Office of Congressional Workplace Rights

Office of the General Counsel

UNIONIZATION IN THE LEGISLATIVE BRANCH: QUESTIONS & ANSWERS JUNE 29, 2022

Introduction

Over the past few months, the OCWR has received numerous questions from legislative branch stakeholders regarding unionization and collective bargaining. Although many of these questions have come to us in connection with recent congressional staff unionization efforts, most of them would apply to employees of other legislative branch employing offices as well. To assist the legislative branch community in understanding the unionization and collective bargaining process, we have compiled answers to the most commonly asked questions we have received.

Background

Section 220 of the Congressional Accountability Act of 1995 (CAA), 2 U.S.C. § 1351, applies certain provisions of the Federal Service Labor-Management Relations Statute (FSLMRS) to the legislative branch. Covered employees have been unionizing and negotiating collective bargaining agreements (CBAs) with management since the late 1990s. However, until recently, the substantive regulations passed by the Board of Directors of the Office of Congressional Workplace Rights (OCWR) did not apply to employees of any of the employing offices listed in section 220(e)(2) of the CAA, 2 U.S.C. § 1351(e)(2), which includes the vast majority of employing offices within the Senate and the House of Representatives, among others.

On May 10, 2022, the House passed H. Res. 1096, which applied the OCWR Board's existing labor-management regulations to those employing offices within the House that are listed in section 220(e)(2). The Board issued its H Series regulations through publication in the *Congressional Record* on May 17, 2022, and those regulations will become effective for House employees on July 18, 2022.

Process Overview

In order for eligible employees to become represented by a union, the process begins with a "showing of interest." This showing must include the signatures of at least 30% of the employees

in a proposed bargaining unit. Once this threshold has been met, the union may petition the Office of Congressional Workplace Rights for an election of exclusive representation.

Once a petition for representation is received, the OCWR investigates and resolves all pre-election issues raised by the parties. Prior to the election, any other union showing they are supported by at least 10% of the employees in the proposed bargaining unit may file a petition to gain a place on the ballot. When all of the pre-election conditions have been met, the OCWR holds an election in which employees have the opportunity to vote by secret ballot to choose which labor organization, if any, they would like to represent them. If a majority of the voting employees choose to be represented by a particular union, the OCWR Board of Directors certifies the union as the employees' exclusive representative.

Employees may choose to join the union – or not – without fear of penalty or reprisal.

After a union is certified, it engages with the employing office's management representatives to negotiate and reach a collective bargaining agreement. Should the parties disagree about whether a given proposal is outside the scope of bargaining, the OCWR's substantive regulations provide resolution procedures. Similarly, if the union and management are unable to reach a collective bargaining agreement, there are procedures for the Board to resolve issues that have caused the impasse.

Once the parties reach a collective bargaining agreement, the agreement's terms of contract will apply until such a time that they expire, the union is dissolved, or a new collective bargaining agreement is successfully negotiated. The OCWR's Substantive Regulations on collective bargaining and unionization can be found on our web site at www.ocwr.gov.

Role of the OCWR

The OCWR is an independent, neutral, and nonpartisan organization within the legislative branch, and was established to administer and enforce the Congressional Accountability Act. In the context of labor-management relations, the OCWR has several different roles: the Office of the Executive Director, acting as the designee of the Board of Directors, processes petitions for representation and holds elections; the General Counsel investigates charges of unfair labor practices (ULPs) and files ULP complaints when appropriate; Hearing Officers may decide negotiability disputes, exceptions from arbitration awards, and ULP complaints; and the Board of Directors ultimately decides issues raised by petitions, reviews appeals from Hearing Officer decisions, and also acts as an impasse panel.

Another role of the OCWR is to educate the legislative branch community regarding the rights and obligations established by the CAA, including in the area of labor-management relations. Educational materials can be found on our web site, and we are currently developing additional materials and training programs.

The OCWR is not affiliated with any labor organization, or with the management of any other employing office. The OCWR does not determine the role of the Office of House Employment Counsel or its counterparts in other employing offices, or the House Office of Employee Advocacy, the Congressional Workers Union, or any labor organization.

Differences Between Executive and Legislative Branches

In our answers to the questions below, we include some references to case law precedents from both the OCWR Board of Directors and the Federal Labor Relations Authority (FLRA), which administers and enforces the FSLMRS in the executive branch. However, it is important to note that although the CAA applies provisions of the FSLMRS to the legislative branch, that does not necessarily mean that the unionization and collective bargaining process will be identical in the two branches. The OCWR Board of Directors views the decisions of the FLRA as persuasive, but the Board is not bound to follow the FLRA's precedents, and may deviate from them if there is good cause to do so. We cannot yet anticipate all the circumstances in which different application of the law may be appropriate; it is simply worth noting that legislative branch employees, unions, and employing offices should not take for granted that the Board will necessarily follow the FLRA in every circumstance.

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Applicability of Labor-Management Rights

- *Who is covered by the FSLMRS in the legislative branch?*

The CAA provides union rights to many legislative branch employees, including employees of the United States Capitol Police, the Office of the Architect of the Capitol, the Office of Congressional Accessibility Services, the Office of Attending Physician, the Stennis Center for Public Service, and offices in the Senate and House of Representatives that are not listed in Section 220(e)(2) of the Act.

Some legislative branch offices have union rights under laws other than the CAA. The FSLMRS provides union rights to employees of the Library of Congress and Government Publishing Office. 5 U.S.C. § 7103. Similarly, while the FSLMRS itself does not grant union rights to employees of the Government Accountability Office (GAO), the GAO Personnel Act guarantees

the rights of GAO employees to form, join, or assist, or not to form, join, or assist, an employee organization freely and without fear of penalty or reprisal. 31 U.S.C. § 732(e). These rights are enforced by the GAO Personnel Appeals Board.

The CAA also provided that union rights would extend to offices in the Senate and House of Representatives listed in Section 220(e)(2) of the Act when regulations were adopted by the Board, approved by the House and/or Senate with respect to those offices, and issued by the Board. Those regulations were adopted by the Board in 1996 but were not approved by Congress at that time.

