

65 FLRA No. 146

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Activity)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Petitioner/Exclusive Representative)

WA-RP-09-0036

DECISION AND ORDER
ON REVIEW

March 31, 2011

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members¹

I. Statement of the Case

This case is before the Authority on an application for review (application) filed by the Petitioner/Exclusive Representative (Union) under § 2422.31 of the Authority's Regulations.² The Activity filed an opposition. Pursuant to § 2429.9 of the Authority's Regulations, the American Federation of Government Employees (AFGE) requested, and received, permission to file an amicus curiae brief (amicus brief). The Activity filed a reply (reply) to AFGE's amicus brief.

The Union filed a petition to determine whether the position of Internal Revenue Police Officer (Officer) is properly within the bargaining unit represented by the Union. The Regional Director (RD) determined that the Officer position performs security work that directly affects national security and,

1. Member Beck's separate opinion, dissenting in part, is set forth at the end of this decision.

2. As discussed further below, the Union argues that the Regional Director failed to apply established law. Section 2422.31 of the Authority's Regulations provides, in pertinent part, that the Authority may grant an application when "[t]here is a genuine issue over whether the Regional Director has[] . . . [f]ailed to apply established law[.]" 5 C.F.R. § 2422.31(c)(3)(i).

therefore, should be excluded from the unit. In an order issued following the filing of the application for review, the Authority granted the Union's application and deferred action on the merits.

On review of the merits, and for the reasons that follow, we reverse the RD's Decision and Order, and we order the RD to take appropriate action consistent with this decision.

II. Background and RD's Decision**A. Background**

The Activity utilizes three computer centers -- collectively known as the Enterprise Computing Center Division -- that oversee "the operations and maintenance requirements for all of the computers that run the [Activity's] tax processing system." RD's Decision at 2. The most critical of these computer centers is located in Martinsburg, West Virginia (the Center). The Center has a "Level 5" security rating -- the highest possible security rating under the Department of Justice rating system -- and is restricted to "authorized persons only." *Id.*

The Center contains the Master File, a computer system that contains the final processed tax return information for all individual and business tax returns in the country. *Id.* at 3. The Center also has a "mainframe computer" that is a "direct processing and handling engine" for five of the ten tax submission processing centers in the country. *Id.* Additionally, the Center has a "physical [l]edger" that essentially serves as "the nation's balance sheet," containing "a statement of receipts and disbursements." *Id.* at 3-4. The Center handles functions that cannot be performed at the other two computer centers; incapacitation of the Center would greatly impede the Activity's ability to process tax information. *Id.* at 3. The Center also is designated as a Continuity of Operations (COOP) site. *Id.* at 4. In the event of a "catastrophe," high ranking officials from the Department of the Treasury and the Activity who are "essential" to the continuity of the Activity's functions may congregate at the Center. *Id.*

The Center employs twelve Officers who are tasked with "protect[ing] the security" of the Center and its people. *Id.* It is the only Activity facility that has Officers. Officers have received extensive federal law enforcement training and carry firearms, batons, cell phones, and communication devices; they are also required to be present twenty-four hours a day, every day of the year.

Officers have several duties. They are stationed at the Center's front gatehouse where they check incoming vehicles and passengers for proper identification and authorization to enter the building. *Id.* at 4. The Officers also perform vehicle patrols of the Center's grounds. *Id.* at 5. Additionally, Officers perform foot patrols of the Center's interior. As part of these patrols, Officers check card readers to ensure that they are functioning, and they also watch for suspicious individuals and may ask individuals to verify whether they have proper identification, or "challenge" their badges. *Id.* Contract security guards (Guards) also work the front gate and check card readers. *Id.* at 4, 5. Moreover, Guards are primarily responsible for determining which individuals may actually enter the building and providing visitors with identity badges. *Id.* at 5.

Officers have access to all areas within the Center and perform duties in areas to which access is "highly restricted." *Id.* Two of these highly restricted areas are the Treasury Secure Room (Secure Room) and the Treasury Cage (Cage). The Secure Room contains information that is more sensitive than the information contained in the Cage, and is used primarily by the Secretary of Treasury. *Id.* at 4. Officers do not have regular access to the Secure Room, but they can follow certain procedures to access the room in the event of an emergency. *Id.* at 5. Officers usually patrol the area adjacent to the Secure Room during a COOP event. *Id.* at 6. The Cage is a fenced-in room containing sensitive documents that are not maintained anywhere else in the country. *Id.* at 5; Tr. at 95, 111. Only authorized individuals, including Officers, may enter the Cage.

Officers also have duties during a COOP event. In particular, officers are extensively involved in the execution of COOP security plans and regularly participate in COOP preparation exercises. RD's Decision at 6. Moreover, during an actual COOP event, Officers must: patrol and monitor various areas in the Center; ensure that only authorized individuals enter the COOP area; and oversee the transfer of sensitive material from the Cage to the Secure Room.

B. RD's Decision

The RD stated that, under § 7112(b)(6) of the Statute, a bargaining unit is not appropriate if it includes "any employee engaged in . . . security work which directly affects the national security." RD's Decision at 6 (quoting 5 U.S.C. § 7112(b)(6)). Applying this section, the RD concluded that Officers' duties involve national security within the meaning of

§ 7112(b)(6) and that they perform security work.³ *Id.* at 7-9. With regard to whether their duties directly affect national security, the RD stated that an employee's duties directly affect national security if they have "a straight bearing or unbroken connection that produces a material influence or alter[ation]" on national security. *Id.* at 9 (quoting *Dep't of Energy, Oak Ridge Operations, Oak Ridge, Tenn.*, 4 FLRA 644, 655 (1980) (*Oak Ridge*)).

