

BARGAINING UNIT DETERMINATIONS



Appropriate Units

Exclusions from Units

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TWO AREAS BEING COVERED

- Appropriateness of unit
- Statutory exclusions from any unit
 - Most-often encountered ones



APPROPRIATE UNIT

- Criteria Established – 5 U.S.C. § 7112(a)
 - Employees Share in a Clear and Identifiable Community of Interest
 - Unit Promotes Effective Dealings with the Operations of the Agency
 - Unit Promotes Efficiency of Operations of the Agency Involved



APPROPRIATE UNIT

- **An appropriate unit**
 - Statute does not describe THE appropriate unit
 - Statute does not require THE MOST appropriate unit
 - An organization may have many appropriate units
 - Each unit must satisfy the criteria of section 7112(a)



COMMUNITY OF INTEREST

- Purpose: To ensure that it is possible for employees to deal collectively with management
- Factors to consider – whether employees:
 - Are part of same organizational structure
 - Are subject to same chain of command
 - Support same mission
 - Have similar/related duties
 - Are subject to same general working conditions
 - Are governed by same personnel, LMR policies
 - Are serviced by same personnel office



EFFECTIVE DEALINGS

- Pertains to the relationship between management and the union
- Factors to consider –
 - Past collective bargaining experience of parties
 - Level at which LMR policy is set by agency
 - Location and scope of authority of personnel office which will administer the policies



EFFICIENCY OF OPERATIONS

- Whether the proposed unit bears a rational relationship to operational and organizational structure of the agency
- Factors to consider –
 - Effect of unit on agency costs, use of resources, productivity
 - Level at which LMR policy is set by agency
 - Location and scope of authority of personnel office administering policies



EXCLUSIONS FROM UNITS

- Under 5 U.S.C. §7112(b) units may not include:
 - Management officials or supervisors
 - Unique units containing management officials or supervisors allowed under 5 U.S.C. §7135;
 - Confidential employees
 - Employees engaged in Federal personnel work
 - Employees engaged in national security work



Unit Exclusions

- For any excluded position –
 - Nature and type of work performed
 - Position description helpful, not dispositive
- What does the employee do???



MANAGEMENT OFFICIAL

- Defined in 5 U.S.C. § 7103(a)(11)
 - Individual in a position, whose duties and responsibilities require or authorize the individual to formulate, determine, or influence the policies of the agency



Management Officials

- Create, establish or prescribe general principles, plans or courses of action for an agency;
- Decide or settle upon general principles, plans or courses of action for an agency; or
- Bring about or obtain a result as to the adoption of general principles, plans or courses of action for an agency.



Management Officials

- Positions found to be excluded:
 - Employees wrote and interpreted Air Force Regulations
 - Employees had complete responsibility for negotiating and administering a contract with a private corporation, and had final signatory authority to bind the Activity and its resources
 - Member of the Board of Immigration and Appeals, where Board's decisions were precedential and binding on Immigration Judges and the Agency
 - Attorney made independent decisions (not reviewed) for Agency regarding energy matters; made decisions for Agency on foreclosure of multi-million dollar barge terminal facility and disposal of alternative fuel plants



Not Management Officials

- Resource persons, or professionals who offer advice to decision-makers
 - Attorneys engaged in litigation on behalf of the Agency and gave legal advice to Agency officials who promulgated policy
 - Management Analyst reviewed decisions of the Activity for improving and approving the Activity's new computer system, and his recommendations were reviewed by higher levels with ultimate decision being made by the Activity's manager



Not Management Officials

- Those who implement, interpret or effectuate policies
 - Examiners who assigned credit ratings to Credit Unions applied existing policies and regulations
 - Contract Administrators interpreted and applied regulations and policies and had decision-making authority within that framework



SUPERVISORS

- Defined in 5 U.S.C. § 7103(a)(10) as employees who have the authority to:
 - hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline or remove employees
 - adjust their grievances
 - or effectively recommend such action
- “Appraise employees” is not listed
 - Appraising employees is considered when appraisal is used for retention, awards, layoff



Supervisor

- Exercise of one indicia excludes position from bargaining unit
- Exercise of authority requires the consistent exercise of independent judgment
 - An issue in lead positions
- Must supervise a federal employee



Supervisory Firefighters & Nurses

- Must devote a **preponderance** of their employment time to exercising supervisory authorities
 - Preponderance = majority
 - Employment time = work time as determined by the record in a case
 - Does not mean entire 24-hour shift, for firefighters



