AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. Hrg. 115–420

NOMINATIONS OF HON. ERNEST W. DUBESTER, HON. COLLEEN D. KIKO, AND JAMES T. ABBOTT

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

NOMINATIONS OF THE HONORABLE ERNEST W. DUBESTER, HONORABLE COLLEEN D. KIKO, AND JAMES T. ABBOTT TO BE MEMBERS, FEDERAL LABOR RELATIONS AUTHORITY

NOVEMBER 7, 2017

Available via the World Wide Web: http://www.govinfo.gov/

Printed for the use of the
Committee on Homeland Security and Governmental Affairs

U.S. GOVERNMENT PUBLISHING OFFICE
30–098 PDF WASHINGTON : 2019

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

RON JOHNSON, Wisconsin, *Chairman*

JOHN McCAIN, Arizona
ROB PORTMAN, Ohio
RAND PAUL, Kentucky
JAMES LANKFORD, Oklahoma
MICHAEL B. ENZI, Wyoming
JOHN HOEVEN, North Dakota
STEVE DAINES, Montana

CLAIRE McCASKILL, Missouri
THOMAS R. CARPER, Delaware
JON TESTER, Montana
HEIDI HEITKAMP, North Dakota
GARY C. PETERS, Michigan
MAGGIE HASSAN, New Hampshire
KAMALA D. HARRIS, California

CHRISTOPHER R. HIXON, *Staff Director*
GABRIELLE D'ADAMO SINGER, *Chief Counsel*
DAVID N. BREWER, *Chief Investigative Counsel*
MARGARET E. DAUM, *Minority Staff Director*
DONALD K. SHERMAN, *Minority Senior Counsel*
LAURA W. KILBRIDE, *Chief Clerk*
BONNI E. DINERSTEIN, *Hearing Clerk*

CONTENTS

	Page
Opening statements:	
Senator Lankford	1
Senator Heitkamp	2
Senator McCaskill	12
Senator Hassan	13
Senator Harris	17
Prepared statement:	
Senator Heitkamp	23

WITNESSES

TUESDAY, NOVEMBER 7, 2017

Hon. Jim Sensenbrenner, a Representative in Congress from the State of Wisconsin	3
Hon. Colleen D. Kiko to be a Member, Federal Labor Relations Authority	
Testimony	4
Prepared statement	24
Letter from the Office of Government Ethics	26
Biographical and financial information	29
Responses to pre-hearing questions	50
Responses to post-hearing questions	69
Hon. Ernest W. DuBester to be a Member, Federal Labor Relations Authority	
Testimony	6
Prepared statement	72
Letter from the Office of Government Ethics	74
Biographical and financial information	77
Responses to pre-hearing questions	103
Responses to post-hearing questions	123
James T. Abbott to be a Member, Federal Labor Relations Authority	
Testimony	7
Prepared statement	126
Letter from the Office of Government Ethics	128
Biographical and financial information	131
Responses to pre-hearing questions	154
Responses to post-hearing questions	173
Letter of support	177

NOMINATIONS OF HONORABLE ERNEST W. DUBESTER, HONORABLE COLLEEN D. KIKO, AND JAMES T. ABBOTT TO BE MEMBERS, FEDERAL LABOR RELATIONS AUTHORITY

TUESDAY, NOVEMBER 7, 2017

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:29 a.m., in room SD–342, Dirksen Senate Office Building, Hon. James Lankford, presiding.

Present: Senators Lankford, Daines, McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Good morning, everyone. Today we will consider of Colleen Kiko, James Abbott, Ernest DuBester as to be members of the Federal Labor Relations Authority (FLRA). The Committee takes these nominations very seriously, so we are pleased to have three very strong candidates before us. All three nominees are highly experienced in Federal Labor Relations and have largely dedicated their careers to public service in the Federal Government. We thank you for your work.

The Honorable Colleen Duffy Kiko, originally of North Dakota—earned a B.S. from North Dakota State University and her law degree from George Mason School of Law. Ms. Kiko began her career at the Federal Labor Relations Board in 1976 as a supervisory labor relations specialist while it was still a division of the Department of Labor (DOL). She has been associated with FLRA longer than it has been in its current capacity as an independent agency.

After her initial job at FLRA, Ms. Kiko went to law school, then returned to Federal service, working first at the Department of Justice (DOJ), then the House Judiciary Committee. In 2002, Ms. Kiko became a judge in the Department of Labor's Employees' Compensation Appeals Board. Then in 2005, she was appointed by President Bush to serve as General Counsel (GC) at the Federal labor Relations Board, a post she held until 2008 when she returned to the Department of Labor Employees' Compensation Appeals Board.

Ms. Kiko, you began your career at the FLRA as a worker bee, and now you are sitting here before us nominated to be the Chair

of FLRA. I believe you would call that a real Washington, D.C., success story in many ways.

Mr. James Thomas Abbott of Virginia earned his B.A. from Malone University of Canton, Ohio, in 1980 and his J.D. from Temple University in 1983. Mr. Abbott spent almost two decades working as an Army civilian as counsel who focused on labor, personnel, and ethics issues. During this time, he was awarded the Commander's Award for Civilian Service, Department of the Army, in 1996, and in 2002, he was awarded the Meritorious Civilian Service Award from the U.S. Defense Contract Management Agency.

After a career with the Army, Mr. Abbott came to Capitol Hill and served as the Deputy General Counsel in the Congressional Office of Compliance. Since 2007, Mr. Abbott has served as the Chief Counsel to the Chairman of the Federal Labor Relations Authority.

Thank you, by the way, for your service as well.

Finally, the Honorable Ernest William DuBester, who currently serves as the Member of the FLRA. Mr. DuBester, welcome back. Glad to be able to see you again here. Certainly, you are familiar with this process, as the third time you have been nominated to be a Member of the FLRA.

Mr. DuBester received his B.A. from Boston College in 1972, his law degree from Catholic University in 1975, and his master of law from Georgetown in 1980. Mr. DuBester has 40 years of experience in labor-management relations. He began his career at the National Labor Relations Board. He has been a counsel to the AFL–CIO and a professor at both Catholic University School of Law and the George Mason School of Law where he was named the Distinguished Professor of Law and Chair of the Dispute Resolution Program. Mr. DuBester has also been a mediator and Chairman of the National Mediation Board. Mr. DuBester was first appointed to be a Member of the FLRA by President Obama in 2009 and reappointed in 2013.

Clearly, we have three very qualified nominees before us who are all experienced and have extensive previous experience at FLRA.

Committee staff reached out to all these nominees and colleagues and affiliates who all spoke very highly of them. Committee staff also had the opportunity to interview all three nominees on an array of Federal labor relations issues. They thoughtfully and competently answered each question to the staff's satisfaction.

To date, the Committee has found you to be qualified for the positions you have been nominated. I look forward to speaking with you a bit more on your experience and accomplishments, how you intend to be able to bring those to be fair and impartial in your leadership in the FLRA.

I now recognize Ranking Member Heitkamp for her opening statement.

OPENING STATEMENT BY SENATOR HEITKAMP

Senator HEITKAMP. Thank you, Chairman Lankford. I do not want to give an extensive opening statement. He took most of the material already, anyway.

Senator LANKFORD. That is what Chairmen do.

Senator HEITKAMP. Yes. Mr. Chairman did.

Senator LANKFORD. That is what Chairmen do.

Senator HEITKAMP. Oh, that is what Chairmen do, I guess.

But unlike the Chairman, I would like to welcome our Congressman from Wisconsin, Congressman Sensenbrenner. Thank you so much for coming, and thank you so much for being involved to the point where you will introduce one of our witnesses today. It is an honor, and it is also an honor to welcome a fellow North Dakotan to the table.

That is how you say it, "North Dakotan."

Senator LANKFORD. That is how you say it.

Senator HEITKAMP. Yes.

But I will acknowledge that your father also had a very distinguished career in Federal service, and so you come from good stock and hardy stock since she comes from the very far reaches of our Northern Border, Pembina. I really appreciate all of your willingness to serve and look forward to your testimony.

