The Law of Federal LABOR-MANAGEMENT *Relations*

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

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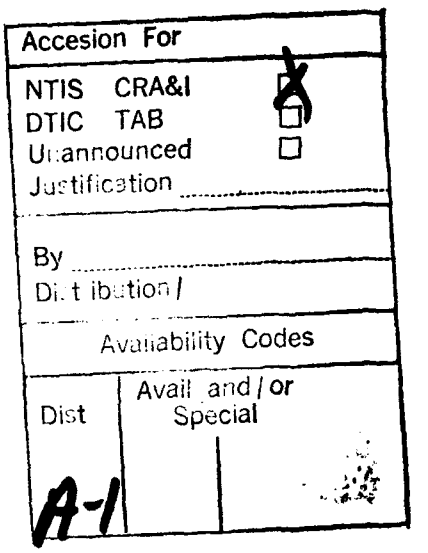

PREFACE

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

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

This casebook does not purport to promulgate Department of the Army policy nor to be in any sense directory. The organization and development of legal materials are the work products of the members of The Judge Advocate General's School faculty and do not necessarily reflect the views of The Judge Advocate General or any governmental agency. The words "he," "him," and "his" when used in this publication represent both the masculine and feminine genders unless otherwise specifically stated.

THE LAW OF FEDERAL LABOR-MANAGEMENT RELATIONS

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CHAPTER 1

INTRODUCTION

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

Federal Service labor-management relations had evolved under Executive Orders since 1962, when President Kennedy issued Executive Order 10988, "Employee-Management Cooperation in the Federal Service." The Order specifically recognized the right of Federal employees to join, or to refrain from joining, employee organizations. Among other provisions, the Order established procedures for the granting of recognition to organizations of Federal employees, defined the scope of consultations and negotiations with the employee organizations, and authorized the use of advisory arbitration of grievances.

In 1969, a review of the program indicated that the policies of Executive Order 10988 had brought about more democratic management of the workforce and better employee-management cooperation; that negotiation and consultation had produced improvements in a number of personnel policies and working conditions; and that union representation of employees in exclusive bargaining units had expanded greatly. However, significant changes in the program were recommended to meet the conditions produced by the increased size and scope of labor-management relations. These recommendations led to the issuance in 1969 of Executive Order 11491, "Labor-Management Relations in the Federal Service," with the private sector as the model.

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

Several other third-party processes were instituted at the same time to assist in the resolution of labor-management disputes. The Assistant Secretary of Labor for Labor-Management Relations was empowered to decide questions principally pertaining to representation cases and unfair labor practice complaints. The Federal Mediation and Conciliation Service was authorized to extend

its mediation assistance services to parties in Federal labor-management negotiations. The Federal Service Impasses Panel was established as an agency within the Council to provide additional assistance when voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, failed to resolve a negotiation impasse. In addition, the Order authorized the use of binding arbitration of employees' grievances and of disputes over the interpretation or application of collective bargaining agreements.

Under Executive Order 11491, the Federal Service labor-management relations continued to expand. By 1977, 58 percent of nonpostal Federal employees were in units of exclusive recognition, and collective bargaining agreements had been negotiated covering 89 percent of those employees. As the program evolved, Executive Order 11491 was reviewed and amendments or clarifications of the Order were made on several occasions. The 1977 Task Force of President Carter's Federal Personnel Management Project identified a variety of problems, particularly relating to structure and organization, which remained unresolved in the Federal Service labor-management relations program established by Executive Order. Recommendations developed by the task force formed a basis for both parts of the President's reform program--a reorganization plan and proposed substantive legislation which became the Civil Service Reform Act of 1978 (CSRA).

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

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

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

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

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

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

Since 1962, many Federal employees have elected to have unions represent them. The Office of Personnel Management has reported that as of January 1991, 60% (1,250,777) of all non-postal Federal employees were represented by labor organizations. Exclusive recognitions covered 93 percent of wage system employees and 53 percent of the general schedule employees. These figures are especially impressive when you consider that many Federal employees, such as supervisors and management officials, are not eligible to be represented by labor organizations.

In the Department of the Army union gains have also been impressive. By January 1991, 205,820 Army civilian employees were represented by unions, maintaining DA's status as the Executive Branch agency with the highest number of employees represented by unions. These figures include non-appropriated fund employees, who may also be represented by an exclusive representative. See chapter 13, AR 215-3.

Recognizing the Army's need for legal advice in labor-management relations, The Judge Advocate General and the Director of Civilian Personnel in July 1974 undertook a program for improving communication and coordination between the legal and personnel staffs at all levels of command. As part of this program, at least one lawyer at each Army installation is designated to provide legal advice on labor relations to the Civilian Personnel Officer (Appendix A). The labor counselor program received added emphasis from The Judge Advocate General in 1982 (Appendix B) and 1985 (Appendix C).

This text is intended primarily to be used in conjunction with classes designed to give DOD lawyers the background they need to serve as labor advisors to Civilian Personnel Offices. However, it also is structured to provide a ready desk reference for lawyers with labor law issues in the field.

To practice Federal sector labor law, a lawyer must have additional reference materials. As a minimum, a lawyer must have the rules and decisions of the various program authorities which

govern labor law in the Federal sector. The Bureau of National Affairs has published these rules and decisions in its Government Employee Relations Report as has the Labor Relations Press in the Federal Labor Relations Reporter. Information Handling Services also publishes and indexes these decisions in a microfiche service. The Government Printing Office publishes all the decisions of the Federal Labor Relations Authority and the Federal Service Impasses Panel. The GPO publications are essential for all labor counselors.

In addition to these reference materials, a lawyer must also refer to private sector labor law, as many aspects of Federal sector labor law are analogous to private sector labor law.

The Office of Personnel Management operates a computerized data retrieval service called Labor Agreement Information Retrieval System (LAIRS). A variety of statistical and textual information is available for a "search" fee, with requests forwarded from local activities through major commands.

For an introductory overview of Federal sector labor-management relations, the student should read Section II, Chapter 8, DA Pam 27-21, Military Administrative Law.

1-3. Federal Labor Relations Authority.

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

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

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

(A) determine the appropriateness of units for labor organization representation;
(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees voting in an appropriate unit and otherwise administer the provisions relating to according of exclusive recognition to labor organizations.
(C) prescribe criteria and resolve issues relating to the granting of national consultation rights;
(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations;
(E) resolve issues relating to the duty to bargain in good faith;
(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment;
(G) conduct hearings and resolve complaints of unfair labor practices;
(H) resolve exceptions to arbitrators' awards; and
(I) take such other actions as are necessary and appropriate to effectively administer the provisions of Title VII of the Civil Service Reform Act of 1978.

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

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

The General Counsel of the Authority is appointed by the President, by and with the advice and consent of the Senate, for a term of five years. The General Counsel is primarily responsible for supervision of the seven Regional Offices. In ULP cases the regional staffs serve as the General Counsel's field representatives. Each Regional Office is headed by a Regional Director, with a Regional Attorney who works closely with him or her as ULP cases develop. Each region also has a supervisory attorney or supervisory labor relations specialist who supervises the investigation of the ULP's and the processing of representation cases. After investigation, the Regional Office

decides if these issues brought to it by a union or management have merit and will be pursued before the Authority. This decision of the Regional Office is appealable to the General Counsel. The remainder of the professional regional staff is roughly composed of half attorneys and half labor relations specialists. All staff members may function as ULP investigators but only the attorneys serve as prosecutors in ULP hearings.

1-5. Federal Mediation and Conciliation Service.

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

1-6. Federal Service Impasses Panel.

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

Regional Structure of the Federal Labor Relations Authority

The Authority's headquarters are located at 500 C St., SW., Washington, DC 20424
Commercial: (202) 382-0748 FTS: 382-0748

Region I
10 Causeway St., Room 1017
Boston, MA 02222-1046
FTS 835-7280
Comm. (617) 565-7280

Region II
1111 18th St., NW., 7th Floor
P.O. Box 33758
Washington, D.C. 20033-0758
FTS 653-8500
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1371 Peachtree St. NE., Suite 122
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Region IV
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FTS 886-3468
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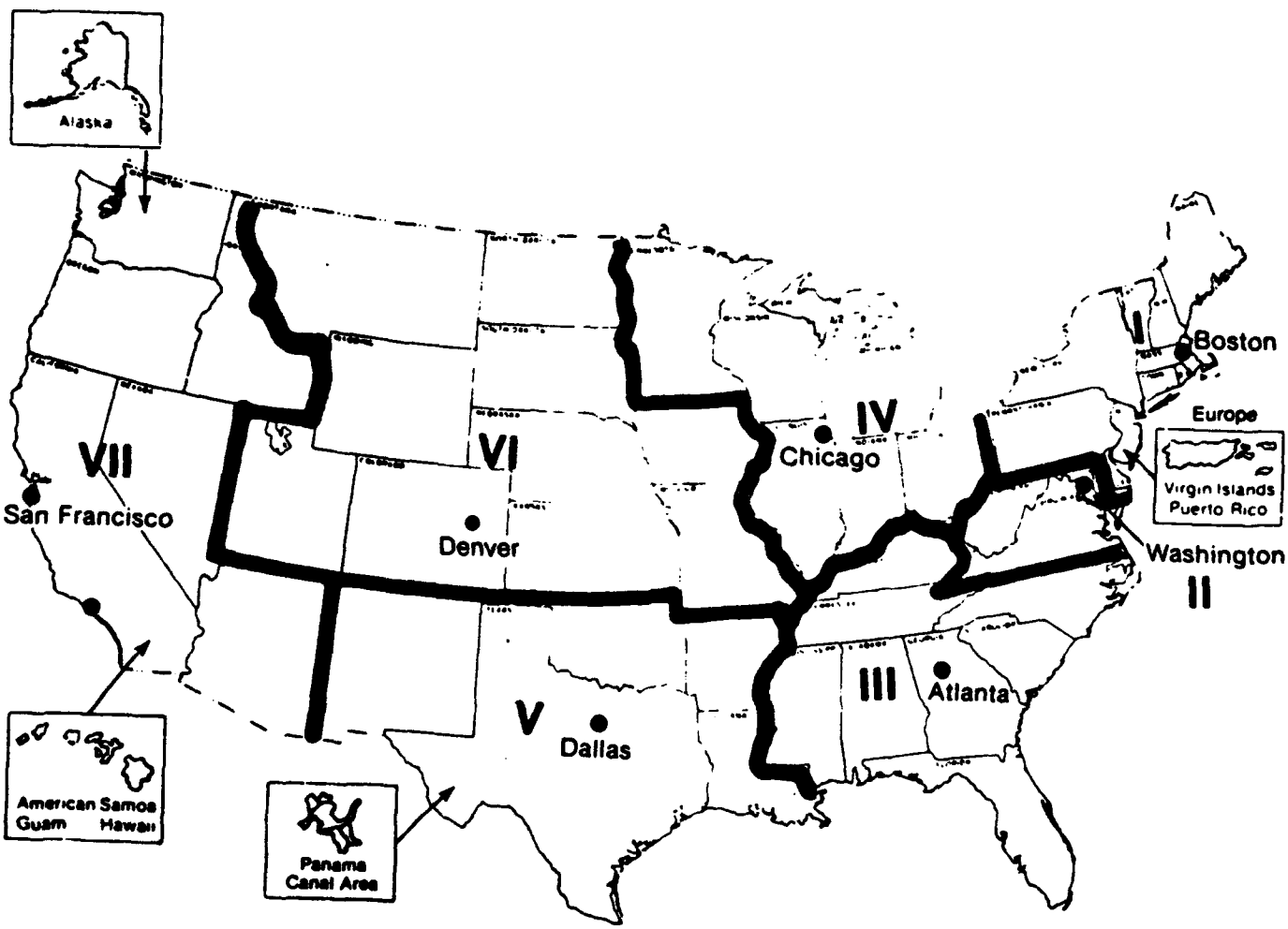

1-7. Jurisdiction.

a. Scope of the CSRA.

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

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

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

> "employee" means an individual--
> (A) employed in an agency; or
> (B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority; but does not include--
> (i) an alien or noncitizen of the United States who occupies a position outside the United States (except for agency operations in Republic of Panama - see 22 U.S.C.A. 3701(a)(1));
> (ii) a member of the uniformed services;
> (iii) a supervisor or a management official;
> (iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the Agency for International Development, or the International Communication Agency; or
> (v) any person who participates in a strike in violation of section 7311 of this title;
> . . . .

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

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

(A) the General Accounting Office;
(B) the Federal Bureau of Investigation;
(C) the Central Intelligence Agency;
(D) the National Security Agency;
(E) the Tennessee Valley Authority;
(F) the Federal Labor Relations Authority;

or

(G) the Federal Service Impasses Panel;

. . . .

This section of the CSRA and 5 U.S.C. §§ 104 and 105 exclude the U.S. Postal Service from the jurisdiction of the Authority. It is governed by the National Labor Relations Act. See United States Postal Service, Dallas, Texas and National Association of Letter Carriers, 8 FLRA 386 (1982).

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

FORT BRAGG SCHOOLS SYSTEM,
FORT BRAGG, NORTH CAROLINA

3 FLRA 99 (1981)

(Summary of Decision)

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

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

The Petitioner filed an amended petition seeking exclusive recognition as the certified representative of all employees of Fort Bragg Schools Cafeteria Fund (Fund).... Petitioner argues that the Fort Bragg Schools System (System) is the Activity because

the Fund is an instrumentality of the Army at Fort Bragg, and not a separate and distinct entity as contended by the Activity. The Activity asserts the Fund is not an "agency" within the meaning of section 7103(a)(3), the employees of the Fund are not "employees" within the meaning of section 7103(a)(2) of the Statute and, therefore, the Fund is not subject to the Authority's jurisdiction. The sole issue herein is whether the Fund is an "agency" within the meaning of the Statute, and therefore subject to the jurisdiction of the Authority.

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

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

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

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

The Fund's constitution and employee contracts are the only written documents governing the Fund's operations. Article II(f)

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

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

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

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

ORDER

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

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

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

The National Treasury Employees Union challenged the Executive Order as violating Federal employees' First Amendment freedoms of speech and association. The court upheld the issuance of the Executive Order. N.T.E.U. v. Reagan, 679 F.2d 262 (D.C. Cir. 1982).

Also, exercising his authority under section 7103(b)(1), President Reagan issued Executive Order 12666 exempting Federal Air Marshall from the coverage of the Labor Relations Program. The president determined that those Federal Aviation Administration employees primarily do investigative and intelligence work, and the program cannot be applied to them in a manner consistent with national security requirements (Federal Register Jan. 17, 1989).

In addition to his authority to exclude such organizations, the President may also suspend, under 5 U.S.C. § 7103(b)(2), the application of CSRA to any "agency, installation, or activity located outside the 50 States and the District of Columbia," when such suspension is in the interest of national security.

In Ward Circle Naval Telecommunications Center, 6 FLRA 498 (1981), the Authority held that it was without jurisdiction to process a representation petition for a four-person unit of employees engaged in the operation, maintenance and repair of "off line" and "on line" cryptographic equipment because the activity was excluded from the coverage of CSRA by EO 12171. In Criminal Enforcement Division, Bureau of Alcohol, Tobacco and Firearms, 3 FLRA 208 (1980), the Authority held that it had no jurisdiction over an RO case involving a proposed unit of all professional and nonprofessional employees of the activity because the activity was excluded from the coverage of CSRA by EO 12171. In Los Alamos Area Office, Department of Energy, 2 FLRA 916 (1980), the Authority dismissed a negotiability petition on the ground the subdivision of the agency was excluded from the coverage of CSRA by EO 11271.

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

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

CHAPTER 2

THE REPRESENTATION PROCESS

2-1. Introduction.

a. **Recognition.** Under the Civil Service Reform Act of 1978, Title VII (5 U.S.C. § 7101 et seq.) (CSRA), labor organizations may represent Federal employees in four situations:

1. exclusive recognition--7103(a)(16) and 7111;
2. national consultation rights--7113;
3. consultation rights on government-wide rules or regulations--7117(d); and
4. dues allotment recognition--7115(c).

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

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

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

d. **Dues allotment recognition.** A union qualifies for dues allotment recognition if it can show that at least 10% of the employees in an appropriate unit for which no union holds exclusive recognition are members of the union. 5 U.S.C. § 7115(c)(1). A union accorded dues allotment recognition can negotiate on only one matter: the withholding of union dues from the pay of the employees who are members of the union. The dues withholding and official time provisions of 5 U.S.C. §§ 7115(a) and 7131(a),

applicable only to unions holding exclusive recognition, do not apply to a union with only dues allotment recognition.

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

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

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

2-2. Solicitation of Employees.

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

a. Solicitation by nonemployees.

The case below discusses the rules management may use in restricting nonemployee labor organizers from entry on the installation. These are normally persons paid by the national office. As a general rule, management need not allow professional labor organizers on the activity premises to solicit support. There are exceptions such as when the organizers show they cannot reasonably communicate with the proposed bargaining unit employees on a direct basis outside the activities premises (employee inaccessibility). A second exception is when management decides to allow one union to use its services and facilities. It would then be required to furnish equal services and facilities to other unions that have equivalent status to the first union. The following is a leading case in this area. It discusses the above points in a factual situation, provides the rationale for adopting these rules, and refers to other cases which should be researched by the labor counselor who is confronted with an "access to the facility" problem. The case excerpt is the Administrative Law Judge's recommendation to the Assistant Secretary of Labor, followed by a summary of the Assistant Secretary's decision. Note that he rejects some of the Administrative Law Judge's reasoning and recommendations.

Note also that DoD policy is to allow professional union organizers to solicit, absent mission interference, under certain conditions. Generally, both oral and written solicitation is permissible so long as it is done in a non-work area during non-duty time. Paragraph 3-5, CPM chapter 711.

U.S. ARMY NATICK LABORATORIES
NATICK, MASSACHUSETTS
A/SLMR No. 263 (1973)

Finding of Fact

Introduction

The essential facts are largely undisputed,* and unless noted to the contrary it may be assumed that there is no issue concerning the following matters.

The U.S. Army operates the Natick Laboratories on a military reservation which is enclosed by a fence. Tight security prevails, and it is necessary to pass security guards in order to enter the premises. Approximately 1250 civilian personnel are employed of whom 900 to 1000 are in the unit represented by NAGE.

NAGE was granted exclusive recognition on March 29, 1965, under Executive Order 10988. It and the Respondent entered into a collective bargaining agreement which was approved by the

* Only pertinent footnotes are included.

Department of the Army on June 1, 1971. That agreement was terminated on December 1, 1971, as a result of NAGE's timely request that it be renegotiated. Throughout the events in issue the parties were engaged in negotiations looking toward a new contract.

On December 20, 1971, AFGE National Representative Pat Conte requested a list of all eligible employees and permission to conduct an organizational campaign on the premises from January 3 to January 28, 1972. Respondent made available the list of employees, and authorized Mr. Conte, Mr. Guy Colletti, and Mr. Arthur LaBelle, all union representatives and nonemployees, to enter the reservation and solicit memberships in AFGE during that period. Space was provided in the main lobby and the cafeteria in the Administration Building, and the AFGE representatives were permitted to visit the vending machine areas in the Research Building, the Development Building, and the Engineering Building. AFGE was also given access to the shop areas in the Shop Building and the Services Building during the 30-minute break when those Shop Areas shut down for lunch. Solicitation in the other areas described above was allowed during normal duty hours - 7:15 a.m. to 4:15 p.m. The only reservations were that employees were not to be approached at their work sites during duty hours and AFGE literature was not to be placed at their desks or work stations during duty hours. AFGE's organizational effort was apparently successful. On February 7 it filed a petition for an election with the Boston Area Administrator of LMSA, and the petition is still pending before that office.

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It is now necessary to make findings concerning the accessibility of the Laboratories employees to the efforts of an outside union desiring to communicate with them. As noted above, there are between 900 and 1000 employees in the bargaining unit, of a total civilian complement of about 1250. Respondent provides 996 parking spaces for all personnel, of which about 950 are used on an average day. In addition, about 60 employees use the walk-in gate. The facility is guarded and is enclosed by a high fence. It is located approximately 18 miles west of Boston, and its employees reside throughout eastern Massachusetts. Some even commute from Rhode Island and southern New Hampshire. It is evident from a comparison of the Personnel Roster (Respondent's Exhibit 4) and a map that the employees' residences are scattered among many small towns and, as Respondent asserts, that no single newspaper, radio station or television station would reach all or even a substantial number of them. Access to them through the media is wholly dissimilar to the problem of thus reaching employees who live in a single town and its environs, and who are serviced by a small number of newspapers and radio or television stations. There are approximately 23 towns within a 15 mile radius of Natick, and it appears that about one-third of the employees live even farther away. They are thus divided, in terms of the big-city media, among Boston and Worcester, Massachusetts, Providence, Rhode Island and Manchester, New Hampshire. Without

attempting to subject this issue to some kind of rigorous and extended analysis, I think it fair to conclude that employees whose residences are as scattered as are these, in this particular geographical setting, cannot be reached by reasonable effort through the news media, or through visits to their homes. Likewise, it appears clear that an effort to sift the various telephone directories for purposes of contacting so large and so dispersed a group of people would have been a considerable chore.

AFGE did not request the addresses or telephone numbers of unit employees, and Respondent's witnesses stated such a request would have been refused pursuant to outstanding regulations (Respondent's Exhibit 4 - Appendix C, Federal Personnel Manual). Nor is there any indication that AFGE requested that Respondent permit the use of its internal mailing system as an alternative method which would achieve effective communication with unit employees without disclosing addresses or telephone numbers. Mr. Nicholas J. Morana testified that, while he was not sure that AFGE had requested permission to use the internal mailing system, such a request would likewise have been refused.

There was considerable testimony and some dispute concerning the efficacy of any effort to reach employees through the distribution of leaflets at the gate. The pedestrian entrance at the west end of Kansas Street lends itself readily to leafleting. However, only about 60 employees can be reached in this fashion. Thus, almost all of the unit employees enter and leave the premises in some of the 950 cars which regularly park within the reservation. The main gate is off of Kansas Street some several hundred yards west of its intersection with Route 27. The security guards stationed at the gates have no authority to interfere with anyone who wishes to hand out leaflets from the roadway adjacent to the installation. However, it is highly questionable whether this can be done in a safe and effective way. Both George Hoerner, a Security Guard called by (and President of) NAGE Local 21-34, and Chief Edward C. Kennedy of the Security Guards called by Respondent, testified that the approximately 950 automobiles are cleared into or out of the gate in about 20 minutes. Such traffic occupies two of the three lanes on Kansas Street, and is controlled as it leaves or enters Route 27 by a Natick policeman who is assigned to that intersection for approximately 30 minutes. Mr. Hoerner conceded on cross-examination that it would be dangerous to stand in the road in an effort to hand literature to drivers. It is clear that the drivers would be on the opposite side of the car from anyone attempting to distribute literature from the edge of the road when cars were leaving the gate, and that cars occupying the middle lane of Kansas Street would be inaccessible to those distributing literature at all times unless distribution took place in the street between the lanes of morning traffic or

in the third lane which is apparently not much used.[4] While the evidence is far from clear with respect to how often and for how long cars may be stopped as they proceed along Kansas Street to or from Route 27, it is clear that the Natick policeman makes every effort to move the traffic from the Laboratories, and to have it out of the way before the heavy traffic along Route 27 begins. In order to move the number of cars involved in the 20 minutes generally agreed upon as par for that course, it would be necessary for about 47 per minute to enter or exit the base. It is also relevant to note that the open period in this contract, and the rival organizational drive happened to occur in midwinter, under conditions which Mr. Hoerner conceded would make distribution of leaflets both difficult and dangerous.

Issues

The central issue posed by this controversy may be stated as follows: Did Respondent "sponsor, control or otherwise assist" AFGE in violation of section 19(a)(3) by permitting its nonemployee representatives to conduct an organizational campaign, in nonwork areas of the installation or nonwork time, for the purpose of securing the 30% showing of interest required as a prerequisite to the filing of a petition challenging the status of NAGE as the exclusively recognized collective bargaining representative?

A subsidiary issue will become critical should the Assistant Secretary decide that the scope of the access granted the rival AFGE would in ordinary circumstances be overbroad and hence a form of assistance violative of the Order. The possibility of such a holding requires a resolution of the question whether there existed in the particular facts of this case obstacles to the rival union's effective communication with the employees through other means which were so great as to justify the degree of access permitted here.

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Contentions

NAGE's essential argument is simply that section 19(a)(3) prohibits an Agency from granting nonemployee union representatives access to its property for organizational (as distinguished from electioneering) purposes where there is an exclusively recognized labor organization in the unit. It argues that an exclusive representative's status, under the scheme of the Order, operates to preclude access to an activity's premises by nonemployee

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[4] The record is not clear on the question whether most automobile occupants could be reached from the side of the road after several days of distribution. It appears unlikely that they could, as the traffic in the south lane proceeds to or from the lower ramp leading to the lower parking lot and the traffic in the north lane proceeds to or from the upper ramp leading to the upper parking lot.

representatives of another organization until the rival has filed a petition with LMSA. It points out that section 19(a)(3), in condemning assistances to labor organizations, as an exception permits an agency to "furnish customary and routine services and facilities under section 23 * * * when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status." The basic thrust of this argument, as I read it, is that the two unions here involved did not enjoy equivalent status (in fact could not until both were on the ballot pursuant to an agreement for, or direction of, an election), and that it was therefore unlawful for the Activity to furnish its services and facilities to AFGE. Thus NAGE appears to raise the issue which was before the Assistant Secretary, in a somewhat different context, in U. S. Department of Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143.

A second argument advanced by NAGE is that, even if section 19(a)(3) does not absolutely prohibit an agency from granting an outside union access to its premises in all circumstances, the employees here were not so "inaccessible" under the Babcock & Wilcox doctrine[6] as to justify the degree of access granted here. It asserts that the Assistant Secretary dealt directly with this issue in Department of the Treasury, Bureau of Customs, Boston, Massachusetts, A/SLMR No. 169, in which he sustained the Agency's refusal to permit nonemployee organizers, to electioneer on the premises. The Assistant Secretary held that, in order "to support a contention that nonemployee organizers should be accorded personal access (as distinguished from access through the mail) to employees on Activity premises for the purpose of campaigning it must be shown that the employees at whom the campaigning is directed are inaccessible, thus rendering reasonable attempts to communicate with them on a direct basis outside the activity's premises ineffective." In this respect, NAGE contends that the record herein will not support a finding that the employees were so inaccessible as to render ineffective the existing alternative methods of communication. It points to AFGE's failure even to request use of the internal mailing system, the claimed availability (and use) of the confidential list of employee names and addresses, and the lack of persuasive evidence that employees could not be reached by leafleting or other traditional methods outside the premises.

A third and final argument on this issue appears to be that the development of a uniform and hence stabilizing policy in this important area of labor relations in the Federal sector requires a finding that Respondent violated section 19(a)(3) in the circumstances presented here. Thus, it is argued that the Assistant Secretary, in the Bureau of Customs case, made it clear that he will compel an agency to permit nonemployee union organizers to campaign on its premises only in the rare case of employee inaccessibility to other modes of communication. From

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[6] NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

this premise NAGE argues that, in the ordinary case where effective channels of communication off the premises do exist, thus rendering personal visitations unnecessary and unnecessarily disruptive, the grant of such access should as a matter of policy be found to constitute unlawful assistance, for the failure to do so will, in effect, delegate to agencies the unpoliced power to grant or withhold permission, and thereby to create in the Federal sector an unpredictable and unstabilizing atmosphere.

Respondent's argument may be briefly summarized. The general rule in the private sector is that an employer need not open up his private property to nonemployee organizers if the union otherwise has adequate access to his employees. The rule set forth by the Supreme Court in Babcock & Wilcox has in effect been adopted by the Assistant Secretary in the Bureau of Customs case. If it is appropriate to require a private employer to open his private property where employees are not reasonably accessible to a union desiring to communicate with them, a fortiori it is appropriate to require a public employer to open his public property in similar circumstances. Here the size of the unit, the geographical dispersal of the employees' residences, and the difficulties and dangers which would attend any effort to distribute leaflets left no effective means of communication reasonably available except access to the premises. More limited means, such as home addresses and/or phone numbers, or use of the internal mailing system were published by regulation. Hence the refusal to permit the outside union to enter and organize on the premises would have deprived the employees of their right to be informed of the programs of a rival union, deprived the rival union of the right to mount a challenge to the incumbent's status, and would have constituted, in effect, a grant of exclusive recognition in perpetuity to the incumbent. . . .

Analysis and Conclusions.

The Assistant Secretary has never been squarely faced with the issue presented herein. As noted, in the Geological Survey[7] case he was confronted with the question whether the agency interfered with its employees' freedom of choice in selecting an exclusive bargaining representative by announcing that it was permitting a non-intervening labor organization to use its facilities on an equal footing with the petitioner and thereafter granting the non-intervenor access to its facilities and permission to distribute and to post election propaganda. In holding such conduct interfered with the election, the Assistant Secretary noted that section 19(a)(3) of the Order prohibits agency assistance to a labor organization except in circumstances where it may desire to furnish customary and routine services and facilities under section 23, and contains a proviso that any such services and facilities must be furnished "on an impartial basis to organizations having equivalent status." (Emphasis his.) He concluded that the underscored language clearly "establishes a general policy of

[7] A/SLMR No. 143.

permitting equal treatment by agencies to those labor organizations having equivalent status." He further concluded that where labor organizations do not enjoy equivalent status, equivalent treatment may be improper." (Emphasis mine.) Working from this expression of policy in the unfair labor practice area, he held that an incumbent union's failure to intervene in the proceeding which arose upon its rival's filing of a petition which raised a valid question concerning representation operates to preclude it from having equivalent status with petitioner and requires a finding that it is not entitled to equivalent treatment with respect to electioneering privileges. [Editor's Note: Under the Executive Order the incumbent was required to affirmatively intervene to be a party to the election. Under Title VII the incumbent is automatically a party to the election unless it takes action to disallow itself from the election.]

There is a superficial appeal to the assertion that this holding is dispositive here. Obviously AFGE, an outside organization, does not enjoy equivalent status with NAGE, the exclusively recognized representative. From this disparity in status it can persuasively be argued that Respondent unlawfully assisted AFGE by permitting it to wage an organizational effort on the premises on an equal[8] footing with NAGE. At least in the absence of factors supporting a finding that the employees were not reasonably accessible to other methods of organization, such a rationale would have the advantages of uniformity and ease of application. However, it is far from clear to me that the scheme of the Executive Order calls for such a result.

Looking to the Order's language, I read in section 19(a)(3) the purpose of compelling agencies to implement section 23's directive that, by April 1, 1970, they issue policies and regulations with respect to the use of agency facilities by labor organizations in a manner which does not discriminate as between unions of equivalent status. As indicated above, I am aware of the fact that the Assistant Secretary, in the Geological Survey Center case, found the language under examination to establish a general policy of permitting equal treatment of labor organizations having equivalent status, whereas I read the text as requiring parity in any proffer of facilities. I see no necessary conflict, however, as the Assistant Secretary did not have to reach this precise issue in that representation proceeding. He was called upon to address the issue whether an activity interfered with an election by permitting a union not on the ballot to contend on an equal footing with the union which was seeking exclusive representative status. He reasoned that a union which fails successfully to intervene in a representation proceeding cannot enjoy equal status with a union which is on the ballot, and that granting such a union electioneering privileges equivalent to those granted the latter

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[8] AFGE was not given all the facilities available to NAGE. Thus, it did not request and was not offered use of the bulletin boards used by NAGE. However, NAGE was offered the same campaigning privileges extended to AFGE.

union constitutes interference with the freedom of choice of the employees. Although obviously bound by the holding, I feel constrained to note that I do not think its basis has ever been fully explicated. Thus, I fail to see why a union unable (or unwilling at the moment for some strategic reason) to participate in an election should not have the same avenues of communication to the electorate as the union on the ballot, if only to solicit a vote rejecting the petitioner, thereby preserving its right to bid for representation rights a year or more later. I see no command in the Order that employees be protected from making such a choice in an atmosphere conducive to a full and fair exchange of the opposing views. If anything, the need for so interpreting the Order seems to be strengthened by the fact that in the public sector there is no explicit provision (as in section 8(c) of the Taft-Hartley Act) for the expression of anti-union views by management. [Editor's Note: Management must be neutral in the Federal sector.] Robert E. Hampton, Chairman, U.S. Civil Service Commission, has observed that Government officials do not mount "vote no" campaigns.[9] In this connection he noted that a "significant difference between the Federal sector and the private sector is the positive approach the Government, as employer, has taken toward union organizing." He also noted that the Federal Government has taken a position of neutrality as far as union representation of its employees is concerned, a position which derives from the preamble to, and Section 1 of, the Order. Given this rather authoritative statement of the Order's purposes, it seems to me the more important that the rights of organizations as well as individuals who oppose the union or unions on a ballot should be generously respected.

Nevertheless, the Assistant Secretary has made it quite clear, at least in an election context, that a nonparticipating union may not be given equal status for electioneering purposes with the participating organization. Thus, in Federal Aviation Administration, New York Air Route Traffic Control Center, A/SLMR No. 184, he ruled that the Activity did not interfere with the election by permitting certain employees, including officials of the formally recognized PATCO local union which could not participate in the election, to conduct a "vote no" campaign during nonwork time in nonwork areas. He reasoned that the pro-PATCO employees were merely exercising their rights, recognized in Charleston Naval Shipyard, A/SLMR No. 1, to engage in campaign activity during nonwork time in nonwork areas without interference from the Activity and further, that these rights, which derived from their status as employees in the bargaining unit in which the election was held, were not diminished by the fact that some of them happened also to be officials of the PATCO local. In the absence of any evidence that they were aided or abetted in this effort by nonemployee PATCO officials, he concluded that the Activity had not accorded PATCO equivalent status with the

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[9] See his article, "Federal Labor-Management Relations: A Program in Evolution," The Catholic University Law Review, Volume 21, Number 3, Spring 1972.

petitioning labor organization and hence did not interfere with the election. He distinguished the Geological Survey Center case, noting that there the Activity "formally sanctioned a campaign by a labor organization which was not a party to the election and accorded it the same status as that accorded the labor organization which was a party to the election." It is therefore clear that a labor organization which is not on the ballot may not be accorded use of Activity facilities in its electioneering effort.

The question remains whether this holding, by analogy, applies in the unfair labor practice area to prohibit the furnishing of services and facilities, in advance of any representation proceeding [e.g., before a representation petition has been filed], to a challenging labor organization which desires to unseat an incumbent. Again, a textual analysis of the Order seems only to require that such "assistance" be furnished on an impartial basis to organizations having equivalent status, i.e., to forbid disparity in treatment as among equals. I do not read section 19(a)(3) as compelling the converse--that an agency may not treat unequals equally in terms of granting access to the employees. I am unaware of any "legislative history" of the Order or its predecessor which throws light on this inquiry. Executive Order 10988 (by a Presidential Memorandum issued May 21, 1963) contained a counterpart to section 19(a)(3). Section 3.2(a)(3) prohibited assistance to employee organizations, except that an agency could furnish "customary and routine services and facilities * * *, if requested, on an impartial basis." The additional phrase providing that such facilities shall be furnished on an impartial basis to organizations having equivalent status was apparently added to Executive Order 11491. I have found nothing in the several committee reports leading to the 1963 additions to Executive Order 10988 and the 1969 issuance of Executive Order 11491 which touches upon the purpose of the changes. Nor do I think their purpose is self-evident from a simple reading of the text. As indicated above, I do not think the plain requirement that unions of equivalent status must be given, upon request, equal use of Agency services and facilities compels the conclusion that unions of different status must in all circumstances be granted different degrees of access to such services and facilities. Thus, where, as here, a union which is a stranger to the premises attempts to secure a showing of interest for purposes of challenging an exclusive representative's status in a representation proceeding. I see nothing in the Order which clearly precludes an Agency's grant of the use of its services and facilities to that union on terms equal to those enjoyed by the incumbent organization. If the employees involved are easily accessible to a rival union I see no obligation on Government's part to open up its premises, furnish its mailing services or make available its bulletin boards. On the other hand, I see no legal restraint on an agency's decision to open up the channels of communication on a completely equal basis to the competing unions, despite their difference in status, where it does not display favoritism toward one. Stated otherwise, I cannot conclude that an Agency sponsors, controls or assists a rival organization simply and solely because it grants that organization, for a limited period of time, access to its employees

on terms equal to those that exist for the incumbent organization. I therefore find that Respondent's grant of access to AFGE did not violate section 19(a)(3). [Editors Note: The ALJ's holding that unions of unequal status may be given equal treatment up to the time an RO petition is accepted by the Regional Office is inconsistent with the previous law. The Assistant Secretary overruled this portion of the ALJ's opinion.]

Apart from the foregoing analysis, I would in any event find that the Laboratories' employees are not reasonably accessible through the normal means of communication, and that the difficulties faced by an outside union seeking to reach them justified in the circumstances Respondent's grant of access. [Editor's Note: Again, the Assistant Secretary disagreed with the ALJ's holding that the employees were not reasonably accessible.] As described above, there are almost 1000 employees in the unit, and their residences are so dispersed as to make the effort to secure their home addresses and/or telephone numbers from various directories, or to visit their homes both difficult and time consuming. Likewise, the number of cities and townships within their residential area would require the use of many newspapers, radio or television stations in order successfully to reach them with the AFGE message. The security prevailing at the work place, including the parking lot, and the traffic pattern, make contact adjacent to the reservation very difficult indeed. While I am mindful that there is no requirement that Agency management make such communication convenient for a union,[10] I think the difficulties which would attend any effort to reach these particular employees off the premises are so great as to warrant access to them on the job. The Activity might, of course, have chosen a less disruptive method, as, for example, agreeing to deliver mail at work, or to address envelopes provided by AFGE. However, the fact that it chose to grant access to nonemployee organizers does not, in my judgment, render the form of "aid" chosen a species of unlawful assistance.

I doubt that a detailed analysis of the circumstances of cases applying the Babcock & Wilcox doctrine[11] would be very helpful. There, the Supreme Court held that an employer need not permit nonemployee organizers the use of its property where other available and effective channels of communication exist. I think it important to note that the Court was confronted with the need to balance the rights of nonemployee union organizers (as opposed to employee adherents) against the private property rights of management. In striking the balance, the Court declared that the distinction between the rules of law applicable to employee and those applicable to nonemployee is one of substance, and that while Federally preserved property rights must be required to yield to federally guaranteed self-organizational rights of employees except

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[10] See Internal Revenue Service, Office of the District Director, Jacksonville District, A/SLMR No. 214.

[11] NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

in situations where restriction of the latter is demonstrably necessary to maintain production or discipline, such property rights need not yield in the case of nonemployee organizers unless in the circumstances the employees are beyond the reach of reasonable union efforts to communicate with them off the premises. The Court noted that in each of the cases before in the plants were close to small well-settled communities where a large percentage of the employees lived and the usual methods of imparting information were available.

It is questionable whether the accommodation struck between property rights and organizational rights in Babcock & Wilcox is appropriate in the Federal sector. As noted above, while the Government is to be neutral regarding its employees' decisions concerning union representation, the scheme of the Order contemplates that the Government be hospitable to the concept of collective bargaining. There is no explicit provision for management "vote no" campaigns, and, as a corollary, it would seem to me there is no justification for Government management to place unnecessary impediments on the freedom of communication essential to the exercise of its employees' right to self-organization. Put another way, there is no constitutionally secured property right, as prevails in the private sector, to be weighed against a statutory policy of promoting collective bargaining. Although I recognize that the Assistant Secretary has distinguished as between the direct exercise of self-organizational rights by employees on the premises and the rights of employees to learn the advantages of organization from nonemployee organizers, it nevertheless seems to me that the distinction must be grounded on Government's right to avoid unnecessary interference with production or discipline rather than the assertion of property rights. Hence, I would conclude that the circumstances in which Government as an employer can legitimately bar nonemployees from its property, or restrict the scope of their activities, must be far more circumscribed than is the case in the private sector. It would follow that the burden of establishing that degree "of inaccessibility of employees (which) makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels" and thus demonstrating that exclusion from the property (or denial of services) is unjustifiable, is a lesser one in the public than in the private sector.

I conclude that the difficulties of reaching the Laboratories' employees through such channels of communication as exist off the premises were great enough to justify the action taken by the Army, even though such action might, in other circumstances, be found to constitute unlawful assistance.

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RECOMMENDATION

In view of the findings and conclusions made above, I recommend that the Assistant Secretary dismiss the complaint.

[Signed: Administrative Law Judge]

Despite the well-articulated rationale of the Administrative Law Judge, the Assistant Secretary concluded that the Respondent's conduct in permitting nonemployee representatives of the AFGE access to its premises violated section 19(a)(3) of the Order. Based on the principles set forth in U.S. Department of the Interior Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143 and Defense Supply Agency, Defense Contract Administration Services, Region SF, Burlingame, California, A/SLMR No. 247, the Assistant Secretary found that a labor organization, such as AFGE in the instant case, which had not raised a question concerning representation (had not filed an RO petition) and which clearly did not have equivalent status with the incumbent exclusively recognized representative, could not be furnished with the use of an agency's or activity's services and facilities. (But note the following exception.) The Assistant Secretary noted, however, that there might be special circumstances which would warrant a departure from the principle stated above. Thus, where no question concerning representation exists, nonemployee representatives of a labor organization that does not have equivalent status nevertheless may be furnished with agency or activity services and facilities for the purpose of an organizational campaign only where it can be established that the labor organization involved has made a diligent, but unsuccessful, effort to contact the employees away from the agency or activity premises and that its failure to communicate with the employees was based on their inaccessibility. Under the circumstances of the case, however, the Assistant Secretary concluded that no such special circumstances had been demonstrated by the Respondent.

The Assistant Secretary found also that the conduct of a supervisor, in posting AFGE literature on the bulletin board reserved for the Complainant, constituted a further violation of section 19(a)(3) of the Order.

Having found that Respondent violated section 19(a)(3) of the Order, the Assistant Secretary issued a remedial Order.

NOTE 1: For rules regarding management's obligation to permit unions to solicit members on installation premises, it may be helpful to consider the practice in the private sector. There the Supreme Court has held that an employer may deny access to his property to nonemployee union organizers, provided (1) the union is reasonably able to communicate with the employers by other means, and (2) the employer's denial does not discriminate against the union by permitting other unions with equal status to solicit or distribute literature. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). It appears that the Assistant Secretary follows a modification of this private sector rule. See Department of the Army, U.S. Army Natick Laboratories, Natick, Mass., A/SLMR No. 263 (May 16, 1973), supra. For other private sector rules regarding

the extent to which an employer may limit union solicitation, see Mason & Hanger-Silas Mason Co. v. NLRB, 405 F.2d 1 (5th Cir. 1968); Campbell Soup Co. v. NLRB, 380 F.2d 372 (5th Cir. 1967); and Stoddard-Quirk Mfg. Co., 138 NLRB 615 (1962).

NOTE 2: Paragraph 3-5, CPM Chapter 711, provides that names, position titles, grades, salaries and/or duty stations of activity or unit employees will be furnished to labor organizations upon request. This information is known as the "Excelsior List." See Excelsior Underwear, Inc., 156 NLRB 111 (1966).

NOTE 3: In National Treasury Employees Union v. King, 798 F.Sup. 780 (D.D.C. 1992) the National Treasury Employees Union (NTEU) successfully raised a constitutional challenge to the limitation of outside union solicitation in public areas under the control of a federal agency, when that agency has treated the location as a public forum. NTEU requested permission to solicit membership at a Social Security Administrative facility. The agency denied permission on the grounds that allowing such access would be an unlawful assistance of a rival union. This position was supported by the FLRA. Social Security Administration and National Treasury Employees Union and American Federation of Government Employees, 45 FLRA No. 27 (1992). The court, however, found this restriction constituted a violation of the First Amendment of the Constitution since the agency had allowed charitable organizations to conduct solicitations at the same spot. By allowing charitable organizations to use the sidewalk, the agency had converted the location into a public forum and could no longer limit the union expression at that location.

b. Solicitation by Employees.

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

CHARLESTON NAVAL SHIPYARD
A/SLMR 27 (1970)

DECISION AND ORDER

On July 13, 1970, Hearing Examiner Frederick U. Reel issued his Report and Recommendations in the above-entitled proceeding, finding that Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Hearing Examiner's Report and Recommendations. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Hearing Examiner's Report and Recommendations and the Complainant filed an answering brief. The Civil Service Commission and the Department of Defense which,

upon the invitation of the Hearing Examiner, had submitted statements to him in connection with their respective positions in this matter, also filed exceptions and supporting statements to the Hearing Examiner's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Assistant Secretary has considered the Hearing Examiner's Report and Recommendations and the entire record in the subject cases, including the exceptions, statements of positions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Hearing Examiner only to the extent consistent herewith.

The complaints in the instant cases filed by the Charleston Metal Trades Counc l (herein called the Union) against the Charleston Naval Shipyard (herein called the Shipyard) alleged violations of sections 19(a)(1) and 20 of Executive Order 11491 based on the Shipyard's notice of February 18 and its subsequent memoranda of March 16 and 27, 1970. The Union contends that the notice and memoranda effectively coerced, restrained, and intimidated employees in the exercise of their rights assured under Executive Order 11491. The Shipyard, on the other hand, defends its conduct in issuing the above-mentioned directives on the basis that it was merely acting in accordance with outstanding instructions of the Civil Service Commission which provide, in part, that during the period subsequent to the filing of a valid challenge requiring a redetermination of exclusive status, an "agency should not authorize the use of agency facilities to either the incumbent exclusive representative or the challenging organization(s) to conduct membership or election campaigns."[4] In this respect, the Shipyard contends that the Assistant Secretary of Labor is without authority to find that a directive, regulation, order or policy issued by the Civil Service Commission, Department of Defense, or any other "higher authority" over the Shipyard is invalid because such a determination would violate sections 4(b) and 25(a) of the Order.

The Hearing Examiner concluded that the directives governing union electioneering activities promulgated by the Shipyard[5]

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* Only essential footnotes are included.

[4] Federal Personnel Manual Letter 711-6 also provides, in part, that "There shall be no restriction at any time on the right of employees to freedom of normal person-to-person communication at the workplace provided there is not interference with the work of the agency. Employees may engage in oral solicitation of employee organization membership during nonwork periods on agency premises."

[5] The Shipyard's notice of February 18, 1970, provided, in pertinent part, that:

> a. Neither the currently recognized Charleston Metal Trades Council nor the challenging

interfered with, restrained, or coerced employees in the rights assured by Executive Order 11491 since such rules infringed on the employees' right under section 1 of the Order to "assist a labor organization." In reaching his recommendation, the Hearing Examiner relied on precedent developed under the National Labor Relations Act. He reasoned that in view of the similarity of language between sections 7 and 8(a)(1) of the Act and sections 1 and 19(a)(1) of the Order, that "the decisions under the statute dealing with employee rights in solicitation and in distribution of literature are applicable under the Order (footnote omitted)." The Hearing Examiner also rejected the Shipyard's contention that in issuing the disputed regulations it was acting under a legal obligation to follow the directives of the Civil Service Commission and the Department of Defense. In this regard he stated that rights of employees established under the Executive Order "are not diminished by erroneous rulings of the Civil Service Commission or the Department of Defense."

There is no indication in the reports and recommendations which preceded Executive Orders 10988 and 11491 that the experience gained in the private sector under the National Labor Relations Act would necessarily be the controlling precedent in the administration of labor-management relations in the Federal sector. Thus, many of the provisions of Executive Order 10988 constituted clear attempts to take into account situations peculiar to Federal sector labor- management relations. Moreover, in 1969, when it was

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> National Association of Government Employees shall conduct any type of electioneering on Naval Base premises until campaign procedures are established. Prohibited actions include:
>
> (1) posting or distribution on Naval Base premises of any poster, bulletin or other material which relates to the challenge;
>
> (2) Meetings on Naval Base premises for the purpose of electioneering or campaigning;
>
> (3) Solicitation of authorization revocations by the challenged union on Naval Base premises;
>
> (4) Solicitation of further authorizations by the challenging union on Naval Base premises.
>
> b. The prohibitions stated in paragraph 3a above, apply equally to employees and non-employee representatives of the organizations involved.
>
> . . .

The Shipyard's memorandum of March 16, 1970, as amplified on March 27, 1970, placed certain restrictions on the Union's stewards with respect to the time allowed for their conducting of union business. The March 16 memorandum also stated, in part, that "Electioneering or campaigning at this time is prohibited."

determined that improvements in the Federal labor-management relations program were warranted, it was made clear by the Study Committee that the proposed changes dealt only with deficiencies found to exist under Executive Order 10998 and there was no intention to adopt some other model for Federal labor-management relations.

Based on the foregoing, it is my belief that decisions issued under the Labor-Management Relations Act, as amended, are not controlling under Executive Order 11491. I will, however, take into account the experience gained in the private sector under the Labor-Management Relations Act, as amended, policies and practices in other jurisdictions, and those rules developed in the Federal sector under the prior Executive Order. Accordingly, I reject the reasoning of the Hearing Examiner in the instant case insofar as he implies that all of the rules and decisions under the Labor-Management Relations Act, as amended, would constitute binding precedent on the Assistant Secretary with respect to the implementation of his responsibilities under Executive Order 11491.

Also, I reject the Shipyard's assertion that I am without authority to determine whether directives or policy guidance issued by the Civil Service Commission, Department of Defense or any other agency are violative of the Order when those directives or policies are asserted by the activity as a defense to allegedly violative conduct. Both the Study Committee's Report and Recommendations and the Order itself clearly indicate the role which the Assistant Secretary was intended to play in the processing of unfair labor practices complaints under the Order. Thus, the Study Committee's Report and Recommendations stated that the lack of a third party process in resolving unfair labor practice charges was a serious deficiency under the prior Federal Labor-Management Program. To rectify this deficiency, it was recommended that the Assistant Secretary of Labor for Labor-Management Relations be authorized to issue decisions to agencies and labor organizations subject to a limited right of appeal to the Federal Labor Relations Council. The Study Committee stated that as the Assistant Secretary issues decisions a body of precedent would be developed from which interested parties could draw guidance. The recommendations of the Study Committee culminated in section 6(a)(4) of the Order which provides, in part, that the Assistant Secretary of Labor for Labor-Management Relations shall ". . . decide complaints of alleged unfair labor practices and alleged violations of the standards of conduct for labor organizations." Hence, neither the Study Committee's Report and Recommendations nor the Order itself require that in processing unfair labor practices complaints I am bound to accept as a determinative those directives or policies of the Civil Service Commission, the Department of Defense or any other agency which in my view contravene the purposes of the Order.[8]

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[8] The Shipyard's contention that sections 4(b) and 25(a) of the Executive Order preclude the Assistant Secretary from finding that directives, etc. issued by the Civil Service Commission and the Department of Defense are invalid is rejected. Thus, section 4(b)

Accordingly, I reject the Shipyard's contention that I am without authority to find a violation in the instant case because its conduct was based on directives issued by the Civil Service Commission and the Department of Defense.

As did Executive Order 10988, Executive Order 11491 guarantees to employees of the Federal Government the right "to form, join and assist labor organization "without fear of penalty or reprisal." Section 19(a)(1) of Executive Order 11491 states that "Agency management shall not interfere with, restrain or coerce employees in the exercise of the rights assured by this Order." That provision raises the basic issue to be resolved herein, i.e. - were the Shipyard's attempts to control employees electioneering on its premises, as evidenced by its February 18 notice to employees and its subsequent memoranda of March 16 and 27, in derogation of expressly guaranteed employee rights under Executive Order 11491.[11]

In attempting to resolve this issue, I have carefully reviewed the policy and practice developed in the Federal sector under Executive Order 10988 pursuant to the Civil Service Commission's Personnel Manual Letter 711-6. As noted above, such policy and practice was adopted to cover a particular period prior to the execution of an election agreement when a valid and timely challenge had been filed with respect to an incumbent labor organization's exclusive representative status. During this period, agencies were counseled not to authorize the use of their facilities to either the incumbent exclusive representative or the challenging organization for the purpose of conducting membership or election campaigns.[12] The Civil Service Commission contended that this procedure represents "the most reasonable approach we have discovered to achieving among the contending unions the requisite fairness of equality of opportunity which alone can guarantee a genuinely free and representative election." The Shipyard and the Department of Defense offered further justification for the Civil Service Commission policy on the

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merely defines the overall responsibility of the Federal Labor Relations Council under the Order and section 25(a) sets forth the Civil Service Commission's technical assistance role to the agencies with respect to their respective Federal labor-management relations programs. In my view, neither of these sections was intended to limit the authority of the Assistant Secretary in the manner stated by the Shipyard.

[11] As noted in footnote 2 of the Hearing Examiner's Report and Recommendations, the subject cases involve only the rights of employees and not the rights of non-employee union representatives.

[12] As noted above in footnote 4 and as distinguished from the Shipyard's directive herein, normal employee "person-to-person communication at the workplace" was permitted under Federal Personnel Manual Letter 711-6 and employees were allowed to "engage in oral solicitation of employee organization membership during nonwork periods on agency premises."

grounds that the Government, as an employer, is "more neutral" in these matters than private employers and that there exists a substantial past practice under this policy which, if changed, would result in instability in Federal labor-management relations.

The basic rules governing employee solicitation and distribution were established by the Supreme Court in Le Tourneau Co. of Georgia v. NLRB, 324 U.S. 793 (1945) and Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). The Court held that the enforcement of no-distribution and no-solicitation rules against employees during their nonworking time was unlawful except where there were unusual circumstances present.

In the instant cases there is no evidence to establish that employee solicitation activity with respect to the forthcoming election or their distribution of campaign literature had the effect or would have had the effect of creating a safety hazard or interfering with work production or the maintenance of discipline in the Shipyard. Moreover, the argument that a moratorium on electioneering prevents that incumbent from exercising its natural advantage over the challenger is likewise unpersuasive since equality also can be maintained by granting full communication rights to both unions. A prohibition on any reasonable form of solicitation or election campaigning works not only to the detriment of unit employees who may seek to become informed, but also to the detriment of the challenging union, which, unlike the incumbent, has not enjoyed the advantage of a prior relationship among the unit employees. I conclude, therefore, that the purposes sought to be achieved by the operation of the Shipyard's rules are neither attained, nor do they justify limiting the employees' right established under Executive Order 11491 "to assist a labor organization."

Accordingly, in the absence of any evidence of special circumstances which would have warranted the Shipyard's limiting or banning employee solicitation during nonwork time and the distribution of campaign materials on its premises during employee nonwork time and in nonwork areas, I find that the Shipyard's notice of February 18, 1970, and its subsequent memoranda of March 16 and 27, 1970,[15] interfered with employee rights assured under

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[15] As noted above, the Shipyard's memoranda of March 16 and 27, 1970, placed certain restrictions on the Union's stewards with respect to their handling of union business at the facility. Under these restrictions, before being granted time off to carry out their responsibilities to the unit employees, stewards were required to specify to management representatives the type of union business to be conducted and, unless such business was included on a list of 18 permissible activities, excused time would be denied. The Shipyard admitted that the desire to limit electioneering activities was one of the reasons for issuance of these memoranda. Although, under article VI, section 5 of the parties' agreement, stewards must first obtain oral permission from their supervisor when they desire to leave their work area to transact appropriate union business during work hours, insofar as the Shipyard's

Executive Order 11491,[17] and were therefore violative of Section 19(a)(1) of the Order.

CONCLUSION

By promulgating and maintaining a rule which prohibits employees from engaging in solicitation on behalf of the Union or any other labor organization during nonwork time and from distributing literature for the Union of any other labor organization on Activity premises in nonwork areas during nonwork time, the Shipyard has violated section 19(a)(1) of the Executive Order.

THE REMEDY

> Having found that the Shipyard has engaged in certain conduct prohibited by section 19(a)(1) of Executive Order 11491, I shall order the Shipyard to cease and desist therefrom and take specific affirmative action, as set forth below, designed to effectuate the policies of the Order. . . .

NOTE: Paragraph 3-5, CPM Chapter 711, provides that activity employees may solicit membership or support on behalf of or in opposition to a labor organization on activity premises during the nonwork time of the employees involved provided there is no interference with work. They may distribute literature on activity premises in nonwork areas and during the nonwork time of the employees involved provided there is no interference with work.

. . . .

2-3. The Representation Petition.

a. RO Petition.

March 16 and 27 memoranda constituted a broad restriction against electioneering by stewards during their nonwork time, they violated section 19(a)(1) of the Order.

[17] The fact that the Government, as an employer, must remain neutral during an election campaign was not considered to require a contrary result. Thus, standing alone, this factor would not warrant a curtailment of employee rights under the Order.

A union which desires a secret ballot election to determine whether employees desire it as their exclusive representative files an RO petition with the Regional Office of the Authority. Instructions relating to the filing of RO petitions are in 5 C.F.R. 2422.2(a).

b. Showing of Interest.

The petition must be accompanied by a 30% showing of interest. 5 U.S.C. § 711(b)(1) and 5 C.F.R. § 2422.2 The "showing of interest" is a list of employees who have indicated they desire to be represented by a particular labor organization. Such indication may be in many different forms, such as: evidence of membership in a labor organization; employees' signed authorization cards or petitions authorizing a labor organization to represent them for purposes of exclusive recognition; unaltered allotment of dues forms executed by the employee and the labor organization's authorized official; current dues records; an existing or recently expired agreement; current exclusive recognition or certification. The original representation petition "showing of interest" list must number at least 30 percent of the eligible employees in the proposed bargaining unit. Those on the list are not necessarily union members nor are they required to vote for the union. They only need to have indicated they would support the union's request for an election.

Section 7111(b) provides:

> (b) If a petition is filed with the Authority--
>
> (1) by any person alleging--
> (A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative. . . .
>
> the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot. . . . .

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c. Timeliness.

The original petitioner and subsequent intervenors must file their petitions within certain time limits or the Regional

Director will dismiss the petitions (CSRA § 7111). These time limit rules are known as the "election bar," the "certification bar," and the "contract or agreement bar."

1. Election Bar.

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

5 C.F.R. § 2422.3 "When there is no certified exclusive representative of the employees, a petition will be considered timely filed provided the petition is not for the same unit or subdivision thereof in which a valid election has been held within the preceding twelve (12) month period."

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

2. Certification Bar.

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

5 C.F.R. § 2422.3(b). "When there is a certified exclusive representative of the employees, a petition will not be considered timely if filed within twelve (12) months after the certification . . . . unless a signed and dated agreement . . . has been entered into . . . by the activity and the incumbent exclusive representative."

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

. . . .

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3. Agreement Bar [CSRA § 7111(f) and 5 C.F.R. § 2422.3(d)].

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

> (3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless--
>
> (A) the collective bargaining agreement has been in effect for more than 3 years, or
>
> (B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement;"

In order to constitute a bar to a challenging petition, an agreement must contain a clear and unambiguous effective date and language setting forth its duration so that any potential challenging party may determine when the statutory open period will occur. An agreement that goes into effect automatically and that does not contain the date on which the agreement became effective does not constitute a bar to an election petition. See Watervliet Arsenal, 34 FLRA 98 (1989).

If a contract is of more than three years duration and has a definite termination or automatic renewal date, it bars an election only for the first three years. If there is no termination or automatic renewal date, the contract does not bar a petition anytime (A/SEC No. 45).

A petition may be filed during the window period before the termination date or the automatic renewal date. If a contract has been signed 106 days or more before the termination or automatic renewal date, it does not bar a petition filed during the window period.

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

U.S. DEPARTMENT OF DEFENSE
DOD OVERSEAS DEPENDENT SCHOOLS
A/SLMR No. 110 (Nov. 29, 1971)

. . . .

In Case No. 46-1813(RO) the Petitioner, Overseas Education Association, National Education Association, herein called OEA, seeks an election in the following unit: All nonsupervisory professional employees who are employed by the Department of Defense Overseas Dependent Schools assigned to the Atlantic, European and Pacific Areas, including those whose appointments are "not to exceed" the school year, excluding supervisors and substitute teachers.

. . . .

The OEA has represented exclusively, under separate negotiated agreements, all nonsupervisory teachers in Area-wide units in the Pacific and the European Areas, except for certain currently unrepresented individual schools in the European Area, and certain other schools in the European Area which are represented currently by the OFT. The European Area agreement, which has a two year duration, expired on April 1, 1971, and the Pacific Area agreement, which had a one year duration, expired on July 16, 1971. The OEA's petition in Case No. 46-1813(RO) was filed on June 10, 1970.

. . . .

The record reveals that the DOD considers its European and Pacific Area negotiated agreements with the OEA, as well as the negotiated OFT agreement at the Frankfurt American High School, and the five other OFT negotiated agreements awaiting approval at a higher management level, to operate as a bar to the OEA's petition for a worldwide unit. In this regard, the DOD indicated clearly that it would not waive such negotiated agreements insofar as they constituted a bar to the OEA's petition.

The agreement bar rule, set forth in section 202.3(c) of the Assistant Secretary's Regulations, was promulgated under the authority vested in the undersigned by Executive Order 11491. The basic objective of this rule is to afford each of the parties to a negotiated

agreement a reasonable period of stability in their relationship without interruption and at the same time afford employees the opportunity, at reasonable times, to change or eliminate their exclusive representative if they choose to do so. In my view, the above established rule may not be waived unilaterally by one of the parties to a negotiated agreement. A contrary interpretation would be inconsistent with the above-stated objective. Accordingly, I find that the DOD-OEA negotiated agreements which were in effect at the time the petition in Case No. 46-1813(RO) was filed, constitute a bar to the OEA's petition in that case. . . .

. . . .

NOTE 1: The above case states the rationale for the agreement bar. Under the Executive Order it could not be waived unilaterally but could be if both parties desired such.

NOTE 2: Once the agreement is executed by local management and union officials, it is generally effective as a bar to further representation petitions even though subsequent, higher level review is pending and the effective date is in futuro. See Federal Aviation Administration, Department of Transportation, A/SLMR No. 173 (July 20, 1972).

NOTE 3: In determining the open period, the effective date rather than its execution date is used. IRS, 3 FLRA 59 (1980); see also Watervliet Arsenal, 34 FLRA 98 (1989).

NOTE 4: In Department of the Navy, Naval Air Station, Memphis, Millington, Tennessee, A/SLMR No. 346 (Jan. 25, 1974) the Assistant Secretary declined to dismiss a representation petition which was "untimely" because the U.S. Postal Service had misdirected it to another federal activity. The Assistant Secretary permitted another untimely petition in Department of the Navy, Naval Air Station, Corpus Christi, Tex. In that case the petitioning union filed an untimely petition after having withdrawn a timely petition on the erroneous advice of the Labor-Management Services Administration that an existing agreement barred its petition. Allowing the petition, the Assistant Secretary reasoned that it would be unfair to penalize the petitioner under these circumstances. Department of the Navy, Naval Air Station, Corpus Christi, Tex., A/SLMR No. 150 (April 27, 1972), aff'd on other grounds, FLRC No. 72A-24 (May 22, 1973). Normally, however, the time limits are strictly adhered to.

NOTE 5: For other election bar decisions, see Federal Aviation Administration, Department of Transportation, A/SLMR No. 173 (July 20, 1973) and Department of Interior, Bureau of Indian Affairs, Navajo Area, Gallup, N.M., A/SLMR No. 99 (Oct. 12, 1971).

NOTE 6: For other certification bar cases, see Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, Fort Dix,

N.J., A/SLMR No. 195 (Aug. 24, 1972) and Department of Interior, Bureau of Indian Affairs, Navajo Area, Gallup N.M., S/SLMR No. 99 (Oct. 12, 1971).

NOTE 7: For a good discussion of agreement bar, see Watervliet Arsenal v. NFFE, 34 FLRA 98 (1989).

NOTE 8: For purposes of the agreement bar, a negotiated agreement must contain a clear and unambiguous effective date and language setting forth its duration. Watervliet Arsenal v. NFFE, 34 FLRA 98 (1989); U.S. Army Recruiting Command, Concord N. H. and AFGE, 14 FLRA 73 (1984).

2-4. Posting of Notice.

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

b. The notice not only advises the employees that an RO petition has been filed, but also puts potential union intervenors on notice that they have 10 days subsequent to posting of the notice to intervene in the election.

2-5. Intervention [CSRA § 7111(c) and 5 C.F.R. § 2422.5].

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

NOTE 1: 5 C.F.R. § 2422.5(a) provides that "an incumbent exclusive representative shall be deemed to be an intervenor in the proceeding unless it serves on the Regional Director a written

disclaimer of any representation interest for the employees in the unit sought. . . ." For a discussion of disclaimers, see HHS and AFGE and NTEU, 11 FLRA 681 (1983).

NOTE 2: The affect of the incumbent union's rejecting its intervention rights is to be placed in a lower status than the petitioner union. It will not be on the ballot and may not be given as many opportunities to solicit employees to reject the petitioner union.

2-6. Consent to Elections.

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

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

2-7. Bargaining Unit Determination.

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

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

> CSRA § 7112. "Determination of appropriate units for labor organization representation.

(a)(1) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of, the agency involved."

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

The three statutory criteria (community of interest, promoting effective dealings, and efficiency of operations) are, theoretically, given equal weight in analyzing the appropriateness of the unit. DOT, 3 FLRA 708 (1980). See also, U.S. Department of Labor and National Council of Field Locals, AFGE, 23 FLRA 464 (1985).

Community of Interest. Among the factors considered when determining if a community of interest exists are: the work performed, skills, training and education of the employees, geographic proximity of work sites, relationship of the work, common supervisors, organizational relationships, common applicability of personal practices and working conditions, and bargaining histories. See Redstone Arsenal, Alabama and AFGE, 14 FLRA 150 (1984).

Effective Dealings With the Agency. Among the factors considered when determining whether or not a given unit will promote effective dealings are: the level at which negotiations will take place, at what point grievances will be processed, whether substantial authority exists at the level of the unit sought, and bargaining history.

Efficiency of Agency Operations. Among the factors to consider in determining whether a unit will promote the efficiency of the agency operations are: the degree to which there is interchange outside the unit sought, the extent of differences with other groups of employees outside the unit sought, whether negotiations would cover problems common to employees in the unit, and bargaining history.

It should be noted that there is a substantial overlap of factors with all three criteria. Satisfaction of one criteria will

often satisfy all three. Questions as to the appropriate unit and related issues may be referred to the Regional Office for advice.

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

FEDERAL AVIATION ADMINISTRATION,
NEW ENGLAND REGION
AND
AFGE

20 FLRA 224
(1985)

. . .

The FAA contends that the only appropriate unit is a nationwide unit of all air traffic controllers. It argues that the Regional Director's decision: (1) will not promote safe and efficient agency operations, but will result in a fragmented, diverse approach to work rules, practices, and safety issues; (2) will hinder effective accomplishment of the greatest safety in air traffic movement, and will not promote agency efficiency as required by section 7112 of the Statute;[4] and (3) will hinder effective labor-management bargaining because control over such bargaining rests at FAA Headquarters. FAA further argues that there is no clear and

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[4] Section 7112(a)(1) provides:

§ 7112. Determination of appropriate units for labor organization representation

(a)(1) 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.

identifiable community of interest among employees within the New England Region that is separate and distinct from other FAA employees in the other eight regions, but rather that a community of interest exists among all of its air traffic controllers nationwide. The ATA supports the FAA's contention that the establishment of regional bargaining units would have a detrimental effect on both the efficiency and safety of the National Air Traffic System (NATS). ATA contends that only a nationwide unit with its inherent stability, uniformity and control would be appropriate in this case.

AFGE and NFFE contend, in support of the Regional Director's Decision, that a region-wide unit is appropriate under the criteria set forth in section 7112(a)(1) of the Statute. AFGE further contends that the FAA has not presented any evidence to demonstrate that a regional unit "creates the unacceptable risk of a diminution in the safe and efficient operations of the air traffic system; decreases the level of cooperation, trust, and standardization in the system; and raises the potential for divisions. . . ." In this regard, both AFGE and NFFE argue that section 7106 of the Statute limits the scope of bargaining to the degree that standardization will not be threatened. They also argue that day-to-day operations including labor relations, are performed at the regional level, and that FAA presently has the organizational structure to deal with a regional bargaining unit in an efficient and effective manner.

. . . .

In his Decision, Order and Direction of Election herein, the Regional Director found that a unit consisting of all air traffic control specialists, automation specialists, and air traffic assistants who are engaged in air traffic control duties, employed within the New England Region, Federal Aviation Administration, was appropriate for the purpose of exclusive recognition under the Statute. He based such findings on the following factors: (1) the regional unit is co-extensive in scope with a major subcomponent of the FAA and conforms to the FAA's regional personnel and labor relations structure; (2) the regional director has significant operational and administrative responsibilities within the region and has broad authority in matters involving overtime pay, awards and staffing; (3) there is common supervision of all regional employees; (4) all controllers within the FAA's New England Region are covered under the same merit promotion, EEO and agency grievance procedures; and (5) the majority of controller reassignments are accomplished on an intra-regional basis.

Based on established precedent, see, e.g., cases cited at n. 5, infra, and the particular circumstances of this case, the Authority disagrees with the Regional Director's conclusion that a region-wide unit is appropriate herein. While the Regional Director's Decision does contain factual support for his finding that the employees sought to be represented within the New England Region share a community of interest, his Decision fails to recognize and properly evaluate the facts which clearly demonstrate that this same community of interest is equally shared by all air traffic control specialists employed throughout the FAA. The record indicates that the specific mission of all the air traffic control facilities within the FAA is to ensure the safe and efficient use of the nation's airspace, promote aviation safety, and operate a nationwide system of air navigation; that the working conditions, skills required and the duties performed by the employees of the New England Region at issue herein are the same for all such employees in the nine regions of the FAA: there is interchange and transfer of air traffic control specialists among the various regions; air traffic control specialist positions are advertised on a nationwide basis; that personnel policies and practices are centrally established and administered at FAA Headquarters and apply uniformly to all employees of the FAA, not just to the employees of the New England Region; and that labor relations policy also is centrally established for the entire FAA employee complement at FAA Headquarters. In this regard, while each FAA regional direction has some autonomy in handling day-to-day problems involving personnel and labor relations matters, he must strictly adhere to the guidelines and directives promulgated by FAA Headquarters. Further, all air traffic control specialists receive the same training and must maintain the same level of proficiency. Under all of these circumstances, the Authority concludes that the employees of the New England Region do not share a clear and identifiable community of interest separate and distinct from the other employees of the FAA.

> Further, in disagreement with the Regional Director, the Authority finds that the proposed unit would not promote effective dealings within the FAA. In this regard, as previously discussed, FAA Headquarters establishes and administers common personnel policies and practices for all employees of the FAA, negotiating expertise is concentrated at FAA Headquarters where labor relations policy is established for all employees of the FAA, and there is both an established practice of bargaining at the national level for currently represented FAA employees and a past history of effective nationwide bargaining for

air traffic control specialists. In light of these factual determinations, and for the reasons previously stated, the Authority concludes that the Regional Director's finding below that the proposed unit would promote effective dealings within the FAA is inconsistent with the purposes and policies of the Statute, especially the policy of promoting a more comprehensive bargaining unit structure.

Finally, with respect to efficiency of agency operations, the Regional Director failed to give adequate weight to the unique importance of the National Air Traffic System and the strict requirement of nationwide uniformity to ensure the safety of the millions of people who use the air transport system. In this regard, a nationwide unit conforming to the centralized operational and organizational structure of the FAA would result in uniform policies, practices and working conditions nationally, and would reduce the potential for inconsistency among the regional offices. The Regional Director also failed to give adequate weight to the fact that the employees in the unit sought enjoy a commonality of mission, personnel policies and practices and matters affecting working conditions with all air traffic control specialists of the FAA. Accordingly, in light of these considerations, and for the reasons previously stated, the Authority concludes that the Regional Director's finding that the proposed unit would promote the efficiency of the FAA's operations is inconsistent with the purposes and policies as set forth in section 7112(a)(1) of the Statute.

. . . .

Unit consolidation cases, however, are another matter. The Authority stressed the "efficiency of agency operations" criterion. In its first three unit consolidation cases decided under the statute, the Authority adopted a test that is more rigorous than the Assistant Secretary's "presumption": namely, whether the employees in a proposed consolidated unit will be sufficiently well distributed throughout the organizational and geographical elements of an agency, or major subdivision thereof, as to constitute a "meaningful" unit. The proposed unit must be representative of, and bear some resemblance to, the organizational and administrative anatomy of the agency.

See DOT, 5 FLRA 646 (1980), AAFES, 5 FLRA 657 (1981), and Corps of Engineers, 5 FLRA 677 (1981).

. . . .

In Department of the Navy, Naval Civilian Personnel Command, 8 FLRA 643 (1982), all firefighters from the Navy, Army, and Air Force were consolidated. The FLRA ruled that despite the fact that this resulted in the dissolution of the entire Army CBU, that no question of representation was presented. "All employees involved shared a clear and identifiable community of interest and the new enlarged unit exclusively represented by AFGE would continue to promote effective dealings and efficiency of agency operations."

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c. How Appropriate Units Are Determined.

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

2. Determination by the Regional Director and the Authority.

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

(b) As stated previously, even when both parties strongly agree upon the composition of a unit, the Regional Director may nevertheless refuse to certify as a result of his independent evaluation of the unit. See, e.g., Army and Air Force Exchange Service, White Sands Missile Range, A/SLMR No. 25 (April 21, 1971), Internal Revenue Service Southeast Region, A/SLMR No. 565 (Sept. 30, 1975); and Department of the Navy, Norfolk Naval Shipyard, A/SLMR No. 547 (August 9, 1975) for cases where the Assistant Secretary (the Regional Director's predecessor) refused to certify.

d. Persons/Units Specifically Excluded or Distinguished.

There are certain classes of employees who are not allowed, by Title VII, to organize and be represented by an exclusive

representative. Often there is an objection by management because these personnel are included in the proposed unit. CSRA §§ 7112(b) and (c) provides:

> (b) A unit shall not be determined to be appropriate . . . if it includes--
> (1) except as provided under section 7135 (a)(2) of this title, any management official or supervisor;
> (2) a confidential employee;
> (3) an employee engaged in personnel work in other than a purely clerical capacity;
> (4) an employee engaged in administering the provisions of this chapter;
> (5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;
> (6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or
> (7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.
> (c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization--
> (1) which represents other individuals to whom such provision applies; or
> (2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

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1. Supervisors.

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

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

3 FLRA 51
(1980)

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under § 7111(b)(2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, a hearing was held before Hearing Officer Robert E. Bailey. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

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

> '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;

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* The Petitioner was certified as the exclusive representative in the unit involved on July 8, 1974.

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

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

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

The record reveals that the Fire Captains do have additional duties, responsibilities, and authority in the fire station as compared with the other Firefighters. Their authority is, however, limited. Fire Captains <u>do not</u> hire, promote, suspend, remove, transfer, furlough, layoff, or recall employees. However, Fire Captains assign tasks set out in the Daily Work Assignments, which

is, in fact, a directive from Headquarters. The Daily Work Assignments designates the duties to be accomplished by the station crew as a whole on a day to day basis (washing trucks, cleaning equipment and the station). The Captain may order the Firefighter he wishes to the job. Additionally, he does not have to abide by the daily schedule, so long as the daily work assignments are completed within the week. The record discloses that the assignment of personnel to perform the daily tasks is considered a routine procedure taken directly from a long-standing and established rotation system designated to make each Firefighter share equally in all of the work.

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

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

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

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

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

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

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

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

ORDER

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

NOTE 1: A supervisor or management official may join a union, but may not participate in management of the union or be a member of the union leadership.

NOTE 2: The statute requires the employee to consistently exercise independent judgment. A WG-11 electrician who headed the evening shift, handed out preexisting work assignments, and directed the work of other shift employees was not a supervisor. The directing and assigning of work the electrician did was routine and did not require the consistent exercise of independent judgment, U.S. Army Armor Center, Fort Knox, KY, 4 FLRA 20 (1980).

NOTE 3: To be classified as a supervisor, the supervisor must exercise his authority over individuals who are "employees" as defined in section 7103(a)(2). If the supervisor has authority only over aliens, non-US citizens or military personnel, he is not a supervisor. Section 7103(a)(10) provides that "supervisor" means an individual having authority over "employees," who are defined, in pertinent part, as individuals employed in an agency, but does not include an alien, or noncitizen who occupies a position outside the United States or a member of the uniformed services.

See Interpretation and Guidance, 4 FLRA 754 (1980), and New York, N.Y., 9 FLRA 16 (1982).

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2. Confidential Employees.

GSA, NATIONAL ARCHIVES, WASH, DC
8 FLRA 73 (1982)

. . . .

Position No. 8257, Management Analyst, GS-343-13, Program Management and Coordination Division

The incumbent, Yvonne M. Starbuck, is one of two individuals who occupy Position No. 8257 in the ORIM's Program Management and Coordination Division. Only the position occupied by Ms. Starbuck is in dispute as to confidential employee status.

The Authority finds the position occupied by this incumbent to be that of a "confidential employee" within the meaning of section 7103(a)(13) of the Statute. As a member of management's negotiation team and in dealing with union representatives on a day-to-day basis, the individual in this position acts in a confidential capacity with respect to those management officials who formulate or effectuate management's policies in the field of labor-management relations. Accordingly, the Authority shall order that Position No. 8257, Management Analyst, GS-343-13, Program Management and Coordination Division (Yvonne M. Starbuck), be excluded from the AFGE's exclusively recognized unit.[4] For additional discussion concerning confidential employees, see Pennsylvania Army National Guard, 8 FLRA 691 (1982), and

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[4] In view of the above finding on status as a confidential employee, it was considered unnecessary to pass upon the Activity's assertion that the incumbent should also be excluded from the unit on the basis that she is engaged in Federal personnel work in other than a purely clerical capacity.

Department of the Interior, Bureau of Mines, 9 FLRA 109 (1982).

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3. Management Officials.

CSRA § 7103a(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."

GSA, NATIONAL ARCHIVES, WASH, DC
8 FLRA 73 (1982)

. . . .

Position No. R562, Management Analyst, National Inspection Coordinator, GS-343-15, Office of the Deputy Assistant Archivist

The incumbent is nominally assigned to the ORIM's Office of the Deputy Assistant Archivist and is presently employed in such duties as gathering the materials for and drafting a five-year plan for the office and preparing a book of office internal procedures. The record is clear that the incumbent has not been permitted to effectively exercise any duties and responsibilities which would require or authorize him to formulate, determine, or influence the policies of the Activity within the meaning of section 7103(a)(11) of the Statute, as interpreted by the Authority in Department of the Navy, Automatic Data Processing Selection Office, 7 FLRA 172 (1981).[8] Accordingly, the Authority finds the position in question not to be that of a management official, and shall order that Position No. R562, Management Analyst, National Inspection Coordinator, GS-343-15, Office of the Deputy Assistant Archivist, be included in the AFGE's exclusively recognized unit.

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[8] In this lead case, the Authority interpreted the definition of "management officials" in section 7103(a)(11), and concluded that it includes those individuals who: (1) create, establish or prescribe general principles, plans or courses of action for an agency; (2) decide upon general principles, plans or courses of action for an agency; or (3) bring about or obtain a result as to the adoption of general principles, plans or courses of action for an agency.

NOTE 1: In United States v. Army Communications Command, Fort Monmouth, N.J. and NFFE, 4 FLRA 83 (1980), the Authority held that auditors, electronics engineers and project officers were management officials. Communication specialists, data management officers, financial management officers, general engineers, procurement analysts, program analysts, public information officers, and traffic managers were not management officials.

NOTE 2: The Assistant Secretary has decided that attorneys are not necessarily management officials. U.S. Department of the Treasury, Office of Regional Counsel, Western Region, A/SLMR No. 161 (May 18, 1972).

NOTE 3: Management personnel who happen to be union members may not vote in internal union elections. G.C. case numbers 2-CA-20669 and 2-CA-30376 (1983).

4. Professionals.

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

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

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

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

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

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

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

NOTE 1: CSRA § 7112(b) prevents professionals from being included in a unit with nonprofessional employees "unless a majority of the professional employees vote for inclusion in the unit." A related question of interest to attorneys is whether lawyers may be included in a unit with nonlawyer professionals. The Assistant

Secretary has ruled, and the Federal Labor Relations Council has affirmed, that this is permissible under the Order. U.S. Department of Treasury, Office of General Counsel, Western Region, A/SLMR No. 161 (May 18, 1972), aff'd, FLRC No. 72A-32 (Feb. 22, 1973). Nevertheless, the American Bar Association Standing Committee on Professional Ethics has opined that, for the purpose of bargaining with their employers, lawyers may join only organizations which limit their membership to lawyers employed by the same employer. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 275 (1947); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 917 (1966); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 986 (1967); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1029 (1968). In a September 1973 meeting of its national council, the Federal Bar Association voted against adopting a resolution similar to the American Bar Association's position. See 532 GOV'T EMP. REL. REP. A-9 (Dec. 3, 1973).

NOTE 2: See Department of Interior, A/SLMR No. 170 (1972) for factors to consider when attempting to classify an employee as a professional or not.

NOTE 3: The professional will consider two matters when he votes in the secret ballot representation election. The first is whether or not he desires to be part of the proposed bargaining unit. The second is which union, if any, he desires to represent him or if he desires no union representation. As an example, his options might include: (1) no union, (2) union A, (3) professional union.

5. Employees Engaged in Internal Security.

Although the President has authority to exclude organizations from the coverage of the statute for national security reasons, authority to exclude a particular individual engaged in national security work is vested in the Authority. 5 U.S.C. § 7112(b)(6). The Authority may also exclude employees who investigate and audit others whose duties affect the internal security of the agency. 5 U.S.C. § 7112(b)(7). With respect to national security exclusions, there is no need to establish that the employee is primarily engaged in such work. DOE, Oak Ridge, 4 FLRA 627 (1980). However, the language of section 7112(b)(7) requires that only employees "primarily" engaged in investigating and auditing employees whose work directly affects the internal security of an agency are to be excluded from units.

6. Work directly affecting national security.

Security work includes the design, analysis, or monitoring of security systems and procedures directly affecting national security. It does not include work involving mere access to, and use of, sensitive information and material. 5 U.S.C. § 7112(b)(6) is not limited, as is section 7112(b)(7), to individuals primarily engaged in the excluded functions; nor is it limited, as is section 7112(b)(3), to the excluded functions in other than a purely clerical capacity. At a minimum, positions to be excluded under section 7112(b)(6) should be designated as "sensitive" pursuant to

EO 10450 and FPM Chapter 732-3, Subchapter 1, Paragraph 1.3a. DOE, Oak Ridge, 4 FLRA 644 (1980).

