

UNITED STATES OF AMERICA
Before The
FEDERAL LABOR RELATIONS AUTHORITY
Washington Regional Office

In the Matter of

NATIONAL CREDIT UNION
ADMINISTRATION,

Agency,

-and-

NATIONAL TREASURY
EMPLOYEES UNION,

Petitioner.

Case No. WA-RP-03-0057

NATIONAL CREDIT UNION ADMINISTRATION'S
POST-HEARING BRIEF

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**NATIONAL CREDIT UNION ADMINISTRATION'S
POST-HEARING BRIEF**

The National Credit Union Administration (“NCUA” or “Agency”) respectfully submits this post-hearing brief in support of its challenge to the unit eligibility of certain Agency employees to be included in the collective bargaining unit proposed by the National Treasury Employees Union (“NTEU” or “the Union”).

I. PROCEDURAL HISTORY

On April 11, 2003, the NTEU petitioned the Federal Labor Relations Authority (“FLRA”) to conduct a representation election among all eligible

employees of NCUA. FLRA-1(a).¹ NTEU proposed a bargaining unit consisting of “all professional and non-professional employees of NCUA, nationwide, excluding those barred from inclusion by the FSLMRA.” *Id.* at box 2. On May 30, 2003, NCUA notified the Union that it objected to the unit eligibility of 510 NCUA employees. The FLRA scheduled a unit eligibility hearing to commence June 30, 2003. FLRA-1(c). The hearing was held on June 30 and July 1, 2, 3 and 22, 2003, before Hearing Officer Saul J. Lubitz. Prior to and during the hearing, the parties stipulated to the unit eligibility of twelve employees. Tr. 835-36. At the close of the hearing, the parties were allowed until September 19, 2003, to submit post-hearing briefs. Tr. 1079-80.

The unit eligibility of the following positions remains at issue before the FLRA: Principal and District Examiner, Problem Case Officer, Regional Training Specialist,² Senior Financial Analyst, Risk/Loss Officer and Realty Specialist as “management officials” pursuant to 5 U.S.C. §7112(b)(1); and Regional Management Assistant for Operations, Employee Development Specialist, Realty Specialist and Attorney-Advisor as “employees engaged in personnel work” pursuant to 5 U.S.C. §7112(b)(3). *See* JE-4.

¹ Throughout this brief, the 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-___”. Transcript citations are referenced by page number alone, *e.g.*, “Tr. ___.” For a glossary of the acronyms used throughout this brief, see JE-3.

² Each Region has a Regional Training Specialist (“RTS”) who is an experienced Principal Examiner who develops and conducts training programs for the Regions. AE-4, AE-5. The parties stipulated that the testimony of the Principal Examiners shall be treated as representative of the RTSs. Tr. 837.

II. STATEMENT OF THE CASE

“Management officials” are excluded by law from a collective bargaining unit of federal agency employees. Employees who effectively influence or bring about the Agency’s plans or courses of action qualify as “management officials.” The record in this matter establishes that NCUA’s District and Principal Examiners and Problem Case Officers meet that criterion because, through their exercise of independent judgment, they effectively influence the Agency’s course of supervisory action to ensure the safety and soundness of the credit unions it oversees.

The Agency’s Senior Financial Analysts likewise effectively influence the Agency’s course of action through their responsibility for developing Agency training programs, as well as for scheduling the participation of Agency Senior Investment Officers in corporate credit union examinations. The Agency’s Risk/Loss Officers effectively influence the Agency’s course of action because they make significant decisions, that are normally followed, committing NCUA to award monetary “special assistance” grants to certain credit unions. Finally, the Agency’s Realty Specialist effectively influences the Agency’s course of action in the “Employee Home Purchase Program” he manages.

Employees “engaged in personnel work” (“personnelists”) are excluded by law from a collective bargaining unit of federal agency employees. The record of the hearing establishes that the five Regional Management Assistants for Operations, the Employee Development Specialist, and the Attorney-Advisor each are “engaged in personnel work in other than a purely clerical basis.” Each of these employees

exercises independent judgment in the performance of duties involving personnel work. As a result, their membership in the bargaining unit would present a conflict of interest. The Agency's Realty Specialist, who manages the "Employee Home Purchase Program," is engaged in personnel work because he has access to sensitive financial information pertaining to Agency employees. Accordingly, all of the employees in dispute are ineligible to be in the collective bargaining unit of NCUA employees because they meet the definition of either a "management officials" or personnelist, and in one case, of both.

III. STATEMENT OF FACTS

A. NCUA's Mission, Structure and Examination Program

1. Mission. NCUA is the federal regulator of the nation's federally-insured credit unions. JE-2. It is an agency of the executive branch of the United States managed by a three-member Board ("NCUA Board") appointed by the President and confirmed by the Senate. 12 U.S.C. §1752a(b)(1); Tr. 19. NCUA is responsible for administering the Federal Credit Union Act ("FCUA"), 12 U.S.C. §1751 *et seq.*, and the National Credit Union Share Insurance Fund ("the Insurance Fund"). 12 U.S.C. §§1782a(a)(1), 1783; 18 JE-2. The Insurance Fund insures members' deposits up to \$100,000 per account. 12 U.S.C. §§1781(a), 1787(k)(1); 12 C.F.R. Part 745. The FCUA gives NCUA regulatory and supervisory authority over almost 10,000 federally-insured credit unions. 12 U.S.C. §§1756, 1784; Tr. 33. Approximately 6000 are federally-chartered by NCUA; the rest are chartered by individual States. *Id.* JE-2.

2. Structure. NCUA's Central Office is located in Alexandria, Virginia, and is subdivided into eleven different offices. AE-1. Among these is the Office of Examination and Insurance ("E&I"). AE-1. E&I's Division of Supervision is in charge of the substance of the agency-wide examination and supervision programs. Tr. 1047. The goal of these programs is to ensure the safety and soundness of federally-insured credit unions, thereby protecting the Insurance Fund from the risk of loss due to credit union failure. Tr. 26, 79, 571-72, 589, 934.

NCUA's field staff is divided among six Regional Offices located in New York, Virginia, Georgia, Illinois, Texas and California. Each Regional Office is headed by a Regional Director ("RD") who reports, through the Agency's Executive Director, to the NCUA Board. AE-1. The principal responsibility of each Regional Office is to manage the day-to-day examination and supervision of the credit unions within its multistate jurisdiction. Tr. 21. To carry out its responsibilities, NCUA field staff regularly examines the financial condition and performance of federally-insured credit unions, evaluates the results, and imposes necessary supervisory restrictions and requirements. 12 U.S.C. §1756; Tr. 24, 81; JE-2.

3. Examination Program. The universe of federally-insured credit unions, and the products and services they offer, is ever expanding, while NCUA's resources remain limited. Tr. 844. As a result, NCUA concluded that the prior "one-size-fits-all" exam program was no longer adequate to accomplish the Agency's mission. Tr. 843-44; AE-21. With extraordinary input from NCUA examiners, Tr. 844, NCUA established the Future Exam Program Committee to develop and test the

“Risk-Focused Examination Program” (“RFEP”).³ JE-1, Vol. 1, at Ch.1; Tr. 111-112, 844. With the introduction of the RFEP in August 2002, both the examination process and the role of the examiner changed fundamentally from the prior exam program. JE-2 at 31. The RFEP is “a more efficient way for . . . [the Agency] to meet . . . [its] mission by putting the decision making at the lowest possible level.” Tr. 27; AE-3 at 1, 12.

First, instead of a “one-size-fits all” examination that “just regurgitated numbers and ratios to the credit union,” Tr. 843, the scope of a risk-focused examination is individualized to fit the risk profile of each credit union. Tr. 840, 843, 1051. The examiner is expected to independently determine the scope of the exam by first assessing the level of risk in seven different “risk areas.” Tr. 201, JE-2 at 31; AE-3 at 1, 5. Second, instead of a process-driven exam that involves simply completing a rote series of checklists, the RFEP is results-driven, requiring the examiner to tailor the extent of review in each risk area according to his or her assessment of the level of risk. Tr. 109, 843; AE-3 at 1, 6, 7, 12. Consequently, some risk areas are reviewed more extensively than others, rather than all areas equally. Tr. 846. Third, instead of focusing on a credit union’s problems retrospectively, as the prior exam program did, the RFEP focuses prospectively on risks as they develop. Tr.843, 883. This allows NCUA to “get in front of the problems in the credit union,” which is “tough to do with yesterday’s numbers.” Tr. 883, 1062. Fourth, examiners themselves are no longer “one-size-fits-all” generalists; the RFEP requires examiners to become “Subject Matter Experts” (“SMEs”) for their Region in selected

³ The Future Examination Program Committee included six examiners among its twelve members. Tr. 112.

examination areas.⁴ Tr. 843. Finally, to make efficient use of its resources in carrying out the RFEP, NCUA's "exam culture" has evolved into one of deference to examiners' independent judgment and experience. AE-3 at 1, 6, 7, 12.

B. Duties of District and Principal Examiners

Each Region has between 70 and 85 examiners. Tr. 80, 157, 840. Each examiner is assigned a district of credit unions to examine that typically combines federally-chartered and State-chartered credit unions. Tr. 32-33, 81. Each examiner belongs to an "SE group" of approximately ten examiners. Tr. 280, 540. Each group is supervised by a Supervisory Examiner ("SE"). Tr. 45. The SE for each group reports to the Region's Associate Regional Director for Programs ("ARDP"), who in turn reports to the RD. Tr. 22, 44. The Examiners at issue here are CU-11 District Examiners (*see* AE-10, AE-11) and CU-12 Principal Examiners in each Region (AE-8, AE-9).

1. Examiner-in-Charge. A District or Principal Examiner is the "Examiner-in-Charge" ("EIC") of the credit unions assigned to his or her district. Tr. 33, 264. Within an annual or 18-month cycle, the EIC typically schedules the date of each examination and decides how much time to budget based on the results of the last exam and any new products, problems or activities that have developed since then. Tr. 93, 180, 200. The EIC may recruit a SME to provide on-site assistance when technical expertise in a particular area is needed. *E.g.*, Tr. 233.

⁴ Each Principal Examiner is required to become a SME in a particular focus area of the examination and to serve as a resource in that area, *e.g.*, Information Systems and Technology, Consumer Compliance, Specialized Lending, and Recordkeeping and Internal Controls. Tr. 95, 539, 843.

If an EIC determines, while an exam is underway, that more time is needed to complete the exam, he or she is generally free to commit up to one or two days of additional time, juggling their schedule of other exams as necessary. These scheduling decisions are generally made without prior supervisory approval. Tr. 444. Because of the potential impact on Regional resources, however, the EIC ordinarily keeps his or her supervisor informed of scheduling changes and SME involvement. Tr. 975.