Thank you.

Senator LANKFORD. Thank you.

It is the custom of this Committee to swear in all witnesses that appear before us. If you do not mind, if the three nominees would please stand. Raise your right hand. Do you swear the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Thank you. You may be seated.

Let the record reflect all three answered in the affirmative.

We are going to recognize our witnesses for their opening statements. We will begin with Ms. Kiko, who has a special guest introducing her. Is that correct?

Jim Sensenbrenner, who is a friend and who has served faithfully in the U.S. Congress for a very long time, it is very good to be able to see you, to be able to do a formal introduction there.

I recognize Congressman Sensenbrenner.

TESTIMONY OF THE HONORABLE JIM SENSENBRENNER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Mr. SENSENBRENNER. Thank you very much, Chairman Lankford, Ranking Member Heitkamp, and Members of the Committee.

I want to thank you for the opportunity to come before this Committee and endorse the qualifications of Ms. Colleen Duffy Kiko for the position of Chairman of the FLRA. She is a great friend and is superbly qualified for this position through her years of experience as well as her personal character.

I have known Colleen Kiko for more than 35 years. In that time, I have seen her commitment to public service, dedication to the rule of law, and the devotion to her family.

Colleen began her career as a newly hired attorney at the Department of Justice, where she worked in the Office of Legal Policy in the Civil Rights Division. She spent her time investigating and prosecuting housing and credit discrimination complaints. She also served as a detailee to the Eastern District of Virginia in prosecuting criminal cases.

I hired Colleen as my committee counsel, where she worked on the successful impeachment of Judge Walter Nixon for which I

served as one of the House Managers during the Senate trial. She served as the principal negotiator for both me and Judiciary Republicans on the Americans with Disability Act, one of the hallmark Civil Rights laws of our Nation. As my counsel, Colleen provided me with sound advice, and I trusted her judgment, discretion, and intuition.

This is not the first time Colleen and I have sat in these seats. I introduced Colleen before this Committee when she was previously confirmed as General Counsel of the FLRA. During her tenure, she demonstrated her excellent legal skills, independent judgment, and commitment to the rule of law. With open lines of communication, she helped revamp the FLRA training programs and also prosecuted unfair labor practices while serving as a respectable negotiator.

Finally, she serves as a judge on the Employees' Compensation Appeals Board. During her time there, Ms. Kiko worked with her colleagues on the board to make appropriate determinations with respect to Federal employees injured during the course of their employment. Each of her experiences has helped prepare her as a nominee as chairman of the FLRA. She undoubtedly possesses the knowledge, temperament, and commitment required for this position.

I am fortunate to be able to present such a qualified public servant with such a distinguished background who deserves swift confirmation by this Committee and the Senate as a whole, and I appreciate your courtesy.

Senator LANKFORD. Congressman Sensenbrenner, thank you again for all your service over the years, and thank you for being here as well.

For each of you, as we begin and as you begin your opening statement, I would ask you to also introduce family, guests, and friends that are here. We understand full well that this is not only bringing you into the Federal service in this role, but you bring friends and family in your community with you as well. Please recognize those folks as you go.

Ms. Kiko, you will go first.

TESTIMONY OF THE HONORABLE COLLEEN DUFFY KIKO[1] TO BE A MEMBER, FEDERAL LABOR RELATIONS AUTHORITY

Ms. KIKO. Thank you, Mr. Chairman, Ranking Member Senator Heitkamp, Members of the Committee. I would like to thank you and your staff for all the kindnesses that have been shown to me as I have prepared for this hearing.

I also deeply appreciate Congressman Sensenbrenner for taking the time away from his very booked schedule to introduce me today. I respect his dedicated service to the U.S. House of Representatives and am deeply honored to call him a friend.

I am here today with some of my family members who represent the others. Our son Philip Kiko Jr. and his wife, Molly, who are expecting our fifth grandchild; our son Michael Kiko; my sister, Tama; and of course, my best friend and husband, who currently serves as the Chief Administrative Officer of the House of Rep-

[1] The prepared statement of Ms. Kiko appears in the Appendix on page 24.

resentatives, Phil Kiko. I appreciate their love and support and the love and support from those who have not been able to be here today.

I would also like to thank Member DuBester and Nominee James Abbott for the welcoming attitude that they have shown me during this confirmation process. I look forward to working with both of them as we journey forward, should I be confirmed.

I would also like to personally thank Pat Pizzella, Acting Chairman; Fred Jacob, Solicitor; and Gina Grippando, Counsel for Regulatory and Public Affairs at the FLRA, for helping me get to this point in the confirmation process.

It is indeed an honor to have been nominated to serve as a Member of the Federal Labor Relations Authority and, if confirmed, to be designated as Chairman of that agency.

My first job was a GS–3 clerk typist in the Department of Treasury, Office of Personnel. My father, Lawrence Duffy, proudly spent over 49 years, almost a half a century, in the Federal service before he retired. He was a railway mail carrier for the U.S. Postal Service (USPS) and later became a customs inspector at the North Dakota-Canadian border. He always considered Federal service to be an honorable profession. His work ethic, extreme pride in his job, and impeccable character were examples for me, and I hope I live up to his standards.

My mother, Angie Duffy, was also an example to me as someone who always wanted to learn new things, have different and varied experiences—she began oil painting in her 50s—and to broaden her horizons. In her quiet, loving way, she pushed all four of her children to be strong and independent.

Congressman Sensenbrenner and, of course, Chairman Lankford have spoken about my background, but I would like to point out a few areas of my career that I believe affirmatively qualify me for this position.

Before the agency became an agency, I was working in a part of the Department of Labor that was transferred into this new agency in 1979. I was there when it opened its doors, and I was there celebrating with a cake on its first birthday. It was a very important part of shaping me as a professional employee, and it was and continues to be a very great place to work.

I have worked in almost every component of the agency. In the regional office, I investigated unfair labor practices, chaired hearings on representational disputes, monitored Federal union elections, and conducted training for both agencies and unions. At the Authority level, I reviewed representational disputes, administrative law judge (ALJ) decisions, and drafted decisions for Authority members. My last position was a supervisory labor relations specialist handling procedural motions before I decided to attend law school.

I graduated from George Mason University, now Antonin Scalia Law School, in 1986, and just 19 years later, I would find myself back at the FLRA serving as the Senate-confirmed position of General Counsel in 2005. And now, another 12 years later, I have again been nominated to serve as a Member of the agency. My career keeps taking me back to my roots.

In my current position as a judge of the Employees' Compensation Appeals Board (ECAB), where I have served for 12 years and rendered over 10,000 decisions, I have polished the attributes necessary to render decisions in an impartial manner, such as reviewing the facts presented, considering arguments provided by the parties, and applying the existing law to the particular facts of the case.

I also have experience in management. While serving as General Counsel, I was responsible for managing the seven regions of the FLRA, which would include budgeting and performance management, leading change, policy development, staff and customer training, in addition to the mission requirements of the office.

Further, as part of the management team under a former Chairman of ECAB, we managed a staff at that time of approximately 50 employees, which included updating performance standards, initiating programs to increase the quality, quantity, and timeliness of the work, and developed an updated case tracking system, to name a few. I believe this experience has prepared me while to serve as a leader in the FLRA.

I believe my 29 years of service in the Federal Government should serve me well in this agency, where we are commissioned to provide leadership and establish policy and guidance relating to matters under the Federal Service Labor-Management Relations Statute, and to effectively administer the nine specific mandates of this statute.

I greatly appreciate the opportunity to appear before you and am willing to answer any questions.

Senator LANKFORD. Thank you. Mr. DuBester.

TESTIMONY OF THE HONORABLE ERNEST W. DUBESTER[1] TO BE A MEMBER, FEDERAL LABOR RELATIONS AUTHORITY

Mr. DUBESTER. Thank you, Chairman Lankford, Senator Heitkamp, Senator McCaskill, and Senator Peters. I greatly appreciate the opportunity to come before this Committee again for its consideration of my nomination to be a Member of the Federal Labor Relations Authority.

