



U.S. Department
of Veterans Affairs

Assistant Secretary for Human Resources and
Administration/Operations, Security and Preparedness
Washington DC 20420

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Mr. Brandon Bradley, Acting Chief
Case Intake and Publication
Federal Labor Relations Authority
1400 K Street, NW
Washington, DC 20424

Dear Mr. Bradley:

Per the attached, I have been designated as the appropriate management official under 5 U.S.C. § 7103(a)(11) to make requests on behalf of the Department of Veterans Affairs (VA) to the Federal Labor Relations Authority ("Authority" or FLRA) for a general statement of policy or guidance pursuant to 5 C.F.R. § 2427.2(a). As such, VA makes the following request, outlined in detail below.

A. Question Presented

Pursuant to 5 C.F.R. § 2427.2, VA requests that the Authority issue guidance on the following topic:

What is the scope of coverage for the term "management official" under 5 U.S.C. § 7103(a)(11) in the context of bargaining unit determinations?

B. Background Information

Under 5 U.S.C. § 7112(b)(1) of the Federal Labor-Management Relations Statute (Statute), bargaining units are not "determined to be appropriate" if the units include "any management official or supervisor." Therefore, any employees falling under the definition of "management official" or "supervisor" must be excluded from bargaining units.

"Management official" is defined as follows under 5 U.S.C. § 7103(a)(11):

"Management official" means 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.

The FLRA regulations do not further clarify the meaning of the term "management official". 5 C.F.R § 2421.2.

The term "supervisor" is defined under 5 U.S.C. § 7103(a)(10) as:

[A]n individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment...

The FLRA regulations do not further clarify the meaning of the term “supervisor”. 5 C.F.R. § 2421.2.

On its face, the definition of “management official” would appear to cover a broader category of employees given that there are three types of duties and responsibilities that would allow an individual to fall under the definition – those whose duties and responsibilities have them either “formulate,” “determine,” or “influence” policies of the agency. However, despite the broad language utilized in the Statute, the Authority caselaw on the subject of “management officials” within the context of bargaining unit determinations has defined the term to require employees to essentially serve in leadership roles to be excluded from the unit. As discussed below, the FLRA has, more often than not, ruled that even highly graded employees with extensive expertise occupying professional positions do not influence policy and therefore, cannot be excluded from the unit. Rather, despite the broad definition of the term “management official” set forth in 5 U.S.C. § 7103(a)(11), the FLRA has narrowly defined the term “management official” in caselaw such that essentially only individuals in leadership roles can qualify. As a result, the Authority has also created a significant overlap with the definition of “supervisor”. 5 U.S.C. § 7103(a)(10). This seems contrary to the intent behind having separate terms and definitions for the underlying functions. *Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al.*, 447 U.S. 102 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”)

C. 5 C.F.R. § 2427.5 Request Standards

1. Address whether the question presented can more appropriately be resolved by other means

The Authority has the ultimate authority to make bargaining unit determinations under 5 U.S.C. § 7112(b)(1) and interpret the Statute. In fact, bargaining unit determinations by the Authority are specifically excluded from judicial review under the Statute. 5 U.S.C. § 7123(a)(2) (“Any person aggrieved by any final order of the Authority other than an order under... (2) section 7112 of this title (involving an appropriate unit determination) may... institute an action for judicial review...” (emphasis added).

In applying this bargaining unit determination authority, the Authority has interpreted the term “management official” very narrowly, requiring that an employee generally be in a

leadership capacity to be excluded from a bargaining unit. This interpretation has come solely in the form of decisions by the Authority in response to filings for bargaining unit determinations. For this reason, the Authority is the sole source that can provide the necessary clarity as to how the definition of "management official" under 5 U.S.C. § 7103(a)(11) should be interpreted. The Authority can provide clear parameters for defining what specific types of duties meet the definition of "formulate, determine, or influence" agency policy under 5 U.S.C. § 7103(a)(11) and the extent of upper level review or concurrence required.

2. Address where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar questions;

There is no right to appeal the FLRA's consistently narrow application of the definition of "management official". 5 U.S.C. § 7123(a)(2). For that reason, the only legitimate forum for consideration of this issue is a request under 5 C.F.R. § 2427.5.

3. Address whether the resolution of the question presented would have general applicability under the FSLMRS;

Clarification of the definition of "management official" under the Statute would help Agencies in making bargaining unit determinations and responding appropriately to representation petitions filed by Unions. This would prevent the draining of resources on unnecessary litigation.

