

UNITED STATES OF AMERICA  
Before The  
FEDERAL LABOR RELATIONS AUTHORITY

In the Matter of	:	
NATIONAL CREDIT UNION ADMINISTRATION,	:	
Agency,	:	Case No. WA-RP-03-0057
-and-	:	
NATIONAL TREASURY EMPLOYEES UNION,	:	
Petitioner.	:	

**NATIONAL CREDIT UNION ADMINISTRATION'S  
APPLICATION FOR REVIEW OF  
REGIONAL DIRECTOR'S DECISION AND ORDER**

The National Credit Union Administration ("NCUA" or "Agency"), pursuant to 5 U.S.C. §7105(f) and 5 C.F.R. §2422.31, hereby applies to the Federal Labor Relations Authority ("FLRA" or "Authority") for review of its Regional Director's "Decision and Order and Direction of Election" in this proceeding.

**I. STATEMENT OF THE CASE**

NCUA takes exception to the FLRA Regional Director's determination that NCUA's credit union examiners are not "management officials" within 5 U.S.C. §7103(a)(11) and, thus, are not exempt from bargaining unit eligibility under 5 U.S.C.

§7112(b)(1). NCUA applies for review of that determination on two grounds: (1) that the Regional Director failed to apply established law that would have dictated a different ruling on the Examiners; and (2) that he committed clear and prejudicial errors, concerning three substantial factual matters, that minimize the breadth of the Examiners' discretion to act independently. 5 C.F.R. §2422.31(c)(3).

Relying primarily on the FLRA Regional Director's own findings of fact, we apply the body of relevant, established case law to demonstrate that, contrary to his conclusion, the functions of Examiners go beyond simply implementing and effectuating policy. Their functions, undertaken with little supervisory oversight, collectively set the Agency's supervisory agenda and drive budget and resource allocations at the Agency's highest levels. It is in that regard that Examiners influence, decide and bring about the Agency's supervisory plans and courses of action, thus satisfying the FLRA's test for determining who is a "management official."

## **II. BACKGROUND**

The National Treasury Employees Union petitioned for an election in a nationwide bargaining unit of professional and non-professional employees of NCUA. The Agency did not dispute the appropriateness of the bargaining unit itself, but did object to the unit eligibility of certain employees. In June and July 2003, a four-day hearing was held before Hearing Officer Saul J. Lubitz to determine the unit eligibility of those employees. On August 12, 2003, the case was transferred to the San Francisco Regional Office of the FLRA. Both parties submitted post-hearing briefs on September 19, 2003.

On December 29, 2003, FLRA Regional Director Gerald M. Cole (“the RD”) issued his “Decision and Order and Direction of Election” (“the RD Decision”).<sup>1</sup> The RD excluded the Regional Management Assistants for Operations and the Employee Development Specialist from the bargaining unit as federal personnelists under 5 U.S.C. §7112(b)(3). RD Decision (“RD Dec.”) at 20, 21. He declined to exclude the Attorney/FOIA Officer as a personnelist. *Id.* at 22. The RD further excluded the Risk/Loss Officers and the Senior Financial Analysts from the bargaining unit as “management officials” under 5 U.S.C. §7112(b)(1). *Id.* at 24, 25. He declined to exclude the Risk Management Analysts and the Realty Specialist as “management officials.” *Id.* at 26, 27.

Finally, the RD declined to exclude NCUA’s Principal and District Examiners, including Regional Training Specialists and Problem Case Officers (collectively “Examiners”), as “management officials.”<sup>2</sup> *Id.* at 24. The Examiners, the RD held, “implement and effectuate the policies of the NCUA in support of its mission. They do not, however, establish agency policy by carrying out that policy.” *Id.* at 23. NCUA contends otherwise in this Application for Review.

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<sup>1</sup> The RD directed an election to be held among the members of the bargaining unit if the FLRA does not undertake to grant review of this action within sixty days after the filing of this application for review. RD Decision at 27.

<sup>2</sup> The RD Decision notes that “NCUA does not appear to have withdrawn its assertion that these . . . employees are supervisors” under 5 U.S.C. 7112(b)(1). RD Dec. at 23. NCUA hereby withdraws the claim that Examiners are supervisors.

### III. GROUNDS FOR REVIEW

#### A. Failure to Apply Established Law.

FLRA review of the RD Decision is warranted because the RD failed to apply established law. 5 C.F.R. §2422.31(c)(3)(i). In holding that Examiners do not qualify as “management officials,” the RD failed to apply an entire body of case law that established criteria for identifying who is a “management official” under 5 U.S.C. §7103(a)(11). As the RD acknowledged, citing *Dept. of the Navy, Automatic Data Processing Selection Office* (“*Navy ADP*”), 7 FLRA 172, 177 (1981), the test for 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 courses of action for an agency. RD Dec. at 22.