I also would like to thank the Committee's staff for their hard work and assistance in reviewing my nomination and scheduling this hearing.

Before making a brief opening statement, I would like to introduce my wife, Karen Kremer, who is sitting in the first row behind me. In a few months, we will celebrate our 30th Anniversary. When I first met Karen, she was working for Senator Howell Heflin on the Senate Judiciary Committee. So the Senate will always hold a special, personal meaning in my life.

I also want to recognize the presence here this morning of quite a few people from the FLRA, including my personal staff. These dedicated public servants, as well as many FLRA staff who are not present, are the key to the FLRA's many successes in recent years.

I am also pleased to appear here today with Colleen and James who, hopefully, if confirmed by the Senate, will be my colleagues.

[1] The prepared statement of Mr. DuBester appears in the Appendix on page 72.

Mr. Chairman, as you mentioned, this is the fifth time I have had the privilege to come before the Senate after being nominated by a President for a position of public trust. During the 1990s, I was nominated twice to serve as Chairman and Member the National Mediation Board, another independent agency. This is the third time that I have had the honor to come before this Committee after being re-nominated by President Trump to continue serving as a Member of the FLRA. I have now served as a Member for over 8 years.

The last 8 years reflect many accomplishments at the FLRA. Exercising our statutory responsibility to provide leadership in labor-management relations, we have engaged in a variety of outreach, facilitation, and training activities, which include the delivery of a variety of training sessions to tens of thousands of labor and management representatives in the Federal community, and during this period, we have also made timely issuance of decisions a major priority.

In addition, with an agency focus on human capital initiatives, such as training and development, performance management, and work-life balance, employee morale has improved dramatically. For the last 2 years, we have ranked in the top five overall in the Partnership for Public Service (PPS) rankings for "Best Places to Work in the Federal Government," and in 2015 and 2016, we received No. 1 rankings in the specific categories of teamwork and effective leadership.

Mr. Chairman, as you mentioned, I am not a kid anymore, with over 40 years of experience in labor-management relations, working as a public servant, as an advocate, a mediator, an arbitrator, and an academic, over 25 of those years are in the Federal sector. I remain strongly committed to the FLRA's mission and to the importance of stable, constructive labor-management relations in the Federal sector, and if re-confirmed, I will continue to work tirelessly so that the FLRA is recognized by the Federal sector's labor-management community as one of the most effective and efficient agencies in the Federal Government.

Again, I appreciate the opportunity to appear before you, and I am pleased to answer any questions that you have.

Senator LANKFORD. Thank you, Mr. DuBester. Mr. Abbott.

TESTIMONY OF JAMES T. ABBOTT[1] TO BE A MEMBER, FEDERAL LABOR RELATIONS AUTHORITY

Mr. ABBOTT. Good morning. Mr. Chairman, Ranking Member McCaskill, Senator Heitkamp, and Members of the Committee, I want to thank you for conducting this hearing at a time when so many other pressing issues are competing for your time and attention. I would also like to thank your Committee staff for the outstanding support which they provided to me as I prepared for this hearing. I appreciate your warm reception.

I am honored and humbled to have been nominated by President Trump to become a Member of the Federal Labor Relations Authority. If confirmed, it will be, for me, the highest privilege of my professional life.

[1] The prepared statement of Mr. Abbott appears in the Appendix on page 126.

With me today are my husband of 21 years, Daniel Gri, and our sons, Caleb and Alfred, who are the pride of my life. That Daniel is able to join me today is nothing short of a miracle. Just 4 months ago, he was on life support following a serious automobile accident. This is his first public outing since that accident and is testament to his indomitable spirit. I rely upon that spirit every day.

My sister and brother-in-law, Linda and Don Walde, and my niece, Heather Legore, as well as my cousin, Gayle Abbott, and her daughter, Elizabeth, are here as well.

My professional career has spanned 34 years, 33 devoted to public service. I learned about service and hard work from my parents and grandparents. Grandfather Whipple worked as a farmhand in Kansas in the 1910s until he saved enough money to buy his own land. His farm survived the Great Depression through his hard work and determination.

Grandfather Abbott singlehandedly operated a grist mill in Painesville, Ohio. He hired helpers only when, in his words, "I could pay a fair wage for a fair day of work."

My mother, a nurse, and my father, a minister, served as missionaries in Congo where they built churches to serve not just as centers of worship but also to serve as local medical clinics and schools.

But for me, the ultimate example of public service was my brother, Denis Abbott, who gave his life in service to his country in Pleiku, Vietnam.

Before joining the FLRA as Chief Counsel, I sat at dozens of bargaining tables negotiating local and nationwide collective-bargaining agreements. Through those experiences, I learned firsthand how differences can be constructively resolved but also how they can end up in dispute. I have witnessed the dynamics of labor relations at work between first-line supervisors and hardworking union stewards in a variety of settings, such as work floors where artillery equipment and attack helicopters are serviced and repaired.

I have met with employees and union stewards at sites where the working conditions were difficult, even dangerous. I have had to tell first-line supervisors and generals that they were wrong and what they must do to comply with the statute. Therefore, I understand why the protections of our statute are so important to Federal employees.

I believe that we can all agree that the Federal workforce in 2017 looks very different than it did in 1978 when our statute was enacted. In this changed environment, the Authority must clearly define what matters affect working conditions and those which constitute negotiable conditions of employment. To that end, I pledge that if I am confirmed, I will adjudicate all matters fairly and impartially, enforce the statute as it is written, but above all respect judicial precedent.

I look forward to working with my colleagues to ensure that the FLRA remains relevant and to drafting decisions that can be understood by laypersons as well as attorneys.

It is my privilege to appear before you today, and as my colleagues, I am happy to answer any questions.

Thank you.

Senator LANKFORD. Thank you, Mr. Abbott.

I am going to ask three mandatory questions of all three of you, and then I am going to defer to Ranking Member Heitkamp. She has another hearing that is happening simultaneous to this. I want to make sure that we get to her questions immediately.

The three questions I am going to ask of all three of you—and I will need a verbal response—and I will just kind of come down the road, starting with Mr. DuBester, Ms. Kiko, and Mr. Abbott.

Is there anything that you are aware of in your background that might present a conflict of interest with the duties of your office to which you have been nominated? Mr. Dubester.

Mr. DUBESTER. No.

Senator LANKFORD. Ms. Kiko.

Ms. KIKO. No, sir.

Senator LANKFORD. Mr. Abbott.

Mr. ABBOTT. No, sir.

Senator LANKFORD. Second question. Do you know of anything, personal or otherwise, that would in any way prevent you from fully and honorable discharging the responsibility of the office of which you have been nominated? Mr. DuBester.

Mr. DUBESTER. No, Mr. Chairman.

Senator LANKFORD. Ms. Kiko.

Ms. KIKO. No, sir.

Senator LANKFORD. Mr. Abbott.

Mr. ABBOTT. No, sir.

Senator LANKFORD. Third question. Do you agree, without reservation, to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed? Mr. DuBester.

Mr. DUBESTER. I do.

Senator LANKFORD. Ms. Kiko.

Ms. KIKO. I do.

Senator LANKFORD. Mr. Abbott.

Mr. ABBOTT. Yes, I will.

Senator LANKFORD. I recognize Ranking Member Heitkamp.

Senator HEITKAMP. Thank you so much, Mr. Chairman.

These are incredible years of service to this organization and to this agency sitting before us, and I cannot imagine a panel more qualified to do this work. But you also have the wisdom of time. You have had a chance to see this agency grow and change.

The question that I have is, What do you believe today is a challenge that will come to you that you did not anticipate all those very many years that you have been serving and been associated?

We will start with Mr. DuBester.

Mr. DUBESTER. Well, the world, of course, is always rapidly changing, and that certainly applies to the field of labor-management relations.