On May 10, 2022, the House approved those regulations for House of Representative employees listed in Section 220(e)(2) of the Act by passing House Resolution 1096. On May 17, 2022, the Board's regulations were published in the Congressional Record pursuant to section 304 of the CAA, 2 U.S.C. § 1384. Approved regulations become effective not less than 60 days after the date on which they are published in the Congressional Record – in this case, on July 18, 2022. After July 18, all employees of the House employing offices listed in the H Series regulations will have the rights afforded to covered employees by the FSLMRS as applied by the CAA, including the right to attempt to unionize and collectively bargain. The House employing offices listed in the H Series regulations are:

> (1) the personal office of any Member of the House of Representatives;
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> (2) a standing, select, special, permanent, temporary, or other committee of the House of Representatives;
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> (3) the Office of the Speaker of the House of Representatives, the Office of the Majority Leader of the House of Representatives, the Office of the Minority Leader of the House of Representatives, the Offices of the Chief Deputy Majority Whips, the Offices of the Chief Deputy Minority Whips, and the following offices within the Office of the Clerk of the House of Representatives: Offices of Legislative Operations, Official Reporters of Debate, Official Reporters to Committees, Printing Services, and Legislative Information;
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> (4) the Office of the Legislative Counsel of the House of Representatives, the Office of the General Counsel of the House of Representatives, the Office of the Parliamentarian of the House of Representatives, and the Office of the Law Revision Counsel;
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> (5) the offices of any caucus or party organization within the House of Representatives; and
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> (6) the Office of the Majority Whip of the House of Representatives, the Office of the Minority Whip of the House of Representatives, the Office of House Employment Counsel, the Immediate Office of the Clerk of the House of Representatives, the Immediate Office of the Chief Administrative Officer of the House of Representatives, the Office of Legislative Computer Systems of the House of Representatives, the Office of Finance of the House of Representatives, and the Immediate Office of the Sergeant at Arms of the House of Representatives.

- *Are job applicants covered?*

Section 2421.3 of the OCWR Substantive Regulations includes an applicant in its definition of "employee." However, Section 2421.3(b)(3) excludes an applicant for the purpose of determining the adequacy of a showing of interest or eligibility for consultation rights.

- *Can former employees be involved?*

Section 2421.3 of the OCWR Substantive Regulations includes a "former" employee in its definition of "employee." However, Section 2421.3(b)(3) excludes former employees for the purpose of determining the adequacy of a showing of interest or eligibility for consultation rights.

The Congressional Accountability Act does not adopt the definition of employee from 5 U.S.C. § 7103, which covers the executive branch. Section 7103(a)(2)(B) only includes a former employee when the employee's "employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment…."

- *Does the law apply differently to D.C. and district staff?*

There is no difference in union rights for staff in different geographical locations. That said, the unions or employing offices may or may not assert that staff in a district have a different community of interests than the staff in D.C. Similarly, the unions or employing offices may or may not assert that having separate or the same appropriate unit for staff in different geographical locations promotes effective dealings and promotes the efficiency of the operations. For a bargaining unit to be an "appropriate unit," the employees must share a "clear and identifiable community of interest" and the unit must promote "effective dealings" with, and efficiency of the operations of, the employing office involved. See 5 U.S.C. § 7112. A pre-election hearing may be necessary to resolve disputes about the appropriateness of a unit proposed in a petition.

- *Are confidential employees and management officials eligible to unionize?*

No. Confidential and management employees – including but not limited to supervisors, human resources, and management officials – do not have the right to unionize for the purpose of collective bargaining even if they work for a covered employing office. These terms are defined in the OCWR Substantive Regulations at Sections 2421.3(j) (management official) and 2421.3(l) (confidential employee).

- *Are unpaid interns eligible to unionize?*

No. Although the CAA provides unpaid interns with protections against certain types of unlawful discrimination, it does not provide unpaid interns with a statutory right to unionize.

Unionization Process

- *What are the steps of the unionization process? How long does it take?*

For a labor organization to be recognized as the exclusive representative, eligible employees who are not represented by a union may petition for an election to decide whether a union will represent a proposed bargaining unit of eligible employees. This petition and election process involves the following steps:

> (1) The employees provide the union with a "showing of interest" – i.e., signatures of at least 30% of the employees of a proposed bargaining unit, showing their wish to be represented by that union;
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> (2) The union petitions the OCWR using the OCWR Representation Petition Form 1351D, which is available on the OCWR web site at https://www.ocwr.gov/labor-management/labor-management-forms/representation-petition-form-1351d-2019/;
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> (3) The OCWR investigates and resolves any pre-election issues raised by the parties;
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> (4) Any other union can gain a place on the ballot by filing a petition showing that they are supported by at least 10% of the employees in the proposed bargaining unit;
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> (5) The OCWR holds a secret ballot election, during which employees have the opportunity to vote to choose which labor organization, if any, they would like to represent them; and
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> (6) If a majority of the voting employees vote to be represented by a particular union, the OCWR Board of Directors certifies the union as the employees' exclusive representative.

It is worth noting that at the showing of interest stage it is possible for one employee to support multiple unions. In other words, the same employees who make up the 30% showing of interest for the union that filed the original representation petition can also make up the 10% showing for other unions seeking a place on the ballot. During the secret ballot election, however, each employee may vote for only one union to act as the exclusive representative for the bargaining unit.

There are multiple factors that can affect the time it takes to elect an exclusive representative and reach the stage of negotiating a collective bargaining agreement. A group of employees must first identify a labor organization they seek to elect as their exclusive representative and then begin – or have the labor organization begin – to collect a showing of interest in that labor organization. A showing of interest may take a longer time to collect in a larger unit than a smaller unit.

After a petition is filed, notice to all employees that the petition has been filed is required to be posted for 10 days. See Section 2422.7 of the OCWR Substantive Regulations. Thereafter, the OCWR investigates and resolves all pre-election issues raised by the parties. If the parties have agreed on all pre-election issues and have entered into an election agreement, then the representation petition can be processed faster. If the parties have not agreed on all pre-election

issues, then a hearing may be required and the representation petition takes longer to process. If the petition is accepted, then a Notice of Election must be posted. Although the OCWR Substantive Regulations do not specify the amount of time the Notice of Election must be posted, the parties must agree to – or the Executive Director, acting on behalf of the Board, will impose – a period for posting the Notice of Election.

The OCWR then holds an election where bargaining unit employees have the opportunity to vote in secrecy to choose which labor organization, if any, they would like to represent them. If the employing office or intervening union challenges the ballots, this prolongs the time between the filing of the petition and the recognition of an exclusive representative. If a majority of the voting employees votes to be represented by a particular union and there is no challenge to the vote, the OCWR Board of Directors certifies the union as the employees' exclusive representative.

