerning the installation and removal of equipment and all the support devices it took to run the equipment, he could shut down the computer centers of the activity if he felt the situation warranted, and he could spend agency funds if an emergency arose that threatened the ADP equipment. An ADP security specialist was a manager. He developed security policy for an activity computer center and he could shut down the facility in the event of a security violation. Those employees had the authority to formulate, determine, or influence the policies of the activity. *EPA, Research Triangle Park and AFGE*, 12 FLRA 358, 359 (1983). But another ADP security specialist was not a manager. He was a highly skilled employee, but he did not formulate policy. *USDA, Food and Nutrition Serv. and NTEU*, 34 FLRA 143, 147 (1990). GS-334–13 and GS-334–14 Computer Analysts and Specialists were not managers. They assisted in technical aspects of procurement and preparation of reports concerning various equipment or services to be considered for purchase, but they apparently did not make recommendations for purchases. The assistance they provided in the implementation of policy established in connection with procurements did not remove them from the bargaining unit. *Navy Automatic Data Processing Selection Office and AFGE Local 1*, 7 FLRA 172, 180–81 (1981).

Management included a GS-13 Geologist who developed a national policy for management of geological resources throughout the Forest Service and who developed regional policy concerning paleontology and geology programs. A GS-13 Wildlife Biologist was a manager. He developed national and regional policy concerning endangered species. Management included a GS-13 Forester who developed regional policy for forest products utilization and who represented the activity on a regional council with signatory authority to bind the agency and its resources. *USDA, Forest Serv. and NFFE Local 60*, 13 FLRA 84, 85 (1983). An individual was a manager who, as an expert on flight safety, established agency policy concerning minimum weather criteria for aircraft operation, instituted changes in flying procedures to cope with problems resulting from the air traffic controllers' strike, and made changes in the Air Force Occupational Safety and Health Standard on bulk storage, affecting Air Force installations worldwide. *Adjutant Gen. of N.H., State Military Reservation and Granite State Chap., ACT*, 13 FLRA 88, 90 (1983); *see 934th Tactical Airlift Group and AFGE Local 1997*, 13 FLRA 549, 550 (1983) (flight instructors/navigators as managers of flight safety programs).

Not managers were individuals responsible for recommending new regulations, implementing existing regulations, reviewing legislative proposals, and analyzing economic data concerning activities within the agency mission, although they assisted in developing and implementing agency policy. *Dept. of Transp., Office of the Sec'y and AFGE Local 3313*, 12 FLRA 103, 104 (1983). A GS-14 Program Analyst was not a manager: he studied and proposed research and development plans and worked with others to implement those plans; he was an expert or professional whose actions assisted in implementing, rather than shaping, agency policy in research, development, and cost effectiveness. *Coast Guard Hq. and AFGE Local 3313*, 7 FLRA 743, 745 (1982). GS-13 Program Analysts responsible for a portion of the overall program planning and financial management were not managers. They were experts rendering resource information and recommendations concerning planning release of appropriated funds; they did not determine policy. A GS-13 Financial Management Officer, responsible for coordination of budget obligations and avoidance of over-obligation, was not a manager. His job was to coordinate and troubleshoot budget operations. He did not set policy. *Army Communications Sys. Agency, Ft. Monmouth, N.J. and NFFE Local 476*, 4 FLRA 627, 631–32 (1980).

The positions of principal investigators and major project engineers, GS-12 to GS-14, were reviewed in *Navy Civil Eng'g Lab., Ft. Hueneme and FUSE, Local R12-196, NAGE*, 8 FLRA 707, 707-08 (1982), and determined not to be managerial:

> The Principal Investigators or major project engineers and scientists are highly qualified professionals, some of whom enjoy national or international reputations in their fields of expertise and contribute to scholarly journals and tribunals. An idea for a major project may originate with one or more of the major project engineers or scientists, who would attempt to sell it to a sponsor or to the Activity, or both. Nevertheless, the decision to fund a project and the determination as to the level of funding are decisions made by potential sponsors based in large part upon considerations outside the control or knowledge of the major project engineers or scientists. Similarly, the decision to accept a project must be made by the Activity's supervisory hierarchy on the basis of available resources and material.… The Principal Investigator influences decisions concerning the initial approach to be taken on a project, changes in that approach, decisions to terminate, and decisions to continue despite seeming failure. However, such decisions are subject to review by higher authority and are not uniformly sustained. Finally, although the Principal Investigators or major project engineers and scientists have extensive contacts outside the Activity, they are expected to report such contacts, to operate within Activity guidelines, and to procure advance approval before discussing any project or decision of a major nature.

