

**FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL**

**REPRESENTATION
CASE LAW GUIDE**

Foreword

The Representation Case Law Guide (RCL) provides information on a variety of substantive topics in representation case law under the Federal Service Labor-Management Relations Statute (the Statute). The RCL has been prepared by the Federal Labor Relations Authority (FLRA), Office of the General Counsel (OGC) pursuant to section 7104(f) of the Statute. The RCL is intended to provide a resource tool for Regional Office employees when processing representation petitions and unfair labor practice cases that raise representation issues. For more information on processing representation petitions, see the Representation Proceedings Case Handling Manual. For more information on preparing for and conducting hearings representation cases, see the Hearing Officer's Guide.

The RCL is published in a handbook style format to make it user friendly. The RCL will be updated annually. Since party understanding of the representation process and regulatory requirements is critical to the timely and effective processing of representation petitions by the Regional Offices, the RCL is available to all parties and individuals who are involved in filing and processing representation petitions. The RCL may be accessed from the FLRA web site, www.FLRA.gov, and is available for purchase from the Government Printing Office.

The RCL provides guidance for the FLRA, OGC staff when processing representation petitions filed under the Statute. The RCL is not intended to be a condensed version of all substantive law, nor it is intended to be a substitute for knowledge of the law. The RCL is not a ruling or directive, nor is it binding upon the FLRA General Counsel or the FLRA. Although the Regional Office staff refers to the RCL when processing cases, the RCL does not encompass all situations that may be encountered in processing representation petitions. Thus, responsible, professional judgment and experience are required in applying and utilizing these guidelines.

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OTHER OFFICE OF THE GENERAL COUNSEL RESOURCE MANUALS

The **Representation Case Handling Manual** (REP CHM) provides procedural and operational guidance to the General Counsel's staff when processing representation petitions filed pursuant to Part 2422 of the FLRA's regulations. Part One discusses processing petitions from providing substantive issues to investigating and resolving the underlying representation matters, and to issuing a certification or taking other final action. Part One tracks, for the most part, the subject matter format in the representation regulations. Part Two consists of resources that the General Counsel's staff uses when processing petitions, including a Cross Reference Table, Flow Charts, Appendices, FLRA Forms and Documents, and sample Figures.

The **Hearing Officer's Guide** (HOG) describes techniques for conducting hearings in FLRA representation proceedings. The first part provides instructions and guidance on preparing for and conducting hearings. It includes a sample script and discusses specific procedural issues, some commonplace, others novel, that arise during hearings. The second part discusses a variety of evidentiary representation issues and employee categories. Each topic is defined and includes an outline of issues and questions to assist the Hearing Officer and the parties to develop a complete record.

The **Unfair Labor Practice Case Handling Manual** (ULPCHM) provides procedural and operational guidance to the General Counsel's staff when processing unfair labor practice charges filed pursuant to Subpart A Part 2423 of the FLRA's regulations. It is divided into 5 Parts that address various topics/issues that arise during distinct phases of the ULP process—from pre-charge through pre and post investigation. It also codifies the OGC's policies with respect to: Facilitation, Intervention, Training, and Education; Quality of Investigators; Scope of Investigations; Injunctions; Prosecutorial Discretion; Settlements; and Appeals. As appropriate, the ULPCHM references relevant case law and provides for uniformity and best practices; criteria and principles governing Regional discretion and judgment; and model and sample forms and letters.

The **Litigation Manual** (LM) provides comprehensive guidance to regional Trial Attorneys in prosecuting ULP cases. The Manual covers each aspect of the trial process—from the issuance of a complaint and notice of hearing to the Authority's decision and order. Where appropriate, it refers to OGC Policy and relevant case law, and contains many examples of litigation techniques, both in the body of the Manual (Binder I) which concerns substantive litigation guidelines, and in the Attachments section of the Manual (Binder II) which contains a compilation of forms,

policies, OGC Guidances, or models relating to the subject matter covered in Binder I.

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SUBSTANTIVE ISSUES
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1 *Appropriate unit determinations*

Appropriate unit issues arise in almost every representation case, including those involving elections, amendments and clarifications, dues allotment, consolidation and any other matter related to representation. Any case that concerns a question of representation requires an appropriate unit determination prior to proceeding to other issues. Section 7112(a) of the Statute sets out the criteria for determining whether a unit is an appropriate unit for exclusive recognition:

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 [the Statute], 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.***

A. *Standard* : The Authority will not find any unit to be appropriate for exclusive recognition unless the unit meets all three of the criteria set out in section 7112(a). In order for a unit to be found appropriate the evidence must show that:

- a) the employees in the unit share a clear and identifiable community of interest;
- b) the unit promotes effective dealings with the agency; ***and***
- c) the unit promotes efficiency of the operations of the agency.

See United States Department of the Navy, Fleet and Industrial Supply Center, Norfolk, Virginia, (FISC, Norfolk), 52 FLRA 950 (1997) citing Defense Mapping Agency, Aerospace Center, St. Louis, Missouri, 46 FLRA 502 (1992).

B. An Appropriate Unit : Parties often succumb to the fallacy that there is a "most appropriate" unit. There is nothing in the Statute which requires a unit proposed for exclusive recognition to be the only appropriate unit or the most appropriate unit. The proposed unit meets the requirements of the Statute if it is **an** appropriate unit. See *American Federation of Government Employees, Local 2004*, 47 FLRA 969, 973 (1993) and *FISC, Norfolk*, 52 FLRA at 959, n.5. The Statute has no preference for any particular size or configuration of units. (For background information on the history of Federal sector bargaining units, see the Study Committee Report which led to the issuance of Executive Order 11491 in 1969, and as amended in 1975.)

C. Overview :

< In making determinations under section 7112(a), the Authority examines the factors presented on a case-by-case basis. See *U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base (Wright-Patterson AFB)*, 47 FLRA 602 (1993).

< In order to be included in a separate appropriate unit, the evidence must demonstrate that the employees at issue have significant employment concerns or personnel issues that are different or unique from those of other employees in the gaining organization. The evidence must also demonstrate that the disputed employees have not been so integrated, either physically or functionally, with other organizational components that the establishment of a separate unit would cause undue unit fragmentation resulting in operational inefficiency and confusion in dealings between labor and management. *FISC, Norfolk*, 52 FLRA at 960.

< A unit may be appropriate despite its small size or limited scope. The Authority may conclude that a small unit is appropriate where the employees are physically and operationally isolated and, thus, share a clear and identifiable community of interest separate and apart from other agency employees. *Defense Logistics Agency, Defense Contract Management Command, Defense Contract Management District, North Central, Defense Plant Representative Office-Thiokol, Brigham City, Utah (DPRO-Thiokol)*, 41 FLRA 316 (1991). (Authority found that disputed employees constituted a separate appropriate unit where: employees had specific local concerns that might result in grievances or bargaining issues unique to the facility; the facility commander had authority to address such grievances and bargaining matters; and the facility commander had responsibility for its day-to-day operations). See also *U.S. Department of*

Defense, Dependents Schools and Overseas Education Association, NEA, 48 FLRA 1076 (1993) and *General Services Administration, National Capital Region*, 5 FLRA 285 (1981).

- < Decisions regarding unit determinations are required to reflect the conditions of employment that exist at the time of the hearing rather than what may exist at the time in the future unless there are definite and imminent changes planned by the agency. *DPRO-Thiokol*, 41 FLRA at 327.
- < In applying the criteria of section 7112(a), the Authority may find that a small unit is not appropriate for exclusive recognition. For example, in *Department of Transportation, Federal Aviation Administration, New England Region (FAA)*, 20 FLRA 224 (1985), the Authority found that a proposed regional unit was not appropriate because the agency's overriding mission of air safety clearly demonstrated a community of interest equally shared by all air traffic control specialists nationwide.
- < There may be more than one unit configuration within an agency which would meet the statutory test set out in section 7112(a). In some instances, a self-determination election may be warranted, in which the employees vote on the unit, as well as exclusive representation. See *Department of Defense Dependents Schools*, 6 FLRA 297 (1981) and *Department of Defense, Department of the Army, 193^d Infantry Brigade Panama et al*, 17 FLRA 471 (1981).

D. Community of Interest :

Community of interest involves a commonality or sharing of interests between the employees in a unit. Its fundamental premise is to ensure that it is possible for the employees to deal collectively with management as a group. *FISC, Norfolk*, 52 FLRA at 960 citing *Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector (Tulsa AFS)*, 3 FLRC 235, 237 (1975), citing a task force report to President Kennedy, *A Policy for Employee-Management Cooperation in the Federal Sector*, November 30, 1961. Many different considerations may enter into a finding of community of

interest.

< The Authority has not specified the individual factors or the number of such factors necessary to establish that a clear and identifiable community of interest exists. Rather, the Authority examines the totality of the circumstances on a case-by-case basis. See *Department of Health and Human Services, Region II, New York, New York, et al, (DHHS)*, 43 FLRA 1245 (1992); *U.S. Department of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge, Chicago, Illinois (OCIJ Chicago)*, 48 FLRA 620 (1993).

< In examining community of interest issues, the Authority looks at whether the employees in the proposed unit:

- are part of the same organizational component of the agency;
- support the same mission and are subject to the same chain of command;
- have similar or related duties, job titles and work assignments;
- are subject to the same general working conditions; and
- are governed by the same personnel and labor relations policies that are administered by the same personnel office. *FISC, Norfolk*, 52 FLRA at 961.

In addition, such factors as:

- geographic proximity;
- unique conditions of employment;
- distinct local concerns;
- degree of interchange between other organizational components; and
- functional or operational separation

may bear upon whether employees in the unit share a community of interest. See *U.S. Department of the Air Force, Air Force Material Command, Wright-Patterson Air Force Base (AFMC)*,

Ohio, 47 FLRA 602 (1993).

- < In addition to examining where the proposed unit fits within the agency's operations, the Authority also determines the level at which various types of management authority is exercised in assessing whether employees share a clear and identifiable community of interest. See *OCIJ Chicago*, 48 FLRA 620 (employees of a field office shared community of interest where authority for day-to-day operations in almost all matters was at the field office level and agency field offices were geographically separate and served distinct geographic areas) and *FAA*, 20 FLRA 224 (1985) (employees in a proposed regional unit did not share identifiable community of interest separate and apart from employees nationwide where agency had centralized control of operations and uniform establishment and application of work requirements and personnel policies on a national basis).

E. Effective Dealings and Efficiency of Operations :

Effective dealings and efficiency of operations factors are considered and decided as separate factors in any case which raises appropriate unit issues. The Authority requires that each of the appropriate unit criteria be given equal weight in order to foster the goal of a more effective and efficient government. Moreover, as first clarified by the Federal Labor Relations Council (FLRC), the Authority must affirmatively determine that any proposed unit of exclusive recognition satisfies each of the three criteria before that unit can properly found to be appropriate. *Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector (Tulsa AFS)*, 3 FLRC 235, (1975) and *FISC, Norfolk*, 52 FLRA at 961, n. 6.

These factors, therefore, are not dependent on the community of interest criteria, but often assess the same evidence on the record from a different perspective(s). See *Department of the Navy, Naval Computer and Telecommunications Area, Master Station-Atlantic, Base Level Communications Department, Regional Operations Division, Norfolk, Virginia, Base Communications Office - Mechanicsburg*, 56 FLRA 228 (2000) (the Authority found that the

Regional Director did not separately evaluate and make explicit findings with respect to each of the criteria).

Application of these two factors requires consideration of the evidence in light of both management's and employee's interests. For instance, a finding that a proposed unit is appropriate also determines the extent of unit fragmentation within the Agency and establishes the level of recognition (the level at which bargaining must take place). See *CHM 28.14.2*. Evidence on these issues is frequently obtained through testimony related to effective dealings and efficiency of operations. Until recently, guidance on applying the second and third criteria for finding a unit appropriate was found primarily in Executive Order cases. The guidance in those cases was adopted by the Authority in *FISC, Norfolk*, 52 FLRA 950. Like community of interest issues, the Authority has not specified the precise factors or number of factors to consider in determining effective dealings/efficiency of operations issues.

Effective Dealings

Effective dealings pertains to the relationship between management and the exclusive representative selected by unit employees in an appropriate bargaining unit. In assessing this requirement the Authority examines such factors as:

- < the efficient use of resources which might be derived from inclusion in other units;
- < the past collective bargaining experience of the parties;
- < the locus and scope of authority of the responsible personnel office administering personnel policies covering employees in the proposed unit;
- < the limitations, if any, on the negotiation of matters of critical concern to employees in the proposed unit; and
- < the level at which labor relations policy is set in the agency. See *Department of Transportation, Washington, D.C. (DOT)*, 5 FLRA

646 (1981); *Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, et al.*, 4 FLRC 669 (1976); *Department of State, Passport Office, Chicago Passport Agency, Chicago, Illinois (Chicago Passport Agency)*, 8 A/SLMR 946 (1978).

Efficiency of Operations

Efficiency of operations concerns the benefits to be derived from a unit structure bearing a rational relationship to the operations and organizational structure of the agency. *FISC, Norfolk*, 52 FLRA at 961 *citing DCASR*, 4 FLRC 669 (1976). Factors examine the effect of the proposed unit on agency operations in terms of cost, productivity and use of resources. In *FISC, Norfolk* at 961, the Authority stated that: "a unit that bears a rational relationship to an agency's operational and organizational structure could result in economic savings and increased productivity to the agency." See also *Local No. 3, International Federation of Professional and Technical Engineers, AFL-CIO-CLC*, 7 FLRA 626, 627 (1982); *DOT*, 5 FLRA at 653; *Chicago Passport Agency*, 8 A/SLMR at 947- 948.

- < Where employees had specific local concerns which may result in grievances or bargaining matters unique to the facility, the facility commander had authority to address such grievances and bargaining matters as well as responsibility for day-to-day operations, and the agency was already engaged in labor relations dealings within another local level bargaining unit, the Authority held that there was nothing to prevent effective labor-management relations. *DPRO-Thiokol*, 41 FLRA 316.

- < The proposed field office unit was not so functionally integrated with other components of the agency that the establishment of a separate unit would result in unwarranted fragmentation of units leading to operational inefficiency and confused labor relations dealings. *OCIJ Chicago*, 48 FLRA 620.

- < The proposed regional office unit would hinder effective dealings

and efficiency of operations where the evidence showed that the unique mission of the agency would be adversely affected by collective bargaining at the level proposed. The proposed unit was not appropriate. *FAA*, 20 FLRA 224 (1985).

- < The Authority does not place “undue emphasis” on centralized agency control of personnel and administrative matters when deciding effective dealings/efficiency of operations issues. A certain centralization of personnel and administrative considerations is inherent in government service and is frequently found within agencies. The Authority has specifically cautioned against finding that a local unit would inhibit effective dealings and impede efficiency of operations merely because of centralized administrative and personnel matters within the parent agency. *DPRO-Thiokol*, 41 FLRA 316.

- < The Authority found a unit of all medical interns, residents and fellows employed by the Activity and paid by the Agency appropriate for exclusive recognition at the Activity level. The Authority found the employees shared a clear and identifiable community of interest and that the unit promoted effective dealings and efficiency of operations. The Authority noted that the Activity had the authority and capacity to conduct effective labor relations at the level of recognition and the unit conformed to the organizational and operational structure of the Activity. *Veterans Administration Medical Center, Brooklyn, New York*, 8 FLRA 289, 294 (1982).

F. Impact of the Concept of Fragmentation on Unit Determinations :

When considering the three criteria in making appropriate unit determinations, the Authority decides appropriate unit questions consistent with the policy of preventing further fragmentation of bargaining units and reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure. *DCASR*, 4 FLRC at 677 and *Army and Air Force Exchange Service, Dallas, Texas (AAFES)*, 5 FLRA 657, 661-662 (1981) (Authority found proposed consolidated unit appropriate).

In *DCASR*, 4 FLRC 668 (1976), the FLRC elaborated on the principles enunciated in *Tulsa AFS* and considered the issue of fragmentation when deciding the appropriateness of units. In summarizing the responsibilities of the Assistant Secretary which flowed from section 10(b) of the Order, the FLRC stated at *DCASR* at 677:

Finally, and most importantly, the Assistant Secretary must make the necessary affirmative determinations that a unit clearly, convincingly and equally satisfies each of the 10(b) criteria in recognition of and in a manner fully consistent with the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure.

The legislative history of the Statute does not reflect that Congress intended to change the appropriate unit criteria or the analytical framework for deciding appropriateness unit issues in new or existing units affected by a reorganization. Decisions considered by the Authority have continued to carry over the principles and procedures for considering unit issues. *FISC, Norfolk* at 960. When applying the criteria enunciated in *FISC, Norfolk* to the facts of that case, the Authority stated that: “[i]n addition, we find that separating the employees of the Yorktown and Charleston Detachments into two very small units of exclusive recognition would result in the artificial and unwarranted fragmentation of an integrated organizational structure, thereby hindering the efficiency of the Activity’s operations.”

G. Relevant Information :

The information needed to make appropriate unit determinations is addressed in the **attached outline (also in HOG 37 which provides guidance about this topic at hearing)**. This outline is available at Figure 37.1 on the n:\figures subdirectory.

NOTE: In a Decision and Order involving an appropriate unit question in an election petition, the Regional Director decides only whether the

unit petitioned for in an election case or any alternative unit the petitioner has agreed to is appropriate. The Regional Director does not decide whether there is a more appropriate unit or whether the Activity's proposed unit is appropriate if s/he finds that the petitioner's unit(s) are not appropriate. See Department of Transportation, Federal Aviation Administration, New England Region (FAA), 20 FLRA 224 (1985). See HOG 33.9.

Recent reference:

Securities and Exchange Commission, 56 FLRA 312 (2000).

REPRESENTATION OUTLINE I
(INFORMATION REQUIRED IN CASES INVOLVING
APPROPRIATE UNIT QUESTIONS)

1. BASIC REQUIREMENTS

A. Evidence

1. **Standards.** Assertions by the parties are not evidence. Evidence is established through the testimony of witnesses, stipulations and exhibits admitted into the record.
2. **Necessity.** At the prehearing conference and during the hearing, the Hearing Officer will determine the necessity of the testimony of proposed witnesses and proposed exhibits and will identify additional witnesses whose testimony is required and additional exhibits necessary to a complete record.

B. Witnesses

1. **Standards.** The parties present witnesses who can testify to and answer questions concerning all facts and issues raised by the petition(s).
2. **Necessity.** All participants deemed necessary by the Hearing Officer will receive official time under section 7131 of the Statute. Any disputes over necessity of participants will be decided by the Hearing Officer.
3. **Knowledge.** Witnesses testify to and answer questions about their personal knowledge of the facts. Second-hand, third-hand or lesser knowledge reduces the relevance of the testimony.
4. **Reference to record.** All testimony during the hearing refers to specific exhibits which have been introduced into the record.
5. **Stipulations.** All stipulations are based on fact and include information and exhibits, as necessary,

establishing the facts of the matter and/or referencing exhibits already received in the record which support the factual basis of the stipulation.

C. Testimony

1. **Standards.** Witnesses testify to and answer questions about their personal knowledge of the facts and documents relevant to the issues of the case. When testifying about documents, the witnesses are generally those who authored or initiated the documents.
2. **Availability.** If witnesses with personal knowledge are not readily available, the parties identify those with direct knowledge and also name additional witnesses whose personal knowledge most nearly approximates the direct testimony described above.
3. **Identification.** The parties name all of their respective witnesses and the subjects about which each witness will testify prior to the prehearing conference. This allows the Hearing Officer to determine the necessity of the proposed testimony of these witnesses.

D. Documents

1. **Standards.** Documents may be accepted into the hearing record by joint submission, by stipulation of the parties, or by one of the parties.
2. **Identification and authentication.** Any exhibit introduced by a party is identified by and testified to by a witness or witnesses who has/have first-hand knowledge of the authenticity of the exhibit, the content of the exhibit, and factual matters concerning the exhibit.
3. **Regulations.** If a party proposes to introduce excerpts from agency regulations, the excerpts are authenticated as true and correct copies. In addition, if only a portion from a regulation is submitted, a copy of the whole regulation is available for review by the parties.

4. **Joint exhibits.** If the parties jointly introduce exhibits, all such exhibits may be referred to by witnesses and/or in briefs.
5. **Objections.** Any party objecting to the introduction of evidence should state the basis for the objection on the record. The Hearing Officer then allows the party proposing introduction of the evidence an opportunity to state a position. The Hearing Officer then rules on admissibility. Exceptions to overruled objections are automatically a part of the record. Thus, there is no need for the parties to state such exceptions.
6. **Stipulations.** Stipulations concerning the introduction of exhibits includes information demonstrating the factual basis of the stipulation and the relevance of the document.

2. **MISSION AND FUNCTION STATEMENTS**

- A. **Mission.** Agency statement of its basic mission. Activities' statements of basic mission(s).
- B. **Function.** Description of how each Activity functions (as needed).
 1. **Differences.** If a proposed unit involves employees of a particular Activity but a party asserts that the unit is broader or narrower, basic mission statements of all entities is entered into the record and testified to.
 2. **Mission and function.** Testimony is required from witness(es) knowledgeable about the mission and function of each Agency and Activity and the interrelationships between them.
 3. **Exhibits.** Obtain for the record copies of the mission and function statements from all affected Agencies, Activities/organizational components.

3. **ORGANIZATION**

- A. **Charts.** Organizational charts of Agency and Activity(ies), updated as necessary.
- B. **Identification.** Testimony concerning which Activity(ies) employ the employees involved in the petition and where in the organization the employees are located is crucial.
- C. **Commonality.** Testimony is required concerning shared mission and functions of organizations in which employees involved in the position are employed. Testimony specifically identifies where in those organizations the employees are located.
- D. **Geographic - Physical Location.**
1. **Organization.** What are the geographic locations in relation to the organization of the Activities? Do Activities have field organizations? Where?
 2. **Function.** Testimony matches the mission and function statements to the organizational charts, thereby showing each Activity's function and relationship to others. What is the organizational framework, beginning with the major organizational components and working down the chart? What does each component do? Similarities? Differences? Interrelationships?
 3. **Location.** Where are each of the employees involved in the petition physically located? How far are the separate locations from each other? Describe any interchange of work and employees between locations.
 4. **Numbers.** Obtain information concerning the numbers and types of employees at each agency / activity / organizational component. This can be established by having the Agency prepare an employee listing reflecting each employee's organizational placement, job title, series and grade, and unit eligibility.

4. **DELEGATIONS OF AUTHORITY**

What authority has been delegated for bargaining, management, supervision, policy, procedure, regulation, administration, and personnel functions? At what level do these delegations exist? What is the effect of these delegations?

5. **BARGAINING HISTORY**

- A. **Incumbents.** Obtain the complete name of each exclusive representative and description of each unit at each Activity.
- B. **Units.** Obtain copies of certifications/recognitions for each unit.
- C. **Contracts.** Obtain copies of the most recent collective bargaining agreements for each unit. What is the status of each such agreement, including the status of any negotiations?
- D. **Dealings.** What is the history of former or existing recognitions, including information as to elections, certifications and contracts. Obtain copies of all certifications, letters of recognition and contracts, for the proposed unit(s) and any other existing units of the agency. When were elections held, what groups of employees were involved and how many employees were affected? Did contracts automatically renew? At what level were negotiations held, both term negotiations and impact negotiations?

6. **SUPERVISORY HIERARCHY**

- A. **Structure.** What is the supervisory structure at the Agency and at each Activity (as relevant) and the lines of supervisory authority within each Activity (and/or between Activities), using the organizational chart(s)?
- B. **Nature.** What is the extent and nature of supervisory duties and responsibilities within or between Activities? Who reports to whom? Who is responsible for specific supervisory functions within or between Activities?
- C. **Control.** Is supervision centrally or locally controlled within the organizational structure? Are there differences in the supervisory

controls between the Activities involved? Are supervisors responsible for common supervision over more than one work group?

7. **JOB FUNCTIONS AND SKILLS**

- A. **Positions.** Obtain copies of the position descriptions for the categories of employees involved in the petition.
- B. **Employees.** The Activity is required to compile listing(s) of all employees involved in the petition which show each employee's name, position title, classification, grade and location within the organization. Include a numerical table showing total numbers of employees by eligibility in each proposed unit.
- C. **Work.** Evidence includes the types of work performed by employees involved in the petition, including descriptions of job duties and actual work performed, the flow of work within and between Activities, and the qualifications and training necessary to perform the work.
- D. **Equipment.** Is special equipment needed to perform certain work? Where is this equipment located? Is training needed to operate the equipment? What is the availability of such training? Are opportunities for advancement and/or movement between positions affected by the availability of this equipment or training?
- E. **Differences.** How do work flow, job duties and/or necessary qualifications, equipment and training differ within and between Activities?

8. **INTEGRATION OF OPERATION AND INTERCHANGE OF EMPLOYEES**

- A. **Movement.** Testimony and documents showing personnel movement, policy and decision making flow, using organizational charts.
- B. **Commingling.** Whether and how employees and functions are commingled among different organizations within and between Activities.
- C. **Commonality.** Whether and in what ways components of the Activities have employees, supervisors and/or managers in

common, identifying the individuals involved using the organizational charts, employee listings, position descriptions, etc.

- D. **Work flow.** What is the flow of work processes, duties and responsibilities in relation to the mission(s)? Is there interrelationship or interdependence between components in work flow, processes or responsibilities?
- E. **Integration.** In what ways are employees and their job functions integrated within and between Activities? Are there frequent transfers of work and/or personnel? How is this accomplished? How is the work coordinated within and between Activities? Are employees required to apply for openings to cross organizational lines?
- F. **Operations.** Is there employee contact between components in performing or transferring work? What is the relative isolation of components? Obtain a description of mobility and interchange of employees between components. What is the extent of telephone contact or inter-component visits? What for? By whom? How often? Where to and from? How many people involved? Clearance necessary from another component to perform certain work?
- G. **Interchange.** Who substitutes for employees' absences for vacation or illness? Over the prior year or so, what is the extent, purpose and duration of TDY assignments? What category/classification of employee(s) have gone on this travel and for what purpose? Within the past three years, how many permanent or temporary transfers were made laterally or by promotion? What category/classification of employee(s) were transferred and for what reason? Have the numbers of transfers increased or decreased ? If so, why?

9. **PERSONNEL POLICIES AND PRACTICES**

- A. **Pay systems.** Description of the pay systems applicable to all of the employees involved (GS, WG, Excepted Service, NAF, etc.), including descriptions of the differences between pay systems.
- B. **Payroll office.** Location of servicing payroll office? Placement within the organizational structure?

