

70 FLRA No. 96

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12, AFL-CIO
(Union/Petitioner)

WA-RP-16-0027

DECISION AND ORDER
ON REVIEW

April 12, 2018

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

As relevant here, the Union petitioned Federal Labor Relations Authority (FLRA) Regional Director Jessica Bartlett (the RD) to clarify the bargaining-unit status of two employees. The RD found that the employees are not confidential employees under § 7103(a)(13) of the Federal Service Labor-Management Relations Statute (the Statute).¹ Accordingly, she concluded that the employees should be included in the bargaining unit that the Union represents. In a December 15, 2017 order, the Authority granted review and deferred action on the merits.

The main question before us is whether the RD failed to apply established law by finding that the employees are not confidential employees. Because the RD's decision is inconsistent with Authority precedent, the answer is yes. Therefore, we direct the RD to clarify the bargaining unit to exclude the employees.

II. Background and RD's Decision

As relevant here, the Union filed a petition seeking to clarify the bargaining-unit status of two employees: a "Program and Administrative Support

Specialist" (support specialist) and a "Management and Program Analyst" (program analyst).²

The RD noted that the support specialist works in the Agency's Office of the Secretary, Office of Public Affairs and that her duties include, among other things, ensuring that federal contracts are executed, that invoices related to those contracts are paid, and that contractors perform their duties.

With respect to the program analyst, the RD observed that she works in the Agency's Office of the Solicitor, Division of Employment and Training Legal Services (the division). The RD stated that the program analyst's primary duties include acting as the division's human-resources liaison, opening and distributing all incoming mail, and proofreading, formatting, and structuring outgoing correspondence. The RD also noted that the program analyst has access to a staffing report that contains information related to promotions, transfers, details, and other personnel actions.

Before the RD, the Agency claimed, as relevant here, that the support specialist and the program analyst should be excluded from the bargaining unit because they are confidential employees under § 7103(a)(13) of the Statute. The RD concluded that the employees are not confidential employees because the "record did not demonstrate" that either employee (1) "serves in a confidential capacity to an individual who is significantly involved in labor-management relations" or (2) "in the normal course of their job duties, obtains advance information on management's position on labor[-]relations matters; attends internal management meetings where labor relations are discussed or overhears such discussions; or prepares or has access to internal management materials on labor-relations matters."³ Consequently, the RD held that the employees should be included in the bargaining unit.

On May 22, 2017, the Agency filed an application for review (application) of the RD's decision. As noted above, in a December 15, 2017 order, the Authority granted review and deferred action on the merits.

III. Preliminary Matter: We deny the Union's request to withdraw its petition.

In its December 15, 2017 order, the Authority stated that, upon "preliminary review of the record," it had concluded that "the Agency's application raise[d] issues that warrant[ed] further review."⁴ On January 4,

² RD's Decision at 1.

³ *Id.* at 6.

⁴ Order at 1-2.

¹ 5 U.S.C. § 7103(a)(13).

2018, the Union submitted a request to withdraw its petition.⁵ Then, on January 11, 2018, the Union filed a “[n]otice of [w]ithdrawal,” in which it asserts that it has withdrawn its petition.⁶ As nothing in the Authority’s Regulations permits the Union to withdraw its petition at this late stage of the proceeding, the Authority will exercise its discretion to decide whether to approve the Union’s request.

In the unfair-labor-practice (ULP) context, a charging party may not unilaterally withdraw its charge without FLRA approval.⁷ And, once the FLRA’s General Counsel has issued a complaint in a ULP case, certain settlement agreements are “subject to approval by the Authority.”⁸ While the ULP process differs from the representation process, it demonstrates that once a proceeding has reached a certain stage, the FLRA has institutional interests in resolving the dispute.

Here, the FLRA has spent considerable time and resources attempting to resolve the parties’ dispute. The Union filed its petition nearly two years ago, on April 27, 2016.⁹ In that time, the FLRA’s Washington Regional Office, including the RD, led an investigation, held a hearing, assessed evidence, conducted research, and issued a decision on the merits of the parties’ dispute. More recently, the Authority processed the Agency’s application, reviewed the legal and factual issues presented on appeal, and notified the parties that the application raised legal issues that warranted further review. The Union does not provide any reason why now, after all this time, it seeks to withdraw its petition. And, after nearly two years, it would be inappropriate to allow the Union to withdraw its petition, without reason, right before resolution.

We also note that it was the Agency – not the Union – that brought this dispute to the Authority by filing an application for review.¹⁰ And the Agency has not indicated any desire to withdraw from this proceeding.¹¹

Further, the Authority has an obligation that extends beyond the parties in this case. Congress charged

the Authority with “provid[ing] leadership in establishing policies and guidance” in matters that include “determin[ing] the appropriateness” of bargaining units.¹² As described more fully below, a bargaining unit cannot properly include a “confidential employee” under § 7112(b)(2) of the Statute.¹³ By issuing a decision that resolves the parties’ dispute, the Authority expands its precedent in this area, which, in turn, assists others in the labor-management community in determining whether their bargaining units are appropriate under law and saves future government and union resources by preventing duplicative disputes.

The dissent asserts that we are improperly engaging in rulemaking, as opposed to adjudication, by issuing a decision that will “assist[] others” in the labor-management community.¹⁴ We disagree. The three primary considerations in distinguishing adjudication from rulemaking are: (1) whether the government action applies to specific individuals or to unnamed and unspecified persons; (2) whether the promulgating agency considers general facts or adjudicates a particular set of disputed facts; and (3) whether the action determines policy issues or resolves specific disputes between particular parties.¹⁵ Here, we are deciding only the dispute placed before us by the parties: whether, under the particular facts of this case, the RD failed to apply established law by finding that the specific employees at issue are not confidential. Resolution of that issue will have an immediate effect on those employees, the Union, and the Agency – all of whom will benefit from knowing the bargaining-unit status of the support-specialist and program-analyst positions.¹⁶ Further, the fact that our decision “will assist[] others” is immaterial;¹⁷ the very nature of adjudication is that it produces precedential decisions that guide the conduct of similarly situated parties.¹⁸ Thus, our refusal to permit the Union to unilaterally terminate proceedings in this matter, and our resulting decision on the merits, does not amount to rulemaking.