4. Address whether the question currently confronts parties in the context of a labor-management relationship;

It is unknown whether the question currently confronts parties in the context of a labor-management relations, however, the question of whether a position should be included in a bargaining unit frequently arises in the context of labor-management relations. A clear statement from the FLRA would assist Agencies in creating greater efficiencies in the bargaining unit determination process and likely decrease the number of unit clarification petitions filed.

5. Identify any known interested parties;

There are no known interested parties to this question.

6. Address whether the question is presented jointly by the parties involved; and

This question is not presented jointly.

7. Address whether the issuance by the Authority of a general statement of policy or guidance on the question would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the FSLMRS.

VA believes that clarification on this matter would promote constructive and cooperative labor-management relationships. Clarification of bargaining units can be an issue of great contention between management and unions. Guidance from the FLRA on this matter would help promote cooperation and dialogue between agencies and unions by providing a baseline understanding from which to operate in determining bargaining unit status.

D. Government's Position

The FLRA has defined "management official" more narrowly than a plain reading of the Statute would support. The narrow interpretation of the Statute has set the standard for meeting the definition of "management official" at a very high level. The Authority's decisions, as outlined below, suggest that an individual must be in a leadership position or position of definitive authority to meet the definition of "management official." See, e.g., *U.S. Dep't of Energy (DOE), Headquarters, Wash., D.C.*, 40 F.L.R.A. 264, 271-72 (1991) (considering 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); *United States Dep't of the Interior, Bureau of Mines, Twin Cities Research Ctr., Twin Cities, Minn.*, 9 F.L.R.A. 109, 112-13 (1982) (same). Due to the structure of most Government Agencies and the concurrence process that is required for Agency policy creation, this analytical framework has resulted in making the broad definition of management official under the Statute almost impossible to meet for most individuals outside of senior leadership. "[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269 (1929). When determining how to interpret statutes, courts initially look at the plain language of the statute and apply the usual and ordinary meanings of the terms in the statute.

Here, the language of the Statute is clear. A "management official" is an individual who is required or authorized to "formulate, determine, or influence" policies within the agency. 5 U.S.C. §7103(a)(11) (emphasis added). In the Merriam-Webster dictionary, the term "formulate" is defined as "to reduce to or express in a formula," "to put into a systemized statement or expression," and "devise."¹ For the term "determine", definitions include "to fix conclusively or authoritatively," "to settle or decide by choice of alternatives or possibilities," "resolve", and "to find out or come to a decision about by investigation, reasoning, or calculation."² Finally, "influence" is defined as "to affect or alter by indirect or intangible means" or "to have an effect on the condition or development of."³ Based on these definitions, the dictionary definition of the term

¹ *Merriam-Webster.com Dictionary*, s.v. "formulate", accessed July 14, 2020, <https://www.merriam-webster.com/dictionary/formulate>.

² *Merriam-Webster.com Dictionary*, s.v. "determine", accessed July 14, 2020, <https://www.merriam-webster.com/dictionary/determine>.

³ *Merriam-Webster.com Dictionary*, s.v. "influence", accessed July 14, 2020, <https://www.merriam-webster.com/dictionary/influence>.

“determine” suggests the need for some authority supporting the decision, which an individual in a leadership position would have. However, the definitions of the terms “formulate”, and “influence” do not require such authority to support the individual’s involvement in agency policy creation.

Of note, the Statute as written indicates that an individual need only meet one of the terms “formulate,” “determine,” or “influence” to meet the definition. However, the FLRA’s interpretation through caselaw suggests that individuals should have duties covering multiple categories in order to meet the definition. See Part V, *infra*. The Statute plainly states “or” as opposed to “and” as a connector for these terms. VA’s position is that an individual who performs agency-related duties in excess of 25% of the time, whether via formulating policy, determining policy, or influencing such policy falls under the statutory definitions outlined above should be considered a “management official.”

E. Relevant Caselaw and/or Proceedings

As noted above, Federal courts have not addressed FLRA’s definition of “management official” because representational determinations by the Authority are not subject to appeal. 5 U.S.C. § 7123(a)(2). Therefore, the available caselaw analyzing the issue solely comes from the Authority.