The efficient use of examiner resources and the technical complexity of a credit union's operations may require a team to conduct the examination. Tr. 94-95. In some cases, the EIC to whose district the credit union is assigned decides whether a team exam is warranted. Tr. 540. The EIC routinely picks the other members of the team from his or her SE group⁵ (often based on the need for a SME); coordinates the team exam date with the team members' schedules; decides how much attention will be devoted to each area of the exam; and assigns each team member responsibility for one or more areas. Tr. 47-48, 95-98, 163, 198, 261, 443-44, 541. While the team exam is underway, the EIC also resolves disputes with credit union management, writes the examination report, and conducts the Joint Conference at which the report is presented. Tr. 97-98, 199, 266-69. Although the SE may be aware of these team exam decisions, the EIC typically makes them without the SE's prior approval. Tr. 542.

⁵ The SE serves as "a traffic controller," explained one EIC who has "a lot of these rural credit unions that aren't in real exotic places like Maui and Las Vegas and so if I ask for -- who needs work in March, and I get no volunteers which has happened, because there's a lot of cattle towns with feed lots that don't smell good. [The SE will] intervene and say 'Now, Tony, didn't Barry help you last year in this job? Does anyone else feel like helping him? If not, I think Tony may assist.'" Tr. 576. This also might happen when an examiner trainee needs exposure to a particular examination area. Tr. 586.

2. Scope of Examination. The EIC personally determines the substantive scope of each risk-focused examination. The first step is to consult the report of the credit union's last examination, the "Scope Workbook" results for that exam (*e.g.*, AE-15), data from the credit union's most recent Call Report (NCUA Form 5300),⁶ and NCUA's "Financial Performance Report" comparing credit unions by peer group. Tr. 204, 963. The EIC also considers information about problems, economic changes, and new products, services and activities that have arisen at the credit union since the last exam. Tr. 204-05, 260, 272, 375-76.

In the next step, the EIC uses the "Scope Workbook" to make a "preliminary risk assessment," for the pending examination, of "high," "low" or "moderate" in each of the following risk areas: credit risk, interest rate risk, liquidity risk, transaction risk, compliance risk, strategic risk and reputation risk. Tr. 136, 210, 270-71, 544, 375-76. Although "risk parameters" based on Call Report data are suggested for the first three risk areas, the EIC is free to override them based on his or her own judgment, and often does. Tr. 205-06. There are no Agency policies or instructions constraining the EIC's discretion to override the suggested risk parameters. Tr. 207. For example, an upswing in employee layoffs by a credit union's sponsor might prompt the EIC to focus more on credit risk resulting from members' inability to repay loans. Tr. 205, 272. The "preliminary risk assessments" are made entirely without supervisory input. Tr. 207.

⁶ Like all federally-insured financial institutions, federally-insured credit unions are required to file a quarterly Call Report (NCUA Form 5300) with NCUA. The Call Report contains data reflecting the credit union's performance over the preceding calendar quarter. The Call Report data is synthesized to produce a matrix of "key ratios" that serve as suggested "parameter codes" in the Scope Workbook and Exam Report. UE-1 at 2; Tr. 31-32, 487, 545, 883.

Relying on his or her “preliminary risk assessment” for each area, the EIC has broad discretion to determine the scope of review for that area, *i.e.*, the appropriate quantity and type of records to review. Tr. 103, 202-03, 278, 847-48. In addressing credit risk for example, the EIC determines the appropriate number of loans to review for delinquency. Tr. 274-75. No regional instruction specifies what or how many records must be reviewed in a particular risk area. Tr. 211-12, 229-30.

Other subjective factors are considered as well. For example, depending on an EIC’s confidence that management is knowledgeable and competent, the EIC may conduct more or less review in areas affected by management decisions, and vice versa. Tr. 210-11. In a risk area that has traditionally been rated “low risk” in prior exams, an EIC is free to plan little or *no* review.⁷ Tr. 211, 445, 846. If, during an examination, it turns out that a “preliminary risk assessment” was incorrect, the EIC may expand or narrow the review in that area accordingly. Tr. 209-10.

When completed, the “Scope Workbook” becomes the EIC’s individualized road map for each credit union examination.⁸ The EIC’s SE does not review or approve the “Scope Workbook” or the resulting determination of the scope of each examination. Tr. 211. That is left entirely to the independent judgment of the EIC. As a result, NCUA knowingly assumes the risk that EICs may occasionally exclude or minimize the review of a significant risk, leading to the deterioration of the credit

⁷ Only three checklists remain mandatory for all examinations: the (1) Call Report data review; (2) Supervisory Committee audit and verification; and (3) Bank Secrecy Act. Tr. 211, 275, 445. The rest of the checklists available in the RFEP are *optional*.

⁸ When an examination is completed, the results of the review will be entered in the “Scope Workbook” under “final risk assessment” for each area, to be consulted when the time comes to prepare for the next exam.

union's safety and soundness, Tr. 860, 987, and potentially exposing the Insurance Fund to risk of loss.

3. Examination Guidance and Parameters. NCUA makes available to its examiners a variety of reference works to provide guidance on exam topics and procedures. Principal among these is the *Examiner's Guide*, a comprehensive source of guidance on exam topics. JE-1. The *Examiner's Guide* was developed and is updated by NCUA's National Examination Committee ("NEC").⁹ Tr. 113, 1048-49, 1069-70. According to the chairman of the NEC, the *Examiner's Guide* was intended as "reference material" available to provide guidance to examiners when they need it. Tr. 1049. As the "foreword" to the *Examiner's Guide* confirms,

[T]he Examiner's Guide remains a guide, not a regulation. The guidance herein is dependable, but *may not be the best or final approach in every situation*. Examiner judgment and flexibility remain crucial to a successful risk-focused program.

JE-1 (emphasis added).

Agency guidance addresses "what a good program would look like, what are some of the best practices it might have [and] what are some of the issues you *might* want to look at." Tr. 113 (emphasis added). "[I]t is just guidance to the examiner, and then they develop what they need to do in that specific situation." Tr. 113. Therefore, it would not be considered improper to do something inconsistent with the approach suggested by the *Examiner's Guide*; it is permissible for an examiner to "do it [her] own way." Tr. 1049-50, 1070.

The Regions generally regard the *Examiner's Guide* as an "informational tool" for examiners, Tr. 848, that "doesn't give them solutions" to specific problems.

⁹ The National Examination Committee includes four credit union examiners among its ten members. Tr. 113.

Tr. 849, 974. Therefore, some RDs do not insist that EICs follow what the *Examiner's Guide* says. Tr. 849. As one RD explained, when the *Examiner's Guide* says an examiner "should" or "may want to" do something, such as consult with an SE, it is not mandatory that the examiner do so because "it's only guidance." Tr. 980, 1011-12. Newer examiners may be more inclined to consult with an SE as the *Examiner's Guide* suggests, whereas more experienced examiners would not. Tr. 982

In practice, examiners tend to rely more on their own judgment and experience than on the *Examiner's Guide*. Tr. 859. One examiner flatly stated: "I do not refer to the *Examiner's Guide*." Tr. 212. Another testified that he references the *Examiner's Guide* perhaps only once a year, explaining:

[T]here's just no way it could encompass [such things as] fraud, local economic impact, insider abuse, preferential treatment. . . . If I come across something that I just don't have any experience with, I might go look and see what it suggests. . . . I think it's in the title of the book, it's a guide and it's a place to go if you have no other point of reference, but I would rather rely on my own experiences, especially with small credit unions that I deal with so often. If I have to go to the guide, I feel I'm being ineffective.

Tr. 547-48. *See also* Tr. 937. NCUA's extensive examiner training program is regarded as more valuable than the *Examiner's Guide* because "from the get go you're taught how to think on your own, how to—it's a creative process. I mean honestly, if you have problems finding solutions to big problems, you probably couldn't handle this job very well." Tr. 581, 867. Because the examination process is no longer a rote, step-by-step process, Tr. 113, examiners are trained in "critical thinking," Tr. 107, and they tend to rely on it.

In addition to the *Examiner's Guide*, some Regions have their own *Supervision Guides*, but these are primarily procedural in nature and do not extend to

the substance of an examination. *See, e.g.,* AE-22; Tr. 936. As one Region's *Supervision Guide* emphasizes:

Remember, the *Examiner's Guide* and the *Region V Supervision Guide* are guides. [They] do not address and cannot from a practical standpoint ever address the many circumstances examiners encounter in the field. *The guides will never substitute for an examiner's reasoned and informed judgment.*

Many sample correspondence letters are included in this guide, but examiners are not restricted to the formats provided. Examiners are encouraged to customize correspondence to the individual needs of the credit unions.

AE-22 at "foreword" (emphasis added); Tr. 851-52. For these reasons, the Region does not consider its *Supervision Guide* to be mandatory. Tr. 853.

Agency guidance notwithstanding, NCUA examiners operate within broad parameters that apply to the standards and practices of credit unions. Tr. 850, 937, 1052-53, 1055, 1064. These parameters are defined by the FCUA, NCUA rules and regulations, standard by-laws, accounting rules, annual audit results, and "best practices" inculcated through examiner training and experience. Tr. 235, 288-94, 454-55, 457, 468-69, 486-87. Within those parameters, the results-oriented approach of the RFEP depends on the exercise of maximum independent discretion by examiners. Tr. Tr. 57, 174, 215, 223, 936, 1071. Through NCUA's performance appraisal process, examiners are held accountable for the decisions they make in the course of an examination.

4. Report of Examination. A risk-focused examination is a three-part process: data gathering, analysis and a report of the results. Tr. 81. While conducting an examination, the EIC enters the results of the review of each risk area

in a “Risk-Focused Examination Report” (“Exam Report”). *E.g.*, AE-16, AE-18, AE-20. As one RD explained,

It’s up to each examiner to scope out each credit union on their own. They make the call on-site, they determine the scope, and they go in and do the examination, provide their findings, [write] the overview, do the [Document of Resolution] if necessary, and [assign] the CAMEL rating.

Tr. 858.

The Exam Report consists of five principal sections, followed by the necessary supporting schedules. Tr. 465, 492, 501, 559, 867. The EIC drafts the narrative in each section. In the “Examination Overview” section, he or she identifies “areas of concern” among the seven risk areas, explains the source of the concern, and prescribes remedial action. Tr. 85, 220, 466-67, 493. The “Examiner’s Findings” section lists the EIC’s findings of operating exceptions, violations of law or regulation, and unsound policies, practices and procedures. Tr. 484. The “Supplementary Facts” section sets forth the facts and data substantiating the concerns identified in the “Examination Overview.” Tr. 483. An Exam Report may include a “Document of Resolution,” discussed in detail below. The final section of the Exam Report is the “CAMEL Evaluation” by which the EIC assigns the credit union’s “composite CAMEL code”—a uniform performance rating system used by all federal financial institution regulators. AE-20 at 18.