GS-1810 Investigators and GS-1899 Investigation Technicians who gather information on the character and general suitability of applicants for Federal employment are not engaged in work directly affecting national security. OPM, 5 FLRA 238 (1981).

e. Other Excluded or Distinguished Employees. There are other classes of employees who are excluded or distinguished from the bargaining unit employees. They will not be discussed here. See CSRA § 7112(b). However, intermittent employees, who are otherwise eligible for union membership, and who have a reasonable expectation of continued employment, may be included in a prospective CBU. Ft. Buchanan Installation, Club Management System, 9 FLRA 143 (1982). Intermittent employees may also grieve their termination under the negotiated grievance procedure. See MCX, Kanehoe, 26 FLRA 801 (1987).

2-8. The Representation Election.

a. General.

CSRA § 7111(a). "An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election."

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

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

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

voters actually cast ballots, yet the union was certified as the exclusive representative).

b. Results of the Election.

1. Certification. (5 C.F.R. § 2422.21). If a union receives a majority of the votes cast, it is certified as the bargaining representative for the unit of employees. If the union loses the election, a certification of results is issued by the Regional Director.

2. Runoff Elections (5 C.F.R. § 2422.22). A runoff election will be conducted when there were at least three choices on the ballot, i.e., at least two unions and a "neither" or "none," and no choice received a majority of the votes. The election will be between the choices who received the highest and second highest number of votes in the original election.

3. Inconclusive Election (5 C.F.R. § 2422.23). An inconclusive election is one in which no choices received a majority of the votes, and there are at least three choices. A new election is held when all choices received the same number of votes, or two received the same number of votes and the third received more but not a majority; or, in a runoff election, both selections received the same number of votes.

ARMY CORPS OF ENGINEERS AND MARINE ENGINEER BENEFICIAL ASSOCIATION A/SLMR REPORT No. 19 (Nov. 18, 1970)

Problem. A request for review was filed with the Assistant Secretary seeking reversal of a Regional Administrator's refusal to set aside and rerun an election which had resulted in a tie vote.

The election provided employees with a choice as to whether or not they desired exclusive representation by the petitioning union (there was only one union on the ballot). The balloting resulted in six votes cast for and six votes against exclusive representation out of a total of about twenty eligible voters. One eligible voter arrived at the polling place ten minutes after the polls had closed and thus was unable to cast a ballot. . . .

. . . No contention was raised that any eligible voter failed to cast a ballot in the election because of improper conduct by any of the parties.

Decision. Section 202.17(c) of the Regulations provides that ". . . An exclusive representative shall be chosen by a majority of the valid ballots cast." Only one union was involved in the election and therefore the Regulations sections 202.21 and 202.22 of "tie vote" situations do not apply.

Accordingly, in the absence of objections to the election alleging improper conduct affecting the conduct or the results of the election and because the union was not chosen as the exclusive representative by a majority of the valid ballots cast as required by Section 202.17(c) of the Regulations, the request for the reversal of the action of the Regional Administrator was denied.

NOTE 1: The above case illustrates that there must be at least three choices on a ballot and no choice must have received a majority of the valid votes counted, before a runoff election will be conducted between the two highest choices on the ballot. A union or a party eliminated in the first election does not retain any rights regarding challenges or objections to the runoff election.

NOTE 2: During the 1974 hearings on the Order many unions said that the requirement for a secret ballot election should be relaxed. They contended this is particularly true if a single, unchallenged union clearly has the support of a majority of the employees in the bargaining unit. The unions urged that the support could be determined by authorization cards or other methods. The Department of Defense, however, argued that authorization cards are an inherently unreliable means of determining employee will. The Defense Department said that an exception to the election rule might be proper in a situation such as occurred in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). In Gissel the NLRB ordered the employer to recognize the union because the employer's unfair labor practices (threats and coercion of employees) had made it improbable that a fair election could still be held. No case similar to Gissel has been reported in the federal sector, where elections are always required. Gissel is also authority for the private sector rule that there need not be an election where the union has a majority showing of interest and the employer agrees to recognition.

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

a. Procedures (5 C.F.R. § 2422.21).

1. A dissatisfied party (normally a union which loses an election) may file an objection to the election within five days after the tally of ballots has been furnished, seeking a new election. The objection may be to the procedural conduct of the election or to conduct which may have improperly affected the results of the election. The objections must be specific, not conclusionary. Within ten days after filing the objection, the

objecting party shall file with the Regional Director statements, documents and other materials supporting the objections.

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

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

4. The interference issue in representation cases is whether conduct interfered with the employees' freedom of choice. Examples of management interference include preelection speeches, interrogation of employees in which management asks employee attitudes towards unions, denial of benefits or rights to union adherents, threats, and the granting of additional benefits shortly before the election. It has been previously discussed that a management rule prohibiting distribution of literature in nonworking areas during nonworking time may be grounds for setting an election aside even though it is not affirmatively shown that the union had difficulty in communicating with employees.

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

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

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

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

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

> "The expression of any personal view, argument, opinion or the making of any statement which--
>
> "(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,
>
> "(2) corrects the record with respect to any false or misleading statement made by any person, or
>
> "(3) informs employees of the Government's policy relating to labor-management relations and representation,
>
> shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

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

5. Department of the Army committed an unfair labor practice (ULP) by assisting a challenging union (Teamsters) prior to an election at Fort Sill, Oklahoma. DA, Fort Sill, Oklahoma, 29 FLRA 1110 (1987). In that case, DA officials, White House officials and Teamsters' representatives held a meeting in Washington, D.C., shortly before an election at Fort Sill prompted by the Teamsters challenge to the incumbent union (NFFE) for

representation of a 2,500 member bargaining unit. The parties met to discuss the commercial activities program at Fort Sill. The Teamsters subsequently publicized this meeting in flyers distributed to bargaining unit members prior to the election. After the election, won by the Teamsters, NFFE filed a ULP against the Army for a breach of neutrality. The authority ultimately agreed, finding that the meeting interfered with employees' rights to freely choose their exclusive representative, and that the flyer distribution interfered with the conduct of a fair election. As a remedy the Authority ordered a new election.

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

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

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

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

effectively contact the employees off the installation (see Natick Laboratories).

Once the union has filed a representation petition, it is elevated to a higher status. Management should give it some limited access to the employees. If an exclusive representative already represents the petitioned for employees, it is deemed to be a party to the election automatically (as discussed previously). The incumbent must be afforded the same access rights as the petitioning union, plus it will have its negotiated rights to services and facilities. Clearly, the challenging union even if it has achieved equivalent status, is only entitled to "customary and routine" facilities. Section 7116(a)(3). If the incumbent has successfully negotiated the use of a building on the installation, for example, management is not required to provide a similar facility to the challenger. U.S. Army Air Defense Center, Fort Bliss, Texas, 29 FLRA 362 (1987).

The labor counselor may be tempted to deny all access, services or facilities to union organizers in order to avoid violating the neutrality doctrine. If they are given nothing, a union may not successfully assert preference by the activity between unions. This may be too simplistic. In the Bureau of Customs, A/SLMR 169, the activity was faulted for denying both competing unions the use of its facilities. It should have given them a means to inform the electorate (use of a bulletin board, distribution system, etc.) but did not have to allow actual access on the installation of nonemployee organizers to talk to employees. This case is also a fine summarization of some of the principles which are discussed elsewhere in this chapter.

See Tinker AFB; Chapter 5, infra; and Pierce, The Neutrality Doctrine in Federal Sector Labor Relations, The Army Lawyer, July 1983, at 18, for a detailed discussion of the neutrality doctrine.

c. Challenged Ballots (5 C.F.R. § 2422.19).

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

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

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

2-10. Other Types of Petitions [5 C.F.R. § 2422.1].

Petition forms may be obtained from the Regional Office. One form is used for all types of petitions. (See petition form at end of this chapter). It is sent with the supporting documents to the Regional Office. The representation petition has been discussed previously. Other petitions include:

a. Decertification Petition (DR Petition).

A DR petition is filed by one or more employees or by an individual filing on their behalf. It requires an election to determine if an incumbent union should lose its exclusive representative status because it no longer represents a majority of employees in an existing union.

A decertification election must ordinarily be in the same unit as was certified. The petition must be accompanied by a showing of interest of not less than thirty percent of the employees indicating that the employees no longer desire to be represented by the currently recognized labor organization (5 C.F.R. (2422.2(b)(2)). The DR petition is subject to the timeliness requirements of 5 C.F.R. 2422.3. The election bar rule applies in those cases in which a union has been decertified and a petition for an election has been filed within 12 months of the decertification election.

b. Agency Petition (RA Petition).

An agency or activity may file an RA petition seeking a determination whether an incumbent union should cease to be the exclusive representative when it has a "good faith doubt" that the union currently represents a majority of the employees in the bargaining unit; or that, because of a substantial change in the character and scope of the unit, it has a "good faith doubt" that the unit is now appropriate. 5 C.F.R. 2422.2(b)(1). See FAA, 1 FLRA 1045 (1979); Army Communications Command, 2 FLRA 231 (1980); Department of Energy, 3 FLRA 76 (1980). An RA petition can be filed at "any time when unusual circumstances exist which substantially affect the unit or the majority representation." 5 C.F.R. § 2422.3(d)(3). In 4787th Air Base Group and AFGE, 15 FLRA 858 (1984), management established its good faith doubt that the union represented a majority of the employees in the existing unit.

c. Unit Clarification Petition (CU Petition).

A CU is filed when a change has occurred in the unit composition as the result of a reorganization or the addition of new functions to a previously recognized unit. Its purpose is to clarify what the bargaining unit is and what employees are in it. It may be filed by an agency or a labor organization. Because of the statutory changes in definitions of supervisors and management officials and because of reorganizations and transfers of functions, this is one of the most common representation petitions filed under the statute. A common example of the use of a CU petition is to determine whether an employee on merit pay is also a supervisor or manager pursuant to Title VII's definition. If so, the employee is not in a bargaining unit. Instructions for filing such a petition are to be found in 5 C.F.R. 2422.2(c).

A good case describing the rules and rationale the FLRA will apply in evaluating unit clarification petitions is FAA and AFGE, 15 FLRA 60 (1984).

d. Amendment of Recognition or Certification Petition (AC Petition).

This is used to conform the recognition to existing circumstances resulting from nominal or technical changes, such as a change in the name of the union or in the name or location of the agency or activity. Like a CU petition, an AC petition may be filed at any time because it does not raise a question concerning representation. The petitioner merely wants to update the identity of the parties to the exclusive relationship. For example, in a combined CU/AC case, the Authority changed the existing recognition to reflect the fact that the Civil Service Commission had been superseded by the Office of Personnel Management. OPM, 5 FLRA 238 (1981).

e. Petition for Consolidation (UC Petition).

An agency or exclusive representative may file a UC petition to consolidate previously existing bargaining units. There is a presumption favoring consolidation. See VA, 2 FLRA 224 (1979). Before such a petition can be filed with the Authority, the party seeking such a consolidation must first serve a written request for consolidation on the other party. If the latter rejects that proposed consolidation or fails to respond within 30 days, the initiating party may file a UC petition with the Regional Director. If the parties agree to consolidate, they may jointly or individually file a UC petition. The petitioner(s) must indicate whether or not an election on the proposed consolidation is desired. Even if the parties agree to consolidate without an election, an election will be held if, after affected employees are given a 10-day notice of the proposed consolidation, 30% of the

employees indicate that they desire an election. An election is required if the petition entails the consolidating of units of professional employees with units of non-professional employees. 5 U.S.C. § 7112(b)(5).

A UC petition may be filed at any time (5 C.F.R. § 2422.3(l)), except that such a petition is subject to a unit consolidation election bar (5 C.F.R. § 2422.3(b)) and a unit consolidation certification bar (5 C.F.R. § 2422.3(h)). Should an RO or DR petition be filed while a UC petition is pending, such a petition will be held in abeyance until the UC case is processed. 5 C.F.R. § 2422.3(j)(i). If there is no consolidation, the RO or DR petition will be processed. But if the UC proceedings result in a consolidated unit being certified, the party filing the RO or DR petition is given 30 days in which to establish a 30% showing of interest for the consolidation unit. 5 C.F.R. § 2422.3(j)(2); Department of Transportation, 4 FLRA 722 (1980).

Once a union is certified as the exclusive representative of a consolidated unit, a new bargaining obligation is created that supersedes bargaining obligations that existed prior to the consolidation. Although 5 C.F.R. § 2422.2(h)(8) requires that the terms and conditions of existing agreements covering units subsequently consolidated are to remain in effect during the hiatus between the consolidation of units and the negotiation of an agreement covering the consolidated unit, such terms and conditions do not include local bargaining reopener clauses. HHS, SSA, 6 FLRA 202 (1981).

Regulations governing consolidation are located at 5 C.F.R. § 2422.2(h).

f. Dues allotment recognition (DA petition). Recognition for the purpose of negotiating a dues allotment agreement is one of two new forms of recognition created by the statute. Regulations relating to the filing of petitions for such recognition are to be found in 5 C.F.R. § 2422.2(d). The unit petitioned for must satisfy the same criteria of appropriateness as a unit for which a union seeks exclusive recognition. However, unlike the 30% showing of interest requirement attaching to RO petitions, the union filing a DA petition must show that 10% of the employees in the proposed unit are members of the petitioning union. 5 C.F.R. § 2422.2(d)(ii). There can be no dues allotment recognition for a unit for which a union holds exclusive recognition. 5 C.F.R. § 2422.2(d).

g. National consultation rights (NCR petition). Requests for NCR are made directly to the agency or the primary national subdivision (PNS). If the agency/PNS grants such recognition, no further proceedings are necessary: there is no need for FLRA to "certify" that the union is entitled to NCR recognition. However,

should the union wish to challenge the agency's determination that the union does not qualify for NCR, it can file an NCR petition with the Authority in accordance with the requirements of 5 C.F.R. § 2426.2.

h. Consultation rights on government-wide rules or regulations (CR petition). Requests for CR, like those for NCR, are made directly to the agency that issues government-wide rules or regulations. Should the agency not grant such recognition, the union may file a CR petition with the Authority in accordance with the requirements of 5 C.F.R. § 2426.12.

NOTE 1: Reorganizations within governmental agencies frequently cause management to doubt the appropriateness of bargaining units which existed prior to the changes in organization. The Assistant Secretary in Headquarters, U.S. Army Aviation Systems Command, St. Louis, Mo., made it clear that an RA petition, not a CU petition, is the proper way to raise such doubts. A/SLMR No. 160 (May 18, 1972). For other reorganization cases in which an RA petition was, or should have been, used, see Federal Aviation Administration, Great Lakes Region, Chicago Airport District Office, A/SLMR No. 318 (Oct. 24, 1973); and Department of the Army, Strategic Communications Command, Fort Huachuca, Ariz., A/SLMR No. 351 (Feb. 5, 1974).

NOTE 2: A CU petition may be appropriate for a union to file during an agency reorganization when two or more unions are involved. See Department of Health and Human Services, Region II, New York, New York, 43 FLRA 1245 (1992).

NOTE 3: Filing Wrong Petition: When the wrong type of petition was filed, the Assistant Secretary would treat it as though it was the proper type to achieve the petitioner's intent rather than dismiss it merely because of a technical error. See AVSCOM, A/SLMR No. 160, Dix-McGuire Consolidated Exchange, A/SLMR No. 199. The Authority has continued this policy. Naval Civilian Personnel Command, 8 FLRA 643 (1982).

Form Approved
OMB No. 3220-0003

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

PETITION

INSTRUCTIONS: File an original and 4 copies of this Petition with the appropriate Regional Director, Federal Labor Relations Authority, and a statement of any relevant facts not contained in the Petition along with a copy of all correspondence relating to the matters raised by the Petition. Upon filing the Petition, serve a copy of the Petition and of the accompanying material referred to above on each known interested party. If more space is required for any item, attach additional sheets, numbered according to the item to which they pertain. The showing of interest and an alphabetical list of names constituting such showing, as required by the Regulations of the Federal Labor Relations Authority, shall be filed with the original of the Petition, but shall not be furnished to any other party or person. A list (including names and addresses) of those upon whom service has been made should accompany the Petition.

DO NOT WRITE IN THIS SPACE

CASE NO

DATE FILED

The Petitioner, if a labor organization, states it has submitted to the activity or agency and the Assistant Secretary of Labor for Labor-Management Relations a roster of its officers and representatives, a copy of its constitution and bylaws and a statement of its objectives.

1. PURPOSE OF THIS PETITION *(Check one)*

_____ RO - CERTIFICATION OF REPRESENTATIVE (Labor Organization Petition) - A substantial number of Federal employees wish to be represented for purposes of exclusive recognition by Petitioner and Petitioner desires to be certified as exclusive representative of employees.

_____ RA - REPRESENTATIVE STATUS (Agency Petition) - The Agency has a good faith doubt, based on objective considerations, that the currently recognized or certified labor organization represents a majority of the employees in the existing unit or that, because of a substantial change in the character and scope of the unit, it has a good faith doubt that such unit is now appropriate. Attach statement containing detailed explanation of the reasons supporting the good faith doubt.

_____ DR - DECERTIFICATION OF EXCLUSIVE REPRESENTATIVE (Employee Petition) - A substantial number of Federal employees assert that the currently recognized or certified labor organization no longer represents a majority of the employees in the unit.

_____ CU - CLARIFICATION OF UNIT (Agency or Labor Organization Petition) - Petitioner seeks clarification of an existing appropriate unit *(Check one)* _____ Previously recognized _____ Previously certified in Case No. _____

_____ AC - AMENDMENT OF RECOGNITION OR CERTIFICATION (Agency or Labor Organization Petition) - Petitioner seeks amendment of recognition or certification *(Check one)* _____ Previously recognized _____ Previously certified in Case No. _____

Attach statement describing the specific amendment sought and the reasons for the request.

_____ DA - CERTIFICATION FOR DUES ALLOTMENT (Labor Organization Petition) - Ten percent or more of Federal employees in an appropriate unit are members of the Petitioner.

2. INFORMATION CONCERNING ACTIVITY AND/OR AGENCY INVOLVED

A. NAME OF ACTIVITY AND/OR AGENCY

B. ADDRESS *(Street and Number, City, State and ZIP Code)*

C. PERSON TO CONTACT, TITLE

D. PHONE NO

E. IF PETITION INVOLVES AN ACTIVITY, NAME THE AGENCY OF WHICH THE ACTIVITY IS A PART

3. DESCRIPTION OF THE UNIT CLAIMED TO BE APPROPRIATE
(In CU Petition, describe PRESENT unit and attach description of proposed clarification and reasons for the request)

INCLUDED

EXCLUDED

4 A. APPROXIMATE NUMBER OF EMPLOYEES IN THE UNIT CLAIMED TO BE APPROPRIATE
PRESENT _____
PROPOSED BY CU/AC _____

4 B. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?*
_____ YES _____ NO
*NOT APPLICABLE IN RA, CU, AC, AND DA

5. RECOGNIZED OR CERTIFIED LABOR ORGANIZATION *(If unknown, or there is none, so state)*

A. NAME *(Local name and number, and national or international)*

B. AFFILIATION, IF ANY

C. PHONE NO

D. ADDRESS *(Street and Number, City, State and ZIP Code)*

E. DATE OF RECOGNITION OR CERTIFICATION

6. DATE OF EXPIRATION OF CURRENT AGREEMENT, IF ANY *(Show month, day and year) (If unknown, or there is none, so state)*

7. LABOR ORGANIZATIONS OTHER THAN PETITIONER *(and other than names in item 5)* **WHICH HAVE SHOWN AN INTEREST IN REPRESENTING ANY OF THE EMPLOYEES IN THE UNIT SET FORTH IN ITEM 3 ABOVE** *(If unknown, or there is none, so state)*

A. NAME *(Local name and number, and national or international)*	B. AFFILIATION, IF ANY	C. ADDRESS *(Street and Number, City, State and ZIP Code)*	D. PHONE NO

8. FULL NAME OF PETITIONER *(If labor organization, give local name and number, national or international, and affiliation, if any)*

ADDRESS *(Street and Number, City, State and ZIP Code)*

PHONE NO

9. I DECLARE THAT I HAVE READ THE ABOVE PETITION AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. WILLFULLY FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001).
BY (Type or print below the name of the representative or person filing the Petition)

SIGNATURE

ADDRESS *(Street and Number, City, State and ZIP Code)*

TITLE	PHONE NO	DATE

U.S. GPO : 1986 0 - 170-569

STATEMENT OF STANDARD PROCEDURES IN REPRESENTATION HEARINGS BEFORE HEARING OFFICERS

The hearing will be conducted by a designated Hearing Officer at the time and place specified in the Notice of Hearing, and in accordance with the provisions of Part 2422 of the Regulations of the Federal Labor Relations Authority. In regard to the hearing, the parties should be aware of the following:

1. POSTPONEMENT OF HEARING. Unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements will not be granted unless good and sufficient grounds are shown and the following requirements are met: (a) The request must be in writing and served on the Regional Director; (b) Grounds therefor must be set forth in detail; (c) Alternate dates for any rescheduled hearing must be given; (d) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and (e) Copies must be served on all other parties and that fact must be noted on the request. Except under the most extraordinary circumstances, no request for postponement will be granted during the five (5) days immediately preceding the date of hearing.

2. PREHEARING EXCHANGE OF EXHIBITS. Any party intending to introduce documentary exhibits at the hearing is expected to furnish a copy of each such proposed exhibit to each of the other parties at least five (5) days before the hearing. This will facilitate the expeditious development of a full record for decision by the Federal Labor Relations Authority.

While the prehearing exchange of exhibits does not preclude the parties from introducing other exhibits at the hearing, parties are urged to comply with the above prehearing practice. Where a copy of the exhibit is not tendered to the other parties because it was not contemplated prior to the opening of the hearing, a copy of such exhibit should be furnished to the other parties at the time it is offered in evidence.

Two (2) copies of each documentary exhibit shall be submitted to the Hearing Officer at the time it is offered in evidence at the hearing.

Objections to any exhibit should be reserved for the hearing when the exhibit is offered in evidence.

3. RIGHTS OF THE PARTIES. Parties may be represented in person, by counsel or by other representative, and shall have the right to examine and cross-examine witnesses and introduce into the record documentary or other relevant evidence in accordance with the procedure contained in Item 2, above and the Regulations.

4. OFFICIAL TRANSCRIPT. An official reporter makes the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Hearing Officer for his approval.

5. OFF-THE-RECORD DISCUSSION. All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Hearing Officer specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Hearing Officer and not to the official reporter.

6. MOTIONS AND OBJECTIONS. Statements of reasons in support of motions and objections should be specific and concise. Automatic exception will be allowed to all adverse rulings, and upon appropriate request, an objection or exception may be permitted to stand to an entire line of questioning.

7. ORAL ARGUMENT. Upon request, any party shall be entitled to a reasonable period of time prior to the close of the hearing for oral argument which shall be included in the official transcript of the hearing. In the absence of a request, the Hearing Officer may ask for a statement of position concerning any issue in the case or theory in support thereof, if at the close of the hearing he believes that such oral argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

8. AGREEMENT FOR ELECTION POSSIBLE BEFORE CLOSE OF HEARING. Prior to the close of the hearing, in accordance with Section 2422.7 of the Regulations of the Federal Labor Relations Authority, an agreement, subject to the approval of the Regional Director may be executed for a secret ballot election in an agreed upon appropriate unit.

9. FILING OF BRIEFS. Any party desiring to file a brief with the Federal Labor Relations Authority shall file the original and six (6) copies within seven (7) days after the close of the hearing, and serve a copy of the brief on each of the parties. A statement of such service shall be filed with the Federal Labor Relations Authority. Upon request made before the close of the hearing the Hearing Officer, for good cause, may allow time, not to exceed fourteen (14) additional days, for such filing.

10. REQUESTS FOR ADDITIONAL TIME TO FILE BRIEFS AFTER THE CLOSE OF THE HEARING. Requests for an extension of time within which to file briefs not addressed to the Hearing Officer during the hearing, shall be made to the Regional Director. Such request will not be considered unless it is in writing and is received by the Regional Director at least three (3) days before the date such briefs are due. Copies of the request for an extension shall be served on all other parties, and statement of service shall be filed with the Regional Director.

FLRA Dec 1974
(1 79)

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

AGREEMENT FOR CONSENT OR DIRECTED ELECTION

Pursuant to a Petition duly filed under Chapter 71 of Title 5 of the U.S.C. and the Regulations of the Federal Labor Relations Authority, and subject to approval of the Regional Director, Federal Labor Relations Authority, the undersigned parties in accordance with the aforementioned Regulations hereby AGREE AS FOLLOWS:

1. **SECRET BALLOT** - An election by secret ballot shall be conducted by the Activity or Agency named herein under the supervision of the Regional Director among the employees of the undersigned Activity or Agency in the unit defined below, at the indicated time and place, to determine whether or not such employees desire to be represented for purposes of exclusive recognition by (one of) the undersigned labor organization(s). Said election shall be in accordance with Chapter 71 of Title 5 of the U.S.C., the Regulations of the Federal Labor Relations Authority, and all applicable procedures and policies of the Federal Labor Relations Authority.

2. **ELIGIBLE VOTERS** - The eligible voters shall be those employees included within the unit described below, who were employed during the payroll period indicated below, including employees who did not work during that period because they were out ill, or on vacation, or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

3. **NOTICES OF ELECTION** - The Activity or Agency shall prepare a Notice of Election and furnish copies to the parties setting forth the details and procedures for the election to be held and incorporating therein a sample ballot. The Activity or Agency shall post such Notices of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. **OBSERVERS** - Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Federal Government, at the polling places during the election to assist in its conduct, to challenge, for good cause, the eligibility of voters, and to verify the tally. Activity or Agency observers shall not be eligible voters or have any official connection with any of the labor organizations involved. Labor organizations shall designate in writing to the Activity or Agency their official observers in advance of the election to allow for any necessary adjustment of work schedules.

5. **TALLY OF BALLOTS** - As soon after the election as feasible, the votes shall be counted and tabulated by the observers. Upon the conclusion of the counting, the Regional Director shall cause to be furnished a Tally of Ballots to each of the parties. The Regional Director shall issue to the parties a certification of the results of the election, or a certification of representative, where appropriate.

6. **OBJECTIONS, CHALLENGES, INVESTIGATIONS AND DETERMINATIONS THEREON** - Objections to the procedural conduct of the election or to conduct which may have improperly affected the results of the election, setting forth a clear and concise statement of the reasons therefor, may be filed with the Regional Director within five (5) days after the Tally of Ballots has been furnished. Copies of such objections and the statement of the reasons therefor, shall be served on the other parties by the party filing them, and a statement of service shall be filed with the Regional Director. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Within ten (10) days of the filing of the objections, the objecting party shall file with the Regional Director evidence, including signed statements, documents and other material supporting the objections. The objecting party shall bear the burden of proof at all stages of the proceeding, regarding all matters alleged in its objections. The investigation and determination of objections and challenged ballots shall be in accordance with Section 2422.20 of the Regulations of the Federal Labor Relations Authority.

7. **RUNOFF PROCEDURE** - In the event more than one labor organization is signatory to this agreement, and in the event that no choice on the ballot in the election receives a majority of the valid ballots cast, the Regional Director shall proceed in accordance with Section 2422.21 and Section 2422.22 of the Regulations of the Federal Labor Relations Authority.

FLRA Form 33
August 1979

CHAPTER 3

COLLECTIVE BARGAINING

3-1. Introduction.

a. Collective Bargaining.

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

b. Typical Clauses Contained in Bargaining Agreements.

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

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

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

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

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

c. Negotiation of the Collective Bargaining Agreement.

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

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

After the ground rules are agreed upon, a memorandum of understanding (MOU) containing them is usually executed. The parties then negotiate their proposals and counter proposals. Neither side need agree to a proposal, but each must discuss it in good faith unless it falls outside the scope of bargaining. Section 7114(b) provides:

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

within the scope of collective bargaining; and

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

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

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

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

Title VII imposes upon both unions and employers the obligation to bargain in good faith concerning conditions of employment. This obligation persists throughout the period of exclusive representation, not only when a collective bargaining agreement is being negotiated or renegotiated. Thus, if management is to change a condition of employment, such as the working hours, it must give the unions notice of the projected change and an opportunity to negotiate. This is addressed in more detail later in this chapter.

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

CSRA section 7131 clearly provides that employees representing an exclusive representative in the negotiation of a collective bargaining agreement and other representational functions shall be authorized official time. That is, time away from their normal job, to accomplish these functions. Functions for which official time have been mandated by the FLRA include, but are not limited to: negotiating a collective bargaining agreement, impasse proceedings, midterm and impact and implementation negotiations, grievance proceedings and EEO complaints. Employees negotiating local supplements to national master agreements are also entitled to official time. American Federation of Government Employees v. Federal Labor Relations Authority, 750 F.2d 143 (D.C. Cir. 1984).

Activities performed by employees relating to internal union business of a labor organization shall be performed during the time the employee is in a non-duty status. But this part of section 7131 has strictly construed internal union business to include little more than solicitation of union membership, election of labor organization officials, and collection of union dues. Also, official time may not be granted an employee during other than normal duty hours. This means that no overtime will be paid to allow employees to perform representational activities, because the CSRA limits official time to those times the employee would otherwise be in a duty status. Finally, official time may not be allowed for employees outside the bargaining unit for which a CBA is being negotiated. National Oceanic and Atmospheric Administration, 15 FLRA 43 (1984); AFGE v. FLRA, 744 F.2d 73 (10th Cir. 1984); Naval Surface Weapons Center, 9 FLRA 193 (1982), reconsidered, 12 FLRA 731 (1983), aff'd, AFGE, Local 2090 v. FLRA, 738 F.2d 633 (4th Cir. 1984).

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

OPM also requires that employers record the time and cost involved in employee representational functions. FPM Letter 711-161), July 31, 1981, SUBJECT: Recording the Use of Official Time by Union and Other Employee Representatives for Representational Functions, requires agencies to initiate methods to record or account for the use of official time. The purpose of this requirement is to record travel and per diem costs when payable, assess the impact on agency operations of official time, and to determine changes that should be sought concerning official time in future negotiated contracts. While agencies cannot intimidate, harass or take other adverse action against a union representative for their use of official time to perform representational functions, agencies can and should monitor the use of official time

to insure it is only being granted for proper purposes. Defense General Supply Center, 15 FLRA 932 (1984); Air Force Logistics Command, 14 FLRA 311 (1984).

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

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER v. FEDERAL LABOR RELATIONS AUTHORITY ET AL.

464 U.S. 89, 104 S. Ct. 439, 78 L.Ed.2d 195 (1983)

JUSTICE BRENNAN delivered the opinion of the Court.

Title VII of the Civil Service Reform Act of 1978 ("Act"), Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. § 7131(a), requires federal agencies to grant "official time" to employees representing their union in collective bargaining with the agencies. The grant of official time allows the employee negotiators to be paid as if they were at work, whenever they bargain during hours they would otherwise be on duty. The Federal Labor Relations Authority ("FLRA" or "Authority") concluded that the grant of official time also entitles employee union representatives to a per diem allowance and reimbursement for travel expenses incurred in connection with collective bargaining. 2 FLRA 265 (1979). In this case, the Court of Appeals for the Ninth Circuit enforced an FLRA order requiring an agency to pay a union negotiator travel expenses and a per diem, finding the Authority's interpretation of the statute "reasonably defensible." 672 F.2d 732 (1982). Three other Courts of Appeals have rejected the FLRA's construction of the Act.[1] We granted certiorari to resolve this conflict, 459 U.S. ____ (1983), and now reverse.

I
A

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

[1] Florida National Guard v. FLRA, 699 F.2d 1082 (11th Cir. 1983), cert. pending, No. 82-1970; United States Department of Agriculture v. FLRA, 691 F.2d 1242 (8th Cir. 1982), cert. pending, No. 82-979; Division of Military & Naval Affairs v. FLRA, 683 F.2d 45 (2d Cir. 1982), cert. pending, No. 82-1021.

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.[2] 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.[3]

The new Act, declaring that "labor organizations and collective bargaining in the civil service are in the public interest," 5 U.S.C. § 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).[4] 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 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 the FLRA, a three-member independent and bipartisan body within the Executive Branch with responsibility for supervising the collective-bargaining process and administering other

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[2] Exec. Order No. 10988, 3 C.F.R. § 521 (1959-1963 Comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 Comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. §§ 605, 634 (1971-1975 Comp.) and 3 C.F.R. § 957 (1971-1975 Comp.).

[3] The Council was established by Executive Order 11491 in 1970.

[4] Certain federal employees, including members of the military and the Foreign Service, and certain federal agencies, including the Federal Bureau of Investigation and the Central Intelligence Agency, are excluded from the coverage of Title VII. 5 U.S.C. § 7102(a)(2) and (3).

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, see H.R. Rep. No. 95-1403, p. 41 (1978), 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).

B

Petitioner, the Bureau of Alcohol, Tobacco and Firearms ("BATF" or "Bureau"), an agency within the Department of the Treasury, maintained a regional office in Lodi, California. Respondent, the National Treasury Employees Union ("NTEU" or "Union") was the exclusive representative of BATF employees stationed in the Lodi office. In November 1978, the Bureau notified NTEU that it intended to move the Lodi office to Sacramento and to establish a reduced duty post at a new location in Lodi. The Union informed BATF that it wished to negotiate aspects of the move's impact on employees in the bargaining unit. As its agent for these negotiations, the Union designated Donald Pruett, a BATF employee and NTEU steward who lived in Madera, California and was stationed in Fresno. Bureau officials agreed to meet with Pruett at the new offices and discuss the planned move. Pruett asked that his participation in the discussions be classified as "official time" so that he could receive his regular salary while attending the meetings. The Bureau denied the request and directed Pruett to take either annual leave or leave without pay for the day of the meeting.

On February 23, 1979, Bureau officials met with Pruett at the proposed new Sacramento offices and inspected the physical amenities, including the restrooms, dining facilities, and parking areas. Pruett and the BATF officials then drove to Lodi where they conducted a similar inspection of the new reduced duty post. Finally, the group repaired to the existing Lodi office where they discussed the planned move. After Pruett expressed his general satisfaction with the new facilities, he negotiated with the agency officials about such matters as parking arrangements, employee

assignments, and the possibility of excusing employee tardiness for the first week of operations in the Sacramento office. Once the parties reached an agreement on the move, Pruett drove back to his home in Madera.

Pruett had spent 11 and one half hours travelling to and attending the meetings, and had driven more than 300 miles in his own car. When he renewed his request to have his participation at the meetings classified as official time, the Bureau informed him that it did not reimburse employees for expenses incurred in negotiations and that it granted official time only for quarterly collective-bargaining sessions and not for mid-term discussions like those involved here. In June 1979, the Union filed an unfair labor practice charge with the FLRA, claiming that BATF had improperly compelled Pruett to take annual leave for the February 23 sessions.

While the charge was pending, the FLRA issued an "Interpretation and Guidance" of general applicability which required federal agencies to pay salaries, travel expenses, and per diem allowances to union representatives engaged in collective bargaining with the agencies.[5] 2 FLRA 265 (1979). The Interpretation relied on § 7131(a) of the Act, which provides that "[a]ny employee representing an exclusive representative in the negotiation of a collective bargaining agreement . . . shall be authorized official time for such purposes. . . ." The Authority concluded that an employee's entitlement to official time under this provision extends to "all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement." 2 FLRA, at 268. The Authority further determined that § 7131(a) requires agencies to pay a per diem allowance and travel expenses to employees representing their union in such negotiations. Id., at 270.

Based on the NTEU's pending charge against the Bureau, the General Counsel of the Authority issued a complaint and notice of hearing, alleging that the BATF had committed an unfair labor practice by refusing to

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[5] Although the Authority invited interested persons to express their views prior to adoption of the Interpretation, see Notice Relating to Official Time, 44 Fed. Reg. 42,788 (July 20, 1979), the decision apparently was issued not under the FLRA's statutory power to promulgate regulations, § 7134, but rather under § 7105(a)(1), which requires the Authority to provide leadership in establishing policies and guidance relating to federal labor-management relations. See Brief for Respondent FLRA at 11 n. 10.

grant Pruett official time for the February 23 meetings.[6] During the course of a subsequent hearing on the charge before an Administrative Law Judge, the complaint was amended to add a claim that, in addition to paying Pruett's salary for the day of the meetings, the BATF should have paid his travel expenses and a per diem allowance. Following the hearing, the ALJ determined that negotiations had in fact taken place between Pruett and BATF officials at the February 23 meetings. Bound to follow the recent FLRA Interpretation and Guidance, the ALJ concluded that the Bureau had committed an unfair labor practice by failing to comply with § 7131. Accordingly, he ordered the Bureau to pay Pruett his regular salary for the day in question, as well as his travel costs and a per diem allowance. The ALJ also required the BATF to post a notice stating that the agency would do the same for all employee union representatives in future negotiations. The Bureau filed exceptions to the decision with the Authority, which, in September 1980, affirmed the decision of the ALJ, adopting his findings, conclusions, and recommended relief. 4 FLRA 288 (1980).

The Bureau sought review in the United States Court of Appeals for the Ninth Circuit, and the Union intervened as a party in that appeal. The Bureau challenged both the FLRA's conclusion that § 7131(a) applies to mid-term negotiations and its determination that the section requires payment of travel expenses and a per diem allowance. After deciding that the Authority's construction of its enabling Act was entitled to deference if it was "reasoned and supportable," 672 F.2d at 735-736, the Court of Appeals enforced the Authority's order on both issues. Id., at 737, 738. On certiorari to this Court, petitioner does not seek review

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[6] Section 7118 of the Act provides in part:

(a)(1) If any agency or labor organization is charged with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. . . .

The complaint issued by the General Counsel in this case relied on § 7116 of the Act, which provides in part:

(a) For the purposes of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(8) to otherwise fail or refuse to comply with any provision of this chapter.

of the holding with respect to mid-term negotiations. Only that aspect of the Court of Appeals' decision regarding travel expenses and per diem allowances is at issue here.

II

The FLRA order enforced by the Court of Appeals in this case was, as noted, premised on the Authority's earlier construction of § 7131(a) in its Interpretation and Guidance. Although we have not previously had occasion to consider an interpretation of the Civil Service Reform Act by the FLRA, we have often described the appropriate standard of judicial review in similar contexts.[7] Like the National Labor Relations Board, see, e.g., NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963), the FLRA was intended to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Act. See § 7105; H.R. Rep. No. 95-1403, p. 41 (1978). Consequently, the Authority is entitled to considerable deference when it exercises its "special function of applying the general provisions of the Act to the complexities" of federal labor relations. Cf., NLRB v. Erie Resistor Corp., supra, at 236. See also Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979); NLRB v. Iron Workers, 434 U.S. 335, 350 (1978); NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957).

On the other hand, the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965). Accordingly, while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, NLRB v. Iron Workers, supra, at 350, they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." NLRB v. Brown, 380 U.S. 278, 291-292 (1965). See Allied Chemical & Alkali Workers v.

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[7] The decisions of the FLRA are subject to judicial review in accordance with the Administrative Procedure Act (APA), 5 U.S.C. § 706. See 5 U.S.C. § 7123(c). The APA requires a reviewing court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." § 706. The court must set aside agency actions and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." § 706(2)(A) and (C).

Pittsburgh Plate Glass Co., 404 U.S. 157, 166 (1971).[8] Guided by these principles, we turn to a consideration of the FLRA's construction of § 7131(a).

III

Section 7131(a) of the Civil Service Reform Act provides in full:

> Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this

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[8] Petitioner suggests that we should accord little deference to the Authority's decision in this case for two reasons. First, petitioner contends that the FLRA's conclusion that employee negotiators are entitled to travel expenses and a per diem allowance was based largely on the Authority's reading of the Travel Expense Act, 5 U.S.C. § 5702, a statute the FLRA does not administer. As we understand the FLRA's decision, however, the Authority's view that the Travel Expense Act supported its conclusion derived primarily from its interpretation of § 7131. See infra, at 17.

Second, petitioner argues that the Interpretation and Guidance is entitled to less weight since it was apparently an "interpretative rule" rather than an "administrative regulation." See n.5, supra. Congress did, however, afford the FLRA broad authority to establish policies consistent with the Act, see §§ 7105 and 7134, and the Interpretation and Guidance was attended by at least some of the procedural characteristics of a rulemaking. See n.5, supra. See 5 U.S.C. § 553. Compare EEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981), with General Electric Co. v. Gilbert, 429 U.S. 125, 141-142 (1976). In any event, we find it unnecessary to rest our decision on a precise classification of the FLRA's action. As we explain in the text, an agency acting within its authority to make policy choices consistent with the congressional mandate should receive considerable deference from courts, provided, of course, that its actions conform to applicable procedural requirements and are not "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law," 5 U.S.C. § 706(2)(A). See, e.g., Batterton v. Francis, 432 U.S. 416, 424-426 (1977); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-138 (1940). When an agency's decision is premised on its understanding of a specific congressional intent, however, it engages in the quintessential judicial function of deciding what a statute means. In that case, the agency's interpretation, particularly to the extent it rests on factual premises within its expertise, may be influential, but it cannot bind a court. General Electric Co. v. Gilbert, supra; Zuber v. Allen, 396 U.S. 168, 192-193 (1969); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). For the reasons set out below, we conclude that the FLRA's decision in this case neither rests on specific congressional intent nor is consistent with the policies underlying the Act.

> chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

According to the House Committee that reported the bill containing § 7131, Congress used the term "official time" to mean "paid time." See H.R. Rep. No. 95-1403, p. 58 (1978). In light of this clear expression of congressional intent, the parties agree that employee union negotiators are entitled to their usual pay during collective-bargaining sessions that occur when the employee "otherwise would be in a duty status." Both the Authority, 2 FLRA, at 269, and the Court of Appeals, 672 F.2d, at 737, recognized that there is no corresponding expression, either in the statute or the extensive legislative history, of a congressional intent to pay employee negotiators travel expenses and per diem allowances as well.

Despite this congressional silence, respondents advance several reasons why the FLRA's determination that such payments are required is consistent with the policies underlying the Act. Each of these arguments proceeds from the assumption that, by providing employee negotiators with official time for bargaining, Congress rejected the model of federal labor relations that had shaped prior administrative practice. In its place, according to respondents, Congress substituted a new vision of collective bargaining under which employee negotiators, like management representatives, are considered "on the job" while bargaining and are therefore entitled to all customary forms of compensation, including travel expenses and per diem allowances.[9] In order to evaluate this claim, it is necessary briefly to review the rights of employee negotiators to compensation prior to adoption of the Act.

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[9] In the Interpretation and Guidance, the FLRA also noted that it had previously construed § 7131(c), which authorizes "official time" for employee representatives appearing before the Authority, to require the payment of travel expenses and a per diem allowance. 2 F.L.R.A., at 270. See 44 Fed. Reg. 44771 (July 30, 1979). The fact that the Authority interpreted two similar provisions of the Act consistently does not, however, demonstrate that either interpretation is correct. We, of course, express no view as to whether different considerations uniquely applicable to proceedings before the Authority might justify the FLRA's interpretation of § 7131(c).

Under the 1962 Executive Order establishing the first federal labor relations program, the decision whether to pay union representatives for the time spent in collective bargaining was left within the discretion of their employing agency,[10] apparently on the ground that, without some control by management, the length of such sessions could impose too great a burden on government business. See Report of the President's Task Force on Employee-Management Relations in the Federal Service, reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 1177, 1203 (Comm. Print 1979) (hereinafter "Legis. Hist."). Under this early scheme, employee negotiators were not entitled to per diem allowances and travel expenses, on the view that they were engaged, not in official business of the government, but rather in activities "primarily in the interest of the employee organization." 44 Comp. Gen. 617, 618 (1965).[11]

Executive Order No. 11491, which became effective in 1970, cut back on the previous Order by providing that employees engaged in negotiations with their agencies

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[10] Section 9 of Executive Order 10988 encouraged agencies to conduct general consultations with labor representatives on official time, but left them free to conduct collective-bargaining sessions "during the non-duty hours of the employee organization representatives involved in such negotiations." 3 CFR 521, 524-525 (1959-1963 Comp.).

[11] The 1962 Executive Order contained no reference to travel expenses or per diem allowances. The decision that such payments were not available was made in 1965 by the Comptroller General, 44 Comp. Gen. 617 (1965), who is authorized to give agencies guidance concerning such disbursements. See 31 U.S.C. § 3529. The following year, the Comptroller General modified his position and approved new guidelines issued by the Civil Service Commission. 46 Comp. Gen. 21, 21-22 (1966). The guidelines provided that, while employees should not generally be allowed travel expenses to attend negotiations, such expenses would be approved if an agency head certified that the employee representatives' travel would be in the "primary interest of the government." Ibid. An agency might make such a certification when, for example, it would be more convenient for management to meet at a particular site and more economical to pay the employees' costs of travelling there than to pay the cost for agency representatives to travel to a different site. Ibid. This exception to the earlier prohibition on travel expenses was, by its terms, consistent with the Comptroller General's view that employee negotiators act principally in the interest of their union and not on official business for the United States.

could not receive official time, even at the agencies' discretion. See 3 CFR 861-862, 873-874 (1966-1970 Comp.). Again, the prohibition was based on the view that employee representatives work for their union, not for the government, when negotiating an agreement with their employers. See Legis. Hist. at 1167. In 1971, however, at the recommendation of the Federal Labor Relations Council, an amending Executive Order allowed unions to negotiate with agencies to obtain official time for employee representatives, up to a maximum of either 40 hours, or 50% of the total time spent in bargaining. Exec. Order No. 11616, 3 CFR 605 (1971-1975 Comp.). The Council made clear that this limited authorization, which was intended "to maintain a reasonable policy with respect to union self-support and an incentive to economical and businesslike bargaining practices," Legis. Hist. at 1169, did not permit "overtime, premium pay, or travel expenditures." Id., at 1264.

The Senate version of the bill that became the Civil Service Reform Act would have retained the last Executive Order's restrictions on the authorization of official time. S. Rep. No. 95-969, p. 112 (1978). Congress instead adopted the section in its present form, concluding, in the words of one congressman, that union negotiators "should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities." 124 Cong. Rec. 29,188 (1978) (remarks of Rep. Clay). See H.R. Conf. Rep. No. 95-1717, p. 111 (1978).

B

Respondents suggest that, by rejecting earlier limitations on official time, Congress repudiated the view that employee negotiators work only for their union and not for the government. Under the new vision of federal labor relations postulated by respondents, civil servants on both sides of the bargaining table are engaged in official business of the government and must be compensated equally. Because federal employees representing the views of management receive travel expenses and per diem allowances, federal employees representing the views of labor are entitled to such payments as well. In support of this view, respondents rely on the Act's declaration that public sector collective bargaining is "in the public interest" and "contributes to the effective conduct of public business," § 7101(a), as well as on a number of specific provisions in the Act intended to equalize the position of management and labor. For instance, the Act requires agencies to deduct union dues from employees' paychecks and to transfer the funds to the union at no cost, §

7115(a);[12] in addition, agencies must furnish a variety of data useful to unions in the collective-bargaining process, § 7114(b)(4). Respondents also contend that Congress employed the term "official time" in § 7131 specifically to indicate that employee negotiators are engaged in government business and therefore entitled to all of their usual forms of compensation.

Although Congress certainly could have adopted the model of collective bargaining advanced by respondents, we find no indications in the Act or its legislative history that it intended to do so. The Act's declaration that collective bargaining contributes to efficient government and therefore serves the public interest does not reflect a dramatic departure from the principles of the Executive Order regime under which employee negotiators had not been regarded as working for the government. To the contrary, the declaration constitutes a strong congressional endorsement of the policy on which the federal labor relations program had been based since its creation in 1962. See, e.g., Exec. Order 10988, 3 CFR 521 (1959-1963 Comp.) ("participation of employees in the formulation and implementation of personnel policies affecting them contributes to effective conduct of public business"); Exec. Order 11491, 3 CFR 861 (1966--1970 Comp.) ("public interest requires . . . modern and progressive work practices to facilitate improved employee performance and efficiency" and efficient government is "benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies affecting the conditions of their employment"). See also S. Rep. No. 95-969, p. 12 (1978); 124 Cong. Rec. 29182 (1978) (remarks of Rep. Udall) ("What we really do is to codify the 1962 action of President Kennedy in setting up a basic framework of collective bargaining for Federal employees").[13]

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[12] Under the Executive Order regime, unions had to negotiate for dues deductions and were generally charged a fee for the service. See Information Announcement, 1 FLRC 676, 677 (1973).

[13] We do not read Representative Udall's remark to suggest that the Authority is bound by administrative decisions made under the Executive Order regime. The Act explicitly encourages the Authority to establish policies and provide guidance in the federal labor relations field, § 7105(a)(1), and there are undoubtedly areas in which the FLRA, like the National Labor Relations Authority, enjoys considerable freedom to apply its expertise to new problems, provided it remains faithful to the fundamental policy choices made by Congress. See supra, at 7-8 and n.8. See also § 7135(b) (decisions under Executive Order regime remain in effect unless revised by President or superseded by Act or regulations or decisions thereunder).

Nor do the specific provisions of the Act aimed at equalizing the positions of management and labor suggest that Congress intended employee representatives to be treated as though they were "on the job" for all purposes. Indeed, the Act's provision of a number of specific subsidies for union activities supports precisely the opposite conclusion. As noted above, Congress expressly considered and ultimately rejected the approach to paid time that had prevailed under the Executive Order regime. See supra, at 12. In contrast, there is no reference in the statute or the legislative history to travel expenses and per diem allowances, despite the fact that these kinds of payments had also received administrative attention prior to passage of the Act, see supra, at 11 and n. 11. There is, of course, nothing inconsistent in paying the salaries, but not the expenses, of union negotiators. Congress might well have concluded that, although union representatives should not be penalized by a loss in salary while engaged in collective bargaining, they need not be further subsidized with travel and per diem allowances. The provisions of the Act intended to facilitate the collection of union dues, see § 7115, certainly suggest that Congress contemplated that unions would ordinarily pay their own expenses.

Respondents also find their understanding of the role of union representatives supported by Congress's use of the phrase "official time" in § 7131(a). For respondents, the use of this term indicates an intent to treat employee negotiators "as doing the government's work for all the usual purposes," and therefore entitled to "all attributes of employment," including travel expenses and a per diem allowance. Brief for NTEU at 24-28. They suggest that, if Congress intended to maintain only the employees' salaries, it would have granted them "leave without loss of pay," a term it has used in other statutes. See, e.g., 5 U.S.C. § 6321 (absence of veterans to attend funeral services), § 6322(a) (jury or witness duty), and § 6323 (military reserve duty). In contrast, Congress uses their terms "official capacity" and "duty status" to indicate that an employee is "on the job" and entitled to all the usual liabilities and privileges of employment. See, e.g. §§ 5751, 6322(b) (employee summoned to testify in "official capacity" entitled to travel expenses).[14]

[14] The Authority seemed to rely on this distinction between "duty status" and "leave" in its Interpretation when it stated that an employee negotiator "is on paid time entitled to his or her usual compensation and is not in leave status." 2 FLRA, at 269.

The difficulty with respondents' argument is that Congress did not provide that employees engaged in collective bargaining are acting in their "official capacity," "on the job," or in a "duty status." Instead, the right to a salary conferred by § 7131(a) obtains only when "the employee would otherwise be in a duty status." (Emphasis supplied). This qualifying language strongly suggests that union negotiators engaged in collective bargaining are not considered in a duty status and thereby entitled to all of their normal forms of compensation. Nor does the phrase "official time," borrowed from prior administrative practice, have the same meaning as "official capacity."[15] As noted above, employees on "official time" under the Executive Order regime were not generally entitled to travel expenses and a per diem allowance. See supra, at 10-12. Moreover, as respondents' own examples demonstrate, Congress does not rely on the mere use of the word "official" when it intends to allow travel expenses and per diems. Even as to those employees acting in an "official capacity," Congress generally provides explicit authorization for such payments. See, e.g., §§ 5702, 5751(b), 6322(b). In the Civil Service Reform Act itself, for instance, Congress expressly provided that members of the Federal Service Impasses Panel are entitled to travel expenses and a per diem allowance, in addition to a salary. See § 5703, 7119(c)(4).[16]

Perhaps recognizing that authority for travel expenses and per diem allowances cannot be found within the four corners of § 7131(a), respondents alternatively contend that the Authority's decision is supported by the Travel Expense Act, 5 U.S.C. § 5702, which provides that a federal employee "travelling on official business away from his designated post of duty . . . is entitled to

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[15] Similarly, the statement of Representative Clay that employee representatives "should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities," 124 Cong. Rec. 29188 (1978), does not indicate that Congress intended union representatives to be treated as if they are "at work" for all purposes.

[16] As further support for their reading of "official time," respondents contend that union representatives engaged in collective bargaining may be entitled to benefits under the Federal Employees' Compensation Act, 5 U.S.C. § 8101 et seq., and may create government liability under the Federal Tort Claims Act, 28 U.S.C. § 136(b). The fact that other federal statutes, with different purposes, may be construed to apply to employee negotiators, however, does not demonstrate that, in enacting the Civil Service Reform Act, Congress intended to treat union negotiators as engaged in official business of the government.

. . . a per diem allowance." The Travel Expense Act is administered by the Comptroller General who has concluded that agencies may authorize per diem allowances for travel that is "sufficiently in the interest of the United States so as to be regarded as official business." 44 Comp. Gen. 188, 189 (1964). Under the Executive Order regime, the Comptroller General authorized per diem payments to employee negotiators pursuant to this statute upon a certification that the employees' travel served the convenience of the employing agency. See n. 11, supra.

Based on its view that employee negotiators are "on the job," the Authority determined that union representatives engaged in collective bargaining are on "official business" and therefore entitled to a per diem allowance under the Travel Expense Act. 2 FLRA, at 269. In support of this reasoning, the Authority notes that § 5702 has been construed broadly to authorize reimbursement in connection with a variety of "quasi-official" activities, such as employees' attendance at their own personnel hearings and at privately-sponsored conferences. See, e.g., Comptroller General of the United States, Travel in the Management and Operation of Federal Programs 1, App. I at 5 (Rpt. No. FPCD-77-11, Mar. 17, 1977); 31 Comp. Gen. 346 (1952). In each of these instances, however, the travel in question was presumably for the convenience of the agency and therefore clearly constituted "official business" of the government. As we have explained, neither Congress's declaration that collective bargaining is in the public interest nor its use of the term of art "official time" warrants the conclusion that employee negotiators are on "official business" of the government.[17]

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[17] Our conclusion that federal agencies may not be required under § 7131(a) to pay the travel expenses and per diem allowances of union negotiators does not, of course, preclude an agency from making such payments upon a determination that they serve the convenience of the agency or are otherwise in the primary interest of the government, as was the practice prior to passage of the Act. See n. 11, supra. Furthermore, unions may presumably negotiate for such payments in collective bargaining as they do in the private sector. See Midstate Tel. Corp. v. NLRB, 706 F.2d 401, 405 (CA2 1983); Axelson, Inc. v. NLRB, 599 F.2d 91, 93-95 (CA5 1979). Indeed, we are informed that many agencies presently pay the travel expenses of employee representatives pursuant to collective-bargaining agreements. Letter from Ruth E. Peters, Counsel for Respondent FLRA, Nov. 9, 1983. See also J. P. Stevens & Co., 239 NLRB 738, 739 (1978) (employer required to pay travel expenses as remedy for failing to bargain in good faith).

IV

In passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest than it had been under the Executive Order regime. See supra, at 2-3. There is no evidence, however, that the Act departed from the basic assumption underlying collective bargaining in both the public and the private sector that the parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." NLRB v. Insurance Agents, 361 U.S. 477, 488 (1960), quoted in General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375, 394 (1982). Nor did the Act confer on the FLRA an unconstrained authority to equalize the economic positions of union and management. See American Ship Building v. NLRB, supra, 380 U.S., at 316-318. We conclude, therefore, that the FLRA's interpretation of § 7131(a) constitutes an "unauthorized assumption by [the] agency of [a] major policy decision properly made by Congress." Id., at 318.

The judgment of the Court of Appeals is Reversed.

FPM Letter 711-162, January 19, 1984, SUBJECT: Payment of Travel and Per Diem Expenses for Employee Negotiators Representing Unions in Collective Bargaining is OPM's guidance in response to the Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms. The letter reiterates that travel and per diem are not part of the "official time" entitlement under section 7131(a), and are specifically prohibited by the Comptroller General (Comp. Gen.) unless certified by the head of the agency, and approved by the Comp. Gen., as in the primary interest of the government. OPM further states that despite the dicta in footnote 17, travel and per diem are outside the scope of bargaining under the CSRA and agencies may not even elect to bargain on this subject without the request of the agency head and the approval of the Comp. Gen.

The FLRA, however, has rejected OPM's position and held that travel and per diem expenses for union negotiators is a mandatory topic of bargaining. NTEU and Customs Service, 21 FLRA 6 (1986). This position was sustained by the D.C. Cir. in U.S. Customs Service v. FLRA, 836 F.2d 1381 (D.C. Cir. 1988).

However, the D.C. Cir. held that the FLRA's regulatory grant of travel and per diem contained in the rules of the FLRA, 5 C.F.R. § 2429.13, exceeded their authority. The court held that the Authority's reliance on section 5 U.S.C. § 7131(c) was misplaced. The FLRA could not require the agency to pay travel and per diem for a witness called by the authority at a hearing. Air Force v. FLRA, 877 F.2d 1036 (D.C. Cir. 1989).

3-2. Scope of Bargaining.

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

President Franklin D. Roosevelt declared:

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

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

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

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

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

> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
> (2) in accordance with applicable laws--
> (A) to hire, assign, direct,

layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

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

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

Section 7106(b)(1) further narrows the boundaries of collective bargaining by enumerating several areas which management may choose to negotiate or may decline to negotiate. It is management's discretion. These permissive/optional areas are:

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

Finally, sections 7106(b)(2) and (3) provide that the express exclusion from negotiations of the above matters does not excuse agencies from negotiating procedures which management officials will observe in exercising any authority reserved to them under the Statute, or appropriate arrangements for employees adversely affected by the exercise of any such authority. This is known as impact and implementation bargaining.

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

The rules for negotiability determinations (located at 5 C.F.R. Part 2424), which reflect the language of the statute and the underlying intent of Congress, provide that an exclusive representative must first request, in writing, an agency allegation whether the duty to bargain extends to the matter proposed to be bargained. Within 15 days after service of the agency's written allegation on the exclusive representative, the exclusive representative must file its petition for review with the Authority. The 15-day time limit is strictly adhered to. (See Arkansas Air National Guard, 6 FLRA 476 (1981).) The rules also provide that the exclusive representative may file its petition for review without a written agency allegation in the situation where the agency has not served its written allegation on the exclusive representative within ten days of receipt of the written request for such allegation. Similarly, the union may properly consider an unrequested written contention from the activity that a proposal is nonnegotiable, to be an allegation of nonnegotiability for the purpose of appeal to the Authority under 5 C.F.R. § 2424.3, NTEU and IRS, Kansas City, 10 FLRA 562 (1982). In either situation, the agency head has 30 days from receipt of the petition for review to file with the Authority a full and detailed statement of the agency's position on the matter. Within 15 days of receipt of the agency's statement of position, the exclusive representative must file a response with the Authority. Subject to the aforementioned requirements, the Authority will expedite negotiability proceedings to the extent practicable and issue a written decision with specific reasons at the earliest practicable date.

If there is no dispute as to the negotiability of the proposal, but the parties cannot reach agreement, impasse procedures are utilized. These are discussed in Chapter 4.

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

When a proposal or decision deals with an area which appears to be nonnegotiable but is not obviously so, the labor counselor will be expected to render a legal opinion as to its negotiability. He should consult Title VII, and decisions of the FLRC, FLRA, and A/SLMR to determine if the issue has been addressed and a precedent exists, realizing that these decisions are very much fact specific.

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

terms of the CSRA, its legislative history, its prior decisions and, most importantly, to the facts of the case.

3-3. Negotiability of Particular Subjects.

a. Conditions of Employment.

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

UNITED STATES AIR FORCE,
2750TH AIR BASE WING HEADQUARTERS,
AIR FORCE LOGISTICS COMMAND,
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1138, AFL-CIO

16 FLRA 335 (1984)

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq.

Upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 1138, AFL-CIO (the Union herein), on October 13, 1981 against the United States Air Force, 270th Air Base Wing Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (Respondent herein), the General Counsel of the Authority, by the Regional Director for Region 5, issued a Complaint and Notice of Hearing alleging Respondent refused to negotiate with the Union regarding procedures for the use and impact and

implementation of a new health club at Respondent's facility. . . .

Findings of Fact

At all time material herein the Union has been the exclusive collective bargaining representative of approximately 4,700 of Respondent's employees located at Wright-Patterson Air Force Base. For many years Respondent has operated the AFLC Health Club located on the Base in Building 262.[1] This recreational facility is a nonappropriated fund instrumentality and managed by Respondent's Morale, Welfare and Recreation Division. Its operation is controlled by various Air Force regulations including AFR 215-1. The Air Force sponsors such programs as the Health Club to provide a wide variety of off-duty leisure time activities to military and civilian personnel for recreation, morale and welfare purposes, the goal being to produce a "better employee" in the case of civilians. Under the current AFR 215-1,[2] priority for program eligibility and use is given first to active and retired military personnel and then to Department of Defense civilian employees assigned to the Base. Thus, if membership vacancies in the Health Club were still available after military personnel were accommodated, civilians would then be allowed to join.

From the time of its inception until approximately 1970 the Health Club was opened only to male military personnel. Around 1970 membership was opened to higher graded male civilian employees, and around 1978 lower graded male civilian employees were allowed to join. In the spring of 1980 employees petitioned to have the Health Club opened to females as well as males. Based upon this expression of interest Colonel Rigney, the Base Commander, decided to construct a new Health Club which would be utilized by both men and women. The new facility was to be located approximately 50 yards down a hall from the existing Health Club in the same building. After funding was arranged, planning commenced and construction was scheduled to begin in February 1981 and completed in May of that year. The project was delayed for various reasons and the construction contract was ultimately awarded in April 1981. Construction began in mid June 1981 and it was estimated that the new Health Club would be completed the following September.

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[1] Several other similar clubs are located on the Base, none of which are concerned herein.

[2] It is undisclosed whether the same regulation was in effect since the Health Club was first opened.

Meanwhile, by letter dated February 24, 1981, the Union notified Colonel Rigney that although it was aware facilities for females were planned for a target completion date of May, nevertheless, the same privileges accorded male employees should immediately be provided to female employees with regard to using the existing Health Club. The Union requested a meeting "to promptly end this matter of discrimination against . . . female employees."

Colonel Rigney met with the Union on March 13, 1981. The Union suggested that the facility be available for use to women on a rotating basis with men.[3] Colonel Rigney declined to accept the Union's suggestion due to "inadequate sanitary provisions" and notified the Union that the new Health Club was expected to be completed by the end of June at which time men and women would have equal Health Club access. Thereupon, on April 6, 1981 the Union filed a grievance under the parties' collective bargaining agreement concerning Respondent's refusal to provide female employees with immediate access to the Health Club. The grievance on that issue was denied and the grievance is still unresolved.[4]

Construction of the new Health Club began in June 1981. The Union observed its progress and, pursuant to a request under the Freedom of Information Act, received blue prints of its layout. In September 1981 it was apparent that construction on the Health Club was nearing completion. By letter dated September 24 the Union demanded that Respondent ". . . bargain on the procedures for using the facilities and on appropriate equipment for a co-ed facility."[5] By this date construction on the Health Club was approximately 93 percent complete.

In a letter to the Union dated September 30, 1981 Respondent refused to bargain with the Union contending that the request to bargain was "untimely filed." Respondent's letter of refusal indicated that its decision to construct the new Health Club had already been implemented and further stated: "Since you were aware of management's plans and did not request bargaining during the months prior to the commencement of construction, you have constructively waived your right to bargain." The letter concluded by informing the

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[3] The Health Club at the time had only shower, locker, and sanitary facilities available for men.

[4] Matters concerning the grievance are not material to a resolution of the issues herein.

[5] It was the practice of the Union to first submit a general request to bargain which was then followed by specific proposals.

Union: "Any comments your local would wish to present will be considered. However, it is too late to change management's plans now."

Construction of the Health Club was completed on October 8, 1981 and the club officially opened on October 26. The facility has separate locker, shower, and sauna rooms for males and females, and a common exercise room containing various equipment including a Universal machine and an exercise bicycle.[6] The Health Club currently has 65 female members and 185 male members, 40 to 50 percent of whom are civilian employees, and locker accommodations for 110 females and 216 males. The rules governing the operation of the facility, including the four dollar a month membership fee, are the same as those which were in effect for the old club when it was in existence. The facility remains open 24 hours a day although the vast majority of its use occurs during lunch hours.

Counsel for the General Counsel called two employee witnesses to testify regarding use and benefits from their Health Club membership. One witness testified the visited the facility one to two days a week during her lunch hour, at which time she would run in place, use the exercise equipment, sauna, and shower. She testified that she felt more "alert" during the afternoon on the days she frequented the club. Membership in private, off Base health clubs is available but substantially more expensive and located where use during lunch hours would not be feasible.

The second witness testified he has been a member of both the prior Health Club and the new facility for a total of approximately three years. He uses the Health Club an average of three days a week in connection with a running program usually engaged in after work. He uses the facility to change his clothing and perform some calisthenics. Thereafter, he leaves the building and runs three to ten miles after which he returns to the Health Club, performs more calisthenics, showers, changes back to street clothes and goes home. This witness has been running for about five years and testified that since he began running he feels "better", has more energy and stamina, and is more alert. In addition, his blood pressure has improved substantially. He further testified that due to the convenience and safety in carrying out his running program on the Base, the Health Club offered a distinct advantage to him. However, even in the absence of the Health Club facilities he would nevertheless continue his running program.

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[6] The new club uses virtually the same equipment as that found in the old club except for "one or two" new replacement pieces.

Discussion and Conclusions

Respondent contends that the Union's request to bargain was untimely and, in any event, Respondent was not required to bargain on matters concerning the Health Club since such matters are not "conditions of employment" within the meaning of the Statute.[7]

I reject Respondent's contention that the Union bargaining request of September 24, 1981 was untimely. Granted, the Union perhaps made its bargaining demand rather "late in the day" to obligate Respondent to negotiate on the full scope of matters which would otherwise be bargainable had the demand been made earlier.[8] However, the request, following the usual practice, was non-specific, merely requesting bargaining on "procedures for using the facilities and on appropriate equipment . . ." Accordingly, Respondent could not have known if the Union would have submitted proposals which would encompass matters too far committed to permit deviation or would have somehow impermissibly delayed the opening of the Health Club. The Health Club did not formally open until a month after the Union's demand.

In my view Respondent was obliged to negotiate with the Union to whatever extent discretion to act remained at the time of the demand.[9] Indeed, the Union, if afforded the opportunity, might well have made proposals which were easily accommodated and mutually beneficial to all concerned. However, Respondent never provided itself with the opportunity to make such judgments. In these circumstances I conclude the Union's bargaining request of September 24, 1981 was not untimely.[10]

Turning now to Respondent's contention that the Health Club did not constitute a "condition of

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[7] Section 7103(a)(14) of the Statute provides: "(14) 'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . ."

[8] See generally Division of Military and Naval Affairs, State of New York, Albany, New York, 8 FLRA 307 at 320 (1982).

[9] Cf. Internal Revenue Service, Chicago, Illinois, 9 FLRA 648 (1982).

[10] I also conclude that Respondent's statement that any comments the Union presented would be considered did not, in the circumstances herein, indicate an offer to bargain as required by the Statute.

employment" under the Statute, Respondent relies primarily upon the decision of the Authority in International Association of Fire Fighters, AFL-CIO, CLC, Local F-116 and Department of the Air Force, Vandenberg Air Force Base, California, 7 FLRA 123 (1981). That case involved a negotiability determination of a union proposal to grant off-duty personnel and their dependents hunting and fishing recreation rights on Vandenberg Air Force Base. In declaring the Union's proposal to be not within the duty to bargain under the Statute, the Authority held:

> "On its face, the disputed proposal in the present case does not concern personnel policies, practices, or matters affecting working conditions of unit employees. Similarly, as to the effect of the proposal, no relationship between the recreational activities of off-duty employees and their dependents and employment as firefighters at the Base is adverted to by the Union or is otherwise apparent. That is, nothing in the proposal itself or elsewhere in the record before the Authority indicates that allowing employees and their dependents to hunt and fish at the Base would relate to conditions of employment. In particular, the Union has not provided the Authority with any explanation as to the intent of the proposal which would support a finding that such relationship exists.
>
> "Therefore, in the absence of any demonstration in the record of a direct relationship between the Union's proposal and unit employees' work situations or employment relationships, the Authority must find that the proposal does not concern matters which are 'conditions of employment' within the meaning of section 7103(a)(14) of the Statute" (Footnotes omitted).

The General Counsel contends that matters concerning the Health Club are negotiable, relying in substantial part upon the Authority's decision in American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980). In that case the Authority held negotiable a union's proposal that the employer provide space and facilities for self supporting day care facilities, operated by the union and available to all Base employees. In so finding, the Authority stated:

> ". . . the availability of day care facilities affects the work situation and employment

> relationship in a variety of significant ways. For example, the existence and availability of such facilities can be determinative of whether an individual will be able to accept a job with an employer and of whether an employee will be able to continue employment with an employer. Thus, in addition to being an asset to management in recruiting and keeping a stable workforce, such facilities can be a decisive factor in the maintenance by unit employees of an employment relationship. Furthermore, problems with child care arrangements can result in employee tardiness and absenteeism. Thus, they have a detrimental effect on employee use of leave and on employee productivity, resulting in lowered morale and lessened ability to perform satisfactorily in relation to established expectations. It is also noted that, because of the increased number of families in which both parents work, as well as the necessity for single parents to work, the significance of day care facilities to the employment relationship has increased over recent years.
>
> "For the foregoing reasons, it is concluded that use of agency space for day care facilities is a condition of employment. It is directly related to the personnel policies, practices and matters affecting working conditions of unit employees and is within the scope of bargaining under . . . the Statute" (Footnotes omitted).

Thus, the General Counsel takes the position that the facts of the case herein support a finding of a "direct relationship" between the Health Club and matters affecting working conditions and Respondent argues that the facts herein do not establish the requisite "direct relationship" to support a finding of a condition of employment, without which there is no obligation to bargain.

In my view the Health Club is more closely identifiable with hunting and fishing recreation rights than with day care facilities. Both are primarily recreational in nature and, as with hunting and fishing facilities, the Health Club does not, "on its face", concern personnel policies, practices, or matters affecting working conditions. Nor is there "otherwise apparent" any relationship between the health club activities of off-duty employees and employment that was not "otherwise apparent" in the Vandenberg case. In both cases it is obvious employees would receive something of monetary value and convenience in being accorded

recreational rights from the employer. In both cases it is obvious that improved morale and perhaps benefits to employees' mental and/or physical well being, normally associated with recreational pursuits in general, would inure. The differences between health club rights and the hunting and fishing rights seems to be primarily in the indoor verses outdoor nature of the activity; a more physical verses a more sedentary activity; and the availability of one form of recreation during lunch hours as opposed to use before and after work and days off.

The standard used by the Authority in the cases cited herein in determining whether an activity is a condition of employment is whether there is a "direct relationship" between the activity being considered and unit employees' work situations or employment relationships. I find no such "direct relationship" within the meaning of the Authority's decisions in this area exists in the case herein. Even if some relationship may exist, it will not suffice to establish a duty to bargain on the matter if that relationship is merely remote and speculative.[11] Accordingly, although the use of the Health Club is an incident of employment in that it arises out of the employment relationship and bestows some benefit to the employer and employees, I am constrained to conclude that the matter of the Health Club herein does not constitute a condition of employment within the meaning of the Statute.

One difference between the Vandenberg case and the case herein is in Vandenberg employees had apparently never been permitted hunting and fishing privileges, while in the case herein some employees have used Respondent's health club facilities for a number of years and continue to do so. However, I do not find this difference to be controlling.

Under Executive Order 11491, as amended, it had been long held that the obligation to bargain on matters affecting working conditions under section 11(a) of the Order was intended to encompass only those matters which "materially affect, and have a substantial impact on personnel policies, practices, and general working conditions."[12] That approach was followed regardless of

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[11] National Association of Air Traffic Specialists and Department of Transportation, Federal Aviation Administration, 6 FLRA 588 at 593 (1981).

[12] Department of Defense, Air National Guard, Texas Air National Guard, Camp Mabry, Austin Texas, 6 A/SLMR 591 (1976).

whether a unilateral change of a practice occurred[13] or whether the employer had unilaterally established a practice.[14] The Authority adopted this "substantial impact" rule in Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 5 FLRA 333 (1981), a case arising under the Statute. Since I perceive no significant difference between the aforementioned "direct relationship" test and the "substantial impact" rule as applied to the instant case, I conclude that the status of employee use of the Health Club herein is not reason to depart from my prior conclusion that the matter of the Health Club does not constitute a condition of employment within the meaning of the Statute.

Therefore, in view of the entire foregoing it is recommended that the Federal Service Labor Relations Authority issue the following Order pursuant to 5 C.F.R. 2424.29(c):

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 5-CA-20017 be, and hereby is, dismissed.

NOTE: The FLRA, in two recent decisions, has set out its definition of "conditions of employment" in AFGE and VA, 41 FLRA 73 (1991), and VA Medical Center, Leavenworth, Kansas, 40 FLRA 592 (1991).

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

A union proposal which is contrary to a statute is nonnegotiable. Management has no discretion to change the statute. Examples include:

In Fort Shafter, Hawaii, 1 FLRA 563 (1979), the Authority held that an agency shop proposal comes into conflict with 5 U.S.C. § 7102, which assures employees the right to form, join, or assist any labor organization, or to refrain from any such activity.

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[13] Id.; Social Security Administration, Bureau of Hearings and Appeals, 2 FLRA 238 (1979).

[14] Department of the Navy, Naval Communication Area, Master Station Eastpac, Honolulu, 8 A/SLMR 504 (1978).

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

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

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

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

Most of the proposals which are contrary to a statute are contrary to the management rights provisions of § 7106, CSRA. They are those subjects which Congress has decreed will not be negotiated because they go to the heart of managing effectively and efficiently. OPM has published policy guidance for agency management about the extent to which various issues are, or should be, subject to negotiation. See FPM Bulletin 990-47, July 28, 1983, SUBJECT: Management Rights, Consultation and Scope of Bargaining Policy in Labor-Management Relations. Some unions alleged this guidance was an attempt by OPM to usurp the authority of the FLRA with regard to negotiability issues. OPM's right to advise agencies in this area has been upheld. NTEU v. Devine, 587 F. Supp. 960 (D.D.C. 1984); aff'd, 751 F.2d 1424 (D.C. Cir. 1984).

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

(a) Mission. "[T]he mission of the agency," the Authority said in the Air Force Logistics Command (hereinafter AFLC) case, 2 FLRA 603 (1980), are "those particular objectives which the agency was established to accomplish." The mission of the Air Force Logistics Command, for example, is the providing "of logistical support to the Air Force." Not all of any agency's programs are part of its mission. An EEO program was held not to

be directly or integrally related to the mission of the Air Force Logistics Command. See also West Point Teacher's Assoc. v. FLRA, 855 72d. 236 (2d. Cir. 1988); where court held negotiations over school calendar interferes with management's right to determine its mission.

(b) Budget. The meaning of budget is not defined in Title VII nor in its accompanying reports or recommendations. In the AFLC case, the agency contended that a proposal requiring the activity to provide space and facilities for union-operated day care centers interfered with the agency's right to determine its budget. In rejecting this contention, the Authority said that a proposal does not infringe on an agency's right to determine its budget unless (a) the proposal expressly prescribed either the programs or operations the agency would include in its budget or the amounts to be allocated in the budget for the programs or operations, or (b) the agency "makes a substantial demonstration that an increase in costs is significant and avoidable and not offset by compensating benefits." Department of the Air Force, Elgin AFB, 24 FLRA 377 (1986), where the FLRA discussed in detail the two-prong test set out in AFLC.

AF LOGISTICS COMMAND, WRIGHT-PATTERSON AFB, OHIO

2 FLRA 604 (1980)

[The Union submitted the following proposal:]

. . . .

ARTICLE 36 DAY CARE FACILITIES

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

. . . .

The agency next alleges that Union Proposal I violates its right to determine its budget under section 7106(a)(1) of the Statute because it would require the agency to bear the cost of the space and facilities provided for the day care center. The underlying assumption of this position appears to be that a proposal is inconsistent with the authority of the agency to determine its budget within the meaning of section 7106(a)(1) if it imposes a cost upon the agency which requires the expenditure of appropriated agency funds. Such a construction of the Statute, however, could

preclude negotiation on virtually all otherwise negotiable proposals, since, to one extent or another, most proposals would have the effect of imposing costs upon the agency which would require the expenditure of appropriated agency funds. Nothing in the relevant legislative history indicates that Congress intended the right of management to determine its budget to be so inclusive as to negate in this manner the obligation to bargain.

There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation.[8] Whether a proposal directly affects the agency's determination of its budget depends upon the definition of "budget" as used in the Statute. The Statute and legislative history do not contain such a definition. In the absence of a clearly stated legislative intent, it is appropriate to give the term its common or dictionary definition.[9] As defined by

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[8] See, for example, the statement of Congressman Clay, one of the proponents of the "Udall substitute," during the House debate on Title VII of the Civil Service Reform Act of 1978:

> Congressman CLAY:
>
> . . . .
>
> The Udall substitute contains a management rights clause substantially enlarged beyond that in the committee print. An important element in our agreeing to entrust such an expanded management rights clause to the hands of the new Authority is the example of the protection afforded the collective bargaining process by conscientious scrutiny of management claims of infringements on management rights, especially as found in the two 1978 decisions above. If the new Authority is faithful to these interpretative guidelines, the ultimate exercise of the specified managerial responsibility, the only subject exempted from the bargaining obligation, will be protected and the general obligation to bargain over conditions of employment will be unimpaired. However, it is essential that only those proposals that directly and integrally go to the specified management rights be barred from the negotiations. [Emphasis supplied.]

124 CONG. REC. H9638 (daily ed. Sept. 13, 1978).

See also the statement of Congressman Ford of Michigan, 124 CONG. REC. H9649 (daily ed. Sept. 13, 1978).

[9] See National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California, Case No. O-NG-3, 2 FLRA No. 30 (Dec. 13, 1979), Report No. _____ at 4 of the decision.

the dictionary, "budget" means a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the periods and proposals for financing them.[10] In this sense, the agency's authority to determine its budget extends to the determination of the programs and the determination of the amounts required to fund them. Under the Statute, therefore, an agency cannot be required to negotiate those particular budgetary determinations. That is, a union proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them would infringe upon the agency's right to determine its budget under section 7106(a)(1) of the Statute.

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

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

Finally, it is noted that the agency has not adverted to problems which might arise in connection with implementation and administration of an agreement, should it include Union Proposal I, vis a vis provisions of

[10] Webster's Third New International Dictionary (Unabridged) (1966).

applicable law and Government-wide rule or regulation[11] governing, e.g., the use or allocation of space. There, the Authority makes no ruling as to whether Union Proposal I is consistent with such law or regulation.

. . . .

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

(c) Organization. There have been no cases specifically defining the term "organization." In the following case, it was held that a union proposal which would require an agency to create four, instead of two, sections in its American Law Division and mandates that each section be assigned a Section Coordinator, violates management's right to determine its organization.

CONGRESSIONAL RESEARCH EMPLOYEES ASSOCIATION
and
THE LIBRARY OF CONGRESS
3 FLRA 737 (1980)

. . . .

Section 1 of the Union Proposal

Section 1 of the union's proposal requires the agency to create four sections instead of two in its American Law Division and mandates that each section be assigned a Section Coordinator.

Question Here Before the Authority

The question is whether Section 1 of the union's proposal violates the right of the agency to determine

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[11] Cf. Federal Property Management Regulations, 41 C.F.R. § 101-17.2.

its organization under section 7106(a)(1) of the Statute,[1] as alleged by the agency.

Opinion

Conclusion: Section 1 of the union's proposal violates management's right to determine its organization under Section 7106(a)(1) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 5 C.F.R. § 2424.10 (1980), the agency's allegation that Section 1 of the union's proposal is not within the duty to bargain is sustained.

Reasons: Section 1 of the union's proposal states that "[t]he following organizational changes shall take place in the American Law Division . . ." and, that "[f]our sections for attorneys will be created in place of the present two." Thereafter, Section 1 would establish what sections will be part of the American Law Division and each section's substantive area of responsibility. Section 1 concludes by providing that "[e]ach section will have assigned to it a Section Coordinator."

The plain language of Section 1 would require the agency to adopt a certain organizational structure. Section 7106(a)(1), however, expressly reserves to management officials of any agency the right to determine the organization of the agency. Thus, Section 1 of the union's proposal clearly violates the agency's right under section 7106(a)(1) of the Statute to determine the "organization" of the agency. Hence, the agency's allegation that Section 1 of the union's proposal is not within the duty to bargain is sustained.

. . . .

(d) Number of Employees. In E.O. 11491, section 11(b) covered "the number of employees" and "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty." Because both concepts (i.e, "the number of employees" and "the numbers . . . of employees assigned to an organizational unit, work project, or tour of duty") were embodied in section 11(b), cases did not distinguish between

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[1] Section 7106(a)(1) of the Statute provides, in pertinent part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the . . . organization . . . of the agency [.]

them. The August 1969, Study Committee Report which led to the issuance of E.O. 11491 did indicate the differences it had in mind. According to the Study Committee, there would be no obligation to bargain on:

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

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

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

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

(e) Internal Security Practices. In Army-Air Force Exchange Service, Hill Air Force Base, Utah, FLRC No. 77A-123, Council Report No. 153, the Council addressed a union proposal concerning internal security practices. It said that the term "internal security" meant, among other things:

> [T]hose policies, procedures and actions that are established and undertaken to defend, protect, make safe or secure (i.e., to render relatively less subject to danger, risk or apprehension) the property of an organization. . . .
>
> As a consequence of the variety of risks which might be involved, the specific methods employed . . . will, of necessity, differ according to the particular circumstances. Thus, depending on the circumstances, they may involve one or a combination of practices, for example, guard forces, barriers, alarms and special lighting. Further, they may involve procedures to be followed by employees, which procedures are designed to

eliminate or minimize particular risks to the property of an organization from such employees.

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

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

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

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 29

and

DEPARTMENT OF THE ARMY, KANSAS CITY DISTRICT, U.S. ARMY CORPS OF ENGINEERS, KANSAS CITY, MISSOURI

21 FLRA 233 (1986)

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

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

II. Union Proposal 1

The Employer recognizes that all employees have a statutorily created right to their pay, retirement fund and annuities derived therefrom. The Employer further recognizes that charges/allegations of pecuniary liability shall not be construed to be indebtedness or arrears to the United States until the affected employee has had the opportunity to fully exercise his/her rights of due process; wherein due process shall provide equal protection to all employees and shall require a hearing

before an unbiased, unprejudiced and impartial tribunal, free from any command pressure or influence. All claims by the Government for pecuniary liability shall be capped at a maximum of $150.00. (Only the underlined portion is in dispute.)