As an initial matter, the RD found that the Officers' "routine foot patrols of the perimeter fence and the buildings" and "their work at the main gate" do not satisfy this standard. *Id.* at 10. However, the RD also found that the Officers' "access to and protection of" the Secure Room and the Cage directly affect national security. *Id.* With regard to the Secure Room, the RD acknowledged that Officers "do not routinely access" that Room, but found that "it is their duty to [e]nsure its protection in the event of an alarm or during a COOP event." *Id.* With regard to the Cage, the RD found that Officers "regularly patrol the . . . Cage and particularly at night, will walk through to [e]nsure that no documents are visible or computers left on." *Id.* In this connection, the RD stated that although the Officers "may not be required themselves to access or understand the documents or materials with which they may come into contact in the . . . Cage, it is their job to secure and protect this critical material." *Id.* Further, the RD stated that in a COOP event, the Officers "are responsible for guarding the sensitive materials that are moved from" the Cage to the Secure Room. *Id.* Moreover, the RD stated that although the Officers' performance of the foregoing duties is merely "occasional, . . . [it] is not incidental to their security work but is part and parcel of their mission to protect" the facility and its personnel. *Id.*

Based on the foregoing, the RD concluded that Officers are engaged in security work that directly affects national security within the meaning of § 7112(b)(6) of the Statute and, thus, should be excluded from the unit. *Id.*

III. Positions of the Parties

A. Union's Application for Review

The Union asserts that the RD failed to apply established law when he concluded that the Officers' work directly affects national security. *See* Brief by the Union in Support of Application for Review (Brief) at 12. According to the Union, any effect that the

3. The Union does not dispute either of these conclusions. *See* Brief by the Union in Support of Application for Review at 9 n.3.

Officers have on national security is limited by “low levels of discretion and by the existence of several intervening layers of personnel and processes[.]” *Id.* at 20-21. In this connection, the Union contends that the Officers’ effect on national security is made indirect by: (1) the duties performed by the Guards; (2) the requirement that Officers must report serious matters to their supervisors; and (3) the fact that Officers do not write or implement security plans and are not the only personnel to respond to emergencies. *Id.* at 19-21. Based on the foregoing, the Union asserts that Officers’ positions are similar to the position at issue in *United States Department of Agriculture, Food Safety and Inspection Service*, 61 FLRA 397 (2005) (*USDA*). Brief at 18-19.

In addition, the Union asserts that the Officers’ duties with regard to the Secure Room do not directly affect national security. In this regard, the Union claims that: Officers do not access the Secure Room when they conduct their patrols; there are Officers who never have entered that Room; and “[o]nly one of the officers who testified at hearing had ever even entered the Room, and that was only once.” *Id.* at 17 (footnote omitted). Also in this regard, the Union claims that “[i]f a special need to enter the [R]oom arises (i.e., to check an alarm that has been triggered),” then the Officer “must first sign out a special key and passcode from a safe in the command center[.]” and the individuals who staff the command center “would release the key and passcode to the [Officer] only after confirming the [Officer’s] authority to enter the Secure Room[] and arranging for an escort to accompany the [Officer].” *Id.* (citing Tr. at 220-21, 419-20).

Finally, the Union contends that the Officers’ duties with regard to the Cage do not directly affect national security. The Union relies on one Officer’s testimony that, “once in the Cage, the [Officers] view and have access to very little -- nothing more than can be seen by the naked eye.” *Id.* at 16 (citing Tr. at 356-57). Also according to the Union, “[i]n the event that an officer were to see something suspicious, or come across documents left unsecured, he would look for another person authorized to remedy the problem.” *Id.* (citing Tr. at 358).

B. Activity’s Opposition

As a preliminary matter, the Activity moves to strike the Union’s brief in support of its application. According to the Activity, although the Authority’s Regulations permit parties to file an “application for review,” they do not permit parties to file briefs in support. Opp’n at 2 (quoting 5 C.F.R. § 2422.31(a)). Rather, the Agency contends that briefs are permitted

only *after* the Authority grants an application for review. *Id.* (citing 5 C.F.R. § 2422.31(g)).⁴

With regard to the merits of the Union’s application, the Activity contends that the RD properly concluded that the Center’s work concerns national security, that Officers perform security work, and that the Officers’ duties directly affect national security. *Id.* at 10, 14, 16. For support, the Agency cites: *Social Security Administration, Baltimore, Maryland*, 59 FLRA 137 (2003) (Chairman Cabaniss concurring and then-Member Pope concurring in part and dissenting in part on other grounds) (*SSA*); and *United States Department of the Treasury, Internal Revenue Service*, 62 FLRA 298 (2007) (Chairman Cabaniss and then-Member Pope concurring) (*IRS*).

C. AFGE’s Amicus Brief

AFGE argues that, in concluding that Officers perform duties that directly affect national security, the RD failed to apply established law. In this connection, AFGE asserts that Officers rarely exercise independent judgment and, instead, generally follow “plans and procedures designed by others.” Amicus Brief at 3. In addition, according to AFGE, the RD erroneously focused on what the Officers guard and patrol, rather than on the duties they perform while they guard and patrol. *Id.* at 2. Further, AFGE requests that the Authority “re-examine its current test for exclusion under § 7112(b)(6)[.]” *id.* at 8, which AFGE asserts often speculates as to a possible “chain of events” and “future duties” and how they could affect future circumstances.⁵ *Id.* at 5-6.

4. 5 C.F.R. § 2422.31, “Application for review of a Regional Director Decision and Order[.]” states, in relevant part:

(a) *Filing an application for review.* A party must file an application for review with the Authority within sixty (60) days of the Regional Director’s Decision and Order.

....

(g) *Briefs if review is granted.* If the Authority does not rule on the issue(s) in the application for review in its order granting review, the Authority may, in its discretion, afford the parties an opportunity to file briefs.

5. As neither party to this proceeding has requested reexamination of the Authority’s current § 7112(b)(6) test, we do not address further AFGE’s request. *See, e.g., UPS, Inc. v. Mitchell*, 451 U.S. 56, 61 n.2 (1981) (declining to resolve issue raised solely by amicus).

D. Activity's Reply to Amicus Brief

The Activity contends that “[c]onsideration of the national security implications of the thing being guarded is an *essential* part of any analysis of whether the security work is ‘guarding, shielding or protecting’ something that directly affects national security.” Activity’s Reply at 6-7. In addition, the Activity disagrees with AFGE’s assertion that the Authority should modify its test for exclusion under § 7112(b)(6).

