

**71 FLRA No. 9**

UNITED STATES  
DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
(Agency/Petitioner)

and

NATIONAL AIR TRAFFIC CONTROLLERS  
ASSOCIATION, AFL-CIO  
(Union)

WA-RP-17-0008  
WA-RP-17-0040

DECISION AND ORDER  
ON REVIEW

February 12, 2019

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**

In this case, we clarify that future duties may be considered, and that reliance on representative testimony may not be appropriate, in determining whether an employee meets the definition of a “confidential employee” under § 7103(a)(13) of the Federal Service Labor-Management Relations Statute (Statute).<sup>1</sup>

As relevant here, Regional Director Jessica Bartlett (RD), of the Federal Labor Relations Authority, found that four employees, in three administrative support positions, are not confidential employees under § 7103(a)(13). On March 22, 2018, the Authority granted the Agency’s application for review and deferred action on the merits.

We find that the RD failed to apply established law by finding that the administrative officer, Jonni Christian, and administrative specialist, Carol Hinterlong, are not confidential employees, and we direct the RD to exclude them from the

bargaining unit. We also find that the testimonies of representative witnesses are insufficient for us to determine the confidential status of the two remaining administrative employees, and we remand the case to the RD for further proceedings consistent with this decision.

**II. Background and RD’s Decision**

The Agency and Union both filed petitions to clarify the bargaining-unit status of fifty-five positions in the Agency’s headquarters office and nine regional offices.<sup>2</sup> As relevant here, the Agency contends that four employees in three administrative positions – administrative officer, administrative services specialist, and administrative specialist – are confidential employees and should be excluded from the bargaining unit under §§ 7103(a)(13) and 7112(b)(2) of the Statute.<sup>3</sup>

Prior to the hearing, the parties agreed to use “representative witnesses” in order to avoid repetitive testimony.<sup>4</sup> The parties selected Sarah DeWitt, an administrative officer, to testify on behalf of the administrative employees (employees) and John Speckin, a deputy regional administrator, to testify on behalf of the regional administrators and deputy regional administrators (supervisors).

The RD found that the duties performed by the administrative employees are “practically interchangeable” and that they perform similar functions in support of the regional or deputy regional administrators in their regional offices.<sup>5</sup> Central to this case is the question of whether the regional and deputy regional administrators are involved in labor-relations matters, and to what extent these administrators would require their administrative employees to act in a confidential capacity in handling these matters. As relevant here, the RD noted that Speckin, as the deputy regional administrator, is responsible for the day-to-day operations of the central regional office and that if an unfair labor practice (ULP) charge were filed by the Union, he would be the designated management official to develop the response in coordination with the labor relations specialist and the regional administrator.<sup>6</sup> The evidence demonstrated,

<sup>1</sup> 5 U.S.C. § 7103(a)(13).

<sup>2</sup> On April 19, 2017, the RD issued an order consolidating Case Nos. WA-RP-17-0008 and WA-RP-17-0040.

<sup>3</sup> Agency’s Post Hr’g Br. at 46-48.

<sup>4</sup> Application for Review (Application) at 2.

<sup>5</sup> RD’s Decision at 16.

<sup>6</sup> *Id.*

however, that during Speckin's tenure, no ULP charges have been filed in his region.

The RD found that the administrative employees are not confidential employees because (1) they do not have a confidential working relationship with supervisors or managers who are significantly involved in labor-management relations, (2) there was no evidence that the regional administrator would consult with administrative officers in labor relations tasks, and (3) the employees perform mostly administrative tasks. Consequently, the RD held that the employees should be included in the bargaining unit.

On January 29, 2018, the Agency filed an application for review (application) of the RD's decision, and on February 13, 2018, the Union filed an opposition. As noted above, on March 23, 2018, the Authority granted the Agency's application.

### III. Analysis and Conclusions

The Agency argues that the RD committed clear and prejudicial error concerning substantial factual matters and failed to apply established law by determining that the four administrative employees are not confidential employees under §§ 7103(a)(13) and 7112(b)(2) of the Statute.<sup>7</sup> We agree that a review of the RD's decision is warranted under § 2422.31 of the Authority's Regulations.<sup>8</sup>

An employee is a "confidential employee," within the meaning of § 7103(a)(13), if (1) there is evidence of a confidential working relationship between the employee and a supervisor or manager, and (2) the supervisor or manager is significantly involved in labor-management relations.<sup>9</sup> Under § 7112(b)(2), "confidential employees" may not be included in a bargaining unit.<sup>10</sup>

Employees are confidential employees if, in the normal performance of their duties, they may obtain advance information of management's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters.<sup>11</sup> The frequency and amount of time spent on those types of labor-relations matters may be relevant, but are not controlling factors.<sup>12</sup>

- A. Jonni Christian and Carol Hinterlong are confidential employees because they are in a confidential working relationship with the deputy regional administrator.

The Agency argues that Jonni Christian and Carol Hinterlong are confidential employees because of the duties they would be called upon to perform for the deputy regional administrator in the event that a ULP charge or grievance is filed. The Agency contends that it is not relevant that they have not yet had to perform those functions.<sup>13</sup>

The record establishes that the regional office and the Union have maintained a seemingly good relationship and that no formal grievances or ULP charges have been filed by the Union. However, the record is equally clear that, were the Union to file a formal grievance or ULP charge, the deputy regional administrator would be responsible for responding and would use the

<sup>9</sup> *U.S. DOL, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1377 (1990) (*DOL*); *see also U.S. Dep't of the Navy Commander, Navy Region NW Fire & Emergency Servs., Silverdale, Wash.*, 70 FLRA 231, 232 (2017) (noting advanced knowledge of labor matters); *U.S. Dep't of the Army, U.S. Army Materiel Command, U.S. Army Research Dev. & Eng'r Command, U.S. Aviation & Missile Research Dev. & Eng. Ctr., Redstone Arsenal, Ala.*, 66 FLRA 852, 854-55 (2012) (finding no error regarding incumbent who sat outside door during labor meetings taking notes).

<sup>10</sup> 5 U.S.C. § 7112(b)(2).

<sup>11</sup> *DOL*, 37 FLRA at 1383.

<sup>12</sup> *Id.* at 1382.

<sup>13</sup> Application at 6.

<sup>7</sup> Application at 7-14.

<sup>8</sup> 5 C.F.R. § 2422.31(c)(3)(i).

“administrative officer for support . . . [to d]raft, [and] collectively lay out how [the Agency would] respond.”<sup>14</sup>

With regard to negotiations, Speckin testified that he has “worked [with the Union] in more of a collaborative, informal way”<sup>15</sup> but has engaged in negotiations with the Union over a regional parking order and will be negotiating with the Union concerning the details of a new lease for the regional offices in the fall of 2018.<sup>16</sup> According to Speckin, when those negotiations occur, Christian and Hinterlong will be “interchangeable”<sup>17</sup> and both will have “firsthand knowledge” of the Agency’s position and will be a part of “the various aspects” of bargaining any memorandum of understanding.<sup>18</sup>

Thus, there is no dispute here that the deputy regional administrator is responsible for significant labor-relations matters including negotiating with the Union, answering grievances, and responding to ULP charges. And although Christian and Hinterlong have not yet had the opportunity to support Speckin on these matters, those are duties they are responsible to perform when requested to do so.<sup>19</sup>

Therefore, to the extent that our precedent has implied that only those duties which have *actually* been performed will support an exclusion under § 7103(a)(13),<sup>20</sup> we take this opportunity to clarify that it is necessary to consider those duties which an employee would be called upon to perform when a grievance or complaint is filed or negotiations with the Union occur.<sup>21</sup> Specifically, we will consider the manner in which a supervisor defines the duties of a confidential employee as well as those duties which are set forth in a position description.<sup>22</sup> To hold otherwise can only lead to conclusions which are nonsensical. For example, the fact that a facilities manager has never had to call on an agency’s fire station to quell a fire or its security department to investigate a crime does not make the assigned firefighters any less engaged in safety or the criminal investigators any less engaged in internal security.

<sup>14</sup> Hr’g Tr. at 427-28.

<sup>15</sup> *Id.* at 429.

<sup>16</sup> *Id.* at 437.

<sup>17</sup> *Id.* at 399.

<sup>18</sup> *Id.* at 437-38.

<sup>19</sup> *U.S. DOL*, 70 FLRA 452, 455 (2018) (*DOL II*).

<sup>20</sup> *See U.S. Dep’t of VA, Wash. D.C.*, 60 FLRA 749, 751 (2005).

<sup>21</sup> *Broad. Bd. of Governors*, 64 FLRA 235, 238 (2009) (Dissenting Opinion of Member Beck).

<sup>22</sup> *See U.S. DOL II*, 70 FLRA at 455.

Similarly, a civilian weapons engineer, who stands guard at a remote launch facility to arm an intercontinental ballistic missile, should an order come from the Pentagon, is no less engaged in national security because he has never been called upon to do so.

Accordingly, under the circumstances of this case, we conclude that Christian and Hinterlong are confidential employees within the meaning of § 7103(a)(13).

- B. Remand is warranted for the RD to determine whether the remaining administrative officer and administrative services specialist should be excluded from the bargaining unit.

The RD’s findings with respect to the confidential status of the remaining administrative employees were based on the “representative” testimonies of DeWitt and Speckin. Because the confidential determination turns so critically on whether the regional or deputy regional administrator in each regional office would require the administrative employees to act in a confidential capacity in handling labor-relations matters, we find that this is not an appropriate case for representative witnesses.<sup>23</sup>

Therefore, we remand this issue to the RD to reopen the record, obtain the necessary evidence from the supervisors of the remaining administrative officer and administrative services specialist, and make the necessary findings and determinations on the issue of whether these employees are confidential employees.