A. Positions of the Parties

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

The Union disputes the Agency's contentions.

B. Analysis

1. Management Rights

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

property by making clear the consequences of property destruction, loss or damage, and is within the Agency's right to determine its internal security practices.[1]

Even if, as the Union argues, the Agency's plan is designed primarily as a means of recouping government loss, in the Authority's view the Agency's statutory authority includes determining that the plan has, also, the effect of minimizing the risk of the loss occurring in the first place. Similarly, the Union's argument that the Agency's plan is not an effective deterrent is beside the point. It is not appropriate for the Authority to adjudge the relative merits of the Agency's determination to adopt one from among various possible internal security practices, where the Statute vests the Agency with authority to make that choice. In this regard, the Union's contention that its proposal limiting liability to $150.00 is merely a procedural proposal under section 7106(b)(2) of the Statute is not persuasive. The proposal directly impinges on management's right to establish its internal security practices.

2. Inconsistent with Federal Law

The Claims Act specifically states that the Act does not diminish the existing authority of a head of an agency to litigate, settle, compromise or close claims.[2] Pursuant to 10 U.S.C. § 4831, et seq., the Secretary of the Army was vested with the existing authority to compromise, settle or close claims when the Claims Act was enacted.[3]

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[1] See American Federation of Government Employees, AFL-CIO, Local 15 and Department of the Treasury, Internal Revenue Service, North Atlantic Region, 2 FLRA 874 (1980), in which the Authority found that a regulation, which directly related to and was part of the agency's plan to prevent disruption, disclosure or property destruction at its facilities, concerned the internal security practices of the agency.

[2] Section 953 of the Federal Claims Collection Act provides as follows:

§ 953. Existing agency authority to litigate, settle, compromise, or close claims

Nothing in this chapter shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims.

[3] Section 4832 of title 10 of the U.S. Code provides as follows:

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

C. Conclusion

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

III. Union Proposal 2

When the Employer determines it is necessary to hold an employee(s) liable for loss, damage, or destruction of property, the Employer may take appropriate disciplinary action or charge the employee pecuniarily liable, but not both. Under either action, the Agency's allegation will only be sustained if the Agency proves its charge with a preponderance of evidence. Any disciplinary action taken will be in accordance with applicable laws and higher authority regulation and the negotiated Agreement. If the Employer decides to hold the employee pecuniarily liable, the Employer will provide the employee a hearing before an arbitrator. (Only the underlined portion is in dispute.)

A. Positions of the Parties

The Agency contends that the proposal violates management's right to discipline employees under section 7106(a)(2)(A) and/or management's right to determine its internal security practices under section 7106(a)(1).

The Union disputes the Agency's contentions, arguing that the proposal is a procedure.

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§ 4832. Property accountability: regulations

The Secretary of the Army may prescribe regulations for the accounting for Army property and the fixing of responsibility for that property.

B. Analysis

This proposal would require the Agency to choose between holding an employee financially liable or imposing disciplinary action for loss, damage or destruction of property caused by the employee, but not both. The proposal therefore expressly would condition management's right to discipline an employee upon its decision not to hold an employee financially liable. Pursuant to section 7106(a)(2)(A) of the Statute, management has the right to take disciplinary action against its employees. The disputed proposal would interfere with this right by conditioning the Agency's exercise of this right upon the Agency's relinquishment of its right to impose financial liability. Contrary to the Union's contention that his proposal is procedural in nature, the Authority finds that the proposal is procedural in nature, the Authority finds that the proposal instead concerns the substantive exercise of management's rights. Professional Air Traffic Controllers Organization and Federal Aviation Administration, 5 FLRA No. 101 (1981). See also National Labor Relations Board Union, Local 19 and National Labor Relations Board, Region 19, 2 FLRA No. 98 (1980) (proposal establishing a condition upon management's ability to assign specified duties to an identified employee is inconsistent with the agency's right "to assign work").

We also find that the decision to hold an employee financially liable concerns only the application of the Agency's internal security practices. It does not affect the determination of what those practices will be. The proposal would not also directly interfere with management's right to determine its internal security practices under section 7106(a)(1).

C. Conclusion

Union Proposal 2 directly interferes with management's right to discipline employee under section 7106(a)(2)(A) and is outside the Agency's duty to bargain. Because it would infringe on the substance of the right it is not a negotiable procedure under section 7106(b)(2). The proposal would not be nonnegotiable under section 7106(a)(1).

. . . .

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

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 15

and

DEPARTMENT OF THE ARMY
U.S. ARMY ARMAMENT, MUNITIONS
AND CHEMICAL COMMAND
ROCK ISLAND, ILLINOIS

30 FLRA 1046 (1988)

I. Statement of the Case.

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

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

. . . .

II. Background

A. The Army Drug Testing Program.

On April 8, 1985, the Department of Defense issued DOD Directive 1010.9, "DOD Civilian Employees Drug Abuse Testing Program." On February 10, 1986, the Department of the Army promulgated regulations implementing the DOD

Directive. Interim Change No. I11 to Army Regulation 600-85, Alcohol and Drug Abuse Prevention and Control Program ("Interim Change to AR 600-85" or "amended regulation"). The proposals in dispute in this case arose in connection with impact and implementation bargaining over paragraph 5-14 of the Interim Change to AR 600-85.

Paragraph 5-14 states that the Army has established a drug abuse testing program for civilian employees in critical jobs. The stated objectives of the program are:

> (1) To assist in determining fitness for, appointment to, or retention in a critical job.
>
> (2) To identify drug abusers and notify them of the availability of appropriate counseling, referral, rehabilitation services, or other medical treatment.
>
> (3) To assist in maintaining national security and the internal security of the Department of the Army by identifying individuals whose drug abuse could cause disruption in operations, destruction of property, threats to safety for themselves or others, or the potential for unwarranted disclosure of classified information through drug-related blackmail.

Id. at paragraph 5-14a.

Jobs designated by the Army as "critical" for the purpose of drug abuse testing are those "important enough to the mission or to protection of public safety that screening to detect the presence of drugs is warranted as a job-related requirement." Id. at paragraph 5-14b. These jobs fall into the following categories: (1) law enforcement; (2) positions involving national security or the internal security of the Army at a level of responsibility in which drug abuse could cause disruption of operations or the disclosure of classified information that could result in serious impairment of national defense; and (3) jobs involving the protection of property or persons from harm, or those where drug abuse could lead to serious threats to the safety of personnel. Id.

A complete listing of jobs and job classes to be included in the drug abuse testing program is set forth at Appendix K, Section I to the Interim Change to AR 600-85. These jobs and job classes include aviation positions, guard and police positions, chemical and nuclear surety positions, and all employees at Army forensic drug testing laboratories. Section II of Appendix K outlines the procedure by which local

commanders may request that additional jobs be identified as critical.

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

The amended regulation also sets forth the procedures to be used for the actual urinalysis test; the action to be taken in the event of a confirmed positive test result or a refusal by an employee to submit a specimen; and the requirements of notice to affected employees. See id. at paragraphs 5-14c through f. The amended regulation also states (id. at paragraph 5-14g):

> Drug testing of civilian employees is not negotiable with recognized labor organizations because it involves the Army's internal security practices within the meaning of 5 U.S.C. § 7106(a)(1).

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

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

1. Executive Branch and Congressional Actions

By notice published in the Federal Register on August 22, 1986, the Authority invited interested persons to file amicus briefs in this and other proceedings in which agency management has asserted the nonnegotiability of union proposals relating to various aspects of agency initiated testing of civilian employees to identify drug abuse. See 51 Fed. Reg. 30124 (Aug. 22, 1986). The

notice requested that amicus briefs be submitted on October 22, 1986.

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

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

Because of the significant implications of the Executive Order and the implementation of its provisions for the resolution of the matters pending before the Authority in this and other cases, the Authority extended the time for filing amicus briefs until January 20, 1987. See 51 Fed. Reg. 37071 (Oct. 17, 1986). Briefs were submitted by the Office of Personnel Management, the Department of Justice, other Federal agencies, several labor organizations representing Federal employees, and other interested parties.

On February 13, 1987, HHS issued "Scientific and Technical Guidelines for Drug Testing Programs" (Guidelines) as directed in the Executive Order. Thereafter, the Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, 101 Stat. 391, 468 (July 11, 1987) was enacted. Section 503 of that Act required notice of the Guidelines to be publicized in the Federal Register. Notice of the Guidelines was published on August 14, 1987, and interested persons were invited to submit

comments.[1] See 52 Fed. Reg. 30638 (Aug. 14, 1987). As of the date of this decision, final regulations have not been published in the Federal Register.

On August 6, 1987, the Authority issued an order in this and other cases raising drug testing issues. In light of the issuance of the Executive Order, the FPM Letter, the Guidelines, and section 503 of the Supplemental Appropriations Act, as well as several court decisions addressing issues relating to drug testing, the Authority directed the parties to supplement their positions concerning these developments. The Agency and the Union filed supplemental statement in this case. Additionally, on December 22, 1987, we granted the Department of Justice's request to file an additional amicus brief to address issues raised by the Guidelines and the other developments in this area.

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III. Proposal 1.

Section II - Frequency of Testing

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

A. Positions of the Parties

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

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The Union contends that the proposal involves conditions of employment and that the Agency has failed to provide any evidence linking testing for off-duty drug

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[1] Pub. L. No. 100-71 placed certain restrictions on the use of appropriated funds for drug testing of civilian employees. The Department of the Army's drug testing program is temporarily exempted from those restrictions. Section 503(b)(1)(C).

use to internal security. The Union also argues that the Agency has not adequately shown that it has a compelling need for the amended regulation. Finally, the Union asserts that even if the proposal infringes on an internal security practice, it is negotiable as an appropriate arrangement. The Union contends that this proposal is intended to address the harms that employees will suffer, such as invasion of privacy and the introduction of an element of fear into the workplace, by eliminating the random nature of the testing and substituting a test based on probable cause.

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

B. Discussion

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

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

Similarly, by limiting management's ability to conduct random testing for employee use of illegal drugs, Proposal 1 directly interferes with management's internal security practices. As the Agency indicated in issuing

the Interim Change to AR 600-85, one purpose for instituting the drug testing program is to identify "individuals whose drug abuse could cause disruption in operations, d uction of property, threats to safety for themselves and others, or the potential for unwarranted disclosure of classified information through drug-related blackmail." Interim Change to AR 600-85, Paragraph 5-14a(3). Clearly, the drug testing program set forth in the Agency regulation, including the provision for unannounced random tests, Interim Change to AR 600-85, Paragraph 5-14e(1)(b), concerns the policies and actions which are a part of the Agency's plan to secure or safeguard its physical property against internal and external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the Agency's activities.

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

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

This case is not like Department of Defense v. FLRA, 685 F.2d 641 (D.C. Cir. 1982). In that case, the court

concluded that there was no "connection" between the proposal at issue and the agency's determination of the internal security practices. Rather, this case is similar to Defense Logistics Council v. FLRA, 810 F.2d 234 (D.C. Cir. 1987). In that case, the Authority found that proposals pertaining to the agency's program to prevent drunk driving were nonnegotiable because they directly interfered with management's right to determine its internal security practices under section 7106(a)(1). In upholding that decision, the U.S. Court of Appeals for the District of Columbia Circuit rejected the claim that the drunk driving program did not involve internal security practices. The court concluded that the Authority's interpretation of the term "internal security practices" to include preventive measures designed to guard against harm to property and personnel caused by drunk drivers was a reasonable disposition of that issue. In reaching that conclusion, the court specifically distinguished the Department of Defense decision. We see no material difference between the Agency's drug testing program and the drunk driving program.

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IV. Proposal 2

Section III.A - Testing Methods and Procedures

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

A. Positions of the Parties

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

The Union contends that the proposal concerns the methods and equipment used to test employee urine samples, and does not concern the technology, methods, and means of performing work within section 7106(b)(1)

because drug testing is not the work of the Agency. The Union also argues that the proposal does not concern the Agency's internal security practices since urinalysis testing bears no relationship to employee performance or conduct at the workplace. Finally, the Union argues that the proposal is an appropriate arrangement because the proposal assures that the most accurate testing methods and equipment will be used.

B. Discussion

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

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

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

management would be precluded from selecting equipment or methods which are reliable for a particular purpose if there are equipment and methods which were more reliable for that purpose.

By limiting the range of management's choices as to the methods and equipment it may use to conduct drug tests--regardless of the particular phase of the testing process or the purpose of the test--Proposal 2 establishes a substantive criterion governing the exercise of management's determination of its internal security practices. Generally speaking, the most accurate and reliable test at this time for confirming the presence of cocaine, marijuana, opiates, amphetamines, and phencyclidine (PCP) is the gas chromatography/mass spectrometry (GC/MS) test. See the proposed Guidelines, 52 Fed. Reg. 30640. As indicated above, the plain wording of Proposal 2 would therefore appear to require the use of that test at all stages of the drug testing program. See Union Response to Agency Statement of Position at 9. It would preclude the use, for example, of the less reliable immunoassay test at any stage or for any purpose, including as an initial screening test. We find, therefore, that the proposal directly interferes with management's rights under section 7106(a)(1) of the Statute and is outside the duty to bargain unless, as claimed by the Union, it is an appropriate arrangement under section 7106(b)(3).

NOTE: A narrow majority of Supreme Court Justices approved the drug testing of custom service employees seeking jobs in drug interdiction or which require the use of firearms. The Justices held that the test did not violate the 4th amendment prohibition against unreasonable government search and seizure, despite an absence of "individual suspicion". NTEU vs. Von Raad, 489 U.S. 656 (1989). Also, in a companion case, the court held that drug and alcohol testing of railway train crew members involved in accidents is legal. This case holds that general rules requiring testing "supply an effective means of deferring employees engaged in safely-sensitive task from using controlled substance on alcohol in the first place," Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989). The Army's drug testing program was sustained in Thomson v. Mursh, 884 7.2d 113 (4th Cir. 1989). The court relied upon the Supreme Court's decisions in Skinner and Von Road. The D.C. Circuit held that proposals concerning split samples are not negotiable. Aberdeen Proving Ground et al. v. FLRA, 890 F.2d 467 (D.C. Cir. 1989).

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2. To Hire, Assign, Direct, Lay Off, and Retain Employees in the Agency, or To Suspend, Remove, Reduce in Grade or Pay, or Take Other Disciplinary Action Against Such Employees (CSRA § 7106(a)(2)(A)).

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

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

However, the Authority ruled that the portion of the proposal requiring ma agement to announce a certain percentage of its vacancies as upward mobility positions was found to be a negotiable procedure. The agency had argued that the proposal would require it to perform a potentially useless act, thereby causing unreasonable delay when the agency decided to fill the positions as other than upward mobility positions or decided not to fill them at all. The Authority, invoking the "acting at all" doctrine it employed in Fort Dix, 2 FLRA 152 (1979), found the "unreasonable delay" argument without dispositive significance.

(b) To Assign Employees. The right to "assign employees" applies to moving employees to particular positions and locations.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 695, and DEPARTMENT OF THE TREASURY U.S. MINT, DENVER, COLORADO
3 FLRA 43 (1980)

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Union Proposal I

ARTICLE VI. WORK ASSIGNMENTS

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Section 2. Work and position rotation in the Coin Press Branch: Work assignments shall be rotated weekly.

Section 4. Work and position rotation in the Coin Blanking Section: Work assignments shall be rotated weekly.

Question Here Before the Authority

The question is whether the union's proposal is within the duty to bargain under the Statute or is outside the duty to bargain under section 7106(a)(2)(A), as alleged by the agency.

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Opinion

Conclusion: The proposal conflicts with management's right to assign employees within the meaning of section 7106(a)(2)(A) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reasons: The agency contends, among other things, that the union's proposal would prevent the activity from assigning any employee in either the Coin Press Branch or Coin Blanking Section to any appropriate work at any time and therefore violates section 7106(a)(2)(A) of the Statute. In its submissions to the Authority, the union does not specify the intent of its proposal. However for the reasons stated below, it is concluded that the proposal violated management's right to assign and therefore is outside the duty to bargain under the Statute.

On its face, the disputed proposal requires that "[w]ork assignments shall be rotated weekly" in the Coin Press Branch and the Coin Blanking Section of the activity. However, it is unclear whether the proposal would compel the activity to assign employees to different positions within these operations (each position requiring particular skills and qualifications in the performance of specific duties identified with that position) or would merely require employees to be rotated through the variety of duties contained in his or her own position description. In the instant case, it is immaterial which interpretation of the proposal was intended, for in either case the language of the disputed proposal would conflict with management's reserved right to assign within the meaning of section 7106(a)(2)(A) of the Statute. That is, even if the union intended only that employees be rotated to the various duties within their own position description, the specific language of the proposal at issue would require all employees to be rotated each week regardless whether any work were available which required the performance of such duties or whether the work previously assigned had been completed. In other words, management would be restricted in making new assignments, or in modifying, terminating, or continuing existing ones as deemed

necessary or desirable. Accordingly, the specific proposal at issue herein is outside the duty to bargain under the Statute.

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Section 3. Details Involving Special Qualifications
In situations where it is necessary to select an employee with specific qualifications for a detail outside his branch, the employees within the branch will be informed of the type of work to be performed, the length of the detail and the qualifications for the assignment. The senior qualified employee within the branch who has volunteered for the detail will be selected. If there are no volunteers, the least senior qualified employee within the branch will be selected.

Section 4. Emergency Details
It is understood that the detail procedures outline[d] in Sections 2 and 3 will be followed (use of seniority and volunteers). Where an unforeseen situation arises that temporarily precludes compliance of the use of seniority and volunteers, the following steps and conditions will apply:

1. The detail will not exceed two (2) hours duration.

2. The union steward will be informed of the reasons for applying this section (Section 4) within this two (2) hour period.

3. At the end of the two (2) hour period Section 2 or 3 will be utilized for any further detail needs.

Section 5. Application of this Article
This Article shall constitute the sole procedure for the detailing of unit employees to positions within the unit at the United States Mint, Denver, Colorado, and shall supersede any and all previous such memoranda and/or agreements between Management and the Local Union.

Question Here Before the Authority

The question is whether the union's proposal conflicts with the agency's right to assign employees under section 7106(a)(2)(A) of the Statute.

Opinion

Conclusion: The proposal conflicts with the agency's right to assign under section 7106(a)(2)(A) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et

seq. (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reasons: The agency alleges that the proposal is nonnegotiable because the requirement that volunteers be solicited and seniority be used as the sole factor in the selection of employees for details would directly interfere with the agency's right to assign employees and would not, as the union argues, constitute merely a procedure used in selection.

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NOTE 1: In the multi-issue AFLC case, 2 FLRA 604 (1979), the Authority found that proposals requiring the selection of a particular individual for a temporary assignment on the basis of seniority directly interfered with the right of an agency to assign employees. In this regard, the Authority stated (at p. 10 of the decision):

> The right to assign employees in the agency under section 7106(a)(2)(A) of the Statute is more than merely the right to decide to assign an employee to a position. An agency chooses to assign an employee to a position so that the work of that position will be done. Under 7106(a)(2)(A) of the Statute, the agency retains discretion as to the personnel skills needed to do the work, as well as such job-reliability. Therefore, the right to assign an employee to a position includes the discretion to determine which employee will be assigned. [Emphasis added.]

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

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

NOTE 2: Other proposals found to interfere with management's right to assign employees to positions include:

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

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

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

(c) To Direct Employees.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 32
and
OFFICE OF PERSONNEL MANAGEMENT, 3 FLRA 784 (1980)

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Union Proposal 4

Section 6. Employees shall participate in establishing performance standards through collective bargaining, to the extent this matter is within the scope of bargaining.

Question Here Before the Authority

The question presented is whether the Union's proposal is a matter within the duty to bargain under the Statute or, as alleged by the Agency, violates section 7106(a)(2) of the Statute (to direct employees).

Opinion

Conclusion: The proposal violates section 7106(a)(2)(A) and (B) of the Statute insofar as it requires negotiation on the establishment and content of performance standards. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 5 C.F.R. 2424.10, the Agency's allegation that the proposal is not within the duty to bargain is sustained.

Reasons: Both the Union and the Agency have interpreted this proposal as requiring collective bargaining concerning the establishment and substance of performance standards and the proposal is so interpreted for the purpose of this decision. Thus, the substantive issue presented here is identical to that addressed by the Authority in Bureau of the Public Debt, 3 FLRA No. 119 (1980), supra. In that decision, the Authority held that a proposal to establish a particular critical element and performance standard would directly interfere with the

exercise of management's rights to direct employees and to assign work under section 7106(a)(2)(A) and (B) of the Statute and, therefore, was not within the duty to bargain. Since the proposal here would likewise require negotiations concerning the establishment and content of performance standards, it bears no dispositive difference from the proposal held not to be within the duty to bargain in the Bureau of the Public Debt case. Therefore, for the reasons fully set forth in Bureau of the Public Debt, the proposal here in dispute must also be held not to be within the duty to bargain. It is emphasized, however, as stated in Bureau of the Public Debt (at page 2 of the decision) that:

> [C]onsistent with the intent of Congress as expressed in section 7101 of the Statute that employees participate through labor organization of their own choosing in decisions which affect them, and other sections discussed hereinafter, the agency's right to identify critical elements and establish performance standards under section 7106(a) is subject to certain rights of a labor organization under the Statute. Specifically, under section 7117, as to the units of exclusive recognition, it is within the duty of the agency to bargain, consistent with law and regulation, on aspects of performance appraisal systems other than identification of critical elements and content of performance standards. The duty to bargain extends to, among other matters, the form of the employee participation in the establishment of performance standards required under section 4302 of the Civil Service Reform Act (CSRA). In this connection, section 4302 in its reference to participation of employees in establishing performance standards refers to all employees, whether represented or unrepresented.
>
> Furthermore, section 7106(a) is subject to section 7106(b). Under section 7106(b)(2), an agency has the duty to bargain on procedures which management officials will observe in the development and implementation of performance standards and critical elements; and, under section 7106(b)(3), on appropriate arrangements for employees adversely affected by the application of performance standards to them. In addition, under section 7114 of the Statute, the agency must afford an exclusive representative the opportunity to be present at any formal discussion between an agency representative

> and a unit employee regarding the establishment or implementation of performance standards and critical elements and, when requested, at any investigatory review of a unit employee who reasonably believes that the examination may result in discipline for unacceptable performance under section 4303 of the CSRA. Finally, the right of an agency under section 7106(a) to identify critical elements and establish performance standards is subject to the right of an employee against whom disciplinary action has been taken. The employee has a right to challenge such action under the appellate procedures of section 7701 of the CSRA or under a negotiated grievance procedure pursuant to section 7121 of the Statute.

Thus, in the instant case, the Agency's right to identify critical elements and establish performance standards is subject to the right of a labor organization to negotiate on significant aspects of performance appraisal systems, including the form of the employee participation in the establishment of performance standards. Furthermore, management has an obligation to negotiate procedures and appropriate arrangements for employees adversely affected by management's establishing performance standards. In addition, an exclusive representative must be given the opportunity to be represented at certain meetings between management and employees relating to the development and implementation of performance appraisal systems and, when requested, at any investigatory interview when a unit employee believes that the examination may result in discipline for unacceptable performance. Finally, an employee against whom disciplinary action has been taken for unacceptable performance has a right to challenge under appellate procedures or a negotiated grievance procedure the action taken. However, insofar as the proposal here as interpreted by the parties requires bargaining over the content of performance standards, it is outside the duty to bargain, and the Agency's allegation must be sustained.

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A number of cases have addressed a variety of similar proposals concerning the criteria management uses to determine job critical elements and performance standards. In all these cases, the FLRA has held that these proposals are not negotiable because they would curtail management's unlimited right to assign and direct work. See NTEU and Dept. of HHS, 7 FLRA 727 (1983); NTEU and Bureau of Public Debt, 3 FLRA 768 (1981), aff'd sub. nom. NTEU v. FLRA, 691 F.2d 553 (D.C. Cir. 1982); AFGE Local 1968 and DOT St.

Lawrence Seaway, 5 FLRA 70 (1981), aff'd sub. nom. AFGE v. FLRA, 691 F.2d 565 (D.C. Cir. 1982). Also see FPM Bulletin 430-18, April 24, 1984, SUBJECT: Significant Performance Management Decisions. But, union proposals that mandate discussions between managers and employees of performance appraisals before the evaluations go to a reviewing official are negotiable. Such advance discussions do not interfere with management's decisionmaking processes or any other aspect of its reserved right to direct employees and assign work. NFFE and Dept. of the Army, Fort Monmouth, N.J., 13 FLRA 426 (1983).

(d) To Suspend Employees. The Fort Dix-McGuire Exchange case changed the law as it had been interpreted by the Federal Labor Relations Counsel in the Blaine Air Station case, decided in 1975. In that case the union desired to negotiate a proposal which would not allow management to take adverse action against employees until after the employee had exhausted his grievance and arbitration rights. For instance, management may decide to suspend an employee who is continually late to work. With this proposal, management could not suspend the employee until he had grieved and arbitrated the matter. This does not appear so disadvantageous until you realize that it may take months for an employee to exhaust all of his rights. For disciplinary action to be effective, it must be expeditious. The Council decided in that case that the proposal was not negotiable because it would unreasonably delay management's right to take disciplinary action.

In the Fort Dix-McGuire Air Force Exchange case, decided in 1979, the proposal was similar to the Blaine Air Station case. It stated that the grievant will be allowed to exhaust his appeal rights before a suspension or removal could be effectuated. The agency argued that the proposal violated the management rights clause because it would unreasonably delay the exercise of management's right to suspend and remove employees, citing Blaine Air Station. The Authority rejected the rationale of the Blaine case and stated that the mere fact that the procedure being negotiated would unreasonably delay the sought after action would not cause the proposal to be nonnegotiable. Management's right to act does not include the right to act promptly. The Authority stated Congress did not intend to preclude negotiation on a proposal merely because it may impose upon management a requirement which would delay implementation of a particular action involving the exercise of a specified management right. It would be nonnegotiable only if it negated the management right, i.e., management could not act at all. The Authority held that management need not negotiate the decision to suspend or remove but must negotiate the procedures in which it will be done (impact and implementation bargaining, to be discussed later).

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1999
and
ARMY-AIR FORCE EXCHANGE SERVICE, DIX-McGUIRE EXCHANGE, FORT DIX, NEW JERSEY
2 FLRA 153 (1979)

. . . .

DECISION ON NEGOTIABILITY ISSUES

Union Proposal I

Article 7, Section 12

> In the event of a disciplinary suspension or removal, the grievant will exhaust the review provisions contained in this Agreement before the suspension or removal is effectuated, and the employee will remain in a pay status until a final determination is rendered.

Question Here Before the Authority

The question is whether the union's proposal establishes a negotiable procedure, under section 7106(b)(2), which management officials will observe in exercising the authority to suspend or remove employees under section 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute (the Statute).

Conclusion: The union's proposal establishes a negotiable procedure under section 7106(b)(2) of the Statute. Accordingly, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), the agency's allegation that the union's proposal is not within the duty to bargain is set aside.[3]

Reasons: The union's proposal provides, essentially, that an employee the agency has decided to discipline by suspension or removal may not actually be suspended or removed pending completion of the contractual grievances procedure, including arbitration. The agency's basic position is that the union's proposal is nonnegotiable because the procedure it creates would unreasonably delay the exercise of the agency's authority under section 7106(a)(2)(A) of the Statute to suspend and remove

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[3] In so deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

employees. The agency's position, however, is without support in the legislative history of the Statute.

Section 7106 of the Statute specifies, in subsection (a), various rights reserved to agency management. Section 7106(b)(2), however, provides that the enumeration of the specified management rights in subsection (a) does not preclude the negotiation of procedures which management will observe in exercising those rights. The legislative history of the Statute, as it pertains to subsection (b)(2), reveals, first of all, that the Committee on Conference, in adopting the bill which subsequently was enacted by Congress and signed into law by the President, specifically rejected a provision of the Senate bill (S. 2640) which provided that negotiation on procedures should not "unreasonably delay" so as to "negate" the exercise of management's reserved rights.[4] The conclusion is justified, therefore, that Congress did not intend subsection (b)(2) to preclude negotiation on a proposal merely because it may impose on management a requirement which would delay implementation of a particular action involving the exercise of a specified management right. Rather, as the Conference Report indicates, subsection (b)(2) is intended to authorize an exclusive representative to negotiate fully on procedures, except to the extent that such negotiations

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[4] Section 7218 of the Senate bill provided as follows:

§ 7218. Basic Provisions of agreements.

. . . .

(b) Nothing in subsection (a) of this section shall preclude the parties from negotiating--

(1) procedures which management will observe in exercising its authority to decide or act in matters reserved under such subsection; or

(2) appropriate arrangements for employees adversely affected by the impact of management's exercising its authority to decide to act in matters reserved under such subsection, except that such negotiations shall not unreasonably delay the exercise by management of its authority to decide or act, and such procedures and arrangements shall be consistent with the provisions of any law or regulation described in 7215(c) of this title, and shall not have the effect of negating the authority reserved under subsection (a).

would prevent agency management from acting at all.[5] That is, insofar as it is consistent with the right of management ultimately to act, Congress intended the parties to work out their differences with regard to procedures in negotiations.[6]

Since Congress has clearly rejected the grounds for nonnegotiability asserted by the agency, it only remains to be determined whether the proposal at issue herein contravenes the limitations Congress did place on the negotiation of procedures under section 7106(b)(2). That is, the basic issue is whether a procedural requirement that the agency hold in abeyance implementation of suspension or removal of an employee until that employee exhausts the negotiated grievance and arbitration procedures would prevent the agency from exercising at all its statutory right to suspend or remove employees. Clearly it would not: the procedural requirement

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[5] The Joint Explanatory Statement of the Committee on Conference stated, in the Conference Report accompanying the bill which was enacted and signed into law, as follows:

> 3. Senate section 7218(b) provides that negotiations on procedures governing the exercise of authority reserved to management shall not unreasonably delay the exercise by management of its authority to act on such matters. Any negotiations on procedures governing matters otherwise reserved to agency discretion by subsection (a) may not have the effect of actually negating the authority as reserved to the agency by subsection (a). There are no comparable House provisions.
>
> The conference report deletes these provisions. However, the conferees wish to emphasize that negotiations on such procedures should not be conducted in a way that prevents the agency from acting at all, or in a way that prevents the exclusive representative from negotiating fully on procedures. . . .

S. REP. No. 95-1272, 95th Cong., 2nd Sess. 158 (1978). See also the statement of Congressman FORD of Michigan on the House floor during debate on the "Udall substitute." 124 CONG. REC. H9650 (daily ed. Sept. 13, 1978).

[6] Cf. the following statement of Congressman FORD of Michigan with respect to section 7106 of the Statute:

> A principal goal in revising the management rights clause is to change the current situation and, wherever possible, encourage both parties to work out their differences in negotiation.

124 CONG. REC. H9649 (daily ed. Sept. 13, 1978).

established by the proposal relates only to when the suspension or removal may be effectuated, not to whether the agency ultimately will be able to implement those actions. In this respect, the only foreseeable effect of this procedural requirement upon the exercise of the statutory management rights involved is the possibility of delay and, as indicated above, Congress rejected the standard of "unreasonable delay" as the sole basis for excluding proposed procedures from negotiations. Therefore, the fact that the proposal at issue herein, unlike that in National Treasury Employees Union, Chapters 103 and 111 and U.S. Customs Service, Region VIII, Case No. O-NG-16, decided in conjunction with the instant case, contains no time limits governing the various aspects of the arbitration process and consequently constitutes no impediment under the Statute to a finding that the proposal is negotiable. First of all, the absence of such time limits in the instant proposal does not in and of itself justify the conclusion that compliance with the proposal would prevent the agency from effectuating a suspension or removal action. Moreover, the agency has not shown that under the particular circumstances present in the bargaining unit involved in this case, compliance with the disputed proposal would make it impossible for the agency to implement such disciplinary actions. For these reasons, therefore, the procedural requirement in question is within the duty to bargain under section 7106(b)(2) of the Statute.

This result is consistent with and implements the intent of Congress as to the significance of the provisions of Title VII with respect to the Civil Service Reform Act as a whole. Congress enacted the Civil Service Reform Act in order to provide increased management authority, among other things, to hire and to discipline employees.[7] However, Congress also recognized the need to provide protections for employees to balance this increased management prerogative. The grievance and arbitration provisions of Title VII, as well as the provisions

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[7] The Senate Committee Report accompanying S. 2640 stated the following:

> One of the central tasks of the civil service reform bill is simple to express but difficult to achieve: Allow civil servants to be able to be hired and fired more easily, but for the right reasons. This balanced bill should help to accomplish that objective. It is an important step toward making the government more efficient and more accountable to the American people.

S. REP. No. 95-989, 95th Cong., 2d Sess. 4 (1978). See also H. R. REP. No. 95-1403, 95th Cong., 2d Sess. 2-4 (1978).

permitting agencies and labor organizations to negotiate fully on procedures, are among the means Congress utilized to provide such protection for employees.[8] By

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[8] In introducing the amendment (the "Udall substitute") which became the final House version of Title VII and which, as relevant herein, was enacted and signed into law, Congressman UDALL stated as follows:

> The Federal employee unions . . . gain in my substitute some guarantees about procedures that management must follow. They get to arbitrate some things that now go through a torturous appeal process--things involving various labor grievances.
>
> It would be a mistake to view this title VII or my substitute as some kind of a labor bill that is attached to an unrelated bill dealing with management prerogatives in the Federal service. This is how I view what we are trying to do here: It moves 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.
>
> But I say this in two respects. One, it gives some balance. We are saying to the Federal employees that we are going to give management some broad new rights here in this legislation, we are going to enable them to move. And employee organizations are saying, in turn, that they are entitled to have a more independent, secure position from which to deal with management as it operates under this new freedom in the bill.
>
> Second, the arbitration provision I view as much of a gain for management as for labor. The Federal managers now, instead of having to go through difficult, complex appeal procedures, will be able to submit them to arbitration, and this is a gain for management.

124 CONG. REC. H9633 (daily ed. Sept 13, 1978). Congressman FORD of Michigan, a proponent of the "Udall substitute," also stated as follows:

> I should say that I have tried to be supportive of the efforts of the administration because I think that the purposes stated by the President, when he sent the legislation to us, are purposes we can all agree with. But, as I stated before, in attempting to give the executive branch greater flexibility and greater power in terms of their ability to manage the Federal work force we have in fact, if we did nothing more than that, changed the balance that has established itself over a period of time between the employees' individual rights and their collective rights, vis-a-vis the powers and prerogatives of management.

its decision herein the Authority gives full effect to this Congressional intent.

On the other hand, of course, this decision does not represent a judgment as to the desirability of the disputed aspect of the proposal as a matter of sound labor relations practice.[9] Similarly, it does not require the agency to agree to the proposal. It does mean, however, that an agency must achieve through negotiations the procedural certainty and assurance it determines that it needs.

In particular, with respect to the procedures governing the exercise of statutory management rights, the Statute, in section 7106(b)(2), gives the parties latitude to negotiate the provisions each deems necessary. That is the clear import of the relevant portion of the Conference Committee Report previously adverted to which states that labor organizations should not be prevented under section 7106(b)(2) from negotiating fully on procedures.[10] The result herein gives expression to the intent of Congress, as set forth in the relevant legislative history of the Statute, that the parties not be prevented from exploring in negotiations a wide range of possible procedural arrangements and from reaching agreement on those which are mutually satisfactory.

. . . .

NOTE 1: Fort Dix-McGuire was affirmed on review in Dep't of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981).

For this reason, while considering the increased powers for management, we always had in mind that we would put together a totality here, a total package that we hoped--and obviously we had great disagreement during the months that we have considered this, on just what the final product should look like--that we hoped would represent a fair package of balanced authority for management, with a fair protection for at least the existing rights the employees have.

124 CONG. REC. H9647 (daily ed. Sept. 13, 1978).

[9] With regard to the subject matter of the proposal at issue herein, we note, for example, that the common practice in the private sector is for management, to implement the disciplinary action, subject to reversal, or modification, of that decision during the grievance or arbitration procedure and restoration to the disciplined employee of lost pay and benefits.

[10] See note 5, supra.

NOTE 2: The result is that we now have union proposals which could result in management not being able to take disciplinary action for an extended period of time. How do we confront these? We should make every attempt not to agree to stay disciplinary action pending indefinite appeals. Attempt to resist all stays of disciplinary action, or at least get a time limit as to the amount of delay which is permissible. For instance, negotiate that the action can be delayed only for a period of up to 60 days. Thus, if the arbitration award is not rendered within 60 days following receipt by the employee of management's decision to take adverse action against the employee, management could act.

(e) To remove employees. In National Air Station, Patuxent River, MD, 3 FLRA 3 (1980), the Authority found nonnegotiable a proposal that would have required management to separate intermittent employees before they could reduce the hours of temporary and regular part- and full-time employees below certain levels. The FLRA held:

> In thus compelling the separation of particular employees, the proposal directly interferes with the agency's discretion to determine whether to remove employees, and, if so, which employees to remove, in violation of section 7106(a)(2)(A) of the Statute. [Emphasis added.]

See also NLRB Union, 18 FLRA 320 (1985).

(f) To layoff, retain, reduce in grade and pay.

ASSOCIATION OF CIVILIAN TECHNICIANS
and
MONTANA AIR NATIONAL GUARD
11 FLRA 505 (1983)

. . . .

Union Proposal 2

Article 11, Section 2

Determination of which employee(s) will be affected will be done in the following manner and order:

a. Volunteers for RIF will be asked for and accepted from the area affected. [The underlined portion of the proposal is in dispute.]

This proposal would require the Agency to layoff particular employees in a RIF, i.e., those who volunteer from the area affected. In agreement with the Agency, the Authority finds that, by requiring such action as to

particular employees, the proposal directly interferes with the Agency's discretion under section 7106(a)(2)(A) of the Statute to determine which employees to "layoff, and retain. . . ." National Treasury Employees Union and Internal Revenue Service, 7 FLRA No. 42 (1981), Proposal 5. Therefore, the proposal is outside the duty to bargain.

. . . .

(g) To take other disciplinary action. Union's proposals, which provide that employees have an annual opportunity to assess supervisors' performance and that no employee shall be disciplined by supervisors who have not received training in accordance with FPM and OPM regulations, are outside agency's duty to bargain. AFGE, National Council of EEOC Locals No. 216, and EEOC, 3 FLRA 503 (1980).

NFFE, Local 29
and
CORPS OF ENGINEERS, KANSAS CITY
21 FLRA 233 (1986)

. . . .

Union Proposal 3

In any event, the Employer will apprise the employee(s), in writing, prior to the Employer's formal investigation, of any instance requiring a report of survey, of his/her rights. At a minimum, the Employer will inform the employee(s) of his/her right to have a representative present during the investigation, the right to remain silent, and in the event a recommendation is made to hold the employee liable, the right to review any and all evidence and statements relative to the report, and the right to an impartial hearing. The procedures for selecting an arbitrator shall be similar to those contained in the negotiated Agreement and all fees and expenses will be borne by the employer. (Only the underlined portion is in dispute.)

A. Positions of the Parties

The Agency contends that the proposal violates management's rights to discipline employees under section 7106(a)(2)(A) and to assign work under section 7106(a)(2)(B).

The Union disputes the Agency's contentions.

B. Analysis

In agreement with the parties, the Authority finds that the issue raised by Union Proposal 3 is essentially the same as that presented in International Brotherhood of Electrical Workers, AFL-CIO, Local 1186 and Navy Public Works Center, Honolulu, Hawaii, 4 FLRA 217 (1980), enforcement denied sub nom. Navy Public Works Center, Pearl Harbor, Honolulu, Hawaii v. Federal Labor Relations Authority, 678 F.2d 97 (9th Cir. 1982). See also Tidewater Virginia Federal Employees Metal Trades Council and Navy Public Works Center, Norfolk, Virginia, 15 FLRA 343 (1984). In the Tidewater case, the Authority, in agreement with the 1982 decision of the 9th Circuit Court of Appeals in Navy Public Works Center, Honolulu, Hawaii, found that a proposed contract provision concerning an employee's right to remain silent during any discussion with management in which the employee believed disciplinary action may be taken against him or her was outside the duty to bargain, as the provision prevented management from acting at all with regard to its substantive rights under section 7106(a)(2)(A) and (B) of the Statute to take disciplinary action against employees and to direct employees and assign work by having employees account for their conduct and work performance.

C. Conclusion

Based upon our decision in the Tidewater case, we find that Union Proposal 3 directly interferes with management's rights to direct and discipline employees under section 7106(a)(2)(A) and to assign work under section 7106(a)(2)(B).

V. Order

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

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

(a) To Assign Work. This refers to the assignment of work tasks or functions to employees. The right to assign duties to positions or employees has also been construed broadly

by the Authority. Proposals aimed at placing limitations on the right to assign work have consistently been found nonnegotiable. Although management has broad authority to assign work, it can be required to bargain on proposals that would require the updating of position descriptions so that they accurately reflect the duties assigned.

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

AFGE, Local 199
and
ARMY - AIR FORCE EXCHANGE SERVICE,
FORT DIX, NEW JERSEY
2 FLRA 16 (1979)

Union Proposal II

Article 13, Section 2

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

Question Here Before the Authority

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

Opinion

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

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

Under Federal personnel regulations, a position description is a written statement of the duties and responsibilities assigned to a position. It is the official record of, among other things, the work that is to be performed by the incumbent of the position, the level of supervision required, and the qualifications needed to perform the work. From the standpoint of the employee, the position description defines the kinds and the range of duties he or she may expect to perform during the time he or she remains in the position. In the actual job situation, however, an employee might never be assigned the full range of work comprised within the position description. That is, the position description merely describes work which it is expected would be assigned, but is not itself an assignment of work.

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

It is in this context that the intent of the union's proposal must be understood. Both the language of the proposal and the record in this case support the conclusion, briefly stated, that the subject proposal is designed to insure the accuracy of employee position descriptions. That is, the intended effect of the proposal is to prevent the agency from expanding the work regularly required of the incumbent of a position by assigning work which is not reasonably related to the duties spelled out in the position description under the

guise of the general phrase "other related duties as assigned." This does not mean, however, that the proposal would foreclose the agency from adding such unrelated duties to a position. Nothing in the language of the proposal or the record indicates that it is intended to shield the employee from being assigned additional "unrelated" duties, i.e. duties which are not within those described in his or her existing position description in order to do so. The proposal would in no way preclude the agency from including additional, though related, duties in the position description. Thus, in the circumstances of this case, the right of the agency to assign work remains unaffected, while the employee is assured that his or her position description accurately reflects the work assigned to the position.

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

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NATIONAL ASSOCIATION OF AIR TRAFFIC SPECIALISTS
and
FAA
6 FLRA 588 (1981)

. . . .

Union Proposal V

ARTICLE 80 - PERFORMANCE OF BARGAINING UNIT WORK

Section 1. The Employer recognizes that performance of duties normally assigned to bargaining unit members should be performed by properly qualified bargaining unit members.

Question Before the Authority

The question is whether Union proposal V is inconsistent with the Agency's right to assign work under section 7106(a)(2)(B) of the Statute, as alleged by the Agency.

Opinion

Conclusion and Order: Union proposal V, as drafted, is inconsistent with the Agency's right to assign work under section 7016(a)(2)(B) of the Statute and is, therefore, nonnegotiable. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (5 C.F.R. 2424.10 (1981)), IT IS ORDERED that the portion of the Union's petition for review relating to proposal V be, and it hereby is, dismissed.

Reasons: The Union, in response to the Agency's statement of position on the nonnegotiability of proposal V and two other Union proposals discussed immediately below, stated that:

> The clauses of the proposal in the instant case would function as a policy to guide the facility managers in the assignment of unit work but would not prohibit all or even any particular assignment of unit work to nonunit personnel. Proper implementation of the proposal would merely insure that the unit and nonunit personnel continue to function primarily within the spheres of their respective position descriptions which the agency has defined and retains the right to define.

This statement as to the intended meaning of the proposal is inconsistent with the proposal's plain language which would require the continued assignment of bargaining unit work to qualified bargaining unit employees. That is, the proposal would require Agency managers to recognize that work usually assigned to the unit should be performed by qualified employees in that unit. Thus, the proposal directly conflicts with the right to assign work reserved to management by section 7106(a)(2)(B) of the Statute.

Implicit, however, in the Union's statement set forth is a connection between the intended meaning of Union proposal V and proposal II in American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA No. 16 (1979), enforced as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981). The latter prevented agency management from using the term "other related duties as assigned," as it appears in an employee's position description, as a basis for regularly assigning duties which are not reasonably related to those described in a current position description. The Authority held in Dix-McGuire that:

> Nothing in the language of the proposal or the record indicates that it is intended to shield the employee from being assigned additional "unrelated" duties, i.e., duties which are not within those described in his or her existing position and which are not related to those which are so described. Rather, as a consequence of this proposal, if the agency decided to add unrelated duties, to be performed regularly, to a position, it would need to change the position description in order to do so.

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> It is precisely the difference between the Dix-McGuire proposal and Union proposal V herein which underscores the nonnegotiability of the instant proposal as drafted. In Dix-McGuire, the proposal did not impose any limitations on the agency's authority to assign work. Rather, it obligated the agency to reflect certain assignment changes in employees' position descriptions. By contrast, proposal V herein, as drafted, would restrict assignment of work by imposing an obligation upon management to assign specific work to "qualified" employees in the bargaining unit, not to other employees in the unit or to employees outside the unit. Hence, Union proposal V is nonnegotiable. It should be noted, however, that if the proposal were redrafted consistent with the Union's stated intent and the Dix-McGuire decision, it would be an appropriate matter for negotiation.
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> . . . .

NOTE 1: Although proposals concerning work assignment are nonnegotiable, proposals dealing with overtime are often negotiable. Management must be prepared to negotiate who will be assigned overtime but need not negotiate how much overtime is to be assigned or if it is necessary at all. See AFGE and Dep't of Agriculture, 22 FLRA 496 (1986); NFFE and VA, 27 FLRA 239 (1987).

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

> [E]ven if the union intended only that employees be rotated to the various duties within their own position description, the specific language of the proposal at issue would require all employees to be rotated each week regardless whether any work were available which required the performance of such duties or whether the work

previously assigned had been completed. In other words, the manager would be restricted to making new assignments, or in modifying, terminating, or continuing existing ones as deemed necessary or desirable. Accordingly, the specific proposal at issue herein is outside the duty to bargain under the Statute. [Emphasis added.]

NOTE 3: For more recent cases involving management's right to assign work, see MTC and Navy, 38 FLRA 10 (1990); AFGE and Department of Labor, 26 FLRA 273 (1987).

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

The following case is significant because the authority states that not only are the management rights decisions nonnegotiable but neither are those matters which are an "integral part of management's deliberations" concerning those decisions.

NFFE and HOMESTEAD AFB
6 FLRA 588 (1981)

. . . .

Union Proposal 1

Article 12.1

It shall be the policy of the Employer to consult openly and fully with the Labor Organization regarding any review of a function for contracting out within the unit. The Employer agrees that work shall not be contracted out when it can be demonstrated that work performed "in-house" is more economically and effectively performed. "Milestone Charts" related to review or feasibility studies for contracting out of work will be made available to the Labor Organization as actions are taken in accordance with such charts. [Only the underscored language of this proposal is in dispute.]

Question Before the Authority

The question presented is whether the underscored portion of this Union proposal is excluded from the duty

to bargain by reason of being inconsistent with section 7106(a)(2)(B) of the Statute, as alleged by the Agency.

Opinion

Conclusion and Order: The underscored portion of the proposal is inconsistent with section 7106(a)(2)(B) of the Statute and therefore is not within the duty to bargain. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (5 C.F.R. 2424.10 (1981)) IT IS ORDERED that the petition for review of the underscored portion of the proposal be, and it hereby is, dismissed.

Reasons: The disputed part of the Union's proposal would, first, prevent the Agency from contracting out for services under certain conditions, and, second, require the Agency to make available to the Union certain "milestone charts" used by management in deciding whether to contract out. The Agency contends that the proposal improperly interferes with its right under section 7106(a)(2)(B) of the Statute to make determinations with respect to contracting out. The Union argues that the proposal constitutes a procedure which is negotiable under section 7106(b)(2) of the Statute.

A proposed procedure which would prevent the Agency from acting at all with respect to a management right is not within the duty to bargain. See American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA No. 16 (1979) at 3, enforced sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. No. 80-1119, July 2, 1981). Section 7106(a)(2)(B) of the Statute reserves to management the right to make determinations with respect to contracting out. On its face, the first underscored sentence of the Union's proposal would prevent the Agency from contracting out work "when it can be demonstrated that work performed 'in-house' is more economically and effectively performed." Thus, under that prescribed condition, the proposal would prevent the Agency from acting at all with regard to contracting out. Accordingly, this part of the proposal is not within the duty to bargain.

The Union's argument that this part of the proposal is negotiable in that it merely reiterates the restrictions contained in Office of Management and Budget (OMB) Circular No. A-76, which prescribes general policies for contracting out, cannot be sustained. Assuming, arguendo, that the proposal accurately reflects the provisions of the OMB Circular, such limitations on the exercise of management's statutory right to contract out are not appropriate for inclusion in a collective

bargaining agreement. In this regard, while the OMB Circular might place limitations on management's discretion, the Statute precludes the negotiation of contractual limitations on management's rights. Thus, section 7106(a) of the Statute provides that "nothing in this chapter shall affect the authority of any management official" to exercise the rights enumerated therein. Therefore, no provision could be negotiated which would preclude the exercise of a management right.

Incorporation of specific contractual terms, such as those proposed here, would require management to comply with those terms, regardless whether OMB subsequently revised or eliminated the directives/circulars from which they were taken. Thus, the proposal would impose an independent contractual requirement upon management's discretion with respect to contracting out and hence would interfere with management's rights under the Statute in this regard. In other words, the proposal here goes beyond contractual recognition of any external limitations and imposes substantive limitations in and of itself. Consequently, the mere fact that the proposal here might reflect the current provisions of an OMB circular does not make it negotiable. Therefore, it is inconsistent with section 7106(a)(2)(B) of the Statute.

This proposal is to be distinguished from one which requires the Agency to act in accordance with whatever applicable OMB directives/circulars may be extant at the time the Agency is exercising its right to contract out. Such a proposal would only require that when management acts, it does so in accordance with applicable OMB directives existing at the time.

Turning to the last underscored sentence of the proposal which would require the Agency to make available to the Union "milestone charts," the Agency has explained that such charts are internal management recommendations, developed from feasibility studies, used by management officials in determining whether to contract out. Since this explanation is uncontroverted, it is adopted for purposes of this decision. In these circumstances, the "milestone charts" constitute an integral part of management's deliberations concerning the relevant factors upon which a determination whether to contract out will be made. The applicable legislative history demonstrates that Congress enacted section 7106 in furtherance of its purpose and intent to "give management the power to manage and the flexibility that it needs." Thus, the right of management officials under section 7106(a)(2)(B) of the Statute to make determinations with respect to contracting out encompasses not only the right to act in this regard but also the right to discuss and deliberate concerning the relevant factors upon which

such a determination will be made. Since the "milestone charts" in question are an essential element in management's internal deliberative process, the Union proposal is not procedural in nature; rather it directly affects the exercise of management's right under section 7106(a)(2)(B) to make determinations with respect to contracting out. Thus, the proposal is outside the duty to bargain.

Union Proposal 2

Article 12.2

> In accordance with Office of Federal Procurement Policy Circular A-76, and Air Force Manual 26-1 policies established therein shall not be used:
>
> a. As authority to enter into contracts if such authority does not otherwise exist, nor will it be used to justify departure from any law or regulation, including regulations of the Office of Personnel Management or other appropriate authority, nor will it be used for the purpose of avoiding established salary or personnel limitations.
>
> b. To contract out work that deals with products or services which are provided to the public by the employer.
>
> c. To contract out products or services obtained from other Federal agencies which are authorized or required by law to furnish them.

Questions Before the Authority

The question presented is whether this proposal is excluded from the duty to bargain because it is inconsistent with section 7106(a)(2)(B) of the Statute, as alleged by the Agency.

Opinion

Conclusion and Order: This proposal is inconsistent with section 7106(a)(2)(B) of the Statute and therefore is not within the duty to bargain. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (5 C.F.R. 2424.10 (1081)), IT IS ORDERED that the petition for review of this proposal be, and it hereby is, dismissed.

Reasons: In its face, this proposal would prevent the Agency in certain circumstances from exercising its statutory authority under section 7106(a)(2)(B) to make

determinations with respect to contracting out. The Union asserts that the proposal is within the duty to bargain since the limitations on management's authority contained in the proposal reflect the provisions of OMB Circular A-76, which established policies for contracting out. However, for the reasons set forth in the discussion of current provisions of OMB Circular A-76 is without controlling significance herein. Since, as noted above, the proposal would, pursuant to a negotiated agreement, prevent the Agency from contracting out in the stated circumstances, it is inconsistent with section 7106(a)(2)(B) which reserves such determinations to management. Accordingly, the Agency's allegation that the proposal is not within the duty to bargain must be sustained.

Union Proposal 3

Article 12.3

> The Labor Organization shall be furnished dates and times of the pre-bid and bid-opening conferences and shall have the right to have two Labor Organization representatives present at the conferences. The contract will not be awarded for at least ten work days following the bid opening conference. Only the underscored portion of the proposal is in dispute.

Question Before the Authority

The question presented is whether the underscored portion of this proposal is within the Agency's duty to bargain under the Statute or is excluded therefrom by reason of being inconsistent with section 7106(a)(2)(B) of the Statute, as alleged by the Agency.

Opinion

Conclusion and Order: The underscored portion of this proposal is inconsistent with section 7106(a)(2)(B) of the Statute and therefore is not within the duty to bargain. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (5 C.F.R. 2424.10 (1981)), IT IS ORDERED that the petition for review of the underscored portion of the proposal be, and it hereby is, dismissed.

Reasons: The Agency states that the pre-bid and bid-opening conferences are "wholly management related meetings at which the management aspects of the contracting out issue are either discussed or acted on, and which occurred after the union has been afforded the opportunity to comment on the contracting out proposal."

Since this explanation of the purpose and function of these conferences is uncontroverted, it is adopted for purposes of this decision. As noted above, the right of management officials to make contracting out determinations includes the right to discuss among themselves and deliberate concerning the relevant factors upon which such determinations will be based. The conferences in question constitute an integral part of that process.

The proposal here by its express terms would guarantee the Union the right to be present at the conferences. The Agency interpreted the proposal, which interpretation is uncontroverted, as permitting the submission of Union views on technical matters relating to the bids. Such involvement of the exclusive representative of these sessions where Agency officials are engaged in managerial deliberations and discussion as part of their decision-making process, would directly interfere with management's right under the Statute to make determinations with respect to contracting out.

This proposal is to be distinguished from proposals which would require joint union-management efforts for purposes for which would not involve the exclusive-representative in management deliberations and discussion as part of decision-making on matters covered by section 7106(a). In American Federation of Government Employees, AFL-CIO, Local 1786 and Marine Corps Development and Education Command, Quantico, Virginia, 2 FLRA No. 58 (1980), for example, the Authority held negotiable a proposal which would establish a union right to representation on wage survey teams which gather data on local prevailing wages for use in determining the pay of certain hourly-paid nonappropriated fund employees.

Based on the foregoing, the Agency's allegation that the underscored portion of the Union's proposal is outside the duty to bargain is sustained.

Union Proposal 4

Article 12.4

> Contracting out of normal services will be limited to those positions/functions not deemed mission/emergency essential by Homestead AFB and the Dept. of the Air Force.
>
> The employer agrees to take all possible actions to minimize the impact on employees when functions/positions are contracted out. Affected employees will be reassigned and/or retrained to the maximum extent possible. Maximum retention of career employees shall be achieved by considering attrition patterns and

restricting new hires. [Only the underscored portion of this proposal are in dispute.]

Question Before the Authority

The questions presented are whether the underscored sentences of the Union's proposal are within the duty to bargain under the Statute or, as alleged by the Agency, whether they are excluded therefrom by reason of being inconsistent with sections 7106(a)(2)(B) and 7106(a)(2)(A), respectively.

Opinion

Conclusion and Order: The first sentence of this proposal is inconsistent with section 7106(a)(2)(B) of the Statute and therefore is not within the duty to bargain. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (5 C.F.R. 2424.10 (1981)), IT IS ORDERED that the petition for review of the first sentence of the proposal be, and it hereby is, dismissed. The last sentence of the proposal, however, concerns an appropriate arrangement under section 7106(b)(3) of the Statute for employees adversely affected by management's exercise of its right to contract out and therefore it is within the duty to bargain. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (5 C.F.R. 2424.10) (1981)), IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the last sentence of the proposal.

Reasons: The first sentence of the proposal would expressly prohibit the Agency from contracting out for normal services which are deemed "mission/emergency essential." As has already been pointed out, section 7106(a)(2)(B) of the Statute reserves to management the authority to make determinations with respect to contracting out. Thus, the first sentence of the proposal is inconsistent with section 7106(a)(2)(B) and the Agency's allegation that the proposal is not within the duty to bargain must be sustained.

The last sentence of the Union's proposal seeks to achieve maximum retention of career employees in contracting out situations by requiring the Agency to consider "attrition patterns and restricting new hires." The Agency has alleged that the proposal would affect is authority under section 7106(a)(2)(A) to hire, layoff, and retain employees by requiring it to impose hiring freezes before instituting reductions in force. The Union, however, argues that the proposal constitutes an appropriate arrangement for adversely affected employees which, pursuant to section 7106(b)(3), is within the duty to bargain.

The Agency has misinterpreted the disputed language. On its face, nothing in this part of the proposal would require the Agency to take, or to refrain from taking, any action with respect to the retention of affected employees. The proposal would only require Agency management to consider attrition patterns and to consider the restricting of new hires. The decision as to which employees shall be retained and which shall be subject to layoff is reserved to management under the proposal. Similarly, under the proposal, management would not be prohibited from hiring new employees; rather management would retain the discretion to determine whether, when, how many, and who shall be hired in the Agency. Thus, the proposed language is hortatory rather than mandatory and does not interfere with the exercise of management rights. See Association of Civilian Technicians, Delaware Chapter and National Guard Bureau, Delaware National Guard, 3 FLRA No. 9 (1980). Based upon the foregoing, the last sentence of the proposal is not inconsistent with management's statutory rights and is within the duty to bargain under section 7106(b)(3) as an appropriate arrangement for employees who would be adversely affected by management's exercise of its right under section 7106(a)(2)(B) to contract out.

. . . .

The FLRA's decision in the preceding case was enforced by the District of Columbia Circuit, NFFE v. FLRA, 681 F.2d 886 (D.C. Cir. 1982). But in an abrupt change of direction, this same court upheld an FLRA determination that management must negotiate a union proposal requiring it to comply with OMB Circular A-76 and other laws and regulations regarding contracting out. In AFGE, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 10 (1982), the Authority had concluded that the proposal did not impair EEOC's 5 U.S.C. § 7106(a)(2)(B) reserved right "to make determinations with respect to contracting out" because it merely recognized existing limitations on the Commission's rights. EEOC had also argued that the proposed language would subject contracting out decisions to the negotiated grievance procedure, thereby conflicting with the internal review procedures required by OMB Circular A-76. The Authority rejected the Commission's premise that contracting out decisions were not grievable in the absence of the proposed language, relying on the 5 U.S.C. § 7103(a)(9) definition of grievance as including any complaint concerning the interpretation of "any law, rule or regulation affecting conditions of employment." It ruled that the Circular could not limit the statutorily-prescribed scope of the grievance procedure. Because the proposal was not inconsistent with either the Federal Service Labor-Management Relations Statute (the Statute) or Circular A-76, the FLRA ordered EEOC to bargain.

Considering the EEOC petition for review, the court first noted that it would uphold FLRA's interpretation of the Statute if

it was "'reasonably defensible' [citations omitted] and not inconsistent with any congressional mandate or policy." Analyzing EEOC's contention that 5 U.S.C. § 7106(a)(2)(B) gave it unfettered authority to contract out, the court noted that the rights to "make determinations with respect to contracting out" is restricted by the requirement that it be exercised "in accordance with applicable laws." The court also observed that Section 7106(b) requires negotiation of procedures to be used in exercising reserved management rights. The court concluded, therefore, that management does not have the unrestricted right to make contracting out decisions.

EEOC also argued that making compliance with Circular A-76 a requirement under a collective bargaining agreement would, in effect, give an arbitrator the authority to make contracting out decisions. As had the Authority, the court considered EEOC's premise that contracting out decisions would not be grievable absent the proposed language. The court also relied on the statutory definition of grievance in adopting the Authority's conclusion that the proposed language would not expand a union's existing right to challenge contracting out decisions under the negotiated grievance procedure. Finally, the court considered EEOC's allegation that the Circular's language, precluding creation of an additional right of appeal except as provided in the Circular, barred negotiation of the proposal. The court quickly dismissed that contention with the observation that Congress never intended that the Executive Branch could limit by regulation the statutorily-defined grievance procedure.

In his lengthy dissent Judge MacKinnon found that the Authority interpretation was due less deference because the FLRA had construed a statutory provision which arguably limits its authority. He then asserted that contracting out decisions are not grievable absent the language in question. He reasoned that "personnel polices, practices and matters affecting working conditions" do not include speculations about continued future employment of bargaining unit members. If contracting out decisions are already grievable, he wondered, why is the union seeking so "strenuously" to impose a limitation on management it does not already possess? He concluded that the provision in question would create a right of arbitral review of decisions which Congress entrusted to the EEOC and all other federal agencies. EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984), cert. granted, 472 U.S. 1026 (1985), cert. dismissed, 476 U.S. 19 (1986).

The Supreme Court granted certiorari in June, 1985, and heard oral argument in the case in January, 1986. During this period of time, the FLRA held numerous arbitration awards to which exceptions had been filed in abeyance pending the court's decision. Then, in late April, 1986, the Court dismissed the petition as improvidently granted because the EEOC had raised new issues before the Supreme Court without having litigated them in the lower court. Id.

In the interim, the Ninth Circuit Court of Appeals rendered a unanimous opinion holding that contracting out actions were not

grievable. Defense Language Institute v. FLRA, 767 F.2d 1398 (9th Cir. 1985). The 4th Circuit Court of Appeals initially sided with the D.C. Circuit. Health and Human Services v. FLRA, 822 F.2d 430 (4th Cir. 1987). The court, meeting en banc, reversed their position and held that providing arbitration and grievance coverage to contracting out decisions would deprive the agency of substantive decision making authority and was not negotiable. The court found that OMB Circular A-76 was not an "applicable law" in the context of § 7106 but was a government wide regulation within the context of § 7106(a). Since the Circular was a government wide regulation that specifically limited the appeal procedure to that provided for in the Circular, the provision of binding arbitration and grievance coverage would conflict with the government wide regulation. This provided an additional basis for their finding that the proposals were not negotiable. Health and Human Services v. FLRA, 844 F.2d 1087 (4th Cir. 1988)(en banc). Regardless, the Authority has continued to hold such issues negotiable and grievable, although it has significantly restricted arbitrators' award authority in this area. Redstone Arsenal, 23 FLRA 179 (1986); Blytheville AFB, 22 FLRA 656 (1986).

The Supreme Court finally granted cert. in IRS v. FLRA, 862 F.2d 880 (D.C. Cir. 1989). The issue in this case concerned the union's ability to negotiate or grieve management's decision to contract out federal work. The proposal submitted by the union would have established the grievance and arbitration provision of the union's master labor agreement as the union's internal administrative appeal for disputed contracting out cases. The Court held the proposal was not negotiable. It stated that a union cannot try to enforce a rule or regulation through negotiated grievance procedures if the attempt affects the exercise of a management right unless the rule or regulation is "an applicable law." The Court remanded the case back to the D.C. Circuit. IRS v. FLRA, 110 S. Ct. 1623 (1990). The D.C. Circuit promptly remanded the case back to the FLRA, stating that the determination of whether Circular A-76 is an "applicable law" must be performed in the first instance by the FLRA. IRS v. FLRA, 901 F.2d 1130 (D.C. Cir. 1990). On remand, the FLRA ruled that Circular A-76 is an "applicable law" and hence unions can challenge contracting out decisions through arbitration. NTEU and IRS, 42 FLRA 377 (1991). On review, the D.C. Circuit initially found that OMB Circular A-76 was an "applicable law" within the meaning of § 7106 and also found that the proposal was negotiable. IRS v. FLRA, 901 F.2d 1130 (D.C. Cir. 1990). As with the 4th Circuit case, this opinion was short lived. The court, meeting en banc, reversed its position and held that the provision was not negotiable. The court found that it was unnecessary to decide whether the Circular was an "applicable law" in order to determine whether it was negotiable. The court found the Circular to be a government wide regulation under § 7117(a) that specifically excluded the use of grievance and arbitration procedures. The court held,

> We hold that if a government-wide regulation under section 7117(a) is itself the only basis for a union grievance--that is, if there is no pre-existing legal right upon which the

> grievance can be based--and the regulation precludes bargaining over its implementation of prohibits grievances concerning alleged violations, the Authority may not require a government agency to bargain over grievance procedures directed at implementation of the regulation. When the government promulgates such a regulation, it will not be hoisted on its own petard.

IRS v. FLRA, 996 F.2d 880 (D.C. Cir. 1993).

(c) Personnel by which operations are accomplished. In Marine Corps Development and Education Command, 2 FLRA 422 (1980), the union proposed union representatives be made members of wage survey teams collecting data to be used in determining the wages of Nonappropriated Fund (NAF) administrative support and patron service employees. Although the agency had extended the right to participate on wage survey teams to unions representing crafts and trades employees, the right to participate on wage survey teams gathering wage data to be used in determining the pay of administrative support and patron service employees was not similarly extended. The agency argued that the union's proposal interfered with management's right, under Section 7106(a)(2)(B), to determine the personnel by which its operations were conducted; that is, the agency was contending that the wage survey team constituted an operation of the agency. The Authority disagreed.

> [I]rrespective of whether the use of such wage survey teams constitute a part of the operation of the agency or is a procedure by which the pay determination operation is carried out, nothing in the disputed provision would interfere with the agency's right to determine the personnel who will represent the agency's interests on such wage survey teams. The union's proposal merely provides that there will be union representation on such already established wage survey teams. [Emphasis in original.]

The Authority added that the disputed provision was consistent with the public policy, as expressed in 5 U.S.C. § 53(c)(2), of providing for unions a direct role in the determination of pay for certain hourly-paid employees.

4. With respect to filling positions, to make selections for appointments from--(i) among properly ranked and certified candidates for promotions; or (ii) any other appropriate source--Section 7106(a)(2)(C).

In VA, Perry Point, 2 FLRA 427 (1980), the union proposal in dispute read as follows:

> It is agreed that an employer will utilize, to the maximum extent possible the skills and talents of its employees. Therefore, consideration will be given in filling vacant positions to employees within the

> bargaining unit. Management will not solicit applications from outside the minimum area of consideration or call for a Civil Service Register of candidates if three or more highly qualified candidates can be identified within the minimum area of consideration. This will not prevent applicants from other VA field units applying provided they specifically apply for the vacancy being filled, and that they are ranked and rated with the same merit promotion panel as local employees.

The Authority concluded that the proposal, despite express language to the contrary, would not prevent management from expanding the area of consideration once the minimum area was "considered and exhausted as the source of a sufficient number of highly qualified candidates."

In Community Services Administration, 3 FLRA 83 (1980), the disputed proposal bore a striking resemblance to the Perry Point proposal. It provided that:

> If five in-house employees . . . within the area of consideration are rated qualified, the area of consideration shall not be extended. If less than five such employees are rated qualified, a selection may be made or the area may be extended, at the option of the selecting official. [Emphasis added.]

The agency had contended that "where management does not select from the referenced certificate, it cannot fill the position." That is, if the area of consideration yielded five qualified candidates, management either had to make a selection from among them or leave the vacancy unfilled. The Authority adopted the management's interpretation, and concluded that the proposal would prevent management from exercising its section 7106(a)(2)(C) right to select. In a footnote the Authority distinguished the Perry Point proposal by noting that it only required that "consideration" be given to unit employees, but did not, as did the CSA proposal, prevent management from expanding the area of consideration or using other appropriate sources to fill vacancies. It did not, however, show how the express terms of the two proposals warranted radically different interpretations.

In the Navy Exchange, Orlando case, 3 FLRA 391 (1980), the Authority was faced with another proposal seeking to restrict management's ability to consider outside applicants. The disputed proposal provided that management could consider outside applicants only when less than three minimally qualified internal applicants were being considered. It also provided that management could engage in external recruitment only when it was determined that none of the internal applicants were qualified.

The agency argued that the proposal would negate management's right, under 5 U.S.C. § 7106(a)(2)(C), to select from among properly ranked and certified candidates for promotion or from any

other appropriate source. The agency also argued that the proposal would require the promotion of an internal unit employee if three minimally qualified employees were available. This interpretation was adopted by the Authority for the purpose of its decision. The FLRA held that the proposal violated section 7106(a)(2)(C).

> The proposal here involved, which would restrict management's right to consider properly ranked and certified candidates for promotion or outside applicants . . . would infringe upon the right to select.

The Authority distinguished this case from Perry Point by noting that the Perry Point proposal, in requiring only that consideration be given to unit employees, did not prevent management from exercising its reserved right to select. The Authority added that, to the extent the proposal required selection of unit employees if there were three minimally qualified employees it, like the CSA case, would conflict with 5 U.S.C. § 7106(a)(2)(C).

A union proposal to include one union member on a three member promotion-rating panel for specific unit vacancies was held non-negotiable in AFGE, Mint Council 157 and Bureau of the Mint, 19 FLRA 640 (1985). The FLRA reasoned that the provision would interject the union into the determination of which employees would be selected for promotion, thus interfering with management's right to select under section 7106(a)(2)(c), CSRA.

5. Right to take actions necessary to carrying out agency mission during emergencies--section 7106(a)(2)(D).

ASSOCIATION OF CIVILIAN TECHNICIANS
and
PENNSYLVANIA NATIONAL GUARD
7 FLRA 346
1981

Summary of the Case:

The disputed provision said that management retained the right "to take whatever actions may be necessary to carry out the mission of the agency during emergencies, when verified and declared by the Activity Supervisor." (Only the underlined language was disputed.) The intent of the provision, according to the union, was to make clear who would be telling employees that an emergency situation existed. This explanation was rejected by the Authority on the ground that the language was clear and unambiguous and, as such, came into conflict with 5 U.S.C. § 7106(a)(D).

> The provision here in dispute, on its face, would directly interfere with [management's] statutory right by requiring that a particular

management official must first verify and declare that an "emergency" exists before management could act pursuant to section 7106(a)(2)(D).

FLRA added that were a proposal explicitly drafted to conform with the stated intent of the union, it would constitute a negotiable procedure.

This is the first case in which the Authority has found a proposal nonnegotiable on the ground that it interfered with management's rights under section 7106(a)(2)(D). Although its decision throws no light on the question of what constitutes an emergency, it does make clear that any proposal that requires a particular agency official to first ascertain and announce that an emergency exists before management can take necessary action, violates management's rights under 5 U.S.C. § 7106(a)(2)(D). As the agency argued, given the union's provision, management officials would be unable to respond to an emergency if the designated official was not available or for any reason did not verify or declare an emergency.

NOTE: The Authority has narrowly construed the parameters of what constitutes an emergency. In NTEU Chapter 22 and IRS, 29 FLRA 348 (1987) the Authority held that not all proposals which relate to agency actions to carry out the agency mission during emergencies are nonnegotiable under section 7106(a)(2)(D). The agency must show how the proposals in question will, "either directly interfere with agency action or prevent the agency from taking the emergency action . . . ." In Mac Dill Air Force Base, Florida and NAGE Local 547, 43 FLRA 1565 (1992) the Authority held that Operation Desert Storm did not constitute an emergency.

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c. **Permissive/Optional Areas of Negotiation.** Numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work.

This section is the successor to section 11(b) of E.O. 11491. Management may refuse to discuss a permissive subject of bargaining, or it may negotiate on such a matter at its discretion, § 7106(b)(1). Management may terminate negotiations on a permissive subject any time short of agreement, National Park Service, 24 FLRA 56 (1986). In this regard, certain excerpts from the floor debate in the House may be helpful:

> Mr. Ford of Michigan . . . I might say that not only are they [Management] under no obligation to bargain [on a permissive subject], but in fact they can start bargaining and change their minds and decide they do not want to talk about it any more, and pull it off the table. It is completely within the control of the agency

> to begin discussing the matter or terminate the discussion at any point they wish without conclusion, and there is no appeal or reaction possible from the parties on the other side of the table.
>
> It is completely, if you will, at the pleasure and the will of the agency.
>
> . . . .

Once agreement has been reached on a permissive subject, the agency head may not refuse to approve the agreement provision on the basis that there was no obligation to bargain on the subject, National Park Service, 24 FLRA 56 (1986).

Activities renegotiating a collective bargaining agreement may attempt to eliminate provisions found in the earlier contract. The union may be reluctant to give up rights they have already obtained and will often assert that management may not declare those provisions which address permissive subjects nonnegotiable. The Federal Labor Relations Authority has stated that management is under no obligation to negotiate permissive subjects even if it has done so in earlier agreements. FAA, Los Angeles and PASS, Local 503, 15 FLRA 100 (1984).

On 1 October 1993, President Clinton issued an executive order directing the heads of each agency to, "negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same . . . ." The impact of the order on union management relations may be tempered by the following limitation that is also included in the order,

> 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, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Exec. Order No. 12,871, 58 Fed. Reg. 52201 (1993).

1. The Numbers, Types, and Grades of Employees or Positions Assigned to Any Organizational Subdivision, Work Project, or Tour of Duty (Staffing Patterns).

This permissive subject area involves the distribution and composition of the work force within the overall employee complement. Generally, if the proposal addresses the number of employees in an organizational subdivision, it falls within this section. The following case is helpful in understanding how the work force is changed and how staffing patterns are established.

AFGE LOCAL 1940 v. PLUM ISLAND ANIMAL DISEASE LABORATORY DEPARTMENT OF AGRICULTURE, GREENPORT, N.Y.
FLRC No. 71A-11 (July 9, 1971)

. . . .

During negotiations on a supplement to the agreement between the union and Plum Island Animal Disease Laboratory (PIADL), a dispute arose over the establishment of tours of duty by the agency. The circumstances surrounding this dispute are briefly as follows:

PIADL is a facility located on an island a short distance off the coast of the United States, and engaged in research on exotic diseases of animals. Its major operations are conducted in two laboratory buildings, a decontamination plant and a power plant. To provide for round-the-clock operation and maintenance of its buildings and equipment, PIADL currently employs four crews of 11 men each (including a foreman) who work on three rotating, weekly shifts, and who supplement the regular 8-hour, 5 days per week, maintenance employees.

Management has now decided that, by reason of improvements in equipment and operating procedures, its work can be more effectively and efficiently accomplished by eliminating the third shift in one laboratory, and establishing two new fixed shifts, working on a regular five day basis. No reductions in force or in grades are anticipated, although premium pay would be reduced. Improved staffing of the first and second shifts would be effected by the agency action.

The action claims that such changes in tours of duty, and particularly the establishment of new tours, are negotiable, and the union submitted the following proposal on tours of duty, during bargaining on the supplemental agreement:

> Both parties recognize that management has the right to fix and to assign the number, type, and grades of personnel to any segment in its organization, to any location and to an approved scheduled tour of duty. Changes in personnel from one scheduled shift to another, or from one existing five-day period to another, are assignments or scheduling of personnel and not changes in tours of duty.
>
> Should management in exercising the above-cited rights determine that a change in scheduled tours of duty is necessary to maintain the efficiency of the Government operations entrusted to them, such determination will be presented to the Local representatives with a recommended revised schedule tour of duty for consideration, together with a recommended effective date not less than two pay periods dating from the date it is presented to the Local.
>
> During the above period, consultations will be undertaken to arrive at a mutually acceptable

schedule. If consultation does not result in a mutually acceptable tour of duty and if requested by the Local, negotiations of a formal schedule will be initiated; these negotiations shall be conducted in good faith to insure no undue delay in establishing an effective date for a revised schedule.

Tours of duty now in existence will remain the same unless changed in accordance with the provisions of this article.

PIADL asserted that the union's proposal is nonnegotiable and, upon referral, the Department of Agriculture upheld such position, on the ground that the proposal conflicts with management's rights under the Order. The union appealed to the Council from Agriculture's determination, and the Council accepted the petition for review under section 11(c)(4) of the Order.

Opinion: The essential question is whether changes in tours of duty, including the establishment of new tours, must be negotiated under section 11(a) of the Order, or whether such changes are excepted from the obligation to bargain, particularly under section 11(b) of the Order.

. . . .

The intent of the . . . provisions in section 11(b) is explained in the Report accompanying E.O. 11491 (Labor-Management Relations in the Federal Service (1969)), as follows (pp. 38-39):

We believe there is need to clarify the present language in section 6(b) of [E.O. 10988, which preceded E.O. 11491 and which excluded from the obligation to bargain an agency's "assignment of its personnel"]. The words "assignment of its personnel" apparently have been interpreted by some as excluding from the scope of negotiations the policies or procedures management will apply in taking such action as the assignment of employees to particular shifts or the assignment of overtime. This clearly is not the intent of the language. This language should be considered as applying to an agency's right to establish staffing patterns for its organization and the accomplishment of its work--the number of employees in the agency and the number, type and grades of positions or employees assigned in the various segments of its organization and to work projects and tours of duty.

. . . .

It is plain from the foregoing that the establishment or change of tours of duty was intended to be excluded form the obligation to bargain under section 11(b). As stated in the Report, the agency has the right to determine the "staffing patterns" for its organization and for accomplishing its mission. Clearly, the number of its work shifts or tours of duty, and the duration of the shifts, comprise an essential and integral part of the "staffing patterns" necessary to perform the work of

the agency. Further, the specific right of an agency to determine the "numbers, types, and grades of positions or employees" assigned to a shift or tour of duty, as provided in section 11(b), obviously subsumes the agency's right to fix or change the number and duration of those shifts or tours. To hold otherwise, i.e., to interpret section 11(b) as sanctioning the right of the agency to determine the composition of the shift or tour and not the framework upon which the composition depends, would render the provisions of section 11(b) virtually meaningless.

While the obligation to bargain does not therefore extend to the establishment or change of tours of duty under section 11(b), negotiations may be required on the impact of such actions on the employees involved. For example, as indicated in the Report, bargaining may be required on the criteria for the assignment of individual employees to particular shifts; on appropriate arrangements for employees who are adversely affected by the realignment of the work force; and the like. Indeed, the agency stated in the instant case, "There is no disagreement that matters such as procedures for determining how qualified individuals will be assigned to a particular shift or tour and advance notice of such changes before they are made are negotiable and agreement has, in fact, been reached on those matters."

Turning now to the union's proposal in the present case, this proposal would, among other things, require bargaining on changes of tours of duty if so requested by the union, and would prescribe any such changes by the agency unless agreed upon by the union. As already indicated, the obligation of an agency to bargain does not extend to the establishment or changes of tours of duty under section 11(b). PIADL was consequently free from the obligation to bargain on this proposal by the union.

Accordingly, pursuant to section 2411.18(d) of the Council's rules of procedure, we hold that the determination by the Department of Agriculture that negotiations were not required on the union's proposal here involved was proper and must be sustained.

NOTE 1: In determining whether a matter concerning changes in employees' hours of work is within the scope of section 7106(b)(1), the Authority previously made distinctions between: (1) changes in employees' hours of work which were integrally related to and consequently determinative of the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty (see, for example, National Federation of Federal Employees, Local 1461 and Department of the Navy, U.S. Naval Observatory, 16 FLRA 995 (1984); U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116, 117 (1982)); and (2) changes which permit "a modicum of flexibility within the

range of starting and quitting times for [an] existing tour of duty" National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 FLRA 927, 930 (1979); see also U.S. Customs Service, Region V, 9 FLRA at 118-19. As to the former category of cases, the changes in employees' hours of work were found to be outside the duty to bargain; as to the latter category, the changes in hours were found to be within the duty to bargain. It has been noted that these distinctions are subtle ones. See, for example, Veterans Administration Medical Center, Leavenworth, Kansas, 32 FLRA 124, Judge's Decision at 842 (1988); National Treasury Employees Union v. FLRA, 732 F.2d 703 (9th Cir. 1984).

In AF Scott Air Force Base v. FLRA, 33 FLRA 532 (1988), the authority clarified the bargaining obligations with respect to changes in employees' hours of work. The authorities founded that the distinctions previously used are not supported by the relevant statutory and regulatory provisions.

An employee's daily tour of duty, stated the Authority, consists of the hours that the employee works; that is, from the time when the employee starts work until he or she ends work. A decision as to what will constitute an employee's tour of duty is a decision by management as to when and where an employee's services can best be used. When an agency changes an employee's hours, that change, under applicable statutory and regulatory provisions, results in a new tour of duty for the employee. The degree of the change--whether it is a 1-hour change or an 8-hour change--does not alter the fact that the change results in a new tour of duty for the employee. A change in employees' starting and quitting times is a change in their tours of duty.

Changes in employees' tours of duty affect the "numbers, types, and grades of employee . . . assigned to . . . [a] tour of duty" within the meaning of section 7106(b)(1) of the Statute. To the extent that previous decisions of the Authority are to the contrary, they will no longer be followed.

Consistent with the statutory and regulatory provisions discussed above, agencies must generally give appropriate notice to employees of changes in their tours of duty. Further, the fact that an agency's decision to change employees' tours of duty is negotiable only at the agency's election should not be viewed as encouraging agencies not to bargain over these changes. Moreover, even where an agency exercises its right under section 7106(b)(1) not to bargain over the change itself, an agency has an obligation to bargain over the matters set forth in section 7106(b)(2) and (3) of the Statue: procedures to be observed by management in exercising its authority and appropriate arrangements for employees adversely affected by management's exercise of its authority.

NOTE 2: In some instances, bargaining over flexible work schedules has been specifically authorized by statute. See, for example, American Federation of Government Employees, Local 1934 and Department of the Air Force, 3415 ABG, Lowry AFB, Colorado, 23 FLRA

872 (1986). Those instances ar. not affected by the decision in 33 FLRA 532 (1988).

(2) Technology, Methods and Means of Performing Work.

(a) Technology. Technology is the method of execution of the technical details of accomplishing a goal or standard.