Once an exclusive representative is elected, the parties are encouraged to meet to decide whether they are going to first negotiate ground rules or proceed straight to negotiation of the collective bargaining agreement. Each party will then need time to draft proposals. As with the representation petition process, understanding and agreements between the parties expedites the process.

- *Can we start the process prior to July 18, 2022?*

The OCWR will not begin receiving and processing petitions for representation of employees in the employing offices listed in the H Series regulations until July 18, 2022, when the regulations become effective. Employees and unions can start preparing before then, but it is not without risk to begin the process prior to the effective date of union rights. First and foremost, employees who engage in union activity prior to July 18, 2022 may not be protected from retaliation. Second, if a showing of interest card is signed by a current employee who has left employment by the time of submission of the representation petition, the petition may be challenged and rejected.

- *Can an employing office voluntarily recognize a bargaining unit and union?*

An employing office can agree with the union as to the appropriateness of a bargaining unit. However, federal law requires employing offices to provide employees the right to vote "in a secret ballot election" for their exclusive representative. See 5 U.S.C. § 7111(a). An employing office that voluntarily recognizes one particular union deprives other unions from intervening and employees of the right to vote in a secret ballot election for the union of their choice.

- *Does a union have to satisfy any requirements to be eligible to be an exclusive representative of a legislative branch bargaining unit?*

The OCWR Substantive Regulations at section 2421.3(d) define "labor organization" to mean "an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an employing office concerning grievances and conditions of employment." That section also lists certain characteristics that would disqualify a group from acting as an exclusive representative of legislative branch employees.

Further, under section 2422.3(b) of the OCWR Substantive Regulations, in order to be eligible to represent legislative branch employees, the labor organization must have submitted to the employing office and to the Department of Labor a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

- *What must be included when filing a petition?*

A labor organization must file documentation to establish the proper showing of interest and an alphabetical list of the people showing interest, together with OCWR Representation Petition Form 1351D. The questions and instructions in the petition form further describe the information required, including but not limited to contact information for all stakeholders, a description and estimated size of the bargaining unit(s) at issue, a statement of the results sought by the petitioner, a verification that the showing of interest requirement has been met for the representation petition, and a signature of the person filing the petition. The form also contains instructions for filing. For more information, see Sections 2422.2 – 2422.5 of the OCWR Substantive Regulations.

- *Which employees count toward the 30% threshold for the showing of interest?*

A showing of interest requires at least 30% of current employees in an appropriate unit. Since management officials cannot be part of a such a unit, they are not included in the count. In addition, Section 2421.3(b) excludes job applicants and former employees for the purpose of determining the adequacy of a showing of interest.

- *What documentation is needed to show interest for a representation petition?*

An "authorization" or "signature" card which is signed and dated by the employee is most often used to show interest. However, other documentation may be used to show interest, such as a document which is signed and dated by multiple employees authorizing the union to represent them, a signed and dated allotment of dues form, and/or evidence of employees' membership in a union. An employee who shows interest in one of these ways is not voting for a union; rather, the employee is merely indicating that the employee would like an election to occur. In addition, an employee's signature on an authorization card or document does not commit the employee to vote for the union.

OCWR Procedural Rule 1.05 allows for electronic signatures on any "filing" that is filed electronically. The OCWR Board has never specifically determined whether this rule applies to authorization cards and petitions filed electronically. If signatures on authorization cards are obtained electronically, it would be a good practice to maintain a record of the e-mail interaction or other similar documentation in case an investigation into the authentication of the signatures is conducted.

- *Can a representation petition be challenged?*

Yes. Many aspects of the petition may be challenged, including the validity of the showing of interest, the composition of the bargaining unit, the status of the labor union, and the timeliness of the petition if there is a time bar because of a previous election, collective bargaining agreement, or other bars. For more information, please see the OCWR Substantive Regulations

at Sections 2422.10 (validity of showing of interest), 2422.11 (challenging status of the labor union), or 2422.12 (timeliness).

- *What is e-voting and how will it work?*

The OCWR will be using the same e-voting platform used by the FLRA to conduct elections. Through the use of the e-voting platform, eligible voters will be able to cast a ballot electronically either by computer or by phone. The OCWR will have a model election agreement that describes the e-voting procedure. Briefly, after the list of eligible voters is compiled and agreed to, each of the eligible voters is sent instructions on how to cast their ballot electronically, along with a unique voter ID number. During the voting process, the voter must first establish that they are eligible to vote, and then the system will allow them to cast their ballot. The votes are kept secret from the union(s) and the employing office. The e-voting vendor can connect a ballot to a voter if the vote has been identified as "challenged"; challenged votes are identified separately by the system and are not counted unless it would affect the final outcome of the election.

- *What subjects are covered in the model election agreement?*

Section 2422.16 of the OCWR Substantive Regulations discusses election agreements. Subject matters contained in the election agreement include:

- purpose of the election;
- description of the unit and the effect of the vote;
- the eligibility list and its potential binding effects;
- use of the challenged ballot procedure;
- use of manual, mail and/or absentee ballot procedure;
- payroll period for eligibility;
- date of the election;
- hours of the election;
- place of the election;
- type, names, and positions on the ballot;
- requirements for voter identification;
- service of the tally of ballots;
- provision for observers;
- notice of election and period for posting;
- updating and checking of the eligibility list;
- custody of the ballots and ballot box;
- electioneering; and
- challenged ballot procedure.

Bargaining Unit

- *What is an "appropriate unit"?*

For a proposed bargaining unit to be an "appropriate unit," the employees must share a "clear and identifiable community of interest" and the unit must promote "effective dealings" with, and efficiency of the operations of, the employing office involved. See 5 U.S.C. § 7112.

- *Is there a minimum size for an appropriate unit?*

The Board has never decided this question, but it is commonly accepted that you need at least two people to have a bargaining unit.

According to the federal courts that have addressed this issue, an appropriate unit is expected to be a grouping of two or more employees aggregated for the assertion of organization rights or for collective bargaining. Determining an appropriate unit is closely tied to the facts of the case. The community of interest test considers several factors including: (1) similarity in skill, interests, duties, and working conditions; (2) functional integration, including interchange and contact among employees; (3) the employer's organization and supervisory structure; and (4) the extent of bargaining history and union organization among the employees. See *Salary Policy Emp. Panel v. Tenn. Valley Auth.*, 149 F.3d 485, 492 (6th Cir. 1998); *Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1157 (6th Cir. 1996).