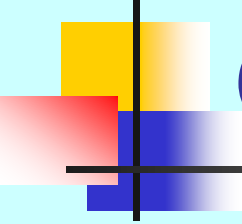
CONFIDENTIAL EXCLUSION

- Defined in 5 U.S.C. §7103(a)(13)
 - Employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations



Confidential Exclusion

- Labor-nexus test: An employee is a confidential when –
 - There is evidence of a confidential working relationship between an employee and the employee's supervisor or other official; **and**
 - The supervisor or other official is significantly involved in labor-management relations



Labor-Nexus Test: Other Official's Work

- Do the official's responsibilities include:
 - Developing negotiation strategies
 - Developing bargaining proposals for management
 - Deciding grievances
 - Conducting negotiations
 - Preparing arbitration cases for hearing
 - Handling ULPs



Confidential

- Employee must be acting in confidential capacity to official while official is engaged in labor-management relations. Examples:
 - Seeing or preparing grievance responses
 - Attending meetings where officials deliberate management's response to a union bargaining proposal



Confidential

- Other positions found to be confidential:
 - Employees, who, in the normal performance of their duties, obtain advance information of management's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters



CONFIDENTIAL -- WARNING

- Merely seeing or processing information of a personal nature about other employees does not make employee a confidential
 - Employee who sees SSNs, change of marital status documents
 - Employee who sees EEO case documents



FEDERAL PERSONNEL WORK

- Employee's work must directly relate to personnel operations of the agency
- Work must be more than clerical in nature
- Employee must exercise independent judgment and discretion in personnel duties



Federal Personnel Work

- Positions excluded under exemption:
 - Management analysts conducted contracting-out studies
 - Employee development specialist developed and implemented region-wide training program
- But not:
 - Employee development specialist made recommendations regarding training, scheduled it
 - Legal assistant maintained case files, prepared documents



NATIONAL SECURITY

- Employees engaged in security work which directly affects national security
- Three aspects
 - Security work
 - Directly affects
 - National security



Security Work

- Guarding, shielding, protecting, preserving
 - Design, analysis, monitoring of security systems, procedures
- Regular use of, or access to, classified information
 - Security clearance is factor, but not dispositive



Directly Affects

- Straight bearing or unbroken connection that produces a material influence on, or alteration to, national security
 - No intervening steps between the employees' duties and the potential effects on national security



National Security

- Sensitive activities of the government --
 - Directly related to the protection and preservation of the military, economic and productive strength of the U.S.
 - Includes security of the Government from sabotage, subversion, foreign aggression and any other illegal acts which adversely affect the national defense



National Security

- National security exclusion found:
 - Physical security specialists designed and monitored security systems related to SSA's and IRS' critical infrastructure
 - Protocol officer accessed classified information to perform work
- Exclusion not found:
 - Inspectors performed security work, but no direct affect on national security



Management Official

- *Dep't of the Navy, Automatic Data Processing Selection Office, 7 FLRA 172 (1981)(early Authority decision on topic, often cited in subsequent Authority decisions)*
- *Headquarters, 1947th Administrative Support Group, U.S. Air Force, Wash., D.C., 14 FLRA 220 (1984) (employees wrote Agency regulations)*
- *Headquarters, Space Div., Air Force Systems Command, Dep't of the Air Force, Dep't of Def., 9 FLRA 885 (1982)(employees negotiated and administered contract with private corporation)*
- *U.S. Dep't of Justice, Board of Immigration and Appeals, 47 FLRA 505 (1993) (Member of the Board of Immigration and Appeals is management official)*



Management Official

- *U.S. Dep't of Energy, Headquarters, Wash., D.C.*, 40 FLRA 264 (1991)(some attorneys found to be management officials, while others were not)
- *U.S. Dep't of Agric., Fed. Crop Insurance Corp., Wash. Reg'l Office*, 46 FLRA 1457, 1465-1466 (1993)(management analyst not a management official).
- *Nat'l Credit Union Admin.*, 59 FLRA 858 (2004) (examiners applied existing policies and regulations)
- *DOD, Defense Contract Management Comm.*, 48 FLRA 285 (1993)(employees applied existing policies and regulations)



