

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY  
SAN FRANCISCO REGION

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NATIONAL CREDIT UNION ADMINISTRATION  
Activity

-and-

NATIONAL TREASURY EMPLOYEES UNION  
Petitioner

CASE NO. WA-RP-03-0057

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**DECISION AND ORDER AND DIRECTION OF ELECTION**

A petition was filed with the Washington Regional Director of the Federal Labor Relations Authority (Authority) under section 7111(b) of the Federal Service Labor-Management Relations Statute (Statute). By Order dated August 12, 2003, this case was transferred to the San Francisco Region for processing. Section 7105(e)(1) of the Statute provides that the Authority may delegate to any Regional Director certain authorities and in section 2422.30(c) the Authority delegated to me the authority to conduct investigations and hearings in representation matters and issue Decisions and Orders. A hearing was held before a Hearing Officer of the Authority from June 30 to July 2, 2003 and on July 22, 2003. Upon careful consideration of the entire record in this case, including the timely post-hearing briefs submitted by both parties and pursuant to section 2422.30 of the Authority's Rules and Regulations, I hereby find and conclude as follows:

**STATEMENT OF THE CASE**

The National Treasury Employees Union (NTEU) filed the petition in this case seeking an election in a nationwide unit of professional and nonprofessional employees of the National Credit Union Administration (NCUA). The parties agree that the unit is appropriate for exclusive recognition and that there are no bars to an election in this case based on an agreement, prior election or certification. Although the parties stipulated to the appropriateness of the petitioned-for unit, they do not agree on the bargaining unit eligibility of many employees. Most of the employees whose eligibility is in dispute are Credit Union Examiners, CU-580-11 and CU-580-12. NCUA asserts that these

employees should be excluded from the bargaining unit because they are management officials and/or they perform supervisory functions.<sup>1</sup> NTEU contends that the employees in the positions at issue are neither management officials nor supervisors as defined under the Statute and, therefore, the employees should be included in the bargaining unit.

The parties do not agree about the unit eligibility of employees in the position of Problem Case Officer, Regional Training Specialist, Senior Financial Analyst and Risk/Loss Officer. NCUA contends that the employees in these positions should be excluded from the bargaining unit as management officials, while NTEU alleges that the incumbents are not management officials and are appropriately included in the unit.

Finally, the parties disagree about the unit status of employees in the position of Management Assistant for Operations, Risk Management Analyst, Employee Development Specialist, Realty Specialist and Attorney/Advisor (FOIA Officer)<sup>2</sup>. NCUA argues that the employees in the disputed positions all are engaged in federal personnel work in other than a purely clerical capacity and should be excluded from the unit. In addition, NCUA asserts that the Realty Specialist and the Risk Analysis Officers should be excluded from the proposed unit as a management official NTEU asserts that these employees either are not engaged in federal personnel work or that their work is merely clerical in nature and that they should be included in the proposed bargaining unit. NTEU does not agree that the Realty Specialist is a management official.

With the exception of the Realty Specialist, Employee Development Specialist and the FOIA Officer, who evidently occupy unique positions, all findings in this case are based on representative testimony, that is, the parties agreed that the testimony of particular individuals would be representative of all others in the same position and that decisions based on this testimony would be applied to all other employees in that position. In addition, the parties agreed that the record developed concerning the unit status of Credit Union Examiners was equally applicable to Regional Training Specialists and that the

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<sup>1</sup> The hearing record does not reflect that NCUA withdrew its claim that Credit Union Examiners perform supervisory functions and should be excluded from the unit, in part, based on supervisory status. Therefore, although NCUA did not argue on brief that the employees should be excluded as supervisors, I will decide whether they are supervisors within the meaning of section 7106(a)(10) and excluded from the unit under section 7111(b) of the Statute.

<sup>2</sup> NCUA asserts on brief that the individual in this position also serves as the agency's Assistant Ethics Officer. The record does not reflect this title or contain evidence concerning the employee's duties as an Assistant Ethics Officer.

decision on unit eligibility of examiners would be applied to the Training Specialists, as well.

## FINDINGS

### Mission and Organization

The mission of NCUA is to administer the Federal Credit Union Act. Under that Act, NCUA is responsible for administering the National Credit Union Shared Insurance Fund and has authority to supervise and regulate federally insured credit unions. Some of the credit unions subject to NCUA supervision are chartered by state agencies; the majority are federally-chartered by NCUA. NCUA supervises the operations of the federally insured credit unions to ensure their safety and soundness and to minimize risk to the Shared Insurance Fund.

The Shared Insurance Fund provides funding to cover the liabilities of an individual credit union that is closed and is liquidated at cost. The Shared Insurance Fund ensures that the depositors of a liquidated institution receive all of their insured funds. Assets of the Insurance Fund come from a one percent investment by each credit union that participates in the fund and the earnings that are generated from those funds. A primary concern of NCUA is to protect the Insurance Fund by supervising the operation of credit unions to minimize their impact on the fund.

The agency is headed by the NCUA Board, a three-person panel appointed by the President. Day-to-day operations are managed by an Executive Director who reports to the Board. The NCUA organization consists of a central office and six regional offices, although one of the regional offices is to be eliminated at the end of 2003. Each regional office is assigned a particular geographic area and is responsible for the supervision of the credit unions based in that area. NCUA provides supervision to all federally-insured credit unions. Depending on the states assigned to a NCUA regional office, agency employees may work with only federal credit unions or both state and federal credit unions.

Organizationally, each NCUA Region is headed by three senior staff members, the Regional Director, the Associate Regional Director (ARD) of Programs and the ARD of Operations and consists of a Regional Office with Divisions of Supervision, Insurance, Special Actions and Management Services, as well as a Division of Programs. The Regional Directors report to the NCUA Executive Director. In each region, the ARD of Operations supervises all the employees in the Regional Office and its divisions. The ARD of Programs supervises the Supervisory Examiners who are the first line supervisors for the field examiners. The examiners are the contact point at the credit unions, no one reports to an examiner as a NCUA employee.

## FIELD POSITIONS

### Credit Union Examiners/Regional Training Specialists

Primarily, the examiners conduct reviews of credit union operations, called examinations, and make findings about whether the credit union is operating in a safe and sound manner. Each examiner has a district of credit unions in a particular area within a region. After completing an examination of a credit union, the examiner issues an examination report. The report sets out the examiner's findings concerning the credit union's operations and performance in specific areas. Each of these findings must be specifically documented and supported by evidence attached to the report. The examination report may contain a document of resolution (DOR) that addresses the actions that the credit union board of directors has agreed to take within particular time frames, in order to ensure compliance with regulations and the safe and sound operation of the credit union.

As part of the examination process, examiners ensure that a credit union is complying with all applicable laws, rules and regulations, including the Bank Secrecy Act. The requirement to comply with this Act exists to make it difficult to launder money in today's terrorist environment. Examiners also ensure compliance with the Supervisory Committee Audit and Verification Review. The Supervisory Committee is an integral part of oversight for the individual credit unions, acting as the watchdog for the NCUA Board and the credit union. NCUA does not conduct audits and relies on the Supervisory Committee for this function. Therefore, the examiners determine whether the credit union's Supervisory Committee has done an ample job meeting that requirement.

NCUA has a rating system for the safety and soundness of credit unions. Based on examination results, the credit union is assigned a rating between 1 and 5. These are known as the CAMEL ratings. The CAMEL rating assigned to a credit union determines the level of supervision provided by NCUA. Credit unions with CAMEL ratings of 1 and 2 are eligible to participate in Regflex, a program that allows them to operate with less supervision from NCUA. A credit union with a 4 or 5 CAMEL rating is considered to be in danger of failing within two years and is subject to frequent examination by NCUA.