IV. Preliminary Issue

As stated previously, the Activity argues that the Authority should strike the Union’s brief in support of the application. As the Activity correctly states, § 2422.31(a) of the Authority’s Regulations authorizes parties to file an “application for review[.]” 5 C.F.R. § 2422.31(a). However, this section does not state that parties may *only* file an application, and nothing in § 2422.31 suggests that a party is prohibited from submitting a brief as part of its application for review. In addition, although § 2422.31(g) of the Authority’s Regulations provides that the Authority has discretion to allow parties to file briefs after it grants an application for review, § 2422.31(g) does not state that briefs are permissible *only* in that situation. Accordingly, we deny the Activity’s motion to strike the Union’s brief.

V. Analysis and Conclusions

As the RD noted, under § 7112(b)(6) of the Statute, a bargaining unit is not appropriate if it includes any employee engaged in “security work which directly affects national security[.]” 5 U.S.C. § 7112(b)(6). It is undisputed that Officers are engaged in security work that involves national security. Consistent with the application for review, the issue is whether the RD erred by finding that the Officers’ work *directly affects* national security, as required by § 7112(b)(6).

The Authority has interpreted and applied § 7112(b)(6) for more than thirty years -- since the Statute’s enactment. In *Oak Ridge*, the Authority considered the “ordinary meaning” of the term “directly affects” and found that it means “a straight bearing or unbroken connection that produces a material influence or alter[.]ation.” 4 FLRA at 655. The plain terms of this definition -- that any bearing on national security must be “straight[.]” any connection must be “unbroken[.]” and any influence or alteration must be “material[.]” *id.* -- make it clear that § 7112(b)(6) does not permit the exclusion of positions

merely because they have *some* relationship to national security.⁶

Applying § 7112(b)(6), the Authority, since *Oak Ridge*, has found that positions directly affect national security only in limited circumstances. 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. *U.S. Dep’t of the Air Force, Davis-Monthan Air Force Base, Ariz.*, 62 FLRA 332, 335 (2008) (Chairman Cabaniss concurring). By contrast, where an employee’s role in protecting national security is “limited[.]” the Authority has not found the requisite direct connection. *U.S. Dep’t of the Air Force, Tyndall Air Force Base, Tyndall AFB, Fla.*, 65 FLRA 610, 614 (2011) (*Tyndall AFB*); *USDA*, 61 FLRA at 402. Similarly, where employees must “go through another individual” before they may conduct a more extensive review of a situation that they believe may pose a security risk, the Authority has declined to find a direct effect. *USDA*, 61 FLRA at 403. *Cf. Tyndall AFB*, 65 FLRA at 613 (officers were responsible for evacuating and cordoning off areas containing suspicious packages, and preventing unauthorized individuals from entering the areas, but other positions were responsible for eliminating the threat posed by the packages). The Authority also has declined to find a direct effect where duties were “carried out in accordance with established procedures and provide[d] little opportunity for making choices[.]” *Oak Ridge*, 4 FLRA at 659. Further, the mere fact that employees’ work may have a relationship to important national interests is not sufficient to find a direct effect on national security. *See, e.g., USDA*, 61 FLRA at 402-03 (declining to exclude inspectors who were involved in “guard[ing], shield[ing], and protect[ing] the food supply from the importation of unsafe, adulterated, damaged or ineligible food products[.]”).

The Authority’s precedent applying § 7112(b)(6) is consistent with not only the plain wording of that statutory section, but also important statutory rights and policies discussed in *Oak Ridge*. In this connection, in *Oak Ridge*, the Authority emphasized that

[e]xclusion from an appropriate unit deprives employees of the opportunity under the

6. We note that the dissent does not: squarely address the plain wording of “directly affects[.]” challenge how it has been interpreted since *Oak Ridge*; or explain how it permits any conclusion other than a conclusion that this language “should be interpreted narrowly[.]” Dissent at 12.

Statute to determine whether or not they wish to be represented by a labor organization and of the opportunity to engage in collective bargaining with respect to conditions of employment through labor organizations. Labor organizations and collective bargaining in the civil service have been determined by the Congress to be “in the public interest.” 5 U.S.C. § 7101(a). *Therefore*, the term “national security” must be interpreted to include only [certain activities].

Oak Ridge, 4 FLRA at 655 (emphasis added). This passage, which underscores the importance of the statutory rights and policies involved in this case, supports a narrow application of the “directly affects” requirement. Such an application is necessary to ensure that Congress’ determination in § 7101(a) to “safeguard[] the public interest” through the institution of collective bargaining for federal employees is fully effectuated, rather than being unreasonably limited by constricted interpretations of the Statute that are not compelled by the Statute’s plain language.

In addition, as particularly relevant in this case, the Authority’s precedent applying § 7112(b)(6) is consistent with Congress’ determination that federal employees who perform guard duties may be included in bargaining units with non-guard employees. In this connection, Executive Order (E.O.) 11,838, which preceded the Statute, amended E.O. 11,491, in pertinent part, “by eliminating the requirement that guards be represented in separate units and only by labor organizations which represented guards exclusively.” *U.S. Dep’t of the Treasury, Bureau of the Mint*, 2 FLRA 457, 460 (1980). In this connection, in a report that accompanied the issuance of E.O. 11,838, the Federal Labor Relations Council stated that “[g]uards have demonstrated no conflict of interest in performing their duties[.]” and “[s]o long as the existing prohibition on strikes by federal employees is continued, such conflicts as might exist in the private sector need not be anticipated.” *Labor-Mgmt. Relations in the Fed. Sector* (1975), at 30. This principle was continued when Congress enacted the Statute. *See Bureau of Indian Affairs, Wind River Agency, Fort Washakie, Wyo.*, 29 FLRA 935, 936, 938 (1987) (noting regional director’s finding in this regard and declining to reconsider the policy created by E.O. 11,838). Thus, unlike certain other statutory exclusions -- such as management officials under § 7112(b)(1) -- there is no inherent conflict of interest arising when bargaining unit members perform guard duties. *Cf. Dep’t of the Navy, Automatic Data Processing Selection Office*, 7 FLRA 172, 175 (1981) (noting “the intent reflected in the legislative history to

exclude . . . officials who are identified with management and whose inclusion would result in an apparent conflict of interest[.]”).