<sup>23</sup> *See U.S. DOD, Pentagon Force Prot. Agency, Wash. D.C.*, 62 FLRA 164, 172 (2007) (holding that the RD failed to apply established law by considering the testimonies of representative witnesses of different categories of police officers and not examining the distinct rules of the various categories of police officers employed in different locations in reaching § 7112(b)(6) determinations); *Dep’t of the Navy, Naval Computer & Telecomms. Area, Master Station-Atl. Base Level Commc’ns Dep’t, Reg’l Operations Div., Norfolk, Va., Base Commc’ns Office-Mechanicsburg*, 56 FLRA 228, 230 (2000) (holding that the RD failed to apply established law because the RD did not separately evaluate and make explicit findings with respect to each statutory criterion under § 7112(a) to determine the appropriateness of a bargaining unit).

#### IV. Order

The RD is directed to clarify the bargaining unit to exclude the administrator officer, Jonni Christian, and administrative specialist, Carol Hinterlong. We remand for the RD to reopen the record and make the necessary findings and determinations on the issue of the confidential status of the remaining administrative officer and administrative services specialist.

#### Member Abbott, concurring:

Under our Statute, Members of the Authority are tasked with the responsibility to “provide leadership”<sup>1</sup> and to make *decisions*—typically, final decisions on disputes concerning bargaining-unit status,<sup>2</sup> the duty to bargain,<sup>3</sup> exceptions to arbitrator’s awards,<sup>4</sup> and “other actions [necessary] to effectively administer the provisions of the [Statute].”<sup>5</sup>

I have expressed concerns in several cases about extending excessive deference to the determinations made by arbitrators.<sup>6</sup> Here, I am similarly concerned with the excessive deference accorded by the dissent to a recommended determination of a regional director made pursuant to authority delegated in a clarification-of-unit dispute.

The Statute permits the Authority to “delegate to any regional director its authority . . . to determine whether a group of employees is an appropriate unit.”<sup>7</sup> But, it is equally true that, when “any interested person” disagrees with that determination and files with the Authority an “application [for review],” it is incumbent upon the Authority to “review such action” and

<sup>1</sup> 5 U.S.C. § 7105(a)(1).

<sup>2</sup> *Id.* at § 7105(a)(2)(A).

<sup>3</sup> *Id.* at § 7105(a)(2)(E).

<sup>4</sup> *Id.* at § 7105(a)(2)(H).

<sup>5</sup> *Id.* at § 7105(a)(2)(I).

<sup>6</sup> See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 749 n.24 (2018) (*BOP Florence*) (Member DuBester dissenting); *U.S. Small Bus. Admin.*, 70 FLRA 885, 887 n.18 (2018) (*SBA*) (Member DuBester dissenting). In *BOP Florence* and *SBA*, I noted that the dissent’s deference to arbitrators appears to have “no end” (*SBA*, 70 FLRA at 749 n.24) and elevates arbitral awards to a “decisional pedestal” which effectively renders Authority review “inconsequential.” *SBA*, 70 FLRA at 887 n.18. To support that perspective, the dissent harkens to private-sector precedent which dates back at least sixty years but ignores entirely the National Labor Relations Board (NLRB)’s recent adoption of a less-deferential standard when reviewing arbitral awards concerning unfair labor practices, an approach which has been affirmed by federal courts. *Beneli v. NLRB*, 873 F.3d 1094, 1099 (9th Cir. 2017). Since 2014, the NLRB defers to arbitral findings only when the arbitrator has been explicitly authorized to decide the statutory issue and only if “[NLRB] law reasonably permits the award.” *Babcock & Wilcox Constr. Co.*, 361 NLRB 1127, 1151 (2014).

<sup>7</sup> 5 U.S.C. § 7105(e)(1).

“affirm, modify, or reverse” that determination.<sup>8</sup> In other words, the plain language of our Statute mandates a complete (not partial) review of determinations made pursuant to that delegated authority. To fail to do so is an abdication of a key statutory responsibility.

The dissent’s deference is not applied consistently and is out of step with the Merit Systems Protection Board (MSPB) and out of step with the less deferential approach applied by the National Labor Relations Board. It is indeed paradoxical that the dissent accords far greater deference to the decisions of regional directors and arbitrators than to administrative law judges who are highly experienced in the adjudication of unfair labor practices. When called upon to review the decisions of highly-experienced *administrative law judges* in unfair-labor-practice cases, the dissent embraces a preponderance-of-the-evidence standard—an approach that has been sharply criticized since 2009 by Members Pizzella and Beck.<sup>9</sup> The MSPB accords little deference, except on credibility determinations, to their administrative judges<sup>10</sup> and instead makes its own findings whenever an administrative judge strays from the specific issue in question or fails to apply the correct legal standard or analytical framework.<sup>11</sup>

I am no more willing to give a pass to erroneous determinations and findings made by a

regional director than I am to erroneous determinations made by an arbitrator.

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<sup>8</sup> *Id.* at § 7105(f).

<sup>9</sup> *Sport Air Traffic Controllers Org.*, 70 FLRA 554, 556 n.15 (2018) (Member DuBester concurring) (citing *U.S. Dep’t of VA, William Jennings Bryan Dorn VA Med. Ctr., Columbia, S.C.*, 69 FLRA 644, 649 (2016) (Dissenting Opinion of Member Pizzella); *SSA*, 64 FLRA 199, 207 (2009) (Dissenting Opinion of Member Beck); *U.S. Dep’t of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 179-80 (2009) (Concurring Opinion of Member Beck); *U.S. Dep’t of the Air Force, 12th Flying Training Wing, Randolph Air Force Base, San Antonio, Tex.*, 63 FLRA 256, 262-63 (2009) (Separate Opinion of Member Beck).

<sup>10</sup> *Alvarado v. Wynne*, 626 F. Supp. 2d 1140, 1150–51 (D.N.M. 2009), *aff’d sub nom. Alvarado v. Donley*, 490 F. App’x 932 (10th Cir. 2012) (citing *Weaver v. Dep’t of the Navy*, 2 M.S.P.R. 129 (1980) (“giving the presiding official’s findings only so much weight as may be warranted by the record and by the strength of the presiding official’s reasoning”).

<sup>11</sup> *Sadiq v. Dep’t of VA*, 119 M.S.P.R. 450 (2013) (citing *Hollingsworth v. Dep’t of Commerce*, 115 M.S.P.R. 636 (2011)).

**Member DuBester, dissenting:**

Contrary to the majority, Authority precedent and the record support the Regional Director's (RD) decision that the administrative employees at issue are not confidential employees. The RD based her decision on the seminal *Yuma* case.<sup>1</sup> She determined that the administrative employees are not confidential employees under the Statute because there is no evidence that their supervisors are "significantly involved in labor-management relations" by performing tasks such as developing labor policy, processing grievances, handling unfair labor practices, or negotiating contracts.<sup>2</sup> And, the RD further determined, there is no evidence that the disputed employees have a "confidential working relationship"<sup>3</sup> with these supervisors.

Most of the Agency's claims in its application for review simply disagree with the RD's evaluation of the facts. But the weight the RD ascribed to certain evidence does not provide a basis for finding that the RD committed clear errors in making factual findings.<sup>4</sup> And, an argument that the RD ignored certain evidence merely challenges the weight the RD gave to that evidence.<sup>5</sup>

Also without merit is the Agency's reliance on the prospective collaboration between management and employees over new office space, to support its claim that the employees' supervisors are involved in labor-management relations.<sup>6</sup> Consistent with well-established Authority precedent, a supervisor's potential, limited involvement in a single issue does not demonstrate that the supervisor's involvement in labor-management relations is *significant*.<sup>7</sup>

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<sup>1</sup> *U.S. Dep't of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Ariz.*, 37 FLRA 239, 244 (1990) (*Yuma*).

<sup>2</sup> RD'S Decision at 17; *see also Yuma*, 37 FLRA at 244.

<sup>3</sup> RD's Decision at 17.

<sup>4</sup> *U.S. Dep't of the Interior, Nat'l Park Serv., Ne. Region*, 69 FLRA 89, 91-92 (2015).

<sup>5</sup> *Id.* at 91.

<sup>6</sup> *Id.*

<sup>7</sup> *E.g., U.S. Dep't of VA*, 60 FLRA 887, 889 (2005); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 55 FLRA 1243, 1246 (2000); *Dep't of VA, Reg'l Office, Waco, Tex.*, 50 FLRA 109, 111 (1995). The majority's rejection of this well-established principle fails to acknowledge the principle's distinction between involvement in labor-management relations that is

Finally, without substantial discussion, and relying on inapplicable precedent, the majority rejects the parties' agreement to use "representative witnesses" to testify on behalf of all of the administrative employees and their managers.<sup>8</sup> The parties agreed that the representative witnesses' testimony would be determinative of whether the employees should or should not be excluded from the bargaining unit.<sup>9</sup> Because the parties know best how to proceed with presenting the evidence in an efficient manner, and because our review of RDs' decisions and orders in representation is based on the record the parties compile, I would not remand the matter to the RD for further factual findings.

Accordingly, I dissent from the majority's disposition of this case.

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"significant," and that which is not. The majority does not discuss that point.

<sup>8</sup> *See* Application for Review (Application) at 2, 10. The application is incorrectly numbered—with two pages numbered "2" and two pages numbered "3." References to page "2" are to the second page marked "2." Reference in the following footnote to page "3" is to the second page marked "3."

<sup>9</sup> *See* Application at 2, 3, 10, 12.