In two decades of decisions since *Navy ADP*, the FLRA has developed criteria to determine whether an employee influences, decides or brings about an agency’s plans and courses of action: (1) Whether the incumbent makes independent decisions within broad agency guidelines, *Dept. of Interior, Bureau of Mines* (“*Bureau of Mines*”), 9 FLRA 109, 111 (1982); (2) The degree to which the incumbent’s actions are subject to prior supervisory approval or subsequent review, *Dept. of Energy*, 40 FLRA 264, 266 (1991); *Dept. of Agriculture, Food & Nutrition Service* (“*Food & Nutrition Service*”), 34 FLRA 143, 145 (1990); *Federal Crop Insurance Corp.*, 46 FLRA 1457, 1463 (1993), other than for purposes of checking for consistency with established programs. *Bureau of*

*Mines*, 9 FLRA at 111; (3) Whether the incumbent's decisions carry considerable weight, are accepted as authoritative and are frequently implemented. *Id.*; *U.S. Coast Guard*, 7 FLRA 743, 744 (1982); *Defense Communications Agency*, 8 FLRA 273, 274 (1982); (4) Whether the incumbent speaks for the agency and, by his or her actions, binds its resources. *Space Division, Air Force Systems Command* ("*Space Division*"), 9 FLRA 885, 887 (1982); and (5) The degree to which the incumbent's decisions commit the agency to a particular course of action without supervisory approval. *Federal Crop Insurance Corp.*, 46 FLRA at 1463; *Rock Island Arsenal*, 8 FLRA 857, 858 (1982).

In its Post-Hearing Brief, NCUA thoroughly applied the post-*Navy ADP* body of case law to evidence in the record, demonstrating that its Examiners influence, decide and bring about the Agency's plans and courses of action. NCUA Post-Hearing Brief filed Sept. 19, 2003, at 38-49. But the RD Decision essentially addressed only one criterion—the degree of supervisory approval and review—and, as we contend below, that criterion was misapplied with respect to the Examiners. In any case, supervisory approval and review is but one factor to be considered; it is not the sole factor. *Dept. of Energy*, 40 FLRA at 266; *Food & Nutrition Service*, 34 FLRA at 145. The RD Decision pays no heed to the other factors nor mentions the cases that produced them.

Bypassing the post-*Navy ADP* case law, the RD Decision relies primarily on *Dept. of Justice, Executive Office of Immigration Review* ("*Executive Office of Immigration Review*"), 56 FLRA 616, 618 (2000), a case evaluating whether Immigration Judges effectuate or implement immigration policy. In *Executive Office of Immigration Review*, the FLRA denied the application for review, which had claimed an absence of applicable precedent as a ground for review. Rejecting that claim, the FLRA

cited an “abundance of Authority case law offering guidance with respect to how the Judges’ new responsibilities should be evaluated.” *Id* at 621-22. That “abundance of Authority case law” includes the post-Navy ADP cases set forth above and in NCUA’s Post-Hearing Brief. Here, the RD Decision adopted the holding in Executive Office of Immigration Review without applying the “abundance of Authority case law” need to justify its application to NCUA’s Examiners.

In addition to ignoring the post-Navy ADP body of cases, the RD Decision disregards the case most comparable on its facts to this one: U.S. Army Communications Systems Agency, Fort Monmouth, NJ (“Ft. Monmouth”), 4 FLRA 627 (1980), which has never been overruled and is still cited as binding authority in the FLRA’s own Representation Case Law Guide (Oct. 2000 ed.) at 22-2. The FLRA held in that case that the principal auditor of an Army command group was a “management official” because he functioned beyond the level of “an expert or professional rendering resource information or recommendations.” *Id.* at 631. We found no decision of the FLRA, before or after Navy ADP, that is more comparable on its facts to this one than Ft. Monmouth, yet the RD Decision never mentions it.

In sum, the RD decision denies NCUA the benefit of established, directly relevant case law, namely, the post-Navy ADP case law criteria for evaluating who influences, decides and brings about an agency’s plans and courses of action, and the factually similar Ft. Monmouth decision. Had those precedents been applied in the RD Decision here, we contend that NCUA Examiners would qualify as “management officials” exempt from bargaining unit eligibility.

**B. Clear and Prejudicial Error Concerning Substantial Factual Matters.**

FLRA review of the RD Decision is warranted because the RD committed a clear and prejudicial error concerning three substantial factual matters. 5 C.F.R. §2422.31(c)(3)(iii). In each instance, the RD's finding of fact is contradicted by evidence in the record, if not by facts adopted elsewhere in the RD Decision.

**1. Examiners Use Substantial Discretion To Manage The CAMEL Rating Process; They Do Not Merely "Correct" Default Ratings**

The RD Decision erroneously minimizes the critical role of Examiners in assigning CAMEL ratings--the measure of a credit union's safety and soundness that singularly "determines the level of supervision provided by NCUA." RD Dec. at 4. The RD found that Examiners "are expected to be able to use a *degree of discretion . . . to correct* proposed CAMEL ratings that do not comport with the credit union's real posture." *Id.* at 22 (emphasis added). He then goes on to dismiss them as "technical experts in NCUA policy and its application to the credit unions they supervise." *Id.* On the contrary, it is clear that Examiners play a far more influential role than robots whose discretion is limited to "correcting" the final product of the CAMEL rating process.

As the evidence summarized in section IV. below shows, the CAMEL rating is the result of a process that the Examiner manages exclusively from start to finish. The Examiner first evaluates seven "risk areas" that make up the scope of the examination, making a preliminary risk assessment in each one, and then accords as much attention to each area as he or she sees fit. Based on his or her examination findings in each area, the Examiner then rates each corresponding CAMEL component.

