71 FLRA No. 230

U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF RESEARCH AND DEVELOPMENT
CENTER FOR ENVIRONMENTAL
MEASURING AND MODELING
GULF ECOSYSTEM MEASURMENT
AND MODELING DIVISION
GULF BREEZE, FLORIDA
(Agency)

and

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 9
(Union/Petitioner)

AT-RP-20-0013

_____

DECISION AND ORDER ON REVIEW

December 21, 2020

_____

Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member Abbott concurring;
Member DuBester dissenting)

I. Statement of the Case

The Union filed a petition seeking to clarify the bargaining-unit status of a single position that the Agency appointed under 42 U.S.C. § 209(g). Federal Labor Relations Authority Regional Director (RD) Richard Jones granted the petition, finding that Title 42 of the U.S. Code does not exclude the ecological-toxicologist position from the coverage of the Federal Service Labor-Management Relations Statute (Statute), and that the position is included in the bargaining unit that the Union represents. The Agency filed an application for review (application) of the RD's decision. In an August 21, 2020 order, the Authority granted review and deferred action on the merits.

For the reasons that follow, we conclude that the RD erred in finding that the Title 42 ecological-toxicologist position is covered by the Statute.

II. Background and RD's Decision

The Union is the certified representative of a bargaining unit that includes certain professional and nonprofessional employees at the U.S. Environmental Protection Agency's (EPA's) Gulf Breeze facility in Florida. In 2019, the Agency appointed an individual to a "Title 42 Ecological Toxicologist" position.[1] Unlike the rest of the employees at that facility, the Agency made this appointment under § 209(g) of Title 42. Prior to this appointment, the incumbent held a different position at the Agency and was included in the bargaining unit. Upon the incumbent's appointment, she was excluded from the unit, and, as a result, the Union filed a petition to clarify the bargaining-unit status of the Title 42 ecological-toxicologist position.

In his decision, the RD acknowledged that "[t]he Authority has not reached the question of whether agencies' authority to employ Title 42 employees is subject to the . . . Statute."[2] Nevertheless, he rejected the Agency's argument that the position was ineligible for such coverage by the terms of § 209(g). That section states, in part, that "individual scientists . . . may be . . . appointed for duty . . . without regard to the civil-service laws."[3] The RD determined that the authority to "appoint" without regard to the civil-service laws referred only to the process of hiring and contained no specific exclusions from the Statute.[4] He further stated that "exclud[ing] Title 42 appointees from the Statute would expand the authority granted to agencies . . . beyond the language enacted by Congress" in Title 42.[5] Accordingly, the RD found that § 209(g) did not exclude the Title 42 ecological-toxicologist position from the coverage of the Statute. After weighing several factors related to the Title 42 position to determine whether it was appropriate for the Union's existing bargaining unit, he ordered that it be included in that unit.

On June 23, 2020, the Agency filed an application for review of the RD's decision. The Union did not file an opposition. And, in an August 21, 2020

[1] RD's Decision at 5.
[2] *Id.* at 10.
[3] 42 U.S.C. § 209(g).
[4] RD's Decision at 14.
[5] *Id.* at 13.

order, the Authority granted review but deferred action on the merits.[6]

III. Analysis and Conclusions

A. The RD's decision raises an issue for which there is an absence of precedent.

The Agency contends that the Authority's review of the RD's decision is warranted because he made a determination concerning an issue about which there is an absence of Authority precedent.[7] As the RD himself correctly acknowledged, "[t]he Authority has not previously reached the question" of whether employees appointed under 42 U.S.C. § 209(g) are subject to the Statute.[8] Therefore, we review the RD's decision in accordance with 5 C.F.R. § 2422.31(c)(1).[9]

B. The RD erred in finding that the Title 42 ecological-toxicologist position is covered by the Statute.

The Agency argues that the RD erred in finding that the Title 42 ecological-toxicologist position is covered by the Statute.[10] The incumbent was appointed to that position pursuant to 42 U.S.C. § 209(g),[11] a hiring authority that Congress granted to the EPA.[12] This authority allows the EPA, to "secure the services of talented scientists and engineers for a period of limited duration" by use of fellowships when "customary employing methods [are] impracticable or less effective."[13] In relevant part, § 209(g) states,

> In accordance with regulations, individual scientists . . . may be designated . . . to receive fellowships, appointed for duty . . . without regard to the civil-service laws, may hold their fellowships under conditions prescribed therein, and may be assigned for studies or investigations either in this country or abroad during the terms of their fellowships.[14]

In his decision, the RD focused on the word "appointment" in § 209(g) when determining whether the position was eligible for inclusion in the bargaining unit. In this regard, he found that, because § 209(g) states only that the "appointment" of scientists is to be made "without regard to the civil-service laws," other aspects of federal employment, including the coverage of the Statute, are not affected.[15] However, the RD's analysis ignored the more critical language of that section: namely, that Congress also provided that individuals appointed under § 209(g) are to be "designated," "appointed," "assigned," and allowed to "hold their fellowships" only "*in accordance with regulations*."[16]

Pursuant to that grant of authority, the EPA promulgated regulations giving the EPA administrator the exclusive right to establish fellowships, including determining qualifications, methods of application, selection processes, stipends, and duration.[17] The EPA's regulations set out discrete areas where Title 42 fellows are granted entitlements on the same terms as other employees – travel and transportation allowances,[18]

---

[6] Chairman Kiko notes that under § 7105(f), of the Statute, where the Authority has delegated authority to a regional director to take action in representation cases, "[t]he Authority may affirm, modify, or reverse" any such action. 5 U.S.C. § 7105(f). "If the Authority does not undertake to grant review of the action" within 60 days of the filing of an application for review, then the regional director's decision becomes "the action of the Authority." *Id.* "In some cases, consistent with § 2422.31(f) and (g) of the Authority's Regulations, the Authority grants review of a regional director's decision, but defers ruling on the issues in the application for review until a later time." *FDIC*, 68 FLRA 260, 261 (2015) (citing 5 C.F.R. § 2422.31(f) ("The Authority *may* rule on the issue(s) in an application for review in its order granting the application for review." (emphasis added)); *id.* § 2422.31(g) ("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,* give the parties an opportunity to file briefs." (emphasis added))). Where the Authority "undertake[s] to grant review" of a regional director's decision within sixty days of a properly filed application for review, then the regional director's decision does not become "the action of the Authority." 5 U.S.C. § 7105(f) (setting forth no deadline for the Authority to "affirm, modify, or reverse" the regional director's action); *see also FDIC*, 68 FLRA at 261.

[7] Application at 2.

[8] RD's Decision at 10.

[9] 5 C.F.R. § 2422.31(c)(1); *see also Dep't of the Army, U.S. Army Aviation Missile Command (AMCOM), Redstone Arsenal, Ala.*, 55 FLRA 640, 642 (1999) (granting an application for review on issue for which there was no Authority precedent).

[10] Application at 2-3.

[11] RD's Decision at 4.

[12] Department of the Interior, Environment and Related Agencies Appropriation Act of 2006, Pub. L. No. 109-54, 119 Stat. 499 (2005) ("[T]he Administrator may, after consultation with the Office of Personnel Management, make not to exceed five appointments in any fiscal year under the authority provided in 42 U.S.C. [§] 209 for the Office of Research and Development."), *as amended by* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014).

[13] 40 C.F.R. § 18.3.

[14] 42 U.S.C. § 209(g).

[15] RD's Decision at 13.

[16] 42 U.S.C. § 209(g) (emphasis added).

[17] 40 C.F.R. §§ 18.5, 18.6, 18.7, 18.8(a), 18.9.

[18] *Id.* § 18.8(b) (noting that except as otherwise provided, fellows "shall be entitled to travel and transportation allowances authorized in this part at the same rates as may be authorized by

benefits,[19] and training[20] – and clarify that Title 42 fellows are subject to the same "regulations and requirements as Title 5 appointees" concerning "Standards of Conduct" and "Financial Disclosure."[21] But, other than these limited exceptions, the regulations state that the EPA administrator is responsible for "prescrib[ing,] in writing[,] the conditions" under which Title 42 fellows "hold their fellowships."[22]

There is no dispute that the EPA prescribed the conditions, in writing, under which Title 42 appointees hold their positions.[23] Specifically, and as the RD recognized, "[t]he [EPA's] Title 42 Operations Manual lists specific definitions which apply to Title 42 appointees."[24] The operations manual provides that "[a]ppointments under Title 42 . . . are not generally governed by federal statute and corresponding regulation in Title 5 of the U.S. Code and Title 5 of the Code of Federal Regulations."[25] Most relevantly, the operation manual also explicitly states that "Title 42 appointees are *excluded* from the bargaining unit" and "*not* covered by Title 5 U.S. Code Chapter 71."[26]

Based on the above, we conclude that 42 U.S.C. § 209(g) grants the EPA the authority to prescribe the conditions under which Title 42 employees, appointed under § 209(g), will hold their fellowships. In considering whether there is Congressional intent for such a conclusion, we note that the U.S. Court of Appeals for the D.C. Circuit considered a similar grant of authority under Title 38 of the U.S. Code.[27] In *Colorado Nurses Association v. FLRA*, the court found that Congress had authorized the Veterans Administration (VA) administrator to prescribe conditions of employment by regulation.[28] The Court found that "by directing the [a]dministrator to prescribe regulations – rather than simply issue or promulgate them – Congress intended that the [a]dministrator determine the content of those regulations."[29] Furthermore, it found that "Congress intended to grant the [a]dministrator exclusive authority to determine the working conditions of [the] employees."[30] Thus, contrary to the RD's finding that "exclud[ing] Title 42 appointees from the Statute would expand the authority granted to agencies . . . beyond the language enacted by Congress,"[31] we find that Congress granted agencies just such authority.

Acting under its authority, the EPA excluded Title 42 positions – including the Title 42 ecological-toxicologist position at the Agency – from the coverage of the Statute and from the bargaining unit that the Union represents.[32] Accordingly, we hold that the RD erred in concluding that the position is eligible for inclusion in the unit.[33]

IV. Order

On review, we find that the Title 42 ecological-toxicologist position is not eligible for inclusion in the bargaining unit.

law and regulations for other civilian employees of the [Agency]").

[19] *Id.* § 18.8(c) ("[F]ellows shall be entitled to benefits as provided by law or regulation for other civilian employees of the Agency.").

[20] *Id.* § 18.8(d) ("[F]ellows are eligible for training at Government expense on the same basis as other Agency employees.").