⁵ Request to Withdraw.

⁶ Notice of Withdrawal at 1.

⁷ 5 C.F.R. § 2423.10(a)(1) (stating that an RD, on behalf of the General Counsel, may “[a]pprove a request to withdraw a charge”).

⁸ *Id.* § 2423.25(a)(2).

⁹ RD’s Decision at 1.

¹⁰ Application at 1.

¹¹ *Cf. AFGE, ICE, Nat’l Council 118*, 70 FLRA 441, 441 (2018) (granting union’s request to withdraw negotiability petition where agency effectively agreed with union’s request, contingent on the Authority vacating the underlying decisions at issue).

¹² 5 U.S.C. § 7105(a).

¹³ *Id.* § 7112(b)(2).

¹⁴ Dissent at 12 (citation omitted).

¹⁵ *Gallo v. U.S. Dist. Court for the Dist. of Ariz.*, 349 F.3d 1169, 1182 (9th Cir. 2003), *cert. denied*, 541 U.S. 1073 (2004).

¹⁶ *See Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) (noting that “adjudications . . . have an immediate effect on specific individuals (those involved in the dispute)”).

¹⁷ Dissent at 12 (citation omitted).

¹⁸ *See, e.g., Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999) (stating that “the nature of adjudication is that similarly situated non-parties may be affected by the policy or precedent applied, or even merely announced in dicta” (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969))).

Based on the above, we do not permit the Union to withdraw its petition at this late stage. Consequently, we deny the Union's request to withdraw.

IV. Analysis and Conclusions

The Agency argues that review of the RD's decision is warranted under § 2422.31(c)(3)(i) of the Authority's Regulations.¹⁹ Under that section, the Authority may grant an application for review when the application demonstrates that the RD has failed to apply established law.²⁰ Citing Authority precedent,²¹ the Agency claims that the RD erred by finding that the support specialist and the program analyst are not confidential employees under § 7103(a)(13) of the Statute.²²

As noted above, under § 7112(b)(2) of the Statute, a bargaining unit cannot properly include a "confidential employee."²³ Section 7103(a)(13) of the Statute defines a "confidential employee" as "an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations."²⁴ The Authority will exclude, as a confidential employee, any employee who has a "confidential working relationship" with an individual who formulates or effectuates labor-management-relations policies.²⁵ The Authority will also exclude as a confidential employee any individual who actually formulates or effectuates labor-management-relations policies.²⁶

To determine whether an individual formulates or effectuates labor-management-relations policies, the Authority considers, among other things, whether the individual develops, or advises management in developing, positions or proposals for bargaining with the

union, or represents management in negotiations,²⁷ or other similar types of discussions,²⁸ with the union.

- A. The support specialist is a confidential employee because she formulates or effectuates labor-management-relations policies.

Here, it is undisputed that the support specialist has represented the Office of Public Affairs in a discussion with the Union.²⁹ In addition, the record indicates that the support specialist was thoroughly involved in assisting management's development of an "action plan[]"³⁰ that was aimed at making "substantive change[s]" in the workplace.³¹ In this regard, the record establishes that the support specialist attended several meetings³² in which attendees discussed and proposed ideas for making changes in the areas of "leadership, training, and innovation."³³ Between the meetings, she maintained a draft of the action plan and solicited ideas from attendees.³⁴ The Union "wanted a chance to review the plan[], make suggestions, and note any issues . . . or any concerns [that] they had."³⁵ The Office of Public Affairs scheduled a "high[-]level" meeting with the Union to discuss the action plan and asked the support specialist to represent management at that meeting.³⁶

²⁷ E.g., *U.S. Dep't of the Air Force, Air Force Materiel Command*, 67 FLRA 117, 121-22 (2013) (*Air Force*) (citations omitted).

²⁸ See *Marion*, 55 FLRA at 1246 n.5 (an individual's involvement in partnership activities with a union may constitute a type of responsibility that the Authority considers to be an aspect of the formulation and effectuation of labor-management policies (citing *U.S. Dep't of Transp., FAA, Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 319 (1997) (collective bargaining may occur in a variety of ways))).

²⁹ Hr'g Tr. at 97 (testimony from the support specialist stating that she attended "one union meeting" with the agency head).

³⁰ *Id.* at 35.

³¹ *Id.* at 36; see *id.* at 42 (stating that the support specialist was "involved as much as any member of the management team was in th[e] process [of creating the plan] and slightly more because she was working with [the] agency head on some out-of-meeting steps").

³² *Id.* at 95-97; see *id.* at 37 (testimony stating that the support specialist "coordinat[ed] . . . the activities related to the [action] plan"); Agency Ex. 2 at 1-2 (emails requesting support specialist to attend the management meetings to discuss the action plan); Agency Ex. 3 at 1 (email from the support specialist asking meeting attendees to "review and print out a copy" of the action plan for an upcoming meeting).

³³ Hr'g Tr. at 36; see also Agency Ex. 3 at 2 (draft of the action plan noting the areas of "leadership, training, and innovation").

³⁴ Agency Ex. 4 at 1 (email from the support specialist to meeting attendees soliciting "changes/updates" to the action plan); see Hr'g Tr. at 96.

³⁵ Hr'g Tr. at 44.

³⁶ Agency Ex. 5 at 1 (email from Agency head asking support specialist to represent the Office of Public Affairs at a meeting

¹⁹ Application at 4.

²⁰ 5 C.F.R. § 2422.31(c)(3)(i).

²¹ Application at 11, 13 (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 55 FLRA 1243 (2000) (*Marion*); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv., E. Region*, 5 FLRA 319 (1981) (*Commerce*)).

²² *Id.* at 7-14.

²³ 5 U.S.C. § 7112(b)(2).

²⁴ *Id.* § 7103(a)(13).

²⁵ E.g., *NASA, Glenn Research Ctr., Cleveland, Ohio*, 57 FLRA 571, 573 (2001) (*NASA*); see *Marion*, 55 FLRA at 1246.

²⁶ *U.S. DOL, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1377 (1990) (*DOL Solicitor*) (citation omitted).

