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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> …
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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).

AFGE v. Trump, 318 F. Supp.3d 370 (D.D.C. 2018) [https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv1261-58], enjoining portions of an executive order modifying some components of the federal sector labor relations program, traced evolution of the program:

> II. *BACKGROUND*
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> A. *An Historical Overview Of The Management Of Federal Public Employees*
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> The history of federal public employment in the United States evidences two competing visions of the proper relationship between the President and the individuals who are employed to work for the federal government within the Executive Branch. *See The Civil Service and the Statutory Law of Public Employment*, 97 Harv. L. Rev. 1619, 1619 (1984). The first of these visions emphasizes "broad deference to the executive in matters of public employment[,]" and is based on the belief that such deference "is essential both to efficient public administration and [to] the realization of the popular will." *Id*. According to this view, the President must have free reign to discharge federal employees, and to regulate labor relations between the government and its employees, because such authority is necessary to run a capable and efficient Federal Government. *See id*. at 1620. This belief also maintains that such power is necessary to ensure that the President can promote the will of the people by installing federal bureaucrats who actually seek to achieve the political platform that undergirds the President's election. *See id*.
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> The second vision of public employment worries that unfettered "executive discretion" to hire and fire civil servants can damage "the integrity of public administration in general," especially if an unchecked administration arbitrarily discharges career employees who hold contrary political views or who seek to blow the whistle on abusive employment practices within the Executive Branch. *Id*. This second vision of public employment also often asserts that a public employee has acquired a "property interest of sorts in his office[,]" *id*., and expresses concerns not only about the impact that an abrupt dismissal might have on the administration of the federal government as a whole, but also on that employee's future employment prospects, *see id*. at 1621. Based on such concerns, the second vision of the civil service system "fosters the view that the public executive ought to be extensively constrained in employment decisions" regarding apolitical civil service employees. *Id*. at 1619; *see also, e.g., Harrison v. Bowen*, 815 F.2d 1505, 1518 (D.C. Cir. 1987) (discussing how certain statutes constrain executive discretion to remove employees).
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> As relevant here, these two different visions of the role of the President in managing the civil service have proven ascendant at different moments in American history, including during periods that preceded the statute at issue in this case. Indeed, because "[i]nitially, presidents

had broad powers to fill the civil service with their [own] appointees[,]" Jacob Marisam, *The President's Agency Selection Powers*, 65 Admin. L. Rev. 821, 863 (2013), throughout the nineteenth century, newly inaugurated presidents would regularly purge the ranks of the civil service, *see id*.; *see also U.S. Civil Serv. Comm'r v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 557–58 (1973) (describing these practices). The exercise of presidential power to manage the federal workforce in this way waned significantly in the mid-twentieth century, as both President John F. Kennedy and President Richard M. Nixon expressly curtailed the purging practice by issuing executive orders that afforded significant procedural protections to civil servants. *See, e.g*., Exec. Order No. 11,491, 34 Fed. Reg. 17605 (October 29, 1969); Exec. Order No. 10,988, 27 Fed. Reg. 551 (January 17, 1962). The Kennedy and Nixon orders also authorized the creation of labor unions representing federal government employees, and expressly granted federal employees "limited collective bargaining rights[,]" thus "provid[ing] the initial authorization for federal experimentation with unionization." *See* Scott L. Novak, *Collective Bargaining*, 63 Geo. Wash. L. Rev. 693, 695–96 (1995); *see also Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth*., 464 U.S. 89, 91–92 (1983) ("*BATF*").