Individuals Considered Management Officials

“Management official” is defined under 5 U.S.C. § 7103(a)(11) 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.” The Authority initially found that to be a “management official,” an individual must have an “active role” in influencing and determining policy. *United States Army Commc’ns Sys. Agency, Fort Monmouth, N.J.*, 4 F.L.R.A. 627, 631 (1980). Within the definition, the Authority interpreted the term “to influence” to be similar to the term “to effectively influence” and to mean “to bring about or to obtain a result.” *Dep’t of the Navy, Automatic Data Processing Selection Office (Dep’t of Navy ADPSO)*, 7 F.L.R.A. 172, 174-175 (1981). In the *Dep’t of Navy ADPSO* decision, the criteria utilized by the Authority for determining whether an employee is a management official included whether the person in the position: (1) creates, establishes or prescribes general principles, plans, or courses of action for an agency; (2) decides upon or settles upon general principles, plans or courses of action for an agency; or (3) brings about or obtains a result as to the adoption of general principles, plans, or course of action for an agency. *Id.* at 177.

In the subsequent *Headquarters, 1947th* case, the Authority determined that a number of different individuals in the office were management officials. *Headquarters, 1947th Admin. Support Grp., U.S. Air Force, Wash., D.C.*, 14 F.L.R.A. 220 (1984). Such individuals included: a Logistics Management Specialist who had “substantial input in orchestrating logistics facilities requirements” and maintaining Air Force regulations; a

Program Analyst who managed the vehicle procurement program and exercised independent authority” when determining the amount of funds necessary for the program; a Transportation Officer who had “signatory authority” to bind the U.S. on decisions regarding airlift procedures at international conferences; a Transportation Customs Officer who was the Air Force Program Manager for the Department of Defense Customs Program and authored and maintained related guidelines; a Transportation Maintenance Specialist who established Joint Services policies and procedures governing worldwide transportation of passengers and cargo as well as determined the tariff rate and whether anyone would be subject to that rate; a Traffic Management Specialist who oversaw reciprocal agreements with allied air forces and was responsible for regulations governing military airlifts for the Department of Defense; and a Realty Officer who managed Contract Engineering Technical Services and rewriting an Air Force manual on obtaining such services. *Id.* at 227-229. *See also, Internal Revenue Service (IRS), Kan. Serv. Ctr.*, 15 F.L.R.A. 208, 209 (1984) (individual whose “major function is a review of the Activity’s work practices and policies which he may change” and who is able to “commit funds and resources through direct negotiations with vendors” had responsibilities which required him to formulate, determine, or influence policies); *Dep’t of Transportation, 8th Coast Guard District, New Orleans, Louisiana*, 35 F.L.R.A. 84 (1990) (civilian who developed policy applicable only to military personnel may be a management official); *U.S. Dep’t of Justice, Board of Immigration Appeals*, 47 F.L.R.A. 505, 509 (1993) (individual whose “judgements and decisions in [immigration] cases...influence and determine the Board’s policies” was a management official).

Individuals Not Considered Management Officials

The FLRA caselaw determining that individuals do not meet the broad definition of a management official under the Statute is more extensive. For example, individuals who do not “come to independent decisions...as to what the Agency’s policy will be” are not management officials and are instead acting in the role of experts or professionals rendering resource information. *DOI U.S. Fish & Wildlife Serv., Patuxent Wildlife Research Ctr., Laurel, Md.*, 7 F.L.R.A. 643, 648-649 (1982). Individuals who assist with the development and implementation of policies are not management officials within the meaning of 7103(a)(11) but are instead more “experts rendering useful resource information.” *U.S. Dep’t of Transportation (DOT), Office of the Sec’y of Trans.*, 12 F.L.R.A. 103, 104 (1983). Individuals who assist in implementing as opposed to shaping policy are not management officials. *934th Tactical Airlift Group (AFRES), Minneapolis-St. Paul Int’l Airport, Minneapolis, Minn.*, 13 F.L.R.A. 549, 551 (1983). In contrast to the *US DOJ* case above, the FLRA found that immigration judges did not formulate national or local Agency policy despite participation in advisory committees and court evaluation teams. *DOJ, Exec. Office of Immigr. Rev., Office of the Chief Immigr. Judge*, 56 F.L.R.A. 616, 621 (2000). “[T]he Authority has reserved the term ‘management official’ for a discrete category of employees whose responsibilities extend beyond that of a professional or technical expert, and/or employees who are authorized to draft or author agency rules, regulations, or directives.” *Nat’l Credit Union Admin. (NCUA)*, 59 F.L.R.A. 858, 862 (2004). An individual who has recommendations generally accepted by