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

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U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
(Agency/Petitioner)

and

NATIONAL AIR TRAFFIC CONTROLLERS  
ASSOCIATION, AFL-CIO  
(Union/Petitioner)

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WA-RP-17-0008 & WA-RP-17-0040

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DECISION AND ORDER

**I. Statement of the Case**

In Case No. WA-RP-17-0008, the National Air Traffic Controllers Association, AFL-CIO (Union) filed a petition, on December 1, 2016, under section 7111(b) of the Federal Service Labor-Management Relations Statute (Statute). Tr. 7.<sup>1</sup> The petition sought to clarify the bargaining unit status of forty positions within the U.S. Department of Transportation, Federal Aviation Administration, Office of Assistant Administrator for Finance and Management (AFN). Tr. 7; Authority Ex. 1a.

In Case No. WA-RP-17-0040, the U.S. Department of Transportation, Federal Aviation Administration filed a petition, on April 19, 2017, under section 7111(b) of the Statute. Tr. 8. The petition sought to clarify the bargaining unit status of an additional fifteen positions within AFN. Authority Ex. 1d.

On April 19, 2017, I issued an order consolidating Case Nos. WA-RP-17-0008 and WA-RP-17-0040.

An Authority Hearing Officer conducted a hearing on this matter from June 13 to June 15, 2017. The issue at the hearing was whether the positions encumbered by certain individuals within AFN should be clarified as being included in the existing bargaining unit represented by the Union or should be clarified as being

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<sup>1</sup> “Tr.” References are to the three-volume transcript of the hearing held from June 13, 2017, to June 15, 2017. Also, all Authority exhibits will be listed as “Authority Ex.” and Agency exhibits will be noted as “Agency Ex.” Additionally, references to the Agency’s brief will be noted as “Agency Br.” and references to the Union’s brief will be listed as “Union Br.”

excluded from that unit under section 7112(b) of the Statute. Tr. 15. Throughout the hearing, the parties narrowed the positions in dispute through stipulations on the record. By the end of the hearing, thirty-seven positions remained in dispute. Tr. 15-16. The Hearing Officer’s rulings were not prejudicial to either party, and I hereby affirm them.

After consideration of the entire record, including the parties’ post-hearing briefs, I have determined that, pursuant to section 7112(b)(3) of the Statute, the positions encumbered by the following individuals *are not eligible* for inclusion in the existing bargaining unit: William Thomas, Khalid Khudur, Christopher Perone, John Heiston, Teresa Price, Shane Hart, Christiana Paul, Martin Sobol, Clayton Richards, Ellis Feldman, Lewis Fisher, Mark Friedman, Niatika Griffin, Susan Laird, Marcine Mason, Jacob Sagha, Brandon Sheplak, John Sullivan, Robert Sullivan, and Rachel Weber. I have determined that, pursuant to section 7112(b)(2) of the Statute, the position encumbered by the following individual *is not eligible* for inclusion in the existing bargaining unit: Michael Fleming. Also, I have determined that, pursuant to section 7112(b)(6) of the Statute, the positions encumbered by the following individuals *are not eligible* for inclusion in the existing bargaining unit: Patrick O’Toole, Glen Pettit, William Schamberger, Mark Staggs, Cecil Wolf, Gordon Evans, James Hamill, Tracy Matthews, and James O’Leary.

However, the remaining positions at issue encumbered by the following individuals *are eligible* for inclusion in the bargaining unit: Lakesha Bankston-Glover, Barbara Gulick, Jonni Christian, Sarah DeWitt, Ava Fleming, Carol Hinterlong, and Cynthia Hansen-Sacks.

**II. Findings**

**A. Background**

On January 25, 2016, (in Case Nos. WA-RP-14-0012 and WA-RP-14-0014) the Authority certified the Union’s bargaining unit as follows:

Included: All professional and nonprofessional employees nationwide of the Office of the Assistant Administrator for Finance and Management (AFN), Federal Aviation Administration.

Excluded: All employees of the Mike Monroney Aeronautical Center, Regions and Center Operations (ARC), AFN, including all employees of the FAA Academy, Oklahoma City, Oklahoma; management officials; supervisors; temporary employees with appointments less than thirty days, and employees described in 5 U.S.C. Section 7112(b)(2), (3), (4), (6), and (7).

## **B. The Structure of AFN**

AFN is comprised primarily of five Offices: (1) Financial Services (ABA); (2) Acquisitions and Business Services (ACQ); (3) Information and Technology Services (AIT); (4) Mike Monroney Aeronautical Center (AMC); and (5) Regions and Center Operations (ARO). Joint Ex. 3:2. Each of the thirty-seven positions that the Parties sought to clarify are in one of three Offices: ABA, AIT, and ARO.

### **ABA Office**

The ABA Office is comprised of six Directorates: (1) Budget and Programs (ABP); (2) Financial Analysis (AFA); (3) Investment Planning & Analysis (AFI); (4) Financial Operations (AFO); (5) Financial Reporting & Accountability (AFR); (6) Labor Analysis (ALA). Joint Ex. 3:3. The positions which the Parties sought to clarify within the ABA Office are concentrated in three Directorates: AFA, AFI, and AFR.

## **C. Functionality of AFA Directorate**

The AFA Directorate is comprised of four Divisions: (1) Acquisition Oversight Division (AFA-100); (2) Program Analysis Division (AFA-200); (3) Business Analysis Division (AFA-300); (4) Metrics Division (AFA-400). Joint Ex. 3:3. The Parties sought to clarify one position in AFA-200, and one position in the AFA-300 Division.

The AFA Directorate conducts financial analyses. Joint Ex. 3:3. The AFA-100 Division reviews the financial appropriateness of all contracts that the Agency is proposing to enter, with a value over \$10 million. TR:221. The AFA-200 Division reviews

programs and program offices at the Agency, seeking out opportunities to gain efficiencies. TR:221. AFA-300 conducts financial analyses, including business case analyses and user fee studies. TR:221. The AFA-400 Division is responsible for analytics related to financial issues at the Agency, including international comparisons. A range of clients are served across all four AFA Divisions, with most divisional recommendations being sent directly to the Agency's Chief Financial Officer (CFO). TR:221.

### **1. Position in AFA-200 Division**

#### **a. Management and Program Analyst, position encumbered by William Thomas**

William Thomas joined the Agency in 2009. TR:254. He came to AFA on a detail in 2013 and was converted to a full-time employee in AFA in June of 2014. Thomas works as a Management and Program Analyst in the AFA-200 Division. TR:254. He is a J-band employee, equivalent to a GS-14. TR:254. Thomas evaluates program offices and processes to look for efficiencies and improvements. TR:254.

David Rickard, Financial Analyst Director, is Thomas's second-line supervisor. TR:277. Rickard testified that Thomas spends 100 percent of his time performing analyses and developing recommendations that impact terms and conditions of employment. TR:266-267. Thomas's final recommendations may involve changing staffing levels. Although his final recommendations do not always involve changing staffing levels, the changing of staffing levels is always within the scope of what he might recommend. TR:267. For example, the AFA Directorate received a request from AFN-140, AFN's office handling Freedom of Information Act (FOIA) requests, regarding changing its workflow and job duties to respond to new requirements being doled out by a new Administration.<sup>2</sup> TR:254-255. AFA-200 and AFA-400 were asked by AFA-001 (Rickard) to make recommendations for adjustments to current staffing levels to support cost reduction. Agency Ex. 24:1. In response to the request, Thomas interviewed employees involved in the work, management of those employees, and other organizations that did FOIA work for other lines of business within the Agency in order to gain an understanding of the current work flow and to identify areas that required change. TR:255, 262. Next, Thomas created a draft document outlining his proposals for what changes should be made. TR:262. Thomas recommended ways to change staffing levels to optimize the performance of the organization, changes to contract

<sup>2</sup> Employees in AFN-140 are represented by NATCA.

support, and changes to job responsibilities. TR:262; Agency Ex.24:6. After developing the draft, Thomas discussed it with Rickard, the Agency CFO, and the AFN-140 program office so that his recommendations could be properly assessed. TR:262. Ultimately, it was up to the program office to make a decision to accept or reject Thomas's recommendations. TR:275.

In March 2016, Thomas was tasked with conducting an analysis regarding the post-implementation review (PIR) process. Agency Ex. 22. The PIR is a quantitative assessment of a functional, in-service system. Based on the PIR, recommendations are made to the Joint Resource Council (JRC), and if the intended benefits are being realized, the system should be supported as is; if the benefits are falling short, however, recommended corrective actions will be detailed. Agency Ex. 22:1. In order to conduct his analysis, Thomas conducted multiple interviews with different stakeholder groups including employees, support contractors, management, members of the JRC and the program offices that feed information to the PIR. TR:256. Thomas was fully responsible for providing the recommendations outlined in the PIR Analysis Report, including comments evaluating the appropriateness of the ratio of work done by Federal employees compared to contractors. TR:257.

Thomas was also involved in the Cost Control Strategy for Maximizing Position-Cost Savings in Regional Optimization. Agency Ex. 23. In the document, Thomas made specific recommendations about staffing changes after speaking with regional administrators and other people involved, in order to understand workflows in an attempt to align work being done across regional offices to be more internally consistent. TR: 258. Thomas's work product and recommendations would be reviewed by his management, including potentially by the CFO. TR:260. It would also be reviewed by the program office for their evaluation of the impact. Thomas could gather feedback from the program office in order to make adjustments to his work. TR:260.

Thomas was the financial lead on a project involving the Human Weather Observer program. TR:264; Agency Ex. 25. The Agency hired human observers to augment the work that is done by automated weather technology. TR:263. There was an initiative under the ATO to evaluate whether the work performed by the human observers, a mix of contractors and Agency employees, could be reassigned to Agency employed air traffic controllers. TR:263-264. Within the document that was created in association with the Human Weather Observer program, Thomas made comments on the components of the strategy, and made recommendations to change the strategy. TR: 264; Agency Ex. 25. The author of the document, an unnamed employee within the

ATO, had discretion to incorporate or not incorporate Thomas's comments. TR:276.