There is no Agency-wide policy that dictates how or what the substance of an Exam Report should say. Nor do the Regions typically have a policy or instruction on the substance of an Exam Report. Tr. 867. The diversity of circumstances among different credit unions requires each credit union to be evaluated subjectively. This

responsibility falls to the EIC because he or she is on-site directly confronting the credit union's problems and is most familiar with management's ability to correct them. Tr. 182-83, 889. Therefore, examiners are expected to rely on their own judgment and experience to identify risks and decide on appropriate action. Tr. 640, 895, 902-03.

EICs occasionally receive advice from peers and from their SE, Tr. 895, 901, but they are not necessarily bound by it. Tr. 102, 494, 867. An EIC typically neither shows nor discusses an Exam Report with an SE before issuing it to the credit union. Tr. 69, 157, 199, 219, 250, 488, 626, 640, 868. In fact, the first time an SE normally would see an Exam Report is after it has been uploaded to NCUA's computer system, following delivery to the credit union. Tr. 868. An SE typically will access an Exam Report to review it in connection with the EIC's annual performance evaluation, Tr. 70, 194, not to second guess or overrule the EIC's judgments and decisions.

5. Document of Resolution. An EIC may decide that it is necessary to include a "Document of Resolution" ("DOR") in a credit union's Exam Report. A DOR is a "to do" list prescribing corrective action that must be taken by the credit union in each area of concern (*e.g.*, profitability, capital, provision for loan loss expenses, loan delinquency), identifying the official responsible for taking the specified corrective action, and setting a deadline for compliance. Tr. 34, 86-87, 192, 226-27, 238, 478-79, 481, 499, 502, 561; *e.g.*, AE-12, AE-16. The DOR is viewed as a voluntary commitment by the credit union to take corrective action.¹⁰ Tr. 157-58,

¹⁰ One examiner goes so far as to have the board of directors vote to accept the DOR as "what that credit union and the NCUA has agreed upon as a course of action," putting "quite a bit of teeth in [the DOR]." Tr. 562.

154. Failure to comply will expose the credit union to more severe supervisory action beginning with a “preliminary warning letter” or “regional director letter,”¹¹ continuing with a “Letter of Understanding and Agreement,” and culminating in a formal administrative action. Tr. 470-71, 874, 879.

The purpose of a DOR is to address “significant deficiencies” and “unacceptable risks” that warrant “immediate action.” Tr. 484-85. No Agency or Regional policy dictates when a DOR must be issued, Tr. 868, and the decision to do so does not depend on the composite CAMEL rating a credit union receives. Tr. 869. The EIC has the discretion to decide if and when it is necessary to issue a DOR, Tr. 484, based on his or her judgment of the risk(s) and severity of the problem(s) identified in the Exam Report. Tr. 926.

No NCUA or Regional policy dictates what a DOR must or cannot say. Tr. 870. The EIC is authorized to negotiate the terms of a DOR with credit union management on NCUA’s behalf, or to otherwise reach a consensus on the terms of a DOR, Tr. 240, 563, 642, 870, without an SE’s approval. Tr. 574, 642. But in case of an impasse, it is the EIC who ultimately decides what the DOR will say, although the credit union’s objection may be noted. The EIC drafts the substance of a DOR. Tr. 389, 641-42, 869. A DOR typically is not discussed with or reviewed by an SE before it is issued to the credit union. Tr. 157, 266, 626, 642, 870. Normally, a DOR would be seen by an SE for the first time after the Exam Report in which it is included is issued to the credit union. Tr. 871.

¹¹ Some Regions issue a “Preliminary Warning Letter” and others issue a “Regional Director Letter” to enforce the terms of a DOR. *E.g.*, AE-17, AE-19. The narrative substance is drafted by the EIC, who is encouraged to customize the letter as needed. AE-22 at “Foreword”; Tr. 854. The substance of the letter is rarely altered before the letter is signed and sent to the credit union. Tr. 98-99, 192, 241-43, 245, 472.

Under the RFEP, examiners exercise independent discretion to determine what problems and risks a DOR should address, what corrective action should be prescribed, who is responsible for carrying out each action, and the timetable for compliance. Tr. 34, 239. It is therefore possible that an EIC may neglect to include in a DOR a risk or problem that requires immediate attention; may prescribe corrective action that is inadequate to solve the problem; or may not require the credit union to correct the problem promptly enough. Tr. 107-108, 250, 872, 873. In deferring to EICs' judgment, NCUA assumes the risk that a problem may be allowed to worsen, in turn threatening the credit union's safety and soundness, and thereby increasing the Insurance Fund's to risk of loss. Tr. 570-71, 860, 875-76.

6. CAMEL Rating. A credit union's composite CAMEL rating is the single most important factor setting the course of future supervisory action. Tr. 34. A CAMEL rating consists of five categories: Capital adequacy, Asset quality, Management, Earnings and Asset/Liability Management. Tr. 214. Each category is coded between "1," indicating "best," and "5," indicating "worst." A composite CAMEL rating between "1" and "5" is then determined by the EIC. Credit unions view their CAMEL rating as a report card on their level of risk, performance and financial condition. Tr. 551, 570, 881. NCUA management, in addition, views it as a tool for budgeting Agency resources, Tr. 887, because a change to the CAMEL rating commits the Agency's resources to a more time-consuming and aggressive course of oversight. Tr. 407-08.

The EIC determines the category and composite CAMEL ratings during or at the conclusion of the exam. There is no objective formula for assigning a CAMEL

rating. There is no NCUA policy or instruction that requires a particular rating to be given when a certain problem or condition is found to exist in a category. Tr. 134. Nor does the *Examiner's Guide* offer advice on determining a CAMEL rating. The only guidance on the subject is *Letter to Federal Credit Unions*, No. 03-CU-04 (March 2003), explaining the significance of each CAMEL category and rating to credit unions. UE-1; Tr. 882. But as the *Letter to Credit Unions* itself confirms,

For the risk-focused examination to be effective the examiner must look behind the numbers to determine the significance of supporting ratios, trends, projections, and the interrelationships with the seven risk categories. Likewise, when evaluating the CAMEL components, examiners will consider both the quantitative measurements as well as the qualitative considerations To ensure objectivity, in the uniqueness of individual credit unions during the examination process, examiners do have the discretion to increase or decrease any rating if in their professional judgment a change in rating is justified.

UE-1 at 2; Tr. 884. Thus, Agency guidance encourages EICs to use their experience and judgment to decide, based on exam results, what is an appropriate CAMEL rating. Tr. 58, 139, 882.

For three of the categories (“C,” “A” and “E”), the credit union’s Call Report data suggests a rating (called a “parameter code”), but examiners are free to disregard these ratings and often do. UE-1 at 2; Tr. 214-15, 281, 384, 387, 544, 885, 1068. In one example, the suggested “parameter code” for the “Capital” category was “4” or “5” due to increased 3rd quarter delinquency. Upon closer inspection, however, the EIC discovered that the delinquencies were on “summer skip” loans¹² that were authorized by the credit union’s loan policies, and she adjusted the CAMEL rating

¹² “Summer skip” loans, on which payments are suspended during the summer months, sometimes are offered by teacher-based credit unions whose members are not paid during the summer months.

accordingly. Tr. 221. Another EIC whose district includes farm communities looks at “the economy in which the credit union exists” because “there’s no way for the [Call Report data] matrix to take into consideration that [a particular] plant is closing.” Tr. 545. In determining a CAMEL rating, an NTEU witness concurred, “[i]t’s prudent examining to take a look at the whole picture.” Tr. 387. EICs do not need to check with anyone at NCUA before decreasing or increasing a suggested rating as they deem appropriate. Tr. 215, 222.

“Management” and “Asset/Liability Management” are the two CAMEL categories with no suggested rating. Tr. 888. “Management” is considered by many to be the key CAMEL component. Tr. 558. Because there is no suggested rating in that category, an EIC would evaluate management according to whether it is responsive or lax about taking corrective action and complying with applicable rules and regulations, and rate “Management” accordingly. Tr. 223. It is the practice of some EICs to not rate “Management” any higher than the lowest rated of the other four categories. Tr. 558. In one example, an examination revealed an over-concentration in high-yield share certificates maturing at the same time. Due to the risk of a liquidity crisis, the EIC gave the credit union “4”s in both the “Management” and “Asset/Liability” categories. Tr. 560-61.

A credit union’s composite CAMEL rating is not simply a numerical average of the category ratings. UE-1 at 1; Tr. 72, 883. In fact, there is no numerical formula for determining the composite CAMEL rating. On the contrary, examiners are encouraged to use their own judgment and experience in determining what is an appropriate composite rating, regardless of the category ratings. Tr. 889. Many

resort to their own “rule of thumb.” Tr. 558, 891, 904-05. “As the Management category goes, so goes the credit union’s composite rating” is one such rule. Tr. 891, 904. It is acceptable to give greater weight to “Management” than to other categories in determining the composite CAMEL rating. Tr. 558, 891. In any case, an EIC does not need supervisory approval for his or her “rule of thumb.” Tr. 889-90.

It is entirely possible—albeit unlikely—that the same CAMEL category in a credit union examined at the same time by two different examiners would receive a different rating from each. Tr. 104. *See also* Tr. 235, 454, 1065. Neither examiner would necessarily be wrong. Tr. 1065. To illustrate, the chairman of the NEC gave this example:

[W]hen I was a new examiner, . . . I went into a small church group credit union [that had a loan delinquency of] 16 percent. Now going into large credit unions, I would never want to have a 16 percent delinquency But in a church group, it was only two loans, . . . and Sunday came along, and they made their collection, and it was fine. So I learned through my experiences that it’s okay to have a higher delinquency ratio, and the next examiner behind me would have to learn that too.

Tr. 1066.

EICs generally are not required to seek supervisory approval before giving a particular CAMEL rating, and in practice they do not. Tr. 59, 101-102, 127-128, 158, 172, 501, 626, 640-41, 864-65, 905, 907, 918, 922. This is the case even when an EIC downgrades a credit union to a CAMEL “4”,¹³ Tr. 248-49, 459, 549, 650, 862. In one case, an EIC changed a suggested CAMEL rating of “1” for “Asset Quality” to

¹³ The Regions formerly used a “Standard Authorization Memo” requiring the signature of the SE, ARDP and RD approving an upgrade to, or downgrade from a “3” rating. However, this practice was abandoned beginning well before introduction of the RFEP. Tr. 905, 957.

a “5” without any SE interaction. Tr. 546. There is no reason to interact at all with an SE on a CAMEL “1” or “2” rating, and probably not on a “3” rating. Tr. 940-41.