Here, the RD found that the Officers’ duties directly affect national security based on the Officers’: (1) access to and protection of the Secure Room; (2) access to and protection of the Cage; and (3) guarding of sensitive materials when those materials are moved during a COOP. *See* RD’s Decision at 10. For the following reasons, applying the terms of § 7112(b)(6) and the well-established Authority precedent cited above, we find that the record does not support the RD’s conclusion that these duties (the disputed duties) demonstrate a direct effect on national security.⁷

As an initial matter, other individuals play an important role in securing the Center. In this connection, Guards also work the front gate and check card readers, and it is Guards, not Officers, who are primarily responsible for: (1) determining which individuals may actually enter the building; and (2) providing visitors with identity badges. *Id.* at 4-5. By controlling access to the facility, the Guards’ duties have a substantial impact on the security of the facility. Further, the record indicates that Guards “man the command center,” including the video monitors in that center, Tr. at 344, and dispatch Officers if Guards see something “that shouldn’t be[.]” *id.* at 199. In this connection, one Officer testified that if he was not nearby when someone needed to be apprehended, the Guard could apprehend the individual and, in those situations, “would be the first line of defense[.]” *Id.* at 387. Another individual testified that Guards “can do . . . walk-throughs of the building, the card readers” and “help [Officers] in that respect[.]” and that although, “because of manpower, mainly, [the Guards are] . . . at the fixed post at the gate, . . . they can and they have helped do walk-throughs of th[e] buildings.” *Id.* at 217. In addition to Guards, an information technology specialist testified that “[e]mployees are always told that security begins with us, so we’re supposed to question if someone is not wearing their badge properly, if there is a suspicious package or if we get bomb threats,” *id.* at 308, and that she “ha[s] actually challenged some people that didn’t have their badges on,” *id.* at 309. That employees other than Officers play such an important role in securing the

7. There is no basis for the dissent’s statement that this decision “modif[ies] the Authority’s approach to exclusion under § 7112(b)(6) of the Statute.” Dissent at 12. We expressly apply the Authority’s longstanding approach to § 7112(b)(6), as underscored by our conclusion that the RD “failed to apply *established law*” regarding § 7112(b)(6). *Infra* at 11 (emphasis added).

Center supports a conclusion that Officers do not directly affect national security.

In addition, the disputed duties occur within rooms that are accessible only by keys and/or card readers, and those rooms are within the Center, which, as stated previously, is accessible only by individuals who have been screened at the front gate. These additional layers of security render it less probable that the Officers' performance of the disputed duties within the secured Center would produce "a material influence or [alteration]" on national security. *SSA*, 59 FLRA at 143.

Further, in addition to the disputed duties, the Officers perform numerous other duties, including: checking incoming vehicles and passengers for proper identification and authorization to enter the building; performing vehicle patrols of the Center's grounds; and engaging in foot patrols of other areas of the Center's interior. RD's Decision at 5. That the Officers perform numerous, important duties unrelated to the disputed duties related to the Secure Room and the Cage is relevant to determining whether the Officers should be excluded from the unit.⁸

Moreover, the nature of the disputed duties does not demonstrate a straight or unbroken connection to national security. As an initial matter, we emphasize that the Officers are not stationed outside either the Secure Room or the Cage, checking badges of individuals who wish to enter the rooms. Rather, the Officers check on the rooms only as part of their foot patrols through the entire Center.

8. The RD's findings and the record do not establish how frequently the Officers perform the disputed duties. In this connection, the RD found both that Officers' "duties relative to" the Secure Room and the Cage are only "occasional[]" and that "[e]vidence demonstrates that [Officers] regularly patrol the . . . Cage and particularly at night, will walk through to insure that no documents are visible or computers left on." RD's Decision at 10. With regard to the record, one Officer testified that "when I'm doing a patrol of the annex, I would generally take a tour through" the Cage, Tr. at 357, while another Officer testified: "I don't go in there really unless I'm called, because if I'm doing my foot patrol through there, or a card reader, I go around the outside of it; and[] . . . if something is showing smoke or something, or I'm requested to go in there, I will go in, but it's not a regular thing for me to go in there." *Id.* at 421. Accordingly, it is not clear whether Officers "regularly patrol the Cage area" and "the interior of the Cage." Dissent at 15. In any event, that Officers perform numerous other duties indicates that the disputed duties are not the sole focus of their responsibilities, which informs our determination as to their unit status even if it is not a dispositive consideration.

With regard to the Secure Room in particular, the record indicates that Officers generally do not access that Room. *See, e.g.*, Tr. at 420, 436 (Officer's testimony that he does not go into the Secure Room on a regular basis and had been informed that he was to "go into [it] only when [he] need[s] to[]" do so); *id.* at 356, 383 (other Officer's testimony that he "do[es] not have access to[]" the Secure Room). In particular, the record indicates that the circumstances under which Officers access that Room are limited. In this connection, one Officer testified only that he had "opened the door for the person that's supposed to be there[.]" that he had "checked a motion alarm before and c[o]me back out[.]" and that he sometimes checks "glass-break alarms" from the outside of the room. *Id.* at 418-19. In fact, that Officer testified that he does not know what is contained in, or what is done in, the Secure Room. *Id.* at 418 & 436. Further, in order to access the Room, Officers must obtain the assistance of other individuals. Specifically, one witness testified that the command center has an envelope with a sealed key, and the individuals in the command center must "make phone calls[] . . . to notify people that you're going in that room, and then you use that key and you can get in[.]" *Id.* at 220-21. As to the Officers' protection of the Secure Room, the record evidence is limited. For example, an Officer testified that "as long as the door [to the Room] is closed, that's usually enough[.]" *Id.* at 420.

Thus, Officers access the Secure Room only rarely and in limited circumstances, and they must obtain the assistance of other individuals in order to access it. In addition, the record evidence of their duties in protecting the Secure Room is limited. In these circumstances, we find that the record does not reflect that Officers' duties with respect to the Secure Room have "a straight bearing or unbroken connection that produces a material influence or [alteration]" on national security. *SSA*, 59 FLRA at 143.