(b) Methods and Means of Performing Work. These were previously prohibited subjects of bargaining under the Executive Order. In Naval Public Works Center, Norfolk, FLRC No. 71A-56, Council Report No. 41, the Council defined these terms as follows:

> "Method" is a procedure or process for obtaining an object, or a way, technique, or process of or for doing something. In other words, a method is the procedure followed in doing a kind of work or achieving a given end. . . . The term "methods" as used in the Order, therefore means the procedures, processes, ways, techniques, modes, manner, and systems by which operations are to be conducted--in short, how operations are to be conducted.
>
> "Means" is something by the use or help of which a desired end is attained or made more likely: an agent, tool, device, measure, plan, or policy for accomplishing or furthering a purpose. . . . The term "means" as used in the Order, therefore includes the instruments (e.g., an in-house Government facility or an outside private facility; centralized or decentralized offices) or the resources (e.g., money, plant, supplies, equipment or, material) to be utilized in conducting agency operations--in short, what will be used in conducting operations.

In Customs Region 8, 2 FLRA 254 (1979), the Authority agreed with the agency's contention that "the activity's requirement that uniformed employees wear nameplates while performing duties as customs officers is a decision as to the means of performing the agency's work." It further held that a proposal making the wearing of nameplates voluntary was not a bargainable appropriate arrangement because such an arrangement "would, in effect, empower employees to nullify the [nameplate] experiment."

The report of the House and Senate conferees states that while there might be circumstances when it would be desirable to negotiate on an issue in the methods and means area, it is not intended that agencies will discuss general policy questions determining how an agency does its work. The language must be construed in light of the paramount right of the public to an effective and efficient Government as possible. For example, the

phrase "methods and means" is not intended to authorize IRS to negotiate with a labor organization over how [tax] returns should be selected for audit, or how thorough the audit of the returns should be.

The conferees went on to give other examples: EPA may not negotiate about how it would select recipients for environmental grants, nor may the Energy Department bargain over which of its research and development projects should receive top priority. OPM considers the intent of Congress to be that these examples are so closely related to agency "mission" as to be prohibited from bargaining.

In Oklahoma City Air Logistic Center, 8 FLRA 740 (1982), management was found to have committed a ULP by unilaterally changing existing conditions of employment regarding a policy on facial hair and respirator use without giving notice and opportunity to bargain to the union on the change. The Authority rejected management's contention that the change involved "technology, methods, and means of performing work" within the meaning of section 7106(b)(1). The issue was not about respirator use per se, but rather the effect of a change in facial hair policy on unit employees required to use the respirator. On a remand from the 9th Circuit, the Authority likewise found a union proposal on agency pay check distribution procedure to be a mandatory topic of bargaining, in spite of precedent holding it was a permissive matter because it involved a method or means of performing work. Mare Island Naval Shipyard, 25 FLRA 465 (1987).

Distinguishing between "mission" (prohibited) and "methods and means" (permissive) may be quite difficult in some cases. However, management should never consider negotiating whenever a permissive proposal involves basic policy choices with respect to priorities and overall efficiency and effectiveness. "Methods and means" are removed from basic policy; they relate more to the techniques, procedures, plans, tools, etc., used to accomplish policy goals.

d. Negotiating Proposals Which Contradict Executive Orders, Government-Wide Regulations, or Agency Regulations-Compelling Need.

1. Proposals which Conflict with Executive Orders and Government-wide Regulations.

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

N.T.E.U.
and
I.R.S.
3 FLRA 675 (1980)

. . . .

Union Proposal

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

Question Here Before the Authority

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

Opinion

Conclusion: The union's proposal, insofar as it requires the agency to retain the disputed parking spaces, is consistent with applicable Government-wide regulations under section 7117(a) of the Statute, does not concern a matter which may be negotiated at the election of the agency within the meaning of section 7106(b)(1) of the Statute, and does not violate the agency's rights under section 7106(a)(1) of the Statute. However, to the extent that the proposal implicitly requires the agency to provide the parking spaces so retained free of charge to employees, it is inconsistent with applicable Government-wide regulations under section 7117(a) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3513 (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained in part and set aside in part.

Reasons: Under the Statute, the duty of an agency to negotiate with an exclusive representative extends to the conditions of employment affecting employees in an appropriate unit except as provided otherwise by Federal law and regulation, including Government-wide regulation. That is, under the Statute, if a proposed matter relates to the conditions of employment of an appropriate unit of employees in an agency and is not inconsistent with law or regulation--i.e., is within the discretion of an agency--it is within the scope of bargaining which is

required of that agency. In this case, the agency alleges, first of all, that the union's proposal is not within the duty to bargain because it is contrary to applicable Government-wide regulations. Specifically, the agency alleges that retention of the employee parking spaces which are the subject of the instant dispute conflicts with provisions of the Federal Property Management Regulations (FPMR).

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

. . . .

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

However, while the legislative history of the term "Government-wide" indicates Congress intended that regulations which only apply to a limited segment of the Federal civilian work force not serve to limit the duty to bargain, it does not precisely define the outer limits of the reach required of a regulation in order for that regulation to be a "Government-wide" regulation within the meaning of section 7117. That is, it is unclear, for example, whether Congress intended that a regulation must apply to all employees in the Federal civilian work force in order to constitute a "Government-wide" regulation. In this regard, it is a basic rule of statutory construction that legislative enactments are to be construed so as to give them meaning. A requirement that a regulation apply to all Federal civilian employees in order to constitute a "Government-wide" regulation under section 7117 would render that provision meaningless, since it does not appear that there is any regulation

which literally affects every civilian employee of the Federal Government. Furthermore, such a literal definition of the term would also render meaningless the concomitant right of a labor organization under section 7117(d) of the Statute in appropriate circumstances to consult with the issuing agency on Government-wide rules or regulations effecting substantive changes in any conditions of employment. In this regard, the legislative history of the Statute indicates that Congress intended the consultation rights provided in section 7117(d) to be substantial union rights.

. . . .

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

. . . .

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

The Authority, for purposes of this decision, adopts GSA's conclusion that an agency is obligated to relinquish space to GSA, including space for parking, once the agency determines in its discretion, that such space is no longer needed or utilized. However, GSA's further conclusion that the agency could not exercise its discretion in this regard through negotiations with a union is without support. As stated at the outset of this decision, Congress, in enacting the Federal Service Labor-Management Relations Statute, established a requirement that an agency negotiate with the exclusive

representative of an appropriate unit of its employees over the conditions of employment affecting those employees, except to the extent provided otherwise by law or regulation. That is, to the extent that an agency has discretion with respect to a matter affecting the conditions of employment of its employees, that matter is within the duty to bargain of the agency.

. . . .

GSA also states, however, that even if the agency's decision to relinquish space is subject to the duty to bargain under the Statute, the agency would be precluded from agreeing to provide those spaces free of charge by provision of FPMR Temporary Regulation D-65 (Temp. Reg. D-65), 44 Fed. Reg. 53161 (1979). Specifically, under section 11 of this regulation, Federal employees utilizing government-controlled parking spaces shall be assessed a charge at a rate which is the same as the commercial equivalent value of those parking spaces. (Between November 1, 1979, and September 30, 1981, however, the charge will be one-half of the full rate to be charged.) This regulation is presently in effect and applies to the parking spaces here in dispute. Further, based upon the analysis stated above, this regulation, which is generally applicable throughout the executive branch, is a Government-wide regulation within the meaning of section 7117 of the Statute and precludes negotiation on a conflicting union proposal. Thus, since the union proposal would require the agency to provide the disputed parking spaces free of charge to employees, it is inconsistent with FPMR Temporary Regulation D-65 and, to that extent, is outside the agency's duty to bargain under the Statute.

. . . .

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

NOTE 1: See also Dep't of Treasury v. FLRA, 873 F.2d 1473 (D.C. Cir. 1989).

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2. Compelling Need Assertions - Agency Rules and Regulations.

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

CSRA § 7117(a)(1) provides:

> Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.
> (2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation . . . only if the Authority has determined under subsection (b) of this section that no compelling need exists for the rule or regulation.
> (3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency,
>
> (b) (1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.
>
> (2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if--
>
> (A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or
>
> (B) the Authority determines that a compelling need for a rule or regulation does not exist."

NOTE 1: Proper forum to address the question of compelling need is in a negotiability proceeding and not an ULP proceeding. FLRA v. Aberdeen Proving Ground, 485 U.S. 409 (1988).

NOTE 2: The compelling need criteria are located at 5 C.F.R. § 2424.11.

> A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria;
>
> (a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.
>
> (b) The rule or regulation is necessary to insure the maintenance of basic merit principles.
>
> (c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

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

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

In Fort Leonard Wood, 26 FLRA 593 (1987), the Authority ordered the command to negotiate on four union proposals made in

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

e. Mid-Contract Bargaining/Unilateral Changes.

1. Overview. The obligation to negotiate does not end when the collective bargaining agreement is signed. Whenever management is to make a change concerning a matter which falls within the scope of bargaining, the exclusive representative must be given notice of the proposed change and given an opportunity to negotiate if the change results in an impact on unit employees, or such impact was reasonably foreseeable. U.S. Government Printing Office, 13 FLRA 39 (1983).

If the matter is not addressed in the collective bargaining agreement, the union must be given reasonable notice of the proposed change and an opportunity to negotiate. If the union indicates it does not desire to negotiate the matter or fails to respond within a reasonable time, the decision may be implemented. If the union desires to negotiate the matter the parties must negotiate and reach agreement or initiate impasse procedures. See Scott AFB and NAGE, 5 FLRA 9 (1981).

If the matter is addressed in the collective bargaining agreement, the union must be given notice and agreement must be reached. If agreement cannot be reached and there is not an emergency, the decision cannot be implemented. Management must wait until renegotiation of the contract to change it.

In 1985 the Authority took the position that, "other than negotiations leading to a basic collective bargaining agreement, there is no obligation to bargain over union-initiated proposals." IRS, 17 FLRA 731, 736 (1985). On review, the D.C. Circuit refused to enforce this decision. The D.C. Circuit, relying heavily on private-sector precedent, held that to deny a union the right to initiate midterm bargaining, while an agency retained such a right, would violate the statutory goal of equalizing the positions of labor and management at the bargaining table. NTEU v. FLRA, 810 F.2d 295, 300-301 (D.C. Cir. 1987). On remand, the Authority held that Agencies must bargain on union-initiated midterm proposals concerning matters not addressed in the CBA unless the union has clearly and unmistakably waived its right to bargain about the particular matter. This waiver could be established either by express agreement or bargaining history. IRS, 29 FLRA 162, 166 (1987).

IRS established a two pronged test for determining whether midterm bargaining was required. If a union requested negotiations on an issue that was addressed in a collective bargaining agreement, the agreement would control as long as it was in effect. There was no duty to participate in mid-term bargaining on that issue. If the subject was not addressed in the contract, bargaining was required on negotiable issues if the union had not clearly and unmistakably waived its rights to bargain. In order to determine whether a union had waived its rights required inquiry into, "the wording of the provision, . . . other relevant provisions of the contract, bargaining history, and past practice." IRS at 166. The difficulty in this analysis lay in determining the level of similarity required between a contract provision and a proposal before the proposal was deemed to be covered by the contract. The Authority initially determined that, "the determinative factor is whether the particular subject matter of the proposals . . . is the same." U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 31 FLRA 1231, 1236-36 (1988). The D.C. Circuit soundly criticized this position in Marine Corps Logistics Base v. FLRA, 962 F.2d 48 (1992).

During the same time period, the 4th Circuit in Social Security Administration, 956 F.2d 1280 (1992) took a very different position on the same issue. A federal agency sought review of a FLRA order directing the agency to participate in mid-term collective bargaining. The Court of Appeals held that there was no obligation to engage in union-initiated midterm bargaining over matters that did not involve an agency's changes in conditions of employment.

The FLRA has clearly rejected the 4th Circuit's opinion, electing to continue adhering to their holding IRS. See, Michigan National Guard, 46 FLRA No. 57 (1992); Social Security Administration and AFGE Council 220, 47 FLRA No. 96 (1993). In response to the D.C. Circuit criticism, the Authority has established a new test for determining whether an otherwise bargainable matter is covered by an existing contract. The authority will now look to see if the express language of the agreement "reasonably encompasses" the subject matter of the proposals. This no longer requires that the language be the same but whether, "a reasonable reader would conclude that the provision settles the matter in dispute." Social Security Administration, 47 FLRA No. 96 at 1018 (1993). If the language does not expressly encompass the matter, the Authority will look to determine whether the subject is, "inseparably bound up with and . . . thus is plainly an aspect of . . . a subject expressly covered by the contract." Id. This analysis, "will examine whether, based on the circumstances of the case, parties reasonably should have contemplated that the agreement would foreclosure further bargaining . . . ." Id at 1019. While additional cases will be necessary in order to flesh out this "framework," it appears that the new approach will give greater strength to agency arguments that union mid-term proposals deal with matters already covered by existing contract provisions. See also Social Security Administration and AFGE Council 147, 47 FLRA No. 99 (1993); Sacramento Air Logistics Center, McClellan Air Force Base and AFGE Local 1857, 47 FLRA No. 113 (1993).

The 4th Circuit has recently held that the union does not have the right to initiate mid-term bargaining. SSA v. FLRA, 956 F.2d 1280 (4th Cir. 1992). The FLRA has indicated its intent to follow the D.C. Circuit's ruling.

2. Notice Requirements. Management has a duty to give adequate prior notice to the union of changes in conditions of employment. Failure to do so is, by itself, an unfair labor practice. In Newark Air Force Logistics Command, 4 FLRA 512 (1980), the FLRA ruled that even though the union had actual knowledge of a proposed change, that the activity did not give appropriate advance notice of the change to the union, as a union. This was the result of the presence of a union steward as an employee, not as a union representative, at a meeting discussing a proposed change in working conditions. This ruling was overturned by the Sixth Circuit Court of Appeals. According to the court, the Authority's apparent attempt to prevent employers from running changes in working conditions past unions before they can act may be valid. But, the court stated that the FLRA should take this action via a policy statement or regulation, not through a case decision where the facts show that the employer provided adequate notice. The court further stated that . . . "labor statutes such as the one at issue here are designed, in part, to smooth labor-management relations by providing informal mechanisms to guide the operation of the workplace and the resolution of disputes. The Authority's decision appears to inject needless formality into that process." Air Force Logistics Command, Aerospace Guidance and Metrology Center, Newark, Ohio v. Federal Labor Relations Authority, 681 F.2d 466 (6th Cir. 1982).

Notice of proposed changes in conditions of employment must be "adequate." What constitutes "adequate" prior notice will vary depending on the nature of the proposed change. The probable impact of a major reorganization, for instance, is greater than the probable impact of a decision to schedule the downgrading of two positions after they are vacated. The former warrants earlier notice than the latter. One should distinguish between the notice given the union of a proposed change in working conditions and a notice given a bargaining unit at impasse of intent to implement management's last best offer. The latter notice must be adequate to give the union an opportunity to invoke the services of the Impasses Panel, should the union elect to do so. It takes little time for the union to do this. In the AFLC case, 5 FLRA 288 (1981), the Authority concluded that eight days' notice of intent to implement management's impasse position was sufficient.

It is customary for the parties to establish steward districts and for the union to designate those of its officials who are entitled to act as agents of the union in the established districts. Where a proposed change in conditions of employment is limited to employees in a particular steward district, it is reasonable, in absence of negotiated arrangements and established practices to the contrary, to notify the steward servicing the district.

There is no requirement that the notice be in writing. Many proposed changes are quite straight forward, limited in impact (although nonetheless meeting the "substantial" impact test), and need to be implemented with dispatch. Notice and bargaining, if any, can be accomplished by means of a telephone call or a meeting--either a meeting called for the purpose or at a regularly scheduled union-management meeting. The greater the degree of formality in day-to-day transactions with the union, the longer it takes to complete the notice/bargaining process. Whether the parties find such informal dealings acceptable depends, in part, on the character of the relationships. Where there is mutual trust and where oral understandings are treated with the same deference as written agreements, the parties are apt to prefer informal dealings.

Once adequate notice is given to an appropriate union agent, the burden is on the union to request bargaining. See IRS, 2 FLRA 586 (1980). Union bargaining requests need not be accompanied by specific proposals. However, a general bargaining request should promptly be followed up with specific union proposals that directly relate to the proposed change. 5 FLRA 817 and 823 (1981).

3. Bargaining Impasses. Management can unilaterally implement its last best offer provided that it gives the union notice of its intent to implement and union does not timely invoke the services of the Impasses Panel. (See Air Force Logistics Command, 5 FLRA 288 (1981).) The Authority will review the conduct of the parties to determine whether both parties negotiated in good faith to impasse and whether the union's failure to seek assistance constituted a clear and unmistakable waiver. Compare Michigan National Guard, 46 FLRA No. 57 (1992) with Lowry Air Force Base and AFGE Local 1974, 22 FLRA 171 (1986). Although the Panel, in 5 C.F.R. § 2470.2(e), defines an impasse as "that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement," one should not infer that mediation is necessary. In this connection, see DOT, Denver, 5 FLRA 817 (1981), where the ALJ found that the parties had bargained to impasse after a brief discussion. In that case no reference was made to mediation. Nor can one say how long the parties must bargain before a bona fide impasse is reached. This will vary, depending on the number and nature of the items being negotiated. In DOT, Denver, a discussion taking less than an hour was sufficient. In SSA, Birmingham, 5 FLRA 389 (1981), the ALJ found that the parties had not bargained to impasse because they had only one bargaining session and there was no other evidence in the record indicating that the parties had exhausted bargaining.

It is OPM's position that management, in the context of impact and implementation bargaining, has the right to implement after bargaining in good faith to a bona fide impasse, regardless of whether the services of the Impasses Panel are timely invoked, in

order to comply with law or appropriate regulation and in order to exercise a retained management right in a timely fashion to meet mission requirements. For example, an agency may have determined it is necessary to relocate part or all of its work force geographically. If the parties impassed on impact and implementation matters, management should not be required to delay the moves pending Panel action, which could involve many months with its attendant costs. Such a position is bound to be controversial. In taking the position that management's rights include the right to implement without unreasonable delay when such delay can adversely affect mission accomplishment (as opposed to the delay of an individual disciplinary action), it must be emphasized that management has certain obligations. It has the duty to provide the union with the adequate notice and to afford it sufficient time to bargain on procedures and appropriate arrangements.

If a unilateral decision is made (one in which the union is not given notice or an opportunity to negotiate), the union frequently files an unfair labor practice charge for failure to negotiate in good faith [§ 7116(a)(5)]. Philadelphia Naval Shipyard, 15 FLRA 26 (1984).

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f. **Impact and Implementation Bargaining**. Although certain agency decisions are not subject to bargaining, they may have a substantial impact on bargaining unit employees. As such, procedures for implementing these agency actions and arrangements for employees adversely affected are bargainable, even if the decision to take a specific course of action is not. Sections 7106(b)(2) and (3) state:

> Nothing in this section shall preclude any agency and any labor organization from negotiating--
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

The decisions themselves are not subject to bargaining because they involve the exercise of rights reserved to management by 5 U.S.C. § 7106. Moreover, the impact and implementation, or procedures and arrangements bargaining obligation arises only as the result of a management initiative--i.e., of a proposed action that has a substantial impact on the conditions of employment of bargaining unit employees. The difficulty arises because the distinction between procedure and substance is not always clear.

In Department of Health and Human Services, SSA, Chicago, 19 FLRA 827 (1985), the FLRA reiterated the rule that no duty to

bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than de minimus. To aid in determining whether exercise of a right has only a de minimus impact several factors must be considered:

> . . . . the nature of the change (e.g., the extent of the change in work duties, location, office space, hours, loss of benefits or wages and the like); the temporary, recurring or permanent nature of the change (i.e., duration and frequency of the change affecting unit employees); the number of employees affected or foreseeably affected by the change; the size of the bargaining unit; and the extent to which the parties may have established through negotiation or past practice procedures and appropriate arrangements concerning analogous changes in the past, ...

The Authority modified the de minimus test in HHS, Northeastern Program Service Center, 24 FLRA 403 (1986). In that case it held that the primary emphasis in applying the test would be placed on the nature and extent, or reasonably foreseeable effect, of the change on employees' conditions of employment. Further, the FLRA stated that it now considers the size of the bargaining unit irrelevant, and that it would consider the number of employees affected and the bargaining history only with a view toward expanding, not limiting, the number of situations in which bargaining would be required.

1. Procedures to be observed by management in exercising its retained right--Section 7106(b)(2).

Although management, under E.O. 11491, retained its decision making and action authority respecting certain rights, it nonetheless had to bargain on procedures it would follow in exercising its rights. There was, however, an important caveat; the procedures could not be such as to "have the effect of negating the authority reserved." (See VA Research Hospital, 1 FLRC 227, 230, where the Council held that a proposed promotion procedure was negotiable because it did not "appear that the procedure proposed would unreasonably delay or impede promotion selections." The "unreasonable delay" standard was forcefully restated in the Blaine Air Force Station case, 3 FLRC 75, 79, where the Council said that a right reserved to management "includes the right . . . to accomplish such personnel actions promptly, or stated otherwise, without unreasonable delay." [Emphasis in original.]

The Order's "unreasonable delay"standard was challenged in the IRS, New Orleans case, 1 FLRA 896 (1979)--the second negotiability decision issued under the Statute. In that case a provision outlining a procedure management would follow in deciding whether to permit revenue officers to work from their homes was disapproved by the agency on the ground it came into conflict with section 7106(a). The Authority, relying upon a joint explanatory statement of the House-Senate Conference Committee, concluded that

"procedures" were fully bargainable except where they prevented management from "acting at all." Finding nothing in the disputed provision preventing management from "acting at all," the Authority set aside the agency's allegation.

The implications of this decision were made highly visible in the Fort Dix case, 2 FLRA 152 (1979). The disputed proposal required management to indefinitely stay the implementation of a grieved suspension or removal decision until "a final determination is rendered," The agency argued that the proposed procedure would unreasonably delay, and therefore negate, the exercise of the agency's authority, under 5 U.S.C. § 7106(a)(2)(A), to suspend and to remove employees. The Authority said that Congress rejected the standard of "unreasonable delay" when the Senate bill, which expressly covered unreasonable delay situations, was not adopted in conference. Since the disputed procedure did not prevent management from "acting at all" it was a negotiable procedure under section 7106(b)(2). The Fort Dix decision has been upheld in Federal court. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981).

Although assigned an earlier decision number, the issue presented in the Customs Region 7 case, 2 FLRA 147 (1979), was decided in terms of the Fort Dix decision. In Customs the proposal required management to stay grieved suspension decisions for up to 50 days, pending exhaustion of the grievance procedure by the employee. The Authority noted that the proposal was not materially different from the "indefinite stay" proposal in the Fort Dix case, except that it has a more limited effect on management's right to suspend because of the 50-day time limit. If a stay of indefinite duration did not render a procedure nonnegotiable, there are all the more reason to find a stay within a 50-day limit negotiable, the Authority reasoned.

For more recent applications of the "acting all" test, see Dep't of Interior v. FLRA, 873 F.2d 1505 (D.C. Cir. 1989); AFGE v. FLRA, 802 F.2d 1159 (9th Cir. 1986).

2. Appropriate arrangements for employees adversely affected--Section 7106(b)(3).

In Customs, Region 8, 2 FLRA 254 (1979), the Authority found that a proposal which made an experimental nameplate program voluntary was not a negotiable "appropriate arrangement" because it would prevent management from "acting at all."

> By permitting employees to choose whether to participate, the proposal would allow individual employees to determine whether agency management could act at all to implement the test program. Consequently, this portion of the proposal would not constitute an appropriate arrangement, within the meaning of section 7106(b)(3), for agency employees adversely affected by management's exercise of its right to determine the means of

performing work but would, instead, prevent management from acting at all.

But nameplate formats--e.g., requiring that management use pseudonyms--were found to be negotiable appropriate arrangements. So, too, was a requirement that employees be allowed to remove their names from telephone directories before they were required to wear nameplates. Such an "arrangement" was negotiable even if it would delay implementation of the experiment for 6-18 months. To show that a proposed "appropriate arrangement" violated the exercise of a reserved management right, the Authority added, it would be necessary to show that the proposed arrangement prevented management from acting at all.

The FLRA has recently adopted the "excessive interference" test to determine the negotiability of a proposed appropriate arrangement which interferes with the exercise of a management right. See NAGE and Kansas ANG, 21 FLRA 24 (1986). The test and important factors:

(1) Does the union proposal concern an arrangement for employees detrimentally affected by management's actions? If not, then the proposal is not an appropriate arrangement within the meaning of section 7106(b)(3). See AFGE v. Alaska NG, 33 FLRA 99 (1988).

(2) If so, the FLRA will then determine whether the arrangement is appropriate, or inappropriate because it excessively interferes with management rights. Some factors to consider:

(a) What conditions of employment are affected and to what degree?

(b) To what extent are the circumstances giving rise to the adverse affects within the employees' control?

(c) What is the nature and extent of impact upon management's ability to deliberate and act pursuant to its statutory rights?

(d) Does the negative impact on management rights outweigh any benefits to be derived from the proposed arrangement?

(e) What is the effect on effective and efficient government operations?

If, after applying this test, implementation of the union proposal would excessively interfere with the exercise of management's reserved rights, the proposal is nonnegotiable.

Note: The excessive interference test may not normally be applied to government-wide regulations. An exception would be when

government-wide regulations restate section 7106 rights. OPM v. FLRA, 864 F.2d 165 (D.C. Cir. 1988).

NOTE: Management must carefully examine union allegations to ensure that the union has articulated an adverse effect. In IRS v. FLRA, 960 F.2d 1068 (D.C. Cir. 1992) the agency and union had entered into an agreement that employees would be paid extra if detailed to a higher graded position for more than one pay period. When management regularly assigned employees to temporary details of less then one period, the union proposed a provision that would prevent details for less than one pay period to avoid paying the higher wages. When the FLRA found this was not excessive interference, the court reversed finding that the detail was a benefit and that the mere denial of a benefit was not an adverse affect warranting application of the excessive interference test.

NOTE: In those instances when an adverse effect is found, the appropriate arrangement must be tailored to redress only the employees affected. In Interior Minerals Management Service v. FLRA, 969 F.2d 1158 (D.C. Cir. 1992) the court found union proposals concerning implementation of a drug testing program to be inappropriate. The proposals dealt with all employees when the only employees adversely affected were the few who would test positive for drugs.

3-4. Right of Exclusive Representatives to Attend Formal Meetings/Investigatory Examinations Between Management and Employees.

a. Statutory Provision.

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

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

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

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b. Formal Discussions.

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

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

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

"Grievance" is any matter in which an employee is seeking redress from management to include redress sought through third parties such as the Merit Systems Protection Board. VA Medical Center, Denver, Colorado v. FLRA, 44 FLRA 408 (1992). This is more than a gripe. The exclusive representative has a right to be present at any grievance discussion affecting unit employees. This right exists at all stages of the grievance procedure and includes the so-called "informal" stage in which an employee is initially discussing the grievance with the supervisor. (Note: a pre-disciplinary oral reply of an employee is not considered a formal discussion and the exclusive representative has no right to be present. DOJ v. AFGE, 29 FLRA 52 (1987)). It also includes a meeting with any management representative and any unit employee

involving an adjustment of the grievance, or meetings to interview employee witnesses for third-party proceedings, such as MSPB hearings or EEOC hearings. NTEU v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985); McClellan AFB, supra. This right exists even if the employee does not want the union present because the union represents the interests of all bargaining unit employees, and any grievance could impact on other employees.

Several meetings between an employee and management representatives on individual employee matters have been found not to fall within the definition of this term. They include counselling sessions, SSA and AFGE, 14 FLRA 28 (1984); meetings at which an employee is disciplined, discussion of individual job performance and meetings to deliver work instructions or to discuss work assignments. IRS Brookhaven and NTEU, 9 FLRA 930 (1982).

The following case addresses factors determining the "formality" of a discussion:

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

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

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

The Authority dismissed both the "bypass" and "formal discussion" allegations because, based on the stipulated facts, the General Counsel did not meet his burden of proving that the individual meetings were either formal discussions or a bypass of the union. The

bypass allegation was dismissed because there was no evidence in the record concerning the specific content of the communications. All it showed was that the supervisor initiated the conversations "solely to gather information to assist the Respondent in making a non-negotiable management determination concerning the assignment of work."

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

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

The Authority's checklist of factors to be considered in determining whether a meeting is "formal" is a bit more specific than the factors mentioned by its predecessor, the Federal Labor Relations Council, in the Norfolk Naval Shipyard case (FLRC No. 77A-141, 6 FLRC 1103). In that case the Council said the following:

> [T]he question of whether a meeting is "formal" or informal is essentially a factual determination which . . . is a matter best resolved on a case-by-case basis by the . . . finder of fact, taking into consideration and weighing a variety of factors such as: who called the meeting and for what purpose; whether written notice was given; where the meeting was held; who attended; whether a record or notes of the meeting were kept; and what was actually discussed.

It also bears a striking resemblance to the factors listed by ALJ Heitfetz in his nonprecedential decision in the Army and Air Force Exchange Service case (Case

Nos. 7-CA-1050 and 1051, April 22, 1982, published in ALJ Report No. 8). There, the ALJ found that a discussion of nepotism with a husband and wife was a formal discussion because nepotism was not a purely personal matter and the meeting was "formal." Regarding the issue of formality, the ALJ said the following:

> Granted that the meeting to be held on the 14th was called for by [the husband, not the store manager] and that, at the actual meeting . . . no formal notes or other record was made of the discussion, numerous factors compel the conclusion that the meeting was "formal" within the meaning of the Statute: (1) the meeting was prearranged and not spur-of-the-moment; (2) it was set a day earlier than scheduled at [the store manager's] instance; (3) it involved the Store Manager and the Department Supervisor, fairly high-level officials; (4) the situs was in the official's office; (5) it involved the interpretation of an agency regulation; (6) management was prepared and did enter into a discussion of the regulation; (7) the meeting was of sufficient duration to allow for a discussion of the agency regulation; (8) . . . the matter had ramifications for all unit employees and was not integrally related to the formal grievance process; (9) the discussion was more than a mere counselling session involving an individual's conduct; (10) the discussion was not merely shoptalk concerning day-to-day operations of the unit; and (11) there was debate over the regulation and not merely an announcement of policy.

Let us consider each of the factors mentioned by the Authority. It is not clear why it would want to know whether the individual holding the discussion is "merely a first-level supervisor or is higher in the management hierarchy," for certainly a first-level supervisor can conduct a formal discussion. Our guess is that the Authority recognizes that discussions held by first-level supervisors are often informal, involving shop talk and counseling sessions involving an individual's conduct. (See 124 Cong. Rec. H 9650, daily ed., Sept. 13, 1978, where Congressman Ford said the following: "The compromise inserts the word 'formal' before discussions merely in order to make clear that this subsection does not require that an exclusive representative be present during highly personal, informal meetings between a first-line supervisor and an employee are apt to be routine, held at the desks or work stations of the employees, and of brief duration. In short, a large proportion of the discussions between a

first-line supervisor and employees under his supervision are going to be "informal." In making the distinction between discussions held by "merely a first-line supervisor" and officials higher in the management hierarchy, the Authority is perhaps sending a signal to the agents of the General Counsel to take an especially critical look at alleged formal discussions held solely by first-line supervisors.

The second factor, whether more than one management representative attended, seems an obvious test of formality. (See, in this connection, the IRS, Fresno Service Center case, 7 FLRA No. 54, S/C #24, where an EEO precomplaint meeting called and chaired by a supervisor and attended by an EEO Officer and an EEO Counselor was found to be a formal discussion.) FLRA also may have mentioned this factor because section 7114(a)(2)(A) itself defines a formal discussion, in part, in terms of "one or more representatives of the agency."

The third factor, involving the location of the discussion, is somewhat elaborated on by the Authority in its parenthetical remarks. The implication seems to be that discussions held away from the employee's desk or work station are more likely to be formal than discussions held at the employee's desk. (See SSA, San Francisco, 9 FLRA No. 9, where FLRA held that unscheduled and brief meetings held by the branch manager at the desks of individual employees were not formal discussions. Contrast this case with IRS, Fresno, where the precomplaint meeting was held in an office away from the employee's normal work station.)

The significance of the duration factor is perhaps captured by ALJ Heifitz's remark in the nonprecedential AAFES case mentioned above: i.e., the meeting has to be of sufficient duration to allow for a discussion of the condition of employment. (The briefness of the conversations held by the branch manager in the SSA, San Francisco case is one of the factors cited in supporting the conclusion that the meetings were not formal discussions.)

The fifth factor, how the meetings were called, also is elaborated on by the Authority in its parenthetical comments. Presumably, written notice of a meeting tends to indicate "formality." (In EPA, 8 FLRA No. 98, the ALJ found that a discussion that was not prearranged but based on a spur-of-the-moment request by the branch chief that her secretary enter her office to sign a written assurance concerning the employee's acceptance of a permanent job at another agency was not a formal discussion.)

The "agenda" factor is illustrated by the Authority's decision in the HEW, Atlanta case, 5 FLRA No. 58, where it held that new employee orientation sessions were formal discussions because, among other things, an agenda had been established by management to discuss a number of matters involving general conditions of employment.

The HEW, Atlanta case also illustrates the "mandatory attendance" factor--the seventh listed by the Authority. That case should be contrasted with the IRS, Brookhaven Service Center case, 9 FLRA No. 132, where the Authority held that noncoercive interviews of unit employees in preparation for third-party proceedings do not constitute formal discussions provided that certain precautions, such as obtaining the employee's participation on a voluntary basis, are taken.

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

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

Note: For a good discussion on formal discussion and Brookhaven Warnings, see Veterans Administration and AFGE, 41 FLRA 1370 (1991).

c. Investigatory Examinations.

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

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

(ii) the employee requests representation.

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

Understanding key terms is important. To qualify as an investigatory examination, the meeting must involve questioning of an employee as part of a searching inquiry to ascertain facts. "Agency representative" includes supervisors, management officials, personnel specialists, internal agency auditors, and inspectors general. The term is broadly defined and applied. Defense Logistics Agency, 28 FLRA 1145 (1987). The term "examination" is also broadly construed. It need not be confrontational. A request to provide a written statement regarding an incident has been found to be an examination. INS, Del Rio, Texas and NAGE Local 2366, 46 FLRA No. 31 (1992).

The right of the union to be present is triggered only by the employee's request. If the employee does not request representation, management may hold the meeting without union notification. Management is not required to notify the employee of this right at the meeting. Management's obligation to notify the employee consists of an annual notification to all employees. § 7114(a)(3). If union representation is requested, management has three alternatives: allow a representative to attend; end the interview; or give the employee the option (in a non-threatening manner) of either answering the questions without the representative or having no interview. Bureau of Prisons, Leavenworth, 46 FLRA No. 72 (1992).

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

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

The remedy for violation of the Weingarten rights is the revocation of any disciplinary action that flow from the examination. In Dept of Navy v. FEMTC, 32 FLRA 222 (1988), the Authority ruled that if disciplinary action is taken against an employee for engaging in

protected activity a make whole remedy is appropriate. However, a make whole remedy will not be ordered where the disciplinary action taken relates solely to an employee's misconduct independent of the examination itself. See also DOJ, Bureau of Prisons, 35 FLRA 431 (1990), rev'd on other grounds, DOJ v. FLRA, 939 F.2d 1170 (5th Cir. 1991).

3.5 Approval of the Collective Bargaining Agreement.

Upon completion of negotiations, both parties will sign the agreement and it will be forwarded to higher headquarters for review. Section 7114(c) provides:

> (c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.
>
> (2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable, law, rule or regulation (unless the agency has granted an exception to the provision).
>
> (3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representation subject to the provisions of this chapter and any other applicable law, rule, or regulation.

The purpose of the statutory provision is to ensure the effective time of the new contract is not held in abeyance pending higher headquarters' approval. The review of the contract could continue indefinitely so that without this statutory provision, implementation of the contract could be unreasonably delayed. With it, the contract becomes effective on the 31st day after execution regardless of the promptness of the higher headquarters' review of the CBA.

Can the head of the agency disapprove any and all provisions of the contract and force the parties to return to the bargaining table to renegotiate the discovered clauses? The answer is "no." Once the contract is signed at the installation, all provisions, with the exception discussed below, become effective upon the agency head's approval or on the 31st day after execution, whichever is sooner.

However, if a contract clause is contrary to statute (to include the management rights section or any other section of the CSRA), rule or government-wide regulation, the clause is void. The remainder of the contract will go into effect and those clauses will be renegotiated or deleted.

The following case illustrates this point:

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1862
and
INDIAN HEALTH SERVICE, PHOENIX, ARIZONA
3 FLRA 181 (1980)

DECISION ON NEGOTIABILITY APPEAL

The basic facts, as set forth in the record, are that the local parties executed a negotiated agreement on July 17, 1979, and submitted it to the agency for review and approval in accordance with section 7114(c) of the Statute; and that by letter of October 4, 1979, the agency notified the union that it has disapproved a number of provisions of that agreement as being inconsistent with applicable law, rule or regulation. Thus, the agreement was executed by the local parties on July 17, 1979, and the agency's disapproval was served on the union by mail on October 4, 1979, or at least 79 days after the agreement was executed.

Thus, under section 7114(c)(3) of the Statute, an agreement which has not been approved or disapproved by the agency involved within 30 days after its execution becomes effective and binding on the parties on the 31st day, without the approval of the agency, subject only to the requirements of the Statute and any other applicable law, rule or regulation.

In this case, as previously indicated, the parties negotiated agreement was executed on July 17, 1979, and submitted for agency review and approval. However, the agency's disapproval was not served on the union until October 4, 1979, or at least 79 days after the agreement was executed and submitted for approval. Therefore, under section 7114(c)(3) of the Statute, the parties' agreement went into effect no latter than August 17, 1979, and is binding on the parties, subject only to the requirements of the Statute and any other applicable law, rule or regulation.

Consequently, since the entire agreement, as negotiated and executed by the parties, became effective no later than August 17, 1979, the agency's subsequent disapproval raises no dispute concerning the terms of such agreement which is cognizable under section 7117 of the Statute.

Our conclusion that the propriety of the agency's disapproval of a number of the agreement provisions is not cognizable in the present proceeding does not, of course, mean that any provisions in the agreement which are contrary to the Statute or any other applicable law, rule or regulation, are hereby enforceable. Rather, a question as to the validity of such provisions may be

raised in other appropriate proceedings (such as grievance arbitration and unfair labor proceedings) and, if the agreement provisions are there found to be violative of the Statute or any other applicable law, rule, or regulation, they would not be enforceable but would be deemed void and unenforceable.

Higher headquarters power to review collective bargaining agreements for compliance with law and appropriate level regulations extends to contract provisions imposed by the Federal Service Impasses Panel, Interpretation and Guidance, 15 FLRA 564 (1984).

See also, Pacific Missile Test Center, Point Mugu, California, 8 FLRA 389 (1982).

CHAPTER 4

IMPASSE RESOLUTION

4-1. Introduction.

During the course of negotiating a collective bargaining agreement, certain union proposals may be unacceptable to management, so management will refuse to agree to the proposals. If the union feels strongly about the proposals, it will pursue them further. In the private sector, the strike serves as an incentive for the resolution of negotiation impasses. Because strikes are illegal in the federal sector (5 U.S.C. § 7311), there must be some other means of impasse resolution if collective bargaining is to be meaningful. The Federal Mediation and Conciliation Service and Federal Service Impasses Panel serve as this means. Impasse resolution in general is merely an extension of the collective bargaining process.

CSRA § 7119 authorizes the use of the Federal Service Impasses Panel (hereinafter referred to as the Panel) and the Federal Mediation and Conciliation Service (hereinafter referred to as the FMCS). Both existed under the Executive Order, the latter operating through regional offices located throughout the country.

4-2. The Federal Mediation and Conciliation Service.

The FMCS is an independent agency of the federal government created by Congress with a Director appointed by the President. Federal mediators, known as commissioners, are stationed throughout the country.

FMCS rules require that parties to a labor agreement file a dispute notice if they do not agree to a new collective bargaining agreement at least 30 days in advance of a contract termination or reopening date. The notice must be filed with the FMCS and the appropriate state or local mediation agency. The notice alerts FMCS to possible bargaining problems. If an impasses evolves, either party may request the services of the FMCS.

While methods and circumstances vary, the mediator will generally confer first with one of the parties involved and then with the other to get their versions of the pending difficulties. Then he will usually call joint conferences with the employer and the union representative to try to get them to agree. If this fails to resolve the impasse, either or both parties, or the FMCS on its own, may request the Panel to become involved by considering the issue itself or approving the use of binding arbitration.

4-3. Federal Service Impasses Panel.

The Panel consists of a chairman and at least six members, all of whom serve part-time to the extent dictated by caseload. The Panel meets monthly in Washington, D.C. with three members constituting a forum. The Chairman is responsible for overall leadership and direction of its operations. An Executive Secretary, assisted by a professional staff of several associates, is responsible for the day to day administration of the Panel's responsibilities.

The Panel has attempted to avoid actions which might inhibit the growth of the bargaining process by constantly seeking to prevent its service from being used as a substitute for the parties' own efforts. With this in mind, an impasse has been defined as that point at which the parties are unable to reach full agreement, notwithstanding their having made earnest efforts to reach agreement by direct negotiations and by the use of mediation or other voluntary arrangements for settlement. 5 C.F.R. § 2470.2(e). The Panel will not take jurisdiction of a suit until these requirements have been met.

The Panel's involvement is a two-tiered system. It will first attempt to mediate the impasse, just as the FMCS does. As the Panel can impose a settlement, the parties are often willing to settle at this stage. The second stage is the imposition of a settlement.

Request for Panel consideration of a negotiation impasse must include information about the issues at impasse and the extent of negotiation and mediation efforts. An investigator will be appointed, and a preliminary investigation of the request will be made, to include consultation with the national office of FMCS whose evaluation of mediation efforts is a critical element in the Panel's determination whether it will take jurisdiction. The Panel may decline to assert jurisdiction if it finds that no impasse exists or for other good reason.

If it has determined, however, that voluntary efforts have been exhausted, the Panel normally recommends procedures for the resolution of the impasse or assists the parties in resolving the impasse through whatever methods it considers appropriate. If a hearing to ascertain the positions of the parties is deemed necessary, it is conducted by a designee of the Panel who may also conduct a prehearing conference to inform the parties about the hearing, obtain stipulations of fact, clarify the issues to be heard, and discuss other relevant matters. Basically a formal, but nonadversary proceeding, the hearing gives the parties an opportunity to present evidence relating to the impasse through the testimony of witnesses and the introduction of exhibits. An official transcript is made of the proceeding.

It is the duty of the factfinder to develop a complete record upon which he will base his report to the Panel. The report includes findings of fact on such matters as the history of the

current negotiations, the unresolved issues and negotiation efforts with respect to them, justification for the proposals made on the impasse issues, and prevailing practices in comparable public sector bargaining units. These posthearing reports of the factfinder or other designee of the Panel may contain the factfinder's recommendations for settlement, if authorized by the Panel. Absent such authorization, the report goes directly to the Panel which has the authority to take whatever action it considers appropriate at that point of its procedures. The Panel will normally take one of three actions: (1) require both parties to submit written submissions stating their positions and rebuttals, (2) will require both parties to submit a final offer and the Panel will pick one of them, or (3) will approve a request to have the matter arbitrated. With the former two alternatives, the Panel will give the parties its "recommendation."

The parties have 30 days to accept the recommendations of the Panel or its designee, or otherwise reach a settlement, or notify the Panel why the dispute remains unresolved. If there is no settlement at this stage despite the Panel's efforts, it can take whatever action it considers appropriate, such as imposing the previously issued recommendations or ordering binding arbitration. The regulations underline the fact that such "final action" is binding upon the parties. Failure to comply at this stage may result in an unfair labor practice (5 U.S.C. § 7116).

In those cases when the parties request approval of outside binding arbitration, the parties must furnish information about the bargaining history, issues to be submitted to the arbitrator, negotiability of the proposals, and details of the arbitration procedure to be used. After consideration of such data, the Panel will either approve or disapprove the request.

4-4. Decisions of the Impasses Panel.

Panel decisions were published under the Executive Order and are presently published under Title VII. As each case before the Panel generally turns on its own unique factual situation and is not considered precedent for subsequent cases, it would not be useful to include a multitude of Panel cases in this chapter. The following case is included merely to offer an illustrative example of the types of factors which the Panel considers in reaching its recommendations and demonstrates the procedures involved.

In the matter of

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
ATLANTA, GEORGIA

and

LOCAL 1568, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 85 FSIP 14 (1985)

REPORT AND RECOMMENDATIONS

Local 1568, American Federation of Government Employees, AFL-CIO (Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse between it and the Department of Housing and Urban Development, Atlanta, Georgia (HUD or Employer).

The Panel determined that the impasse should be resolved pursuant to written submissions from the parties with the Panel to take whatever action it deemed appropriate to resolve the impasse. Written submissions were made pursuant to these procedures and the Panel has considered the entire record.

BACKGROUND

The dispute arose in the context of impact and implementation bargaining over the consolidation of HUD's Regional and Area Offices in Atlanta. Approximately 300 bargaining-unit employees have been affected by the relocation of offices from 4 floors onto 2 floors which began during September 1984.

THE ISSUES AT IMPASSE

The parties are in dispute over (1) accomodations for the Union's principal office representative and (2) smoking policy.

1. Accomodations for the Union's Principal Office Representative.

a. The Union's Position.

The Union proposes that it be provided with office space of at least 150 square feet, enclosed by ceiling-high partitions, situated near a window. It also asks for a credenza and chair in addition to the current furniture. While it would be easily accessible to

bargaining-unit employees, the office would also have adequate privacy.

Prior to the move, the Union contends, its office had 117 square feet of space and was located next to a window. Although now placed by a window, there is not guarantee that the office will continue to be at this location. Because of narrow walkways and furniture protruding into the aisles, the current space is inaccessible to the handicapped and other employees can see over the 5-foot high acoustic screens that surround the office. Additionally, those in adjacent work areas make noise which is distracting to Union officials. Ceiling-high partitions are needed in order to guarantee adequate privacy for the Union to conduct its representational activities.

b. The Employer's Position.

Under the Employer's proposal, the office would be located near an entrance to the work area so as to provide easy access to employees. It would have no more than 100 square feet of floor space and would continue to be enclosed by 5-foot high area dividers. The same furniture plus another chair would be provided.

The Employer asserts that prior to the move, the Union had 75 square feet of office and another 17 square feet of usable space on top of the air vents near a window. It now offers a somewhat larger area which is of reasonable size, especially in light of the fact that employees experienced a substantial reduction in space when 17,000 square feet were reallocated. Additionally, there is no reason to provide the Union with ceiling-high partitions which the Employer characterizes as walls. This would give the Union a private office that it did not have prior to the move. Should it need to conduct a private meeting, the Union has access to conference rooms pursuant to the parties' collective-bargaining agreement.

2. Smoking Policy.

a. The Union's Position.

Since many employees now work in open areas instead of enclosed ones, more consideration must be given to the problems by smoking. The Unions proposes, therefore, that smoking be permitted in common-use areas until bargaining-unit employees express concern over health problems due to smoke. Additionally, the Union would be provided with a list of areas designated as common-use and nonsmoking. This list, which the Union contends would consist of data normally maintained by the

Employer, would clearly set forth those areas where smoking could be prohibited.

b. The Employer's Position.

Under the Employer's proposal, an employee could post a no-smoking sign while working in a common-use area. Since an employee would have responsibility for posting such a sign, it would mean that individuals could smoke if no one objected. The Employer would not provide a list of areas designated as common-use and nonsmoking. Not only does it not normally maintain such a list, but also it would be burdensome to keep one.

DISCUSSION

With respect to the first issue, the parties are looking to the Panel to determine the type of accommodations to be provided to the Union's representative. Based upon our consideration of the record before us, we conclude that the Employer's proposal provides a reasonable basis for settlement, especially in view of the fact that there has been a reallocation of a substantial amount of space. As the representative's office would be easily accessible under the Employer's proposal, services should be readily available to bargaining-unit employees. Since it is possible to see over the 5-foot high dividers, however, employees may be reluctant to seek the assistance of the Union and its activities could otherwise be hindered by such lack of privacy. Accordingly, we amend the proposal to include ceiling-high movable dividers. This should ensure the Union adequate privacy as well as reduce noise levels in the office.

With respect to the smoking policy, neither party's proposal is appropriate for resolution of the dispute. The Union's proposal is ambiguous and could generate grievances. That is, it is unclear as to what constitutes "concern" about a health problem, the effect of the expression of such concern, and whether smoking would be allowed again after such concern was displayed. The Employer's proposal is not acceptable because it may result in the prohibition of smoking in just part of a common-use area. Neither of the proposals clearly comes to grips with health hazards associated with cigar, pipe, and cigarette smoke. To provide adequate protection for nonsmoking employees, therefore, especially those working in open areas, the Employer should prohibit smoking by employees except in a few, appropriately designated locations where they may smoke while on breaks. This would ensure that nonsmoking employees are protected in the workplace from the dangers associated with passive smoking, while affording those employees who choose to smoke the opportunity to do so somewhere on the premises.

RECOMMENDATIONS

We make the following recommendations for settlement.

1. Accomodations for the Principal Office Representative.

The parties shall adopt the Employer's proposal as amended to provide for movable, ceiling-high area dividers.

2. Smoking Policy.

The parties shall adopt the following wording:

Employees shall work, to the maximum extent feasible, in a smoke-free environment. Separate areas will be designated in which employees will be permitted to smoke on their breaks.

By direction of the Panel.

NOTE 1: As the preceding case indicates, the Panel first recommends a resolution to the parties. Usually, the parties either adopt that recommendation or resolve the impasse in some other way. However, the Panel has occasionally ordered the parties to write prescribed terms into their next agreement. See, e.g., AFGE (National Border Patrol Council) v. Immigration & Naturalization Service, 73 FSIP 14 (March 19, 1975); American Federation of Government Employees Local 2151 v. General Services Administration Region III (Washington), 73 FSIP 18 (July 11, 1974).

NOTE 2: The Panel's rules and regulations can be found at 5 C.F.R. § 2470. These should be consulted to ascertain the specific procedures to be used when the Panel's services are needed.

NOTE 3: There is no statutory provision permitting direct review of an imposed adverse Panel decision. Parties have, therefore, occasionally refused to cooperate with an FSIP order, thereby voluntarily submitting themselves to a ULP proceeding. This lays the groundwork for review by the Authority and possibly the courts. Council of Prison Locals v. Brewer, 735 F.2d 1497 (D.C. Cir. 1984); Florida National Guard and National Association of Government Employees, 9 FLRA 347 (1982).

NOTE 4: FSIP may use a variety of methods to resolve an impasse, but it cannot resolve the underlying obligation to bargain. NTEU, 11 FLRA 626 (1953). The panel can resolve an impasse relating to a proposal concerning a duty to bargain if it applies to existing (Authority) case law. Canswell AF Base v. AFGE, 31 FLRA 620 (1988).

NOTE 5: The FLRA has finally resolved when Agency Head review is allowable under § 7114(c) of interest arbitration awards. The Authority ruled in Patent and Professional Association and Department of Commerce, 41 FLRA 795 (1991), that impasses resolved under § 7119(b)(1) are subject to Agency Head review under § 7114(c). Impasses resolved under § 7119(b)(2) are not subject to Agency Head review under § 7114(c), but are reviewable under § 7122.

CHAPTER 5

UNFAIR LABOR PRACTICES

5-1. Procedures (CSRA § 7116; 5 C.F.R. § 2423).

An unfair labor practice is a means by which either management, a labor organization, or an employee can effect compliance with the CSRA, and is a means to obtain a remedy against a violator of the statute. If one party acts in a manner inconsistent with the statute, the other party may file an unfair labor practice charge with the Regional Director, who will investigate and file a complaint if the allegation has substance. The General Counsel will prosecute the complaint before an administrative law judge (ALJ). If the ALJ sustains the ULP, his report and recommendation, with exceptions by the parties, will be forwarded to the Authority who will issue an order requiring the wrongdoer to cease and desist from the complained of acts. It will be posted in the work area of the employees for 60 days. Failure to comply with the order may result in Federal court involvement and harsher sanctions.

Section 7116, CSRA, lists the unfair labor practices. The statute incorporates the unfair labor practice provisions of Executive Order 11491, with a few additional ones. The unfair labor practice procedures are located at Title 5, Code of Federal Regulations 2423.

Informal Procedures. The Authority encourages the parties to resolve disputes informally. 5 C.F.R. Part 2423.7 attempts to effectuate this policy by delaying the investigation of a ULP complaint for fifteen days after filing of the charge, to allow the parties to attempt to informally resolve the complaint. The Authority also encourages the parties to include informal procedures in the collective bargaining agreement.

The Charge. The charge is an allegation of an unfair labor practice filed directly with the appropriate Authority regional office within six months of the wrong. The rules set forth the procedural requirements for filing an ULP charge. The charge is an informal allegation, as opposed to a complaint which is akin to a formal, legal indictment. Any "person" (an individual, labor organization or agency) may file a charge against an activity, agency, or labor organization.

Unfair labor practice charges must be submitted on forms supplied by the regional office. Aside from the required identifying information (e.g., name, address, telephone number, etc.), the form must contain a clear and concise statement of the facts constituting the alleged ULP, including the date and place of the occurrence. The charging party must submit any supporting evidence and documents along with the charge.

The Investigation. When the charge is received in the regional office, it will be docketed, assigned a case number, and investigated to the extent deemed necessary by the Regional Director. All involved parties will have an opportunity to present evidence. All persons are expected to cooperate. Statements and information supplied to the regional office will be held in confidence.

Extent of Investigation. The regional office will conduct some form of investigation for almost every charge received. It may range from as little as a telephone conversation to an extensive, on-site search for information. Both the charging party and the Respondent may recommend that the regional office look into certain matters. The Regional Director will have the final say in this regard. Experience to date demonstrates that the parties can expect an on-site investigation only if the Authority has adequate funds. In the recent past these funds were not always available.

Role of the Regional Office. During the investigative stage, it the General Counsel's policy for the regional office to assume an impartial fact-finder role. The objective is to gather the facts and arguments on both sides of the issue so that a decision as to the merits of the charge may be made by the Regional Director. Some managers have expressed displeasure with the approach taken by some investigators from regional offices, feeling that the investigators are biased in favor of the charging party.

Regional Director's Options. After the regional office receives and investigates an ULP charge, it has some options as to what to do with it. It may refuse to issue a complaint, may request the charging party withdraw or to amend it, or it may issue a complaint and notice of hearing.

Withdrawals. Only the charging party may withdraw a charge, and then only with the approval of the Regional Director. ULP charges are matters dealing with public rights, as opposed to private rights, and the General Counsel is responsible for enforcing these rights. Hence the requirement for the Regional Director's approval. The only time a Regional Director's approval may be difficult to obtain is when individual employee's rights are involved and the agreed-upon settlement does not serve to adequately remedy violations which affect employees.

Withdrawals arise under a number of different circumstances. First, the charging party may decide to unilaterally withdraw the charge for reasons unknown. More often, the regional office will complete its investigation, find no merit in the ULP charge, and suggest to the charging party that it withdraw the charge or face dismissal. Finally, management and the union, with or without the regional office's assistance, may agree to a settlement which is conditioned upon the union's withdrawal of the charge.

Dismissals. A dismissal by the Regional Director is disposition of an ULP charge with prejudice and without the concurrence of the charging party. The dismissal letter from the

Regional Director will state the reason(s) for the action and is subject to review on appeal within 25 days to the General Counsel's office in Washington, DC. The decision of the General Counsel is final and not subject to further review. Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982).

Dismissals may occur for a number of reasons. If the regional office investigates and finds no merit, and the charging party refuses to withdraw, the Regional Director may dismiss the charge. Dismissals may also occur for procedural or jurisdictional reasons. For instance, if the charge is untimely filed or the Regional Director determines that the issue has been raised under a grievance or appeals procedure pursuant to Section 7116(d) of the statute, the charge should be dismissed. It is also possible for the Respondent and the Regional Director to enter into a settlement of the charge without concurrence of the charging party. In this case, the Regional Director will dismiss the charge.

Amendments to Charges. The rules state that the charging party may amend the charge at any time prior to issuance of a complaint. Oftentimes, the regional office, upon completion of its investigation, will recommend to the charging party that it amend the charge. The charge will then accurately cite the alleged incident(s) and violations so that any complaint (which is issued later) will not contain surprises for the parties.

Issuance of Complaints. The Regional Director will issue a complaint if there appears to be merit in the ULP charge and the case remains unsettled. The General Counsel has also expressed an interest in issuing complaints in those cases he categorizes as "elucidating," i.e., cases which raise issues under a statute that have not been tested before the Authority. The issuance of a complaint by a Regional Director cannot be appealed by the Respondent to the General Counsel for review. (Refusal to issue a complaint may be appealed to the General Counsel.)

Answer. The Respondent has twenty days after service of the complaint to answer it. He serves the answer on the Chief Administrative Law Judge and on all parties.

Settlements. If there is some substance to the allegation, the Regional Director will exert considerable pressure upon the parties to reach a settlement agreement. Management will settle when there are advantages to such. For instance, if it is clear an unfair labor practice has been committed, a settlement will result in termination of the proceedings and a saving in the use of resources. Often management will settle those cases in which a "nonadmission of guilt" is part of the settlement agreement. ("It is understood that this does not constitute an admission of a violation of the statute.")

The Hearing. The date, time, and place of the hearing are contained in the complaint. Typically, the hearing will be conducted at or near the activity involved in the case. An administrative law judge will preside at the hearing. The Federal

Rules of Civil Procedure do not apply to ULP hearings; rather the proceedings are generally governed by the Administrative Procedures Act contained in Chapter 5 of Title 5 of the U.S. Code. These rules assure that the basic tenets of due process will apply to ULP hearings. The ALJ is empowered to make rulings on motions, objections, and to otherwise control and conduct the hearing. Either party may call witnesses and has the right to examine or cross-examine all witnesses. The General Counsel has the burden of proving the allegations of the complaint by a preponderance of the evidence.

Motions. Motions may be made in writing prior to the hearing, or in writing or orally after the hearing opens. Responses to motions must be made within five days after service of the motion. Interlocutory appeals are not permitted for motion rulings. Rather, motion rulings are considered by the Authority if the case is appealed.

ALJ Decision and Exceptions. Upon receipt of briefs, if any, the ALJ will prepare his or her decision expeditiously and transmit it to the FLRA while serving copies on the parties. Any party may file exceptions to the Authority decision, in writing, with the Authority. The rules set forth a 25-day time limit from the date of service of the ALJ decision in which to file exceptions.

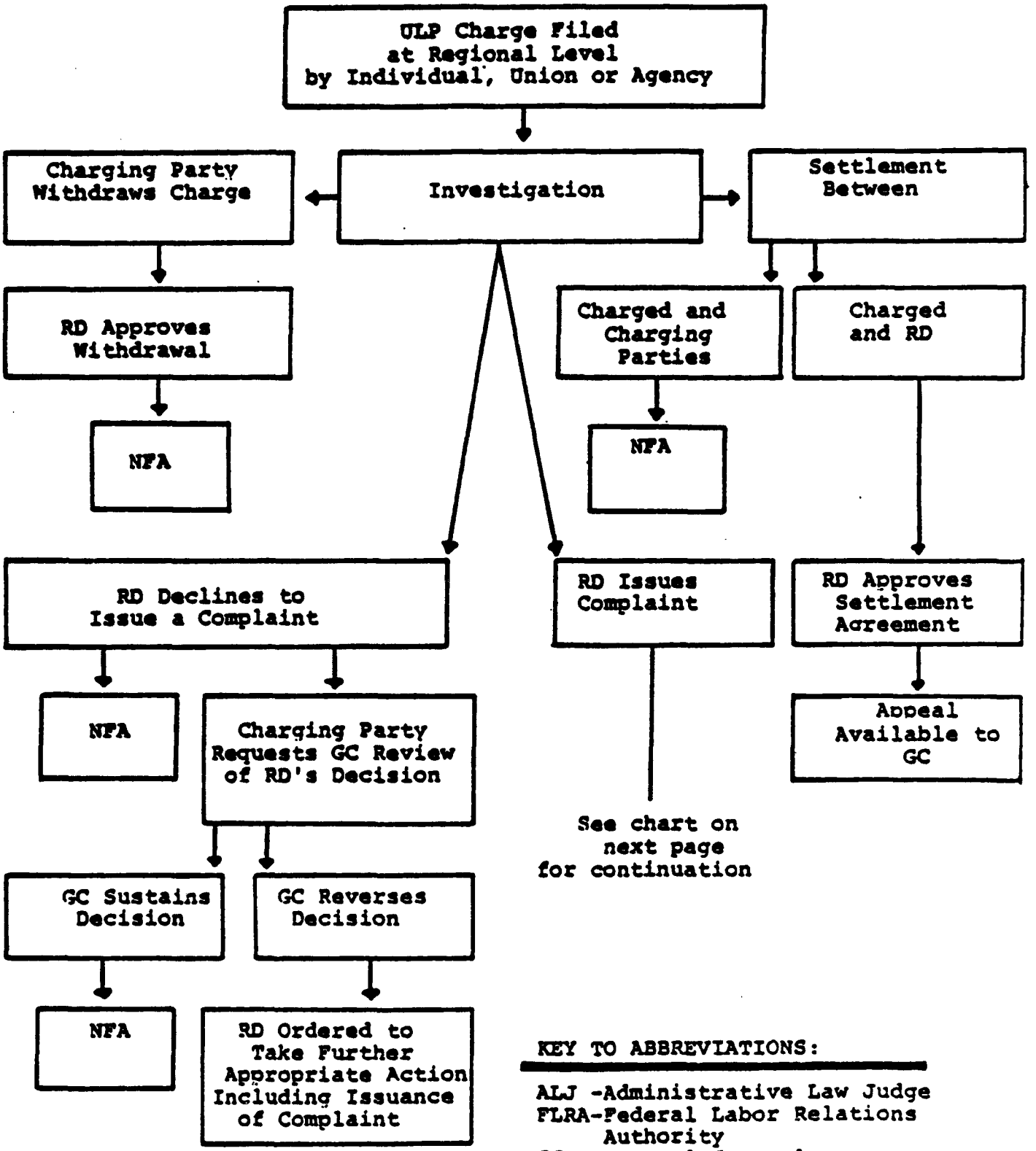
FLRA Decision and Order. The rules outline the Authority's role in making the final ULP decision and in fashioning a remedy. If exceptions to the ALJ decision are filed with the Authority, it will provide a decision complete with discussion and its rationale for affirming, reversing, or modifying the ALJ's decision. If exceptions have not been filed, the Authority simply adopts the ALJ's decision without discussion. In either case, the Authority ruling serves as the final administrative decision on the matter. These decisions are published by the Authority and may be obtained from the Government Printing Office.

The Federal Labor Relations Authority has broad remedial power in ULP cases. The most common remedy is for the losing party to sign a notice promising not to engage in violative conduct in the future (Cease and Desist Order). If the circumstances of the case warrant, the Authority may award back pay to affected employees or order the losing party to revert to the status quo ante by taking any other affirmative action which is deemed appropriate.

Judicial Review. Within 60 days of the date of the Authority's decision and order, any aggrieved party may initiate an action for judicial review in the appropriate U.S. Circuit Court of Appeals. Section 7123 of the statute sets forth the requirements and procedures for judicial review. To file a petition for judicial review of an Authority decision, Federal agencies must work through the appellate division of the Department of Justice. The Justice Department has the final say as to whether or not court action will be initiated.

UNFAIR LABOR PRACTICE PROCEDURES

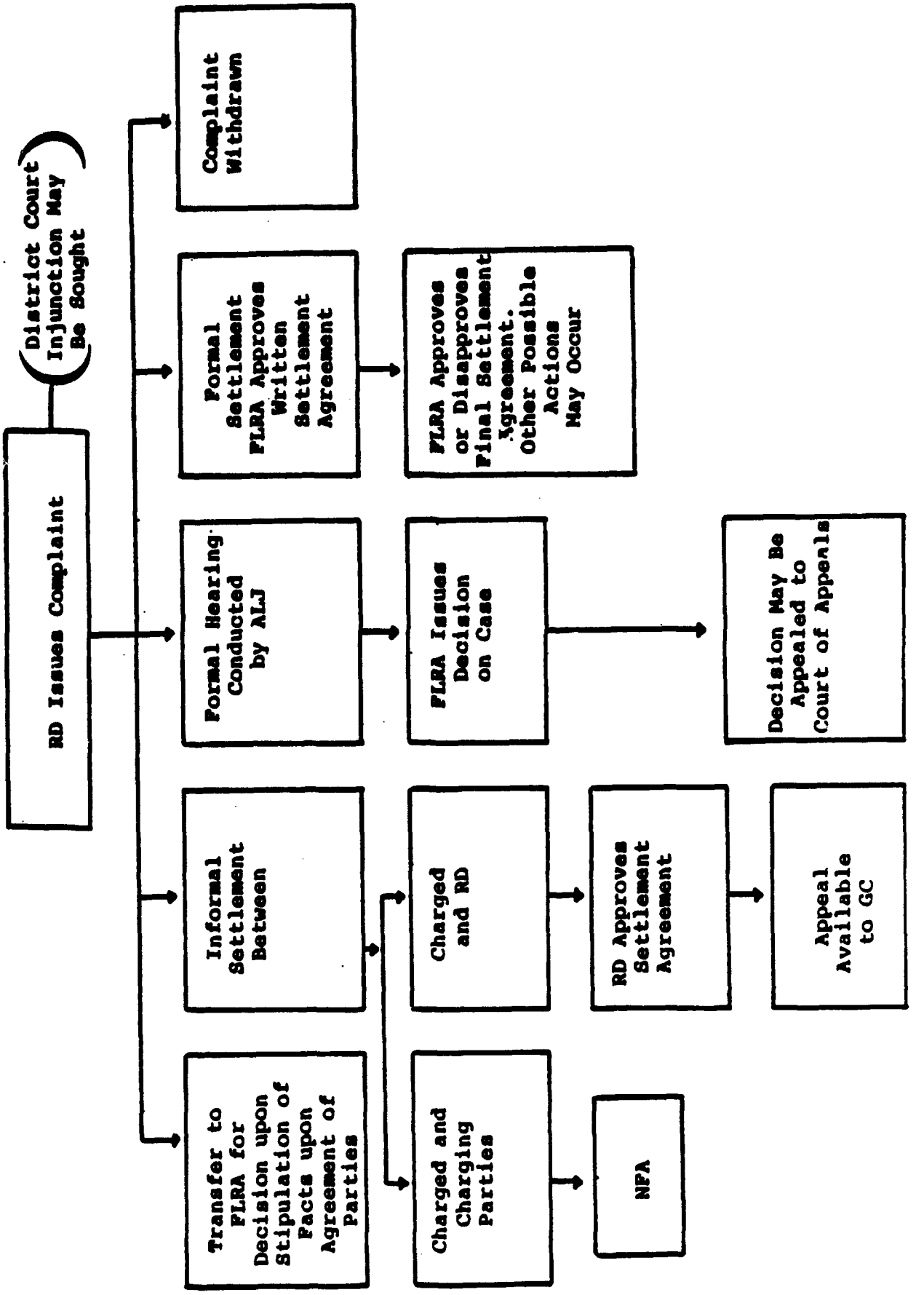
(Pre-Complaint Procedures)



KEY TO ABBREVIATIONS:

ALJ -Administrative Law Judge
FLRA-Federal Labor Relations Authority
GC -General Counsel
NFA -No Further Action
RD -Regional Director

UNFAIR LABOR PRACTICE PROCEDURES
(Post-Complaint Procedures)



Strikes. There is a special provision in Title VII governing enforcement of the "no strike" provision for unions (Federal employees and their unions are not allowed to engage in work slowdowns or strikes). If the Authority should find the exclusive representative violated Section 7116(b)(7), CSRA, the following sanctions may be taken:

(1) Revoke the exclusive recognition status of the labor organization (decertification), and

(2) Take any other appropriate disciplinary action.

See PATCO v. FLRA, 685 F.2d 547 (D.C. Cir. 1982).

Temporary Relief. Section 7123(d), CSRA, sets forth a procedure through which the Authority may seek temporary relief in an unfair labor practice case. Upon issuance of an unfair labor practice complaint, the Authority may petition a District Court for appropriate temporary relief, to include a restraining order. This is used in those cases where the unfair labor practice continues, in spite of the filing of a charge and issuance of a complaint.

Unfair Labor Practices: Section 7116, CSRA defines the unfair labor practices:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;
>
> (3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;
>
> (4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
>
> (6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;
>
> (7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this Title) which is in conflict with any applicable collective bargaining agreement if the agreement was in

effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure--

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures

under its constitution or bylaws to the extent consistent with the provisions of this chapter. (Emphasis added).

Most ULP's have been filed by unions against management. The remainder of the chapter discusses the specific unfair labor practices and includes illustrative cases of different types of unfair labor practices.

5-2. Interference with Employees Rights.

Section 7116(a)(1) provides it shall be an unfair labor practice for an agency:

> to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

Title VII sets forth employee rights in § 7102 as follows:

> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--
>
> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
>
> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

When management interferes with, restrains, or coerces an employee in the exercise of these rights, it violates § 7116(a)(1) of Title VII.

. . . .

Surveillance

The next issue is whether the attendance of school principals at several union informational meetings held for the teachers constituted a violation of 5 U.S.C. § 7116(a)(1).

During the first few months of 1979, Virginia D. Ryan, State Director of the North Carolina Federation of Teachers, AFT, AFL-CIO, ("AFT") contacted Dr. Haywood Davis, the Superintendent of the Fort Bragg Schools. Her purpose was to get permission to use school mailboxes, bulletin boards, and rooms in order to organize a new AFT chapter and solicit membership among the teachers.[6]

On April 19, Davis granted her request and told her that meetings could be held in the various schools at 3:30 p.m.[7]

On April 24, 1979, Ryan contacted Davis H. Orr, principal of the Irwin Junior High School. She scheduled a meeting with the Irwin teachers for May 2 and told Orr that he should not attend union informational meetings. She explained the history and objectives of AFT to Orr at an informal gathering on April 24.

Ryan met with Superintendent Davis on May 2 and requested that he ask the school principals not to attend AFT informational meetings. Davis immediately got a legal opinion on the matter by telephone and informed her that he could not prevent their attendance. Subsequently, at 3:30 p.m., Ryan held the scheduled meeting at Irwin School with about 12 teachers. Principal Orr and his assistant were in attendance. Ryan discussed the history of AFT and some of the benefits, goals and objectives of the organization; she also discussed the rights granted to employees and explained how AFT could help the Fort Bragg teachers in this regard. AFT literature and membership applications were made available to the teachers at the meeting. The meeting included a question and answer period.

Subsequently, Ryan held identical meetings with seven to 10 teachers at the McNair Elementary School (May 3), Bowley Elementary School (May 8), and Butner

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[6] The Fort Bragg Federation of Teachers, Local 3976, was chartered on July 1, 1979.

[7] Children were expected to be off school grounds by that time and the teachers' "normal" duty day was over at 3:45 p.m. (G.C. Ex. 4, p. 32-33).

Elementary School (May 10). The May 3 meeting was attended by Principal Richard M. Ensley, the May 8 meeting by Principal Forrest H. Deshields, and the May 10 meeting by Principal Stahle H. Leonard, Jr. In each case the principal was sitting in full view of all teachers attending. Deshields attended in spite of Ryan's specific request to him just before the May 8 meeting that he not attend and her warning that she might have to file a charge against him if he did.

Counsel for the General Counsel argues that the presence of the principals at the four above-mentioned informational and organizational meetings constituted a violation of 5 U.S.C. § 7116(a)(1) because, in each case, it interfered with, restrained, or coerced the employees in the exercise of their § 7102 rights to form, join, or assist a labor organization. It is well settled in the private sector that overt surveillance by management supervisors of employees while the latter are attending union organizational meetings is prohibited by § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) because it interferes with comparable protected rights. National Labor Relations Board v. Collins & Aikman Corp., 146 F.2d 454 (4th Cir. 1944); N.L.R.B. v. M & B Headwear Co., 349 F.2d 170, 172 (4th Cir. 1965).

Respondents argue that the employees in the instant case were not shown to be affected by the presence of the school principals. However, this is not a necessary element of proof to sustain a violation. The test is whether the action by the supervisors "tended" to have a chilling effect on the exercise by the employees of their protected rights. N.L.R.B. v. Huntsville Manufacturing Co., 514 F.2d 723, 724 (5th Cir. 1975). In the instant case the teachers were aware that their immediate supervisor was watching them and, for example, was in a position to take note of any indication during the question and answer period of an employee's interest in how working conditions could be improved by means of collective bargaining. It is reasonable to infer that some employees might have felt inhibited by the presence of their supervisor from showing an interest and asking questions. Some may have been concerned that their supervisor even knew that they attended the meeting for fear of subsequent reprisal.[8] The meetings in question were designed and advertised for teachers, not principals; therefore, the awkward presence of the principals tended to highlight their anxiety about union

[8] In an analogous case it was held that management cannot interrogate an employee concerning the names and number of employees who had signed a representation petition. Federal Energy Administration, Region IV, Atlanta, Georgia, A/SLMR No. 541, 5 A/SLMR 509 (1975).

organization.[9] Accordingly, it is held that the presence of the principals tended to interfere with, restrain, or coerce the teachers in the exercise of their rights to form, join, or assist a labor organization.

The Superintendent's Statement

The final issue is whether Respondent violated section 7116(a)(1) of the statute when the Superintendent of Fort Bragg Schools made a statement to a group of employee teachers.

On May 14, 1979, the North Carolina Association of Educators ("NCAE") held a meeting at the Irwin School for the purpose of enlightening the teachers at Fort Bragg about collective bargaining. The speaker was a representative from the state office of NCAE. The meeting was attended by about 50 or 60 teachers and the Superintendent of the Fort Bragg Schools, Dr. Haywood Davis.

At one point during the question and answer period after the lecture, the speaker was in the process of explaining the process by which the teachers could obtain collective bargaining. He noted that it would be necessary for a certain number of teachers to request it. At this point Superintendent Davis walked up to the podium and made a statement to the audience. The intent and effect of Davis' statement was to discourage the teachers from filing a petition with the Authority for collective bargaining. He told the teachers that although he supported the right of any teacher to join any labor organization, he did not want to see collective bargaining in his school system because it would put administrators and teachers "on opposite sides of the table." He prefaced his remarks by acknowledging that it might be improper for him to make such a statement, but that he wished all of his teachers were there to hear it.[10]

The General Counsel and the Charging Party both argue that the above statement violated 5 U.S.C. § 7116(a)(1) because it interferes with, restrained, or coerced the employee teachers in the exercise of their rights under the statute. Section 7102 gives each

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[9] Respondent argues that the principals had a right to attend the meetings since they were on federal property. However, management authorized the use of certain rooms for the meetings and there is no evidence that any appropriate function of management was served by the attendance of principals.

[10] Findings with respect to Davis' statement are based on the credible testimony of three teachers; I do not credit Davis' testimony that he was merely trying to say that it is possible to have exclusive representation without collective bargaining.

employee the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal. This right specifically includes the right to engage in collective bargaining with respect to conditions of employment through chosen representatives. 5 U.S.C. § 7102(2). The Superintendent's statement at the May 14 meeting clearly interfered with and restrained the Fort Bragg teachers from exercising their protected right to engage in collective bargaining. The charging party, AFT, only a few days earlier, had conducted several meetings with the teachers to explain collective bargaining and solicit membership. Davis' statement had the effect of discouraging this effort. Moreover, Davis' remarks were particularly coercive since he was in charge of the entire Fort Bragg school system, including the discipline and annual rehiring of the teachers. It is irrelevant that Davis did not specifically threaten the employees with reprisal if they did not act in accordance with his wishes.[11] Accordingly, it is held that Respondent violated section 7116(a)(1) of the statute.

. . . .

NOTE: The wearing of union insignia generally may not be prohibited unless there is a legitimate business reason such as it interferes with work or creates a safety hazard. The activity did not violate Section 7116(a)(1) of the Statute when it prohibited two hotel service employees from wearing union stewards' badges while dealing with the public, particularly in view of the size and conspicuous nature of the badges, where (1) restriction is pursuant to and consistent with activity's long-standing policy of enforcing its prescribed uniform requirement, (2) there is no evidence of a discriminatory purpose, and (3) uniformed employees are allowed to wear union stewards' badges when they are not serving the public. United States Army Support Command, Fort Shafter, Hawaii and Service Employees International Union, Local 556, AFL-CIO, 3 FLRA 795 (1980). See also DOJ v. FLRA, 955 F.2d 998 (5th Cir. 1992) (INS policy banning on-duty employees from wearing union pins on their uniforms did not violate CSRA or First Amendment).

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[11] A contrary result may have been obtained under one unenacted bill which provided that the expression of any personal views would not constitute an unfair labor practice if it did not contain a "threat of reprisal or force or promise of benefit or undue coercive conditions." S. 2640, 95th Cong., 2d Sess., § 7216(g). This subsection was ultimately modified to provide for limited freedom of expression in three instances not applicable herein. 5 U.S.C. § 7116(e).

AIR FORCE PLANT REPRESENTATIVE OFFICE
AND
NFFE
5 FLRA 492 (1981)

. . . Upon consideration of the entire record in the subject cases, including the Regional Director's Report and Findings on Objections in Case No. 6-RO-7 and the parties' stipulation and respective briefs in Case No. 6-CA-233, the Authority finds:

In May 1979, the National Federation of Federal Employees, Local 1958 (NFFE) filed a petition seeking to represent a unit consisting of all the Activity's General Schedule professional and nonprofessional employees, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135). The American Federation of Government Employees, AFL-CIO, Local 1361 (AFGE) became an Intervenor in that proceeding. In June 1979, the parties entered into an approved Agreement for Consent or Directed Election pursuant to which a representation election was scheduled to be conducted on July 12, 1979. A few days before the election, on or about July 10, 1979, the Activity published a newsletter entitled "Talley-Ho ! Gram," dated July 10, 1979 signed by the Activity's chief management official. The newsletter was published in the Activity's eleven divisions by being posted on bulletin board located approximately 90 feet from the voting booth in the prospective election and in a direction from which the majority of the employees would pass on their way to vote. The "Talley-Ho ! Gram," which remained posted on the bulletin boards through July 12, 1979, the date of the election, stated as follows:

10 July 1979
POST ON ALL BULLETIN BOARDS

1. NOTICES HAVE BEEN POSTED AND DISTRIBUTED ON THE UNION ELECTION TO BE HELD THURSDAY, 12 JULY, BETWEEN 1345 AND 1545. EMPLOYEES ON THE PAYROLL AS OF CLOSE OF BUSINESS 2 JUNE 1979 WILL BE ELIGIBLE TO CAST THEIR VOTE FOR:

   * NO UNION
   * AFGE
   * NFFE

   YOUR DECISION WILL BE BINDING OVER THE YEARS TO COME SHOULD YOU VOTE FOR A UNION TO REPRESENT YOU.

2. YOU ALL HAVE REPRESENTATIVES IN CONGRESS. A 15 CENT STAMP WILL ALLOW YOU TO COMMUNICATE WITH THEM. WHEN WRITING TO YOUR CONGRESSMAN, I SUGGEST ONLY ONE TOPIC OR SUBJECT TO A LETTER.

3. THE UPCOMING ELECTION WILL BE MONITORED BY THE FEDERAL LABOR RELATIONS AUTHORITY. ALL PARTIES CONCERNED WILL HAVE AN OBSERVER PRESENT AT THE VOTING LOCATION (MIC). VOTES WILL BE TALLIED BY THE OBSERVER AND CERTIFIED TO BY THE FEDERAL LABOR RELATIONS AUTHORITY.

4. BETWEEN NOW AND THURSDAY AFGE AND NFFE WILL HAVE REPRESENTATIVES IN THE AFPRO BETWEEN 1100 AND 1300. VIRGINIA SCHMIDT, CPR, HAS SENT OUT NOTICES CITING WHERE THESE REPRESENTATIVES WILL MEET WITH EMPLOYEES. BE CANDID WITH THESE REPRESENTATIVES. ASK THEM WHAT THEY CAN DO FOR YOU THAT YOUR CONGRESSMAN CANNOT DO. I HAVE TALKED TO EACH REPRESENTATIVE. - NOW IT IS YOUR TURN. VOTE ACCORDINGLY.

DORSEY J. TALLEY, COLONEL, USAF
COMMANDER

In the secret ballot election conducted on July 12, 1980, a majority of the valid votes counted (50 of 90 nonprofessionals and 10 of 18 professionals) were cast against exclusive recognition.

AFGE thereafter filed timely objections to conduct alleged to have improperly affected the results of the election (Case No. 6-RO-7), contending that the contents of the "Talley-Ho ! Gram" posted by the Activity a few days before the election interfered with the free choice of eligible voters in the election. Additionally, AFGE later filed an unfair labor practice charge alleging that, by such conduct, the Activity also violated section 7116(a)(1) of the Statute (Case No. 6-CA-233).[1]

In Case No. 6-RO-7, the Regional Director issued his Report and Findings on Objections in which he found, based upon an investigation and the positions of the parties, that no question of fact existed with regard to the content of the Activity's newsletter and that portions of the newsletter violated the Activity's duty

[1] On March 27, 1980, the General Counsel issued a Complaint and Notice of Hearing in 6-CA-233 based upon AFGE's unfair labor practice charge. Thereafter, on July 28, 1980, pursuant to the terms of a stipulation reached by the parties therein and section 2429.1 of the Authority's rules, the Regional Director ordered the case transferred directly to the Authority for decision.

of neutrality and/or contained misrepresentations of fact. More specifically, the Regional Director found that the last sentence of item 1 in the "Talley-Ho ! Gram," i.e., "Your decision will be binding over the years to come should you vote for a union to represent you," was factually incorrect and violated the statutory requirement of agency neutrality by clearly implying the employees would be "burdened with the union for many years if they voted for exclusive recognition. He further found that item 4 of the "Tally-Ho ! Gram," which advises employees to question both labor organizations on the ballot regarding what union representation could do for them that their Congressman could not do, clearly implied that the unit employees did not need a union at all and therefore constituted a violation of agency neutrality. In so finding, the Regional Director rejected the Activity's contention that the message contained in the newsletter was factual and neutral and was an expression protected by section 7116(e) of the Statute. Accordingly, he concluded that improper conduct occurred which affected the results of the election and required the election to be set aside and rerun as soon as possible after resolution of the issues in the related unfair labor practice case (6-CA-233). The Activity thereafter filed a request for review seeking reversal of the Regional Director's Report and Findings on Objections, contending that the "Talley-Ho ! Gram" did not violate agency neutrality and, in any event, was an expression protected by section 7116(e) of the Statute.

In Case No. 6-CA-233, the Activity essentially restated the foregoing arguments in its brief to the Authority, arguing that the issues in both cases were the same. AFGE and the General Counsel, in their respective briefs, contended in effect that the statements contained in the "Talley-Ho ! Gram" were not an expression of "personal views" but contained an implied anti-union attitude on the part of management and therefore were unprotected by section 7116(e) of the Statute.

