



September 19, 2002

Homeland Security and 5 U.S.C. §7112(b)(6)

The Lieberman Amendment Throws Out Long-Standing Labor Rules That Help Safeguard Our National Security (And Invoking Cloture May Prevent The Senate From Fixing It)

There is widespread agreement that the United States should create a Department of Homeland Security. When the President made his proposal, he asked for broad discretion so that he could use the personnel and matériel of the new Department most quickly and effectively.

The House of Representatives did not give the President the broad discretion he asked for, but it did give him a fair measure of flexibility. The House bill passed with 295 votes, 88 of them from Democrats.

Regrettably, the leading Senate proposal, the Lieberman Amendment No. 4471, too often takes just the opposite approach. For example, on the vital point of labor-management relations and national security, the Lieberman Amendment ties the President's hands:

- It doesn't give the President the flexibility he asked for.
- It doesn't give the President and the Secretary the flexibility the House agreed to.
- It doesn't give the President and the Secretary the flexibility that was written into law when other departments were created or reformed.
- *And, it doesn't even allow the President and the Secretary to continue to have the flexibility of current law.*

The mighty Sleeping Giant that was attacked on September 11, 2001 still finds that he is bound by a thousand Lilliputian threads – and there is powerful opposition to cutting that web of rules and restrictions and regulations that restrains him.

Additionally, some Senators are now trying to invoke cloture. *If cloture is obtained, both*

the House's language on personnel flexibility and any bipartisan substitute would be nongermane and out-of-order.

I. Current Law

Chapter 71 of Title 5 of the U.S. Code provides that Federal employees can “form, join, or assist any labor organization” and can “engage in collective bargaining with respect to conditions of employment.” These provisions were part of the Civil Service Reform Act of 1978, Public Law 95-454. There are, of course, numerous exceptions and nuances to the general law, and *two of the more important are nullified or substantially weakened by Section 187 of the Lieberman Amendment*:

- Current law allows a President, unilaterally, to exclude *entire agencies and offices* from the labor-management provisions (5 U.S.C. §7103(b)(1)). This issue was addressed at some length in the RPC paper of September 5, 2002, “How the Senate Is Threatening the National Security Powers of Presidents – *All Presidents, Not Just This President.*”
- Current law prohibits certain *individual employees* from being a part of a bargaining unit. 5 U.S.C. §7112(b)(6) provides that no bargaining unit shall include “any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security.” This provision may be invoked by an individual office or agency, and disagreements are resolved by the Federal Labor Relations Authority (FLRA).

II. What the Lieberman Amendment Does

If the Lieberman Amendment is enacted, section 7112(b)(6) will be pretty much irrelevant within the Department of Homeland Security (DHS):

- A. For *employees transferred* into DHS, section 7112(b)(6) will be *inapplicable* unless
- (1) “the primary job duty of the employee is materially changed after the transfer;”
 - (2) “the primary job duty of the employee after such change consists of intelligence, counter-intelligence, or investigative duties directly related to the investigation of terrorism;” and (3) “it is clearly demonstrated that membership in a unit and coverage under chapter 71 of title 5, United States Code, cannot be applied in a manner that would not have a substantial adverse effect on national security.” [Amendment No. 4471, §187(f)(1)(B)] It is not at all clear that the showing entailed by requirement number
 - (3) can *ever* be made. Is it possible to “*clearly demonstrate*” that taking an action “*cannot*” be done without “having a *substantial* adverse effect” on national security?
- B. An employee of DHS who is “primarily engaged in carrying out” a *function transferred* to DHS “shall not be excluded from” a collective bargaining unit under section 7112(b)(6) unless the function “was performed by an employee excluded from a unit under that section” before the transfer was made. [§187(f)(1)(C)]

- C. For *employees and functions that are in DHS but not because they were transferred in*, “an employee of the Department shall not be excluded from a unit under section 7112(b)(6) . . . unless the primary job duty of the employee consists of intelligence, counterintelligence, or investigative duties directly related to terrorism investigation, if it is clearly demonstrated that membership in a unit and coverage under chapter 71 of title 5, United States Code, cannot be applied in a manner that would not have a substantial adverse effect on national security.” [§187(f)(1)(D)(ii)] As explained above under “A,” it may be impossible to make such a showing.

III. Some Practical Effects of the Lieberman Amendment

The Department of Justice Case

The American Federation of State, County, and Municipal Employees represented about 1,200 nonprofessional employees in the United States Department of Justice in the mid-1990s when the Department claimed that more than 200 employees in the Criminal Division were not eligible for membership in the bargaining unit because they were engaged in national security work within the meaning of §7112(b)(6). More specifically, the “work performed in the Criminal Division involve[d] the security of the Government in domestic and foreign affairs, against and from espionage, sabotage, subversion, and foreign aggression.” 52 FLRA No. 111, at part IV.B.

We have been unable to learn when the decision about the employees was first made, but we assume (based on the 1997 date for the final FLRA opinion) that the Department of Justice was under the stewardship of President Bill Clinton and Attorney General Janet Reno.

The union disputed the decision and took its complaint to the Federal Labor Relations Authority. The Regional Director held that some (unknown) number of employees had to be excluded, and the union appealed with respect to 84 employees.

The Authority affirmed the decision of the regional director. In its opinion, the Authority held that (1) “work performed by employees in civilian as well as military agencies can constitute ‘security work which directly affects national security’ within the meaning of section 7112(b)(6) of the Statute,” 52 FLRA No. 111, at note 8, and (2) the term “security work” includes “work involving mere access to and use of sensitive information and material,” *U.S. Department of Justice and A.F.S.C.M.E.*, 52 FLRA 1093 (No. 111) (March 14, 1997), at part IV.C.1.*

* In a former case, the Authority had held that the term “security work” includes “the design, analysis, or monitoring of security systems and procedures” but does *not* include “work involving mere access to and use of sensitive information and material.” *Department of Energy, Oak Ridge Tennessee Operations, and N.A.G.E. et al.*, 4 FLRA 644 (No. 85) (1980).

