# U.S. Department of Commerce

# Labor-Management Relations Handbook

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Date

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# I. INTRODUCTION

A. Purpose.

This Handbook updates the Department of Commerce's (Department's) policy and procedures governing its Labor-Management Relations (LMR) program. It is to be interpreted consistent with the Federal Labor-Management Relations Statute (FLMRS or Statute), codified at 5 United States Code (U.S.C.), Chapter 71 (5 U.S.C. §§ 7101-7135), the regulations of the Federal Labor Relations Authority (FLRA), the Federal Labor Relations Authority's General Counsel, and the Federal Service Impasses Panel (FSIP) in 5 Code of Federal Regulations (CFR), Parts 2420-2473, and any applicable provisions of a collective bargaining agreement, memorandum of understanding, or memorandum of agreement.

The Handbook is a complete revision of the existing Department Administrative Order (DAO) 202-711, "Labor-Management Relations," September 25, 1979. The major changes include: (1) all labor obligations must be satisfied prior to any changes in bargaining unit employees' conditions of employment in accordance with the Statute; and (2) Principal Human Resources Managers (PHRM) are to coordinate with the Director for Human Resources Management/Chief Human Capital Officer (Director) and/or the Office of General Counsel (OGC), Employee and Labor Law Division (ELLD) on certain significant labor-management relations events. In addition, the Handbook more clearly defines the roles and responsibilities of the appropriate officials within the Department's labor-management relations program and provides updates to terminology and definitions.

B. Scope.

The provisions outlined apply to:

Department of Commerce *managers* (See Definitions);
Department of Commerce *supervisors* (See Definitions); and
Department of Commerce employees responsible for *administering the FLMRS*,

C. References.

5 U.S.C., Chapter 71; 5 U.S.C. §§ 7101-7135; and
5 CFR Chapter XIV, Parts 2420 – 2473

D. Definitions.

1. *Agency Head Approval.* All agreements between any agency or bureau and an exclusive representative shall be subject to the approval of the Secretary. "Agency Head Approval," then, is the statutorily-required process whereby the Secretary, or designee, shall approve any bargaining agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of 5 U.S.C. Chapter 71 and any other applicable law, rule, or regulation. Under the law, an agreement will take effect and be binding on

management and the union if the Secretary or designee does not disapprove the agreement within the 30-day period.

2. *Appointing officer*. An official who has been delegated the authority to take or approve final position and personnel actions in the Department. (Personnel actions include appointments, assignments, transfers, reassignments, promotions, details, demotions, and removals, i.e., in general, all decisions affecting an individual's status or pay in the Federal service.) Appointing officers are identified in Section 4.01 of DAO 202-250, "Delegation of Authority for Human Resources Management," and in Appendix A to DAO 202-250.

3. *Collective bargaining*. The performance of the mutual obligation of a representative of the Department and the exclusive representative of employees in an appropriate unit in the Department to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting unit employees, and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached. Collective bargaining does not compel either party to agree to a proposal or to make a concession.

4. *Collective bargaining agreement (CBA)*. An agreement entered into as a result of collective bargaining pursuant to the Statute.

5. *Conditions of employment*. Personnel policies, practices, and matters, whether established by rule, regulation, or otherwise (e.g., by custom or practice), affecting working conditions, except that such term does not include policies, practices, and matters:

a. Relating to political activities prohibited under 5 U.S.C. § 7321;

b. Relating to the classification of any position; or

c. To the extent such matters are <u>specifically</u> provided for by Federal statute.

6. *Confidential employee*. An employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of <u>labor-management relations.</u> Confidential employees are excluded from bargaining units.

7. *D/OPP*. Director, Office of Policy and Programs

8. *DAO*. Department Administrative Order.

9. *Director*. The Department's Director for Human Resources Management and Chief Human Capital Officer.

10. *DOO*. Department Organizational Order.

11. *Dues*. Dues, fees, and assessments.

12. *Employee*. An individual as defined by 5 U.S.C. § 7103(a)(2). "Employee" does not include: aliens or noncitizens of the United States who occupy positions outside the United States; NOAA commissioned officers, supervisors or management officials; an officer or employee in the Foreign Service of the United States employed in the Department; or any person who participates in a strike in violation of 5 U.S.C. § 7311.

13. *Exclusive representative*. Any labor organization which: (1) is certified as the exclusive representative of employees in an appropriate unit pursuant to 5 U.S.C. § 7111; or (2) was recognized by the Department under the provisions of Executive Orders 10988 or 11491, as amended, immediately before the effective date of the Statute as the exclusive representative of employees in an appropriate unit on the basis of an election or on any basis other than an election, and continues to be so recognized in accordance with the provisions of the Statute.