- *Can a bargaining unit include employees in multiple offices?*

If an employing office consists of multiple offices or locations, it is possible for employees in multiple offices to form a single bargaining unit, as long as it is an "appropriate unit" – i.e., the employees must share a "clear and identifiable community of interest" and the unit must promote effective dealings with, and efficiency of the operations of, the employing office involved.

- *Can bargaining units from multiple employing offices bargain together to form a single collective bargaining agreement?*

Employing offices may agree to bargain collectively with one union that represents bargaining units from multiple employing offices, and enter into one collective bargaining agreement that includes multiple offices' bargaining units. However, this must be agreed upon by all of the parties involved.

- *Can a single employing office have multiple bargaining units and/or agreements?*

Yes. Several legislative branch employing offices have more than one bargaining unit. In some cases those units form different locals of the same union, while in other cases different unions represent the various bargaining units. This may hold true even for smaller employing offices, such as Members' offices or Committees, depending on whether the employees have a community of interest. How many bargaining units form within a given employing office also depends on whether there is a sufficient showing of interest within each proposed unit, whether a union petitions for an election to represent each unit, and whether the employees within each proposed unit vote to elect a union as their exclusive representative.

It is also possible for a single bargaining unit to have both a master collective bargaining agreement for the entire employing office-wide unit and separate local agreements – for example, one master agreement for a Member's office, with separate local agreements for the D.C. and District offices.

- *Can an individual employee be part of multiple bargaining units?*

An employee may be part of only one bargaining unit for any given employer. However, if an individual is employed by more than one employing office, and both workforces are unionized, there is a possibility that the individual might be included in a bargaining unit within each employing office.

- *How would this work for "shared" employees?*

Assuming that this question refers to someone working for two different employing offices, this is a question that has yet to be decided. The key inquiry would be whether a "community of interest" exists between the "shared employees" and other employees working for the same offices.

- *Do professionals and non-professionals have different organizing rights?*

Professional employees may organize collectively. Because some professional employees have a different community of interest from non-professionals, a bargaining unit may not include both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit. See 5 U.S.C. § 7112.

- *Who is excluded from joining a bargaining unit?*

Although the CAA and the OCWR Substantive Regulations provide employees the right to unionize, an employing office may argue that not all employees are eligible to be a part of a bargaining unit. A bargaining unit may not include:

  - any management official or supervisor;
  - a confidential employee;
  - an employee engaged in personnel work in other than a purely clerical capacity;
  - both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;
  - any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or
  - any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an employing office whose duties directly affect the internal security of the employing office, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.
  - Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization –

    (1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

See 5 U.S.C. §§ 7112(b), (c); see also *U.S. Capitol Police Bd. v. Teamsters*, No. 96-LM-1, 1997 WL 34678669 (OOC Board Feb. 24, 1997).

- *Who qualifies as a "manager" or "supervisor"?*

Section 2421.3 of the OCWR Substantive Regulations definitions defines a "supervisor" and "management official" as follows:

> (i) The term "supervisor" means an individual employed by an employing office having authority in the interest of the employing office 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, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority.
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> (j) The term "management official" means an individual employed by an employing office in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the employing office.

- *Are employees who supervise interns considered "supervisors"?*

Whether the supervision of an intern is a supervisory position is fact-specific. The parties may come to agreement on whether the supervision of an intern causes the employee to be included or excluded from the bargaining unit. Alternatively, the OCWR Executive Director, on behalf of the Board, can investigate the question and/or initiate a hearing on the issue.

- *How are questions or disputes over the bargaining unit resolved?*

There are multiple ways to challenge the appropriateness of the bargaining unit. In a representation petition, questions regarding the bargaining unit are resolved by the OCWR Executive Director on behalf of the Board. The Executive Director is charged with investigating pre-election issues regarding the appropriateness of the bargaining unit. The Executive Director may also resolve the questions via hearing before a hearing officer.

If there is a dispute about whether an employee or group of employees should be part of an established bargaining unit, an employing office or union can petition the OCWR to resolve the dispute using the procedures set forth in Section 2422 of the OCWR Substantive Regulations for clarification of the unit.

Unions or employing offices may also petition to consolidate two or more bargaining units within the same employing office.

Other questions regarding the bargaining unit such as accretion, successorship, or decertification are also resolved through the filing of petitions, investigation, hearing and/or decertification election.

Subjects of Bargaining

- *What is "collective bargaining"?*

"Collective bargaining" is the performance of the mutual obligation of the employing office and the union, which is the exclusive representative of employees, to meet at reasonable times and consult and bargain in a good-faith effort to reach agreement on personnel policies, practices, and matters affecting working conditions.

A collective bargaining agreement (CBA), sometimes called a "master agreement," is a comprehensive legal contract that includes the negotiated terms between the parties. The collective bargaining agreement usually contains multiple topics and includes articles and sections related to hours, leave, overtime, compensatory time, working conditions, benefits, training, safety, the grievance and arbitration procedure, midterm bargaining provisions, the duration of the agreement, and other rights for workers.

A memorandum of understanding (MOU) is usually a single-topic agreement, often resulting from midterm bargaining or in settlement of a grievance pertaining to the entire unit.

- *What type of proposals can a union make during collective bargaining?*

Bargaining subjects can be separated into three categories: mandatory, permissive, and prohibited. There is no referee at the bargaining table, so unions are free to make proposals on any matter affecting conditions of employment. However, an employing office is only obligated to respond to proposals that impose a "duty to bargain." Only subjects that fall into the "mandatory" category impose a duty to bargain. "Permissive" subjects can be bargained at the election of the employing office, and "prohibited" subjects are those that employing offices usually will not (and usually should not) respond to.

- *What types of proposals are "mandatory"?*

Mandatory subjects of bargaining are generally those proposals covering any condition of employment or change in any condition of employment of bargaining unit employees. Bargaining is required if the change in the bargaining unit employee's condition of employment is more than *de minimis* – i.e., more than a trivial change. Examples of mandatory bargaining topics include overtime, parking arrangements, hours of work, seniority, assignment of office space and office moves, non-discrimination provisions, safety issues, grievance procedures, progressive discipline provisions, testing of employees, rest and lunch periods, official time and representation, definition of bargaining unit work, reorganizations, and limitations on contracting out.

- *What are "permissive" subjects of bargaining?*

Topics that may be bargained but are not required to be bargained are called "permissive" subjects of bargaining. A list of permissive bargaining topics is provided in 5 U.S.C. § 7106(b)(1) and includes the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, and the technology, methods, and means of performing work. Permissive topics may be bargained at the election of the employing office, and the employing office may cease bargaining on the matter before reaching a final agreement.

