

16 ***Employee within the meaning of the Statute***

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

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

Government Entities:

- ▶ Nonappropriated fund (NAF) instrumentalities are established under the jurisdiction of the armed forces for the comfort, pleasure and physical improvement of military members. Employees paid from nonappropriated funds of the Army and Air Force Exchange Service, the Navy, Marine Corps and Coast Guard exchanges are employees; these NAF activities are specifically included in the definition of agency; see section 7103(a)(3) of the Statute.
- ▶ The Kennedy Center for the Performing Arts, as a bureau of the Smithsonian Institution, is an agency within the meaning of the Statute. Employees of both entities are employees within the meaning of section 7103(a)(2). *Kennedy Center for the Performing Arts, Washington, D.C.*, 45 FLRA 835 (1992).
- ▶ The U.S. Postal Service is a government owned corporation and, therefore, is not an agency within the meaning of section 7103(a)(3). Postal Service employees are subject to the LMRA; they are not employees within the meaning of the Statute.
- ▶ Employees of the U.S. Foreign Service are excluded from the definition of employee in section 7103(a)(2), but are subject to a different law governing labor-management relations. Section 1001 of the Foreign Service Act, which is administered by the FLRA, covers labor-

management relations for Foreign Service employees.

- ▶ The Federal Reserve Board, including the Board of Governors, was found by the Assistant Secretary of Labor for Labor-Management Relations in 1978 not to be and agency within the meaning of the Executive Order. *Federal Reserve Board, Board of Governors, Washington, D.C., Case No. 22-08347(RO)*, appealed denied (1978).

Types of Appointments:

- ▶ The Authority has found it appropriate in some situations to apply the definition of employee contained in 5 U.S.C. 2105(a) in addition to the definition of employee found at section 7103(a)(2) of the Statute. *U.S. Department of Labor and Operations Maintenance Service, Inc. (Keystone Job Corps Center)*, 32 FLRA 622 (1988).
- ▶ Excepted service employees appointed pursuant to 5 U.S.C. 2103, are considered “employees.”
- ▶ Off-duty military personnel employed by an agency are “employees” and may not be excluded from appropriate units based solely on their military status. *See Navy Exchange, Mayport, Florida*, 1 A/SLMR 142 (1970).
- ▶ Teachers employed by the Department of Defense Dependents Schools system are employees and are not independent contractors. *See Fort Knox Dependents Schools*, 5 FLRA 33 (1981). If employed overseas, teachers are subject to unique terms and conditions of employment established by the Overseas Teachers Pay and Personnel Practices Act, 20 U.S.C. 901, et seq.
- ▶ Health care professionals employed under Title 38 have unique appointments and terms and conditions of employment. Nevertheless, they are employees within the meaning of the Statute.
- ▶ Registered aliens working within the United States are employees under section 7103(a)(2). *See U.S. Department of the Treasury, Internal Revenue Service, Detroit District, Detroit, Michigan*, 38 FLRA 52 (1990).
- ▶ A proposed unit of VISTA volunteers was not appropriate for exclusive recognition. Although they worked for a federal agency, VISTA volunteers were specifically denied status as federal employees in the Economic Opportunity Act of 1964. Thus, VISTA volunteers are not “employees”. *See VISTA*, 1 A/SLMR 445 (1974).

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

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