As previously stated, the questions before the Authority are (1) whether certain statements contained in the "Talley-Ho ! Gram" constitute sufficient basis for setting aside the election in Case No. 6-RO-7, and (2) whether such statements further constitute a violation of section 7116(a)(1) of the Statute as alleged in Case No. 6-CA-233. For the reasons set forth below, the Authority concludes that both questions must be answered in the affirmative.

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* Some footnotes deleted.

Section 7116(e) of the Statute, as finally enacted and signed into law, incorporates a number of amendments which were added by the Senate-House Conference Committee to the provision contained in the bill passed by the Senate. The Joint Explanatory Statement of the Committee on Conference indicates the following with respect thereto:

EXPRESSION OF PERSONAL VIEWS

> Senate section 7216(g) states that the expression of
>
> * * * any personal views, argument, opinion, or the making of any statement shall not constitute an unfair labor practice or invalidate an election if the expression contains no threat of reprisal or force or promise of benefit or undue coercive conditions.
>
> The House bill contains no comparable provision.

The House recedes to the Senate with an amendment specifying in greater detail the types of statements that may be made under this section. The provision authorizes statements encouraging employees to vote in elections, to correct the record where false or misleading statements are made, or to convey the Government's view on labor-management relations. The wording of the conference report is intended to reflect the current policy of the Civil Service Commission when advising agencies on what statements they may make during an election, and to codify case law under Executive Order 11491, as amended, on the use of statements in any unfair labor practice proceeding. [Emphasis added.]

Thus, section 7116(e) provides that:

> The expression of any personal view, argument, opinion . . . shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions . . . constitute an unfair labor practice. . . .

As to representation elections, section 7116(e) provides that:

> [T]he making of any statement which--
>
> (1) publicizes the fact of a representational election and encourages employees to exercise

their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions . . . constitute an unfair labor practice . . . or . . . constitute grounds for the setting aside of any election. . . .

Accordingly, while section 7216(g) of the Senate bill permitted the expressing of personal view during an election campaign, section 7116(e) of the Statute specifies those statements which are authorized--i.e., statements encouraging employees to vote in elections, correcting the record where false or misleading statements are made, or conveying the Government's views on labor-management relations.

While Executive Order 11491, as amended, did not contain a specific provision such as section 7116(e) of the Statute, a policy was established thereunder that agency management was required to maintain a posture of neutrality in any representation election campaign.[5] Where management deviated from its required posture of neutrality and thereby interfered with the free and untrammeled expression of the employees' choice in the election, such election would be set aside and a new election ordered.[6] Moreover, management's breach of neutrality during an election campaign was also found to violate section 19(a)(1) of Executive Order 11491, as amended,[7] by interfering with, restraining and coercing

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[5] See, e.g., Charleston Naval Shipyard, A/SLMR No. 1, 1 A/SLMR 27 (1970), at n.17; and Antilles Consolidated Schools, Roosevelt Roads, Ceiba, Puerto Rico, A/SLMR No. 349, 4 A/SLMR 114 (1974). See also Robert E. Hampton, Chairman, United States Civil Service Commission, "Federal Labor-Management Relations: A Program in Evolution," 21 Catholic University Law Review 493, 502 (1972).

[6] See, e.g., Antilles Consolidated Schools, 4 A/SLMR 114, supra n.5.

[7] Section 19(a)(1) provided as follows:

(continued...)

employees in the exercise of their protected rights to determine whether to choose or reject union representation.[8] We now turn to the application of the foregoing policy and case law to the facts and circumstances of the subject cases, in accordance with the stated intent of Congress in enacting section 7116(e) of the Statute (supra n.2).

In Case No. 6-RO-7, as previously stated, the Regional Director found that portions of the "Talley-Ho! Gram," as posted on the Activity's bulletin boards and distributed to the employees shortly before the election, violated the requirements of neutrality and/or contained misrepresentations of fact which required the election to be set aside. The Authority concludes, in agreement with the Regional Director, that those statements in the "Talley-Ho ! Gram" to the effect that the employees' "decision will be binding over the years to come should you vote for a union to represent you" and urging the employees to "[a]sk [the unions] what they can do for you that your Congressman cannot do" violated the requirements of management neutrality during an election campaign. Such statements clearly could be interpreted by the unit employees as implying that they did not need and would not benefit from union representation, and would be unable to rid themselves of union representation for years to come if they were to vote in favor of exclusive recognition in the forthcoming election. In the Authority's view, such statements interfered with the employee's freedom of choice in the election and therefore the election to be set aside.

In so concluding, the Authority rejects the Activity's contention that the foregoing statements contained in the "Talley-Ho ! Gram" were protected by section 7116(e) of the Statute. At the outset, the Authority rejects the Activity's assertion that the "Talley-Ho ! Gram" was merely the "expression of [a] personal view, argument, [or] opinion within the meaning of section 7116(e) of the Statute. Rather, where (as here) written statements by the head of an Activity are

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[7](...continued)

Section 19. Unfair labor practices. Agency management shall not--

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order. . . .

[8] See, e.g., Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, A/SLMR No. 523, 5 A/SLMR 377 (1975), review denied by the Federal Labor Relations Council, 5 FLRC 75 (1977).

posted on all bulletin boards and circulated to unit employees, they are not merely the expression of personal views but may reasonably be interpreted as the Activity's official position with regard to the matters addressed in such statements. In addition, as previously stated (supra p. 6), section 7116(e) authorizes statements encouraging employees to vote in elections, correcting the record where false or misleading statements are made, or conveying the Government's views on labor-management relations. While the "Talley-Ho ! Gram," in part, publicized the forthcoming representation election and encouraged employees to vote in such election, and to that extent fell within the protection of section 7116(e), c her portions of the "Talley-Ho ! Gram" set forth above went beyond the scope of permissible statements thereunder and did not require protected status merely because they were contained in the same document which properly publicized and encouraged employees to vote in the election. Moreover, as found by the Regional Director, "there was no evidence that the publication was intended to correct the record with respect to any false or misleading statements made by the party." Finally, such statements did not "convey the Government's views on labor-management relations." As indicated above, the Government's views are that employees should be free to choose or reject union representation while management maintains a posture of neutrality, and, as further stated by Congress in section 7101 of the Statute, that "labor organizations and collective bargaining are in the public interest."[9] To the extent that the "Tally-Ho ! Gram" implied that union representation was unnecessary and undesirable, therefore, such statements were directly contrary to the Government's views on labor-management relations.

Turning next to the question raised in Case No. 6-CA-233, the Authority concludes that, in the circumstances presented, the same statements which caused the election to be set aside in Case No. 6-RO-7 also constitute a violation of section 7116(a)(1) of the Statute which provides that "it shall be an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter." Consistent with the findings and purpose of Congress as set forth in section 7101 (supra n.9), section 7102 of the Statute (entitled "Employees' rights") provides in part that "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." Under Executive Order 11491, as amended, which established and protected identical employee rights,[10] management's breach of neutrality during an election campaign was found to constitute unlawful

interference with such protected rights in violation of section 19(a)(1) of the Order (supra n. 7).[11] Consistent with the stated intent of Congress, the Authority concludes that management's breach of neutrality during an election campaign similarly interferes with the same protected rights of employees under the Statute and therefore violates section 7116(a)(1) of the Statute.

In the instant case, as found above with respect to Case No. 6-RO-7, the Activity breached its obligation to remain neutral during the election campaign by posting on all bulletin boards and distributing to unit employees--shortly before the scheduled election--a message signed by the head of the Activity which strongly implied that unions were unnecessary, undesirable, and difficult to remove once the employees voted in favor of exclusive recognition. Such violation of neutrality interfered with the employees' protected right under section 7102 of the Statute to "form, join, or assist any labor organization, or to refrain from any such activity," and therefore violated section 7116(a)(1) of the Statute in the circumstances of this case.

In view of the foregoing, the Respondent in Case No. 6-CA-233 shall take the action set forth in the following Order; and the election conducted on July 12, 1979, in Case No. 6-RO-7, is hereby set aside and a second election shall be conducted as directed below.

. . . .

NOTE 1: In light of more recent cases, Colonel Talley's statements seem less dangerous. In Arizona Air National Guard, Tucson and AFGE, 18 FLRA 583 (1985), the Authority confirmed the propriety of commanders and their staffs speaking out on union representation matters, so long as it is within the bounds of the law. The agency issued a memorandum to all employees containing a series of questions and answers concerning the implications of a pending election. Although the union argued that the memo, "by inference, suggested the negative aspects of unionism and interfered with the employee's freedom of choice in a representation election," the Authority held the agency had not violated § 7116(a)(1). It reasoned that, as the memo was correct as to law and Government policy, and did not promise benefits to or threaten employees, it did not interfere with their freedom of choice.

NOTE 2: In IRS, Louisville, 20 FLRA 660 (1985), the Authority found that a supervisor's threat to sue a bargaining unit employee and the union did not constitute an ULP. The libel suit was threatened by the supervisor personally, not the agency, and was in response to the employee's rash allegations made in conjunction with a grievance, not in retaliation for her filing the grievance. Therefore, there was no violation of § 7116(a)(1), CSRA.

NOTE 3: What right does a union have to disparage supervisors and managers? In IRS and NTEU, 7 FLRA 596 (1981), the union printed a leaflet in which a supervisor was awarded the "Holiday Turkey" award. It enumerated working practices with which the union was unhappy. The leaflet was distributed at a cafeteria table which was generally used for distribution of union literature. An unfair labor practice was sustained against management when it confiscated the literature. The Authority stated that employees may distribute union literature in nonwork areas during nonworking time, provided there is not a personal attack on management's officers. Epithets such as "scab," "liar," and "unfair" have been an insufficient basis for removal.

NOTE 4: Management violates § 7116(a)(1) derivatively whenever it violates any of the other provisions of section 7116. The rationale is that when management violates any of the other ULP provisions it violates the employee's rights as enunciated in section 7102. The authority of the union and its reasons for existence are undermined. See DLA, 5 FLRA 126 (1981).

NOTE 5: A supervisor recommended to an employee that she drop a grievance. The supervisor explained that even if she should succeed in having her evaluation changed she would not gain anything in the long run. The Authority adopted the ALJ's finding that this is a coercive or intimidating statement implying adverse consequences and an implied threat, and thus constituted a violation of § 7116(a)(1). Further, the statement, even if not overhead, was so phrased that it implied that the career of any employee who complained of management action by processing grievances would suffer. United States Dept. of Treasury Bureau of Alcohol, Tobacco and Firearms, Chicago IL, and NTEU Chapter 94, 3 FLRA 723 (1980).

NOTE 6: In Navy Resale System Commissary, 5 FLRA 311 (1981), the Authority adopted the ALJ's finding that a statement by an employee's supervisor angrily reminding the employee that he was the boss, that things would go more smoothly if problems were brought to him, and that the union president should be left out of such matters is a violation of § 7116(a)(1) as it is coercive of the statutory right of employees to request their union's representation.

5-3. Discrimination to Encourage or Discourage Union Membership.

Section 7116(a)(2) provides that it is an unfair labor practice for an agency:

> to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment; . . .

This ULP often arises when management treats a union representative differently from other employees. The following case demonstrates this.

INTERNAL REVENUE SERVICE, BOSTON
AND
NTEU, 5 FLRA 700 (1981)

. . . .

The Judge found that BDO violated section 7116(a)(1) and (2) of the Statute by removing employee James E. Tacy, Revenue Officer, GS-12, from a work detail at the Center at least in part because of Tacy's activities on behalf of the National Treasury Employees Union (NTEU) during his nonduty time while at the Center.[3] In so finding, the Judge specifically rejected the contention that termination of the detail was effected solely for business reasons, relying upon BDO's awareness of Tacy's activities on behalf of NTEU, the timing of Tacy's removal from the detail, and "the lack of any credible and persuasive reason for the termination" of the detail. More particularly, the Judge rejected the assertion that Tacy's detail had been rescinded by BDO because GS-12 was too high a grade for the detail as suggested in a memorandum previously submitted by two BDO employees who had been detailed to the Center in the past. In rejecting such assertion, the Judge noted that the 1979 IRS Manual Supplement, which provides a basis for reconstituting the detail, imposed no grade level restriction on the detail; that the employee who ordinarily would have filled the detail also was a GS-12; that BDO management was aware of both Tacy's grade level and the former detailees' memorandum at the time it approved Tacy's request for the detail; that for a period prior to the detail, and thereafter, grade level was not a management consideration; that the termination of Tacy's detail involved considerable difficulty in terms of reassigning work so as to enable another employee to be detailed as a replacement for Tacy; that no other detail had ever been terminated prematurely; and that the timing of management's concern with Tacy's union activities at the Center coincided with the termination of his detail. Accordingly, as previously stated, the Judge concluded that the removal of Tacy from the detail was motivated at least in part by anti-union considerations and was a reprisal for Tacy's activities

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[3] At all times material herein, the bargaining unit employees at the Center were exclusively represented by the American Federation of Government Employees, AFL-CIO (AFGE), and NTEU was waging an organizational campaign to replace AFGE as the bargaining agent. Bargaining unit employees at BDO are exclusively represented by NTEU.

on behalf of NTEU, in violation of section 7116(a)(1) and (2) of the Statute. However, the Judge further found that the record contains no evidentiary basis for concluding that the Center was in any way responsible for the termination of Tacy's detail; accordingly, he concluded that those portions of the complaint alleging violations against the Center should be dismissed. By way of remedy, the Judge ordered, inter alia, a posting at BDO but not at the Center; the General Counsel's exceptions object, in part, to the absence of a posting requirement at the Center.

The Authority concludes, in agreement with the Judge, that Respondent BDO violated section 7116(a)(1) and (2) of the Statute. The Authority also adopts the Judge's rationale for finding a violation, as set forth, supra. However, unlike the Judge, the Authority finds that the Judge's credibility resolutions lead to the conclusion that the termination of Tacy's detail was based solely upon his protected union activities at the Center since the record establishes that the reason asserted by BDO for taking such action is pretextual.

Having found that BDO violated section 7116(a)(1) and (2) of the Statute, the Authority adopts the Judge's remedial order which requires BDO to cease and desist from such unlawful conduct and to post a notice at the various posts of duty within BDO. Additionally, inasmuch as the unfair labor practice occurred at the Center and thus directly affected the protected rights of employees at that location, the Authority also shall order BDO to post the same notice at the Center in order to fully remedy the unfair labor practice.[4]

NOTE 1. The Statute does not offer any protection to employees participating in concerted activities unrelated to membership in, or activities on behalf of, a labor organization. VA, 4 FLRA 76 (1980).

NOTE 2. IRS, Washington, D.C. and NTEU, 6 FLRA 96 (1981). The FLRA reversed the ALJ who, in finding a violation of 5 U.S.C. § 7116(a)(1) and (2), held that it is sufficient to establish that the union or protected activity played a part in management's decision not to promote. In cases involving an allegation of discrimination for engaging in protected activity, the test to be applied is as follows:

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[4] The Authority notes that the General Counsel has not requested an order requiring that Tacy's detail be reinstated. Further, the Authority takes administrative notice of the fact that NTEU was certified on August 12, 1980 as the exclusive representative of Center employees.

> [T]he burden is on the General Counsel to make a prima facie showing that the employee had engaged in protected activity and that this conduct was a motivating factor in agency management's decision not to promote. Once this is established, the agency must show by a preponderance of the evidence that it would have reached the same decision as to the promotion even in the absence of the protected conduct.

Finding that the agency established by a preponderance of the evidence that the employee would not have been selected even if she had not engaged in protected activity, the Authority dismissed the complaint. See also SSA, San Francisco and AFGE, 9 FLRA 73 (1982).

5-4. Assistance to Labor Organizations.

Section 7116(a)(3) provides that it is an unfair labor practice for an agency:

> to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status; . . .

The provision is intended to prevent "company" unions. It is rarely violated. When this ULP is sustained, it is usually because management, either intentionally or inadvertently, has aided one union to the detriment of another.

DEPARTMENT OF THE NAVY
NAVAL AIR REWORK FACILITY, JACKSONVILLE, FLA.
A/SLMR No. 155 (May 8, 1972)

This case involves a complaint filed by the National Association of Government Employees (complainant) against the Department of the Navy, Naval Air Rework Facility, Jacksonville, Florida (Respondent) alleging violations of Section 19(a)(1) and (3) of the Order. The basis of the complaint was that Respondent had extended a negotiated agreement with the International Associations of Machinists and Aerospace Workers, Naval Air Local 1630 (incumbent), at a time when a valid question concerning representation was pending. Respondent stated it had extended the agreement pursuant to a Department of Defense Directive. Complainant further alleged the Directive violated the Order. The case was before the Assistant Secretary based on a stipulation of facts, issues, and accompanying exhibits submitted by the parties.

Noting that continuity and stability in a collective bargaining relationship is desirable, the Assistant

Secretary considered it to be reasonable and proper that parties be permitted to extend, in writing, an agreement while awaiting resolution of a representation question, if the granting of the extension occurs during the term of the parties' existing agreement. In the subject case, however, the evidence established that the granting of the extension of the agreement occurred after the termination of the parties' existing agreement. The Assistant Secretary viewed such conduct as, in effect, entering into a new agreement with the incumbent and bestowing upon it specific rights and privileges which had terminated when the prior agreement expired. He noted that under normal circumstances, the Respondent's execution of a "new retroactive agreement" with the incumbent at a time when a valid question concerning representation was pending would constitute interference with employee rights and improper assistance in violation of Section[s] 19(a)(1) and (3) of the Order. However, in the particular circumstances of this case, including the fact that the underlying representation issue has been resolved with the complainant being certified as the exclusive representative of the employees involved, the Assistant Secretary found the questions of interference and improper assistance to a labor organization had been rendered moot. In his view, it would not effectuate the purposes of the Order to find a violation where, as here, the improperly assisted labor organization has been displaced by the complainant and there is no evidence that the Respondent's conduct was motivated by anti-union considerations.

With respect to the DOD Directive, the Assistant Secretary found that it was not violative of the Order because it could be interpreted consistent with the policy established in this case.

In view of the above, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

NOTE: Since the complainant won the election, the issue was rendered moot. If the complainant had lost, the ULP would have been sustained and a new election ordered. The point: do not enter into a collective bargaining agreement with an incumbent union once an RO petition has been filed and the existing agreement has expired.

UNITED STATES ARMY AIR DEFENSE CENTER
FORT BLISS TEXAS
AND
NFFE

29 FLRA 362 (1987)

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent and the National Association of Government Employees, Local R14-89 (NAGE) to the attached decision of the Administrative Law Judge. The General Counsel filed an opposition to the exceptions. The issued is whether the Respondent violated section 7116(a)(2) and (3) of the Federal Service Labor-Management Relations statute (the Statute) by refusing to provide the Charging Party, National Federation of Federal Employees, Local 2068, Independent (NFFE) with a building for NFFE's use during a representation election campaign. For the reasons stated below, we find, contrary to the Administrative Law Judge, that the Respondent was not required to provide NFFE with a building similar to the one used by NAGE and that the Respondent satisfied the requirements of section 7116(a)(3) of the Statute by offering NFFE the use of customary and routine facilities for use in the campaign.

II. Background

On May 25, 1984, NFFE filed a petition for an election in a bargaining unit of certain employees of the Respondent. At that time, the unit was represented by NAGE. Until on or about October 16, 1984, the Respondent and NAGE were parties to a collective bargaining agreement. After October 16, 1984, and during the pendency of the representation case, the Respondent and NAGE continued to give effect to their agreement. On February 28,1985, the Regional Director of the Authority approved an agreement for a consent election. On May 8 and 9, 1985, an election was conducted. The results of that election were inconclusive because neither NAGE nor NFFE received a majority of the valid votes cast in the election. The petition for election is presently pending the outcome of a run-off election to determine the exclusive bargaining representative.

Under the collective bargaining agreement between the Respondent and NAGE, the Respondent agreed to provide a building to NAGE for use as a "Union Hall." The building provided for NAGE's use was a one-story, wooden, barracks-type building in the middle of a heavily populated part of the Base. Beginning on or about April 17, 1985, NFFE representatives observed NAGE using the building in connection with its election campaign efforts. In that regard, about 2 weeks before the

election, a large banner which read "VOTE NAGE" was placed on the side of the building.

The matter of NAGE's use of the building for campaign purposes was initially raised by NFFE at the consent election meeting in February 1985. Subsequently, and prior to the election, NFFE asked the Respondent to provide it with a building for its campaign. NFFE also asked the Respondent to stop NAGE from using the building in question for campaign activities. The Respondent denied both requests. The Respondent advised NFFE that NAGE had obtained the use of the building through negotiations and that the building was provided by the collective bargaining agreement. The Respondent maintained that it could not restrict NAGE's use of the building for campaign purposes. Additionally, the Respondent advised NFFE that it would not provide NFFE with a building because a building "is not in keeping with what the Statute defines as customary and routine services and facilities." The Respondent did, however, offer NFFE the use of various meeting facilities, including a theater and conference rooms, to use in its campaign effort. NFFE did not avail itself of the offered facilities. NFFE rented an office off Base for its campaign headquarters.

III. Administrative Law Judge's Decision

The Judge concluded that the Respondent violated section 7116(a)(1) and (3) of the Statute when it refused to provide NFFE with a building to use during the election campaign. In reaching that conclusion, the Judge found that NFFE acquired "equivalent status" within the meaning of section 7116(a)(3) of the Statute when it filed its representation petition and, therefore, that it was entitled to the same "customary and routine services and facilities" the Respondent had furnished NAGE. The Judge noted that the legislative history of section 7116(a)(3) described as an example of customary and routine services and facilities, "providing equal bulletin board space to two labor organizations which will be on the ballot in an exclusive representation election." He concluded that if both unions would be equally entitled to bulletin board space, they were both equally entitled to a building for campaign purposes. The Judge reasoned that the Respondent's contract obligation to provide NAGE with a building was in accordance with its section 7116(a)(3) permission to provide customary and routine services and facilities and that 7116(a)(3) required that NFFE receive the same facilities and services.

The Judge concluded that the Respondent's refusal to provide NFFE with a building violated section 7116(a)(1) and (3) of the Statute. Further in that regard, the Judge rejected the Respondent's contention that the Authority's Regional Office was responsible for

any violation because the Region was responsible for supervising the election.

IV. Positions of the Parties

In its exceptions, the Respondent essentially contends that an agency does not have a duty under section 7116(a)(3) of the Statute to provide an equivalent status union the same facilities that an incumbent exclusive representative has acquired through collective bargaining. The Respondent maintains that its obligation was only to provide "customary and routine" facilities. The Respondent argues that the building in dispute in this case was obtained by NAGE through negotiation as the exclusive representative and was provided for under the collective bargaining agreement between itself and NAGE. The Respondent argues that it did not provide NFFE with a building because it did not consider a building a "customary and routine" facility under section 7116(a)(3). The Respondent further contends that it offered NFFE the use of numerous meeting places, but that NFFE never availed itself of any of the offered facilities.

In its exceptions, NAGE also contends that its use of a building as a union hall was obtained through negotiations and maintains that there is no basis in section 7116(a)(3) for giving an intervenor the same rights that an incumbent exclusive representative has gained through bargaining. NAGE also argues that NFFE was not disadvantaged in this case because the Respondent gave or offered NFFE extensive access to various facilities on the Base and that NFFE had vans with campaign signs displayed riding around the Base 8 to 10 hours a day.

In its exceptions, the General Counsel contends that the Judge correctly found that the Respondent violated the Statute.

V. Discussion

The significant part of the complaint in this case is that the Respondent committed an unfair labor practice by failing to (1) provide NFFE with a building similar to the one used by NAGE or (2) to stop NAGE from using its building for other than representational purposes. The Judge decided this narrow issue, as do we. We find, contrary to the Judge and the General Counsel, that the Respondent did not violate section 7116(a)(1) and (3) of the Statute as alleged in the complaint.

Section 7116(a)(3) provides that an agency may, upon request, furnish a labor organization with customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status. Thus, under section 7116(a)(3), if an agency grants a

union's request for customary and routine services or facilities in a representation proceeding, the agency must, upon request, provide such services or facilities to another union having equivalent status.

We agree with the Judge that NFFE had equivalent status with NAGE in the representation proceeding. However, NAGE did not request and the Respondent did not grant NAGE the use of a building as a "customary and routine" facility during that proceeding. Rather, the Respondent provided NAGE with the building through the give and take of negotiations with NAGE as the exclusive representative of the unit involved before NFFE filed its representation petition. NAGE's right to use the building as a "Union Hall" was expressly established in NAGE's collective bargaining agreement with the Respondent before NFFE became a union "having equivalent status."

We can find no compelling indication in the plain language or legislative history of section 7116(a)(3) that an agency is required to furnish a labor organization that has achieved equivalent status with an incumbent union in a representation proceeding with the exact same services and facilities that the incumbent obtained through collective bargaining before the proceeding. On the contrary, it is reasonable to expect that an incumbent labor organization will have acquired some advantages in agency services and facilities over a rival union through collective bargaining. The Statute does not require that an agency equalize their positions upon request of the rival.

The example from the legislative history of section 7116(a)(3) cited by the Judge does not compel a different conclusion. That example, "providing equal bulletin board space to two labor organizations which will be on the ballot in an exclusive representation election[,]" was used to illustrate the kind of customary and routine services and facilities an agency may furnish "when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status[.]" H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 49 (1978), reprinted in Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 178, Committee Print No. 96-7, at 695 (1979).

We do not believe that a building is the kind of "customary and routine" facility contemplated by Congress in fashioning section 7116(a)(3). But even assuming that a barracks-type building is a customary and routine facility at Fort Bliss, we reemphasize that NAGE did not request and the Respondent did not gratuitously provide NAGE with the building in question during the representation proceeding. NAGE's right to sue the building was established by the previously negotiated

agreement. Therefore, the Respondent was under no duty to grant NFFE's request for a similar building. Additionally, we note that the Respondent specifically advised NFFE that it was prepared to provide, upon request, NFFE and NAGE with various meeting facilities for use in their election campaigns.

Accordingly, we conclude that the Respondent did not violate section 7116(a)(1) and (3) of the Statute as alleged in the complaint.

NOTE: Unions continue to frequently allege violations of the neutrality doctrine as ULP's under § 7116(a)(3). A recent problem at Fort Sill, Oklahoma, was discussed in Chapter 2, supra. See Fort Sill, Oklahoma, 29 FLRA 1110 (1987).

5-5. To Discriminate Against an Employee Because of His Filing a Complaint or Giving Information.

Section 7116(a)(4) provides that it is an unfair labor practice for an agency:

> to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter; . . .

CONSUMER PRODUCT SAFETY COMMISSION
AND
AFGE
4 FLRA 803 (1980)

The Issues

1. Did Respondent violate Sections 19(a)(1), (2) and (4) of the Order by its detail of the Local Union President to Pittsburgh for the period of July 17, 1978 to August 11, 1978? (Case No. 3-CA-12)

For reasons more fully set forth hereinafter, I have found a violation as to Issues 1 and 2; and have found no violation as to Issues 3, 4, 5 and 6.

FINDINGS

A. Background

Respondent was established in 1973 to enforce various laws dealing with consumer products, such as the Consumer Product Safety Act, the Hazardous Substances Act, the Poison Prevention Act, and the Inflammable Fabrics Act. Respondent operates through area offices,

one of which is located in Philadelphia, Pennsylvania. In 1978, the basic supervisory structure of the Philadelphia Area Office, which is the only Area Office involved in this proceeding, was as follows: Mr. Lacy B. Ward was Area Director and generally responsible for supervising all aspects of the Office; the Community Services Division, which handled public relations, was headed by Ms. Maria Juarique and she reported directly to Mr. Ward; the Administration and Compliance branches also reported directly to Mr. Ward; Mr. Raymond Benson was Director of Operations and supervised investigations conducted by the Office. Operations was further divided into two teams of six or seven investigators with each team being under a supervisor, Mr. Frank Krivda or Mr. William Robinson. In addition, there were three resident posts: Pittsburgh, supervised by Mr. Robinson; and Richmond, Virginia, and Baltimore, Maryland, both supervised by Mr. Krivda.

In January, 1977, the Charging Party (hereinafter also referred to as the "Union") was granted exclusive recognition for certain of Respondent's employees at its Philadelphia Area Office. The following individuals served as Union officers during 1978: Mr. Raymond Labonski, President; Mr. Gary Armbrust, Vice President; and Mr. Ben Fink, Secretary/Treasurer.

B. Mr. Labonski's Union Activity through July 10, 1978

During the first half of 1978, Mr. Labonski was engaged in a series of activities on behalf of the Union. In February, Mr. Labonski filed an unfair labor practice charge concerning a memorandum from Mr. Ward requiring secretaries to report their time in 15 minute increments which was asserted to have been a unilateral change in working conditions without negotiation with the Union. In March, an employee was informed that she was about to be discharged and went to Mr. Labonski for assistance. After an unsuccessful attempt to discuss the matter with Mr. Ward, Mr. Labonski filed three charges of unfair labor practices over the matter (G.C. Exhs. 2, 3 and 4). On March 10, Mr. Labonski accompanied the employee to a meeting with Mr. Ward and, when Mr. Labonski sought to speak, he was told to leave. Thereafter, Mr. Labonski filed a suit in the United States District Court (G.C. Exh. 5) and testified at a hearing in the matter. After Mr. Labonski's testimony, the hearing was adjourned, and, after a meeting in chambers, the parties signed a Consent Decree (G.C. Exh. 6) which provided, in part, that the discharge be rescinded and the employee be allowed to resign. Shortly thereafter, Supervisor Krivda in a conversation with Mr. Labonski referred to this matter as a "blood letting" and told Mr. Labonski he should watch his step (Tr. 71).

In May, Mr. Labonski served as chief negotiator for the Union, with Mr. Gary Armbrust a member of the Union's negotiating team, and, as an alternate, either Mr. Benedict Fink or Mr. James Ferrar. Ms. Catherine Davis was chief negotiator for respondent, Mr. Raymond Benson served as a member of Respondent's negotiating team as did Mr. Ward on occasion. A contract was completed in mid-May 1978. On June 7, 1978, Respondent issued a memorandum concerning a "No Smoking Policy" and on June 8, 1978, Mr. Labonski filed an unfair labor practice charge (G.C. Exh. 7), alleging that Respondent had made no effort to negotiate impact or implementation of such a policy prior to its issuance. On June 21, 1978, Mr. Benson met with Messrs. Labonski and Fink and on June 27, 1978, Mr. Ward advised Mr. Labonski that he was implementing the policy effective June 28, 1978, because: a) the meting with Mr. Benson had given "ample opportunity for discussion" and b) "I do not believe any action taken by this Office . . . has had any impact on the employees of the bargaining unit" (G.C. Exh. 8). On June 30, 1978, Mr. Labonski filed a complaint (G.C. Exh. 9). On July 10, at a weekly staff meeting, Mr. Ward announced that there would be a no smoking policy in the conference room and Mr. Labonski promptly stood up and stated that the Union had filed formal charges about the policy.

C. The Pittsburgh Detail

On July 10, 1978, Mr. Ward asked supervisor Robinson for the itineraries of Jane Hanlon and Gary Armbrust. Mr. Robinson supplied the itineraries and testified that he did not recall any prior occasion when Mr. Ward had asked for the itineraries of individual employees. Mr. Armbrust's itinerary showed that for most of the next two weeks he was scheduled for hospital visits in conjunction with the NEISS redesign program.

The Pittsburgh Resident post was to become open at the end of the week, July 14, 1978, as the Resident Officer had resigned and was leaving at that time. The Pittsburgh Resident post had, since its inception, been filled by a GS-9 investigator. During July, 1978, in Mr. Benson's absence, Mr. Krivda was Acting Director of Operations and Mr. Labonski was Acting Supervisor for Mr. Krivda's group from July 3 (G.C. Exh. 10). Mr. Krivda testified that on July 12, 1978, at about 8:00 a.m., Mr. Ward had asked what Mr. Labonski's duties were and that he had told him Mr. Labonski was an acting supervisory inspector. Later in the day, on July 12, Mr. Krivda placed the time as about 10:00 a.m. and Mr. Ward as about 1:30 p.m., Mr. Ward asked Mr. Krivda what his plans were for filling the Pittsburgh Resident post. Mr. Krivda replied that he intended to send Ms. Joyce Allen, a GS-7 investigator, and Mr. Fink, then a GS-9

investigator, for about a week each. This had also been shown on the Work Plans memorandum dated July 3, 1978 (G.C. Exh. 10) and Mr. Fink was aware that he was scheduled to go to Pittsburgh for the week of July 17 through 21.

Mr. Ward told Mr. Krivda that he wanted a senior investigator, (i.e. a GS-11 investigator) in the Pittsburgh post for the next several months. The Philadelphia Area Office had only two GS-11 investigators, exclusive of the Resident Officers in Baltimore, Maryland, and Richmond, Virginia, namely Labonski and Armbrust.[5] Mr. Ward testified, in part, as follows:

> "I told Mr. Krivda that I wanted a senior investigator in the Pittsburgh Resident Post for the next several months and that I want the person on detail to remain there for a minimum of a month.
>
> . . .
>
> "THE WITNESS: Two weeks were not requested nor granted. We did not discuss a two week detail at this time." (Tr. 555)

Mr. Krivda testified on direct examination, in part, as follows:

> "Q Did Mr. Ward give you any instructions with regard to how he wished the Pittsburgh Resident Post to be filled?
>
> "A. He wanted a senior investigator or a GS-11 investigator assigned to the Pittsburgh Resident Post. (Tr. 271)

After his recollection was refreshed by his examination of a prior statement, Mr. Krivda further testified:

> ". . . I told Mr. Ward that Labonski was an acting supervisor for me and that Gary Armbrust was away doing a NEISS training thing in a training hospital in Elkton, Maryland, at the time.
>
> "To the best of my knowledge, I remember saying that something to the effect that Labonski is the only one or something.

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[5] Mr. Fink became a GS-11 in March, 1979.

"I can't really recall the total--

"Q. Just recall it as best as you can. Do you remember generally telling Mr. Ward, that Labonski was the only person available to be sent at that time?

"A. Yes." (Tr. 276-277).

After the meting with Mr. Ward, Mr. Krivda called Mr. Labonski to his office and told him he was being detailed to Pittsburgh for one month.[6] Mr. Labonski was dismayed and told Mr. Krivda it would impose a hardship for him because his wife was in advanced pregnancy and was having difficulty. To appreciate the magnitude of the problem to Mr. Labonski, his wife had five prior miscarriages and her present pregnancy, which had begun in December, 1977, was being continued by the use of daily medication which caused appreciable physical pain. Mr. Ward was aware of Mrs. Labonski's pregnancy and from his action at a staff meeting I draw the inference that Mr. Ward was aware that her pregnancy was notable. In May, 1978, Mr. Labonski had spoken to Mr. Benson[7] about his wife's pregnancy and had asked to double-up on some road trips in order that he might be spared going out of town in late August or early September and that Mr. Benson said, ". . . I should not worry. I would not be traveling at that time." (Tr. 135, see, also, Tr. 83, 137).

When Mr. Krivda told him, "He [Mr. Ward] wants you out there for a month. He wants a GS-11 out there and it has to be a month" (Tr. 81), Mr. Labonski, after telling Mr. Krivda that he [Labonski] couldn't do it, told Mr. Krivda,

". . . that I would call Mr. Lacy Ward and personally express my difficulty with the assignment. Mr. Frank Krivda told me, 'Go ahead. Give it a try.'" (Tr. 81).

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[6] I am aware that Mr. Krivda on cross-examination testified that Mr. Ward told him to send a GS-11 to Pittsburgh for ". . . two weeks to a month.' (Tr. 307, 307) and that Mr. Krivda had told Mr. Robinson that Mr. Ward had told him the detail was to be from two or four weeks (Tr. 373). In view of the action taken by Mr. Krivda as well as the testimony of Mr. Labonski, I do not credit Mr. Krivda's testimony that Mr. Ward told him that the detail was to be two weeks to a month and credit Mr. Ward's testimony that he told Mr. Krivda that the detail was to be for a minimum of one month. However, from subsequent events, I find that Mr. Krivda reasonably concluded that Mr. Ward authorized his modification of Mr. Labonski's detail by his direction that he, Krivda, handle Mr. Labonski's problems.

Mr. Labonski went to his office and called Mr. Ward. Mr. Labonski testified that the following conversation ensued,

> ". . . Lacy, Frank tells me I'm to go to Pittsburgh for a month and I'm having a great deal of difficulty with this, my wife is eight months pregnant.
>
> "Lacy immediately said that, 'If you have a problem with one of your assignments, see your supervisor. He's the one that makes up your assignments,' and he hung up the phone." (Tr. 83-84).

CONCLUSIONS

1. Case No. 3-CA-12

The facts, fully set forth hereinabove, show by an overwhelming preponderance of the evidence that the motivation, purpose and intent of the Director of the Philadelphia Area Office, Mr. Lacy Ward, in detailing Raymond Labonski to the Pittsburgh Resident Post was to punish him for activities as President of the Union. Respondent thereby violated Sections 19(a)(1), (2) and (4) of the Executive Order.

Mr. Labonski, a GS-11 investigator, was an active and vocal Union president who used the processes of the Order to challenge actions of the Area Office which Mr. Labonski felt were either unfair or which violated Union or employee rights. In April, 1978, Mr. Ward had commented to Ms. Jaurique during an automobile trip to Harrisburg that Mr. Labonski was always harassing him; that Mr. Labonski was disruptive and a troublemaker; and that he had been in court on St. Patrick's Day when Mr. Labonski was representing a secretary that he, Ward, had terminated and Mr. Labonski was showing off. A supervisor had termed the court action, which had been brought by Mr. Labonski on behalf of the employee, a "blood-letting" and warned Mr. Labonski to watch his step.

On June 30, 1978, Mr. Labonski filed an unfair labor practice complaint which concerned an asserted unilateral issuance of a no smoking policy. In early July, Mr. Ward called Ms. Jaurique to his office and read the unfair labor practice complaint aloud and then stated that since Ray [Mr. Labonski] had nothing better to do he was going to detail him to the Pittsburgh Resident Post, which was to become vacant July 17, for a month. Mr. Ward further told Ms. Jaurique that he didn't have to do it himself, he would get a supervisor to do it for him.

The Director of Operations, Raymond Benson, was on leave the first three weeks of July, 1978, and Mr. Frank Krivda, the senior team supervisor, was Acting Director of Operations, with Mr. Labonski, normally a member of Robinson's staff (Mr. Robinson was the other team supervisor), was Acting Supervisor of Krivda's team. On July 3, 1978, the Work Plan had been issued which showed that Ben Fink, a GS-9 investigator, and Joyce Allen, a GS-7 investigator, would cover the Pittsburgh Resident Post from July 17, 1978, through July 28, 1979. The record shows without contradiction that most details had been for a week and that the maximum duration had been two weeks. From its inception, the Pittsburgh Resident Post had been filled by a GS-9 investigator, although, on paper, it could have been filled with a GS-12. Both prior to creation of the Pittsburgh Resident Post and thereafter, all grades of investigators, GS-5 through GS-11, had been detailed to Pittsburgh. Mr. Fink, an experienced GS-9 investigator, wanted to go to Pittsburgh and had previous experience in Pittsburgh, his most recent assignment there having been in June, 1978. The record showed that a large case backlog had existed in Pittsburgh (See, Res. Exhs. 23, 24); however, as the result of the reassignment of cases and the assignment of additional personnel (See, Mr. Benson's memorandum to Mr. Ward dated June 12, 1978 (Attachment to Res. Exh. 23)), Mr. Robinson, who supervised the Pittsburgh Resident Post, testified that, in his opinion, as of July, 1978, there were not sufficient cases at the Pittsburgh Resident Office to require the presence of a GS-11 senior investigator and that, in his opinion, Mr. Fink could have performed the duties of Resident Officer in Pittsburgh.

On July 11, 1978, in a meeting with Robinson, Jaurique and Webb, Mr. Ward mentioned, to get the most out of the cost, sending someone to Pittsburgh "for a longer period of time," something of this sort ". . . that was not a request. It was just a subject that came up. It was, shall we say, thrown out at the meeting." (Tr. 387). Also on July 11, 1978, Mr. Ward asked Mr. Robinson for the itineraries for Mr. Armbrust, the other GS-11, and for Jane Hanlon. Mr. Robinson stated that this was the first time Mr. Ward had ever requested an individual employee's itinerary. The itineraries showed that Mr. Armbrust would not be available if a GS-11 were to be detailed to Pittsburgh on July 17 since only Armbrust and Hanlon did NEISS redesign training and both had scheduled NEISS assignments for this period. On the morning of July 12, Mr. Ward asked Mr. Krivda what Mr. Labonski was doing and Mr. Krivda told him he was an acting supervisor. Later that morning, Mr. Ward called Mr. Krivda to his office and asked Mr. Krivda what his plans were for covering the Pittsburgh Post. Upon being told by Mr. Krivda that he

intended to send Mr. Fink and Ms. Allen for a week each, Mr. Ward instructed Mr. Krivda to send a GS-11 for a month. Mr. Krivda told Mr. Ward that Mr. Armbrust was not available and that Mr. Labonski was the only other GS-11 and he was an acting supervisor. Mr. Ward insisted that Mr. Krivda assign a GS-11.

Mr. Ward knew that Mr. Labonski's wife was pregnant and was aware that this was not a routine pregnancy. In May, Mr. Labonski had spoken to Mr. Benson about his wife's pregnancy and had requested that he double up on travel so that he could avoid out-of-town travel in August and Mr. Benson had told him not to worry, that he wouldn't be travelling then. Although it was not shown that Mr. Benson discussed this matter with Mr. Ward, Mr. Ward's knowledge might reasonably be inferred; however, since Mr. Labonski told Mr. Ward on July 12, that he was having a great deal of difficulty with the assignment to Pittsburgh for a month because his wife was eight months pregnant and Mr. Ward made the comment to Ms. Jaurique that they had sent him to Korea when his wife was pregnant so why couldn't he send Ray [Labonski] to Pittsburgh, the direct testimony of Mr. Labonski and Ms. Jaurique, which I credit, shows that Mr. Ward acted with full knowledge that the detail of Mr. Labonski to Pittsburgh was a personal hardship to Mr. Labonski.

When Mr. Krivda told Mr. Labonski he was being detailed to Pittsburgh for a month, Mr. Labonski told Mr. Krivda that he [Labonski] couldn't do it and told Mr. Krivda that he would call Mr. Ward and personally express his difficulty with the assignment and Mr. Krivda said "Go ahead." Give it a try," whereupon Mr. Labonski called Mr. Ward and Mr. Ward testified that he told Mr. Labonski "to discuss any problems that he might have with" Mr. Krivda and that he told Mr. Krivda to "take care of the assignment"; and when Mr. Krivda said "So do you mean that you want a GS-11 in Pittsburgh" he, Ward, had responded "I thought that was what my instructions were at first." Mr. Labonski again discussed the hardship of his going to Pittsburgh, because of his wife's pregnancy, with Mr. Krivda and suggested that perhaps Mr. Armburst could go; but Mr. Krivda replied that the earliest Mr. Armbrust could go would be in two weeks. As it appeared to Mr. Krivda from Mr. Ward's comments that Mr. Ward was interested only in having a GS-11 in Pittsburgh, he agreed to send Mr. Labonski for two weeks to be followed by Mr. Armburst. Mr. Labonski talked to Mr. Armbrust on July 12 and Mr. Armbrust told Mr. Labonski he would be happy to go to Pittsburgh after Labonski's two week detail for whatever length of time was necessary under Mrs. Labonski was out of danger and the baby was born. On July 24, Mr. Armbrust confirmed his going to Pittsburgh for a month and a half with Mr. Robinson, his immediate supervisor, and with Mr. Benson.

On July 25, 1978, Mr. Ward again mentioned to Ms. Jaurique his displeasure with Mr. Labonski's Union activities which he described as a means to harass him [Ward] and went on to say he was upset with some of the people in the office because there had been a switch in detailing Labonski to Pittsburgh for a month and that he "made it clear to the supervisors that Ray was to go for a month to Pittsburgh." However, pretending ignorance of the "switch in detailing," Mr. Ward did nothing until July 31 when Mr. Labonski was back in the office. With full knowledge that Mr. Armbrust was ready to go to Pittsburgh, Mr. Ward ordered Mr. Krivda to stop Mr. Armbrust from going to Pittsburgh and Mr. Ward ordered Mr. Benson to order Mr. Robinson to send Mr. Labonski back to Pittsburgh for another two weeks. Mr. Benson told Mr. Robinson that if Mr. Labonski refused to go he, Robinson, was to charge Labonski with insubordination. In a most revealing comment, Mr. Robinson testified that when he asked Mr. Benson if this direction was from him, Benson, or from Mr. Ward, Mr. Benson said "It comes from Mr. Ward . . . if you ask me if he said that, I'll say no. . . ."

The record shows that Mr. Ward was beset with two obsessions: First to punish Mr. Labonski for his Union activity, which Mr. Ward considered personal harassment, and perhaps, also just to get Mr. Labonski "out of his hair" for a month. Second, to make it appear that he, Ward, was blameless (See, also Re. Exh. 6). On July 11, he suggested sending someone to Pittsburgh "for a longer period of time" and obtained the itinerary for Mr. Armbrust, one of the two GS-11s in the office, Mr. Labonski being the other. On July 12, he told Mr. Krivda to send a GS-11 to Pittsburgh for a month; when Mr. Labonski told Mr. Ward he had a problem with the assignment because of his wife's pregnancy, Mr. Ward told him to discuss any problem he has with the assignment with Mr. Krivda and he told Mr. Krivda that he wanted a GS-11 in Pittsburgh but carefully refrained from any statement to Mr. Krivda that Mr. Labonski was to be detailed to Pittsburgh for a month. Mr. Krivda, not being privy to Mr. Ward's true purpose, namely to subject Mr. Labonski to a detail out of town for a month, which Mr. Ward knew was a personal hardship to Mr. Labonski, in retaliation for Mr. Labonski's Union activities, reasonably believed from Mr. Ward's comments that Mr. Ward simply wanted a GS-11 in Pittsburgh which, in view of Mr. Labonski's personal problem, he achieved by the detail of Mr. Labonski for two weeks, to be followed thereafter by Mr. Armbrust.

The record strongly suggests that Mr. Ward's decision to send any GS-11 investigator to Pittsburgh was of doubtful wisdom, and, in reality, was simply a ruse

to reach Mr. Labonski[15] but under Section 11(b) of the Order, agency management has the right to determine ". . . grades of positions or employees assigned to an organizational unit, work project or tour of duty. . .", encompassing the wise as well as the ill conceived (But see, Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656, 6 A/SLMR 237 (1976)). While Respondent could properly decide that the Pittsburgh Resident Post should be manned by a Senior, GS-11, Investigator, exercise of otherwise legitimate authority to "interfere with, restrain, or coerce an employee in the exercise of the rights assured by the Order" (Section 19(a)(1), by "discrimination in regard to . . . conditions of employment" to encourage, or discourage membership in a labor organization (Section 19(a)(2)), or to "discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under the Order" (Section 19(a)(4)), is an unfair labor practice. I find that Mr. Ward's order to assign a GS-11 investigator to Pittsburgh on July 17, 1978, without knowledge that Mr. Labonski was the only GS-11 investigator then available, and with intent and design to punish Mr. Labonski for his union activity, including the filing of an unfair labor practice complaint under the Order, violated Sections 19(a)(1), (2) and (4) of the Order.

5-6. Refusal to Bargain.

Under Section 7116(a)(5), it is an unfair labor practice for an agency:

"to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . .

This is the most violated ULP. Usually it is because management did not realize it had a duty to negotiate, or refused to concede that the exclusive representative could usurp what the commander/manager felt was his traditional decision-making powers as a commander/manager. The following case illustrates what happened when a commander made changes to work practices without bargaining with the exclusive representative (unilateral changes).

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[15] For example, Mr. Benson's memorandum of June 4, 1978, shows action taken to deal with the Pittsburgh backlog; Mr. Ward testified that he had no knowledge of the case load in Pittsburgh as of July, 1978; yet he made no inquiry before making his decision; and Mr. Robinson testified that, because of the various actions taken, in his opinion, there was no need to detail a GS-11 senior investigator to Pittsburgh as of July, 1978. Nor was there any economy of travel (See, TR. 159-161).

U.S. ARMY FINANCE AND ACCOUNTING CENTER
FORT BENJAMIN HARRISON, INDIANAPOLIS, INDIANA
A/SLMR No. 651 (May 19, 1976)

[Recommended Decision of the Administrative Law Judge]

. . . .

Findings of Fact

1. At all times material herein Local 1411 AFGE was the exclusive collective bargaining representative for an Activity wide unit, including all professionals, and excluding the usual supervisory, managerial and personnel employee exclusions.

2. The Activity and Local 1411 AFGE entered into a collective bargaining agreement with an effective date of September 26, 1973, and duration of three years.

3. Article III Section 2 of the agreement provides, in part, ". . . No management or staff official will issue or implement any local policy statement on a negotiable issue or any matter that is appropriate for consultation unless it has been referred to the Union."

4. Article III Section 6 of the Agreement provides that pending the adjustment of any negotiable matter there will be no change in conditions and that the "determination of any negotiable issue will be accomplished by means of the conference machinery. . . ." Section 7 provides that the Agreement is a "living" document and the parties must meet to discuss and consult on matters not originally covered. Section 8 provides that practices, etc., which have not been specifically covered by the Agreement will not be changed prior to discussion with the Union.

5. Article XVII Section 11 provides, that an employee won't be charged as tardy or with annual leave if he is in his seat or "accounted for in his immediate work area when his tour of duty begins."

6. On November 20, 1974, prior to 10:00 a.m., Mr. Robert Ege, Labor Relations Specialist for the Activity delivered to Union President, Mr. Thomas A. Walton, a draft of a memorandum entitled "Poor Work Habits." Mr. Ege advised Ms. Walton that this was a "hot item" and that there was a meeting of supervisors scheduled that day at 12 noon for distribution of the documents. Mr. Ege also indicated that the decision had already been made and therefore any Union comments really didn't matter. Mr. Walton protested and advised Mr. Ege that he felt the memorandum violated Article XVII, Section 11 of the contract.

7. Between 10:00 a.m. and 12 noon of November 20, Mr. Ege delivered to Mr. Walton another copy of the draft memorandum on "Poor Work Habits." This was accompanied by a transmittal slip, which advised the Local 1411 AFGE

that it was being transmitted for consultation purposes and that Local 1411 AFGE would have to submit comments prior to 10:00 a.m. on November 21, and that failure to do so would result in the memorandum being issued to all first line supervisors during the afternoon of November 21, 1974.

8. Local 1411 AFGE President Walton responded in a timely fashion stating, in writing, that Paragraph 1(a) of the proposed memorandum violated Article XVII, Section 11 of the contract and requested that "proper negotiation procedures be established as outlined in Article XL, Section 2 and 3." President Walton also referred to Article III, Sections 6, 7 and 8 of the Agreement. He also requested that part of paragraph 3 of the draft, including the table of penalties, be deleted and that the release date of the memorandum of November 21, be rescinded and that "Union and Management jointly consult, and negotiate on proposed action." Finally, he requested that the Union be notified, in writing of any action taken "prior to implementation."

9. Mr. Ege met with Mr. Walton and briefly discussed the Union's position. Mr. Ege testified that he really only had authority to transmit Local 1411 AFGE's position to the proper decision making authorities. In his recommendation to higher authorities Mr. Ege concluded that the memorandum didn't constitute a change in conditions and therefore "negotiations . . . are not required." In this regard he noted that previously the Centralized Pay Operations instituted a procedure similar to paragraph 1 of the proposed memorandum and noted that the matter was not "formally grieved by the Union."

10. On November 21, 1974, at 12:00 noon the Activity met with its supervisors and distributed a memorandum concerning "Poor Work Habits." This memorandum, although not identical to the draft shown to the Local 1411, AFGE, was, in all major respects, substantially identical to the draft and did not incorporate any of the Union's proposals.

11. The Union was not contacted or communicated with from the time Mr. Ege met with Mr. Walton immediately after receipt of the Union's reply (as described in paragraph 9) and the issuance of the final memorandum.

NOTE: All footnotes are deleted.

12. The terms of the memorandum of November 21, were then instituted and applied to the employee in the collective bargaining unit.

13. The November 21 memorandum provided in paragraph 1 that first line supervisors must enforce the following requirements:

a. Employees will be at their desks or work stations ready to commence work at the beginning of the official tour of duty, after break periods and at the end of their official lunch periods. Except for the approved break periods, employees must be in their designated work areas or under your supervisory control completing their assigned work.

b. Personal conversations during non-break periods will be kept at a minimum. Visiting on personal matters will be done during nonduty periods.

c. Clean up time will be allowed for desk and work area only. A maximum of 3 to 5 minutes will be allowed at the end of the employees' tour of duty.

d. No coats and/or overshoes will be put on prior to completion of the official tour of duty. There will be no line ups to leave at doorways and in hallways. All employees will remain at their desks until completion of the duty tour.

14. Paragraph 3 of the Memorandum of November 21 stated that noncompliance with the requirements of the memorandum would result in disciplinary action and set forth a table of penalties which provided for an oral warning for a first offense; a written reprimand for a second offense; a 1-5 day suspension for a third offense; and a 5-day suspension to removal for a fourth offense.

15. On November 25, the Activity issued a memo to all Operations Directors referring to the November 21 memorandum and stating that employees who come in tardy must be charged with AWOL if [they do] not have meritorious justification.

16. The Union was neither shown, nor advised of this November 25 memorandum in advance of its being issued.

17. On December 21, 1974, at the monthly Union-Activity meeting, Mr. Walton attempted to raise the "Poor Work Habits" issue with General Currier, the Commanding Officer, but General Currier refused to discuss it because it was apparently not on the agenda.

18. Prior to the issuance of the November 21 memorandum an employee was not considered tardy or AWOL if he was accounted for in his "work area." This is distinguished from "work station," as provided in the November 21 memorandum. The former refers to a more general area in which the employee works, whereas the latter referred to the specific machine to which the employee was assigned.

19. Prior to the issuance of the November 21 memorandum personal conversations in the work area, during non-break periods, were permitted; employees were permitted to discuss personal matters during non-break periods; employees were permitted a rather liberal clean

up period and were allowed more than 3 to 5 minutes for clean up time; and they were permitted to put on coats and overshoes prior to the actual end of the tour of duty.

20. Prior to the issuance of the November 21 memorandum and its required penalties supervisors had been quite flexible and had permitted tardy employees to work during breaks or to take annual leave, but they were not normally charged with being AWOL.

Conclusions of Law

1. It is concluded that the time at which an employee is considered to have reported and be ready for work, at his "work station" or in the "work area," is a term and condition of employment, as are whether personal conversations, etc., are permitted during non-break periods, the amount of time permitted for cleanup, and whether employees can put on coats and overshoes prior to the actual end of the tour of duty.

2. It is concluded that generally permitting tardy employees to either take annual leave or to work during breaks to make up the late time are terms and conditions of employment.

3. An activity is not permitted to alter or change such working conditions without first notifying the collective bargaining representative of the employees affected and, upon request, bargaining about such proposed changes before they are put into effect. Cf. IRS, Office of the Regional Commissioner, Western Region, A/SLMR No. 473; NLRB Washington, DC, A/SLMR No. 246; and VA Hospital, Charleston, SC., A/SLMR No. 87.

4. In the subject case the Activity notified the Union of the proposed changes in working conditions but when advised that the Union was not agreeing to the proposed changes, the Activity gave the Union only 24 hours to make written comments. The Union protested the limited time and requested to meet and negotiate concerning these proposed changes. The Union's request was not granted and the proposed changes were put into effect almost immediately.

5. The Activity was in fact advising the Union of changes it was going to make and did not wish to seriously consider any Union proposals.

6. The Activity's position that, because in the past it had required the Union to respond in writing, often allowing little time for the response the Union agreed to such a procedure, is rejected. In the instant case the Union specifically requested to meet and bargain. There was no showing with respect to the past occurrences that the union didn't agree with the changes or that it requested to meet and bargain.

7. Similarly, the activity's position that the Union had by contract or practice waived its right to negotiate and bargain about such changes in working conditions and had settled for some limited type of consultation permitting the activity to require the union

to respond in 24 hours, in writing, and nothing more is also rejected. The entire thrust of the contract is to have the parties meet, confer and negotiate concerning changes in the agreement or in terms and conditions of employment. The activity relies on NASA, Kennedy Space Center, A/SLMR No. 223 as establishing that a Union can waive its rights under the Order. But, in that case, the Assistant Secretary held that such a waiver must be clear and unmistakable and, in fact, he found no such waiver. In the subject case, considering the contract, as a whole, it does not appear that the Union waived its rights to bargain about such a fundamental matter as changes in working conditions.

8. The Activity has not submitted any evidence to justify why the proposed changes had to be made on such short notice and couldn't have been postponed so as to permit negotiation with the Union.

9. Further all of the Activity's references to various manuals and regulations establish that the changes were permitted and proper, but not that they were required, or that the prior practices were improper or violated the various regulations.

10. In light of all of the foregoing it is concluded that the Activity did not negotiate and bargain in good faith with the union about the changes in working conditions, as is required by Section 19(a) (6) of the Order, because it did not give the Union notice in sufficient time to prepare a response, did not meet, confer and negotiate with the Union concerning the proposed changes, and had no intention of considering, in good faith, any Union proposals. Therefore, it is concluded that the Activity violated Section 19(a) (6) of the Order.

11. Such conduct also has a foreseeable effect of interfering with, restraining and coercing employees in exercising their rights as protected by the Order and therefore violated Section 19(a) (1) of the Order.

Recommendation

In view of my findings and conclusions stated above, I make the following recommendations to the Assistant Secretary of Labor for Labor-Management Relations:

That Respondent be found to have engaged in conduct prescribed by Section 19(a) (1) and (6) of Executive Order 11491, as amended, by its unilaterally changing terms and conditions of employment without giving Local 1411 AFGE adequate advance notice and by refusing to meet, confer and negotiate with the Union about the changes, and that the following order, which is designed to effectuate the policies of Executive Order 11491, as amended, be adopted:

. . . .

NOTE 1: The Assistant Secretary adopted the ALJ's findings, conclusions, and recommendations with certain modifications in the remedial order. Thus, if the change affects working conditions, notice must be given the exclusive representative and management must negotiate with the union if the union so desires.

NOTE 2: In AG Publications Center, 24 FLRA 695 (1986), the Authority held that the activity was not required to negotiate with the union over its decision to cancel an annual employee picnic. The FLRA reasoned that the picnic was not a condition of employment because it had no direct connection to the work situation or employment relationship of bargaining unit employees.

NOTE 3: Recall that no notice or opportunity to bargain need be given to the union if the change to be instituted has no more than de minimis impact on the bargaining unit employees. SSA and AFGE, 19 FLRA 827 (1985). In EPA, Region II and AFGE, 20 FLRA 644 (1985), the Authority applied the factors set forth in the previous case and found that a relocation of 12 unit employees from one area to another on the same floor had de minimis impact when the parties had no past practice involving these procedures.

NOTE 4: The activity violated sections 7116(a)(1) and (5) of the Statute when it unilaterally changed the existing time frame for processing cases within its Estate and Gift Tax Group without giving prior notice to the union and affording it an opportunity to consult or negotiate concerning impact and implementation of the change when the change had a substantial impact on the employees' working conditions. The fact that the completion dates were easily changed and that none of the attorneys were subjected to meetings with the Chief of the Branch is of no import as the absence of enforcement bears solely on the remedy and not on the change. Department of Treasury IRS, Jacksonville District and NTEU, 3 FLRA 630 (1980).

NOTE 5: Issues concerning disclosure of bargaining unit employees' names and home addresses to unions upon request have had a lengthy litigation history. Under CSRA § 7114(b)(4), management has a duty to furnish data necessary for a union to fulfill its bargaining obligations upon the union's request. The disclosure of such data as names and home addresses, however, implicates employee privacy concerns, which in turn resulted in many cases involving requests for release of such information. While the Authority has remained steadfast in its commitment to requiring the release of this information, there has been a clear split in the circuits regarding the propriety of this position. Most circuits considering the issue have found release of this information to be a violation of the Privacy Act and have denied enforcement. FLRA v. DOD, 984 F2d 370 (10th Cir. 1993) Navy v. FLRA, 975 F2d 348 (7th Cir. 1992), FLRA v. Department of Veterans Affairs, 958 F.2d 503 (2d Cir. 1992); FLRA v. Navy, 941 F.2d 49 (1st Cir. 1991); FLRA v. Dept of Treasury, Financial Management Service, 884 F.2d 1446 (D.C. Cir 1989), cert. denied, 110 S. Ct. 863 (1990). A minority of the circuits have found the federal labor relations concerns to be paramount and have ordered release of the information. FLRA v.

DOD, 975 F.2d 1105 (5th Cir. 1992), cert. granted 113 S. Ct. 1642 (U.S. Mar. 29, 1993)(No. 92-1223); FLRA v. Navy, 958 F.2d 1490, (9th Cir. 1992); FLRA v. Department of Commerce, 954 F.2d 994 (4th Cir. 1992). The 5th Circuit case is currently before the Supreme Court in order to resolve the conflict.

NOTE 6: If, during negotiations of a new CBA, the existing CBA expires, many of the provisions of the old CBA will continue to have effect. IRS Brookhaven, FLRC No. 77-A-92 (1977).

The Past Practices Doctrine.

Often a local employment-related practice has been established informally (known as a "past practice") and the management action has the effect of changing the past practice without affording the union an opportunity to negotiate. For a discussion of this problem in the context of both negotiations and grievance arbitration, see Coupe, D.F., The Past Practices Doctrine in Federal Labor-Management Relations in The Army Lawyer (September 1978), at 1. The following synopsis may also be helpful in understanding the effects of past practices:

A. Negotiations. This doctrine requires local management to negotiate within the recognized scope of bargaining on changes in informally established personnel policies, practices and working conditions which may be (1) covered by ambiguous language in the contract; or (2) not covered at all by the contract. The obligation to bargain on such changes is enforceable as an unfair labor practice under §§ 7116(a)(1) and (5). Thus, where local management wants to change an established personnel practice, it must offer to negotiate with the union. The extent of negotiation required varies according to the following:

(a) If the change by management concerns matters that are mandatorily negotiable, management must negotiate to the full extent of its discretion, whether to have the change and how to make the change.

(b) If the change sought by management is an attempt to enforce management rights that have been afforded employees which were optionally negotiable, management must also negotiate fully but only as to the impact and implementation of the change but need not negotiate the decision whether to continue the practice.

(c) If the change by management is in response to a requirement of law or an assertion of prohibited negotiable rights (for which there is no authority to allow the concession), management should revoke the illegal practice immediately, giving notice concurrently to the union that it stands ready to negotiate the impact and implementation which local management can control.

(d) Depending on the facts, the Authority may well find that there is no appreciable impact within the control of local management thus there may be no need to negotiate at all. SBA, Puerto Rico, A/SLMR No. 751 (Nov. 17, 1976).

The doctrine does not apply to negotiations:

(a) if there is no exclusive representative; or

(b) if there is a specific CBA provision which gives management the right to the unilateral change; or

(c) where the subject is not negotiable.

The past practices doctrine does not render permissive nor prohibited matters negotiable. Further, negotiation is required only to the extent that the change is controlled by local management.

B. Grievance Arbitration. The past practices doctrine is also applied in the arbitration of grievances to construe party intent and to formulate appropriate remedies.

SSA, KANSAS CITY
AND
AFGE LOCAL 1336
9 FLRA 229 (1982)

Recommended Decision and Order of the Administrative Law Judge

Findings of Fact

. . . .

1. At all times material herein, the National Office of the American Federation of Government Employees, AFL-CIO, (National Council of Social Security Payment Center Locals), of which the Union herein, a labor organization, is an agent and constituent local representative, has been recognized as the exclusive representative for a unit consisting of all non-supervisory employees (including professionals) in all the Social Security Administration Program Service Centers, excluding management officials and employees engaged in Federal personnel work in other than a purely clerical capacity.

2. At all times since June 10, 1969, Local 1336, AFGE has been the exclusive representative or the agent of the exclusive representative of the employees in the unit described above and employed at Respondent's Kansas City, Missouri Mid-America Program Service Center.

3. Respondent has approximately 2200 employees. Most of the work is accomplished in 42 modules of 50 employees each. Each module is headed by a manager and two assistants. Above the module organization are seven section chiefs with responsibility for six modules each, two branch chiefs, the Director of Operations, and the Director.

4. The authorized daily hours of work has consistently included a 30 minute lunch period and two 15 minute rest periods or breaks. Breaks are considered official time and employees are considered to be on duty.

5. Immediate supervisors and all supervisory positions above them have consistently been authorized to excuse brief absences and tardiness from duty of less than an hour and to consider such absences as time on duty when the reasons appeared to be adequate. Absences, or tardiness of more than one hour, are to be charged to leave.

6. Prior to March 12, 1979, some module supervisors excused one or more employees from duty for five to 30 minutes prior to the beginning of the allotted lunch period, and for a similar period after the luncheon, so that such employees could prepare for, and clean up after, special lunch functions for such occasions as holidays, birthdays, retirements, showers, and related celebrations. Such luncheons often ran over the allotted 30 minute period, and such supervisors excused the excess time for employees in their module.

7. Prior to March 12, 1979, some module supervisors excused employees from duty before and after breaks in order to prepare food and drink when special celebrations of birthday parties, showers, etc., were scheduled during the breaks. Such celebrations often caused the breaks to run over the allotted 15 minute period, and such supervisors excused the excess time for employees in the module.

8. Prior to March 12, 1979, the Direction of Operations held staff meetings with section chiefs and branch chiefs and orally reminded them on at least a monthly basis to restrict employee lunches to 30 minutes and breaks to 15 minutes. Section Chiefs and/or branch chiefs, in turn, would meet with their respective manager to disseminate the information.

9. MAMPSC Guide 7-1, implemented March 12, 1979, noted that the lunch time for SSA employees is "no more than a 1/2 hour period. Consequently, employees must confine their preparation, eating and cleaning up time to this lunch period."

10. Since the issuance of MAMPSC Guide 7-1 lunches and breaks have been confined to the authorized times and administrative or official time for luncheon preparation and clean-up, or break preparation and clean-up has not been permitted.

Catering of luncheons

11. Prior to March 12, 1979 the food for special occasions luncheon functions for unit employees was often brought in and set up by a catering establishment, or restaurant located outside of Respondent's various buildings, or by the in-building cafeteria.

12. MAMPSC Guide 7-1, implemented March 12, 1979, provided that "outside catering (including in-building cafeteria will not be permitted.)"

13. Since the issuance of MAMPSC Guide 7-1 outside catering of luncheons has been severely curtailed, or, in most cases, completely eliminated.

Ordering out and having food delivered

14. Prior to March 12, 1979 many unit employees consistently participated in the "ordering out" of luncheons, whereby groups of employees would agree together to order food for lunch from a particular outside establishment. The food order would either be picked up by a unit employee and brought back to the work area, or delivered by the outside establishment to the work area.

15. Since the issuance of MAMPSC Guide 7-1 on March 12, 1979 the practice on ordering out and having food delivered by outside establishments has been severely curtailed, or, in most cases, completely eliminated.

Special activities during break, display of food at break and at other than luncheon period

16. Prior to March 12, 1979, many, if not most, unit employees routinely participated or engaged in celebrations of various types during morning and afternoon break periods for such occasions as baby showers, birthday parties, and employee resignation and reassignments. During this time food and drink served at these luncheon and break functions would remain on display in the work area for consumption by unit employees during the rest of the regular duty time.

17. MAMPSC Guide 7-1, implemented March 12, 1979, provided that, "a display of refreshments will not be permitted before or after the assigned lunch time." The Guide also provided that, "any other activities not covered or authorized above (e.g., baby showers, birthday parties, etc.) are not authorized to be held during regular duty time."

18. Since the implementation of the MAMPSC Guide special celebrations during the break period and the display of refreshments at other than lunch time have been severely curtailed, or eliminated.

Inter-module collections of donations

19. Prior to March 12, 1979 envelopes requesting monetary donations for employees undergoing retirement, recent death of family members, or personal tragedies were routinely circulated to the desks of unit employees, or to their work areas. Such collection envelopes would be circulated frequently and routinely within the initiating component's work area and throughout other work areas.

20. MAMPSC Guide 7-1, implemented March 12, 1979 provided that the circulation of collection envelopes to components outside the initiating component's area was not authorized.

21. Since the March 12, 1979 the circulation of collection envelopes to components outside the initiating component's area has been eliminated.

Employee dress code - costumes

22. Prior to March 12, 1979 a small percentage of the 2200 employees of the Respondent would wear costumes during duty time in celebration of such holiday functions as Halloween, Thanksgiving, Christmas, and St. Patrick's Day. One or more employees were observed on some of these occasions dressed in Santa Claus, elves, and pilgrim costumes. One module manager once wore a pilgrim costume. One or two employees also once went through various modules at Halloween wearing gorilla masks or clown costumes.

23. The SSA Guide on Employee Conduct, issued in September 1978 and made available to unit employees, provided, in part, that "An employee shall observe standards of dress and appearance acceptable in the community and suitable to the work environment."

24. MAMPSC Guide 7-1, implemented on March 12, 1979, provided, in part, that, "Except in rare situations requiring the Director of Management's approval, employees are prohibited from wearing "costumes" during working hours.

25. Since the implementation of the MAMPSC Guide, no unit employees have been observed wearing costumes.

Retirement activities during duty hours

26. Prior to March 12, 1979 retirement receptions were held for retiring employees. The conference room was reserved. One or two employees from the retiree's unit would be permitted official time to decorate the room, serve punch and cake, and clean up afterwards. The receptions were usually scheduled for two hours in the afternoon in order to accommodate staggered break periods and allow the retiree to be greeted by fellow employees. Employees from throughout the Center, who were acquainted with the retiree and were granted permission by the supervisor, were permitted to attend the reception during their break period. Such receptions were usually attended by a large number of unit employees and supervisors. These retirement receptions occurred not more than eight times a year prior to 1978. During 1978 there were as many as 20 retirement receptions a year and the number was expected to increase.

27. MAMPSC Guide 7-1, implemented on March 12, 1979, provided that, "Retirement receptions and parties will not be permitted in the work area during duty time. Luncheons for retirement purposes will be subject to the above stated policy [governing luncheons]."

28. Since the implementation of the MAMPSC Guide, retirement luncheons have been limited to the employee's own work place during the 30 minute lunch period. No retirement receptions of the type occurring prior to March 12, 1979 have been permitted.

Consultation/Bargaining concerning MAMPSC Guide 7-1

29. On December 5, 1978 Respondent transmitted to the Union MAMPSC Guide 7-1, "Social Activities at the Worksite" in draft form. The Union immediately prepared a memorandum to Respondent requesting negotiations on the proposed issuance of the Guide. The parties agreed to meet on February 8, 1979.

30. At the February 8, 1979 meeting, the parties discussed the language and content of the transmittal sheet attached to the subject Guide and the language and content of the proposed Guide itself. The Union conceded management's right to curtail such activities as the wearing of gorilla costumes by unit employees, but opposed issuance of the Guide itself. The Union orally advanced two proposals: (1) no change in existing conditions of employment; and (2) in the alternative, the institution of a flex band at lunch time.

31. Respondent transmitted to the Union its final proposed version of the Guide on March 5, 1979, which indicated a proposal implementation date of March 12, 1979. The Union requested and was granted a second meeting on March 8, 1979.

32. The March 8, 1979 meeting was very brief and consisted of the Union presenting Respondent with written proposals concerning the subject Guide which were identical to those raised orally at the February 8, 1979 meeting. Respondent replied that management had considered the Union's previous proposals and the written proposals were nothing new. At this point, Reginald T. Huey, Union executive vice president, used the telephone to call the local office of the Federal Mediation and Conciliation Service (FMCS). He advised FCMS that the parties were involved in negotiations and needed assistance. Robert D. Pack, Respondent's labor relations specialist, advised Mr. Huey that, "We're not negotiating, we're consulting." Mr. Huey then left Mr. Pack's office after handing him a typed FMCS form.

33. Mr. Pack received several phone calls from FMCS Commissioner Calvin Hogue that day and later furnished Mr. Hogue all the relevant and pertinent documents which he had requested. Upon being advised that the FMCS could do nothing further, Mr. Huey prepared a request to the Federal Service Impasses Panel (FSIP).

34. The following day, March 9, 1979, Mr. Pack received a copy of the Union's request of the FSIP for assistance. Respondent implemented the subject Guide on March 12, 1979 and considered it in full force and effect from that date onward. On or about March 25, 1979, Mr. Pack received formal notice from the FSIP that a request for their services had been filed. Respondent furnished to the FSIP all requested information. Subsequently, the Union withdrew its request for FSIP assistance, and Respondent was so notified. In the intervening period, the instant unfair labor practice charge was filed.

35. At all times material herein the above named parties were governed by one of two national master collective bargaining agreements. The 1974 national master agreement provided in Article 2, section e that, "the Program Center will consult with its respective Local on matters within the authority of the Regional Representative relating to personnel policies, practices, and working conditions." Accordingly, in January 1975 Respondent and Union formalized their "consultation practices" by agreeing as to the levels of management and the union to be involved in "consultation" and the formality of the requests. The 1978 national master agreement did not contain any description of the local bargaining arrangement, because that issue was subject to reopening as soon as its negotiability was finally determined. Following a negotiability determination, the matter was before the Federal Service Impasses Panel in March 1979. At this time, Respondent was instructed to follow the prior contract with respect to its dealings with the Union.

Discussions, Conclusions, and Recommendations

The General Counsel alleges that Respondent unilaterally changed past practices rising to the levels of conditions of employment in eight areas by issuing MAMPSC Guide 7-1.

In order to constitute the establishment by practice of a term and condition of employment the practice must be consistently exercised for an extended period of time and followed by both parties, or followed by one party and not challenged by the other over a substantially long duration. Cf. Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA 412 (1980).

Based on the above findings and the entire record, I conclude under this criteria that a preponderance of the evidence does not establish the existence of a past practice throughout the Center with regards to the granting of official or administrative time for luncheons and breaks extending over 30 and 15 minutes, respectively, or for the preparation and clean-up of such luncheons and celebrations during breaks. Some module supervisors did excuse employees from duty for such activities, but higher management at the Center continually reiterated that the lunch period was limited to 30 minutes and breaks to 15 minutes and sought to have the supervisors enforce these limits. Thus, MAMPSC Guide 7-1, by confining the preparation, eating, and cleaning up of luncheons to 30 minutes merely reaffirmed existing personnel policies and practices at the Center.

Similarly, a preponderance of the evidence does not establish the existence of a past practice whereby unit employees consistently wore costumes for holiday celebrations during working hours. Such incidents as are reflected in the record are properly deemed isolated occurrences by a small number of employees among the 2200 employees at the Center. These incidents do not prove

the existence of a recognizable working condition. A reasonable person would not view these isolated incidents as reflecting a consistent pattern that suggests reoccurrence based on design as distinguished from reoccurrence based on luck or one-time affairs. Thus, MAMPSC Guide 7-1, by prohibiting the wearing of personnel policies and practices at the Center providing for "the standard of dress and appearance acceptable in the community and suitable to the work environment."

The preponderance of the evidence does establish that MAMPSC Guide 7-1 changed past practices rising to the level of conditions of employment by prohibiting unit employees from having (1) retirement receptions as previously conducted, (2) inter-module collections of donations, (3) employee activities during break and the display of food and refreshments at breaks and at other than luncheon periods, (4) catering of luncheons, during the authorized luncheon period, and (5) ordering out and delivery of food for lunch. It is well established that terms and conditions of employment established by past practice may not be altered by either party in the absence of agreement or impasse following good faith bargaining. Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA 412 (1980).

The record reflects that Respondent unilaterally made these changes in past practice without bargaining in good faith. The Union's specific proposals were neither agreed to by management, modified and agreed to by the parties, withdrawn by the Union, or in any other way resolved by the parties as required by the Statute prior to the time the changes were implemented through the MAMPSC Guide on March 12, 1979. Respondent viewed its primary obligation under the master agreement and a 1975 memorandum as one of "consultations" rather than "negotiations." This argument must be rejected for the same reasons set forth in a series of decisions under the Executive Order affirmed by the Assistant Secretary and cited with approval most recently in Department of Health, Education and Welfare, Social Security Administration, Great Lakes Program Center, Chicago Illinois, 2 FLRA 559 (1980). Neither the master agreement nor the January 1975 agreement in which Respondent and the Union formalized their oral "consultation practices" constituted a clear and unmistakable waiver of the Union's right to bargain mid-contract changes. No differentiation is spelled out between "consult" and "negotiate."

Respondent's additional arguments that a critical work exigency existed and that the nature of the Union's proposals and its actions on March 8, 1979 justified the unilateral implementation of the changes are also rejected. Accordingly, it is concluded that Respondent violated section 7116(a)(5), by refusing to negotiate in good faith, and derivatively, section 7116(a)(1) of the Statute.

Alleged Refusal to Cooperate with Impasse Procedures

The General Counsel alleged that Respondent violated section 7116(a)(6) and (8) by refusing to cooperate with impasse procedures. The General Counsel contends that Respondent's action in unilaterally implementing the MAMPSC Guide on March 12, 1979, after having received notice of the Union's request for the services of the Federal Service Impasses Panel, and before such request had been acted on by the Panel, constituted a failure to cooperate in impasse procedures, regardless of whether an actual negotiation impasse had been reached and regardless of whether the impasse request was proper.

It is noted that Respondent furnished all information requested by the Panel and, in so doing, contended, in part, that its issuance of the Guide was not negotiable and that its obligation on such matters was only to consult with the Union. This position was Respondent's basic error in the controversy and the remedy afforded herein ror a violation with regard to its failure to bargain in good faith makes it unnecessary to reach the issue of a separate violation of section 7116(a)(6) and (8). However, if it were deemed proper to reach this issue, I would conclude that there was no "impasse" within the meaning of 5 C.F.R. section 2470.2(e) which "means that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement." Consequently, in my view, the impasse provisions of section 7119(b) of the Statute were inapplicable and, under the circumstances, I would find no separate violation of sections 7116(a)(6) and (8) as alleged.

. . . .

NOTE 1: On 24 June 1982, the Authority adopted the ALJ's findings, conclusions and recommendations.

NOTE 2: The Authority found that the agency violated §§ 7116(a)(1) and (5) when it unilaterally eliminated an established past practice by issuing an instruction stating that leave without pay (LWOP) will not be granted to employees who had reached the maximum allowable earnings for a pay period, and then failing to bargain in good faith over this change and its impact on unit employees. The Authority found that a past practice of granting LWOP at the discretion of supervisors existed and rejected the agency's argument that it was effectively discontinued. Whatever attempt made by the activity to end the practice was not communicated to the union, nor was it ever made clear to management's own supervisors. Portsmouth Naval Shipyard, 5 FLRA 352 (1981).

NOTE 3: Annual picnic and post exchange privileges as past practices. See AG Publications Center, 24 FLRA 695 (1986); AFGE v. FLRA, 866 F.2d. 1443 (D.C. Cir. 1989).

NOTE 4: The FLRA has ruled that a past practice is irrelevant when it does not affect bargaining unit employees or is within management's exclusive authority. AFGE Local 2761 v. FLRA, 866 F.2d 1443 (1989).

5-7. Failure to Cooperate in Impasse Procedures.

It is an unfair labor practice for an agency to:

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter; . . .

FLORIDA NATIONAL GUARD
and
NATIONAL ASSOCIATION OF GOVERNMENT
LOCAL R5-91, R5-107, R5-120
Case No. 4-CA-407

. . . .

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute (the Statute), 92 Stat. 1191, 5 U.S.C. § 7101 et seq. It was instituted by the issuance of a Complaint and Notice of Hearing on April 22, 1980 based upon a charge filed on March 25, 1980 by National Association of Government Employees, Locals R5-91, R5-107, and R5-120, herein referred to as the Charging Party or Union. The Complaint alleges, and there is no serious factual dispute, that Florida National Guard, herein referred to as the Respondent, rejected and refused to comply with a Decision and Order of the Federal Service Impasses Panel, herein referred to as the FSIP or the Panel, in Case No. 78 FSIP 100. By so doing, Respondent is alleged to have violated Sections 7116(a)(1), (5), (6) and (8) of the Statute.

The issues, as set forth in the General Counsel's brief, are as follows:

A. Whether Respondent's refusal to comply with a Decision and Order of the FSIP violates Sections 7116(a)(1), (6) and (8) of the Statute.

B. Whether Respondent's refusal to enter into negotiations with the Union concerning compliance with a Decision and Order of the FSIP, upon request by the Union, violates Sections 7116(a)(1) and (5) of the Statute.

This case represents another chapter in the continuing saga of the efforts by the National Guard to eventually obtain court review of a decision of the Federal Service Impasses Panel. In the absence of any statutory provision permitting direct review of an adverse FSIP decision, the National Guard in this and in other cases throughout the country[1] is exhausting its administrative and statutory remedies by first subjecting itself to an unfair labor practice proceeding so that it can lay the groundwork for court review pursuant to Section 7123 of any adverse decision by the Federal Labor Relations Authority. Thus, Respondent is acting in accordance with the views of the Authority as set forth in its decisions denying petitions for direct review of a Federal Service Impasse Panel Decision and Order.[2]

At the hearing in St. Augustine, Florida all parties were afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and argue orally. Thereafter, Respondent and General Counsel filed briefs which have been duly considered.

Upon consideration of the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence presented at the hearing, I make the following findings of fact, conclusions of law and recommended order.

Findings of Fact and Conclusions of Law

1. The mission of the Employer is to provide units of trained personnel to augment the armed forces of the United States, and to preserve peace, order, and public safety within the State of Florida. To carry out this mission the Employer maintains a cadre of some 530 Army and 320 Air National Guard technicians. Most of these employees are located at Jacksonville (432), Camp Blanding (110), and St. Augustine, Florida (106), but there are 17 one-person and 11 two-person locations among the many which are served by Army National Guard technicians.

2. At all times material herein, including since on or about August 1971, the National Association of Government Employees, Local R5-91, R5-107 and R5-120 have been certified as exclusive representatives in appropriate units of all non-supervisory wage grade, and general schedule Army and Air National Guard technicians in the State of Florida but excluding supervisors and non-supervisory employees engaged in Federal Personnel work except in other than a purely clerical capacity,

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[1] New York, California, Kentucky, Kansas, New Mexico.

[2] State of New York, Division of Military and Naval Affairs and New York Council, Association of Civilian Technicians, Inc., 2 FLRA 185 (1979). On the same date, the Authority issued two similar decisions involving the California National Guard in 2 FLRA 190 and 2 FLRA 195 (1979).

management officials, professional employees, and guards in NAGE Local R5-91, R5-107 and R5-120.