[21] *Id.* § 18.11.

[22] *Id.* § 18.4. We note that the regulation mirrors § 209(g), which also states that fellows may "hold their fellowships under conditions prescribed therein." 42 U.S.C. § 209(g).

[23] *See* Application at 14; *see also* Application, Attach. 4, Title 42 Operations Manual (Operations Manual).

[24] RD's Decision at 4.

[25] Operations Manual at 1.

[26] *Id.* at 7 (emphasis added).

[27] *Colo. Nurses Ass'n v. FLRA*, 851 F.2d 1486 (D.C. Cir. 1988) (determining that, because Congress allowed the terms of employment to be set exclusively by the agency administrator, the agency was not required to engage in collective bargaining), *superseded by statute*, Department of Veterans Affairs Labor Relations Improvement Act of 1991, Pub. L. No. 102-40, title II, § 202, 105 Stat. 187, 200 (1991), *as stated in NFFE, Local 589 v. FLRA*, 73 F.3d 390, 392-93 (D.C. Cir. 1996) ("In 1991[,] Congress granted [Title 38 appointees] the right 'to engage in collective bargaining' in accordance with chapter 71 of title 5.").

[28] *Id.* at 1489.

[29] *Id.*

[30] *Id.* at 1491. As noted above, Congress subsequently amended Title 38 to provide limited bargaining rights to VA employees appointed under that statutory provision. We note that Congress has not amended Title 42 to provide similar rights to individuals appointed under 42 U.S.C. § 209(g).

[31] RD's Decision at 13.

[32] Operations Manual at 7.

[33] Chairman Kiko reiterates her longstanding commitment to avoiding unnecessary delays and issuing carefully reasoned decisions as expeditiously as possible. The Chairman's ability to respond to the allegations of her concurring colleague in more detail is constrained by her belief that to do so would constitute an infidelity to the confidentiality of the deliberative process.

Member Abbott, concurring:

I agree that the Regional Director (RD) erred by finding that the ecological-toxicologist position is covered by the Federal Service Labor-Management Relations Statute (the Statute). The RD not only treats 42 U.S.C. § 209(g) as though its wording is vague—which it is not—he avoids entirely specific language in § 209(g) which contradicts his unpersuasive conclusion that the ecological-toxicologist position is eligible for inclusion in the bargaining unit. However, I write separately to address my concerns with the timeliness of the Authority's decision.

Section 7105(f) of the Statute states the following:

> If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of –
>
> > (1) the date of the action; or
> >
> > (2) the date of the filing of any application under this subsection for review of the action;
>
> the action shall become the action of the Authority at the end of such 60-day period.[1]

Consistent with § 7105(f), an RD's decision becomes final and binding unless the Authority "undertake[s] to grant review" within sixty days of receiving a properly filed application for review (application) of the decision.[2] Consequently, I read the plain language of the Statute as requiring the Authority to issue a full decision under § 7105(f) within sixty days of receiving a proper application.[3]

Despite the plain language of the Statute, the Authority has previously used the sixty-day period in § 7105(f) to "grant[] review of a regional director's decision, but defer[] ruling on the issues in the application for review until a later time."[4] This practice is commonly referred to as a "bare grant." Furthermore, once the Authority issues a bare grant, the Authority has concluded that "nothing in the Statute requires the Authority to rule on the issues in the application within any particular time period."[5] Consistent with this approach, the Authority issued a bare grant in the instant case on August 21, 2020 and deferred action on the merits of the RD's decision.[6] Prior Authority decisions cite to § 2422.31 of the Authority's Regulations as the only support for issuing a bare grant.[7] However, the plain wording of the Statute makes no mention of a bare grant and it demonstrates that Congress intended to give the Authority no more than sixty days to review the decision of a regional director.[8]

Therefore, while I do not agree with the Authority's previous decision to issue a bare grant in the instant case, I join the majority in finding that the RD erred to avoid an impasse.

Yet, it is still inexplicable, and in my view inexcusable, that the Authority did not issue a full decision within the sixty days allocated by Congress for such review. The Authority currently has a full complement of members and there is no valid justification for waiting more than sixty days to issue a full decision. Moreover, the Authority had the majority decision drafted and ready for issuance, prior to the expiration of the sixty-day deadline in this case, waiting only for the dissent's opinion. Sadly, the timeliness issues in this case are not isolated and many cases currently pending before the Authority are far older and wait in limbo.

The Authority utilizes several internal goals for achieving an effective and efficient review with regard to

[1] 5 U.S.C. § 7105(f).
[2] *Id.*
[3] *See id.*; *Hall v. United States*, 566 U.S. 506, 519 (2012) (relying on the plain language, context, and structure of a statute to determine the meaning of the terms in question); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (finding that "the legislative purpose is expressed by the ordinary meaning of the words used [by Congress]" (citing *Richards v. United States*, 369 U.S. 1, 9 (1962))).
[4] *FDIC*, 68 FLRA 260, 261 (2015).
[5] *Id.*
[6] Order Granting Application for Review at 1.
[7] *FDIC*, 68 FLRA at 261 n.24.
[8] *See* 5 U.S.C. § 7105(f).

case-processing.[9] With regard to the Authority's review of arbitration decisions, the Authority endeavors to issue a decision within 210-days of receiving a party's exceptions.[10] If the first goal is not met, then the Authority has a secondary goal date of issuing a decision within 365-days of receiving exceptions.[11] Furthermore, each member of the Authority has an internal target of voting on a decision within fourteen-days of receiving a drafted decision.

However, many cases exceed their 365-day target and it has become increasingly unrealistic to expect the Authority to achieve its primary target of 210 days. In the 2019-2020 performance year, the Authority has issued a total of fifty-four decisions that exceed the Authority's 365-day goal. Many cases exceed the 365-day goal because Member offices fail to timely draft a separate opinion, or in some cases, a timely vote. In that regard, there have been thirty-five instances during the 2019-2020 performance year where other offices have not timely voted on a drafted decision.[12] Furthermore, there are an additional twenty instances during the 2019-2020 performance year where a case did not issue because it took at least a month—and, in some instances, several months[13]—to receive a separate opinion from another office.[14] Correspondingly, the Authority has watched as the average age, and number of, cases in inventory has steadily increased.[15]

The dissent's claim that "carefully" drafted separate opinions take several months to complete is self-serving and pity-seeking.[16] This claim is entirely baseless because prior members, such as former Members Beck and Pizzella, faced similar challenges writing dissents and were able to operate within the accepted framework of the Authority's protocols. Also, while some may characterize the Authority's recent decisions as "flawed," others might call these decisions a correction of prior erroneous rulings.[17] It is the Authority's responsibility to ensure that the Statute is interpreted and applied correctly.[18] Therefore, the mere fact that one Member does not want to do so is not an excuse for late dissents.

As a result, the Authority's latest Congressional Budget Justification demonstrates that we continue to fail in numerous measures and goals.[19] I therefore apologize to the federal labor-management relations community as a whole and acknowledge, as one Member of the Authority, that far too many matters brought to the Authority for resolution are not being addressed in an effective, efficient, and timely manner. I pledge that I have been, and will continue, to do everything within my individual authority to correct these unnecessary delays.

[9] FLRA, *2019 Annual Performance Report*, https://www.flra.gov/system/files/webfm/FLRA%20Agency-wide/Public%20Affairs/Annual%20Performance%20Report%20(APR)%20-%20FY19.pdf (last visited Dec. 17, 2020).
[10] *Id.*
[11] *Id.*
[12] During the 2018-2019 performance year, there were a total of fourteen instances where the other offices did not timely vote.
[13] Additionally, there was one instance where it took an office seven months to vote on a drafted decision.
[14] Furthermore, during the 2018-2019 performance year, there were a total of seven instances where the other offices took months to draft a separate opinion. While it might be understandable to occasionally need additional time for a separate opinion on a particularly complex case, needing a month or more for every separate opinion is not, in my opinion, justifiable.
[15] FLRA, *2021 Congressional Budget Justification*, https://www.flra.gov/CJ (last visited Dec. 17, 2020).
[16] Dissent at 13-14.
[17] *Id.*
[18] 5 U.S.C. § 7105(a)(1).
[19] FLRA, *2021 Congressional Budget Justification*, https://www.flra.gov/CJ (last visited Dec. 17, 2020).

Member DuBester, dissenting:

The majority's decision fails to address the findings of the Regional Director (RD), ignores provisions in the Federal Service Labor-Management Relations Statute (Statute) specifically governing bargaining-unit exclusions, and patently misconstrues both Authority and judicial precedent. Accordingly, I dissent. To properly address the question before us, the majority should have simply followed the roadmap provided by the RD. In determining whether the incumbent, who was hired by the Agency pursuant to 42 U.S.C. § 209(g), is eligible for inclusion in the bargaining unit, the RD first examined whether the incumbent is an "employee" eligible for inclusion in a bargaining unit pursuant to § 7103(a)(2) of the Statute.[1] This provision states, in relevant part, that an "employee" is "an individual . . . employed in an agency."[2] And upon finding that the incumbent met this definition, the RD determined that she did not fall into any category of employees specifically excluded by this same provision.[3]

The RD then analyzed whether the incumbent's inclusion in the bargaining unit would be prohibited by § 7112(b) of the Statute, which states that a unit shall not be determined appropriate if it includes employees in any of seven delineated categories.[4] Applying the extensive factual record, and noting that the Agency "raise[d] no argument that [the incumbent's] position should be excluded from the unit based on any of the statutory criteria,"[5] the RD concluded that inclusion of the incumbent's position in the bargaining unit did not offend this provision.

There is certainly no dispute that the Environmental Protection Agency is an "agency" within the meaning of § 7103(a)(3) of the Statute.[6] It is also undisputed that the incumbent is "an individual . . . employed" in the Agency.[7] Indeed, the Agency's own regulations specify that individuals appointed under 42 U.S.C. § 209 "shall be *employees of the* [*Agency*]."[8]

The majority takes no issue with these findings and conclusions. In fact, it does not even mention them. Instead, the majority concludes that the RD erred by including the incumbent's position in the bargaining unit because the Agency, acting under authority granted by 42 U.S.C. § 209(g), "excluded Title 42 positions . . . from the coverage of the Statute and from the bargaining unit that the Union represents."[9]

But the Agency did nothing of the sort. It is certainly true, as the RD found, that the Agency appointed the incumbent pursuant to § 209(g), which provides that "scientists . . . may be designated . . . to receive fellowships, appointed for duty . . . without regard to the civil-service laws."[10] And applying this provision, the RD found that § 209(g), and the Agency's implementing regulations, grant the Agency "broad authority to advertise and select candidates without regard to Title 5 regulations."[11] But it simply does not follow that § 209(g) authorizes the Agency to exclude Title 42 positions from coverage under the Statute, or that the Agency has done so by operation of its implementing regulations.