C. Administrative Services

1. **Personnel services.** Location of servicing personnel office? How is the personnel office staffed? Placement within the organizational structure? Who handles personnel management? Where does personnel management fit within the organizational structure? If there is more than one personnel office, are there differences in authority between personnel offices?
2. **Personnel actions.** Are personnel actions done centrally or locally? Who decides on hiring, firing, promotion, transfer, layoff, and recall of employees? How are these actions accomplished and these actions processed? Where do the entities performing these functions fit within the organizational structure?
3. **Employment and classification authority.** Who has classification authority for the employees involved in the petition? Who decides to establish positions, to fill vacancies, and what skills or training are needed for a position? How are vacancies filled? What are the differences within or between Activities?
4. **Retention, promotion and RIF.** What are the areas of consideration? How were these established? How have they been applied recently? What are the differences within and between Activities?
5. **Disciplinary and adverse action.** Who has authority to propose and decide such action? What are the differences within or between Activities?
6. **Personnel policies and regulations.** Are personnel regulations promulgated centrally or locally? What are the differences within and between Activities? To what extent do local officials have any discretion with respect to implementing policies and regulations initiated centrally?

- D. Personnel changes.** How are personnel moved between non-supervisory positions? From non-supervisory to supervisory positions? What are the differences in the ways changes are

accomplished within and between Activities?

E. Employee services. At what level are programs administered for equal employment, employee assistance, upward mobility, disability and workers compensation benefits, individual development, retirement, and health and life insurance? What are the differences in these programs within and between Activities?

F. Conditions of Employment

1. **Hours.** What are the hours of work of employees affected by the petition? Alternative Work Schedules, including whether employees work flexible schedules and/or compressed work weeks? Compensatory time? Starting and quitting times? Core hours? Restrictions on days off? Lunch hours? Break times? How were these established? What are the differences within and between Activities or organizations within each Activity?
2. **Training.** What training is required and/or available for the employees involved in the petition? What are the differences in training within and between Activities?
3. **Personnel.** At what level is the authority for personnel policy, service, and/or action? At what level are employee service programs provided? What are the differences in programs, services, and levels of authority within and between Activities?
4. **Associations.** At what level do associations exist such as Credit Unions, athletic, health or wellness groups, blood drives, literacy projects, and/or public school sponsorship? What are the differences within and between Activities?
5. **Impact.** All parties state specific positions concerning impact of the possible unit findings. What impact on the Agency/Activity is there from the various possible unit findings? What is the impact on employees?
6. **Factors.** What are the areas of consideration for hiring, promotion and RIF? Who issues vacancy announcements? Who has the authority to hire, fire, lay

off, transfer or promote? Who determines the compensation and salary structure for vacancies? Where are the OPF's maintained? Who rates performance and writes appraisals? Who reviews and approves the appraisals? Who has the authority to initiate disciplinary or adverse action? Who has the authority to issue travel orders, direct training of employees, grant incentive and achievement awards? Who assigns parking, determines break and leave schedules, approves leave, overtime and compensatory time? Who initiates personnel actions, personnel management programs, standards for performance evaluation and/or standards of personal conduct? Who determines the budget or is responsible for meeting a budget? Who has authority to negotiate and execute a collective bargaining agreement?

10. **EFFECTIVE DEALINGS**

Efficient use of resources derived from inclusion in existing units and negotiation in one unit rather than many units in segments of the activities.

- A. **History.** What is the history of collective bargaining dealings under the existing unit structure(s)? How have labor relations policy and labor relations authority been implemented and exercised respectively?

- B. **Grievances.** What are the formal, informal, negotiated and activity grievance procedures for employees involved in the petition? What is the past history of grievance processing?
- C. **Units.** In what way would the proposed units involved in the petition affect existing bargaining and grievance procedures? The parties are required to state their positions as to how the proposed units would promote effective dealings.
- D. **Authority.** What is the locus and scope of responsible personnel office(s)? Who handles the various personnel functions at present? How would the existence of the proposed units affect this authority? Are the employees involved special or unique because of job duties or work location in a manner which could affect the appropriateness of unit.
- E. **Limitations.** What is the extent of and who has authority to negotiate? What limitations are there on the authority of the petitioned-for Activity to negotiate? Are there any matters which could be negotiated if the unit were different from that proposed in the petition? Are there matters which could be negotiated only if the unit structure were different from that proposed? Why is this so?
- F. **Expertise.** What is the likelihood that personnel with greater labor relations experience will be available in the existing unit, the proposed unit or other possibly appropriate units? Who currently handles labor-management relations? Where in the organizational structure does this exist? At what level is labor relations consultation and support provided?
- G. **Policy.** At what level is labor relations policy set? How does the existence of multiple negotiated agreements, bargaining obligations, and grievance procedures affect labor relations dealings? Are employees performing essentially the same functions currently covered by different systems?
- H. **Training.** How and by whom are supervisors and managers trained in labor relations? Who decides on training requirements and those needing training? Where are the trainers located?

11. **EFFICIENCY OF AGENCY OPERATIONS**

Benefits to be derived from a unit structure bearing a rational relationship to the operational and organizational structure of the Activity.

- A. **Organization.** What, specifically, are the structure, chain of command, line of authority, and uniformity of personnel policy and practice considerations supporting the effectiveness of the various proposed units?
- B. **Structure.** What are the organizational structure, supervisory hierarchy, chain of command, authority over work functions, personnel and labor relations policies and dealings? Who reports to whom? What is the organizational structure of the personnel staff?
- C. **Authority.** Do personnel with operational authority also have labor relations authority? What are the differences within and between Activities?
- D. **Benefits.** Why would any proposed unit be more beneficial than another proposed unit? How do the personnel policies and job benefits of employees differ within and between Activities?
- E. **Resources.** How is the effective use of negotiation resources derived from the existing unit structure? How would the proposed units affect the use of these resources? What effect would the various proposed units have on cost of the labor-management program, hours spent administering the program, staffing requirements, etc.
- F. **Impact.**
1. **Views.** What are the parties' views of the impact of the proposed and/or other potentially appropriate units on efficiency of operations or the effectiveness of dealings?
 2. **Agency operations.** What is the impact of the proposed unit structure on agency operations in terms of cost, productivity and use of resources?
 - a. **Cost.** What savings or costs (in terms of labor relations personnel, productivity, etc.) result from the existing unit(s), proposed unit(s) or other possibly appropriate units? What effect would the proposed unit(s) have on the cost of the labor-management relations program, hours spent administering the program, staffing

requirements, etc.?

- b. **Productivity.** What impact on productivity would result from the existing unit(s), proposed unit(s), other possibly appropriate unit(s), or the existence of one or several units. Productivity includes work performed by employees as it affects them if one unit were found appropriate versus several and work performed by the managerial, supervisory and labor-management staff.

- G. **Fragmentation.** Would the proposed unit result in fragmentation? If so, how, and how would this affect agency operations?

2 **Scope of unit (including residual units, add-ons, expanding and contracting units)**

When applying the three appropriate unit criteria, section 7112(a) of the Statute also requires that the Authority will determine the scope of the proposed unit, that is, whether:

...the appropriate unit should be established on an agency, plant, installation, functional or other basis.

The scope of a unit involves a variety of appropriateness of unit issues. For instance, scope of unit questions may arise following reorganizations or when a union seeks exclusive recognition for a group of the agency's unrepresented employees. Scope of unit questions may also arise in petitions involving add-on elections to existing units, residual units, units of employees specifically excluded from existing units and expanding and contracting units.

In general, the relevant information in a case involving the scope of a unit is identical to that at issue in any case involving unit appropriateness. See *RCL 1 - Appropriate Unit Determinations, Representation Outline I*.

A. Size and Functional Grouping : The Authority has found appropriate a wide variety of differently sized and configured bargaining units, based on case-by-case application of the statutory criteria, considering such factors as geographic and organizational location, commonality of working conditions and degree of operational and functional separation. The **size** of a proposed unit is only one factor considered in the context of all facts and circumstances relevant to appropriateness of unit.

< The Authority has found appropriate very small units, if the units otherwise meet the criteria set out in section 7112(a)(1). A unit of less than twenty employees was appropriate for exclusive recognition. *U.S. Department of the Air Force, Edwards Air Force Base, California (Edwards)*, 35 FLRA 1311 (1990).

< The small size of a proposed unit does not automatically disqualify the unit from being found appropriate. However, to be appropriate, there must be more than one employee in the unit as "the principle of collective bargaining presupposes that there is more than one person on whose behalf bargaining takes place." *General Services Administration, Las*

Vegas Fleet Management Center, Sparks Field Office, Sparks, Nevada (GSA Sparks), 48 FLRA 1258 (1993). See also, Report on a Ruling of the Assistant Secretary No. 44, 2 A/SLMR 637 (1972).

- < Unit of employees of single field office found appropriate. *OClJ, Chicago, 48 FLRA 620 (1993).*
 - < Unit of employees of district office found appropriate. *U.S. Department of the Interior, U.S. Geological Survey, Caribbean District, 46 FLRA 832 (1992).*
 - < Unit of employees of single plant found appropriate. *DPRO-Thiokol, 41 FLRA 316 (1991).*
 - < Unit of employees of one activity at multi-activity base was appropriate. *Department of the Air Force, 6th Missile Warning Squadron, Otis Air Force Base, 3 FLRA 111 (1980).*
 - < A regional level unit of air traffic control specialists was not appropriate, as employees shared community of interest with all other specialists nationwide. *Department of Transportation, Federal Aviation Administration, New England Region (FAA), 20 FLRA 224 (1985).*
 - < Unit of employees in a single department of Activity was not appropriate given extensive interchange among employees in other line departments. *Naval Sea Support Center Atlantic Detachment, 7 FLRA 626 (1982).*
- The Authority also applies the section 7112(a) criteria in determining the appropriateness of proposed units limited to employees in a particular **functional grouping**.
- < Employees in a proposed unit of air traffic control specialists and technicians had unique qualifications, physical requirements, hours of work, work processes and retirement provisions and there was limited interchange between the employees in the proposed unit and other agency employees. The proposed unit was appropriately structured around a functional grouping of employees who possessed characteristics and concerns limited to that group. *See Edwards, 35 FLRA 1311 (1990).*
 - < Absent unusual circumstances warranting severance, a unit based on functional grouping will not be found appropriate if there is a history of representation in a larger unit. *Library of Congress, 16 FLRA 429 (1985); Department of the Air Force, Carswell Air Force Base, Texas, 40 FLRA*

221 (1991). *See section 45 - Severance.* Where there is no such bargaining history, such units may be found to be appropriate, assuming that all three statutory criteria are met. *See Edwards; FAA, 20 FLRA 224.*

- < A proposed unit of temporary cooks was not appropriate for exclusive recognition where there was evidence of extensive interchange between cooks and other employees; the cooks lacked a separate and distinct community of interest. *U.S. Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas, 31 FLRA 938 (1988).*
- B. Residual Units :** A residual unit is a unit of all eligible unrepresented employees of the type covered by the petition. *See Federal Trade Commission (FTC II), 35 FLRA 576 (1990).* Residual unit claims are most frequently made in petitions seeking to add a previously unrepresented group of employees to an existing unit, however, adding these employees to an existing unit is not a requirement. In order for a unit to be considered "residual," the petition must seek to represent all "eligible" unrepresented employees in the organization. If the evidence demonstrates a proposed unit is a residual unit, strict application of the appropriateness criteria is not required. *See FTC II and GSA Sparks.* However, if the evidence demonstrates that a proposed unit is not a residual unit, all appropriateness of unit criteria of section 7112(a) must be met. Handling complicated elections involving a group of residual employees when there is an intervenor raise novel issues. **See CHM 58.3.16.**
- C. Add-ons to Existing Units :** Where a union petitions for an election to add employees to an existing unit, the inclusion of such employees must result in an overall unit which meets the criteria for appropriateness of unit set forth in section 7112(a) of the Statute. In addition, if the proposed unit to be added is not a residual unit, it must independently constitute an appropriate unit. Thus, in any case involving an add-on to an existing unit, it may be crucial to determine whether the unit is a residual unit, in order to decide whether to apply the three appropriate unit criteria. *See GSA Sparks* (in which the Authority held that a unit was not a residual unit, was not appropriate standing alone and, therefore, was not an appropriate add-on to an existing unit).
- D. Expanding and Contracting Units :** Expanding and contracting unit issues arise when the unit appears to be either growing or shrinking during the time that the petition is processed. In cases involving successorship, issues may arise as to the appropriate time for determining whether employees of the predecessor constitute a majority of the successor's unit. *See Naval Facilities Engineering Service Center, Port Hueneme, California (NFESC), 50 FLRA 363 (1995).* Both contracting and expanding units may

also raise the issue of “at what point” or “when” an election may be held. *Trident Refit Facility, Bangor, Bremerton, Washington, 5 FLRA 606 (1981).*

Expanding Units

- < Parties may assert arguments concerning the adequacy of a showing of interest based on an expanding unit. When an agency's operations are expanding, a showing of interest is required only among those employed at the time that the petition is filed. *U.S. Department of Transportation, U.S. Coast Guard Finance Center, Chesapeake, Virginia (Coast Guard), 34 FLRA 946 (1990).* The Hearing Officer limits any such assertion concerning the showing of interest to a statement of position.
- < An election may be conducted in an expanding unit if the work force then on the rolls is “substantial and representative” of the skills and types of employees who will ultimately constitute the unit. *Coast Guard, citing Fall River Dyeing and Finishing Corp. v. NLRB (Fall River Dyeing), 482 U.S. 27, 48 (1987).*
- < Where there is evidence of a substantial and representative complement of employees, delaying an election until full staffing is achieved unduly frustrates the existing employees' ability to choose a representative, if any. *See Coast Guard.*

Contracting Bargaining Units

- < Contracting bargaining unit issues arise when there are immediate and fundamental changes in the employer's operations after a petition is filed and a party claims that it is not appropriate to conduct the election at a particular point in time because of the changes. The Authority has rejected such assertions when the claim of a contracting unit was speculative. *See Federal Deposit Insurance Corporation (FDIC), 34 FLRA 50 (1989).* In *FDIC*, the Authority distinguished the circumstances present in *FDIC* from certain NLRB cases involving immediate and fundamental changes in the employer's operations.
- < The agency anticipated eliminating an entire category of employees in the petitioned-for unit. This change was to occur gradually over a two-year period and the remaining category of employees in the petitioned-for unit simultaneously was to increase by roughly the same number. The Authority declined review of the Regional Director's decision to conduct the election. *FDIC.*

- < No election was held in circumstances where the employer had just reorganized and five of the six employees in the petitioned-for unit had become supervisors. *United Transports, Inc.*, 107 NLRB 1150 (1954).
- < Where most of the work of the bargaining unit had been contracted out and the layoff of 75% of the employees was imminent, no election was held. *Douglas Motors Corp.*, 128 NLRB 307 (1960).

See HOG 38 for specific guidance about this topic at hearing.

Other References:

Department of the Air Force, Langley, Virginia, 40 FLRA 111 (1989).

Department of the Air Force, 90th Missile Wing (SAC), F.E. Warren Air Force Base, Cheyenne, Wyoming (F.E. Warren), 48 FLRA 650 (1990).

Department of the Interior, National Park Service, 55 FLRA 311 (1999) (functional unit of Agency-wide unrepresented Law Enforcement Park Rangers, Criminal Investigators, and Correctional Officers are not an appropriate separate unit).

Defense Logistics Agency, Defense Supply Center Columbus, Columbus, Ohio, 53 FLRA 1114 (1998).

Immigration and Naturalization Service, 12 FLRA 309 (1983).

which a transcript shall be kept) after a reasonable notice.

This section applies whenever a petition is filed to resolve the effect of an agency reorganization on an existing unit, either with respect to employees who remain in the unit, employees who have been transferred from the unit or employees who have been added to the unit. See *CHM 27.5, Hearing Requirements*.

The substantive factors applied in cases arising from reorganizations have remained valid and consistent since Executive order 11491. **As discussed in RCL 1, Appropriate Units, any case that concerns a question of representation requires an appropriate unit determination prior to proceeding to other issues.** Section 7112(a) of the Statute sets out the criteria for determining whether a unit is an appropriate unit for exclusive recognition:

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 [the Statute], 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.**

Thus, in making determinations under section 7112(a), the Authority examines the factors presented on a case-by-case basis.¹ To meet the

¹ *United States Department of the Navy, Fleet and Industrial Supply Center, Norfolk, Virginia*, 52 FLRA 950 (1997) (*FISC, Norfolk*) (a reorganization case in which the Authority considered how to resolve representation issues that result from a reorganization where both successorship and accretion are claimed to apply to the employees) citing *Defense Mapping Agency, Aerospace Center, St. Louis, Missouri*, 46 FLRA 502 (1992) (*Defense Mapping Agency*) (the Authority found that the employees were part of four functionally distinct groups of employees who did not share a community of interest with the employees in the Union's existing unit and whose inclusion in the existing unit would not foster effective dealings or efficiency of the

requirements of the Statute, a proposed unit need only be an appropriate unit.² The Authority requires that each of the appropriate unit criteria be given equal weight in order to foster the goal of a more effective and efficient government.³ Moreover, as first clarified by the Federal Labor Relations Council (FLRC), the Authority must affirmatively determine that any proposed unit of exclusive recognition satisfies each of the three criteria before that unit can properly found to be appropriate⁴.

The Authority is required to make appropriate unit determinations to resolve reorganization-related questions related to representation in the same manner as when it decides the appropriateness of units of unrepresented employees in election petitions.⁵ Thus, in reorganization

Agency's operations).

² *American Federation of Government Employees, Local 2004*, 47 FLRA 969, 973 (1993) (Authority upheld RD's decision that petitioned-for unit is appropriate).

³ *FISC, Norfolk* at n. 6 citing *Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airways Facilities Sector*, 3 FLRC 235 (1975) (*Tulsa AFS*) [an appeal to the Federal Labor Relations Council (FLRC) from a decision of the Assistant Secretary that considered the Assistant Secretary's responsibilities when deciding appropriate unit questions arising from reorganizations. The FLRC decision also discussed the development of the appropriate unit criteria under Executive Order 11491].

⁴ *Tulsa AFS* at 240.

⁵ *Morale, Welfare and Recreation Directorate, Marine Corps Air Station, Cherry Point, North Carolina*, 45 FLRA 281(1992) (*Morale, Welfare*) (a case that considered the effects of a reorganization on an established unit and also provided policy guidance when examining the impact of a reorganization on an established unit) and *Labor-Management Relations in Federal Service*, 1975, at 51, published by the Federal Labor Relations Council, FLRC 75-1 (4/75) ("the resolution of reorganization-related representation problems is already governed by a policy requirement in section 10(b) of E.O. 11491 that units of exclusive recognition must ensure a clear and identifiable community of interest among the employees involved and must promote effective dealings and efficiency of agency operations").

cases, the Region develops a complete factual record upon which it can examine each of the appropriate unit criteria and make an affirmative determination regarding the effect of the reorganization on the continued appropriateness of the unit(s) and the rights of the parties.⁶

The record includes information relevant to making an affirmative determination with respect to each of the three appropriate unit criteria. Evidentiary considerations which may be relied upon to support a finding of a community of interest, for instance, may not be solely the basis for concluding that a unit will promote effective dealings and efficiency of operations.⁷ Finally, the Authority is required to decide appropriate unit questions consistent with the policy of preventing further fragmentation of bargaining units and reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure.⁸

To carry out their responsibilities to assist the parties in resolving representation issues arising from reorganizations, it is imperative that Regional Office personnel become familiar with Authority and Assistant Secretary case law concerning reorganizations and other realignments in agency operations that may result in substantial changes in the character and scope of exclusively recognized bargaining units. Regional Office personnel:

- < identify representation issues,
- < obtain relevant facts,
- < discuss applicable case law and
- < assist the parties in narrowing and resolving issues

⁶ *Morale, Welfare at 286* citing *Federal Aviation Administration, Aviation Standards National Field Office (Aviation Standards)*, 15 FLRA 60, 63 (1984) (the Authority considered the effects of a reorganization on a variety of bargaining units and found different results based on the record facts).

⁷ *Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California et al.*, 4 FLRC 669 (1976) (*DCASR*) (three election petitions which the FLRC considered on appeal from the A/SLMR and reaffirmed and elaborated on the discussion in *Tulsa AFS*).

⁸ *Army and Air Force Exchange Service, Dallas, Texas*, 5 FLRA 657, 661-662 (1981) (*AAFES*) (Authority found proposed consolidated unit appropriate).

consistent with the Statutory requirements for appropriate units and unit eligibility (see *HOG 2.3*, ethical considerations, *CHM 1* and *CHM 25*).

2. Relevant Information Required:

The Authority in *Morale, Welfare and Recreation Directorate, Marine Corps Air Station, Cherry Point, North Carolina (Morale, Welfare)*, 45 FLRA 281 (1992) set forth the responsibility of a Regional Director in deciding cases arising from changes to existing units that are caused by reorganizations. The standard set forth in *Morale, Welfare* is still applied to any case filed by a party or parties that raise a matter related to the representation of employees in bargaining unit(s) affected by reorganizations or realignments of agency operations.

...the Regional Director must examine the effect of the reorganization in order to determine the continued appropriateness of the unit or units and the rights of the parties.

Morale, Welfare, 45 FLRA at 286. In *U.S. Department of the Navy, Commander, Naval Base, Norfolk, Virginia (USN)*, 56 FLRA 328 at 332 (2000) the Authority stated that, "in determining whether an existing unit remains appropriate after a reorganization, it will focus on the changes caused by the reorganization," (*citing Morale, Welfare*) "and assess whether those changes are sufficient to render a recognized unit inappropriate" *citing Defense Logistics Agency, Defense Supply Center Columbus, Columbus, Ohio (DLA Columbus)*, 53 FLRA 1114 at 1122-23 (1998). In *USN*, the Authority also stated that it "makes appropriate unit determinations on the basis of a variety of factors, without specifying the weight of any individual factors," *citing, e.g., Local 2004*, 47 FLRA 969, 972 (1993). The Authority also considered the effect on bargaining units of reorganizations that modify portions of the chains of command at managerial levels, but do not affect the day-to-day working conditions of bargaining unit employees. Finally, the Authority found that a change in the chain of command, by itself, will not render an existing unit inappropriate.

Factors considered in cases raising issues related to changes in the character and scope of existing bargaining units are the same as any other cases in which appropriate unit issues are raised. However, three issues affect any determination the Region or the Authority makes with respect to the impact of a reorganization on employees in existing bargaining units.

- a. **When seeking information about the three appropriate unit criteria, it is first necessary to address the factors from two perspectives: how the unit functioned prior to the change and how it functions after the change.** Evidence is obtained with respect to the mission and organizational structure and other appropriate unit criteria **both before and after the reorganization.** Changes to employees and their conditions of employment, particularly their day-to-day working conditions, the actual impact on employees and the impact on agency operations, the blending of employees are all compared to the employees' conditions of employment prior to the reorganization.

There are no hard and fast rules pertaining to determining unit appropriateness; and as a rule, no factor can "weigh" more than any other. However, given the circumstances of a reorganization and the changes resulting from the reorganization, each case may have factors that are more significant than others. Clearly the evidence has to be sufficient to enable the Regional Director and the Authority to make an affirmative decision that any proposed unit of exclusive recognition satisfies each of the three criteria. The Authority examines the totality of circumstances including the objective of preventing further fragmentation of bargaining units and reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure.

Prior to deciding the impact of a reorganization on an existing collective bargaining unit, an inquiry is made to ascertain what happened to employees affected by the reorganization, and, in particular, whether and how their conditions of employment were changed by the reorganization. Issues may concern the impact of the reorganization on an entire unit or on a particular group of employees in the unit. In reorganization-related representation cases that involve deciding the effects of a reorganization on an entire existing unit, the evidence must demonstrate how the reorganization affected the entire unit. Where the reorganization only affected some of the employees in the unit, the evidence must demonstrate that the employees at issue have significant employment concerns or personnel issues that are different or unique from those of other employees in the unit.⁹ Application of the appropriate unit criteria to

⁹ See, e.g., *Defense Logistics Agency, Defense Supply Center Columbus, Columbus, Ohio*, 53 FLRA 1114, 1131 (1998) (*DLA Columbus*) (unique case involving appropriate unit, successorship and accretion questions where a union sought to continue to represent employees who had been

changes in existing units requires a diagnostic approach to assessing the effect of the reorganization on the character and scope of the unit.

To summarize, when examining the effects of a reorganization on an existing appropriate unit, the evidence reflects the employees' terms and conditions of employment as well as other factors that are routinely considered when examining the appropriate unit criteria **both before and after** the reorganization. This is the best method for ensuring an adequate record and one that will provide sufficient information to decide the continued appropriateness of the unit and/or the extent that the reorganization affected employees in the existing unit.

b. Additionally, timing is significant.

Frequently, agencies involved in large reorganizations are not certain as to what the activity/agency structure will be upon completion of the reorganization, or when that completion will occur. Thus, there are interim organizations, relocations without official reassignments, and multi-year (phase-in) implementations. The timing of the petition could affect the outcome, and could result in the same reorganization being the subject of different petitions at different times. **When conducting hearings in such cases, the Regions ensure that the record reflects the stage of the reorganization and any further agency plans regarding future related reorganizations. Case law dictates that any unit determination is based on the facts presented at the time of the hearing.** *DPRO - Thiokol*, 41 FLRA at 327.

geographically relocated to an activity and the positions they encumbered were specifically both excluded from the unit represented by that union and included in the description of a unit represented by another union) and *FISC, Norfolk*, 52 FLRA at 961.

c. Finally, the record examines the broad impact of the reorganization on the agency as well as the effect of the reorganization on the activity.¹⁰

Considering the record from broad and narrow perspectives allows the Regional Director to consider all criteria and significantly, the issue of fragmentation. In this manner, the Regional Director solicits, and the parties introduce, sufficient evidence to resolve all issues.

FISC, Norfolk is an excellent example of why it is necessary to obtain information about the affected employees from the perspectives of their inclusion in an appropriate unit prior to a reorganization and after a reorganization. In *FISC, Norfolk*, a case involving claims of successorship and accretion, the Authority had to balance the parties' competing claims: NAGE claimed that separating employees from the base-wide unit at the Yorktown detachment would be inappropriate and cause fragmentation; but FISC argued that not including the Yorktown detachment in FISC, Norfolk would cause fragmentation in FISC.

This case also demonstrates that it is important to obtain complete evidence about the facts and circumstances giving rise to the petition, i.e., often from a broader scope or perspective than reviewing the impact on the employees at a single site. For instance, if NAGE had filed the petition in FISC seeking a determination of the effect of the establishment of FISC only on its base-wide unit at Yorktown, the record may have emphasized different facts even though the results should have been the same. However, a review of relevant case law confirms that "how" and "what" evidence is presented may often lead to different results. Because the record in *FISC, Norfolk* presented evidence from both broad and narrow perspectives, the facts clearly demonstrated that including the Yorktown detachment in the FISC, Norfolk Activity was appropriate.

Once this information is obtained and evaluated, the facts are applied to the appropriate unit criteria set forth in section 7112(a) of the Statute. The facts are assessed to determine whether the change was a "paper" reorganization, i.e., nothing more than a technical change in the name of the activity or agency, or a change in the level of recognition; or whether the change affected the character and scope of the unit significantly enough to render it inappropriate.

¹⁰ See *Defense Mapping Agency* and *FISC, Norfolk*.