NCUA formerly conducted its examinations in a process-oriented fashion in which every examination covered exactly the same information, regardless of the specific challenges presented by a particular credit union. In about August 2002, NCUA changed to a risk-focused examination process which allows the examiners to assess and focus on the risks associated the operation of the particular credit union. While examiners always exercised professional judgement in assessing credit union operations, NCUA's change to the risk-focused approach enhanced their ability to do so. In the risk-focused examination, the examiner has more authority than under the previous system to determine

how to spend his/her time and more flexibility to determine the scope of the examination at a particular credit union.

NCUA provides examiners with many tools to structure, focus and conduct their examinations of credit unions. The credit unions are required to submit quarterly financial reports to NCUA. These reports are used by the examiners as a starting point to determine the scope of their examination. The information from these reports and past examinations is entered into AIREs, which is NCUA's examination package software. AIREs provides a matrix with a preliminary assessment of the credit union's risk profile in seven different risk areas. In addition, AIREs provides electronically all of the forms and suggested procedures for conducting the examination. This computer matrix also provides a suggested CAMEL rating for the credit union. However, the examiner has discretion to change the CAMEL rating if examination findings reflect that a different rating is justified. In addition to AIREs, the examiners have access to an extremely detailed agency examination manual that includes agency policy and explicit guidance on many examination issues, as well as forms and worksheets to assist the examiner in obtaining necessary information to make decisions concerning the CAMEL rating. In some NCUA regions, a regional-level policy manual provides further direction to the examiners.

Depending on their experience level, some examiners are more reliant on the national and/or regional manuals in conducting their work while others rarely, if ever, have a need to refer to these manuals in carrying out their assigned examinations. The examiners are trained by NCUA to develop their professional skills and to apply their professional judgement in conducting examinations. Most examiners are given a great deal of discretion in determining what areas of risk to focus on in carrying out an examination. Most examiners also have the discretion to change a CAMEL rating for a credit union, without prior approval from regional management. This varies somewhat by region, in that some regional directors wish to know and concur in a determination to lower a credit union's rating to level 4 or 5. The decisions made by examiners in determining the scope of the examination of a credit union and in assigning a CAMEL rating affect the amount of staff time and agency resources directed to that credit union. If the examination can be specifically focused, it may take less of the examiner's time and fewer of the agency's resources to accomplish. The CAMEL rating assigned directly affects how much supervision the credit union will receive from NCUA and, thus, the amount of NCUA resources directed to that credit union.

After completing an examination, the examiner prepares a report documenting the findings and describing any corrective action to be taken by the credit union. The examiner holds a Joint Conference with the credit union's board to advise the board of the findings and the CAMEL rating. If the examiner wishes the credit union to take specific actions, these are recorded in a Document of Resolution (DOR). At the Joint Conference, the examiner tries to obtain the board's concurrence with the DOR. Following the Joint Conference, the examiner's report is reviewed and signed by the supervisor and the

regional director. It is then forwarded to the credit union board with a cover letter that explains the procedure for appealing the examination findings. In some NCUA regions, the examiner meets with the board before the supervisor or the regional director review or sign the examination report. In other regions, the examiner's supervisor normally attends the Joint Conference and is aware of the findings in a DOR before they are presented to the board. In all cases, the credit union is informed that it may appeal the examiners findings to the regional director.

In essence, the examiners seek to obtain the credit unions' voluntary compliance with applicable law, rule and regulation, as well as with NCUA policies designed to protect safety and soundness of the Shared Insurance Fund, mitigating risks to the fund and protecting the fund resources. Through identifying problems at a credit union and devising solutions, the examiner contributes to returning the institution to sound operation, thereby protecting the health of the Shared Insurance Fund. If the credit unions do not voluntarily comply, additional informal steps are taken at the regional level to prompt them to cooperate. This may include a specific Letter of Understanding in which the credit union promises to take actions to correct identified problems or the issuance of a regional director's Preliminary Warning Letter advising the credit union that NCUA may take specific action to restrict operations and impose procedures. The examiners may be involved in negotiating a Letter of Understanding or may draft a Preliminary Warning Letter for the regional director's consideration. However, the decision to take either of these actions is the regional director's, not the examiner's. In fact, any formal action against a credit union must be approved by NCUA at the national level.

At times, NCUA examinations are conducted by a team of employees. Each examiner is assigned to participate in some team examinations each year. The examiner whose holds responsibility for supervising the credit union is also responsible for assembling the team and distributing work responsibilities among team members. The examiners must estimate their work time and schedules and that of team members and obtain concurrence from the supervisor. Although most examiners have latitude to choose team members, in practice, they regularly chose the colleagues who have the most experience in the areas subject to the examination. In some instances, for example when a credit union is in a less-desirable travel location and colleagues are unwilling to voluntarily agree to be on an examination team, the supervisory examiner may assign the team members. The Examiner-In-Charge (EIC) during the team examination of a credit union normally distributes the work based on the team members' areas of expertise. Team members provide their data and findings to the EIC, who is responsible for preparing the report, assigning the CAMEL rating, conducting the Joint Conference and drafting any further letters, as appropriate.

### Problem Case Officers

These employees are experienced examiners who are assigned primarily to deal with complex problems in credit unions within a NCUA region. The Problem Case Officer (PCO) normally is assigned to supervise credit unions that have CAMEL ratings of 4 or 5. These ratings indicate a high probability that the credit union will fail within two years. PCO's conduct examinations and have the same examination responsibilities and access to examination tools as all other examiners. However, they are expected to closely supervise the credit unions they are assigned and to resolve problems expeditiously, with a view to protecting the Shared Insurance Fund. In doing this, PCO's have discretion to skip entire portions of the normal examination process and to focus directly on the perceived areas of risk. The PCO is to assess the operation of a credit union identified as failing and to assess whether NCUA's resources are better spent on close supervision in an attempt to restore financial health or on swift liquidation or merger of the credit union to minimize risk to the insurance fund. In doing this, the PCO develops what is known as a workout plan, which includes the PCO's recommendation as to NCUA's course of action with respect to the credit union. In most cases, the PCO's recommended workout plan is adopted, without revision.

### Regional Management Assistants for Operations

There is one Management Assistant in each Regional Office. These employees are primarily responsible for coordinating benefits and personnel actions within the region. The position was formerly known as Personnel Coordinator. The assistant answers questions about benefits such as retirement, life insurance, health insurance, and various types of leave. The assistant also serves as the coordinator with the agency's Office of Human Resources (OHR) in recruitment and staffing.

The assistant's role in recruitment is to prepare a request for personnel action, when regional management determines to fill a vacancy. The request is sent to OHR, prompting staff there to contact the Office of Personnel Management (OPM) to post the vacancy announcement on the Internet. The assistant does not determine whether to recruit or when to recruit. Instead, the assistant sends a request for personnel action to OHR at the requesting of the regional director or other regional manager.

The assistant provides information to employees on benefits, answering their questions, if possible, and referring matters to OHR if policy decisions are involved or if more complex issues must be researched. The assistant participates in new employee orientation by meeting with the new employee, swearing the employee in and reviewing his or her personnel paperwork. At that time, the assistant reviews all the benefits documentation and answers the new employee's questions about federal benefit programs.