3. The certified units referred to above in paragraph 2 have been embodied in the terms of a collective bargaining agreement approved January 29, 1975 between Respondent and Union.

4. At all times material herein, including all times since January 29, 1975, the National Association of Government Employees, Locals R5-91, R5-107 and R5-120 have been and are the exclusive representatives of the employees in the units described above in paragraph 2.

5. At all times material herein, the following named persons occupied the positions set opposite their respective names and have been and are now supervisors and management officials of the Respondent within the meaning of 5 U.S.C. § 7103(a)(10) and (11) and are agents of Respondent at its St. Augustine, Florida location.

K. C. Bullard ----- Major General, Commander Florida National Guard

C. M. McCormick, Jr. ----- Colonel, SS, FLARING Technician Personnel Officer

Report and Recommendation in Case No. 78 FSIP 100 involving Respondent and Union herein in which it made the following settlement recommendations to the parties.

1. <u>The wearing of the military uniform</u>

a. The parties should adopt language in their agreement affording individual employees, while performing their day-to-day technician duties, the daily option of wearing either (a) the military uniform or (b) an agreed upon standard civilian attire without display of military rank, such clothing to be obtained by employees who choose to wear it.

b. The parties should agree upon exceptions to cover those circumstances and occasions for which the wearing of the military uniform may be required.

7. On January 29, 1980, the FSIP issued its Decision and Order in Case No. 78 FSIP 100 involving Respondent and Union herein in which it ordered the parties to adopt in their collective bargaining agreement the recommendations of the FSIP as contained in its Report and Recommendations in Case No. 78 FSIP 100, which recommendations are set forth in paragraph 6.

8. On or about February 20, 1980, Randy J. Cohen, attorney for the Union, wrote Colonel McCormick requesting negotiations concerning compliance with the January 29, 1980 FSIP Decision and Order. Respondent on or about February 29, 1980 by its supervisor, management official and agent Technician Personnel Officer Colonel C. M. McCormick, Jr., informed in writing Mr. Howard W. Solomon, Executive Director, FSIP, with a copy to the

Union, that Respondent was rejecting the FSIP's Decision and Order in Case No. 78 FSIP 100 and would not comply with it. The pertinent part of that letter is quoted below:

> "The Panel Decision and Order has been carefully reviewed, and it appears that management is in the untenable position of being put in violation of its lawful military requirements, if the basic issue involved is not otherwise resolved. The authority for wear of the military uniform flows from statutory requirement under the United States Code, which prescribes the wear and use of the military uniform, under appropriate regulations of the Secretary of Defense. The impasse is not between Labor and Management, but arises from compliance with mission essential requirements of the National Guard.
>
> It is further submitted that the issue is one which leaves no avenue of settlement or negotiation open to the Florida National Guard. The uniform wear is an integral part of the mission of National Guard personnel, and it is not appropriate for the Authority to compel requirements incompatible with the function and mission of the National Guard.
>
> The Florida National Guard has therefore concluded that compliance with the Panel's Decision and Order cannot be initiated in good conscience as it relates to the uniform issue. In view of this conclusion, and the fact that no avenue of review or appeal exists, this Headquarters must respectfully reject the Panel's decision. . . ."

A copy of this February 29, 1980, letter of Colonel McCormick refusing compliance with the Panel's Decision and Order was sent to Mr. Cohen in response to his February 20, 1980 request for compliance negotiations with regard to the Panel's Decision and Order.

9. Since on or about February 20, 1980 and continuing to date, Respondent has at its St. Augustine, Florida location, in violation of 5 U.S.C. § 7116(a)(1) and (6) failed and refused and continues to fail and refuse to cooperate in impasse procedures and decisions by refusing to comply with and rejecting the FSIP Decision and Order in Case No. 78 FSIP 100 as outlined above in paragraphs 6, 7 and 8.

10. Since on or about February 29, 1980 and at all times thereafter, Respondent has, at its St. Augustine, Florida location, in violation of 5 U.S.C. § 7116(a)(1) and (8), failed and refused and continues to fail and refuse to comply with provisions of 5 U.S.C. § 7119 (c)(5)(C) by failing and refusing and continuing to fail and refuse to adopt in their agreement with the Union the

binding language of the FSIP Decision and Order in Case No. 78 FSIP 100 as outlined in paragraphs 6, 7 and 8.

11. Since on or about February 29, 1980 and at all times thereafter Respondent did refuse and continues to refuse to bargain in good faith with the union as the exclusive representative of the employees in the units described above in paragraph 2 in that Respondent failed and refused and continues to fail and refuse to negotiate in good faith the requirements of the language and adopt in their agreement with the Union the requirements of the FSIP Decision and Order in Case No. 78 FSIP 100 as outlined above in paragraphs 6, 7 and 8 as part of its final resolution of the impasse between the Respondent and the Union.

Discussion and Analysis

The pertinent statutory provisions involved in this proceeding are as follows:

> §7116. Unfair labor practices
>
> "(a) For the purpose of this chapter, it shall be an unfair labor practice of an agency--
>
> "(1) to interfere with, restrain or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . .
>
> "(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
>
> "(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter; . . .
>
> "(8) to otherwise fail or refuse to comply with any provision of this chapter.

In addition, Section 7119(c)(5)(C) of the Statute provides that:

> Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise. (Emphasis added.)

Although the Authority's New York and California decisions (cited herein in paragraph 2) were not unfair labor practice proceedings, it is significant that the Authority referred to the following legislative history (H. Rep. No. 95-1403, July 31, 1978, at 54-55) and itself added emphasis to a portion thereof:

> Notice of any final action of the Panel must be promptly served upon the parties, and the action is final and binding upon the parties during the term of the agreement, unless the parties agree otherwise. Final action of the Panel under this section is not subject to appeal, and failure to comply with any final action ordered by the Panel constitutes an unfair labor practice by an agency under

section 7116(a)(6) and (8) or a labor organization under section 7116(b)(6) and (8). [Emphasis added.]

The foregoing language of the Authority compels me to the following conclusions: A final action of the FSIP is binding upon the parties and is not subject to collateral attack in an unfair labor proceeding; rather, the only issue before me is Respondent's non-compliance with that decision. There being no dispute about Respondent's non-compliance, I am constrained to find a violation of Section 7116(a)(6) and (8).[3] Further, by rejecting the statutory procedure enacted to resolve impasse disputes, Respondent has interfered with the rights of employees in violation of Section 7116(a)(1).[4]

A new issue presented in the instant proceeding is whether Respondent refused to "consult or negotiate" as required by the Statute. In Veteran's Administration, Salem, Virginia, 1 FLRA No. 101 (August 21, 1979) the Authority held that the refusal to negotiate on an issue after the issue had been determined to be negotiable by the processes under the Executive Order, constitutes an unfair labor practice pursuant to Sections 19(a)(1) and (6) of the Order. In that case, respondent refused to bargain over an issue deemed negotiable by the FLRC, pending respondent's request to the United States Attorney General for an opinion as to the responsibility of respondent to abide by a negotiability determination of the FLRC which was allegedly contrary to the agency's regulations. The Authority determined that Respondent's actions in holding negotiations in abeyance pending referral of a request for an opinion of the U.S. Attorney General for review does not relieve Respondent of its obligation to bargain.

Accordingly, if in Veteran's Administration, Salem, Virginia, supra it was held by the Authority that respondent's refusal to bargain over an issue determined to be negotiable by the procedures provided for determining such negotiability, was violative of Sections 19(a)(1) and (6) of the Order, then I agree with the General Counsel that in the instant case, a fortiori, Respondent's refusal to bargain, upon request by the Union, over compliance with a Decision and Order of the FSIP is also violative of Section 7116(a)(1) and (5).[5]

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[3] Division of Military and Naval Affairs, State of New York, Case No. 1-CA-19, (April 9, 1980); State of California National Guard, Case Nos. 9-CA-44 and 9-CA-95 (March 21, 1980). A more detailed discussion of these issues is contained in these decisions.

[4] State of New York, supra, para. 3.

[5] In the State of California case (supra par. 2), the ALJ also found a violation of Section 7116(a)(5).

Respondent attempts to defend its rejection of and refusal to comply with the FSIP's Decision and Order, in essence, by asserting that: the FSIP has no jurisdiction to rule on a matter of "purely military concern", i.e., the wearing of the military uniform; the wearing of the military uniform is a non-negotiable issue; and the FSIP erred in its Decision and Order. I agree with the General Counsel that the above defenses have been raised in the past by various respondent National Guards units in similar circumstances and have been uniformly found non-meritorious. With regard to said defenses raised by Respondent, the Federal Labor Relations Council (FLRC) in National Association of Government Employees, Local R14-87 and Kansas National Guard (and other cases consolidated therewith), FLRC No. 76A-16, 5 FLRC 124 (1977), reconsideration denied 5 FLRC 336 (1977) found, in pertinent part, that the issue of the wearing of the military uniform by civilian technicians was negotiable. Accordingly, I reject Respondent's defenses, and I reaffirm any ruling at the hearing denying its Motion to Dismiss.

In conclusion, the record demonstrates that Respondent has failed and refused to comply and cooperate with a final Decision and Order of the Federal Services Impasses Panel, in violation of 5 U.S.C. § 7116(a)(6) and (8), has failed and refused to consult and negotiate with the Union concerning the implementation of the Panel's final Decision and Order, in violation of 5 U.S.C. § 7116(a)(5), and, by such action, has interfered with and restrained the exercise by employees of their rights in violation of 5 U.S.C. § 7116(a)(1).

NOTE: Agencies must also maintain the status quo while an issue is pending before the FSIP. Any failure or refusal to maintain the status quo would, except where inconsistent with the necessary functioning of the agency, be a violation of section 7116(a)(1) (a derivative violation), (5) (avoiding the bargaining obligation), and (6) (failure to cooperate in impasse procedures). BATF and NTEU, 18 FLRA 466 (1985).

5-8. Regulations in Conflict with CBA.

Section 7116a(7) provides that it is an unfair labor practice for an agency:

> to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed.

. . . .

The first issue before the Authority concerns the negotiability of those portions of Article 2 sections 1A and B, Article 32 section 10A and Article 40 section 3 which establish that whenever provisions contained in the negotiated agreement conflict with Government-wide or agency-wide rules or regulations issued after the date the agreement became effective, the agreement provisions will prevail. The Authority, in agreement with the Union, concludes that these provisions are consistent with the language of the Statute and its legislative history. In this regard, section 7116(a) provides, in relevant part, as follows:

> § 7116. Unfair labor practices
>
> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> . . . . . .
>
> (7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed. . . .

The conference committee report concerning this section stated as follows:[2]

> The conference report authorizes, as in the Senate bill, the issuance of government-wide rules or regulations which may restrict the scope of collective bargaining which might otherwise be permissible under the provisions of this title. As in the House, however, the Act generally prohibits such government-wide rule or regulation from nullifying the effect of an existing collective bargaining agreement. The exception to this is the issuance of rules or regulations implementing section 2302. Rules or regulations issued

[2] H. Rep. No. 95-1717, 95th Cong., 2d Sess. 155 (1978).

under section 2302 may have the effect of requiring negotiation of a revision of the terms of a collective bargaining agreement to the extent that the new rule or regulation increases the protection of the rights of employees.

Consequently, while the duty to bargain under section 7117 of the Statute[3] does not extend to matters which are inconsistent with existing Government-wide rules or regulations or agency-wide rules or regulations for which a compelling need is found to exist, once a collective bargaining agreement becomes effective, subsequently issued rules or regulations, with the exception of Government-wide rules or regulations issued under 5 U.S.C. § 2302 (relating to prohibited personnel practices), cannot nullify the terms of such a collective bargaining agreement. Thus, the provisions here in dispute are within the duty to bargain under the Statute.

. . . .

5-9. Catch-all Provision.

Section 7116a(8) provides that it is an unfair labor for an agency:

to otherwise fail or refuse to comply with any provision of this chapter.

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[3] Section 7117 of the Statute provides, in pertinent part, as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation . . . only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

DEPARTMENT OF DEFENSE
DEFENSE CRIMINAL INVESTIGATIVE SERVICE
AND
AFGE, LOCAL 2567

28 FLRA 1145 (1987)

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Decision of the Administrative Law Judge filed by the General Counsel. An opposition to the exceptions was filed by the Defense Criminal Investigative Service (DCIS).[1] The issue is whether the Respondents violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by denying employees their right under section 7114(a)(2)(B) of the Statute to union representation at investigatory examinations. For the reasons discussed below, we find that DCIS violated section 7116(a)(1) and (8) of the Statute by interfering with the right of employees to union representation under section 7114(a)(2)(B). We also find that no further violation was committed by DCIS or the other Respondents.

II. Background

The facts are fully set forth in the Judge's Decision. Briefly, they indicate that the American Federation of Government Employees is the exclusive representative of a consolidated unit of employees of the Defense Logistics Agency (DLA). The Defense Contract Administration Services Region, New York (DCASR NY) is a field component of DLA. Within DCASR NY is the Defense Contract Administration Services Management Area, Springfield, New Jersey (DCASMA), at which the Charging Party, AFGE Local 2567, is the local representative. Organizationally, at all times relevant to this case, DLA was "a separate [a]gency of the Department of Defense under the direction of the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics)." Post-hearing Brief of DLA and DCASR NY at 17.

DCIS is the criminal investigative component of the Office of Inspector General in the Department of Defense (DOD). Organizationally, DCIS is within the Office of the Assistant Inspector General for Investigations who,

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[1] An opposition to the General Counsel's exceptions filed by the Respondents Defense Logistics Agency and Defense Contract Administration Services Region, New York was untimely filed and therefore has not been considered.

together with other Assistant Inspectors General, reports to the Inspector General. The latter, in turn, reports to the Secretary of Defense.

The functions of the Inspector General and DCIS are more fully described by the Judge in his Decision. We note here that DCIS has various responsibilities within DOD, including the authority to investigate alleged criminal incidents involving DLA employees in connection with their official duties. Once DCIS decides to conduct an investigation, no one within DOD may interfere with the investigation except the Secretary of Defense and then only on matters affecting national security.

An incident occurred in January 1985, involving an alleged gun shot at the home of a DCASMA supervisor. The incident was reported to the local police as well as to the Deputy Director of DCASMA. The latter, in turn, notified DCASR NY which then referred the matter to DCIS. As a part of its investigation, DCIS separately interviewed two employees employed at DCASMA. One of the employees was named as a possible suspect by the supervisor at whose home the shooting occurred. The other employee was thought to own a vehicle matching the description of one observed in the vicinity of the supervisor's home. Both employees were interviewed at their place of employment by an investigator from DCIS and a member of the local police force. The Deputy Director of DCASMA provided a room for the interviews and had the employees summoned to the interview.

Prior to the interview with the first employee, the Deputy Director informed the DCAS investigator that the DLA-AFGE collective bargaining agreement provided that a union representative was entitled to be present during the questioning of an employee, if the employee requested representation and if the employee reasonably believed that the questioning could lead to disciplinary action. The DCIS investigator informed the Deputy Director that DCIS was not bound by the parties' agreement and that the so-called "Weingarten rule" did not apply to DCIS investigations. In each of the interviews, the employees requested and were denied union representation by DCIS and the local police. No request for union representation was made to DCASMA and no one from DCASMA, DCASR NY or DLA was present at either of the interviews.

III. Judge's Decision

The Judge concluded that neither DLA nor DCASR NY violated the Statute as alleged. In reaching that conclusion, he found that if the interviews had been conducted by DLA, DCASR NY, or DCASMA, the employees would have had a right to union representation under section 7114(a)(2)(B) of the Statute and denial of their

requests for representation would have violated section 7116(a)(1) and (8). However, the Judge further found that in this case neither DLA nor any of its constituent components questioned or examined the employees.

The Judge also found no violation by DCIS which, with the local police, refused the employees' request for union representation. The Judge found that DCIS was independent of DLA and was not acting as an agent or representative of DLA. The Judge further found that DCIS itself was not obligated to afford the employees union representation under section 7114(a)(2)(B) since DCIS has no collective bargaining relationship with the Union.

In reaching his conclusions, the Judge found it unnecessary to determine whether use of DCIS reports by DLA to justify disciplining employees would have violated the Statute.

IV. Positions of the Parties

The General Counsel filed exceptions to numerous portions of the Judge's Decision including the Judge's finding that it was not necessary to reach any question regarding DCIS reports and their potential uses. The General Counsel argues that DCIS is a "representative of the agency, within the meaning of section 7114(a)(2)(B) of the Statute. Essentially, the General Counsel's position is that DCIS acted as an agent of DLA in conducting the interviews and, therefore, that both DCIS and DLA violated section 7114(a)(2)(B) of the Statute by failing to afford the employees their right to union representation. To remedy the alleged unlawful conduct, the General Counsel requests that any documents, reports, and references to the interviews be expunged from the official personnel folders of the two employees, and that the Respondents be ordered to refrain from using the information obtained or derived from the interviews in any disciplinary action initiated against either employee subsequent to the date of the interviews.

In its opposition, DCIS argues that the Judge was correct in not making findings regarding the DCIS reports and was also correct in finding that no violation was committed by DLA, DCASR NY, or DCIS. More specifically, as to the reports, DCIS noted that no reports had been provided to DLA concerning the investigation and no disciplinary action had been taken against any employees as a result of the investigation.

V. Analysis

Under section 7114(a)(2)(B) of the Statute, in any examination of a unit employee by a representative of an agency in connection with an investigation, the employee

has the right to have a union representative present if the employee reasonably believes that the examination may result in disciplinary action and the employee requests representation. United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA 874 (1987); Department of the Treasury, Internal Revenue Service, Jacksonville District and Department of the Treasury, Internal Revenue Service, Southeast Regional Office of Inspection, 23 FLRA 876 (1986). There is no question here that the employees had a reasonably belief that disciplinary action might result from the examinations and that the employees requested union representation. The Judge noted that the employees were each advised prior to the examination that a criminal investigation was being conducted and that both employees made their requests for union representation to DCIS. The parties disagree, however, as to whether the examinations were conducted by a "representative of the agency" within the meaning of section 7114(a)(2)(B).

As to that point of disagreement, we agree with the Judge's finding that DCIS, which conducted the examination with the local police, was not acting as an agent or representative of DLA. As described above, DCIS and DLA are organizationally separate from each other. DCIS is empowered to conduct criminal investigations within DOD and reports to the Secretary of Defense. However, we find that DCIS, as an organizational component of the Department of Defense was acting as a "representative of the agency," that is, DOD, within the meaning of section 7114(a)(2)(B). Clearly, DOD is an "agency" within the definition of the term in section 7103(a)(3) of the Statute as the parties have acknowledged in the complain and answers in this case. As the investigative arm of DOD, DCIS was conducting an investigation into alleged criminal activity involving DLA employees. That a criminal investigation may constitute an "examination in connection with an investigation" was recognized by the Authority in the Internal Revenue Service case cited above, and is not in dispute in this case. Accordingly, we find that each of the interviews with the employees constituted an examination in connection with an investigation within the meaning of section 7114(a)(2)(B) of the Statute at which the employees were entitled to union representation, upon request.

We have previously noted that the purpose of Congress in enacting section 7114(a)(2)(B) of the Statute was to create a right to representation in investigatory interviews for Federal employees similar to the right of private sector employees as described by the Supreme Court in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). For example, Bureau of Prisons, 27 FLRA 874, slip op. at 5-6. Under Weingarten, when an employee

makes a valid request for union representation in an investigatory interview, the employer must: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview. Id. at 6.

In this case, although DCIS was not the employing entity of the employees, once it was aware of the employees' statutory right to union representation in the interview, it could not act in such a manner so as to unlawfully interfere with that right.[2]

DCIS was informed by the Deputy Director of DCASMA that the employees were entitled to union representation upon request.[3] When the employees requested representation, DCIS should have (1) granted their request, (2) discontinued the interview, or (3) offered the employees the choice between continuing the interview unaccompanied by a union representative or having no interview.

However, DCIS failed to properly act on the requests and instead denied the requests and continued with the examinations. DCIS therefore interfered with the statutory right of the employees to have union representation at the examinations. Accordingly, we find that DCIS violated section 7116(a)(1) and (8) of the Statute.

As noted above, the General Counsel disagreed with the Judge's finding that it was not necessary to reach any questions regarding reports prepared by DCIS. We find that the matter of DCIS' reports is not properly before us. The complaint in this case contained no allegation that the reports were in any way violative of the Statute. Also, as noted by DCIS, no reports were submitted to DLA following the investigation and no

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[2] An organizational entity of an agency not in the same "chain of command" as the entity at the level of exclusive recognition violates section 7116 of the Statute by unlawfully interfering with the rights of employees other than its own. See Headquarters, Defense Logistics Agency, Washington, D.C., 22 FLRA 875 (1986).

[3] Although not alleged as a violation of the Statute, we note that the conduct of DCASMA Deputy Director in providing a room and having the employees summoned for the interviews did not constitute a violation in the circumstances presented. As previously stated, no one within DOD may interfere with a DCIS investigation except the Secretary of Defense, and then only in limited circumstances. For DCASMA to have refused to provide a room or to summon the employees for the interviews arguably would have interfered with the investigation.

employee was disciplined as a result of the investigation.

To remedy DCIS' violation of the Statute, we shall order that DCIS cease and desist from unlawfully interfering with the statutory rights of employees represented by the Charging Party to union representation at examinations in connection with investigations. We find no basis on which to grant the General Counsel's request that the Respondents be ordered to expunge any documents referring to the examinations from the official personnel folders of the two employees interviewed and to refrain from using information from the interviews in any action initiated against the employees. The record before us does not indicate that any documents were placed in the employees' official personnel folders or that any action was initiated against the employees.

Finally, we believe that it would be appropriate for the Secretary of Defense, the Inspector General, or other officials with administrative responsibility for DCIS, to advise DCIS investigators of the pertinent rights and obligations established by Congress in enacting the Federal Labor-Management Relations Statute. More particularly as to matters raised in this case, DCIS investigators should be advised that they may not engage in conduct which unlawfully interferes with the rights of employees under the Statute.

NOTE 1: In Customs Service, 5 FLRA 297 (1981), the Authority adopted the ALJ's finding that the agency violated §§ 7116(a)(1) and (8) by failing to provide an employee an opportunity to be represented by a union representative at an investigatory interview of that employee. Although the representative was afforded full opportunity to assist the employee at the initial interview, in the subsequent taped interview, where the form of the questions was different from the initial interview, the representative was admonished not to speak out or make statements.

NOTE 2: An agency's obligation to deduct dues is based not upon a contractual obligation but rather upon an obligation imposed by the Statute. The failure to comply with this mandatory obligation constitutes a violation of section 7116(a)(8) of the Statute. DLA, 5 FLRA 126 (1981). See AFGE v. FLRA, 835 F.2d 1458, (D.C. Cir. 1987).

5-10. The DeMinimus Rule and Other Arguments.

Conduct which is otherwise an unfair labor practice has been held not to constitute one if the harm resulting from the prohibited conduct has had only a minimal effect. Often the offending party takes steps, after the violation, to minimize the

adverse effect. This is an important concept (taking corrective action to minimize the effect) and should be used when it becomes obvious that management has committed an unfair labor practice. The following Executive Order case explains the Rule in a factual setting.

VANDENBERG AIR FORCE BASE,
VANDENBERG, CALIFORNIA
AND
LOCAL UNION 1001, NATIONAL
FEDERATION OF FEDERAL EMPLOYEES
VANDENBERG AIR FORCE BASE
CALIFORNIA
A/SLMR No. 435
FLRC No. 74A-77
(8 Aug 75)

Background of Case

This appeal arose from a Decision and Order of the Assistant Secretary who, upon a complaint filed by Local Union 1001, National Federation of Federal Employees, Vandenberg Air Force Base, California (herein called the union), held that the 4392d Aerospace Group, Vandenberg Air Force Base, California (herein referred to as the activity), had violated section[s] 19(a)(1) and (6) of the Order by unilaterally terminating the parties' regularly scheduled negotiating session based on an alleged impasse with respect to one subject of bargaining and refusing to meet and confer on other subjects of bargaining.

The factual background of this case, as found by the Administrative Law Judge and adopted by the Assistant Secretary, is as follows: The union is the certified representative of separate units of professional and nonprofessional employees at the activity. During the negotiation of the initial contract for the professional unit, the union proposed that the parties jointly negotiate a single agreement covering both units, since the contract covering the nonprofessional unit was about to terminate, but the first session in this format broke down. Subsequently, the activity proposed a different negotiating procedure--joint bargaining of separate contracts--and the union accepted the proposal as the first agenda item for the next regularly scheduled bargaining session. However, when the activity attempted to discuss the proposal at that session, the union refused to discuss the proposal and refused to let the activity explain its position. The activity's chief negotiator then stated that he considered the negotiations to be at an impasse, and when the union negotiator attempted to begin discussion of the next agenda item, the activity's negotiator stated further

that he did not intend to continue the negotiations until the impasse was resolved. In response, the union negotiator stated that he would file an unfair labor practice charge citing the activity's refusal to bargain. Thereupon, the activity negotiating team left the session. However, on the next day, the activity's chief negotiator communicated to his union counterpart an offer to resume negotiations and, in an informal contact with a member of the activity negotiating team, the union's chief negotiator was informed that the activity would not insist on discussing the first agenda item. This offer was reaffirmed in response to the unfair labor practice charge which the union filed 2 days later with the activity, but the union suspended negotiations pending resolution of its complaint. Subsequently, efforts by the Federal Mediation and Conciliation Service to facilitate the resumption of negotiations proved to be without effect.

The Administrative Law Judge found that when the activity walked out of the meeting, it had committed a technical violation of section 19(a) (6) of the Order [refusal to negotiate in good faith] in that it did not have a right to insist, to the point of impasse, that the union discuss its proposal for dual-simultaneous negotiations. The Administrative Law Judge then, however, reviewed the subsequent events and concluded:

> However, I further find that this violation was rendered moot the following day when the Union was advised twice . . . that the Activity had receded from its position and was willing to return to the bargaining table. In these circumstances, I cannot understand why the Union refused to accept this offer by the Activity. Even if the Union had some doubt about the Activity's good faith, it could quickly test this good faith by returning to the bargaining table. Instead, the Union insisted upon filing an unfair labor practice charge to which the Activity promptly responded . . . that the Activity's <u>decision</u> with respect to the charge was to "negotiate seriously on any appropriate matter." There is no evidence in the record to suggest that the Activity had in mind anything but to do precisely what an Assistant Secretary's order would accomplish if a violation were found, i.e., <u>to order the Activity back to the bargaining table</u>. I conclude that as of the date that the unfair labor practice charge was filed, the Activity was not insisting to impasse upon multi-unit bargaining as a condition precedent to bargaining. Therefore,

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* All footnotes are omitted.

> I recommend that no violation of section[s] 19(a) (6), (1), and (2) of the Executive Order be found.
>
> In light of the foregoing, I further conclude that the Union's conduct in this entire matter, both at the [regularly scheduled bargaining session] and thereafter, raises a serious question as to its own genuine willingness to bargain in good faith. It is noted, however, that apparently the Activity did not file an unfair labor practice charge against the Union. Instead, the Activity has attempted to bargain with the Union, despite the Union's apparent unwillingness to do so, at the same time that it is bargaining in good faith with the same Union for a contract covering a different unit at the same location. [Emphasis in original.]

On review, the Assistant Secretary agreed with the Administrative Law Judge that, in the particular circumstances of the case, the activity violated section 19(a)(6) of the Order by unilaterally terminating the parties' negotiation session based on the alleged impasse with respect to one subject of bargaining and refusing to meet and confer on other subjects of bargaining. The Assistant Secretary also found that such conduct constituted an improper interference with employee rights in violation of section 19(a)(1) of the Order. The Assistant Secretary then concluded:

> However, I disagree with the Administrative Law Judge's conclusion that, under the circumstances of this case, the Respondent's improper conduct constituted merely a "technical violation" of the Order which did not require a remedial order. Accordingly, I shall order that the Respondent remedy its violation of Section[s] 19(a)(1) and (6) of the Order.

The activity appealed the Assistant Secretary's decision to the Council, alleging that the decision was arbitrary and capricious and presented major policy issues. The Council accepted the activity's petition for review, concluding that a major policy issue was present concerning the finding of a violation of sections 19(a)(1) and (6) and the issuance of a remedial order in the circumstances of this case. . . .

Opinion

As indicated above, the Assistant Secretary found that the activity violated section[s] 19(a)(1) and (6) by unilaterally terminating the parties' regularly scheduled bargaining session. In the opinion of the Council, the finding of a violation of section[s] 19(a)(1) and (6), based on the activity's conduct in the

circumstances of this case, is inconsistent with the purposes of the Order.

Section 11(a) of the Order imposes on an agency (or activity) and a labor organization engaged in the process of negotiating a collective bargaining agreement the duty to negotiate in good faith. Section 19(a)(6) provides that agency management shall not refuse to negotiate as required by the Order. Thus, the issue before the Assistant Secretary in this case was whether, based wholly on the series of events complained of herein, the activity violated the Order by failing to negotiate in good faith with the union.

While an impasse in negotiations which results from a demand that certain improper conditions be met before negotiations can continue may, under certain circumstances, constitute a refusal to negotiate in good faith, it is difficult to conclude that the circumstances of this case are an appropriate basis for the finding of such a refusal to negotiate. Though the activity's chief negotiator did refuse to negotiate regarding the second agenda item pending the mediation of the impasse over the first item on the agenda, almost as soon as that refusal was made, the activity retracted it and offered to resume negotiations. Subsequently and consistently, both in its response to the union's unfair labor practice charge and in informal contacts with the union, the activity reiterated its willingness to resume negotiations and to withdraw its insistence on negotiation of the first agenda item. However, the labor organization has consistently refused to return to the negotiating table until its complaint was resolved.

What is at issue in this case is whether a violation of the Order should have been found on the basis of so brief an interruption in the negotiations. In our view, when all of the circumstances of the situation are taken into account, it is evident that the activity's conduct in this one instance was of a de minimis nature and thus is not sufficient to constitute a failure to negotiate in good faith in violation of the Order. Experience in labor relations, whether in the Federal labor-management relations program, on the state and local government level, or in the private sector, indicates that there are occasions when, during the course of negotiating an agreement, representatives of either party, management or labor organization, engage in conduct which might, standing alone, constitute the basis for an unfair labor practice complaint. However, that experience also indicates that it is not uncommon for the party quickly to cease engaging in such conduct and to continue negotiations in good faith. The Council feels strongly that in appropriate factual situations, such as that in this case, similarly brief interruptions of negotiations with a de minimis effect should not warrant the finding of a violation. Rather, an isolated incident which results in such a brief interruption should be examined

in the context of the totality of the respondent's bargaining conduct for a determination as to whether it would effectuate the purposes of the Order to find a violation when no further benefit would accrue from that finding and from the resultant remedial order. Thus, we conclude that in the instant case, where the representatives of the activity ceased to engage in the alleged improper conduct immediately after it occurred, and where the activity at all times sought to continue the negotiations in good faith, a finding that the activity violated the Order is not warranted.

. . . .

For the foregoing reasons, we find that the Assistant Secretary's decision that the activity violated section 19(a)(1) and (6) in the circumstances of this case is inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.17(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for appropriate action consistent with our decision.

NOTE 1: Two standards have been used to date to identify those changes which require bargaining. The old standard required a "substantial" impact. See, for example, Social Security Administration, Bureau of Hearings and Appeals, 2 FLRA 238 (1979). The recent standard required that the impact be more than de minimis. In discussing the de minimis standard in Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois, 19 FLRA 827 (1985), the Authority identified a number of factors to be considered in determining whether a particular change in conditions of employment was more than de minimis. The factors identified were (1) the nature of the change (for example, the extent of the change in work duties, location, office space, hours, loss of benefits or wages, and the like); (2) the duration and frequency of the change (that is, the temporary, recurring, or permanent nature of the change)(; (3) the number of employees affected or foreseeably affected by the change; (4) the size of the bargaining unit; and (5) the extent to which the parties established, through negotiations or past practice, procedures and appropriate arrangements concerning analogous changes in the past.

However, the Authority has now developed a new test to determine if a matter rises to the level of bargaining. In order to determine whether a change in conditions of employment requires bargaining, the pertinent facts and circumstances presented in each case will be carefully examined. In examining the record, the Authority will place principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involved.

As to the number of employees involved, this factor will not be a controlling consideration. It will be applied primarily to expand rather than limit the number of situations where bargaining will be required. For example, the Authority may find that a change does not require bargaining. However, a similar change involving hundreds of employees could, in appropriate circumstances, give rise to a bargaining obligation. The parties' bargaining history will be subject to similar limited application. As to the size of the bargaining unit, this factor will no longer be applied. See HHS v. AFGE, 24 FLRA 403 (1986).

NOTE 2: There are other arguments management may assert.

a. Motive. The Assistant Secretary generally required some evidence of anti-union animus to support an unfair labor practice charge against management, but such evidence was often inferred in appropriate cases. See, e.g., Defense Supply Agency, Los Angeles, A/SLMR No. 633 (March 26, 1976). Concerted action, as opposed to isolated, individual action is also a factor. See, e.g., U.S. Navy, Norfolk Naval Shipyard, A/SLMR No. 746 (Nov. 10, 1976). The FLRA adheres to this requirement for anti union animus. See Portsmouth Naval Shipyard, 6 FLRA 491 (1981). Dual motive Program Operations, SJA, 9 FLRA 648 (1983); AFGE v. FLRA, 716 F.2d 47 (D.C. Cir. 1933)

b. Timeliness of the Charge. The Authority's regulations provide that a charge must be filed within six months of the occurrence of the unfair labor practice (with some exceptions). When a charge is filed more than six months after the event in question, the respondent should assert that the charge is not timely filed.

c. Defects in the Charge. If there has been a failure to follow the regulations with respect to the contents of the charge, service of it, or the filing of it, such should be asserted. The failure to follow filing procedures constitutes prejudice to the respondent if it is more than a mere technical defect. The Authority will permit the defect to be corrected by the charging party if it is a mere technical defect.

d. Wrong Appeal Route. Section 7116(d) provides that issues "which can properly be raised under an appeals procedure may not be raised as an unfair labor practice." An appeals procedure is one which provides for third party determination. For instance, in one case management refused to promote an employee due to his union activity. The Assistant Secretary declined to hear the complaint because the matter could have been considered under the agency's Job Evaluation Complaint and Appeals Procedure. Tank Command, A/SLMR No. 447. See also Va, A/SLMR No. 296.

When grievants raised the issue of non-production of requested information in connection with disciplinary actions taken against them, thus exercising their option to raise the issue under a grievance procedure or by unfair labor practice complaint under section 7116(d) of the Statute, the union could not thereafter,

independently raise the same issue in an unfair labor practice complaint. IRS, Chicago, Illinois and NTEU, NTEU Chapter 10, 3 FLRA 478 (1980).

NOTE 3: Prior settlement offers are not admissible at ALJ hearings on unfair labor practices. Norton Air Force Base, A/SLMR No. 261 (April 30, 1973).

NOTE 4: What happens when the exclusive representative seeks evaluation materials relating to employee promotion selection, and the employees object on privacy grounds (assume the union is representing an employee who is grieving his non-selection)? In Department of the Treasury, IRS, Milwaukee, A/SLMR No. 974 (Jan. 27, 1978), a balancing test was applied weighing the degree of public interest against individual privacy interest on a case-by-case basis.

NOTE 5. Frequently supervisors and employees engage in "robust communication" including heated language. The Federal sector has generally followed the private sector's moderate response to such problems: "The employee's right to engage in concerted activity may permit some leeway for impulsive behavior," e.g., calling a superintendent a "horse's ass" at a grievance hearing. N.L.R.B. v. Thor Power Tool Co., 351 F.2d 584, 586-87 (7th Cir. 1965). Moreover, when there is unplanned, spontaneous physical contact between a supervisor and a union steward during a heated exchange, no ULP lies against management even if the supervisor initiated the assault. DOL and AFGE, 20 FLRA 568 (1985).

5-11. Management/Employee Complaints Against Unions.

Department of Army managers rarely file an ULP. Before it is to be done, Department of the Army and the major command of the installation should be consulted. Management, in other agencies of the Federal sector, has filed ULP's on a more frequent basis. Regardless, very few cases are reported.

Section 7116(b) provides:

> For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> (2) to cause, or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;
>
> (3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;
>
> (4) to discriminate against an employee with regard to the terms or conditions of membership in the labor

organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) (A) to call, or participate in a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to takc action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Section 7114 provides:

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

The following case illustrates the current interpretation of this provision.

NATIONAL TREASURY EMPLOYEES UNION
AND
FLRA

800 F.2d 1165 (D.C. Cir. 1986)

BORK, Circuit Judge:

The National Treasury Employees Union petitions for review of a decision and order of the Federal Labor Relations Authority and the Authority cross-applies for enforcement of its order. The Authority held that the union committed an unfair labor practice by refusing to provide attorneys to represent employees who were not members of the union on the same basis as it provided attorneys to members. The attorney representation sought related to a statutory procedure to challenge a removal

action and not to a grievance or other procedure growing out of a collective bargaining agreement.

The question before us is whether the distinction between procedures that arise out of the collective bargaining agreement and those that do not is dispositive or irrelevant under the pertinent provision of the Federal Service Labor-Management Relations Statute. The union contends that it is dispositive because the statute enacts the private-sector duty of fair representation, a duty that is limited to those matters as to which the union is the exclusive representation of the employees. Since the NTEU was not the exclusive representative as to the statutory appeal involved here, the duty of fair representation did not attach, and, the union contends, it was free to provide representation to members that it denied to non-members. The Authority, on the other hand, argues that the statute enforces a duty of nondiscrimination broader than that of private-sector fair representation, a duty that extends to all matters related to employment.

The facts being undisputed, we have before us a single, clearly-defined issue of statutory construction. We think the statute does not admit of the Authority's interpretation and therefore reverse.

I.

NTEU is the exclusive representative of all non-professional employees of the regional offices of the Bureau of Alcohol, Tobacco and Firearms, Department of Treasury. In August, 1979, BATF gave notice of its intention to institute an adverse action against Carter Wright, a BATF inspector in Denver, Colorado. The action would, if successful, result in Wright's discharge. Wright, who was not an NTEU member, telephoned Jeanette Green, president of NTEU chapter representing his bargaining unit, and asked whether non-members were eligible to obtain an NTEU attorney. He did not tell green what kind of a case was involved. She replied that it was NTEU's "policy generally not to furnish legal counsel to non-members." Green suggested that Wright call an NTEU staff attorney in Austin, Texas, for more information, but Wright instead telephoned NTEU National Vice-President Robert Tobias in Washington, D.C. They discussed the details of Wright's case, and Tobias said he would consult the union's national president. Wright called back a few days later and Tobias said the president had decided it "wouldn't be advisable" for the union to provide an attorney. He and the president thought Wright's case not a good one. Tobias said they handled cases for union members automatically but that non-members with poor cases did not necessarily receive representation.

Several weeks later the national president of NTEU sent a memorandum to all local chapter presidents stating

that NTEU would continue its policy of refusing to supply attorneys to non-members. This policy applied across the board, to procedures related to the collective bargaining agreement as well as to those not so related. This court, as will be seen, has held that the discrimination between members and non-members with respect to procedures of the former type violates the statute.

BATF proceeded against Wright and ordered him removed. Wright hired private counsel, pursued the statutory appeals procedure created by the Civil Service Reform Act, see 5 U.S.C. §§ 7512, 7513, and 7701 (1982), and ultimately prevailed when the Merit System Protection Board overturned the agency's removal decision.

II.

BATF filed an unfair labor practice charge against NTEU and its Denver chapter. FLRA's General Counsel then issued a complaint alleging that the union violated 5 U.S.C. § 7114(a)(1) (1982), a provision of the Federal Service Labor-Management Relations Statute, by following a policy of discrimination between union members and non-members in the provision of attorney representation. The violation of section 7114(a)(1) meant, it was charged, that the union had committed unfair labor practices in violation of section 7116(b)(1) and (8) of the statute.[1] The union was also charged with a separate unfair labor practice under section 7116(b)(1) for violating section 7102.[2]

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[1] The charges under these sections depend upon a finding that § 7114(a)(1) was violated. Section 7116(b)(1) provides that it is an unfair labor practice for a union "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter." 5 U.S.C. § 7116(b)(1) (1982). Section 7116(b)(8) makes it an unfair labor practice for a union "to otherwise fail or refuse to comply with any provision of this chapter."

[2] That section provides:

> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--
>
> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to the heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(continued...)

The Administrative Law Judge found that both the Denver chapter and the NTEU had committed the unfair labor practices charged. The ALJ assumed without deciding that the NTEU had no duty to represent any employee before the MSPB but held that, if the NTEU provided representation to union members, it must provide equal representation to non-members. See Joint Appendix ("J.A.") at 109.

The Authority held that the Denver chapter violated the statute but adopted the ALJ's other findings, conclusions, and recommendations. J.A. at 103. The NTEU petitioned this court for review and the FLRA cross-applied for enforcement of its order.

III.

The scope of the NTEU's duty depends upon the meaning of the second sentence of section 7114(a)(1) of the statute. That section provides:

> A labor organization which as been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representation is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

5 U.S.C. § 7114(a)(1) (1982).

Each party contends that its position is compelled by the plain language of the second sentence: the union, that the statute embodies only the private-sector duty of fair representation; the Authority, that the statute states a flat duty of nondiscrimination in all matters related to employment. We, on the other hand, find nothing particularly plain or compelling about the text, standing alone.

The statute requires the union to act evenhandedly with respect to the "interests" of employees. Adopting the ALJ's analysis, the FLRA found that Wright had an "interest," within the meaning of section 7114(a)(1)'s second sentence, in pursuing his appeal under the Civil Service Reform Act and so must be furnished counsel by the union for that purpose if the union furnishes counsel for the same purpose to union members. The difficulty with this analysis is that the meaning of "interests" is

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[2](...continued)

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

5 U.S.C.§ 7102 (1982).]

not given by the statute and is not self-evident. Unless the word is taken to mean all things that employees might like to have--a meaning that neither party attributes to the word--"interests" requires further definition. While deference is owed the Authority's statutory construction, we think the circumstances of this case--the structure of the statute, and, more particularly, the history against which section 7114(a)(1) was written--establish Congress' intent to enact for the public sector the duty of fair representation that had been implied under the private sector statute and therefore preclude the Authority's interpretation. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778, 2782 n.9, 81 L.Ed.2d 694 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

The structure of section 7114(a)(1) supports the union's position--that the "interests" protected are only those created by the collective bargaining agreement and as to which the union is the exclusive representative. Thus, the first sentence establishes the union as the "exclusive representative" and states what the union is entitled to do in that capacity: "act for, and negotiate collective bargaining agreements covering, all employees in the unit." The second sentence of a discrete provision such as this might reasonably be expected to relate to the same subject as the first. A natural, though not necessarily conclusive, inference, therefore, is that the duty of representing all employees relates to the union's role as exclusive representative.

This inference is reinforced by the way the statute deals with representation in procedures of various sorts.

> Section 7114(a)(5) provides:
>
> The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--
>
> (A) being represented by an attorney or other representative, of the employee's own choosing in any grievance or appeal action; or
>
> (B) exercising grievance or appellate rights established by law, rule, or regulation;
>
> except in the case of grievance or appeal procedures negotiated under this chapter.

5 U.S.C. § 7114(a)(5) (1982). The statute itself thus distinguishes between the employees' procedural and representational rights by drawing the line the union urges here, the line between matters arising out of a collective bargaining agreement and other matters. Section 7114(a)(5) does not address the precise question before us but it employs a distinction that is familiar

from private sector cases and thus suggests that section 7114(a)(1) may similarly be drawn form private sector case law with which Congress certainly was familiar.

These observations bear upon a line of argument the FLRA apparently found persuasive. The ALJ, whose rulings were affirmed and whose findings and conclusions were adopted by the Authority, reasoned that the Federal Service Labor-Management Relations Statute imposes a broader duty of fair representation upon unions than courts have implied in the private sector under the National Labor Relations Act.

> The doctrine of fair representation developed in the private sector is applicable under the Statute; but with an important and significant difference: § 14(a)(1) specifically provides that "An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership". . . . The first sentence of § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), is substantially similar to the first sentence of § 14(a)(1) of the Statute; but the language of the second sentence of § 14(a)(1) . . . is wholly absent in § 9(a) of the NLRA. . . . Consequently, under the Statute that statutory command of § 14(a)(1), i.e., a specific non-discrimination provision, must be enforced, not merely the concept of fair representation developed in the private sector as flowing from the right of exclusive representation.

J.A. at 119. This is the only reasoning offered and it is unpersuasive in light of the history of, and the rationale for, the duty of fair representation. The ALJ, and hence the Authority, reason that the private-sector duty of fair representation cannot have been intended because Congress added to this statute a sentence about unions' duties that is not found in the NLRA. The quick answer is that the duty of fair representation was imposed upon the NLRA by courts reasoning from the NLRA's equivalent to the first sentence of section 7114(a)(1). Subsequently, Congress wrote the Federal Service statute and added a second sentence that capsulates the duty the courts had created for the private sector. The inference to be drawn from Congress' use of the language of the judicial rule of fair representation is not that Congress wished to avoid that rule. To the contrary, the inference can hardly be avoided that Congress wished to enact the rule.

The duty of fair representation was first formulated by the Supreme Court in Steele v. Louisville & Nashville R.R., 323 U.S. 192, 65 S. Ct. 226, 89 L.Ed. 173 (1944). The Court found the duty to be inferred from the union's

status as exclusive representative of the employees in the bargaining unit. Thus, the Court said, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it also imposed on the representative a corresponding duty." Id. at 202, 65 S. Ct. at 232 (citation omitted). The Court stated it was "the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against the." Id. at 202-03, 65 S. Ct. at 231-32.

> So long as a labor union assumes to act as the statutory representative of a craft, it cannot refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its members, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.

Id. at 204, 65 S. Ct. at 233.

It will be observed that the Court, in the case creating the duty of fair representation, repeatedly rooted the duty in the powers conferred upon the union by statute, the powers belonging to the union as exclusive representative.[3] The duty was thus co-extensive with the power; the duty is certainly not narrower than the power, and this formulation indicates that it is also not broader.

This view of the duty as arising from the power and hence coterminous with it is expressed again and again in the case law:

> Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," Vaca v. Sipes, 386 U.S. 171, 182 [87 S.

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[3] Of course, a minority union has never been held to act under a duty of fair representation. A minority union cannot be recognized as the exclusive bargaining representative without violating the NLRA. See Interrational Ladies' Garment Workers' Union, AFL-CIO v. NLRB, 366 U.S. 731, 81 S. Ct. 1603, 6 L.Ed.2d 762 (1961). This provides additional support for the view that the duty arises from, and its contours are defined by, a union's status as exclusive representative.

> Ct. 903, 912, 17 L.Ed.2d 842] (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, "the responsibility of fair representation." Humphrey v. Moore, [375 U.S. 335] at 342 [84 S. Ct. 363, 368, 11 L.Ed.2d 370 (1964)]. . . . Since Steel v. Louisville & N.R. Co, 323 U.S. 192 [65 S. Ct. 226, 89 L.Ed. 173] (1944), . . . the duty of fair representation has served as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." Vaca v. Sipes, supra, 386 U.S. at 182, 87 S. Ct. at 912.

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564, 96 S. Ct. 1048, 1056, 74 L.Ed.2d 231 (1976).[4]

If this were a private sector case, it would seem clear that the union has not violated its duty of fair representation because the rationale that gives rise to that duty does not apply here. In the case before us the union's authority as exclusive representative did not strip Wright of redress as an individual. To the contrary, Wright actively pursued his statutory appeal rights and won. He did not do that by the union's suffrage but as a matter of right. Not only was that appeal procedure open to him but the union was forbidden by section 7114(a)(5) from attempting to control it.

The NTEU's position thus runs along the line established by the private-sector case law and suggested by the structure of the relevant statutory provisions. The Authority's position adopts a new line that is not to be found in the case law antedating the statute or in the statute's structure. Counsel for the FLRA was asked at oral argument whether, on the Authority's reasoning, a union that provided probate advice to its members would thereby be obligated to provide the same advice to non-members. Counsel replied that the union would not have that duty, the distinction being that the provision of probate services does not relate directly to the members' or non-members' employment. Of course, the statute does

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[4] See International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB, 587 F.2d 1176, 1181 (D.C. Cir. 1978); 1199 DC, National Union of Hospital and Health Care Employees v. National Union of Hospital and Health Care Employees, 533 F.2d 1205, 1208 (D.C. Cir. 1976); Truck Drivers and Helpers, Local Union 568 v., NLRB, 379 F.2d 137, 141 & n.2 (D.C. Cir. 1967); see generally H. Wellington, Labor and the Legal Process 129-84 (1968). For a recent statement and application of the duty of fair representation, see, e.g., Kolinske v. Lubbers, 712 F.2d 471, 481-82 (D.C. Cir. 1983).

not even imply that distinction, nor does the pre-existing case law.

The ambiguity that will often exist in determining whether a service is or is not directly related to the employment relationship may be a reason to be wary of the Authority's proffered test. It is easier to determine whether the service provided grows out of the collective bargaining relationship. There is, moreover, a clear and articulated policy reason for confining the scope of the union's duty to the scope of its exclusive power: the individual, having been deprived by statute of the right to protect himself must receive in return fair representation by the union. Rights are shifted from the individual to the union and a corresponding duty is imposed upon the union. No such policy supports the additional line drawn by the Authority. The FLRA's position depends not upon the reciprocal relationship of the union's rights and duties but upon a demand for equality of services when the employment relationship is involved. Yet the distinction between services that are employment-related and those that are not seems arbitrary. All services provided by the union are employment-related in the sense that they are provided to employees only. When, as here, the individual retains the right to protect himself in the employment relationship, it is by no means obvious why the union's provision of an attorney to assist in a statutory appear action is more valuable than the union's provision of an attorney to draft a will. Both are services employees will value, both would cost the individual money, so that it is not apparent why it is discrimination to provide one service to union members only but not discrimination to provide the other in that restricted fashion.

[1,2] Thus, we cannot accept as reasonably the Authority's claim that, in including the second sentence in section 7114(a)(1), Congress intended to impose a duty broader than that implied in the private sector. The Supreme Court in Steele and subsequent cases drew from the first sentence of section 9(a) of the NLRA an implication of a duty that is substantially expressed in the second sentence of 5 U.S.C. § 7114(a)(1) (1982), the federal sector provision. The logical, and we think (in light of the history and the rationale for the duty of fair representation) conclusive, inference is that when Congress came to write section 7114(a)(1) it included a first sentence very like the first sentence of section 9(a) and then added a second sentence which summarized the duty the Court had found implicit in the first sentence. In short, Congress adopted for government employee unions the private sector duty of fair representation.

Two additional factors persuade us that this is the correct inference. First, if Congress were changing rather than adopting a well-known body of case law, one would expect mention of that intention somewhere in the

legislative history. The Authority has referred us to, and we are aware of, nothing of that sort. Second, if the union's duty had been broadened beyond the scope of its right of exclusive representation, one would expect the range of the new duty to be delineated, or at least suggested, probably by some indication in the statute or its legislative history of what the term "interests" means. It is conceded that the word does not cover everything an employee might like to have, which would mean that the union may not differentiate between members and non-members in any way whatever. But is that is not the case, the statute gives no direction of any sort unless it adopts the private sector equation of the scope of the union's right and its duty.[5]

This leaves only the Authority's argument that our decision in NTEU v. FLRA, 721 F.2d 1402 (D.C. Cir. 1983), is "dispositive" of this case. The FLRA contends that we affirmed its decision that "discrimination based on union membership in any representational activity relating to working conditions which an exclusive representative undertakes to provide unit employees is violative of the Statute. . . . At no point did this court in its decision in 721 F.2d 1402 intimate that it was reaching its decision only in connection with discrimination in grievance arbitration or other contractually created proceedings." Brief for the Federal Labor Relations Authority at 17-18 (emphasis in original). It is instructive to compare that representation by counsel for the Authority with the case counsel is discussing.

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[5] The ALJ found that NTEU's failure to provide Wright with an attorney constitute not only a violation of § 7114(a)(1), but also "an independent violation of section 7116(b)(1) of the Statute by interfering with the employees' protected right under section 7102 of the Statute to refrain from joining a labor organization." J.A. at 103. The Authority appears to have adopted these conclusions: "[T]he Authority finds that NTEU has failed and refused to comply with section 7114(a)(1) of the Statute, and therefore has violated section 7116(b)(1) and (8) of the Statute." J.A. at 104.

It follows from our holding that the Union did not violate § 7114(a)(1) that there was no independent violation of § 7102. The latter section provides in pertinent part: "Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." 5 U.S.C. § 7102 (1982). Were we to conclude that although a union's provision of counsel to members but not to non-members concerning matters unrelated to the collective bargaining agreement doe not violate § 7102. Not even the Authority contends that the statute compels this result. Accordingly, our conclusion that the Union has not violated § 7114(a)(1) requires the same conclusion with respect to § 7102.]

This court stated the practice under review in 721 F.2d 1402 as follows:

> Under a policy adopted and implemented by the Union, only Union members are furnished assistance of counsel, in addition to representation by local chapter officials and Union stewards, with respect to grievances or other matters affecting unit employees in the context of collective bargaining. Non-members, however, are limited to representation by chapter officials and stewards, and are expressly denied the assistance of counsel in matters pertaining to collective bargaining.

721 F.2d at 1403 (emphasis added and omitted). These discrepant policies framed the issue the court thought it was deciding. The court stated that the duty of fair representation "applies whenever a union is representing bargaining unit employees either in contract negotiations or in enforcement of the resulting collective bargaining agreement." Id. at 1406. This court thus stated the duty of fair representation as the NTEU states it here, not as the Authority states it, as extending to all matters relating to employment.

> To put a cap on it, the court stated: [T]he Union is incorrect in suggesting that the challenged policy merely reflects an internal Union benefit that is not subject to the duty of fair representation. Attorney representation here pertain directly to enforcement of the fruits of collective bargaining. Therefore, as exclusive bargaining agent, the Union may not provide such a benefit exclusively for Union members.

Id. at 1406-07 (emphasis added). It is difficult to know what could have prompted counsel to say that the case stands for the proposition that a union may not differentiate between members and non-members as to any representational function and that at no point did the opinion intimate that the decision rested on the fact that the representation related to contractually created proceedings. We would have thought that no one could read the case in that fashion. This court's opinion in 721 F.2d 1402 clearly proceeds on a rationale that supports the position here of the NTEU, not that of the FLRA.[6] So clear is this that, if we had before us only

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[6] The Authority states that its construction of the statute is "fully consistent with private sector precedent" and cites Del Casal v. Eastern Airlines, 634 F.2d 295 (5th Cir.), cert. denied, 454 U.S. 892, 102 S. Ct. 386, 70 L.Ed.2d 206 (1981), and Bowman v. Tennessee Valley Authority, 744 F.2d 1207 (6th Cir. 1984), cert. (continued...)

the precedent of that case, and nothing more, we would have difficulty holding for the Authority.
For the foregoing reasons, the Authority's decision is hereby Reversed.

NOTE 1: At least one other Circuit Court of Appeals and the FLRA have agreed with the D.C. Circuit's interpretation. See AFGE v. FLRA, 812 F.2d 1326 (10th Cir. 1987); DODDS, 28 FLRA 908 (1987).

NOTE 2: In AFGE, Local 2000, 14 FLRA 617 (1984), the president of a local union stated to the most vocal of the nonmembers that the nonmember was a "troublemaker" and that she would "get" him. The statement constituted a threat and, made in the presence of other nonmembers, also had a chilling effect upon the right of other employees to refrain from joining or assisting any labor organization "freely and without fear of penalty or reprisal." Accordingly, the union violated § 7116(b)(1).

NOTE 3: Federal employees do not have a private right of action against their union's for breach of the duty of fair representation. See Karahalios v. NFFE, 489 U.S. 527 (1989).

Strikes and Picketing

A unanimous panel of the U.S. Court of Appeals for the District of Columbia Circuit held that the FLRA did not abuse its discretion by stripping PATCO of exclusive representation rights for striking the FAA in 1981. It upheld the FLRA finding that PATCO "willfully and intentionally" ignored federal laws prohibiting federal employee strikes. Section 7120(f) of the CSRA says that when the FLRA finds that a union has committed the ULP of striking, it shall revoke the union's status as bargaining representative or "take any other appropriate disciplinary action." This seems to suggest that the FLRA has discretion in strike cases.

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[6](...continued)
denied, 470 U.S. 1084, 105 S. Ct. 1843, 85 L.Ed.2d 142 (1985). Brief for the Federal Labor Relations Authority's position at 15 n.10. neither case supports the Authority's position here. Del Casal involved the union's refusal to represent an employee in a grievance procedure governed by the collective bargaining agreement on the ground that he was not a union member. That was held breach of the duty of fair representation. Bowman made a similar holding where the union had negotiated a collective bargaining agreement giving members preferential transfer rights. The court linked the duty of fair representation to the right of exclusive representation. Since both cases involved discrimination against non-members as to matters within the union's role as exclusive representative, neither provides any support for the Authority's position here. If these cases are "fully consistent" with the FLRA's position, that can be so only in the sense that they are not explicitly inconsistent.

But presumably such discretion would only be exercised to take action short of decertification if a strike were proved to be a wildcat. See Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547 (D.C. Cir. 1982).

CSRA § 7116(b) provides: "Nothing in paragraph (7) of this subsection [which prohibits work stoppages/slowdowns] shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice." The Department of Army still prohibits picketing on the installation except in "rare instances." See Department of Army message, Subject: Clarification of Department of Army Policy on Informational Picketing, 24 February 1979. The rationale is that picketing always interferes with the mission. The installation, however, must be prepared to articulate how the picketing interferes with the agency mission. Fort Ben Harrison and AFGE, 40 FLRA 558 (1991).

Although Section 7116(b)(7) contains a general prohibition against picketing if it interferes with the agency's mission, Section 7116(b) further provides that

> Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

Thus, when an agency (Social Security Administration) filed an ULP charge against a union (AFGE) for picketing the lobby of its building and a complaint issued on the charge, the Authority dismissed the complaint because there was no interference with the agency's operations. Social Security Administration and AFGE, 22 FLRA 63 (1986). Because there were only 11 pickets, the picketing lasted only 10 minutes, and the pickets were silent, there was no disruption of the mission.

CHAPTER 6

GRIEVANCES AND ARBITRATION

6-1. Introduction.

The labor counselor will be involved with grievance resolution and, to a much greater extent, arbitration. The management team will be depending upon the labor counselor to perform in a professional, competent manner. This will require a basic knowledge of the CSRA's provisions and private sector principles, as well as being able to perform as an accomplished advocate.

This chapter will be concerned with analysis of the grievance and arbitration provisions of the CSRA, of pertinent private sector experience and policies, and will provide some practice pointers for the processing of grievances and for case presentations at arbitration.

6-2. The Grievance Procedure Prescribed by the CSRA.

Section 7121 of the CSRA sets forth many statutory requirements concerning the negotiated grievance procedure and prescribes certain features of that procedure. Most prominently, section 7121(a)(1) and (b)(3)(C) together provide that all collective bargaining agreements shall provide procedures for the settlement of grievances, including questions of arbitrability, and that the terminal step of those procedures shall provide for binding arbitration of any grievance not satisfactorily settled. Section 7121(b)(3)(C) further restricts invocation of binding arbitration to either the agency or the exclusive representative; it does not permit arbitration to be invoked by aggrieved employees. Army Armament Research and Development Command, 17 FLRA 615 (1985). Section 7121(b) prescribes certain other features of the negotiated grievance procedure, such as, that it shall be fair and simple and shall provide for expeditious processing. More importantly, however, in section 7121(b)(3) a balance has been struck between the sometimes competing or conflicting interests of the exclusive representative and the aggrieved employee in the presentation and processing of grievances. Thus, the negotiated grievance procedure must assure an exclusive representative the right, in its own behalf or on behalf of any bargaining-unit employee, to present and process grievances. At the same time, the procedure must assure the employee the right to personally present a grievance without the representation of the exclusive representative although the exclusive representative in such event has the right to be present during the grievance proceeding. What this means is that with respect to the negotiated grievance procedure, an aggrieved employee is precluded from being represented by an attorney or representative other than the exclusive representative because the only circumstances under which the employee may avoid the representation of the exclusive representative in the presentation and processing of a grievance

is by the employee presenting the grievance in the employee's own behalf. The Authority has also held in this area that the "right to be present during the grievance proceeding" in section 7121(b)(3)(B) includes an implied right of the union to be notified when a grievance is filed by an employee on the employee's own behalf and to be timely served on request with copies of all documents relating to the grievance to the extent that such disclosure is consistent with law. Social Security Administration, Office of Hearings and Appeals, 25 FLRA 571 (1987) (to the extent that it is inconsistent, Lowry Air Force Base, 17 FLRA 469 (1985), will no longer be followed). Section 7114(a) also deals with the rights of employees and the exclusive representative in the presentation of grievances.

Section 7121 together with the statutory definition of grievance set forth in section 7103(a)(9) set the framework for the coverage and scope of the negotiated grievance procedure. Under these provisions, the negotiated grievance procedure automatically extends to all matters, except those excluded by law, covered by the statutory definition of grievance unless the parties mutually and specifically agree to exclude any of those matters in their collective bargaining agreement. Section 7103(a)(9) broadly defines grievance as any complaint:

> (A) by any employee concerning any matter relating to the employment of the employee;
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
> (C) by any employee, labor organization, or agency concerning-
> (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

In short, all matters that under law could be submitted to the negotiated grievance procedure "shall in fact" (to quote the Conference Report that accompanied the CSRA) be within the coverage of a grievance procedure unless the parties negotiate specific exclusions. These provisions are in significant contrast to private sector labor relations and collective bargaining, particularly the structuring of the subject of coverage that is to be negotiated. Unlike in the private sector, agencies and unions under the CSRA no longer negotiate matters into coverage by the grievance procedure with all other matters consequently excluded. Instead, the parties will have the broadest procedure allowed by law from which they may mutually choose to negotiate specific matters out of coverage.

Any such negotiated exclusion would then be in addition to the exclusions by law from a negotiated grievance procedure. The CSRA in section 7121(c) specifically excludes from coverage by a negotiated grievance procedure grievances concerning the following five general matters: (1) prohibited political activities; (2)

retirement, life insurance, or health insurance; (3) a suspension or removal for national security reasons; (4) any examination, certification, or appointment; and (5) the classification of any position which does not result in the reduction-in-grade or pay of an employee. The statutory exclusion that has resulted in the most decisions of the Authority construing the substance of the exclusion is section 7121(c)(5). In this respect the Authority has specifically advised that when the essential nature of a grievance is integrally related to the accuracy of the classification of the grievant's position, that is, where the substance of the dispute concerns the grade level of the duties assigned and performed by the grievant, the grievance concerns the classification of a position within the meaning of section 7121(c)(5). FAA, 8 FLRA 532 (1982). Similarly, section 5366(b) of the CSRA specifically excludes as a matter of law certain grievances concerning grade and pay retention matters. Specifically, section 5366(b) provides that an action which is the basis of an employee's entitlement to grade and pay retention benefits shall not be grievable under a grievance procedure negotiated under the Statute. Thus, the Authority has expressly recognized that reductions-in-grade made pursuant to position reclassification actions for which grade and pay retention benefits are available are precluded from grievance and arbitration. Social Security Administration, 16 FLRA 866 (1984); VA Medical Center, 16 FLRA 869 (1984).

Decisions have also been issued by the Authority finally resolving whether three vigorously disputed matters are within the permissible coverage of a grievance procedure negotiated under the Statute. The three disputed matters are: (1) the separation of a probationary employee (2) the discipline of a National Guard civilian technician; and (3) the discipline of a professional employee of the Department of Medicine and Surgery of the Veterans Administration. Initially, the Authority uniformly held that grievances over such matters were within the permissible coverage of a grievance procedure negotiated under the Statute; the federal courts uniformly held on review of negotiability and ULP cases that such matters are precluded by law from grievance and arbitration; and the Authority uniformly adopted the rationale and conclusions of the courts in reversing the initial determinations and holding that such matters are precluded by law from grievance and arbitration. The matter that has had the greatest ramifications because it applies to such a large category of federal employees is the matter of the separation of a probationary employee. Specifically, the Authority in a number of arbitration cases involving grievances over the separation of a probationary employee held that there was nothing in the language of the Statute, nothing in the legislative history to the Statute, and nothing in law and regulation pertaining to the probationary period of employment to indicate that Congress intended to preclude grievance and arbitration over the separation of probationary employees. However, on review of a negotiability decision in Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983), the court held that the statutory and regulatory scheme for a probationary period of employment set forth in 5 U.S.C. § 3321 and 5 C.F.R. part 315 precludes coverage under

a negotiated grievance procedure of a grievance concerning the separation of a probationary employee. In a series of arbitration cases, e.g., Department of Labor, 13 FLRA 677 (1984), the Authority consequently has held on the basis of the rationale and conclusion of the court in INS that grievances over the separation of a probationary employee are precluded by law and regulation. Department of Medicine & Survey employees of VA was similar. A number of federal courts of appeal on review of decisions of the Authority uniformly held contrary to the Authority that the National Guard Technicians Act, 32 U.S.C. § 709, unmistakably forecloses any obligation on the part of the National Guard to arbitrate a grievance over discipline taken under section 709(e) of that Act. E.g., Indiana Air National Guard v. FLRA, 712 F.2d 1187 (7th Cir. 1983). Thus, the Authority consequently held on the basis of the rationale and conclusions of the courts of appeal that grievances concerning an adjutant general's decision to take any of the actions enumerated in section 709(e) of the Technicians Act are precluded by law. E.g., Wisconsin Army National Guard, 14 FLRA 57 (1984).

In a case similar to these, VA Medical Center of Cleveland, 19 FLRA 297 (1985), the Authority held that the coverage by a negotiated grievance procedure of a grievance concerning the separation during the initial year of employment of an employee holding a veterans readjustment appointment is precluded by the statutory and regulatory scheme for these appointments set forth in 38 U.S.C. § 2014 and 5 C.F.R. part 307. In so deciding the Authority found a close alignment between the initial appointment to a competitive service position and the veterans readjustment appointment.

6-3. Grievance resolution under the CSRA.

The CSRA has provided the employee in a bargaining unit a number of means of resolving an employment dispute that may arise. When the employee chooses to resolve that dispute by the filing of a grievance, four general types or categories of disputes can be identified under the terms of section 7121. It is important to examine each type or category because each has its own unique features of processing that must be recognized. The four types of grievance disputes may be categorized as (1) a pure grievance, (2) unacceptable performance and serious adverse action cases under section 4303 and section 7512, (3) a pure discrimination case, and (4) a mixed case under section 7702.

a. Pure Grievance.

A pure grievance is any grievance, as that term is defined in section 7103(a)(9), that is not excluded by law from coverage by a negotiated grievance procedure, that does not involve a 4303 or 7512 matter or a similar such matter that has arisen under another personnel system, and that does not involve a complaint of discrimination of the type within the jurisdiction of EEOC. However, pure grievances concern the most common disputes that arise in an employment and collective bargaining relationship.

Primarily, pure grievances will involve disputes over the proper interpretation and application of provisions of the collective bargaining agreement and provisions of laws and regulations governing aspects of federal employment in cases concerning such diverse matters as overtime assignments, promotion and detail actions, and just cause for minor disciplinary actions. As for their processing, which is displayed graphically, the negotiated grievance procedure is first examined to determine whether the particular matter has been excluded, as any matter may be by negotiated agreement of the parties. But if the matter is not excluded, under the express terms of section 7121(a)(1), the negotiated grievance procedure is the sole and exclusive procedure available to employees in that bargaining unit for resolving pure grievances.

The application of this exclusivity provision is probably most notable with respect to disputes that for such employees otherwise would have been, and for nonbargaining-unit employees are, appealable to the Merit Systems Protection Board. Predominantly, these involve the denial of a within-grade salary increase or reduction-in-force actions. See, e.g., Patent Office Professional Association and U.S. Patent and Trademark Office, 34 FLRA 883 (1990). For eligible nonbargaining-unit employees and for eligible bargaining-unit employees whose collective bargaining agreement has excluded such matters, these disputes are of course appealable to MSPB. Another notable aspect of this application with respect to these matters is that in resolving such disputes MSPB is governed by section 7701 which does not govern the arbitration of these disputes. Thus, with respect to the denial of a within-grade increase, for example, the Authority has specifically held that in contrast to MSPB an arbitrator is not required to apply either the substantial evidence standard or the harmful-error rule. Department of Education, 17 FLRA 997 (1985); IRS, 17 FLRA 1001 (1985). Accordingly, it must be recognized that the scheme of resolving disputes provided by the CSRA has expressly provided means of resolving these matters generally based on bargaining-unit status that are not governed by the same standards and consequently may not reach the same result in like cases.

Continuing the processing of a pure grievance, if the grievance is not satisfactorily settled, binding arbitration may be invoked by the union which will ultimately result in an award of an arbitrator. Under section 7122(a), either party to the arbitration may file exceptions to the award with the FLRA. Unless provided otherwise, the parties to arbitration will only be the union and the agency, and not the grievant employee, who therefore is not entitled to file exceptions. Finally, under the terms of section 7123 relating to judicial review, no judicial review is available of the Authority's decision resolving the exceptions unless "the order involves an unfair labor practice." See 6-23 infra for a more detailed discussion of judicial review.

b. Section 4303 or Section 7512 Case.

This category refers to sections of the CSRA and the dispute in these matters arises when an agency takes a 4303 or 7512 action against an employee. 4303 actions are a removal or a demotion for unacceptable performance. 7512 actions are serious adverse actions--removal, suspension for more than 14 days, a reduction-in-grade or pay, and a furlough for 30 days or less. In this type of case, the exclusivity provision of section 7121(a)(1) does not apply and under section 7121(e)(1) a nonprobationary, competitive service employee or a preference-eligible, excepted service employee may have an option. This type of dispute in the discretion of the aggrieved employee may be appealed to MSPB or a grievance may be filed if the dispute has not been excluded from the negotiated grievance procedure. If the grievance option is elected and the grievance is submitted to arbitration, this arbitration is different from that of pure grievances in two respects.

First, under section 7121(e)(2), the arbitrator in hearing a 4303 or 7512 grievance must apply the same statutorily prescribed standards in deciding the case as would have been applied if the matter had been appealed to MSPB. Thus, in accordance with the evidentiary standards prescribed by section 7701, the decision of the agency in an action based on unacceptable performance must be sustained by the arbitrator, absent harmful error, if supported by substantial evidence. Likewise, in serious adverse action cases the decision of the agency must be sustained, absent harmful error, if supported by a preponderance of the evidence. In addition, as the result of the decision of the U.S. Supreme Court in Cornelius v. Nutt, 472 U.S. 648 (1985), arbitrators must also apply the harmful-error rule of section 7701 precisely as MSPB does. That is, arbitrators can only refuse to sustain an agency's decision by reason of harmful error if the employee has shown error that caused substantial prejudice to the employee's individual rights by possibly affecting the agency decision. Thus, an arbitrator after Nutt may no longer refuse to sustain an agency's decision on the basis of a violation of a collective bargaining agreement that is harmful only to the union and not the employee.

These arbitrations are different from pure grievances in a second respect. In this type of dispute, judicial review of the award is available in the same manner and under the same conditions as if the matter had been decided by MSPB. Thus, these awards are appealable directly to the U.S. Court of Appeals for the Federal Circuit as if the award were the final decision of MSPB. These awards are not appealable to the Authority. 4303 and 7512 actions are matters described in section 7121(f), and therefore under the express terms of section 7122(a), pertaining to the filing of exceptions with the Authority, exceptions may not be filed to an award relating to such matters. With respect to the judicial review of these awards, only employees have a right of appeal. Agencies have no right of appeal, but the Director of the Office of Personnel Management may obtain review of the decision of the arbitrator in the limited circumstances and under the stated

conditions of section 7703(d) which essentially are that the arbitrator has erred in interpreting civil service law and regulation and the error will have a substantial impact. Because section 7703(d) is stated only in terms of obtaining review of MSPB decisions, the Federal Circuit has had to clarify its application to arbitration and those decisions should be consulted on the specifics of OPM obtaining judicial review of these arbitration awards. See Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983); Devine v. Nutt, 712 F.2d 1048 (Fed. Cir. 1983), rev'd as to other matters sub nom. Cornelius v. Nutt, 472 U.S. 648 (1985).

For employees employed in a personnel system other than the ordinary competitive or excepted service system against whom actions similar to those of section 4303 and section 7512 are taken, the processing of their grievances would be very similar. Section 7121(e) indicates that such employees have a similar option of raising the matter under applicable appellate procedures or of filing a grievance if the matter has not been excluded from the negotiated grievance procedure. Section 7121(f) further specifies that when the grievance option has been elected and the matter is submitted to grievance arbitration, judicial review of the arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures. See VA Medical Center, Chillicothe, 15 FLRA 448 (1984).

c. Pure Discrimination Case.

A pure discrimination case involves an allegation of employment discrimination within the jurisdiction of EEOC that does not also involve a matter appealable to MSPB. This type of case commonly involves a claim of discrimination as the result of a failure to be promoted. As with 4303 and 7512 cases, in this type of case the exclusivity provision of section 7121(a)(1) does not apply and under section 7121(d) the employee may have an option. This type of dispute in the discretion of the aggrieved employee may be raised under the equal employment opportunity complaint procedures or a grievance may be filed if the dispute has not been excluded from the negotiated grievance procedure. If the grievance option is elected, the initial processing of the grievance is nearly identical to that of a pure grievance. If the grievance is not satisfactorily settled, arbitration may be invoked and either party may file exceptions with the Authority for its decision resolving the exceptions. Discrimination cases differ from pure grievances in that section 7121(d) provides that the selection of the grievance procedure does not prevent the aggrieved employee from requesting EEOC to review "a final decision" respecting "a complaint of discrimination of the type prohibited by any law and administered by [EEOC]." Because of this provision, EEOC in 1983 amended its regulations to include procedures for an appeal by an aggrieved employee to EEOC from the final decision of the agency on the discrimination grievance as to which arbitration was not invoked, from an arbitrator's award, and from a decision of the Authority resolving exceptions to the arbitration award. 29 C.F.R. § 1613.233(b). These regulations also incorporate the statutory

rights of an employee to judicial review. Thus, in accordance with the prescribed time frames, an employee can file in an appropriate district court after the final agency decision on the discrimination complaint or after not receiving within the allotted time a decision on the complaint for a de novo review of the case by the court. 29 C.F.R. § 1613.281. Thus, if the pure discrimination grievance can be equated with the discrimination complaint in this respect, which seems reasonable but which, it must be noted, is not expressly stated, the employee has the option of judicial review of the agency denial of the grievance or of the agency action that has been grieved. Because these regulatory provisions do not mention arbitration awards or FLRA decisions, it is likewise uncertain whether the employee has a similar right to judicial review of the arbitrator's award or the decision of the Authority resolving exceptions to the award. Consequently, the full delineation of this right to judicial review must await regulatory or judicial clarification.

As has been noted, in these cases the employee may have an option, but it is an election of remedies provision pursuant to which the employee must choose under which procedure to raise the matter after which the employee will be precluded from raising the matter under the other procedure. Specifically, section 7121(d) provides in this respect that the employee shall be deemed to have exercised the option at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing whichever event occurs first. The Authority has concluded that a grievance filed in accordance with a negotiated grievance procedure raising the matter of alleged discrimination under the Civil Rights Act of 1964 is only precluded or barred by the grievant having earlier raised the same matter by the timely filing of a formal EEO complaint under the complaint procedures set forth in 29 C.F.R. § 1613.214. Consultation with an EEO counselor pursuant to precomplaint procedures does not preclude the subsequent filing of such a grievance. U.S. Marshals Service, 23 FLRA 414 (1986). The EEOC's amendment of its rules in October 1987 was to the same effect. 29 C.F.R. § 1613.219 (1987).

d. Mixed Case.

The last category is a section 7702 or mixed case. A mixed case is one where an agency takes an action against an employee that is appealable to MSPB and the employee asserts that the action was taken on the basis of prohibited discrimination. Common examples would be a removal or demotion for unacceptable performance or a serious adverse action alleged by the affected employee to have been based on discrimination. Because the scheme for processing these matters is very complex, the graphic only summarizes their processing. For more specific details the statutory and regulatory provisions should be carefully consulted, primarily section 7702 and 5 C.F.R. part 1201, subpart D and 29 C.F.R. part 1613, subpart D.

As with pure discrimination and 4303 and 7512 cases, the exclusivity provision of section 7121(a)(1) does not apply and

under section 7121(d) the employee may have an option. This type of dispute may be raised in the discretion of the aggrieved employee under the EEO complaint procedures by the filing of a mixed case complaint with the agency or a grievance may be filed if the dispute has not been excluded from the negotiated grievance procedure. If the grievance option is elected and the grievance is not satisfactorily settled, arbitration may be invoked by the union. Either party to arbitration may file exceptions to the arbitration award with the Authority except for an award where the agency had taken a 4303 or 7512 action against the employee. As had been noted, under section 7122(a) exceptions to an award relating to such an action may not be filed with the Authority. What differentiates the processing of these matters from all others is that section 7121(d) provides, in addition to the provision for EEOC review discussed with respect to pure discrimination cases, that the selection of the negotiated grievance procedure does not prevent the employee from requesting MSPB to review a "final decision" in this matter. Thus, the aggrieved employee has available both MSPB and EEOC review.

Although it is not as express as with respect to the agency's final decision on the pure discrimination grievance, it appears that the employee has the option of invoking MSPB review at the final agency decision step of the grievance procedure instead of seeking arbitration. See 5 C.F.R. § 1201.154(b). The regulations do expressly provide for the invocation of MSPB review of the final arbitration award or the decision of the FLRA. Thus, the employee could appeal the final award instead of seeking to have the union file exceptions with the FLRA where permitted. If exceptions are properly filed with the Authority by either the union or the agency or both and the Authority issues a decision adverse to the employee, the employee may invoke MSPB review of the Authority's decision. In cases where MSPB review is invoked and MSPB issues a decision adverse to the employee, the employee has the right to petition EEOC to consider MSPB's decision. If the employee petitions EEOC and EEOC accepts the petition, EEOC may either concur in the MSPB decision or issue a decision different from MSPB and forward that decision to MSPB. On receipt of such a decision, MSPB can concur in the EEOC decision or reaffirm its decision. If MSPB reaffirms its decision, the matter is immediately referred to a Special Panel, consisting of permanent chairperson, a EEOC member and a MSPB member, which issues a decision finally resolving the matter. If the Panel decision is adverse to the employee, the employee has the right to file in an appropriate U.S. district court for a de novo review of the case by the court. As provided by regulation, the employee also has the option of seeking judicial review at earlier stages of the processing of these matters. Thus, the employee may file for judicial review of an adverse decision of MSPB instead of petitioning EEOC. When the employee has petitioned EEOC, judicial review is available of the determination by EEOC not to consider the petition for review of the MSPB decision, the determination by EEOC to concur in the decision of MSPB, and the decision of MSPB to concur in or adopt the decision of EEOC which differed from that of MSPB. Under the statutory and regulatory scheme, it is uncertain whether the employee has the

option of seeking judicial review after the final agency decision on the grievance or after not receiving within the allotted time a decision on the grievance. For reasons similar to those stated with respect to pure discrimination grievances, it would appear that such a right is available. What is more uncertain and will need to await regulatory or judicial clarification is whether the employee also has the right to seek judicial review, as an option to MSPB review, of the arbitrator's award or a decision of the FLRA.

6-4. Multiple Forums.

As indicated by the preceding discussion, an aggrieved employee in many cases has multiple forums available in which to raise a disputed matter although with respect to the available options an election must often be made. In addition to the options already discussed, an employee also may have the option of raising a disputed matter under the grievance procedure or as an unfair labor practice. But again, pursuant to section 7116(d), an election is required which precludes an employee from raising the issue under both procedures. In terms of whether a grievance may be precluded in this respect, section 7116(d) effectively provides that when in the discretion of the aggrieved party, an issue has been raised under the unfair labor practice procedures, the issue may not subsequently be raised as a grievance. Thus, the Authority has recognized that the elements of section 7116(d) which must attach in order for a grievance to be precluded are: (1) the issue which is the subject matter of the grievance is the same as the issue which is the subject matter of the unfair labor practice; (2) such issue was earlier raised under the unfair labor practice procedures; and (3) the selection of the unfair labor practice procedures was in the discretion of the aggrieved party. E.g., Department of Defense Dependents Schools, Pacific Region, 17 FLRA 1001 (1985).

In order for element 1 to attach, the issue which is the subject matter of the grievance must be substantially the same issue which is the subject matter of the unfair labor practice charge. In addition, the Authority has held that section 7116(d) only precludes duplicate filings of an issue actually raised in the grievance and unfair labor practice forums and does not extend to an issue which the aggrieved party could have, but did not, raise in the earlier selected forum. INS, U.S. Department of Justice, 18 FLRA 412 (1985).

With respect to element 2, the Authority has determined that the critical event as to this aspect of section 7116(d) occurs when the procedures are selected by the filing of a charge or a grievance. Thus, the Authority has held that an issue has been "raised" within the meaning of section 7116(d) at the time of the filing of the unfair labor practice charge even if the charge is subsequently withdrawn and never adjudicated. Headquarters, Space Division, Los Angeles Air Force Station, California, 17 FLRA 969 (1985).

As to element 3, the Authority has determined that identity of filing parties is not required. Thus, the Authority has held that this element attaches when the choice of the unfair labor practice procedures was made by the aggrieved party, regardless of who is formally the filing party of the charge. For example, in U.S. Department of Justice, INS, 20 FLRA 743 (1985), it was determined that the individual employee was the aggrieved party and that the filing of a charge by the Union was in a representative capacity in behalf of that employee. Consequently, it was held that the filing of the charge constituted the choice and selection of the unfair labor practice procedures by the employee, the aggrieved party, which precluded raising the issue subsequently under the grievance procedure.

6-5. The Grievance Procedures.

The negotiated grievance procedure normally consists of three or four steps, depending on how many levels of supervisors the employee/union can appeal the decision to. A "typical" four-step employee grievance procedure is illustrated as follows:

Step 1. The aggrieved employee will informally discuss the grievance orally with his or her immediate supervisor within a specified number of days from the complained-of act. A decision will be rendered within a few days of the discussion.

Step 2. If no satisfactory solution is reached, the employee may pursue the grievance by submitting the matter, in writing, within a specified number of days, to the activity head. The activity head will meet with the employee and union representative, discuss the matter, and render a written decision.

Step 3. The grievant may pursue the matter further if is denied by submitting within a specified number of days, the written grievance and the Step 2 supervisor's decision to the Deputy Installation Commander for a decision. The Deputy Installation Commander will meet with the employee, his union representative, and the Civilian Personnel Officer to discuss the matter. A written decision will be rendered within a specified number of days.