With the 1970s, the view that slothful federal employees enjoyed too much protection against discharge became increasingly popular, amidst mounting concern over government integrity in the wake of the Watergate scandal. It was against this backdrop that Congress enacted the Civil Service Reform Act of 1978 ("the CSRA"), Pub L. No. 95-454, 92 Stat. 1111 (1978), which was codified (as amended) in scattered sections of Title 5 of the United States Code. This legislation was expressly billed as an effort to codify the previous assortment of executive orders and rules that regulated the relationships between the federal government and its civil service employees. *See The Civil Service and the Statutory Law of Public Employment*, 97 Harv. L. Rev. at 1631–33. And the CSRA "comprehensively overhauled the civil service system," *Lindahl v. Office of Pers. Mgmt*., 470 U.S. 768, 773 (1985), by replacing the "outdated patchwork of statutes and rules built up" during the previous hundred years through executive orders and federal statutes, *United States v. Fausto*, 484 U.S. 439, 444 (1988) (quoting S. Rep. No. 95-969, p.3 (1978)), with "an elaborate new framework for evaluating adverse personnel actions against federal employees[,]" *id*. at 443 (internal quotation marks, citation, and alternation omitted).

Significantly for present purposes, Congress crafted the CSRA with the express goal of "balanc[ing] the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id*. at 445. To that end, "[t]he CSRA protects covered federal employees against a broad range of personnel practices, and it supplies a variety of causes of action and remedies to employees when their rights under the statute are violated." *Grosdidier v. Chairman, Broad. Bd. of Governors*, 560 F.3d 495, 497 (D.C. Cir. 2009). At the same time, the CSRA also streamlined the lengthy and laborious appeals processes that pre-dated the CSRA, making it easier for employers to take successful disciplinary or performance-based actions against federal employees. *See Fausto*, 484 U.S. at 445.

The aforementioned FSLMRS, which addresses collective bargaining and labor unions exclusively, is Title VII of the CSRA, and is "the first statutory scheme governing labor relations between federal agencies and their employees." *BATF*, 464 U.S. at 91.

B. *The Statutory Provisions That Are Relevant To The Instant Dispute*

The arguments presented in the parties' cross-motions for summary judgment in this case chiefly revolve around several provisions of the FSLMRS, *see* 5 U.S.C. §§ 7101–06, 7111–23, 7131–35, as well as a few miscellaneous provisions that appear either in the CSRA or elsewhere in the United States Code, *see, e.g., id*. §§ 4302, 7301.

1. *The Purpose, Structure, And Provisions Of The FSLRMS*

The very first section of the FSLMRS lays out the purposes of the statute and the legislative findings that underlie it. Congress makes crystal clear that, in its considered judgment, labor unions and collective bargaining "safeguard[ ] the public interest"; "contribute[ ] to the effective conduct of public business"; and "facilitate and encourage the amicable settlement[ ] of disputes between employees and their employers involving conditions of employment[.]" 5 U.S.C. § 7101(a)(1). This statutory text also emphasizes the importance of adhering to "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." *Id*. § 7101(a)(2). Broadly speaking, the FSLMRS sets out to accomplish these goals by, among other things: affirming the rights of federal employees to unionize and to engage in collective bargaining, *see id.* §§ 7102, 7103(a)(12); determining what matters must, can, or cannot be bargained over, *see id*. §§ 7102, 7106, 7117, 7121, 7131; and developing a dispute-resolution mechanism for the various foreseeable issues that might arise during the collective bargaining process or as part of a final collective bargaining agreement, *see id*. §§ 7104–05, 7116, 7118–19, 7121–22, 7132.

First and foremost, the FSLMRS firmly establishes the rights of federal employees to join labor unions for the purpose of petitioning government officials about labor matters, *see id*. §§ 7102, 7102(1), and describes labor unions as entities that represent federal employees by "engag[ing] in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter[,]" *id*. § 7102(2). The terms "collective bargaining" and "conditions of employment" are terms of art within the FSLMRS, which means they have particular meanings that bear on this case. "Collective bargaining" is defined as "the performance of the mutual obligation of…an agency and the [union]…to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees." *Id*. § 7103(a)(12). The "conditions of employment" that are subject to negotiation under the statute include "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions[.]" *Id*. § 7103(a)(14). Furthermore, when bargaining over such matters, both agencies and union representatives must abide by their obligation to "meet and negotiate in good faith[,]" *id*. § 7114(a)(4), and this means that the parties to the negotiation must generally "enter into discussions with an open mind and a sincere intention to reach an agreement[,]" *United Steelworkers of Am., AFL-CIO-CLC, Local Union 14534 v. Nat'l Labor Relations Bd*., 983 F.2d 240, 245 (D.C. Cir. 1993) (quoting *Sign and Pictorial Union Local 1175 v. Nat'l Labor Relations Bd*., 419 F.2d 726, 731 (D.C. Cir. 1969)).