- *What does "covered by" mean?*

A proposal is outside the duty to bargain if its subject matter is covered by an existing collective bargaining agreement. There is no duty to bargain over something that has already been agreed upon in an existing collective bargaining agreement.

- *What are "conditions of employment"?*

Section 2421.3(m) of the OCWR Substantive Regulations defines the term "conditions of employment" to mean personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters relating to prohibited political activities, classification of any position, or to the extent such matters are specifically provided for by Federal statute. See also *AFGE Loc. 1929 v. FLRA*, 961 F.3d 452 (D.C. Cir. 2020).

- *Can unions bargain to change employees' "at will" relationships into a stronger standard, like "just cause"?*

The right to discipline and terminate an employee is a management right. The OCWR Board has addressed whether the "just cause" standard was an appropriate arrangement that did not abrogate this management right. Relying on FLRA precedent, the OCWR Board held that contract provisions establishing general standards, including "fair," or "for just or specific cause," to guide the exercise of management's right to discipline constitute appropriate arrangements within the meaning of section 7106(b)(3) of the Statute as incorporated by the CAA. See *AFSCME Council 26 v. Office of the Architect of the Capitol*, No. 13-ARB-01, 2014 WL 793368 (OOC Board Feb. 26, 2014).

- *Can unions bargain over legislative branch employees' salaries?*

Pay is a quintessential condition of employment. However, since pay is widely settled by federal law, it is often found to be non-negotiable. See Section 2421.3(m) of the OCWR Substantive Regulations. The OCWR Board case law relies on the Supreme Court's decision in *Fort Stewart Schools v. FLRA*, 495 U.S. 641 (1990), to determine whether a pay proposal will be found nonnegotiable. If a proposal involves a matter for which a governing statute leaves no discretion to an employing office, the matter is deemed "specifically provided for by Federal statute" and therefore is excluded from bargaining. Similarly, if a governing statute vests an employing office with sole and exclusive discretion over a matter, a proposal that subjects the exercise of that discretion to collective bargaining would be "inconsistent with law." Thus, when a proposal

implicates a pay-specific statute or regulation, a careful examination of the structure, purpose, and operation of the statute is required.

The OCWR Board examined a negotiability issue involving employee pay in *Plumbers Local 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the Office of the Architect of the Capitol*, 2001 WL 36175212 (Dec. 3, 2001). During the negotiations for a collective bargaining agreement, the parties negotiated wage rates for a unit of plumbers. The parties agreed to utilize the prevailing wage determinations of the Department of Labor under the Davis-Bacon Act to calculate the basic rate of pay of unit employees. The union also proposed premium pay for holiday work. The AOC argued that the holiday premium pay proposal was non-negotiable as specifically provided for by federal statutes, including the Prevailing Rate Systems Act, the Davis-Bacon Act, and the Debt Limit Act. The AOC argued that as prevailing wage rate employees, the plumbers were excluded from holiday premium pay. In addition, the AOC argued it was prohibited from spending appropriated funds for holiday premium pay. Without reaching a decision on the merits of the proposal, the Board found the proposal for premium pay benefits negotiable.

- *If the Members' Representational Allowance (MRA) is lowered after an agreement is finalized, and the negotiated pay levels can no longer be met, what happens?*

Although there are exceptions, it is typically an unfair labor practice for an employing office "to enforce any rule or regulation which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed." 5 U.S.C. § 7116(a)(7). It is generally understood, however, that it is *not* an unfair labor practice for an employing office to enforce a statute which is in conflict with any applicable collective bargaining agreement, even if the agreement was in effect before the date the statute was promulgated and/or went into effect. The Members' Representational Allowance is determined as part of an appropriations statute.

Many collective bargaining agreements have provisions that address what happens when there is a change in statute relating to a negotiated right. For example, a provision may say "It is agreed and understood by the Employer and the Union that in the administration of all matters covered by this agreement, officials and employees are governed by existing or future laws and regulations of appropriate authorities." See, e.g., *U.S. Dep't of the Air Force, Seymour Johnson Air Force Base*, 57 F.L.R.A. 772 (2002).

Thus, assuming that employee pay is determined to be negotiable (see previous question), unions and employing offices may want to consider including such a provision in their collective bargaining agreements.

- *Can unions bargain over legislative branch employees' benefits, such as health insurance and retirement?*

Benefits are a quintessential condition of employment. However, since health insurance and retirement benefits are widely settled by federal law, proposals relating to health insurance or retirement benefits are often found to be non-negotiable. See Section 2421.3(m) of the OCWR Substantive. The OCWR Board case law relies on the Supreme Court decision in *Fort Stewart Schools v. FLRA*, 495 U.S. 641 (1990) to determine whether a benefit proposal will be found

nonnegotiable. If the proposal involves a matter for which a governing statute leaves no discretion to an employing office, the matter is deemed "specifically provided for by Federal statute" and therefore is excepted from bargaining. Similarly, if a governing statute vests an employing office with sole and exclusive discretion over a matter, a proposal that subjects the exercise of that discretion to collective bargaining would be "inconsistent with law." Thus, when a proposal implicates a pay-specific statute or regulation, a careful examination of the structure, purpose and operation of the statute is required.

The OCWR Board considered a proposal involving benefits in *Plumbers Local 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the Office of the Architect of the Capitol*, 2002 WL 34461693 (Oct. 7, 2002). Unions representing AOC plumbers and electrical workers proposed that the AOC, on behalf of each individual bargaining unit employee, make pre-tax fringe benefit contributions into the unions' employee benefit trust funds (e.g., health and life insurance, retirement, training, and savings). The Board found these proposals non-negotiable because their adoption would either infringe upon the Architect's authority, or be barred statutorily.

- *Can unions bargain over legislative branch employees' hours?*

Employees' hours are a condition of employment. All conditions of employment other than management rights, prohibited political activities, classification of any position, or matters specifically provided for by federal statute, are subject to good faith negotiations. Depending on the particular proposal in question, bargaining over hours may be mandatory or permissive, or may be limited to impact and implementation bargaining.

- *Can other benefits, such as telework and holiday office closures, be negotiated?*

Telework and office closure are conditions of employment. All conditions of employment other than management rights, prohibited political activities, classification of any position, or matters specifically provided for by federal statute, are subject to good faith negotiations. The OCWR Board has not issued any decisions on whether a proposal related to telework or holiday office closures is negotiable. However, both telework proposals and holiday office closures are regularly negotiated in the federal sector.