14. *Federal Labor Relations Authority (FLRA)*. The independent administrative agency responsible for administering the Statute by providing leadership in establishing policies and guidance relating to matters covered by the Statute. This includes: determining the appropriateness of bargaining units; supervising and conducting representational elections; resolving issues relating to the granting of national consultation rights; resolving issues relating to determining compelling need for agency rules or regulations; resolving issues relating to the duty to bargain in good faith; prescribing criteria relating to the granting of consultation rights on Government-wide rules or regulations affecting any substantive change in any condition of employment; conducting hearings and resolving complaints of unfair labor practices; and resolving exceptions to arbitrator's awards. The term "FLRA" usually refers to the entire FLRA, which includes the three member Authority, the Office of the General Counsel, and the Federal Service Impasses Panel.

15. *Federal Service Impasses Panel (Panel or FSIP)*. An entity within the FLRA, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives. The Panel consists of a Chair and at least six individuals appointed by the President without Senate confirmation.

16. *Formal discussion*. A discussion between one or more representatives of the Department and one or more employees in a bargaining unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.

17. *Grievance*. Any complaint: by an employee concerning any matter relating to his/her employment; by any labor organization concerning any matter relating to the employment of any employee; or by any employee, labor organization, or agency concerning (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or (ii) any claimed violation of any law, rule, or regulation affecting conditions of employment.

18. *Head of operating Unit*. An official who is assigned by the President or by the Secretary to manage a primary or constituent operating unit of the Department (as defined in DOO 1-1, "Mission and Organization of the Department of Commerce," and in the Orders establishing the respective operating units). For policies and decisions involving the Office of the Secretary, the Chief Financial Officer/Assistant Secretary for Administration (CFO/ASA)

will fulfill the responsibilities of the head of an operating unit except where it would be more appropriate for the Secretary or Deputy Secretary to do so. References to the head of an operating unit also include any official designated to carry out these functions.

19. *Impact and Implementation (I&I) Bargaining.* Under the Statute, Department management has the duty to notify the union of any change in conditions of employment caused by management's exercise of its rights established by 5 U.S.C. § 7106(a), and, upon the union's request, bargain on the procedures which management officials will observe in exercising any authority under 5 U.S.C. 7106(a), or bargain on appropriate arrangements for employees adversely affected by the exercise of that authority under 5 U.S.C. § 7106(a).

20. *Labor organization.* See *union* and *exclusive representative*. An organization composed in whole or in part of employees, in which employees participate and pay dues, and that deals with the Department concerning grievances and conditions of employment, but does not include: an organization that, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, civil service status, political affiliation, marital status, or handicapping condition; an organization that advocates the overthrow of the constitutional form of Government of the United States; an organization sponsored by the Department; or an organization that participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

21. *Management official.* Department employees whose duties and responsibilities require or authorize him/her to formulate, determine, or influence the policies of the agency.

22. *National consultation rights (NCR).* If a labor organization has been accorded national consultation rights under 5 U.S.C. § 7113 and 5 C.F.R. 2426.1, the Department and/or a primary subdivision, if applicable, will inform the labor organization of any substantive change in conditions of employment proposed by the Department or primary national subdivision and permit the labor organization the opportunity to present its views and recommendations prior to the final decision by management. If the labor organization presents any views or recommendation, Department management shall consider those views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented, and management shall provide the labor organization with a written statement of the reasons for taking the final action.

23. *Negotiated grievance procedure (NGP).* Negotiated procedures for the settlement of grievances and questions of arbitrability, except for those matters specifically excluded by 5 U.S.C. § 7121. Any NGP must be fair and simple, provide for expeditious processing, and include procedures that assure the union's rights to represent itself and the employee, to present grievances, and to provide for binding arbitration for any grievance not satisfactorily settled.

24. *Operating Unit.* An organizational entity, office, bureau, or component of the Department, as defined in DOO 1-1, through which most of its substantive functions are carried out. In addition, for purposes of this Handbook, Departmental offices such as the Office of the Secretary of Commerce and Secretarial offices are considered to be operating units.

25. Panel. See Federal Service Impasses Panel.

26. *Particularized need.* A union requesting information must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute. The requirement that a union establish such need will not be satisfied merely by showing that requested information is or would be relevant or useful to a union. Instead, a union must establish that requested information is "required in order for the union adequately to represent its members." [Citing *Justice v. FLRA*, 991F.2d, 285, at 290, (5th Cir. 1993)]

27. *Past practice.* A condition of employment established by a practice that is consistently exercised over a significant period of time and followed by both parties or followed by one party and not challenged by the other.

28. *Primary National Subdivision.* A first-level organizational segment of the Department that has functions national in scope that are implemented in field activities.

29. *Principal Human Resources Manager (PHRM).* An appointing officer designated to provide human resources management advice and support to heads of operating units in the development of policies and programs in addition to the delivery of human resources service.