### 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). For a position to be excluded under this section, it must be determined that the incumbent in the position is involved in work directly relating to the personnel operations of the employee's agency. *832nd Combat Support Group, Luke Air Force Base, Ariz.*, 23 FLRA 768 (1986). The character and extent of involvement of the incumbent in personnel work must be more than clerical in nature and the duties of the position in question must not be performed in a routine manner. The incumbent must exercise independent judgment and discretion in carrying out the personnel duties. *SSA*, 56 FLRA 1015, 1018 (2000) (*SSA*) citing *Dep't of the Treasury, Internal Revenue Serv., Wash., D.C.*, 36 FLRA 138, 144 (1990); see also *United States Dept. of Agriculture, Forest Serv., Albuquerque Serv. Ctr., Human Capital, Mgmt., Albuquerque, N.M.*, 64 FLRA 239 (2009) (*Albuquerque*).

The Authority held in *U.S. Department of the Army, Headquarters, 101<sup>st</sup> Airborne Division, Fort Campbell, Kentucky*, 36 FLRA 598 (1990) (*Fort Campbell*) that personnel work includes that which has "a significant effect on personnel decisions." *Id.* at 603. *Fort Campbell* involved analysts, whom, in part, studied whether the activity should purchase or invest in equipment "resulting at times in the reduction of personnel positions."

Here, the record demonstrates evidence that Thomas's analyses can have a direct impact on Agency personnel decisions. William Thomas is involved in work that affects the staffing of the Agency. Thomas performs cost control analyses and develops recommendations that can have a direct effect on Agency personnel. Specifically, Thomas was assigned to work on a project in which he was required to make recommendations on staffing levels. Agency Ex. 24:1. While it is ultimately the program office's decision on whether or not to adopt Thomas's recommendations, those recommendations are generally presented directly by Thomas to an organization's leadership. For example, in a Workload & Staffing Analysis completed by Thomas, the AFA-200 (and AFA-400) Divisions were asked by Director Rickard to make recommendations for adjustments to current staffing levels to support cost reduction. Here, Thomas's analysis ultimately resulted in a proposal that one or two I-band positions be reduced. While Rickard was aware of the recommendations prior

to the report being finalized, Rickard did not formally approve of the recommendations first. Similarly, in another report on Cost Control Strategy, Thomas again made specific recommendations about staffing levels and speaking with Regional Administrators. Agency Ex. 23.

As was the case in *Fort Campbell*, Thomas is making recommendations about the staffing levels, method of operations and capital investments. In *Fort Campbell*, the Authority stated, “inasmuch as the analysts’ job duties can have a direct impact on the elimination of jobs, the creation of positions and the overall work environment...the nature of the job is such that it creates a conflict of interest.” *Id.* Thomas’s work at the Agency is analogous to the work of the analysts in *Fort Campbell*, and he must be excluded from any bargaining unit in accordance with section 7112(b)(3) of the Statute.

## 2. Position in AFA-300 Division

### a. Financial Analyst, position encumbered by Khalid Khudur

Khalid Khudur has encumbered the Financial Analyst position since September of 2014. TR:223. Khudur is an entry-level F-band employee, equivalent to a GS-9. TR:223. Khudur works on business case analyses and tracks the Agency’s cost control program. TR:223. He works with Agency program offices that have proposed cost control initiatives to help them understand what they are proposing to do, and then he works with them throughout the year to track their progress against the established plan. TR:223. Khudur does not develop the cost control initiatives or savings targets himself. TR:223, 281.

In his role as a Financial Analyst, Khudur evaluates different ways that Agency offices might save money, some of which would impact personnel, some of which would not, and then he works with the program office to develop a template that describes the components of activities that would save money and how much. TR:224. Next, Khudur would provide the Financial Analyst Director with the proposal. TR:224. If the Director approves Khudur’s proposal, it becomes a part of the cost control target for the year, and Khudur would work with the offices to understand the financial impact of any variances from the plan. TR:224. Khudur may also develop initial ideas to resolve the variances. TR:225.

Every month, Khudur prepares a report that tracks the cost control programs that have been approved by the Director. TR:226; Agency Ex. 16. The Fiscal Year 2016 cost control report lists activities that were approved

in 2016. The reports provide a good sense of the breadth of work that Khudur executes. TR:227; Agency Ex. 16. The largest cost control program, SAVES, involves acquiring office supplies and does not impact personnel decisions. Agency Ex. 16; TR:287. Other programs listed on the Fiscal Year 2016 cost control report involve staffing as well as analysis that would involve possible effects on terms and conditions of employment regarding employees. TR:264-265. For example, Workers Compensation; ARO’s Regional Optimization program, where ARO proposed to reduce head count in their regional offices in order to achieve costs savings targets; the Human Weather Observers program, whose goal is to have work done by contract weather observers transferred to air traffic controllers; and the lease projects impact personnel. TR:227;233.

Khudur tracks expected savings related to the Office of Human Resource Management’s Workers Compensation initiative. Agency Ex. 17. Khudur does not have any involvement in actually administering Workers’ Compensation or in determining whether any claim should be approved or rejected. TR:269. Khudur tracks costs and avoidance for ARO’s Regional Optimization program. Agency Ex. 18. Khudur has made recommendations in regard to how backfilling a vacancy can create variance in established cost control targets, but he has not made recommendations concerning the hiring or firing of individual employees. TR:270.

## Analysis and Conclusions

Khalid Khudur performs cost control analyses and develops recommendations. The record reflects that Khudur advises the Agency on how to save costs and some of these recommendations could have a direct impact on staffing. In *Fort Campbell*, the Authority described duties that justified the exclusion of incumbents. For example, “they analyze the work load...[and] determine the essential task that needs to be done and then the personnel, equipment and facility needed to achieve that task.” *Id.* at 603. The duties of the analysts in *Fort Campbell* are analogous to those performed by Khudur. Khudur’s recommendations can have a direct impact on staffing levels. *Id.* at 604. Thus, Khudur’s position must be excluded from any bargaining unit in accordance with section 7112(b)(3) of the Statute.

## D. Functionality of AFI Directorate

The AFI Directorate is comprised of four Divisions: (1) Business Case (AFI-100); (2) Lifecycle Cost Estimates (AFI-200); (3) Operations Research (AFI-300); (4) Standards and Guidance Division (AFI-400). Joint Ex. 3:3. The Parties sought to clarify three positions in AFI-100, nine positions in

AFI-200, five positions in AFI-300, and one position in the AFI-400 Division.

The AFI Directorate reviews and analyzes business cases for various programs at the Agency. Ultimately, AFI provides recommendations to the Joint Resource Council (JRC), a decision-making body within the Agency, concerning the economic benefits of the programs. TR:19. AFI is comprised of four Divisions that work together to accomplish the overall AFI mission. TR:26. AFI uses a team approach to analyzing the business cases for each program, and teams typically include at least one employee from AFI-100, AFI-200, and AFI-300. In certain cases, AFI-400 also joins the team. TR:35.

1. **Positions in AFI-100, AFI-200, AFI-300, and AFI-400**
  - a. **Business Case Analyst, position encumbered by Christopher Perone; Cost Analyst, positions encumbered by John Heiston and Teresa Price; Financial Analyst, positions encumbered by Shane Hart, Christiana Paul, and Martin Sobol; Management and Program Analyst, position encumbered by Clayton Richards; Operations Research Analyst, positions encumbered by Ellis Feldman, Lewis Fisher, Mark Friedman, Niatika Griffin, Susan Laird, Darcine Mason, Jacob Sagha, Brandon Sheplak, John Sullivan, Robert Sullivan, and Rachel Weber**

AFI employees perform analyses that require them to have technical or finance backgrounds. TR:41. The Job Analysis Tools (JATs) for the disputed AFI positions provide an overview of employee duties and responsibilities. *See* Agency Ex. 7. The JATs for the disputed AFI positions indicate that the positions involve, among other things, using complex and detailed financial analyses and extensive financial modeling, forecasting, estimating, and variance analyses; designing models to analyze how proposed changes may affect costs, benefits, efficiency, and service levels; developing and evaluating cost estimates in support of investment decisions; creating and applying analytical studies regarding Agency resource requirements for various programs; leading studies to optimize resource allocation; updating and maintaining policies and procedures to support the continued development of AFI; and presenting findings to managers and supervisors. Agency Ex. 7. The majority of AFI employees are J-band technical series employees,

equivalent to GS-14. Three of the incumbents at issue—Dr. Ellis Feldman, Lewis Fisher, and Rachel Weber—are nonsupervisory K-band employees, equivalent to GS-15. TR:40-41.

The disputed Financial Analysts and Business Case Analyst in AFI-100 serve as the project leads for AFI's review of investment analyses. TR:152. The employees lead analysis teams and gather information from other groups within AFI to present to Katrina Williams Hall, Director of Investment Planning and Analysis, as well as the Agency's CFO.

The disputed Cost Analysts and Operations Research Analysts<sup>3</sup> in AFI-200 primarily review lifecycle cost estimates that are used to support Agency acquisitions and the Agency budget. TR:151. The Analysts assess the cost estimates programs for comprehensiveness, accuracy, and credibility. TR:155. They also support benefits estimating and reviewing cost avoidance and cost saving claims. TR:20. Their analyses are used in order to determine whether a business case is robust and AFI will recommend that the JRC approve a program, or whether a business case is weak and AFI will recommend disapproval. TR:20. The AFI-200 Division also provides support to the CFO review regarding projects that are handled by the AFA Directorate involving Agency procurements in excess of \$10 million. TR:20.

The disputed Financial Analyst and Operations Research Analysts in AFI-300 are responsible for benefits estimating and evaluating the shortfalls of a business case. TR:22-23. Employees in the AFI-300 Division work with staffing models and complicated software, and must have an understanding of system engineering. TR:41.