The rationale for the Authority's decision is set out in part in the footnote below.** This same rationale may very well apply with respect to some employees within the Department of Homeland Security – but the Lieberman Amendment will foreclose the same result. Under the Lieberman Amendment, employees of DHS who are engaged in the essential work of domestic and foreign security and protecting against espionage, sabotage, subversion, and foreign aggression cannot be treated in the same manner as other employees doing much the same work at the Department of Justice.

The Army Corps of Engineers Case

As recently as this past summer, the Federal Labor Relations Authority affirmed the position that it took in 1997 in the *U.S. Department of Justice* case (above).

In this recent case, 177 employees were excluded from a bargaining unit under authority of 5 U.S.C. §7112(b)(6) because they have the highest security classification in the Department of Defense

** “. . . With respect to the relationship between access to information and national security, 5 C.F.R. § 732.102(a) defines the term ‘national security position’ as a position ‘that require[s] regular use of, or access to, classified information.’ Pursuant to E.O. 10450, Section 3(b) [titled “Security Requirements for Government Employment” and issued by President Eisenhower in 1953], agency heads must designate as sensitive any position within the agency or any department, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security. *See also* 5 C.F.R. § 732.201(a). E.O. 12968 [titled “Access to Classified Information” and issued by President Clinton in 1995] establishes security policies to protect classified information, the disclosure of which can cause irreparable damage to the national security. 60 Fed. Reg. 40245. An employee’s eligibility for access to classified information is dependent upon the results of a favorable background investigation and the employee is certified or cleared to hold such position. *See* E.O. 12968, Section 3.1.(a)&(b).

“These provisions demonstrate that a position that requires the regular use of, or access to, classified information is one that is necessary to protect the national security. This ensures that an employee occupying a position that requires the regular use of, or access to, classified information is available to the agency when the need for security work arises. *Cf. Hartness v. Bush*, 919 F.2d 170, 173-74 (D.C.Cir.1990) (random drug testing was permissible for employees with top security clearances ‘regardless of the fact that some employees may be rarely, if ever, exposed to’ classified information; ‘[t]he whole point of granting top secret security clearances in advance is to provide flexibility, to ensure that employees can be given access to top secret materials as soon as the need arises’).” *U.S. Department of Justice and A.F.S.C.M.E.*, 52 FLRA 1093 (No. 111) (March 14, 1997), at part IV.C.1.

and have access to a Sensitive Compartmented Information Facility (SCIF) (but spend relatively little time within the SCIF). *U.S. Army, Army Corps of Engineers, Engineer Research Development Center, Vicksburg, Mississippi and A.F.S.C.M.E. et al.*, 57 FLRA – (No. 180), 2002 WL 1292778 (June 6, 2002).

The Authority quoted with approval the findings of the Regional Director:

“[T]he Regional Director found that the employees’ mission is to provide the war fighter with knowledge of the battlefield through research, development, and the application of expertise in the topographic and related sciences. The Regional Director determined that the employees’ responsibilities make it clear that the work performed involves preservation of the military strength of the Government in domestic and foreign affairs, against and from espionage, sabotage, subversion, and foreign aggression. Accordingly, the Regional Director found that the work performed by the employees involves national security.

“The Regional Director also found that the evidence demonstrated that all of the employees at issue are able to access the SCIF and thus have access to classified information. The Regional Director noted that while the disputed employees may spend relatively little of their actual working time in the SCIF, they possess a badge that allows them unescorted access to the SCIF at any time. Additionally, the Regional Director found that the record shows that if a national emergency were declared, the . . . employees may be called upon to support crisis and contingency response missions, which would require access to [sensitive compartmented information]. Therefore, the Regional Director concluded that the work of the . . . employees includes the regular use of, or access to, classified information concerning matters of national security. Accordingly, the Regional Director found that all of the employees at issue here are engaged in security work which directly affects the national security within the meaning of §7112(b)(6) of the Statute and that the employees should be excluded from the bargaining unit.” 57 FLRA No. 180, at II.B. (citations omitted).

Employees at the Corps of Engineers are subject to §7112(b)(6). In similar circumstances at DHS, the Lieberman Amendment will foreclose a similar finding.

IV. Conclusion

The Lieberman Amendment does *not* seek to reverse decisions that were made before the creation of DHS (or, in some cases, before July 20, 2002, see §187(f)(1)(A) & (f)(1)(E)). ***The Lieberman Amendment will not overturn the decisions described above, but the Lieberman Amendment will foreclose similar decisions within DHS.***

The Lieberman Amendment will “grandfather” employees who are transferred into DHS, *and* employees of DHS who perform functions that are transferred into DHS, so that ***the Secretary of the Department of Homeland Security will not be able to apply §7112(b)(6) as it is applied in every other department of the Federal Government.***

Section 187 of the Lieberman Amendment will change Federal labor-management relations law so that generally applicable rules relating to national security, long a part of Federal law, will *not* apply to the Department of Homeland Security – a Department that is being created specifically in response to the most deadly and insidious attack ever completed against the civilian population of the United States.

Senate Joint Resolution 23, which Congress passed a year ago, authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States. . . .”

We are in a war against terrorism. This is not the time to revoke those regular and ordinary statutory powers which have been held and responsibly used by Presidents Carter, Reagan, G.H.W. Bush, Clinton, and G. Bush and their subordinates for decades.

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