30. *Professional employee.* An employee engaged in the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities); requiring the consistent exercise of discretion and judgment in its performance; which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time. It also means an employee who has completed the courses of specialized intellectual instruction and study described above and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee as described above.

31. *Servicing Human Resources Office (SHRO).* The organization or individuals tasked by the head of the operating unit for carrying out the human resources functions of the operating unit. The designation used may vary from operating unit to operating unit.

32. *Supervisor.* An individual employed by the Department having authority in the interest of the Department to hire, direct, assign, promote, reward, transfer, furlough, lay off, recall, suspend, discipline, or remove employees, to adjust their grievances, or effectively to 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

that includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising supervisory authority.

33. *Unfair labor practice (ULP).* A violation of the Federal Labor-Management Statue as set forth in 5 U.S.C. § 7116.

34. *Union.* See labor organization and exclusive representative.

E. Guidance

The Office of Human Resources Management (OHRM), Office of Policy and Programs (OPP) is responsible for issuing the Department's labor-management relations (LMR) policy and providing LMR guidance to the operating units. All questions of an operating or procedural nature are to be addressed to the appropriate SHRO or operating unit.

The Office of the General Counsel, Employment and Labor Law Division (OGC/ELLD) is responsible for providing legal advice to management on all labor matters, and representation of the Department in all labor disputes and litigation. OGC/ELLD has offices at the Herbert C. Hoover Building, and in Silver Spring, Maryland (for NOAA), and Suitland, Maryland (for Census).

F. Cancellations.

This Handbook supersedes Department Administrative Order (DAO) 202-711 of September 25, 1979.

## II. POLICY

Each employee shall have the right to form, join, or assist any union, or to refrain from such activity, freely, and without fear or penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this Handbook and Statute, such right includes the right to act for a union in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies, and other officials of the Executive branch of the Government, the Congress or other appropriate authorities, and the right to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees. The requirements of this Handbook are to be applied in a manner consistent with the requirements of an effective and efficient Government.

Management shall give a union that is the exclusive representative of the employees the opportunity to act for and negotiate collective bargaining agreements for the employees in the unit. Management shall inform the union, in advance, of any proposed substantive change in conditions of employment for which there is a bargaining obligation and they will give the union the opportunity to request to bargain over those changes.

No operating unit will issue regulations or procedures requiring changes to bargaining unit employees' conditions of employment without satisfying all applicable obligations under the Statute and this Handbook before implementation.

Nothing in this Handbook shall abrogate or override any lawful collective bargaining agreement in effect on the date this Handbook is issued.

To ensure that national consultation rights (NCR) obligations at the Department level are met, operating units will notify the Director before taking any action that substantially changes conditions of employment for bargaining unit employees and the change is required by the Department. A primary national subdivision that has accorded a union national consultation rights at that level is responsible for fulfilling its national consultation obligation before taking any action that substantially changes the conditions of employment for employees of the primary national subdivision and the change is required by the national primary subdivision.

Individuals designated to represent the Department, or any of its operating units, in any labor-management undertaking must meet established minimum training standards to undertake such responsibilities. Such standards may be determined, published, and from time to time adjusted, by the Director, or by the PHRMs, as delegated. The PHRM may waive this requirement on a limited case-by-case basis, e.g., the individual is serving as a technical expert, or is participating in the undertaking as part of a training program. Any attorney in OGC/ELLD, so designated by the Chief, OGC/ELLD, is deemed to meet these standards. Labor-management undertakings include, but are not limited to serving as a chief negotiator or team member during term or mid-term negotiations.

Any authority of a Department official provided for in this Handbook may be delegated to a subordinate level official. Such delegation shall be made in writing and a copy maintained by the SHRO and a copy provided to the Office of Policy and Programs.

## III. RESPONSIBILITIES

A. The Chief Financial Officer/Assistant Secretary for Administration (CFO/ASA).

1. Responsible under DOO 10-5, "Chief Financial Officer and Assistant Secretary For Administration," for all matters relating to personnel within the Department.

2. The responsibility to develop, issue, and administer civilian human resources policy (including labor relations program policy) is redelegated to the Director in DOO 20-8, "Director for Human Resources Management."

B. The Director for Human Resources Management and Chief Human Capital Officer (Director).

Responsible for the development and issuance of the Department's labor-management relations policy and the management and evaluation of the Department labor-management relations program. The Director provides authoritative advice to the Office of the Secretary on labor relations matters, such as labor agreement negotiations.

The Director will annually inform Department employees of their rights to union representation under 5 U.S.C. § 7114(c)(2)(B).

C. Director of the Office of Policy and Programs/Office of Human Resources Management (D/OPP).

1. Provide labor relations policy guidance to all Department operating units under the direction and concurrence of the Director.