The record also establishes that the support specialist serves as the administrative officer in certain circumstances.³⁷ In that position, the support specialist is responsible for preparing management's response to any filed grievance.³⁸

The above evidence demonstrates that the support specialist is aligned with management in such a manner that her inclusion in the bargaining unit would create a conflict between the interests of management and those of the Union.³⁹ Consistent with Authority precedent, we find that the support specialist formulates or effectuates labor-management-relations policies and, thus, is a confidential employee under § 7103(a)(13) of the Statute.⁴⁰ Consequently, the RD's conclusion that the support specialist is not a confidential employee is inconsistent with established law.

- B. The program analyst is a confidential employee because she is in a confidential working relationship with the deputy associate solicitor.

The Agency argues that the program analyst is in a confidential working relationship with her supervisor,⁴¹ the deputy associate solicitor.⁴² The record evidence indicates that the deputy associate solicitor is involved in labor-management issues "from time to

time."⁴³ He has "consult[ed]" with the Union about office relocations⁴⁴ and is the management official responsible for responding to grievances.⁴⁵ Consistent with Authority precedent finding that an agency representative who answers grievances and negotiates with the union formulates or effectuates labor-management-relations policies,⁴⁶ we find that the deputy associate solicitor is such an individual.

We further find that the nature of the program analyst's position requires her to act in a confidential capacity to the deputy associate solicitor. In this regard, the support specialist is the primary source of management support for all personnel activities within the division⁴⁷ and is the only employee available to support the deputy associate solicitor in handling labor-management matters.⁴⁸ Moreover, the program analyst has access to: employees' personnel files,⁴⁹ the division's incoming and outgoing correspondence,⁵⁰ and a staffing report⁵¹ – which the record indicates contains information related to pending personnel actions, such as promotions, transfers, and details.⁵² As the Agency points out,⁵³ the Authority has found similar employees to be confidential employees under § 7103(a)(13) of the Statute.⁵⁴ Accordingly, we find, contrary to the RD, that the support specialist is a confidential employee.

⁴³ Hr'g Tr. at 114.

⁴⁴ *Id.*

⁴⁵ *See id.* at 114, 116-17.

⁴⁶ *See Army*, 60 FLRA at 772; *see also Air Force*, 67 FLRA at 121-22 (to determine whether a particular individual formulates or effectuates labor-management policies, the Authority considers whether the individual represents management in negotiations with the union); 5 U.S.C. § 7103(a)(12) (defining collective bargaining as including "consult[ing] . . . to reach agreement" (emphasis added)).

⁴⁷ Joint Ex. 8 at 2 (program analyst's position description).

⁴⁸ Hr'g Tr. at 116.

⁴⁹ *Id.* at 113, 120, 141-42 (stating that the program analyst maintains personnel files and created a personnel filing system); Agency Ex. 10 at 5.

⁵⁰ Hr'g Tr. at 134; RD's Decision at 3.

⁵¹ Hr'g Tr. at 140; RD's Decision at 3.

⁵² Hr'g Tr. at 157 (stating that the staffing report contains information related to details, transfers, promotions, and other personnel actions); Agency Ex. 10 at 2 (email from program analyst stating that the staffing report "informs about actions that will take place within a specific pay period[and] allows for advance notice of actions that are certain to occur during the entire 2015 fiscal year" (emphasis added)).

⁵³ Application at 13.

⁵⁴ *See NASA*, 57 FLRA at 571, 574 (finding employees who, among other things, "screen[ed] incoming correspondence, review[ed] outgoing correspondence[,] and establish[ed] and maintain[ed] files containing correspondence and documentation concerning pending personnel actions" to be confidential employees); *Commerce*, 5 FLRA at 322-23 (finding employees who, among other things, processed all outgoing and incoming correspondence and maintained personnel files to be confidential employees).

with the Union to discuss the action plan and take questions from the Union); *see* Hr'g Tr. at 44.

³⁷ Joint Ex. 1 at 6 (position description noting that the support specialist "[s]erves as the O[ffice of] P[ublic] A[ffairs'] [a]dministrative [o]fficer . . . in [his or her] absence"); Hr'g Tr. at 67 (stating that the support specialist had previously served as the administrative officer for three months); *id.* at 88.

³⁸ Hr'g Tr. at 67 (stating that when "a grievance [is] filed, [the administrative officer] [is] involved in preparing the package for that in support of the assistant secretary").

³⁹ *See DOL Solicitor*, 37 FLRA at 1380 (stating that employees "who by their duties, knowledge, or sympathy [are] aligned with management should not be treated as members of labor" and should be excluded from the bargaining unit (alteration in original) (quoting *NLRB v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 193 (1981))).

⁴⁰ *See U.S. Dep't of the Army, U.S. Army Aviation Ctr., Fort Rucker, Ala.*, 60 FLRA 771, 772 (2005) (*Army*) (finding an RD's determination – that an agency representative formulates and effectuates management policies in the field of labor relations because he assists in negotiations and answers grievances – consistent with Authority precedent (citing *U.S. Dep't of HHS, Office of the Gen. Counsel, Balt., Md.*, 45 FLRA 894, 896-97 (1992); *U.S. Dep't of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Ariz.*, 37 FLRA 239, 240-41 (1990)).

⁴¹ Hr'g Tr. at 110 (deputy associate solicitor stating that he is the program analyst's first-line supervisor).

⁴² Application at 12-14.

Based on the above, we find that the RD's decision is inconsistent with Authority precedent. Therefore, we direct the RD to clarify the bargaining unit to exclude the support specialist and the program analyst. Because we find that the RD's decision fails to apply established law, it is unnecessary for us to resolve the Agency's argument that the RD also committed a clear and prejudicial error concerning a substantial factual matter.⁵⁵

V. Order

We direct the RD to clarify the bargaining unit to exclude the support specialist and the program analyst.

⁵⁵ Application at 4, 14.

Member Abbott, concurring:

While I fully agree with both the reasoning and the order of the Authority's decision in this case, I write separately to discuss additional concerns.