With regard to the Officers' duties in and around the Cage, one Officer testified that when he enters the Cage, he's "checking for fire hazards, anything that would threaten the facility, any danger, and I don't do it on a daily basis." Tr. at 435. According to that Officer, employees work in the Cage during the weekday, *id.* at 421-22, and consequently, if he sees files laying out, he "wouldn't bother to look[]" because he would "assume somebody is working there." *Id.* at 454. In this connection, he stated that he has "never read [anything] on anybody's desk[.]" *Id.* at 453. Further, when asked whether he "look[s] for things like computers being on[.]" he testified: "I do not pay attention to the computers at all. I don't know who is in -- what people are doing in there. I don't know what

they're doing and what they have on and what they need to have on." *Id.* at 435.

As for Officers on the night shift, another Officer testified that when he patrols the Cage, he looks for "computers that have been left on, any unsafe conditions that may exist." *Id.* at 358. For example, he said that "[t]here have probably been twice, in recent memory, where somebody has reported smoke, the smell of smoke[.]" *Id.* However, he also testified that he has "never found" a computer left on. *Id.* at 357. He further testified that, if he found a live computer on, then he would "attempt to get somebody to remedy the problem[.]" and "[i]f [he] can't find anybody in the area, [he] know[s] how to power down a computer and you just turn it off. That would be the extent of what [he] would do." *Id.* at 358. He also testified that he would also "look[] for a possibility that somebody left files or papers out[.]" *id.* at 373, but that he's "never seen any[]" documents and files lying out because "[g]enerally, everything is secured when [the employees who work in the Cage] leave." *Id.* at 357-58. As with the other Officer, he testified that he does not know what is performed in the Cage. *Id.* at 373.

Thus, the record indicates that other individuals work directly with the materials in the Cage. The record also indicates that at night, Officers who enter the Cage generally do not see documents left out or computers left on, and even if they did see a computer on, they would first contact someone else to address it and would turn it off only if someone was not available to address it. Given these circumstances, we find that the record does not reflect that Officers' duties with respect to the Cage have "a straight bearing or unbroken connection that produces a material influence or [alteration]" on national security. *SSA*, 59 FLRA at 143.

With respect to the guarding of sensitive materials when those materials are moved during a COOP, an Officer testified that he did not know what was in the "locked tubs[]" that are moved, and that the extent of the Officer's involvement is to "let the warehouse in and out[]" (sic), and provide for access and exit of the materials "[i]n and out of the dock areas[.]" *Tr.* at 430.⁹ In other words, the Officers do not move any

materials, and merely oversee the movement of the materials, which are in locked tubs. Given that other individuals are actually moving the materials, that the tubs are locked, and that the movement occurs only in COOP events and inside of an already secured facility, we find that any connection that this activity has to national security is not direct.

Taking all of the disputed duties together, we find that the Officers' duties do not directly affect national security. In so finding, we note that in the decisions cited by the Activity and the dissent, employees who were excluded from units under § 7112(b)(6) engaged in activities such as designing, analyzing, and /or installing security systems at the facilities involved. *See, e.g., IRS*, 62 FLRA at 303;¹⁰ *SSA*, 59 FLRA at 146. The Officers do not engage in similar activities. Thus, those decisions are distinguishable.

For the foregoing reasons, we find that the RD failed to apply established law when he found that the Officers' duties directly affect national security, and we direct the RD to clarify the unit to include the Officers.

VI. Order

The RD is directed to take appropriate action consistent with this decision.

9. We note the dissent's statement that the Officer "agreed that Officers provide 'secure access and secure exit' of these materials." Dissent at 18 (citing *Tr.* at 430) (emphasis added in dissent). In fact, the Officer testified, "We let the warehouse in and out." When asked, "You provide for secure access and secure exit of these materials?", the Officer responded: "In and out of the dock areas, yes." *Tr.* at 430. Thus, the word "secure" was solely the questioner's, and the emphasis is solely the dissent's.

10. We note that, other than *IRS* -- which is distinguishable from this case for the reasons stated above -- the dissent cites no Authority precedent to support his position.

Member Beck, Dissenting in part:

I concur with my colleagues' conclusion to deny the Agency's motion to strike the Union's brief in support of its application for review (application). I also agree with my colleagues' decision not to consider AFGE's request to reexamine the Authority's approach under § 7112(b)(6) of the Statute. However, I disagree with the remainder of the Majority's decision.

Before addressing the merits of the Union's application, I address the Majority's decision to modify the Authority's approach to exclusion under § 7112(b)(6) of the Statute. Section 7112(b)(6) merely states that a bargaining unit is not appropriate if it contains "any employee engaged in . . . security work which *directly affects* national security." 5 U.S.C. § 7112(b)(6) (emphasis added). It contains no other qualifying language. Nevertheless, the Majority announces that the phrase "directly affects" should be construed "narrow[ly,]" because the Authority has interpreted it narrowly for the more than thirty years since the Authority issued its decision in *Dep't of Energy, Oak Ridge Operations, Oak Ridge, Tenn.*, 4 FLRA 644, 656 (1980) (*Oak Ridge*). Maj. Op. at 6-7. Despite this assertion, the Majority cites not a single case from those thirty-plus years that actually articulates this principle. Instead, the Majority offers three justifications as to why "directly affects" should be interpreted narrowly. These justifications do not withstand scrutiny.

First, the Majority argues that a narrow interpretation for this phrase is appropriate because the Authority supposedly has found that positions directly affect national security in limited circumstances. Maj. Op. at 6-7. In the Majority's cited decisions, the Authority did nothing more than decide whether a position's duties directly affected national security within the plain meaning of § 7112(b)(6). See, e.g., *U.S. Dep't of the Air Force, Tyndall Air Force Base, Tyndall AFB, Fla.*, 65 FLRA 610, 613 (2011) (*Tyndall, AFB*) (Authority stated that it looked to whether intervening factors "limit[]" a position's direct effect on national security as that term is used in § 7112(b)(6) of the Statute) (citation omitted)¹; *U.S. Dep't of the Air*

Force, Davis-Monthan Air Force Base, Ariz., 62 FLRA 332, 335 (2008) (Chairman Cabaniss Concurring) (*Davis-Monthan*) (Authority found that "RD's conclusion that the disputed positions directly affect national security *within the meaning of § 7112(b)(6)* is supported by the record.") (emphasis added); *U.S. Dep't of Agric., Food Safety & Inspection Serv.*, 61 FLRA 397, 402-03 (2005) (*USDA*) (after noting Authority's definition of the phrase "direct effect," Authority concluded that RD properly found that position did not directly affect national security (citation omitted)); *Oak Ridge*, 4 FLRA at 659 (after analyzing position's duties, administrative law judge concluded that position did not "engage[] in security work which *directly affects* the national security") (emphasis added)). The Majority does not explain how the Authority's decision to apply the plain language of § 7112(b)(6) leads to a conclusion that part of § 7112(b)(6) should be interpreted narrowly, particularly since none of the foregoing cases actually states this principle.