superiors does not rise to the level of “influential”; instead, there must be exercise of additional authority involved, such as the authority to commit agency funds. *U.S.D.A. Nat’l Fin. Ctr., New Orleans, La.*, 68 F.L.R.A. 211, 227 (2015). In fact, the vast majority of FLRA caselaw concerning the application of the management official exclusion requires individuals to perform a combination of duties related to the formulation, determination, and influence of agency policy. See e.g., *United States Army Commc’ns Sys. Agency, Fort Monmouth, N.J.*, 4 F.L.R.A. 627, 631 (1980), where auditor was found to be a “management official” based on his responsibilities requiring him to “influence the policies of the Activity”, his role extending to “the point of active participation in the ultimate determination as to what the policy in fact will be...”, and his performing duties including reviewing internal procedures and making recommendations as to policy changes.

Definition of “Influence”

The *Navy ADPSO* case expanded the definition of “influence” to mean “brings about or obtains a result as to the adoption of general principles, plans, or course of action for an agency.” *Dep’t of Navy (ADPSO)*, 7 F.L.R.A. 172, 177 (1981). The term “implement” is frequently utilized by the Authority to distinguish between actions constituting “influencing” policy (“shaping” or “making”) versus actions that do not (“implementing existing policies”). (See e.g., *U.S. Dep’t of Energy (DOE), Headquarters, Wash. DC.*, 40 F.L.R.A. 264, 271 (1991) (attorneys involved in implementing Agency’s policy objectives were not management officials); *AFRES*, 13 F.L.R.A. 549, 551 (1983) (employees whose actions assist in implementing, as opposed to shaping, policies are not management officials); *United States Army Commc’ns. Sys. Agency, Fort Monmouth, N.J.*, 4 F.L.R.A. 627, 630 (1980) (employee who does no more than implement policy procedures already determined by higher management authority is not management official)). However, the term “implement” is noted to be synonymous with the phrase “brings about.”⁴ This would suggest that individuals who perform actions to “implement” policies essentially “influence” policy and should be considered a management official.

One of the first cases to attempt to distinguish between those who “shape” versus “implement” policy was the *Health Care Finance Administration* case. *Health Care Fin. Admin.*, 1984 FLRA LEXIS 638, F.L.R.A. ALJ Dec. No. 36 (1984). In the case, the Respondent contended that “an individual whose responsibilities affect the Agency’s policy mission, using independent judgment and functions without final review... meets the definition of management official.” *Id.* at 19. The Administrative Law Judge (ALJ) disagreed, noting that responsibilities that merely “affect” policy or the use of “independent judgement” and creation of “unreviewable decisions” did not mean the individual influences or makes policy. *Id.* The ALJ found the individual to be a professional employee who applied technical expertise and knowledge to factual situations presented in cases before him. *Id.* at 21. The ALJ determined that the individual did not make policy; he implemented policy. *Id.* at 22. The ALJ findings were adopted by the Authority in a later ruling.

⁴ See *Collins Thesaurus of the English Language* – Complete and Unabridged 2nd Edition, 2002.

Subsequent cases likewise held that individuals were not management officials because they acted in the capacity of subject matter experts and “implemented” but did not make policy. (See *United States DOT*, 12 F.L.R.A. 103(1983); *IRS, Kans. Ser. Ctr.*, 15 F.L.R.A. 208 (1984); *AFRES*, 13 F.L.R.A. 549 (1983); *U.S. Dep’t of Energy (DOE), Headquarters, Wash., D.C.*, 40 F.L.R.A. 264 (1991); *U.S. Dep’t of the Army, U.S. Army Corps of Eng’rs Logistics Activity Ctr., Millington, Tenn.*, 69 F.L.R.A. 436 (2016)). The *U.S. DOE* case is particularly notable given that the Authority determined that one subset of attorneys at the DOE were management officials while other attorneys were not. *U.S. DOE*, 40 F.L.R.A. 264 (1991). Specifically, a Regional Director (RD) determined that 32 individuals in GM-15 level attorney positions in the Office of General Counsel were not management officials under 5 U.S.C. § 7301(a)(11). *Id.* at 264-265. Applying the *Navy ADPSO* case, the RD concluded that the 32 attorneys did not perform duties that required or authorized them to formulate, determine, or influence agency policies. *Id.* The attorneys worked independently, handled more complex cases, and made recommendations to implement agency policy. *Id.* The agency argued that most, if not all, of the attorneys clearly met one or more of the criteria listed in *the Dep’t of Navy ADP* case – all of the attorneys participated “in the formulation or determination of agency policy and influence that policy as it is developed and refined”, the RD determined that they acted as highly skilled attorneys providing legal advice in their particular area of expertise. *Id.* at 267. For the attorneys outside of Finance, the Authority found that the attorneys served as “highly trained experts who provide legal advice and assistance within their areas of knowledge” despite acknowledging that the attorneys worked independently with little direct supervision and served on policy committees and panels. *Id.* at 269-270. However, for the attorneys in Finance, they had wide discretion to act for the General Counsel in matters, made independent and unreviewed decisions, had independent signatory authority, and “substantively influence[d] the formulation of Agency policies by providing valued advice.” *Id.* at 271-272. This case highlights the fine and often undistinguishable line between what actions would render an individual a “management official” under 5 U.S.C. § 7103(a)(11).