There are a variety of representation scenarios and issues that may result from an agency reorganization:

- 1) Where the character and scope of a bargaining unit have not changed substantially, the Regional Director may properly find that the existing unit remains appropriate and the exclusive representative of that unit continues to be the exclusive representative of that unit. *Federal Aviation Administration, Aviation Standards National Field Office (Aviation Standards)*, 15 FLRA 60, 63 (1984).
- 2) A bargaining unit may be accreted to another established bargaining unit. *Id.* at 67-68; *Defense Contract Audit Agency*, 6 A/SLMR 251, 252 n.7 (1976).
- 3) _____ One or more bargaining units may be combined to form an entirely new unit. *Department of the Army, 89th Army Reserve Command, Wichita, Kansas (Department of the Army)*, 7 A/SLMR 796, 798-99 (1977); *Navy Public Works Center, San Francisco Bay (Public Works Center)*, 6 A/SLMR 142, 147 (1976); .
 - (a) Where this new unit contains all the components of the previously recognized units, or where substantial portions of the former units can be identified within the new unit, and the new unit is appropriate for exclusive recognition, the Regional Director may properly order an election to determine which of the unions, if any, shall represent the new unit. *Department of the Army; Public Works Center*.
 - (b) Where, however, a substantial portion of the former units cannot be identified within the new unit, the Regional Director may properly decide not to order an election, especially where the new unit also includes employees who have previously been unrepresented. *Aviation Standards*, 15 FLRA at 67-68; *Department of the Army*.
- 4) A gaining entity may be a successor to the former entity and a union retains its status as the exclusive representative. *Naval Facilities Engineering Service Center, Port Hueneme, California (NFESC)*, 50 FLRA 363 (1995). A gaining entity may be a successor to the former entity and a union retains its status as the exclusive representative because it is sufficiently predominant over another labor organization that was also transferred to the new entity. *Department of the Army, U.S. Army Aviation Missile Command, Redstone Arsenal, Alabama (AMCOM II)*, 56 FLRA

126 (2000).

- 5) Due to a change in the character and scope of the unit: (1) a bargaining unit is no longer appropriate; and/or (2) an exclusive representative of an appropriate unit ceases to be the exclusive representative of that unit.

In the cases cited, it has been the "totality of the circumstances" upon which the Authority based its decision that a unit may continue to be appropriate, or if not, whether and when an election is appropriate.

B. Successorship.

Successorship involves a determination of the status of a bargaining relationship between an agency/activity which acquires employees who were in a previously existing bargaining unit, and a labor organization that exclusively represented those employees prior to their transfer. The representation petition is a nonadversarial process for determining the new activity's obligation to recognize and bargain with a union that had represented the employees of its predecessor.

When addressing successorship issues and other issues related to the effects of reorganizations on bargaining units, the interests in maintaining stable bargaining relationships that are affected by massive reorganizations must be balanced with the rights of employees to choose their representative. In *Naval Facilities Engineering Service Center, Port Hueneme, California, (NFESC)*, 50 FLRA 363 (1995), the Authority established three criteria to determine whether, following a reorganization, a new employing entity is the successor to a previous one such that a secret ballot election is not necessary to determine representation rights of employees who were transferred to the successor. The Authority will "find that a gaining entity is a successor, and a union retains its status as the exclusive representative of employees who are transferred to the successor, when:

- < An entire recognized unit, or a portion thereof, is transferred and the transferred employees: (a) are in an appropriate bargaining unit, under section 7112(a)(1) of the Statute; and (b) constitute a majority of the employees in such unit;
- < The gaining entity has substantially the same organizational mission as the losing entity, with the transferred employees performing substantially the same duties and functions under substantially similar working conditions in the gaining entity; and
- < It has not been demonstrated that an election is necessary to determine representation."

1. Criterion One - Characteristics of the unit:

The Authority stated that successorship is not precluded because an entire unit is not transferred intact to the new entity, *Hydrolines, Inc.*, 305 NLRB 416, 422 (1991); what is required is that the acquired employees must be in appropriate units both before and after successorship, *International Union of Petroleum & Industrial Workers v. NLRB*, 980 F.2d 774, 780 (D.C. Cir. 1992). The Authority also stated that the portion of the unit which is transferred need not constitute a separate appropriate unit by itself, provided that the transferred employees constitute a majority of the post-transfer unit. Thus, successorship is possible "even if only a portion of a unit is transferred, and a post-transfer unit may be found appropriate even if it has been expanded to include employees in addition to those transferred."

A finding of successorship results in continued recognition without a new secret ballot election as required under the Statute. Thus, a finding of successorship depends on the fact that the affected union is the choice of a majority of employees in the claimed successor's unit. Accordingly, although the post-transfer unit need not encompass the transferred employees exclusively, those employees must constitute a majority of the post-transfer unit.

In cases where the reorganization is ongoing or subject to long term implementation or a "start-up period," the Authority has adopted the NLRB's substantial and representative complement" test for determining whether the successor's unit is sufficiently representative of the ultimate unit, in size and composition, so that it is appropriate to measure whether employees of the predecessor constitute a majority of the unit. See *Fall River Dyeing & Finishing Corp. v. NLRB (Fall River)*, 482 U.S. 27 (1987) and *Coast Guard*, 34 FLRA 946, 951-54 (1990). (The Authority adopted the "substantial and representative complement" test to determine whether and when to hold a representation election in an expanding unit.)

Summary of criterion:

< An entire unit need not be transferred intact to the new entity. *NFESC*, 50 FLRA 363 (1995).

- < Acquired employees must be in appropriate units both before and after successorship. *NFESC*.
- < The portion of the unit which is transferred need not constitute a separate appropriate unit by itself, provided that the transferred employees constitute a majority of the post-transfer unit. *NFESC*.
- < The method used to move the employees from one entity to another has no bearing on the requirement that they be transferred. *FISC, Norfolk*, 52 FLRA 950 (1997).
- < “Transferred employees” set forth in *FISC* is a generic term that refers to any organizational movement of employees within an agency or between agencies, regardless of the method of the reorganization. *Defense Supply Center, Columbus*, 53 FLRA 1114(1998).
- < “Gaining organization” refers to a pre-existing or newly established organization. *FISC, Norfolk* at n.4.
- < Majority standard applies. *Department of the Interior, Bureau of Land Management, Sacramento, California, and Department of the Interior, Bureau of Land Management, Ukiah District office, Ukiah, California*, 53 FLRA 1417, 1422 (1998).

2. Criterion Two - Characteristics of the successor employer and continuity in working conditions:

This criterion requires that the claimed successor have substantially the same organizational mission as the losing entity and that transferred employees perform substantially the same duties and functions under substantially similar working conditions after the transfer.

Summary of criterion:

- < The Authority does not require that the missions of

the predecessor employer and the claimed successor be identical.

< The question is whether in a basic sense, the new entity is in essentially the same business as its predecessor.

< The emphasis is on the employees' perspective, that is, whether the employer's operations, as they affect unit employees, remain essentially the same after the transfer. See *Fall River*, 482 U.S. 27 (1987).

< The Authority's approach is primarily factual in nature and based on the totality of circumstances of a given situation.

< In order for the mission to be substantially changed, the mission of the new entity represents any new elements not found in one or more of the other disestablished organizations. See *NFESC*, 50 FLRA 363 (1995) and *AMCOM II*, 56 FLRA 126, 130 (2000) (the mission of the new entity blended the two missions of the former activities into the gaining employer while maintaining a mission in the new entity that is substantially the same as the missions in the disestablished entities).

3. Criterion Three - An election is not necessary:

The mere filing of a representation petition for an election will not preclude the finding of successorship. The Authority has and will continue to decide whether units continue to be appropriate after reorganizations, and if not, whether and when an election is warranted. See *Morale, Welfare*, 45 FLRA 281 at 286 (1992) and *NFESC*, 50 FLRA 363 (1995).

< An election may be necessary after a reorganization when more than one labor organization represents employees transferred into one new unit. *Social Security Administration, District Office, Valdosta, Georgia*, 52 FLRA 1084, 1091 (1997), and *Defense Supply Center Columbus*, 53 FLRA 1114, 1134 at (1998) citing *Martin Marietta Co*, 270 NLRB 821 (1984) and *Boston Gas Company*, 221 NLRB 628, 629 n.5.(1975).

< But see *AMCOM II*, 56 FLRA 126, 131 (2000)

where an election was not ordered because one union was sufficiently predominant and the Authority stated that: “we take as a guiding principle for determining whether one group is sufficiently predominant to render an election unnecessary whether there is a reasonable assurance of a meaningful contest” citing *Coast Guard*, 34 FLRA 946, 949 (1990). The Authority found that a union that represents more than 70% of the employees in the newly combined unit formerly represented by two or more unions is sufficiently predominant to render an election unnecessary because such an election would be a useless exercise.

When all three factors set forth above are met, the Authority will find that successorship exists and as a result, the agency/activity involved must recognize the exclusive representative of the employees in the unit without a new, secret ballot election.

4. Competing claims of successorship:

In *USN*, 56 FLRA 328, 332-333 (2000), the Authority discussed how it would resolve competing claims of successorship. The Authority stated that there is a preference in the Statute for preventing unit fragmentation when an existing unit otherwise remains appropriate. See *U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio (AFMC)*, 55 FLRA 359, 361 (1999). See also *Library of Congress and Fraternal Order of Police, Library of Congress Police Force Labor Committee (Library of Congress)*, 16 FLRA 429, 431 (1984). Consistent with this statutory preference, the Authority held that successorship claims should be resolved prior to accretion claims because a finding of successorship permits a union to retain its status as the employees' chosen, exclusive representative, rather than altering the relationship between the employees and their chosen representative by placing the employees in a different unit. See *FISC, Norfolk*, 52 FLRA 950, 954 (1997).

Consistent with these policies, the Authority held that, when presented with competing successorship claims alleging different appropriate units, they first consider the appropriate unit claim that

will most fully preserve the *status quo* in terms of unit structure and the relationship of employees to their chosen exclusive representative. If the Authority finds that a petitioned-for, existing unit continues to be appropriate, then they will not address any petitions that attempt to establish different unit structures, because the Statute requires only that a proposed unit be *an* appropriate unit, not the most, or the only, appropriate unit. See *Department of the Navy, Naval Supply Center, Puget Sound, Bremerton, Washington* and *Department of the Navy, Fleet Industrial Supply Center, Bremerton, Washington (FISC, Bremerton)*, 53 FLRA 173 at 183, n.9 (1997).

See HOG 39B for specific guidance on developing a record about successorship at hearing.

C. Accretion .

Accretion involves the addition, without an election, of a group of employees to an existing bargaining unit. Accretion issues most frequently arise as a result of a reorganization or realignment of agency operations. *Department of the Navy, Naval Hospital, Submarine Base Bangor Clinic, Bremerton, Washington*, 15 FLRA 125 (1984). The employees at issue in an accretion case may come from another established organizational entity (i.e., agency or activity or subdivision thereof) or may be a newly established category of employees that do not fall within the express language of the current unit description. Accretion also may arise as an issue in an election case if a party contends that the employees subject to the petition have accreted to an existing unit. See *Department of the Air Force, 6th Missile Warning Squadron, Otis Air Force Base*, 3 FLRA 112 (1980).

To find accretion, the acquired employees:

- < are not in newly created positions that fall within the express language of the unit description. *Department of the Army, Headquarters, Fort Dix, Fort Dix, New Jersey (Fort Dix)*, 53 FRA 287 (1997). See *RCL 15*.
- < do not constitute an appropriate separate bargaining unit on their own.

< become functionally and administratively integrated into the gaining organization's pre-existing unit(s), and that adding the transferred employees to the unit(s) would be appropriate under section 7112(a) of the Statute in that the employees in the resulting unit share a community of interest with employees in the established unit and the resulting unit promotes effective dealings with and efficiency of operations of the agency. *U.S. Department of Energy, Oak Ridge Operations Office, Oak Ridge, Tennessee (DOE Oak Ridge)*, 15 FLRA 130 (1984) (no accretion found). *Compare, Department of the Navy, Naval Hospital, Submarine Base Bangor Clinic, Bremerton, Washington*, 15 FLRA 125 (1984) (employees administratively transferred along with their function into a different activity were accreted into an existing bargaining unit, as requested by the gaining activity and the labor organization exclusively representing that activity's employees, inasmuch as the inclusion of such employees in the established bargaining unit satisfied the three criteria of section 7112(a) of the Statute). *AMCOM II*, 56 FLRA 126.

A finding of accretion forecloses an employee's basic right to select an exclusive representative. Therefore, any accretion issues must be carefully considered. Accretion will not be found in a reorganization case in which the employees sought to be added to the existing unit continue to maintain a separate and distinct identity and have not been functionally, operationally or physically integrated into the existing unit. *See DOE Oak Ridge; Naval Air Station, Meridian, Michigan*, 9 FLRA 22 (1982); *General Services Administration, National Capital Region*, 5 FLRA 285 (1981).

The Office of the General Counsel has established the following guidelines for processing cases involving accretion issues:

- 1. The first step is to determine whether the acquired employees constitute a separate appropriate unit. The following factors are considered:**

- a. whether the acquired employees have a clear and identifiable community of interest separate and distinct from other employees;
- b. whether the acquired employees have been functionally and administratively integrated with other employees in the existing bargaining unit such that they do not have a clear and identifiable separate community of interest;
- c. whether proposed unit configurations would promote effective dealings and efficiency of operations; and
- d. whether a separate unit would result in fragmentation of units.

2. If the investigation establishes that the acquired employees constitute a separate appropriate unit, the region decides:

- a. in a reorganization, whether the new employer is a successor for purposes of collective bargaining with the labor organization that represented these employees at the predecessor.
- b. if no reorganization, and the issue concerns whether a newly established office, clinic or other organization is an accretion to an existing unit, whether the unit is appropriate as a separate stand alone unit.

< If yes - in a reorganization case, the region applies the successorship criteria and if it finds successorship, issues an appropriate certification. For guidance on successorship, see *RCL 3B* and *NFECS*, 50 FLRA 363, n.7 and n.11 (1995). See also *CHM 23.7*.

< If yes - in a newly established organization scenario, the petition is dismissed and the union is required to refile the petition with an adequate showing of interest.

< If yes, but there are competing claims for representation, the region decides whether combining the subject employees with the employees in the existing unit would result in an overall appropriate unit.

- If yes, the processing an election under these circumstances is novel particularly whether a self-determination election is warranted. *See U.S. Department of Labor, Pension and Welfare Benefits Administration*, 38 FLRA 65, 73 (1990); *NFESC*, 50 FLRA 363, 364 n.11, *citing Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969). **See CHM 58.3.17.**

- If no, dismiss - requirement to file petition with a showing of interest for an election.

The acquired employees constitute a separate appropriate unit, but successorship is not warranted (either because the employees were previously unrepresented or the unit did not meet the successorship criteria). Moreover, the acquired employees do not share a sufficient community of interest to be included in the existing unit. In such cases, the petition would be dismissed. The only way a labor organization could represent these employees is through a petition seeking an election. The petition must be accompanied by a showing of interest.

3. If the investigation establishes that the acquired or subject employees do not constitute a separate appropriate unit, the region decides whether it is appropriate to accrete these employees into the existing unit.

< If yes - clarify existing unit to include acquired employees.

If the acquired employees are functionally and administratively integrated into the existing unit and adding the acquired employees to the existing unit results in an appropriate unit under section 7112(a), an accretion may be found. If accretion is found, the unit is clarified to include the accreted employees. *FISC, Norfolk*, 52 FLRA at 963.

< If no - dismiss.

There may be situations where neither an accretion nor a separate unit is appropriate. In this case the petition is dismissed. *Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina*, 36 FLRA 237 (1990).

4. Considerations in Reorganizations Where Accretion is Claimed:

A significant consideration in a petition asserting accretion based on reorganization is the timing of the petition. Parties may file accretion petitions in anticipation of future changes, which could result in unit determinations based on speculation as to the impact of changes. On the other hand, delay in deciding accretion questions until all organizational changes have occurred may place the representational status of affected employees in limbo during the interim, another undesirable result. The standard to apply in determining whether the accretion petition has been filed at an appropriate time for making a decision in the matter is the “substantial and representative complement” test. See *NFESC*, 50 at 372, fn 9, which applied the “substantial and representative complement” test to successorship situations. (See, *RCL 2 - Scope of Unit*, for discussion of expanding units).

Another issue in an accretion case is “numerical overshadowing,”

that is, whether there are more employees in the acquired group of employees than in the existing unit. Accretion is not found if the numbers of acquired employees exceeds the number of employees in the existing unit. See *DHHS*, 43 FLRA 1245 (1992); *Air Force Materiel Command*, 47 FLRA 602 (1993) citing *Renaissance Center Partnership*, 239 NLRB 1247 (1979). In *Department of the Interior, Bureau of Land Management, Sacramento, California, and Department of the Interior, Bureau of Land Management, Ukiah District Office, Ukiah, California*, 53 FLRA 1417, 1422 (1998) the Authority stated that it “will continue to apply the majority standard in accretion cases involving groups of represented and unrepresented employees. Accordingly, to the extent the Authority previously stated that the ‘nearly equals or exceeds’ standard applies in accretion cases, those cases will no longer be followed.”

5. Previously Excluded Employees:

Accretion is not found in circumstances where the petitioner seeks to include in an existing unit a group or category of employees who were specifically excluded from that unit, unless the evidence establishes that meaningful changes have occurred in the employment status of the previously excluded group. If no such changes have occurred, then election procedures are required to add the group of employees to the existing unit. *FTC II*, 35 FLRA 576 (1990). See also *RCL 2 - Scope of Units, Residual Units*.

6. Questions have been raised concerning the differences between accretion and successorship in reorganization cases.

Essentially, accretion concerns the status of a group of employees while successorship concerns the status of a bargaining relationship between an agency/activity which acquires employees who were in a previously existing bargaining unit and a labor organization that exclusively represented those employees prior to their transfer. Reorganizations often raise both accretion and successorship issues because the impact of what happened is not immediately clear on the unit structure. It is important to find out what happened to the employees and determine how the

reorganization affected their conditions of employment. Once information is gathered, the factors of accretion and successorship can be applied and analyzed. It is not possible to have both an accretion and a successorship involving the same employees.

See HOG 39C for specific guidance on developing a record about accretion at hearing.

Other References:

Headquarters, 97th U.S. Army Reserve Command, Fort George G. Meade, Maryland, 32 FLRA 567 (1988).

Department of the Air Force, 6th Missile Warning Squadron, Otis Air Force Base, 3 FLRA 112 (1980)

AMCOM II, 56 FLRA 126 (2000)

U.S. Department of the Air Force, Air Force Material Command, Wright-Patterson Air Force Base, Ohio, 47 FLRA 602 (1993)

D. Competing Claims of Successorship and Accretion.

FISC, Norfolk, 52 FLRA 950 (1997) involved the Department of the Navy's decision to consolidate and reorganize its purchasing and supply functions, and the resultant representation petitions that were filed in this case, **presented the Authority with an opportunity to clarify how it will analyze reorganization cases in which both successorship principles and accretion principles are claimed to apply to the same employees.**

1. Overview:

The Authority found that the most expeditious way to resolve such cases is to begin with a determination of whether the transferred employees are included in, and constitute a majority of employees in, a separate appropriate unit in the new employing entity. The first analytic step in resolving both successorship and accretion claims is to determine whether the transferred employees are included in, and constitute a majority of employees in a separate appropriate unit.

Once this determination has been made, the Authority will proceed to apply either the remaining successorship principles, or the remaining accretion principles, as appropriate.

2. Analytic framework adopted by the Authority:

- a. When resolving cases arising from a reorganization where employees are transferred to a pre-existing or newly established organization and both successorship and accretion principles are claimed to apply, the Authority adopted the following framework:
 - 1) Initially, the Authority determines whether employees who have been transferred are included in, and constitute a majority of, a separate appropriate unit(s) in the gaining organization under section 7112(a) of the statute. The outcome of this inquiry governs whether successorship or

accretion principles are next applied.

- 2) If it is determined that the transferred employees are included in a separate appropriate unit(s) in the gaining organization under section 7112(a), and if they constitute a majority of the employees in that unit(s), the Authority applies the remainder of the successorship factors set forth in *NFESC*, 50 FLRA 363, with respect to the units(s) determined to be appropriate. The outcome of the *NFESC* analysis determines whether the gaining organization is a successor for purposes of collective bargaining with the labor organization(s) that represented the transferred employees at their previous employer.
- 3) If it is determined that the transferred employees are not included in, and constitute a majority of employees in, a separate appropriate unit in the gaining organization, the Authority applies its long-established accretion principles. The outcome of this analysis determines whether the transferred employees have accreted to a pre-existing unit in the gaining organization.

b. Explanation of the framework:

- 1) Determine whether the transferred employees are included in a separate appropriate unit:
 - (a) The Authority first examines whether the transferred employees are included in a separate appropriate unit in the gaining organization and if they constitute a majority of the employees in that unit. This step of the analysis corresponds to the first factor set forth in *NFESC* which requires, inter alia, that “the post-transfer unit must be appropriate.” For a discussion of the

factors required in making appropriate unit determinations, see RCL 1 and Part A of this chapter discussing in detail FISC, Norfolk, 52 FLRA 950, See also FISC, Norfolk at 961, n.6.

- (b) The Authority stated that the application of the appropriate unit criteria to the facts of each case will determine the appropriateness of any proposed unit. If it finds that the transferred employees are included in, and constitute a majority of the employees in, a separate appropriate unit in the gaining organization, the Authority will proceed to determine whether the remaining successorship factors set forth in *NFESC* have been met.

Alternatively, if the Authority finds that the transferred employees are not included in, and constitute a majority of the employees in, a separate appropriate unit, the Authority will proceed to determine whether the transferred employees have accreted to another bargaining unit, as claimed.

- 2) If the transferred employees are included in, and constitute a majority of the employees in, a separate appropriate unit in the gaining organization, apply the remaining successorship factors.

- (a) Examine the following:

- < whether the gaining organization has substantially the same organizational mission as the losing entity, with the

transferred employees performing substantially the same duties and functions under substantially similar working conditions after the transfer; and

< whether an election is necessary to determine the representation rights of the transferred employees.

(b) If all of the factors set forth in *NFESC* have been met, the Authority finds that successorship exists and, as a result, that the gaining organization must recognize, without a secret ballot election, the exclusive representative of the transferred employees prior to their transfer. An appropriate certification is issued and any competing accretion petition(s) for the same group of employees is dismissed.

3) If successorship is not appropriate, consider accretion claims. First, consider:

(a) Whether the transferred employees are functionally and administratively integrated into the gaining organization's pre-existing unit(s); and

(b) Whether adding the transferred employees to the unit(s) would be appropriate under section 7112(a).

(c) If both tests are met, accretion will be found.

The Authority reiterated that in deciding questions of accretion, it is bound by the three criteria for determining the appropriateness of any unit set forth in section 7112(a)

of the Statute.

c. Impact of imminent reorganizations:

One of the issues raised in *FISC, Norfolk* was the impact of any imminent reorganization have on the bargaining units whose status is an issue. The Authority cited *DPRO Thiokol*, 41 FLRA 316, at 327: decisions regarding unit determinations must reflect the conditions of employment that existed at the time of the hearing rather than what may exist in the future, unless there are definite and imminent changes planned by the agency.

d. Quality of the record:

The quality of the record is vitally important. *FISC, Norfolk*, and *FISC, Bremerton*, 53 FLRA 173, presented the same issues. The decisions in these two cases were different. In *FISC, Norfolk*, the Regional Director affirmed the Authority's finding of accretion. In *FISC, Bremerton*, 53 FLRA 173 (1997), the Authority affirmed the Regional Director's finding that FISC, Concord Detachment was a successor employer to the Concord Naval Weapons Station (NWS Concord) for an appropriate unit of employees transferred from NWS Concord to the newly established FISC, Concord Detachment. The Regional Director, as affirmed by the Authority, based his decision on different facts in the record.

E. Consolidated Units :

When applying the appropriate unit criteria to a successorship/accretion situation that involves a consolidated bargaining unit, the criteria are applied with respect to the entire nationwide consolidated unit. The Region does not apply the criteria to any organizational segment (or former unit encompassed within the consolidated unit) below the level of exclusive recognition. Thus, successorship and accretion issues are not considered below the level of exclusive recognition. *Compare*

*Social Security Administration, District Office, Valdosta, Georgia
(SSA, Valdosta), 52 FLRA 1084 (1997).*

F. Unresolved Issues :

Since the Authority in *AMCOM II*, 56 FLRA 126 (2000) found prong two of the successorship criteria (substantially same organization mission, duties and working conditions) to be met, it was unnecessary to address whether the new "sufficiently predominate" standard would be applicable to "merger" situations where the second successorship prong has not been satisfied. This issue continues to remain unresolved.

NOTE: In three cases that the Authority considered in the past three years, issues of a question concerning representation were raised in the context of reorganizations. The issue outlined above has not yet been resolved based on the facts of the case as analyzed using the *FISC, Norfolk* framework. In *SSA, Valdosta*, 52 FLRA 1084, 1090, the Authority stated that it and the NLRB have found that an election would be necessary to determine representation after a reorganization or consolidation when the number of unrepresented employees in the gaining entity exceeds the number of represented employees [citing *HHS, Region II*, 43 FLRA 1245 (1992) and *Renaissance Center Partnership*, 239 NLRB 1247 (1979)]. The Authority also noted that the NLRB found an election necessary after a reorganization when more than one labor organization represents employees transferred into one new unit. *Martin Marietta Co.*, 270 NLRB 821 (1984) in which the NLRB said:

When an employer merges two groups of employees who have been historically represented by different unions, a question concerning representation arises, and the Board will not impose a union by applying its accretion policy where neither group of employees is sufficiently predominant to remove the question concerning representation.

In *DLA, Columbus*, 53 FLRA 1114, the Authority stated: "In the context of an agency realignment of functions, the Authority has

ordered an election where the employees at issue could be part of two petitioned-for appropriate units,” citing *DLA, Akron*, 15 FLRA 962 (1984). As the Authority held in *DLA, Akron*, where “the considerations in favor of each [unit] are evenly balanced, the determining factor should be the desires of the employees themselves.” *Id.* at 966.

In addition the Authority reiterated that an election may be necessary where, as here, more than one labor organization represents employees transferred into the new unit. See *SSA, Valdosta*, 52 FLRA at 1091. The Authority also cited supporting NLRB case law where it found an election necessary after a reorganization or corporate merger where more than one labor organization has represented employees in the new unit and neither group is sufficiently predominant (emphasis added) to remove the question of overall representation. *Seven-Up*, 281 NLRB 943 at 946 (1986); *Boston Gas Company*, 221 NLRB 628, 629 n.5 (1975). On the other hand, the Authority noted NLRB case law that said that it will not direct an election where it would be a useless exercise or prejudicial to the dominant group. (citing the same cases).