At the outset, nothing in the plain wording of § 209(g) supports this conclusion. And as the RD correctly noted, federal courts have rejected the premise that similar language in § 209 authorizing agencies to appoint individuals "without regard to the civil-service laws" precludes these individuals from claiming entitlement to Title 5 rights as "employees" of their agencies.[12]

For instance, in *Lal v. MSPB*,[13] the court held that "special consultants" appointed pursuant to 42 U.S.C. § 209(f) are not excluded from the definition of employees entitled to exercise Title 5 rights pertaining to Merit Systems Protection Board appeals under the Civil Service Reform Act (CSRA).[14] Significantly, the court reached this conclusion notwithstanding the language in § 209(f) which – similar to § 209(g) – states that the

[1] 5 U.S.C. § 7103(a)(2).
[2] *Id.* § 7103(a)(2)(A).
[3] RD's Decision at 9 (Decision) (applying 5 U.S.C. § 7103(a)(2)(B)(i)–(v)).
[4] *Id.* at 9-10 (applying 5 U.S.C. § 7112(b)(1)–(7)).
[5] *Id.* at 10.
[6] Section 7103(a)(3) defines an "agency" as "an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, the Government Publishing Office, and the Smithsonian Institution[,] but does not include –
(A) the Government Accountability Office;
(B) the Federal Bureau of Investigation;
(C) the Central Intelligence Agency;
(D) the National Security Agency;
(E) the Tennessee Valley Authority;
(F) the Federal Labor Relations Authority;
(G) the Federal Service Impasses Panel; or
(H) the United States Secret Service and the United States Secret Service Uniformed Division." 5 U.S.C. § 7103(a)(3).
[7] *Id.* § 7103(a)(2).
[8] 40 C.F.R. § 18.2 (emphasis added).
[9] Majority at 5-6.
[10] 42 U.S.C. § 209(g).
[11] Decision at 10 (citing 40 C.F.R. § 18.5-18.7).
[12] *Id.* at 10-14 (citing *Lal v. MSPB*, 821 F.3d 1376 (Fed. Cir. 2016); *King v. Briggs*, 83 F.3d 1384 (Fed. Cir. 1996); *Afshari v. Leavitt*, No. 1:05-CV-127, 2006 WL 3030323 (N.D. W.Va. Oct. 23, 2006) (*Afshari*)).
[13] 821 F.3d 1376.
[14] *Id.* at 1381.

consultants "may be appointed without regard to civil service laws."[15] The court found that this language "merely ensures that the Secretary has the authority to hire individuals into the excepted service."[16] And, finding that nothing in § 209(f) "explicitly exempt[s] personnel from the definition of 'employee'" in the CSRA, the court "decline[d] to find an additional implicit exemption to [the CSRA's] definition of 'employee'" for these appointees.[17]

The majority does not explain how the RD erred by relying upon these decisions to interpret the meaning of § 209(g). Instead, it concludes that Title 42 appointees are excluded from coverage under the Statute pursuant to *Colorado Nurses Ass'n v. FLRA* (*Colorado Nurses*).[18] But the majority's understanding of *Colorado Nurses* is incorrect.

In *Colorado Nurses*, the court held that the Veterans Administration (VA) was not required to bargain over proposals pertaining to a bargaining unit of medical personnel hired under Title 38 of the U.S. Code because that provision granted the VA sole authority to prescribe by regulation their conditions of employment "[n]otwithstanding any law."[19] In reaching this conclusion, the court found that Title 38 effectively authorized the VA to create an "independent personnel system" for the Title 38 unit employees.[20] It therefore absolved the VA from a *duty to bargain* over the proposals because this personnel system "does not leave room for mandatory collective bargaining over union proposals relating to [the employees'] working conditions."[21]

Importantly, however, *Colorado Nurses* neither concluded, nor even *suggested*, that the employees to whom the proposals related were *excluded from coverage under our Statute* by virtue of its negotiability determination. Indeed, both the Authority and the U.S. Court of Appeals for the District of Columbia Circuit have *specifically recognized* that *Colorado Nurses* did not operate to exclude these personnel from coverage as "employees" under the Statute.[22]

And *even if* the decision in *Colorado Nurses* could somehow be construed to pertain to bargaining-unit exclusions – a premise which even a modicum of legal research would have dispelled – the decision is *still* entirely distinguishable from the case before us. As noted, the court based its negotiability determination in *Colorado Nurses* upon its finding that Congress effectively authorized the VA to create an entirely separate personnel system for the medical personnel which left no room for bargaining with the union.

But here, as the RD found, there are numerous conditions of employment pertaining to the Title 42 appointees that are left untouched by the Agency's implementing regulations.[23] For instance, § 18.8 of the Agency's regulations states that "[i]n addition to other benefits provided herein," the appointees "shall be entitled to benefits as provided by law or regulation for other civilian employees of the Agency."[24] Similarly, § 18.11 of the regulations states that "[a]ll individuals appointed . . . shall be subject to the same current standards and disclosure regulations and requirements as Title 5 appointees."[25] In fact, as the RD found, the Agency's Operations Manual lists at least *fifteen* discrete subjects for which Agency policies apply equally to Title 42 appointees and other Agency employees.[26] Based on these findings, which the majority does not disturb, there is simply no basis for concluding – as the court concluded in *Colorado Nurses* – that the Agency's implementing regulations "*do*[] *not leave room* for mandatory collective bargaining over union proposals relating to" the Title 42 appointees.[27]

In sum, not a single aspect of the majority's analysis survives scrutiny. It is truly regrettable that the

---

[15] *Id.* at 1378 (quoting 42 U.S.C. § 209(f)).
[16] *Id.* at 1380.
[17] *Id.* at 1381. As the RD also noted, a federal district court employed a similar analysis to conclude that Title 42 fellows appointed under § 209(g) are "civil service appointees subject to the provisions of the CSRA." Decision at 11 (quoting *Afshari*, 2006 WL 3030323 at *6).
[18] 851 F.2d 1486 (D.C. Cir. 1988).
[19] *Id.* at 1488 (quoting 38 U.S.C. § 4108).
[20] *Id.* at 1489.
[21] *Id.* at 1492.
[22] *Dep't of VA, VA Med. Ctr., S.F., Cal.*, 40 FLRA 290, 295 (1991) (*VA San Francisco*) (holding that "[i]t is clear, and not contested by the [agency], that the Charging Party [a Title 38 nurse] is an 'employee,' within the meaning of section 7102" (quoting 5 U.S.C. § 7103(a)(2)(A))); *see also U.S. Dep't of VA, Wash., D.C. v. FLRA*, 1 F.3d 19, 21 (D.C. Cir. 1993) ("Although Title 38 employees had no statutorily-protected right to negotiate collective[-]bargaining agreements, or to administer such agreements through grievance[-]arbitration procedures, they had and retain other rights protected by the [Statute], including 'the right to form, join, or assist a labor organization without fear of penalty or reprisal'" (quoting *VA San Francisco*, 40 FLRA at 301)).
[23] Decision at 10.
[24] *Id.* (quoting 40 C.F.R. § 18.8).
[25] *Id.* (quoting 40 C.F.R. § 18.11).
[26] *Id.* at 7. Remarkably, while essentially ignoring the RD's findings on this point, the majority *does* rely upon an excerpt from the Operations Manual stating that "'Title 42 appointees are *excluded* from the bargaining unit' and [are] '*not* covered by Title 5 U.S. Code Chapter 71.'" Majority at 5 (quoting Application, Attach. 4, Title 42 Operations Manual at 7). But *even the Agency* concedes that this provision in the Operations Manual "is certainly not dispositive of the issue in this representation proceeding." Application for Review at 19.
[27] *Colorado Nurses*, 851 F.2d at 1492 (emphasis added).

majority would issue a consequential decision of this nature with such cavalier disregard for our Statute and governing precedent.

But even more troubling is my concurring colleague's suggestion that the time and effort necessarily expended to rebut the majority's conclusions amounts to nothing more than "unnecessary delay[]."[28] I fully appreciate and respect the Authority's obligation to address the cases before us in an efficient and timely manner. But this obligation should never serve as a proxy for issuing hastily-drafted decisions that deprive our parties of fundamental statutory rights based upon wholly specious rationales. And looking beyond the approximately eighty-seven days my colleague – ironically – devoted to drafting his concurring opinion, I submit that the time spent researching, and rebutting, the majority's decision was entirely justified.

Sadly, today's decision is not an isolated occurrence. During the 2019-2020 performance year referenced by my concurring colleague, the majority issued numerous decisions in which it reversed or significantly altered long-standing Authority precedent based, in my view, upon similarly flawed analyses.[29] And in each of these cases (in addition to thirty-six other cases during the performance year), I drafted separate opinions carefully explaining the basis for my dissent.

I disagree with my colleague that there is "no valid justification" for the time taken to draft, and revise, the extensive majority and dissenting opinions in these cases, many of which have reversed Authority precedent dating back to the early days of our Statute. And, contrary to my colleague's righteous self-aggrandizement, this is not about me as one Member. Rather, this is about many Members, Republican and Democratic alike, who have applied this precedent through carefully-reasoned decisions over a period of decades.

Having chosen to discard this precedent, my colleague should understand that our parties deserve nothing less than thoroughly reasoned decisions that fully articulate our respective positions regarding these significant matters. And I, for one, will continue to make every effort to ensure that we issue these decisions in an efficient, timely *and responsible* manner.

[28] Concurrence at 9.