An GS-9 Administrative Officer of the Day at a VA hospital was not a manager. The position involved admission and treatment of patients. The incumbent's discretion, limited by VA policies, did not encompass policy formation. *VA and AFGE*, 60 FLRA 749 (2005).

e. Contract Negotiators and Specialists

GS-1102–13 Contract Negotiator/Specialists, who worked with Source Selection Evaluation Boards to process requests to procure computers or computer services, were responsible for negotiating various clearances leading to a contract award. The negotiator/specialists also administered contracts awarded. They had limited authority to commit the agency to transactions. They were not managers. *Navy Automatic Data Processing Selection Office and AFGE Local 1*, 7 FLRA 172, 178–80 (1981). *Compare DLA, Defense Contract Mgmt. Command and AFGE Local 2265*, 48 FLRA 285, 289 (1993) ("[I]n this case, the responsibilities of the CACOs and DACOs do not require them to formulate, determine, or influence the policies of the Activity"), *with Hq., Space Div., Air Force Sys. Command and AFGE Local 2429*, 9 FLRA 885, 888 (1982) (contract negotiator and contract administrator were management officials; they had "complete responsibility for negotiating the Aerospace Corporation contract, and had final signatory authority to bind the activity and its resources").

f. Engineers

A GS-13 Electronics Engineer was a management official: he was responsible for planning, budgeting, and scheduling long range research and development programs. His role extended beyond that of an expert or professional providing resource information. He effectively participated in the ultimate determination of agency policy in his area of technology. He was responsible for the conception and implementation of new concepts in airborne and satellite remote sensing systems, and he was responsible for the agency's development of technology. *Coast Guard Hq. and AFGE Local 3313*, 7 FLRA 743, 744–45 (1982). Under *NFFE Local 476*, *supra*, 4 FLRA 627, 632–35 (1980), positions including GS-13 Electronics Engineer, Communications Management Specialist, General Engineer, and Traffic Manager were not managers. They provided expert guidance but did not set policy; some of those individuals were responsible for project management and made decisions concerning a project, but their decisions were limited in scope and did not involve participation in determination of policy. Others were responsible for making recommendations as to technical matters and management applications involving programs, but they were not involved in policy determination. They were quality assurance and acquisition experts. Those involved in the planning, programming, organizing, direction, and execution of various programs were not involved in determination of agency mission or assignment of overall agency tasks; they were not involved in agency management.

g. Lawyers

The Authority provided guidance concerning whether high-level government lawyers are managers in *Dept. of Energy Hq., Washington, D.C. and NTEU*, 40 FLRA 264, 264, 269–73 (1991). Some were managers; some were not:

> With regard…to the attorneys outside the Finance Section, the record indicates that some or all of these employees are engaged in the following activities: providing legal advice on energy-related matters; participating in litigation on behalf of the Agency; serving on various committees and panels; drafting regulations and other documents; and negotiating interagency and settlement agreements and Agency contracts relating to patents and copyrights.
>
> …
>
> In our view, the record establishes that the attorneys do not function as management officials. Instead, they serve as highly trained experts who provide legal advice and assistance within their areas of knowledge and who represent the Agency in various capacities.
>
> For example, the attorneys render legal advice to the Agency officials who promulgate policy and engage in litigation activities on behalf of the Agency. In this manner, the attorneys are involved in providing expertise and implementing, rather than shaping, the Agency's policies. *See U.S. Department of Mass Housing and Urban Development, Boston Regional Office, Region I, Boston, Massachusetts,* 16 FLRA 38, 39 (1984) (employees classified as GM-Attorney Advisors (General) are highly trained and experienced professionals who handle litigation on behalf of the agency, provide legal expertise and interpret agency policies and are not management officials); *Merit System Protection Board*, 12 FLRA 137, 140 (1983) (employees classified as Attorney-Examiners, General