The U.S. Court of Appeals for the D.C. Circuit recently considered one such proposal in *NTEU v. FLRA*, 1 F.4th 1120 (D.C. Cir. 2021). During negotiations over a new collective bargaining agreement, the agency argued that a proposal relating to the number of days that an employee was permitted to telework was non-negotiable. The proposal included eligibility standards for telework and required supervisory approval for telework. However, the agency claimed that determining the frequency of telework was a management right, specifically management's right to assign work and management's right to direct employees. The FLRA agreed with the agency and determined that (1) "the frequency of telework—the 'when' an eligible employee may perform his or her duties away from the duty station and 'when' that eligible employee must report to the duty station—is inherent to management's right to assign work"; and (2) the frequency of telework imposed a substantive restraint on management's right to determine the methods used to direct employees. The D.C. Circuit overturned and remanded the FLRA's decision. The D.C. Circuit held that the FLRA "did not reasonably explain" how it interpreted

the proposal to infringe on a management right when the proposal maintained management discretion to deny a telework request.

- *What issues cannot be negotiated?*

Matters relating to non-unit and supervisory positions are not subject to bargaining and would generally fall within the "prohibited" category; consequently, an employing office has no duty to respond to proposals involving these subjects. Similarly, union proposals that are inconsistent with federal law, government-wide regulations, or employing office rules for which there are compelling needs are not subject to bargaining. This includes such topics as prohibited political activity, classification of positions, and other matters specifically provided for by federal law. Lastly, management rights are not subject to bargaining. A list of these management rights is provided in 5 U.S.C. § 7106(a) and includes such topics as determining the mission, budget, organization, number of employees, and internal security practices of the employing office. However, even if a topic is designated as a management right, this does not preclude bargaining over procedures that the employing office will observe when exercising that right or appropriate arrangements for employees adversely affected by the exercise of that right. This is commonly referred to as "impact and implementation" bargaining. See 5 U.S.C. § 7106(b).

Collective Bargaining Process

- *Who actually does the bargaining on behalf of the employees?*

The CAA provides employees the right to organize and elect an exclusive representative. In addition, the CAA authorizes official time for any employee representing the union in the negotiation of a collective bargaining agreement during the time the employee would otherwise be in a duty status. 5 U.S.C. § 7131; see also Section 2429.13 of the OCWR Substantive Regulations. Different unions are structured differently: some unions have paid agents who are employees of the union, who bargain on behalf of and represent the unit; some unions have officers and stewards who are employee volunteers, who bargain on behalf of and represent the unit; and most unions have both paid agents and employee officers.

- *What is a negotiability dispute?*

A negotiability dispute occurs when an employing office and a union disagree over the requirement to bargain or the legality of a proposal or provision.

A proposal is any matter offered for bargaining about which there is not yet agreement. A negotiability dispute may occur when the parties to the negotiation disagree about whether the employing office is required, or permitted, to negotiate over the proposal. The union may file a petition for review with the OCWR Board of Directors if the employing office alleges that its duty to bargain does not extend to the proposed matter because: (1) it conflicts with federal law, a government-wide rule or regulation, or an employing office regulation for which there is a compelling need; or (2) it concerns a "permissive" topic of negotiation (see question above about permissive subjects of bargaining).

A provision is created when the union and employing office agree to a proposal during negotiations. A provision can become the subject of a negotiability dispute when the head of the employing office has disapproved the provision as allegedly contrary to law during the process of "agency-head review" under 5 U.S.C. § 7114(c). The union may file a petition for review with the OCWR Board of Directors if the head of the employing office alleges that the provision is not in accordance with law.

- *How are negotiability disputes resolved?*

Negotiability disputes can be resolved by filing a Petition for Review with the OCWR Board of Directors using the procedures set forth in Section 2424 of the OCWR Substantive Regulations. Cases which solely involve an employing office's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained, and which do not involve actual or contemplated changes in conditions of employment, may only be filed as negotiability disputes.

Alternatively, refusal to bargain over a proposal that is clearly negotiable may constitute an unfair labor practice, and a dispute of this nature can be resolved by filing an unfair labor practice charge with the OCWR General Counsel. See section 2423 of the OCWR Substantive Regulations, and the ULP section of the labor-management FAQs on the OCWR web site. An unfair labor practice charge must be filed within 180 days of the alleged failure to bargain.

- *Can I file both a negotiability petition for review and an unfair labor practice charge?*

Ordinarily, both set of procedures will not be used simultaneously. Even when the labor organization files both a negotiability petition for review and an unfair labor practice charge, the labor organization must choose between the unfair labor practice procedures or the negotiability petition procedures. The selection of forum is not dependent on whether the petition or charge was filed first. Upon selection of one procedure, further action under the other procedure will ordinarily be suspended.

- *What is the process for filing a negotiability dispute?*

The union has 15 days to file a timely petition for review from the date that the employing office makes an assertion of non-negotiability to the union. When the union requests the employing office to provide its written assertion of non-negotiability, if the employing office does not serve the written assertion of non-negotiability within 10 days of the request, then the union may file a petition for review of a negotiability issue even without the written assertion.

Unlike the forms available for a representation petition, request for impasse, or unfair labor practice charge, there is no form for a petition for review of a negotiability issue. However, OCWR Substantive Regulation 2424.4 sets forth what should be included in a petition. Specifically, the petition must be in writing, must be dated, and must include: (1) a statement setting forth the express language of the proposal sought to be negotiated as submitted to the employing office, (2) an explicit statement of the meaning attributed to the proposal by the exclusive representative, (3) a copy of the employing office's written assertion of non-negotiability, (4) any other relevant documentary material, and (5) notification whether an unfair labor practice charge was also filed regarding the negotiability issue.

The petition for review may be e-mailed to ocwrefile@ocwr.gov, faxed to (202) 426-1913 (limit 75 pages), or hand delivered during regular business hours to the Office of Congressional Workplace Rights, John Adams Building, 110 Second Street, SE, Room LA-200, Washington, DC 20540-1999. In addition, a copy of the petition and all attachments must be served on the head of the employing office and on the principal employing office bargaining representative at the negotiations.