After establishing that the right to good-faith collective bargaining exists, the statute lays out what matters are subject to negotiation and the extent to which those matters must be discussed. In this regard, the FSLMRS establishes a three-tier system based upon the negotiability of matters in collective bargaining discussions. First, the FSLMRS establishes a default presumption that it is "mandatory" for agencies and unions to bargain over the "condition[s] of employment" in the workplace. *U.S. Dep't of the Navy, Naval Aviation Depot, Cherry Point, N.C. v. Fed. Labor Relations Auth*., 952 F.2d 1434, 1439 (D.C. Cir. 1992); *accord* 5 U.S.C. §§ 7102(2), 7103(a)(12), (14). Moreover, while the phrase "conditions of employment" is broad, the FSLMRS further explicitly emphasizes at least two mandatory bargaining matters: the scope of grievance procedures for disputes between employees and management, *see* 5 U.S.C. § 7121(a), and the availability of "official time[,]" *id*. § 7131(d)—i.e., the availability of paid time to union members to work on union-related matters, *see BATF*, 464 U.S. at 91. Second, the FSLMRS explicitly designates a narrow category of matters (listed in section 7106(b)(1)) as 'permissive' matters for bargaining, in the sense that the parties may bargain over the matters contained within this section "at the election of the agency[.]" 5 U.S.C. § 7106(b)(1); *see id*. (allowing, "at the election of the agency," negotiation as to the "numbers, types, and grades of employees or positions assigned to" any project, or "the technology, methods, and means or performing work"); *see also Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth*., 414 F.3d 50, 53 (D.C. Cir. 2005) (acknowledging that these matters constitute "permissive" subjects of bargaining).

Third and finally, the FSLMRS *prohibits* negotiation over matters relating to management rights or those matters subject to Government-wide rules or regulations. Accordingly, none of the bargaining rights the FSLMRS confers may interfere with the rights of federal agencies "to determine the mission, budget, organization, number of employees, and internal security practices of the agency" or "to hire, assign, direct, layoff, and retain employees…or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees" as allowed by law. 5 U.S.C. § 7106(a). The statute also frees federal agencies of any obligation to negotiate over those "matters which are the subject of any…Government-wide rule or regulation[.]" *Id*. § 7117(a)(1). This means that the right to collective bargaining does not extend to rules or regulations that are "generally applicable throughout the Federal Government[,]" even if the rule does not "apply[ ] to…a fixed minimum percentage of the federal civilian workforce." *Overseas Educ. Ass'n, Inc. v. Fed. Labor Relations Auth*., 827 F.2d 814, 816–17 (D.C Cir. 1987) (internal quotation marks and citation omitted); *see also Am. Fed'n of Gov't Emps., Local 2782 v. Fed. Labor Relations Auth*., 803 F.2d 737, 741 (D.C. Cir. 1986).

As mentioned, the FSLMRS also recognizes that a number of disputes may arise in the context of collective bargaining negotiations or during the execution of a collective bargaining agreement. Thus, the statute prohibits labor unions or federal agencies from engaging in "unfair labor practices[,]" such as interfering with the ability of employees or agencies to pursue their rights under the FSLMRS, or refusing to negotiate in good faith. 5 U.S.C. § 7116(a)(1), (a)(5), 7116(b)(1), (b)(5). It also provides mechanisms for agencies and labor unions to resolve any impasse during negotiations, *id*. § 7119, and to determine whether a union's proposal is actually negotiable under the FSLMRS, *id*. § 7117(c).