Second, the Majority contends that a narrow interpretation for "directly affects" is warranted because, in crafting the standard for exclusion under § 7112(b)(6), the Authority concluded that "[l]abor organizations and collective bargaining in the civil service have been determined by the Congress to be 'in the public interest.'" Maj. Op. at 7 (quoting *Oak Ridge* at 655). Although the Authority acknowledged that collective bargaining benefits the public interest, it also acknowledged that collective bargaining -- and hence the associated public interest -- is necessarily limited by § 7112(b)(6). See *Oak Ridge*, 4 FLRA at 656 (acknowledging that positions that were "directly related to the protection and preservation of the . . . United States" are excluded from bargaining units). Thus, from the outset, the Authority has recognized that the "important statutory rights and policies" that flow from the Statute have limits. Maj. Op. at 7. Not surprisingly, then, the Majority offers no language from *Oak Ridge* instructing that the phrase "directly affects" should be viewed narrowly. To the contrary, the only language the Majority cites refers solely to the phrase *national security* as it is used in § 7112(b)(6). Maj. Op. at 7 ("Labor organizations and collective bargaining in the civil service have been determined by the Congress to be 'in the public interest.' . . . Therefore, the term 'national security' must be interpreted to include only [certain activities].") (quoting *Oak Ridge*, 4 FLRA at 655 (emphasis added)).

Third, the Majority avers that Authority decisions interpreting the executive orders (E.O.) that preceded the Statute should inform the Authority's interpretation of § 7112(b)(6). Specifically, the Majority relies on

1. The Majority relies on the recently decided *Tyndall, AFB* to support its assertion that the Authority has applied the phrase "directly affects" narrowly. See Maj. Op. 7. *Tyndall, AFB* involved remarkably similar circumstances to this case in that there, as here, the Authority examined whether certain duties performed by police officers directly affected national security. See *Tyndall, AFB*, 65 FLRA at 613-14. Despite this striking similarity, *Tyndall, AFB* contains *absolutely no discussion* as to whether the phrase "directly affects" should be applied narrowly. See *id.*

decisions suggesting that, under the executive orders, the mixing of guards with other types of employees in a bargaining unit created no conflict. *See* Maj. Op. at 7-8 (citing *Bureau of Indian Affairs, Wind River Agency, Fort Washakie, Wyo.*, 29 FLRA 935, 938 (1987) (*Fort Washakie*); *U.S. Dep't of the Treasury, Bureau of the Mint*, 2 FLRA 457, 460 (1980)). However, the E.O. decisions cited by the Majority are inapplicable because they address a completely different provision of the Statute -- whether guards shared a "community of interest" with other employees, as that term is used in E.O. 11,491 and § 7112(a) of the Statute.² *See Fort Washakie*, 29 FLRA at 938 (activity's argument consisted of disagreement "with regard to the 'community of interest' criterion"). Decisions about the Authority's interpretation of § 7112(a) tell us little about § 7112(b)(6). Indeed, the Majority offers no language from either of the executive orders, or decisions interpreting them, addressing the phrase "directly affects" as it appears in § 7112(b)(6). Thus, these decisions do not apply here. *See, e.g., Div. of Military & Naval Affairs (N.Y. Nat'l Guard), Latham, N.Y.*, 53 FLRA 111, 118 (1997) (*Latham*) (Authority chose not to rely on E.O. 11,491 to interpret § 7111(f)(1) of Statute because E.O. contained "no equivalent").

Moreover, even if the E.O. precedent were somehow helpful, a significant difference exists between the executive orders and § 7112(b)(6). The Statute, federal courts, and the Authority acknowledge that executive orders may inform interpretations of the Statute to the extent Congress intended their incorporation into the Statute. *See* 5 U.S.C. § 7135(b) ("[p]olicies, regulations, and procedures established under and decisions issued under [the executive orders] . . . shall remain in full force and effect . . . unless superseded by provisions of [the Statute.]"); *see also, e.g., Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal. v. FLRA*, 877 F.2d 1036, 1040-41 (D.C. Cir. 1989) (stating that executive order precedent could be used if Statute was unclear) (citation omitted); *U.S. Dep't of Homeland Sec., Bureau of Customs & Border Prot.*, 61 FLRA 485, 494 (2006) (applying executive order precedent that was consistent with language of Statute). However, these same authorities acknowledge that a difference between the executive orders and the Statute

demonstrates the inapplicability of the former to the latter. *See* 5 U.S.C. § 7135(b); *see also, e.g., Air Force*, 877 F.2d at 1040-41 (noting that "Congress viewed the [S]tatute as a departure from the law that had developed under the [e]xecutive [o]rder structure," court found that Statute's failure to include language permitting certain travel expenses meant those expenses were no longer recoverable even though executive orders permitted such recovery); *Latham*, 53 FLRA at 118 (Authority chose not to rely on E.O. 11,491 to interpret § 7111(f)(1) of Statute because order contained "no equivalent").

E.O. 11,838 amended E.O. 11,491 to permit guards and other employees to be in the same bargaining unit; previously, guards were required to be in separate units. Thus, under E.O. 11,838, guards faced no obstacles to being in the same bargaining units as non-guards. Section 7112(b)(6) of the Statute altered this situation by mandating that guards could no longer be in *any* bargaining units if they perform duties that directly affect national security. *Compare Fort Washakie*, 29 FLRA at 938 (stating that E.O. 11,838 "eliminated the general exclusion of guards from units of other employees[.]") *with U.S. Dep't of Justice*, 52 FLRA 1093, 1098 (1997) (Member Wasserman not participating) ("*Congress determined* in [§] 7112(b)(6) that a unit *may not include any* employee engaged in security work which directly affects national security[.]" (emphasis added)). In other words, whereas, under E.O. 11,838, guards faced no impediments to being in a bargaining unit, under the Statute, guards may not be in *any* bargaining unit if their duties directly affect national security. The decisions upon which the Majority relies are inapplicable because they were superseded by § 7112(b)(6). *See* 5 U.S.C. § 7135(b).