At the onset, I do not share my dissenting colleague's confidence that the Agency's silence, in response to the Union's request to withdraw at the last stage of this case, demonstrates the Agency's support for the Union's self-serving action. On this point it is significant that the Agency, not the Union, is the filing party in this application for review; the Agency's application was filed from the Regional Director's (the RD's) decision which answered the Union's request to include these employees in the bargaining unit; the Agency's application was filed in complete accord with its rights *under § 7105(f) of our Statute and 5 CFR § 2422.31(a) of our Regulations*; when the Agency filed its application, the Authority, alone, assumed the power to either grant review, not grant review,¹ or to *remain silent in response to the application*; and, if we were to remain silent here, the RD's decision would become "the action of the Authority."² For these reasons, an Agency's silence in this proceeding, in response to the Union's request to withdraw, is given no meaning whatsoever.

Contrary to the assertions of the dissent, neither our Statute nor our Regulations provide for the withdrawal of a petition after an RD has issued a decision, an interested party has requested review of that decision, or after the Authority has granted review (as here). The Authority has long held that a party must "request leave" to file any document which is not specifically provided for in our Statute or Regulations. It is then up to the Authority to grant leave to file that document.³ In this case, the Union never filed such a request for leave. Even in those circumstances where such a request is filed, the Authority has routinely declined to grant the request in the absence of extraordinary circumstances.⁴

Furthermore, the notion suggested by the dissent that permitting the Union to unilaterally deny the Agency the opportunity to have its application for review of the RD's decision resolved by the Authority somehow promotes "effective and efficient government" is puzzling. The dissent even goes so far as to suggest that

the Union should be able to unilaterally withdraw *this* petition and then refile a *new* petition in sixty (60) days!⁵

I would contend that processing a case through the administrative process and then seeking to withdraw it when it is on the cusp of a final decision (in effect telling the Authority to "never mind") does not promote the amicable resolution of cases or effective and efficient government. As I commented in my concurring opinion in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Englewood, Littleton, Colorado* (and it is worth repeating here):

"... this case highlights how parties' strategies and the Authority's own precedent has contributed to the *manipulation of Title V* in such a manner that does not 'facilitate[]' or 'encourage[] the amicable settlements of disputes' between employees, unions, and federal agencies. When [our Statute] was enacted, Congress led with the mandate that the rights, privileges, and obligations contained in the Statute are to be 'interpreted in a manner consistent with the requirement of an effective and efficient Government.'"⁶

There is nothing about the Union's request to withdraw that promotes any semblance of effectiveness or efficiency.

¹ 5 C.F.R. § 2422.31(c); *see also* 5 U.S.C. 7105(f).

² *See* 5 C.F.R. 2422.31(e)(2); *see also* 5 U.S.C 7105(f).

³ 5 C.F.R. § 2429.26.

⁴ *See U.S. Dep't of Treasury, BEP, Wash., D.C.*, 70 FLRA 359, 361 n.13 (2018); *Sport Air Traffic Controllers Org.*, 70 FLRA 345, 345 n.7 (2017) (granting leave); *Haw. Fed. Emp. Metal Trades Council*, 70 FLRA 324, 326 n.27 (2017).

⁵ Dissent at 12, n.11 (citing 5 C.F.R. § 2422.14).

⁶ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Englewood, Littleton, Colo.*, 70 FLRA 372, 376 (2018) (Concurring Opinion of Member Abbott).

Member DuBester, dissenting:

The majority's issuance of their decision in this case violates the Authority's Regulations, the Administrative Procedure Act (APA), and fundamental administrative law principles. Accordingly, I dissent.

The Union has informed the Authority that it no longer has an interest in representing the disputed employees, by moving to withdraw its petition to include those employees in its bargaining unit. The Agency does not oppose the motion.¹ Consistent with its Regulations, the Authority should grant the motion and dismiss the petition.

When the Authority performs its statutory responsibility to "determine the appropriateness of units for labor organization representation,"² it performs an adjudicative function. And, when it is engaged in adjudication, the Authority decides only matters placed before it by litigants. In accord with federal courts, the Authority has held that a dispute becomes moot when the parties no longer have a legally cognizable interest in the outcome.³ And it is well-settled that "the Authority does not resolve disputes that have become moot."⁴

¹ The Union filed a petition to clarify the bargaining unit status of certain Agency positions, contending that these positions should be included in the unit it represents. The Agency did not file a cross-petition. It merely alleged that these positions should be excluded from the unit. Accordingly, the Union's motion to withdraw its petition removed any interest the Agency had in this matter.

² 5 U.S.C. § 7105(a)(2)(A).

³ *SSA, Bos. Region (Region 1), Lowell Dist. Office, Lowell, Mass.*, 57 FLRA 264, 268 (2001); *accord United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

⁴ *NTEU*, 67 FLRA 280, 281 (2014) (*NTEU*). It is also a fundamental labor-law principle that there is no issue concerning representation when a union does not seek to represent the employees. *Morale, Welfare & Recreation Directorate, Marine Corps Air Station, Cherry Point, N.C.*, 48 FLRA 686, 701 (1993) ("It is axiomatic, in a single union situation, that no [question concerning representation] can be presented where the union does not seek to represent employees in an appropriate unit."); *Fed. Trade Comm'n*, 35 FLRA 576, 583 (1990) ("A [unit clarification petition] is the proper procedure to clarify, *consistent with the parties' intent*, inclusions or exclusions from a unit.") (emphasis added).

The majority's decision is irreconcilable with its grant of a union's analogous dismissal request in *AFGE, ICE, Nat'l Council 118*, 70 FLRA 441, 441 (2018) (granting union's request to withdraw negotiability petition because the request mooted the case). In both instances, the matters became moot because the union moved to withdraw a petition seeking a ruling from the Authority. Contrary to the majority, Majority at 3, n.11, these matters became moot once those motions were filed, regardless of the Agency's agreement.

