

68 FLRA No. 106

UNITED STATES
DEPARTMENT OF STATE
BUREAU OF CONSULAR AFFAIRS
PASSPORT SERVICES
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1998
(Petitioner/Union)

WA-RP-13-0068

ORDER DENYING
APPLICATION FOR REVIEW

May 29, 2015

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring, in part, and dissenting, in part)

I. Statement of the Case

The Union petitioned Federal Labor Relations Authority Acting Regional Director Greg A. Weddle (RD) to clarify, as relevant here, the bargaining-unit (unit) status of two Agency positions: (1) program analyst, in the Office of Acceptance Facilities Oversight (AFO analyst); and (2) management and program analyst, in the Office of Planning and Program Support, Strategic Planning Division (PPS/SP analyst).¹ In the attached decision, the RD found that, because AFO analysts do not perform audits within the meaning of § 7112(b)(7)² of the Federal Service Labor-Management Relations Statute (the Statute), these positions should be included in the unit.³ The RD also found that, although the PPS/SP position that is now encumbered by Frank Garcia is engaged in personnel work within the meaning of § 7112(b)(3)⁴ of the Statute and should be excluded from the unit, the remaining five PPS/SP analyst positions should be included in the unit.⁵ There are five substantive questions before us.

The first question is whether the RD committed clear and prejudicial error concerning substantial factual matters in finding that AFO analysts do not perform audits within the meaning of § 7112(b)(7) of the Statute. Because the Agency does not directly challenge any of the RD's factual findings as unsupported by the record, and because the record supports the RD's findings, we find that the answer is no.

The second question is whether the RD committed clear and prejudicial error concerning substantial factual matters because he failed to consider the AFO analysts' role in overseeing the Agency's summer-work-travel-monitoring program (summer program). Because the Agency's challenge to the weight that the RD attributed to certain evidence does not provide a basis for finding that the RD committed clear and prejudicial errors in his factual findings, and because AFO analysts do not investigate Agency employees when monitoring the summer program, we find that the answer is no.

The third question is whether the RD failed to apply established law in finding that AFO analysts do not perform investigations or audits with the meaning of § 7112(b)(7) of the Statute. Because AFO analysts perform nothing more than a straightforward accounting of a passport acceptance facility's compliance with normal Agency procedures, we find that the answer is no.

The fourth question is whether the RD committed clear and prejudicial error concerning substantial factual matters regarding whether the PPS/SP analyst position currently encumbered by Scott Muroski performs personnel work, and whether the RD failed to apply established law to these facts. Because the work performed by this position does not have a direct impact on personnel matters, we find that the answer is no.

The fifth question is whether the RD committed clear and prejudicial error concerning substantial factual matters regarding whether the four PPS/SP analyst positions other than those encumbered by Scott Muroski and Frank Garcia perform personnel work, and whether the RD failed to apply established law to these facts. Because the parties agreed that Muroski would provide representative testimony regarding the duties of all six PPS/SP analyst positions at issue, and because the position encumbered by Muroski should be included within the unit, we find that the answer is no.

¹ RD's Decision at 1.

² 5 U.S.C. § 7112(b)(7).

³ RD's Decision at 9.

⁴ 5 U.S.C. § 7112(b)(3).

⁵ RD's Decision at 11.

II. Background and RD's Decision

The Agency's primary mission, insofar as it concerns these proceedings, is to process applications for, and to issue, U.S. passports. The Union filed a petition in September 2013 seeking to clarify the unit status of four positions. The RD found that two of those positions should be excluded from the unit, and that two others – AFO analysts and PPS/SP analysts (with the exception of one incumbent's, as explained below) – should be included within the unit. The Agency's application challenges the RD's determination that the AFO analyst and PPS/SP analyst positions should be included within the unit.

A. AFO Analysts

The AFO was established in 2010 to periodically inspect the approximately 7,550 passport acceptance facilities (acceptance facilities) nationwide. The Agency established the AFO in order to "improve the integrity of the passport acceptance process" by identifying which acceptance facilities were failing to adhere to the Agency's procedures.⁶ AFO analysts, which are classified as general schedule (GS)-0343-13 positions, perform duties that the Agency describes as audit functions, insofar as they perform on-site inspections of acceptance facilities. These duties involve assessing each facility's level of compliance with Agency policy and identifying instances of noncompliance.

Acceptance facilities are usually post offices, libraries, or other public establishments to which the Agency has delegated the duty of accepting passport applications from the public. Acceptance-facility employees are not hired or employed by the Agency, and AFO analysts do not interact with Agency employees when conducting onsite inspections. AFO analysts submit reports of each inspection to their own supervisors and then to other Agency employees, in particular customer service managers (CSMs). CSMs are in charge of supervising and overseeing individual acceptance facilities and provide training and support needed by acceptance facilities to achieve full compliance with Agency standards.

If an AFO analyst's report finds deficiencies within an acceptance facility, that facility is then subject to re-inspection by the AFO analyst. If deficiencies are found on successive inspections, the AFO analyst may recommend that the facility be suspended or deactivated.

The RD observed that AFO analysts interact almost exclusively with acceptance-facility personnel who are not employed by the Agency, and "do[] not meet

with, interview, or interact with Agency employees in the course of [their] onsite investigations."⁷ The RD noted that, in order to be excluded from a unit under § 7112(b)(7) of the Statute, an employee's audits or investigations must "relat[e] to the work of individuals employed by [the] agency,"⁸ and that investigations of non-employees do not satisfy this standard.⁹ The RD also found that, although AFO analysts submit their reports to CSMs, who are Agency employees, AFO analysts' investigations are not designed to expose fraud or abuse on behalf of CSMs.¹⁰ Further, the Agency did not establish that investigations of acceptance facilities have any bearing on the performance evaluations of CSMs. Accordingly, the RD found that AFO analysts do not meet the criteria for exclusion from the unit under § 7112(b)(7) of the Statute.

B. PPS/SP Analysts

The PPS/SP office is divided into three teams: the strategic planning team, the funds management team, and the statistics team. Although the Union sought clarification of six¹¹ PPS/SP analyst positions consisting of members of all three teams, only one PPS/SP analyst, Scott Muroski of the statistics team, testified. The PPS/SP division chief, who supervises these analysts, also testified as to the work performed by this group.

Muroski oversees the Agency's passport demand forecast (demand forecast), which is a statistical model that estimates the number of U.S. passports that will be issued over the next two years. Muroski arrives at this estimate by weighing a combination of historical, economic, and political factors. The demand forecast is utilized by the PPS/SP office as part of its staffing model, which the Agency uses to determine future staffing requirements. For example, if the demand forecast predicts that a larger-than-normal number of passports will be issued in the next two years, the Agency may hire more staff to handle the increase in demand. PPS/SP analyst Frank Garcia is the primary analyst overseeing the Agency's staffing model.

The RD determined that PPS/SP analyst Garcia should be excluded from the unit under § 7112(b)(3) of the Statute because his work on the Agency's staffing model constitutes personnel work in more than a purely clerical capacity. However, the RD found that the

⁷ *Id.* at 8.

⁸ *Id.* (quoting 5 U.S.C. § 7112(b)(7)).

⁹ *Id.* (citing *U.S. DOJ, Fed. BOP, Seagoville, Tex.*, 65 FLRA 239, 241 (2010) (*BOP Seagoville*)).

¹⁰ *Id.* at 9.

¹¹ Although the Agency refers throughout its application to eight PPS/SP analysts, *e.g.*, Application at 19, the record reflects that there are only six positions at issue. See RD's Decision at 5.