[29] *See, e.g.*, *USDA, Office of the Gen. Counsel*, 71 FLRA 986 (2020) (Member DuBester dissenting) (concluding that the period for agency-head review under 5 U.S.C. § 7114(c) begins on the first day that the terms of a collective-bargaining agreement are extended pursuant to a continuance provision); *OPM*, 71 FLRA 977 (2020) (Member DuBester dissenting) (concluding that unions do not have a statutory right to demand midterm bargaining, and that reopener and zipper clauses are mandatory subjects of bargaining); *U.S. Dep't of Educ. & USDA*, 71 FLRA 968 (2020) (Member DuBester dissenting) (applying a "substantial impact" test to determine whether a change to a condition of employment requires bargaining); *Nat'l Right to Work Legal Def. Found.*, 71 FLRA 923 (2020) (Member DuBester dissenting) (concluding that the Statute prohibits "indirect" or "grass roots" lobbying by union representatives on official time); *SSA*, 71 FLRA 798 (2020) (Member DuBester dissenting) (reversing precedent governing arbitrators' authority to award prospective relief to remedy a contractual violation); *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 769 (2020) (Member DuBester dissenting) (concluding that the Authority will no longer follow precedent regarding determinations made under 38 U.S.C. § 7422); *SSA*, 71 FLRA 763 (2020) (Member DuBester dissenting) (reconsidering and reversing earlier decision denying the union's request to stay the Federal Service Impasses Panel from asserting jurisdiction over its bargaining dispute); *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr.*, 71 FLRA 758 (2020) (Member DuBester dissenting) (broadly expanding the scope of the jurisdictional bar under 5 U.S.C. § 7121(d)); *NTEU*, 71 FLRA 703 (2020) (Member DuBester dissenting) (concluding that telework proposals affect management's right to assign work and direct employees and that the Authority will no longer follow cases holding otherwise); *OPM*, 71 FLRA 571 (2020) (Member DuBester dissenting) (concluding that dues allotments made pursuant to 5 U.S.C. § 7115(a) may be revoked at any time after the first year of assignment); *see also U.S. DOJ, Fed. BOP, FCI Miami, Fla.*, 71 FLRA 660, 672-76 (2020) (Dissenting Opinion of Member DuBester) (explaining how the majority's refusal to apply the deferential standard of review applied by federal courts for addressing essence exceptions to arbitration awards is contrary to the Statute); *Nat'l Weather Serv. Emp. Org.*, 71 FLRA 380, 384-85 (2020) (Dissenting Opinion of Member DuBester) (criticizing the majority for failing to apply the deferential standard of review applied by federal courts for addressing essence exceptions to arbitration awards), *pet. for review granted, rev'd in part sub nom., Nat'l Weather Serv. Emp. Org v. FLRA*, 966 F.3d 875, 881-82 (D.C. Cir. 2020) (concluding that the Authority acted "contrary to law" by failing to apply "a similarly deferential standard of review" as applied by federal courts "in private-sector labor-management issues" for reviewing essence exceptions to arbitration awards).

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR
RELATIONS AUTHORITY
ATLANTA REGION

_____

U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF RESEARCH AND DEVELOPMENT
CENTER FOR ENVIRONMENTAL MEASURING
AND MODELING
GULF ECOSYSTEM MEASUREMENT AND
MODELING DIVISION
GULF BREEZE, FLORIDA
(Agency)

and

NATIONAL ASSOCIATION OF INDEPENDENT
LABOR, LOCAL 9
(Labor Organization/Petitioner)

_____

AT-RP-20-0013

_____

DECISION AND ORDER

I. Statement of the Case

On January 10, 2020, the National Association of Independent Labor, Local 9 ("the Union" or "the Petitioner") filed the petition in this matter pursuant to Section 7112 of the Federal Service Labor-Management Relations Statute ("the Statute"). The petition seeks to clarify the bargaining unit status of an employee of the Environmental Protection Agency ("EPA" or "the Agency"), Office of Research and Development ("ORD"), Center for Environmental Measuring and Modeling ("CEMM"), Gulf Ecosystem Measurement and Modeling Division ("GEMMD"),[1] located at Gulf Breeze, Florida.[2] This petition affects a single Title 42 Ecological Toxicologist (AS-0415) position.

The National Association of Independent Labor ("NAIL") is the certified representative for a bargaining unit of employees employed by the Agency. For the purposes of collective bargaining, NAIL has delegated authority to the Petitioner. The Petitioner has filed this petition with the approval and assistance of NAIL.[3]

The Agency asserts that the nature of the incumbent's Title 42 status renders the position ineligible for bargaining unit inclusion. Furthermore, the Agency asserts that the incumbent lacks a community of interest with other employees in the bargaining unit represented by NAIL. The Petitioner contends that nonsupervisory employees appointed under the provisions of Title 42 are eligible for bargaining unit inclusion, and that the incumbent's position should be included in the bargaining unit NAIL represents.

The Region investigated the facts surrounding this petition and received information and documentation from the parties. Based upon this investigation, I find that the Title 42 Ecological Toxicologist position is eligible for inclusion in a bargaining unit. Further, I find that the Title 42 Ecological Toxicologist position is included in the unit represented by NAIL. Accordingly, I will clarify that NAIL is the certified exclusive representative for nonsupervisory Title 42 Staff Scientists in its existing unit.[4]

II. Findings

Under 42 U.S.C. § 209(f)-(g) ("Title 42"), the EPA is authorized to employ up to fifty persons at any one time within its ORD. These provisions state:

> f) Special consultants
> In accordance with regulations, special consultants may be employed

[1] Prior to a September 2019 reorganization, GEMMD was known as the Gulf Ecology Division ("GED") and CEMM was known as the National Health and Environmental Effects Research Laboratory ("NHEERL"). In some documentation, including the position description for the position at issue, these components are referred to by their prior names. This decision uses the updated names, and citations to documents containing the prior names are corrected.

[2] While the Agency's ORD is located at Research Triangle Park, North Carolina, the position affected by this petition is physically located at the GEMMD in Gulf Breeze, Florida.

[3] To require NAIL to file a replacement petition in this circumstance would be to inject needless formality into this proceeding. *See U.S. Dep't of the Air Force, Travis Air Force Base, Cal.*, 64 FLRA 1, 5 (2009) (Authority found parent organization of exclusive representative had standing to file petition, particularly where exclusive representative agreed with and participated in the processing of the petition). And, in any event, under § 7111(b)(2) of the Statute, any person has standing to file a clarification petition such as this one. *Small Bus. Admin.*, 56 FLRA 926 (2000).

[4] The Regional Director has broad discretion to determine how to investigate a representation petition. 5 C.F.R. § 2422.30; *Dep't of Veterans Affairs*, 67 FLRA 266 (2014). Here, the investigating Authority Agent reviewed the incumbent's position description and performance plan and the Agency's Title 42 Operations Manual. The investigating Authority Agent also obtained a sworn affidavit from the incumbent employee. A copy of this sworn statement was provided to both parties, and both parties were given the opportunity to provide a response. I find that the evidence is sufficient to make a determination regarding the bargaining unit status of the position affected by this petition.

> to assist and advise in the operations of the Service. Such consultants may be appointed without regard to the civil-service laws.
>
> g) Designation for fellowships; duties; pay
> In accordance with regulations, individual scientists, other than commissioned officers of the Service, may be designated by the Surgeon General to receive fellowships, appointed for duty with the Service without regard to the civil-service laws, may hold their fellowships under conditions prescribed therein, and may be assigned for studies or investigations either in this country or abroad during the terms of their fellowships.

Title 42 is a direct hiring authority separate and distinct from Title 5. 42 U.S.C. § 209(h) also grants the Agency the authority to employ aliens as special consultants or fellows. While the incumbent is not an alien, the Agency's authority to employ an alien does distinguish the position from other positions in the bargaining unit. The Agency's Title 42 Operations Manual states:

> Title 42 authority provides the Agency with a flexible hiring mechanism for securing the services of experienced and talented scientists for renewable appointments where the nature of the work or the character of the individual's services render customary employing methods impracticable or less effective or where a scientist would be otherwise reluctant to leave his or her current position because of an inability to meet individual salary needs under other personnel systems. Scientists hired under the Title 42 authority work on the Agency's current, critical research needs.

The Agency's Assistant Administrator for Research and Development or a designee allocates Title 42 positions to be filled within ORD, establishes the procedures for evaluating applicants, establishes an appropriate range and level of compensation, and ultimately approves hiring actions and term renewals. ORD's CEMM division also maintains research laboratories in other locations nationwide, and CEMM employs Title 42 employees in at least three additional bargaining units.

NAIL represents a bargaining unit originally certified in Case No. AT-RP-05-0001 (March 15, 2005) ("the unit"). The certification was most recently amended in Case No. AT-RP-20-0008 (January 23, 2020), and is described as:

Included:	All professional and nonprofessional employees of the Center for Environmental Measurement & Modeling, Gulf Ecosystem Measurement & Modeling Division, Gulf Breeze, Florida, and all nonprofessional employees of the Office of Research and Development geographically located at Gulf Breeze, Florida.
Excluded:	Management officials; supervisors; U.S. Public Health Commission Corps members; temporary employees on appointments of 90 days or less; and employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6), and (7).

The Ecological Toxicologist position that is the subject of this position is the only known Title 42 position located at the Gulf Breeze Laboratory or within GEMMD. The incumbent works within the Biological Effects and Population Response Branch ("BEPRB"), which is one of the three branches of GEMMD located at the Gulf Breeze Laboratory. There are approximately 50-60 total employees at the Gulf Breeze Laboratory, approximately ten of whom work within the BEPRB. GEMMD is a division of CEMM, which is a component of ORD. The inclusion of nonprofessional employees of ORD who are located at Gulf Breeze refers to ORD employees who do not fall within the GEMMD chain-of-command, but are nevertheless located at Gulf Breeze.

There are four main categories of Title 42 employees. Categories A and B are specific to Fellow appointments made under 42 U.S.C. § 209(g), and categories C and D are specific to Special Consultant appointments made under 42 U.S.C. § 209(f). A Title 42 appointee's category is determined by the appointee's role, as well as the professional stature and the impact and recognition of the appointee's work in a field of expertise. The Title 42 Operations Manual lists specific definitions which apply to Title 42 appointees based on their category. These definitions are broader than the duties and objectives that are listed in an employee's position description. The definitions for each category

may apply to a wide range of otherwise unrelated research positions.

The Ecological Toxicologist position that is the subject of this petition is a Section 209(g) Fellow and is classified as a Category A Staff Scientist. The Title 42 Operations Manual provides the following definitions for Category A Staff Scientists:

> a. Role: The staff scientist serves as an independent researcher, team member or team leader.
>
> b. Supervision: The supervisor assigns broad research areas, and the staff scientist exercises initiative in developing innovative ways to accomplish the program objectives.
>
> c. Stature/Recognition/Impact: The staff scientist is recognized as a significant contributor to a professional field, as an expert in the field, and as a leader of a productive research team or as a leader in the conception and formulation of productive research ideas. The staff scientist takes a leadership role on important committees dealing with key technical matters. He or she has received prestigious awards for research accomplishments, has received invitations to address national and international professional organizations, and is frequently cited in the works of other senior researchers. He or she is regularly sought out for consultation on difficult problems in the field of expertise. Evidence of the staff scientist's stature, recognition, or impact may be found in his or her publication record; for example, he or she has authored multiple, key publications, including several in the most prestigious scientific journals, that detail improvements in existing theories or current technology or illuminate scientific phenomena considered critical to furthering an organization's mission.
>
> d. Salary range: The salary range is from the GS-13 step 1 to the GS-15 step 10, including applicable locality pay.