The Authority had an opportunity in its *Order Granting Application for Review and Denying Stay of Election in Department of the Army, U.S. Army Aviation Missile Command, Redstone Arsenal, Alabama (AMCOM I)*, 55 FLRA 640 (1999), to consider when an election is necessary where a reorganization has rendered inappropriate separate, preexisting bargaining units inappropriate. However, as noted, it found prong 2 of the successorship criteria met and created a standard for finding unions sufficiently predominant in that context. **When successorship issues involve more than one union, regions should be attentive to any cases in which prong 2 of the successorship criteria is not met. See CHM 58.3.18.**

4 *Issues related to the majority status of the currently recognized or certified labor organization and/or defunctness*

Section 7111(b)(2) of the Statute permits the filing of a petition seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation. Based on current Authority case law, three types of petitions may be filed under this section that raise issues related to the majority status of the currently recognized or certified labor organization:

1. petitions questioning the continued majority status of the recognized or certified labor organization which are generally filed by agencies;
2. petitions filed by an exclusive representative to amend its certification in which the investigation raises a reasonable cause to believe a question of representation (QCR) or defunctness exists; and
3. questions of defunctness of the exclusive representative which is an interrelated, but not identical, concept.

In the three scenarios, section 7111(b)(2) provides, in relevant part, that if a petition is filed with the Authority:

by any person seeking . . . 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. . . .

The Authority stated in *U.S. Department of the Interior, Bureau of Land Management, Phoenix, Arizona (BLM)*, 56 FLRA 202, 206 (2000) that “[c]onsistent with the plain wording of this section, if in investigating a petition to amend a certification there is reasonable cause to believe that a QCR exists, then an opportunity for a hearing on the matter ‘shall’ be provided. This statutory requirement is not discretionary and does not depend on the type of petition filed. Rather, it depends on whether there is reasonable cause to believe that a QCR exists. The Authority noted, in this respect, that § 2422.1 of the regulations provides for only one type of petition.

Petitions that raise majority status issues that are filed by a labor organization that is not a party to the exclusive bargaining relationship and are not accompanied by a thirty percent showing of interest are set for hearing as to the standing of the petitioner to file such a petition (see *CHM 23.9.2*).

- A. **Timeliness considerations :** Absent unusual circumstances, a petition challenging the majority status of an exclusive representative must be filed in accordance with the timeliness requirements of the Statute and regulations. See *Department of State, Bureau of Consular Affairs, Passport Services*, 35 FLRA 1163 (1990); *RCL 11 - Timeliness*. Examples of unusual circumstances are when a union is defunct or in a situation in which the petitioner seeks to amend its own certification due to a change in affiliation or merger (*RCL 7*).

- B. **Good faith doubt as to union’s continued majority status :** A party filing a petition asserting a good faith doubt as to the continuing majority status of an exclusive representative is not required to prove that an actual numerical majority of employees opposes the union. Rather, the party must demonstrate objective considerations sufficient to support a conclusion that a reasonable doubt exists that a union continues to represent a majority of employees in an existing unit. The factors asserted to support a good faith doubt as to majority status must be viewed both in their context and in combination with each other, in determining whether such doubt is warranted. *Overseas Private Investment Corporation*

(*OPIC*), 36 FLRA 480, 484-85 (1990). The Authority does not determine whether the union continues to be the exclusive representative of employees; that determination is made by the employees themselves through the election process. The Authority determines whether, based upon objective considerations, a good faith doubt exists that the union continues to represent a majority of employees. If so, an election is conducted to determine the exclusive representative, if any, in the unit.

Objective considerations sufficient to support a conclusion that a reasonable doubt exists are, for example:

- < lack of officers or representatives of a union;
- < lack of a collective bargaining agreement;
- < lack of demands to bargain in response to management proposed changes;
- < few employees on automatic dues withholding;
- < long periods of dormancy by the union, etc.

See Department of the Interior, National Park Service, Western Regional Office, San Francisco, California, 10 FLRA 502 (1982); Department of the Interior, National Park Service, Western Regional Office, San Francisco, California, 15 FLRA 338 (1984); and OPIC. An incumbent's attempt to revive itself once the petition had been filed asserting a good faith doubt of continued majority status does not overcome the good faith doubt as to continued majority status. OPIC.

- C. Petition to amend a certification :** Generally, such petitions are filed when the exclusive representative seeks to change its affiliation or merge with another union pursuant to the *Montrose* requirements discussed at *RCL 7*. The number of union members in the bargaining unit compared with the total number of employees in the bargaining unit may raise a question concerning

representation which the Region investigates by following the outline discussed below. If the Regional Director determines that there is reasonable cause to believe that a QCR exists, an opportunity for a hearing is provided. If on the record of the hearing, it is determined that a QCR exists, the Regional Director supervises or conducts an election on the question, as appropriate. If the Regional Director finds there is no reasonable cause to believe that a QCR exists with respect to the unit, the Regional Director, based on record facts, dismisses the petition or grants the amendment. *BLM*, 56 FLRA at 206.

An unresolved issue is whether all of the factors discussed in *OPIC* must be present in order for a QCR to be present in this type of petition as well. In *OPIC*, the Authority stated that “[w]hile a low level of membership, standing alone, would not support a doubt as to majority status, neither does it contribute to overcoming the doubt that reasonably results from a lengthy period of virtually total inactivity.” *OPIC*, 36 FLRA at 486.

- D. Defunctness :** The exclusive representative is held to be defunct when it is either unwilling or unable to represent employees. If it is determined that the union is defunct and has ceased to represent employees, this represents an unusual circumstance warranting the filing of a petition at any time, without regard to the timeliness requirements of the Statute. Further, if the union is held to be defunct, the petition does not necessarily result in an election among the affected employees. In the absence of intervenors in the representation case, granting a petition asserting defunctness results in a finding, without conducting an election, that there is no exclusive representative in the unit. *See Duluth International Airport, 4787th Air Base Group, Duluth, Minnesota*, 15 FLRA 858 (1984).

See HOG 40 for specific guidance on developing a record about this topic at hearing.

Other references:

Celanese Corp., 95 NLRB 664 (1951); *Thomas Industries, Inc. v. NLRB*, 687 F.2d 863, 868 (6th Cir. 1982); *Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977) cited in *OPIC*.

Department of State, Bureau of Consular Affairs, Passport Services, 35 FLRA 1163 (1990).

5 ***(Reserved)***

6 Dues allotment

A labor organization may be granted certification for the limited purpose of negotiating an agreement for dues allotment under section 7115(c) of the Statute, which provides:

(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 a 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) 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.

Standard: To certify a union for dues allotment, the union is required to file a petition with a Regional Office that includes the following criteria:

- a) the petition seeks certification for dues allotment for a unit for which there is no exclusive representative;
- b) the claimed unit is appropriate for exclusive recognition;
and
- c) the petitioner provides a showing of **membership** of not less than 10 percent (10%) in the unit claimed to be

appropriate.

Application of standard: Any appropriate unit determination for the purposes of dues allotment petitions must be consistent with the criteria of section 7112(a) of the Statute. *Defense Industrial Plant Equipment Center, Memphis Tennessee*, 31 FLRA 1105 (1988). Other issues in dues allotment cases include:

- < Any dues withholding agreement negotiated between a labor organization and an agency pursuant to a dues allotment certification becomes null and void upon the certification of an exclusive representative of the unit. *See 5 U.S.C. 7115(c)(2)(B)*.
- < The fact that a union loses an election for exclusive representation does not, in and of itself, invalidate the prior evidence of membership for the purpose of a dues allotment petition. An issue may be raised if the Activity offers independent evidence to support a claim that the union's 10% showing of membership is no longer valid. *Area Maintenance Support Activities, 86th Army Reserve Command, Forest Park, Illinois*, 32 FLRA 822 (1988).
- < Determining the adequacy of evidence of membership is handled similarly to other petitions requiring a showing of interest. The Regional Director administratively determines adequacy of the evidence submitted and a determination that the evidence is adequate is not subject to collateral attack at a hearing or on appeal to the Authority. *See §2422.9 and CHM 18.3*.

See HOG 42 for specific guidance on developing a record about this topic at hearing.

7 Changes in the name of the certified or recognized exclusive representative

This section discusses the concepts and procedures for processing petitions to amend a certification or recognition due to changes in the name of the certified or recognized labor organization. Such changes fall within two categories:

A. Technical or nominal changes :

These changes occur when the union merely seeks a technical or nominal change in its certification due to a clerical or administrative error. See *National Aeronautics and Space Administration, Headquarters, Administrative Division*, 12 FLRA 152 (1983) (granted a name change for the exclusive representative - no discussion of *Montrose* factors).

In *Naval Aviation Depot, Naval Air Station, Alameda, California (NAS Alameda)*, 47 FLRA 242 (1993), the Authority granted the Activity's petition to change the name of the Activity, but denied the Union's request to amend the certification to reflect a change in the local designation within the same international union. The Authority stated: "in order to amend the certification issued by the Authority to reflect a change in the designation of the exclusive representative for the bargaining unit in this case from IAM Lodge 739 to IAM Lodge 1584, it was necessary to follow the procedures required by *Montrose*." The Authority cited *Florida National Guard, St. Augustine, Florida (FNG II)*, 34 FLRA 223 (1990) ; and *Florida National Guard (FNG I)*, 25 FLRA 728 (1987). In *FNG I*, the Authority applied the *Montrose* procedures where two locals within the same national union merged, and in *Florida National Guard II*, the Authority applied the *Montrose* procedures where, as here, two locals within the same international union merged. The Authority stated in *NAS Alameda* that: "[I]n this case, it has not been demonstrated that the merger conforms to the wishes of the membership of IAM Lodge 739, the certified exclusive representative of the Activity's employees." *NAS Alameda* at 245, 246.

The Regions should look out for any petition where the petitioner seeks to effect a change in affiliation from one local union to another local union of the same national or international union, but the *Montrose* criteria have not been met. More clarification on this issue from the Authority may be helpful. **See CHM 58.3.19.**

B. Montrose: changes in affiliation or mergers of labor organizations :

When a petitioner seeks amendment to reflect a change in affiliation resulting from either a reaffiliation or a merger of unions, two conditions must be met. These two conditions were first described in *Veterans Administration Hospital, Montrose, New York (Montrose)*, 4 A/SLMR 858 (1974). The Authority specifically adopted *Montrose* in *Florida National Guard, St. Augustine, Florida (FNG I)*, 25 FLRA 728 (1987).

Montrose cases are distinguished from cases in which the union merely seeks a technical or nominal change in its certification due to a clerical or administrative error. However, a simple change in the numerical designation of a local is subject to the *Montrose* requirements unless the union can show the change was purely technical.

The two conditions that must be met to determine whether the designation of the exclusive representative of a recognized or certified unit may be amended are:

1. **Due Process:** *Montrose* sets out specific procedures to ensure that union members have an adequate opportunity to vote on the change. These are:

- < the proposed change in affiliation is the subject of a special meeting of the members of the incumbent labor organization, called for this purpose only, with adequate advance notice provided to the entire membership;
- < the meeting takes place at a time and place convenient to all members;

- < adequate time for discussion of the proposed change was provided, with all members given an opportunity to raise questions within the bounds of normal parliamentary procedures; and
- < a vote by the members of the incumbent labor organization was taken by secret ballot, with the ballot clearly stating the change proposed and the choices inherent therein.

2. Continuity of Representation: Any change in an affiliation may not affect the continuity of the unit employees' representation and clearly does not leave open questions concerning such representation. *See Montrose*, 4 A/SLMR 858, 860. The Authority has not identified the specific factors or number of factors it will consider in deciding this issue. However, elements to weigh include:

- < continuity of officers or representatives,
- < local autonomy and control of day-to-day operations, and
- < whether the gaining union has agreed to administer the existing contract. *U.S. Department of the Army, Rock Island Arsenal, Rock Island, Illinois (Rock Island)*, 46 FLRA 76 (1992) citing *NLRB v. Financial Institution of Employees of America, Local 1182 (Financial Institution)*, 475 U.S. 192 (1986).

Financial Institution included a discussion concerning the difference between affiliation and other organizational changes that alter a union's "identity." The discussion may be helpful in cases where there is an issue related to continuity of unit employees' representation. The Court appeared to limit the review to identifying organizational changes, rather than the motivation behind such changes. The Supreme Court noted that the Board recognized that "an affiliation does not create a new organization, nor does it result in the dissolution of an already existing organization." The Court noted that in a change of affiliation, the union will determine "whether any administrative or organizational changes are

necessary in the affiliating organization. If the changes are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation." *Financial Institution*, at 206.

3. Examples of changes in affiliation: There are various types of changes in affiliation which may involve application of *Montrose*. For example, two national unions may merge or two or more locals of a national union may merge. A local union affiliated with one national union may reaffiliate with another national union. A local union may become a new independent union. A local union may split into two or more affiliates of a national union.

4. Application of Standards: The Authority applies the *Montrose* standards on a case-by-case, unit-by-unit basis and has considered virtually every aspect of each standard.

< Any petitions that seek to amend a recognition or certification as a result of reaffiliation or merger must follow the procedures established in *Montrose*. These procedures were designed to ensure that an amendment of certification of "an exclusive representative in an existing unit" conforms to the desires of the membership of that unit. *U.S. Department of the Interior, Bureau of Land Management, Phoenix, Arizona (BLM)*, 56 FLRA 202 (2000) citing *Rock Island*, 46 FLRA at 79. A union which has recognition or certification for several units may reaffiliate with another union, but the Montrose due process standards are applied on a unit specific basis and the continuity of representation is assessed for each separate unit. For instance, specific information is obtained regarding the union's membership in each unit for which the union seeks to amend the recognition or certification.

< A change in affiliation vote must be open to all union members in the affected unit, not to all members of the bargaining unit. *Bureau of Indian Affairs, Gallup, New Mexico*, 34 FLRA 428 (1990); *Financial Institution*, 475 U.S. 192 (1986).

- < A change in affiliation may not be used to change the scope of the existing bargaining unit. Thus, *Montrose* procedures may not be used to sever a group of employees from an existing bargaining unit or to extend recognition to a category of previously unrepresented employees. Further, a petition to reflect a change in affiliation may not be used to and, if granted, does not result in consolidation of bargaining units. *Florida National Guard, St. Augustine, Florida (FNG II)*, 34 FLRA 223 (1990).
- < *Montrose* does not apply to a change in affiliation involving a labor organization other than an exclusive representative. *U.S. Department of Defense, National Guard Bureau, Division of Military and Naval Affairs, Latham, New York*, 46 FLRA 1468 (1993).
- < The notice of the special meeting must clearly and adequately inform employees of the nature of the proposed change. See *Union of Federal Employees (UFE)*, 41 FLRA 562 (1991), but compare *U.S. Department of the Interior, Bureau of Indian Affairs, Gallup, New Mexico*, 33 FLRA 482 (1988), 34 FLRA 428 (1990), and 35 FLRA 99 (1990) [*BIA I, II, and III*, respectively] in which no special meeting was required in the unusual circumstances present. The Authority determined where geographic dispersion precludes a special meeting of all of the members of the bargaining unit, a mail ballot may be substituted.
- < The certified exclusive representative is not required to notify the national labor organization of a disaffiliation vote. *New Mexico Army and Air National Guard (New Mexico AANG)*, 56 FLRA 145, 149 (2000).
- < There is no requirement that any specific number or percentage of members must cast ballots in order for an affiliation change to be effective. See *Rock Island*, 46 FLRA 76 (1992). There must be union members in the unit and the members must have been sent notice of the meeting. *UFE*, at 574.
- < Where there are no members of the union in the bargaining unit, a *Montrose* is not appropriate since the requirements established in

Montrose were designed to ensure that an amendment of certification of an exclusive representative in an existing unit conforms to the desires of the membership of that unit. *BLM*, 56 FLRA at 207.

- < The ballot must inform the members of the choices inherent in the election so that the members may make a reasoned decision on how to vote. Reasonable precautions must also be taken to ensure the secrecy of the ballots so that the privacy and free choice of voters is not compromised by election conduct. *UFE*, at 587.

C. Impact of Trusteeships on Reaffiliation Petitions :

1. Trusteeship Imposed After the Filing of the Petition: when a trusteeship is imposed after a reaffiliation vote and after the filing of a petition to change the certification, the trusteeship cannot affect the processing of the petition and the issuance of a new certification. *New Mexico AANG*, 56 FLRA at 149. Thus, for purposes of processing the reaffiliation petition, the validity of the trusteeship is not an issue.

- a. Any national union or the trustee on behalf of the national union requesting to intervene based on its interest in ensuring that the local exclusive representative affiliated with the national union has properly followed the Montrose standards is allowed to participate as an intervening party with the right to file an application for review with the Authority. The national labor organization is a party “affected by issues raised in the petition” and is notified of the petition in accordance with § 2422.6 of the regulations. *Utah Army National Guard, U.S. Department of the Army, Draper, Utah (Utah ARNG)*, an unnumbered decision dated April 16, 1999.
- b. The Region deals with the local union which filed the petition as the petitioner throughout the processing of the petition, regardless of the imposition of a trusteeship. Thus, requests by the

trustee or national union to withdraw a petition filed by a local exclusive representative are denied.

2. Trusteeship Imposed Prior to the Petition, Whether Before or After the Vote:

a. A trusteeship imposed before a petition, if valid, results in dismissal of the petition. The framework of the Statute requires the “vote - trusteeship - petition” scenario to be treated in the same manner as if the trusteeship had been imposed before the reaffiliation vote occurred i.e. - the “trusteeship - vote - petition” scenario. Thus, if otherwise presumed valid (discussed below), the trusteeship is deemed effective and any individual filing a petition seeking a change in the certification must be authorized to do so by the exclusive representative’s administrator - the trustee. Thus, whether the reaffiliation vote precedes or is subsequent to the imposition of the trusteeship, if the trusteeship is valid, the Regions recognize the designated trustee as the representative of the union. The critical event is not whether the reaffiliation vote preceded the trusteeship, but whether the trusteeship preceded the filing of the petition.

b. Determining the Procedural Validity of the Trusteeship:

1) Procedural Validity of Trusteeship Pending Before the Department of Labor

In U.S. Environmental Protection Agency, Washington, D.C. and National Federation of Federal Employees, Local 2050 (EPA), 52 FLRA 772 (1996), a situation where the trusteeship was imposed prior to a reaffiliation vote and the petition (“trusteeship, vote and petition” situation), the local

union placed in trusteeship filed a complaint with the Assistant Secretary challenging the legality of the trusteeship. Where the trusteeship was imposed prior to the filing of the petition and the validity of the trusteeship was pending before the Department of Labor, the Authority provided the following guidance to the Regional Directors:

- (a) Where the Regional Director determines that a trusteeship was established "in conformity with the procedural requirements of [the parent labor organization's] constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution and bylaws[,]" as provided by 29 C.F.R. § 458.28, the Regional Director, in the absence of a final decision by the Assistant Secretary resolving the trusteeship matter, will presume the validity of the trusteeship and will dismiss the petition on the ground that the person purporting to act for the incumbent labor organization has no authority to act.
- (b) Where the Regional Director determines that a trusteeship was not established "in conformity with the procedural requirements of [the parent labor organization's] constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution and bylaws[,]" as provided by 29 C.F.R. § 458.28, the Regional Director, in the absence of a final decision by the

Assistant Secretary resolving the trusteeship matter, will place the petition in abeyance. Upon being notified by the parties of the issuance of a final decision by the Assistant Secretary, the Regional Director will take appropriate action in light of that decision to either process or dismiss the petition [footnote omitted].

(2) Procedural Validity of Trusteeship Not Pending Before the Department of Labor

A legal issue remained unanswered in *EPA* at footnote 13 - namely, the effect that will be given to the failure of a local union placed in trusteeship to file a complaint with the Assistant Secretary challenging the legality of a trusteeship. Based on the first enumerated principle in *EPA*, Regional Directors also determine in this scenario whether a trusteeship was established in conformity with the procedural requirements of the parent labor organization's constitution and bylaws and authorized or ratified after a fair hearing even if no party has filed a challenge with the Assistant Secretary.¹¹

¹¹ The Labor-Management Reporting and Disclosure Act of 1959, as amended (29 U.S.C. § 464(c)), and implementing Department of Labor regulations (29 C.F.R. § 458.28), establish the criteria for presuming the validity of a trusteeship for eighteen months. 29 U.S.C. § 464(c) provides:

In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution and bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for the purpose allowable under section 462 of this title....

29 C.F.R. § 458.28 provides:

In any proceeding involving § 458.26, a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance

with its constitution and bylaws shall be presumed valid for a period of 18 months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for purposes allowable under § 458.26. After the expiration of 18 months the trusteeship shall be presumed invalid in any such proceeding, unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under § 458.26.

If the Regional Director finds that the procedural requirements have been met, the Regional Director presumes “the validity of the trusteeship,” just as if there had been a challenge filed with the Assistant Secretary. The principle established by the Authority in *EPA* remains valid even though no challenge was filed with the Assistant Secretary. Thus, since the Authority has mandated that Regional Directors may make such threshold decisions and presume the validity of a trusteeship based on procedural grounds when a challenge is pending before the Assistant Secretary, Regional Directors have that same authority when no challenge has been filed with the Assistant Secretary. To hold otherwise, would tend to discourage a party that wishes to challenge a trusteeship from filing with the Assistant Secretary based on the strategy that not to file would prevent the Regional Director from presuming the validity of the trusteeship on procedural grounds.

c. Determining Whether the Trusteeship was Established for a Valid Purpose

The Assistant Secretary has taken a position in cases where a party has challenged the legality of the purpose of a trusteeship imposed to block a reaffiliation vote. The parties in these cases had *Montrose* petitions pending in the Regions which had been deferred pending the Assistant Secretary’s determination on the validity of the trusteeships which were imposed prior to the filing of the petition. The Assistant Secretary took the legal position that parent labor organizations cannot impose a trusteeship simply to prevent a local from disaffiliating from the parent organization.¹² The Assistant Secretary issued a complaint in one case alleging

¹² See e.g., *AFL-CIO Laundry and Dry Cleaning International Union v. AFL-CIO Laundry et. al.*, 70 F. 3d 717 (1st Cir. 1995) (“[Co]urts have widely recognized that preventing disaffiliation is not a proper purpose under [29 U.S.C.] § 462 for imposition of a trustee.”).

that imposition of such a trusteeship violated section 7120(d) of the Statute, as implemented by 29 C.F.R. § 458.26 because the trusteeship was imposed for an improper purpose. In view of the pending litigation, the Region continued to defer processing those reaffiliation petitions.¹³

The Authority to date only has had an opportunity to discuss trusteeships and reaffiliation petitions in one case where the matter was pending before the Assistant Secretary. In order to obtain further guidance from the Authority in a manner that provides for representation petitions to be processed expeditiously, the Regional Director also examines the validity of the purpose of a trusteeship when there is no pending case before the Department of Labor and the trusteeship was imposed prior to the filing of the petition. In view of the legal position taken by the Assistant Secretary and noting particularly that it is the Assistant Secretary and not the Office of the General Counsel that has established the test for determining the validity of trusteeships, Regions limit the examination to a factual finding of whether the illegal purpose of blocking reaffiliation was the purpose for imposing the trusteeship. The Regions can not make determinations as to whether other asserted purposes are valid under 29 U.S.C. § 462.

With respect to the procedural validity of the trusteeship, the Regions:

- < examine the procedural requirements of the parent union's constitution and bylaws and decide if those provisions were followed;
- < decide if the local union was afforded a fair hearing; and
- < determine if the trusteeship was authorized or ratified after that hearing as provided for in the parent union's constitution and bylaws.

¹³ These petitions involve the National Federation of Federal Employees (NFFE) and NFFE Local 28 at Fort Sam Houston, Texas.

With respect to the purpose of the trusteeship, the Regional Directors also determine if the purpose of the trusteeship was to preclude reaffiliation. In situations: (1) where there is no pending Department of Labor proceeding when a petition is filed after imposition of the trusteeship; and (2) the Region finds that the trusteeship lacks either procedural validity or was established to block reaffiliation - the Region obtains clearance from the Office of the General Counsel prior to continue processing the reaffiliation petition.

D. Unresolved Issues : The OGC identified several unresolved issues that were not before the Authority in cases discussed herein. The Regions should be alert to any cases:

- < Involving an agency's failure to recognize the incumbent when a trusteeship is imposed after a *Montrose* petition is filed.
- < Raising issues of the continuation of a labor organization.
- < Where the Region determines that a trusteeship imposed prior to the filing of a *Montrose* petition is invalid, procedurally or substantively.
- < In which the national labor organization revokes the charter of the local union that holds the certification during a *Montrose* proceeding.
- < Any *Montrose* petitions where a very small percentage of the employees are union members and vote for reaffiliation, raising the possibility that there is a question as to continued majority status that affects the continuity of representation criteria. *BLM*, 56 FLRA 202.

See CHM 58.3.20.

E. Filing Procedures:

- < Only an authorized agent of the incumbent labor organization has standing to file a petition to amend the incumbent's certification. *U.S. Army Reserve Command, 88th Regional Support Command, Fort Snelling, Minnesota*, 53 FLRA 1174, 1178 (1998).
- < The "gaining" union in a *Montrose* situation may file the petition on behalf of the incumbent petitioner if it is designated by the incumbent as its representative. *BLM*, 56 FLRA 202 at n.1.
- < In accordance with § 2422.6 of the regulations, the Regions serve a copy of a *Montrose* petition on the national union of the

incumbent local that is seeking to change its affiliation. *New Mexico AANG*, 56 FLRA 145.

- < In *Utah ARNG*, an unnumbered decision dated April 16, 1999, the Authority denied an application for review of the Regional Director's Decision and Order where the unions on the reaffiliation ballot were granted "interested party" status. The application for review was filed by a third party on the reaffiliation ballot. In a footnote, the Authority noted that the Regional Director granted the gaining union and another union that was on the ballot "interested party" status. The Authority denied review, noting the unions were granted "interested party" status and not "intervenor status." Neither the regulations nor the Statute provide for "interested party" status and the Authority did not differentiate between "interested parties" and intervenors in the footnote.

- < The Regulations, however, do not provide a procedure for the union(s) on the reaffiliation ballot to intervene, although the potential gaining union is clearly affected by issues raised in the petition (see § 2421.21 of the regulations and *CHM 5.2* and *CHM 15.5.2*). The intervention section of the regulations, § 2422.8, does not appear to specifically provide a procedure that permits the potential gaining union, other unions that were on the ballot or the parent of the incumbent local to intervene in the petition. Consistent with *Utah ARNG*, these unions are "affected by issues raised" and pursuant to § 2422.6 are notified of the pending petition in accordance with *CHM 15.10* and *CHM 17.13*.

See HOG 43 for specific guidance on developing a record about amending the name of the exclusive representative and trusteeships at hearing.