⁶ *Id.* at 3.

five remaining PPS/SP analysts, including Muroski, do not exercise independent judgment with regard to staffing or other personnel actions, and should be included within the unit.

The Agency filed an application for review of the RD's decision, and the Union filed an opposition to the Agency's application.

III. Preliminary Matters

- A. We will not consider the Union's supplemental submission.

On April 6, 2015, the Union filed a supplemental submission – a motion to dismiss the Agency's application for review – without requesting leave to file it under § 2429.26 of the Authority's Regulations.¹² As the Union failed to request leave to file this supplemental submission, we will not consider it.

On April 17, 2015, the Agency filed a supplemental submission – a request for leave to file a response to the Union's motion to dismiss and request to amend certificates of service as appropriate. Where the Authority declines to consider a document, the Authority also declines to consider a subsequent response to that document because the response is moot.¹³ Consistent with this precedent, as we are not considering the Union's supplemental submission, we will not consider the Agency's supplemental submission, which responds to the Union's filing.

- B. We deny the Agency's request for leave to file a response to the Union's opposition.

On April 30, 2015, the Agency filed another supplemental submission – a request for leave to file a response to the Union's opposition. This request did not include a response to the Union's opposition; however, on May 27, 2015, the Agency filed its response.

The Authority's Regulations provide that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate.¹⁴ The Authority has granted such leave where, for example, the supplemental submission would respond to arguments raised for the first time in an opposing party's filing.¹⁵ The Agency requests leave to respond to the Union's opposition, claiming that the Union's opposition "discusses issues

not raised in the Agency's [a]pplication, and contains inaccurate statements of fact."¹⁶ However, as set forth in detail below, the issues raised by the Agency's application for review can be resolved regardless of the contents of the Union's opposition. Accordingly, we deny the Agency's request for leave to file a response to the Union's opposition.

On May 11, 2015, the Union filed another supplemental submission – an opposition to the Agency's April 30 supplemental submission. As we are denying the Agency's request for leave, the Union's supplemental submission is moot.

IV. Analysis and Conclusions

- A. AFO Analysts

1. The Agency has not demonstrated that the RD committed clear and prejudicial error regarding a substantial factual matter relating to AFO analysts' oversight of acceptance facilities.

The Authority may grant an application for review if it is demonstrated that the RD committed clear and prejudicial error concerning a substantial factual matter.¹⁷ Regarding AFO analysts' role in investigating passport acceptance facilities, the Agency contends that the RD committed prejudicial error in finding: (1) that "[t]he Agency presented no evidence to establish that the [AFO analysts'] inspections and summary reports have any bearing on the CSM's performance rating or represent anything more than a straightforward accounting of an acceptance facility's compliance with the [Passport Agent Reference Guide (PARG), the Agency's policy and procedural manual to which acceptance facilities must adhere];" and (2) that the Agency did not "present evidence to demonstrate that passport acceptance facility inspections are designed to uncover waste, fraud, abuse, wrongdoing, or misconduct on the part of [CSMs] or [their] subordinates."¹⁸

The Agency does not challenge these factual findings as unsupported by the record. Rather, the Agency cites purportedly contrary evidence to substantiate its claim that the RD erred. For example, the Agency notes that the AFO office was created as a result of an investigation conducted by the Government Accountability Office and the Agency's Office of Inspector General that "revealed vulnerabilities and improprieties" in acceptance facilities' handling of

¹² 5 C.F.R. § 2429.26.

¹³ *Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011).

¹⁴ 5 C.F.R. § 2429.26; *U.S. DHS, ICE*, 64 FLRA 1003, 1005 (2010) (*ICE*) (citing *Cong. Research Employees Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004)).

¹⁵ *ICE*, 64 FLRA at 1005 (citation omitted).

¹⁶ Agency's Apr. 30 Supp. Submission at 2.

¹⁷ 5 C.F.R. § 2422.31(c)(3)(iii).

¹⁸ Application at 5 (quoting RD's Decision at 9).

passport applications.¹⁹ The Agency also cites to testimony asserting that AFO analysts are responsible for “reveal[ing] . . . ignorance of duty by the CSM[s],”²⁰ and that AFO analysts “can uncover a lack of attention to job responsibilities by the CSM.”²¹

This evidence cited by the Agency does not directly contradict the RD’s findings. The Agency’s disagreement with the weight the RD ascribed to certain evidence does not provide a basis for finding that the RD committed clear errors in making factual findings.²² Moreover, the RD’s factual findings are supported by the record. The RD found that AFO analyst investigative reports do not have any bearing on the performance ratings of CSMs.²³ This is supported by the testimony of AFO analyst Michael Garofano, who stated that he did not know of any CSMs whose evaluations suffered due to the investigations of AFO analysts.²⁴

The RD also found that AFO analyst reports are not designed to uncover waste, fraud, abuse, or wrongdoing on behalf of CSMs.²⁵ The Agency presented no evidence of fraud, waste, or abuse on the part of CSMs uncovered by AFO analysts during their investigations. The only example of unsatisfactory performance exposed by AFO analysts concerned acceptance facility personnel leaving sensitive passport applications “in plain view in an area accessible to the public.”²⁶ These errors, which were not committed by Agency employees, do not constitute fraud, abuse, or misconduct on behalf of Agency employees. As the Agency presented no other evidence of any waste, fraud, abuse, or wrongdoing uncovered by the audits of AFO analysts, the RD’s findings are supported by the record.

The Agency also contends that the hearing officer committed prejudicial error by restricting testimony regarding how AFO analysts’ work “impacts the performance rating, and . . . employment status, of CSMs.”²⁷ Specifically, when the Agency representative asked a witness to describe the impact of including AFO analysts within the unit, and the witness mentioned CSMs, the hearing officer initially interrupted to state

that “[t]he [CSM] isn’t the issue here.”²⁸ According to the Agency, this interruption constituted prejudicial error.²⁹ However, a review of the record shows that the witness was then allowed to answer the question in full, and that the hearing officer did not prevent the witness from offering a complete response.³⁰

The Agency further claims that the hearing officer erred by preventing AFO analyst Garofano from opining on what impact, if any, being included in the unit would have on his work.³¹ However, following the hearing officer’s objection to this question, the Agency representative responded by withdrawing the question.³² Furthermore, Garofano testified extensively regarding his duties as an AFO analyst,³³ and the Agency has not demonstrated how precluding him from answering this solitary question rises to the level of prejudicial error.

Accordingly, for the reasons explained above, we find that the RD did not commit clear and prejudicial error concerning factual matters relating to AFO analysts’ role in investigating acceptance facilities.

2. The Agency has not demonstrated that the RD committed clear and prejudicial error regarding a substantial factual matter relating to AFO analysts’ oversight of the summer program.

The Agency also argues that the RD ignored the AFO analysts’ role in the Agency’s summer program.³⁴ The Agency asserts that the RD “focused exclusively on the relationship between AFO analysts’ audits of passport acceptance facilities,” and “ignored all of” the Agency’s testimony regarding the summer program.³⁵ However, an argument that the RD ignored certain evidence merely challenges the weight the RD ascribes to such evidence.³⁶ As stated above, such challenges do not demonstrate that the RD committed clear and prejudicial error concerning a substantial factual matter.³⁷

Moreover, the record supports the RD’s decision not to exclude AFO analysts from the unit due to their connection to the summer program. The summer program pairs international students with various

¹⁹ *Id.* at 6.

²⁰ *Id.* (citing Hr’g Tr., Mar. 20, 2014 (Hr’g Tr.) at 23).