EICs often inform their SEs of a CAMEL rating of “3” or worse just to keep them “in the loop,” Tr. 488, 496, 917-18; to ensure that the SE “won’t be caught off guard,” Tr. 254; and for the purpose of “tracking resources.” Tr. 945. But this is not the case with credit unions rated “1” and “2.” Tr. 945. An SE normally first sees the CAMEL rating after the Exam Report in which it appears has been uploaded to NCUA’s computer system, which happens after the credit union has received the report.¹⁴ Tr. 215.

7. Reviewability of Decisions. EICs are viewed by the credit unions they examine as the face and voice of NCUA when making exam findings, negotiating DORs and determining the appropriate CAMEL code. Tr. 217, 245, 248-49, 253, 502, 570, 877, 1014. It is the EIC who presents and explains the results of the exam at the Joint Conference with the board of directors, who negotiates the terms of a DOR, and who persuades the board to agree to comply with the DOR. Tr. 240, 246, 248, 488, 563, 642, 870.

Theoretically, the DOR and CAMEL rating within an Exam Report are reviewable.¹⁵ A dissatisfied credit union is entitled to ask an RD to review the results

¹⁴ When a CAMEL “4” or “5” is given, the Region sends a “troubled condition” letter warning the credit union that it is now subject to 12 C.F.R. §701.14, which requires NCUA prior approval of appointees to senior management positions at the credit union. UE-7, UE-11; Tr. 855-56, 914-16. The EIC drafts the substance of the letter, Tr. 857, 911, and it is sent to the credit union *after* the EIC has issued the Exam Report bearing the “4” or “5” rating. Tr. 857, 908-09.

¹⁵ Exam Reports are reviewed *after being issued* for two separate purposes: the EIC’s annual performance appraisal and quality control of the RFEP. Tr. 939-40. To evaluate an EIC’s performance (and, in the case of new examiners, to assess their professional development), SEs routinely review a sampling of Exam Reports, Tr. 388, 862, 896, 972. Tr. 865-66. To ensure the quality and consistency of the RFEP, the Region’s Division of Supervision reviews certain CAMEL

of an Exam Report, including the DOR and CAMEL rating. Tr. 63, 72, 122, 169, 192, 216, 244-45, 253, 460, 584. If dissatisfied with the RD's decision on review, a credit union may be entitled to appeal that decision to NCUA's Supervisory Review Committee. Tr. 123, 1019. In practice, however, it is "amazingly rare" for a credit union to seek Regional Director review of a DOR or CAMEL rating. Tr. 75, 192, 245. Of the 14,676 recent Exam Reports for which NCUA kept records of appeals, only 34 DORs or CAMEL ratings were appealed. JE-5; Tr. 75, 93, 122, 192. Of the 34 appeals, only three resulted in a reversal, meaning that in all other examinations, the EIC's judgment was upheld.¹⁶ JE-5.

8. Consequences of CAMEL Rating. For every federally-insured credit union, the further course of supervisory action is driven by the CAMEL rating given a credit union by its EIC. Tr. 90-91, 224, 447, 641, 1055. A worsening CAMEL rating triggers more aggressive oversight by, and interaction with, NCUA; restrictions on the credit union's activities; loss of certain regulatory benefits; and a reallocation of Agency resources. Tr. 34, 158, 558, 1055-56.

First, a credit union rated a CAMEL "3" or worse loses its eligibility for the "risk-based examination scheduling program" (also known as the "deferred exam program"). NCUA, *Letter to Federal Credit Unions*, No. 01-FCU-05 (Aug. 2001).¹⁷ As a result, the credit union must be examined annually instead of every 18 months.

ratings to ensure that the justification supports the rating, Tr. 886, 920, 1066, 1075, but not to second-guess the rating itself. Tr. 921, 1009, 963-64.

¹⁶ NCUA examiners completed 28,202 examinations during the years 1999 through 2002. JE-5 at 2. Of the EICs who testified, none could recall ever having a DOR or CAMEL rating withdrawn or reversed during their tenure as examiners. Tr. 93, 215, 252, 460, 1006.

¹⁷ NCUA *Letters to Credit Unions* are official publications available on-line at: <http://www.ncua.gov/ref/letters/letters.html>

Tr. 91, 225, 251, 556, 923, 976, 1005, 1056. The need to conduct an examination more frequently demand that NCUA divert resources, in terms of additional examiner time and travel costs, to that credit union. Tr. 34, 388.

Second, as the CAMEL rating declines below “1,” NCUA oversight through additional “supervision contacts” increases. Tr.1055. There are two types of contacts. One is an on-site visit to the credit union between exams to verify that certain improvements are being made; the other is to require the credit union to periodically furnish information about ongoing problems or activities to the EIC for review (*e.g.*, a monthly financial statement).¹⁸ Tr. 550, 934. The examiner has complete discretion to decide the appropriate number and type of “supervision contacts” that are needed between exams. Tr. 34, 79, 100-101, 550, 861, 924-25, 1058. Except for extraordinary time commitments, supervisory approval is not needed. Tr. 933. The need to increase “supervision contacts” impacts NCUA resources because of the additional examiner time and travel costs required. Tr. 100, 307.

Third, a worsening CAMEL rating jeopardizes a credit union’s ability to expand its “field of membership” (“FOM”) (*i.e.*, the occupational, community or associational group(s) it serves). An FOM expansion can be approved only if it is “economically advisable.” 12 C.F.R. §701.1 *incorporating* IRPS No. 99-1: *Chartering and Field of Membership Manual*, 63 FR 71997, 72039 (Dec. 30, 1998). The “economic advisability” prerequisite for an FOM expansion is determined by the credit union’s post-expansion likelihood of success and the fitness and skill of its

¹⁸ EICs have the discretion to reassess a credit union’s CAMEL rating during a “supervision contact,” Tr. 550-51, 926, usually based on improvement in a discrete area. *Id.*

management. 63 FR at 72019; Tr. 1059-61, 1219-20, 1273, 1371-72, 1375. A CAMEL rating that reflects a lack of “economic advisability” (also referred to as “economic viability”) will be a bar to an FOM expansion.¹⁹ Tr. 461-62, 549, 552-53, 999-1000, 1219-20, 1273, 1371-72, 1375. As a result, CAMEL “4” and “5” credit unions are allowed to expand “very infrequently.” Tr. 1056, 1061.

Fourth, a worsening CAMEL rating jeopardizes a credit union’s ability to merge with another credit union and survive as the continuing entity. The merger of a federally insured credit union is subject to NCUA approval. 12 U.S.C. §1785(b)(3); 12 C.F.R. §708b.101(b). To be approved, a merger must “not present an undue risk to the [Insurance Fund].” 12 C.F.R. §708b.105(b). As in the case of FOM expansion, NCUA assesses undue risk to the Insurance Fund by the standard of “economic advisability.” Tr. 1221. Therefore, a CAMEL rating that reflects the proposed continuing credit union’s lack of “economic advisability” will effectively bar a merger with another credit union. Tr. 448, 554, 928-29, 1060. No witness could recall a single instance where NCUA allowed a CAMEL “4” or “5” credit union to survive as the continuing credit union in a merger. Tr. 1061.

Fifth, a credit union rated a CAMEL “4” or worse is designated by regulation as in “troubled condition.” 12 C.F.R. §701.14(b)(3); Tr. 100, 1005. A credit union in “troubled condition” is required by statute to get NCUA approval of persons appointed to fill a variety of its management positions and to serve on the board of

¹⁹ In rare instances when an FOM expansion will reverse a credit union’s financial problems, ninety-nine percent of the determinations of “economic viability” to expand (which encompasses “management capability”) come from examiners. Tr. 973-74, 1015.

directors. 12 U.S.C. §1790a(b); Tr. 225, 459, 557, 855-56, 912, 914-15, 929, 1001-02, 1017-18, 1055.

Finally, a worsening CAMEL rating deprives a credit union of automatic eligibility for NCUA's Regulatory Flexibility Program ("RegFlex"). 12 C.F.R. §742; Tr. 92, 115, 225, 555-56, 930, 1002-03, 1055. RegFlex credit unions enjoy the benefit of either no limit or a relaxed limit on: the amount of fixed assets they can acquire; the maximum maturity length on their investments; the charitable donations they can make; and the amount of nonmember deposits they can accept. 12 C.F.R. §742.4; Tr. 459, 930. In addition, RegFlex credit unions are granted the additional power to retain in their portfolios a variety of loans purchased from other credit unions. 12 C.F.R. §742.5.

A credit union having sufficient net worth that receives a CAMEL "1" or "2" for two consecutive examination cycles is *automatically* eligible for RegFlex. 12 C.F.R. §742.2. A credit union that receives a CAMEL "3," or a CAMEL "1" or "2" for less than two consecutive examination cycles, is not automatically eligible; it must apply to an RD for RegFlex, which may be denied (without appeal) or granted as to some benefits but not to others. *Id.* Tr. 932. A credit union with a CAMEL rating worse than "3" is disqualified from RegFlex. Tr. 932.

C. Problem Case Officers.

Each Region has a staff of approximately four Problem Case Officers ("PCOs"). They report to the Region's Director of Special Actions ("DSA"). Tr. 45, 681-82. PCO Bruce Lum testified about the duties and responsibilities of PCOs. Tr.

681. Mr. Lum has served extensively both as a PCO and as DSA for NCUA's Region VI.

1. "Problem Credit Unions". PCOs are highly trained examiners who are utilized to resolve sensitive and complex problems at credit unions insured by NCUA.²⁰ Tr. 81. Credit unions assigned to a Region's Division of Special Actions typically have major operational issues that pose an immediate threat to solvency. Tr. 643. Major problems usually must be resolved promptly in order to prevent the institution's failure. Tr. 683. To do that, a PCO generally makes an initial evaluation of a credit union's condition and determines whether the NCUA should expend resources trying to resolve the problems in the institution or whether to minimize further losses through liquidation or merger. Tr. 160, 165.

During an initial contact or "scrub," a PCO has complete discretion to review the history of the credit union, identify the problems, and determine what issues need to be addressed. Tr. 684-685. He or she decides when to schedule the examination, what SMEs will be needed to assist in the exam, and what the exam's focus will be. Tr. 685. In undertaking this analysis and review, the PCO relies on his or her experience and judgment, acting without prior approval by the DSA or other NCUA officials. Tr. 684-686.