8 **Schism**

Schism is defined as “[a] basic intraunion conflict over policy at the highest level of an international union or within a federation which results in a disruption of existing intraunion relationships; and the employees seek to change their representative for reasons related to such conflict resulting in such confusion in the bargaining relationship that stability can only be restored by an election.” *Syscon International, Inc.*, 322 NLRB 539, 543 (1996) *citing Yates Industries*, 264 NLRB 1237, 1249 (1982), *citing Hershey Chocolate Corp. (Hershey Chocolate)*, 121 NLRB 901 (1958) [enforcement denied in the unfair labor practice case in *NLRB v. Hershey Chocolate Corp.*, 297 F.2d 286 (3rd Cir. 1981) but schism doctrine not impaired]. In a schism case, the petitioner generally asserts that the intra-union conflict constitutes the type of unusual circumstances which justifies the filing of an election petition during a contract bar period or which justifies severance of a group of employees from a larger appropriate unit.

Standard: *Department of the Navy, Pearl Harbor Naval Shipyard Restaurant System, Pearl Harbor, Hawaii (Pearl Harbor)* 28 FLRA 172 (1987) is the first and only case considered by the Authority on the merits of schism. In that case, the Authority upheld the Regional Director’s decision and found that the Regional Director properly used private sector case law as a guide in rendering his decision. Citing *Hershey Chocolate*, 121 NLRB 901, (1958), the Authority adopted NLRB precedent in determining whether an asserted schism existed.

In *Hershey Chocolate*, 121NLRB at 906, the NLRB stated:

The initial consideration is a determination of the factors necessary to a finding that a schism exists warranting an election. Relevant to that determination is the fact that the schism issue arises in the context of an existing contract which would otherwise achieve the statutory objective of promoting industrial stability and therefore under normal Board practice

would remain a bar for the balance of its reasonable term. The direction of an election on the basis of a schism therefore constitutes an exception to the general principle that in the interest of promoting industrial stability, the existence of a contract meeting the required standards warrants postponement of the employees' statutory right freely to select their representative. Accordingly, before directing an election on the basis of an alleged schism, the Board must be satisfied that the existing contract can no longer serve to promote industrial stability, and that the direction of an election would be in the interests of achieving industrial stability as well as in the interests of the employees' rights in the selection of their representative.

A schism occurs when:

1. there is basic intra-union conflict over fundamental policy questions within the highest level of an international union or federation; **and**
2. the conflict causes employees in the local unit to take action, based on the conflict itself, which creates such confusion in the bargaining relationship that stability can only be restored through an election.

Pearl Harbor, 28 FLRA at 173. *Hershey Chocolate*, 121 NLRB at 908.

Factors: To make a schism finding, *Hershey Chocolate* established three conditions:

1. There must be a basic intra-union conflict affecting the

certified representative. A basic intra-union conflict is any conflict over policy at the highest level of an international union, whether or not it is affiliated with a federation, or within a federation, which results in the disruption of existing intra-union relationships. *Hershey Chocolate* 121NLRB at 907.

2. Employees in the unit seek to change their bargaining representative for reasons related to the basic intra-union conflict and have an opportunity to exercise their judgment on the merits of the controversy at an open meeting, called with due notice to the members in the unit for the purpose of taking disaffiliation action for reasons related to the basic intra-union conflict. *Hershey Chocolate* 121NLRB at 908.

3. The action of the employees in the unit seeking to change their representative took place within a reasonable time after the occurrence of the basic intra-union conflict. *Hershey Chocolate* 121NLRB at 908.

Pearl Harbor findings: In applying the schism test in *Pearl Harbor*, the Authority concluded that:

- < Alleged intra-union conflicts which merely involve a dispute over the local union's internal procedures do not support an assertion of schism. To find a schism, the alleged intra-union conflicts must involve a dispute over fundamental policy issue(s). In addition, the conflict must exist at the highest level of an international union or federation of unions.

- < In the absence of evidence that realignment, disaffiliation or expulsion of members had occurred as a result of the internal disputes, no schism was present.

Based on the facts in *Pearl Harbor*, the Regional Director did not have to consider whether conditions two or three were met.

See HOG 44 for specific guidance on developing a record

about this topic at hearing.

References:

The Louisville Railway Co., 90 NLRB 678 (1950).

Swift and Co., 145 NLRB 756 (1963). (Discusses schism criteria. A mere disaffiliation movement within a local, born out of a policy conflict between the local and the international, does not alone satisfy the Board's requirement for schism.)

Southwestern Portland Cement Co., 126 NLRB 931, 934 (1960).

DOD, National Guard Bureau, New York National Guard, Division of Military and Naval Affairs, Latham, New York, 46 FLRA 1468. (Discusses appropriate petition if schism not found.)

Georgia Kaolin Co., 287 NLRB 485 (1987). (Conflict must be at highest level or Board cannot reach question of whether other conditions exist for a schism.)

9 Severance

Severance issues arise when a petitioner seeks to "carve out" or sever employees from an established bargaining unit to establish a separate unit. Any election petition requesting severance from an existing unit requires a 30 percent showing of interest in the petitioned-for unit, not 30 percent of the existing bargaining unit. *Office of Hearings and Appeals, Social Security Administration*, 16 FLRA 1175 (1984).

Standard: Severance is granted only in the rare circumstances where:

- (1) the existing unit continues to be appropriate under the criteria set forth in section 7112(a)(1) of the Statute; and
- (2) unusual circumstances are present which justify removing the particular group of employees from the existing unit.

U.S. Department of Veterans Affairs (Veterans Affairs), 35 FLRA 172, 179-80 (1990) (severance denied) and *U.S. Department of the Treasury, Bureau of Engraving and Printing (BEP)*, 49 FLRA 100 (1994) (severance granted). Where the Authority determines that the existing unit remains appropriate and no unusual circumstances exist which would warrant severance, there is no need to make any further finding with respect to whether the petitioned-for unit would also constitute a separate appropriate unit. *Carswell Air Force Base, Texas (Carswell Air Force Base)*, 40 FLRA 221, 228 (1991).

Unit continues to be appropriate: Where an established unit continues to remain appropriate and no unusual circumstances are present, then the Regional Director does not grant a petition for severance and dismisses the petition. Therefore, the Hearing Officer ensures that the record contains all evidence necessary to make an appropriate unit determination in the existing bargaining

unit, applying the criteria of section 7112(a)(1) of the Statute. See, Section 37, Appropriate unit determinations.

As a rule, the Authority relies on the second and third criteria of the appropriateness of unit test to find severance is not warranted where it would result in unit fragmentation. Thus, in *Library of Congress*, 16 FLRA 429 (1984), the Authority concluded that “a petition seeking to remove certain employees from the overall unit and to separately represent them must be dismissed, in the interest of reducing the potential for unit fragmentation and thereby promoting effective dealings and efficiency of agency operations.”

Unusual circumstances are present: In evaluating whether unusual circumstances warranting severance exist, the Authority looks at a number of factors.

- A. *Reorganization:* The exclusion or “severance” of a group of employees from the existing unit due to a substantial change in the character and scope of the unit may be an unusual circumstance which would warrant severance. In such cases, the employees who are severed from the existing unit no longer have a community of interest with the remaining employees. *U.S. Department of Labor*, 23 FLRA 464 (1986).
- B. *The adequacy of the representation afforded by the incumbent:* The Authority will consider the incumbent union’s failure to represent the petitioned-for employees fairly and effectively in evaluating whether severance is warranted. See *Veterans Affairs*, 35 FLRA at 180; *Department of the Navy, Naval Air Station, Point Mugu, California (Point Mugu)*, 26 FLRA 620 (1987); and *Department of the Army, Headquarters, Fort Carson, and Headquarters, 4th Infantry Division, Fort Carson, Colorado*, 34 FLRA 30 (1989).
- C. *Inequities in working conditions among employees in the same classifications and job assignments who are in different bargaining units.* See *International*

Communication Agency and the National Federation of Federal Employees, Local 1418 and International Communication Agency and the American Federation of Government Employees, Local 1812, 5 FLRA 97 (1981).

The following do not evidence inadequacy of representation by an incumbent unit for the purpose of establishing unusual circumstances:

X A bare disclaimer of interest, without more. *BEP*, 49 FLRA at 107 n.3.

X A small percentage of membership in the incumbent union. *Carswell Air Force Base*, 40 FLRA at 230-231.

- X The lack of a collective bargaining agreement, where there is no evidence that the failure to renegotiate such an agreement has deprived unit employees of rights under the Statute or otherwise has not affected the petitioned-for employees any differently than other employees in the unit. *Point Mugu*, 26 FLRA at 623.
- Unrepresented employees. Severance concerns carving out a group of employees from an existing represented bargaining unit. *Library of Congress*, 16 FLRA at 432.
 - The size of the incumbent's membership is not indicative of the quality or extent of the incumbent's representation of the group of employees that the petitioner seeks to sever. *Carswell Air Force Base*, 40 FLRA at 230.

In addition to obtaining a complete record on the appropriateness of the existing unit, and evidence of unusual circumstances warranting consideration of severance, the Hearing Officer obtains a complete record as to the appropriateness of the proposed unit of severed employees. This is not inconsistent with the Authority's finding in *Carswell Air Force Base*. Since only the Regional Director is empowered to make representation case determinations, the Hearing Officer obtains a complete and adequate record, without pre-judging the results.

See *BEP*, 49 at 107, where the Agency opened a new facility and most of the employees were transferred along with the parties' agreements to recognize the exclusive bargaining relationships that exist at the first plant. However, the circumstances surrounding the special police at the new facility were completely different and warranted an appropriate severance as the police formed an appropriate functional unit.

See HOG 45 for specific guidance on developing a record about this topic at hearing.

Other references:

Defense Logistics Agency, Defense Supply Center Columbus,

Columbus, Ohio, 53 FLRA 1114 (1998).

*National Association of Government Employees, Service
Employees International Union, Local 5000, AFL-CIO-CLC and
Service Employees International Union, AFL-CIO-CLC and
Department of Veterans Affairs, 52 FLRA 1068 (1997).*

Department of Health and Human Services, 43 FLRA 1245 (1992)

10 Status of a labor organization

A. Compliance with section 7103(a)(4) of the Statute .

A labor organization is defined in section 7103(a)(4) of the Statute as:

[A]n 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

Section 7103(a)(4) also provides four statutory exemptions in defining labor organization under the Statute:

(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.

Basis for challenge: Section 2422.11(a) of the regulations states that the **only** basis on which a challenge to the status of a labor

organization may be made is compliance with 5 U.S.C. 7103(a)(4). A challenge to the status of a labor organization can be made by any party including the Regional Director. For guidelines on processing challenges to the status of a labor organization, see *CHM 19* of the Representation Case Handling Manual.

The Authority has held that challenges may also be filed pursuant to section 7111(f)(1) of the Statute. Section 7111(f)(1) prohibits granting exclusive recognition to a union which is subject to corrupt or undemocratic influences. See **Part B** below.

Factors in determining status as a labor organization pursuant to section 7103(a)(4) of the Statute: The Authority looks to the facts and circumstances of each case to determine whether a petitioner or an intervenor is a labor organization within the meaning of section 7103(a)(4).

- < A formal dues structure is not necessary to establish that a petitioner or an intervenor is a labor organization. Rather, in applying the broad definition of the term dues in section 7103(a)(5) of the Statute, the Authority examines whether there is evidence that employees paid dues, fees or assessments. See *U.S. Department of Veterans Affairs*, 35 FLRA 172 (1990).
- < A union in the formative stages of developing its structure and operations as a labor organization, will not necessarily operate with the degree of formality or precision expected of an established organization. Such a lack of formality does not alone establish that a union is not a labor organization. *U.S. Department of Veterans Affairs* at 178.
- < The fact that a union is in trusteeship, will not alone suffice to disqualify it as a labor organization. *Terminal System Inc.*, 127 NLRB 979 (1960).
- < The Authority has revoked the certification of a federal sector union based on Section 7103(a)(4)(D) of the Statute, because the union engaged in an unlawful strike. The Authority held that the union was no longer a labor organization within the meaning of the Statute. See *Professional Air Traffic Controllers Organization, Affiliated with MEBA, AFL-CIO*, 7 FLRA 34 (1981).

Note: There are major differences between the private sector and federal sector definitions of a labor organization. Private sector precedent on this issue may be misleading.

See HOG 46A for specific guidance on developing a record about this topic at hearing.

B. Claims made pursuant to section 7111(f)(1) of the Statute that a labor organization should not be accorded exclusive recognition under the Statute because the labor organization is subject to corrupt influences or influences opposed to democratic principles.

In 1997 the Authority issued two decisions concerning section 7111(f) of the Statute that could have a significant impact on the manner in which the Regions process representation petitions: *Division of Military And Naval Affairs (New York National Guard), Latham, New York and National Federation of Civilian Technicians (NYNG)*, 53 FLRA 111 (1997) and *U.S. Information Agency, Washington, D.C. and American Federation of Government Employees, Local 1812, AFL-CIO, (USIA)*, 53 FLRA 999 (1997).

Both decisions concern challenges that a labor organization should not be accorded exclusive recognition under the Statute because the organization is subject to corrupt influences or influences opposed to democratic principles. The challenge in *NYNG* was raised by an incumbent union against a raiding union that had filed a petition for an election during an open period. The challenge in *USIA* was raised in a petition filed by an individual bargaining unit member seeking to decertify the incumbent, filed without a showing of interest. Neither the regulations expressly provide for this type of petition or this type of challenge. However, the Authority held in these two cases, that a petition or a challenge raising claims pursuant to section 7111(f)(1) may be filed and addressed by the FLRA. If filed as a petition, there is nothing in the Statute or its legislative history that suggests that a petition filed pursuant to section 7111(f)(1) requires a showing of interest or is subject to the timeliness requirements. In all other respects, such a petition is processed according to the regulations concerning petitions which do not require a showing of interest. See *USIA*, 53 FLRA 999, 1004 (1997) and *CHM 20.1.8*.

Section 7111(f)(1) of the Statute, provides that:

(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;

In *NYNG*, the Authority established certain legal principles or rules of law for making section 7111(f)(1) determinations [*NYNG*, 53 FLRA 111, 119-125 (1997)]:

1. The Authority makes determinations concerning exclusive recognition under section 7111(f)(1) of the Statute:
 - (a) Only the Authority has jurisdiction to decide issues relating to the granting of exclusive recognition to labor organizations representing employees in the Federal sector.
 - (b) Freedom from corrupt and anti-democratic influences is a requirement that must be met before the Authority can certify a labor organization as an exclusive representative.
2. The Authority's framework for deciding challenges to exclusive recognition under section 7111(f)(1) of the Statute includes:
 - (a) The Statute does not define the terms "corrupt influences" or "influences opposed to democratic principles" in either section 7111(f)(1) or 7120. However, a labor organization is presumed free from corrupt and anti-democratic influences if the labor organization is subject to the governing requirements specified in section 7120(a)(1) through (4) of the Statute. This may be demonstrated by submission of a constitution and bylaws that meet the criteria set forth in section 7120(a). (NOTE: When a petition is filed by a labor organization, the labor/organization petitioner, by signing the petition form, certifies that

it has submitted to the Department of Labor and to the activity/agency in the case, in compliance with section 7111(e) of the Statute, a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives. Thus, when the Region determines that a petitioner has complied with Reg. § 2422.3(b), the petitioner has demonstrated a presumption that it is not subject to corrupt or anti-democratic influences.)

- (b) The presumption that a labor organization is free from corrupt and anti-democratic influences, established by meeting the requirements of section 7120(a), may be rebutted by a showing that there is reasonable cause to believe that the labor organization is not free from such influences. The standards for rebutting the presumption are set forth in section 7120(b). Under section 7120(b), the presumption may be rebutted based on reasonable cause to believe that:
- (1) the organization was suspended or expelled from, or was otherwise sanctioned by, a parent organization, or federation of organizations with which it had been affiliated, based on its demonstrated unwillingness or inability to comply with the governing procedures set out in section 7120(a)(1) through (4); or
 - (2) the labor organization is in fact subject to corrupt or anti-democratic influences. *NYNG* at 121.
- (c) A finding by a third party with jurisdiction over the allegations asserted to establish corrupt or anti-democratic influences may establish reasonable cause for the Authority to proceed with the section 7111(f)(1) claim. The Authority will rely on the third party findings when the third party has jurisdiction over the matter asserted to establish the requisite reasonable cause. The Authority recognizes the “primacy” of other third party procedures for resolving specific disputes between unions and either individuals or other unions. In this regard, the Authority stated that “the representation proceedings provided by section 7111 are designed solely to certify and define the collective bargaining rights of employees and unions to engage in representational activity with agencies. They are not designed to adjudicate specific

disputes with collective bargaining representatives and they provide no remedies other than the grant or denial of certification. Such disputes are appropriately resolved through the procedures designed to adjudicate them..." *USIA*, 53 FLRA 999, 1004 (1997). For instance, the Department of Labor has jurisdiction for enforcing standards of conduct set forth in section 7120. See also *NYNG*, 53 FLRA at 122, n.12 and 13.

If a third party with jurisdiction over the conduct alleged to establish the requisite reasonable cause finds a violation based on the same facts raised by the 7111(f)(1) challenge, the Authority will accept that finding as evidence that there is reasonable cause to believe that the presumption of freedom from corrupt or anti-democratic influences has been rebutted. Consistent with the requirements of section 7120(b), the accused labor organization must furnish evidence to the Regional Director of its freedom from such influences.

- (d) If the presumption is rebutted, the burden of proof under section 7111(f) shifts to the accused labor organization to demonstrate that, in fact, it is free from influences that would preclude recognition. A labor organization meets this burden by demonstrating, for example, that: (1) the violation found by a third party has been cured (for example, that sanctions imposed by a parent organization have been lifted); or (2) the violation found by a third party is in effect de minimis and thus is insufficient to warrant denial or revocation of certification.
- (e) Dismissal by a third party, such as DOL, will suffice to establish the absence of reasonable cause to believe that denial of certification is required under section 7111(f)(1).
- (f) The Authority will normally stay its proceedings

when a case is pending before a third party that is based on the same or substantially similar allegations that support the section 7111(f)(1) claim.

CAUTION: Violations of Standards of Conduct Do Not Automatically Establish Corrupt Influences Warranting Revocation or Denial of Certification

It is significant to note the difference between the traditional remedies ordered in standards of conduct cases and the remedy which the Authority is required to order if it finds that a union is subject to corrupt or anti-democratic influences. For example, the Department of Labor may order a respondent to cease and desist from violative conduct and may require a respondent to take such affirmative action as is deemed appropriate to effectuate the policies of the Statute.¹⁴ Under the Statute, however, a labor organization that is found to be subject to corrupt or anti-democratic influences may not be recognized under the Statute as an exclusive representative and thus, either loses its existing recognition for any bargaining unit it may represent or is precluded from being recognized as the representative for any new bargaining unit.

If a third party with jurisdiction over conduct alleged to constitute reasonable cause to believe that a labor organization is subject to corrupt or anti-democratic influences find a violation, that finding establishes only reasonable cause to believe that the presumption of freedom from corrupt or anti-democratic influences has been rebutted. That finding does not establish that, in fact, the union is subject to corrupt and anti-democratic influences. Rather, that is the Authority's sole province. Thus, even though certain conduct may be found to be violations of standards of conduct requiring an affirmative remedy, that same conduct may not establish that a union is subject to corrupt or anti-democratic influences requiring the denial or revocation of certification. Moreover, if a union is found to be subject to corrupt or anti-democratic influences, it is

¹⁴ 29 C.F.R. § 458.91.

unclear whether any revocation of certification extends to all bargaining units represented by that union under the Statute. For example, some locals and nationals represent more than one bargaining unit. The authority has not had an opportunity to provide guidance on these issues nor has it had a case before it in which it found the union to be subject to corrupt influences or influences opposed to democratic principles.

For Case Handling Procedures, see *CHM 5.10, 19.1, 20.1.8, 23.9.3.*

See also *HOG 46B* for guidance at a hearing if a case alleging a labor organization is subject to corrupt or undemocratic principles raised issues requiring a hearing.

12 **Timeliness of election petitions**

Timeliness requirements for petitions are imposed by section 7111 of the Statute and implemented in section 2422.12 of the regulations. The Statute's timeliness requirements apply **only** to petitions seeking an election, whether filed by labor organizations, by individuals seeking decertification of an exclusive representative or by agencies.

- Exceptions to the timeliness requirements may be warranted in unusual circumstances.
- Certain timeliness requirements may apply to the filing of amended petitions and the adequacy of a petitioner's showing of interest. *See CHM 18.8.*
- Additional bars set out in section 2422.14 of the regulations apply to the filing of petitions seeking elections after the withdrawal or dismissal of a petition or after the filing of a disclaimer of interest by an exclusive representative. *See CHM 11.*

A. **Election and Certification Bars**

Election Bar: Section 7111(b) precludes conducting an election in "any appropriate unit or subdivision thereof within which, in the preceding 12 calendar months, a valid election...has been held."

The election bar is applicable to units where there is no incumbent exclusive representative. Thus, if a valid election is conducted, and no union is certified, no election may be held in that unit or a subdivision of that unit within twelve months of the date the election is held. The Authority has not had the opportunity to issue a decision on this point. In the private sector, the election is considered to have been held on the date the balloting is completed, rather than the date of issuance of the certification of results of election. *See Mallinckrodt Chemical Works, 84 NLRB 291 (1949).*

The election bar rule does not apply to a petition seeking an election in a broader unit which includes the unit in which an election previously was conducted, because the broader unit is not the same unit or a subdivision of the unit in which the election was held. *See Federal Aviation Administration, 2 A/SLMR 340 (1972)*. The election bar rule does not apply to petitions to consolidate existing units filed under section 7111(g).

Certification Bar: Section 7111(f) prohibits according exclusive recognition to a labor organization:

(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

- The certification bar applies during the first year following the issuance of a certification of representative, including a certification on consolidation of units, if no collective bargaining agreement has been executed. Once an agreement is executed, the contract bar rule applies to the unit.
- An exclusive representative voluntarily waives the certification bar when it files a petition for a broader appropriate unit which includes the unit for which the certification was issued. *See U.S. Army Corps of Engineers, Mobile District, 2 A/SLMR 486 (1972)*. In such cases, in order to obtain an election in the broader unit, the exclusive representative must be willing to waive its exclusive recognition status by putting it "on the line" at the election.
- A union that seeks an election to displace an incumbent may not circumvent the certification bar rule by petitioning for a broader unit. *See Bureau of Indian Affairs, Navajo Area, New Mexico, 1 A/SLMR 459 (1971)*.

If during the period normally covered by a certification bar, a collective bargaining agreement covering the claimed unit is pending agency head review under 5 U.S.C. 7114(c) or is in effect, other timeliness provisions in the regulations apply [see section 2422.12(b) of the regulations].

Assertions of Election and Certification Bars at Hearing: The determination of whether an election or certification bar precludes further processing of a petition is normally made during the initial processing of a petition since the FLRA Regional Offices maintain the records necessary to establish the pertinent dates. Thus, it is unusual to conduct a hearing on an election or certification bar issue. However, a party is not precluded from asserting an election or certification bar at hearing.

Claims of Certification Bars in Successorship: The Authority has not had an opportunity to rule on certification bar issues that arise following the finding that a new employing entity is a successor to a previous one in which a labor organization retains its status as the exclusive representative of the employees who transferred to the successor. This issue is unresolved. **See CHM 58.3.21.** NLRB cases may prove helpful in this area when researching the issue. *See Citisteel USA*, 312 NLRB 815 (1993); *NLRB v. Burns Security Services*, 406 U.S. 272 at 280 (1972); and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, at 37 (1987).

B. Contract Bars

Section 7111(f) prohibits according exclusive recognition to a labor organization:

(3) if there is then in effect a lawful written 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. . .

Absent unusual circumstances, the Authority will dismiss an election petition filed for a bargaining unit at a time when the unit is covered by a lawful written collective bargaining agreement, unless the agreement has been in effect for more than three years or the petition is filed during the 45-day “window period” set out in section 7111(f)(3)(B) of the Statute.

There are two basic issues in contract bar cases:

- (1) whether the agreement asserted to bar a petition is a lawful written collective bargaining agreement; and
- (2) whether the agreement is free from ambiguity regarding its effective date so that it constitutes a bar to an election petition. *U.S. Department of Health and Human Services, Social Security Administration (SSA)*, 44 FLRA 230 (1992), *citing Appalachian Shale Products*, 121 NLRB 1160 (1958) and *Department of the Navy, Navy Exchange, Miramar, California*, 6 A/SLMR 44 (1976).

1. Lawful written agreement:

In *SSA*, the Authority stated that in order for an agreement to constitute a collective bargaining agreement that can bar the filing of a petition for exclusive recognition:

an agreement must contain substantial terms and conditions of employment sufficient to stabilize the bargaining relationship between the parties to the agreement.

The Authority found that:

- the mere fact that an agreement contains language allowing the parties to reopen and modify the agreement's provisions does not automatically disqualify the agreement as a bar.
- contracts need not delineate every possible provision in order to contain sufficient terms to constitute a bar.

A more difficult hearing situation is presented when a party, usually the petitioner, alleges that an agreement is not **lawful**. If the petitioner's claims amount to allegations of unfair labor practice conduct, they are not appropriate for resolution in a representation proceeding. See *Veterans Administration Center, Togus, Maine*, 3 A/SLMR 568, n.1 (1973). The Hearing Officer **does not accept** any testimony or other evidence purportedly bearing on the motivation of a party or allegations involving unlawful considerations or actions in obtaining an agreement. If in doubt as to the nature and purpose of the offered evidence, the Hearing Officer questions the offering party on the record about his/her intentions and ask the party to make an offer of proof. See *HOG 28*, Objections; *HOG 29*, Offers of Proof; and *HOG 33.6*, Attempt to litigate unfair labor practices.

2. Effective Date:

The effective date and duration of agreements are addressed in § 2422.12(h) of the regulations, which states that collective bargaining agreements:

...including those agreements that go into effect under 5 U.S.C. 7114(c) and those that automatically renew without further action by the parties, do not constitute a bar to a petition seeking an election under this section unless a clear and unambiguous effective date, renewal date where applicable, duration and termination date are ascertainable from the agreement and relevant accompanying documentation.

This 1995 addition to the regulations tracks existing Authority case law, holding that any potential challenging party must be able to determine when the statutory open period will occur. *Department of the Army, Concord District Recruiting Command, Concord, New Hampshire*, 14 FLRA 73, 75 (1984). It is appropriate to read other documents in conjunction with the collective bargaining agreement such as the agency head's approval of it in determining if the agreement contains a clear and unambiguous effective date. *SSA*, 44 FLRA 230 (1992).

An agreement to extend the terms of a collective bargaining agreement during negotiations for a successor agreement does not qualify as a bar to an election petition because "a temporary stopgap agreement does not constitute a final agreement of fixed duration and lacks the stability sought to be achieved by the agreement bar principle." *Department of the Army, Corpus Christi Army Depot, Corpus Christi, Texas*, 16 FLRA 281, 282-83 (1984).

3. Time of filing a petition:

Existing contracts: When there is a contract having a valid

effective date, a contract is considered timely if filed during the open period as described in section 7111(f) of the Statute and §§ 2422.12(d) and (e) of the regulations. NOTE: For calculating the window period of a contract for deciding whether a petition is timely, see Appendix B.