Furthermore, the Majority's reliance on executive order precedent is misplaced for yet another reason. The Majority contends that the Authority's approach to guard duties under the executive orders supports a determination that "directly affects" under § 7112(b)(6) should be viewed narrowly. *See* Maj. Op. at 6-7. But the Majority's proffered decisions go solely to one position -- guards; by contrast, § 7112(b)(6) has been applied to a wide spectrum of positions. *See, e.g., Davis-Monthan*, 62 FLRA at 335 (secretary); *USDA*, 61 FLRA at 402-03 (food inspectors); *SSA, Balt., Md.*, 59 FLRA 137, 146 (2003) (Chairman Cabaniss concurring and then-Member Pope concurring in part and dissenting in part) (analyst). The Majority does not explain why viewing *one* position narrowly justifies viewing *all* positions narrowly.

2. E.O. 11,491 § 10(b) states, in relevant part, that "[a] unit may be established . . . which will ensure a clear and identifiable community of interest among the employees concerned[.]" E.O. 11,491 § 10(b). Section 7112(a) of the Statute states, in relevant part, that "[t]he Authority . . . shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest[.]" 5 U.S.C. § 7112(a).

The Majority's proffered justifications for a narrow interpretation of the phrase "directly affects" do not withstand scrutiny. Accordingly, I find no basis to conclude that the Authority's approach to exclusion under § 7112(b)(6) should be altered.³

Applying the proper standard for review under § 7112(b)(6), I conclude, in disagreement with my colleagues, that the duties of the Internal Revenue Police Officers (Officers) directly affect national security. As the Majority states, the RD found that Officers directly affect national security after he examined their: (1) access to and protection of the Treasury Cage (Cage); (2) access to and protection of the Secured Room; and (3) duties during a Continuity of Operations (COOP) event. *See* Maj. Op. at 8 (citing RD's Decision at 10). An analysis of the foregoing responsibilities establishes why the RD was correct.

Turning first to the Cage, as the Majority states, the Cage contains sensitive information that is not stored anywhere else in the country. RD's Decision at 5; Tr. at 95, 110. Moreover, it is a "restricted area" and access is limited *solely* to United States Department of Treasury officials, authorized individuals, and Officers. RD's Decision at 6; Tr. at 80; *see also id.* at 383 (Officer testified that "[t]he Cage . . . [has] very, very limited access."). Of the foregoing, only one group is charged with maintaining the security of this restricted area: Officers. Indeed, the Officers are the *only* security personnel with the authority to actually access the Cage. *See, e.g.,* Tr. at 219 (Officer testified that Contract Guards (Guards) "may not" enter the Cage).

Officers are charged with protecting the Cage and preventing unauthorized access to it. As the Director of Physical Security and Emergency Preparedness (Director) testified, Officers "make sure that the integrity of the Cage is maintained, and also . . . ensure that no one is able to gain access to the Cage, unless he or she is otherwise authorized to get in." Tr. at 80. (emphasis added). To this end, Officers regularly patrol the Cage area. *See* RD's Decision at 10. Additionally, Officers have the authority to question individuals approaching the Cage as to whether their identification badges are authorized. *See id.* at 5. Moreover, Officers check card readers to make sure they are functioning properly.

In addition to protecting the Cage itself, the Officers ensure the security of its contents. To that

end, Officers regularly patrol the interior of the Cage. *See* RD's Decision at 10; *see also* Tr. at 357 (Officer testified that he "would generally take a tour" of the Cage while doing his patrol). When Officers tour through the Cage, they look for any documents that have been inadvertently left out or computers that have been left on by accident. Officers may not handle the documents; however, they are authorized to turn off the computers if no other authorized individual is available to do so. *See* Tr. at 358.

The Officers also perform security duties -- albeit limited ones -- in relation to the Secure Room. The Secure Room contains information that is more sensitive than the information stored in the Cage, and is primarily used by the Secretary of the Treasury. RD's Decision at 4. Managers at the Center do not even have access to this area. *See* Tr. at 81. As the Majority acknowledges, Officers check on the Secure Room during their foot patrols of the Center's interior. Maj. Op. at 9. Although the Majority is correct that Officers do not "generally" access the Secure Room, Officers nevertheless may access the room to check on emergencies such as fires, grant individuals access to the room, and check on matters that are out of the ordinary. *See, e.g.,* Tr. at 81, 418-19. Additionally, during a COOP event, Officers patrol the area that is adjacent to the Secure Room in order to maintain security. RD's Decision at 6. The record contains no indication that any other position has duties associated with the protection of the Secure Room.

Finally, the Officers perform several duties during a COOP event that also demonstrate how the Officers' duties affect national security. As stated by the Majority, Officers: are part of the execution of COOP security plans; are frequently a part of COOP preparation exercises; patrol and monitor areas of the Center during a COOP event; and prevent unauthorized individuals from accessing the Center during a COOP. Maj. Op. at 3. Moreover, as the record reveals, during a COOP event, Officers coordinate traffic, check the identification of individuals in the Center, check vehicles that pass through the Center, and search those vehicles. Tr. at 358-59. Additionally, Officers oversee the transfer of confidential documents during a COOP event. *See* Tr. at 429-30.

The foregoing establishes that all of the Officers' duties in question directly affect national security. The Majority disagrees, and claims the Officers' effect on national security is limited due to several reasons, all of which are erroneous.