2. The Director has delegated to the D/OPP, the authority to conduct the Agency Head Approval required by 5, U.S.C. § 7114(c), and 22 U.S.C. § (4113)(f). Conduct Agency Head Review pursuant to 5 U.S.C. § 7114(c) and 22 U.S.C. § 4113(f)(1) for the Department. The D/OPP will consult with OGC concerning legal interpretations of an agreement.

D. Heads of Operating Units.

1. Responsible for ensuring the implementation of this Handbook

2. Issuing supplemental guidance, if necessary, to carry out the policies expressed herein.

E. Principal Human Resources Managers (PHRM).

1. Ensure this Handbook and the Statute are applied to covered employees in his or her operating unit.

2. Accord recognition to unions that are certified as the representative of employees in an appropriate unit and establishing and maintaining the collective bargaining relationship with the exclusive representative.

3. Maintain a position of neutrality in any matter where a question concerning representation arises until the bureau establishes its position in consultation with the Director.

4. Provide the Director with one copy of any request to the FLRA to supervise an election; challenge the validity of a showing of interest; challenge the status of a labor organization; or request the FLRA to examine objections to an election or challenged ballots prior to the filing with the FLRA.

5. Provide the Director with one copy of any operating unit request to the FLRA to conduct an election to determine whether a union should cease to be the exclusive representative of employees in an existing unit of recognition prior to the filing with the FLRA. The request must include the supportive evidence that there is a good faith doubt that the union represents a majority of the employees in the unit and/or that the unit is no longer appropriate. It must be provided to the Director prior to filing with the FLRA.

6. Provide the Director and Chief, OGC/ELLD, with a copy of all ULP charges and all other related documents when the operating unit is served by the FLRA.

7. Provide the Director and Chief, OGC/ELLD, with a copy of all requests seeking assistance from the Federal Mediation Conciliation Services (FMCS) prior to submission to the FMCS. The written notice will include the nature of the issue(s) and the position(s) of management and labor on the issue(s).

8. Coordinate with the Director and Chief, OGC/ELLD, on all requests for assistance from the Federal Service Impasses Panel (FSIP) prior to submission to the FSIP.

9. Provide the D/OPP and Chief, OGC/ELLD, with one hard and one electronic copy of each executed negotiated agreement, including Memorandums of Understanding (MOU), for agency head approval pursuant to 5 U.S.C. § 7114(c) and 22 U.S.C. § 44113 (f)(1). These must be provided to the D/OPP and Chief, OGC/ELLD within three (3) calendar days from the date the agreement is executed.

10. Coordinate with OGC/ELLD on the development of a local plan for responding to a job action initiated by employees and/or a union and submitting it to the Director for review and approval. Telephonic notification shall be provided to the Director, and to the PHRM upon learning of planned or actual job action or informational picketing by a union.

11. Maintain effective working relationships with exclusive representatives to ensure that any required bargaining or consulting requirements are met as new policies, directives, practices or initiatives are undertaken that affect the conditions of employment of Department bargaining unit employees.

F. Bureau or operating unit labor relations officer(s).

1. Monitor and track the use of official time by union representatives under the following categories: (a) contract term negotiations; (b) mid-term negotiations; (c) dispute resolution and related activities; and (d) general labor-management relationship, or as otherwise directed by the Office of Personnel Management.

2. Provide the Department's Labor Relations Officer (LRO) with a copy of all written management and union proposals prior to the beginning of negotiations. The LRO will provide the operating unit(s) with guidance and recommendations, as appropriate. To provide time for this, strive to include language in ground rules that requires union to provide proposals at least 10 workdays prior to negotiations.

G. Servicing Human Resources Offices (SHROs).

1. Provide support and technical assistance to OGC/ELLD in matters pending before the FLRA, including, but not limited to bargaining unit determinations, ULPs, negotiability determinations, and bargaining impasses for the operating units they service.

2. Provide support and technical assistance to OGC/ELLD in arbitration cases and collective bargaining negotiations.

## IV. RECOGNITION OF RIGHTS AND DUTIES OF LABOR ORGANIZATIONS AND MANAGEMENT

A. Exclusive Recognition of Labor Organization. Each operating unit of the Department, through an authorized appointing officer (see DAO 202-250, Appendix A) or, in the case of national exclusive, the Director, will accord exclusive recognition to a union that has been selected as the representative, in accordance with the procedures established by the FLRA by the majority of the employees in an appropriate unit who cast ballots in the election.

B. Determination of Appropriate Units for Labor Organization Representation.

1. The establishment of a bargaining unit shall be appropriate only if the establishment will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficient operations of the Department.