²¹ *Id.* at 8 (citing Hr’g Tr. at 91).

²² *USDA Forest Serv., Albuquerque, N.M.*, 64 FLRA 239, 242 (2009) (*Forest Serv., Albuquerque*) (citing *U.S. DOD, Pentagon Force Prot. Agency, Wash., D.C.*, 62 FLRA 164, 170 (2007); *Nat’l Credit Union Admin.*, 59 FLRA 858, 862 (2004)).

²³ RD’s Decision at 9.

²⁴ Hr’g Tr. at 154:4.

²⁵ RD’s Decision at 9.

²⁶ Application at 9.

²⁷ *Id.* at 7; *see also id.* at 11, 15-16.

²⁸ Hr’g Tr. at 39:9-10.

²⁹ Application at 7.

³⁰ *See* Hr’g Tr. at 39:11-40:10.

³¹ Application at 11 (citing Hr’g Tr. at 144).

³² Hr’g Tr. at 144:9-10.

³³ *See id.* at 117:11-145-25.

³⁴ Application at 16-18.

³⁵ *Id.* at 18.

³⁶ *U.S. Dep’t of the Air Force, Dover Air Force Base, Del.*, 66 FLRA 916, 921 (2012) (internal citation omitted).

³⁷ *See Forest Serv., Albuquerque*, 64 FLRA at 242 (2009).

employers otherwise not associated with the Agency.³⁸ AFO analysts were tasked with overseeing this program and submitting reports to the Agency's Bureau of Education and Cultural Affairs (ECA).³⁹ However, the record reflects that AFO analysts interact almost exclusively with the summer program's participants and their various employers, and any interaction with Agency employees is limited to the submission of reports to the ECA.⁴⁰ As investigations or audits of non-Agency employees do not warrant exclusion under § 7112(b)(7) of the Statute,⁴¹ the Agency has not established that the RD committed a clear and prejudicial error of fact regarding the AFO analysts' role in overseeing the summer program.

3. The Agency has not demonstrated that the RD failed to apply established law relating to the AFO analyst positions.

The Authority may grant an application for review if a party demonstrates that the RD failed to apply established law.⁴² In determining whether a specified investigative or audit position is properly excluded from a unit, the Authority considers whether: (1) the incumbents are "primarily engaged in investigation or audit functions"; (2) these functions "relat[e] to the work of individuals employed by an agency whose duties directly affect the internal security of the agency"; and (3) these functions are "undertaken to ensure that the duties are discharged honestly and with integrity."⁴³ A position will be excluded from a unit under § 7112(b)(7) only if audits or investigative work constitute a preponderance of the position's overall duties.⁴⁴

Generally, the Authority has found that § 7112(b)(7) applies where individuals "perform[] internal investigations of employee wrongdoing and fraud," with the potential for uncovering "employee fraud, misuse of funds, or malfeasance,"⁴⁵ as well as where individuals investigate "fraud, waste, and abuse."⁴⁶ However, this standard is not limited to employees who perform investigations or audits relating to "fraud, waste, or abuse," but includes any audit or investigation that

relates to the "honesty and integrity" of particular types of employees.⁴⁷

The Agency argues that the RD erred in finding that AFO analysts are not responsible for ensuring that CSMs perform their duties "honestly and with integrity."⁴⁸ The Agency alleges that AFO analysts investigate the honesty and integrity of CSMs by reporting on the quality of CSMs' job performance, which is necessary to deter "fraud, neglect of job duty, and other unsatisfactory performance."⁴⁹

However, as discussed above, the RD found that the Agency presented no evidence to show that AFO analyst investigations are designed to uncover fraud or abuse committed by CSMs or their subordinates.⁵⁰ The RD also found that AFO analysts' investigations and reports represent nothing more than "a straightforward accounting of an acceptance facility's compliance with the PARG."⁵¹ These findings demonstrate that AFO analysts' primary function is to ensure that acceptance facilities are not deviating from Agency standards such as the PARG. The Authority has previously held that merely performing "procedural quality control checks to ensure [that employees] compl[y] with generally accepted government . . . standards" is not sufficient to exclude employees from a unit under § 7112(b)(7).⁵² Accordingly, consistent with this precedent, we find that the Agency has not established that the RD failed to apply established law regarding his decision to include AFO analysts within the unit.

B. PPS/SP Analysts

1. The RD did not commit clear and prejudicial error concerning substantial factual matters relating to the PPS/SP analyst position encumbered by Scott Muroski, and did not fail to apply established law to these facts.

Section 7112(b)(3) of the Statute excludes from units any employee "engaged in personnel work in other than a purely clerical capacity."⁵³ A position is excluded under this provision where: the character and extent of

³⁸ Application at 16.

³⁹ *Id.*

⁴⁰ Hr'g Tr. at 35:14-36:17.

⁴¹ *U.S. DOJ, Fed. BOP, U.S. Penitentiary McReary, Pine Knot, Ky.*, 63 FLRA 153, 155 (2009).

⁴² 5 C.F.R. § 2422.31(c)(3)(i).

⁴³ *BOP Seagoville*, 65 FLRA at 240-41 (quoting 5 U.S.C. § 7112(b)(7)).

⁴⁴ *See id.* at 241.

⁴⁵ *Small Bus. Admin.*, 34 FLRA 392, 402 (1990).

⁴⁶ *U.S. Dep't of the Navy, Naval Audit Serv. Se. Region*, 46 FLRA 512, 519 (1992).

⁴⁷ *AFGE, Local 3529*, 57 FLRA 633, 638 (2001) (*Local 3529*) (citing *U.S. DOJ, BOP, Marion, Ill.*, 55 FLRA 1243, 1248 (2000)).

⁴⁸ Application at 6-11.

⁴⁹ *Id.* at 8-9.

⁵⁰ RD's Decision at 9.

⁵¹ *Id.*

⁵² *Local 3529*, 57 FLRA at 638.

⁵³ 5 U.S.C. § 7112(b)(3).

the employee's involvement in personnel work is not merely clerical in nature; the employee's duties are not performed in a routine manner; and the employee exercises independent judgment and discretion.⁵⁴

As stated above, the RD found that the PPS/SP analyst position that is encumbered by Garcia should be excluded from the unit because his work on the Agency's staffing model constitutes "personnel work" under § 7112(b)(3) of the Statute.⁵⁵ Specifically, the RD found that Garcia "reviews expected workload, staff composition, and expected work production so that the Agency can determine . . . correct staffing levels."⁵⁶ As such, the RD concluded that Garcia exercises independent judgment over decisions that significantly impact the Agency's personnel decisions.⁵⁷ The RD determined that, although the five remaining PPS/SP analysts' job performance is "ultimately a factor in the Agency's determination of staffing levels," the Agency failed to establish that they exercise independent judgment with regard to personnel actions.⁵⁸

The Agency argues that the RD erred in including these five PPS/SP analysts, and "the [p]osition [o]ccupied by Scott Muroski in [p]articlar," within the unit,⁵⁹ and alleges that "established law . . . warrants reconsideration" of the RD's decision.⁶⁰ Regarding Muroski, the Agency asserts that he exercises independent judgment over recommendations that could significantly impact the Agency's personnel decisions.⁶¹ Muroski is the lead analyst for the Agency's demand forecast, which predicts the number of passport applications that will be received within the next two fiscal years.⁶² The PPS/SP division chief opined that Muroski exercises a certain amount of independent judgment in developing the results of the demand forecast,⁶³ and asserted that the demand forecast "directly impacts" the outcome of the staffing model.⁶⁴ Accordingly, the Agency argues that the PPS/SP analyst position encumbered by Muroski should be excluded from the unit under § 7112(b)(3) because the incumbent wields significant influence over personnel matters.⁶⁵

However, the PPS/SP division chief also testified that the demand forecast is only one of several factors that are used in formulating the staffing model.⁶⁶ He further stated that the PPS/SP analyst position currently encumbered by Frank Garcia is in charge of assigning weight to each of these several factors, and ultimately controls each factor's impact on the outcome of the staffing model.⁶⁷ Thus, the position encumbered by Muroski does not have a dispositive impact on the outcome of the staffing model, and the record evidence does not establish that the work performed by Muroski could have a "direct impact on the elimination of jobs," as is required to be excluded from the unit under § 7112(b)(3).⁶⁸ Accordingly, we find that the Agency has not established that the RD committed prejudicial errors of fact relating to the PPS/SP position encumbered by Muroski, or that the RD failed to apply established law to those facts.