Step 4. If the matter is still not resolved, the exclusive representative or management may refer the matter to binding arbitration.

Different procedures will be provided for those grievances initiated by the exclusive representative or by management. Usually, the first step will be omitted. (See the sample grievance provision at the end of this chapter.)

While the labor counselor will not normally be directly involved with the processing of routine grievances, he or she will still have a professional interest in the way they are handled since grievances that are handled by management representation in a perfunctory or sloppy manner will tend to reduce the chances of

a satisfactory disposition and push the matter up the grievance ladder and may result in unnecessary appeals to arbitration.

Grievances should be disposed of at the lowest level possible. If the issues between the parties are not identified and developed and the pertinent evidence is not properly collected and preserved early in the process, the task of the labor counselor will be much more difficult in settlement negotiations and preparation for arbitration.

Complaints and disputes should be resolved at the grievance stage if at all possible. Unjustified resort to arbitration will add unnecessary cost, delay and uncertainty to the case, and may have an adverse effect on morale. Arbitration should be the rare exception rather than the rule.

FLRA has recognized an agency obligation to furnish to employees the documents needed during the grievance stages of a controversy. (See U. S. Customs Service, Los Angeles, 10 FLRA 251 (1982).) The Authority has also recognized the propriety of agency personnel preparing for an arbitration (or an unfair labor case) to meet directly with employees. (See IRS, Brookhaven Service Center, 9 FLRA 930 (1982) and U. S. Customs Service, Region V, 9 FLRA 951 (1982).)

6-6. Multiple Sources of "Law".

One of the most significant differences between arbitration in the private sector and the federal sector is the so-called multiple sources of "law" in the federal sector where grievances and disputes can involve law and regulations as well as provisions of the collective bargaining agreement. The basic function of grievance arbitration in the private sector is as a mechanism for resolving disputes which assures for the parties compliance with the terms and conditions of the parties' collective bargaining agreement. This primary function is correspondingly reflected in the coverage and scope of the grievance procedure that is negotiated in the private sector which ordinarily is confined to disputes over the interpretation and application of the collective bargaining agreement.

In contrast the scope of the grievance procedure in the federal sector is much more expansive. Under the CSRA, grievance procedures automatically extend to all matters, except those excluded by law, covered by the broad statutory definition of grievance, unless the parties mutually and specifically agree to exclude any of those matters in their collective bargaining agreement. As earlier noted, section 7103(a)(9) broadly defines grievance as any complaint by any employee concerning any matter relating to the employment of the employee; any complaint by a union concerning any matter relating to the employment of any employee; or any complaint by any employee, labor organization, or agency concerning the effect or interpretation, or claim of breach of a collective bargaining agreement or any claimed violation, misinterpretation, or misapplication of any law, rule or regulation

affecting conclusions of employment. With this broad statutory definition of grievance and with relatively few matters excluded by law in the federal sector, an important additional function of the negotiated grievance procedure and grievance arbitration under the CSRA is as a means of assuring, and if necessary enforcing, compliance with law and regulation as well as enforcing compliance with the terms and conditions of the parties' collective bargaining agreement. As a consequence, the parties, the party representatives, and the arbitrator in the federal sector unlike the private sector will be constantly dealing with the interpretation and application of laws, rules, and regulations in addition to the interpretation and application of provisions of the collective bargaining agreement.

Because of this significant difference, arbitrators with substantial private sector experience and comparatively little federal sector experience must be educated and instructed on this expansion of the negotiated grievance procedure and arbitration in the federal sector to understand that consideration of laws, rules, and regulations in the federal sector is not precluded but is mandatory. As stated by the Authority in Louis A. Johnson VA Medical Center, 15 FLRA 347 (1984), nothing prevents an arbitrator from considering the meaning and applicability of relevant law and regulations when resolving a grievance under the negotiated grievance procedure. Indeed, the Authority emphasized that when exceptions are filed, section 7122 authorizes the Authority to take such action as it considers necessary with respect to an arbitration award which it finds deficient because the award is contrary to any law, rule, or regulation. Thus, the Authority specifically advised that to "avoid such findings of deficiency by the Authority, an arbitrator must perforce consider any relevant law, rule or regulation when fashioning a grievance arbitration award in the federal sector." Correspondingly, the arbitrator must be provided with accurate and complete reference materials to all laws, rules, and regulations that each party will rely on in developing its case.

In presenting the case, and in any post-hearing brief, the labor counselor should take special care to make sure that the arbitrator is in a position to fully understand the meaning of a particular law, rule or regulation and the reasons for asserting its applicability to the facts of the case. When the cited authority is highly technical or complex, or would appear obscure to an outsider, it will be necessary to develop its background and operational context. (See Norfolk Naval Shipyard, 9 FLRA 538 (1982), where an award was remanded because the arbitrator was not aware of the specialized meaning of "offense" in a disciplinary matter.) This may be done with witnesses, "expert" or otherwise, who can educate the arbitrator about the background and operational aspects, by agreeing to stipulations, by providing "legislative" history, and the like. FLRA has indicated that it is not improper for an arbitrator to devise a "rule of reason" for applying a regulation in the absence of guidance from the parties. (See Community Services Administration, 5 FLRA 254 (1981).)

6-7. Submission Statement (The Issue Statement).

As is almost always the case in the private sector, an unresolved grievance in the federal sector will be submitted to binding arbitration by either the agency or the exclusive representative by simply invoking it in a timely fashion. This is because the CSRA requires a collective bargaining agreement to contain procedures for the settlement of grievances which must include arbitration as the terminal step. So a "submission statement" does not serve as a commitment to arbitration in general, but rather it serves at the very least, to identify the grievance or grievances which the selected arbitrator will hear. It will state the question or issue to be resolved. Submission statements are highly encouraged.

In many cases these may not even be a "statement" in the accepted sense. The "submission" will consist merely of the original grievance, step answers and any correspondence between the parties relating to the grievance, with a referring agency (the Federal Mediation and Conciliation Service or the American Arbitration Association) and the arbitrator. Arbitrations may, and often do, proceed with nothing more formal in the way of a submission. In such a posture, the "case" to be decided, that is, the issues to be decided, the facts to be found, and the appropriate remedy, if any, will have to be deduced from what transpired during the processing of the grievance and ultimately what goes on in the arbitration proceeding. Some types of cases, such as most discipline cases, can proceed reasonably well in this configuration, since the operative factual events are usually readily discernible or agreed upon in general and the legal issue in any event would likely reduce to a stylized statement--"Was there just cause for the disciplinary action taken on such-and-such date? If not, what is the appropriate remedy?" (See San Antonio Air Logistics Center, 9 FLRA 378 (1982).)

Nevertheless, while a submission statement is not jurisdictional, that is, necessary to the conduct of the arbitration, a well thought out submission statement will prove useful to the parties in preparing and presenting their respective cases, and to the arbitrator in the conduct of the hearing and in deciding the case. It will often identify the controlling provisions of the collective bargaining agreement and it will specify the relief desired. The original grievance statement may be inarticulate or incomplete and the record produced by the grievance steps may not do much to clarify the crux of the dispute.

Once arbitration is invoked, it is good practice for the persons responsible for preparing each side of the case to attempt to reach a mutual understanding of what the case is all about. If the grievance steps have been done well, the factual contentions and the legal claims should have become apparent. An early appreciation of the dimensions of the case should facilitate settlement discussions, or at least can lead to the dropping of erroneous or unsupported claims and provide a basis for possible stipulations of facts.

If there is no precise issue specified, the authority of the arbitrator is unrestricted and he or she may decide any dispute presented which arises under the collective bargaining agreement. By a mutually agreed submission statement, the parties may restrict, or enlarge, the arbitrator's jurisdiction over the case. Once the issue (or issues) to be decided are agreed upon, each party can prepare their evidentiary and legal case with economy and precision and with confidence that the arbitrator will decide the case which the parties have in mind and have prepared for.

A submission statement may have other additional benefits. A statement of the specific matter to be arbitrated may prove useful in determining whether collateral proceedings, such as a parallel unfair labor practice hearing, should continue or be stayed pending arbitration. The statement will be useful to the arbitrator in deciding the materiality or relevancy of evidence that is offered at the hearing. Finally the submission statement may prove helpful on appeals to the Authority, since an arbitration decision which goes beyond the scope of the submission may be found deficient.

FLRA has held that arbitrators exceed their authority by deciding an issue not included in an agreed submission. Veterans Administration, 24 FLRA 447 (1986).

If the parties cannot agree to a submission, one or both should present their own unilateral statements of the issue to the arbitrator. Often the differences are not all that great and the arbitrator may bring the parties together. Even if no agreement can be reached, the statements of position will be helpful to the arbitrator's understanding of the dimensions of the case.

In the absence of an agreed statement of the issue, the Authority, like the federal courts, will accord an arbitrator's formulation of the issues to be decided the same substantial deference accorded an arbitrator's interpretation and application of a collective bargaining agreement. Housing and Urban Development, 24 FLRA 442 (1986).

6-8. Enforcement of Agreement to Arbitrate.

Because the statutory policy of the United States favors arbitration in the federal labor management sector, it will be a rare situation which requires outside coercion against one of the parties to abide by the commitment in their collective bargaining agreement to arbitrate a grievance which has been properly carried to that level. The CSRA contains no specific provision for the enforcement of the obligation to arbitrate. An unfair labor practice proceeding would be in order. A refusal by an agency to arbitrate would constitute an unfair labor practice under section 7116(a)(1), (5), and (8). A refusal by a union to arbitrate would constitute a violation of section 7116(b)(5) and (8).

Once an arbitrator has been selected, the arbitration may proceed ex parte. An award would be binding on the uncooperative party if there has been proper notice, no procedural irregularity and if the successful party "proves" its case or otherwise "bears" its burden under the CBA.

In the private sector the obligation to arbitrate generally persists beyond the termination date of the collective bargaining agreement, at least when the events giving rise to the grievance occurred during the life of the collective bargaining agreement. This is the policy also followed in the federal labor management sector. FLRA has found it to be an unfair labor practice for an agency to refuse to process a grievance over matters which occurred prior to the expiration of the CBA. It declared, "In the Authority's view, the purposes and policies of the Statute are best effectuated by a requirement that the existing personnel policies and practices and matters affecting working conditions -- including negotiated grievance and arbitration procedures -- must continue as established upon the expiration of a negotiated agreement, absent an express agreement by the parties to the contrary or unless modified in a manner consistent with the Statute." (See Dept. of the Air Force, 35th Combat Spt. Gp. (TAC), George AFB, CA, 4 FLRA 22 (1980).)

Even though the FLRA has recognized that an ex parte arbitration may proceed in the absence of one of the parties, it has declared refusal to participate to be an unfair labor practice. (See Department of Labor, Wage and Hour Division, 10 FLRA 316 (1982).)

6-9. Variety of Arbitrator Arrangements.

The collective bargaining agreement, of course, will contain the arbitration arrangement(s) which the parties have agreed to. The choice may include the use of: (1) ad hoc arbitrators; (2) a permanent umpire; (3) tri-party boards, or (4) expedited procedures.

The use of ad hoc arbitrators is the mostly widely used arrangement in both the private and public sector. The ad hoc arbitrator will be appointed to arbitrate a particular case between the parties and upon completion of his or her office, the relationship with the parties will cease. While the parties may select an arbitrator from those that are personally known and acceptable to them, most likely the selection will be from a list of experienced labor arbitrators supplied by the Federal Mediation and Conciliation Service or the American Arbitration Association.

If an installation generates a large number of arbitrations or if there is need for arbitrators who are acquainted with special needs or complexities, a permanent umpire or permanent panel of arbitrators may be provided for in the collective bargaining agreement. The appointment process will be greatly shortened. The presentation of cases will be expedited since the permanent arbitrator will not have to be "educated" about many of the

standard details concerning the parties, and their operations and practices. Also the decisions of permanent umpires/arbitrators can be expected to be more consistent and sensitive to the particular circumstances of the parties.

Tri-party arbitration boards consist of a management member, a union member and a neutral member (usually an arbitrator selected through the FMCS or AAA). Permanent tri-party panels have the advantages of the permanent umpire systems and provide each side direct participation in the decisional process and by providing expertise and special perceptions from both sides. In practice, their use also tends to bring in an element of partisanship which places the neutral member in the position of tie-breaker.

The logistical problems may be significant when an ad hoc neutral member is used, especially if he or she lives at a distance. There may not be adequate opportunity for the board to meet, become acquainted and exchange views before, during and after the hearing. Often the ad hoc neutral member will leave the hearing with the understanding to decide the case and that the winning side will "vote" with the "majority" and the losing side will "dissent." It is not surprising that the ad hoc tri-party board is very frequently "waived" altogether and the neutral member performs as a sole arbitrator.

Expedited procedures are designed for the rapid processing of the "routine," minor disciplinary action grievances whose validity will turn on the facts that can be proved, or other kinds of grievances which do not require any significant interpretation of the collective bargaining agreement. A rotating panel of selected arbitrators is used. The arbitrator at the top of the list is notified and is expected to be able to hear the case within a stipulated period. If this cannot be done, the next arbitrator will be called. Two or more short cases may be considered at a single hearing. The arbitrator will be required to issue a bench decision or decide the case within a few days. The award need not be accompanied by an opinion and any opinion, if used, must be brief. Awards in expedited proceedings carry no precedential value and will not be released for publication, including even those containing a short opinion. The U.S. Postal Service has used expedited arbitration for several years. (An expedited arbitration provision is printed at the end of this chapter.)

6-10. Selection of an Arbitrator.

The selection of an ad hoc arbitrator, and the selection of the initial members of a permanent panel or a replacement member requires the exercise of judgment and should be done on the basis of the best available information about the candidate(s). All of the arbitrators on a FMCS or AAA list may be strangers to the parties. Sources of information include biographical information supplied by the FMCS or AAA, or that which may be in the LAIRS system. Prior awards of given arbitrators may have been published by a labor law service publisher such as Federal Labor Relations Press, BNA or CCH, or in other collections. Useful information may

also be garnered from others who have had experience with the arbitrator.

An arbitrator who is selected by the parties is under an obligation to disclose to the parties any circumstances, associations or relationships which might reasonably raise any doubt about his or her impartiality or technical qualifications regarding a particular case. If either party declines to waive a presumptive disqualification, the arbitrator should withdraw from the case. Impartiality or bias, preexisting or which may occur subsequent to appointment, may provide the basis for vacation of the arbitrator's award.

6-11. Arbitrability Challenges.

Section 7121 provides that the collective bargaining agreement "shall provide procedures for the settlement of grievances including questions of arbitrability." In all likelihood, a collective bargaining agreement will provide that these kinds of questions be decided by the arbitrator preliminary to a consideration of the merits. Even if the collective bargaining agreement is silent on the point, it is likely that the task must be left to the arbitrator since, in the absence of an agreement, there appears to be no other readily available alternative mechanism for deciding it. Even if one were identifiable, a collateral determination by a separate entity would likely be sufficiently cumbersome and time consuming as to conflict to the policy of "expeditious processing" enunciated by the Act.

The two general categories of arbitrability challenges are: (1) procedural and (2) subject matter. The second type is a challenge to the arbitrator's authority to deal with the matter, or parts of it, while the first type may be considered to be essentially a request that the arbitrator dispose of the matter on a procedural point without reaching the merits.

An issue of procedural arbitrability will concern questions of whether or not a procedural requirement or a formal prescription contained in the collective bargaining agreement for the processing of the grievance has been satisfied by one of the parties. These may concern such questions as whether the grievance or an appeal to one of the grievance steps was filed or completed in a timely fashion, whether the grievance was signed by the proper party or a notice given in the prescribed form. Disposition of these issues usually turn on such considerations as findings of fact, determination of whether under the agreement the prescription is mandatory, whether there has been a waiver, estoppel or an excuse from a requirement, or whether it has been satisfied. The FLRA has uniformly held that questions of procedural arbitrability are questions solely for determination by the arbitrator and that exceptions disagreeing with that determination consequently provide no basis for finding an award deficient. E.g., Headquarters, Fort Sam Houston, 15 FLRA 974 (1984).

Substantive arbitrability will concern questions of whether the dispute is of the type within the scope and coverage of the negotiated grievance procedure. In this type of case, there may be no dispute as to the facts or any question of procedural regularity. The crucial question is how to properly characterize the dispute and whether or not it is subject to grievance and arbitration under law and the collection bargaining agreement. The arbitrator should consider an arbitrability issue before reaching the merits. A bench decision may be issued on arbitrability before hearing the merits, or arbitrability and the merits may be heard at the same hearing and the arbitrator will decide the respective issues later. (See Department of Army, 83d ARCOM, 11 FLRA 55 (1983)). A matter continues to be grievable and arbitrable even though the aggrieved employee has subsequently been promoted to management. (See IRS, Brookhaven Service Center, 11 FLRA 486 (1983)).

Unlike practice in the private sector, an arbitrator in the federal sector has original plenary powers to decide subject matter arbitration issues, subject only to any limitation of law or the terms of the CBA. The Supreme Court has decided that in the private sector the question of fundamental subject matter arbitrability is initially a matter for judicial determination. Nevertheless, this preliminary consideration is not to implicate the merits and doubts are to be resolved in favor of arbitrability. (See Steelworkers v. Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); and Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)). Since the CSRA provides no judicial or direct administrative mechanism for addressing preliminary arbitrability issues and because section 7121 specifically requires the agreement to provide for arbitrability issues, it appears that preliminary consideration of subject matter arbitrability questions by external authorities is precluded unless the parties provide otherwise.

Subject matter arbitrability is usually considered "jurisdictional" by arbitrators and many will allow it to be raised for the first time at the arbitration. But of course, since "jurisdiction" in arbitration is created by agreement of the parties themselves it may be informally waived even though the terms of the CBA literally preclude the consideration of a particular case. This is on the theory that parties to an existing controversy have the capacity to submit controversies to arbitration by agreement even though there is no present or preexisting obligation to do so. Of course, under the CSRA the parties could not agree to something excluded from grievance/arbitration by law.

6-12. Arrangements for the Hearing.

Once the date and time for the arbitration hearing have been fixed by the parties and the arbitrator, the parties will generally be responsible for the details of arrangements for the hearing. Of course, if they do not or cannot take responsibility the arbitrator will take charge.

If an official transcript is to be made, the court reporter must be scheduled. Unless the collective bargaining agreement provides otherwise, an official transcript should only be taken when the seriousness of the case justifies it. Absent other justifications, even a "complicated" case (because of technical, factual or legal complexities) may be adequately handled by making an informal tape recording of the proceedings and providing the arbitrator with a copy of a typescript or the tapes.

The location of the hearing will probably be left to the discretion of the parties. Usually it will take place in a room on the premises of the agency or in the union hall, but it may be scheduled at some "neutral" location, such as a public court room, library or a motel conference room. The hearing room must provide a quiet, adequate and comfortable environment for a proceeding that may last for a number of hours. Some preliminary consideration should be given to scheduling the breaks. It will be helpful if the parties can agree to such contingencies in advance.

Arrangements for assuring the attendance of witnesses should be made. The bulk of witnesses will likely be government employees. These should be identified and the parties should assure that they will be present at the hearing place or that they can be expected to respond promptly when called from their work-place. If witnesses are to be sequestered, a comfortable place for them to wait should be provided.

6-13. Pre-Hearing Discovery.

In the private sector, formal pre-hearing procedures are very limited, and there is no reason to presume that the situation will be much different in the federal labor management sector. The CSRA does not address the subject and collective bargaining agreements are not likely to deal with it.

A candid and thorough processing of the dispute at all grievance stages should prove to be a more than adequate substitute for formal discovery procedures in most cases. Arbitrators in the private sector have remanded a case back to the grievance stage so that informal discovery may be completed. The legal basis for more formal discovery authority in the arbitrator is not at all certain when the collective bargaining agreement itself is silent. State arbitration statutes and the Federal Arbitration Act, as well as the AAA rules and civil procedure laws, have been cited as possible sources. Some arbitrators have claimed inherent authority deriving from their right to rule upon procedural questions in the conduct of the hearing. The ultimate sanction for extreme failures to cooperate at the pre-hearing stage would be the filing of an unfair labor charge. (See Internal Revenue Service, Buffalo District, 7 FLRA 654 (1982).)

6-14. The Hearing.

The arbitrator is in control of the hearing and it will reflect his or her personal conceptions of what an arbitration hearing should be like and what the role of an arbitrator should be. Because of its nature, the arbitration hearing will contain the basic elements of a judicial trial (opening statements, presentation of documentary evidence, examination and cross-examination of witnesses, closing arguments, etc.), but the style of the hearing may range from the rigidly formal to the very casual. The arbitrator may choose to take a dominating role in the proceedings or may be quite passive and non-directive.

There is precedent in the private sector for the arbitrator to proceed ex parte when one of the parties fails to appear, provided the party has received proper notice. The arbitrator will be reluctant to proceed this way and will probably make an attempt to induce the participation of the reluctant party. Failing this, the party in attendance will be expected to present its case and, if they have the burden of proof, satisfy that burden. (See Harry S. Truman Memorial Veteran's Hospital, 6 FLRA 565 (1981)).

Under the CSRA, the agency and the exclusive representative are the formal parties in the arbitration proceeding, and as such will be in a position to control their respective sides of the controversy and to select the person or persons to present the case. (See Immigration and Naturalization Service, 7 FLRA 549 (1982).) This is the practice in the private sector also. Occasionally an aggrieved employee may wish to be represented by counsel of his or her own choosing. The employee has no right as such.

The hearing will seldom last more than one day. Continuances or adjournments should be granted at the request of a party for good cause, such as the absence of a material witness. An improper refusal may provide the basis for vacating the award, may require a reopening of the case, or may affect the weight that will be given the award in a collateral proceeding.

6-15. Witnesses.

Witnesses may or may not be required to testify under oath depending on the wishes of the parties or the arbitrator or the mandate of the collective bargaining agreement. At the request of one of the parties, witnesses may be removed from the hearing room until after they have presented their testimony. Of course, the grievant will be allowed to be present throughout the proceedings.

Wide latitude will be allowed the parties in their presentation of testimonial evidence. The number and order of witnesses will be largely left to the discretion and needs of the parties. Cross-examination will not be limited to the scope of the direct examination. Witnesses will be allowed to testify out of sequence when practical considerations necessitate such. For

example, a witness just coming off the night shift would be allowed to testify first in order to return home to sleep.

Though the parti ill be allowed wide freedom in the choice of witnesses, as a matter of practice, each side may be reluctant to call witnesses from the "other" side. The one common exception occurs in discharge or disciplinary suspension cases. In such cases management, which will have the burden of proof and will proceed first, may call the grievant as an adverse witness.

In the private sector arbitrators will occasionally issue subpoenas for the attendance of witnesses. They undoubtedly have the authority to issue them and, as a practical matter, the arbitrator's subpoena will usually be enough. A court may or may not enforce the arbitrator's order. (See Washington-Baltimore Newspaper Guild v. Washington Post, 442 F.2d 1234 (D.C. Cir. 1971); Department of Labor and Local 12, AFGE, FLRC 77A-75 (1978)). A court may issue its own subpoena, deriving its authority from either a state arbitration statute or the federal arbitration law.

6-16. Burden and Quantum of Proof.

Ordinarily, the burden of proof, in the sense of persuasion, will lie with the moving party (the grievant) and this will also determine the order of presentation. However, practical considerations may alter the order in which the case will be developed. Discipline cases are the exception to the rule. In these, management, ordinarily, will have the burden of proving the justification of the disciplinary action that was taken. (See Alaska Area Native Health Service, 80 FLRR ¶ 2-1680; Immigration and Naturalization Service, Laredo, TX, 79 FLRR ¶ 2-1320; and Federal Aviation Administration, St. Louis, MO, 80 FLRR ¶ 2-1907.)

Once the party with the burden of proof has established a prima facie case, the burden "shifts" to the other party to rebut, mitigate or otherwise defend as they are able. Unless otherwise expressly provided, the arbitrator may fix the standard of proof. (See Department of Defense, Dependents Schools, 4 FLRA 412 (1980).) In most instances the quantum of proof will be "preponderance of the evidence." In discharge cases where the employee is charged with criminal or morally reprehensible conduct, some arbitrators have required "proof beyond a reasonable doubt" to establish the case for the discharge. This high standard of proof is justified by the social stigma involved. Not all arbitrators will apply this standard. They more likely will require "clear and convincing proof" in discharge cases, though some will require only a "preponderance" of evidence. (See Federal Aviation Service, St. Louis, MO, 80 FLRR ¶ 2-1907. The arbitrator would have applied "clear and convincing" proof; however the CBA only required a "preponderance".) In cases where the exercise of managerial judgment is involved--such as evaluating, comparing and ranking employee skills for a promotion decision--the quantum of proof to upset the determination may be proof that it was "arbitrary, capricious and unreasonable," or to put it another way, the

managerial decision will be sustained if there is substantial evidence to support it.

For the special statutorily prescribed rules of proof for unacceptable performance cases (§ 4303) and adverse action cases (§ 7512) see § 6-3.b., supra.

6-17. Rules of Evidence.

The guiding imperative in an arbitration proceeding is to provide a fair and expeditious hearing which will provide each party with a full opportunity to all the evidence which they deem material and relevant to their case. Technical legal rules of evidence will not be applied. Yet, one should not lose sight of the common sense bases for the rules of evidence.

Hearsay evidence will almost always be admitted, for "what it is worth", if it is somehow relevant to the issues of the case. (See VA Medical Center, Bedford, MA, 2 FLRR 1131.) Leading questions are broadly tolerated. These liberal practices greatly speed the development of the case and satisfy the parties that they have had a "full day in court." But when elements crucial to the ultimate disposition of the case are reached, arbitrators may be expected to "tighten up" and insist that the "best evidence" be produced: e.g. a key witness be brought in for cross-examination unless there is a very good reason not to. They also will request that the witness be allowed to testify in his or her own words. Even when the arbitrator does not "tighten up", the parties should do so themselves when crucial issues are involved since the arbitrator will be more skeptical when only secondary sources are used without good explanation or upon realization that the examiner ended up saying more about the facts than did the witness.

Depositions will be readily accepted and ex parte affidavits are often received. This may be the only practicable way that certain kinds of information can be brought before the arbitrator, either because outsiders will not cooperate beyond providing these or their presence would be too expensive. There are numerous instances when unverified letterhead and prescription pad statements from medical doctors or their office staff will be accepted.

In disciplinary cases, evidence of prior misconduct will not be received to prove the subsequent charges of misconduct but will be considered in evaluating the justification of the harshness of the disciplinary sanction that was imposed. (See National Gallery of Art, 81 FLRR ¶ 2-1140.)

Evidence connected with settlement offers and negotiations will be excluded by arbitrators. However, evidence concerning grievance discussions will not be privileged.

If classified evidence will be an essential part of an arbitration case, the parties should insure that the arbitrator

selected has a security clearance sufficient to receive such information.

6-18. Principles of Construction.

An arbitrator's authority is principally derived from the collective bargaining agreement and the arbitrator is to construe and apply that collective bargaining agreement to the facts of a particular case. In the private sector a body of doctrine has developed regarding how the collective bargaining agreement should be construed. Essentially, they are not much different than the principles of construction applied to any private document. Under the CSRA, the arbitrator will be called upon to construe applicable laws, rules and regulations as well as construing the collective bargaining agreement.

In dealing with the collective bargaining agreement, arbitrators will begin with the assumption that they are obliged to enforce the words of the collective bargaining agreement and that they are confined by and to those words unless there are exceptional circumstances. Thus, initially they will search for the meaning of the words within the four corners of the document itself. This means they will search for meaning by considering the words themselves, the context in which they are used, related provisions, whether the words are used in a technical or ordinary sense, whether they are used in a special or general provision, etc. Any of the so-called intrinsic rules of construction may be used to ascertain the meaning of the collective bargaining agreement, including reasonably implied meanings.

In the event that the crucial language proves to be ambiguous, then extrinsic evidence will be resorted to. (See XVIII Airborne Corps, Ft Bragg, NC, 81 FLRR ¶ 2-1021.) One of the most common extrinsic aids to meaning is "bargaining history." This includes contractual proposals/counter-proposals, inclusions/exclusions or removals of contract language. (See Social Security Administration, Philadelphia, PA, 79 FLRR ¶ 2-1437.) A second common extrinsic aid is "past practices." A past practice is a long-standing and consistent mode of conduct known to both parties under circumstances that indicate it represents the accepted way of administering a particular provision of the collective bargaining agreement. (See San Antonio Air Log Center, Kelly AFB, TX, 81 FLRR ¶ 2-1222.) Arbitrators may consult textbooks for guidance as an aid to interpretation. (See Department of Air Force, Los Angeles Air Station, 6 FLRA 664 (1981).

Arguments about the effect of so-called "past practices" may also be to the effect that the party is "estopped" from changing the practice once it is well established and has come to be relied upon or that the practice represents an informal contractual undertaking by the parties which modifies the existing contract or adds to it. (See Naval Ordinance Station, Louisville, KY, 79 FLRR ¶ 2-1206) While many arbitrators will readily accept evidence of past practice to cast light on unclear language, many will reject the use of past practice to establish an estoppel or a new

contractual undertaking. Mere nonuse of a right founded in the CBA will not amount to a binding past practice or waiver. (See Federal Correctional Institution, Petersburg, VA, 80 FLRR ¶ 2-2002.)

However, once the arbitrator has determined whether or not there is a binding past practice and once the arbitrator has rendered an award constituting the interpretation and application of the collective bargaining agreement, that determination and that award are virtually unreviewable. The Authority has continuously held that the interpretation and application of the collective bargaining agreement is a matter for the arbitrator and to the extent exceptions constitute disagreement with that interpretation and application no basis is provided for finding the award deficient. E.g., SSA, 10 FLRA 436 (1982). Likewise, the Authority has held that disagreement with the arbitrator's determination on whether or not there is a binding past practice provides no basis for finding an award deficient. See RCPAC, 10 FLRA 507 (1982).

6-19. Remedies.

In the private sector arbitrators consider that their appointment carries with it the implied power to devise remedies appropriate to the needs of the case, whether or not the remedy is specifically provided for in the collective bargaining agreement or the submission agreement. Of course, the collective bargaining agreement may explicitly restrict the arbitrator's ambit. In the federal sector it is recognized that arbitrators have broad remedial powers. (See Veterans Administration Hospital, Newington CN, 5 FLRA 64 (1981)).

The arbitrator may order a party to conform their conduct to the requirements of the collective bargaining agreement, either in general terms or in detail, or the arbitrator may prohibit conduct which is violative of the collective bargaining agreement. In non-disciplinary cases, a "make whole" remedy may be ordered which would include payment for lost economic opportunities, compensatory overtime opportunities, promotion or promotion preferences. For a promotion remedy to be sustained, it is necessary to prove that an unwarranted action was taken and that "but for" that action the grieving employee would have received the promotion. (See National Bureau of Standards, Washington, DC, 3 FLRA 614 (1980), following OPM advice concerning binding OPM directives.) When no causal connection is proven the appropriate remedy would be priority consideration at the next promotion opportunity. (See Naval Mine Engineering Facility, 5 FLRA 452 (1981).)

In disciplinary cases the remedy may include reinstatement (absolute or conditional), with or without back pay, or a reduction of the discipline that was assessed. Award requiring management to "admonish" a supervisor has been held proper. VA Hospital, Ft. Howard, MD, 11 FLRA 10 (1983).

The arbitrator is not required to compute the exact amount of economic damages that are to be awarded. The award will be considered sufficiently complete and final if a formula is provided

for the parties to follow. On rare occasions, an additional hearing may be necessary to implement the award. An award that requires the performance of a useless act may not be enforced. (See New York Division of Military and Naval Affairs, 1 FLRA 823 (1979), in which an arbitrator had ordered the rerun of a promotion activity). An award which only "suggested" that something be done has been sustained. (See National Bureau of Standards, Boulder Laboratories, 9 FLRA 433 (1982)).

Any backpay remedy subject to the Back Pay Act (5 U.S.C. § 5596) must satisfy the requirements of that Act. In this regard the Authority has consistently stated that the Back Pay Act requires not only a determination that the aggrieved employee was affected by an unjustified or unwarranted personnel action, but also a determination that such unwarranted action directly resulted in the withdrawal on reduction in the pay, allowances, or differentials that the employee otherwise would have earned or received. Thus, in order for an award of backpay by an arbitrator to be authorized by the Act, the arbitrator must find that an agency personnel action with respect to the grievant was unjustified or unwarranted, that such unjustified or unwarranted personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials, and that but for such action, the grievant otherwise would not have suffered such withdrawal or reduction of pay, allowances, or differentials. E.g., Aberdeen Proving Ground, 19 FLRA 258 (1985). Furthermore, the employee is entitled, on correction of such a personnel action, to receive reasonable attorney fees related to the personnel action which shall be awarded in accordance with standards established under section 7701(g) pertaining to MSPB.

Similarly, although retroactive promotion may be a proper remedy under certain circumstances, it cannot be made back to a time at which the grievant was not yet qualified for the position (Adjutant General of Michigan, 11 FLRA 13 (1983), or where the position was not yet established (SEIU Local 200, 10 FLRA 49 (1982). It may be proper for the arbitrator to order that a grievant receive "special consideration" next time (ACTION, 11 FLRA 514 (1983)). In a promotion re-run order the arbitrator may not restrict the candidates to the original group considered (Defense Contract Administration, 10 FLRA 547 (1982)).

6-20. Post-Hearing Procedures.

After the evidentiary hearing is closed there is rarely need for a reopening, though for good cause a reopening may be ordered by the arbitrator sua sponte or at the request of one of the parties.

Post-hearing briefs may or may not be necessary. They may be particularly helpful to the arbitrator in factually complicated or highly technical cases, or when the legal concepts are complicated or unusually subtle. Obviously no new evidence may be introduced at this stage and any new legal theories interjected in the brief will be ignored by the arbitrator. Briefs are usually sent to the

arbitrator for exchange or the parties may exchange them directly on a specified date. In the ordinary case a good summation should suffice.

6-21. The Award.

An arbitration award should be in a writing and signed by the arbitrator. See SBA and AFGE, 38 FLRA 386 (1990). If an award is served on the parties by mail, there should be a transmittal letter by the arbitrator clearly indicating the date of service because this date commences the 30-day period during which exceptions may be filed under section 7122(a) with the Authority.

The award must contain a resolution of the grievance capable of being understood by the parties and being implemented so that any further litigation on the matter may be avoided and that any collateral proceedings may be appropriately resolved.

An opinion is not essential to the validity of an award, unless required by law or the collective bargaining agreement, but the practice of arbitrators is to provide a written opinion which purports to explain the bases of fact and legal analysis which underlie the award. FLRA has not insisted that the arbitrator explicitly discuss every issue, charge and CBA citation. Immigration and Naturalization Service, 8 FLRA 248 (1982).

The doctrine of stare decisis does not exert a very strong influence in the field of arbitration, but similar cases will be considered for their educational and persuasive effect. Res adjudicata has a stronger influence because of the concept of "finality" and concerns that the arbitration process should provide stability for the parties. But on occasion arbitrators will refuse to be bound by a prior award between the parties which covers the same point.

Under the common law rule of functus officio, once an award has been rendered the arbitrator has no power to recall the award, order a rehearing, amend the award or interpret it. FLRA has generally acknowledged the applicability of this rule. See American Federation of Government Employees, Local 1501, 7 FLRA 424 (1981). The collective bargaining agreement may, of course, specifically incorporate the rule or may provide otherwise. In the decisions of the FLRA, there are instances in which the arbitrator has retained jurisdiction beyond the date of the award. For example, in NLRB Union, Local 19, 7 FLRA 21 (1981), the arbitrator retained jurisdiction for 90 days following the award, "to resolve any problem resulting from the award." FLRA will not entertain an appeal until the arbitrator's decision is "final." See Hawaii Federal Employees Metal Trades Council, AFL-CIO, 6 FLRA 667 (1981); NTEU, Chap. 165, 9 FLRA 1031 (1982).

6-22. Review of Arbitration Awards.

Unlike the private sector where arbitration awards are subject to judicial review, review in the Federal sector in most cases is

by filing exceptions to the award with the Federal Labor Relations Authority under section 7122. Probably, the best explanation of how this review by the Authority works is the actual language of section 7122 pertaining to that review.

Two provisions that are critical to the means of this review are the filing period and compliance provisions of section 7122(b) providing that if no exception is filed during the 30-day period beginning on the date the award is served, the award is final and binding and providing that an agency shall take the action required by a final award.

The 30-day filing period for exceptions may be the most important provision in the review of arbitration awards to understand because it controls whether review has been timely invoked. It is important to understand because the provision is jurisdictional: the Authority is not empowered to waive or extend the 30-day requirement. As to the actual computation of the 30-day period, this period begins on the day the award is served. This provision is the result of an amendment in 1984 to change the beginning of the period from the date of the award to the date of the service of the award to correct the perceived inequity of some situations where the arbitrator dated the award, thereby commencing the 30-day period in which exceptions must be filed, but failed to immediately transmit the award to the parties. In computing the 30-day period, the exception must be filed within 30 days unless the 30th day is a Saturday, Sunday, or Federal holiday in which event the exception must be filed by the next day that is not a Saturday, Sunday, or Federal holiday. If the award was served by mail, an additional 5-days is added to the filing period, computed taking into account weekends and holidays, and is extended if the 5th day falls on a Saturday, Sunday, or Federal holiday. This additional 5 days which is generally provided when service is by mail was not provided before the amendment of the Statute, but only became available as the result of the change to specifically reference the date of service of the award. However, the most significant development in the filing of exceptions was the Authority's adoption in December 1986 of the so-called mail-box rule. Section 2429.21 of the Authority's Rules. Until the change, filing required receipt by the Authority within the allotted time period. With respect to filing by mail, the revised rules now provide that the date of filing is the date of mailing indicated by the postmark date.

A word of caution is necessary on government-franked envelopes. The revised Rules provide that if no postmark is evident on the mailing, as will usually be the case with government-franked envelopes, it is "presumed" to have been mailed 5 days prior to receipt. Although using the word "presumed," the Rules do not state a rebuttable presumption. The use of the word "presumed" instead describes how the rule is implemented. Veterans Administration Medical Center, 29 FLRA 51 (1987). Specifically, the rule provides the method of determining the date of filing in the absence of a postmark: namely, the date of receipt minus five days. Agency representatives are not without flexibility. For

example, the Postal Operations Manual of the U.S. Postal Service expressly provides for postmarking of specific government mailings on the request of an agency. Thus, a postmark of a government-franked envelope can be obtained to assure timely filing. Furthermore, when certified mail is used, the postmarked certified mail receipt will suffice in lieu of a postmarked envelope.

An important aspect of the framework for the review of arbitration awards is the provision of section 7122(b) that requires compliance with a final arbitration award. In conjunction with this provision of section 7122(b) is the provision of section 7116(a)(8) of the Statute making it an unfair labor practice for an agency to refuse to abide by a requirement of the Statute. As a result of these provisions, the Authority has addressed these obligations in three different types of cases where agencies have been charged with an unfair labor practice for failing to implement an arbitration award.

One type of case is where no exceptions, or no timely exceptions have been filed to the arbitration award. In this type of case, the Authority has held that the award became final and compliance with that award was required when the 30-day period for filing exceptions expired and that section 7122(b) precludes a challenge to the validity of the award in the ULP proceeding charging a refusal to implement the award. The Authority's position with respect to this type of case has been judicially upheld. AFLC, Wright-Patterson AFB, 15 FLRA 151 (1984), aff'd Air Force v. FLRA, 775 F.2d 727 (6th Cir. 1985). These cases serve to emphasize the importance of timely invoking the review of the Authority by filing exceptions because even meritorious claims of illegality will be precluded in the ULP proceeding and court review of the ULP proceeding which will focus solely on whether or not there has been compliance with a final award of an arbitrator as required by section 7122(b).

The second type of case is where timely exceptions are filed and denied by the Authority. In this type of case the Authority has similarly held that the award became final and compliance was required when the exceptions were denied and that the Authority will not relitigate in the ULP proceeding the denial of the exceptions. What the agencies are actually attempting to do in this type of case is to obtain indirectly through the ULP case judicial review of the Authority's decision denying the exceptions, an attempt necessitated by the restrictive provisions as to direct judicial review of the Authority's decision resolving exceptions. The Authority's position with respect to this type of case has also been judicially upheld with the courts holding that the denial of the exceptions could not be relitigated in the context of the ULP proceeding by either the Authority or the court. U.S. Department of Justice v. FLRA, 792 F.2d 25 (2d Cir. 1986).

The third type of case where this obligation to comply with a final arbitration award has been addressed is where timely exceptions have been filed and are pending before the Authority but no stay of the arbitration award was requested under the provisions

of the Authority's Rules and Regulations. In Soldiers' and Airmen's Home, 15 FLRA 139 (1984), the Authority notwithstanding the stay provisions of the Regulations held that when timely exceptions are filed, the award by definition is not final during the pendency of the exceptions and therefore compliance is not required under section 7122(b). That decision was vacated and remanded by the court in AFGE Local 3090 v. FLRA, 777 F.2d 751 (D.C. Cir. 1985). The court essentially concluded that the interpretation of section 7122(b) in this type of situation was ambiguous. Thus, the court determined that the Authority's interpretation was a permissible one, but that a contrary construction, that absent some sort of stay the award even during the pendency of exceptions must be complied with, was also a permissible interpretation of section 7122(b). Consequently, the court held that this permissible contrary construction must prevail so long as the Authority's Rules and Regulations contained provisions providing for a stay of arbitration awards when filing exceptions. The court advised that the Authority could not enforce the interpretation of section 7122(b) applied in Soldiers' and Airmen's Home, that an award was not final within the meaning of section 7122(b) during the pendency of exceptions, until such time as the stay provisions of the Authority's Rules had been withdrawn by rulemaking. As a result of the court's decision, the Authority revoked the provisions for requesting a stay of an arbitration award in conjunction with the filing exceptions. 52 Fed. Reg. 45754. The revocation of the stay provisions is intended by the Authority to permit it, consistent with the court decision, to interpret and enforce section 7122(b) of the statute to the effect that an arbitration award is not final and compliance is not required during the pendency of timely filed exceptions before the Authority.

The best explanation of the role of the Authority in actually reviewing arbitration awards is the language of section 7122(a) authorizing that review.

The introductory provision to section 7122(a) states that "[e]ither party to arbitration may file with the Authority an exception to any arbitrator's award." "Party" is defined in the Authority's Rules as any person who participated as a party in a matter where an award of an arbitrator was issued. What this means is that unless provided otherwise, only the union and the agency are entitled to file exceptions because they are the only parties to the arbitration proceeding. Therefore, in cases in which an exception was filed by the grievant, that exception was dismissed by the Authority because the grievant had not participated as a party in the proceedings before the arbitrator, and consequently the grievant was not entitled to file exceptions under section 7122(a).

The next important provision of section 7122(a) is the parenthetical to the introductory provision of either party filing exceptions with the parenthetical stating "other than an award relating to a matter described in section 7121(f)." Pursuant to this provision, arbitration awards relating to a matter described

in section 7121(f) are not subject to review by the Authority and exceptions filed to such awards with the Authority have been and will be dismissed for lack of jurisdiction. The matters primarily described in section 7121(f) are those matters covered by section 4303 and section 7512 of the CSRA. The means of review of arbitration awards relating to these matters was discussed in § 6-3.b., supra.

The next provision of section 7122(a) provides the grounds for the Authority review of arbitration awards. This provision provides that the Authority will review an arbitration award to determine if it is deficient because it is contrary to any law, rule, or regulation or if it is deficient on other grounds similar to those applied by federal courts in private sector labor relations cases. However, before examining these grounds on which an arbitration award can be found deficient the context of Authority review needs to be recognized and acknowledged. Although Congress specifically provided for review of arbitration awards in section 7122(a), at the same time, Congress expressly made clear that the scope of that review is very limited. The Committee on Conference stated as follows in the Conference Report that accompanied the Bill that was enacted and signed into law.

> The Authority will be authorized to review the award of an arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector.

S. Rep. No. 95-1272, 95th Cong., 2d Sess. 153 (1978). Thus, the Authority's approach in resolving exceptions is to presume that the award should be accorded the binding status required by the Statute and only when it is expressly established that the award is deficient on one of the grounds specified in section 7122(a) will an award be vacated or modified by the Authority.

Section 7122(a)(1) specifies the grounds on which the most arbitration awards are asserted to be deficient and on which the most decisions finding an award deficient have been based. Thus, the most common exception is that the award is contrary to law or contrary to regulation and of the awards found deficient the most common basis has been that the award was contrary to law or contrary to regulation. In this respect the Authority has certainly indicated that an arbitrator in the federal sector cannot ignore the application of law and regulation. There is a framework of law and regulation governing many aspects of the employment relationship between federal employees and their employer -- the federal government. The arbitrator in the federal sector, unlike the arbitrator in the private sector, ordinarily cannot limit consideration solely to the collective bargaining agreement. The federal sector arbitrator must turn to any provisions of law and regulation which govern the matter in dispute, in addition to the provisions of the parties' collective bargaining agreement.

As has been noted, the other grounds on which an arbitration award may be found deficient are generally stated in section

7122(a)(2) as those which are similar to grounds applied by federal courts in private sector labor relations cases. In regard to what are commonly termed the private sector grounds for review, the Authority has recognized 5 specific private sector grounds on which federal courts find arbitration awards deficient and consequently so will the Authority. The private sector grounds that have been recognized are the following:

1. The arbitrator failed to conduct a fair hearing.

The Authority has held that an arbitrator has considerable latitude in the conduct of the hearing and that a claim by a party that the arbitrator conducted a hearing in a manner that the party finds objectionable will not support an allegation that the arbitrator denied that party a fair hearing. E.g., Social Security Administration, 24 FLRA 959 (1986). An arbitrator's refusal to hear relevant and material evidence may constitute a denial of a fair hearing. However, the Authority and the courts have long recognized that liberal admission of testimony and evidence is the customary practice in arbitration. Therefore, the Authority has denied all exceptions claiming that the party was denied a fair hearing because the arbitrator admitted and considered certain evidence and testimony. National Border Patrol Council, 3 FLRA 401 (1980). Exceptions which merely assert but do not establish that the arbitrator improperly refused to consider certain evidence have also been denied. Warner Robins Air Logistics Center, 24 FLRA 968 (1986). Likewise, arguments that the arbitrator failed to give appropriate weight to particular evidence or testimony provide no basis for finding an award deficient. International Trade Commission, 13 FLRA 440 (1983). Similarly, unsubstantiated allegations that an arbitrator was biased have been denied. Social Security Administration, 24 FLRA 959 (1986).

2. The award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible.

The Authority has indicated that in order to find an award deficient on this ground, there must be a showing that the award is so unclear or uncertain in its meaning and effect that it cannot be implemented. Delaware National Guard, 5 FLRA 50 (1981). No appealing party has yet made this showing and consequently all such exceptions have been denied.

3. The arbitrator exceeded his or her authority.

The Authority has held that arbitrators exceed their authority if they resolve an issue that was not submitted by the parties for resolution. Veterans Administration, 24 FLRA 447 (1986). However, the Authority, like the federal courts, will accord an arbitrator's interpretation of a submission agreement and an arbitrator's formulation of issues to be decided the same substantial deference accorded an arbitrator's interpretation and application of a collective bargaining agreement. Housing and Urban Development, 24 FLRA 442 (1986).

The Authority has also determined that arbitrators exceed their authority by extending an award to cover employees outside the bargaining unit or by ordering an agency to take an action beyond its authority. Bureau of Indian Affairs, 25 FLRA 902 (1987); Immigration and Naturalization Service, 20 FLRA 391 (1985). The Authority has also ruled that arbitrators may exceed their authority by extending an award to cover employees who did not file grievances or whose union representatives did not file grievances on their behalf. National Center for Toxicological Research, 20 FLRA 692 (1985). However, the Authority has indicated that when a dispute concerns a management practice generally applicable to the entire bargaining unit, the arbitrator's authority is quite broad and relief may be appropriate which encompasses similarly situated employees. Los Angeles Air Force Station, 24 FLRA 516 (1986).

4. The award is based on a "nonfact."

The Authority will find an award deficient if the central fact underlying the arbitrator's award is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached. It must be shown that the alleged mistake concerned a fact that was objectively ascertainable, central to the result of the award, and indisputably erroneous, and it must be shown that but for the arbitrator's mistake, the arbitrator would have reached a different result. U.S. Army Missile Materiel Readiness Command, 2 FLRA 432 (1988). Under this stringent standard, only two awards have been found deficient. Headquarters San Antonio Air Logistics Center, 6 FLRA 292 (1981); U.S. Army Missile Command, 28 FLRA 953 (1986).

In San Antonio Air Logistics Center, 6 FLRA 292 (1981), the arbitrator denied the grievance because he found that the collective bargaining agreement of the unit involved had been superceded by a multi-unit agreement. However, on its face, the multi-unit agreement clearly and unequivocally excluded the bargaining unit in question, and it was equally clear that the arbitrator's error in this regard was the central fact on which he based his denial of the grievance. Thus, the award was found deficient because the central fact underlying the award was concededly erroneous and in effect was a gross mistake of fact.

In U.S. Army Missile Command, 18 FLRA 374 (1985), the arbitrator determined that a requirement in the parties' 1979 collective bargaining agreement was applicable to a personnel selection action in 1978. However, because the agreement was not in effect at the time of the selection action, the arbitrator's finding that the agency violated the agreement was indisputably erroneous and it was equally clear that the arbitrator's error in this regard was the central finding on which he based his award. Thus, this award was also found deficient because the central fact underlying the award was concededly erroneous and in effect was a gross mistake of fact, but for which, a different result would have been reached.

Other than these two awards, no other arbitration awards have been found deficient on this ground. As to most of these exceptions, the Authority found that the contentions constituted nothing more than disagreement with the factual findings of the arbitrator and it is well established, and the Authority has continuously held, that mere disagreement with the arbitrator's findings of fact does not establish that the award was based on a nonfact and does not otherwise provide a basis on which the award may be found deficient under the Statute. E.g., IRS, 15 FLRA 461 (1984).

5. The award does not draw its essence from the collective bargaining agreement.

In recognizing the essence ground, the Authority explained that the test for essence has been variously described by federal courts as an award which cannot in any rational way be derived from the agreement; or as an award that is so unfounded in reason or fact, so unconnected with the wording and purposes of the collective bargaining agreement, so as to manifest an infidelity to the obligation of the arbitrator; or as an award that evidences a manifest disregard of the agreement; or as an award that on its fact does not represent a plausible interpretation of the agreement. USAMIRCOM, 2 FLRA 432 (1980).

In OEA, 4 FLRA 98 (1980), the Authority found that a portion of the arbitrator's award had no rational basis in the collective bargaining agreement. The dispute in this case involved official time for labor relations for which the parties' agreement provided only two options. When as part of his award, the arbitrator fashioned a third category not provided by the agreement, the award was found deficient as manifesting a disregard of the parties' collective bargaining agreement.

Similarly, in VA Hospital, 19 FLRA 725 (1985), the Authority found the award deficient as failing to draw its essence from the collective bargaining agreement because the arbitrator subjected to grievance and arbitration the agency's decision on an incentive award in manifest disregard of the parties agreement which expressly excluded such a matter from coverage by the negotiated grievance procedure.

All other exceptions contending that the award does not draw its essence from the agreement have been denied by the Authority. As to most of these exceptions, it was clear that the appealing party was actually disagreeing with the arbitrator's interpretation and application of the collective bargaining agreement or was disagreeing with the arbitrator's reasoning and conclusions, and it is well established and the Authority has repeatedly held that the arbitrator's interpretation and application of the collective bargaining agreement and the arbitrator's reasoning and conclusions are not subject to challenge. Thus, such assertions provide no basis on which to find an award deficient under the Statute. E.g., NRC, 12 FLRA 609 (1983).

6-23. Judicial Review.

In contrast to most other decisions of the Authority, the CSRA prescribes that the Authority's decision resolving exceptions to an arbitration award is generally not subject to judicial review. Specifically, under section 7123 these decisions are not subject to judicial review "unless the order involves an unfair labor practice." Although the meaning of this provision is not certain, the reason for generally excluding Authority decisions resolving exceptions to an arbitration award is clearly stated by Congress in the Conference Report that accompanied the bill that was enacted and signed into law as the CSRA. In this respect the Conference Report states as follows:

> The conferees, in light of the limited nature of the Authority's review, determined that it would be inappropriate for there to be subsequent review by the court of appeals in such matters.

Consistent with this congressional intent, the courts have construed this provision narrowly. Specifically, the 4th, 9th, and 11th Circuits all have concluded that there was a lack of jurisdiction to consider a petition for review of such Authority decisions. Tonetti v. FLRA, 776 F.2d 929 (11th Cir. 1985); U.S. Marshals Service v. FLRA, 708 F.2d 1417 (9th Cir. 1983); AFGE Local 1923 v. FLRA, 675 F.2d 612 (4th Cir. 1982). For instance, in U.S. Marshals Service, the 9th Circuit was of the view that there is no jurisdiction unless an unfair labor practice is either an explicit or a necessary ground for the final order issued by the Authority. In particular, the court stated that there would be no jurisdiction in the common case where the collective bargaining agreement was the basis for the arbitration award and the Authority's review. The court explained that to grant judicial review whenever a collective bargaining agreement dispute can also be viewed as an unfair labor practice would give too little scope and effect to the arbitration process and to the final review function of the Authority, both of which Congress made a central part of the CSRA. The D.C. Circuit in consolidated cases found that it lacked jurisdiction in one case, but reviewed and remanded the other case. Overseas Education Association v. FLRA, 824 F.2d 61 (D.C. Cir. 1987). In both cases the court followed the narrow construction of section 7123 by the 9th Circuit in U.S. Marshals Service, but determined in the one case that it had jurisdiction to review the decision of the Authority because an unfair labor practice was "involved" or "necessarily implicated."

6-24. Conclusion.

The labor counselor will be extensively involved with arbitration and, to a lesser extent, grievances. As a lawyer, trained in the art of advocacy, the labor counselor will present a well-organized case. However, he will ultimately fail if he is not familiar with labor-management relations and civilian personnel law. The only means of becoming knowledgeable in these two areas is to become intimately involved with the program as it is being

implemented at the installation. This includes working closely with the personnel of the Civilian Personnel Office on a daily basis and reading the memoranda which address these areas that the office receives. Failure to learn the area of law and to develop this rapport with people in the Civilian Personnel Office may result in a loss of confidence in and credibility of the labor counselor.

SAMPLE

EXPEDITED ARBITRATION PROVISION

ARTICLE XV

Section 4. Arbitration

A. General Provisions (1) A request for arbitration shall be submitted within the specified time limit for appeal.

(2) No grievance may be appealed to arbitration except when timely notice of appeal is given in writing to the appropriate official of the Employer by the certified representative of the Union. Such representative shall be certified to appeal grievances by the National President of the Union to the Employer.

(3) All grievances appealed to arbitration will be placed on the appropriate pending arbitration list in the order in which appealed. The Employer, in consultation with the Union, will be responsible for maintaining appropriate dockets of grievances, as appealed, and for administrative functions necessary to assure efficient scheduling and hearing of cases by arbitrators at all levels.

(4) In order to avoid loss of available hearing time, back-up cases should be scheduled to be heard in the event of late settlement or withdrawal of grievances before hearing. In the event that either party withdraws a case less than five (5) days prior to the scheduled arbitration date, and the parties are unable to agree on scheduling another case on that date, the party withdrawing the case shall pay the full costs of the arbitrator for that date. In the event that the parties settle a case or either party withdraws a case five (5) or more days prior to the scheduled arbitration date, the backup case on the appropriate arbitration list shall be scheduled. If the parties settle a case less than five (5) days prior to the scheduled arbitration date and are unable to agree to schedule another case, the parties shall share the costs of the arbitrator for that date.

(5) Arbitration hearings normally will be held during working hours when practical. Employees whose attendance as witnesses is required at hearings during their regular working hours shall be on Employer time when appearing at the hearing, provided the time spent as a witness is part of the employee's regular working hours.

(6) All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. Unless otherwise provided in this Article, all costs, fees, and expenses charged by an arbitrator will be shared equally by the parties.

(7) All arbitrators on the Regular Panels and the Expedited Panels shall serve for the term of this Agreement and shall continue to serve for six (6) months thereafter, unless the parties otherwise mutually agree.

(8) Arbitrators on the Regular and Expedited Panels shall be selected by agreement of the parties or by striking names.

(9) Any dispute as to arbitrability shall be submitted to the arbitrator and be determined by such arbitrator. The arbitrator's determination shall be final and binding.

B. Regular Arbitration (1) Three (3) separate lists of cases to be heard in arbitration shall be maintained: (a) one for all removal cases and cases involving suspensions for more than 14 days, (b) one for all cases referred to Expedited Arbitration, and (c) one for all other cases appealed to arbitration.

(2) Cases will be scheduled for arbitration in the order in which appealed, unless the Union and employer otherwise agree.

(3) Only discipline cases involving suspensions of 14 days or less and those other disputes as may be mutually determined by the parties shall be referred to Expedited Arbitration in accordance with Section C hereof.

(4) Cases referred to arbitration which involve removals or suspensions for more than 14 days, shall be scheduled for hearing at the earliest possible date in the order in which appealed by the particular Union involved.

(5) Normally, there will be no transcripts of arbitration hearings or filing of post-hearing briefs in cases heard in Regular arbitration, except either party at the hearing may request to file a post-hearing brief. However, each party may file a written statement setting forth its understanding of the facts and issues and its argument at the beginning of the hearing and also shall be given an adequate opportunity to present argument at the conclusion of the hearing.

(6) The arbitrator in any given case could render an award therein within thirty (30) days of the close of the record in the case.

C. Expedited Arbitration (1) The parties agree to continue the utilization of an expedited arbitration system for disciplinary cases of 14 days suspension or less which do not involve interpretation of the Agreement and for such other cases as the parties may mutually determine. This system may be utilized by agreement of the Union involved through its President or designee and the Deputy Installation Commander, or designee. In any such case, the FMCS or AAA shall immediately notify the designated arbitrator. The designated arbitrator is that member of the Expedited Panel who, pursuant to a rotation system, is scheduled

for the next arbitration hearing. Immediately upon such notification the designated arbitrator shall arrange a place and date for the hearing promptly but within a period of not more than ten (10) working days. If the designated arbitrator is not available to conduct a hearing within the ten (10) working days, the next panel member in rotation shall be notified until an available arbitrator is obtained.

(2) If either party concludes that the issues involved are of such complexity or significance as to warrant reference to the Regular Arbitration Panel, that party shall notify the other party of such reference at least twenty-four (24) hours prior to the scheduled time for the expedited arbitration.

(3) The hearing shall be conducted in accordance with the following:

(a) the hearing shall be informal;
(b) no briefs shall be filed or transcripts made;
(c) there shall be no formal rule of evidence;
(d) the hearing shall normally be completed within one day;
(e) if the arbitrator or the parties mutually conclude at the hearing that the issues involved are of such complexity or significance as to warrant reference to the Regular Arbitration Panel, the case shall be referred to that panel; and
(f) the arbitrator may issue a bench decision at the hearing but in any event shall render a decision within forty-eight (48) hours after conclusion of the hearing. Such decision shall be based on the record before the arbitrator and may include a brief written explanation of the basis for such conclusion. These decisions will not be cited as a precedent. The arbitrator's decision shall be final and binding. An arbitrator who issues a bench decision shall furnish a written copy of the award to the parties within forty-eight (48) hours of the close of the hearing.

(4) No decision by a member of the Expedited Panel in such a case shall be regarded as a precedent or be cited in any future proceeding, but otherwise will be a final and binding decision.

(5) The Expedited Arbitration Panel shall be developed by the parties with the aid of the American Arbitration Association and the Federal Mediation and Conciliation Service.

Section 5.

The provisions of this Article will become effective February 1, 1981. Grievances instituted prior to February 1, 1981, will be processed, including arbitration, under the Grievance-Arbitration Procedure set forth under Article XV of the 1979 Agreement.

SAMPLE

GRIEVANCE PROVISION

ARTICLE 6

GRIEVANCE PROCEDURE

SECTION 6.01: SCOPE AND COVERAGE

This Article shall constitute the sole and exclusive procedure available to the Employer, the Union, and the employees of the bargaining unit for the resolution of grievances subject to the control of the Employer applicable to any matter involving the interpretation, application, or violation of this Agreement or local supplements thereto, any matter involving working conditions, or any matter involving the interpretation and application of policies, regulations and practices of the Air Force, AFLC, and subordinate AFLC activities not specifically covered by this Agreement.

SECTION 6.02: EXCLUSIONS

The sole exclusions to this grievance procedure are as follows:

a. Matters subject to a statutory appeal procedure, except as indicated in Article 5, Discipline.

b. Nonselection for promotion from a group of properly ranked and certified candidates.

c. Written notices of proposed disciplinary actions where such actions would be grievable under this Procedure when effectuated. This exclusion does not infringe upon an employee's right to obtain representation for assistance in preparing a response to such notices.

d. Grievances filed by employees over alleged health and safety violations, where issues contained therein have been previously filed by those employees and/or adjudicated under the procedures set forth in 29 C.F.R. 1960 and applicable implementing regulations.

e. Nonadoption of a suggestion or disapproval of a quality salary increase or performance award.

f. Separation of probationers, trial period employees, and temporary hires.

g. An action terminating a temporary promotion within a maximum period of two years and returning the employee to the position from which he or she was temporarily promoted or to a position of like grade.

h. Actions or decisions taken under the Personnel Security Program.

i. IG Complaint. However, such complaints may serve as a substitute for the informal grievance, subject to time limits set forth herein. If the complaint is not resolved within 14 days of its submittal, the employee may pursue the unresolved grievance by submitting said grievance at Step 2 of this Procedure, subject to the time limits set forth herein, provided that the employee withdraws the IG complaint by written notification to the IG terminating the IG's involvement in the grievance. This shall not preclude an employee from pursuing a grievance at Step 2 of this Procedure, subject to the time limits therein, if the response from the IG is not satisfactory. The employee may be accompanied by a designated representative when using the IG complaint system.

SECTION 6.03: GRIEVABILITY/ARBITRABILITY DETERMINATIONS

The Employer agrees to furnish the Union a final written decision concerning the nongrievability or nonarbitrability of a grievance, within the time limits provided for the written decision in Step 3 of this procedure. If the grievance is alleged to be subject to statutory appeal procedures, except as modified by Article 5, Discipline, the decision shall expressly state that it is the activity's final decision in the matter. All disputes of grievability or arbitrability shall be referred to an arbitrator as a threshold issue of the grievance in accordance with Article 7, Arbitration. If the arbitrator determines that the issue is arbitrable, the arbitrator will hear the merits of the grievance.

SECTION 6.04: EXTENSIONS OF TIME LIMITS

Time limits in this Article may be extended by mutual agreement of the Employer and the Union. Mutual agreement must be in writing and signed by the activity Local Union President, or a designated representative, and the activity Labor Relations Officer, or a designated representative. Failure to respond or meet will permit the grievance to be elevated to the next step.

SECTION 6.05: UNION OBSERVER AT GRIEVANCES WHERE EMPLOYEES REPRESENT THEMSELVES

If a Unit employee presents a grievance directly to Management, without Union representation, for adjustment consistent with the terms of this Agreement, the Local shall be given an opportunity to have an observer present at any discussions of the grievance on official time if the observer would otherwise be in a duty status.

SECTION 6.06: PROTECTION FROM REPRISAL

The Employer and the Union agree that every effort will be made by Management and the aggrieved to settle grievances at the lowest possible level. Inasmuch as dissatisfaction and disagreements arise occasionally among people in any work situation, the filing

of a grievance shall not be construed as reflecting unfavorably on an employee's good standing, performance, loyalty, or desirability to the organization.

SECTION 6.07: PROCEDURES FOR EMPLOYEE GRIEVANCES

The following procedure shall be exclusively used for the submission of employee grievances to the Employer under this Article.

a. Step 1. Informal Procedure. An employee of the bargaining unit desiring to file a grievance must first discuss the matter informally with his first level supervisor within twenty-one (21) calendar days of the date of the management action or occurrence giving rise to the grievance or reasonable awareness of such action or occurrence. Such informal grievances may be presented orally or in writing. If the grievance is present in writing, the STANDARD GRIEVANCE FORM, AFLC Form 913 (Appendix 3), will be used.

(1) An employee desiring to file an informal grievance may request the assistance of his Shop Steward in preparing and presenting the informal grievance. A grievant will inform his supervisor of the nature of his grievance and request the assistance of the Area Shop Steward so that arrangements may be made to informally discuss the grievance.

(2) Subject to the provisions of Article 4, Official Time, a grievant and the Shop Steward will be allowed a maximum of up to 60 minutes of official time, if otherwise in a duty status, in reasonable privacy and in the grievant's immediate work area, to prepare for the informal discussion of the grievance. The grievance shall then be discussed with the grievant, the Shop Steward, the first-level supervisor, and any other person(s) the supervisor believes necessary for resolution. However, if upon being informed of the nature of the grievance pursuant to paragraph (1) above, the first-level supervisor determines that it is not within his authority to resolve the matter, the supervisor shall make arrangements with the appropriate management official with requisite authority to informally discuss the grievance with the employee and his Shop Steward.

(3) The RECORD OF DISCUSSION OF INFORMAL GRIEVANCE, AFLC Form 912, (Appendix 2) furnished by the Shop Steward, shall be completed and signed at the informal discussion meeting with a copy to the supervisor.

(4) If the matter is not satisfactorily resolved at the informal discussion meeting, a final informal decision will be issued to the grievant by the first-level supervisor (or other management official as appropriate) within 14 calendar days of the informal discussion. If the informal grievance was presented in writing on the Standard Grievance Form provided by the Employer, the informal decision will be in writing.

b. Step 2. Formal:

(1) If the informal discussion or decision at Step 1 fails to resolve the matter, the grievance may be processed by the employee or a representative designated by the Union, with the Directorate, Staff Office, Tenant Commander, (or, in the case of grievance filed by unit employees of HQ AFLC, to the Deputy Chief of Staff) or equivalent level of his/her organization. The grievance must be received by the Employer within 7 calendar days of the Step 1 decision. The STANDARD GRIEVANCE FORM, AFLC Form 913, provided by the Employer, with a copy of the RECORD OF DISCUSSION OF INFORMAL GRIEVANCE and a copy of the Step 1 decision, where applicable will be filed with the appropriate management official at this Step. Additional issues, as distinct from related and supporting authority for such issues, may not be raised at this Step unless first considered at the informal Step.

(2) Within 7 calendar days of receipt of the grievance, the parties will meet to discuss the matter.

(3) Within 10 calendar days of the date of that meeting, the designated management representative shall render his written decision on the grievance.

c. Step 3. Formal. If the Employer denies the grievance at Step 2, the grievant may appeal the decision to the Commander of the subordinate AFLC activity (for HQ AFLC, the 2750th ABW Commander). The grievance must be received by the servicing activity's Labor and Employee Relations Division within 10 calendar days of receipt of the Step 2 decision.

(1) The appeal must contain the grievance case file, decisions rendered at preceding steps of the grievance procedure and any rebuttal arguments. New issues not considered at preceding steps shall not be raised.

(2) The Commander or his designee may schedule a meeting with the grievant and the designated representative. Within 10 calendar days of the date of the meeting, or within 21 calendar days of the date the grievance was filed at Step 3, whichever occurs first, the Employer shall render a decision in writing to the grievant. Such decision shall constitute the Employer's final decision on the grievance for the purpose of invoking arbitration.

SECTION 6.08: UNION OR EMPLOYER GRIEVANCES AT ACTIVITY LEVEL

For grievances between the Employer and the Union at the activity level concerning the interpretation and/or application of this Agreement, and supplements thereto, the following procedures apply.

a. If the Employer is aggrieved at the subordinate activity level, its representative shall file a written grievance with the president of the Union local representing bargaining unit employees at that particular activity within 21 calendar days of the date of the act or awareness of the act causing said grievance.

Representatives of the parties shall meet as soon as possible on a mutually agreeable date, but not later than 14 calendar days from the date of submission of the grievance, at the subordinate AFLC activity to discuss the matter. Within 14 calendar days of said meeting, the president of the resident AFGE Local shall render his decision, in writing, in the matter to the Commander of the subordinate AFLC activity. If such decision fails to resolve the matter, the Employer may invoke the procedures for activity level arbitration set forth in Article 7.

b. If the Union is aggrieved, the president of the resident activity AFGE Local shall submit the grievance in writing to the Commander of the activity within 21 calendar days of the act or awareness of the act causing the grievance. The Commander or his designee may schedule a meeting with the local Union president.

(1) Within 10 calendar days of the date of the meeting or within 21 calendar days of the date the grievance was received by the Commander, whichever comes first, the Commander shall render a written decision to the local Union.

(2) If the activity Commander's decision fails to resolve a grievance over the interpretation or application of a local supplement, the Union may submit the issue to arbitration in accordance with Article 7.

(3) If the activity Commander's decision fails to resolve the grievance over the interpretation or application of this Agreement, the Union may appeal the decision to HQ AFLC. Such appeal, including any appropriate documentation must be forwarded to the Chief, Labor Employee Relations Division, HQ AFLC, within 7 calendar days of receipt of the activity Commander's decision. New issues shall not be raised.

(4) HQ AFLC shall review the grievance and render a final decision within 14 calendar days of receipt. The parties may meet to discuss the grievance upon mutual agreement. Failure of the Employer to render a decision within the above time limits shall constitute a denial of the grievance. The Employer's final decision shall be forwarded to the local Union president, with a copy to the Council President. The local Union may invoke the procedures for arbitration upon receipt of the Employer's final decision as provided in Article 7, Arbitration.

SECTION 6.09: UNION OR EMPLOYER GRIEVANCES AT COMMAND LEVEL

Grievances between the Employer and the Union at the Command level over interpretation/application of this Agreement involving actions or decisions of the Employer's headquarters or the Union's Executive Officers shall be filed directly by the aggrieved party as follows:

a. Within 30 calendar days of the incident or knowledge of the incident, the aggrieved party must file a written grievance with the party alleged to have violated this Agreement stating the

basis for the grievance and including documentation, information, and correspondence.

b. The parties, at either the command or the activity level, may meet informally to discuss and attempt to resolve the matter.

c. Within 30 calendar days of the date of the initial grievance, the responding party shall issue the final decision in the matter. If the matter is not resolved the aggrieved party may invoke arbitration. Questions of grievability/arbitrability must be raised at this point. The President, AFLC Council of AFGE Locals or his designee, and the Chief, Labor/Employee Relations Division, HQ AFLC, are authorized to file and/or respond to grievances at the Command level for the Union and the Employer respectively.

SECTION 6.10: WITNESSES

Employees shall be made available as witnesses at any step and will not suffer loss of pay or charge to leave while they are serving in that capacity if otherwise in a duty status.

PRIVATE SECTOR BIBLIOGRAPHY
FOR GRIEVANCE/ARBITRATION

The "Trilogy"

United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960).
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).
United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960).

Other Supreme Court Cases

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).
Operating Engineers, Local 150 v. Flair Builders, Inc., 406 U.S. 487 (1972).
Nolde Brothers, Inc. v. Bakery Workers, Local 358, 430 U.S. 243 (1977).
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981).

Private Sector Cases That Have Been Cited By FLRA in Reviewing Arbitration Awards

Arbitrator Excess of Authority

Local 791, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. Magnavox, 286 F.2d 465 (6th Cir. 1961).
Northwest Airlines, Inc. v. Air Line Pilots Assoc., 530 F.2d 1080 (D.C. Cir. 1976).
Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969).
Truck Drivers & Helpers Union, Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964).

Failure to Conduct a Fair Hearing

Harvey Aluminum v. United Steelworkers, 236 F. Supp. 488 (C.D. Cal. 1967).
Shopping Cart, Inc. v. Amalgamated Food Employees, Local 196, 350 F. Supp. 1221 (E.D. Pa. 1971).
Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974).

Award Incomplete, Ambiguous or Contradictory

Bell Aeroscope Co., Division of Textron, Inc. v. Local 516, U.A.W., 500 F.2d 921 (2d Cir. 1974).
United Mine Workers of America, District No. 2 v. Barnes, 561 F.2d 1093 (3d Cir. 1977).

Gross Mistake of Fact But For Which a Different Result Would Be Reached - "Non-Fact"

International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local 874 v. St. Regis Paper, 362 F.2d 711 (5th Cir. 1966).

Storer Broadcasting Co. v. American Federation of Television & Radio Artists, Cleveland Local, 600 F.2d 45 (6th Cir. 1979).

Mere Disagreement With Findings, etc., Not Sufficient to Overturn

Holly Sugar Corp. v. Distillery, Rectifying, Wine and Allied Workers International Union, 412 F.2d 899 (9th Cir. 1969).

Electronics Corp. of American v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, 492 F.2d 1255 (1st Cir. 1974).

Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co., 415 F.2d 403 (5th Cir. 1969).

(See also "Arbitrator Excess of Authority" cases supra.)

Useful Texts

ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 4th ed., 1985

FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION, 2d ed., 1983

FLEMING, THE LABOR ARBITRATION PROCESS, 1965

Helpful Articles

Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482 (1959).

Melzer, Ruminations About Ideology, Law & Labor Arbitration, 34 U. Chi. L. Rev. 545 (1967).

Dunau, Three Problems in Labor Arbitration, 55 Va. L. Rev. 427 (1969).

Goetz, Arbitration After Termination of a Collective Bargaining Agreement, 63 Va. L. Rev. 693 (1977).

St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny, 75 Mich. L. Rev. 1137 (1977).

Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review, 80 Col. L. Rev. 267 (1980).

Markham, Judicial Review of an Arbitrator's Award Under § 301(a) of LMRA, 39 Tenn. L. Rev. 613 (1972).

Aaron, Judicial Intervention in Labor Arbitration, 20 Stan. L. Rev. 41 (1967).

Jones, The Name of the Game is Decision: Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration, 46 Tex. L. Rev. 865 (1968).

Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, 53 Mich. L. Rev. 1017 (1961).

Aaron, Some Procedural Problems in Arbitration, 10 Vand. L. Rev. 739 (1957).

Frazier, Labor Arbitration in the Federal Sector, 45 Geo. Wash. L. Rev. 712 (1977).

Frazier, FLRA Policy and Practice on Arbitration Appeals: The Role of Regulation, 81 F.L.R.R. No. 9. Highlights (June 1981).

CHAPTER 7

JUDICIAL REVIEW

7-1. Introduction.

Under section 7123(a) of the Statute, any person aggrieved by any final order of the Federal Labor Relations Authority, with two exceptions, may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the U.S. Court of Appeals in the circuit in which the person resides or transacts business, or in the U.S. Court of Appeals for the D.C. Circuit. Section 7123(a) excludes from judicial review orders under section 7112 of the Statute, which involve an appropriate unit determination, and orders under section 7122, which involve decisions resolving exceptions to arbitration awards, unless the order of the Authority under section 7122 involves an unfair labor practice. Consequently, an order of the Authority resolving exceptions to an arbitration award would be subject to judicial review when the Authority's order involves an unfair labor practice.

Concurrently, under section 7123(b), the Authority may petition an appropriate U.S. Court of Appeals for the enforcement of any of its orders, for appropriate temporary relief, or for a restraining order.

Parties may request the General Counsel of the Authority to seek appropriate temporary relief (including a restraining order) in a U.S. district court under section 7123(d). The General Counsel will initiate and prosecute injunction proceedings only on the approval of the Authority. A determination by the General Counsel not to seek approval of the Authority for temporary relief is final and may not be appealed to the Authority.

Upon the issuance of a complaint and when seeking such relief is approved by the Authority, a regional attorney of the Authority or other designated agent may petition any U.S. district court, within any district in which the unfair labor practice is alleged to have occurred or the respondent resides or transacts business, for appropriate temporary relief. Section 7123(d) directs that the district court shall not grant any temporary relief when it would interfere with the ability of the agency to carry out its essential functions, or when the Authority fails to establish probable cause that an unfair labor practice was committed.

7-2. Standard of Review.

The standard of review of the decisions of the Authority is narrow. E.g., U.S. Naval Ordnance Station v. FLRA, 818 F.2d 545, 547 (6th Cir. 1987). Section 7123(c) of the Statute provides that review of an order of the Authority shall be conducted on the record in accordance with the Administrative Procedures Act, 5 U.S.C. § 706. Section 706(2)(A) of the Act requires the reviewing

court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The reviewing courts must, however, give deference to the decisions of the Authority. In Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97 (1983), the U.S. Supreme Court noted that the Statute intends the Authority to develop specialized expertise in the field of labor relations and to use that expertise to give content to the principles and goals set forth in the Statute. Consequently, the Court ruled that the Authority is entitled to "considerable deference when it exercises its 'special function of applying the general provisions of the Statute to the complexities' of federal labor relations." Id. (citations omitted). Accordingly, reviewing courts recognize that in order to sustain the Authority's application of the Statute, the court does not need to find that the Authority's construction is the only reasonable one or that the Authority's result is the result that the court, itself, would have reached. Instead, the courts adopt the Authority's construction when it is reasonably defensible and there is no compelling indication of error. E.g., AFGE Local 3748 v. FLRA, 797 F.2d 612, 615 (8th Cir. 1986). The U.S. Court of Appeals for the D.C. Circuit specifically explained the constraints of judicial review as follows:

> We are not members of Congress, with the power to rewrite the terms of a law which may have revealed infirmities in its implementation. Nor are we members of the FLRA, to whom Congress delegated the primary authority to fill in interpretative voids in the [Statute]. . . . [T]he dissent's main theme is that the Authority's interpretation should be reversed because it is not the best, or the most reasonable one. We view our task, in contrast, as simply deciding, whether, given the existence of competing considerations that might justify either interpretation, the Authority's interpretation is clearly contrary to statute or is an unreasonable one.

AFGE v. FLRA, 778 F.2d 850, 861 (D.C. Cir. 1985). Thus, an interpretation of the Statute by the Authority, when reasonable and coherent, commands respect. The courts are not positioned to choose from plausible readings the interpretation the courts think best. Their task, instead, is to inquire whether the Authority's reading of the Statute is sufficiently plausible and reasonable to stand as governing law. E.g., AFGE Local 225 v. FLRA, 712 F.2d 640, 643-44 (D.C. Cir. 1983). A court is not to disturb the Authority's reasonable accommodation of conflicting policies that were committed to the Authority by the Statute. AFGE v. FLRA, 778 F.2d at 856.

At the same time, the Supreme Court in Bureau of Alcohol, Tobacco, and Firearms, 464 U.S. at 97, cautioned that deference due an expert tribunal "cannot be allowed to slip into a judicial inertia." Accordingly, the Court stated that while courts should uphold reasonable and defensible interpretations of an agency's enabling act, they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or

that frustrate the congressional policy underlying a statute." Id. (citations omitted). The Court also advised that when an agency's decision is premised on an understanding of a specific congressional intent, the agency is engaging in the "quintessential judicial function of deciding what a statute means." Id. at 98 n.8. In such a case, the agency's interpretation may be influential, but it cannot bind a court. Id.

The standard of review accorded Authority decisions that involve an examination of law other than the Statute or regulations other than its own is generally broader than the standard of review accorded their decisions interpreting and applying the Statute. E.g., California National Guard v. FLRA, 697 F.2d 874, 879 (9th Cir. 1983). For example, one court has stated that the Authority is due "respect," but not "deference," when interpreting or applying statutes and regulations other than its own. Professional Airways System Specialists v. FLRA, 809 F.2d 855, 857 n.6 (D.C. Cir. 1987). However, deference has been granted the Authority's rulings involving the interpretation of law other than the Statute when the court perceived that the interpretation "bears directly on the 'complexities' of federal labor relations." Health and Human Services v. FLRA, 833 F.2d 1129, 1135 (4th Cir. 1987) (quoting Bureau of Alcohol, Tobacco, and Firearms, 464 U.S. at 97).

In sum, these pronouncements reaffirm the general principle that courts will give great weight to an interpretation of a statute by the agency entrusted with its administration. In other words, the courts will follow the construction of the Statute by the Authority unless there are compelling indications that it is wrong. E.g., NFFE Local 1745 v. FLRA, 828 F.2d 834, 838 (D.C. Cir. 1987).

7-3. Court Review of Issues Not Raised Before the Authority.

Section 7121(c) of the Statute provides that absent extraordinary circumstances, no objection which has not been urged before the Authority shall be considered by a reviewing court. The meaning of this provision has been explained as effectively designating the Authority as the sole factfinder and as the first-line decisionmaker, and designating the courts as reviewers. Treasury v. FLRA, 707 F.2d 574, 579-80 (D.C. Cir. 1983). Thus, in Treasury v. FLRA, the court ruled that it could not review issues that an agency never placed before the Authority. In the view of the court, such action would in large measure transfer the initial adjudicatory role Congress gave the Authority to the courts in clear departure from the statutory plan. Id.

The U.S. Supreme Court has explained that the plain language of section 7123(c) evidences an intent that the Authority shall pass on issues arising under the Statute and shall bring its expertise to bear on the resolution of those issues. Consequently, in EEOC v. FLRA, 476 U.S. 19 (1986), the Court dismissed a writ of certiorari as having been improvidently granted when the agency failed to excuse its failure to raise before the Authority the same principal objections it raised in its petition for certiorari.

7-4. Review of Specific Categories of Cases.

a. Decisions of the Authority Resolving Exceptions to Arbitration Awards.

Section 7123(a) excludes from judicial review orders under section 7122 of the Statute, which pertain to decisions resolving exceptions to arbitration awards, unless the order of the Authority under section 7122 involves an unfair labor practice. In other words, decisions of the Authority resolving exceptions to arbitration awards are only judicially reviewable when the decision involves an unfair labor practice. Consistent with the legislative history to the Statute, the courts have narrowly construed the provision for judicial review of Authority decisions in this area.

The Conference Report which accompanied the bill that was enacted and signed into law stated: "The conferees, in light of the limited nature of the Authority's review, determined that it would be inappropriate for there to be subsequent review by the court of appeals in such matters." Consistent with this congressional intent, the U.S. Courts of Appeals for the 4th, 9th, and 11th Circuits have all concluded that there was no jurisdiction to consider a petition for review of such Authority decisions. Tonetti v. FLRA, 776 F.2d 929 (11th Cir. 1985); U.S. Marshals Service v. FLRA, 708 F.2d 1417 (9th Cir. 1983); AFGE Local 1923 v. FLRA, 675 F.2d 612 (4th Cir. 1982). For instance, in U.S. Marshals Service, the 9th Circuit believed that there is no jurisdiction unless an unfair labor practice is either an explicit or a necessary ground for the final order issued by the Authority. In particular, the court stated that there would be no jurisdiction in the common case where the collective bargaining agreement is the basis for the arbitration award and the Authority's review. The court explained that to grant judicial review whenever a collective bargaining dispute can also be viewed as an unfair labor practice would give too little scope and effect to the arbitration process and to the final review function of the Authority, both of which Congress made a central part of the Statute. The D.C. Circuit, in consolidated cases, found that it lacked jurisdiction in one case, but reviewed and remanded the other case. Overseas Education Association v. FLRA, 824 F.2d 61 (D.C. Cir. 1987). In both cases, the court followed the narrow construction of section 7123 by the 9th Circuit in U.S. Marshals Service, but determined in the one case that it had jurisdiction to review the decision of the Authority because an unfair labor practice was involved or necessarily implicated.