The examination software generates suggested ratings for some of the components at the outset of the examination. These suggested ratings are derived from numerical data reflecting past performance that credit unions provide to NCUA; they are not regarded as default ratings that stay in place unless and until the Examiner “corrects” them to reflect his or her findings.<sup>3</sup> Instead, Examiners are to apply their subjective judgment from the outset to determine the final ratings without regard to the suggested ratings. They are always free to override the suggested component ratings, and routinely do so. This applies to the “composite” rating as well. Once determined, the CAMEL rating is normally presented to the credit union *before* it is known to anyone in the Examiner’s chain of command, meaning that the rating is neither reviewed nor approved in advance by a supervisor.

The finding that Examiners “use a degree of discretion” to merely “correct proposed CAMEL ratings” minimizes the Examiner’s discretion and therefore is prejudicial to NCUA. Whether Examiners influence, decide or bring about NCUA’s plans and courses of action depends on the extent to which their actions commit the Agency to a plan or course of action. *Federal Crop Insurance Corp.*, 46 FLRA at 1463; *Rock Island Arsenal*, 8 FLRA at 858. The CAMEL rating they assign, more than anything else, determines the course, amount and aggressiveness of future supervision that NCUA will devote to the credit unions it oversees. And no one plays a more pivotal role in the CAMEL rating process than NCUA’s Examiners. If left intact, therefore, the finding that Examiners “use a degree of discretion” to “correct proposed CAMEL

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<sup>3</sup> The RD Decision also states that “the Examiner has discretion to *change* the CAMEL rating” from the one suggested by the computer matrix “if examination findings reflect that a different rating is justified.” RD Dec. at 5 (emphasis added). While technically true, adopting a rating that differs from the suggested rating is not really a rating *change* because the suggested ratings are never considered to be default ratings in the first place.



ratings” suggests that all they do is check for errors in ratings that are determined by default or proposed by someone else.

2. **Although Theoretically Reviewable and Appealable, Examiner Decisions Are Seldom Reviewed, Rarely Appealed, And Almost Never Reversed.**

The RD concluded that “everything [Examiners] do is subject to review by regional and national level and to appeal by the credit union of a [Document of Resolution] including the CAMEL rating assigned.” RD Dec. at 22. This statement is inaccurate and misleading. It is true that Examiner decisions are “subject to review” in that theoretically a supervisor has the authority to review them; and they are “subject to appeal” in that theoretically a credit union has the right to appeal them to a higher level. But unit eligibility must be assessed according to evidence of how the incumbent functions in actual practice, not according to how he or she is supposed to function in theory or in a position description. *Dept. of Air Force, Aberdeen Proving Ground* (“*Aberdeen Proving Ground*”), 57 FLRA 154, 157 (2001); *Dept. of Labor, Office of the Solicitor*, 37 FLRA 1371, 1377 (1990). Here, the RD Decision overlooked current actual practice confirming that Examiner decisions are seldom reviewed, rarely appealed and almost never overturned.

As the evidence summarized in section IV. below indicates, supervisors rarely see the examination report, nor the CAMEL rating and any Document of Resolution within, until *after* the Examiner has presented the final report to the credit union. It is the rare exception rather than the rule that a supervisor would review an examination report beforehand. And in most cases, supervisors are not made aware of what a credit union’s final CAMEL rating will be.

The cover page of every examination report, a form letter, says that it can be appealed to a Regional Director. But the evidence shows that, in reality, the number of appeals filed in recent years is, as one Regional Director put it, “amazingly rare.” Moreover, the number of those appeals that have been granted, resulting in reversal (3 out of 34 appeals), is similarly rare. Thus, Examiner decisions reflected in an examination report are indeed “subject to” review and appeal in theory, but they almost never are in fact.

The finding that everything examiners do “is subject to review . . . and to appeal” is inaccurate and misleading and, therefore, prejudicial to NCUA. Two of the factors for determining if NCUA Examiners influence, decide or bring about NCUA’s plans and courses of action are: (1) the extent to which their actions are subject to prior supervisory approval or subsequent review, *Dept. of Energy*, 40 FLRA at 266; *Food & Nutrition Service*, 34 FLRA at 145; *Federal Crop Insurance Corp.*, 46 FLRA at 463; and (2) the extent to which they are routinely adopted. *Bureau of Mines*, 9 FLRA at 111; *U.S. Coast Guard*, 7 FLRA at 744; *Defense Communications Agency*, 8 FLRA at 274. However, the RD misapplied these criteria by failing to heed current actual practice indicating how frequently those actions actually *are* reviewed and/or appealed. The implication that review and appeal are routine vastly overstates the true extent to which Examiner decisions are reviewed, while greatly understating the true extent to which they are implemented without modification.

3. **An Examiner's Report Is Neither Reviewed Nor Signed By A Supervisor or Regional Director Before It Is Finally Presented To A Credit Union.**

The RD Decision concludes that “the examiner’s report is reviewed and signed by the supervisor and the regional director. It is then forwarded to the credit union board . . . .” RD Dec. at 5-6. The evidence summarized in section IV. below contradicts this statement in almost every detail. First, the Examiner’s report typically is *not* reviewed by a supervisor before it is presented to the credit union. Second, it is *never* signed by a supervisor either before or after being presented to the credit union. And third, the report is *neither reviewed nor signed* by the Regional Director either before or after it is presented to the credit union. It is signed only by the Examiner.