I think that probably one of the changes that is a fairly recent change that will remain a challenge in the years ahead is the approach our agency brings to the resolution of disputes. On the one hand, of course, we have a very direct statutory responsibility for resolving particular cases, and that remains fairly constant over time. But we also have responsibility under our statute that was referred to earlier to provide leadership and guidance to help agen-

cies throughout the Federal Government develop successful labor-management relations programs.

I think among other things, the kind of outreach that we have done over the last few years in terms of training them and developing their skills and abilities to improve their own relationships, so agency representatives and labor representatives can learn how to resolve more of their disputes, even voluntarily, so that a lot of the disputes that come to us now will not necessarily come to us anymore. Day in and day out throughout the Federal Government, it is those agency reps and those labor reps who have to work together, who have to address the problems that are unique to their agency. By giving them the problem-solving skills, learning how to treat with certain situations through the use of alternative dispute resolution services, I think is and has been a recent challenge but will remain a challenge in the future, in my view.

Senator HEITKAMP. Thank you. Ms. Kiko.

Ms. KIKO. Thank you, Senator Heitkamp.

I would say that the immediate challenge is, not disagreeing at all with Mr. DuBester, I would certainly agree with those, but I would also say that cybersecurity is an issue that is facing all the agencies right now. I would take that as a very serious concern for every agency.

But also, I believe that the backlog that is sitting there at the moment, we would like to get those moved.

Senator HEITKAMP. How does that compare to your recollection back when you were previously with the agency?

Ms. KIKO. When I was with the General Counsel, there was a backlog waiting for me when I got there, and I am sure there is a backlog waiting for a full complement of the Authority when we get there, so——

Senator HEITKAMP. Is it worse today than it was 10 years ago?

Ms. KIKO. Right now, there is a General Counsel. When I came in as the General Counsel, there had not been a General Counsel for several months, and so there had been an inability to file any kind of unfair labor practice complaints or issue decisions on appeals. Those decisions were waiting for me to be issued.

At the current moment, we have a General Counsel. So from that perspective, I do not think there is anything waiting there to be decided.

On the Authority side, I do not have anything to compare it to since I was not on the Authority side.

Senator HEITKAMP. We always say justice delayed is justice denied, and I agree that that we need to make decisions in a timely fashion. Mr. Abbott.

Mr. ABBOTT. Well, Senator, just as when Congress enacted our statute in 1978 and the original Members of the Authority, when the statute was created, just as they could not have anticipated a workforce that had computers at every desk, the availability of email, and the ability of enemies of the country to have access to our security and cyber systems and to wipe out swaths of information in a moment, I think we cannot, sitting here, anticipate all of the changes that will be coming during our terms. I believe that requires that the Authority be certain to maintain its relevancy to the labor-management community by looking at our statute and

being clear in our decisions to give a road map to our customers, which is the labor relations community.

Senator HEITKAMP. In response to a question regarding political difficult choices in your policy questionnaire, each of you stated you do not make political choices, which I think is great, but could you describe a time when you made a difficult or unpopular decision or choice that you thought was in the best interest of the country or your agency? Probably just give me one of the most difficult decisions that you have had to make. Mr. DuBester.

Mr. DUBESTER. Senator Heitkamp, I think as I mentioned in my questionnaire, I probably refer back to my service as Chairman of the National Mediation Board. That agency has jurisdiction in the transportation sector over airlines and railroads. Not all, but many of the disputes that arise are high-profile disputes, often with a national impact. Given the nature of that statute, it also allows for the intervention of the White House, if you will, the President, to take certain actions that will have a bearing on the dispute.

It was my responsibility, of course, to make recommendations to the White House, and I had to bring my sense of the situation as well as my experience in labor-management relations to bear and often—sensitivities, if you will, of a political nature. My decisions were not political, but I was serving a White House, and obviously, all of you as public servants and elected officials understand considerations of your constituencies.

I think those were challenging situations, where I often knew they were tough decisions and I had to give the best decision I could.

Senator HEITKAMP. Ms. Kiko.

Ms. KIKO. Well, I have certainly made difficult decisions in my life. Probably the most difficult decision that I ever made was when I chose to stay home and quit my career and stay home with my four children and raise them. I do believe I think that might have been of service to this country, I am hoping. [Laughter.]

Senator HEITKAMP. Thank you. Mr. Abbott.

Mr. ABBOTT. Yes. One of the most difficult decisions that I had to make as a Federal manager was in January of this year when Acting Chairman Pizzella transitioned to our new Acting Chairman. We had to assess the needs of the agency that were the resources that we had.

We had an office, by way of example, that had increased its staffing by 200 percent in a matter of 1 year with the plan and hope that the new program developed would create workload. That workload did not develop, and there was a decrease in caseload. The Acting Chairman and myself, we had to make the difficult choice in recognizing that the Office of General Counsel (OGC) did not have resources, and as difficult as it always is to change priorities such as that, we had to make that difficult decision for the good of the agency and so the labor-management community, would be served in processing unfair labor practices.

Senator HEITKAMP. Thank you so much.

Senator LANKFORD. I would like to recognize the Ranking Member of the full Committee, Claire McCaskill.

OPENING STATEMENT OF SENATOR MCCASKILL

Senator MCCASKILL. Thank you very much.

I just have a simple question for the three of you, and it probably will not take you long to answer, at least I hope not. I would ask each of you to respond to this question. Do you fully support the right of government employees to organize and bargain collectively?

Ms. KIKO. I can answer that absolutely, positively. I am there to provide leadership and establish guidance under the Federal Service Labor-Management Relations Statute and effectively administering all of these mandatory mandates under the statute, and I absolutely would agree with that.

Senator MCCASKILL. Mr. Abbott.

Mr. ABBOTT. I do as well. I believe that our statute serves a very important part of the construct of Title 5 and Title 7 to provide an avenue of recourse for employees who are aggrieved, and I have witnessed and seen myself how constructive positive labor-management relations are.

Yes, I believe that the statute, as written, establishing collective bargaining is a positive force in the Federal Government.

Senator MCCASKILL. You would support it even if the statute were not there. Your support is because you believe in the concept, not because you are following the statute?

Mr. ABBOTT. I believe in the concept and the statute. Yes, ma'am.

Senator MCCASKILL. OK. I know you have to follow the law. I am not asking about whether or not—I am asking whether you agree with the law that that should be something that is allowed in the United States of America for government employees to organize and collectively bargain.

Mr. ABBOTT. Without a doubt.

Senator MCCASKILL. OK.

I probably know your answer, Mr. DuBester.

Mr. DUBESTER. The answer is yes, Senator. I very strongly believe in the institution of collective bargaining. And beyond that, I often say one reason is because I am a great believer in mechanisms that afford the opportunity for interaction and dialogue between employer representatives and their employees through exclusive representatives. I think that is the best way to address problems in any workplace, in any jurisdiction, whether it is the private sector, the public sector, or the Federal sector.

But beyond that, of course, I saw that Ms. Kiko was holding up our statute, and while I know you were not asking for a statutory commitment, but in the very first section of the statute, Findings and Purpose, it talks about collective bargaining and the findings of Congress that it is in the public interest. I believe in the statute and the agency's mission.

Senator MCCASKILL. Thank you.

Thank you, Mr. Chairman.

Senator LANKFORD. Senator Hassan.

OPENING STATEMENT OF SENATOR HASSAN

Senator HASSAN. Thank you very much, Mr. Chairman, and good morning to you all. Congratulations on your nominations and being here.

I wanted to follow up a little bit. I had a similar question to Senator McCaskill, and I thank you for your answers to that.

I also come from an employment law background. I represented management for years, and I, too, believed that collective bargaining has proved to be not only an excellent mechanism for workers to protect themselves and each other and have the benefit of concerted action, but also it has been a very good tool for communication between labor and management and resolving issues.

Toward that end—and this is for each of you—do you all believe, as I do, that official time can be used to resolve important matters and, in turn, save time and resources?

We will start with you, Mr. Abbott.

Mr. ABBOTT. Official time is defined by our statute, and it provides that reasonable official time is what is agreed to by management and the union together.