The Majority first asserts that the Officers' effect on national security is limited because Guards perform

3. To be sure, I am not suggesting that the Authority should view the phrase "directly affects" broadly. Rather, the Authority should do no more and no less than continue to apply the plain language requirements of § 7112(b)(6), as it has done since *Oak Ridge*.

various security functions within and outside of the Center. Specifically, the Majority goes to great lengths to explain how the Guards' duties "play . . . an important role in securing *the Center*." Maj. Op. at 8 (emphasis added). Missing from the Majority's explanation is any citation to the record that explicitly or implicitly links the duties of the Guards to the safety of the restricted areas, *which are the only areas in dispute*. Unable to point to any portion of the record that actually states the Guards or other employees have any involvement with the restricted areas, the Majority merely assumes that the Guards' duties in relation to the Center as a whole make it "less probable" that the Officers' duties in the restricted areas directly affect national security. *Id.* at 9. However, the Majority does not dispute that Officers are the *only* employees that protect and secure the Center's restricted areas. Indeed, Guards have little effect if an unauthorized individual accesses the Center. Once such a situation occurs, Officers are almost always "[t]he first line of defense." Tr. at 83; *see also id.* at 228. *Only Officers* have the authority to arrest unauthorized individuals because "[t]hey are *the* law enforcement entity for [the Center]." *Id.* at 83 (emphasis added); *see also id.* at 86-87 (Director testified that she can "direct [Officers] to do things that [she could] not otherwise direct any of the [Guards]" to do). Indeed, Officers have the discretion to delegate certain duties to Guards in order to detain unauthorized individuals. *Id.* at 228. Furthermore, even though Guards assign badges to individuals, the Majority offers no testimony that Guards or other employees have ever checked badges at or near the restricted areas.

Second, the Majority argues that, because the Officers' disputed duties are not the "sole focus of their responsibilities," the Officers' effect on national security is limited. Maj. Op. at 9 n.9; *see also id.* at 9 ("That the Officers perform numerous, important duties unrelated to the disputed duties . . . is relevant to determining whether the Officers should be excluded from the unit."). The Majority does not produce a single Authority decision that states a position's effect on national security is lessened by the fact that the position performs other duties. This is because the relevant inquiry under § 7112(b)(6) is whether an employee performs "security work which directly affects national security[.]" not whether an employee performs "security work which directly affects national security" *all of the time*. 5 U.S.C. § 7112(b)(6). Indeed, in the recently decided *Tyndall, AFB*, although the police officers at issue performed several duties, *see Tyndall, AFB*, 65 FLRA at 611 (describing duties), the Authority analyzed *only* the two duties that were in dispute to determine whether the work of those officers directly affected national security. *See Tyndall, AFB*,

65 FLRA at 613-14 (analyzing solely suspicious package and commercial vehicle inspection duties). The Authority gave no indication that the effect on national security was reduced because the officers performed other duties. *See id.* at 613-14. The Majority does not explain why, in this nearly identical case, it has adopted a contrary approach.

Third, the Majority concludes "that the Officers' duties with respect to the Secure Room [do not] have 'a straight bearing or unbroken connection that produces a material influence or [alteration]' on national security." Maj. Op. at 10 (quoting *SSA, Balt., Md.*, 59 FLRA at 143 (2003)). The Majority is correct that the Officers' duties in relation to the Secure Room are limited. However, the Majority errs because it examines those duties in isolation, instead of in conjunction with the Officers' other disputed duties, to determine the Officers' effect on national security. When examining whether a position directly affects national security, the Authority examines *all* of the duties that are in dispute. *See, e.g., Tyndall, AFB*, 65 FLRA at 613-14 (examining disputed duties at issue in order to determine whether position directly affected national security); *U.S. Dep't of the Treasury, IRS*, 62 FLRA 298, 303-04 (2007) (Chairman Cabaniss concurring and then-Member Pope concurring) (*IRS*) (examining several duties at issue in order to determine whether position directly affected national security); *USDA*, 61 FLRA at 402-03 (same). Thus, the proper inquiry is not whether the Secure Room duties in and of themselves directly affect national security, but whether those duties *in addition* to the Officers' other disputed duties establish such an effect. The Majority's attempt to view those duties in isolation, therefore, is misplaced.

Fourth, the Majority asserts that the Officers' effect on national security is limited because Officers do not work with the materials in the Cage. *See* Maj. Op. at 10. This is unpersuasive. Although other individuals *work* with the materials in the Cage, Officers *protect* those materials. The Authority has found that positions directly affect national security where those positions' duties, in-part, include monitoring sensitive areas. *See, e.g., IRS*, 62 FLRA at 304; *cf. USDA*, 61 FLRA at 403 (finding that position did not directly affect national security, in part, because employees were not responsible for protecting physical premises).⁴ Thus, the fact that Officers do not work with these materials is of no consequence.

4. The Majority claims that *IRS* is inapplicable because the employees in *IRS* "engaged in activities such as designing, analyzing, and/or installing security systems at the facilities involved." Maj. Op. at 11 (citations omitted). Although it is true that the employees in that case designed, analyzed,

Finally, the Majority contends that the Officers' COOP duties have a limited effect on national security because Officers "merely oversee the movement of . . . materials, which are in locked tubs[,]" through an already locked area, i.e., the warehouse. Maj. Op. at 11 (citation omitted). However, one of the Officers who regularly participates in COOP events agreed that Officers provide "*secure* access and *secure* exit" of these materials. Tr. at 430 (emphasis added).⁵ Therefore, although the materials are moved in a secured area, the Officers are responsible for ensuring that the area is secured to begin with. Furthermore, regardless of whether the warehouse is locked, as stated above, employees directly affect national security where their duties include monitoring sensitive areas. See, e.g., *IRS*, 62 FLRA at 304; cf. *USDA*, 61 FLRA at 403.

Based on the foregoing, I would conclude that the Officers' duties at issue have a direct effect on national security.

and/or installed security systems, nothing in the decision suggests that the employees' duties directly affected national security *only* because they performed such duties. Thus, the Majority's attempt to distinguish this case is unpersuasive.

5. The Majority quizzically finds significance in the fact that the Officer did not himself state that Officers provide "secure access and secure exit" of materials during a COOP event, but only replied affirmatively when asked on cross-examination whether he performed such duties. Not only does this assertion ignore well-settled principles of evidence and trial technique, see, e.g., 3 *Wigmore, Evidence* § 773 (Chadbourn rev. 1970) ("[I]t is well settled that on cross-examination of an opponent's witness, ordinarily no question can be improper as leading." (citations omitted)), but it also obfuscates the relevant issue -- that the Officer fully agreed to the question asked and, thus, unquestionably performs this duty. The Majority offers nothing that contradicts this point.