2. The RD did not commit clear and prejudicial error concerning a substantial factual matter in finding that the remaining four PPS/SP analysts, other than Garcia and Muroski, should be included within the unit, or fail to apply established law to these facts.

As stated above, the RD determined that all PPS/SP analysts other than Garcia should be included within the unit.⁶⁹ The Agency argues that this decision was reached in error for two reasons. First, the Agency claims that it was denied the opportunity to present testimony regarding the job duties of the four PPS/SP analyst positions other than those encumbered by Garcia and Muroski.⁷⁰ The Agency contends that Muroski, the only PPS/SP analyst allowed to testify, lacks knowledge of the duties of his peer analysts (other than duties shared between all PPS/SP analysts), and could not provide adequate testimony regarding their responsibilities.⁷¹ As such, the Agency requests that this matter be remanded to the RD in order to clarify the record regarding the duties performed by the remaining four PPS/SP analysts other than Garcia and Muroski.⁷²

⁵⁴ *U.S. Dep't of the Navy, Navy Undersea Warfare Ctr., Keyport, Wash.*, 68 FLRA 416, 436 (2015) (citing *VA, N. Cal. Health Care Sys., Martinez, Cal.*, 66 FLRA 522, 524 (2012)).

⁵⁵ RD's Decision at 11.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Application at 26.

⁶⁰ *Id.* at 34 (citing *U.S. Dep't of the Army Headquarters, 101st Airborne Div., Ft. Campbell, Ky.*, 36 FLRA 598 (1990) (*Ft. Campbell*)).

⁶¹ *Id.* at 26-34.

⁶² Hr'g Tr. at 188:7-10.

⁶³ *Id.* at 190:1-14.

⁶⁴ *Id.* at 188:21

⁶⁵ Application at 26-34.

⁶⁶ Hr'g Tr. at 194:4-196:24.

⁶⁷ *Id.* at 196:8-24.

⁶⁸ *Ft. Campbell*, 36 FLRA at 604 (emphasis added).

⁶⁹ RD's decision at 11.

⁷⁰ Application at 19.

⁷¹ *Id.* at 20.

⁷² *Id.* at 23.

Second, the Agency argues that the RD committed a prejudicial error of fact by ignoring the shared nature of the duties of all PPS/SP analysts.⁷³ The Agency cites the division chief's testimony that the PPS/SP analysts perform cross-team training, as well as Muroski's testimony that he works within all three teams that make up the PPS/SP office.⁷⁴ Moreover, the Agency asserts that each PPS/SP analyst serves as acting division chief on a rotational basis,⁷⁵ and that they are also required to stand in for their coworkers in the event that one of them should be absent from, or leave, the Agency.⁷⁶ Accordingly, the Agency argues that if one PPS/SP analyst is excluded from the unit, then all six must be excluded as well.⁷⁷

However, the Agency concedes that "[t]he parties agreed upon . . . Muroski" to provide representative testimony regarding the duties of all six PPS/SP analyst positions (including Garcia and Muroski).⁷⁸ Although the Agency claims that it was denied "a full and fair opportunity" to present the entirety of its case because the hearing officer "forced the parties to agree upon one incumbent" to provide representative testimony,⁷⁹ there is no record evidence to support this claim – despite the fact that, at the hearing, the hearing officer gave both parties the opportunity to present additional information and arguments.⁸⁰ Given these circumstances, we find that Muroski's testimony was representative of all six PPS/SP analyst positions. Accordingly, we find that the Agency has not shown that the RD committed clear and prejudicial error concerning a substantial factual matter in holding that the four PPS/SP analyst positions other than those encumbered by Garcia and Muroski should be included within the unit, or that the RD failed to apply established law to those facts.

V. Order

We deny the Agency's application for review.

Member Pizzella, concurring, in part, and dissenting, in part:

I agree with the majority that AFO analysts should not be excluded from the bargaining unit (unit).

Section 7112(b)(7) of the Federal Service Labor-Management Relations Statute (the Statute) excludes from a unit any "employee primarily engaged in investigation or audit functions."¹ Section 7112(b)(7) also requires that such duties must "*relat[e] to the work of individuals employed by [the] agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.*"² The majority interprets this to mean that only those auditors or investigators who investigate the activities of employees of the agency may be excluded under this provision.³

I question, however, whether the phrase "relating to the work of individuals employed by the agency"⁴ should be interpreted that narrowly. In *U.S. Department of the Navy, Naval Audit Service, Southeast Region (Naval Audit Service)*, the Authority held that employees who "conduct[] audit functions related to matters external to the [agency]" may be excluded under § 7112(b)(7), so long as "an investigation of [agency] employees may result."⁵

But, in this case, the Agency failed to demonstrate that the oversight of passport facilities, which the AFO analysts perform, "may result" in the investigation of Agency employees.⁶

But I would not conclude, as does the majority, that the oversight of agency programs or facilities, which are staffed by contractors or other non-agency employees (such as the passport acceptance facilities here), could not exclude these employees if the record demonstrated that the oversight duties performed (on behalf of the Agency, by contractors or other non-Agency employees) "ensure that the duties are discharged *honestly* and with *integrity.*"⁷

It is also noteworthy that the AFO office was established after investigations by the Agency's Office of Inspector General (OIG) revealed performance

⁷³ *Id.*

⁷⁴ Hr'g Tr. at 204:24-25:2, 230:19-231:23.

⁷⁵ Application at 21.

⁷⁶ *Id.* at 24.

⁷⁷ *Id.* at 26.

⁷⁸ *Id.* at 19.

⁷⁹ *Id.* at 19, 23.

⁸⁰ Hr'g Tr. at 457:25-458:8.

¹ 5 U.S.C. § 7112(b)(7).

² *Id.* (emphases added).

³ Majority at 8-9.

⁴ 5 U.S.C. § 7112(b)(7).

⁵ *U.S. Dep't of the Navy, Naval Audit Serv., Se. Region*, 46 FLRA 512, 515 (1992).

⁶ *Id.*

⁷ *Id.* at 517 (emphasis added) (citing *U.S. Small Bus. Admin.*, 34 FLRA 392, 400-02 (1990)).

deficiencies at some of the Agency's passport acceptance facilities. The U.S. Court of Appeals for the D.C. Circuit in *U.S. DHS, U.S. CBP v. FLRA* recently held that investigations performed by employees of an agency's Office of Inspector General (OIG) cannot be hindered by the collective-bargaining process.⁸ I believe that we should heed the court's caution concerning how the collective-bargaining process could potentially hamstring the mission of OIGs throughout the federal government. In this case, however, there is no indication that the AFO office is part of, or shares investigatory responsibilities with, the OIG.