2. A unit shall not be determined to be appropriate solely on the basis of the extent to which the employees have organized, nor shall it be determined to be appropriate if it includes:

a. A management official or supervisor except as provided in accordance with 5 U.S.C. § 7135;

b. A confidential employee;

c. An employee engaged in personnel work in other than a purely clerical capacity;

d. An employee engaged in administering the provisions of the Statute;

e. Both professional and other employees, unless a majority of the professional employees vote for inclusion in the unit;

f. An employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

g. An employee primarily engaged in investigative or audit functions relating to the work of individuals employed by the Department whose duties directly affect the internal security of the Department, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

3. Two or more units in the Department for which a union is the exclusive representative may, upon petition by the Department or union, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate.

C. Determinations as to Exclusive Recognition. The FLRA makes final determinations as to the exclusive recognition to be accorded to unions representing Department employees, appropriate bargaining units within the Department, and whether or not a union continues to be a representative of the Department's employees. In order to assist with this process:

1. The PHRM, or designee, must provide the Director and Chief, OGC/ELLD, with one copy of all requests for exclusive recognition or consolidation of units and all material provided to the FLRA concerning questions as to the appropriateness of units and related issues.

2. The PHRM, or designee, must provide the Director and Chief, OGC/ELLD, with a copy of any request by the operating unit to the FLRA: (a) to supervise an election; (b) to challenge the validity of a showing of interest; (c) to challenge the status of a union; or (d) to examine objections to an election or challenged ballots. A copy of the request must be provided to the Director and Chief, OGC/ELLD, prior to the filing with the FLRA.

3. The PHRM, or designee, must provide the Director and Chief, OGC/ELLD, with one copy of any request to the FLRA to conduct an election to determine whether a union should cease to be the exclusive representative of employees in an existing unit of recognition prior to filing with the FLRA. The PHRM, or designee, shall include with their submission the supportive evidence that there is a good faith doubt that the union represents a majority of the employees in the unit and/or that the unit is no longer appropriate.

D. National Consultation Rights (NCR).

1. When no labor organization has been accorded exclusive recognition on a Department-wide basis, a union that is the exclusive representative of a substantial number of the employees of the Department, or primary national subdivision thereof, as determined in accordance with criteria prescribed by the FLRA, shall be granted national consultation rights at the Department level by the Director, or at the primary national subdivision level by an appropriate appointing officer. (See Appendix A to DAO 202-250.) Any issue relating to any union's eligibility for, or continuation of, NCR shall be subject to determination by the Authority.

2. The designated official at the level of recognition shall ensure that any union having NCR with the Department shall:

a. Be informed by the Director (at the Department level) or an appropriate appointing officer (at the primary national subdivision level) of any substantial change in conditions of employment proposed; and

b. Be permitted reasonable time to present its views and recommendations regarding the changes.

3. If any views or recommendations are presented to the designated official at the level of recognition by any union:

a. The Department or primary national subdivision shall consider the views or recommendations before taking final action on any matter with respect to which the views and recommendations are presented; and

b. The Department or primary national subdivision shall provide the union a written statement as to the reason or basis for taking the final action.

4. NCR is distinct from collective bargaining. NCR does not limit the right of the Department or any exclusive representative of Department employees to engage in collective bargaining negotiations.

E. Representation Rights and Duties.

1. The Department or its operating units, as appropriate, recognize that a union that has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering all employees in the unit.

2. An exclusive representative of an appropriate unit in the Department shall be given the opportunity to be represented at:

a. Any formal discussion between one or more representatives of the Department and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

b. Any examination of an employee in the unit by a representative of the Department in connection with an investigation if (1) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (2) the employee requests representation.

3. The Department or its operating units, as appropriate, will furnish to the union, or its authorized representative, upon request and, to the extent permitted by law, data that (1) is normally maintained by the Department in the regular course of business; (2) is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (3) does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

4. Appropriate representatives of the Department or its operating units, as appropriate, and any exclusive representative of an appropriate operating unit in the Department, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the Department or its operating units, as appropriate, and the exclusive representative may determine appropriate techniques to assist in any negotiation.

5. The Department or its operating units, as appropriate, will negotiate with a union in good faith, and shall:

a. Approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

b. Be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

c. Meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays; and

d. Execute, if an agreement is reached, at the request of any party to the negotiations, a written document embodying the agreed terms, and to take such steps necessary to implement such agreement.

6. An agreement between the Department or any of its components and a union is subject to agency head approval by the D/OPP. PHRMs are required to forward to the D/OPP and the Chief, OGC/ ELLD, all agreements within three business days of their execution (signing). The Chief, OGC/ELLD, will provide the D/OPP with comments on the legal form and effect of the agreement before the D/OPP approves the agreement. An agreement will be approved within 30 days of its execution if the agreement is in accordance with the Statute and other applicable law, rule, or regulation (unless the Department has granted an exception to a policy or regulation). An agreement that has not been approved or disapproved within 30 days from the date of its execution shall go into effect and be binding on the parties subject to the provisions of the Statute and other applicable law, rule, or regulation.