The Title 42 Operations Manual also lists mandatory critical elements by which Title 42 employees of each category must be evaluated. For Category A Staff Scientists, the mandatory critical elements are "leading change," "building coalitions," "results driven," and "scientific impact." The Operations Manual also lists the optional critical elements of "leading people" and "business acumen."

Candice Lavelle serves as the incumbent for the Title 42 Ecological Toxicologist position that is the subject of this petition. Dr. Lavelle received her Title 42 appointment in approximately July 2019. Before accepting the appointment, Dr. Lavelle had been serving as an R-Term Post-Doctoral Toxicologist since approximately November 2016. Before accepting the Title 42 appointment, Dr. Lavelle had been a Title 5 employee compensated according to the General Schedule, and had been included in the unit. Upon accepting her Title 42 appointment, Dr. Lavelle was notified that her position would no longer be included in the unit. Before Dr. Lavelle accepted the Title 42 appointment, there were no Title 42 employees at GEMMD – the position was created along with her appointment.

The position description for the Title 42 Ecological Toxicologist notes that the position is a five-year renewable term appointment. This distinguishes the position from the majority of positions in the unit, which are generally filled by permanent employees. According to the Title 42 Operations Manual, the decision to renew a term appointment is made by ORD and may be based on factors including changes in programmatic needs, changes in budget, or congressional actions.

The position description describes the incumbent as a "recognized expert in ecotoxicology and molecular biology" with expertise using complex research techniques in a "new and rapidly evolving field of research." The position requires a doctoral degree (Ph.D. or D.Sc.) with a background in the disciplines related to the position. The incumbent "will lead an innovative research team to understand the effects of chemical stressors on aquatic organisms and apply methods and approaches that produce data to strengthen ecological risk assessments." The incumbent is described as a "hands-on researcher capable of producing scientific publications, advancing the state-of-the-science, and developing new research programs."

The position description states that the incumbent "serves as an advisor to the BEPRB Chief and the [GEMMD] Director, as well as the broader [CEMM] and ORD on ecological sciences." The incumbent "works collaboratively with researchers within and outside the Agency," including participation in "various cross-

Agency workgroups" related to the Agency's mission of "protecting human health and the environment." The incumbent "uses his or her expertise to help the Agency identify and provide critical ecosystem research to support environmental decision-making at the state and local level."

The BEPRB Chief serves as Dr. Lavelle's first-line supervisor. The same BEPRB Chief also served as Dr. Lavelle's supervisor for the period during which Dr. Lavelle was a Title 5 employee. While the BEPRB Chief is Dr. Lavelle's supervisor, the position description states that the incumbent "independently plans and carries out assignments, resolves most conflicts, coordinates work with others as necessary, interprets policy and regulatory requirements, develops changes to plans and methodology, and recommends improvements to meet program objectives." Dr. Lavelle works with her supervisor to discuss her team's overall objectives and available resources, including the timeframes and scope of assignments and approaches that the team will take in conducting research. Dr. Lavelle independently plans and carries out the assignments according to her supervisor's instructions. This includes coordinating research activities with other team members, interpreting applicable policy and regulatory requirements, developing necessary changes to plans and methodology, and recommending improvements to meet ORD program objectives. Over the course of a research project, Dr. Lavelle keeps her supervisor informed of progress and potential concerns. She also advises her supervisor and other Agency leadership on arising matters related to ecological sciences.

Based on the category-specific requirements of the Title 42 program, Dr. Lavelle's broader career objectives have changed since she accepted the Title 42 appointment. In Dr. Lavelle's previous Title 5 position as a post-doctoral fellow, she performed research under the guidance of a mentor, a Research Ecologist and bargaining unit employee. The Agency asserts that this mentor was responsible for coordinating resources and facilitating Dr. Lavelle's research within the larger objectives of ORD. The Agency maintains that Dr. Lavelle's post-doctoral appointment served as a career-building experience, and not a leadership position. Now, according to the Title 42 Operations Manual, "leading change" and "building coalitions" are among the four critical elements by which Dr. Lavelle is evaluated. The Agency asserts that Dr. Lavelle is now expected to perform research independently and hold a leadership role within the research organization.

While Dr. Lavelle was serving as a post-doctoral fellow, management identified her to lead two research projects related to her field of study. Dr. Lavelle was not actually assigned a team-lead role on these projects until after her Title 42 appointment went into effect in approximately July 2019. Dr. Lavelle leads the same team of approximately ten researchers with whom she had previously worked. She shares these duties with a co-lead, who is a Title 5 employee and bargaining unit member. The co-lead is also the employee who had previously served as Dr. Lavelle's mentor. The team primarily studies the effects of chemical stressors on aquatic organisms, applying methods and approaches that produce data to strengthen ecological risk assessments. Within the team, Dr. Lavelle's co-lead conducts much of the field work, and Dr. Lavelle primarily works in a laboratory setting. Her laboratory duties include testing the effects that various substances have on organisms' proteins and DNA. While she occasionally collaborates with Agency personnel in other ORD subdivisions, she primarily works with other employees in the BEPRB. She has only rarely collaborated with individuals outside of the EPA. Ultimately, Dr. Lavelle is responsible for integrating her research with data from the other researchers on her team into a peer-reviewed journal article. The Agency maintains that these duties would not be expected of a post-doctoral Title 5 employee.

Dr. Lavelle does not supervise any employees. While Dr. Lavelle's critical elements do include "leading change" and "building coalitions," the Agency does not rate Dr. Lavelle based on "leading people," which is one of the two optional critical elements listed for Category A Staff Scientists. Additionally, Dr. Lavelle is subject to the same ORD review processes for publications that apply to all ORD scientists, regardless of appointment type or bargaining unit status.

Dr. Lavelle's duties also include assisting with the drafting of quality assurance requirements, including the preparation of recommended EPA Standard Operating Procedures and Quality Assurance Project Plans for review and approval by GEMMD management. She also performed these duties as her post-doctoral position, and these duties have not changed substantially since her Title 42 appointment. Dr. Lavelle's research is driven by the same Strategic Research Action Plans that applied when she was a Title 5 employee. She also assists in drafting these plans, just as she did before she accepted her Title 42 appointment.

The Title 42 Operations Manual states that unless otherwise specified, all other Agency policies apply to Title 42 employees, including:

1. Telework;
2. Patents and royalties;
3. Records management;
4. Preventing violence in the workplace;
5. Domestic violence, sexual assault, and stalking;

6. Employee counseling and assistance program;
7. Research misconduct;
8. Safety, health, and environmental management;
9. Occupational medical surveillance program;
10. Information technology and management;
11. Drug-free workplace plan;
12. Personal property;
13. Participation in professional societies and associations;
14. Contracting and procurement; and
15. Employment of relatives.

There is no indication that any of these policies, as they relate to Dr. Lavelle, have changed following her acceptance of the Title 42 appointment. She is still required to participate in the "Lean Management System" to track project progress, just as bargaining unit members must participate in this process. She uses the same Agency database for publications that she used as a Title 5 employee. She still works in the same office and same laboratory that she occupied before her appointment. She has access to the same conference rooms, cafeteria, break rooms, wellness center, and parking spaces. She uses the same phone, computer, software support, general laboratory supplies, procedures for traveling, and budget requests for intramural support. Her required training, including in the areas of Records Management, Information Security and Privacy Awareness, Working Effectively with Tribal Governments, Continuity of Operations, and FOIA Awareness, have all remained the same since her appointment. Dr. Lavelle's supervisor approves her Time and Attendance, including annual sick leave requests and approvals, just as she did before Dr. Lavelle accepted the Title 42 appointment. Dr. Lavelle is subject to the same facility sign-in procedures and the same electronic systems for leave processing and payroll as the other employees in the unit. Her attendance is still required at all-hands meetings and branch meetings, as before.

Dr. Lavelle has a standing agreement for telework on an episodic basis, and an approved "Flexiplace" arrangement under the parties' current Collective Bargaining Agreement ("CBA").[5] When needed, she requests teleworking from her supervisor, after describing the tasks that she plans to conduct while teleworking. This process remains unchanged from the procedures she used as a post-doctoral employee.

Dr. Lavelle's Human Resources actions are handled by a different Human Resources organization than the organization that performs actions for the other employees in the unit. The Agency's Human Resources Management Division at Research Triangle Park, North Carolina ("RTP") handles Human Resources matters for all GEMMD employees. Actions for Title 42 appointees are handled along with Senior Executive Service and Political appointees, and assigned to the Executive Resources subdivision within the Human Resources Management Division. Title 5 employees are serviced by the Shared Service Center, a different subdivision that is also located at RTP. Dr. Lavelle confirms that she occasionally seeks the assistance of Human Resources personnel within the Executive Resources subdivision.

The most significant distinctions between the Title 42 position and the Title 5 employees in the unit relate to performance evaluation and pay. The Agency is granted broad authority to establish the pay of Title 42 employees up to $275,000 per year. The pay limits that apply to Title 5 employees do not apply to Title 42 employees. For Category A Title 42 Fellows, pay is limited to the GS-15, step 10 level, but is otherwise set at the discretion of the Administrator or a designee. Title 42 employees are employed on a pay-for-performance system, under which pay is increased based solely on annual performance rather than Merit Promotion, career ladders, within-grade increases, or cost of living increases. If a Title 42 employee's performance falls below the effective (or equivalent) level, pay may be reduced by up to twenty percent without any performance improvement plan or other automatic opportunity for remediation. This differs significantly from the requirements that must be met before reducing the pay of a Title 5 employee. When Dr. Lavelle accepted her Title 42 appointment, her initial rate of compensation was identical to the level of a GS-13, step 1 employee in her locality.