The assistant monitors the performance appraisal system, by gathering the appraisals and ensuring that they have the necessary signatures and to check the supervisor's addition in calculating the appraisal scores that have been assigned. The assistant then forwards the appraisal data, the scores assigned by the supervisor to OHR. The assistant's access to the appraisals occurs after the appraisals are presented to the employees and signed by the employees. In transmitting the appraisal data to OHR, the assistant simply takes the scores from the evaluations and sends them to headquarters. The assistant does not review anything in the substance of the appraisal, including the score.

The assistant also processes cash awards, tracks awards and maintains reports on awards. The decision that an employees should get an award is made by the supervisor, who asks the assistant to process the award. The assistant prepares the necessary document and submits it to the ARD for approval. The request is then sent to NCUA headquarters for processing.

The assistant may be assigned to draft letters involving disciplinary or adverse actions for an agency supervisor. The employee who provided representative testimony had drafted such letters several times, including proposals to remove an employee from federal service and the agency's letter removing the employee. The assistant was not involved in the decision to propose or take this adverse action. However, she had access to the draft documents before they were issued to the employee. In addition, she had access to management's disciplinary file used to document the proposed action.

The assistant is currently involved in processing of grievances under the agency grievance procedure. In this regard, the assistant sends the employee a form letter acknowledging receipt of the grievance. While the assistant has limited responsibility in the EEO process, she may be asked to get information from agency management to include in standard response letters in EEO cases. The assistant has no involvement in employee appeals of discipline, adverse action or EEO complaints; all of these matters are assigned to staff in the central office. In addition, she is not involved in any discussion of or decision making on grievances or in generating grievance decision documents as all grievances are also assigned to headquarters personnel.

The assistant is involved with the process of establishing the salaries for new examiners and for examiners transferring from other regions. The assistant uses a salary administration spreadsheet to develop a recommended salary for a the new employee. Examiners may receive salaries within a certain range of pay and the assistant compares what other employees in the same grade receive in order to make a recommendation. The assistant's recommendation on pay levels is based on application of established criteria, however, she may recommend that the employee receive a different salary based on consideration of background, experience and education. Her recommendations are normally adopted by regional management.



The assistant also provides advice to supervisors on leave issues and may research leave issues if the supervisor suspects abuse. She researched one such issue and determined that, based on NCUA policy, the employee was not abusing leave as the supervisor suspected, but was using family-friendly leave. The assistant determined that the employee's use of leave was warranted under the regulations and so advised the supervisor, who did not pursue action against the employee based on her advice.

The assistant handles all worker's compensation claims for the region by sending the necessary forms to the employee and supervisor, working with the employee to assist in filling out the forms, advising the employee on what further documentation may be necessary and ensuring that the employee knows the time limits for processing a claim. When the employee and supervisor return the forms, the assistant reviews them and submits them to the Office of Workers Compensation Programs. During the processing of the claim, the assistant receives and reviews copies of the doctors' statements.

## HEADQUARTERS POSITIONS

### Risk/Loss Officers

The individuals in the position of Risk/Loss Analysis Officers are assigned to the Division of Risk Management in Examination and Insurance (E&I) at NCUA headquarters. These employees' main duties involve dealing with individual credit union problem cases. The officer reviews the matters submitted by the regions for concurrence. Concurrence is often required for items officially delegated by the NCUA Board and, most often, the officers work on cases that, by the delegations of authority, require the concurrence of E&I. The credit unions the officers work with are identified for action by the regions as a result of the examination process.

The NCUA Board has established standards as to how the region determines when to forward these cases. Once the determination has been made by the regional director to forward a matter, the officer performs his own analysis of what the region is proposing to do, and then either recommends that the Director of E&I approve or disapprove the region's recommended action. The nature of the action or assistance is beyond what the regional level of NCUA is authorized to provide to the credit union without E&I approval. The officers deal with about one concurrence case per month. The number of these cases essentially depends on the economy; in poorer economic times there are more cases and in good times there are fewer cases. After concurrence with the regional recommendation, the officers monitor the credit union by preparing quarterly or annual reports, keeping a watch on the balances of any financial assistance outstanding and monitoring the quarterly financial reports.

In their analysis process, the officers essentially replicate the work of the examiners, conducting an independent review of the data to determine whether the examiners findings

make sense and whether the region's proposal is an appropriate course of action. The officer completes an analysis and makes a recommendation to the Director of E&I, who makes the final decision. The officers' recommendations are normally adopted. The officers rarely, if ever, recommend against whatever action the region desires. However, the officer may find problems with the data and contact the region for corrections. In this way, most concerns revealed by the officer's analysis are resolved and the officer's recommendation to the Director of E&I supports the region's request.

The officers are also involved in providing training. The witness who provided representative testimony prepared the lesson plan for and conducted problem resolution seminars for NCUA and state examiners. He developed the class and reviewed his plan with the Director of Risk Management, making revisions as requested by the Director. The officer conducted this training three times in 2003. He is also responsible for coordinating and developing the agenda for the training conference held periodically for problem case officers. The officer works with the Director on the agenda and they develop the course together. He then presents the class personally.

The officer maintains the Special Assistance Program Manual, which was approved by the NCUA Board of Directors, and describes what credit unions are eligible to receive assistance, and what types of assistance can be granted without having to go to the NCUA Board. In doing this, the officer developed the policy in draft and presented it to the Director of Risk Management and the Director of E&I for revision. He and the Director of Risk Management then presented the manual to the NCUA Board, which had ultimate authority as to whether it would be the policy of the Agency. To the extent the manual sets out requirements necessary in order for a credit union to qualify for special assistance, the officer developed these requirements, which were approved by Risk Management, by E&I and by the Board without substantial changes.

The officer is also responsible for developing and maintaining SATEX and other risk management software systems. SATEX is a system which enters detailed financial information into a spreadsheet to identify ratios and trends that would allow analysis of a credit union's financial condition month to month and to track compliance with the document of resolution or a letter of understanding and agreement. This program is used by Risk Management staff to monitor the problem credit unions and provide regional management with detailed reports. SATEX is also used to track credit unions that have been approved for special assistance, to maintain tight supervision of the status of outstanding assistance.

The officer is also involved in setting the level provided for loss expense with the national credit union share insurance fund. Each month, he receives reports from the regions on anticipated losses in specific credit union cases. He consolidates that information to determine the need for reserves to meet these potential losses. In addition, the officer analyzes historical losses over the past 15 years and makes recommendations

to the Director of E&I as to how much NCUA should be expensing or not expensing to properly disclose potential losses. Decisions in both of these areas ultimately impact the liquidity of the Shared Insurance Fund and the officer's recommendations concerning these reserves are routinely accepted without substantial change.

The officers also conduct post-mortem analysis of the losses incurred when the Shared Insurance Fund must expend more than \$2 million to either merge, liquidate or continue operations in an individual credit union. The purpose of this analysis is to review NCUA's supervision of the case to determine whether there are lessons to be learned from the experience or changes that should be made in policy or procedure to avoid similar situations in the future. The officer's post-mortem analysis is reviewed and adopted by Risk Management and E&I before it is issued to the region in draft form for comment. The final document may be changed based on input from the region. However, once the final post-mortem is issued, the region is required to take the actions required by the analysis and the officers track compliance by the region.

#### Risk Management Analyst

The Agency asserted at the hearing that employees in this position should be excluded from the unit both as management officials and as personnelists. There was some confusion on the record as to the position of the representative witness with the agency. It is unclear whether the witness was called in the mistaken belief that she occupied a different position or whether the parties actually disputed her eligibility based on her actual position. She may, in fact, be a Risk/Loss Officer, but this was not clarified on the record. NCUA did not address this position in its brief, however, there is nothing to show that NCUA ever withdrew its assertion that the incumbents of this position should be excluded from the unit. Therefore, I will decide the matter.