The effect of this provision of section 7123 generally precluding judicial review has also been addressed in the context of judicial review of an Authority decision finding an unfair labor practice for refusing to comply with an arbitration award as to which exceptions to the award were denied by the Authority. In the unfair labor practice cases before the Authority, the Authority has held that the arbitration award became final and compliance was required when the exceptions to the arbitration award were denied;

and that the Authority would not relitigate the denial in the unfair labor practice proceeding.

In such cases, the courts have likewise declined review of the underlying Authority decision denying exceptions. The courts have refused to attribute to Congress the intent of allowing the courts to do indirectly what Congress specifically prevented courts from doing directly under section 7123(a). Department of Justice v. FLRA, 792 F.2d 25 (2d Cir. 1986). In DOJ v. FLRA, the court concluded that in order for judicial review to be available, the unfair labor practice must be part of the underlying controversy that was subject to arbitration and not some "after the fact" outgrowth of the refusal to abide by the arbitrator's award. 792 F.2d at 28. To the U.S. Court of Appeals for the 9th Circuit, this "roundabout way of obtaining appellate review of a nonreviewable arbitration award has little to commend it in terms of judicial economy" and "flies in the face of legislative intent." U.S. Marshals Service v. FLRA, 778 F.2d 1432, 1436 (9th Cir. 1985). In agreeing with the Authority's method of disposing of these cases, the court stated that it would review the award only to determine whether an unfair labor practice was committed by refusing to comply. Id. at 1437. A U.S. district court has reviewed an Authority decision resolving exceptions to an arbitration award on the ground that the Authority's decision deprived an employee of a property interest in violation of the Fifth Amendment due process clause. The U.S. Court of Appeals for the D.C. Circuit ruled that neither the Statute nor the legislative history to the Statute was sufficient to preclude judicial review of a constitutional claim in U.S. district court. Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988). Citing the case of Leedom v. Kyne, 358 U.S. 154 (1958), the court also indicated that judicial review would be available in U.S. district court where the Authority had acted in excess of its delegated powers and contrary to a specific provision of the Statute. The court explained, however, that the Leedom v. Kyne exception is intended to be of extremely limited scope and that the action is not one to review a decision of the Authority made within its jurisdiction. Rather, the action is one to strike down a decision of the Authority made in excess of its delegated powers.

b. Authority Decisions in Representation Proceedings.

In addition to the specific provision of section 7123(a) precluding judicial review of Authority determinations of appropriate units under section 7112 of the Statute, the U.S. Court of Appeals for the D.C. Circuit has held that Congress intended that Authority decisions in representation cases would not be reviewable because they were not final orders. Department of Justice v. FLRA, 727 F.2d 481 (D.C. Cir. 1984). Specifically, the court held that an Authority decision under section 7111 setting aside an election and directing another election was not final and consequently was not reviewable. The court concluded that Congress made it clear that the provisions of the Statute concerning court review of representation proceedings were based on established practices of the National Labor Relations Board. 727 F.2d at 492. In this respect, the court noted that NLRB orders directing

elections have consistently been found not to be final. In addition, the court noted similar treatment by the courts of "any type of order by the Board during representation proceedings, which include the determination of an appropriate bargaining unit, the direction of an election, ruling on possible election objections, and the certification of a bargaining representative." Id. (citations omitted).

c. Decisions of the Federal Service Impasses Panel.

In Council of Prison Locals v. Brewer, 735 F.2d 1497 (D.C. Cir. 1984), the court affirmed the dismissal by the U.S. district court for lack of jurisdiction of an appeal from a decision of the Federal Services Impasses Panel. The court held that Congress clearly precluded direct judicial review of decisions and order of the Panel. The court explained that instead, Panel decisions and orders are reviewable through unfair labor practice proceedings for refusing to comply, first by the Authority and then by the courts in an appeal from the Authority's decision and order in an unfair labor practice case under section 7123 of the Statute. The court emphasized that in such an appeal, it may review the validity of the Panel decision and order as to which compliance was refused. 735 F.2d at 1500. The court indicated, however, that a U.S. district court may exercise Leedom v. Kyne jurisdiction to invalidate a Panel decision and order when the extraordinary circumstances required under Leedom are presented.

d. Authority Statements of Policy or Guidance.

In AFGE v. FLRA, 750 F.2d 143 (D.C. Cir. 1984), the court held that Authority issuances on general statements of policy or guidance were judicially reviewable under section 7123(a). The court determined that Authority's statement on policy or guidance was final and was encompassed by the term "order" as used in section 7123(a). The court also determined that the Authority's statement was ripe for review. The court concluded that the issue was solely one of law, and the impact of the Authority's statement on the union was definite and concrete.

e. Refusals by the General Counsel to Issue a Complaint.

In Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982), the court held that Congress clearly intended the General Counsel of the Authority to have unreviewable discretion to decline to issue unfair labor practice complaints. The court noted that the legislative history to the Statute makes clear that the role and functions of the General Counsel were closely patterned after the General Counsel of the NLRB. In this respect, the court emphasized that it is clear under the National Labor Relations Act that a decision of the NLRB General Counsel declining to issue an unfair labor practice complaint is not a final order of the NLRB and consequently is not judicially reviewable. Thus, the court ruled that the General Counsel of the Authority must be accorded the same discretion with respect to the issuance of complaints as the NLRB General Counsel.

7-5. Temporary Relief in U.S. District Court.

As noted, section 7123(d) of the Statute authorizes the Authority to seek appropriate temporary relief (including a restraining order) in U.S. district court. The injunctive proceedings are initiated and prosecuted by the General Counsel only on the approval of the Authority. As noted by the court in U.S. v. PATCO, 653 F.2d 1134 (7th Cir. 1981), before relief can be sought, there must be an unfair labor practice charge filed and there must be a determination to issue a complaint. Section 7123(d) directs that a court shall not grant any temporary relief if the Authority fails to establish probable cause to believe that an unfair labor practice is being committed. Section 7123(d) also directs that a court shall not grant any temporary relief if such relief will interfere with an agency's ability to carry out its essential functions.

APPENDIX A

DEPARTMENT OF THE ARMY

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON, D.C. 20310

REPLY TO ATTENTION OF: DAJA-CP 1974/8342

15 JUL 1974

SUBJECT: The Army Lawyer as Counselor to the Civilian Personnel Officer

SEE DISTRIBUTION:

1. In recent years, Army lawyers have continued to assume greater responsibility for providing legal services to the Civilian Personnel Officer and his personnel management specialists. The labor law curriculum at The Judge Advocate General's School and textual material made available to the field reflect acknowledgment of this responsibility. However, the growing sophistication of the civilian personnel system, the requirement for representation of management in adversary proceedings, and the current emphasis on the rights and benefits of employees and management require renewed emphasis on the need for competent legal support. The amendments to Executive Order 11491, Labor-Management Relations in the Federal Service, introduced the Department of Labor as a third party in management-employee relations and provided for hearings before Administrative Law Judges. These administrative tribunals require the introduction of evidence, cross-examination and the preparation of briefs on appeal. As in all formal adjudicative procedures, the preliminary or informal processes, which are critical to final resolution, can be successful only when a close working relationship has been established between the attorney and the personnel management specialist.

2. The need for an effective labor counselor at every installation is also made apparent by the present trend towards expanding the scope of bargaining and by placing greater authority for the labor relations program at the local level. In February 1974, The Director of Civilian Personnel, OCCSPER, at the worldwide Civilian Personnel Officer Conference, stressed the importance of utilizing the services provided by judge advocate offices. This was followed by a Labor Relations Bulletin #80 in July 1974 which outlined legal services available to the civilian personnel officer and his staff (Incl to Appendix).

DAJA-CP 1974/5342
SUBJECT: The Army Lawyer as Counselor to the Civilian Personnel Officer

3. In view of these developments and in order to be fully responsive to the needs of the military commander and his staff, an Army lawyer will be designated at each installation to provide comprehensive legal services to the civilian personnel officer and his personnel management specialists. The requirements for this labor counselor program are set forth in the appendix to this letter. While this will be an additional duty at most installations, it is expected that the Army lawyer selected for this specialization will have the necessary time to pursue professional training and to acquire the practical experience essential to providing competent legal services. Each staff judge advocate will give his support to this program by taking a personal interest in developing the professional qualifications of his labor counselor, by fostering a sound working relationship with the civilian personnel officer and his staff, and by working towards the establishment of an effective labor relations team at his installation.

1 Incl
Appendix
w/Incls

HAROLD E. PARKER
Major General, USA
Acting The Judge Advocate General

APPENDIX

JAG LABOR COUNSELOR PROGRAM

1. Designation of Labor Counselor. Designate one Army lawyer by letter order at each installation as principal counselor to the Civilian Personnel Officer and his staff. A second attorney will be designated as his alternate to insure continuity of services upon transfer of the principal counselor.

a. The attorney must have at least one year of experience as an Army lawyer and he will be expected to specialize in this area of law for practice in future assignments in the Corps.

b. An attorney with the qualifications listed below should be selected. If such an attorney is not available, the designated attorney should pursue these qualifications upon selection as labor counselor:

(1) Attendance at one law school course in labor law.

(2) Attendance at The Judge Advocate General's School Law of Federal Employment Course.

(3) Attendance at one labor relations course presented by Office of the Deputy Chief of Staff for Personnel (ODCSPER), Department of the Army or the United States Civil Service Commission (USCSC).

(4) Practical experience representing the command at hearings conducted by the United States Civilian Appellate Review Agency, the United States Civil Service Commission, or the Department of Labor.

c. The name, qualifications, and orders appointing the designated labor counselors will be furnished this headquarters: ATTN: DAJA-CP by 23 August 1974. A copy of the orders will be filed with the individual's personnel records in Personnel, Plans and Training Office, OTJAG.

2. Responsibilities. The JAG labor counselor will be expected to develop effective relations with the civilian personnel officer and his personnel management specialists in order to undertake the following responsibilities:

a. Participate in the development and/or review of local policies and procedures for administration of the labor-management relations program.

b. Participate in contacts with labor organizations, particularly when union attorneys are involved.

c. Represent the activity in third party proceedings, including bargaining unit determinations and unfair labor practice complaints; prepare briefs in third party proceedings for submission to the Federal Labor Relations Council.

d. Assist in resolution of grievances arising from the administration of labor agreements; represent the activity in grievance arbitration, including preparation of post-hearing briefs.

e. Provide legal advice to the installation labor negotiation committee.

f. Provide legal advice on the interpretation and application of negotiated labor agreements.

g. Represent the command in hearings before USCSC.

h. Assist in conducting workshops and seminars designed to carry out the management training requirements outlined in CFR 200, Chapter 250.1.

3. Training and Education. In order to develop an effective labor relations team and to insure sound legal support, professional training must be a continuing consideration.

a. Attendance by Army lawyers at courses presented by ODCSPER, USCSC, and TJAG School should be scheduled. Similarly, arrangements may be made for attendance at TJAG School courses by personnel management specialists by coordinating with DAJA-CP. Army lawyers may arrange to attend ODCSPER and USCSC courses by coordinating with the local civilian personnel officer.

b. Workshops and seminars with personnel management specialists should be scheduled on a regular basis to study current installation labor relations problems and to review significant rulings and decisions of the Department of Labor. Members of the OTJAG staff will be available to assist in planning and presentation of initial workshops. Requests for such assistance should accompany report in 1g above.

c. The labor counselor should be available to discuss recent Department of Labor decisions in management training programs mentioned in 2h above.

d. Joint orientation visits should be scheduled to the regional or district offices of the USCSC and the Labor-Management Services Administration.

e. Participation by the labor counselor in programs sponsored by the local labor relations bar is encouraged.

f. Inquiries concerning graduate study in labor law should be addressed to PP&TO.

4. Law Library References. There is a critical need to develop library resources in order to practice in this area of law. While some references are available in the CPO office, labor counselors must have their own research materials.

a. Essential references:

(1) Administrative Law Handbook, DA Pam 27-71, ~~October 1973~~ May 75 (Chapter 4)

(2) CPR 700, Chapter 711. This regulation includes DA instructions; DoD Directive 1426.1, Labor-Management Relations in the Federal Government; and Executive Order 11491, as amended.

(3) FPM Supplement 711-1. This regulation contains rules, forms and functions of Department of Labor, including procedures to be followed at hearings before Administrative Law Judges.

(4) CPR 700, Chapter 751.1 - Discipline; CPR 751.3 - Reprimands. These regulations were forwarded to all Judge Advocate offices by letter on 21 November 1973.

(5) CPR 752-1, Adverse Actions. This regulation was also forwarded on 21 November 1973.

(6) CPR 771.C. DA Grievance and Appeals System. This appendix was forwarded to Judge Advocate offices on 3 April 1974.

(7) CPR 700, Chapter 713.B, Processing Complaints of Discrimination on Grounds of Race, Color, Religion, Sex or National Origin. This appendix was forwarded on 23 July 1973.

(8) Labor relations legal service. Prentice-Hall, Bureau of National Affairs, and Commerce Clearing House publish legal services which provide authoritative information on civilian personnel law and labor relations in the public sector, including the latest decisions of the Department of Labor. Illustratively, BNA's Government Employees Relations Report is published weekly and costs about $228.00 per year. Local funds should be used to procure these services.

b. Inclosure to Appendix contains a list of references which should be available in all Army law libraries. Distribution of CPR's to Army legal offices, coordinated at DA, will begin summer, 1974.

5. Coordination of Third Party Proceedings. As the number of decisions by the Department of Labor continues to grow and precedents are set, the need for coordinating appearances at hearings, post-hearing briefs, and appeals for submission to the Federal Labor Relations Council becomes critical. Labor counselors should endeavor to inform DAJA-CP informally by letter or telephone upon initiation of proceedings when a hearing officer is involved. This includes hearings on bargaining unit determinations, unfair labor practice charges, and grievance arbitration. This coordination and discussion is intended to assist Army lawyers who have not practiced in this area of the law.

APPENDIX B

DEPARTMENT OF THE ARMY

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON, D.C. 20310

REPLY TO ATTENTION OF

07 JUL 1982

DAJA-ZX

SUBJECT: The Labor Counselor - Policy Letter 82-5

ALL JUDGE ADVOCATES

1. The Labor Counselor Program provides judge advocates and civilian personnel officers a means for understanding and resolving civilian personnel and labor relations law problems and, of course, those arising from employment discrimination.

2. Each statutory administrative agency which deals with Federal labor/civilian personnel problems has its own special rules and regulations. Labor counselors must be cognizant of these differences when they represent management before the Merit Systems Protection Board, the Federal Labor Relations Authority, the Equal Employment Opportunity Commission, and other third party proceedings. Labor counselors must also be familiar with industrial labor relations laws and regulations so that they can effectively advise contracting officers regarding contractor labor disputes which affect government operations.

3. In view of the complex area of law with which the labor counselor must be familiar, I expect each Staff Judge Advocate to give renewed emphasis to the program. The need for an effective, well-trained labor counselor at every installation or activity is apparent. Sufficient library resources must be available to enable labor counselors to provide competent legal services.

4. The Labor Counselor Program will be an item of interest during Article 6, UCMJ inspections.

Hugh J. Clausen

HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

APPENDIX C

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO ATTENTION OF

DAJA-LC 23 September 1985

SUBJECT: The Labor Counselor Program - Policy Letter 85-3

STAFF AND COMMAND JUDGE ADVOCATES

1. Since its creation in 1974, the Army Labor Counselor Program has provided specialized legal services to commanders and civilian personnel offices in the fields of labor and civilian personnel law. Effective 8 July 1985, the Director of Civilian Personnel, HQDA, required Labor Counselor coordination on all adverse personnel actions under AR 690-700, Chapter 751.

2. The importance of this program demands our renewed emphasis as the number of labor and civilian personnel cases continues to grow. To meet the requirements of the Labor Counselor Program, we must ensure that:

a. We have a well-trained and aggressive Labor Counselor to support every civilian personnel office in the Army.

b. We provide necessary personnel and resources to meet legal requirements of AR 690-700, Chapter 751.

c. Each Labor Counselor has attended the TJAGSA Federal Labor Relations course, or equivalent training, before assuming the duties of Labor Counselor.

d. To the maximum extent possible, Labor Counselor assignments are stabilized to develop a strong relationship between the civilian personnel office and the Labor Counselor.

e. Whenever possible, an assistant Labor Counselor be appointed to enhance continuity.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

SUBCHAPTER I—GENERAL PROVISIONS

§ 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.

§ 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.

§ 7103. Definitions; application

(a) For the purpose of this chapter—

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual—

(A) employed in an agency; or

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

but does not include—

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

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

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

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

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

(A) the General Accounting Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority; or

(G) the Federal Service Impasses Panel;

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include—

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(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;

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

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

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means—

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

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

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

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

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

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

(16) "exclusive representative" means any labor organization which—

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit—

(i) on the basis of an election, or

(ii) on any basis other than an election,

and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

§ 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. The term of any member shall not expire before the earlier of—

(1) the date on which the member's successor takes office, or

(2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

(2) The General Counsel may—

(A) investigate alleged unfair labor practices under this chapter,

(B) file and prosecute complaints under this chapter, and

(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall 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.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(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;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(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;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e)(1) The Authority may delegate to any regional director its authority under this chapter—

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

(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.

(g) In order to carry out its functions under this chapter, the Authority may—

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

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

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

§ 7111. Exclusive recognition of labor organizations

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

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

(1) by any person alleging—

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

(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit; or

(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation;

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after a reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

(c) A labor organization which—

(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;

(2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or

(3) has submitted other evidence that it is the exclusive representative of the employees involved;

may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose—

(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

(2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

(f) Exclusive recognition shall not be accorded to a labor organization—

(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

(2) in the case of a petition filed pursuant to subsection (b)(1)(A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition;

(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless—

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

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

(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority.

§ 7112. Determination of appropriate units for labor organization representation

(a)(1) 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.

§ 7113. National consultation rights

(a)(1) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization's eligibility for, or continuation of, national consultation rights shall be subject to determination by the Authority.

(b)(1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) be permitted reasonable time to present its views and recommendations regarding the changes.

(2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

(c) Nothing in this section shall be construed to limit the right of any agency or exclusive representative to engage in collective bargaining.

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

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

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

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

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

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 7115. Allotments to representatives

(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

(b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when—

(1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or

(2) the employee is suspended or expelled from membership in the exclusive representative.

(c)(1) Subject to paragraph (2) of this subsection, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in an agency have membership in the labor organization, the Authority shall investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(A) The provisions of paragraph (1) of this subsection shall not apply in the case of any appropriate unit for which there is an exclusive representative.

(B) Any agreement under paragraph (1) of this subsection between a labor organization and an agency with respect to an appropriate unit shall be null and void upon the certification of an exclusive representative of the unit.

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive repre-

sentative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which—

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

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

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

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

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

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

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

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefore at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

§ 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or in-

dividuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

§ 7119. Negotiation impasses; Federal Service Impasses Panel

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 7120. Standards of conduct for labor organizations

(a) An agency shall only accord recognition to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles. Except as provided in subsection (b) of this section, an organization is not required to prove that it is free from such influences if it is subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for—

(1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings;

(2) the exclusion from office in the organization of persons affiliated with communist or other totalitarian movements and persons identified with corrupt influences;

(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provisions for accounting and financial controls and regular financial reports or summaries to be made available to members.

(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in subsection (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences or influences opposed to basic democratic principles if there is reasonable cause to believe that—

(1) the organization has been suspended or expelled from, or is subject to other sanction, by a parent labor organization, or federation of organizations with which it had been affiliated, because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by subsection (a) of this section; or

(2) the organization is in fact subject to influences that would preclude recognition under this chapter.

(c) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with the Assistant Secretary of Labor for Labor Management Relations, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

(d) The Assistant Secretary shall prescribe such regulations as are necessary to carry out the purposes of this section. Such regulations shall conform generally to the principles applied to labor organizations in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violations of this section and require it to take such actions as he considers appropriate to carry out the policies of this section.

(e) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chapter, or by an employee if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

(f) In the case of any labor organization which by omission or commission has willfully and intentionally, with regard to any strike, work stoppage, or slowdown, violated section 7116(b)(7) of this title, the Authority shall, upon an appropriate finding by the Authority of such violation—

(1) revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit; or

(2) take any other appropriate disciplinary action.

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

§ 7131. Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

§ 7132. Subpenas

(a) Any member of the Authority, the General Counsel, or the Panel, any administrative law judge appointed by the Authority under section 3105 of this title, and any employee of the Authority designated by the Authority may—

(1) issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States; and

(2) administer oaths, take or order the taking of depositions, order responses to written interrogatories, examine witnesses, and receive evidence.

No subpena shall be issued under this section which requires the disclosure of intramanagement guidance, advice, counsel, or training within an agency or between an agency and the Office of Personnel Management.

(b) In the case of contumacy or failure to obey a subpena issued under subsection (a)(1) of this section, the United States district court for the judicial district in which the person to whom the subpena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(c) Witnesses (whether appearing voluntarily or under subpena) shall be paid the same fee and mileage allowances which are paid subpenaed witnesses in the courts of the United States.

§ 7133. Compilation and publication of data

(a) The Authority shall maintain a file of its proceedings and copies of all available agreements and arbitration decisions, and shall publish the texts of its decisions and the actions taken by the Panel under section 7119 of this title.

(b) All files maintained under subsection (a) of this section shall be open to inspection and reproduction in accordance with the provisions of sections 552 and 552a of this title.

§ 7134. Regulations

The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations, and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision, or repeal of any such rule or regulation.

§ 7135. Continuation of existing laws, recognitions, agreements, and procedures

(a) Nothing contained in this chapter shall preclude—

(1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or

(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

CPM CHAPTER 711: LABOR-MANAGEMENT RELATIONS
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Subchapter 1. Purpose and Applicability

1-1. PURPOSE. This CPM Chapter sets forth policies and procedures applicable to labor-management relations within the Department of Defense in order to promote effective and equitable implementation of the policies, rights and responsibilities established by the Federal Service Labor-Management Relations Statute (CPM 711.E-1) and DoD Directive 1426.1 (CPM 711.E-2).

1-2. APPLICABILITY AND SCOPE

a. Except as provided in subsection b., below, the provisions of this Chapter and the Federal Service Labor-Management Relations Statute (CPM 711.E-1) apply to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, and the Defense Agencies, including nonappropriated fund instrumentalities under their jurisdiction

b. This Chapter and the Statute shall not apply:

(1) To the National Security Agency, as provided in 5 U.S.C. 7103(a)(3);

(2) To organizational or functional entities within the Department of Defense which the President has excluded from coverage pursuant to 5 U.S.C. 7103(b) and which are listed in Executive Order 12171 (CPM 711.E-3); or

(3) Except for those in the Panama Canal area, to non-U.S. citizen personnel employed at installations or activities of the Department of Defense which are outside the United States. Relationships with labor organizations representing such non-U.S. citizen employees will be consistent with pertinent intergovernmental agreements, local practices and customs and DoD Instruction 1400.10 (CPM 711.E-4).

1-3. DEFINITIONS. See Appendix D.

1-4. REFERENCES. See Appendix E.

1-5. EFFECTIVE DATE AND IMPLEMENTATION. This CPM Chapter is effective immediately. Forward two copies of implementing documents to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) within 120 days. Insofar as appropriate, primary national subdivisions shall consult with representatives of recognized labor organizations in formulating such documents.

Subchapter 2. General Policies

2-1. BASIC PRINCIPLES. Labor-management relations in the Department of Defense shall be governed by the following policies and principles:

a. Effective labor-management relations are a basic part of the responsibility of DoD managers, military and civilian, at all levels, wherever there are employees subject to the Federal Service Labor-Management Relations Statute (CPM 711.E-1).

b Authority on matters of personnel policy and practice and working conditions will be delegated to the maximum feasible extent consistent with the need for uniformity (where such a need exists), efficiency, and for effective direction and control. Delegation to local managers will help to ensure meaningful employee participation, as well as to avoid escalation of problems which should be resolved at lower levels.

c. Managers shall refrain from interfering with the free choice of employees in representation matters. When employees have chosen exclusive representation through established procedures, managers should take steps to establish positive and constructive relationships with the union selected.

d. Emphasis in dealing with recognized unions will be not only on the resolution of issues and problems which arise at the bargaining table and at the worksite, but also on the establishment of relationships and understandings that can help to preclude such problems. When disputes cannot be resolved without third-party assistance, and resort to such assistance is timely and appropriate, the machinery established by the Statute will be utilized as expeditiously as possible in order to remove such disputes as sources of friction, employee dissatisfaction, and reduced productivity.

e. Unions which have been accorded recognition as the exclusive representative of DoD employees have a legitimate interest in matters affecting the terms and conditions of employment of personnel in the bargaining unit. Attention should be devoted to ensuring that information concerning such matters is provided to union representatives as a matter of good labor-management practice.

f. The achievement of modern and efficient work practices and a commitment to high standards of performance are essential. Managers must retain the ability and authority to determine work methods, assign work, and make other decisions that are basic to the efficient management of the public enterprise and the accomplishment of the national security mission of the Department of Defense.

g. Labor-management relations activities will be given a high priority in the allocation of resources and manpower in order to assure adequate professional staff resources and training of managers in this area.

2-2. SUBJECTS APPROPRIATE FOR NEGOTIATION. Subjects appropriate for negotiation with labor organizations holding exclusive recognition include conditions of employment of unit employees as defined in 5 U.S.C. 7103(a)(14), which fall within the scope of authority of the responsible official at the level at which recognition was accorded. Also subject to negotiation, insofar as their application to the unit at the level of bargaining is concerned, are matters of personnel policy and practice set forth in (a) regulations issued below the primary national subdivision level, and (b) a regulation issued at the DoD or primary national subdivision level (1) for which a specific exception has been granted by the issuing authority or (2) with respect to which the Federal Labor Relations Authority has determined that no compelling need exists.

2-3. MANAGEMENT RIGHTS. In dealings with labor organizations, DoD management representatives shall ensure that the management rights set forth in 5 U.S.C. 7106(a) are retained.

2-4. PROPOSALS FOR CHANGES IN REGULATIONS. Nothing in this Chapter shall be considered to imply that the existence of established DoD-wide or primary national subdivision personnel policies or regulations on any matter precludes recognized labor organizations from presenting suggested changes or modifications in those policies or regulations to the officials responsible for them.

2-5. CONFLICTS OF INTEREST. In order to avoid actual or apparent conflicts of interest between the activities of DoD personnel and their official responsibilities, it is the policy of the Department of Defense that:

a. Although the following individuals may join any labor organization, they may not act as a representative of, participate in the management of, or be represented by any such organization which is subject to the Federal Service Labor-Management Relations Statute (CPM 711.E-1):

(1) Management officials and supervisors (except that this subsection does not apply to supervisors in maritime occupations serving as officers or representatives of labor organizations which traditionally represent such supervisors in private industry and which held exclusive recognition for one or more units of such supervisors in any Federal agency on October 29, 1969, or supervisors in units to which section 1271(a) of the Panama Canal Act of 1979 (CPM 711.E-5) applies).

(2) Employees engaged in personnel work in other than a purely clerical capacity; and

(3) Confidential employees.

b. No employee shall carry on any activities, as an officer or agent or a labor organization, which conflict or give the appearance of conflicting with the proper exercise of, or are incompatible with, his or her official duties or responsibilities. In the event such a conflict or incompatibility arises, the individual concerned will be given a reasonable opportunity to correct the condition causing it. Should an apparent conflict or incompatibility arise with reference to an employee in an exclusive unit, consideration

shall be given to the filing of a unit clarification petition under the procedures set forth in the regulations of the Federal Labor Relations Authority (CPM 711.E-6), 5 CFR 2422, to obtain a determination as to whether the employee is properly included in the unit.

2-6. RESPONSIBILITIES

a. Responsibility for the development of Department of Defense policy regarding labor-management relations and for coordination of labor-management relations programs and activities throughout the Department rests with the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), as set forth in DoD Directive 1426.1 (CPM 711.E-2). The designee of the ASD (MRA&L) for the carrying out of these functions, except for the most critical policy determinations, is the Deputy Assistant Secretary of Defense (Civilian Personnel Policy). The DASD(CPP) is accordingly the Department's primary point of contact with the Federal Labor Relations Authority. Primary national subdivisions will submit any letter, petition, or other document to Authority headquarters involving a policy issue, a negotiability dispute, or exceptions to an arbitration award only after consultation with and authorization, on a case basis, from the DASD(CPP). The DASD(CPP) will coordinate as appropriate with the Office of the General Counsel, Department of Defense.

b. The Head of each primary national subdivision having jurisdiction over employees paid from both appropriated and nonappropriated funds shall designate a single official to act on his or her behalf in formulating labor-management relations policies applicable to both types of employees and to decide or recommend action on disputes involving both types of employees which may arise out of the labor-management relations program.

2-7. TRAINING. The commanding officer of a DoD activity at which there are one or more bargaining units consisting of civilian employees subject to this Chapter and the Federal Service Labor-Management Relations Statute should arrange to attend a course in labor-management relations of at least 2 days' duration prior to or within 6 months of the date he or she reports to the activity, or within 6 months of the date an exclusive representative is certified for the first time at the activity, unless he or she has attended equivalent training within the previous 3 years. An individual designated as Chairperson of the management negotiating team at a DoD activity shall, unless he or she is experienced in labor negotiations, undergo appropriate negotiation training conducted either by a primary national subdivision or the Office of Personnel Management prior to the commencement of negotiations.

2-8. LOCAL AREA COORDINATION. DoD activities with employees subject to the Statute are strongly encouraged to participate with other Federal offices and activities in the same geographic area on committees or study groups formed for the purpose of exchanging information concerning developments in local negotiations and other aspects of labor-management relationships of concern to management. Where no such interactivity group exists, the largest DoD activity in the area is encouraged to take the initiative in forming one.

2-9. EMERGENCY SITUATIONS. Nothing in this Chapter or any agreements entered into under its provisions shall restrict the Department of Defense or its officials in situations of emergency from taking any actions necessary to carry out its mission.

Subchapter 3. Recognition of and Dealings with Labor Organizations

3-1. GRANTING NATIONAL CONSULTATION RIGHTS

a. Upon written request by the head of a national or international labor organization, national consultation rights shall be extended by the head of a primary national subdivision within DoD when it is determined that the organization meets the criteria set forth in the regulations of the Federal Labor Relations Authority (CPM 711.E-6), 5 CFR 2426, with respect to that primary national subdivision.

b. National consultation rights shall be extended by the ASD(MRA&L) when it is determined that a requesting labor organization meets the established criteria with respect to the DoD as a whole

c. Once each year the head of each primary national subdivision and the ASD(MRA&L) will review grants of national consultation rights then in effect to determine whether the labor organizations involved continue to meet the criteria for such rights. Figures used for this purpose will be those reported to the Office of Personnel Management in November of each year and reflected subsequently in OPM's annual publication "Union Recognition in the Federal Government." Where it is determined that a labor organization no longer represents enough employees under exclusive recognition to qualify for national consultation rights, the organization will be provided 30 days' advance written notice of intent to terminate its national consultation rights.

3-2. DEALINGS WITH ORGANIZATIONS HOLDING NATIONAL CONSULTATION RIGHTS

a. A labor organization granted national consultation rights shall be notified by the primary national subdivision of proposed substantive changes in personnel policies issued by the primary national subdivision which affect employees represented by the organization, and shall be given the opportunity to comment on such proposed policies. The primary national subdivision will respond in writing to labor organizations submitting comments, advising them of the reasons for the actions taken.

b. An organization holding national consultation rights may raise personnel policy matters, including requested changes in personnel policies, procedures and practices of interest to the employees they represent, either in writing or through conferring in person with appropriate officials of the primary national subdivision concerned. The views and suggestions of organizations holding national consultation rights will be considered carefully in the formulation or revision of personnel policies.

c. Primary national subdivisions are not required to consult with a labor organization holding national consultation rights with respect to any management decision or action which, if the organization were entitled to exclusive recognition at the national level, would not be included within the obligation to negotiate as set forth in the Federal Service Labor-Management

Relations Statute (CPM 711.E-1). However, labor organizations must be informed of such proposed decisions or actions and are entitled to consult, on request, with regard to their impact on employees represented by the organization.

3-3. PROCEDURES RELATING TO PETITIONS FOR EXCLUSIVE RECOGNITION

a. Each primary national subdivision shall establish procedures to ensure that upon receipt of a copy of a petition filed by a labor organization for exclusive recognition in a DoD activity or command, or a request for consolidation of existing units, the activity or command involved will promptly forward a copy of the petition or request to the head of the primary national subdivision or designee.

b. The criteria set forth in CPM 711.A will be applied by primary national subdivisions, commands and activities in determining their position as to the appropriateness of units under consideration. No particular type of unit may be prescribed in advance by management officials. (Information concerning procedures for the handling of disputes on unit representation and election issues is set forth in CPM 711.4-1.)

c. Where agreement is reached on a unit, the activity or command, as appropriate, shall cooperate with the Federal Labor Relations Authority, and with the labor organization(s) involved, in working out arrangements and details of an election (unless the unit results from the agreed-upon consolidation of existing units) to be supervised or conducted by the Authority.

d. Heads of DoD commands and activities are responsible for complying with applicable regulations of the Authority with respect to the posting of notices, observance of time limits, and similar requirements.

e. As provided in 5 U.S.C. 7116(e), management may publicize the fact of a scheduled representation election and encourage employees to exercise their right to vote, so long as any statements made are noncoercive in nature and context.

3-4. DEALINGS WITH ORGANIZATIONS HOLDING EXCLUSIVE RECOGNITION

a. Rights and Obligations

(1) A labor organization granted exclusive recognition in an appropriate unit shall have the rights and responsibilities conferred upon such organizations by the Federal Service Labor-Management Relations Statute (CPM 711.E-1), subject to explication through decisions of the Federal Labor Relations Authority and of the courts.

(2) Under the Statute, management and labor organizations holding exclusive recognition have a mutual obligation through appropriate representatives to meet at reasonable times and bargain in good faith on negotiable matters. Such obligation does not, however, compel either party to agree to any specific proposal advanced, or require the making of a concession on any specific matter.

b. Negotiation of Agreements

(1) Heads of DoD commands and activities will arrange for authority on negotiable matters to be exercised by those persons designated as the principal management representative in negotiations with labor organizations holding exclusive recognition.

(2) Negotiation of agreements will take place at such times and places as are mutually agreeable to the parties.

(3) Terms and provisions of agreements will apply within the unit for which negotiated and will not be contrary to any published policy or regulation of the DoD or the cognizant primary national subdivision in effect as of the effective date of the agreement, except a published policy or regulation (a) for which a waiver or exception has been approved at the request of one or both of the parties to permit negotiation on a particular subject, or (b) with respect to which the Federal Labor Relations Authority has determined that no compelling need exists. (Information concerning procedures for the handling of negotiability issues is set forth in CPM 711.4-2.)

(4) Substantive Government-wide regulations as well as regulations which are issued within DoD, and which do not merely transmit requirements imposed by law, do not override any provisions of a negotiated agreement during the term of that agreement. However, each agreement must be brought into conformance with applicable published policies and regulations of the primary national subdivision and of the DoD and with regulations of appropriate non-DoD authorities, at the time it is renegotiated, or when it is renewed or extended and such renewal or extension will result in its being in effect for more than 3 years and 90 days since it was last brought into conformance with applicable laws and regulations.

(5) An agreement negotiated with a labor organization accorded exclusive recognition will contain a procedure, applicable only to the unit, for the consideration of grievances. As provided in 5 U.S.C. 7121, such a procedure (a) may exclude from its coverage such matters as the parties mutually decide, and (b) for grievances not satisfactorily settled, must terminate in binding arbitration.

(6) No agreement will exceed 3 years in duration from its effective date. An agreement may be renewed or extended for a specific period (not to exceed 3 years for each renewal or extension) where the parties so agree, subject to the requirement set forth in subparagraph (4) above.

(7) It is recognized that deadlocks in negotiations may develop on some issues despite good faith bargaining by both parties. Every effort must be made to avoid or resolve apparent deadlocks and to achieve agreement without unduly protracted negotiations. Such efforts should include painstaking reappraisal of positions by those participating in the negotiations. The use of joint fact-finding committees, the seeking of guidance from higher echelons within the primary national subdivision or the labor organization

involved, or both, and/or the use of a third party for consultation or advice may be helpful. Where a negotiation deadlock cannot be resolved by the parties, its resolution shall be pursued in accordance with CPM 711.4-3.

(8) The effective date of an agreement, supplement, or amendment will be (a) the date of its approval by the head of the primary national subdivision or by an official who has been delegated such approval authority, or (b) any other date upon which the parties may have agreed which is subsequent to the date of approval, provided such effective date is clearly described in the agreement, supplement, or amendment, or (c) the 31st day following the date of execution of the agreement if approval/disapproval action has not been taken before then. Approval action should not be taken until the review discussed in subparagraph (10) below has been completed; approval of an agreement which is subsequently found to contain provisions that conflict with published policies or regulations of the primary national subdivision or of the DoD constitutes, in effect, waiver of the conflicting regulatory requirements.

(9) Heads of primary national subdivisions may delegate authority for the approval of agreements to heads of subordinate offices, commands, or activities. Agreements (and supplements and amendments thereto) shall be approved if they conform to applicable laws, regulations of appropriate non-DoD authorities, and published policies and regulations of the DoD and the cognizant primary national subdivision (see CPM 711.3-4.b.(3), above).

(10) Heads of primary national subdivisions shall ensure that all negotiated agreements, and any supplements and amendments thereto, upon execution (including insertion of the date of execution) by the negotiating parties, are immediately forwarded for review by a professionally competent staff organization at a higher level. This review should be completed and both parties notified of the results as soon as possible. Should one or more provisions be determined to conflict with applicable laws, published policies, or regulations, the parties shall be provided with information clearly identifying each conflict so that they may take appropriate action. Any notice of disapproval of portions of an agreement based on conflict with law, published policy or regulation must be served in written form on the union's designated representative - i.e., mailed by certified mail or delivered in person - <u>within</u> 30 days from the date of execution of the agreement.

c. <u>Changes Initiated by Management</u>

(1) Except with respect to matters covered in an existing agreement, when management at the level of exclusive recognition contemplates taking action which will impact on conditions of employment of unit personnel, the exclusive representative will be notified sufficiently in advance to provide it a reasonable opportunity to request bargaining on the proposed change or on its impact and implementation within the unit, as appropriate.

(2) Upon receipt of a new or revised regulation dealing with personnel policies or practices or matters affecting working conditions of DoD civilian employees, management at the level of implementation shall promptly provide a copy to any labor organization holding exclusive recognition as representative of employees affected by the regulation. Except where the parties have agreed otherwise, management shall, upon request, enter into discussions with the labor organization with the objective of reaching a mutual understanding as to how the regulation is to be implemented locally (to the extent local management has discretion in its implementation) and its impact on unit employees. The foregoing does not apply in the case of a regulation which conflicts with provisions of an existing agreement (see CPM 711.3-4.b.(4), above).

d. Grievances and Arbitration

(1) Except in the case of matters set forth in 5 U.S.C. 7121(c) and (e), the negotiated grievance procedure is the sole procedure available to the parties and to employees in the unit for resolving grievances which fall within its coverage.

(2) An employee or group of employees in the unit, in filing a grievance under the negotiated procedure, may be represented only by the exclusive union or by a person selected in accordance with the agreement. An employee or group of employees in the unit wishing to present such a grievance without representation may do so; however, any adjustment of such grievance must not be inconsistent with the terms of the agreement, and the exclusive union must be given the opportunity to be present during the grievance proceeding.

(3) Arbitrators' services may be obtained and paid for in accordance with section XXII, Part 2, paragraphs 22-207 and 22-209 of the Defense Acquisition Regulation (CPM 711.E-7), or as otherwise agreed by the parties.

e. Interpretation of Regulations. Questions as to interpretation of published policies or regulations of a primary national subdivision, of the Department of Defense, or of appropriate authorities outside the DoD, may be referred to the head of the primary national subdivision concerned or designee.

(1) When such a question involves interpretation of DoD or higher authority regulations it will be referred by the primary national subdivision to the DASD(CPP) who will either render or, in coordination with the primary national subdivision and the national headquarters of the union involved (if any), obtain an authoritative interpretation.

(2) Questions of interpretation of regulations which arise (a) under a negotiated agreement with reference to material incorporated in that agreement, or (b) in a grievance context, will be processed in accordance with whatever procedure has been agreed upon by the parties.

(3) Where a question of interpretation is involved in a dispute over negotiability, it shall be resolved in accordance with the procedure set forth in CPM 711.4-2.

f. Payroll Withholding of Labor Organization Dues

(1) Arrangements between labor organizations holding exclusive recognition and DoD activities for the voluntary payroll withholding of dues of members in the unit shall conform with applicable requirements of 5 U.S.C. 7115 and the Civil Service Regulations (CPM 711.E-8).

(2) DoD activities and commands shall consult with the head of the cognizant primary national subdivision or designee before responding to a labor organization's petition seeking dues withholding based on 10 percent membership in a proposed unit pursuant to 5 U.S.C. 7115(c).

(3) A supervisor excluded from a formal or exclusive unit on or before December 31, 1970 pursuant to former section 24(d) of Executive Order 11491 may continue his/her allotment for withholding of labor organization dues in accordance with section 550.323 of the Civil Service Regulations (CPM 711.E-8) and subject to the policies and conditions set forth in CPM 711.C.

g. Right of Representation. DoD activities shall inform employees in established bargaining units annually of their right to union representation set forth in 5 U.S.C. 7114(a)(2)(B). The posting of an appropriate notice on employee bulletin boards normally will meet this annual notice requirement. A sample notice is provided in CPM 711.B.

h. Change in Unit or in Status of Exclusive Union

(1) Where functional transfers or changes in organizational structure result in changes in the composition of a unit which give rise to questions as to its continued appropriateness or the validity of its existing designation, or when a question arises as to whether certain positions or employees are or should be included in an existing unit, an appropriate petition may be filed in accordance with the regulations of the Federal Labor Relations Authority (CPM 711.E-6).

(a) Until such questions have been resolved through appropriate procedures, the activity concerned will, to the maximum extent practicable, maintain the personnel policies, practices, and matters affecting working conditions which have been applicable to the employees involved, including dues withholding.

(2) When an existing unit is transferred substantially intact from one DoD activity or command to another, and there is no question as to its continued appropriateness or the representative status of the incumbent labor organization, the gaining employer will adhere so far as practicable to the personnel policies, practices, and matters affecting working conditions which have been applicable to the employees involved, including dues withholding, until such time as the gaining employer has fulfilled its bargaining obligation under the Statute.

(3) The head of a DoD activity or command shall petition for an election to determine whether employees in an exclusive unit should cease to be represented by a labor organization only on the basis of a good faith doubt that the organization enjoys the support of a majority of the employees in the unit, and shall then do so only after consultation with the head of the primary national subdivision involved, or designee.

(4) Under no circumstances will DoD supervisors or management officials initiate, circulate, or provide assistance in connection with the circulation of a decertification petition for signature by employees, or poll individual employees as to their membership in or desire to continue to be represented by an exclusively recognized labor organization. Petitions for decertification elections may be circulated by employees only during nonwork time

(5) Exclusive recognition accorded a labor organization shall not be terminated by the head of a DoD activity or command except upon receipt of a certification from the Federal Labor Relations Authority that the organization does not represent the employees in the unit, or in compliance with a requirement issued by the Authority.

3-5. GENERAL PROVISIONS

a. Solicitation of Membership and Support

(1) Activity employees may not be prohibited from soliciting membership or support on behalf of or in opposition to a labor organization on activity premises during the nonwork time of the employees involved (that is, both those engaged in solicitation and those being solicited), provided there is no interference with the work of the installation.

(2) Activity employees may not be prohibited from distributing literature on behalf of or in opposition to a labor organization on activity premises in nonwork areas and during the nonwork time of the employees involved (that is, both those engaged in distribution and those receiving literature), provided there is no interference with the work of the activity.

(a) Literature posted or distributed within a DoD activity must not violate any law, applicable regulations, provisions of a negotiated agreement, or the security of the DoD activity, or contain libelous material.

(b) Labor organizations will be considered responsible for the content of literature distributed by their representatives.

(3) Subject to normal security regulations and reasonable restrictions with regard to the frequency, duration, location(s), and number of persons involved in such activities, labor organization representatives who are not employees of the activity may be permitted, upon request, and at the discretion of the head of the activity, to distribute literature or to solicit membership or support on activity premises in nonwork areas and during the nonwork time of the employees involved.

(a) Permission may be withdrawn with respect to any such activities which interfere with the work of the installation, or with respect to any representative who has engaged in conduct prejudicial to good order or discipline on activity premises.

(b) Where no labor organization holds exclusive recognition as representative of the employees involved and permission is granted to one such organization for nonemployee representatives to engage in on-station organizing or campaigning activities, the same privilege shall be extended to any other requesting labor organization with equivalent status.

(c) Where the employees involved are covered by exclusive recognition, permission will not be granted for on-station organizing or campaigning activities by nonemployee representatives of labor organizations other than the incumbent exclusive union except where (1) a valid question concerning representation has been raised with respect to the employees involved, or (2) the employees involved are inaccessible to reasonable attempts by a labor organization other than the incumbent to communicate with them outside the activity's premises.

b. Use of Facilities. Where no union holds exclusive recognition, activity facilities may be made available for the use of labor organizations where practicable, upon request, on an impartial and equitable basis, for such purposes as the posting of notices or membership meetings outside regular working hours. Where a labor organization holds exclusive recognition, the use of activity facilities by that organization is a proper subject for negotiation under the Federal Service Labor-Management Relations Statute (CPM 711.E-1).

c. Use of Official Time

(1) In the interests of efficient conduct of Government business and the economical use of Government time, and in order to draw a reasonable distinction between official and unofficial activities, those activities concerned with organizing efforts and the internal management of labor organizations may be conducted only while the employees involved are in a nonduty status.

(a) Such activities include but are not limited to the solicitation of memberships, collection of dues or other assessments, circulation of authorization cards or petitions, solicitation of signatures on dues-withholding authorizations, campaigning for labor organization office, and distribution of literature.

(b) Similarly, when labor organizations schedule membership meetings, internal elections, workshops on negotiating skills or techniques, local, State, or national conventions or similar events wholly or partially within the scheduled work hours of employees, any employees attending or participating in such events shall do so in an annual leave or leave without pay status.

(2) Employees who represent a labor organization shall be on official time when participating in the negotiation of a labor-management agreement within the limitations set forth in 5 U.S.C. 7131.

(3) An employee who is an official or representative of a labor organization holding exclusive recognition may be excused without charge to leave in conjunction with attendance at a training session sponsored by that organization, provided the subject matter of such training is of mutual concern to the DoD and the employee in his/her capacity as an organization representative and the DoD's interest will be served by the employee's attendance.

(a) Administrative excusal for this purpose should cover only such portions of a training session as meet the foregoing criteria and will normally not exceed 8 hours annually for any individual. (See Comptroller General decisions B-156287, July 12, 1966, February 28, 1977, and March 23, 1977.)

(b) Subject to the same criteria and limitations, an employee who is a representative of a labor organization with responsibilities under the Federal Wage System (FWS) also may be excused for the purpose of attending a training session sponsored by the labor organization concerning FWS policies and operations.

(4) Primary national subdivisions shall ensure that activities under their cognizance have established systems for the recording and maintenance of data on the amount of official time spent by employees on representational functions, as defined in section 711.104 of Book II, FPM Supplement 711-1 (CPM 711.E-9), in accordance with instructions issued by the Office of Personnel Management.

d. Furnishing of Information. Lists of names, position titles, grades, salaries, and/or duty stations of activity or unit employees will be furnished to labor organizations upon request. Lists of DoD employees' home addresses or telephone numbers will not be furnished to labor organizations. Other information which is necessary and relevant to the performance of an exclusive union's representational functions (but not including material described in 5 U.S.C. 7114(b)(4)(C)) shall be furnished to the union on request, subject to the guidance set forth in Appendix C to FPM Supplement 711-2 (CPM 711.E-9).

(1) If the cost of providing documents or other information is significant, an appropriate charge should be made in accordance with DoD Instruction 7230.7 (CPM 711.E-10) or DoD Directive 5400.7 (CPM 711.E-11), whichever is applicable.

(2) When a list of employees is furnished to a Federal Labor Relations Authority representative for use in checking a labor organization's showing of interest, a copy of the list shall be furnished, without charge, to the petitioning organization and to any other labor organization qualifying as an intervenor.

e. Standards of Conduct for Labor Organizations. In any case in which a labor organization requests or holds exclusive recognition and a question arises as to whether the organization is in compliance with the Standards of Conduct set forth in 5 U.S.C. 7120, the activity concerned shall promptly furnish all available information concerning the matter to the head of the primary national subdivision, or designee. Where the information available raises a substantial question as to compliance with the Standards of Conduct on the part of a labor organization seeking or holding exclusive recognition or national consultation rights, the head of the primary national subdivision may refer the matter to the appropriate office of the Federal Labor Relations Authority or the Labor-Management Services Administration of the Department of Labor.

f. Threatened or Actual Strike, Work Stoppage, Slowdown or Prohibited Picketing. Action to be taken in the event of a threatened or actual strike, work stoppage, slowdown or disruptive picketing of a DoD activity in a labor-management dispute engaged in by DoD employees is set forth in CPM 711.4-6.c. Primary national subdivisions shall establish, issue, and periodically review work stoppage contingency planning guidance applicable to all commands and activities having employees subject to the Federal Service Labor-Management Relations Statute (CPM 711.E-1).

Subchapter 4. Resolution of Labor-Management Disputes

4-1. UNIT, REPRESENTATION, AND ELECTION ISSUES

a. The regulations of the Federal Labor Relations Authority (CPM 711.E-6) set forth procedures for the handling of various types of disputes and appeals that may arise in connection with the processing of petitions for exclusive recognition. These include challenges to a labor organization's status under the Federal Service Labor-Management Relations Statute (CPM 711.E-1) or to the showing of interest filed with its petition, failure to agree on an appropriate unit, failure to agree on election details, objections to the conduct of an election or to conduct affecting the results of an election, disputes arising during the course of hearings, or similar matters.

b. Denial by the head of a primary national subdivision or by the ASD(MRA&L) of a labor organization's request for national consultation rights, or termination of such rights, may be appealed by the labor organization to the Federal Labor Relations Authority in accordance with the Authority's regulations.

c The head of any primary national subdivision proposing to file exceptions with the Authority concerning a recommended decision involving a unit, representation or election matter, where such recommended decision appears to have important DoD-wide implications, shall provide a copy of the proposed exceptions to the DASD(CPP) as soon as possible but not later than 5 workdays prior to the deadline for filing.

4-2. DISPUTES CONCERNING NEGOTIABILITY

a. When an issue develops in connection with negotiations between a DoD command or activity and a labor organization over the negotiability of any proposal, the following procedure will be followed:

(1) The activity or command should make every effort to develop, and obtain the labor organization's acceptance of, a feasible, legal alternative to the proposal whose negotiability is questioned.

(2) If efforts to find a mutually acceptable alternative to the proposal prove unsuccessful, and the labor organization requests in writing a statement of position on the negotiability of the proposal in question, the activity or command shall immediately consult, by telephone, with the head of the primary national subdivision or designee for this purpose.

(3) Under 5 U.S.C. 7117 and the regulations of the Federal Labor Relations Authority (CPM 711.E-6), 5 CFR 2424, labor organizations may appeal to the Authority (a) upon receipt of a written statement setting forth the position of the activity or command on the negotiability issue, or (b) if no written statement is received within the period of time specified in the regulations. In order to comply with 5 U.S.C. 7117(c)(2)(B), a labor

organization must serve a copy of any such appeal on the Director, Labor-Management Relations, Department of Defense, OASD(MRA&L), Room 3D264, The Pentagon, Washington, D.C. 20301.

(4) Upon receipt of a copy of an appeal filed with the Authority concerning a negotiability issue, the Director, Labor-Management Relations, will immediately provide a copy to the primary national subdivision concerned, if the latter has not been served a copy, and will work with the primary national subdivision in developing an agency statement of position for submission to the Authority.

b. Where a proposal appears to conflict with a regulation of the primary national subdivision concerned or of the Department of Defense, and there is no apparent conflict with applicable law or regulations of appropriate authority outside DoD, either party may request a regulatory exception to permit negotiation on the proposal. Such requests, as well as questions as to the level of issuance of a regulation, should be referred to the head of the primary national subdivision or his/her designee. The party initiating such a referral should serve a copy on the other party.

(1) Issues referred to the primary national subdivision level by one or both parties will be processed as follows:

(a) When the issue is whether an exception to one or more published policies or regulations of the primary national subdivision should be granted to permit negotiation, the head of the primary national subdivision or his/her designee shall forward a copy of the referral to the DASD(CPP). The proposed decision of the head of the primary national subdivision shall be discussed with the DASD(CPP) prior to issuance.

(b) Where the issue is (1) whether an exception to one or more published DoD policies or regulations should be granted to permit negotiation on the proposal, or (2) whether a particular regulation was issued at the primary national subdivision level, the head of the primary national subdivision shall refer the case as promptly as possible to the DASD(CPP). The case file will be accompanied by the primary national subdivision's analysis of the issue and its recommendation and rationale therefor.

(c) A request for an exception to a published policy or regulation may be denied only on the basis of a determination (1) that the regulation deals with a matter concerning which, pursuant to the Federal Service Labor-Management Relations Statute (CPM 711.E-1), agencies are not obligated to negotiate; (2) that the regulation results from the exercise of an agency management right established by 5 U.S.C. 7106; or (3) that a compelling need for the regulation appears to exist under criteria established by the Federal Labor Relations Authority. Decisions on requests for exceptions to published policies or regulations issued at the DoD or primary national subdivision levels may not be made at subordinate levels.

c. When an issue of negotiability arises in the context of unfair labor practice proceedings before the General Counsel of the Federal Labor

Relations Authority, or in connection with impasse proceedings before the Federal Service Impasses Panel, the DoD command or activity involved shall promptly notify the head of the cognizant primary national subdivision or designee as to the nature of the issue. The primary national subdivision will, in turn, alert the DASD(CPP). Determinations on such issues will be made in conformance with the procedures set forth above, to the maximum practicable extent consistent with the rules of the General Counsel or the Panel, as appropriate.

4-3. NEGOTIATION IMPASSES

a. In the event a negotiation dispute between a DoD activity or command and an exclusively recognized labor organization persists despite diligent efforts to reach agreement on all issues, the assistance of the Federal Mediation and Conciliation Service (FMCS) may be requested in accordance with the procedures set forth in the regulations of the FMCS (CPM 711.E-12). Mediation shall be considered the primary means of resolving negotiation impasses within the Department of Defense.

b. When a negotiation impasse remains unresolved despite the efforts of the FMCS or other mediator agreed upon by the parties, the issues involved may be referred to the Federal Service Impasses Panel by the labor organization or by the DoD activity or command (as appropriate), or both, in accordance with the Panel's regulations (CPM 711.E-6), 5 CFR 2471. A copy of any such referral shall be promptly forwarded by the activity or command to the head of the primary national subdivision or designee.

c. Arbitration may be used by DoD commands or activities and labor organizations in attempting to resolve negotiation impasses after consultation with the head of the primary national subdivision or designee and subject to approval of the proposed procedure by the Panel.

4-4. DISPUTES OVER GRIEVABILITY OR ARBITRABILITY. Under 5 U.S.C. 7121(a)(1), agreements must include procedures for the resolution of disputes as to whether a matter is grievable or arbitrable under the provisions of the negotiated grievance procedure.

4-5. NONACCEPTANCE OF ARBITRATION AWARDS IN GRIEVANCE CASES

a. An award rendered by an arbitrator on any issue referred to arbitration under the terms of a negotiated grievance procedure will be accepted by the cognizant DoD official unless (1) implementation of the award would involve violation of applicable law or regulation, or (2) the award presents other grounds for review similar to those applied by Federal courts in private sector cases.

b. The head of a DoD activity or command who proposes that exceptions be filed to an arbitration award for one of the reasons referred to above shall forward the proposal including full justification, within 10 calendar days of issuance of the award, to the head of the primary national subdivision or designee for this purpose.

c. If he/she agrees that exceptions are warranted, the head of the primary national subdivision shall promptly refer all pertinent information concerning the case, including a copy of the award in question, to the DASD(CPP). The DASD(CPP), upon concurrence, will authorize further processing of the case in accordance with the regulations of the Federal Labor Relations Authority (CPM 711.E-6).

(1) Upon concluding that exceptions are not warranted, the head of the primary national subdivision or the DASD(CPP), as appropriate, shall issue instructions for compliance with the arbitration award.

(2) Where an award involves pay, leave, or other expenditure of Government funds, and a question arises as to whether implementation of the award would involve violation of law, a ruling may be sought from the Comptroller General. Seeking such a ruling directly, however, does not relieve an agency of its obligations under the Statute and is not a defense to an unfair labor practice complaint. Exceptions should therefore be filed with the Authority in accordance with the procedure set forth herein in every case in which an award appears to conflict with applicable law.

d. Each primary national subdivision shall establish procedures to ensure that arbitrators, when rendering awards concerning matters covered by 5 U.S.C. 4303 or 5 U.S.C. 7512, have applied the same standards as a Merit Systems Protection Board (MSPB) examiner would have used if the matter had been appealed to the MSPB. A negative finding in this regard may be grounds for seeking judicial review under 5 U.S.C. 7121(f) and 5 U.S.C. 7703(d). Proposals for judicial review in such cases should be submitted as promptly as possible to the Office of Personnel Management by the head of the cognizant primary national subdivision or his/her designee, with a copy to the DASD(CPP).

e. Upon learning that a labor organization has filed with the Authority exceptions to an arbitration award involving a DoD activity or command, the head of the primary national subdivision involved shall promptly provide the DASD(CPP) with a copy of the award in question and the labor organization's petition for review.

4-6. ALLEGATIONS OF UNFAIR LABOR PRACTICES

a. In order to maximize settlement prospects and avoid costly litigation wherever possible, DoD activities and commands are encouraged to seek agreement with labor organizations holding exclusive recognition that either party, before filing an unfair labor practice charge with the Federal Labor Relations Authority (except in cases involving apparent violations of 5 U.S.C. 7116(b)(7)), will provide the other party with a copy of the proposed charge and meet, on request, to discuss the matter and explore its resolution.

b. Each primary national subdivision will establish procedures for the processing of allegations that 5 U.S.C. 7116 has been violated, subject to the following requirements:

(1) Issues which are subject to established appeal procedures will be processed under such procedures rather than under the unfair labor practice regulations of the Federal Labor Relations Authority.

(2) Except for matters where the aggrieved employee has the option of using either the negotiated grievance procedure or an appeal procedure pursuant to 5 U.S.C. 7121(e) and (f), unfair labor practice issues which can be raised under a grievance procedure may be processed under that procedure or under the unfair labor practice regulations of the Authority, at the election of the aggrieved party.

(3) All cases involving any strike, work stoppage, slowdown, or the picketing of an activity where such picketing interferes with activity operations, will be governed by the procedures set forth in 4-6.c., below.

(4) Procedures governing cases involving unfair labor practice charges filed against DoD activities or commands under the regulations of the Federal Labor Relations Authority will provide for:

(a) Observance of time limits and other requirements set forth in the regulations of the Authority (CPM 711.E-6), 5 CFR 2423.

(b) Timely investigation of the charge by the activity or command involved, including informal contacts and discussion with representatives of the labor organization, so as to determine all relevant facts and, if possible, produce an acceptable resolution of the matter without resort to formal proceedings.

(c) Prompt notification to the head of the primary national subdivision or designee by the DoD activity or command upon receipt of a formal unfair labor practice complaint issued by a Regional Office of the Federal Labor Relations Authority.

(d) Thorough and professional preparation and presentation of the management case in connection with any hearing held before the Authority.

(e) Transmittal by the activity or command, within 3 days of its receipt, of a copy of the Administrative Law Judge's recommended decision to the head of the primary national subdivision or designee.

(f) Timely submission to the head of the primary national subdivision or designee of any recommendations from the activity or command that (1) exceptions to the Administrative Law Judge's recommended decision should be filed or (2) judicial review of the Authority's final decision should be sought. Any such recommendation should be accompanied by supporting rationale and case citations

(g) Transmittal to the DASD(CPP) of a copy of each Administrative Law Judge's recommended decision as soon as it is received by the primary national subdivision.

c Job Actions. The proscriptions in 5 U.S.C. 7116(b)(7) and the provisions of this section concern strikes, work stoppages, slowdowns, and prohibited picketing involving labor organizations representing DoD employees.

(1) Establishing Responsibility. In proceeding against a labor organization under 5 U.S.C. 7116(b)(7) it will be necessary to establish:

(a) That employees or organization representatives are participating or have participated in a prohibited act; and

(b) That the prohibited act was ordered, approved or authorized by a responsible official of the organization; or that when apprised of participation in the prohibited act by organization representatives and/or by employees represented by the organization, the responsible labor organization official did not take prompt steps to disavow the act and order those involved to cease their participation.

(2) Procedure

(a) When information reaches the head of a DoD activity that a representative of a labor organization with members employed at the activity has indicated that such members may or will engage in an act prohibited by 5 U.S.C. 7116(b)(7), or when it is apparent that employees are actually engaging in such an act, an appropriate representative of the activity or primary national subdivision concerned will immediately seek to contact the head of the local labor organization and apprise that individual of the situation. If the head of the labor organization disavows or withdraws any threatening statements and there is no evidence that the organization ordered, approved or authorized a prohibited act, and if prompt steps are taken by the organization to disavow any such act and order its members to cease their participation, no futher action will be taken against the organization.

(b) If (1) there is evidence that the labor organization ordered, approved or authorized the prohibited act (even though it took prompt steps to stop the act), or (2) the organization fails to take prompt steps to disavow the prohibited act and order its members to cease their participation, or (3) the organization denies that a prohibited act has occurred, an unfair labor practice charge should be filed with the cognizant Regional Director of

the Federal Labor Relations Authority in accordance with applicable provisions of the Authority's regulations. Such a charge should be filed as promptly as possible following consultation between the activity and the headquarters of the primary national subdivision concerned.

(c) Upon receipt of information indicating that acts prohibited under 5 U.S.C. 7116(b)(7) have occurred or been threatened, the head of the primary national subdivision or his/her designee will, if the labor organization involved is affiliated with a national or international organization, notify the head of such organization and acquaint him/her with the available facts. The DASD(CPP) will also be alerted. At this time such informal discussions as may be necessary to clarify the facts should be held and, if required further investigation will be made by the primary national subdivision.

(d) DoD management representatives are expected to cooperate fully with representatives of the Federal Labor Relations Authority in connection with expedited investigations and other proceedings stemming from the filing of a section 7116(b)(7) charge.

d Individual employees engaging in any strike activity prohibited by 5 U.S.C. 7311 will be subject to disciplinary procedures and to penalties established by applicable law and regulations without regard to other provisions of this Chapter.

4-7. JUDICIAL REVIEW

a. Most types of final decisions issued by the Federal Labor Relations Authority may be appealed to an appropriate United States Court of Appeals pursuant of 5 U.S.C. 7123. In order to ensure consistency of interpretation and full consideration of the policy and program implications of such appeals, any proposal for judicial review of a decision of the Authority shall be forwarded through channels to the Office of the General Counsel, DoD, for review and approval in coordination with the DASD(CPP).

b. Staff attorneys authorized to represent the Department of Defense in connection with court appeals of decisions of the Authority shall furnish copies of case documents on a timely basis to the DASD(CPP).

c. The DASD(CPP) shall be promptly notified when a primary national subdivision learns that a labor organization has initiated court action in a matter arising out of its relationship with a DoD activity.

Subchapter 5. Information and Reports Required

5-1. INFORMATION REQUIRED. In addition to other requirements set forth in this Chapter, primary national subdivisions shall furnish the following to the DASD(CPP):

a. A copy of any letter issued by a primary national subdivision that (1) denies a request for national consultation rights, or (2) provides a labor organization with notice of intent to terminate its national consultation rights

b. A copy of any written communication submitted to the Office of Personnel Management that requests guidance or advice on a labor-management relations matter.

c. A copy of any petition for exclusive recognition filed by a labor organization, or any request for unit consolidation, that would result in a unit extending beyond a single DoD activity or installation.

5-2.- REPORTS. Primary national subdivisions within DoD shall submit the following to the Office of Personnel Management (OPM):

a. An annual updating of data on recognitions and agreements in accordance with section S2-8, FPM Supplement 711-1 (CPM 711.E-9), and annual FPM Bulletins issued by OPM. Data on units of nonappropriated fund activity employees will be identified as such and summary data on such employees will be reported separately.

b. Major changes in regulations dealing with labor-management relations, copies of arbitration awards, negotiated and renegotiated agreements, and information on new or revised units of recognition and significant third-party cases, in accordance with subchapter S2-8 of FPM Supplement 711-1 (CPM 711.E-9).

c. Interagency Report Control Number 1060-OPM-AN has been assigned to these reporting requirements.

APPENDIX A

Guide for Determining Appropriateness of Bargaining Units

A-1. POLICY. The determination of bargaining unit appropriateness under the Federal Service Labor-Management Relations Statute (CPM 711.E-1) is a function of the Federal Labor Relations Authority. The Authority is governed by the following basic policies:

a. A unit may be established on any agency, activity or installation, craft, function or other basis which will (1) ensure a clear and identifiable community of interest among the employees concerned, (2) promote effective labor-management dealings, and (3) promote efficiency of operations. These three criteria must be given equal weight.

b. No unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized.

c. No unit shall be established that includes both professional employees and nonprofessional employees unless a majority of the professional employees vote for inclusion in the unit.

d. No unit may include:

(1) Any management official or supervisor (except that this prohibition does not apply to units of supervisors in maritime occupations represented by labor organizations which traditionally represent such supervisors in private industry and which held exclusive recognition for such units in any Federal agency on October 29, 1969, or to supervisors in units to which section 1271(a) of the Panama Canal Act of 1979 (CPM 711.E-5) applies).

(2) Any confidential employee, i.e., an employee who assists and acts in a confidential capacity to an official who formulates or effectuates management policies in the field of labor relations, and who therefore has regular access to confidential labor relations material;

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

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

(5) Any employee primarily engaged in investigation or audit functions of the type described in 5 U.S.C. 7112(b)(7).

e. No unit may include any employee of a DoD subdivision which has been excluded from coverage of the Federal Labor-Management Relations Program by Executive Order 12171 (CPM 711.E-3).

A-2. UNIT CRITERIA. The factors and considerations listed below will be applied by primary national subdivisions, commands, and activities in developing management's position with respect to the appropriateness of units proposed in petitions for exclusive recognition. Where management concludes that a proposed unit would not meet one or more of the three basic criteria (see A-1.a., above) and therefore would not be appropriate, and the petitioning union cannot be persuaded to change its position, management should make a full presentation before the Federal Labor Relations Authority of the basis for its belief that the unit is not appropriate. The consolidation of two or more existing appropriate units will not necessarily result in an appropriate unit; therefore, management should consider each proposed unit consolidation in the light of the criteria and factors set forth herein.

a. Community of Interest

(1) A determination as to the existence of a clear and identifiable community of interest, sufficient to warrant recognition of the employees concerned as constituting an appropriate unit, requires the exercise of judgment and must be made in light of the specific facts and circumstances. An appropriate unit is one in which the particular grouping of employees therein is such that it makes sense for them to deal collectively with management through a single voice.

(2) In evaluating proposed units from the standpoint of community of interest, such factors as the following, among others, should be considered:

- Similarity or relationship of skills
- Distinctiveness of functions performed
- Extent of integration of work processes
- Commonality of working conditions
- Place or places of work
- Extent of employee interchange
- Organizational structure
- Governing personnel and administrative regulations
- Locus of significant authority for personnel and labor relations program decisions
- Common supervision
- Pay systems
- Tenure of employees
- Labor relations history

Many of these factors are interrelated. Following are comments concerning some of them:

(a) Organizational Structure. In evaluating the effect of organizational structure on the appropriateness of a proposed unit, consideration should be given to the common employment interest of the employees in an organizational entity such as a primary national subdivision, command, activity or subdivision thereof, as well as the commonality of supervision exercised and other factors.

(b) Similarity of Skills or Occupations. Units based on a trade, craft, or other distinct occupation normally will consist of a homogeneous group of skilled employees with basically similar training and experience working together with their trainees and helpers. Among factors to be considered in determining the appropriateness of such a unit are the existence of separate supervision and whether all such employees within the organization would be included.

(c) Distinctiveness of Function. Employees with dissimilar skills may have a community of interest as parts of a larger group working together in the performance of a distinct function, which may form the basis for an appropriate unit.

(d) Working Conditions. Consideration should be given to whether there are special work problems or conditions to which the employees in question are subject, as well as their physical location and work sites and whether facilities (tool cribs, locker rooms, and cafeterias) are used in common.

(e) Integrated Work Process. Although there may be functionally distinct organizational elements at an activity, the existence of an integrated work process, in which there is a continuous flow of work among organizational elements, may make a single unit appropriate rather than a number of separate smaller units.

(f) Personnel Regulations and Programs. Whether employees in a proposed unit are covered by the same merit promotion program, are in the same or different areas for RIF bumping purposes, and are covered by the same medical, recreational, and other employment-related programs may have a bearing on community of interest. Whether all employees so covered are included should also be considered.

(g) Labor Relations History. Where a particular pattern of collective dealings has become well established over the years, with effective representation of the interests of various groups of employees involved, effective processing of grievances, and general acceptance on the part of employees and management, this should be given weight in considering unit proposals which would represent a departure from the established pattern. However, where there are two or more units at a DoD activity, the fact that relationships have been satisfactory should not stand in the way of possible consolidation to reduce or eliminate unit fragmentation.

(3) A conclusion that employees in the proposed unit do not share a community of interest normally will be sufficient to warrant opposing the unit. On the other hand, the fact that a clear and identifiable community of interest does appear to exist among the employees in a proposed unit is not sufficient basis, in itself, for approval of the unit. All three of the criteria established by the Statute and set forth in this Guide must be considered and any proposed unit should be viewed in relation to alternative possibilities that might better meet the criteria.

b. Effective Dealings

(1) In order to determine that a unit is appropriate, it must be found that the unit is such as to promote or contribute to effective dealings between management and labor organizations representing employees under the jurisdiction of the level of management involved. Generally speaking, a proposed unit that would contribute to fragmentation--that is, a pattern characterized by several relatively small units at an activity--or which would have the effect of separating employees who share common functions, working conditions, or supervision, will not promote effective labor-management dealings.

(2) Factors to be considered include:

(a) The size and composition of the unit under consideration in relation to the organization's total work force and the size, composition, and number of exclusive units already in existence within the organization and any others currently being sought.

(b) The traditional jurisdiction or representation pattern of the labor organization involved in relation to the types of unit proposed, and the nature and history of relationships with that organization and other labor organizations holding or seeking recognition.

(c) The organization level(s) encompassed by the unit under consideration, the level at which negotiation will take place, and the potential at that level for meaningful negotiation with respect to personnel policy matters and working conditions of the employees involved.

(d) Personnel management resources of the organization and their availability for day-to-day dealings and negotiation with the labor organization concerned as well as those representing other actual or potential units.

(3) A number of the factors listed under "community of interest" may also be pertinent here, such as organizational structure, commonality of supervision, integration of work processes, and coverage of personnel regulations and practices, among others.

c. Efficiency of Operations

(1) The unit under consideration, to be found appropriate, must be reasonably expected to contribute to efficiency of operations. The question to be asked here is whether negotiation and subsequent dealings on matters of personnel policy and working conditions with the particular group of employees encompassed in the proposed unit, separately from others, will contribute to efficiency.

(2) Pertinent factors include:

(a) Nature, size and location of the unit in relation to the rest of the organization.

(b) The functional relationship of unit personnel to others in the organization.

(c) Physical location of unit employees in relation to others --that is, the degree of separation or intermixture.

(d) The customary flow of work assignments to and completed work from the personnel of the unit in question in relation to other parts of the organization.

(e) The anticipated effect of the proposed unit on personnel managment in terms of the resources available and required, morale factors, etc.

(f) Other costs which would be incurred in negotiating and administering agreements for smaller units as opposed to a broader single unit--whipsaw possibilities, increased training costs, etc.

A-3. APPLICATION OF CRITERIA. The factors and criteria discussed above must be applied to the particular situation and conditions involved in each petition for exclusive recognition, and will not necessarily produce uniform results throughout DoD. However, the following generalizations are valid in most cases:

a. A proposed unit which would consist of all eligible employees of a single DoD activity or installation is appropriate.

b. A proposed unit which would include both appropriated fund and nonappropriated fund employees is not appropriate.

c. A proposed unit which would cross primary national subdivision lines--that is, include employees of more than one primary national subdivision of the Department of Defense--is not appropriate.

APPENDIX B

Sample Notice to Employees - Right of Representation

NOTICE TO EMPLOYEES
IN EXCLUSIVE BARGAINING UNITS

_____
(Name of Activity)

Right of Representation

This is to inform you that pursuant to section 7114(a)(2) of Title 5, U.S. Code, the exclusive union must be given the opportunity to be represented at any examination of an employee in the bargaining unit by a management representative in connection with an investigation if:

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

(2) The employee requests representation.

_____
(Activity Official)

APPENDIX C

Payroll Withholding of Union Dues for Supervisors Excluded from Units of Recognition Pursuant to Former Section 24(d) of E.O. 11491

C-1. EMPLOYEES COVERED. The instructions herein apply only to supervisors who where excluded from formal or exclusive units on or before December 31, 1970, pursuant to former section 24(d) of Executive Order 11491, and allotments for the withholding of labor organization dues for such employees covered by section 550.323 of the Civil Service Regulations (CPM 711.E-8).

C-2. CONTINUATION OF ALLOTMENT. Allotments for the withholding of dues to labor organizations which were in effect on December 31, 1970, will continue in effect until revoked by the employee or terminated under the conditions described herein.

C-3. NEW ALLOTMENT. No new allotment for the payment of dues to a labor organization may be made by an employee covered by these instructions, except under the condition described in C-5.b., below.

C-4. REVOCATION OF ALLOTMENT. A covered employee may revoke his allotment in writing at any time. A written revocation will be effective as of the first pay period beginning after the date of its receipt in the appropriate payroll office. Once revoked, an allotment may not be reinstated.

C-5. TERMINATION OF ALLOTMENT

a. An allotment for the payment of dues to a labor organization under these instructions will be terminated when the employee:

(1) Dies, retires, is separated from the Federal Service, transfers between agencies, or is moved within the Department of Defense by any type of personnel action to an organizational segment having a payroll office other than the one responsible for withholding dues from the employee's pay as of December 31, 1970;

(2) Becomes a member of an exclusive unit represented by a different labor organization; or

(3) Is suspended or expelled from the labor organization, as determined by the labor organization.

b. Once terminated, an allotment may not be reinstated except in the case of an employee who has completed a period of temporary suspension from membership in the labor organization.

C-6. AMOUNT OF DEDUCTION. The amount to be withheld each pay period will be the amount being withheld as of December 31, 1970, unless notice of a change in the amount of dues is given to the payroll office by the labor organization in accordance with the instructions herein.

C-7. WHEN DEDUCTIONS ARE MADE. A deduction will be made each pay period except that no deduction for labor organization dues will be made for any pay period in which the employee's net salary after other legal and required deductions is insufficient to cover the full amount of the deduction for dues.

C-8. SERVICE FEE No service fee will be charged in connection with dues withholding in the case of supervisors covered by these instructions.

C-9. TRANSMISSION TO LABOR ORGANIZATION. Dues withheld will be transmitted to the labor organization each pay period, and will be transmitted to the office or official designated to receive such payments as of December 31, 1970, unless the payroll office is notified of a change by the labor organization in accordance with the instructions herein.

C-10. RESPONSIBILITIES OF LABOR ORGANIZATION. The labor organization is responsible for promptly notifying the payroll office in writing of:

a. Any change in the name and/or address to whom dues withheld from employees' pay are to be transmitted:

b. Any change made by the labor organization in the amount of dues applicable to an employee whose dues are being withheld under these instructions;

c. The suspension or expulsion from membership of an employee whose dues are being withheld.

C-11. RESPONSIBILITIES OF PAYROLL OFFICE. The payroll office is responsible for notifying the labor organization upon:

a. Receipt of a revocation of a dues allotment from an employee covered by these instructions;

b. Termination of a dues allotment as the result of an event described in C-5.a.(1) and (2), above.

APPENDIX D

Definitions

D-1. The terms "Authority," "labor organization," "Panel," "supervisor," "management official," and "grievance," as used in this Chapter, are defined in 5 U.S.C. 7103(a).

D-2. Employee. See the definition in 5 U.S.C. 7103(a)(2). Within the Department of Defense this definition includes civilian employees paid from nonappropriated fund instrumentalities (NAFIs) (including off-duty military personnel with respect to employment with a DoD NAFI when such employment is civilian in nature and separate from their military assignment). Military personnel are not "employees" for purposes of this Directive with respect to any matter related to their military status or assignment. Contractor personnel also are not covered by the definition. Pursuant to section 1271(a) of the Panama Canal Act of 1979 (CPM 711.E-5), the definition includes non-U.S. citizen employees of the Department of Defense in the Panama Canal area.

D-3. Primary National Subdivision. Within the Department of Defense the following are primary national subdivisions as defined in the regulations of the Federal Labor Relations Authority (CPM 711.E-6), 5 CFR 2421:

a. The Office of the Secretary of Defense/Organization of the Joint Chiefs of Staff

b. The Military Departments

c. The Defense Agencies (except those excluded from coverage under CPM 711.1-2.b.(1) and (2))

d. The National Guard Bureau

e. The Army and Air Force Exchange Service

D-4. Unit. A grouping of employees found to be appropriate under 5 U.S.C. 7112 for the purpose of collective representation by a labor organization in dealing with management.

APPENDIX E

References

E-1. The Federal Service Labor-Management Relations Statute, 5 U.S.C. Chapter 71

E-2. DoD Directive 1426.1, "Labor-Management Relations in the Department of Defense", June 29, 1981 (see Appendix F)

E-3. Executive Order 12171, "Exclusions from the Federal Labor-Management Relations Program," November 19, 1979

E-4. DoD Instruction 1400.10, "Employment of Foreign Nationals in Foreign Areas," December 5, 1980

E-5. The Panama Canal Act of 1979, Public Law 96-70, September 27, 1979

E-6. Regulations of the Federal Labor Relations Authority, General Counsel of the Federal Labor Relations Authority, and Federal Service Impasses Panel, 5 CFR Chapter XIV

E-7. Defense Acquisition Regulation

E-8. Federal Personnel Manual Supplement 990-1, Book III, Sections 550.301-313

E-9. Federal Personnel Manual Supplement 711-1, "Labor-Management Relations"

E-10. DoD Instruction 7230.7, "User Charges," June 12, 1979

E-11. DoD Directive 5400.7, "DoD Freedom of Information Act Program," March 24, 1980

E-12. Regulations of the Federal Mediation and Conciliation Service, 29 CFR Part 1425

June 29, 1981
NUMBER 1426.1

ASD(MRA&L)

Department of Defense Directive

SUBJECT: Labor-Management Relations in the Department of Defense

References: (a) DoD Directive 1426.1, "Labor-Management Relations in the Department of Defense," October 9, 1974 (hereby canceled)
(b) Title 5, United States Code, Chapter 71, "The Federal Service Labor-Management Relations Statute"

A. REISSUANCE AND PURPOSE

This Directive reissues reference (a) to reflect current authority and responsibility for the establishment of labor-management relations programs and policies covering employees of the Department of Defense and for the exercise of certain functions in implementation of reference (b).

B. APPLICABILITY

The provisions of this Directive apply to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, and the Defense Agencies, with the exception of the National Security Agency/Central Security Service, the Defense Intelligence Agency, and the Defense Investigative Service.

C. POLICY

It is the policy of the Department of Defense that DoD managers at all levels shall carry out their responsibilities in labor-management relations with full consideration of the rights of DoD employees and labor organizations representing them as well as of the need for timely mission accomplishment and increased productivity and efficiency of operations. Effective intra-DoD coordination with respect to labor-management relations issues and developments shall be given priority attention.

D. RESPONSIBILITY

1. The Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) (ASD(MRA&L)) shall:

a. Establish basic principles governing relationships between DoD management and labor organizations representing DoD employees, consistent with the provisions of reference (b).

b. Accord exclusive recognition at the DoD level to qualifying labor organizations under 5 U.S.C. 7111(a) and 7120(a) (reference (b)).

c. Grant national consultation rights at the DoD level to qualifying labor organizations, or terminate such rights, under 5 U.S.C. 7113(a)(1) (reference (b)).

d. With right of redelegation:

(1) Establish labor-management relations programs, policies, and procedures, issue guidance to DoD managers on labor relations matters, and coordinate labor relations programs and activities within the Department of Defense;

(2) Develop or review and clear submissions to the Federal Labor Relations Authority that set forth the DoD position on issues before the Authority, subject to coordination with the General Counsel, Department of Defense, on matters involving legal issues;

(3) Represent the Secretary of Defense in negotiation of agreements with labor organizations accorded exclusive recognition at the DoD level, pursuant to 5 U.S.C. 7114(a) (reference (b)); and

(4) Approve or disapprove negotiated agreements covering units of DoD employees, pursuant to 5 U.S.C. 7114 (c) (reference (b)); and

(5) Represent the Department of Defense in dealings with the Federal Labor Relations Authority, the Office of Personnel Management, and other agencies on labor-management relations matters.

2. The General Counsel, Department of Defense, shall:

a. Develop or review and clear proposals for judicial review of decisions of the Federal Labor Relations Authority under 5 U.S.C. 7123(a) (reference (b)) in cases arising within the Department of Defense, subject to coordination with respect to policy and program implications with the ASD(MRA&L).

b. Communicate with the Department of Justice for the purpose of seeking judicial review of decisions of the Authority and provide or authorize the provision by DoD Components of such legal support as the Department of Justice may require in connection with such cases.

E. EFFECTIVE DATE

This Directive is effective immediately.

Frank C. Carlucci
Deputy Secretary of Defense

APPENDIX F

SUBJECT MATTER INDEX