The finding that examination reports are “reviewed and signed by the supervisor and the regional director” before being “forwarded to the credit union” is contradicted by the evidence and is therefore prejudicial to NCUA. The extent to which an Examiner’s actions require prior supervisory approval is arguably the most important factor in determining if they influence, decide or bring about NCUA’s plans and courses of action. *Dept. of Energy*, 40 FLRA at 266; *Food & Nutrition Service*, 34 FLRA at 145. The conclusion that examination reports must pass through two levels of review and sign-off before being issued--when in fact there typically is no review and there never is any sign-off--exaggerates the extent of prior supervisory approval that is required before an examination report can be issued.

#### IV. SUMMARY OF RELEVANT EVIDENCE

Except as noted above, NCUA generally does not dispute the findings adopted by the RD regarding the Agency's Examiners. Therefore, the following summary of evidence is drawn primarily from those findings, as elucidated by evidence in the hearing transcript,<sup>4</sup> including facts that belie the misstatements noted in section III.B. above.

Key Functions. The key functions of a Examiner include scheduling the examination of each credit union in their district; conducting examinations (sometimes as the examiner-in-charge of a team); assessing whether a credit union is operating in a safe and sound manner; issuing an examination report documenting the Examiner's findings about the credit union's operations and performance, and prescribing remedial actions; assigning a CAMEL rating that reflects those findings; determining whether the credit union is in compliance with all applicable laws, rules and regulations; ensuring that the credit union's Supervisory Committee has conducted a satisfactory annual audit; and deciding whether it is necessary to issue a Document of Resolution ("DOR"), and if so, what corrective actions it should prescribe and by what deadline the credit union should comply. RD Dec. at 4. Uniquely among the Federal banking agencies,<sup>5</sup> nearly 100 percent of NCUA's Examiners work out of their own homes to accomplish these functions, when not on-site at a credit union, tr. 119, 189; they do not have offices anywhere within the Agency.

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<sup>4</sup> Citations to the hearing transcript are referenced by page number alone, *e.g.*, "Tr. \_\_\_." FLRA's exhibits are cited as "FLRA-\_\_\_." Joint exhibits of both parties are cited as "JE-\_\_\_". NCUA exhibits are referenced as "AE-\_\_\_". NTEU exhibits are referenced as "UE-\_\_\_".

<sup>5</sup> The other Federal banking agencies are: the Federal Reserve Board, the Office of Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision.

The goal of the examination process is to ensure that credit unions conform to applicable law and regulation and to NCUA policies designed to protect the National Credit Union Share Insurance Fund (“Insurance Fund”) against losses. *Id.* at 6. Through the process of identifying problems at a credit union and devising solutions, the Examiner furthers the institution’s return to sound operation, thereby protecting the Insurance Fund. *Id.*

Parameters and Guidance. In carrying out their key functions, Examiners operate within broad parameters set by the Federal Credit Union Act, NCUA rules and regulations, standard by-laws, and accounting rules. Tr. 850, 937, 1052-53, 1055, 1064. Examiners also have access to a detailed examination manual that addresses agency policy, offers guidance on many issues, and suggests “best practices.” RD Dec. at 5; *E.g.*, JE-1. In some NCUA Regions, there are similar, Regional-level manuals. *Id.*; *E.g.*, AE-22. But no Agency-wide or Regional manual dictates what the result should be in any area of an examination. Tr. 867, 870. Depending on their level of experience, some Examiners rely on these manuals more than others, and some rarely, if ever, refer to them. RD Dec. at 5. The manuals themselves concede that the guidance they offer “may not be the best or final approach in every situation.” JE-1 at “foreword”; Tr. 852. Thus, Agency guidance to Examiners is not uniformly regarded as mandatory.

Risk-Focused Examination. NCUA trains its Examiners to develop their professional skills and to apply their professional judgment in conducting examinations. RD Dec. at 5. To that end, the introduction of the “risk-focused examination process” in 2002 gave Examiners enhanced authority and flexibility. *Id.* at 4-5. In contrast to the prior “one-size-fits-all” approach, the risk-focused process allows Examiners to set the

scope of each examination; to decide how much time and attention each “risk area” merits based on his or her assessment of the level of risk; to focus on those risks; and to exercise professional judgment in assessing the credit union’s operations. *Id.* at 4. Depending on how specifically each examination can be focused, it may take less of the Examiner’s time and fewer of the Agency’s resources to accomplish. *Id.* at 5. As the RD Decision acknowledges, most examiners are “given a great deal of discretion” to determine what “risk areas” to focus on in carrying out an examination. *Id.*

CAMEL Rating. Examiners are also expected to apply their professional judgment in assigning a CAMEL rating, *id.* at 5, which reflects the Examiner’s evaluation of a credit union’s safety and soundness. *Id.* at 4. No policy or instruction dictates what rating must be given when a particular problem or condition is discovered.<sup>6</sup> Tr. 134. Based on his or her findings in each “risk area” of the examination, the Examiner then rates the corresponding CAMEL components from “1,” indicating “best,” to “5,” indicating “worst.” *Id.* at 4; Tr. 548-550.