The performance evaluation system for the Title 42 position more closely resembles that of members of the Senior Executive Service ("SES"). Each Title 42 employee prepares an annual self-assessment form detailing his or her performance accomplishments in terms of the critical elements and the performance metrics formulated along with the employee's supervisor at the beginning of the performance year. The employee provides the self-assessment in the form of a narrative, and the form is uploaded to the Agency's evaluation system for SES members. The employee's supervisor provides written comments for each critical element,

[5] The parties' current CBA has expired and has been renewed automatically on a year-to-year basis. The parties are currently in the process of negotiating a new CBA. As NAIL had delegated bargaining authority to the Petitioner, the principal signatories for the expired CBA were the Petitioner's Local President and the GEMMD (then GED) Director. Current negotiations are taking place between the Petitioner's Local President and the Agency's Labor Relations office at Research Triangle Park, North Carolina.

along with a rating of Unsatisfactory, Needs Improvement, Effective, Commendable, or Outstanding. The performance evaluation is ultimately approved by the ORD Assistant Administrator or a designee. When Dr. Lavelle received her Title 42 appointment, she and her supervisor shaped her performance objectives similarly to those under which she had been evaluated as a Title 5 employee.

Title 42 employees are also subject to additional financial disclosure requirements. Title 42 employees must file financial disclosures annually due to an agreement existing between ORD and the Agency's Office of General Counsel. Title 5 employees are only required to file financial disclosures on a case-by-case basis.

Dr. Lavelle also serves on division committees, including the Awards Boards that determine peer awards. As a post-doctoral fellow, Dr. Lavelle also participated in these Awards Boards. The Agency maintains that service on committees is discouraged for term-employees. Dr. Lavelle does not formulate, determine, or influence the Agency's broader policies at the local level. She has no duties related to the collective bargaining relationship between the Agency and the Petitioner. She is not involved in any personnel work.

III. Analysis and Conclusions

A. The Title 42 Ecological Toxicologist Position is Eligible for Representation Under the Statute.

The Statute provides that employees of federal agencies may be included in bargaining units. Section 7103(a)(2) of the Statute defines an "employee" as an individual (A) employed in an agency; or (B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority. Section 7103 also notes that the definition of "employee" does not include "(i) an alien or noncitizen of the United States who occupies a position outside the United States; (ii) a member of the uniformed services; (iii) a supervisor or a management official; (iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the Agency for International Development, the Department of Agriculture, or the Department of Commerce; or (v) any person who participates in a strike in violation of section 7311 of this title." Dr. Lavelle's Title 42 appointment does not exclude her from the statutory definition of employee. Even if an alien accepted an identical appointment, as is allowed under Title 42 authority, the alien would still fall under the Statute's definition of employee so long as the position was occupied within the United States. *See U.S. Dep't of the Treasury, Internal Revenue Serv., Detroit Dist., Detroit, Mich.*, 38 FLRA 52 (1990) (registered aliens working within the United States are employees under section 7103(a)(2)).

Section 7112(b) of the Statute lists the statutory bases for excluding an employee from a bargaining unit. A unit is not appropriate if it includes (1) any management official or supervisor; (2) a confidential employee; (3) an employee engaged in personnel work in other than a purely clerical capacity; (4) an employee engaged in administering the provisions of the Statute; (5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit; (6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or (7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an 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.

Dr. Lavelle does not perform any management or supervisory functions. She has no confidential relationship with her supervisor or any other supervisor related to labor relations. She engages in no personnel work. Her duties are not related to the administration of the Statute. She is not engaged in any intelligence counterintelligence, investigative, or security work related to national security. She is not engaged in any investigative or audit functions. The Agency raises no argument that Dr. Lavelle's position should be excluded from the unit based on any of the statutory criteria. Section 7112(b)(5) is not at issue, as NAIL's certification includes both professional and nonprofessional employees.

Instead, the Agency asserts that the Title 42 position is ineligible for bargaining unit inclusion based on the language of the Title 42 statute. Both the Special Consultant and Fellowship provisions of the Title 42 statute state that Title 42 appointments are awarded "without regard to the civil-service laws." Title 40, Sections 18.5-18.7 of the Code of Federal Regulations grant the Agency broad authority to advertise and select candidates without regard to Title 5 regulations. However, 40 C.F.R. § 18.8 states that "[i]n addition to other benefits provided herein, Environmental Protection Research fellows shall be entitled to benefits as provided by law or regulation for other civilian employees of the Agency." 40 C.F.R. § 18.11 states that "[a]ll individuals appointed to an Environmental Protection Research

Fellowship or as a Special Research Consultant shall be subject to the same current standards and disclosure regulations and requirements as Title 5 appointees."

The Agency asserts that the provisions of Title 42 and 40 C.F.R. exclude Title 42 appointees from the protections of the Statute. The Agency contrasts the language of Title 42 with that of 38 U.S.C. § 7422 ("Title 38"), which details special pay and appointment provisions related to the employment of medical or health care providers at the Department of Veterans Affairs or National Institutes of Health. Title 38, Section 7422(a) explicitly states that the authority of agencies employing Title 38 employees "is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with chapter 71 of title 5." Title 42 contains no such provision.

The Authority has not reached the question of whether agencies' authority to employ Title 42 employees is subject to the collective bargaining requirements provided by the Statute. However, Authority decisions related to the collective bargaining rights of Title 38 employees are instructive. The Authority has held that, despite the limitations placed on the bargaining rights of Title 38 employees, the employees are eligible for inclusion in a bargaining unit. *See, e.g., U.S. Dep't of Veterans Affairs, Captain James A. Lovell Fed. Health Care Ctr., N. Chi., Ill.*, 66 FLRA 870, 872 (2012).

Here, the provisions of Title 42 state that Special Consultants and Fellows may be appointed without regard to the civil service laws. The language of Title 42, however, does not state that appointees are without civil service protections after their appointments go into effect, with the exception of the evaluation and pay reduction authority reserved to the Agency. A Federal District Court has held that the "appointed without regard to the civil service laws" provision refers to the procedures used to appoint a Title 42 employee, and that once hired, the appointee enjoys all the protections applicable to other employees concerning personnel disputes, including the availability of administrative and judicial review. *Afshari v. Leavitt*, Civil Action No. 1:05–CV–127, 2006 WL 3030323 (N.D.W.V. Oct. 23, 2006). In *Afshari*, the court considered the termination of two Title 42 fellows who later alleged that their terminations violated their rights under the Civil Rights Act of 1964 (Title VII). The agency argued that the Civil Service Reform Act of 1978 ("CSRA"), which created the Authority, the Merit Systems Protection Board ("MSPB"), and the Office of Personnel Management ("OPM") provided the exclusive remedy for the plaintiffs' claims. The court held that "[a] careful reading of the statutory language . . . demonstrates clearly that, although it was the intention of Congress to provide federal agencies with the flexibility to hire Service Fellows without regard to the normal hiring formalities of the Civil Service, Congress did not intend to disregard the CSRA in its entirety with respect to Civil Service Fellows." 2006 WL 3030323 slip op. at *4. As a result, the court held that the Title 42 employees were "civil service appointees subject to the provisions of the CSRA." *Id.* at *6.

The court in *Afshari* examined an earlier decision from the Federal Circuit, *King v. Briggs*, 83 F.3d 1384 (Fed. Cir. 1996). In *King*, the Federal Circuit reviewed an MSPB case that arose concerning the employment of technical and professional employees of the National Council. 29 U.S.C. § 783(a)(1) stated that the National Council "may appoint, without regard to the provisions of Title 5 governing appointments in the competitive service, or the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, an Executive Director to assist the National Council to carry out its duties." The MSPB held that the plaintiff was nevertheless an "employee" under the definitions of the CSRA, 5 U.S.C. § 7511(a)(1)(C)(ii), and thus was subject to MSPB jurisdiction. The Federal Circuit affirmed the MSPB's decision after determining that the text of Title 29 "makes plain that Congress gave the Council the option of disregarding only certain parts of Title 5." *83 F.3d* at 1388. The court held that while Congress had specifically excluded the appointees from certain civil service protections, "notably absent" from the listed exclusions were the provisions which afford employees the right to appeal adverse actions to the MSPB and to seek judicial review of the MSPB's decision. 83 F.3d at 1389.[6]

More recently, the Federal Circuit ruled in *Lal v. MSPB* that MSPB appeal rights apply to Title 42 employees. 821 F.3d 1376 (2016). In *Lal*, the court noted that "[t]he plain language of the [Title 42] statute only speaks in terms of appointment authority, and does not discuss the removal of the employee." 821 F.3d at 1378. In ruling that MSPB protection did extend to Title 42 employees, the court considered the history of Title 42, dating to its original enactment in 1944, along with the CSRA and Civil Service Due Process Amendments of 1990:

> As the civil service-law matured, section 209(f) remained substantively unchanged. The Civil Service Reform Act of 1978 (CSRA) "comprehensively overhauled the civil service system," creating "a new

[6] Congress later amended Title 29 to exempt National Council appointees from MSPB protections.

framework for evaluating adverse personnel actions against 'employees'" within the newly formed Merit Systems Protection Board. *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768 (1985). The CSRA "prescribes in great detail the protections and remedies applicable to" actions taken against certain federal employees, "including the availability of administrative and judicial review." *United States v. Fausto*, 484 U.S. 439, (1988). As is relevant here, the CSRA extended certain benefits, including the right to administrative review by the [MSPB] and appeal rights to this court, to individuals in the competitive service and "certain veterans and their close relatives – so-called 'preference eligibles,'" in the excepted service. *Id.* at 441 n. 1. But the CSRA did not extend these benefits to non-preference eligible members of the excepted service.

Recognizing a gap in administrative and judicial appeal rights for non-preference eligible members of the excepted service, Congress enacted the Civil Service Due Process Amendments of 1990 (the Due Process Amendments), Pub.L. No. 101–376, 104 Stat. 461 (Aug. 17, 1990) (codified in relevant part at 5 U.S.C. § 7511). *See Bennett v. MSPB*, 635 F.3d 1215, 1220 (2011) (recognizing that Congress enacted the Due Process Amendments in response to the Supreme Court's decision in *Fausto*, where the Court held that the CSRA precluded judicial review for non-preference eligible members of the excepted service); *see also* H.R. Rep No. 101–328, at 1 (1989), *reprinted in* 1990 U.S.C.C.A.C. 695 ("The key difference between the protections available to competitive service employees and preference eligibles in the excepted service, on the one hand, and excepted service employees who are not preference eligibles, on the other, is the right to appeal an adverse action to the Merit Systems Protection Board for independent review."). The Due Process Amendments broadened the CSRA's definition of covered employees to include non-preference eligible individuals in the excepted service "who [are] not serving a probationary or trial period under an initial appointment pending conversion to the competitive service," or "who [have] completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less . . . " 5 U.S.C. § 7511(a)(1)(C).