2. Equivalent of EICs. In directing a team examination, the PCO is the equivalent of an EIC and, therefore, decides how the particular sections of the Exam Report will be written, as well as what particular areas are significant enough to be identified in the DOR. Tr. 687. He or she evaluates the problems in the credit union

²⁰ In some circumstances a PCO may have responsibility for running the day-to-day operations of a credit union in conservatorship. Tr. 167-168.

and determines how they can most effectively be resolved. These solutions are negotiated by the PCO with the officials of the credit union and are finalized in a DOR that commits both the credit union and NCUA to a workout scenario. In securing this commitment to a particular course of action, the PCO typically acts without any advance approval from the DSA or other NCUA official. Tr. 711. By deciding how to resolve the problems in a particular case, the PCO has a direct impact on the cost of the workout to NCUA. Tr. 722.

3. PCOs' Authority. The PCO has the authority, based upon his or her judgment and a review of the situation at the institution, to change the CAMEL rating. Tr. 700-701. PCO Bruce Lum testified that in one instance he changed a CAMEL rating from a "1" to a "5." Tr. 700-701. Changes to the CAMEL rating have a direct effect on Agency resources because they commit the Agency to a much more time consuming and aggressive supervision of the institution in question. Tr. 706. The CAMEL changes also directly impact the ability of the credit union to expand its field of membership, avail itself of the benefits of RegFlex (see §B.8. above), and limit the institution's ability to offer certain member services through a Credit Union Service Organization. Tr. 705-706. In instances when the PCO downgrades a CAMEL rating, he or she has the authority to impose certain restrictions on the institution. For example, if necessary in the judgment of a PCO, he or she may restrict a credit union from paying a dividend (the equivalent of interest) on shares on deposit. Tr. 698-699.

4. Workout Plan. Finally, the PCO issues a report to the "problem credit union," emphasizing appropriate corrective measures based upon his or her

experience and judgment. Tr. 689. This report sets forth the institution's workout plan and is issued to the credit union by the PCO without any advance approval by anyone at NCUA. Tr. 689-691.²¹ In conducting his or her analysis and making judgments that form the basis of the workout report, a PCO is guided by knowledge of the law and regulations governing credit unions as well as published Agency guidance. Tr. 710. Although a PCO will act in a manner that is consistent with Agency guidance, the guidance is not routinely consulted. Tr. 710-711. Typically, particular cases require specific, unique solutions based on the PCO's experience and judgment. Tr. 711. Normally the PCO alone will decide, through the workout plan, what is the best way to workout or resolve problems identified in a particular case. Tr. 706. Because the credit unions involved are in poor condition, the PCO's decision typically commits NCUA to a workout approach involving significant expenditures of funds and personnel resources. Tr. 722.

D. Other Employees

1. Duties of Senior Financial Analysts. Senior Financial Analysts Dan Gordon and Stephen Sherrod work in the Office of Strategic Program Support and Planning, located in the Agency's Central Office. Tr. 793. Among other duties, the Senior Financial Analysts serve as coordinators for a program of assistance their office provides to the Office of Corporate Credit Unions. Tr. 787. Both Senior Financial Analysts work on policy issues, such as the Agency's Interpretative Ruling and Policy Statements. *Id.* Tr. 796-97. They also engage in substantive rulemaking

²¹ When Mr. Lum worked as DSA his PCOs also issued their reports to the "problem credit union" without advance approval from him. Tr. 691.

by drafting regulations pertaining to such areas as investments and asset/liability management. *Id.*

Senior Financial Analysts frequently serve on rulemaking task forces that formulate Agency policy and make recommendations to the NCUA Board. Tr. 796. They are regarded as the Agency experts on certain regulations. For example, Mr. Sherrod is considered the Agency expert on the regulation pertaining to corporate credit unions, 12 C.F.R. Part 704. In Mr. Sherrod's words, he is "the 704 person." Tr. 801. Further, Senior Financial Analysts are responsible, without supervisory approval, for designing, scheduling and delivering training to the Agency's Capital Markets Specialists on investment and asset/liability management. As Mr. Sherrod explained, he has the final say over the nature and scope of the training given to examiners in those areas. Tr. 796. Additionally, Mr. Sherrod sets the schedules of the Agency's Senior Investment Officers to participate in corporate credit union examinations. Tr. 800-01.

2. Duties of Risk/Loss Officers. Steven Farrar is a Loss/Risk Analysis officer in E&I's Division of Risk Management. Tr. 804. Mr. Farrar reviews regional requests for concurrence in granting financial assistance under the Agency's "Special Assistance Program" to aid financially troubled credit unions. Tr. 805. Other significant duties include the development of training courses for NCUA and State examiners and development of the "Special Assistance Program." Tr. 815, 817. Mr. Farrar designed NCUA's SATEX software program that analyzes financial data in order to monitor the financial risk in certain troubled credit unions. Tr. 822-823. This important tool allows NCUA to minimize risk in cases where the Agency has

provided a “special assistance” grant. Mr. Farrar also has responsibility for analyzing specific credit union losses and historical trends and recommending a specific reserve level that the Insurance Fund should maintain to absorb expected losses. Tr. 823-824.

Mr. Farrar’s decision regarding whether a credit union should receive a “special assistance” grant commits NCUA to a potentially expensive course of action. The amounts sought are typically large and the financial circumstances of the credit union are typically volatile. Therefore, Mr. Farrar engages in a due diligence review of the request to assure that “special assistance” is appropriate. Tr. 811. Typically, the Director of E&I adopts Mr. Farrar’s decision. Tr. 812. Mr. Farrar developed the Agency’s *Special Assistance Manual* that sets forth agency-wide benchmarks and criteria for determining a credit union’s eligibility for special assistance. This manual was adopted without substantive change by the NCUA Board. Tr. 817, 821-822.

As part of his training duties, Mr. Farrar develops the curriculum for NCUA’s “Problem Resolution Seminar.” Tr. 815. This training program is offered to NCUA and State examiners approximately three times a year. Tr. 815. In developing this course of study, Mr. Farrar relies on his judgment and past experience as a PCO in suggesting best practices for problem resolution. Tr. 815, 819. Although the curriculum is responsibility of E&I’s Division of Risk Management, it is Mr. Farrar who actually develops the lesson plans, which are typically adopted without change. Tr. 820.

3. Duties of Management Assistants for Operations. Each of the Agency’s six Regional Offices has a Management Assistant for Operations (“MAO”),

who has certain personnel responsibilities for his or her respective Region. Tr. 1020. MAOs advise managers in their Regions on the procedures and policies (both technical and legal) for taking personnel actions, such as recruiting internally and externally, reassignments, pay actions, awards, performance appraisals and disciplinary actions. Tr. 1022, 1025, 1027-28, 1033-34, 1039. They work with personnelists in the Office of Human Resources (“OHR”) to resolve personnel problems in the Regions and are responsible for completing the appropriate paperwork and submitting it to OHR for all personnel actions. Tr. 1028-29. MAOs advise managers on the appropriate documentation needed to support a disciplinary or adverse action, review grievances, and identify the appropriate fact-finder necessary to resolve the issues in the grievance. Tr. 1030-31, 1042. Additionally, they are a source of information for employees on all questions regarding pay, personnel actions, benefits, etc., and conduct orientation training for all new Regional employees. Tr. 1020, 1023, 1037.

4. Duties of Employee Development Specialist. John Faith is an Employee Development Specialist (“EDS”) in OHR. He was assigned to that position from a computer specialist position between the time the petition for an election was filed and the date of the hearing. Tr. 732. Both positions are located in OHR and many of the duties Mr. Faith performed as a computer specialist he will continue to perform as an EDS. Tr. 733-34. This year Mr. Faith was assigned by the Deputy Executive Director to develop the merit pay calculations for all NCUA employees and based on those calculations, determine the amount of merit pay for each employee. Tr. 739-40. In doing so, he was required to review each employee’s

performance rating and ensure that the calculations accurately reflected the Agency's pay policy, which he was instrumental in developing. Tr. 737-38, 749. Additionally, Mr. Faith had responsibility for resolving employee pay issues, frequently requiring him to access the employee's personnel and pay records. Tr. 737.

As an EDS, he will serve as the program manager for the new electronic supervisory training program. Tr. 741-42, 746-47. His responsibilities will include developing the computer training modules, implementing the program's curriculum, evaluating the program's effectiveness and making recommendations to improve it. Tr. 746-47. He will also be asked to develop individualized training for new supervisors depending on the needs of each individual. Tr. 748. Mr. Faith testified that in his EDS position he would also be developing and evaluating electronic "e-course" training for the Agency's examiner corps. Tr. 747.

5. Duties of Attorney-Advisor (General). Attorney-Advisor Diane Salva is both the Agency's Freedom of Information ("FOIA") Officer and Deputy Ethics Officer. Tr. 760. As the FOIA Officer, she reviews document requests to determine whether documents should be released, whether redactions are necessary, and whether the requester should be charged an appropriate fee. Tr. 762. Many of the FOIA requests are for employee records, including but not limited to Official Personnel Files, performance appraisal files and employee relations files. Tr. 760-61, 763. In addition, Ms. Salva also has access to Inspector General ("IG") investigative reports. Tr. 763. While she does not determine whether the IG reports are releasable, she does review them in order to determine whether relevant documents accompanying the report should be released. Tr. 763.

Ms. Salva testified that in a year she might receive as few as six and as many as twelve requests for personnel records. Tr. 765. She testified that it would not surprise her to find that in some months she might receive three requests for personnel records. Tr. 765. Ms. Salva also testified that she advises other attorneys in the Agency's Office of General Counsel regarding the release of employee records in response to discovery requests. Tr. 763.

6. Duties of Realty Specialist. Realty Specialist Robert McDonald, a member of the Office of the Chief Financial Officer in the Agency's Central Office, manages the Agency's "Employee Home Purchase Program," a program he helped to develop. Tr. 756. This program ensures that Agency employees who are being relocated will not lose money on the sale of their homes. The Realty Specialist provides employees approved for enrollment in the "Employee Home Purchase Program" a full range of services to facilitate their relocation and the purchase and sale of their homes. Tr. 752. These services include real estate appraisals, property inspections, and legal representation to close the purchase and sale. *Id.* If an employee is unable to sell the property or can only sell at a loss, the Agency will either purchase the home or pay the difference to the employee. Tr. 755. The Realty Specialist has access to sensitive personal financial information pertaining to Agency employees enrolled in the "Employee Home Purchase Program," such as salary information, mortgage balances and other loan documents. Tr. 753, 757-58. In his capacity as Realty Specialist, Mr. McDonald makes recommendations to his superiors to commit Agency funds to pay the costs of property inspections, appraisals, and repairs, as well as the amount to be paid to relocating employees for the value of their

homes. Tr. 756. These recommendations are routinely accepted by his supervisors.