Clayton Richards is a Management and Program Analyst, and the only employee in the AFI-400 Division. Richards coordinates and manages the updates of standards and guidance for AFI. TR:153. Richards manages the internal budget and collects lessons learned from projects to determine how AFI services and analyses should be performed in the future. TR:25. Occasionally, Richards is used to "shore up holes" that exist elsewhere in AFI. TR:25-26. In fact, all AFI employees may cross over to different work groups to support other components in the evaluation process. TR: 26-29.

Once an AFI employee team completes its evaluation process, it presents its findings to the AFI-100,

<sup>3</sup> Lewis Fisher encumbers one of the Operations Research Analyst positions in AFI-200. Fisher provided Representative Testimony for all disputed positions in the AFI Directorate.

AFI-200, and AFI-300 managers. TR:210. The findings include only the results of the team's analysis and do not include a recommendation for a course of action. TR:210. After the employee team has briefed the manager, the team and the manager work together to develop a recommendation to present to Director Hall. TR:211. The managers' opinions have more weight because they are more involved in the shaping of the ultimate decision and the employee team is more involved with the technical aspects that aid in the decision making process. TR:212. If Hall agrees with the recommendation she receives, she finalizes it and the employee team would brief the Agency CFO, who is a member of the JRC. TR:93, TR:107. The CFO follows the AFI recommendation the majority of the time. TR:32. However, the CFO possesses the authority to disagree with AFI's recommendation. TR:107. In the event that the CFO disagrees with a final recommendation from AFI, he will meet with AFI to discuss the issue with the team, and if he still disagrees, he would make his own recommendation to the JRC instead of the AFI recommendation. TR: 107. The JRC makes the ultimate determination in regard to whether the projects that AFI employees work on are pursued. TR:99.

Some of the projects that AFI is tasked with may involve discussions about whether staffing is required. The discussions may also concern the staffing costs that can be avoided if an investment is approved. TR:21. For example, as the Agency moves to transforming the National Airspace System, it is looking at tools that will help the workforce, but also save the workforce time, which may have implications on how the Agency chooses to staff its workforce. TR:23. Staffing level recommendations are buried within AFI analyses. TR:32. Recommendations that result from AFI employee team findings could indirectly implicate staffing. TR:209. For example, a program office would provide AFI with the number of contractor FTEs (full time equivalents) and the number of Federal FTE's needed to run its program, and then AFI employees would cost out the program based on those numbers. TR:192. The AFI analysis reports whether the program is accurately costed out but does not make recommendations regarding whether labor should be performed by Federal employees or contracted out. TR:192. The AFI cost analysis would not consider individual positions specifically, but rather the generic job functions (e.g. administrative support, logistics, managers) that are needed to run the program. TR:164. AFI lacks the expertise to make evaluations of how many employees are needed to perform a function. TR: 197. AFI coordinates with ABA's Labor Analysis (ALA) Directorate on projects that implicate staffing. TR: 32-33. ALA works with resource optimization, labor cost analysis, workforce analysis, and staffing standards. Joint Ex. 3:2. AFI defers to ALA concerning Collective Bargaining Agreements, staffing, and the impact of certain decisions on the terms and conditions of

employment for bargaining unit employees. TR:70-71. AFI employee teams make recommendations that have an impact on staffing levels. TR:209.

### Analysis and Conclusions

The record demonstrates that Christopher Perone, John Heiston, Teresa Price, Shane Hart, Christiana Paul, Martin Sobol, Clayton Richards, Ellis Feldman, Lewis Fisher, Mark Friedman, Niatika Griffin, Susan Laird, Darcine Mason, Jacob Sagha, Brandon Sheplak, John Sullivan, Robert Sullivan, and Rachel Weber perform analyses that can have a direct impact on personnel decisions. Although CFO and JRC are the ultimate decision makers, AFI employees conduct complex financial analyses to produce findings and make recommendations that could have an impact on organizational structure and staffing levels. The record demonstrates that AFI employees' main function is to help determine whether the justification for a certain program is robust or weak. Similar to the analysts excluded in *Fort Campbell*, the primary function of these employees is to "recommend to management the most efficient and effective method of performing its mission,...and their decisions, consciously or unconsciously, may be influenced by their desire to advance the interests of the bargaining unit rather than the best interests of management." *Id. at 604*. Therefore, they must all be excluded from any bargaining unit under section 7112(b)(3).

### E. Functionality of AFR Directorate

The AFR Directorate is comprised of three Divisions: (1) Financial Policy Division (AFR-100); (2) Internal Controls Division (AFR-200); (3) Financial Statements & Reporting Division (AFR-300). Joint Ex. 3:3. The Parties sought to clarify two positions in the AFR-100 Division.

AFR is responsible for managing the travel card program for the Agency. TR:110. AFR prepares cases and waivers, as well as appeals and hearings before Administrative Law Judges. TR:110. In addition, AFR prepares fact sheets and makes recommendations to the Agency's General Counsel's Office on how to adjudicate claims, and it also publishes the Agency's travel policy. TR:110.

Pursuant to a Personnel Reform Act, the Agency was granted authority to develop its own travel policy rather than be bound by the guidelines of the Federal Travel Regulations published by the General Services Administration. TR:112. Employees in the AFR-100 Division are responsible for communications with Agency employees concerning

travel policy entitlements, reimbursements, and authorized expenses while in a foreign or domestic travel status. TR:112.

### 1. Positions in AFR-100 Division

#### a. Program Analyst, positions encumbered by Lakesha Bankston-Glover and Barbara Gulick

Lakesha Bankston-Glover and Barbara Gulick are employees in the AFR-100 Division who perform work in connection with the Agency's travel policy. TR:110. Bankston-Glover is a J-band employee, equivalent to a GS-14. Agency Ex. 9. Gulick is an H-band employee, equivalent to a GS-11 or GS-12. Agency Ex. 10. Bankston-Glover and Gulick perform the same duties. TR:121.

Bankston-Glover and Gulick field dozens of phone calls every day from Agency employees. TR:113. The calls can require a significant amount of research and interpretation of the Agency's travel policy. TR:114. In addition, Bankston-Glover and Gulick may have to consult Collective Bargaining Agreements for applicable contract provisions that may preempt Agency travel policy. TR:113. Because all of the situations presented to the Program Analysts are unique, they must interpret and apply Agency travel policy as necessary. Bankston-Glover and Gulick are not told how to answer the questions. They evaluate the situations and make determinations. Agency Br.:31; TR:124-125,132.

The Program Analysts regularly provide guidance to Agency accountants who research waivers and appeals for travel overpayments received by employees. TR:116. Bankston-Glover and Gulick are also involved in audits when a question arises that requires an interpretation of Agency travel policy. TR:145. Roughly 90% of the Program Analysts' time is dedicated to travel policy. TR:133. Approximately 40% of the time spent on travel policy is dedicated to direct investigations and travel policy audits. TR:148. The Program Analysts can initiate audits. TR:148.

Bankston-Glover and Gulick may be called upon as subject-matter expert witnesses during civil hearings and union grievances. Agency Ex. 9; TR: 137. If called upon, the Program Analysts would assist Agency Labor Relations Staff in determining whether a given situation violated Agency travel policy. TR:117. The Program Analysts do not make recommendations on what disciplinary action the Agency should take. TR:119. Rather, the Policy Analysts provide the manager of Labor Relations with the facts and documentation necessary to make a determination. TR:119.

In November 2016, Bankston-Glover and Gulick supervised a team of contractors who were tasked with converting the Agency's travel policy from a Question & Answer format to a plain language format. TR:140. The Program Analysts would provide recommendations to make substantive changes to Agency travel policy. TR:140. The recommendations for changes to Agency travel policy would originate with Bankston-Glover and Gulick. TR:141. The Program Analysts would provide Manager of AFR-100, Joe Hodge, with their recommendations, and if Hodge agreed, he would provide the recommendation to Director of AFR, Allison Ritman, who would then make a recommendation to the Agency's CFO. TR:141-142. The FAA Administrator delegated the responsibility for creating travel policy to the CFO pursuant to the Travel and Transportation Reform Act. TR:142.

The Program Analysts do not make recommendations to hire or terminate employees. TR:138. The Program Analysts do not prepare or process SF-50s, prepare grievance responses, nor are they involved in the Agency's Equal Employment Opportunity program. TR:138.

### Analysis and Conclusions

Applying the principles of *Luke Air Force Base* and *SSA*, I find that the Program Analysts are not personnelists. Lakesha Bankston-Glover and Barbara Gulick do not exercise independent judgment in making recommendations regarding personnel actions. Roughly ninety percent of Bankston-Glover and Gulick's time is spent researching, interpreting, and applying Agency travel policy. On occasion, they may advise labor relations on grievances regarding Agency travel policy, but they do not recommend discipline, exercise discretion in initiating personnel action, or have any settlement authority.

Section 7103(a)(11) of the Statute defines a management official as "an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency." 5 U.S.C. Section 7103(a)(11). Section 7112(b)(1) of the Statute mandates that management officials be excluded from bargaining units. 5 U.S.C. Section 7112(b)(1). In deciding whether an individual is a management official, the Authority considers whether the individual: (1) creates, establishes, or prescribes general principles, plans, or courses of action for an agency; (2) decides or settles upon general principles, plans, or courses of action for an agency; or (3) brings about/obtains a result as to the adoption of general principles, plans, or courses of action for an agency. *E.g., Dep't of the Navy, Automatic Data Processing Selection Office*, 7 FLRA

172, 177 (1981) (*Navy*). The Authority also considers whether an individual's recommendations and findings are accepted and implemented, whether they have authority to make independent decisions, and the extent that their actions are reviewed. *See e.g., U.S. Dep't of Energy, Headquarters, Wash., D.C.*, 40 FLRA 264, 271-72 (1991) (*Energy*); *Dep't of the Interior, Bureau of Mines, Twin Cities Research Ctr., Twin Cities, Minn.*, 9 FLRA 109, 112-13 (1982).