Accordingly, I would conclude that the oversight of agency programs or facilities, which are staffed by contractors or other non-agency employees (such as the passport acceptance facilities here), are duties which could exclude such employees when it is demonstrated that the oversight performed "ensure[s] that the duties are discharged *honestly* and with *integrity*"⁹ or as in the case of *Naval Audit Service*, such investigations have the potential to expose serious waste, fraud, or criminal wrongdoing.¹⁰

I also do not agree with the majority insofar as they conclude that the five PPS/SP analyst positions (other than the one encumbered by Frank Garcia) should be included in the unit.

In *U.S. Department of the Army Headquarters, 101st Airborne Division, Ft. Campbell, Kentucky (Ft. Campbell)*, the Authority held that, where employees exercise independent judgment over recommendations or decisions that can have "a direct impact on the elimination of jobs," they should be excluded from the bargaining unit under § 7112(b)(3) of the Statute because their judgment "may be clouded . . . consciously or unconsciously . . . by their desire to advance the interests of the bargaining[-]unit employees rather than the best interests of management."¹¹

According to my colleagues, the duties performed by another PPS/SP analyst, Scott Muroski, do not have a "direct impact" on personnel decisions, and that the demand forecast which he prepares is "only one of several factors" that affects the Agency's staffing model.¹² In this respect, the majority seems to interpret the meaning of the term, "directly affects," as though it means the same thing as *exclusively* affects.¹³

The record demonstrates that Muroski regularly exercises significant independent judgment in preparing the Agency's demand forecast which predicts the number of passport applications that will be received within the next two fiscal years.¹⁴ Not only does Muroski serve as the lead analyst in preparing that forecast, he is also recognized as its "subject matter expert."¹⁵ Furthermore, the demand forecast is "one of the largest drivers of"¹⁶ and "directly impacts"¹⁷ the Agency's staffing model.

Therefore, even though other factors may go into the development of the Agency's staffing model, the manipulation of the demand forecast could "directly impact the elimination of jobs."¹⁸

Therefore, I would conclude that the majority's decision to include Muroski in the unit is inconsistent with the precedent set forth in *Ft. Campbell*. In fact, it creates precisely the conflict of interest that § 7112(b)(3) was designed to prevent.

And, because Muroski's testimony was representative of all six PPS/SP analyst positions,¹⁹ the remaining four PPS/SP analyst positions should be excluded as well.

Thank you.

⁸ 751 F.3d 665 (D.C. Cir. 2014).

⁹ *Naval Audit Service*, 46 FLRA at 517.

¹⁰ *Id.* at 515.

¹¹ *U.S. Dep't of the Army Headquarters, 101st Airborne Div., Ft. Campbell, Ky.*, 36 FLRA 598, 604 (1990) (*Ft. Campbell*).

¹² Majority at 11.

¹³ *See id.*

¹⁴ Hr'g Tr. at 188:7-10.

¹⁵ *Id.* at 190:1-14, 192:21.

¹⁶ *Id.* at 233:5-6.

¹⁷ *Id.* at 188:21

¹⁸ *Ft. Campbell*, 36 FLRA at 604.

¹⁹ Majority at 11.

FEDERAL LABOR RELATIONS AUTHORITY
CHICAGO REGIONAL OFFICE

U.S. DEPARTMENT OF STATE
BUREAU OF CONSULAR AFFAIRS
PASSPORT SERVICES

-Agency-

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1998

-Petitioner/Union-

WA-RP-13-0068

DECISION AND ORDER
CLARIFYING UNIT

I. Introduction

This case concerns the bargaining unit status of four Agency positions: 1) Program Analyst, Office of Acceptance Facilities Oversight (AFO); 2) Program Analyst, Office of Management Analysis and Coordination, Facilities Management (MAC/FM); 3) Management and Program Analyst, Office of Planning and Program Support, Strategic Planning Division (PPS/SP); and 4) Paralegal Specialist, Office of Legal Affairs and Law Enforcement, Legal Affairs Division (L/LA).

The Agency contends that the above positions are excluded from Union's bargaining unit as follows: the AFO Program Analyst position is excluded because incumbents perform audit functions within the meaning of section 7112(b)(7) of the Statute; the MAC/FM Program Analyst position is excluded because incumbents are confidential employees within the meaning of section 7112(b)(2) of the Statute; the Management and Program Analyst, PPS/SP position is excluded because incumbents perform personnel work within the meaning of section 7112(b)(3) of the Statute; and the Paralegal Specialist, L/LA position is excluded because incumbents are engaged in security work within the meaning of section 7112(b)(6) of the Statute. The Union contends that the positions are all eligible for inclusion in the Union's existing unit.

The Region held a hearing on this matter and the parties filed briefs, which I have fully considered.

II. Findings

The Union represents a nationwide unit of the Agency's nonprofessional employees. The unit is currently described as follows:

Included: All employees of the Passport Services, Bureau of Consular Affairs (nationwide), including seasonal employees and temporary employees whose appointments are in excess of 700 hours.

Excluded: All professional employees, temporary employees whose appointments are for 700 hours or fewer, employees appointed under FSA, management officials, supervisors, and employees described in 5 USC §7112(b)(2), (3), (4), (6), and (7).

The Agency is responsible for issuing U.S. passports. Brenda S. Sprague, Deputy Assistant Secretary (DAS), is the Agency's top administrator. Two Managing Directors, Florence G. Fultz, Issuance Operations, and Barry J. Conway, Support Operations, report to Sprague. Issuance Operations handles all passport field operations. Support Operations is responsible for administrative, technical, and legal support for the Agency. Support Operations is largely located in Washington, D.C. and encompasses offices to which three of the four positions at issue in this proceeding are assigned: AFO, PPS/SP, and L/LA. The directors of these three offices report directly to Conway. The remaining position is assigned to MAC/FM, Issuance Operations, and its director reports to Fultz.

Program Analyst, Office of Acceptance Facilities Oversight (AFO)

The AFO was established in 2010 and is comprised of five divisions. Four of those divisions employ approximately forty (40) AFO Program Analysts (AFO Analyst) across the country whose job is to conduct periodic inspections of passport acceptance facilities within their assigned territories. Passport acceptance facilities are often post offices, libraries,

clerks of court, or other public facilities to which the Agency has delegated the function of accepting passport applications from the public. Currently, there are approximately 7,550 passport acceptance facilities across the U.S.

In conducting inspections of the passport acceptance facilities, the AFO Analyst seeks to ascertain the facility's level of compliance with the Agency's *Passport Agent Reference Guide* (PARG), which details the policies and procedures to which those working in the passport acceptance program must adhere. The Agency established AFO to improve the integrity of the passport acceptance process by identifying which acceptance facilities require additional resources or attention and providing that information to the responsible individuals within the Agency's Issuance Operations.

AFO Program Analysts work from a home duty station. Each AFO Analyst is assigned a geographical territory encompassing approximately 225 to 250 acceptance facilities the Analyst is responsible for inspecting each year. AFO Analysts are responsible for scheduling their own investigations at the acceptance facilities and arranging their travel to the facilities based on those appointments. AFO Analysts have access to the Agency's Integrated Acceptance Facility Oversight Database (IAFOD), a database established in June 2011 to maintain data on all passport acceptance facilities across the country.