New contracts: In *Department of the Army, III Corps and Fort Hood, Fort Hood, Texas (Fort Hood)*, 51 FLRA 934, 941 (1996), the Authority decided that where a petition is filed on the same day that an agreement is executed, and all that remains is agency-head review pursuant to 5 U.S.C. 7114(c), the agreement does not act as a bar if certain requirements that are met at the time of execution. The notice to the agency:

- must be in writing and convey that the petitioning union has taken all steps necessary to file a petition with the Authority.
- must be served on a person having authority over agency negotiations, which could extend to and include the head of the agency,
- must be received on the same day that the petition is filed but prior to the point at which the collective bargaining agreement is executed.

Receipt of the notice must be verifiable through documentary evidence. (footnotes omitted)

The region decides whether the petitioner followed these requirements. Once it has been established that the petition is timely and met the prima facie showing of interest requirements, it is given equivalent status. *U.S. Department of Defense Dependents School, Panama Region*, 44 FLRA 419 (1992).

4. Effect of successorship on contract bars:

No cases have yet been filed in the Regions that raise issues concerning the effect of the predecessor's agreement with the

former exclusive representative on the gaining entity that has been found to be a successor employer under *NFESC*, 50 FLRA 363. This includes petitions raising issues regarding the effect of the parties prior agreement on the gaining entity and contract bar provisions. **See CHM 58.3.22**. Note however, under the former successorship rules, the Assistant Secretary sought case handling advice from the Federal Labor Relations Council on the following issue:

Whether the Assistant Secretary can find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the successor employer and the exclusive representative a period of stability free from rival claims or other questions concerning majority status? *U.S. Mortuary, Oakland Army Base, Oakland, California (U.S. Army Mortuary)*, 8 A/SLMR 593 (1978).

The FLRC stated that “[w]hile the gaining employer, as here, may not have assumed the predecessor’s agreement,¹⁵ and therefore no ‘agreement bar’ as such exists, we see no inconsistency with the purposes of the Order in the Assistant Secretary concluding that similar ‘bar’ principles preclude the raising of a rival claim or other questions concerning majority status.” *U.S. Mortuary, Oakland Army Base, Oakland, California (U.S. Army Mortuary)*, 6 FLRC 330 (1978). The FLRC provided the Assistant Secretary with the following advice:

the Assistant Secretary may interpret and apply his existing agreement bar rules or prescribe

¹⁵ As the Council stated in DSA (3 FLRA at 803), a ‘successor’ is not ‘required to adopt and be bound by any agreement which may have been entered into between the losing employer and the incumbent union.’ (Rather, the successor is enjoined to maintain recognition and to adhere to the terms of the prior agreement to the maximum extent possible.”

analogous rules to find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the gaining employer and the exclusive representative a period of stability free from rival claims or other questions concerning representation. U.S. Army Mortuary, 6 FLRC at 335; and 8 A/SLMR at 595.

5. Effect of Section 7114(c) Agency Head Review:

The Statute provides for agency head approval of collective bargaining agreements in section 7114(c). Section 2422.12(c) of the regulations imposes a bar on the filing of an election petition during the agency head review period. *See also Federal Aviation Administration, 2 A/SLMR 340 (1972); Federal Aviation Administration, Case No. 22-3711(RO), 1 Rulings on Requests for Review 258 (1973).* Pursuant to section 7114(c) of the Statute, if the agency head does not approve or disapprove the agreement within 30 days of the date it was executed, the agreement takes effect automatically on the thirty-first day after execution. The Authority has held that for purposes of triggering the time targets for section 7114(c) review, the date of execution is the date on which no further action is necessary to finalize a complete agreement. *Fort Bragg Association of Teachers and U.S. Department of the Army, Fort Bragg Schools, Fort Bragg, North Carolina, 44 FLRA 852 (1992).*

Issues concerning agency head approval of an agreement may arise in contract bar cases. Contracts may take effect either upon the date of the agency head approval provided for in section 7114(c) of the Statute **or**, as noted previously, in cases where the agency head fails to act within the 30-day period specified by section 7114(c), on the 31st day after the contract was executed by the local parties. The date on which the contract was approved by the agency head may have to be discovered from another document, typically a letter giving agency head approval.

If the agency head timely disapproves the agreement or a portion

of the agreement, there is no agreement that is binding on the local parties and, consequently, no bar to an election petition. *U.S. Department of the Army, Watervliet Arsenal, Watervliet, New York (Watervliet)*, 34 FLRA 98, 105 (1989). The parties may agree to implement all portions of their local agreement not specifically disapproved by the agency head. If the parties agree to revise the disapproved portions, rather than implementing the portions of the agreement which were approved, no bar exists until a full and final agreement is executed that triggers the 7114(c) process. See *Watervliet* at 105.

6. Contracts Containing Automatic Renewal Clauses:

Generally, an automatic renewal clause in a collective bargaining agreement provides that the agreement continues in effect after its expiration date, if no action to amend or terminate the agreement is taken within a specified period prior to its expiration date. The presence of automatic renewal language in an agreement creates special problems in contract bar situations that the Authority addressed in *Kansas Army National Guard, Topeka, Kansas (Kansas ARNG)*, 47 FLRA 937 (1993).

Automatically renewed agreements, like initial agreements, are subject to section 7114(c) agency head review. The determination of and relationship between the execution and effective dates of an automatically renewed agreement often operate differently than those involved in an initial or renegotiated agreement. The principles that apply to the operation of section 7114(c) in the context of an initial or renegotiated agreement are incompatible with some of the fundamental aspects of agreements that are the result of automatic renewal. See *Kansas ARNG*, at 942.

In the context of an agreement that is being negotiated for the first time or one that is being renegotiated, the Authority has held that for purposes of triggering the time limits for section 7114(c) review, the execution date is the date on which no further action is necessary to finalize a complete agreement. In initial or renegotiated agreements, this is the date the parties sign off on the agreement. Once execution occurs, if the agency head neither approves nor disapproves the agreement within the prescribed 30-day period, the agreement takes effect automatically on the thirty-

first day after execution. *Fort Bragg Association of Teachers and U.S. Department of the Army, Fort Bragg Schools, Fort Bragg, North Carolina*, 44 FLRA 852 (1992).

Generally, an automatic renewal provision of a contract provides that the contract shall continue in effect after its expiration date if no action to amend or terminate it is taken within a specified period prior to its expiration date. In *Kansas ARNG*, the date which triggered agency head review was the point at which the time limits for making a request to negotiate the agreement expired with no timely request forthcoming. Thus, the period for agency head review commenced on the day after the expiration of the contractual window period for requesting renegotiation of the expiring agreement, and ended thirty days thereafter, well before the effective date of the renewed agreement. Unlike initial or renegotiated agreements, the effective date of the agreement is not necessarily the date of approval or the thirty-first day after execution. Rather, the effective date is the date previously set by the parties for the renewal of the agreement. The Authority found that this interpretation of section 7114(c) preserves the uniformity of the anniversary date and permits the orderly and predictable operation of automatic renewal provisions of collective bargaining agreements.

Simply put, contracts containing automatic renewal clauses are effective on the day the parties previously established for renewal. They are not dependent on the date of approval of the contract under section 7114(c) of the Statute as are initial agreements. For example, in *Kansas ARNG* the parties negotiated an agreement in 1989 that included a duration clause that stated:

This agreement shall be in full force and effect for three (3) years from the date of National Guard approval or thirty-one (31) days after the date of the signature of the parties, whichever is earlier. This agreement shall be renewed for an additional three year period on each third anniversary date thereafter, subject to NGB re-review and approval, unless either party gives written notice to the other, not more than 90 days or less than 60 days prior to the expiration date, of their desires to renegotiate provisions of the agreement.

The agreement was approved by the NGB on April 11, 1989. The contractual window period for requesting to renegotiate the contract expired on February 10, 1992. The period for agency head review commenced on February 11, 1992, and ended 30 days thereafter on March 11, 1992, well before the effective date of the renewed agreement. The record in *Kansas ARNG* does not establish that the parties intended finalizing the agreement to be dependent on further action. Therefore, the renewed agreement between the parties was for a 3-year term, beginning on April 11, 1992.

It is important to note that in all contract bar cases, including those involving automatic renewal clauses, decisions on timeliness are based on the specific contract, facts and circumstances present in the particular case. A petitioning union may have to consult a source other than the agreement itself to determine whether the agreement was automatically renewed. Consistent with SSA, 44 FLRA 230 (1992), the necessity of checking other sources does not preclude an automatically renewed agreement from serving as a bar to an election petition that is not filed within the section 7111(f)(3)(B) "window period." Thus, a petitioner may have to obtain documents in addition to the collective bargaining agreement to decide, for example, if there was a timely request to renegotiate or timely disapproval by the agency head. *Kansas ARNG* at 944.

7. Requests To Renegotiate:

Certain contracts provide for automatic renewal if neither party

requests to renegotiate the agreement within a specified period of time. A timely request by either party to renegotiate or modify the agreement prevents automatic renewal and precludes the agreement from serving as a bar to an election petition filed after the expiration of the agreement, even if no negotiations ever take place. *U.S. Department of Defense, Army National Guard, Camp Keyes, Augusta, Maine*, 34 FLRA 59 (1989).

8. Ratification Votes:

Ratification of a contract by the union's membership is not a requirement under the Statute in order for an agreement to become effective. However, this issue may arise at hearings involving contract bar or automatic renewal issues, when the parties have agreed either by written agreement, such as a ground rules agreement, or through acquiescence that the agreement must be ratified to become effective. *Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia*, 13 FLRA 571 (1984); *U.S. Department of Commerce, Bureau of the Census*, 17 FLRA 667 (1985).

9. Premature Extensions:

An agreement executed by the parties more than sixty days before the expiration of the current agreement is premature for contract bar purposes since it would modify or extinguish the 45-day "window period" established by section 7111(f)(3)(B) of the Statute. Section 2422.12(g) of the regulations provides that:

Where a collective bargaining agreement with a term of three (3) years or less has been extended and signed more than sixty (60) days before its expiration date, the extension will not serve as a basis for dismissal of a petition seeking an election filed in accordance with this section.

Accordingly, the Authority does not recognize such a premature extension of an agreement as a bar to an election petition. See *Department of Health and Human Services, Boston Regional Office, Region I*, 12 FLRA 475 (1983). The premature extension analysis applies solely to the extension of agreements having a term of three years or less. If an agreement has a term of more than three years, it serves as a bar to an election petition only during its initial three year period. See section 2422.12(e) of the regulations.

C. Unusual Circumstances

Section 2422.12(f) of the regulations states "a petition seeking an

election or a determination relating to representation matters may be filed at any time when unusual circumstances exist that substantially affect the unit or majority representation.” See *Department of State, Bureau of Consular Affairs, Passport Services*, 35 FLRA 1163 (1990); *U.S. Department of the Interior, Indian Health Service, Gallup Indian Health Center, Gallup, New Mexico*, 48 FLRA 890 (1993).

Petitions seeking resolution of matters related to representation (e.g., petitions questioning if a current unit continues to be appropriate because of a substantial change in the character and scope of the unit) are usually filed at the time of the organizational changes, events not necessarily timed to coincide with contractual window periods. The filing of such a petition during the term of a contract is taken as an assertion that unusual circumstances exist, whether or not the petitioner actually uses this term of art.

For detailed discussion of specific situations involving unusual circumstances, see *RCL 4 - Good Faith Doubt of Majority Status* and *RCL 3C - Accretion*.

D. Effect of Dismissal, Withdrawal or Disclaimer on Subsequent Petitions

Certain time bars to the filing of petitions apply in situations where a party previously filed and then withdrew a petition for an election.

1. Bar after Withdrawal or Dismissal of Petition:

Section 2422.14(a) of the regulations provides that, when a petition seeking an election that has been timely filed is withdrawn by the petitioner or dismissed by the Regional Director less than sixty (60) days prior to or following the expiration of an existing agreement, another petition seeking an election is not timely if filed within a ninety (90) day period from either:

- a. the date the withdrawal is approved; or
- b. the date the petition is dismissed by the Regional Director when no application for review is filed with the Authority; or
- c. the date the Authority rules on an application for review.

Other pending petitions that have been timely filed
continue to be processed.

2. Bar after Withdrawal of Petition after Issuance of Notice of Hearing:

Section 2422.14(b) of the regulations provides that a petitioner who submits a withdrawal request for a petition seeking an election that is received by the Regional Director after issuance of a notice of hearing or approval of an election agreement, whichever comes first, will be barred from filing another petition seeking an election in the same unit or any subdivision of the unit for six (6) months of the date of approval of the withdrawal by the Regional Director. This provision applies whenever an election agreement is approved, including those approved after the close of a hearing.

3. Bar after the Filing of a Disclaimer:

Section 2422.14(c) provides that when an election is not held because the incumbent disclaims any representational interest in a unit, a petition by the incumbent seeking an election in the same unit or a subdivision of the same unit will not be timely if filed within six (6) months of cancellation of the election.

E. The effect of a contract on other timeliness issues that may arise in election cases.

There are no Authority decisions on the issues identified below. Thus, these issues are unresolved. See *CHM 58.3.23*.

The Region obtains all pertinent information informally from the parties. In considering representation case issues for which no Authority precedent exists, under section 7135(b) of the Statute, a decision of the Assistant Secretary of Labor for Labor Management Relations remains in full force and effect unless it has been revised or superseded by decisions issued pursuant to the Statute. *FNG I*, 25 FLRA 728 (1987). In addition, the Authority has stated that it may be appropriate to consider case law developed under the National Labor Relations Act. *Coast Guard*, 34 at 952, 953.

Filing a petition untimely: Section 2422.14(a) discusses bars for refiling petitions that are timely filed initially and later withdrawn or dismissed. This regulation does not discuss petitions which are

untimely filed initially.

Amendment of petition: Regional Directors may be required to consider the timeliness of amended petitions. See *General Services Administration, Region 4*, 6 A/SLMR 272 (1976). Cases decided by the NLRB reflect that the filing date of the original petition is controlling as to timeliness where the amendment does not substantially enlarge the character or size of the unit or number of employees in the unit and where the employers, operations and employees were contemplated in the original petition. *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958); *Illinois Bell Telephone Co.*, 77 NLRB 1073 (1948). However, where the amendment materially changes the unit, the Board found the date of the amended petition controlling when the original petition sought a single craft in a departmental unit, but was amended to seek a broader production and maintenance unit. *Hyster Co.*, 72 NLRB 937 (1947). In *Allied Beverage Distributing Co.*, 143 NLRB 149 (1963) the Board used the date of the amended petition as the date of filing when the original petition misnamed the employer in a material manner.

See HOG 48 for specific guidance on developing a record about this topic at hearing.

References:

Where agreements to extend a collective bargaining agreement during negotiations do not serve as a bar:

Department of Health and Human Services, Region IX, San Francisco, California, 12 FLRA 183 (1983).

U.S. Department of Defense, Army National Guard, Camp Keyes, Augusta, Maine, 34 FLRA 59 (1989).

Where by the terms of a collective bargaining agreement, a request to renegotiate an agreement prevented the automatic renewal of the contract:

Office of the Secretary, Headquarters, Department of Health and Human Services, 11 FLRA 681 (1983).

Ambiguity as to effective date of contract:

U.S. Department of the Interior, Redwood National Park, Crescent City, California, 48 FLRA 666 (1993) (a contract that became effective when it was approved by the agency head on June 2, 1998 was not a bar because of a reproduction error that made the effective date in the published copy of the agreement appear to read, "June 12, 1988").

Florida Air National Guard, St. Augustine, Florida, 43 FLRA 1475 (1992) (an agreement showing two different dates of approval by the agency head was not a bar to a petition).

Other considerations:

Although parties may waive their right to assert a contract bar, a contract bar may not be waived unilaterally by one of the parties to the collective bargaining agreement. *Department of Defense, Overseas Dependent Schools*, 1 A/SLMR 516 (1971).

13 Unit consolidation

Section 7112(d) of the Statute provides for the consolidation of existing units:

(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.

A. Consolidation of Units under Executive Order 11491, as amended

Consolidation of units originally resulted from a recommendation submitted by agencies and labor organizations in 1975 to the Federal Labor Relations Council (Council) when it considered proposing amendments to Executive Order 11491. The Council adopted a policy which provided for the consolidation of existing units into a single more comprehensive unit. The Council concluded that this policy would reduce fragmentation in bargaining unit structures and foster the development of a sound Federal labor-management relations program.

1. Standard:

The Council set forth several guidelines for unit consolidation that later formed the basis for the initial implementing regulations. Although the implementing regulations have been streamlined and revised, the guidelines remain valid:

- a. An agency and a labor organization may agree bilaterally

to consolidate, with or without an election, those bargaining units represented by the labor organization within the agency.

- b. The proposed consolidated unit must conform to the appropriate unit criteria.
- c. If there is no bilateral agreement, either party may petition to consolidate its units.
- d. A consolidation may occur with or without an election.
- e. Affected employees should be given adequate notice of a proposed bilateral consolidation, with the right to petition to hold an election on the issue of the proposed consolidation.
- f. A labor organization seeking an election on a proposed consolidation of existing units does not lose its status as the exclusive representative in the existing unit if the employees reject the consolidation.
- g. Election bars, certification bars, and agreement bars do not apply when parties seek to consolidate existing exclusive recognitions.
- h. The procedure for consolidating a labor organization's existing exclusively recognized units applies only to situations where there is no question as to whether the union represents the employees in the proposed consolidated unit.

2. Regulations:

The Assistant Secretary's regulations that implemented section 10(a) of Executive Order 11491, as amended, did not include a provision that specifically permitted the activity(ies) or the agency to file a petition to consolidate existing exclusively recognized units unless there was a bilateral agreement to do so. On the other hand, neither the Executive Order nor the implementing regulations

prohibited an agency from filing a consolidation petition absent a request to recognize such a unit.

B. Consolidation Provisions under the Statute

Consistent with section 7112(d), the following elements must be present in order for consolidation to occur:

- There are two or more units in the same agency;
- A labor organization holds exclusive recognition for these units;
- A petition is filed by the agency or the labor organization; and
- The larger, consolidated unit is appropriate pursuant to section 7112(a) of the Statute.

Thus, the plain language of the Statute provides for a petition to be filed by an agency or a union. However, the Statute also requires that the petition be for units “for which a labor organization is the exclusive representative.” The legislative history of the Statute is clear that agencies are allowed to file petitions to consolidate, [See *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, S. Rep. No. 95-969, at 763 (1978) and H. Rep. No. 95-1403, at 693] and that section 7112(d) “should better facilitate the consolidation of small units.” [124 *Cong. Rec.* H 9634 (daily ed. Sept. 13, 1978) (statement by Rep. Udall)]. It is not clear, however, whether the unions must agree to the consolidation. The legislative history sheds no light on this issue.

The current regulations eliminated any pre-filing requirements for petitions to consolidate. Section 2422.2(c) of the regulations provides that only an agency or a labor organization may file a petition to consolidate existing units for which a labor organization holds exclusive recognition. The regulations provide no specific guidance on processing consolidation petitions and the supplementary information that accompanied the proposed regulations and the final regulations shed no light on the issue.

The supplementary information related to § 2422.2 accompanying the proposed regulations stated that the “[c]urrent pre-filing requirements applicable to UC petitions are eliminated.” Federal Register, Vol. 60, No. 150 (August 4, 1995), The supplementary information accompanying the final regulations was silent on processing petitions to consolidate units. Federal Register, Vol. 60, No. 250 (December 29, 1995).

1. Agency standing to file petition:

One of the unresolved questions that has been recently raised in a petition is whether the exclusive representative of units in an agency or the national union must agree to the consolidation when an agency files the petition. Until the Authority decides this issue, Regions take the position that an Agency has standing to file a petition to consolidate units for which a national union holds certification even if the certification is held by locals of the same national union in separate units. If the unions involved in the petition object to the consolidation, the Regional Director issues a Notice of Hearing on two issues:

- a. whether the Agency/Activity has standing to file when the unions object and
- b. whether the proposed consolidated unit is appropriate pursuant to section 7112(a).

The issue of whether the national union has authority to file a consolidation petition even though the locals hold the certification has already been decided:

2. A National Union Can File a Petition to Consolidate Units Represented by Local Affiliates under Section 7112(d) of the Statute

Under both the Executive Order program and under the Statute, the term “labor organization” when used for describing the consolidation of units has been interpreted to include a national union that seeks to consolidate units for which its local chapters hold exclusive recognition. In *Internal Revenue Service (IRS)*, 7 A/SLMR 357 (1977) *aff’d Internal Revenue Service, Washington, DC and National Treasury Employees Union*, 6 FLRC 289, n. 2

(1978), the Assistant Secretary found that there was nothing in the Order, the FLRC Report, or the regulations that required the Assistant Secretary to challenge the authority of a national labor organization to file a unit consolidation petition on behalf of its exclusively recognized local chapters. Further, the Assistant Secretary found that the affected employees would be protected from arbitrary action by a national organization seeking a consolidation by the provisions of the Order and the Assistant Secretary's regulations which provided for an election on the question of any proposed consolidation at the request of either party or 30 percent or more of the affected employees. The FLRC affirmed the Assistant Secretary's decision that a national labor organization does not need local authorization to file a consolidation petition on behalf of its constituent local chapters.

The Authority also has allowed a national union to consolidate local units. See *U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio (AFMC)*, 55 FLRA 359, 361 (1999) (citation omitted) (Authority approved a consolidation where a national union sought to consolidate one consolidated unit and six units represented by local affiliates).¹⁶

¹⁶ Moreover, there does not appear to be any rule to preclude two different labor organizations from jointly filing a petition to consolidate their units as long as the consolidation occurs within a single agency and meets the appropriate unit criteria.

3. Concepts of Unit Consolidations:

< In *AFMC*, 55 FLRA at 362, the Authority stated that Section 7112(d) of the Statute permits consolidation of two or more bargaining units represented by the same exclusive representative "if the Authority considers the larger unit to be appropriate." This provision was intended by Congress to "better facilitate the consolidation of small units" into more comprehensive ones. *Department of Transportation, Washington, DC (DOT)*, 5 FLRA 646, 652 (1981) (quoting 124 Cong. Rec. H9634 (daily ed. Sept. 13, 1978) (statement of Representative Udall)). Consolidation serves a statutory interest in reducing unit fragmentation and in promoting an effective, comprehensive bargaining unit structure. *See Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees (AAFES), AFL-CIO*, 5 FLRA 657, 661-62 (1981); *Air Force Logistics Command, United States Air Force Wright-Patterson Air Force Base, Ohio and International Association of Fire Fighters, (AFLC Council), AFL-CIO-CLC, (AFLC)*, 7 FLRA 210, 214 (1981).

Previously, case law implied that the purpose of a unit consolidation petition was to consolidate **all** units within an agency for which a particular union holds exclusive recognition. *See DOT*, 5 FLRA at 652 (1981) (Authority denied a petition to consolidate five field units for which a union held recognition and one unit where recognition was at the national union on the basis that the proposed unit would not ensure a clear and identifiable community of interest nor promote effective dealings and efficiency of operations. The Authority noted the small dispersion of field employees compared to headquarters employees. The Authority also noted that the petitioner did not seek to include in the proposed consolidated unit all of the field employee units it represented. However, the Authority, in the alternative, considered whether a consolidated unit of only headquarters employees would be appropriate and denied that also.) In *AFMC*, 55 FLRA at 360, the Authority found a petitioner's request to consolidate six of seven individual units with its national consolidated unit effectuated the purposes of the Statute and consolidation stating:

The purpose of consolidation is to reduce fragmentation of units. See *AAFES*, 5 FLRA at 661-62. The Authority has never imposed a requirement that a consolidation petition eliminate unit fragmentation. The consolidation of six AFGE bargaining units into the current consolidated unit reduces unit fragmentation. The fact that one bargaining unit was not included in the proposed consolidation indicates that a different petition might have reduced unit fragmentation even more than the petition presented; it does not establish that the current petition does not reduce unit fragmentation.

- < The reference in section 7112(d) to the consolidation of "appropriate" units incorporates the appropriate unit criteria established in section 7112(a). Those criteria provide that a unit may be determined to be appropriate if it will: (1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency involved; and (3) promote efficiency of the operations of the agency involved. 5 U.S.C. §§ 7112(a). The Authority has identified a number of factors that generally indicate whether these statutory criteria are met, see generally, *United States Department of the Navy, Fleet and Industrial Supply Center, Norfolk, Virginia (FISC)*, 52 FLRA 950, 960-61 (1997), and has consistently applied certain of these factors in consolidation cases. See *U.S. Department of Justice*, 17 FLRA 58, 62 (1985); *AAFES*, 5 FLRA at 660; *DOT*, 5 FLRA at 652. The Regional Director determines whether the proposed consolidated unit conforms to the appropriate unit criteria and that there is no question as to whether the labor organization represents the employees in the proposed consolidated unit.

- < Any unit found appropriate for consolidation must conform to the unit descriptions of the current exclusively recognized units. *Education Division, Department of Health, Education and Welfare, Washington, D.C.*, 7 A/SLMR 312 (1977).

- < In determining whether a proposed consolidated unit will ensure a clear and identifiable community of interest, the following factors are considered:

- the degree of commonality and integration of the mission and function of the components involved, (“separate missions of each component need only ‘bear a relationship’ to one another, and the functions need only ‘similar or supportive’ to warrant consolidation.” *Department of the Navy, U.S. Marine Corps and American Federation of Government Employees, AFL-CIO (Department of the Navy)*, 8 FLRA 15, 22 (1982). *See also AAFES*, 5 FLRA at 661 stating that “while the [agency] pointed out the distinct role played by the Distribution Regions, it is clear that their function is integrally related to that of the Exchange Regions”).
- the distribution of employees throughout the organizational and geographic components of the agency,
- the degree of similarity of occupational undertakings of the employees in the proposed consolidated unit, and
- the locus and scope of personnel and labor relations authority and functions. *U.S. Department of Justice*, 17 FLRA 58, 62 (1985).

< In determining whether a proposed consolidated unit will promote effective dealings with and efficiency of operations of the agency, the Authority looks at whether:

- the employees in the proposed unit are subject to the same operational chain of command,
- the degree and nature of functional and organizational integration,
- employee interchange and job similarity, and
- common or uniform policies regarding personnel and labor relations apply throughout the existing units. *Naval Submarine Base, New London Naval Submarine School, Navy Submarine Support Facility New London, Personnel Support Activity New London and Naval Hospital Groton*, 46 FLRA 1354 (1993).

See HOG 49 for specific guidance on developing a record about this topic at hearing.