- *What happens after the petition for review is filed?*

The regulations and section 8.06 of the OCWR Procedural Rules provide for expedited review of negotiability disputes. After the petition for review is filed:

> (1) Within thirty (30) days after the head of an employing office receives a copy of a petition for review of a negotiability issue, the employing office shall file a position statement;
>
> (2) Within fifteen (15) days after the exclusive representative receives a copy of the employing office's position statement, the exclusive representative shall file a full and detailed response;
>
> (3) The OCWR Board of Directors, in its discretion, may order a hearing; and
>
> (4) The OCWR Board of Directors will issue a decision and an order.

Unfair Labor Practices/Retaliation for Protected Activity

- *What are unfair labor practices?*

The term "unfair labor practices" (ULPs) refers to provisions of the FSLMRS, as applied by the CAA, that prohibit both employing offices and labor organizations from engaging in conduct that is contrary to the labor-management rights established by law. In the context of an election proceeding, an employing office engages in an unfair labor practice by interfering with, restraining, coercing, or taking reprisal against employees in the exercise of their labor organizing rights, or by encouraging or discouraging an employee to vote in an election. Parties also commit unfair labor practices by, among other things, refusing to negotiate in good faith over terms and conditions of employment.

For a more comprehensive list of unfair labor practices, please see Section 2421.4(d) of the OCWR Substantive Regulations.

- *Can an employing office fire or otherwise discipline employees for trying to organize?*

An employing office commits an unfair labor practice when it violates labor-management rights that the CAA provides to employees, including the right to organize. Therefore, an employee may not be fired for engaging in protected organizing activities.

The legal framework used by the FLRA and the OCWR Board in analyzing claims of retaliation for protected union activity is set forth in *Letterkenny Army Depot*, 35 F.L.R.A. 113, 118-22 (1990). Under *Letterkenny*, the charging party must first establish a prima facie case of discrimination by showing that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the employing office's treatment of the employee. The burden then shifts to the employing office to show, by a preponderance of the evidence, that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity. See *U.S. Capitol Police v. Office of Compliance*, 878 F.3d 1355 (Fed. Cir. 2018).

- *Can employees discuss unionization during business hours?*

It is an unfair labor practice for an employing office to discriminate on the basis of union activity. Thus, if employees of an office are allowed to talk with their coworkers about non-work-related topics during business hours, then the employees cannot be discriminated against for speaking about unionization during business hours. In contrast, if the employing office enforces a policy that employees may only discuss work-related subjects except while on breaks, then the employees cannot discuss unionization during business hours except while on a break or lunch hour.

A collective bargaining agreement may include terms regarding employees' right to discuss union issues relating to conditions of employment during business hours and/or while on official time.

- *What can employees do if they believe they are being discriminated against because of protected union activity?*

There are two possible avenues for employees to pursue if they feel the employing office is discriminating against them in retaliation for protected union activity.

One option is to file an unfair labor practice (ULP) charge against the employing office. The charge may be filed either by the employee or by the exclusive representative of the employee's bargaining unit (if there is one), and must be filed within 180 days after the alleged violation occurred. The official forms for filing an unfair labor practice charge, which are available on the OCWR web site, contain detailed information about what information to include, as well as instructions for how to file the charge and serve a copy on the charged party or its representative. It is best to include as much supporting documentation as you can along with the charge.

The charge is filed with the OCWR General Counsel, who investigates the charge and determines if there is merit to it. If so, and if the parties are unable to resolve the issue on their own, the General Counsel may file a ULP complaint against the employing office, and prosecute the complaint in an OCWR administrative hearing before a hearing officer, whose decision can be appealed to the OCWR Board of Directors and ultimately to the U.S. Court of Appeals for the Federal Circuit. In these proceedings, the General Counsel does not represent the employee, but rather enforces the FSLMRS as applied by the CAA. The hearing officer, OCWR Board, and federal courts would analyze such a complaint using the *Letterkenny* framework described above.

The other option is for the employee to file a claim under section 208 of the CAA, 2 U.S.C. § 1317, which generally prohibits employing offices from intimidating, taking reprisal against, or otherwise discriminating against covered employees who oppose practices made unlawful by the CAA or who participate in OCWR proceedings. Such claims must be filed with the OCWR Executive Director using the OCWR e-filing system, and then the employee has a choice of proceeding through the OCWR's administrative dispute resolution (ADR) process or filing a complaint in federal district court. Like ULP charges, section 208 charges must be filed within 180 days after the occurrence of the alleged violation.

It is worth noting that the OCWR Board analyzes all section 208 claims using a Title VII-based framework for retaliation, rather than the *Letterkenny* framework, even if the underlying statute protecting the employee's activity is the FSLMRS. See *Britton v. Office of the Architect of the Capitol*, No. 02-AC-20 (CV, RP), 2005 WL 6236944, at *3-5 (OOC Board May 23, 2005).

- *Does the FSLMRS protect other concerted activities for mutual aid or benefit, outside of union organizing, like the National Labor Relations Act does?*

In the legislative branch, covered employees have the right to form, join, or assist any labor organization, or to refrain from any such activity. Neither the FSLMRS as applied by the CAA, nor the OCWR Board's regulations implementing the FSLMRS in the legislative branch, expressly cover "concerted activities" like the NLRA. However, concerted activities for the purpose of forming, joining, or assisting any labor organization are protected. For example, when an individual employee asserts a right derived from a collective bargaining agreement, that employee is engaging in protected activity because the individual is assisting the union that negotiated the agreement.

Miscellaneous

- *Can legislative branch employees strike?*

No. Federal government employees, including employees of the legislative branch, are prohibited from engaging in a workers' strike. Section 2421.3(b) of the OCWR Substantive Regulations incorporates by reference 5 U.S.C. § 7311, which prohibits employees from participating in or asserting the right to strike. It is also an unfair labor practice for a union to encourage or organize a strike.

5 U.S.C. § 7311 – Loyalty and striking:

> An individual may not accept or hold a position in the Government of the United States….if he—(1) advocates the overthrow of our constitutional form of government; (2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;
>
> (3) participates in a strike, or asserts the right to strike, against the Government of the United States …; or (4) is a member of an organization of employees of the

> Government of the United States … that he knows asserts the right to strike against the Government of the United States….

OCWR Substantive Regulations, section 2421.3(b):

> ... the term "employee" means an individual…. (2) Whose employment in an employing office has ceased because of any unfair labor practice under section 7116 of title 5 of the United States Code, as applied by the CAA, and who has not obtained any other regular and substantially equivalent employment as determined under regulations prescribed by the Board, but does not include– … (iv) Any person who participates in a strike in violation of section 7311 of title 5 of the United States Code, as applied the CAA.