The individuals in this position are assigned to the Division of Risk Management in NCUA Headquarters. The analysts assess and evaluate risk in the credit union industry. Their assessments involve both the industry as a whole and particular credit unions. In order to do their work, the analysts review the data in the quarterly financial reports that credit unions are required to file with NCUA. The analysts assess this data, draw conclusions from the data and write summary reports of their assessments.

The analysts and the examiners use the same financial reports to do their work. Rather than assessing each financial report, the analysts do a statistical sampling of a certain portion of the reports submitted by the credit unions. In addition, the analysts review and assess quarterly financial reports that cause concern because the credit unions are outside of the norm in terms of risk. The analysts identify these credit unions and report their findings in a written summary. To a large extent, the analyst acts as a quality control for work done by NCUA in the field. The analyst may evaluate the viability of a particular credit union at the same time that the examiner in the region is assessing the

same credit union. The analyst's work provides extra assurance that the examiner and the region identify problems and develop plans for dealing with them. The analyst may contact the region to describe a problem and determine whether the region has also identified it and/or determined a course of action to deal with the problem. In addition, while the examiner reviews the financial data on an individual credit union basis, the analyst may look at geographic areas or the nation as a whole, to assess whether there are pockets of risk or geographically-based issues. Although the analysts may review individual credit unions, their primary task is more systematic in terms of assessing risk to the Shared Insurance Fund.

The written summary reports prepared by the analysts are, in part, an internal tool for management to analyze how to use its resources. Another purpose of the reports is to identify risks to the Shared Insurance Fund, so that NCUA management knows what the risks are and potential losses are avoided or minimized. If analysts identify problems the contents of the report may prompt NCUA management at the national level to determine that more resources must be focused on a certain risk area or in a certain part of the country. An analyst's report may prompt NCUA management at the regional level to focus resources on a particular credit union. In some cases, NCUA management may decide to form a special team to work on risks that are identified in an analysts report. Management may also identify training needs for agency personnel as a result of the analysts' reports. While the Division of Risk Management does not determine how to allocate resources within NCUA, the analysts' reports identifying risks alert those who make the decisions of allocations of financial and personnel resources.

As a result of their reviews, the analysts may also make policy recommendations or recommendations about examination procedures. They may be involved in drafting recommendations submitted by the Division of Risk Management to higher levels of NCUA on better management of certain risks. The analysts do not determine whether or not NCUA will adopt these recommendations, which are subjected to several levels of review and, depending on the type of action recommended, may require final approval by the NCUA Board. At times, an analyst may assemble data and prepare a response to a request for information from a member of Congress.

The analysts draft two types of letters that are sent to credit unions, both of which are subject to several layers of review. One type of letter, considered informational, advises the credit union of trends observed within its operations. The other type of letter is a formal communication process through which NCUA advises the credit union of specific issues; these letters are published and available to the public. Both informational and formal letters to credit unions are drafted by the analyst, reviewed by coworkers and forwarded through the chain of command for signature and issuance by the Chairman of the NCUA Board.

Analysts may also be involved in gathering information used to determine internal policies and procedures within NCUA. For example, an analyst developed the tool used to collect data from the examiners on the amount of time they spend on safety and soundness issues as opposed to regulatory compliance issues. The data is collected so the NCUA can allocate budget according to the time spent in these activities in a cost accounting process known as the overhead transfer process. She drafted the action memorandum making recommendations to the NCUA Board on how much funding was needed based on the study and was one of the analysts who presented findings to the board on the overhead transfer process. However, the analysts do no independent evaluation which will affect staffing at either the regional or national level.

The representative witness testified that she was somewhat involved in the procurement process. She stated that she was involved in the process to procure a vendor that would provide NCUA with economic reports electronically and currently serves as the primary contact for that contract. However, the analyst was not asked to describe either the nature of her involvement in procuring these services or the work she performs as primary contact on the contract. Therefore, while the record shows that she is involved, it does not contain any detail on the nature of her involvement in the procurement process or of her current duties with respect to the contract.

In terms of training, the analysts may identify a need for training as a result of their reviews. They are also used to develop training materials and to conduct training for examiners in such subjects as problem resolution and the risk-focused examination rollout. Developing training materials involves a group effort in determining what should be included and the training seminars themselves are also a team effort in which the analyst may be involved. It appears that the analysts most often are involved in providing existing training programs and that the curriculum is revised based on feedback from other presenters and from the training participants on how the training should be modified by adding new topics and deleting others. The analysts do not make the final determination on the nature and scope of the training programs. Instead, they prepare a proposed program and send it to the agency's Office of Training and Development for approval.

#### Senior Financial Analyst

The individuals in this position serve as program coordinators in the Office of Strategic Program Support and Planning. The witness who gave representative testimony primarily provides examination assistance for investment and liability management issues, assists with policy issues such as interpretive rulings, policy statements and rulemaking for the NCUA Board, and training examiners in investment and liability issues. His work involves corporate credit unions, rather than ordinary or "natural person" credit unions. A corporate credit union is owned by member credit unions and essentially acts as a banker's bank, providing investment services to the member organizations. The member credit unions invest in the corporate credit union which, in turn, invests in investment

securities and large dollar transactions. The corporate credit unions also provide members with services such as process check clearance.

There are a specialized group of about 30 examiners who deal exclusively with these corporate credit unions, some of whom are further specialized as capital market specialists. These employees are assigned to NCUA's Office of Corporate Credit Unions (OCCU) and are located both in NCUA headquarters and in field offices. The financial analyst is involved in complex examination situations, particularly as regards the corporate credit unions. The financial analyst provides on-the-job training to the specialized examiners and also works with the most complicated issues that might be technically challenging to traditional examiners who don't have experience in the capital markets. He also coordinates scheduling of corporate credit union contacts with the senior investment officers. The examiners do not report to the financial analyst, nor do they report to the Office of Strategic Program Support and Planning (OSPSP). However, the financial analyst typically participates in the examinations of the five largest corporate credit unions and a select number of other corporate credit unions that may present certain risk factors or for which OCCU requests assistance. The witness characterized his work unit as "a high-level technical shop that's supporting the office that's doing the corporate evaluations."

In terms of policy and rule making, the financial analyst participated for three years on a task force with OCCU to revise Part 704 of NCUA rules and regulations, addressing corporate credit unions. OSPSP has concurrence authority on supervisory matters that the NCUA Board has delegated for approval involving expanded authorities for corporate credit unions. As corporate program coordinator for OSPSP, the financial analyst advises the Director of his office on whether it would be advisable to concur with OCCU on actions delegated by the Board. In policy issues, the financial analyst cannot act for the Board, but serves as part of the senior staff for the NCUA Board, making recommendations on Board actions.

In addition, the financial analyst authored portions of Part 702 of the NCUA regulations, addressing the risk based examination process. In particular he took the lead role in developing the risk-based network requirement, along with the minor revision in the rule and provisions that were incorporated by reference for risk mitigation credits. He led a focus group to obtain trade organization input on proposed rule changes. The financial analyst's role in authorship of these rules was as a senior staff member who acted as part of a task force of agency technical experts in making recommendations to the Board, which eventually adopted the rules.

The financial analyst also worked with staff from the Division of Examination and Insurance, on a prompt corrective action rulemaking task force for Part 702. The task force formulated implementing regulations for that portion of the regulations and recommended that the Board adopt them. As part of this task force work, the financial analyst represented NCUA in meetings with staff from the Treasury Department and state

agencies. The record, however, does not describe what the financial analyst did at these meetings or the exact nature of his role as a NCUA representative at the meetings.