C. Other references :

Community of interest:

Department of Defense, U.S. Army Corps of Engineers, 5 FLRA 677 (1981). [consolidation denied - represented employees not sufficiently well-distributed throughout the administrative and geographic structure of the Agency so as to constitute a meaningful consolidated unit of all the Agency employees represented by the Petitioner; the unit sought enjoys no common thread of shared missions, but rather a wide diversion of disparate missions based largely on local geographic conditions; the records also reflected a complete lack of commonality with regard to job classifications and working conditions]

U.S. Army Training and Doctrine Command, 11 FLRA 105, 109 (1983); [consolidation denied; proposed unit limited to 5 of the 17 TRADOC installations, and the union did not represent all of the employees at any of the five. Most of the employees included in the petition, making up only about 15% of the workforce have different job classifications and working conditions because of the uniqueness of the mission. Moreover, personnel authority and control of labor relations have historically been delegated to each local installation.]

Department of the Air Force, Air Training Command, Randolph AFB, TX, 12 FLRA 261, 265 (1983); [petition to consolidate NFFE units at the activity denied where Authority found that the employees were involved in disparate missions requiring different job skills, classifications and duties; are not involved in an integrated work process; and do not transfer or interchange among the existing units. Additionally, the proposed consolidated unit would be limited to only 5 of the Activity's 14 geographical locations, constituting only 10% of the activity's total civilian workforce. Authority and control over personnel and labor relations matters historically have been delegated to each local installation commander.]

Department of Health and Human Services, 13 FLRA 39, 42 (1983); [petition to consolidate 4 of HHS 10 regional offices denied where employees not sufficiently well distributed throughout the the administrative and geographic structure of the agency so as to

constitute a meaningful consolidated unit. Cited other reasons not dissimilar to above.]

U.S. Army Support Command, Hawaii, 13 FLRA 529, 532 (1983); [units represented by IAM were subject to a reorganization and as a result, the Authority denied consolidation stating that a unit consolidation petition was not the proper vehicle for clarifying previously recognized or certified units to reflect changes caused by reorganizations. Thus, the employees do not share, with each other or with other employees in the proposed consolidated unit common mission, supervision, or uniform personnel practices or labor relations policies. The Authority found that the proposed unit would not ensure a clear and identifiable community of interest.]

Headquarters, U.S. Army Materiel Development and Readiness Command, 13 FLRA 679, 682-83 (1983); [the Authority denied proposed consolidated based on the limited representation across the agency's organization lines for the same reasons cited above.]

U.S. Department of Justice, 17 FLRA at 62. [the Authority denied consolidation proposed by AFGE citing that the proposed consolidated unit encompasses only 3 of 6 bureaus, fragments of the OBDs, which were organizationally treated as a bureau, and an independent agency; further most of the employees, representing 31% of the work force have divergent career interests and working conditions (attributable to the diverse missions of their respective organizational components). The record reflected a minimal amount of interchange of employees and the majority of job classifications and qualifications as well as the terms and conditions of employment related to the unique functions of the particular organizations in which they were employed.]

Effective dealings/Efficiency of operations:

AAFES, 5 FLRA 657, 661-662 (1981); [consolidation granted. The Authority found that employees in proposed unit are sufficiently well-distributed throughout the organizational and geographical elements which make up AAFES so as to constitute a meaningful consolidated unit of all AAFES employees who are represented by

the petitioner. The Authority found that AAFES is an integrated organization with basically a single primary mission, providing retail facilities for eligible users and thus its employees are engaged in relatively similar functional and occupational undertakings throughout the organization. Further, the Authority found that personnel and labor relations authority is centralized extant within AAFES, and AAFES establishes broad policies at the national level. As a result, the Authority found the proposed unit promoted effective dealings and efficiency of operations.]

Air Force Logistics Command, U.S. Air Force, Wright-Patterson AFB, Ohio, 7 FLRA 210, 213 (1981); [granted consolidation to units of firefighters - finding that the proposed consolidated unit, which encompasses all of the fire prevention units of AFLC except those represented by AFGE is appropriate for the reasons cited in *AAFES*. All of the employees represented by the petitioner were within the proposed unit, perform a unique job function, have common overall supervision at the AFLC level and share essentially similar job classifications and organization, and uniform program direction, personnel policies and practices and labor relations practices. The Authority found that the unit would also promote effective dealings because the proposed unit is activity-wide, the employees are sufficiently distributed throughout the organization, so as to constitute a meaningful consolidated unit, and that AF regulations establish personnel and labor relations policy within all of AFLC whose program direction comes from the AFLC level. Finally the Authority stated that the AFLC Fire Program Manager provides overall guidance and expertise to the components within the proposed unit and the major fire protection program policies are established by the AF to ensure standardization. Thus, the Authority stated that the proposed consolidated unit will promote a more comprehensive, effective bargaining unit structure and will reduce unit fragmentation and thus promote efficiency of agency operations.] (Emphasis added)

Department of the Navy, U.S. Marine Corps, 8 FLRA 15, 23 (1983). [granted consolidation based on the following factors: degree of commonality and integration of the mission and function of the components involved; the distribution of the employees in the proposed unit; and the locus and scope of personnel and labor

relations authority and functions. The consolidated unit will provide for bargaining in a single unit rather than in the existing 22 units, thereby reducing fragmentation and promoting a more effective, comprehensive bargaining unit structure to effectuate the purposes of the Statute.] (Emphasis added)

NOTE: in last two cases cited, the Authority granted the consolidation noting that in addition to other factors, all units represented by the petitioner at the time of the proposed consolidation were included in the petition.

Department of Defense, National Guard Bureau and National Federation of Federal Employees, Independent, Department of Defense, National Guard Bureau and National Association of Government Employees, 13 FLRA 232 (1983).

U.S. Customs Service, 8 A/SLMR 221 (1978).

U.S. Department of Defense, National Guard Bureau, 55 FLRA 657 (1999).

U.S. Department of Treasury, Internal Revenue Service and U.S. Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service, 56 FLRA 486 (2000).

14 Units including supervisors

Section 7135 of the Statute states the circumstances in which recognition may be granted or continued in units which include supervisors. Section 7135(a)(2) provides that nothing shall preclude:

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.

Mixed units of supervisors and nonsupervisory personnel:

The Authority's view that section 7135(a)(2) permits the "grand fathering" of mixed units of both supervisory and nonsupervisory personnel has been rejected by the courts. *United States Department of Energy v. FLRA (Department of Energy)*, 880 F.2d 1163 (10th Cir. 1989), noting that section 7112(b)(1) of the Statute prohibits supervisors from being included in bargaining units established under the Statute unless their inclusion is expressly authorized by section 7135(a)(2) of the Statute. The court held that section 7135(a)(2) allows the Authority "to recognize only exclusive units of supervisors, not mixed units." *Id.* at 1167 (footnote omitted). *See also U.S. Department of Energy, Western Area Power Administration, Golden, Colorado v. FLRA*, No. 87-2062 (10th Cir. 1989).

However, the continuation of mixed units of supervisory and nonsupervisory personnel has been found to be a permissive subject of bargaining. *U.S. Department of Interior v. FLRA*, 23 F.3d 518 (DC Cir. 1994). Thus, if a union has historically represented such a mixed unit, the agency may agree in bargaining to continue to recognize the mixed unit, but is not required to do so. Similarly,

the agency may timely notify a union that it no longer wishes to be bound by a prior agreement in this permissive area of bargaining. *See also, U.S. Department of Interior v. FLRA*, 26 F.3d 179 (DC Cir. 1994) further discussing the permissive nature of bargaining over continued inclusion of supervisors in mixed units.

Units limited to supervisors: The Authority will permit exclusive recognition in a unit consisting solely of supervisors in very limited circumstances in which a labor organization has:

- a) traditionally or historically represented units of supervisors in private industry **and**
- b) held exclusive recognition for a unit of supervisors in a federal agency on the effective date of the Statute.

See Department of Energy, Western Area Power Administration, 38 FLRA 935 (1990).

It is anticipated that few, if any, petitions will be filed concerning the establishment of either mixed units or supervisor-only units. If petitions are filed seeking to exclude supervisors from existing mixed units, relevant information would include evidence to show whether the agency gave timely notice to the union of its intention to remove supervisors from the existing mixed unit.

See HOG 50 for specific guidance on developing a record about this topic at hearing.

EMPLOYEE CATEGORIES
RCL 15 through RCL 28

15 General considerations

Definitions for terms such as exclusive representative, employee, professional, supervisor and labor organization are found in section 7103 of the Statute. In addition, section 7112 prohibits the inclusion in any bargaining unit of specific categories of employees (e.g., confidential, engaged in federal personnel work).

The Authority alone is empowered to determine bargaining unit eligibility. See *U.S. Small Business Administration (SBA)*, 32 FLRA 847 (1988), reconsideration granted 36 FLRA 155 (1990) (Authority reinstated the grievance due to the time delay and a final determination on the unit status in a clarification of unit proceeding).

The Authority makes such determinations based on testimony as to an employee's actual duties at the time of the hearing, rather than on duties that may exist in the future. See *Department of Housing and Urban Development, Washington, D.C.*, 35 FLRA 1249, 1256-1257 (1990). Evidence such as a position description for a position may be useful in making unit determinations, but is not controlling. The hearing addresses whether the incumbent is performing all work listed in the position description, or is performing other work not listed in the position description. Some cases involve special circumstances which are also addressed at the hearing.

Arbitrators are not empowered to decide unit eligibility: The responsibility for determining appropriate units under the Statute is the responsibility of the Authority. This responsibility may include the resolution of questions concerning the bargaining unit status of individuals. *SBA* at 853 citing *National Archives and Records Service, General Services Administration and Local 2578, American Federation of Government Employees, AFL-CIO*, 9 FLRA 381 (1982).

Employee recently placed in position: An employee who recently filled a position may be the subject of a petition to clarify

the status of the position. Where an employee has recently been placed in a position, duties are considered to have been actually assigned where: (1) it has been demonstrated that, apart from a position description, an employee has been informed that he or she will be performing the duties; (2) the nature of the job clearly requires those duties, and (3) the employee is not performing those duties at the time of the hearing solely because of lack of experience on the job. The Authority does not consider duties to have been actually assigned where: (1) the assignment of duties is speculative, because the nature of the job may change or the nature of the job does not require such duties; or (2) although duties may be included in a written position description, it is not clear that the duties actually will be assigned to the employee or that the employee has been informed that he or she will perform these duties. *See Department of the Interior, Bureau of Reclamation, Yuma, Arizona*, 37 FLRA 239 at 245 (1990).

Vacant positions: Generally, eligibility determinations will not be made for vacant positions. *See Department of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Colorado*, 6 FLRA 52 (1981). The Authority has carved out two exceptions in which it will decide the bargaining unit status of vacant positions.

1. Where the clarification of a position will decide if an individual has access to the negotiated grievance procedure, it is appropriate to clarify the position, even if it is vacant at the time of the hearing. *See HQ, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina (Fort Bragg)*, 34 FLRA 21 (1990).
2. The Authority extended its holding in *Fort Bragg* to include resolving a unit clarification petition concerning any vacant position when that unit determination is a collateral issue necessary to the resolution of a grievance at arbitration. *U.S. Department of Veterans Affairs (VA)*, 55 FLRA 781 (1999). Consistent with its holding in *Fort Bragg*, the Authority held that “the Regional Director shall determine the unit status of a vacant position when both parties agree or an arbitrator decides that the unit determination is necessary to the resolution of the grievance at arbitration. In such event, the grievance must be placed in abeyance

pending a decision on a petition for clarification of unit.”
VA at 784.

New positions: New employees are automatically included in an existing bargaining unit where their positions fall within the express terms of a bargaining certification and where their inclusion does not render the bargaining unit inappropriate. Often the positions are newly created. *Department of the Army, Headquarters, Fort Dix, Fort Dix, New Jersey (Fort Dix)*, 53 FLRA 287 (1997). See also *U.S. Department of the Air Force, Carswell Air Force Base, Texas*, 40 FLRA 221 (1991) and *U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Northeast Region*, 24 FLRA 922 (1986). In *Division of Military and Naval Affairs, New York National Guard, Latham, New York, and Selfridge ANG, Michigan and Alaska National Guard (New York NG and Alaska NG)*, 56 FLRA 139 (2000), the Authority considered whether three employees who were separated from their National Guard technician positions and offered Title 5 competitive service provisions pursuant to 5 U.S.C. § 3329 were included in their respective bargaining units. The Authority found that the applicable unit descriptions were “sufficiently broad to include section 3329 employees.” *New York NG and Alaska NG* at 142.

Change in status of employees: If parties agree on inclusions and exclusions at an election agreement meeting, and the Regional Director approves an election agreement, those inclusions and exclusions are binding for the purposes of a later filed petition to clarify the unit unless:

1. If ineligible - stay ineligible unless:
 - a) changed circumstances, *see Federal Trade Commission (FTC I)*, 15 FLRA 247 (1984) (the parties can show that the duties and functions of established positions or job classifications covered in such agreements have undergone meaningful changes after the unit was certified), or
 - b) positions were eligible in the first instance and constitute a residual unit. *See Federal Trade Commission (FTC II)*, 35 FLRA 576 (1990).

2. If eligible - stay eligible unless:
 - a) changed circumstances, or
 - b) position was ineligible in the first instance under 7112(b)(1) thru (7) statutory exclusions. *See U.S. Department of the Army, U.S. Army Law Enforcement Command Pacific, Fort Shafter, Hawaii, 53 FLRA 1602 (1998) (the parties improperly agreed to include positions that were not in conformance with the Statute and were subject to statutory exclusions).*

See RCHM 35, Preparation and Checking of Eligibility List, for information about updating the eligibility list after the election agreement and prior to the election. See HOG 51 for specific guidance on developing a record about this topic at hearing.

Additional references:

Department of Labor, Office of the Solicitor, Arlington Field Office, 37 FLRA 1371 (1990).

Veterans Administration Medical Center, Prescott, Arizona, 29 FLRA 1313 (1987) and cases cited therein.

16 Employee within the meaning of the Statute

An “employee” is defined in section 7103(a)(2) of the Statute as an individual employed by an “agency,” with certain specific exceptions. The definition of employee is very broad and has been applied to a wide variety of federal positions established in accordance with various laws and regulations. Inquiry into the status of individuals as “employees” is not limited to questions of whether a particular exception in section 7103(a)(2) applies to the position(s) at issue. The threshold question in any case involving the status of individuals as “employees” is whether the employees are employed by an “agency” as defined in section 7103(a)(3).

The Authority has considered many different government entities and types of appointments in deciding whether individuals meet the definition of “employees.” Some of these decisions are based on reading the Statute in conjunction with other laws and regulations.

Government Entities:

- < Nonappropriated fund (NAF) instrumentalities are established under the jurisdiction of the armed forces for the comfort, pleasure and physical improvement of military members. Employees paid from nonappropriated funds of the Army and Air Force Exchange Service, the Navy, Marine Corps and Coast Guard exchanges are employees; these NAF activities are specifically included in the definition of agency; see section 7103(a)(3) of the Statute.
- < The Kennedy Center for the Performing Arts, as a bureau of the Smithsonian Institution, is an agency within the meaning of the Statute. Employees of both entities are employees within the meaning of section 7103(a)(2). *Kennedy Center for the Performing Arts, Washington, D.C.*, 45 FLRA 835 (1992).
- < The U.S. Postal Service is a government owned corporation and, therefore, is not an agency within the meaning of section 7103(a)(3). Postal Service employees are subject to the LMRA; they are not employees within the meaning of the Statute.

- < Employees of the U.S. Foreign Service are excluded from the definition of employee in section 7103(a)(2), but are subject to a different law governing labor-management relations. Section 1001 of the Foreign Service Act, which is administered by the FLRA, covers labor-management relations for Foreign Service employees.
- < The Federal Reserve Board, including the Board of Governors, was found by the Assistant Secretary of Labor for Labor-Management Relations in 1978 not to be an agency within the meaning of the Executive Order. *Federal Reserve Board, Board of Governors, Washington, D.C., Case No. 22-08347(RO)*, appealed denied (1978).

Types of Appointments:

- < The Authority has found it appropriate in some situations to apply the definition of employee contained in 5 U.S.C. 2105(a) in addition to the definition of employee found at section 7103(a)(2) of the Statute. *U.S. Department of Labor and Operations Maintenance Service, Inc. (Keystone Job Corps Center)*, 32 FLRA 622 (1988).
- < Excepted service employees appointed pursuant to 5 U.S.C. 2103, are considered “employees.”
- < Off-duty military personnel employed by an agency are “employees” and may not be excluded from appropriate units based solely on their military status. *See Navy Exchange, Mayport, Florida*, 1 A/SLMR 142 (1970).
- < Teachers employed by the Department of Defense Dependents Schools system are employees and are not independent contractors. *See Fort Knox Dependents Schools*, 5 FLRA 33 (1981). If employed overseas, teachers are subject to unique terms and conditions of employment established by the Overseas Teachers Pay and Personnel Practices Act, 20 U.S.C. 901, et seq.
- < Health care professionals employed under Title 38 have unique appointments and terms and conditions of employment. Nevertheless, they are employees within the meaning of the Statute.

- < Registered aliens working within the United States are employees under section 7103(a)(2). *See U.S. Department of the Treasury, Internal Revenue Service, Detroit District, Detroit, Michigan, 38 FLRA 52 (1990).*
- < A proposed unit of VISTA volunteers was not appropriate for exclusive recognition. Although they worked for a federal agency, VISTA volunteers were specifically denied status as federal employees in the Economic Opportunity Act of 1964. Thus, VISTA volunteers are not “employees”. *See VISTA, 1 A/SLMR 445 (1974).*
- < Recruits who have been offered positions pending successful completion of final certification procedures or pre-employment examinations, are not employees within the meaning of the Statute. *See Department of Defense Office of Dependent Schools, 36 FLRA 871 (1990).*
- < Employees assigned to special purpose Intergovernmental Personnel Act (IPA) assignments “remain employed in an agency” within the meaning of section 7103(a)(2)(A) of the Statute. In this case, individuals detailed to work at an Indian health care facility remain section 7103(a)(2) employees, because 5 U.S.C. § 3373 dictates that they remain employees of the agency. *Phoenix Area Indian Health Service, Sacaton Service Unit, Hu Hu Kam Memorial Hospital, Sacaton, Arizona, 53 FLRA 1200 (1998), motion for reconsideration denied, 54 FLRA 243 (1998) and Phoenix Area Indian Health Service, Owyhee Service Unit (Owyhee PHS Indian Hospital, and Elko Clinic) Owyhee, Nevada, 53 FLRA 1221(1998).*
- < Employees participating in a Compensated Work Therapy (CWT) program at the Department of Veterans Affairs, are not employees under section 7103(a)(2) of the Statute. Section 1718(a) of Title 38 states that participants in rehabilitative work programs under that section are not “considered employees of the United States for any purpose.” 38 U.S.C. § 1718(a). Section 1718 operates as a statutory exclusion from the Statute. *U.S. Department of Veterans Affairs, Hunter Holmes McGuire Medical Center, 54 FLRA 471(1998).*

See HOG 52 for specific guidance about this topic at hearing.

17 **Internal audit / investigation function**

Section 7112(b)(7) excludes from all bargaining units:

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.

Employees engaged in investigation or audit functions are excluded from bargaining units under section 7112(b)(7) on the basis that inclusion of individuals performing these functions would create a conflict with bargaining unit status. The nature of the investigation/audit and what the investigation/audit might uncover as it pertains to unit employees is controlling as to this exclusion. For example, individuals who audit agency programs and/or contracts and whose audits may uncover the failure of employees to comply with programs, or employee fraud waste and abuse, are excluded pursuant to section 7112(b)(7). *See Small Business Administration*, 34 FLRA 392, 400 - 402 (1990). Thus, auditors or investigators do not have to be directly investigating unit employees for this exclusion to be considered.

The section 7112(b)(7) standard includes any audit or investigation that relates to the "honesty and integrity" of particular types of employees. It is not limited to employees who perform investigations relating to "fraud, waste, and abuse." *U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois (DOJ)*, 55 FLRA 1243 (2000) [the Authority instructed the Regional Director to "consider whether the Legal Assistant's (the disputed employee) investigations of allegations that employees have used excessive force or have violated the civil rights of inmates constitute investigation of whether such employees have performed their duties honestly and with integrity."]. Also, the fact that the audits or investigations do not regularly find these violations is not dispositive.

See HOG 53 for specific guidance about this topic at hearing.

Other references:

*Department of Labor, Office of the Inspector General,
Region I, Boston, 7 FLRA 834 (1982).*

*U.S. Department of the Navy, Navy Audit Service,
Southeast Region, 46 FLRA 512 (1992).*

18 *Administering a labor relations statute*

Three sections of the Statute discuss exclusions based on duties related to “administering a labor relations statute.”

Section 7103(a)(3) excludes from the definition of “agency” the Federal Labor Relations Authority and the Federal Service Impasses Panel.

Section 7112(b)(4) excludes from any bargaining unit “an employee engaged in administering any provisions of the Statute.” This provision includes federal mediators of the Federal Mediation and Conciliation Service who were found to administer the provisions of Section 7119(a) of the Statute and, therefore, are not eligible for representation. *Federal Mediation and Conciliation Service, Region 7, San Francisco, California*, 3 FLRA 138 (1980); and *Federal Mediation and Conciliation Service*, 52 FLRA 1509 (1997).

In *United States Department of Labor, Office of the Solicitor, Region III (DOL Solicitor)*, 8 FLRA 286 (1982), the Authority concluded that employees who enforce section 7120(a) through (e) of the Statute are engaged in administering its provisions pursuant to section 7112(b)(4).

Other federal employees are employed by federal agencies which administer statutes that pertain to labor-management relations. As to their situation, **section 7112(c)** provides as follows:

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 provisions applies; or

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

Section 7112(c) pertains solely to those employees who are involved in administering a law intended to affect or regulate, in some way, the **collective bargaining process** or other matters directly affecting the labor-management relationship. *U.S. Department of Labor, Pension and Welfare Benefits Administration*, 38 FLRA 65 (1990). Section 7112(c) of the Statute does not prohibit these employees from being represented by a union in a bargaining unit. Rather, section 7112(c) places restrictions on the types of unions that can represent such employees. These restrictions were enacted "to prevent conflicts of interest and appearance of conflicts of interest which would result from represented employees administering labor laws that apply to other employees from their union." See *United States Department of Labor, Pension and Welfare Benefits Administration*, 30 FLRA 1229, 1234 (1988), citing the *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, Committee Print No. 96-7 at 925.

For example, unlike the Department of Labor (DOL) employees who administer Section 7120 (a) through (e) of the Statute and are therefore excluded from coverage based on 7112(b)(4), the Authority reversed an earlier decision and found that DOL employees who administer the Employee Retirement Income Security Act (ERISA) are not precluded from being in a unit represented by AFGE. The Authority stated that ERISA is not a law relating to "labor-management relations" within the meaning of section 7112(c) of the Statute. Rather, the primary functions of ERISA are to regulate and investigate the funding and administration of employee benefit plans. Involvement with a labor organization is in the context of alleged violations of ERISA, not alleged violations of laws relating to collective bargaining or other matters particular to the labor-management relationship. *U.S. Department of Labor, Pension and Welfare Benefits Administration*, 38 FLRA 65 (1990) reversing in part *U.S. Department of Labor*, 23 FLRA 464 (1986).

Interpreting the phrase "affiliated directly or indirectly" in section 7112(c): In *National Mediation Board*, 54 FLRA 1474 (1998), the Authority considered the meaning of "affiliated directly or indirectly" in the Statute for the first time. The NMB administrators

the Railway Labor Act. The Authority construed the phrase to include the relationship between unions that are linked to each other through their separate affiliation with the AFL-CIO. The Authority concluded that the relationship between the petitioner and other union affiliates of the AFL-CIO that represent employees covered by the Railway Labor Act falls within the phrase “indirect affiliation” under section 7112(c).

Applying the definition “administer” to sections 7112(b)(4) and 7112(c): The Authority further elaborated on the word “administer” as construed by the Authority under section 7112(b)(4), stating that since section 7112(b)(4) and 7112(c) “were enacted for the same purpose -- to protect against a conflict of interest between administering employees and the employees covered by the labor relations statute being administered – there appears to be no practical difference in the manner in which the word ‘administer’ as used in each of these provisions, is construed.” *National Mediation Board (NMB II)*, 56 FLRA 1 (2000). Thus, the Authority stated that “administer” means to have charge of, manage, and applies to both section 7112(b)(4) and 7112(c). Any other employees in the agency “who are not responsible for managing, implementing, carrying-out, or otherwise executing a provision of law relating to labor-management relations to be included in an appropriate unit.” *NMB II* at 5. (footnotes omitted).

Employees administering laws affecting labor unions as employers: Labor unions that are employers are subject to laws and regulations relating to discrimination in employment and wage and hour standards, to name a few. Section 7112(c) does not apply to federal employees who administer these types of laws, because these laws do not pertain to the collective bargaining process. Any union can represent these federal employees, as long as the unit meets the appropriateness of unit criteria, as defined in section 7112(a)(1) of the Statute and as addressed in *RCL 1*.

See HOG 54 for specific guidance about this topic at hearing.

19 Confidential employee

“Confidential employee” is defined in Section 7103(a)(13) of the Statute as:

... an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.

A unit is not appropriate if it includes confidential employees [section 7112(b)(2)].

An employee is a "confidential" if (1) there is evidence of a confidential working relationship between an employee and a supervisor or manager and (2) the supervisor or manager is significantly involved in labor-management relations. This two-part, labor-nexus test is used to examine the nature of an employee's confidential working relationship. *See U.S. Department of Labor, Office of the Solicitor, Arlington Field Office, 37 FLRA 1371 (1990)*. Both factors must be present for an employee to be considered "confidential" within the meaning of section 7103(a)(13). *See U.S. Army Plant Representative Office, Mesa, Arizona, 35 FLRA 181 (1990)*. Thus, a determination of confidential status is dependent upon the work performed by the individual with whom the employee works. This individual may be the employee's supervisor or may be another manager.

An individual who actually formulates or effectuates management policies in the field of labor-management relations is considered a confidential employee. *U.S. Department of Housing and Urban Development, Washington, D.C., 35 FLRA 1249, 1255-57 (1990)*. Other responsibilities identified by the Authority in this regard include:

- a. advising management on or developing negotiating positions and proposals,
- b. preparing arbitration cases for hearing, and

- c. consulting with management regarding the handling of unfair labor practice cases.

U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois (DOJ), 55 FLRA 1243 at 1247 (2000).

- d. engaging in partnership activities that includes the formulation and effectuation of labor relations policies. See *U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky, 53 FLRA 312, 319 (1997)* (collective bargaining may occur in a variety of ways, including the use of collaborative or partnership methods). *DOJ, 55 FLRA 1246 at n.5*

Other individuals who are privy to labor-management relations policies as they are developed are excluded on the basis of confidential status, because their inclusion in a bargaining unit would create a conflict of interest between the employee's work duties and unit membership.

Therefore, at a hearing it is necessary to explore not only the work of the employee whose status as a confidential is in dispute, but also the work of the person with whom or for whom the disputed employee works. It is also important to focus on the stage at which this confidential employee is involved in the process by which management labor-relations policies are developed (i.e., is the employee present during the development of the policies, or does the employee's involvement occur after the management policy has been developed and decided). An employee's mere access to labor relations material does not justify unit exclusion.

