The Statute made explicit the legislative goals:

In the preliminary provisions of the labor relations sections of the Reform Act, disputes over negotiability of bargaining proposals and unfair labor practices.

The Service Reform Act of 1978 (CSRA) created for federal sector labor relations

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

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

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

(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.

... 5 U.S.C. § 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

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.

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).

The Act replaced the management-controlled Federal Labor Relations Council with 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...adjusts negotiability disputes, unfair labor practice complaints, bargaining unit issues, arbitration unit issues, 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).


II. BACKGROUND

A. An Historical Overview Of The Management Of Federal Public Employees

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 1619. This first vision of public employment worries that unfettered discretion by the President to dismiss career employees who hold contrary political views or who seek to blow the whistle on abusive 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, 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).

As relevant here, these two different visions of the role of the President in managing the civil service have proven ascendant at different

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 the United States Code. This legislation was expressed 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 and [a]ppell[e]es to determine the missions and budgets, numbers and types of employees, and overall policies" of government administration. See, e.g., id.; see also 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 alteration omitted).

Significantly for present purposes, Congress crafted the CSRA with the express goal of "balanc[ing] the legitimate interests of 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). This right to "collective bargaining" includes the conditions of employment that are "arbitrarily fixed by the parties to the negotiation," id. § 7103(a)(14), and when they negotiate 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 1453 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 tiered system that establishes 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. Dept. 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) and 7103(a)(12). When the purpose of those "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, which 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 of performing work," id. § 7102(2), which the FSLMRS further defines as "conditions of employment," id. §§ 7102, 7102(1), and references the rights of federal employees to join 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.

The Statutory Provisions That Are Relevant To The Instant Dispute

The arguments presented in the parties' cross-motions for summary judgment are generally revolved 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 FSLMRS

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 applicable settlement[] of disputes between employees and employers[] under the 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). Broad 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.

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 the FLRA member may come from any one 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(g). 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 "resol[ving] issues relating to the duty to bargain in good faith under section 7117(c);[" id. § 7105(2)(E);"conduct[ing] hearings and resol[ving] complaints of unfair labor practices;[" id. § 7105(2)(G); and providing, by and large, the final resolution of grievances through 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. It "may, by a majority vote determined by an oral or written 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 wide range of 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 who committed 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 Executive Branch 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 the President may prescribe regulations for the conduct of employees in the Executive Branch. Id. § 7301. The public law version of the CSRA also states: "no provision of [the CSRA] shall be construed to limit, abridge, or terminate any 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 to discipline employees.… But the Reform Act was also aimed to strengthen the position of employee unions in the federal service.”
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 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 FLRA’s authority over, and subject to, the President’s control over, the Authority. The General Counsel has separate authority to promulgate regulations in furtherance of its 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 Engr’s, Memphis and NFFE Local 259, 52 FLRA 931 (1997) (request for general statement of policy or guidance not required); cf. NTEU v. OPM, 120-135-03 (MSPB OP 2003) (OPM’s interpretation of the CPRA’s nonexclusive remedy provision invalid); NTEU v. OPM, 600 F.3d 1322 (D.C. Cir. 2010) (request for general statement of policy or guidance not required); NTEU v. OPM, 600 F.3d 1322 (D.C. Cir. 2010).]

FLRA grants to itself, but rarely employs, the authority to offer an advisory opinion, called a “General Statement of Policy or Guidance,” 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 authority to grant an advisory opinion may also be exercised by the FLRA. FLRA may also ask FLRA for a statement, provided the request is not in conflict with the provisions of chapter 71 of Title 5 USC or other law. FLRA may solicit comments on requests for statements of policy or guidance. A means for publicizing the request for comments if through the Federal Register.

The request must be in writing and, pursuant to 5 CFR 2427.3(a), 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 (2019) 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.

FLRA will not normally consider a request for a statement of policy or guidance concerning any matter pending before the Authority, the General Counsel, Panel, or Assistant Secretary of Labor for Labor-Management Relations. 5 CFR 2427.2(b) (2019). 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. If 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 secret ballot election 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. Representative 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 docket 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 without 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 115 employees serve the FLRA and its General Counsel and regional offices. The agency operates with a budget of about $26 million, according the agency 2020 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. Request for Policy and Guidance

To fulfill its responsibilities, under § 7105 FLRA is granted the power to conduct investigations and provide for hearings, to determine whether a question concerning representation exists, to direct an election, and to supervise or conduct
CHAPTER 1 GUIDE TO FLRA LAW AND PRACTICE