As to the training of agency personnel, the financial analyst completes assignments from the OSPSP Director to design, implement and deliver training for examiners. For the most part, the Director does not review this work after assigning it. An assignment to deliver or develop a particular training assignment usually includes preparing the training, establishing the training objectives, and delivering the training. He is primarily responsible for training corporate capital market specialists. He and the financial analyst who is the program coordinator for regional capital market specialists, may independently determine the issues for which the specialists will receive training, they may receive assignments to develop specific training from their Director or other managers, or they may receive suggestions from other offices on training topics.

#### Employee Development Specialist (EDS)

John Faith is assigned to the Division of Training and Development, Office of Human Resources (OHR). At the time of the hearing he had been in the position one month and it was not clear exactly what the scope of his duties would be. Faith had been told that he would retain some of the responsibilities of his former position as a Computer Specialist in OHR, but he was not sure as of the time of the hearing which duties he would continue to perform. In addition, although he knew the outlines of the responsibilities of his new position as the EDS, he had not had time to perform those duties by the time of the hearing. His supervisor did not appear at the hearing to testify as to the scope of his duties as an EDS, or management's intention to assign him duties described in the position description which he had not yet had an opportunity to perform.

As a Computer Specialist, Faith acted as a business analyst for OHR. He was responsible for virtually all information technology matters for the office, including computers and data processing. He worked on a large project to implement the migration from one automated personnel system to a new one. He was responsible for day-to-day automation support for the OHR staff. Faith also worked with the specialist who was responsible for developing a new pay system. He developed models and did research concerning the computer-related aspects of the pay system. In addition, Faith was responsible for preparing, documenting and monitoring the OHR's budget. In doing this work, he developed a number of monitoring and tracking charts and graphs that would be used not only for the budget but also to defend OHR budget issues to the NCUA Board, to the regional directors and to people outside of the Agency.

Faith routinely had access to employee personnel files in order to obtain performance information to enter into the pay allocation program that determined annual bonuses. He created a computer model that contained the employees' ratings converted to a score. Based on the score and the percentage increase that NCUA had determined

to give as a merit increase for the year, he used his computer model to allocate the pay pool, assigning the money available for the merit increase to all of the NCUA employees based on their performance appraisals. In doing so, Faith utilized a set formula by which employees whose rating score was at a particular level were to receive a certain percentage from the pool of bonus funds. Faith's job was to merely apply those numbers to the performance ratings that were provided by the supervisors of the employees in order to generate the amounts of merit increases. He did not do any individual evaluation of performance or issue the performance ratings themselves. While he reviewed employees' personnel records to obtain their performance information, Faith had access to the performance data after the appraisals were issued to the employees. He did not determine the amount of the percentage increases or the formula for applying it to employees performance records.

Faith's understanding of his new position as EDS is that he will retain the budget function for OHR. He is not sure that he will continue to allocate the pay pool and, if he does not, sees no reason why he would continue to have access to employee personnel records. In terms of Faith's continued responsibility for the office budget, on a monthly basis he inputs the budget numbers into a monitoring worksheet to show the status of all budget items vis-a-vis what had been requested and what funds are available. The data is entered after the comptroller closes the books for the previous month. In addition, every year, Faith prepares a budget for OHR. He obtains forecasts from managers in the office about their budgetary needs are for the upcoming year, including travel needs, training needs for their staff and translates their forecasts into dollar amounts broken down by the various budget categories. He prepares a budget and documentation for the Director of OHR to present to the Board, the Executive Director and the Comptroller.

Faith testified that his major role as an EDS will be to work with the staff of the Division of Training and Development to develop electronic learning modules intended to replace some of the classroom training provided to examiners and other agency employees. In doing this work, rather than relying on his experience in computer technology to support systems, Faith will be relying on his familiarity with the World Wide Web to design the man-machine interface between the examiner and the training media.

He is to participate in the development of all of the current and potential future e-learning courses and in designing systems to capture, monitor and track the Agency employee training information, so that supervisors can assess an employee's training record against the core competencies of the position. He has received an assignment to develop a proposal for a first-line supervisory training program and understands that he is to monitor the program once it is approved and implemented. The training is to focus on developing supervisory skills for new supervisors. Faith will be involved in more than the technological aspects of providing training material in an e-learning format. He will be directly involved in determining the substance of this supervisory training. He will be



expected to design other training courses in his EDS position; the assignment for supervisory training was merely his first assignment.

#### Attorney/FOIA Officer

Diane Salva is a Staff Attorney in NCUA headquarters who serves as the agency's Freedom of Information Act (FOIA) Officer. Responsibility for FOIA matters is one of her duties, but not her primary duty. Salva reviews documents to determine whether their release is required or prohibited under FOIA. From time to time, NCUA receives a request for documents that may be contained in employees' official personnel folders (OPF) or other personnel records maintained by NCUA concerning employee performance or records of discipline. When such requests are received, Salva must review the personnel records to determine which documents may be responsive to the FOIA request and which of those documents may be released or must be withheld. On occasion, she reviews multiple employee personnel records in connection with NCUA's response to a FOIA request. Salva does not take part in any personnel actions with respect to employees and is not involved in the management decisions concerning hiring, firing, promotion or awarding employees that may result in documents being placed in OPF or other personnel records. Instead, she has access to the agency's personnel records, as needed, for the purpose of responding to FOIA or Privacy Act requests.

Salva estimated that 60% of her work involved FOIA and that the majority of the requests she deals with are not for personnel records. She also estimated that her FOIA work involves requests for personnel records between 6 and 12 times in a year and that, because of the highly private nature of the records, each of these requests requires more than one work day, on average, to process. Salva also testified that in "employee-related cases," she occasionally has been asked by attorneys in the Office of General Counsel to review documents relative to whether, in fact, NCUA should release them in discovery in response to interrogatories or provide them in depositions. She was not asked to explain the type of employee-related cases in which she does this work, how often she has been assigned this work or to give any specifics concerning her experience with this work. Therefore, the record does not describe the nature and scope of Salva's work in "employee-related cases."

#### Realty Specialist

Robert McDonald is employed as a Realty Specialist in NCUA headquarters. He is responsible for managing the agency's employee home purchase program. He assists Agency employees being relocated with the purchase and sale of their homes, with appraisals to establish the values, inspections, law services, legal services for the purchase and sale of their properties. These are real estate services that NCUA provides when relocating employees. McDonald participated in a group effort to design the home purchase program for the agency.

McDonald sees the employees' travel orders after they are approved to check that the order includes participation in this program. He has access to information about the employee's salaries. However, he has no access to or involvement in personal credit information and the other personal financial matters which may be at issue in purchasing a new home and has no need to see this information in order to provide the home purchase services. McDonald has no input as to which employees are eligible for this program. The employee applies for the program when selected for a new position or when transferred to a different area. The employee's request is approved or denied by the regional director and OHR.

One feature of the program is that if the relocated employee cannot sell their home, NCUA will purchase it from them and then resell it. Under the program, NCUA will issue equity advances so that the employee can finance the purchase of a new home even if the old one has not yet sold. There are set standards, contained in the agency's travel manual, for determining when NCUA will buy an employee's home under this program. Therefore, McDonald does not need to exercise discretion in making decisions whether to purchase an employee's home. McDonald has input to the NCUA contracting office's decision on blanket purchase agreements for real estate inspections, but has no deciding authority in this area.

McDonald lacks authority to NCUA funds for inspections, property repairs and other costs associated with reselling a property. Instead, he makes recommendations on these matters to higher management. Normally, his recommendations are accepted. McDonald lacks independent authority to sign on behalf of NCUA at the closing of a real estate transaction. Although he exercises signatory authority on such occasions, he is not allowed to sign anything that has not be preapproved, in writing, by higher management. He does have the authority to make an adjustment at closing in an amount below \$1,000 without prior approval.