5 U.S.C. § 7116(b)(7)(A) and (B), as applied by the CAA:

> It is an unfair labor practice for a union to call, participate in and condone a strike at a federal government facility. See e.g., *Professional Air Traffic Controllers Organization & FAA*, 7 F.L.R.A. 34 (1981).

- *Will dues be taken out of my paycheck if my office votes to unionize?*

Many collective bargaining agreements provide that member dues will be deducted from paychecks. This provision is commonly referred to as a "dues check off" provision. Only those employees who choose to join the union as members pay dues; membership is not automatic for all individuals within the bargaining unit. No dues are deducted until after a collective bargaining agreement with a dues check off provision is reached and becomes effective.

- *What involvement does the OCWR Board of Directors have in labor-management issues?*

The OCWR Board plays several roles with regard to labor-management in the legislative branch. The Board can resolve impasses in negotiations, review appeals from hearing officer decisions in unfair labor practice proceedings, and ultimately determine issues raised by petition such as negotiability disputes and exceptions to arbitration awards.

- *Who can help me with my labor-management related problem?*

The OCWR handles labor-management issues for legislative branch employees. Such matters include identifying appropriate units and supervising union elections, handling negotiability appeals, conducting impasse proceedings, and investigating unfair labor practices. However, the Federal Labor Relations Authority (FLRA) handles labor-management issues for employees of the Library of Congress and Government Publishing Office, and the GAO Personnel Appeals Board handles labor-management issues for employees of the GAO.

- *What labor-management rights are protected by the CAA?*

The CAA incorporates by reference 5 U.S.C. §§ 7102, 7106, 7111 through 7117, 7119 through 7122, and 7131 for application to the legislative branch. These sections provide:

7102 – Employees' rights.
7106 – Management rights.
7111 – Exclusive recognition of labor organizations.
7112 – Determination of appropriate units for labor organization representation.
7113 – National consultation rights.
7114 – Representation rights and duties.
7115 – Allotments to representatives.
7116 – Unfair labor practices.
7117 – Duty to bargain in good faith; compelling need; duty to consult.
7119 – Negotiation impasses; Federal Service Impasses Panel.
7120 – Standards of conduct for labor organizations.
7121 – Grievance procedures.
7122 – Exceptions to arbitral awards.
7131 – Official time.

In addition, the CAA provides the OCWR with the authorities provided to the FLRA in Sections 7105, 7111, 7112, 7113, 7115, 7117, 7118, and 7122 of Title 5 and to the President in Section 7103(b) of Title 5.

Resources

For inquiries related to labor-management relations in the legislative branch, please email LMR@ocwr.gov.

Office of Congressional Workplace Rights: https://www.ocwr.gov/

Labor-Management Rights: https://www.ocwr.gov/employee-rights-legislative-branch/labor-management-rights/

Representation Petition: https://www.ocwr.gov/employee-rights-legislative-branch/labor-management-rights/representation-petition/

Substantive Regulations: https://www.ocwr.gov/the-congressional-accountability-act/rules-and-regulations/final-substantive-regulations/federal-service-labor-management-relations-statute-final-substantive-regulations/

Notice of Issuance of H Series Regulations in the *Congressional Record*: https://www.congress.gov/117/crec/2022/05/16/168/83/CREC-2022-05-16-pt1-PgH5006-6.pdf

Federal Labor Relations Authority: https://www.flra.gov/

FLRA Resources and Training: https://www.flra.gov/resources-training

Additional Case Law

Election process:

- *Ass'n of Civilian Techs*., 71 F.L.R.A 612 (2020) (Determination that showing of interest is sufficient is not subject to collateral attack).
- *AFGE*, 68 FLRA 761 (2015) (Whether election was conducted properly when employees who began work between the date of the election and the date of the count were denied the opportunity to vote and whether the length of time between the election and the count caused the ballots to become "stale").

Appropriate unit:

- *AFGE*, 60 F.L.R.A 57 (2004) (Whether employees were engaged in security work which directly affected national security within the meaning of section 7112(b)(6)).
- *NTEU*, 70 F.L.R.A 533 (2018) (Employee whose duty station is her home was excluded from unit "located at" the headquarters office).

Agency neutrality:

- *Union of Pension Emps. for Democracy & Just.*, 66 F.L.R.A. 349 (2011) (Agency remained neutral, consistent with section 7116(e), when it made available to unions competing in upcoming election an e-mail mailbox specifically established for communicating with the entire bargaining unit).

Collective bargaining:

- *AFGE v. FLRA*, 25 F.4th 1 (D.C. Cir. 2022) (Restoring more than de minimis change to conditions of employment standard requiring collective bargaining).
- *AFSCME Council 26 v. Office of the Architect of the Capitol*, No. 04-LMR-02, 2004 WL 5658966 (OOC Board July 23, 2004) (Finding non-negotiable proposals prohibiting outdoor work assignments and overtime payment for time to return to work and finding negotiable a proposal requiring overtime payment for time to answer phones while off-duty).
- *AFSCME Council 26 v. Office of the Architect of the Capitol*, No. 03-LMR-02, 2003 WL 25795022 (OOC Board Dec. 2, 2003) (Negotiability dispute regarding proposal prohibiting signing in and out for meal breaks and whether proposal conflicts with management's right to determine the "methods and means" of performing work).
- *IBEW Loc. 26*, No. 01-LMR-02, 2001 WL 36175211 (OOC Board Dec. 3, 2001) (Finding negotiable proposals to provide premium pay for work on holidays and on Sundays).
- *Nat'l Border Patrol Council AFGE Loc. 2455*, 71 F.L.R.A. 1069 (2020) (Referral of employee engaged in union activity for internal investigation is a condition of employment for the purposes of section 7116(a)(2)).
- *AFGE Loc. 2145*, No. WA-CA-13-0152, 2015 WL 6153674 (F.L.R.A. A.L.J. Sept. 30, 2015) (Coercive comments in violation of section 7116(a)(1)).
- *AFGE Loc. 1501*, 63 F.L.R.A. 677 (2009) (Finding that ULP was not barred by an

earlier-filed grievance because the two procedures involved different aggrieved parties).
- *AFGE Loc. 3936*, 56 F.L.R.A. 174 (2000) (Employer committed ULP by surveilling and threatening employees when informational picketing did not disrupt operations).