The Due Process Amendments also include a list of categories of individuals who are excluded from Title 5 protection, although they would ordinarily fall within the broad definition of "employee" set forth in § 7511(a)(1). *See* 5 U.S.C. § 7511(b)(1)-(10). In addition to excluding political appointees and confidential or policy making positions, the Due Process Amendments also list seven additional categories of individuals that are excluded from § 7511's reach. Many of these categories were either expressly excluded by existing statute or regulation, or already subject to an appeal regime within a particular agency. For example, § 7511(b) excludes employees of the Central Intelligence Agency, the General Accounting Office, and the Veterans Health Services – all of whom were already excluded from the Board's appeals process. *See* H.R. Rep. No. 101–328, at 5, 6-7 (1989) ("The National Security Act of 1946 provides the Director of the Central Intelligence Agency (CIA) with plenary authority to deal with personnel of the CIA. The General Accounting Office Personnel Act of 1980 provides comparable procedural rights for GAO employees through the GAO personnel Appeals Board. The employees at the Veterans Health Services and Research Administration are subject to a special peer review system.").

821 F.3d at 1378-80. "With that context in mind," the court in *Lal* held that the "without regard to the civil service laws" provision in Title 42 "merely ensures that the Secretary has the authority to hire individuals into the excepted service." *Id.* at 1380. Since the Title 42 appointee in *Lal* did not fall within any of the enumerated excluded categories to whom MSPB rights do not apply, the court "decline[d] to find an additional implicit exemption to [the CSRA] definition of 'employee' for

special consultants." *Id.* at 1381. Moreover, the court found "no conflict between § 209(f)'s authority to hire employees into the excepted service and the Due Process Amendments' extension of appeal rights to non-preference eligible members of the excepted service. *Id.* The court held that "because § 209(f) does not explicitly exempt personnel from the definition of "employee" in [the CSRA] or include specific reference to removal authority, the Due Process Amendments extended jurisdiction over [the appointee's] claims."

The same reasoning used by courts in extending MSPB and other CSRA protections to Title 42 employees applies here. Title 42 allows the Agency to appoint Special Consultants and Fellows without regard to the civil service laws. As enacted by Congress, however, the law does not exclude appointees from the provisions of the CSRA as they relate to matters other than appointment. Extending the Title 42 provisions to exclude Title 42 appointees from the Statute would expand the authority granted to agencies by Title 42 beyond the language enacted by Congress. As such, nothing in the Statute or in the Title 42 provisions supports a finding that Title 42 employees are ineligible for inclusion in a unit.

While the Agency does not specifically allege that Dr. Lavelle is employed in a supervisory role, the evidence supports a finding that she serves as a "team lead" for her group of researchers. In cases where the supervisory status of a team lead must be determined, the Authority considers "whether these team leaders consistently exercise independent judgment within the meaning of section 7103(a)(10) of the Statute when assigning work to, and reviewing work of, other team members." *Dep't of the Army, Army Aviation Syst. Cmd. & Army Troop Support Cmd., St. Louis, Mo.*, 36 FLRA 587, 592 (1990). The Authority has found that an employee who works as merely a more senior "lead" among less experienced employees is not a supervisor within the meaning of Section 7103(a)(10) of the Statute, because the employee's responsibilities were routine in nature and did not involve the consistent exercise of independent judgment. *U.S. Army Commc'ns & Elecs. Materiel Readiness Cmd., Ft. Monmouth, N.J.*, 9 FLRA 101 (1982). Additionally, the Authority has found that employees who review their team members' work product from a technical standpoint are not supervisors, so long as the "review function" is routine and does not require the exercise of independent judgment. *U.S. Dep't of the Treasury, Office of Chief Counsel*, 32 FLRA 1255 (1988). Here, Dr. Lavelle is not responsible for assigning work or evaluating the work of her fellow team members. While her duties do require the "consistent exercise of discretion and judgment in its performance," as described by the definition of "professional employee" in Section 7103(a)(15), she does not have the authority to "hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action," under the definition of supervisor in Section 7103(a)(10). While Dr. Lavelle advises her own supervisor in formulating plans to fulfil the Agency's research objectives, she does not meet the Statute's criteria for exclusion based on supervisory status.

The Authority is wary of including a position in a unit when inclusion would create an apparent or actual conflict of interest. *See, e.g., Dep't of the Navy, Automatic Data Processing Selection Office*, 7 FLRA 172, 175 (1981). Here, however, no conflict of interest is created by including Dr. Lavelle's position in the unit. Dr. Lavelle performs duties which closely resemble those performed by the bargaining unit employees alongside whom she works. Dr. Lavelle is not in a position to influence management's bargaining stances or relationship with the Petitioner or NAIL. She is not privy to any confidential management information related to bargaining. She meets the statutory definition of "employee" and does not fall within any of the Statute's categories for exclusion. Most importantly, while Congress provided the Agency with the authority to appoint Title 42 employees without regard to the civil service laws, Congress was silent regarding the civil service protections enjoyed by Title 42 employees after they had been appointed. I view no evidence that Congress intended to exclude Title 42 employees from the collective bargaining rights provided by the Statute. As such, I find that the Title 42 Ecological Toxicologist position is eligible for inclusion in a bargaining unit.

B. The Title 42 Ecological Toxicologist Position is Included in the Unit Represented by the Petitioner.

Section 7112(a) of the Statute requires the Authority to determine whether a petitioned-for or existing unit is appropriate for exclusive recognition. To determine whether a unit is appropriate, the Authority examines whether the unit would (1) ensure a clear and identifiable community of interest among employees in the unit, (2) promote effective dealings with the agency, and (3) promote efficiency of the operations of the agency. *See, e.g., U.S. Dep't of the Navy, Fleet & Indus. Supply Ctr., Norfolk, Va.*, 52 FLRA 950, 959-62 (1997) ("*FISC*"). The Authority applies these criteria on a case-by-case basis. *See U.S. Dep't of the Army, Military Traffic Mgmt. Cmd., Alexandria, Va.*, 60 FLRA 390, 394 (2004). This determination often requires the balancing of factors weighing both in favor and against a finding of an appropriate unit. *See, e.g., U.S. Dep't of Commerce, U.S. Census Bur.*, 64 FLRA 399, 402-03 (2010) (*Census Bureau*).

The present case differs from the fact patterns that are generally considered by the Authority. The majority of petitions reviewed by the Authority relate to the consolidation of two or more units which have been found to be appropriate. Here, the petition relates to only one position. The Petitioner asserts that the position is appropriate for inclusion in the unit and that the position falls within the "included" provision in NAIL's existing certification. The Petitioner is unaware of any other Title 42 Ecological Toxicologists, or any Title 42 employees at all, who have been excluded from the unit since NAIL has held its certification. Only upon Dr. Lavelle's acceptance of the Title 42 appointment did the Petitioner learn that the Agency considered Title 42 employees to fall outside the positions included in NAIL's certification.

As discussed above, the Agency argues primarily that the Title 42 position is not included in NAIL's unit because the position is ineligible for representation based on the circumstances specific to the Title 42 appointment. If the Title 42 position is eligible for inclusion in a bargaining unit, the Agency argues in the alternative that the position nevertheless lacks a community of interest with the employees in the bargaining unit. As there are no other Title 42 employees at GEMMD, this would either leave the Title 42 position alone in a bargaining unit of its own, or with the option of forming a bargaining unit with the other Title 42 employees scattered nationwide. The former of these options would be inappropriate, while the latter would fail to promote effective dealings with management, due to the different Agency components and laboratories who employ Title 42 appointees and the various unions representing units at those laboratories.

Based on the wording of NAIL's certification, there is no apparent basis for excluding a Title 42 employee based on the appropriateness of the unit. NAIL is the certified representative for "all professional and nonprofessional employees" of the GEMMD. Excluded personnel include only "[m]anagement officials; supervisors; U.S. Public Health Commission Corps members; temporary employees on appointments of 90 days or less; and employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6), and (7)." The Title 42 position does not fall under any of the excluded categories. As discussed above, Dr. Lavelle falls within the Statute's definition of "employee." Under on a plain reading of NAIL's certification, the position appears to be included in the unit. Still, based on the parties' competing arguments, analysis of this case under the Authority's "appropriate unit" framework is suitable.

In determining whether employees share a clear and identifiable community of interest, the Authority examines factors including geographic proximity, unique conditions of employment, distinct local concerns, degree of interchange between other organizational components, and functional or operational separation. *See FISC*, 52 FLRA at 961. Additionally, the Authority considers whether the employees in a proposed unit are part of the same organizational component of the agency, support the same mission, are subject to the same chain of command, have similar or related duties, job titles and work assignments, are subject to the same general working conditions, and are governed by the same personnel office. *See id*. at 960-61.

Here, the majority of factors weigh toward a determination that the Title 42 position shares a clear and identifiable community of interest with the other members of the unit. The unit consists of all professional and nonprofessional employees of the GEMMD, as well as other nonprofessional ORD employees located at the Gulf Breeze Laboratory. The Title 42 Ecological Toxicologist position is located at the same laboratory as all, or nearly all, of the other employees in the unit. The majority of the incumbent's duties are performed in close relationship to other employees in the unit. While the Title 42 appointment gives rise to more leadership expectations, Dr. Lavelle's research duties and work assignments are quite similar to those of the bargaining unit employees with whom she works. Employees may perform separate duties and continue to share a community of interest. Under Authority precedent, to establish a shared community of interest, employees in a proposed unit need only perform duties that are "similar[.]" *U.S. Dep't of the Air Force, Air Force Material Cmd., Wright-Patterson Air Force Base, Ohio*, 55 FLRA 359, 363 (1999) (*Wright-Patterson*).

The incumbent is subject to a chain-of-command that begins at the same laboratory as the bargaining-unit-eligible employees. Many of these same employees are supervised by the incumbent's supervisor and, again, are included in the unit. Dr. Lavelle's degree of collaboration with other ORD components is no different than it was when she served in a bargaining unit position. While Dr. Lavelle is serviced by a distinct Human Resources component, both the Executive Resources subdivision servicing political, SES, and Title 42 employees and the Shared Service Center servicing other bargaining unit members are located at RTP.