I believe that official time is a necessary part of most of the areas that are covered by our statute particularly in the traditional labor relations setting where the management and the union are sitting down at the bargaining table negotiating a contract.

Beyond that, I do believe it is for Congress to make that decision.

Senator HASSAN. I thank you for that answer. I think one of our concerns is that if you believe in collective bargaining, then if you do not have the mechanism of official time, you are really making it very difficult for workers to enjoy the benefit of collective bargaining because they do not have anybody who is in the position to really work with the management side in an effective way. I would ask you to think about that.

Is it Kiko—"Kiko." Yes. Thank you.

Ms. KIKO. Good morning, Senator.

Senator HASSAN. Good morning.

Ms. KIKO. As Mr. Abbott has explained, the statute does require that there is official time for collective bargaining negotiations and also for presenting before the Authority, and all other official time is to be negotiated between the agency and the union. I certainly would support that that it is a very a specific part and an important part of the collective bargaining experience.

Yes, I do believe in the collective bargaining experience, if I suggested differently in my earlier answer.

Senator HASSAN. Thank you very much.

Mr. DuBester.

Mr. DUBESTER. Well, Senator, I think the answer to your question very much relates to the question of Senator McCaskill about your commitment to collective bargaining.

I have heard a lot of questions raised about official time over the last few years within the halls of Congress, and in my view, among other things, often the discussions are taken out of context because under our Federal statute at least, we have a carefully crafted statute which, of course, Congress always reserves the right to consider and perhaps amend. But it is a carefully crafted statute, which has a lot of different dimensions to it, including a very explicit statu-

tory management rights provision, obviously the concept of no use of economic weapons, in the employees' case, the right to strike. But it does have the—and in the union's instance, no right to support itself through union security as unions do in other sectors.

Again, my view on official time, beyond what is already contained in the statute, is if you believe in the institution of collective bargaining—and as I said in my prior answer, I believe in it among other things because I believe in any mechanism that affords or promotes the ability for employer reps—in our case, agency reps—and employee reps—in this case, exclusive representatives, their unions—to sit down and talk, to engage in dialogue, hopefully to problem solve.

Senator HASSAN. Yes.

Mr. DUBESTER. The application of official time were to exist in the Federal sector to me is not just a matter which I think is often, in my view, mischaracterized, as for the union, it is in the agency and employer's interest as well when used appropriately because it affords that kind of a mechanism that promotes dialogue and communication.

Senator HASSAN. Thank you, and I thank you all for your answers.

One of the privileges of being from New Hampshire is that I have the good fortune of representing the men and women at the Portsmouth Naval Shipyard, who have a terrific labor-management model going, and I would recommend it to you. They work together incredibly well in part because there is a strong acknowledgement of the value of collective bargaining and official time.

With that, thank you very much again for your willingness to serve, and I yield the remainder of my time, Mr. Chair.

Senator LANKFORD. Thank you, Senator.

Ms. Kiko, you have seen a lot change over the years since the birth of the agency and the first birthday and the cake to now. I have an odd question for you: What has changed in the operation of the agency over that time period, and how did it change? Was it statutory? Is it drift? Are we still on mission? Are we getting better at what we are doing? I am looking for somewhat of a historical look.

Mr. DuBester, I am going to come right back to you on this as well.

Give me a feel for what you have seen, and are we still on track?

Ms. KIKO. Thank you, Senator.

I think the biggest change in the FLRA since I was there is the technology change. We were writing decisions on yellow legal pads and handing them off to a clerk typist to type in a big, giant Wang that was about the size of this table. That has changed, where everyone clearly has all of their technology in their pockets anymore. So that has changed.

The mission of the agency has not changed. The direction of the agency has not changed. We are still doing the best to manage the cooperation of labor-management relations in the Federal Government, and I think that continues to be our mission.

That would be it. If you have any further questions. Yes.

Senator LANKFORD. Mr. DuBester.

Mr. DUBESTER. Well, I certainly agree with Ms. Kiko that the rapid changes in technology cannot be ignored, and among other things, like many agencies, we have gotten in recent years—in terms of providing better customer service gotten into e-filing, if you will, which facilitates the parties' abilities to process cases with us.

Again, I think beyond just the specific case responsibilities we have, certainly over time, we have developed as an agency like ours is designed to do, with certain expertise in the specific areas of case handling that certainly evolves over time, and I think it is helpful to the labor-management community.

As I said before, we are a small agency but with a large mission because we are not just the FLRA, which is a rather small, modest agency, but we have a responsibility for the labor-management relations programs throughout the Federal Government.

If we are doing effective outreach activities, which in recent years we have trained tens of thousands of agency reps and union reps in a variety of activities that are designed to help them do their jobs better. We are helping if you will, labor-management relations through the Federal Government. I think that perspective and appreciation about just how large the impact can be on our mission is——

Senator LANKFORD. Well, that is part of my question, actually. Are we still on track with the mission, or is the mission continuing to be able to grow and the task beginning to grow? When it is one thing to be able to make decisions, the other thing to think we have expertise, how do we actually proactively get this out to agencies?

When we talk about things like guidance, for instance, getting help to entities, somewhat that has been the role of Office of Personnel Management (OPM) to be able to do. Are we drifting into the role of someone else, or are we providing advice to them, or are we finding instructions to them? Where do you draw that line?

Mr. DUBESTER. In the areas that fall within, again, specifically labor-management relations, in the areas mentioned in our statute, then I think, at least in recent years, we have been on the mark and hopefully will continue to be on the mark by doing a variety of things; first, providing information, making available information on our website in the areas that our parties have to handle, like in arbitration cases, negotiability cases, basic statutory rights. We have been actually doing training with our parties in those areas, that kind of outreach.

As I mentioned, I believe, consistent with our statutory responsibility to provide leadership and guidance—and when we are talking about labor-management relations, as I often say, the word that is often overlooked in that phrase is the word "relations."

Senator LANKFORD. Right.

Mr. DUBESTER. Providing training in problem solving and relationship building is very much part of the statute and——

Senator LANKFORD. Sure.

Mr. DUBESTER [continuing]. Part of the service that we can provide to them.

Senator LANKFORD. I think what I am trying to get the boundary here is between OPM and their statutory responsibility and the re-

sponsibility of your agency as well, to be able to say where do you draw the line in things like guidance, between what is helping and providing resources or what is instructing.

Mr. DUBESTER. Again, this is not a pure answer, but to me, OPM, of course, provides information, which to my way of thinking involve the employment relationship and personnel kinds of matters that would apply to any employee in the Federal Government, whereas we have a specific mission involving labor-management relations, which is something that OPM would not get into, if you will, elsewhere in the Federal Government, per se. That is where I think the line pretty much is. It is kind of uniform personnel matters that apply throughout the Federal Government. We would not be providing guidance in that area, I do not think, not appropriately, and I know during my tenure, we certainly have not.

We have complied with OPM directives for our employees, but in the labor-management arena, that is where I think we have an obligation to provide information.

Senator LANKFORD. Same question for Mr. Abbott. Where do you draw that line on what is the difference between guidance and instructions or actually telling someone what to do, or how do you draw that line in the relationship with different agencies?

Mr. ABBOTT. Thank you, Senator.

Yes, I think the Authority has been very effective over the years of its existence when the Authority does what it was created to do, and that is to determine matters under our statute.

In respect to training and outreach, I believe that when the Authority is doing what is basically required under our statute—and that is to provide statutory training and how our statute works and explaining Authority precedent—I think we have been very effective.

When we engage in training on basic interest-based bargaining and problem solving, we are being very effective.

However, I am concerned that when our training outreach goes into areas such as relationship repair, dealing with difficult people, decisionmaking and communication skills, I am not sure that we are the best agency or the best provider of that. There are many qualified, trained individuals in the private sector to provide that.

I think when we go astray of the statutory limits is the time when we are not being effective. I think that we lose an ability—I think the best training that the Authority can give to the labor-management community is when we write decisions that are clear and understandable to laypersons as well as attorneys, and I think that the Authority does best when it answers the questions that the parties bring to it.