McDonald uses a set procedure to determine the amount of an equity advance, based on the sale price minus the equity in the property and applying a set percentage. In doing this work, McDonald has access to documents showing the mortgage balance, i.e. to the employee's loan documents. McDonald arranges for property appraisals, but the employee whose home is being sold selects the appraiser.

## **ANALYSIS AND CONCLUSION**

### Federal Personnelists

Section 7112(b)(3) of the Statute provides that a unit of employees is not an appropriate unit, within the meaning of the Statute, if it includes in it employees engaged in federal personnel work in other than a purely clerical capacity. For a position to be excluded under that section, it must be determined that the incumbent in the position is

involved in work directly relating to the personnel operations of the employee's agency. *832nd Combat Support Group, Luke Air Force Base, Arizona*, 23 FLRA 768, 771 (1986). The character and extent of involvement of the incumbent in personnel work must be more than clerical in nature and the duties of the position in question must not be performed in a routine manner. The incumbent must exercise independent judgment and discretion in carrying out the personnel duties. *Social Security Administration*, 56 FLRA 1015, 1018 (2000) (SSA). Awareness of various personnel regulations and guidelines, as well as providing information and guidance to employees on health benefits or life insurance are not duties which establish that someone is engaged in personnel work in other than a purely clerical capacity. *Headquarters, Fort Sam Houston, Texas*, 5 FLRA 336, 343 (1981). Employees whose duties merely requesting recording and processing completed personnel actions, maintenance of personnel files or screening of personnel actions for technical sufficiency are not excluded from bargaining units under section 7112(b)(3) because their involvement in federal personnel work is in a clerical capacity. *U.S. Naval Station, Panama*, 7 FLRA 489 (1981).

In this case, NCUA argues that the Management Assistants, the Employee Development Specialist, and the FOIA Officer are excluded from an appropriate unit under section 7112(b)(3) of the Statute.

#### Regional Management Assistants for Operations

As employees who coordinate personnel actions within the regional offices, these employees are engaged in federal personnel work. The work the assistants perform, such as answering questions about benefits and leave, processing requests for personnel actions, monitoring the appraisal process and deriving relevant appraisal data for submission to OHR, is personnel related. Many of the duties performed by the assistants involve comprehensive knowledge of government rules and regulations and NCUA policies concerning personnel issues. However, neither expert knowledge nor providing information to management and employees concerning rules and policies is sufficient to exclude the assistants from the bargaining unit under 5 U.S.C. §7112(b)(3). *Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Cincinnati District, Cincinnati, Ohio*, 36 FLRA 138 (1990). See also, *U.S. Department of Health and Human Services, Office of the General Counsel, Baltimore, Maryland*, 45 FLRA 894, 895 (1992) (clerical duties relating to personnel matters within prescribed guidelines and regulations require little, if any, independent discretion or judgement).

Not all of the assistant's duties are routine, however. Some require more than mere action within prescribed guidelines. In this regard, the assistant who gave representative testimony in this case had provided advice to a supervisor concerning a leave situation. The supervisor believed that an employee was abusing leave and sought assistance in

dealing with the matter. The assistant determined that the employee had the right to family-friendly leave and advised the supervisor against taking any action. The supervisor accepted the assistant's advice. Providing such advice to management is not a duty that is routine in nature. Further it requires the exercise of independent judgment by the assistant.

In addition, the assistants are involved in pay matters to the extent that they make recommendations on the level of salary to be offered and their salary recommendations are normally adopted by management. While the assistants apply set criteria to developing a proposed salary, they also have discretion to recommend a different salary for an employee, one that deviates from the prescribed guidelines. In making these recommendations, the assistant's apply their own judgment as the effect of prior experience and education level on the salary NCUA should offer. These duties related to the pay level of examiners are not routine in nature, and require the exercise of independent judgment.

The assistants also provide very specific advice to employees on the processing of workers' compensation claims, including what documentation is necessary from physicians to support a claim. They also draft letters proposing disciplinary and adverse actions, as well as decision letters. While the agency uses template letters for this purpose, the assistant must revise the proposal or decision letter to reflect regional management's decision concerning the matter. This is work that is more than routine or clerical in nature and which requires the exercise of independent judgment.

Therefore, I find that the Management Assistants for Operations is engaged in federal personnel work and that the duties of the position are more than clerical in nature and are not performed in a routine manner, but require the exercise of independent judgment and discretion. SSA. The Management Assistants are engaged in federal personnel work in other than a purely clerical capacity. *U.S. Department of the Army, Headquarters, 101<sup>st</sup> Airborne Division, Fort Campbell, Kentucky*, 36 FLRA 598 (1990). Accordingly, the Management Assistants should be excluded from the bargaining unit in accordance with section 7112(b)(3) of the Statute.

#### Employee Development Specialist

At the time of the hearing, the incumbent, John Faith, had occupied this position for mere weeks. He had been told that he would retain some of his budget responsibilities from his prior position in OHR as a Computer Specialist and had been given the outline of his new duties. He had not had an opportunity to perform the full range of the duties of his new position. However, based on his testimony concerning what he had been told of his future duties, it is possible to reach a decision concerning his unit status. Thus, although Faith has not been required to perform all of the duties of his new position, this is because of his short tenure and not because of a decision that he will not perform the full range of

the responsibilities of the job. *U.S. Department of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, 37 FLRA 239, 245 (1990) (Yuma); U.S. Department of Labor, Office of the Solicitor, Arlington Field Office, 37 FLRA 1371, 1378 (1990) (DOL).*

As an Employee Development Specialist (EDS), Faith's major responsibility will be to help in developing the technical interface for training modules in the agency's e-learning program. He will also receive assignments to develop training courses on particular topics, the substance of the curriculum and training objectives rather than the technical method for presenting the hearing. At the time of the hearing, Faith had received one such assignment, to develop a course on supervisory skills for new supervisors. This work will involve determining which skills are necessary to succeed as a NCUA supervisor. The development of such a course is federal personnel work. In addition, in determining what the course will cover, Faith will be involved in deciding what supervisory skills the agency deems necessary for its supervisors. This work requires the exercise of independent judgment and is neither clerical nor routine in nature. Based on these training responsibilities, I find that Faith is engaged in federal personnel work in more than a clerical capacity and should be excluded from the unit. *See, Department of Health, Education and Welfare, U.S. Office of Education, Headquarters, A/SLMR No. 803 (1977) (training supervisors in employment matters is federal personnel work that is more than routine in nature.)*

#### Attorney/FOIA Officer

Diane Salva works as a staff attorney in NCUA headquarters and is assigned responsibility as the agency's FOIA Officer. From time to time, in her work as FOIA Officer, Salva may review personnel records ranging from OPFs to agency disciplinary files in order to respond to a FOIA request. Salva's review is to determine whether documents exist that are responsive to the request and, if so, whether their release is required or prohibited under FOIA or the Privacy Act. Salva exercises independent judgment in performing this work. She spends roughly 60% of her work time in FOIA activities. Most FOIA requests do not involve personnel records, although Salva reviews personnel records at least six times a year in connection with a FOIA request. She has no involvement whatsoever in determining what actions management will take with respect to personnel matters.