For three of the five CAMEL components (“Capital Adequacy,” “Asset Quality” and “Earnings”), a matrix of “key ratios” in the examination software automatically generates suggested ratings at the outset of the examination. RD Dec. at 5. These suggested ratings are derived from numerical data reflecting past performance that credit unions provide to NCUA. Tr. 378-82. No rating is suggested at all for the other two components (“Management” and “Asset/Liability Management”). Tr. 888. Nor is a rating suggested for the overall “composite” CAMEL rating. Tr. 891. In any case, the

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<sup>6</sup> The only guidance on CAMEL ratings is a *Letter to Federal Credit Unions* explaining to credit unions the differences between the CAMEL components and ratings. UE-1.

suggested ratings are *not* default ratings that stay in place unless and until the Examiner decides to “correct” them to reflect his or her examination findings.

Instead, Examiners are expected to use their own experience and judgment to subjectively determine the ratings without regard to what the software suggests. Tr. 134. They are free to depart from the suggested ratings, and routinely do so. Tr. 885. This applies to the “composite” CAMEL rating as well; rather than simply averaging the five individual component ratings, each Examiner uses his or her own “rule of thumb” that gives greater weight to certain components (*e.g.*, “Management”) over others. Tr. 891.

Examiners generally have the discretion to decide a credit union’s CAMEL rating as they see fit without prior supervisory approval. RD Dec. at 5. Only when a CAMEL rating is being lowered to “4” or “5” do some Regional Directors wish to know and concur, *id.*, because of the impact on Regional staff time and resources, and to ensure that the credit union receives a “troubled condition” letter explaining the additional restrictions that apply.<sup>7</sup> Tr. 855, 917-18, 1055-56.

Prior Supervisory Approval and Subsequent Appeal. Some Examiners keep their supervisors “in the loop” about examination results concerning credit unions rated CAMEL “3” or worse. Tr. 488. However, they are not required to seek supervisory approval before issuing a final examination report, before assigning a particular CAMEL rating, or before issuing a DOR, and in practice they do not do so. Tr. 69, 157, 199, 868.

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<sup>7</sup> At one time, some Regions required the immediate supervisor, the Assistant Regional Director and the Regional Director to all sign off on a “Standard Authorization Memo” before an upgrade to, or downgrade from, a “3” rating. That practice was abandoned beginning well before introduction of the “risk-focused examination process.” Tr. 905, 957.

Neither a supervisor nor a Regional Director signs the final examination report or the final DOR, tr. 865, 871; only the Examiner does. *E.g.*, AE-16, -18, -20.

In no case does the Regional Director review an examination report before it is finally issued. Tr. 857. Even immediate supervisors normally do not see the examination report (and the CAMEL rating and DOR within) for the first time until *after* the Examiner has presented it to the credit union and it has been uploaded to the Agency's computer system. Tr. 862, 868. Typically a supervisor downloads a sampling of the Examiner's reports later on to review them in connection with an Examiner's performance appraisal or to ensure quality control of the examination program. Tr. 70, 194, 1050.

The form letter included with every examination report says that it can be appealed to the appropriate Regional Director. AE-16, -18, -20. Of the 14,676 examination reports completed between 1999 and mid-2003 for which NCUA kept statistics, however, only 34 (or .0023 percent of the examinations) were appealed to challenge a CAMEL rating or DOR. JE-5. Of those 34 appeals, only three were granted. *Id.* Thus, the Examiner prevailed in 99.97 percent of the 14,676 examinations, proving that, as one Regional Director put it, appeals are "amazingly rare." Tr. 75.

Examiner's Contact With Credit Unions. In almost all cases, a credit union's only contact with the NCUA is through the Examiner who comes on-site to conduct the examination. Tr. 69. At the conclusion of the examination, it is the Examiner who holds a Joint Conference with the credit union's board of directors to present and explain the examination report and to answer their questions. RD Dec. at 5. Supervisors do not normally attend Joint Conferences; they do so when needed to inform themselves in



connection with the Examiner's performance appraisal. Tr. 247. Regional Directors do not attend Joint Conferences. Tr. 246. When a DOR is warranted, the Examiner personally negotiates the terms and time frames with the credit union's board and management, and prevails upon them to concur. RD Dec. at 5; Tr. 870. When there is an impasse, it is the Examiner who has the last word on what the DOR will require the credit union to do, and by when. Tr. 871-74. If the credit union does not timely implement the DOR, the Examiner may initiate further actions at the Regional level to prompt the credit union to comply. RD Dec. at 6.

Course of Future Supervision. The CAMEL ratings that each Examiner assigns, reflecting his or her evaluation of a credit union's safety and soundness, collectively drive the Agency's supervisory agenda, in turn, affecting the amount of Agency staff time and resources that must be committed to it. *Id.* at 5.

CAMEL "1" or "2" credit unions receive much less supervision and are eligible for relaxed regulation under the RegFlex program, 12 C.F.R. §742. *Id.* at 4. As a credit union's CAMEL rating declines, however, it demands greater NCUA supervision and must endure more restrictive regulation. *Id.* For example, NCUA policy requires credit unions rated "3" to be examined more frequently (every 12 months instead of every 18 months). Tr. 34, 881. And in between examinations, Examiners have discretion to initiate or escalate on- and off-site "supervision contacts" to the extent they deem necessary to monitor these credit unions' operations and compliance with remedial measures. Tr. 34, 79, 100-101, 550, 861, 924-25, 1058. This intensified supervision forces NCUA to divert resources to these credit unions, tr. 945, thus impacting budget and resource allocation decisions at the Agency's highest levels.