Tr. 756, 758. Additionally, at real estate closings, Mr. McDonald has the authority to agree to minor adjustments that result in changes of less than \$1,000. Tr. 757.

IV. ARGUMENT

A. EXAMINERS-IN-CHARGE AND PROBLEM CASE OFFICERS SHOULD BE EXCLUDED FROM THE BARGAINING UNIT AS “MANAGEMENT OFFICIALS.”

The Federal Service Labor Management Relations Statute (“the Statute”) provides that a proposed collective bargaining unit cannot be certified as appropriate if it includes “management officials” of the agency in question. 5 U.S.C.

§7112(b)(1). The Statute defines a “management official” as an employee whose “duties and responsibilities . . . require or authorize the individual to formulate, determine, or influence the policies of the agency.” 5 U.S.C. §7103(a)(11). The

FLRA has given the following meanings to the critical terms of the definition:

“Formulate” means “to establish or prescribe”; “determine” means “to decide upon” or “to settle upon”; “influence” is synonymous with “to effectively influence” and means “to bring about” or “to obtain a result”; and “policies” refers to “general principles, plans or courses of action.” *Dept. of Navy, Automatic Data Processing Selection Office* (“*Navy ADP*”), 7 FLRA 172, 173-74 (1981); *Dept. of Energy*, 40 FLRA 264, 267 (1991).

As a result of the meanings given to the critical statutory terms, the FLRA interprets the definition of “management official” to include employees who: (1) Create, establish or prescribe general principles, plans or courses of action for the

agency; or (2) Decide or settle upon general principles, plans or courses of action for the agency; or (3) Bring about or obtain a result as to adoption of general principles, plans or courses of action for the agency.²² Navy ADP, 7 FLRA at 174 (1981); Dept. of Justice, Executive Office of Immigration Review, 56 FLRA 616, 618 (2000).

To distinguish employees who influence, decide and bring about an agency's plans and courses of action, the FLRA relies on a variety of factors: First, whether the incumbent makes independent decisions within broad agency guidelines, Dept. of Interior, Bureau of Mines ("Bureau of Mines"), 9 FLRA 109, 111 (1982). Second, 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.²³ Bureau of Mines, 9 FLRA at 111. Third, 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). Fourth, whether the incumbent speaks for the agency and, by his or her actions, binds its resources. Space Division, Air Force Systems Command, 9 FLRA 885, 887 (1982). Fifth, the degree to which the incumbent's decisions commits the

²² An additional factor that alone is not decisive is whether the employee is identified with management and, by virtue of stature and responsibilities, must have the interests of management as his/her primary concern in the context of collective bargaining. 7 FLRA at 173; Army Engineers Topographic Labs, 10 FLRA 125 (1982); Defense Communications Engineering Center, 8 FLRA 702 (1982).

²³ Supervisory approval and review is one factor in determining whether an employee is a "management official"; it is not the sole factor. Dept. of Energy, 40 FLRA at 266; Food & Nutrition Service, 34 FLRA at 145.

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).

To assess these factors, the FLRA looks to the actual duties and responsibilities of the incumbent at the time of the representation hearing, not to his or her prior duties or to a position description. *Dept. of Air Force, Aberdeen Proving Ground*, 57 FLRA 154, 157 (2001); *Dept. of Labor, Office of the Solicitor*, 37 FLRA 1371, 1377 (1990). As explained below, the record establishes that EICs and PCOs, effectively influence, decide and bring about the Agency's plans and courses of action for the credit unions it oversees.

1. Examiners-in-Charge.

a. Independent Decision-making Authority. In carrying out their duties, and to achieve the objectives of the RFEP, EICs make independent decisions, within broad agency parameters and guidance, throughout the examination process. EICs schedule each individual and team exam and independently decide how much time and resources to commit to it. No Agency-wide or Regional policy or instruction dictates the scope of an examination. Rather, EICs decide the scope of each examination and the appropriate type and quantity of data and documentation to review in each "risk area."

The EIC drafts the narrative sections of the Exam Report reflecting their findings. No Agency-wide or Regional policy or instruction dictates the substance of an Exam Report. Rather, EICs independently decide what risk areas need to be addressed and the appropriate corrective action to impose. Tr. 85, 220, 466-67, 493. Further, they decide what specific operating exceptions, violations of law or

regulation, and unsound policies, practices and procedures to bring to the credit union's attention.

The EIC independently decides whether to issue a DOR and what it will say. No NCUA or Regional policy dictates the substance of a DOR, nor prescribes the circumstances when one must be issued. Tr. 870. Based on his or her own judgment of the risks and severity of the problems found, Tr. 926, the EIC drafts the substance of the DOR, prescribes the corrective action that is warranted, identifies the official responsible for taking the specified corrective action, and sets a deadline for compliance. Tr. 34, 86-87, 192, 226-27, 238, 478-79, 481, 499, 502, 561; *e.g.*, AE-12, AE-16.

An EIC independently determines the CAMEL rating that summarizes his or her assessment of each credit union. Although there are suggested ratings for three CAMEL categories, they are not mandatory. There is no numerical formula for determining the composite CAMEL rating. Nor is there an NCUA policy or instruction that prescribes a particular rating to be given when a certain problem or condition is found to exist in a category. Tr. 134. Thus, EICs must rely on their experience and judgment to decide, based on exam results, what is an appropriate CAMEL rating. Tr. 58, 139, 882, 889.

EICs operate within broad regulatory parameters and Agency guidance when making the key decisions of the examination process. The parameters consist of the Act, NCUA rules and regulations, standard by-laws, accounting rules and annual audit results, as well as "best practices" inculcated through examiner training and experience. Tr. 235, 288-94, 454-55, 457, 468-69, 486-87. They set the standards by

which EICs assess and correct problems and undue risks that may threaten safety and soundness, exposing the Insurance Fund to a risk of loss. NCUA also makes available a variety of reference works, on an Agency-wide and Regional basis, to provide guidance on exam topics and procedures. *E.g.*, JE-1, AE-22. Because the Agency concedes that its guidance “may not be the best or final approach in every situation,” JE-1, it is not uniformly regarded as mandatory. Generally, EICs are expected to adhere to the spirit, if not the letter, of Agency guidance.

b. Degree of Higher Level Prior Approval. The record demonstrates that, although EICs often keep their supervisors informed of the outcome of their examinations, they generally are not required to seek prior supervisory approval or concurrence when carrying out the key functions of the job.

When planning the scope of an examination, no supervisory approval is needed for the EIC’s determination of the scope. Tr. 211. In fact, an SE does not see the “Scope Workbook” before or after the EIC implements it. An EIC typically does not consult with an SE before issuing his or her Exam Report to the credit union. Tr. 69, 157, 199, 219, 250, 488, 626, 640, 868. The SE may not see the Exam Report until well after it is uploaded to the Agency’s computer system. If that Exam Report includes a DOR, it typically is neither discussed with nor reviewed by an SE before the EIC issues it to the credit union. Tr. 157, 266, 626, 642, 870.

EICs generally are not expected to seek supervisory approval before giving a particular CAMEL rating, and in practice they do not. Tr. 59, 101-102, 127-128, 158, 172, 501, 626, 640-41, 864-65, 905, 907, 918, 922. This is the case even when an EIC downgrades a CAMEL rating to a “4.” Tr. 248-49, 459, 549, 650, 862.

However, in many cases EICs choose to inform their supervisors when they have given a CAMEL rating of “3” or worse, Tr. 254, 488, 496, 917-18, because of the future impact on the Region’s resources and so that a “troubled condition” letter can be sent to credit unions rated “4” or “5.” *See* note 17 *supra*.

There is no doubt that an SE’s position in the Agency’s chain of command theoretically gives him or her the authority to overrule an EIC’s decision when informed of it in advance. But by all accounts, this is an excessively rare occurrence. On the contrary, the record establishes that EICs make the key decisions of the job with a minimal “degree of higher level approval.”

c. Degree of Higher Level Post-Examination Review. Although technically reviewable, the decisions and actions of EICs are seldom reviewed and almost never overturned. Put another way, those decisions are frequently accepted as authoritative and implemented. *Bureau of Mines*, 9 FLRA at 111; *U.S. Coast Guard*, 7 FLRA 743, 744 (1982); *Defense Communications Agency*, 8 FLRA 273, 274 (1982).

There is no doubt that credit unions regulated by NCUA have the right to appeal the results of an examination, including the EIC’s findings, the terms of a DOR and the CAMEL rating, to an RD. But statistics in the record, JE-5, confirm that it is “amazingly rare” for a credit union to seek review of a DOR or CAMEL rating.²⁴ Tr. 75. Further, when an appeal is granted, it does not necessarily result in reversal of the EIC. Of the 14,676 recent Exam Reports for which NCUA kept statistics, 34 (or .0023 percent of the examinations) were appealed to challenge a

²⁴ It is utter speculation to assume that credit unions rarely appeal DORs and CAMEL ratings because they are “amateurs,” “unsophisticated,” without access to lawyers, or because they view exam findings as “professional advice,” “professional assistance” or guidance “toward viability,” rather than as an evaluation of success or failure. Tr. 145-46, 253, 569, 572, 589.

DOR or CAMEL rating. Of those appeals, three were granted, meaning that the EIC prevailed in 99.97 percent of the 14,676 examinations. Extrapolated to cover the 28,202 examinations completed in the years 1999 through 2002, JE-5, it would mean that an EIC was overturned only eight times. Accordingly, there is no basis in the record for dismissing EICs' decisions merely as "recommendations" because technically they are reviewable; in practice, those "recommendations" nearly always withstand review. EICs' decisions, as a rule, carry considerable weight, are regarded as authoritative and are routinely implemented.

d. Authority to Speak for Agency. In most cases, the EIC is a credit union's only human contact with NCUA because it is the EIC who comes on-site to conduct the examination and follow-up "supervision contacts," to identify problems and risks, to prescribe corrective action, and to determine the CAMEL rating. At the conclusion of the exam, it is the EIC who holds a Joint Conference to present and explain the Exam Report to the credit union's board of directors and to answers their questions.

When a DOR is warranted, the EIC negotiates the terms with the credit union's board and management. When agreement cannot be reached on what corrective action will be taken, the official who will be responsible, and what the deadline for compliance will be, it is the EIC who has the last word. As explained below, the EIC's evaluation of each credit union, as reflected in its CAMEL rating, binds the Agency to a course of action for that credit union. The credit unions NCUA regulates uniformly perceive the EIC as the voice and face of NCUA.

e. Impact on Agency Course of Action. An EIC's assessment of a credit union is reflected in the CAMEL rating and the DOR he or she issues without prior supervisory approval. By statute, policy or regulation, the composite CAMEL rating directly or indirectly triggers a series of specific, enforceable restrictions intended to restore a credit union's safety and soundness.