2. *The Federal Labor Relations Authority*

The various relevant provisions of the FSLMRS discussed above cover a lot of substantive ground regarding the scope of federal labor-management relations. But there's more: to ensure that these statutory prescriptions are

administered effectively, Congress also created a permanent agency that it named the Federal Labor Relations Authority ("FLRA"). *See id*. § 7104(a). The FLRA has three members who are appointed by the President with the advice and consent of the Senate. *See id*. § 7104(a), (b). No more than two of its three members may come from the same political party, *see id*. § 7104(a), and the members may "be removed by the President only upon notice and hearing and only for" cause, *id*. § 7104(b). Thus, the FLRA is a bipartisan, independent agency. *See Secs. Exch. Comm'n v. Fed. Labor Relations Auth*., 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

Per the FSLMRS, the FLRA must "provide leadership in establishing policies and guidance relating to matters under" the statute, 5 U.S.C. § 7105(a)(1), and the agency is specifically tasked with promulgating regulations pertaining to the FSLMRS, *see id*. § 7134. The FLRA must also carry out a number of other prescribed duties, such as "resolv[ing] issues relating to the duty to bargain in good faith under section 7117(c)[,]" *id*. § 7105(2)(E); "conduct[ing] hearings and resolv[ing] complaints of unfair labor practices[,]" *id*. § 7105(a)(2)(G); and providing, by and large, the final word relating to employee grievances under any grievance procedures established by a collective bargaining agreement, *see id*. § 7122.

When the FLRA is called upon to hear a dispute, it may hold hearings and take testimony, require an agency or labor union "to cease and desist from violations" of the FSLMRS, or otherwise "take any remedial action it considers appropriate to carry out the policies of this chapter." *Id*. § 7105(g). However, the FLRA is not the ultimate authority on such matters; under the statute, "[a]ny person aggrieved by any final order of the [FLRA]" may, with two minor exceptions, "institute an action for judicial review of the [FLRA's] order in" the federal court of appeals where that person resides, or in the D.C. Circuit. *Id*. § 7123(a). The statute further provides that when such an appeal is filed, the court of appeals "shall have jurisdiction of the proceeding and of the question determined therein[,]" and may affirm, modify, or set aside the FLRA's order. *Id*. § 7123(c). Given the FLRA's expertise and the extensive role that Congress envisioned for this agency in administering the FSLMRS, the agency is entitled to *Chevron* deference when interpreting the ambiguous provisions within that statute. *See Fort Stewart Schs. v. Fed. Labor Relations Auth*., 495 U.S. 641, 645 (1990).

2. *Relevant Miscellaneous Provisions Of The United States Code*

Other statutory provisions that are either contained within the CSRA (but outside of the FSLMRS), or appear elsewhere in the United States Code, are relevant to this case. For example, in the CSRA, Congress created an agency known as the Merit Systems Protection Board ("MSPB") that adjudicates employee objections to certain adverse personnel actions. *See* 5 U.S.C. § 7701; 5 C.F.R. § 1201.3 (listing the various types of actions that the MSPB may hear). Among other things, the MSPB is specifically empowered to hear cases regarding the removal or reduction in grade of an employee "for unacceptable performance[,]" 5 U.S.C. § 4303, and cases involving an "adverse action taken against employees…based on misconduct[,]" *Fausto*, 484 U.S. at 446; *see also* 5 U.S.C. § 7513. The MSPB's decisions are typically reviewable in the Federal Circuit. 5 U.S.C. § 7703.

In the category of other sections of the United States Code that specifically address the President's ability to regulate the civil service, section 3301 of Title 5 authorizes the President to "prescribe such regulations for the admission of individuals into the civil service in the [E]xecutive [B]ranch as will best promote the efficiency of that service[,]" *id*. § 3301(1), and the President is also expressly authorized to "ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought[,]" *id*. § 3301(2). Similarly, section 7301 of Title 5 states that "[t]he President may prescribe regulations for the conduct of employees in the [E]xecutive [B]ranch." *Id*. § 7301. The public law version of the CSRA also states: "no provision of [the CSRA] shall be construed to limit, curtail, abolish or terminate any function of, or authority available to, the President which the President had immediately before the effective date of this Act." Civil Service Reform Act of 1978, Pub. L. 95-454, § 904(1), 92 Stat. 1111, 1224 (internal quotation marks omitted).