F. Allotments to Representatives.

1. If an operating unit has received from an employee in an appropriate unit a written assignment that authorizes the operating unit to deduct from the pay of the employee a sum for the payment of regular and periodic dues of the exclusive representative of the unit, the PHRM of the operating unit shall honor the assignment and make an appropriate allotment pursuant to the assignment. Administrative expenses for this program will be borne by the operating unit and at no cost to the exclusive representative or the employee. Except as provided under Section F.2., below, any such assignment may not be revoked for a period of one (1) year.

2. An allotment under Section F.1., above, shall terminate when:

a. An agreement between the operating unit and the union involved ceases to be applicable to the employee; or

b. The employee is suspended or expelled from membership in the exclusive representative (labor organization).

G. Unfair Labor Practices (ULP).

1. It is the policy of the Department that it and its representatives shall not:

a. Interfere with, restrain, or coerce any employee in the exercise by the employee of any right under the Statute;

b. Encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

c. Sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

d. Discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given information or testimony under the Statute;

e. Refuse to consult or negotiate in good faith with a labor organization as required by the Statute;

f. Fail or refuse to cooperate in impasse procedures and impasse decisions as required by the Statute;

g. Enforce any rule or regulation (other than rule or regulation implementing 5 U.S.C. § 2302 relating to prohibited personnel practices) in conflict with any applicable CBA if the agreement was in effect before the date the rule or regulation was prescribed; or

h. Fail or refuse to comply with any provision of the Statute.

2. The designated official at the level of recognition may consider recommending to the Chief, OCG/ELLD, the filing of a complaint with the FLRA alleging the union committed a ULP if the union:

a. Interferes with, restrains, or coerces any employee in the exercise by the employee of any right under the Statute;

b. Causes or attempts to cause the Department to discriminate against any employee in the exercise by the employee of any right under the Statute;

c. Coerces, disciplines, fines, or attempts to coerce a member of the union as punishment, reprisal, or for purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

d. Discriminates against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, creed, color, national origin, sex, age, preferential or non-preferential civil service status, political affiliation, marital status, or handicapping condition;

e. Refuses to consult or negotiate in good faith with Department management as required by the Statute;

f. Fails or refuses to cooperate in impasse procedures and impasse decisions as required by the Statute;

g. Calls, or participates in, a strike, work stoppage, or slowdown, or picketing of the Department in a labor-management dispute if such picketing interferes with an agency's operations, or condone any activity described in this subparagraph by failing to take action to prevent or stop such activity;

h. Otherwise fails or refuses to comply with any provision of the Statute; or

i. Denies membership to any employee in the appropriate unit represented by the union except for failure to meet reasonable occupational standards uniformly required for admission; or tender dues uniformly required as a condition of acquiring or retaining membership. This does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of the Statute.

3. Issues that can properly be raised under an appeals procedure may not be raised as ULPs. However, except for matters under 5 U.S.C. §§ 7121(e) or (f), where an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues that can be raised under an NGP may, in the discretion of the aggrieved party, be raised under the NGP or as a ULP, but not under both procedures.

4. The expression of any personal view, opinion or statement that publicizes a representational election and encourages employees to exercise their right to vote, corrects the record with respect to any false or misleading statement, or informs employees of the Department's policy relating to labor-management relations and representation, shall not constitute an unfair labor practice or constitute grounds for the setting aside of any election conducted under provisions of the Statute as long as the expression contains no threat of reprisal, force or promise of benefit, or was not made under coercive conditions.

5. If the Department, any operating unit, or a union is charged with having engaged in a ULP, the PHRM, or designee, will provide the Director and Chief, OGC/ELLD, with one copy of all ULP charges or complaints filed against an operating unit, and one copy of all other documents.

6. The PHRM, or designee, shall consult with the Director and Chief, OGC/ELLD, before alleging a ULP against a labor organization and filing the charge with the FLRA.

H. Duty to Bargain in Good Faith.

1. The Department or its operating units, as appropriate, have a duty to bargain in good faith, and shall, to the extent consistent with any Federal law or any Government-wide rule or regulation, extend that duty to matters that are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

2. PHRMs shall seek the advice of OGC/ELLD on any question as to whether or not a statute or a Government-wide rule or regulation would bar negotiation of a proposal. If necessary, such questions shall be forwarded to the Director for decision.

I. Negotiation Impasses.

1. The PHRM, or designee, will provide the Director and OGC/ELLD with information as to the nature of the issue(s) in dispute and the position(s) on the issue(s) by management and the labor organization prior to filing a request for assistance with the FMCS or any other third party.

2. If voluntary arrangements, including the services of the FMCS or any other third-party mediation, fail to resolve a negotiation impasse the Department may request the Panel to consider the matter, or the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the FSIP.