CAMEL “4” or “5” credit unions, which are considered to be in danger of failing within twenty-four months, will be examined more frequently by NCUA, and will be under more restrictive regulation. RD Dec. at 4. In nearly all cases, these “troubled condition” credit unions will effectively be disqualified from expanding their fields of membership and from being the continuing credit union in a merger with another credit union. Tr. 549, 999-1000. In addition, they will be required by law to obtain NCUA’s approval of persons appointed to fill executive management and board positions. 12 U.S.C. §1790a(b); 12 C.F.R. §701.14; Tr. 225, 557.

## V. APPLICATION OF ESTABLISHED CASE LAW

### A. The RD Failed To Apply The Post-Navy ADP Case Law Criteria

The RD Decision casts NCUA’s argument as a claim that Examiners are “management officials” because they effectuate the Agency’s policies. RD Dec. at 22. On the contrary, we make no such claim. The RD nevertheless responded with the FLRA’s holding in *Executive Office of Immigration Review*, 56 FLRA 616 (2000), that employees who carry out or effectuate agency policy, as opposed to establishing it, are not “management officials” under 5 U.S.C. §7103(a)(11). That holding is not in dispute,<sup>8</sup> but it marks the beginning of the inquiry, not the end. To differentiate employees who effectuate policy from those who shape it, the FLRA refers the finder of fact to the “abundance of Authority case law offering guidance” on how to evaluate the incumbents’ duties and responsibilities. 56 FLRA at 621. Finding that the RD in *Executive Office of Immigration Review* had applied those precedents, and that they fully supported his

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<sup>8</sup> The FLRA expressly rejected the activity’s claim, based on private sector precedent, that “effectuating” policy is the equivalent of making policy. 56 FLRA at 620.

findings, the FLRA affirmed the determination that Immigration Judges are not “management officials.” *Id.* at 622-23.

In contrast, the RD Decision here essentially begins and ends its analysis of Examiners with the holding in *Executive Office of Immigration Review*.<sup>9</sup> The duties and responsibilities of Examiners were not analyzed against the criteria set forth in the “abundance of Authority case law” to which *Executive Office of Immigration Review* refers. Nor were their duties and responsibilities compared with those of the Immigration Judges in that case. Instead, the RD summarily concluded:

In determining the scope of an examination, drafting [examination] reports, conducting Joint Conferences, drafting DORs, letters of understanding [and agreement], preliminary warning letters, and assigning a CAMEL rating, these employees implement and effectuate the policies of NCUA in support of its mission.

RD Dec. at 23. Thus, the RD Decision leaves open the threshold question: in carrying out their duties and responsibilities, do Examiners effectuate or establish NCUA policy?

The answer to that question lies in a long-established test for identifying who is a “management official”: whether an employee influences, decides or brings about an agency’s plans and courses of action. *Navy ADP*, 7 FLRA at 174. Assuming this test survives *Executive Office of Immigration Review*, an employee who meets the test necessarily surpasses one who effectuates and implements agency policy. We apply the post-*Navy ADP* precedents to demonstrate that Examiners’ actions do, in fact, influence,

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<sup>9</sup> The RD Decision also cites *U.S. Dept. of Housing and Urban Development*, 16 FLRA 38 (1984), in which HUD attorneys who handle litigation, provide legal expertise and interpret policies were held to be engaged in implementing policy. Any comparison of attorneys to NCUA Examiners is inapposite because handling litigation, providing advice and interpreting policy all are traditional duties of an attorney to a client in a relationship where, by definition, the attorney gives advice and makes recommendations and the client decides whether to follow the advice and whether to direct the attorney to implement the recommendations.

decide and bring about NCUA's plans and courses of action for future supervision of the credit unions it oversees.

**B. Post-Navy ADP Case Law Demonstrates That Examiners Influence, Decide and Bring About Agency Plans and Courses of Action**

1. Independent Decisionmaking Within Broad Guidelines. The extent to which an incumbent makes independent decisions within broad agency guidelines supports a finding that his or her actions influence, decide and bring about agency plans and courses of action. *Bureau of Mines*, 9 FLRA at 111. In performing the key functions of the job, Examiners are governed by certain parameters: the Federal Credit Union Act, NCUA rules and regulations, standard credit union by-laws, accounting rules, and NCUA-produced manuals offering guidance to Examiners who want it. Within these confines, however, the record shows that Examiners have extraordinary discretion.

As the RD recognized, the "risk-focused examination process" gives Examiners enhanced authority and flexibility. RD Dec. at 4-5. The process allows Examiners to set the scope of each examination; to decide how much time and attention to devote to each "risk area" based on his or her assessment of the risk; and to exercise professional judgment in assessing the safety and soundness of the credit union's operations. *Id.* As a result, most examiners have "a great deal of discretion" to individually focus their examinations. *Id.*

NCUA encourages and trains its Examiners to develop their professional skills and to apply their professional judgment in conducting examinations. *Id.* at 5. The evidence demonstrates that they have the discretion to do exactly that in carrying out the key functions of the job. No law, rule, regulation, policy or Agency guidance tells

Examiners how they must conduct an examination or what outcome they must reach. Rather, these parameters represent the outer limits of the Examiner's discretion to independently decide the outcome of each examination.