The Agency notes that the Title 42 position is a term appointment, renewable only at the discretion of ORD and in consideration of programmatic needs, changes in budget, or congressional actions. A unit including temporary employees is appropriate if the temporary employees have a reasonable expectation of continued employment and the appropriate unit criteria in § 7112(a) of the Statute are otherwise met. *See U.S. Dep't of the Air Force, Lackland Air Force Base, San Antonio, Tex.*, 59 FLRA 739, 741 (2004) "Even where

temporary employees are appointed for a specific term, they may have a reasonable expectation of continued employment beyond that term." *U.S. Dep't of Def., Def. Commissary Agency*, 59 FLRA 990, 992 (2004). Here, the Title 42 position is not among the positions specifically excluded by the unit description. The unit description only specifically excludes temporary employees on appointments of 90 days or less. Dr. Lavelle is on a five-year appointment and maintains a reasonable expectation of employment through at least July 2024. Dr. Lavelle's term status does not prevent her from sharing a community of interest with her permanent coworkers.

In assessing whether a bargaining unit promotes effective dealings with the agency, the Authority examines such factors as the past collective bargaining experience of the parties; the locus and scope of authority of the responsible personnel office administering personnel policies covering employees in the proposed unit; the limitations, if any, on the negotiation of matters of critical concern to the employees in the proposed unit; and the level at which labor relations is set by the agency. *See FISC*, 52 FLRA at 961.

Here, the investigation supports a finding that inclusion of the Title 42 position in the unit promotes effective dealings. The parties' expired CBA was negotiated at the local level, and its principal signatories were the Petitioner's Local President and the GEMMD (then referred to as the GED) Director. With the exception of the special provisions related to pay and performance evaluation, there is no indication that inclusion of the Title 42 position would create any special bargaining consideration. *See Dep't of the Navy, U.S. Marine Corps*, 8 FLRA 15, 23 (1982) (*Marine Corps*) (proposed unit promoted effective dealings even though labor and personnel activities occurred at local level because national level retained ultimate authority). Even if inclusion of the Title 42 position in the unit requires that the Agency reassign Human Resources matters related to the position to the Shared Service Center, this would not weigh determinatively towards a finding that the unit lacks a community of interest. *See Census Bureau*, 64 FLRA at 403 ("the creation of a new labor relations structure is only one of the factors the Authority considers in assessing effective dealings").

The Agency asserts that there are articles in the parties' CBA which could potentially conflict with the Agency's policies toward Title 42 employees. Specifically, the Agency cites the telework provisions of the parties' CBA. Dr. Lavelle's current episodic telework arrangement has not changed since she accepted her Title 42 appointment. Given the statement in the Title 42 Operations Manual that unless otherwise specified, all Agency policies will apply to Title 42 employees as they apply to other employees, there is no indication that any future CBA provision related to telework would create conflicts related to the telework arrangements for the position.

The Agency also alleges that provisions in the parties' CBA may interfere with the Agency's policies regarding a drug free workplace. The Title 42 Operations Manual does list criteria for drug testing based on special considerations, such as positions requiring secret security clearances or positions requiring the issuance of a firearm, but the Ecological Toxicology position does not appear to meet any of these criteria. As a result, it appears that the Agency's policies related to a drug free workplace apply to Dr. Lavelle no differently than they apply to other employees in the unit. Given that the Title 42 Operations Manual states that policies related to a drug free workplace apply no differently to Title 42 employees, there is no indication that any future CBA provision related to this matter would serve as an obstacle to bargaining.

Compensation under a pay system that differs from the system used to compensate other employees in the unit is a factor which weighs toward a finding that a position is not appropriate for inclusion in the unit. *U.S. Dep't of the Interior, Nat'l Park Serv., Wash., D.C.*, 55 FLRA 311, 314 (denying union's petition for review after RD found that a petitioned-for unit was not appropriate, when "petitioned-for employees share separate and distinct community of employment interests from other Park employees, and points out that the petitioned-for employees are paid under a different pay scale than other employees, receive different overtime and retirement benefits, and 'share employment interests in their specialized job risks of injury or death.'"). 40 C.F.R. § 18.8 states that the pay for Title 42 fellows is set at the discretion of the Administrator. While the statutory pay limits that apply to GS employees do not apply to Title 42 employees, the Agency does limit the pay of Category A staff scientists to the GS-15 step 10 level.

But different pay systems do not alone render a bargaining unit inappropriate. *See U.S. Dep't of the Air Force, Travis Air Force Base, Cal.*, 64 FLRA 1, 2 (2009) (denying agency's petition for review of RD's decision consolidating five units) ("*Travis*"). In *Travis*, the Authority upheld the RD's decision, in which the RD rejected the agency's argument that the inclusion of a Non-Appropriated Funds unit with the union's existing unit of GS employees was inappropriate because the employees are subject to different pay and personnel systems. *Id.* The Authority upheld the RD's determination that the employees form an appropriate unit, because they "(1) receive personnel and payroll services from the same sources as the employees of the other units; (2) are subject to the same chain of

command, overall supervision, base-wide policies, and general working conditions; and (3) interact daily with the other employees through their duties controlling access to the installation." *Id.* The RD also noted that the petitioned-for employees "are part of the same overall organization, work side-by-side with GS employees, and interact with employees from the other units." *Id.* Here, the pay for Category A Staff Scientists is set to range from the GS-13 step 1 to the GS-15 step 10, including applicable locality pay. Given the close relationship between the rates of pay between Title 42 and GS employees, including the Title 42 position in the unit would promote effective dealings with the Agency.

Differing methods of evaluating an employee's performance, and differing consequences for an unsatisfactory evaluation, also weigh toward a finding that an employee is not appropriate for inclusion in a unit. *See Dep't of the Treasury, Internal Revenue Serv.*, 56 FLRA 486, 487 (2000) (upholding RD's dismissal of a consolidation petition because of different requirements for grade increases, different criteria for performance awards, differences in telework arrangements, and other factors). However, Authority precedent holds that a unit is not inappropriate merely because the unit includes employees with different congressionally-mandated bargaining rights. *See, e.g., Div. of Military & Naval Affairs, N.Y. Nat'l Guard, Latham, N.Y.*, 56 FLRA 139, 144 (2000) (bargaining unit containing both Title 32 and Title 5 employees found appropriate). While Dr. Lavelle may have less ability to contest an unsatisfactory rating and pay reduction, her inclusion in the unit would not make the unit inappropriate.

When employees are organizationally and operationally integrated, the fact that some of the employees have specialized functions does not prevent a finding of community of interest. *See U.S. Dep't of Homeland Sec., Bur. of Customs & Border Prot.*, 61 FLRA 485, 496 (2006). Again, however, differing standards for imposing adverse actions do not alone render a unit inappropriate. The Authority has held that separating Title 38 employees from a unit of similar General Schedule professionals is not appropriate when the two classes of employees work under generally similar working conditions, even if the two groups are compensated on different scales and subject to different adverse action provisions. *Providence Veterans Admin. Med. Ctr., Davis Park, Providence, R.I.*, 11 FLRA 195 (1983). *See also Letterkenny Army Depot & Def. Logistics Agency, Def. Distribution Reg. E.*, 47 FLRA 969, 972 (1993) (factors which employees did not have in common, such as RIF competitive area, do not undermine the RD's determination that a community of interest exists). Similarly, here, while the Agency maintains a different system for evaluating Dr. Lavelle's performance compared to other employees in the unit, Dr. Lavelle's supervisor reviews her performance evaluation along with the performance evaluations of the bargaining unit employees under her supervision. The use of a different form in Dr. Lavelle's performance evaluation does not prevent the proposed unit from being appropriate.

To evaluate the effect that inclusion in the unit would have on the efficiency of agency operations, the Authority considers "the degree to which the unit structure bears a rational relationship to the operational and organizational structure of the agency." *Census Bureau*, 64 FLRA at 404. In assessing this criterion, the Authority examines the effect of the proposed unit on operations "in terms of cost, productivity, and use of resources." *Id.* Additionally, the Authority has held that "the purpose of [Section] 7112(d) [of the Statute] is to facilitate consolidation, on the ground that reducing unit fragmentation promotes an effective bargaining unit structure." *Wright-Patterson*, 55 FLRA at 364.

Here, in addition to the factors supporting a finding of the promotion of effective dealings, the fact that Dr. Lavelle's chain-of-command is identical to that of employees included in the bargaining unit weighs towards a finding that inclusion in the unit will have a positive effect on agency operations. Dr. Lavelle's inclusion in the unit would not increase the Agency's costs, productivity, or use of resources. In fact, finding that the position is in a bargaining unit other than the unit located at her laboratory would be more likely to increase the costs associated with collective bargaining. Including the Title 42 position would maintain a unit which bears a "rational relationship to the operational and organizational structure of the Agency." *Census Bureau*, 64 FLRA at 404. *See also, U.S. Dep't of the Interior, Nat'l Park Serv., Ne. Reg.*, 69 FLRA 89, 97 (2015) (finding a unit appropriate when it consisted exclusively of employees in the agency's defined geographic region and did not require severance of any employees from existing units).

The unit for which NAIL is the certified representative includes all eligible employees of the GEMMD. As the Title 42 Ecological Toxicologist is an employee under the definitions of the Statute, and is not otherwise removed from the collective bargaining process by the language of Title 42, I find that the position is included in the certification held by NAIL. Furthermore, I find that including in the unit Title 42 Staff Scientists ensures a clear and identifiable community of interest among employees in the unit, promotes effective dealings with the Agency, and promotes efficiency of the Agency's operations. In conclusion, I find that the Title 42 Ecological Toxicologist (AS-0415) position is eligible for inclusion in a bargaining unit, and that Title 42 Staff Scientists who are not otherwise ineligible for representation are included in the unit.

IV. Order

IT IS ORDERED that the Certification of Unit issued on March 15, 2005 (AT-RP-05-0001), most recently amended on January 23, 2020 (AT-RP-20-0008) be clarified to state:

Included:	All professional and nonprofessional employees, including all Title 42 Staff Scientists who are not otherwise excluded, of the Center for Environmental Measurement & Modeling, Gulf Ecosystem Measurement & Modeling Division, Gulf Breeze, Florida, and all nonprofessional employees of the Office of Research and Development geographically located at Gulf Breeze, Florida.
Excluded:	Management officials; supervisors; U.S. Public Health Commission Corps members; temporary employees on appointments of 90 days or less; and employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6), and (7).

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 file an application for review with the Authority within sixty days of this Decision. The application for review must be filed with the Authority by **June 23, 2020**, 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 parties are encouraged to file an application for review electronically through the Authority's website, www.flra.gov. [7]

Dated: April 24, 2020
Richard S. Jones
Regional Director, Atlanta Region

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