3. Any request on behalf of the Department for the FSIP to consider an impasse shall be coordinated with the Director and OGC/ELLD prior to submission to the FSIP.

## V. GRIEVANCES, APPEALS, AND REVIEW

A. Grievance Procedures.

1. Any collective bargaining agreement between the Department, or an operating unit, and a union shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in Section A.3.d., e., and f., below, the procedures shall be the exclusive administrative procedures for resolving grievances that fall within its coverage. The parties may mutually agree to exclude any matter from the scope of the grievance procedures.

2. Any negotiated grievance procedure referred to in Section A.1., above, shall:

a. Be fair and simple; and

b. Provide for expeditious processing.

3. Include procedures that:

a. Assure a union the right, in its own behalf or on behalf of any employee in the unit represented by the union, to present and process grievances;

b. Assure such an employee the right to present a grievance on the employee's own behalf, and assure the union the right to be present during the grievance proceeding; and

c. Provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration that may be invoked by either the union or the Department or operating unit.

d. Allegations of prohibited personnel practices covered by 5 U.S.C. § 2302(b)(1) may be grieved under the NGP or the statutory procedures, but not both. An employee shall be deemed to have exercised his option at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the NGP, whichever event occurs first. Selection of the NGP in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board or the Equal Employment Opportunity Commission to review matters within those administrative bodies' respective jurisdiction.

e. Matters covered by 5 U.S.C. § 4303 (performance based action) and 5 U.S.C. § 7512 (adverse actions) may be appealed under 5 U.S.C. § 7701 or the NGP but not both. An employee shall be deemed to have exercised his/her choice when he/she timely files a notice of appeal under the statutory appeal procedure or timely files a written grievance under the NGP.

f. An employee may seek a remedy for prohibited personnel practices other than those covered by 5 U.S.C. § 2302(b)(1) by appealing to the Merit Systems Protection Board; filing a timely grievance in writing under the NGP; or seeking corrective action under 5 U.S.C.

Chapter 12, subchapters I and III. The employee is deemed to have made his/her election by the timely filing of a formal action under the appropriate procedure

4. The Department will not negotiate a grievance procedure that concerns:

a. Any claimed violation of subchapter III of 5 U.S.C., Chapter 73 (relating to prohibited political activities);

b. Retirement, life insurance, or health insurance;

c. A suspension or removal under 5 U.S.C. § 7532 (relating to suspensions in the interest of national security);

d. Any examination, certification, or appointment; or

e. The classification of any position that does not result in the reduction in grade or pay of an employee.

B. Appeals of Arbitration Awards.

1. The Department will not challenge, seek review, or appeal of an arbitration award covered by 5 U.S.C. § 7121(d) (allegations of prohibited personnel practices under 5 U.S.C. § 2302(b)(1)).

2. The Department will not challenge, appeal or seek review on its own of an arbitration award covered by 5 U.S.C. § 7121(e) (performance-based actions and adverse actions) unless it first requests the Director, OPM to seek judicial review under the provisions of 5 U.S.C. § 7703 (d). Only OPM may seek management review of the arbitration award. The employee may appeal such an arbitration award.

C. Exceptions to Arbitration Awards.

1. After consultation with the PHRM and the Director, OGC/ELLD may file with the FLRA an exception to any arbitrator's award that is allowed by law.

2. If no exception to an arbitrator's award is filed during the 30-day period beginning on the date of the award, the award shall be final and binding. The Department and its operating units shall take the actions required by an arbitrator's final award. The award may include the payment of back pay as provided in 5 U.S.C. § 5596.

D. Judicial Review and Enforcement.

After consultation with the PHRM and Director, OGC/ELLD may seek judicial review of any final order of the Authority. In the event the Authority petitions any United States District Court to enforce any Authority decision, any Department employee receiving such notice of petition shall immediately forward copies to the Director, and the Chief, OGC/ELLD.

## VI. ADMINISTRATIVE AND OTHER PROVISIONS

A. Management Rights.

1. Management officials of the Department are precluded from negotiating over their decision to determine the mission, budget, organization, number of employees, and internal security practices of the Department.

2. Management officials of the Department are precluded from negotiating, in accordance with applicable laws, over their decision:

a. To hire, assign, direct, layoff, and retain employees in the Department, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

b. To assign work, to make determinations with respect to contracting out, and to determine the personnel by which Departmental operations shall be conducted;

c. With respect to filling positions, to make selections for appointments from among properly ranked and certified candidates for promotion; or any other appropriate source; and

d. To take whatever actions may be necessary to carry out the mission of the Department during emergencies.

3. The Department and any labor organization may negotiate, at the election of the Department, the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work.

4. The Department, if requested to do so by the exclusive representative, will negotiate the procedures its management officials will observe in exercising their management rights and appropriate arrangements for employees adversely affected by the Department's exercise of its management rights.