It is clear that Salva's FOIA duties are not clerical in nature or routine and they plainly involve the exercise of independent judgment and discretion, however, her FOIA duties do not involve federal personnel work. The nature of FOIA work is not personnel related. Rather, Salva's duties are in furtherance of the agency's responsibility to comply with a particular federal statute involving release of federal records. Noting that her access to personnel records is definitely post-decisional, I find that Salva's work as the FOIA Officer is not a basis for excluding her from the bargaining unit under section 7112(b)(3) of the Statute. In addition, insufficient evidence was presented at the hearing to establish that

her sometime involvement in discovery procedures for unspecified "employee related cases" requires her exclusion from the unit under section 7112(b)(3) of the Statute. Therefore, I find that Salva should be included in the proposed bargaining unit.

#### Management Official

A 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. 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).

#### Credit Union Examiners/Regional Training Specialists and Problem Case Officers

In essence, NCUA argues that the individuals in these positions effectuate the policies of NCUA and that their effectuation of agency policy makes them management officials and requires that they be excluded from the unit. In its decision in *U.S. Department of Justice, Executive Office of Immigration Review, Office of the Chief Immigration Judge*, 56 FLRA 616 (2000) (*EOIR*), the Authority addressed the issue of effectuation, finding that existing precedent established that individuals who carry out agency policy, as opposed to establishing policy, are not management officials within the meaning of the Statute. In *EOIR*, the Authority contrasted its precedent to that of the National Labor Relations Board concerning management officials, specifically noting that the definition of management official set out in section 7103(a)(11) does not include the word "effectuate" unlike the private sector description of "managerial" employees. The Authority found this difference significant and declined to apply private sector precedent and find judges who effectuated agency policy to be management officials.

The Examiners, Problem Case Officers and Training Specialists at issue in this case essentially perform the same work, although the Problem Case Officers are assigned more complex examinations involving problematic credit unions. These employees are technical experts in NCUA policy and its application to the credit unions they supervise. They are expected to be able to use a degree of discretion in determining the scope of their examinations and to correct proposed CAMEL ratings that do not comport with the credit union's real posture, as revealed by the examination. The employees in these positions attempt to secure credit union compliance with NCUA policies and their success in obtaining voluntary compliance is key to both protecting the resources of the Shared Insurance Fund and conserving NCUA resources. However, everything these employees do is subject to review by the regional and national level and to appeals by the credit union of a DOR including the CAMEL rating assigned.

As an example, NCUA argues that the assignment of the CAMEL rating is the establishment of agency policy. To the contrary, NCUA policy is to assign CAMEL ratings to credit unions and to have the examination staff base these ratings on specific criteria, including their experienced application of professional judgment. The Credit Union Examiners, Problem Case Officers and Regional Training Specialists do not establish any policy with respect to CAMEL ratings. Instead, they carry out the agency's policies concerning CAMEL ratings.

In determining the scope of an examination, drafting reports, conducting Joint Conferences, drafting DORs, letters of understanding, preliminary warning letters, and assigning a CAMEL rating, these employees 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. Therefore, these employees are not management officials within the meaning of the Statute and should not be excluded from the unit on that basis.<sup>3</sup> *U.S. Department of Housing and Urban Development*, 16 FLRA 38 (1984) (attorneys who litigate on behalf of the agency and who provide legal expertise and interpretation of agency's policies were engaged in implementing policy and were not management officials); *EOIR* (immigration judges who adjudicate immigration cases were not management officials.)

NCUA does not appear to have withdrawn its assertion that these three categories of employees are supervisors within the meaning of section 7103(a)(10) of the Statute. In this regard, NCUA asserted at the hearing that when serving as the EIC at a team examination, the employees acted as supervisors. The record supports a finding that the EIC is a team leader. 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).

In this case, the EIC assembles a team by attempting to get voluntary participation by staff members who have technical expertise in particular areas of the planned examination. The EIC distributes the team's work based on this technical expertise. The examiners work independently and provide their results to the EIC for consolidation into the examination report. These EIC duties are routine in nature and do not involve consistent

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<sup>3</sup> I reject NTEU's claims on the record and in its brief that a particular NCUA manager's testimony should not be considered based on credibility considerations. Factual determinations in representation cases, as non-adversarial proceedings, are made by the weight of record evidence and not on the credibility of individual witnesses. In this instance, the manager's testimony did not differ significantly from that of other agency or union witnesses.

exercise of independent judgment. Therefore, I find that assigned as the EIC on a team examination provides no basis for excluding employees from the bargaining unit as supervisors within the meaning of the Statute.

In conclusion, I find that Credit Union Examiners, Problem Case Officers and Regional Training Specialists are neither management officials nor supervisors and that they should be included in the proposed bargaining unit.

#### Risk/Loss Officers

The Risk/Loss Officers review regional requests for concurrence with recommended actions in particular cases. In doing so, they review all aspects of the examination, essentially replicating the examiner's effort. The Officers make a recommendation as to whether Director of Examination and Insurance (E&I) should concur in the regional director's recommendation to take the requested action. The Officers do not have authority to decide whether concurrence will be given, but their recommendations to the Director are routinely accepted. The Officers rarely, if ever, recommend against E&I concurrence with the regional director. Instead, Officers work with the region if there seems to be a problem with the recommendation, in order to obtain better justification for the regional recommendation.

The Officers may also develop and put on training courses for examiners. The Officer drafts plans for the training and either submits them for review by the Director of Risk Management, making revisions as requested, or works with the Director to develop the course together. The Officer who gave representative testimony authored the agency's Special Assistance Program Manual. This manual sets out agency policy on the requirements necessary for a credit union to qualify for special assistance. The Officer developed the requirements, as well as the manual. Both were approved by higher levels within E&I and by the NCUA Board without substantial changes.

The representative witness also conducts analysis and makes recommendations to the Director of E&I concerning the need for reserves to meet potential losses, using both current data on anticipated losses and analysis of historical losses over the past 15 years. The Officer makes recommendations as to the agencies expending to disclose potential losses. His recommendations concerning these financial matters are routinely accepted without substantial change.

Based on record testimony, it is clear that the Risk/Loan Officers exercise independent judgment in formulating agency policy concerning such matters as the amount of NCUA loss reserves and the requirements for credit unions to obtain special assistance. These duties go beyond applying technical expertise in effectuating agency policy. Instead, this work by the Risk/Loan Officers reflects establishing the agency's policies. Their recommendations are routinely adopted without change. Therefore, they formulate NCUA policy and are management officials within the meaning of the Statute. *U.S. Department of Justice, Board of Immigration Appeals, 47 FLRA 505 (1993)*. I find that the Risk/Loan Officers should be excluded from the bargaining unit.



### Senior Financial Analysts

The individuals in this position serve as program coordinators in the Office of Strategic Program Support and Planning. They are considered senior staff of the agency and provide examination assistance for investment and liability management issues, develop policy issues such as interpretive rulings, policy statements and rulemaking for the NCUA Board, and develop training for examiners in investment and liability issues. These analysts' examination work involves the most complex examination situations and includes corporate credit unions.

In terms of policy and rule making, the analysts participate in task forces and work groups that have done significant revisions to the NCUA rules and regulations, affecting the entire work process within the agency, including the implementation of risk focused examinations and Reflex. The analyst acted as part of a task force of agency technical experts in making recommendations to the Board, which eventually adopted the rules. However, in doing so, the analyst actually authored a significant portion of the regulation himself. The analyst was involved in developing the revised regulations, formulating implementing regulations, conducting focus groups and representing NCUA in meetings with other federal and state agencies concerning the proposed revisions.

The analysts also serve as the agency's technical experts on specific sections of the NCUA regulations, providing advice and interpretation of the regulations. In providing training for agency personnel, the financial analyst completes assignments to design, implement and deliver training for examiners. For the most part, the Director does not review this work after assigning it. In addition, the analysts may independently determine the issues for which certain employees will receive training.