See HOG 55 for specific guidance about this topic at hearing.

Other references:

Department of Veterans Affairs, Regional Office, Waco, Texas, 50 FLRA 109, 111-12 (1995).

Department of Interior, Bureau of Reclamation, Yuma, Arizona, 37 FLRA 239 (1990).

U.S. Department of Labor, 33 FLRA 265 (1988). (Authority rejected union's argument that a limited amount of actual confidential labor relations work does not provide a substantial basis for excluding employees from a bargaining unit.)

Tick Eradication Program, Veterinary Services, Animal and Plant Inspection Service, United States Department of Agriculture, 15 FLRA 250 (1984).

Red River Army Depot, Texarkana, Texas, 2 FLRA 659, 660 (1980).

Associated Day Care, 269 NLRB 178, at 181(1984) ("It is well established that mere access to confidential labor relations material such as personnel files, minutes of management meetings, and grievance responses is not sufficient to confer confidential status; even the typing of such material does not, without more, warrant a finding of confidential status. Thus, unless it can be shown that the employee has played some role in creating the document or in making the substantive decision being recorded, or that the employee regularly has access to labor relations policy information before it becomes known to the union or employees concerned, the Board will not find the employee to have confidential status. Based on the record evidence, we find that the Employer's administrative assistants are expected to play a role in the investigation of grievances which will affect the decision made by management on the merits of a grievance and that this is sufficient to render them confidential employees. Furthermore, we find that they are expected to have regular access to, and on occasion to type, memoranda concerning management proposals for collective bargaining before these proposals are presented to the Union; we also note that they will regularly see the minutes of the weekly management meetings at which management proposals for collective bargaining will be discussed. While the administrative assistants may spend relatively little of their working time performing these duties, the amount of time devoted to labor relations matters is not the controlling factor in determining confidential status.")

NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170, at 189 (1981) (The Supreme Court upheld "labor nexus" test for excluding confidential employees, i.e., that the Board will exclude confidential secretaries from bargaining units only if those employees "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.")

20 **Employees engaged in personnel work**

Section 7112(b)(3) of the Statute excludes from an appropriate units "an employee engaged in personnel work in other than a purely clerical capacity." Employees are considered "personnelists" under section 7112(b)(3) if their inclusion in the unit would result in a conflict of interest between work duties and union membership.

Nature of personnel work: A position is excluded under section 7112(b)(3) of the Statute when: (1) the character and extent of involvement of the incumbent in personnel work is more than clerical in nature; and (2) the duties of the position in question are performed in a non-routine manner or are of such a nature as to create a conflict of interest between the incumbent's union affiliation and job duties. *See Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Cincinnati District, Cincinnati, Ohio*, 36 FLRA 138, 144 (1990).

Exercise of independent judgment and discretion: Employees who exercise independent judgment and discretion in initiating personnel actions or making recommendations to management on personnel actions are engaged in federal personnel work in other than a purely clerical capacity. *See U.S. Department of Housing and Urban Development*, 34 FLRA 207, 214 (1990). In contrast, individuals whose duties only require the recording and processing of completed personnel actions, maintenance of personnel files, or the screening of personnel actions for technical sufficiency, are not subject to the exclusion in section 7112(b)(3) because their involvement in personnel work is in a clerical capacity. *See U.S. Naval Station, Panama*, 7 FLRA 489 (1981).

Personnel work must pertain to employees: Employees who are involved in recruiting efforts for the military or who process military personnel information are not engaged in "federal personnel work" within the meaning of section 7112(b)(3) of the Statute. *See U.S. Army District Recruiting Command - Philadelphia*, 12 FLRA 409 (1983); *934th Tactical Airlift Group, Minneapolis-St. Paul International Airport, Minneapolis, Minnesota*, 13 FLRA 549, 561, 562 (1983).

See HOG 56 for specific guidance about this topic at hearing.

Other references:

Headquarters, Fort Sam Houston, Fort Sam Houston, Texas, 5 FLRA 339 (1981).

Veterans Administration Medical Center, Prescott, Arizona, 29 FLRA 1313 (1987).

U.S. Department of the Army, Headquarters, 101st Airborne Division, Fort Campbell, Kentucky, 36 FLRA 598 (1990). (A conflict of interest between job duties and union affiliation may be created when an employee's duties would require the employee to act in a manner adverse to bargaining unit interests, such as recommending appropriate organizational structure and staffing levels, and is one of the factors which the Authority may look to in determining whether a position is involved in personnel work in other than a purely clerical capacity.)

U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois (DOJ), 55 FLRA 1243 (2000)

21 **General attorneys**

Congress intended that attorneys, like other professional employees, have the same right to be represented in bargaining units that Congress conveyed to other federal employees. Membership in a labor organization is in itself not incompatible with the obligations of fidelity owed to an employer by its employees. See *Dun & Bradstreet-II*, 240 NLRB 162, at 163 (1979). The American Bar Association's (ABA) Model Canons of Professional Responsibility is not controlling when making bargaining unit determinations under the Statute.

Nonetheless, the right of an employee to be represented in the collective bargaining process must be balanced with the right of the employer to formulate and effectuate its labor policies with the assistance of employees not represented by the union with which it deals. See *U.S. Department of Labor, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1381 (1990).

Some attorneys perform duties which otherwise cause them to be excluded from bargaining units. For example, an attorney may function in a confidential capacity to an individual who formulates labor-management relations policies. Similarly, an attorney may be privy to labor-management relations policies as they are developed. These employees are confidential employees within the meaning of section 7103(a)(13) of the Statute. Other attorneys may be engaged in federal personnel work in other than a clerical capacity and, thus, excluded from bargaining units, pursuant to section 7112(b)(3). Still others may be engaged in security work within the definition of section 7112(b)(6) of the Statute. See *United States Attorney's Office for the District of Columbia*, 37 FLRA 1077 (1990).

When considering the bargaining unit status of an attorney, a complete examination is made of all the relevant duties and responsibilities of the individual in the position to determine whether the position is eligible for inclusion in the unit or whether it is ineligible based upon a statutory requirement. For items related to specific confidential or federal personnelist exclusions, consult those employee categories in *RCL 19* and *RCL 20* of this manual.

For security work, see *RCL 25*. Where an attorney is being assigned duties or functions as a representative of management, the question may arise as to whether inclusion of this attorney would create a conflict of interest. *RCL 22*.

See HOG 57 for specific guidance on developing a record about this topic at hearing.

Other references:

U.S. Department of Labor, 33 FLRA 265 (1988).

NLRB v. Lorimar Productions, Inc., 771 F.2d 1294 (9th Cir. 1985).

Hoover Co., 55 NLRB 1321 (1944).

22 **Management official**

"Management official" is defined in section 7103(a)(11) of the Statute as:

. . . an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policy of the agency.

A unit is not appropriate if it includes management officials [section 7112(b)(1)].

The criteria to be applied in determining if a position meets the statutory definition of "management official" is whether the person in the position:

- a) creates, establishes or prescribes general principles, plans or courses of action for an agency;
- b) decides upon or settles upon general principles, plans or courses of action for an agency; or
- c) brings about or obtains a result as to the adoption of general principles, plans or course of action for an agency.

See Department of the Navy, Automatic Data Processing Selection Office, 7 FLRA 172, 177 (1981).

Independent judgment exercised by the individual formulating or effectuating agency policies is critical in determining if a person is a management official. Individuals who serve on a board which sets agency policies may be management officials within the meaning of the Statute. *U.S. Department of Justice, Board of Immigration Appeals*, 47 FLRA 505 (1993).

In those cases where an individual recommends policies or courses of action for an agency, the frequency of which the recommendations are adopted is important in determining if that

person is a management official. To be a management official within the meaning of the Statute, the person in the position formulates policy or participates in the formulation of policy. A person who is responsible for effectuating the policy or who assists in the implementation of policy is not a management official.
See HOG 58 for specific guidance about this topic at hearing.

Other references:

U.S. Army Communications System Agency, Fort Monmouth, New Jersey, 4 FLRA 627 (1980).

Department of Defense, Defense Logistics Agency, Defense Contract Management Command, Defense Contract Management District North Central, 48 FLRA 285 (1993)

23 Professional employee

Section 7103(a)(15) of the Statute defines a professional employee as:

- (A) an employee engaged in the performance of work--
 - (i) requiring knowledge of an advance 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 predominately intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work; and
 - (iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or
- B) an employee who has completed the course of specialized intellectual instruction and study described in subparagraph (A)(I) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph.

The Authority noted in *United States Attorneys Office for the District of Columbia*, 37 FLRA 1077, 1081 to 1083 (1990) that consistent with the definition in section 7103(a)(15), a college degree is not always required for an employee to be a “professional” under the Statute. Therefore, it is imperative that the region’s decision cite or discuss specific evidence on which the decision is relied and reference the complete statutory standards. In other words, identify the evidence as it relates to each statutory standard. See *U.S. Department of the Army, Wilmington District, Corps of Engineers, Wilmington, North Carolina*, unnumbered Order Denying Application for Review in Case No. AT-RP-80059, (1999) at 3 (unnumbered footnote).

The effect of finding employees are professionals is significant. Professionals have the right of unit self-determination under section 7112(b)(5). That is, professionals vote not only on whether they wish to be represented by a union in a bargaining unit, but also on whether the bargaining unit will consist solely of professional employees or be a combined professional/nonprofessional unit. In making determinations as to professional status, it is particularly important to focus on the educational requirements of the position, not merely on the credentials or certifications the individual employee may possess. For procedures to follow in elections involving professional employees, see *CHM 28*.

See HOG 59 for specific guidance about this topic at hearing.

Other references:

Veterans Administration Regional Office, Portland, Oregon, 9 FLRA 804 (1982).

24 Schedule C positions

“Schedule C” positions are described in 5 C.F.R. 213.3301:

Section 213.3301 Positions of a confidential or policy-determining character.

Upon specific authorizations by OPM, or under the terms of an agreement with OPM, agencies may make appointments under this section to positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials. Positions filled under this authority are excepted from the competitive service and constitute Schedule C.

- < The OPM guidance that Schedule C employees have a “confidential working relationship with the head of an agency...” does not compel a conclusion that Schedule C employees are expressly excluded from the Statute.
- < Neither the definition of “employee” in section 7103(a)(2) of the Statute nor the specific unit exclusions set forth in section 7112(b) of the Statute references Schedule C employees.
- < Pursuant to section 7105(a)(2)(A) of the Statute, questions concerning the bargaining unit status of employees are exclusively reserved for final resolution with the Authority. *See U.S. Department of Labor, Mine Safety and Health Administration, Southeastern District*, 40 FLRA 937, 941 (1991).
- < The eligibility factors considered when determining if any employee is to be included in a bargaining unit are applied to determining unit eligibility of Schedule C employees.

For questions related to specific Statutory exclusions, consult the Table of Contents for the employee category(ies) at issue and HOG 60 for specific guidance.

Other references:

*U.S. Department of Housing and Urban Development,
Headquarters, 41 FLRA 1226 (1991).*

Generally, employees engaged in intelligence, counterintelligence or national security work are excluded from bargaining units. Three sections of the Statute address these exclusions:

Section 7103(a)(3) specifically excludes from the definition of "agency" the following agencies engaged in national security work: (1) the Federal Bureau of Investigation; (2) the Central Intelligence Agency and (3) the National Security Agency. Thus, employees of these agencies cannot be in any bargaining units.

Section 7103(b)(1) allows the President to exclude employees of certain agencies or subdivisions from coverage of the Statute. This section provides:

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.

In the past, Presidents have excluded entire agencies or subdivisions thereof from coverage of the Statute. In accordance with section 7103(b)(1), Executive Order 12171 was issued, excluding from coverage of the Statute employees working in certain agencies or subdivisions of agencies. It was later amended by Executive Orders 12338 and 12632. The validity of the Executive Order has been upheld in *AFGE v. Reagan*, 870 F.2d 723 (D.C. Cir., 1982). The Executive Order, as amended, identifies numerous activities that are engaged in national security work and as such are excluded from coverage under Chapter 71 of Title 5 of

the United States Code). *See Department of the Navy, Naval Telecommunications Center, Ward Circle*, 6 FLRA 498 (1981).

Section 7112(b)(6) excludes employees in certain categories from all bargaining units. This section applies to specific positions, rather than to an agency or subdivision. Section 7112(b)(6) excludes from any bargaining unit:

any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security.

Under section 7112(b)(6) the Activity must show (1) that the individual employee is engaged in the designated work, and (2) that the work directly affects national security. Neither security work, directly affects nor national security are defined in the Statute. The Authority defines:

- a. security work as a task, duty, function or activity relating to securing, guarding, shielding, protecting or preserving something. As used in context, security work includes “the design, analysis or monitoring of security systems or procedures.” *Department of Energy, Oak Ridge Operations, Oak Ridge, Tennessee (Oak Ridge)*, 4 FLRA 644 at 655 (1980). It would not include work involving the mere access to and use of sensitive information and material. *id. at 655 citing Cole v. Young*, 76 S. Ct. 861, 351 U.S. 536 (1956).
- b. directly affects is “a straight bearing or unbroken connection that produces a material influence or alternation.” *Oak Ridge*, 4 FLRA at 655 (citation omitted).
- b. national security includes “only those sensitive activities of the government that are directly related to the protection and preservation of the military, economic, and productive strength of the United States, including the security of the government in domestic and foreign affairs, against or from espionage, sabotage, subversion, foreign aggression and any other illegal acts with adversely affect the national defense.” *id. at 655-656*.

In *U.S. Department of Justice (Justice II)*, 52 FLRA 1093 (1997), the Authority found that the work of employees of civilian, as well as military, agencies constitute security work which directly affects national security within the meaning of section 7112(b)(6) of the Statute. In addition, the Authority established a standard for considering whether employees of a civilian agency are engaged in “security work” which directly affects national security, within the meaning of section 7116(b)(6). The Authority found that:

an employee is engaged in “security work” within the meaning of section 7112(b)(6) if the required tasks, duties, functions, or activities of the employee’s position include: (1) the designing, analyzing, or monitoring of security systems or procedures; or (2) the regular use of, or access to, classified information. If an employee is engaged in security work, as so defined, which directly affects national security, as discussed above, the employee may not be included in a bargaining unit. *Oak Ridge*, 4 FLRA at 655. (In a footnote the Authority reaffirmed the definition of directly affects in *Oak Ridge*.) *Justice II*, 52 FLRA at 1103.

See HOG 61 for specific guidance about this topic at hearing.

Other references:

Office of Personnel Management, 5 FLRA 238, 247-248 (1981).

U.S. Department of the Navy, U.S. Naval Station, Panama, 7 FLRA 489 (1981).

Defense Mapping Agency, Aerospace Center, Kansas City Office, Kansas City, Missouri, 13 FLRA 52 (1983).

U.S. Department of the Army, Army Ordnance Missile and

Munitions Center and School, Redstone Arsenal, Alabama, 35 FLRA 987 (1990).

U.S. Attorneys Office, Washington, D.C., 37 FLRA 1077, 1084 (1990), citing Defense Mapping Agency, Hydrographic/Topographic Center, Providence Office, Brookside Avenue, West Warwick, Rhode Island, Department of Defense, 13 FLRA 128 (1983).

Section 7103(a)(10) of the Statute defines "supervisor" as:

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.

Except as provided under section 7135(a)(2), a unit is not appropriate if it includes supervisors [see 7112(b)(1) and *RCL 14* for a discussion of units including supervisors].

Consistent exercise of judgment: An individual is a supervisor if s/he **consistently** exercises **independent judgment** with regard to the supervisory indicia set forth in §7103(a)(10) of the Statute. See *Army and Air Force Exchange Service, Base Exchange, Fort Carson, Fort Carson, Colorado*, 3 FLRA 596, 599 (1980).

Supervision of "employees": To be a supervisor within the meaning of the Statute, the person supervises an employee, as defined by the Statute. Thus, individuals who supervise military personnel are not supervisors within the meaning of the Statute, since they do not supervise employees. *Adjutant General of Michigan, Air National Guard, Battle Creek, Michigan*, 11 FLRA 66, 67 (1983).

Number of employees: There is no requirement that an individual supervise a certain number of employees to be a supervisor under section 7103(a)(10). An individual who supervises one employee is a supervisor within the meaning of the Statute. See

Headquarters III Corps and Fort Hood, Fort Hood, Texas, 13 FLRA 479 (1983).

Number of supervisory indicia: Not all supervisory functions must be exercised, for an individual to be deemed a supervisor. An individual who consistently exercises only one of the supervisor indicia is a supervisor within the meaning of the Statute. See *Department of the Air Force, Hanscom Air Force Base, Bedford, Massachusetts*, 14 FLRA 266, 268 (1984). *U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Allen Park, Michigan (VA Allen Park)*, 35 FLRA 1206 (1990).

Joint performance of supervisory function: Joint performance of a supervisory function is sufficient to qualify an individual as a supervisor, if independent judgment is exercised by the individual. See *VA Allen Park*, 35 FLRA 1206 (1990).

Evaluation of employees: Responsibility for independently evaluating employee performance is a basis for finding that an individual is a supervisor, where the evidence demonstrates that the evaluations are used when upper management makes decisions to hire, promote, reward or discipline employees. See *Department of the Interior, Bureau of Indian Affairs, Navajo Area Office*, 45 FLRA 646 (1992).

Use of secondary indicia. In cases where the evidence does not conclusively establish that an individual exercises supervisory authority within the meaning of the Statute, certain "secondary indicia" of supervisory status will be considered. These secondary factors include: (1) attending meetings, including supervisory training sessions and (2) having the authority to grant time off to employees. *Department of the Interior, Bureau of Indian Affairs, Navajo Area Office*, 45 FLRA 646 at 654 (1992). The ability to approve or deny leave, without a showing of the exercise of any specific statutory supervisory authority, is not enough to demonstrate supervisory status. *Veterans Administration Medical Center, Allen Park, Michigan*, 34 FLRA 423, 426 (1990).

Seasonal supervisors. Individuals who exercise supervisory authority for a portion of the year and perform unit work for the remainder are "seasonal supervisors". They are excluded from the

unit as supervisors during the period in which they are supervising employees, and included in the unit the remainder of the year. *U.S. Department of Agriculture, Forest Service, Intermountain Region, Challis National Forest*, 23 FLRA 349 (1981).

Firefighters and nurses. For application of the supervisory indicia to firefighters and nurses, see section 63 of this manual.

Team leaders. Determination of the supervisory status of team leaders rests upon the degree of independent judgment exercised by the team leaders. Team leaders are not supervisors if their responsibilities are routine in nature; if their function is to give technical advice to others, or if their work duties do not involve the consistent exercise of independent judgment. See *U.S. Department of the Treasury, Office of Chief Counsel*, 32 FLRA 1255, 1258-60 (1988). Team leaders who consistently exercise independent judgment in assigning work and directing and reviewing other employees' work are considered supervisors. *U.S. Department of the Army, Army Aviation Systems Command and Troop Support Command, St. Louis, Missouri*, 36 FLRA 587 (1990).

See HOG 62 for specific guidance about this topic at hearing.

Other references:

Department of Energy, Oak Ridge Operations, Oak Ridge, Tennessee, 4 FLRA 644, 651-52 (1980).

Section 7103(a)(10) of the Statute contains a special definition of "supervisor" as it pertains to firefighters and nurses, stating that with respect to any unit including firefighters or nurses, the term "supervisor" includes only those individuals **"who devote a preponderance of their employment time exercising supervisory authority."**

The Statute contains no definition of "nurse" and no specific meaning of the term "nurse" has been developed through Authority cases. Section 7103(a)(17) of the Statute defines "firefighter" as:

...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.

There are two important aspects to the statutory definition of a supervisory firefighter or nurse. The supervisory firefighter or nurse must spend a **preponderance of employment time** engaged in supervisory functions. The term "preponderance" has not been defined by the Authority in any of its decisions. Thus, it is important to develop as complete a record as possible of the duties and assignments of the individuals in question. In addition, the Statute uses the term "employment time", rather than work time. Thus, for those firefighters who are assigned to 24-hour shifts, the amount of time engaged in supervisory duties throughout the entire 24-hour period is developed. See *U. S. Department of the Navy, Marine Corps Base, Camp Pendleton, California*, 8 FLRA 276 (1982). The "preponderance of employment time" test applies only to firefighters and nurses in bargaining units, and not to other types of employees who happen to be in units containing firefighters or nurses. See *Department of the Navy, Naval Undersea Warfare, Engineering Station, Keyport, Washington*, 7 FLRA 526, 529 (1981).

See HOG 62 for specific guidance on supervisory indicia to use at hearing and HOG 63 for guidance about firefighters and

nurses at hearing.

Other references:

Department of the Navy, Naval Education and Training Center, Newport, Rhode Island, 3 FLRA 325, 327 (1980).

U.S. National Park Service, Santa Monica Mountains Recreation Area, Agoura Hill, California, 50 FLRA 164, 170 (1995).

Veterans Administration, Washington, D.C. and Veterans Administration Medical Center, Salisbury, North Carolina, 11 FLRA 176 (1983).

Veterans Administration Medical Center, Lyons, New Jersey, 14 FLRA 46 (1984).

Agencies may hire employees to “temporary” or “term” appointments of fixed durations, as defined in 5 C.F.R. 316. Temporary or term employees may be included in a unit with other employees, as long as their inclusion would otherwise be appropriate. In addition, a separate unit of temporary employees is appropriate, as long as the unit meets the criteria of section 7112(a)(1) of the Statute.

Temporary employees share a community of interest with permanent employees where the evidence shows that they “manifest a substantial and continuing interest in the terms and conditions of employment along with permanent employees.” See *U.S. Department of Agriculture, Region Forester Office, Forest Services, Region 3, Santa Fe National Forest, Santa Fe, New Mexico*, 1 A/SLMR 417 (1971); *U.S. Department of Agriculture, Forest Service, Francis Marion and Sumter National Forests*, 2 A/SLMR 596 (1972).

Therefore, an important consideration in determining whether temporary employees share a community of interest with permanent employees is whether the temporary employees have a **reasonable expectation of continued employment**. See *U.S. Army Engineer Activity, Capital Area, Fort Myer, Virginia*, 34 FLRA 38, 42 (1989). In addition to the standard community of interest criteria, there are a variety of other factors considered in determining whether temporary employees have a reasonable expectation of continued employment.

Nature of appointment. The types of appointments under which temporary employees serve may have a bearing on whether they share a community of interest with permanent employees. This is particularly so since tenure, the period of time an employee may reasonably expect to serve under the current appointment, is granted and governed by the type of appointment. For example, pursuant to 5 CFR 316.301, a person serving a term appointment has a maximum tenure of four years. A person serving a temporary appointment is normally given an appointment of less than one year (5 C.F.R. 316.305). On the other hand, the CFR

does not cover employees employed by nonappropriated fund (NAF) instrumentalities. In cases where the type of appointment given NAF employees is at issue, it is necessary to refer to agency regulations defining types of appointments. *See Department of the Air Force, Langley Air Force Base, Virginia*, 40 FLRA 111 (1991).

Varieties of appointments. Not all agencies use the same types of appointments to hire temporaries, nor do they use the same terms to describe appointments that represent less than permanent, full-time employment. Also, the government has instituted and abolished many types of appointments, some of which may still be reflected in recognitions and certifications. Therefore, it may be necessary to develop on the record the history of temporary employment at the agency. Thus, the inclusion or exclusion of particular employees is not dependent on the type of appointment. Once a determination is made whether these employees have a reasonable expectation of continued employment, then temporary employees are subject to the same eligibility criteria as applied to permanent employees.

Tenure vs. work schedule. Tenure should not be confused with work schedules. It is not necessary to work full time to be a permanent employee. For example, individuals with permanent competitive service appointments may have part time or intermittent work schedules. These employees enjoy permanent tenure and work less than 40 hours per week, or less than 26 pay periods a year, respectively. In contrast, temporary employees may work 40 hours per week, 26 pay periods a year, but have limited tenure because of the temporary appointment.

Probationary periods. Employees who are serving in their initial, probationary period are not considered temporary. Probationary employees are commonly included in bargaining units, if they have a reasonable expectation of permanent employment upon their completion of their probationary period. *Department of the Navy, Navy Exchange, Mayport, Florida*, 1 A/SLMR 143 (1971).

See HOG 64 for specific guidance about this topic at hearing.

Other references:

U.S. Small Business Administration, Lower Rio Grande Valley District Office, 16 FLRA 180, 181 (1984) employees on six-month, temporary appointments; contrast with *USDA, Animal and Plant Health Inspection Service, Plant Protection Quarantine, Pink Bollworm Rearing Facility*, 6 FLRA 261 (1981).

Federal Mediation and Conciliation Service, 5 FLRA 28 (1981), summer employees and a temporary appointment of one year.

U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Northeast Region, 24 FLRA 922 (1986), one year appointments, with an extension of three years.

Department of Interior, Bureau of Mines, Twin Cities Research Center, Twin Cities, Minnesota, 9 FLRA 109 (1982), intermittent or WAE, "when actually employed".

U.S. Corps of Engineers, Kansas City District, Kansas City, Missouri, 15 FLRA 548 (1984) "Stay-in-School Program".

F.E. Warren, 48 FLRA 650 (1993) for types of temporary appointments in a nonappropriated fund activity.

Army and Air Force Exchange Service, Panama Area Exchange, 7 FLRA 514 (1981), regularly scheduled, intermittent.

Federal Deposit Insurance Corporation, 34 FLRA 50 (1989) temporary employees at the FDIC, which has unique appointment authorities.

U.S. Department of Agriculture, Region Forester Office, Forest Services, Region 3, Santa Fe National Forest, Santa Fe, New Mexico, 1 A/SLMR 417 (1971) seasonal employees under temporary appointments have a reasonable expectation of continuous employment, as many of whom work specified periods of time each year, and share a community of interest with other employees in the proposed unit. *See also U.S. Department of Interior, National Park Service, Rocky Mountain National Park, Estes Park, Colorado*, 48 FLRA 1404 (1994). Regional Director dismissal of petition seeking to represent only Wage Grade

employees (including WG seasonal employees) upheld because Wage Grade employees shared a community of interest with the General Schedule employees at the Park. However, there are some cases in which the parties agreed to exclude seasonal employees.

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OTHER OFFICE OF THE GENERAL COUNSEL RESOURCE MANUALS

The **Representation Case Handling Manual** (REP CHM) provides procedural and operational guidance to the General Counsel's staff when processing representation petitions filed pursuant to Part 2422 of the FLRA's regulations. Part One discusses processing petitions from providing substantive issues to investigating and resolving the underlying representation matters, and to issuing a certification or taking other final action. Part One tracks, for the most part, the subject matter format in the representation regulations. Part Two consists of resources that the General Counsel's staff uses when processing petitions, including a Cross Reference Table, Flow Charts, Appendices, FLRA Forms and Documents, and sample Figures.

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