2. Degree of Higher Level Prior Approval. Other than for purposes of checking for consistency with established programs, Bureau of Mines, 9 FLRA at 111, the degree to which the incumbent's actions are subject to prior supervisory approval or subsequent review weighs against a finding that he or she influences, decides or brings about agency plans and courses of action. Dept. of Energy, 40 FLRA at 266; Food & Nutrition Service, 34 FLRA at 145; Federal Crop Insurance Corp., 46 FLRA at 1463,

The evidence shows that Examiners routinely carry out the key functions of the job without prior supervisory approval. Supervisors normally do not review examination reports before the Examiner presents them to the credit union, and Regional Directors never review them. Neither supervisors nor Regional Directors ever sign the final examination report; only the Examiner does. And if the report includes a DOR, it typically is neither discussed with nor reviewed by a supervisor before being issued. Neither supervisors nor Regional Directors ever sign a DOR. As the RD found, most Examiners have the discretion to assign a CAMEL rating without supervisory approval. RD Dec. at 5. At most, supervisors and Regional Directors occasionally are made aware of the examination results before they are presented to the credit union.

Despite this evidence, the RD misapplied the "higher level prior review" criterion to the Examiners. Unit eligibility is supposed to depend on how the incumbent functions in actual practice, not on theory or speculation. Aberdeen Proving Ground, 57 FLRA at 157; Dept. of Labor, Office of the Solicitor, 37 FLRA at 1377. Here, the RD bypassed

the evidence of current actual practice, which showed how rarely higher level approval is required or sought. Instead, he focused on the right that Agency supervisors have to insist on prior review and approval if they wished. The misapplication of this criterion is what allowed the RD to conclude, incorrectly, that “everything [Examiners] do is subject to review” at the Regional and national level. RD Dec. at 22.

In contrast to the Examiners, the RD correctly applied the “higher level prior review” criterion to the Agency’s Risk/Loss Officers (“Officers”). In finding them to be “management officials,” the RD was persuaded that their duties go beyond effectuating Agency policy because “[t]heir recommendations are routinely adopted without change.” RD Dec. at 24. To support this conclusion the RD focused on current actual practice, acknowledging that the Officers’ “recommendations” routinely go up the chain of command through as many as three tiers of “higher level prior review” before ultimately being “adopted without change.” The RD found, for example, that the Officers’ proposals for “special assistance” eligibility criteria must be approved first by the Director of Risk Management in the Office of Examination and Insurance (“E&I”), then by the Director of E&I himself, and finally by the NCUA Board. *Id.* at 10, 24. And the Officers’ draft post-mortem reports on Insurance Fund losses must be submitted for approval by both E&I’s Division of Risk Management and the Director of E&I himself, and then must be submitted for review and comment to the Region where the loss took place. *Id.* at 11.

Applying the “higher level prior review” criterion to evidence of the current actual practice of Examiners, it is clear that they routinely carry out the key functions of the job without prior supervisory approval, and the results are accepted without change.

In comparison, the Officers “recommendations” routinely require prior approval, often at more than one level, before they are accepted without change.<sup>10</sup> Judging by whose functions involve the greater range of “recommendations” that must be approved before being adopted, and the number of levels of approval those “recommendations” must go through, it is the Officers who undergo the greater “degree of higher approval.” By that measure, the functions of NCUA’s Examiners go beyond effectuating Agency policy at least to the extent that the Officers’ functions do.

3. Degree of Post-Examination Higher Level Review. Whether the incumbent’s decisions carry considerable weight, are accepted as authoritative and are frequently implemented, supports a finding that his or her actions influence, decide or bring about agency plans and courses of action. *Bureau of Mines*, 9 FLRA at 111; *U.S. Coast Guard*, 7 FLRA at 744; *Defense Communications Agency*, 8 FLRA at 274. The less the incumbent’s decisions are reviewed, appealed and reversed after the fact, the more weight and authority they carry, and the more frequently they will be implemented.

Post-examination review takes two forms: supervisor review and Regional Director appeal. NCUA supervisors sometimes review examination reports *after* the Examiner presents them to the credit union, but not for purposes of undoing the Examiner’s actions. Rather, each supervisor is required to review a limited number of each supervisee’s past reports so that they can be addressed in the supervisee’s next annual performance appraisal. Also, a sampling of examination reports is reviewed after the fact for quality control purposes. Neither of these purposes intrudes on the

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<sup>10</sup> It is ironic that the RD described one of the Risk/Loss Officers’ functions as “essentially replicating the work of the examiners,” RD Dec. at 9-10, yet he refused to find that the Examiners themselves were “management officials.”

Examiner's discretion to act without supervisory approval; both are more in the nature of checking for consistency within the "risk-focused examination process."

Apart from supervisor review, a discontented credit union has the right to appeal an Examiner's decisions to the appropriate Regional Director. Despite the existence of this right, however, the evidence indicates that those decisions are rarely appealed and almost never overturned. Thus, Examiners' decisions prevail almost all the time.