But over the last 2 years, 52 percent of the decisions of the Authority have dismissed cases Either in part or in whole on procedural technicalities. Every time we dismiss an argument on a technicality, we are not providing guidance to our customers who have had a dispute, an honest dispute, and they are looking to us for an answer.

Senator LANKFORD. Yes. That should be helpful.

Mr. DuBester, I do want to clarify one issue as well. There was a difference of opinion between you and the Appeals Court on the Inspectors General and whether the interviews of the Inspector

General can fall under collective bargaining and negotiations as well. Obviously, that decision was done in 2012, then was later overturned on it. Where are you on that now and your perspective on the relationship between interviews from the Inspectors General and collective bargaining negotiation?

Mr. DUBESTER. I do not have a detailed specific recollection of the case you are talking about, but I am aware, I think, of what you are referring to.

In that particular situation, of course——

Senator LANKFORD. It has been a few years, so I would give you some mercy on that one as well. So yes.

Mr. DUBESTER. The majority decision was overturned by the—I believe the D.C. Circuit, and of course, in that particular instance, the D.C. Circuit ruling becomes the law of the case. It was remanded to us, and of course, that was implemented, and that has now become the law.

These kinds of situations are not necessarily uniform. Number one, they are going to be driven and determined by perhaps unique facts that may arise, and moreover, while the D.C. Circuit—because we are the seat of the Federal Government and that is our jurisdiction, probably matters that are appealed to the circuit courts go to the D.C. Circuit more often than not. But the parties have a right to go to any circuit.

Right now, what I would say is the matter that you referred to became the law of the case in that instance based on the D.C. Circuit ruling, but I am not sure that it is necessarily the law either within the FLRA, depending on what might come back to us in terms of the facts, or what other circuit courts might say about the case.

Senator LANKFORD. In that case, you would not considered that settled?

Mr. DUBESTER. Again, I do not want to make a judgment without seeing the particular facts, but I think in the spirit of what you are asking, I would say that is right in my mind. Yes, Senator.

Senator LANKFORD. What was right in your mind?

Mr. DUBESTER. It is not settled.

Senator LANKFORD. It is not settled?

Mr. DUBESTER. No.

Senator LANKFORD. OK. Senator Harris.

OPENING STATEMENT OF SENATOR HARRIS

Senator HARRIS. This question is for Ms. Kiko.

The FLRA is an important mechanism, obviously, for more than a million Federal employees, and it has a history, unfortunately, however, of backlogs, including a backlog of nearly 400 cases in 2009. Are you familiar with that?

Ms. KIKO. I am not familiar with the backlog in 2009.

Senator HARRIS. Are you aware of the backlog as it currently exists?

Ms. KIKO. I am aware that there is a backlog with some cases waiting to be decided because at this point there is not a full membership of the Authority, and so I would say that that is a backlog sitting there for those decisions. Several of the decisions with just

the two members have been going out, though, in addition to the ones that are pending.

Senator HARRIS. If confirmed, what would your plan be for addressing the backlog and eliminating it?

Ms. KIKO. Well, I think my purpose there is to efficiently and effectively promote the statute, and one of the major jobs is to decide the cases that are before us. I would think of that as a very high priority to get the cases out that are before us.

Senator HARRIS. Have you had any conversations with anyone there about what is going to be most efficient in terms of moving the cases along?

Ms. KIKO. I have had discussions with both Member DuBester and Mr. Abbott on what the situation is at the agency and how the cases are processes, and I would like to work with both of them as we move forward to find out the best way to move the cases and so that we have a good, effective way to get them out efficiently.

We have shareholders, I believe, that are looking for us to spend the money wisely that has been appropriated to us, and one of our jobs is to issue those decisions. I would think of that as a very high priority.

Senator HARRIS. Thank you. Mr. Abbott.

Mr. ABBOTT. I think the most effective way to deal with the backlog that we have when we have not had a full complement is simply we have established internal guidelines for moving cases forward. Upon the three of us being confirmed, we will need to establish and see if those timelines and internal processes are effective.

I would say in my experience, there is no right or wrong way of addressing the matters, but I believe it does require each of us to address as expeditiously as possible holding our own staffs accountable for performance and effective service.

Senator HARRIS. Thank you.

I yield back my time.

Thank you. Thank you both.

Senator LANKFORD. Senator Heitkamp.

Senator HEITKAMP. Thank you for that line of questioning. I think, again, in our oversight capacity, we are going to be very concerned about cleaning out the backlog and making sure, and if you do not have the resources, we need to know that because it is only going to get worse if systemic changes are not made.

Ms. Kiko, in your questionnaire, you talked about your leadership style and how you like to energize and motivate people. One thing that will be inevitable in your position as Chairman, if confirmed, is you are leading an organization through periods of disagreement. The three of you will not always see things the same way, and it is important that the Chairman have the ability to lead and manage the organization through that disagreement.

How would you change your leadership and management style when it comes to leading the Authority through periods of disagreement and challenges?

Ms. KIKO. Thank you, Senator, for that question.

I do not know that I would change my management style necessarily. I do believe that my management style is very collegial, and I would want to work with both Mr. DuBester and Mr. Abbott in trying very hard to find the best way to lead this organization.

Open communication is one of my primary requirements on a management style. I would want to hear what people have to say, find out the best way to lead this agency, but to me, open communication is the key to all of that. I believe that working together with Mr. Abbott and Mr. DuBester is the best way to find the best solutions—by working together and hearing different ideas, if that answers your question.

Senator HEITKAMP. I think it does. I think one of the great challenges that you might have is trying to figure out how you are going to work through this backlog and how you are going to challenge an entire organization to make decisions in a way that is very attentive to the facts and not shortchanging anything but also clearing this docket because those challenges will continue, and it will get bigger and bigger. The problem will be bigger, and it is going to take a lot of communication, and it is going to take a lot of leadership.

As I said in my opening statement, you are three incredibly qualified candidates, but you are coming in at a time when we need to know that it is not business as usual, that things will get done in a timely fashion.

Thank you for that answer, and good luck to all over you.

Ms. KIKO. Thank you, Senator.

Senator LANKFORD. Thank you.

Any final comments from anyone?

[No response.]

I see an overwhelming shaking of the heads here.

Senator HEITKAMP. Quit while you are ahead.

Senator LANKFORD. Yes. I can see that as well.

I do want to be able to say to all of our witnesses, there is an expectation here that the backlog will be taken care of, individuals will be heard, that we are working, as Mr. DuBester said—working on the relations side of things. That the focus continues to be a healthy working environment not only in that entity, but in the entities where we get a chance to serve across the Federal Government.

You have an incredibly important role that hardly anyone knows exists, unless you are in conflict, and then everyone is looking for you. We do count on you to be able to help on those very difficult days.

Mr. DuBester, at some point, you and I can visit at greater length on this other case with the Inspectors General. The one thing that I would say on it is, there is a great challenge of opinion at times that once it goes up to an appeals course, does that resolve the issue, or does that not resolve the issue? I would only say if it goes up to an appeals court, we are under that until the Supreme Court says something different. But in the meantime, we are under that court.

There have been plenty of appeals court decisions across the country that I have not liked, but we live as a nation under law, and that is the way we balance that out. When the facts may change or circumstances may come up differently on that, we can push back and forth on it. That is the fun of our system on it, but I would encourage us to be able to do that.

I would assume you are in that same boat, but based on your previous answer, I was trying to think through the possibilities of what that would mean to have a situation where someone in that position would say an appeals court has spoken on it, but I am not sure I like it. We are all going to try to apply it as well.

I will give you an opportunity to be able to say anything, if you want to, on that as well. I am not trying to shut you out.

Mr. DUBESTER. I certainly agree with your representation about the importance of precedent and stare decisis and the rule of law, and as I mentioned, without any question, in that particular case that you asked about, that became——

Senator LANKFORD. Right.

Mr. DUBESTER [continuing]. The law of the case. That is how we acted, including myself, upon remand.

The only point I was making is that, as you know, there are many circuit courts out there, and they do not always agree either.