Section 2429.10 of the Authority's Rules and Regulations implements this principle by explicitly prohibiting the Authority from issuing advisory opinions.⁵ To refuse to grant the Union's motion to withdraw its petition—and instead to address the petition's merits—is precluded by this regulation. If there is no controversy before the Authority, then any decision in this matter is merely advisory.⁶

The majority attempts to justify their issuance of this advisory opinion by stating that the opinion will "assist[] others in the labor-management community in determining whether their bargaining units are appropriate."⁷ This rationale confuses one Authority process, adjudication, with another, rulemaking. These are two distinct functions. Adjudication is reserved for resolving live disputes, whereas rulemaking is the only process by which the Authority, on its own, may announce prospective policies and guidance.⁸

When an agency fails to comply with its own regulations, its action is unlawful and

⁵ *NTEU*, 67 FLRA at 281 (citing 5 C.F.R. § 2429.10 ("The Authority and the General Counsel will not issue advisory opinions.")).

⁶ *Cf. NFFE, Local 1998*, 48 FLRA 1074, 1075 (1993) (where union has withdrawn underlying grievance, arbitrator's award is moot and Authority decision on award's merits would be an advisory opinion). That the Agency has not withdrawn its application for review, a significant consideration for the majority, Majority at 3, does not render the proceeding less moot. And, as noted, the Agency does not oppose the Union's motion to withdraw its representation petition, undoubtedly because this leaves the disputed employees unrepresented, precisely the result the Agency has sought throughout the proceeding.

⁷ Majority at 3.

⁸ *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Concurring Opinion of J. Scalia) ("[R]ulemaking [is] prospective, . . . adjudication [cannot] be purely prospective, since otherwise it would constitute rulemaking") (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 759 (1969), and *SEC v. Chenery Corp.*, 332 U.S. 194, 194 (1947)). The majority's claim that issuing a merits decision is not backdoor rulemaking is patently incorrect. The majority reasons that its decision "will have an immediate effect on . . . [the disputed] employees, the Union, and the Agency – all of whom will benefit from knowing the bargaining-unit status of the support-specialist and program-analyst positions." Majority at 4. This is simply wrong. What the majority appears reluctant to acknowledge, and that undercuts the majority's entire theory on this point, is that the Union no longer seeks to include any disputed employees in its bargaining unit. Accordingly, the advisory opinion the majority issues will not have any effect on these employees' bargaining-unit status, or on the rights and responsibilities of any of the parties.

exposes the agency to court review.⁹ An agency's failure to follow its own regulations violates the APA's prohibition against agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁰ The Authority should follow its own regulation and "not issue [an] advisory opinion[]." ¹¹

In addition to the illegality of the majority's action, it is difficult to imagine a clearer waste of government resources than the majority's decision to resolve, *sua sponte*, an issue that no longer requires a resolution.¹² The majority's exercise of jurisdiction here—tantamount to manufacturing a dispute where none exists—is in flagrant disregard of the Authority's statutory responsibilities.¹³ The majority's actions here speak more to an interest in issuing overreaching proclamations than engaging in the reasoned adjudication of real disputes.

⁹ *Frisby v. U.S. Dep't of HUD*, 755 F.2d 1052, 1055 (3d Cir. 1985) (validly promulgated agency regulations have the force of law). The majority and concurrence emphasize that denial of the Union's motion to withdraw its petition is within the Authority's discretion. For reasons discussed, by denying this motion, the Authority has abused that discretion and is acting contrary to law.

¹⁰ 5 U.S.C. § 706(2)(A); *see also Aerial Banners, Inc. v. FAA*, 547 F.3d 1257, 1260 (11th Cir. 2008) (agency acts arbitrarily and capriciously by failing to follow its own regulations and procedures); *City of Sioux City v. Western Area Power Admin.*, 793 F.2d 181, 182 (8th Cir. 1986) (agency's failure to follow its own binding regulations is a reversible abuse of discretion); *United States v. Heffner*, 420 F.2d 809, 811-12 (4th Cir. 1969) (courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself); *Morton v. Ruiz*, 415 U.S. 199, 233-35 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.").

¹¹ 5 C.F.R. § 2429.10.

¹² Member Abbott asserts that it is the Union's belated withdrawal of its petition that does not promote effective and efficient government. Concurrence at 9-10. The effective and efficient response to the timing of the Union's motion is not to expend additional resources to resolve a matter that is moot. The Authority already has mechanisms in place to deal with belated requests to withdraw. *See* 5 C.F.R. § 2422.14(b) (imposing waiting periods for filing new representation petitions on parties who belatedly withdraw petitions). If Member Abbott believes, *see* Concurrence at 9, that the 60-day time limit is inadequate, the appropriate response is rulemaking, not issuing an advisory opinion.

¹³ The majority's reliance on an analogy to unfair-labor-practice (ULP) proceedings, to support its claim that the Authority has an "institutional interest" in resolving this case, Majority at 3, ignores fundamental distinctions among the Authority's various statutory responsibilities. The Authority enforces the ULP provisions of the Statute, 5 U.S.C. § 7116(a) & (b), and prosecutes those who violate them. The Authority has no analogous role in representation cases.

The majority fails to dispute the central point: this case is moot.¹⁴ Their decision is an unlawful advisory opinion. Accordingly, I dissent.

¹⁴ The underlying dispute is moot. However, faced with the majority's improper actions regarding the RD's decision, I feel compelled to note that, if I were to reach the merits, I would uphold that decision. The RD found that the employees are not confidential employees under § 7103(a)(13) of the Statute and, thus, should be included in the bargaining unit that the Union represents. The RD's decision is consistent with long-standing Authority precedent concerning the § 7103(a)(13) exclusion. *See, e.g., U.S. Dep't of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Ariz.*, 37 FLRA 239, 244 (1990).

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS
AUTHORITY
WASHINGTON REGIONAL OFFICE**

U.S. DEPARTMENT OF LABOR
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 12, AFL-CIO
(Union/Petitioner)

WA-RP-16-0027

DECISION AND ORDER

I. Statement of the Case

The Union filed the petition in this proceeding on April 27, 2016, seeking to clarify the bargaining unit status of various positions at the Agency. The remaining positions to be clarified are the Agency's Program and Administrative Support Specialist position, the Management and Program Analyst position, and the Staff Assistant position.