The RD misapplied this criterion to Examiners in the same way as he misapplied the last one: by failing to consider evidence of actual current practice, as required when assessing unit eligibility. Despite the evidence that appealable decisions are rarely appealed to a Regional Director, the RD concluded that "everything [examiners] do is subject to . . . appeal by the credit union." RD Dec. at 22. The evidence of current actual practice with respect to post-examination review of Examiners' decisions is to the contrary, confirming that those decisions carry considerable weight and authority within the Agency and, thus, are frequently implemented and almost never overturned.

4. Authority to Speak for Agency. Whether the incumbent speaks for the agency and binds its resources is a factor in determining whether his or her actions influence, decide or bring about agency plans and courses of action. *Space Division*, 9 FLRA at 887.

Credit unions uniformly perceive the Examiner as the voice and face of NCUA. From the outset of the examination process through the Joint Conference with the board of directors and management, a credit union's only contact with the Agency usually is the Examiner. More importantly, it is the Examiner who, through the CAMEL rating reflecting his or her judgments about the credit union's safety and soundness, speaks for



NCUA, sets in motion the Agency's course of future supervision, and binds the Agency's resources accordingly. It is in this regard that Examiners' actions collectively influence, decide and bring about NCUA's plans and courses of action for the credit unions it oversees.

5. Impact on Agency Course of Action. The degree to which the incumbent's decisions commit the agency to a particular course of action without supervisory approval shows that his or her actions influence, decide and bring about agency plans and courses of action. *Federal Crop Insurance Corp.*, 46 FLRA at 1463; *Rock Island Arsenal*, 8 FLRA at 858. As a credit union's safety and soundness deteriorates, the Examiner may decide to lower its CAMEL rating accordingly, triggering more aggressive supervision and more restrictive regulation by NCUA. RD Dec. at 4. This forces NCUA to commit staff and resources to the job of restoring that credit union's safety and soundness.

For example, to conduct more frequent on-site examinations requires NCUA to divert an Examiner from duties elsewhere and absorb the consequent additional labor and travel costs. The same is true of off-site and on-site "supervision contacts" which are necessary to both assist and monitor the credit union in between examinations. To deal with major operational issues that pose a threat to solvency, the Region will have to separately assign a Problem Case Officer and/or a Subject Matter Expert to develop a workout plan for the credit union to avoid liquidation. For these reasons, whenever an Examiner lowers a credit union's CAMEL rating to "3" or worse, there is a tangible impact on the allocation of NCUA's human and monetary resources extending well beyond that individual credit union.

C. NCUA Examiners Meet The Definition Of “Management Official” To The Same Extent As The Auditor In Ft. Monmouth Did

In the case most comparable on its facts to this one, the FLRA held that the principal auditor for an Army command group qualified as a “management official” within the meaning of 5 U.S.C. §7103(a)(11). *Fort Monmouth*, 4 FLRA 627. Among other duties, the incumbent planned, developed and conducted regularly scheduled and special audits; carried out review objectives assigned and prioritized by his supervisor; reviewed internal procedures and recommended policy changes; and used professional judgment to decide if an audit was necessary in a given area and, with supervisory approval, set up procedures for the audit and decided when the audit results were satisfactory. *Id.* at 631. Based on these duties, the FLRA held that the principal auditor had an “active role in influencing the internal review objectives of the activity” that “extends beyond an expert or professional rendering resource information or recommendations to the point of active participation in the ultimate determination [of policy].” *Id.*

The facts here show that Examiners function at least as independently as the principal auditor did in *Ft. Monmouth*. Unlike the principal auditor, for example, NCUA’s Examiners independently set the scope of their examinations, RD Dec. at 5; they do not need to obtain a supervisor’s approval to determine what areas warrant priority review, nor to determine what areas warrant auditing at all.

When “to bring about” is substituted for “influence” and “plans or courses of action” is substituted for “policy,” as *Navy ADP* provides, the FLRA’s *Ft. Monmouth* holding supports a finding, as follows, that the Examiners here meet the definition of a

“management official”: they have an active role in bringing about NCUA’s examination and supervision objectives, extending beyond the role of an expert or professional rendering resource information or recommendations, to the point of active participation in the ultimate determination of Agency plans and courses of action for future supervision of the credit unions it is responsible for overseeing.

## VI. CONCLUSION

For the reasons set forth the above, NCUA respectfully urges the FLRA to grant this application and to reverse the RD’s determination that NCUA’s credit union Examiners are not “management officials” within the meaning of 5 U.S.C. §7103(a)(11).

Respectfully submitted,



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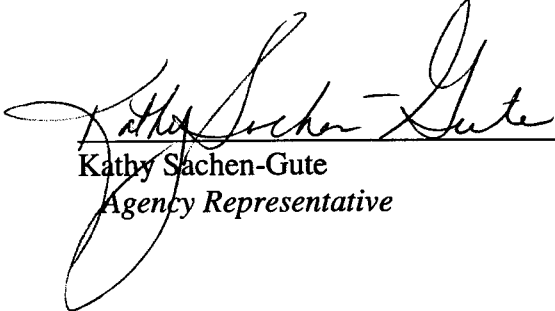
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Dated: February 26, 2004

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "NCUA's Application for Review of Regional Director's Decision and Order" was served by certified U.S. Mail, postage prepaid, this 26<sup>th</sup> day of February 2004, upon the following counsel of record:

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