First, NCUA policy bars a credit union rated CAMEL "3" or worse from the "risk-based examination scheduling program" that allows a credit union to defer its examination from a 12-month to an 18-month cycle. NCUA, *Letter to Federal Credit Unions*, No. 01-FCU-05 (Aug. 2001). The need to examine a credit union once a year, instead of twice every three years, forces NCUA divert its resources to increasing oversight of that credit union.

Second, a CAMEL rating below "1" gives EICs full discretion to escalate on- and off-site "supervision contacts" as needed to monitor the credit union between exams. Tr. 34, 79, 100-101, 550, 861, 924-25, 1058. The need to conduct "supervision contacts" between examinations requires NCUA to divert its resources to more aggressive monitoring of that credit union.

Third, a credit union rated a CAMEL "4" or worse is effectively precluded by regulation from expanding its FOM because, in nearly all cases, such a rating alone would establish that the credit union does not meet the "economic advisability" prerequisite for approval to expand. 12 C.F.R. §701.1 *incorporating* IRPS No. 99-1: *Chartering and Field of Membership Manual*, 63 FR 71997, 72039 (Dec. 30, 1998).

Fourth, a credit union rated a CAMEL "4" or worse is effectively precluded by regulation from being the continuing credit union in a merger with another credit

union because, in practice, such a rating alone would establish that the proposed merger does not meet the prerequisite to “not present an undue risk to the [Insurance Fund].” 12 C.F.R. §708b.105(b).

Fifth, a credit union rated a CAMEL “4” or worse is designated by regulation as in “troubled condition.” 12 C.F.R. §701.14(b)(3); Tr. 100, 1005. The Act requires such “troubled” credit unions to obtain NCUA approval of persons appointed to fill executive management and board positions. 12 U.S.C. §1790a(b).

Sixth, a worsening CAMEL rating gradually deprives a credit union of the benefits of the RegFlex program, 12 C.F.R. §742, which removes or relaxes a series of regulatory restrictions. By regulation, a CAMEL “3,” or a CAMEL “1” or “2” for less than two consecutive examination cycles, ends a credit union’s automatic eligibility for RegFlex, making the benefits of RegFlex available only at the discretion of an RD. 12 C.F.R. §742.2. Further, a CAMEL rating worse than “3” disqualifies a credit union from RegFlex.

An EIC’s decision to issue a DOR, and the corrective actions he or she mandates within, commits the Agency to a course of further supervision and oversight for that credit union. If a credit union fails to act as the DOR instructs, the obligation falls to NCUA to enforce the DOR through a Letter of Understanding and Agreement and other administrative actions.

Finally, 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” under the Statute. *U.S. Army Communications Systems Agency, Fort*

Monmouth, NJ (“Ft. Monmouth”), 4 FLRA 627 (1980).²⁵ 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. 4 FLRA 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, . . . extend[ing] 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, as described above, are even more compelling because they demonstrate that EICs exercise greater independent judgment in carrying out duties and responsibilities comparable to those of the principal auditor in Ft. Monmouth. Substitute “to bring about” for “influence” and “plans or courses of action” for “policy,” as Navy ADP provides, and the FLRA’s Ft. Monmouth holding supports a finding here that EICs and PCOs are “management officials”: 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 the credit unions the EICs oversee.

2. Problem Case Officers.

²⁵ Although Ft. Monmouth is a pre-Navy ADP decision of the FLRA, it remains binding precedent to this day. Not only has that decision not been overruled, it is cited as authority in the FLRA’s current Representation Case Law Guide (Oct. 2000 ed.) at 22-2.

PCOs are highly trained elite examiners who are normally called upon to resolve sensitive and complex problems in insured credit unions. Tr. 81. As such, they possess all of the independent decision making authority of an EIC, *e.g.*, they have the ability to speak for the Agency and by their actions in evaluating and reporting on a credit union's condition commit NCUA to a particular course of action. On this basis alone they qualify as management officials under applicable case law. *See Navy ADP*, 7 FLRA at 174; *Ft. Monmouth*, 67 FLRA 627.

PCOs also have additional independent decision making authority that further supports a finding that they function as management officials. Typically they have complete discretion to review the background of the credit union and to decide which areas to review or "scrub". Tr. 684-685. While acting in a manner consistent with Agency policy, the PCO must fashion unique solutions after reaching conclusions on an appropriate course of action based primarily on his or her judgment and experience. Tr. 710-711.

In contrast to an EIC, a PCO is normally trying to develop a workout plan in credit unions that are in serious financial condition, often facing insolvency. Tr. 643. In one example, Mr. Lum testified that he had changed a credit union's CAMEL rating from a "1" to a "5" without any higher level approval. Tr. 700-701. Typically a PCO is called upon to decide whether the problems in the institution can be resolved or whether the institution should be liquidated or merged. The decision the PCO makes determines whether there will be continued aggressive supervision of the institution or whether it will be liquidated or merged. In either case, when the PCO makes recommendations by developing a workout plan, they are typically made

without prior approval of anyone at NCUA, and when followed, involve significant expenditure of Agency funds and personnel resources. Such decisions shape NCUA's course of action regarding the credit union involved, commit it to a particular approach to problem resolution, and thereby establish that the decision maker functions as a management official. See Bureau of Mines, 9 FLRA at 111; U.S. Coast Guard, 7 FLRA at 744; Defense Communications Agency, 8 FLRA at 274.

B. SENIOR FINANCIAL ANALYSTS, RISK/LOSS OFFICERS AND THE REALTY SPECIALIST SHOULD BE EXCLUDED FROM THE BARGAINING UNIT AS "MANAGEMENT OFFICIALS" OF NCUA.

Under the factors established by the FLRA for identifying "management officials," the record shows that the following employees influence, decide and bring about NCUA's plans and courses of action in the areas in which each one operates.

1. Senior Financial Analysts. Stephen Sherrod is one of two Senior Financial Analysts in the Agency's Office of Strategic Program Support and Planning. The duties of the Senior Financial Analysts are very similar in nature to those of a staff engineer who was considered a management official in Bureau of Mines, 9 FLRA 109. The FLRA observed that the incumbent

uses independent judgment and discretion to plan, budget, schedule and implement research and development programs. Further, he directs the work of others to insure that such programs are completed in accordance with program objectives. In addition, [his] recommendations carry considerable weight and are generally implemented, and, as a result of his recommendations, policy decisions are made that have an effect on the working conditions of Center employees. Thus, based upon the foregoing, the incumbent . . . is more than an expert or professional rendering resource information but rather he brings about or obtains a result as to the adoption of plans or courses of action of the Bureau.

9 FLRA at 112.

Among other duties, Senior Financial Analysts are responsible, without supervisory approval, for designing, implementing and delivering training to examiners regarding investments and asset/liability matters. As Mr. Sherrod explained, he has the final say over the nature and scope of the training given to examiners in those areas. Tr. 796. Additionally, Mr. Sherrod sets the schedules of Agency Senior Investment Officers to participate in corporate credit union examinations. Tr. 800-01. The decisions in these areas have a direct on the use of Agency resources to oversee credit union investment practices.

The Senior Financial Analysts are also regarded as the Agency experts on certain regulations. For example, Mr. Sherrod is considered the Agency expert on the Agency's regulation pertaining to corporate credit unions (12 C.F.R. Part 704). In Mr. Sherrod's words, he is "the 704 person." Tr. 801. Using their depth of knowledge, the Senior Financial Analysts engage in substantive rulemaking by drafting regulations pertaining to such areas as investments and asset liability management. Tr. 796-97. They frequently serve on rulemaking task forces that formulate agency policy and make recommendations to the NCUA Board. Tr. 796. Additionally, they serve as coordinators for the program of assistance their office provides to the Office of Corporate Credit Unions. Tr. 787. Thus, Senior Financial Analysts Gordon and Sherrod are more than experts or professionals rendering resource information. Rather, they bring about or obtain a result as to the adoption of Agency plans or courses of action involving regulation of investments and

asset/liability management. Consequently, they meet the definition of “management official” and should be excluded from the bargaining unit.

2. Risk/Loss Officers. Mr. Farrar is one of two Risk/Loss Officers in E&I. Tr. 804. In that capacity, he performs a number of major duties that directly influence Agency policy in several critical areas. Mr. Farrar has responsibility for reviewing requests from NCUA field offices to provide financial “special assistance” grants to credit unions experiencing operating problems. Tr. 811-812. The amount of funding sought is typically large and, if granted, the assistance commits the agency to a potentially expensive course of action. A careful review of each application is necessary in order to ensure that the need and amount of “special assistance” are both appropriate. Mr. Farrar functions as a management official because he conducts this review and renders a recommendation regarding whether the assistance should be granted. Significantly, his “recommendations carry considerable weight and are generally implemented, and, as a result of his recommendations, policy decisions are made” that commit financial assistance as part of NCUA’s workout plan for the credit union involved. *Bureau of Mines, 9 FLRA 109; U.S. Coast Guard, 7 FLRA 743; Defense Communications Agency, 8 FLRA 273; Tr. 812.*

Mr. Farrar also has responsibility for developing NCUA’s Problem Resolution Seminar, a course specifically designed to teach NCUA and State examiners “best practices” for problem resolution. Tr. 815, 819. In doing so, he exercises independent discretion to plan a curriculum that directly influences how NCUA examiners supervise and resolve problems in credit unions they regulate. Typically, his lesson plans are adopted without change. Tr. 820. The expertise Mr. Farrar

imparts to Problem Resolution Seminar participants profoundly influences NCUA's approach to its primary mission--resolving problems discovered when examining credit unions and ensuring regulatory compliance and safe and sound operation. His development of NCUA's *Special Assistance Manual*, adopted without substantive change, effectively set the criteria used Agency-wide to grant "special assistance" to failing credit unions. Tr. 817, 821-22.

By developing criteria for determining whether to grant "special assistance," personally making authoritative recommendations to grant or deny such assistance, and deciding what "best practices" should be taught to examiners, Mr. Farrar shapes and influences NCUA policy and commits the Agency to a particular course of action. This qualifies him as a management official within the meaning of the statute. 5 U.S.C. §7103(a)(11); *Bureau of Mines*, 9 FLRA 109 (1982); *U.S. Coast Guard*, 7 FLRA 743 (1982); *Rock Island Arsenal*, 8 FLRA 857(1982); *Navy ADP*, 7 FLRA 172 (1981).

3. Realty Specialist. The testimony of Realty Specialist Robert McDonald demonstrates that he functions as a management official. Mr. McDonald "[m]anage[s] the [Agency's] employee home purchase program" (Tr. 752), a program he helped develop. Tr. 756. As he further explained, "I see it as I manage the [that] program." Tr. 752.