The Agency contends that all three positions are excluded from the Union's bargaining unit because they are confidential employees under Section 7112 (b)(2) of the Statute. The Agency also contends that all three positions are excluded from the bargaining unit because the incumbents in the positions are engaged in personnel work within the meaning of Section 7112(b)(3) of the Statute. The Union contends that the positions are not excluded from the bargaining unit and should be included in the unit.

The Region held a hearing on November 2, 2016, and the Agency and Union filed briefs, which I have fully considered.⁵⁶ Based on the entire record of this proceeding, I find that none of the incumbents are engaged in personnel work. I also find that the position of Program and Administrative Support Specialist and the position of Management and Program Analyst are not confidential employees and the incumbent in the Staff Assistant position is a confidential employee. Accordingly, I will clarify the unit to include the incumbents in the Program and Administrative Support Specialist and the position of Management and

Program Analyst and I will clarify the unit to exclude the incumbent in the Staff Assistant position.

II. Findings

On May 17, 2006, in Case Number WA-RP-04-0089, the Authority clarified AFGE, Local 12's (Local 12 or Union) bargaining unit as follows:

Included: All Labor Department employees in the Washington Metropolitan area.

Excluded: All management officials, supervisors, and employees described in section 7112(b)(2), (3), (4), (6) and (7) of the Statute.

**Patricia Gayle, Program and
Administrative Support Specialist**

Patricia Gayle has been a Program and Administrative Support Specialist in the Agency's Office of the Secretary, Office of Public Affairs (OPA), Division of Enterprise Communications (DEC) since June 2010. The DEC provides web services to the Agency and is the primary manager of the Agency's public website. The DEC also manages the Agency's primary intranet and all of the support activities around those operations, which includes web application development, security, capital planning, and help desk support. The DEC is also responsible for quality assurance functions regarding the web applications that it builds.

Gayle's main function is as a Contracting Officer's Representative (COR). As a COR, Gayle ensures that contracts are executed, invoices are paid, and contractors perform their duties. Gayle does not supervise federal employees; rather, she supervises the contracting staff. Gayle has access to DEC employee position descriptions and certain DEC recruitment documents, but she does not have access to employees' official personnel files, Standard Form 50s (SF-50), or other personally identifiable employee information. Although Gayle has been involved in recruitment meetings and has been included on recruitment emails, Sarah Harding, Administrative Officer, is Bailey's primary point of contact for recruitment and other Human Resources (HR) issues.

Robert Bailey is the Director of the DEC and is Gayle's first line supervisor. Bailey has been the Director of the DEC since 2011. As the DEC Director,

⁵⁶ The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

Bailey handles budgetary issues, development of employee performance standards, employee evaluations, assignment of work, administrative functions involving personnel management, and coordination with the Agency on policy matters and policy interpretation. As part of his function, Bailey deals with the HR Office on an as-needed basis. Many DEC HR actions are accomplished at the OPA level. Gayle is not involved in providing guidance on HR issues, but does enter new employees into the badging system and ensures on-boarding paperwork is completed. Gayle also ensures that standard operating procedures are updated and that HR work is performed according to policy.

Gayle attends OPA's monthly management meetings, but she does not provide input or recommendations. Gayle's function at the management meetings is as an observer, and she does not take notes. The OPA management meetings are scheduled weekly but have not occurred consistently since Bailey took over as Director in 2011. The topics of discussion could include: coordination of special events; deadlines; personnel; and the Federal Employee Viewpoint Survey (FEVS). When matters concerning personnel are brought up, the conversation is discontinued because the meetings include managers and non-managers. Gayle also attends monthly budget meetings, but is not present when the budget plans are being developed. The budget meetings may include discussions of DEC staff's pay grades, salaries, and also other budgetary matters. The meetings also may discuss position openings and where newly-hired employees would best fit within the DEC. Gayle does not report back to Bailey regarding the budget meetings.

Gayle also attends DEC weekly staff meetings with Bailey and his four member management team. During one 2014 staff meeting, Bailey presented a plan to convert six contractor positions into federal positions. As the COR, Gayle provided the rates for the contract employees impacted so Bailey could make the appropriate budgetary calculations. During another staff meeting, Bailey discussed employee bonuses in general terms but did not discuss individual employees' bonus amounts.

Kathleen Grogans, Management and Program Analyst

Kathleen Grogans has been a Management and Program Analyst in the Agency's Office of the Solicitor, Division of Employment and Training Legal Services (ETLS), since December 2014. Jonathan Waxman, ETLS's Deputy Associate Solicitor, is Grogans's direct supervisor. The ETLS performs work for the Agency's Employment and Training Administration (ETA) on grants under various statutes, including the Workforce

Innovation and Opportunity Act and the Uniformed Services Employment and Reemployment Act. The ETLS also handles apprenticeships and unemployment compensation as well as provides legal services to the International Labor Affairs Bureau and the Veterans Employment Training Service.

Grogans's primary responsibilities include purchasing supplies for the office and updating and maintaining purchasing records. Grogans is responsible for proofreading, formatting and structuring outgoing correspondence to opposing counsel and other agencies; opening and distributing mail; printing applications/setting up interviews for ETLS position vacancies; and sending recruitment notices to organizations, as directed by Waxman. Grogans also maintains the ETLS's technical equipment, assuring that it is functioning properly.

Grogans is the ETLS's HR liaison. Because ETLS does not have its own HR office, the Agency's Management and Administrative Legal Services (MALS) Division provides HR services. As the ETLS's HR liaison, Grogans has processed promotions into the database that processes personnel actions. She does not exercise judgment in promotions or any other personnel actions nor does she offer advice or recommendations on any such actions. In the past, Grogans has transcribed management's edits to performance standards. Grogans has also made the HR Office copies of ETLS employees' performance appraisals, but she did not have input into the substance of the appraisal. Grogans has no input into employee bonuses, good-job awards, or quality step increases nor does she process the awards.

Grogans also gathers data for a Staffing Activity Report (SAR). The SAR is a bi-weekly report that the MALS HR Office requests. The SAR contains data relating to promotions, transfers, details, and other similar actions. Grogans gathers the data and creates the SAR for MALS HR. Grogans is also the records officer for the ETLS. As the records officer, she created a filing system for hard copies of records. Grogans does not have access to employees' SF-50s or other personally identifiable information in an employee's electronic personnel file.