In performing an inspection of a passport acceptance facility, the AFO Analyst follows a sixty-six-question *AFO Acceptance Facility Review Checklist* and completes the *Acceptance Facility Oversight Report*, which generally details the facility's level of compliance with PARG, and identifies instances of noncompliance. The report is a narrative document that is submitted to the Analyst's supervisor for approval upon completion of the inspection. Once approved by the Analyst's supervisor, the report is submitted to the Customer Service Manager (CSM) who has oversight responsibility of the acceptance facility that was inspected.

Issuance Operations employ CSMs at twenty-nine (29) regional adjudicating and processing passport agencies.¹ The passport agencies report to one of four Regional Directors who report to Managing Director Fultz, Issuance Operations. The AFO Analyst's report is also submitted to the CSM's Regional Director and to Managing Director Fultz. A version of the Analyst's report is given to the acceptance facility that was

inspected. If the Analyst documents deficiencies of the facility in his report, the facility will be subject to re-inspection upon consultation between the Analyst and the CSM. If a facility receives successive deficient inspections, the AFO Analyst may recommend its suspension or deactivation. The CSM is responsible for the coordination and execution of the deactivation of an acceptance facility within his region. The CSM is a non-unit employee of the Agency whose job is to provide passport acceptance facilities with the training and support needed to achieve full compliance with the PARG. The CSM has occasion to interact with Passport Specialists, a position that is in the Union's bargaining unit. This interaction occurs when Passport Specialists serve a rotation under the supervision of the CSM. During this rotation, the Passport Specialist may visit passport acceptance facilities.

Program Analyst, Office of Management Analysis and Coordination, Facilities Management Division, (MAC/FM)

Issuance Operations Managing Director Fultz oversees the Facilities Management Division, as well as all passport field operations. In this capacity, Fultz is involved in developing Agency proposals for negotiations with the Union, and meets with the Agency's chief labor negotiator once a week. Fultz also holds regular meetings with Issuance Operations leadership (MDI meetings) during which management discusses negotiations with the Union. No bargaining unit employees attend the MDI meetings.

Program Analysts (PAs) in MAC/FM are subject matter experts who advise Managing Director Fultz and DAS Sprague on an array of matters pertaining to Agency facilities, from space design and renovation to how a space will be furnished and decorated. FM's budget exceeds \$10 million annually. As the subject matter experts for Agency facilities, the PAs meet weekly with DAS Sprague along with the Agency Office Directors and Regional Directors. The PAs provide updates to meeting attendees concerning ongoing facilities projects and weigh in on any contemplated facilities initiatives from headquarters. The PAs also attend a regular biweekly or monthly FM meeting with Fultz, including the MDI meetings, to update her on issues and for her to share with them any potential projects of which the FM staff needs to be aware.

If the Agency contemplates a relocation or renovation of one of its passport agencies, the PAs perform the necessary research, gather the critical information, work with the General Services Administration (GSA), contractors and vendors, and prepare the necessary implementing documents for review by upper management. They monitor contractor

¹ The Agency's 29 internal regional passport adjudication and processing facilities are called "agencies" within the Agency's parlance; "facilities" refer to non-Agency passport acceptance facilities.

compliance, schedules, and procurement requests. The FM PAs request funding for Agency facilities operations and improvements which include construction, Diplomatic Security installations, telephone infrastructure, and furniture purchase and repair. The PAs prepare written material including memoranda; issue papers; letters and analytical reports on facilities issues; policies and procedures; and talking points and/or briefing papers for senior management officials. They also prepare and update database reports containing project information related to timelines, space requirements, equipment and furniture needs, procurement requests, and costs.

Many of the facilities-related issues in which the PAs are involved are subject to negotiations with the Union. In these instances, Fultz may discuss the Agency's bargaining proposals with the PAs and solicit their input on those proposals in preparation for negotiations, or request information from the PA for the purpose of formulating bargaining proposals. For example, PAs met with Fultz and Agency labor relations personnel to discuss the relocation of the Agency's headquarters office. During these discussions, the Agency's negotiating team queried the PAs as to the feasibility of various Union proposals.

FM PAs are also responsible for developing the budget for the passport agencies with which they work. The budget is an ongoing project that the PAs develop, implement, monitor and update. They are also involved in the Agency's Site Safety Inspection Program, a program required by the parties' collective-bargaining agreement whereby safety inspections are conducted at the passport agencies. One PA incumbent was responsible for writing the new inspection policy and its attendant procedures, and ensuring that the policy was implemented. The PAs receive the reports that are generated from the passport agencies after the inspections are conducted. The PAs are responsible for ensuring compliance with the program at their assigned passport agencies.

Management and Program Analyst, Office of Planning and Program Support, Strategic Planning Division (PPS/SPD)

The SPD is divided into three teams: strategic planning team, funds management team, and statistics team. Scott Muroski, Frank Garcia, Sue Kenworthy, Cherie Trahan, William Wertley, and Heather Joyner hold the six disputed PPS/SPD Management and Program Analyst positions. The Strategic Planning Division Chief Kirk Masterson and Management and Program Analyst Scott Muroski provided testimony concerning the duties of these employees.

Muroski is in charge of the preparation of statistical reports for Passport Services, including an annual report on the expected demand for passports for the following two years. Muroski creates the estimate through the use of different models and takes into consideration historical passport application figures as well as current economic and international travel data. Muroski has been in charge of this "demand forecast" since he started working in SPD three years ago. Muroski briefs higher level management within Passport Services, including DAS Sprague. The demand forecast is utilized by SPD as part of its staffing model. Muroski neither developed nor works on the staffing model, but his estimates for passport demand are used, along with other workload related factors, to develop future staffing requirements.

Muroski also serves as the project coordinator for software that tracks requests for funds and has assisted in developing a model to determine the number of blank passport books and passport cards to order each year.

Management and Program Analyst Frank Garcia works on the Agency's staffing models. When determining appropriate staffing levels within the Agency, Garcia considers the demand forecast created by Muroski, along with time and motion studies of Agency employees' work and the grade level and composition of each Agency component. Garcia also analyzes the distribution of the passport application workload within the Agency components and determines when adjustments to that distribution are necessary.

Paralegal Specialist, Office of Passport Legal Affairs and Law Enforcement Liaison, Legal Affairs Division (L/LA)

The Legal Affairs Division can become involved in any type of passport-related legal issue, from defending the Agency in litigation to acting to revoke a passport. The Division writes policy, drafts legislation, and works closely with law enforcement on issues of mutual concern. The Legal Affairs Division also responds to general inquiries from the Agency's twenty-nine (29) regional passport agencies and other government agencies regarding passport law.

There are various reasons that individuals are not entitled to receive a passport despite being a U.S. citizen, and those reasons are set forth in rule and regulation. Passport applications may be referred to the Legal Affairs Division when a law enforcement agency places a restriction (known as a "hold") on a particular passport application. This happens when the name of a passport applicant is detected in an unclassified database known as CLASS (Consular Lookout and Support System). The CLASS database is accessible to a

multitude of federal, state, and local law enforcement agencies including the FBI, the U.S. Marshalls Service, and the Terrorist Screening Center, through information sharing agreements with the Agency. These entities access CLASS to add information into the system about individuals that are sought by law enforcement, including names, addresses, social security numbers, and photographs. A law enforcement agency will place a hold in the CLASS database if, for example, an applicant is the subject of a felony warrant. The Legal Affairs Division receives in excess of 20,000 holds on passports a year. All passport applications that are the subject of a law enforcement hold are closely scrutinized by the Legal Affairs Division. Holds can be placed in CLASS by law enforcement and intelligence agencies, and by the Division itself.