Senator LANKFORD. Right.

Mr. DUBESTER. Sometimes there is a split among the circuits, and that raises questions about what the state of the law is too.

Senator LANKFORD. That, we have seen as well, as recently as the last couple of weeks, even, in different well-popularized cases, so——

Mr. DUBESTER. But I would certainly be happy, though, as you suggested in your lead-in to follow up with you and/or your staff about it.

Senator LANKFORD. Yes. I would be glad to, and again, we want you to be able to work independently. It is of great value to the Nation to have independent voices that do not all have to nod their heads the same way, to be able to have disagreement, have open argument, though at this dais, we all agree with every issue all the time. [Laughter.]

That is not an issue for us.

The nominees have made financial disclosures and provided responses to biographical and prehearing questions submitted by the Committee.[1] Without objection, this information will be made a part of the hearing record,[2] with the exception of the financial data, which are on file and available for public inspection at the Committee offices.[3]

The hearing record will remain open until 12 p.m. tomorrow, November 8, 2017, for the submission of statements and questions for the record. We would encourage Members to hurry to be able to get that in so that we can walk through this process if there are any pending questions that are there.

However, if Members wish to receive responses to questions prior to the Committee vote on Thursday, which we hope to do, they must submit questions for the record by 5 p.m. today.

Again, thank you for your service already to the Nation and for being willing to be able to go through this process, for Mr. DuBester to go through this process again and again and again and again and again actually for you. Thank you very much for engaging with that.

---

[1] The information of Ms. Kiko appears in the Appendix on page 29.
[2] The information of Mr. Dubester appears in the Appendix on page 77.
[3] The information of Mr. Abbott appears in the Appendix on page 131.

With this, this hearing is adjourned.
[Whereupon, at 10:29 a.m., the Committee was adjourned.]

APPENDIX

U.S. SENATOR HEIDI HEITKAMP

Event: Hearing for the Federal Labor Relations Authority (FLRA) Nominations: Hon. Ernest W. DuBester, Hon. Colleen D. Kiko, and James T. Abbott to be Members

Opening Statement

Thank you, Chairman Lankford.

Over the past few months the President has nominated three new members to serve on the Federal Labor Relations Authority. As you know, the Authority is comprised of three presidentially nominated and Senate confirmed Members responsible for adjudicating unfair labor practice complaints, determining whether to grant exceptions to arbitrators' grievance-arbitration awards, resolving disputes over the negotiability of proposals and provisions made during collective bargaining, and reviewing representation decisions of Regional Directors in representation disputes over union elections and unit determinations.

Our First nominee is Colleen Kiko. This nomine has the distinguished honor of being a native of North Dakota, having been born in the town of Pembina, North Dakota, near the Canadian border. Her father, Lawrence Duffy, was a career federal employee, serving the Postal Service as a railway mail carrier and the Customs Service as a customs inspector. Ms. Kiko also earned a Bachelor of Science at North Dakota State University in 1972. With her stellar North Dakotan roots and education, it is no wonder that she has been so successful. Currently, Ms. Kiko is an Administrative Judge for the Employees' Compensation Appeals Board where she has been since 2008. Previously she served with the FLRA in 2005 when President George W. Bush appointed Judge Kiko to be the FLRA's General Counsel. If confirmed, Judge Kiko will serve as the Chair of the Authority.

Next, we have Ernest DuBester. Member Dubester is currently serving out his second term as a Member of the Federal Labor Relations Authority. He began his career at the National Labor Relations Board, serving as counsel to former Chairman and Member John Fanning. If confirmed, Mr. Dubester will continue to serve as a Member.

Lastly, we have James Abbott. James Abbott has served as Chief Counsel to the Federal Labor Relations Authority since 2007. He is currently serving with Acting Chairman Patrick Pizzella and previously served with Chairman Dale Cabaniss and Member Thomas Beck.
Prior to his appointment to the Authority, Mr. Abbott served as Deputy General Counsel for the Congressional Office of Compliance from 2004 to 2007.

I thank all the nominees for their willingness to serve the citizens of the United States and I look forward to your testimony.

I look forward to learning more about your qualifications and desire to serve

Thank you.

Statement of Colleen Duffy Kiko
Before The Committee on
Homeland Security and Governmental Affairs
United States Senate
November 7, 2017

Thank you, Mr. Chairman.

Chairman Lankford, Senator Heitkamp, Members of the Committee, I would like to thank you and your staff for all the kindnesses that have been shown to me as I have prepared for this hearing.

I also deeply appreciate Congressman Sensenbrenner for taking the time away from his very booked schedule to introduce me today. I respect his dedicated service to the U.S. House of Representatives and am deeply honored to call him a friend.

I am here today with some of my family members – who represent the others. My son Philip and his wife Molly, who are expecting our 5th grandchild, my son Michael, my sister, Tama, and of course my best friend and husband, who currently serves as the Chief Administrative Officer of the House of Representatives – Phil Kiko. I appreciate their support and the support of all of those who are not here.

I would like to thank Mr. DuBester and Mr. Abbott for the genuine kindnesses that they have shown me. I look forward to working with both of them as we journey forward, should I be confirmed. I would also like to personally thank Fred Jacob, the Solicitor at the FLRA for helping me get through the ethics clearance process and Gina Grippando, Counsel for Regulatory and Public Affairs at FLRA, who has truly gone above and beyond to offer me any assistance I needed – even responding to my emails at midnight or early, early morning. She has been of invaluable assistance.

It is indeed an honor to have been nominated by President Trump to serve as a Member of the Federal Labor Relations Authority and, if confirmed, to be designated as Chairman of that agency.

My career with the Federal government began after I moved here from North Dakota in 1972. My first job was a GS-3 clerk typist in the Department of Treasury, Office of Personnel. My father, Lawrence Duffy, proudly spent over 49 years (almost ½ century) in the Federal service before he retired. He was a railway mail carrier for the U.S. Postal Service on the Soo Line Railroad that ran from Enderlin, North Dakota to Portal, North Dakota. He later became an inspector for the U.S. Customs Service at the North Dakota/Canada border. He always considered Federal service to be an honorable profession. His work ethic, extreme pride in his job, and impeccable character were examples for me and I hope I live up to his standards. My mother, Angie Duffy, was also an example to me as someone who always wanted to learn new things, to have different and varied experiences (she began oil painting in her 50s), and to broaden her horizons. In her quiet, loving way, she pushed all four of her children to be strong and independent.

Congressman Sensenbrenner was very kind to speak about my background. But I would like to point out a few areas of my career that I believe affirmatively qualify me for this position. Before FLRA became an agency, I was working in the Department of Labor, Labor Management Services Administration. The duties of that organization were transferred into the new agency in 1979 when it was created – so I was there when FLRA opened its doors. I was there celebrating with a cake on its first birthday party. It was a very important part of shaping me into a professional employee. It was a great place to work.

I have worked in almost every component of the FLRA. In the Regional office, I investigated unfair labor practice charges, chaired hearings on representational disputes, monitored federal union elections, and conducted training for both agencies and unions. In the Authority level, I reviewed representation disputes, Administrative Law Judge decisions and drafted decisions for the Authority Members. My last position was a supervisory labor relations specialist handling procedural motions before the Authority when I decided that I needed to broaden my career perspectives by attending law school.

I graduated with my law degree from George Mason Antonin Scalia Law School in 1986 and, who knew, that just 19 years later I would find myself back at the agency serving in the Senate-confirmed position of General Counsel in 2005. And now – another 10 years later and I have again been nominated to serve as a Member of the Agency. My career keeps taking me back to my roots.

Most recently, having served as the General Counsel of the FLRA provided me more specific experience in managing a diverse and geographically dispersed staff. I managed the seven regions of the FLRA which included all aspects of management from budgeting and budget management, instituting performance standards and evaluating performance, leading change, policy development, staff and customer training, etc.