The financial analysts are more than technical experts who influence or implement, as opposed to shape, agency policy. These are employees who have written agency regulations and provide independent interpretation of the regulations. This work involves formulating agency policy in their specialized areas of expertise and the record reflects that their recommendations are adopted by the NCUA Board and implemented as NCUA policy. The Senior Financial Analysts are management officials within the meaning of the Statute. *Headquarters, Space Division, Air Force Systems Command, 9 FLRA 885 (1982).*

### Management Official/Personnelist

#### Realty Specialist

The Realty Specialist, Robert McDonald, operates the NCUA home purchase program, through which employees are given assistance with real estate sales and purchases when they relocate. McDonald is not involved in deciding who will relocate, where anyone will relocate or whether an employee may participate in the program. Instead, after the employee's participation is approved by higher management, McDonald provides the program services. These include arranging for inspections and appraisals

and may, based on criteria established in the agency's Travel Manual, also involve a loan against home equity or NCUA purchase and resale of an employee's home. In some circumstances, McDonald may have access to mortgage documents, but he does not have access to information about employees' personal credit. While McDonald was involved in developing the home purchase program portions of the NCUA travel manual, he participated in a group effort in doing so and there is no evidence that he was responsible for determining agency policy on this program.

The NCUA home purchase program is an employee benefit program and McDonald's work in operating the program appears to involve federal personnel work. In addition, McDonald's work is arguably more than clerical in nature and some of the duties, such as certain discretion he may exercise in reselling a home, are not performed in a routine manner. However, the record does not reflect that McDonald must exercise independent judgment and discretion in carrying out his duties in the home purchase program. Instead, he serves as a technical expert providing information and guidance and operating the program within set parameters. I therefore find that McDonald is not excluded from the Statute under section 7112(b)(3). *SSA; Headquarters, Fort Sam Houston, Texas*, 5 FLRA 336, 343 (1981).

Further, the evidence does not demonstrate that McDonald is a management official. While he effectuates the NCUA policies on home purchase benefits, there is no evidence that McDonald formulates those policies by carrying them out on the agency's behalf. Therefore, McDonald is not a management official within the meaning of the Statute and should not be excluded from the unit on that basis. *U.S. Department of Housing and Urban Development*, 16 FLRA 38 (1984).

#### Risk Management Analyst

NCUA did not address the matter in its post-hearing brief, but on the record the agency's representative asserted that the individuals in this position are both management officials and federal personnelists. The record contains no evidence to suggest that these employees perform any duties that involve federal personnel work. Therefore, I find that they are not required to be excluded from the unit under section 7112(b)(3) of the Statute. SSA.

The analysts act as a quality control shop for the examination work done in regional offices. They prepare written summary used by agency management to analyze how to use its resources, to identify sources of risk to the Shared Insurance Fund and to identify problems in examinations. This work enables NCUA management to try to avoid or minimize potential losses and risks, to determine how to allocate resources and to assess training needs of employees. The analysts may also make policy recommendations based on their policy recommendations or recommendations about examination procedures as a result of their analyses, including drafting written recommendations to higher level management on better management of certain risks. The analysts do not determine whether or not NCUA will adopt these recommendations, which are subjected to several levels of review.

While the analysts may recommend a course of action or a change in policy or examination procedures to NCUA management, they do not independently determine whether these actions should or will be taken. I find that these risk management analysts 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. Therefore, these employees are not management officials within the meaning of the Statute and should not be excluded from the unit on that basis. *U.S. Department of Housing and Urban Development, Region I, Boston, Massachusetts, 16 FLRA 38 (1984)*

### Conclusion

Based on the foregoing, I conclude that employees in the positions of Regional Management Assistant for Operations, Employment Development Specialist, Risk/Loss Officer and Senior Financial Analyst are excluded from the proposed bargaining unit, but that the positions of Credit Union Examiner, Problem Case Officer, Regional Training Specialist, Attorney/FOIA Officer, Realty Specialist and Risk Management Analyst are appropriately included in the bargaining unit. Based on this determination, I will direct an election<sup>4</sup> in the unit agreed by the parties to be appropriate in this case, which is described as follows:

Included: All professional and nonprofessional employees of the National Credit Union Administration nationwide.

Excluded: Management officials, supervisors and employees described in 5 U.S.C. 7112 (b)(2),(3),(4),(6) and (7).

The parties are advised that pursuant to section 2422.31(e) of the Regulations, absent the timely filing of an application for review of the Decision and Order with the Authority, or if one is filed and denied, or if the Authority does not undertake to grant review of this action within sixty (60) days after the filing of an application for review, an election will be conducted among the employees in the above unit who were on the agency's payroll as of the pay period immediately preceding December 29, 2003.

Eligible to vote in the election are those employees in the voting group who were employed during the payroll period immediately preceding the date of this decision, including employees who did not work during the period because they were out ill, or on vacation or furlough. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Eligible voters will be asked whether they wish to be represented for the purpose of exclusive recognition by the National Treasury Employees Union.

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<sup>4</sup> I have administratively determined that the showing of interest submitted by NTEU in support of the petition in this case is sufficient to meet the 30% requirement. This determination is not subject to review, pursuant to section 2422.9(b) of the Authority's Rules and Regulations.

Pursuant to section 2422.31 of the Authority's Rules and Regulations, a party may file an application for review of this Decision and Order within sixty (60) days of the date of this Decision and Order. This sixty (60) day time limit may not be extended or waived. Copies of the application for review must be served on the undersigned and on all other parties. A statement of such service must be filed with the application for review.

The application for review must be a self-contained document enabling the Authority to rule on the basis of its contents without the necessity of recourse to the record. The Authority will grant review only upon one or more of the grounds set forth in section 2422.31(c) of the Rules and Regulations. Any application filed must contain a summary of all evidence or rulings relating to the issues raised together with page citations from the transcript, if applicable, and supporting arguments. An application may not raise any issue or allege any facts not timely presented to the Regional Director. The application for review must be filed with the Federal Labor Relations Authority, 1400 K Street, NW, Docket Room, Second Floor, Washington, DC 20424-0001 by close of business February 27, 2004. Pursuant to section 2422.31(3)(f) of the Regulations, neither filing nor granting an application for review shall stay any action ordered by the Regional Director unless specifically ordered by the Authority.

Pursuant to section 2429.21(b) of the Rules and Regulations, the date of filing shall be deemed by the date of mailing indicated by the postmark date. If no postmark date is evident on the mailing, it shall be presumed to have been mailed five days prior to receipt. If the filing of the application for review is by personal or commercial delivery, it shall be considered filed on the date it is received by the Federal Labor Relations Authority.

Dated: December 29, 2003

  
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Gerald M. Cole, Regional Director  
San Francisco Region

Attachment: Certificate of Service

CERTIFICATE OF SERVICE

In the matter of:

Case No. WA-RP-03-0037

NATIONAL CREDIT UNION ADMINISTRATION

-Activity

and

NATIONAL TREASURY EMPLOYEES UNION

-Petitioner

This certifies that on December 29, 2003, the foregoing **DECISION AND ORDER AND DIRECTION OF ELECTION** was served upon the interested parties in this action by placing a true copy thereof, postage prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

Certified Mail

Federal Labor Relations Authority  
1400 K Street, NW, Docket Room, Second Floor  
Washington, DC 20424-0001

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Regular Mail

William Persina, Acting Deputy General Counsel  
Office of the General Counsel  
Federal Labor Relations Authority  
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