Supervisor

- *SSA, Office of Disability Adjudication and Review, Balt., Md., 64 FLRA 896 (2010)*(Judges were supervisors)
- Decisions involving firefighters: *U.S. Dep't of the Army, Parks Reserve Training Ctr., Dublin, Cal., 61 FLRA 537 (2006)* and *U.S. Dep't of the Army, U.S. Army Garrison, Fort Lee, Va., 63 FLRA 145 (2009)*
- *VA, Wash., D.C. and VA Medical Ctr., Salisbury, N.C., 11 FLRA 176 (1983)* (head nurses were supervisors)
- *U.S. Dep't of the Army, Army Aviation Sys. Command and Army Troop Support Command, 36 FLRA 587, 593 (1990)* (some engineers were supervisors, while others were not)



Supervisor

- *SSA, 60 FLRA 590 (2005)* (program experts assigned work based on evaluation of employees' abilities and knowledge)
- *Dep't of Interior, Bureau of Indian Affairs, Navajo Area Office, 45 FLRA 646 (1992)* (employee independently evaluated employees' performance and upper management used that information in making decisions regarding hiring, awards, etc.)
- *U.S. Dep't of Veterans Affairs, VA Medical Ctr., Allen Park, Mich., 35 FLRA 1206 (1990)*(exercise of one supervisory indicia)
- *Adjutant General of Mich., Air Nat'l Guard, Battle Creek, Mich, 11 FLRA 66 (1983)*(must supervise federal employee, as defined by 5 U.S.C. §7103(a)(2))



CONFIDENTIAL

- *U.S. Dep't of Interior, Bureau of Reclamation Yuma Projects Office, Yuma, Ariz.*, 37 FLRA 239 (1990) (labor-nexus test)
- *U.S. Army Plant Representative Office, Mesa, Ariz.*, 35 FLRA 181 (1990) (employee is not confidential in the absence of either of the labor-nexus test requirements)
- *U.S. Dep't of the Army, U.S. Army Aviation Ctr., Fort Rucker, Ala.*, 60 FLRA 771 (2005) (examples of the labor-management relations for labor-nexus test)
- *NASA*, 57 FLRA 571 (2001) (secretaries were confidential because they attended management council meetings, and council members discussed and decided hiring, awards, promotions and grievances)



CONFIDENTIAL

- *DOL, Office of the Solicitor, Arlington, Va., 37 FLRA 1371 (1990)*(attorneys had access to management's positions on labor-relations matters excluded as confidential)
- *SSA, 56 FLRA 1015 (2000)* (legal assistants saw information of a personal or sensitive nature while working on MSPB and EEOC cases were not excluded as confidential; EEOC and MSPB cases do not involve labor-management relations work for the labor-nexus test)



FEDERAL PERSONNEL WORK

- *U.S. Dep't of the Army, Headquarters, 101st Airborne Division, Fort Campbell, Ken., 36 FLRA 598, (1990)*(management analysts conducted contracting-out studies)
- *SSA, 17 FLRA 239 (1985)* (program analysts studied field office operations; reviewed personnel structure to determine if it was functioning properly)
- *U.S. Department of Justice, Federal Bureau of Prisons, US Penitentiary, Marion, Ill., 55 FLRA 1243 (2000)*(EDS made recommendations regarding training, scheduled training included in unit)



FEDERAL PERSONNEL WORK

- *U.S. Dep't of Health and Human Serv., Office of the General Counsel, Balt., Md., 45 FLRA 894 (1992) (duties relating to personnel matters were performed within prescribed guidelines and regulations required little, if any, independent discretion or judgment).*
- *SSA, 56 FLRA 1015 (2000)(legal assistant prepared case files, correspondence and documents did not exercise independent discretion or judgment).*



National Security

- Lead case: *Dep't of Energy, Oak Ridge Operations, Oak Ridge, Tenn.*, 4 FLRA 644 (1980)
- *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Ariz.*, 62 FLRA 332 (2008) (employees used SIPRNET account to obtain classified information excluded from unit).
- *Dep't of Justice, Wash., D.C.*, 62 FLRA 286 (2007) (security clearance is a factor, but decision will rest on the type and nature of the work performed)
- *U.S. Dep't of the Treasury, IRS*, 62 FLRA 298 (2007) (physical security specialists excluded under national security)
- *U.S. Dep't of Agriculture, Food Safety and Inspection Serv.*, 61 FLRA 397 (2005) (security work did not directly affect national security)



ADVISORY

- These materials have been provided by the Federal Labor Relations Authority. They are intended to supplement the discussion portion of the training presentation and must be understood in the context of that discussion.
- While this handout will assist in understanding various legal issues, it does not represent legal advice or guidance. Also, since each case depends upon its own unique facts and the application of various legal precedent, this handout should not be relied upon to predict the legal outcome in any particular case.