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). 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), *U.S. Capitol Police v. Office of Compliance*, 908 F.3 776 (Fed. Cir. 2018), *U.S. Capitol Police v. Office of Compliance*, 908 F.3 749 (Fed. Cir. 2018), and *U.S. Capitol Police v. Office of Compliance*, 913 F.3d 1361 (Fed. Cir. 2019). [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 Chapter 2, "Security Exclusions."]

B. FUNCTIONS

Specific powers and duties of FLRA are outlined at 5 USC 7105. Principally, FLRA 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;
>
> 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
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> 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 FLRA both rulemaking and adjudicatory responsibilities. Final orders of FLRA—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 FLRA functions). FLRA 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….
>
> 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 FLRA Chairman. The members are appointed for terms of five years, with provisions for variation of the terms under unusual circumstances described in the Statute. The chairman is the chief executive and administrative officer of FLRA.

In carrying out its functions, § 7105 authorizes FLRA 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. FLRA may obtain advisory opinions from the Office of Personnel Management (OPM) as to interpretation of OPM's rules, regulations, or policy directives. FLRA 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 unsuccessful effort by the union to have MSPB overturn as a "rule" an advisory opinion from OPM to FLRA). If OPM regulations are clear, FLRA may decline the union's invitation to solicit an advisory opinion from OPM. *See DHS, ICE and AFGE Council 118-ICE*, 70 FLRA 628 (2018) (Member DuBester dissenting). [Refer to FLRA's website, www.flra.gov for information on its members, staff, and organizational structure.]

Under § 7104, FLRA 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 five regional offices of the Authority in: Atlanta (404–331–5300), Chicago (312–886–3465), Denver (303–844–5224), San Francisco (415–356–5000), and Washington, D.C. (202–357–6029).

To fulfill its responsibilities, under § 7105 FLRA 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 FLRA. ULP decisions are reviewed through the filing of exceptions.

An Office of Case Intake and Publications operates as FLRA's "clerk of the court." That organization dockets documents received in the course of litigation before FLRA. If a case is clearly untimely or beyond FLRA'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 FLRA for reconsideration. *See NTEU and DHHS, Region X*, 46 FLRA 814, 816 (1992).

About 128 employees serve the FLRA and its General Counsel and regional offices. The agency operates with a budget of about $26 million, according the agency 2019 Budget Justification. An inspector general keeps business regular, and the Authority's solicitor provides representation of FLRA when it is a party to a court case involving enforcement or defense of an FLRA decision. Administrative law judges adjudicate unfair labor practice complaints.

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) (2018), 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;
>
> (2) A statement of the standards under § 2427.5 upon which the request is based;
>
> (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 (2018) 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.

FLRA 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) (2018). 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).

FLRA has decided several sets of issues through interpretation and guidance, and those decisions are scattered through the text of this *Guide*.

2. Advisory Opinions

FLRA 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 (2018):

> 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.

Portions of the executive order were successfully challenged in district court, enjoining operation of Sections 5(a), 5(e), and 6. *AFGE v. Trump*, 318 F. Supp.3d 370 (D.D.C. 2018). https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv1261-58. That decision is on appeal.

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 published final regulations. 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 preserve merit system principles at 5 USC 2302, 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. 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 resolving 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—
>
> (1) the date of the action; or
>
> (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) (2018) 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.
>
> (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.
>
> (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,
>
> (3) There is a genuine issue over whether the Regional Director has:
>
> (i) Failed to apply established law;
>
> (ii) Committed a prejudicial procedural error; or
>
> (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) (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) (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 FLRA regional director to exclude certain employees from unit as bar to subsequent clarification of 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 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 elsewhere in this chapter, "Unit Clarification," for discussion of role of arbitration awards and ULP cases on unit issues; refer also to Chapter 9, "Bifurcated Cases; Issues of Jurisdiction or Arbitrability; Plausible Jurisdiction Defect."] In this chapter we first treat unit questions; the second portion of the chapter discusses election procedures and other matters affecting established units.