Kartarii Lee, Staff Assistant

Kartarii Lee began working in the Office of Trade Adjustment Assistance (OTAA) as a

Staff Assistant on February 7, 2015.⁵⁷ As a Staff Assistant, Lee reports directly to Norris Tyler, Senior Executive for the OTAA. The OTAA is a national program that provides benefits, services, and funding to dislocated workers impacted by global trade market adjustments.

Lee testified that her primary responsibilities include receiving incoming calls then logging the details into a document management program. These documents concern specific inquires/complaints by non-employee members of the public regarding petitions for Agency assistance. After she corresponds with the public regarding the petitions, Lee uploads any related documents into a folder on the Agency's share drive. Lee then creates a hardcopy of the folder and takes it to the appropriate office within the Agency. If Tyler creates a PowerPoint slideshow or has a meeting/presentation, Lee makes copies of the appropriate documents. Lee is also responsible for managing Tyler's calendar. Lee also accepts meeting invitations through Tyler's calendar, but she does not have access to his contacts or email messages.

Lee testified that, in around February and March 2015, she attended one or two meetings with Tyler and an HR Specialist where the parties discussed vacancies in the OTAA but did not discuss who would be hired. Lee testified that she has not been a part of any similar meetings since 2015 because Tyler "removed [her] from attending." Lee testified that she is not involved in labor-management relations meetings with Tyler. Lee also stated that she does not have input into grievance decisions or other employee complaints, including unfair labor practice charges; she also stated that Tyler does not ask for recommendations regarding these actions. If Tyler responds to an employee's grievance, Lee stated that she would not be privy to the response. Lee also testified that she does not see Union demands to bargain or bargaining proposals. Lee stated she has no involvement in personnel actions and does not counsel employees on personnel matters, retirement, or insurance benefits.

Norris Tyler became the Senior Executive of OTAA at some point in 2016. Tyler oversees four divisions: two investigative divisions that handle confidential information dealing with petition investigations; one division that handles program development, which deals with policy, planning, and State guidance and directives as it relates to administering the OTAA; and one division that deals

with confidential reports, data input, and all of the performance measures that States are assigned, including the manner in which States report the information. Tyler also provides program oversight for the OTAA, receives the OTAA budget, and provides technical assistance, regulations and responsibilities to the State officials who operate the OTAA. Tyler handles all of the business administration functions in the OTAA, including personnel performance, medical leave issues, reasonable accommodation requests, and labor-management issues.

Tyler testified that, for approximately the past two years, he and the four division managers meet on a weekly basis. In stark contrast to Lee's testimony, Tyler noted that Lee attends each meeting and acts as his representative. Prior to the meetings, the managers are required to provide the topics/information to Lee, who then arranges the information and briefs Tyler before the meetings. The first item on the agenda at every weekly management meeting is personnel and administrative matters. The management meetings also include conversations about recruitment. The meetings could also include conversations regarding timelines for projects and/or medical leave matters. During one meeting, Tyler discussed OTAA employees' quality step increases (QSI). Tyler and Lee then discussed QSI recommendations one-on-one. During these meetings, Lee takes notes, observes, and provides input on the topics of discussion.

In February 2015, Tyler assisted in negotiating and drafting a Memorandum of Understanding (MOU) to effectuate an OTAA reorganization. Lee was involved in several of the negotiation sessions to the extent that she was taking notes and assuring that personnel information and reclassifications were updated correctly for the impacted employees. In advance of the negotiation sessions, Tyler and Lee met one-on-one to discuss the Agency's bargaining strategy.

In December 2015, the OTAA added an office to its existing suite. To accommodate the move, in July 2015, the Union and management negotiated an MOU; Tyler was not involved in negotiating the MOU because he was no longer a part of the bargaining team. During the weekly meetings, however, Tyler, Lee and the four managers discussed how to best effectuate the MOU for OTAA employees. As part of the move, new carpets were installed in the OTAA suite. Certain individuals were allergic to the dust from the carpet, so management, including Lee, discussed what actions it would take to mitigate the impact on the bargaining unit employees. Also as part of the move, several boxes of files were displaced, creating a safety concern. The Union contacted OTAA management and asked how it would remedy the situation. And, in May 2016,

⁵⁷ At the time of the hearing, Lee was on detail as a Program Analyst in the Office of the Assistant Secretary for Administration. The detail started on August 29, 2016, and was scheduled to last 120 days. This Decision and Order clarifies only Lee's position of record, the Staff Assistant position.

OTAA management internally discussed how it would address the Union's concerns. Tyler and Lee were carbon copied on that email correspondence.

Lee and Tyler meet every day, and Tyler shares sensitive information. For example, in approximately May 2015, Lee assisted in drafting a reasonable accommodation memo for a bargaining unit employee who complained of poor air quality. Lee assisted in finding a new location for the employee and scheduling a telework day. In the past, Tyler has asked Lee for her opinion regarding business decisions and personnel or performance decisions and noted that Lee does a good job at "keeping her ears close to the ground" and reporting staff concerns to him.

III. Analysis and Conclusions

Under Section 7112(b)(3) of the Statute, a bargaining unit will not be appropriate if it includes "an employee engaged in personnel work in other than a purely[,] clerical capacity." 5 U.S.C. Section 7112(b)(3). A position is excluded from a bargaining unit under this exemption when "the character and extent of involvement of the incumbent is more than clerical in nature and the duties of the position in question are performed in a non-routine manner or are of such a nature as to create a conflict of interest between the incumbent's union affiliation and job duties." *U.S. Dep't of the Army, Headquarters, 101st Airborne Div., Fort Campbell, Ky.*, 36 FLRA 598, 602 (1990) (*Airborne Div.*). In order for duties to be considered more than clerical in nature, individuals must exercise independent judgment and discretion in initiating personnel actions or making recommendations to management on such actions. *Id.* at 603.