The Realty Specialist makes recommendations to his superiors to commit Agency funds to pay the costs of property inspections, appraisals, and repairs, as well as the amount to be paid to relocating employees for the value of their homes. Tr. 756. Mr. McDonald testified that when he makes such a recommendation, "[u]sually

it's approved by my director or chief financial officer." Tr. 756. Further, the Realty Specialist also has the ability to commit Agency funds. As Mr. McDonald testified, he has the authority to agree to adjustments of less than \$1000 at relocating employees' real estate closings. Tr. 757.

These duties and functions are clear indicia of a management official. As the FLRA found in *Dept. of Agriculture, Forest Service Activity* ("*Forest Service*"), 13 FLRA 84 (1983), various employees who developed policies at a national or regional level were "management officials" because their responsibilities required and authorized them to formulate, determine or influence the policies of the agency. The duties of the *Forest Service* incumbents are no different than those of NCUA's Realty Specialist, who helped develop the Agency's nationwide "Employee Home Purchase Program."

Furthermore, the duties the Realty Specialist performs in implementing the program further demonstrate that he functions as a management official. In *Forest Service*, a Forest Products Technologist who "has signatory authority to bind the Activity and its resources" was found to be a management official. *Id.* The Realty Specialist's ability to sign documents and to commit Agency funds at property settlements is no different than the Forest Products Technologist. The fact that the Agency has only one Realty Specialist and that his recommendations are regarded by his superiors as authoritative and are frequently adopted, Tr. 756, is yet another indicator that he qualifies as a management official. *Bureau of Mines*, 9 FLRA at 111; *U.S. Coast Guard*, 7 FLRA 743.

Finally, the duties and responsibilities of the Agency's Realty Specialist as manager of the "Employee Home Purchase Program" are remarkably similar to those of the Traffic Management Specialist who was held to be a management official in 1947th Administrative Support Group, 14 FLRA 220 (1984). The FLRA's decision was based on its finding that the incumbent "formulated and manages the 'Do It Yourself Moving Program' for the Air Force and he has developed the guidelines and substantive provisions for this program." For the above reasons, the duties of NCUA's Realty Specialist are such that he formulates, determines and influences Agency employee relocation policy.

C. MANAGEMENT ASSISTANTS FOR OPERATIONS, THE EMPLOYEE DEVELOPMENT SPECIALIST, THE ATTORNEY-ADVISOR AND THE REALTY SPECIALIST SHOULD BE EXCLUDED FROM THE BARGAINING UNIT "AS EMPLOYEES ENGAGED IN PERSONNEL WORK."

An employee is properly excluded from a bargaining unit if he or she is "engaged in personnel work in other than a purely clerical capacity." 5 U.S.C. § 7112(b)(3). Social Security Administration, 17 FLRA 239 (1985); Dept. of Health and Human Services, Region X ("HHS Region X"), 9 LFRA 518 (1982); Fort Sam Houston, 5 FLRA 339 (1981). In determining if an employee is a personnelist working in a non-clerical capacity, the FLRA looks to two factors: (1) whether that employee exercises independent discretion or judgment in performing his/her personnel work (rather than performing duties in a routine manner within established guidelines); and (2) whether in the performance of that work the employee would face a conflict of interest between his/her job and union representation if included in the unit. See OPM and AFGE, 5 FLRA 238, 246 (1981) (conflict of interest); HUD

and AFGE Local 476, 34 FLRA 207, 214 (1990) (independent discretion/judgment factor). Additionally, the FLRA has acknowledged that training activities constitute non-clerical personnel work. See Defense Mapping Agency, 13 FLRA 407 (1983); Social Security Administration, 17 FLRA 239 (employee who evaluated training procedures was engaged in personnel work in other than clerical capacity). Applying these standards to the duties performed by Lavonne Habbestad, John Faith, Dianne Salva and Robert McDonald, each qualifies as a personnelist who should be excluded from the bargaining unit.

1. Management Assistants for Operations. The myriad of personnel duties performed by the MAOs require that they be excluded from the bargaining unit as personnelists. These positions require that, in addition to handling all of the personnel actions for their respective Regions, the MAOs advise Regional employees on leave, insurance and benefits issues. Tr. 1021;1034. See Veterans Administration Medical Center, 11 FLRA 176 (1983). Additionally, they conduct new employee orientation and work closely with their supervisor, the Director of Management Services, in handling all disciplinary actions in their respective Regions. Tr. 1023; 1030. In performing these duties, the MAO is enmeshed in personnel matters that beyond a merely clerical capacity and accordingly, §7112(b)(3) requires them to be excluded from the bargaining unit. EPA and NFFE, 14 FLRA 25 (1984).

In fulfilling their personnel-related duties, the MAOs exercise independent judgment. Tr. 1036; 1044. Whether they are advising employees on leave programs or personnel rules, on hiring procedures, or on benefits programs, the MAOs' work is the antithesis of work done in a "purely clerical capacity." The MAOs' involvement

in grievance and disciplinary actions inevitably would create a conflict between their management side duties and bargaining unit membership. Tr. 1030-31. Under the “conflict of interest” and “independent judgment or discretion” standards of §7112(b)(3), the MAOs are personnelists who should be excluded from the bargaining unit.

2. Employee Development Specialist. When John Faith worked as a computer specialist his duties involved allocation of merit pay, resolution of employee pay issues and development of the Agency’s new pay system. Those duties clearly constituted non-clerical personnel work. In determining merit pay allocations, he had access to every employee’s performance appraisal and saw not only the employee’s rating but the comments supporting that rating. In resolving pay issues, Mr. Faith had access to an employee’s pay history which is maintained in the employee’s Official Personnel File. Mr. Faith’s access to such personal information in the course of his duties as a computer specialist presents a potential conflict of interest because it puts him in a position to use the information to further union interests. See HHS Region X, 9 FLRA 518. Additionally, in his capacity as a computer specialist, Mr. Faith was instrumental in developing the Agency’s new pay policy. The performance of all of these duties clearly constitutes non-clerical personnel work under §7112(b)(3).

As an EDS, Mr. Faith will be involved in developing and evaluating electronic learning (“e-learning”) courses for new supervisors and examiners. His responsibilities will include developing computer training modules, implementing program curriculum, evaluating courses and recommending course improvements.

See Social Security Administration, 17 FLRA 239 (employee who evaluated training procedures was engaged in personnel work in other than a clerical capacity).

Additionally, he will be working with and providing advice and assistance to senior management and Regional offices on career development training programs for their staff. Finally, Mr. Faith will be evaluating and developing additional career development training courses for the Agency's examiner corps. *See Dept. of Justice, Federal Bureau of Prisons*, 55 FLRA 1243, 1247 (2000). While the FLRA ordinarily "bases bargaining unit eligibility determinations on . . . an employee's actual duties at the time of the hearing, . . ." but it has recognized an exception to that rule. *See Social Security Administration and AFGE*, 56 FLRA 1015, 1017. "[T]he Authority considers duties to have been actually assigned where: (1) it has been demonstrated that, apart from a position description, an employee has been informed that he... will be performing the duties; (2) the nature of the job clearly requires those duties; and (3) an employee is not performing them at the time of the hearing solely because of lack of experience on the job." *Id.* 1017. Based on Mr. Faith's testimony, that exception applies in his case. Tr. 734; 736. Mr. Faith has been and will continue to be engaged in personnel work of a non-clerical nature and should be excluded from the bargaining unit. *Dept. of Labor, Office of the Solicitor*, 37 FLRA at 1378.

3. Attorney-Advisor (General). Through her duties as the Agency's FOIA officer, Diane Salva performs personnel work in other than a purely clerical capacity. She spends approximately 60 percent of her time responding to requests for documents, a substantial part of which consists of requests for personnel records. Tr. 764-66.

The potential conflict between Ms. Salva's duties as FOIA Officer and her membership in the bargaining unit are clear. In reviewing an employee's personnel records, Ms. Salva has access to personal information about the employee, his or her performance ratings, the comments that support the rating and any disciplinary action against the employee. In addition, she has access to IG Reports involving investigations of Agency employees who are in the bargaining unit. If Ms. Salva were a member of the bargaining unit, access to such information would put her in a position to use the information to further union interests. Based on the above reasons, Ms. Salva is engaged in personnel work in a non-clerical capacity under §7112(b)(3) and should be excluded from the bargaining unit. *HHS Region X*, 9 FLRA 518.

4. Realty Specialist. The Realty Specialist qualifies for exclusion from the bargaining unit because his job duties meet the definition of an employee engaged in personnel work. The Realty Specialist has access to sensitive personal financial information pertaining to those Agency employees enrolled in the "Employee Home Purchase Program." Such information includes salary information at both the employee's old and new duty station, Tr. 753, mortgage balances, and other loan and credit data. Tr. 757-58. The performance of the Realty Specialist's duties would present a potential conflict of interest, in that an employee with knowledge of such personnel information could use this information to further union interests. *HHS Region X*, 9 FLRA 518.

A further conflict of interest is presented because the Realty Specialist's authority to recommend what the Agency should pay to purchase a relocating employee's home, as well as the services that should be provided to that employee,

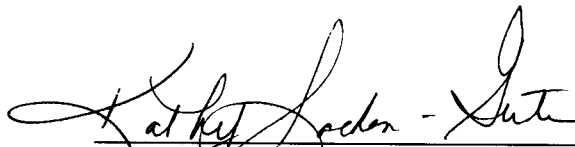
puts him in a position to discriminate against Agency managers and others who are thought not to be union supporters, in order to further union interests. *Id.*

For all of these reasons, the Realty Specialist qualifies as a personnelist who should be excluded from the bargaining unit.

V. CONCLUSION

For the reasons explained above, NCUA respectfully urges the Regional Director to exclude NCUA's Principal and District Examiners, Problem Case Officers, Regional Training Specialists, Senior Financial Analysts, Risk/Loss Officers, Regional Management Assistants for Operations, Employee Development Specialist, Realty Specialist and an Attorney-Advisor from the collective bargaining unit of NCUA employees.

Respectfully submitted,



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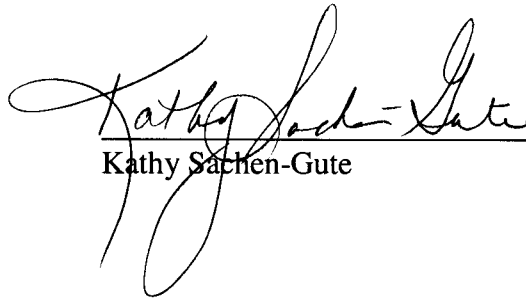
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "NCUA's Post-Hearing Brief" was served by U.S. Mail this 19th day of September 2003, upon the following counsel of record:

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