B. Official Time.

1. For the purposes of this Handbook, official time is not to be confused with "administrative leave," "excused leave," or any other type of leave. It is authorized by 5 U.S.C. § 7131 or by the terms of a collective bargaining agreement.

2. It is the policy of the Department that supervisors and managers are responsible for ensuring employee representative record all official time used and it is coded in accordance with the codes issued by the Office of Personnel Management.

3. Statutory basis for official time:

a. Negotiations/impasses. An employee representing an exclusive representative in the negotiation of a collective bargaining agreement, including attendance at impasse proceedings, has a statutory entitlement under 5 U.S.C. § 7131(a) to official time. The employee must otherwise be in a duty status. The number of employees authorized under this statutory entitlement may not exceed the number of individuals designated as representing the Department in the collective bargaining process.

b. Proceedings before the FLRA. Under 5 U.S.C. § 7131(c), the FLRA makes the determination whether or not any employee participating, for, or on behalf of, a labor organization in any phase of proceedings before the FLRA is authorized official time for those proceeding during the time the employee otherwise would be in a duty status.

3. Prohibited uses of official time. Any activity performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

4. Negotiated entitlement to official time. Under 5 U.S.C. § 7131(d), the parties may mutually agree to the granting of official time for any employee representing an exclusive representative, or, in connection with any other matter in any amount the Department and the exclusive representative involved agree to be reasonable, necessary, and in the public interest. To date, the FLRA has held that an employee does not have to otherwise be in a duty status to be entitled to this type of official time. This type of official time, usually referred to as "representational time," provides preparation time for negotiations, or other representational duties authorized by the Statute.

5. Subject to revision of categories by OPM, recording and reporting of official time usage. Bureaus and operating units are to record the use of official time granted under the Statute or the terms of a collective bargaining agreement in one of the following four categories:

a. Term Negotiations – time used by union representatives to prepare for and negotiate a basic collective bargaining agreement or its successor;

b. Mid-term Negotiations – time used to bargain over issues raised during the life of a term agreement. That includes bargaining over procedures and appropriate arrangements;

c. Dispute resolution – time used to process grievances up to and including arbitration and appeals of bargaining unit employees before various third parties, such as the MSPB, FLRA, and EEOC; and

d. General Labor-Management Relations – time used for activities not included in the above three categories, e.g. meetings between labor and management officials to discuss general conditions of employment (but not bargaining).

## Attachment A: Delegation of Authority for Agency Head Review

JUN 2 8 2012

UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer and
Assistant Secretary for Administration
Washington, D.C. 20230

**DELEGATION OF AUTHORITY**

In accordance with the authority granted to me in Department Organization Order (DOO) 20-8, section 3.a., and Department Administrative Order (DAO) 202-250, I am hereby delegating to the Director, Office of Policy and Programs, Office of Human Resources Management, the authority to conduct Agency Head Review of collective bargaining agreements (CBA) and memorandums of understanding (MOU) required by Title 5, United States Code § 7114(c)(2) and Title 22, United States Code § 4113(f)(1), for the Department of Commerce (Department). This delegation of authority shall extend indefinitely until revoked by me, my successor, or the Chief Financial Officer and Assistant Secretary for Administration. I direct the Office of Policy and Programs to notify me of all CBAs or MOUs submitted to the Department for review and approval, and their disposition. I further direct the Office of Policy and Programs to initiate appropriate action to amend DOO 20-8 and DAO 202-250 in a manner consistent with this delegation of authority.

William J. Fleming
Director for Human Resources Management and
Deputy Chief Human Capital Officer

## Attachment B: Template of Memorandum Requesting AHR

MEMORANDUM FOR

Director
Office of Policy and Programs
Office of Human Resources Management

FROM: [Name and title of PHRM]

SUBJECT: Submission of [Collective Bargaining Agreement, Memorandum of Understanding, or some other agreement] between [name of union – spell out] and [name of organizational unit] Concerning [Subject Matter] for Agency Head Review

In accordance with the provisions of 5 U.S.C. § 7714(c) and Department Administrative Order 202-711 [*or 22 U.S.C. § 4113(f) if Foreign Service*], you are hereby provided with a copy of the [*CBA, MOU, or MOA, etc.*] for Agency Head Review. The document was executed on [*date}*. An electronic copy has been provided to the Department of Commerce's Office of General Counsel, Employment and Labor Law Division to review for legal form and effect compliance as required by 5 United States Code (U.S.C.) § 7114(c)(2) [or 22 U.S.C. § 4113(f) if Foreign Service].

Enclosure

cc: Brian DiGiacomo
Chief, Employment and Labor Law Division
Office of General Counsel

Frank Milman
Labor and Employee Relations Officer
Department of Commerce