Applying these principles, I find that the record contains no evidence to establish that Program Analysts Bankston-Glover and Gulick are management officials within the meaning of the Statute. There is no evidence to suggest that the Program Analysts were required or authorized to formulate travel policy in their supervision of contractors who were tasked with converting the Agency's travel policy from a Question and Answer format to a plain language format. Further, Bankston-Glover and Gulick did not possess the authority to make independent decisions to influence the travel policies of the Agency. Rather, their ideas regarding revisions to the travel policy would have had to first go to Manager Joe Hodge, then to Director Allison Ritman, and finally to the Agency CFO who alone has the authority to approve changes to the FAA travel policy.

Section 7112(b)(2) of the Statute excludes confidential employees from being included in a bargaining unit. 5 U.S.C. Section 7112(b)(2). The Authority has held that an employee is confidential, for the purposes of the Statute, if "(1) there is evidence of a confidential[-]working relationship between an employee and the employee's supervisor[] and (2) the supervisor is significantly involved in labor-management relations." *U.S. Dep't of Interior, Bureau of Reclamation Yuma Projects Office, Yuma, Ariz.*, 37 FLRA 239, 244 (1990) (*Yuma*). Under Authority precedent, mere access to labor-relations material does not warrant the exclusion of the employee from a bargaining unit. *E.g., Fed. Mediation & Conciliation Serv.*, 5 FLRA 28, 31 (1981). Ultimately, the reason for the confidential exemption is that management should not be faced with having bargaining unit members in positions where they could divulge information pertaining to labor-management relations to the union in advance. *U.S. Dep't of Labor, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1383 (1990) (*Labor*).

I find that Bankston-Glover and Gulick are not confidential employees within the meaning of the Statute. The Program Analysts are not in a confidential working relationship with an individual who formulates or effectuates management policies in the field of labor relations. A confidential working relationship exists where an employee: "(1) obtains advance information of

management's position with regard to contract negotiations, the disposition of grievances, and other labor- relations matters; (2) attends meetings where labor-management matters are discussed; or (3) has access to, prepares, or types labor-relations materials, such as bargaining proposals and grievance responses." *U.S. Dep't of the Air Force, Air Force Material Command*, 67 FLRA 117, 122 (2013). The record is devoid of any evidence that Bankston-Glover and Gulick prepare labor relations materials. Further, Bankston-Glover and Gulick do not have a working relationship with anyone who is significantly involved in labor-management relations. Supervisor Joe Hodge testified as to his involvement in the field of labor relations has been limited to commenting on a Memorandum of Understanding (MOU) proposal relating to a revision of travel policy, and input on the master agreement regarding travel. TR:143. However, the record demonstrates that neither of the employees at issue here was consulted in those situations. Hodge is not involved in any way with unfair labor practice charges (ULPs) and he does not participate in management's response to grievances. TR:143-144.

#### AIT Office

The AIT Office is comprised of six Directorates: (1) Solution Delivery Services (ADE); (2) Enterprise Program Management Services (AEM); (3) Infrastructure & Operations Service (AIF); (4) Information Security & Privacy Service (AIS); (5) Business Partnership Service (APS); (6) Strategy & Performance Service (ASP). Joint Ex. 3:4. The positions which the Parties sought to clarify within the AIT Office are concentrated in one Directorate: AIS.

The AIS directorate contains three Divisions: (1) Security Governance Division (AIS-100); (2) Security Compliance Division (AIS-200); (3) Security Operations Division (AIS-300). Joint Ex. 3:4. The positions which the Parties sought to clarify within the AIS Directorate are concentrated in one Division: AIS-300.

The AIS-300 Division is comprised of four Branches: (1) Cybersecurity Operations Support Branch (AIS-310); (2) Cybersecurity Service Branch (AIS-320); (3) Cybersecurity Metrics & Exercises Branch (AIS-330); (4) Security Operations Center (AIS-340). Joint Ex. 3:5. The Parties sought to clarify five positions in the AIS-340 Branch.

#### **F. Functionality of AIS-340 Branch**

In October 2016, the Agency transitioned its AIS-330 Cyber Risk and Response branch activities to a new AIS-340 Branch, and rebranded AIS-330 as the Cybersecurity Metrics & Exercises Branch. Joint Ex. 1:5.

The AIS-340 Branch has been described as the “operational arm” of the AIS-300 Division. TR:296. AIS-340 provides round the clock support for cyber incidents. The Branch provides the services needed to detect, analyze, respond to, report on, and ultimately prevent cybersecurity incidents. The AIS-340 Branch provides consolidated cybersecurity functions by performing the day-to-day activities intended to mitigate information security and privacy risks at the technical level. Union Ex. 2.

### 1. Positions in AIS-340 Branch

#### a. Computer Specialist, positions encumbered by Patrick O’Toole, Glen Pettit, William Schamberger, Mark Staggs, Cecil Wolf

The Computer Specialist Job Analysis Tool (JAT) describes the job duties of the disputed Computer Specialists positions, in a very broad sense. TR:301; Union Ex. 2. Computer Specialists duties include: monitoring security events and initiating appropriate activities based on events; leveraging all resources (both internal and external, classified and unclassified) to identify, track and respond to threats; the detection, notification, and tracking of security and privacy incidents, and media analysis. Union Ex. 2. More specifically, Computer Specialist Glen Pettit has described the Computer Specialists in the AIS-340 Branch as employees who do all of the monitoring of security tools (such as the Department of Homeland Security Einstein System) for intrusions; perform media analysis or forensics; perform classified installs research for cyber events; report cyber events to the United States Computer Emergency Readiness Team (USCERT). TR: 296-7. Pettit is assigned to AIS-340 and performs his work remotely from Anchorage, Alaska. The other four Computer Specialists assigned to AIS-340 are located in Leesburg, Virginia. TR:318. All of the disputed Computer Specialists perform their work under the supervision of Branch Manager Paul Hubble. TR:295. Hubble describes the Computer Specialists as logical security specialists who estimate cybersecurity risks to the Department of Transportation and Federal Aviation Administration enterprises, and ensure proper implementation of logical security measures. TR:329.

All Computer Specialists in the AIS-340 Branch contribute to the analysis and monitoring of cyber threats. TR:335. For example, Pettit works with a system called ArcSight that monitors all of the firewalls and sensors throughout the network, to identify malicious actors, malicious events, malware, advanced persistent threats, randomware, viruses, and inappropriate use of government equipment. TR:298-299. If Computer

Specialists become aware of a threat, they notify system administrators who are charged with making corrections to the security systems. TR: 356. The Computer Specialists in AIS-340 do not actively provide network monitoring services for the National Airspace System (NAS). TR:299. NAS network monitoring is performed by the Network Operations Center (NOC). However, if NOC experiences a network event, it would be reported to the Computer Specialists in the AIS-340 Branch so that the event could be properly reported to USCERT. TR:299. So while Computer Specialists in AIS-340 do not actively monitor the NAS, they are involved in incidents with NAS. TR:299.

In addition to network monitoring, some of the Computer Specialists in the AIS-340 Branch perform media analysis. Media analysis is akin to computer forensics and involves copying hard drives and reviewing bits and bytes to determine what has traversed on the media. TR:300-301. Pettit does not perform media analysis. TR:300. Mark Staggs is the Computer Specialist primarily responsible for media analysis. TR:322.

All of the employees encumbering disputed Computer Specialist positions in the AIS-340 Branch have a minimum of a Top Secret clearance. TR:330. Cybersecurity threats are occasionally labeled with a Top Secret classification. TR:331. Computer Specialists in the AIS-340 Branch are also required to have a Top Secret clearance in place because they attend threat meetings hosted by the Department of Homeland Security that require a Top Secret clearance at minimum. TR:331. Hubble testified that AIS-340 is tasked with protecting systems within the Federal Aviation Administration for aviation, and within the Department of Transportation for maritime, pipeline and hazardous materials in rail that have all been identified as critical infrastructure by the Patriot Act of 2001. TR:332-333. The disputed Computer Specialist positions are expected to comply with all applicable Presidential Policy Directives, guidelines, Federal Aviation Administration Orders and process documents relating to national security and the safeguarding of classified information in the performance of their duties. Agency Exs. 26-27, 29-32; TR:337, 339-343.

### Analysis and Conclusions

Section 7112(b)(6) of the Statute states that a bargaining unit may not include any employee engaged in intelligence, counter-intelligence, investigative, or security work that directly affects national security. The terms “security work,” “directly affects,” and “national security,” are not defined in the Statute. However the Authority has defined these terms in prior cases, making it clear all three prongs of a test must be

satisfied for the exclusion to apply. *Davis-Monahan*, 62 FLRA at 334.

There are two different ways that a position may involve security work. First, the work may involve “the design, analysis, or monitoring of security systems and procedure.” *Dep’t of Energy, Oak Ridge Operations, Oak Ridge, Tenn.*, 4 FLRA 644, 655 (1980). Second, security work can be found if the employee’s duties include “the regular use of, or access to, classified information.” *U.S. Dep’t. of Justice*, 52 FLRA 1093, 1103 (*DOJ*).