Paralegal Specialists (PS) check for holds in one of two email boxes maintained by the Division, one for domestic passport agencies and an overseas mailbox for embassies, posts and consulates. The PS then contacts the law enforcement agency that placed the hold to confirm that the passport applicant and the individual for whom the hold was placed are the same person, and that the hold was correctly placed (*e.g.*, not for an individual charged with a misdemeanor rather than a felony). Based on this information, the paralegal determines whether or not the passport should be issued. A similar process is used to determine whether a current passport should be revoked based on a law enforcement hold. While the denial of a passport application or the revocation of a current passport are subject to a higher level determination, the PA determines when an application should be processed because there is not a match between the person for whom a hold was placed and the applicant.

In some cases, law enforcement agencies will only communicate certain information with the PS through the ClassNet computer system. This is a system used for the transmission of classified data. For example, the FBI's Terrorist Screening Operations Unit (TSOU) may insist that certain intelligence data be transferred through ClassNet rather than over the phone or through an open computer network. When this happens, one PS who has ClassNet on her computer will convey the communications back and forth between the PS handling the hold and the TSOU. The PS handling the hold will then determine if the passport application should be denied. While all PSs have the necessary clearance to access the ClassNet system, only one PS actually accesses the system and sees its classified information, which she does at least once or twice per month. In cases involving classified information from ClassNet, as with other hold cases, the PS determines when there is sufficient information indicating the applicant is not the same person for whom a hold was placed and therefore permits the application to be processed.

III. Analysis and Conclusion

Program Analyst, Office of Acceptance Facilities Oversight (AFO)

In order to exclude an employee from an appropriate unit under section 7112(b)(7) of the Statute, the employee must be (1) primarily engaged in investigation or audit functions; (2) relating to the work of individuals employed by the agency whose duties directly affect the internal security of the agency; and (3) these functions must be undertaken to ensure that the duties are discharged honestly and with integrity. *U.S. DOJ, Fed. Bureau of Prisons, U.S. Penitentiary McCreary, Pine Knot, Ky.*, 63 FLRA 153, 155 (2009) (*Pine Knot*).

The Statute provides that an employee's investigations must "relat[e] to the work of individuals employed by an agency" in order to implicate the exclusion under section 7112(b)(7). Investigations of non-employees do not satisfy this standard. *See U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Inst., Seagoville, Tex.*, 65 FLRA 239, 241 (2010) (*Seagoville*); *Pine Knot*, 63 FLRA at 155.

The record testimony fails to establish that the onsite inspections of passport acceptance facilities performed by the incumbents of this position are of the type contemplated by the section 7112(b)(7) unit exclusion under the Statute.

The AFO Program Analyst's primary job responsibility is to schedule and conduct inspections of more than 200 acceptance facilities a year, and to report findings of each inspection to a supervisor, upper level management, and the inspected facility. The Analyst's inspection is guided by a standardized checklist consisting of a series of questions to be answered by the facility's acceptance agent with whom the Analyst meets during his scheduled inspection. Acceptance facility personnel are not Agency employees and the AFO Analyst does not meet with, interview, or interact with Agency employees in the course of his onsite inspections.

Relying exclusively on *U.S. Dep't. of the Navy, Naval Audit Service, Southeast Region*, 46 FLRA 512 (1992) (*Naval Audit*), the Agency posits that it is the AFO Analyst's tangential interaction with the CSM that requires the position's exclusion from the Union's unit. In this regard, the Agency argues that the Analyst's inspections of passport acceptance facilities relate to the work of Agency employees - here, the CSM and secondarily, Passport Specialists who serve training rotations under the CSM - and review the work of

individuals, again the CSM, whose duties involve the implementation of the Agency's programs.

In *Naval Audit* the Authority found that the audit function exclusion applies to both employees who perform direct audits of agency employees and to those employees who do not perform such direct audits, but whose audits tangentially deal with the performance and integrity of agency employees. On that basis the Authority excluded from the petitioner's unit Navy auditors who were primarily engaged in financial and program audits specifically designed to detect possible waste, fraud, and abuse in the work performed by Navy employees whose duties directly affect the Navy's internal security, and thus undertaken to ensure that the work of the Navy employees is performed with honesty and integrity. The audit employees in *Naval Audit* had reporting responsibilities to the Naval Inspector General and the Naval Investigative Service Command and served a primary role in preventing and detecting fraud and illegal acts committed by other Navy employees.

Here the evidence did not show that the AFO Program Analyst's job duties are in any way comparable to those of the Navy auditors in *Naval Audit*. The Agency presented no evidence to establish that the Analyst's inspections and summary reports have any bearing on the CSM's performance rating or represent anything more than a straightforward accounting of an acceptance facility's compliance with the PARG. Nor did the Agency present evidence to demonstrate that passport acceptance facility inspections are designed to uncover waste, fraud, abuse, wrongdoing, or misconduct on the part of the CSM or his subordinates. Similarly, the Agency did not demonstrate that the work of the CSM and his subordinates directly affect the Agency's internal security. Generally, the Authority has found that section 7112(b)(7) applies where individuals "perform internal investigations of employee wrongdoing and fraud," with the potential for uncovering "employee fraud, misuse of funds, or malfeasance." *U.S. Small Bus. Admin.*, 32 FLRA 402 (1988). The AFO Program Analyst's inspections do not encompass an inquiry into the CSM's honesty and integrity in his oversight of passport acceptance facilities.

Accordingly, I find that the AFO Program Analysts do not perform audits within the meaning of section 7112(b)(7) and thus should be included in the Union's unit.

Program Analyst, Office of Management Analysis and Coordination, Facilities Management Division, (MAC/FM)

Section 7103(a)(13) of the Statute defines a "confidential employee" as an 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." An employee is confidential if 1) there is evidence of a confidential working relationship between an employee and the employee's supervisor; and 2) the supervisor is significantly involved in labor-management relations. *U.S. Dep't of Labor, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1376-77, 1383 (1990).

Employees who, in the normal performance of their duties, may obtain advance information of management's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters, are considered confidential within the meaning of §7103(a)(13) of the Statute. *Id.* The frequency and the amount of an employee's working time devoted to labor relations matters may be relevant factors in determining confidential status, but are not controlling factors for section 7103(a)(13) purposes. *Id.* at 1382.

Managing Director Fultz is involved in developing the Agency's positions for negotiations with the Union, meets regularly with the Agency's chief negotiator for this purpose, and conducts regular meetings with management personnel during which labor relations issues are discussed. As such, Fultz is significantly involved in labor-management relations.

The FM PA is the Agency's subject matter expert on space design and renovation and is responsible for the coordination of such assigned projects from start to finish. Inherent in these types of projects are matters of vital interest to unit employees that are often subject to bargaining between the Agency and the Union. Though not directly involved in the negotiation of subjects arising from these projects, the PA receives assignments from, and works closely with, key Agency officials who do make labor relations determinations on such matters, including Managing Director Fultz and DAS Sprague. As a consequence of these working relationships, the FM PA position incumbent is privy to advance labor relations information and internal management deliberations relating to the Agency's plans to modify its facilities. In this regard, Fultz testified that she meets with the PAs to discuss labor relations matters on an as-needed basis as well as at regularly-scheduled meetings which are attended by other Agency officials and in which sensitive labor relations matters are discussed. As such, the record clearly established that the PA enjoys a confidential relationship with Managing Director Fultz when engaged in the performance of duties of this position.