On December 9, 2009, President Obama issued Executive Order 13522: Dept. of Transp., FAA and PASS new rules become effective, as long as there is no hardship or injustice in a Changes in the procedural rules of the Authority are effective at the time the FLRA may furnish advisory opinions to its General Counsel, the Federal determination resolution; the request presented a unique situation that would not prevent the proliferation of similar cases. Case D-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 D-PS-33, 51 FLRA 409, 412 (1995); FLRA declined an OPM request for guidance on mid-term bargaining obligations. FLRA preferred to provide rulings as circumstances were presented in actual cases and controversies. Case D-PS-36, 71 FLRA 423 (2019). FLRA has decided several sets of issues through statements of policy or guidance, and discussion of those statements is scattered through the text of this Guide.

2. Advisory Opinion

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 (2019):

Notwithstanding the procedures set forth in this subchapter, 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 insight 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.


(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 labor 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-Managemen Relations Act (5 U.S.C. 7101 et seq.); or any other authority permitting employees of such
AGENCIES IN EFFECT ON THE DATE OF THIS ORDER.
(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 judicial review, or any other right, remedy, liability, action,
procedural, or other enforcement of rights under the laws of 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
repealed by President Trump's Executive Order 13812 on September 29, 2017.

A. LABOR RELATIONS GROUP

gov/documents/2018/06/01/2018-11913/developing-efficient-effective-
and-cost--reducing-approaches-to-federal-sector-collective-bargaining,
President Trump directed creation of a “Labor Relations Group” comprising
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
case agency flexibility to address operational needs; reduce the cost of agency
operations, including with respect to the use of taxpayer-funded union
organization; 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) 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 CBA.

Sec. 3. Interagency Labor Relations Working Group.

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

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Group (Labor Relations Group).

(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 judicial review, or any other right, remedy, liability, action,
procedural, or other enforcement of rights under the laws of the United
States, its departments, agencies, or entities, its officers, employees, or
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The activities, successes, or failures of these forums are beyond the scope of
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efficient Government should not take more than a year to renegotiate
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sections 7106(b) 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 CBA.

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 appropriates 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, where appropriate, 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 that has 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 FMCS mediation of 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 shall 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 subsection (d) of this section or the orderly implementation of laws, rules, or policies. 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 subsection (d) 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 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 within 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 bargaining 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 should 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 assistance or 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)(4) 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 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 Accessiblity.

(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 that includes any ground rule in effect as of May 7, 2009, and any other term CBAs and the OPM Director within 30 days of its effective date, and submit new arbitral awards to the OPM Director within 30 days of its effective date.

(b) The OPM Director shall receive the reporting format for the agency each term CBA within 30 days of its effective 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.

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
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.

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.
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 by a labor organization—a union. The union represents a bargaining unit. The union’s recognition as representative is exclusive as to that bargaining unit. In the normal course of events, a union newly formed, or an already-formed union, seeks exclusive recognition status for a bargaining unit that may have already been defined or that is newly defined. Unions may and do compete through elections run by FLRA to represent a bargaining unit. We concern ourselves here with unit definition. Elections come later in time and in our Guide, as do responsibilities of unions for representation and collective bargaining processes.


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 U.S.C. 7105(f) and 5 C.F.R 2422.31, a party may file an application for review with the Authority. Under 5 U.S.C 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;

the action shall become the action of the Authority at the end of such 60-day period.

5 C.F.R. 2422.31(c) (2019) 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 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:

(1) The decision raises an issue for which there is an absence of precedent;
(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 representation proceedings); Int’l Union of Employed Office Workers, 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:

We 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 C.F.R. 2422.17(c) (currently codified at 5 C.F.R 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 as Hearing Officer for review of Authority’s determination of membership for the purpose of determining whether the membership is 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 NFPE 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, Ha, 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
UNIT DETERMINATIONS AND ELECTIONS

CHAPTER 2

A. STATUTORY AND REGULATORY CRITERIA

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

5 USC 7112, establishes unit determination criteria:

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

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

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

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

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

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

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

The statutory definitions are augmented by 5 USC 7103:

(a) For the purpose of this chapter—

(1) "employee" means an individual—

(A) employed in an agency; or

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

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services; or

(iii) a supervisor or a management official;

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

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

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

(A) the General Accounting Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority;

(G) the Federal Service Impasses Panel; or

(H) the United States Secret Service and the United States Secret Service Uniformed Division.

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

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

(13) "confidential employee" means an individual who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(15) "professional employee" means—

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

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

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

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

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

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