Further, the Authority has defined the “directly affects” prong of the Section 7112(b)(6) exclusion to mean that the security work employees perform has a “straight bearing or unbroken connection that produces a material influence” on national security. *Social Sec. Admin., Balt., Md.*, 59 FLRA 137, 143 (2003) (*SSA Balt.*). Employees are not excluded under Section 7112(b)(6), even though they are engaged in investigative or security work that relates to national security, if the relationship of their work to national security is indirect or limited. *Dep’t of Agric., Food Safety & Inspection Serv.*, 61 FLRA 397, 402 (2005). Thus, the Authority will not find that a position directly affects national security unless “there are no intervening steps between the employees’ failure to satisfactorily perform their duties and the potential effect [of that failure] on national security.” *Nuclear Regulatory Comm’n*, 66 FLRA 311, 315 (2011) (*NRC*) (Member Beck dissenting).

Applying these principles, I find that there is evidence to establish that Patrick O’Toole, Glen Pettit, William Schamberger, Mark Staggs, and Cecil Wolf are engaged in security work that directly affects national security. The Computer Specialists are clearly engaged in security work through their performance of functions that include the monitoring of security systems and their regular access and use of classified information. The Computer Specialists contribute to the analysis and monitoring of cyber threats leveraging all resources, both classified and unclassified. The Computer Specialists must address cybersecurity threats that occasionally are classified at a Top Secret level. The incumbents are each required to have a Top Secret clearance in place to perform their job functions and to attend threat meetings hosted by DHS. Here, the nature and type of work performed by these employees cause them to have regular use of, and access to, classified information. And the Computer Specialists perform work that is directly related to national security as their failure to perform duties would affect national security. As O’Toole, Pettit, Schamberger, Staggs, and Wolf are engaged in security work that directly affects national security within the

meaning of section 7112(b)(6) of the Statute, their positions are excluded from the NATCA bargaining unit.

#### ARO Office

The ARO Office contains nine Regions: (1) Alaska Region (AAL-001); (2) Central Region (ACE-001); (3) Eastern Region (AEA-001); (4) Great Lakes Region (AGL-001); (5) New England Region (ANE-001); (6) Northwest Mountain Region (ANM-001); (7) Southern Region (ASO-001); (8) Southwest Region (ASW-001); (9) Western Pacific Region (AWP-001). Joint Ex. 3:2. The Parties sought to clarify three positions in *AAL-001*, three positions in *ACE-001*, two positions in *AEA-001*, one position in *ANE-001*, and one position in the *ANM-001* Region.

#### **G. Functionality of ARO Directorate**

The Deputy Assistant Administrator for Regions and Property Operations leads a nationwide organization through a headquarters office and nine regional offices strategically located across the country. Joint Ex. 3:3. ARO provides government, Department of Transportation, and FAA-wide services in financial systems and operations, emergency readiness, information services, and public and governmental outreach.

##### **1. Administrative Positions (in AAL-001, ACE-001, and AEA-001)**

##### **a. Administrative Officer, positions encumbered by Jonni Christian and Sarah DeWitt; Administrative Services Specialist, position encumbered by Ava Fleming; Administrative Specialist, position encumbered by Carol Hinterlong**

The disputed Administrative Officer and Administrative Specialist positions are practically interchangeable and perform similar functions. TR: 399, 402; Agency Ex. 35. Both positions support the Regional Administrators and Deputy Regional Administrators in their Regional Offices by reviewing incoming and outgoing correspondence, including congressional correspondence, and reviewing and editing documents that require the Regional Administrator’s signature. Both positions are responsible for collecting and organizing documentation for all meetings. TR:390.

Additionally, the incumbents handle personal property in the Regional Office, assist with the budget, and manage the Regional Administrator's and Deputy Regional Administrator's schedules. TR: 387, 457-458; Agency Ex. 34.

The disputed positions are responsible for the Regional Office's Hotline Operations. The Agency Hotline fields complaints related to all aspects of Agency operations, from complaints from the public regarding suspected violations of FAA regulations to internal complaints from Agency employees. TR:460. When a complaint is made, an employee other than the Administrative Officer or Administrative Specialist will prepare a response, and then the Administrative Officer or Administrative Specialist would review it for grammar, punctuation, and to ensure that it is responsive to the questions posed. The Regional Administrator then signs off on the Hotline response, which is sent to Agency Headquarters. TR:460.

The Administrative Officers, and sometimes the Administrative Specialist, serve as the purchase credit card holder for the Regional Office. TR:381. The purchase credit card holder is responsible for purchasing anything needed for the Regional Office staff to accomplish its mission. This usually consists of office supplies, but other times it involves purchasing awards. TR:382.

Administrative Officers perform duties related to personnel awards and performance planning. For instance, the Administrative Officer in the Central Region, Jonni Christian, has been involved in compiling information used by management to justify time-off and cash awards for other Central Region employees, but she would not be involved in determining which employees would actually receive those awards. TR:377. Christian has also assisted in assembling employee performance plans using standardized information. However, she does not develop employee responsibilities and goals, nor does she decide what the metrics are for determining whether an employee is succeeding in their job functions. TR:433.

The Administrative Officers and Administrative Specialist report to the Deputy Regional Director in their respective Regional Offices. TR: 475; Agency Ex. 34, 35. Deputy Regional Administrator, John Speckin, is responsible for carrying out the day-to-day operations of the Central Regional Office. The Regional Administrator and Deputy Regional Administrator are the FAA Administrator's eyes and ears in the field. TR:370. Speckin has had limited involvement in negotiations with the Union. TR:428-429. The Central Regional Office has not had an unfair labor practice charge (ULP) filed against it during Speckin's tenure. TR:428. If a ULP were

filed, however, Speckin would be the management official who would develop the response in coordination with a labor relations specialist and the Regional Administrator. TR:427.

### Analysis and Conclusions

Applying the principles of *Yuma* and *Labor*, I find that DeWitt, Christian, Ava Fleming, and Hinterlong do not have a confidential working relationship with supervisors or managers who are significantly involved in labor-management relations. Deputy Regional Administrator Speckin testified as having no involvement with ULPs and limited involvement with negotiations. Additionally, there was no evidence demonstrating that Regional Administrators would consult with the Administrative Officers before, during or after tasks involving labor relations. Instead, the record demonstrates that the employees perform mostly administrative tasks such as reviewing correspondence, purchasing office supplies and organizing paperwork used by management. The evidence shows that the work actually performed by the incumbents does not satisfy the labor-nexus test, and these positions are therefore eligible for inclusion in the bargaining unit.

## 2. Program Analyst Positions (in ACE-001, AEA-001, AAL-001, and ANE-001)

### a. Program Analyst (Regional Emergency Planner/Preparedness Specialist), positions encumbered by Gordon Evans, James Hamill, Tracy Matthews, and James O'Leary

The Program Analysts serve as emergency planners who are responsible for maintaining a number of emergency preparedness plans for their respective Regional Offices, including the Continuity of Operations Plan (COOP), the Emergency Operations Plan, the Emergency Action Plan, the Regional Office Reconstitution Plan, and others TR: 431; Agency Ex. 36:2. The Program Analysts are provided with templates for the plans from Agency Headquarters. TR:432; TR:496-497. The Program Analysts do not have the discretion to develop any of the plans independently. TR: 497-498. The COOP outlines the plan to ensure continuity of the Regional Office's operations in the event that it can no longer operate in its current facility due to natural or manmade disaster. TR:409-410. The COOP establishes an Emergency Operating Facility where the Regional Office staff would deploy in the event that the current facility becomes unusable. TR:484.

The Emergency Operations Plan outlines what the Regional Office would do in the case of an emergency such as a tornado, fire, or a contaminant outside of the building. TR: 410. Similarly, the Emergency Action Plan details the particular actions that will occur during an emergency regarding sheltering in place or evacuating. TR:410-411. The Regional Office Reconstitution Plan specifies how to reestablish the Regional Office after the facility has been evacuated. TR:412. The Program Analysts are responsible for mitigating potential damage from a disaster through preparedness planning. TR:485. For those events that are preventable, the Regional Offices rely on Federal Protective service. TR:485.

The Program Analysts also assist with facility security and emergency responsiveness for their respective Regional Offices. For example, Program Analyst, Tracy Matthews is the Alaskan Regional Office's facility security coordinator. TR:482 In this role he works with the hazardous waste division and the Agency's security element, and is also responsible for the facility security plan. TR: 481. In addition, he serves as a subject-matter expert on the Occupational Safety and Health Committee for the Regional Office building. TR:482.

The Program Analysts support their regional Crisis Response Steering Groups, which make collaborative decisions to respond to emergencies. Agency Ex. 36:2. The Program Analysts also participate in emergency planning exercises and may be tasked with providing emergency support to other Agency components and government agencies, such as Federal Emergency Management Agency (FEMA). Agency Ex. 36:2.

Program Analysts are required to maintain Secret level security clearances. Agency Ex. 36:2. The Program Analysts serve as their Regional Office's Communications Security (COMSEC) Responsible Officer (CRO) and the Classified Information Security Manager (CISM). TR: 404-405. As CROs, the incumbents are responsible to ensure that the Regional Office's secure communications equipment functions properly. As CISM, they are responsible for storing and maintaining the security of the classified documents at the Regional Office. TR: 486-487. As the CRO in the Alaska Regional Office, Matthews maintains a secure room which contains a secure phone, a secure fax machine, and a secure computer terminal that has access to the Homeland Security Defense Network (HSDN). TR:487. The HSDN communicates classified information at secret level and below. TR:487. The incumbents have unimpeded access to the secure room. TR:409. Matthews accesses the secure room once a week on average. TR:490; Agency Ex. 37. Some of Matthews's

visits to the secure room are to perform quarterly tests of the equipment in conjunction with the Western Regional Operations Center (ROC). The Western ROC sends an unclassified message through the classified system, and Matthews sends an unclassified response through the classified system to ensure that it is functioning properly. TR:492-493. Matthews has never had the need to send a classified communication on the HSDN, but he regularly tests the systems capabilities to do so. TR:493. Matthews estimates that he spends no more than five percent of his time working with classified information and that is mostly spent printing documents. TR:491. Matthews did not have any involvement in designing, or implementing the security apparatus, but he does test and maintain the equipment. TR:499-500.