Accordingly, I find that the FM Program Analysts are confidential employees within the meaning of section 7103(a)(13) and should be excluded from the Union's unit. *Nat'l Aeronautics and Space Admin.*,

Glenn Research Ctr., Cleveland, Ohio, 57 FLRA 571, 573 (2001).

Management and Program Analyst, Office of Planning and Program Support, Strategic Planning Division (PPS/SPD)

Section 7112(b)(3) of the Statute excludes from a bargaining unit any employee “engaged in personnel work in other than a purely clerical capacity.” In order to exclude an employee under this section, the evidence must demonstrate that the character and extent of involvement of the employee in personnel work is more than clerical in nature and that the duties are not performed in a routine manner. *U.S. Dep’t of Veterans Affairs, N. Cal. Health Care Sys. Martinez, Cal.*, 66 FLRA 522, 524 (2012). Further, the evidence must show that the employee exercises independent judgment and discretion. *Id.*; *Dep’t of the Treasury, IRS, Wash., D.C.*, 36 FLRA 138, 144 (1990). The Authority has found that employees who exercise independent judgment to make recommendations that have a significant effect on personnel decisions were excluded under section 7112(b)(3). *U.S. Dep’t of Transp., FAA*, 63 FLRA 356, 360-61 (2009); *U.S. Dep’t of the Army Headquarters, 101st Airborne Division, Fort Campbell, Ky.*, 36 FLRA 598, 603-04 (1990) (*Ft. Campbell*).

In *Ft. Campbell*, the Authority excluded certain management analyst employees from the union’s unit because they performed functions “that involve personnel work, or have a significant effect on personnel decisions.” These analysts reviewed workload and organizational structures to determine the government’s “Most Efficient Organization” for contracting out purposes. In so doing, the analysts exercised “independent judgment as to the appropriateness of the Activity’s organizational structure, staffing, method of operations and capital investments.”

Here, the record evidence establishes that Management and Program Analyst Frank Garcia is engaged in personnel work in other than a purely clerical capacity. Garcia’s work primarily involves the Agency’s staffing models, in that he reviews expected workload, staff composition, and expected work production so that the Agency can determine the correct staffing levels and composition at its components. Garcia also distributes the passport application workload between Agency components based on the above factors. As such, Garcia exercises independent judgment in making recommendations that significantly impact the Agency’s personnel decisions.

However, the record evidence fails to establish that the other Management and Program Analysts in the PPS/SPD consistently exercises independent judgment

carrying out personnel work within the meaning of section 7112(b)(3). While the Analysts’ predictions of future demand for passport application services is ultimately a factor in the Agency’s determination of staffing levels, the record fails to establish that the Analysts themselves exercise independent judgment with regard to staffing, organizational structures, methods of operations, or any other personnel actions. Thus, the Analysts are not comparable to the analysts excluded in *Ft. Campbell*.

Accordingly, I find that only PPS/SPD Management and Program Analyst Frank Garcia is engaged in personnel work within the meaning of section 7112(b)(3) and should be excluded from the Union’s unit on that basis. The remaining PPS/SPD Management and Program Analysts are not engaged in personnel work and should be included in the Union’s unit.

Paralegal Specialist, Office of Legal Affairs and Law Enforcement Liaison, Legal Affairs Division (L/LA)

In order to exclude an employee under section 7112(b)(6) of the Statute an employee must be 1) “engaged in intelligence, counterintelligence, investigative, or security work” that 2) “directly affects” 3) “national security.” *U.S. Nuclear Regulatory Comm’n*, 66 FLRA 311, 315 (2011). The Authority has held that “directly affects” means “a straight bearing or unbroken connection that produces a material influence or alteration.” *U.S. Dep’t of the Treasury, IRS*, 65 FLRA 687, 690 (2011). The plain terms of this definition demonstrate that section 7112(b)(6) does not permit the exclusion of positions merely because they have *some* relationship to national security, even “important national [security] interests.” *Id.* Accordingly, the Authority has found that positions directly affect national security “only in limited circumstances.” *Id.*

For example, when there are “no intervening steps between the employees’ failure” to satisfactorily perform their duties “and the potential effect [of that failure] on national security” the Authority has found the requisite direct connection. *Id.* By contrast, where an employee’s role in protecting national security is “limited,” the Authority has not found the requisite direct connection. *Id.* Similarly, where employees must “go through another individual” before their actions may impact national security, the Authority has declined to find a direct effect. *Id.*; *see also U.S. Dep’t of the Air Force, Tyndall Air Force Base, Tyndall AFB, Fla.*, 65 FLRA 610, 613 (2011).

The Authority will find an employee engaged in security work within the meaning of § 7112(b)(6) if the employee’s actual duties include “the regular use of, or access to, classified information.” *U.S. Nuclear*

Regulatory Comm'n, 66 FLRA 311, 317 (2011) (*NRC*) (quoting *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Ariz.*, 62 FLRA 332, 334 (2008)).

The foregoing facts and witness testimony establishes that the work of the PS directly affects national security within the meaning of section 7112(b)(6). In this regard, the PS determines, without review, when an individual's passport application will be processed despite the presence of a law enforcement hold. Because there are no intervening steps between the PS determination and the continued processing of the passport application, and because the processing of passports for travel abroad (and returning to the U.S.) is directly related to the security of the Government "against or from espionage, sabotage, subversion, foreign aggression, and ... other illegal acts which adversely affect the national defense," I find that PS is engaged in work which directly affects national security. *Dep't of Energy, Oak Ridge Operations, Oak Ridge, Tenn.*, 4 FLRA 644, 656 (1980).

Furthermore, in making the determination to process a passport application despite the presence of a hold, the PS may rely upon classified information delivered through the ClassNet system. While only one PS has the ClassNet system installed on her computer, all PS incumbents have the necessary clearance to use the classified information. In this regard, the PS who accesses ClassNet does so at least once or twice per month and, three or four times per year will pass classified information from ClassNet directly to the PS who is reviewing a hold. While this may not constitute frequent use of classified information, the use of classified information is a part of the PSs' duties in determining when to permit the processing of a passport application in a case involving a law enforcement hold. *NRC*, 66 FLRA at 317.

Accordingly, I find that the L/LA Paralegal Specialists are engaged in security work that directly affects national security within the meaning of section 7112(b)(6) and are excluded from the Union's unit.

IV. Order

IT IS ORDERED that the Union's bargaining unit is clarified to exclude from the Union's unit the MAC/FM Program Analyst position, the L/LA Paralegal Specialist position, and the position currently encumbered by PPS/SPD Management and Program Analyst Frank Garcia; and to include in the Union's unit the AFO Program Analyst position and the remaining PPS/SPD Management and Program Analyst positions.

V. Right to Seek Review

Under section 7105(f) of the Statute and section 2422.31(a) of the Authority's Regulations, a party may seek review of this Decision by filing an application for review with the Authority within sixty (60) days after the date of this Decision. The contents of an application for review and the Authority's grounds for review are set forth in section 2422.31(b) and (c) of the Regulations. The filing and service requirements for an application for review are addressed in Part 2429 of the Authority's Regulations.

The application for review must be filed by March 30, 2015, and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, NW, Washington, DC 20424-0001. The application for review may be filed electronically through the Authority's website, www.flra.gov.²

Greg A. Weddle, Acting Regional Director
Federal Labor Relations Authority
Chicago Regional Office
224 S. Michigan Avenue, Suite 445
Chicago, Illinois 60604-2505

Dated: January 30, 2015

² To file an application for review electronically, go to the Authority's website at www.flra.gov, select **eFile** under the **Filing a Case** tab and follow the detailed instructions.