“Exercise of independent judgement”

The definition of supervisor under 5 U.S.C. § 7103(a)(11) states that individuals meet the definition “if the exercise of the authority.... requires the consistent exercise of independent judgment...” The Authority has applied the concept or terms related to “independent judgment” to the analysis of whether individuals are management officials, further conflating management officials with supervisors. However, unlike the definition of supervisor under the Statute, the definition of management official makes no reference to “the consistent exercise of independent judgment.” *Compare* 5 U.S.C. § 7103(a)(10) *with* 5 U.S.C. § 7103(a)(11).

In early decisions involving the definition of “management official”, the Authority considered whether an individual has authority to make “independent decisions” in addition to considering whether their recommendations and findings are accepted and implemented and to what extent the individual’s actions are reviewed. See e.g., *Dep’t of Interior, Bureau of Mines, Twin Cities Research Ctr., Twin Cities, Minn.*, 9 F.L.R.A. 109,

112-113 (1982) (individual who made independent decision within Agency guidelines considered management official); *U.S. DOE*, 40 F.L.R.A. 264, 271-272 (1991) (attorneys who made independent and unreviewed decisions were considered management officials); *U.S. Dep't of Transp., FAA*, 71 F.L.R.A. 28 (2019)(program analysts were not management officials because they did not have authority to make independent decisions to influence agency travel policies). Later authority decisions specifically referenced the “exercise of independent judgment” when considering whether individuals were management officials. See e.g., *Dep't of Navy Naval Undersea Warfare Ctr. Keyport, Wa.*, 68 F.L.R.A. No. 421 (2015) (contracting officer not a management official because he lacked certain authorities); *Headquarters, 1947th Admin. Support Grp., U.S. Air Force, Wash., D.C.*, 14 F.L.R.A. 220 (1984) (program analyst who exercised independent authority in determining how money allocated for Air Force programs found to be management official). The Authority has further noted that “the independent judgment exercised by the individual formulating or effectuating agency policies is critical in determining whether a person is a management official.” *U.S.D.A. Nat'l Fin. Ctr. New Orleans, La.*, 68 F.L.R.A. 211, 228 (2015) (individual was a management official because she exercised independent judgment in making decisions regarding the deployment of training courses). With these decisions, the Authority has blurred the line between supervisors and management officials in requiring that individuals demonstrate independent judgment and decision-making.

A plain reading of the Statute supports a finding that many of the above noted cases wherein individuals were determined not to be management officials should, in fact, have had the opposite outcome. By historically interpreting the broad definition in 5 U.S.C. § 7103(a)(11) in such a restrictive way, the Authority caselaw has essentially conflated the management official exclusion with the supervisory exclusion under 5 U.S.C. § 7112(b)(1).

F. Conclusion

Based on the foregoing, VA requests that the FLRA issue a policy statement clarifying the scope of coverage for the term “management official” under 5 U.S.C. § 7103(a)(11) that tracks the broader language utilized in the Statute so RD decisions more closely follow the Statute’s requirements.

If you have any questions, please contact Mr. Michael Picerno, Acting Executive Director, Labor Management Relations, Office of Human Resources and Administration/Operations, Security and Preparedness at Michael.Picerno@va.gov.



Daniel R. Sitterly

Attached: Designation Memorandum