### Analysis and Conclusions

Applying the principles of *DOJ* and *SSA Balt.*, I find that the Evans, Hamill, Matthews, and O'Leary are engaged in security work that directly affects national security. The Program Analysts, as CISM and CROs have regular access to classified information and are, therefore, engaged in security work. The Program Analysts are responsible for maintaining the Regional classified networks of the Agency. These duties are directly related to national security as their failure to perform the duties would affect national security. As Evans, Hamill, Matthews, and O'Leary are engaged in security work that directly affects national security within the meaning of section 7112(b)(6) of the Statute, their positions are excluded from the NATCA bargaining unit.

### 3. Program Manager Position (in ANM-001)

#### a. Program Manager (Regional Emergency Transportation Representative), position encumbered by Cynthia Hansen-Sacks

The Program Manager (Regional Emergency Transportation Representative) position is often referred to as RETREP. TR:545. The disputed RETREP position is one of ten RETREPs nationwide, five of whom are employed by the Agency. The other RETREPs are employed in other agencies within the U.S. Department of Transportation (DOT) such as Federal Highway Safety Administration and Federal Motor Carrier Safety Administration. TR:546-547.

One of the RETREP's duties involve training a team of sixteen volunteer cadre members to ensure that they are ready to respond to disasters in Alaska or anywhere else in the country. TR:548. The cadre includes Agency employees as well as employees from other

agencies within DOT. TR:583. The incumbent does not supervise the cadre of volunteers, nor do the employees report to her. TR:551. The RETREP uses a variety of means to ensure that the cadre team members are prepared to respond to a disaster. The RETREP sends out several daily situational awareness reports including the FEMA National Situation Report; DOT’s 24/7 Crisis Management Report, which lists transportation issues from the previous day; and the Maritime Safety Administration daily update on its ready reserve fleet ships. TR: 552-555; Union Ex. 9. Additionally, the RETREP ensures that the team members have completed periodic FEMA online training sessions. TR:583.

In the event that a disaster is declared by the President of the United States, the National Response Coordination Center at FEMA headquarters may decide to activate certain DOT support functions. TR:549. The disputed RETREP position and the cadre team members could deploy in response to natural or manmade disasters. TR:576. For example, in 2005, RETREP Cynthia Hansen-Sacks and two cadre team members deployed to Louisiana during Hurricane Katrina. TR:578. When Hansen-Sacks is activated in response to a disaster, her primary role is to report on the status of all of the transportation infrastructure and any workarounds that would be necessary due to the infrastructure being compromised. TR:600.

Another function of the disputed RETREP position is to engage in disaster planning and emergency preparedness meetings with a variety of governmental and non-governmental organizations. TR:596-597. For example, Hansen-Sacks has met and networked extensively with numerous Federal and State agencies (including FEMA, the U.S. Department of Defense, and GSA) and with stakeholders (including the Red Cross and Ted Stevens International Airport management) regarding transportation, infrastructure, emergency management, and disaster response. Union Ex. 11.

The disputed RETREP position requires that the incumbent maintain a Top Secret clearance. Union Ex. 9:3. Hansen-Sacks is currently in the process of upgrading her Secret clearance to a Top Secret level clearance. TR:567-568. The incumbent has worked as a full-time RETREP since October of 2015. TR:546. There has been one instance where Hansen-Sacks has had to use her Secret clearance as a RETREP. TR:568. In that one instance, she participated in a secret phone call with DOT. TR:569.

**Analysis and Conclusions**

Applying the principles of *DOJ* and *SSA Balt*, I find that the RETREP position does not involve security work as defined by the Authority. Hansen-Sacks

responsibilities as a RETREP involve disaster preparedness and emergency responsiveness. The RETREP duties do not require the performance of intelligence, counterintelligence, or security work. And the record does not indicate that Hansen-Sacks has regular access or use of classified information. The RETREP is primarily engaged in educating and training team members to be prepared for disaster deployment. RETREP responsibilities include a coordinating with various stakeholders and modes of transportation when disasters occur, but the RETREP is not tasked with the prevention of disaster. Moreover, the RETREP work does not have a straight bearing or unbroken connection that produces a material influence on national security. As Hansen-Sacks is not engaged in security work that directly affects national security within the meaning of section 7112 (b)(6) of the Statute, her position is included the NATCA bargaining unit.

- 4. Project Officer Position (in AAL-001)**
- a. Project Officer (Space Management), position encumbered by Michael Fleming**

The JAT for the disputed Project Officer position describes the primary job duties. TR:509; Union Ex. 7. The Project Officer produces project packages regarding space administration and construction projects for the Region. TR:506. A project package consists of a statement of work that accounts for the Agency customer’s square footage requirements and special equipment needs; an independent cost estimate; and the key players for a project. TR:506-507. The Project Officer coordinates with the General Services Administration (GSA) and building contractors regarding space construction projects. Union Ex. 7:3. The Project Officer develops a design and construction package for GSA, GSA bids out the work, then the Project Officer coordinates with GSA and its building contractors to ensure that the project is progressing effectively and meeting Agency needs. TR:510.

The Project Officer works closely with and provides support to managers and human resources specialists who are significantly involved in handling complex, multi-union labor relations issues and projects. Union Ex. 7:3; TR:536-537. For instance, Agency regulations specify how much square footage of office space certain employees are entitled to. TR:520. If there is a bargaining unit agreement in place that applies to the employees that are involved in the space that would be distributed, square footage entitlements may have to be modified, and other consideration would have to be made. TR:521. Agency managers generally ensure that

the Project Officer has access to the appropriate information for each bargaining unit employee, but if managers fail to provide the information, the Project Officer can access it directly and adjust the project package as needed. TR:521. The Project Officer is involved with management in putting the project package together before it is provided to a union. TR:522. The Project Officer assists management in giving unions notice of construction which could result in bargaining between management and a union. TR:523-528. Fleming has served as a subject matter expert during negotiations with a union, helping management to formulate proposals in regard to furniture changes and cost evaluation. TR:514-515. The Project Officer has reviewed and commented on Union proposals as well. TR:537.

The incumbent generally does not speak directly with bargaining unit employees concerning office moves, but he has done so on occasion. Typically, the Project Officer provides information to managers, who then provide that information to the bargaining unit employees. However, the incumbent has held open forum meetings totaling three hours per week for about one year. TR:515-516.

The disputed Project Officer position also serves as the backup for the Alaskan Region Program Analyst (Regional Emergency Planner/Preparedness Specialist). TR:507.

### Analysis and Conclusions

Applying the principles of *Yuma* and *Labor*, I find that Michael Fleming is a confidential employee and should be excluded from the bargaining unit. The record shows that Fleming works directly on labor relations issues including drafting management proposals and reviewing union proposals. The Project Officer (Space Management) Job Analysis Tool provides that Fleming manage space consolidation efforts, to include working closely with and providing support to managers and Human Resources specialists who are significantly involved in handling complex, multi-union labor relations issues and projects. Fleming testified that he advises labor relations managers regarding the impact of changes to space management and that he has provided briefings to the Regional Management Team (RMT) regarding space management while RMT was in the midst of negotiating a change in employee working conditions with Union representatives. Fleming further testified that it would be fair to conclude that he assists management in their preparation of proposals and counterproposals to unions. Additionally, Fleming explained that he regularly obtains information from management concerning relocations and consolidation projects before a union would have access to it. Management should not be faced

with having bargaining unit members in positions where they could provide information pertaining to labor-management relations to the union in advance. Consequently, the Project Officer (Space Management) position currently encumbered by Fleming is not eligible for inclusion in the existing bargaining unit.

### III. Order

IT IS HEREBY ORDERED that the following positions be excluded from the bargaining unit: Management and Program Analyst position currently encumbered by William Thomas; Financial Analyst position currently encumbered by Khalid Khudur; Business Case Analyst position currently encumbered by Christopher Perone; Cost Analyst positions currently encumbered by John Heiston and Teresa Price; Financial Analyst, positions currently encumbered by Shane Hart, Christiana Paul, and Martin Sobol; Management and Program Analyst, position currently encumbered by Clayton Richards; Operations Research Analyst, positions currently encumbered by Ellis Feldman, Lewis Fisher, Mark Friedman, Niatika Griffin, Susan Laird, Darcine Mason, Jacob Sagha, Brandon Sheplak, John Sullivan, Robert Sullivan, and Rachel Weber; Project Officer position currently encumbered by Michael Fleming; Computer Specialist positions currently encumbered by Patrick O'Toole, Glen Pettit, William Schamberger, Mark Staggs, and Cecil Wolf; and Program Analyst (Regional Emergency Planner/Preparedness Specialist) positions currently encumbered by Gordon Evans, James Hamill, Tracy Matthews, and James O'Leary.

IT IS HEREBY ORDERED that the following positions be included in the bargaining unit: Program Analyst positions currently encumbered by Lakesha Bankston-Glover and Barbara Gulick; Administrative Officer positions currently encumbered by Jonni Christian and Sarah DeWitt; Administrative Services Specialist position currently encumbered by Ava Fleming; Administrative Specialist position currently encumbered by Carol Hinterlong; and Program Manager (Regional Emergency Transportation Representative), position currently encumbered by Cynthia Hansen-Sacks.

### IV. 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 **January 29, 2018**, 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](http://www.flra.gov).<sup>4</sup>

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Jessica Bartlett  
Regional Director, Washington Region  
Federal Labor Relations Authority

Dated: November 30, 2017

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<sup>4</sup> To file an application for review electronically, go to the Authority's website at [www.flra.gov](http://www.flra.gov), select **eFile** under the **Filing a Case** tab and follow the instructions.