Awareness of various personnel regulations and guidelines, as well as providing information and guidance to employees on health benefits or life insurance, however, does not establish that someone is engaged in personnel work in other than a purely clerical capacity. *Headquarters, Fort Sam Houston, Tex.*, 5 FLRA 339, 343 (1981) (*Fort Sam*). Personnel positions which have required the recording and processing of completed personnel actions, maintaining of personnel files, or the screening of actions for technical sufficiency, have been included in bargaining units. *See United States Dep't of the Navy, United States Naval Station, Panama*, 7 FLRA 489 (1981) (*Panama*).

As a Program and Administrative Support Specialist, Gayle is the Contracting Officer's Representative (COR), focusing largely on the supervision of non-government employees. Gayle has access to DEC employee position descriptions and certain recruitment documents, but she does not have access to

official personnel files, SF-50s, or any other personally identifiable information. While Gayle has been involved in recruitment and other management meetings, the record revealed that she does not provide input or make recommendations as to personnel actions. In the few instances the DEC actually completed a personnel action, Gayle did not exercise independent judgment in effectuating the actions and was not privy to discussions regarding those actions. Because Gayle is not involved in personnel work in other than a purely clerical capacity, she is not excluded from the bargaining unit under Section 7112(b)(3) of the Statute.

As a Management and Program Analyst, Grogans's primary responsibilities include opening and distributing mail, purchasing office supplies (after receiving supervisory approval), maintaining purchasing records, proofreading/formatting outgoing correspondence, and, when directed, entering personnel actions into the data base that processes personnel actions. Grogans has transcribed edits of performance standards but did not have any input into the content of the edits. Grogans has also made copies of performance appraisals to send to HR but did not have a role in assessing the employee or dealing with any employee complaints arising from the performance rating. When Grogans processes personnel actions on occasion, she does not exercise independent judgment as to the personnel actions nor does she provide input, recommendations, or advice as to the actions. Because Grogans is not involved in personnel work in other than a purely clerical capacity, she is not excluded from the bargaining unit under Section 7112(b)(3) of the Statute.

Lee does not perform personnel work in other than a purely clerical capacity. Lee's relevant responsibilities include receiving incoming calls regarding petitions filed by non-employees then entering the details into the Secretary Information Management System. She also prepares the necessary paperwork for Tyler's meetings, manages his calendar, and informs him of employee leave but does not otherwise have access to the employees' time and attendance records. Lee also does not have access to Tyler's email or the contact information of those corresponding with Tyler. There is also no evidence that she independently performs or offers recommendations on personnel actions such as hiring, evaluating, disciplining, promoting, increasing pay, or any other related actions. Because Lee is not involved in personnel work in other than a purely clerical capacity, she is not excluded from the bargaining unit under Section 7112(b)(3) of the Statute.

Section 7103(a)(13) of the Statute defines a "confidential employee" as an employee "who acts in a confidential capacity with respect to an individual who

formulates or effectuates management policies in the field of labor-management relations." An employee is "confidential" when: (1) there is evidence of a confidential working relationship between an employee and the employee's supervisor; and (2) the supervisor is significantly involved in labor-management relations. An employee is not confidential in the absence of either of these requirements. *National Aeronautics and Space Administration, Glenn Research Ctr., Cleveland, Ohio*, 57 FLRA 571, 573 (2001).

Among the factors considered by the Authority when assessing whether an individual serves in a confidential capacity are whether the individual: (1) obtains advance information of management's position regarding contract negotiations, the disposition of grievances, and other labor relations matters; (2) attends meetings where labor-management matters are discussed; (3) because of physical proximity to their supervisor, overhears discussions of labor-management matters; and (4) has access to, prepares, or types materials related to labor-management relations, such as bargaining proposals and grievance responses. *U.S. Dep't of Labor, Wash., D.C.*, 59 FLRA 853, 855 (2004) (*DOL*).

The record did not establish that either Gayle or Grogans are confidential employees within the meaning of section 7103(a)(13) of the Statute. The record did not demonstrate that Gayle or Grogans serves in a confidential capacity to an individual who is significantly involved in labor-management relations. Thus, the record did not establish that either Gayle or Grogans, in the normal course of their job duties, obtains advance information on management's position on labor relations matters; attends internal management meetings where labor relations are discussed or overhears such discussions; or prepares or has access to internal management materials on labor-relations matters.

Here, the record demonstrates that Lee is in a confidential working relationship with Tyler and Tyler is significantly involved in labor-management relations. Lee testified that she has only attended two OTAA weekly management meetings, which were in February and March 2015, and that after those two meetings, Tyler informed her that she should no longer attend. However, Tyler testified that Lee is involved in every weekly management meeting and has been since she began employment. Based on this, I am inclined to give more credence to Tyler's testimony in that regard. Tyler testified that, prior to the weekly meetings, managers are required to send Lee the material they intend on discussing. Lee organizes the information and briefs Tyler before the meetings. Topics of discussion include recruitment, medical leave matters, and timelines for projects. During the meetings, Lee is Tyler's

representative. After the meetings, Tyler and Lee meet one-on-one to discuss what action Tyler should take regarding each specific situation. During the one-on-one meetings, Tyler asks for Lee's input and considers it in his decision-making process. Lee's involvement in the February 2015 OTAA reorganization and the OTAA move in 2015 and 2016, allowed her to be privy to advance information on management's position and required her to prepare internal materials on labor-relations matters.

Thus, the record establishes that Lee, in the normal course of her job duties, obtains advance information on management's position on labor relations matters; attends internal management meetings where labor relations are discussed or overhears such discussions; and prepares or has access to internal management materials on labor-relations matters. It is clear that under Authority precedent, Lee serves in a confidential capacity. Accordingly, Lee is excluded from the bargaining unit as a confidential employee under Section 7112(b)(2) of the Statute.

IV. Order

IT IS HEREBY ORDERED that the positions of Program and Administrative Support Specialist, encumbered by Patricia Gayle, and Management and Program Analyst, encumbered by Kathleen Grogans, should be included in the bargaining unit.

IT IS FURTHER ORDERED that the position of Staff Assistant, encumbered by Kartarii Lee, should be excluded from the bargaining unit as a confidential employee under Section 7112(b)(2) of the Statute.

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 May 22, 2017, 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

Jessa S. Bartlett
Regional Director, Washington Region
Federal Labor Relations Authority

Dated: March 21, 2017