In my current position as a Judge of the Employees' Compensation Appeals Board, where I have served for 12 years, I have polished the attributes necessary to render decisions on issues that would come before the FLRA. Those attributes include reviewing the facts presented, considering arguments provided by the parties, and applying the existing law to the particular facts of each case. Further, as a part of the management team, we managed a staff at that time of approximately 50 employees, which included updating performance standards, initiating mentor programs to assist staff in increasing the quality, quantity, and timeliness of the work, and developed an updated case tracking system to more readily track the time it takes for cases to work their way to issuance, to name a few of our initiatives. I believe this experience has prepared me well to become a Member of the FLRA.

I believe my 29 years in the Federal government should serve me well in this agency where we are commissioned to provide leadership in establishing policies and guidance relating to matters of Federal Service Labor-Management Relations Statute and by effectively administering the nine specific mandates of the statute. I greatly appreciate the opportunity to appear before you and am willing to answer any questions.

REDACTED

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

September 10, 2017

The Honorable Ron Johnson
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Colleen Kiko, who has been nominated by President Trump for the position of Member, Federal Labor Relations Authority.

We have reviewed the report and have obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

DAVID APOL Digitally signed by DAVID APOL
DN: c=US, o=U.S. Government, ou=Office of Government Ethics, cn=DAVID APOL, 0.9.2342.19200300.100.1.1=5415916298(B7)
Date: 2017.09.10 16:12:02 -04'00'

David J. Apol
Acting Director and General Counsel

Enclosures REDACTED

September 6, 2017

Fred B. Jacob
Solicitor and Designated Agency Ethics Official
Federal Labor Relations Authority
1400 K St., NW
Washington, DC 20424

Dear Mr. Jacob:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Member, Federal Labor Relations Authority.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon confirmation, I will resign from my position with the CM Group. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know the CM Group is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

Upon confirmation, I will resign my position as a Member/Owner of Future With Hope Women, LLC and it will refund my capital, if any. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know Future With Hope Women, LLC is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

I will meet in person with you during the first week of my service in the position of Member in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will also document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), or obligations of the United States.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order no. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

Colleen Kiko

REDACTED

HSGAC BIOGRAPHICAL QUESTIONS FOR EXECUTIVE NOMINEES

1. Basic Biographical Information

Please provide the following information.

Position to Which You Have Been Nominated	
Name of Position	**Date of Nomination**
Member, Federal Labor Relations Authority	

Current Legal Name			
First Name	**Middle Name**	**Last Name**	**Suffix**
Colleen	**Duffy**	**Kiko**	

Addresses					
Residential Address (do not include street address)			**Office Address** (include street address)		
[redacted]			**Street:** **200 Constitution Avenue, N.W.,**		
City: **Arlington**	**State:** **VA**	**Zip:** **22204**	**City:** **Washington**	**State:** **DC**	**Zip:** **20210**

Other Names Used						
First Name	**Middle Name**	**Last Name**	**Suffix**	Check if Maiden Name	**Name Used From** (Month/Year) (Check box if estimate)	**Name Used To** (Month/Year) (Check box if estimate)
Colleen	Margaret	Duffy		x	10/1950 Est ☐	8/1972 Est x
Colleen	Duffy	Raap			8/1972 Est x	1/1982 Est x

Birth Year and Place	
Year of Birth (Do not include month and day.)	**Place of Birth**
1950	Fargo, North Dakota

Marital Status					
Check All That Describe Your Current Situation:					
Never Married	**Married**	**Separated**	**Annulled**	**Divorced**	**Widowed**
☐	x	☐	☐	x	☐

Spouse's Name (current spouse only)			
Spouse's First Name	**Spouse's Middle Name**	**Spouse's Last Name**	**Spouse's Suffix**
Philip	George	Kiko	

Spouse's Other Names Used (current spouse only)						
First Name	**Middle Name**	**Last Name**	**Suffix**	Check if Maiden Name	**Name Used From** (Month/Year) (Check box if estimate)	**Name Used To** (Month/Year) (Check box if estimate)
NONE					Est ☐	Est ☐
					Est ☐	Est ☐

Children's Names (if over 18)			
First Name	**Middle Name**	**Last Name**	**Suffix**
Jamie	**Lynn**	**Raap**	
Sarah	**Kiko**	**Leiby**	
Philip	**George**	**Kiko**	**Jr.**
Michael	**Ryan**	**Kiko**	

2. Education

List all post-secondary schools attended.

Name of School	**Type of School** (vocational/technical/trade school, college/university/military college, correspondence/distance/extension/online school)	**Date Began School** (month/year) (check box if estimate)	**Date Ended School** (month/year) (check box if estimate) (check "present" box if still in school)	**Degree**	**Date Awarded**
North Dakota State University	State University	8/1968 Est x	5/1972 Est x Present ☐	B.S.	5/1972
George Mason Antonin Scalia Law School	Law School	8/1983 Est ☐	5/1986 Est x Present ☐	J.D.	5/1986
		Est ☐	Est ☐ Present ☐		
		Est ☐	Est ☐ Present ☐		

3. Employment

(A) List all of your employment activities, including unemployment and self-employment. If the employment activity was military duty, list separate employment activity periods to show each change of military duty station. Do not list employment before your 18th birthday unless to provide a minimum of two years of employment history.

Type of Employment (Active Military Duty Station, National Guard/Reserve, USPHS Commissioned Corps, Other Federal employment, State Government (Non-Federal Employment), Self-employment, Unemployment, Federal Contractor, Non-Government Employment (excluding self-employment), Other	Name of Your Employer/ Assigned Duty Station	Most Recent Position Title/Rank	Location (City and State only)	Date Employment Began (month/year) (check box if estimate)	Date Employment Ended (month/year) (check box if estimate) (check "present" box if still employed)
Federal Employment	Department of Labor, Employees' Compensation Appeals Board – Washington, D.C.	Judge	Wash., D.C.	3/2008 Est x	Present Est ☐
Federal Employment	Federal Labor Relations Authority, Office of General Counsel, Washington, D.C.	General Counsel	Wash., D.C.	10/2005 Est x	3/2008 Est x
Federal Employment	Department of Labor Employees' Compensation Appeals Board – Washington, D.C.	Judge	Wash., D.C.	2/2002 Est x	10/2005 Est x
Non-Governmental Law Firm	Ronald M. Cohen and Associates, P.C. Arlington, Va	Associate Attorney	Arlington, VA	11/1999 Est x	2/2002 Est x
Non-Governmental Law Firm	Law Offices of Colleen Duffy Kiko, P.C.	Sole Practitioner	McLean, VA	9/1996 Est x	11/1999 Est x

(Continued on Attachment 1).

(B) List any advisory, consultative, honorary or other part-time service or positions with federal, state, or local governments, not listed elsewhere.

Name of Government Entity	Name of Position	Date Service Began (month/year) (check box if estimate)	Date Service Ended (month/year) (check box if estimate) (check "present" box if still serving)
NONE		Est ☐	Est ☐ Present ☐

		Est ☐	Est ☐ Present ☐

4. Potential Conflict of Interest

(A) Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated. NONE

(B) Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity. NONE

5. Honors and Awards

List all scholarships, fellowships, honorary degrees, civilian service citations, military medals, academic or professional honors, honorary society memberships and any other special recognition for outstanding service or achievement. NONE

6. Memberships

List all memberships that you have held in professional, social, business, fraternal, scholarly, civic, or charitable organizations in the last 10 years.

Unless relevant to your nomination, you do NOT need to include memberships in charitable organizations available to the public as a result of a tax deductible donation of $1,000 or less, Parent-Teacher Associations or other organizations connected to schools attended by your children, athletic clubs or teams, automobile support organizations (such as AAA), discounts clubs (such as Groupon or Sam's Club), or affinity memberships/consumer clubs (such as frequent flyer memberships).

Name of Organization	Dates of Your Membership (You may approximate.)	Position(s) Held
Virginia State Bar District of Columbia Bar	1986 - Present 1986 - Present	Member Member
Arlington Cursillo Arlington Cursillo	1979 – Present 2008-2012	Member Weekend Committee Chairman

Future With Hope Women, LLC	2015 – Present	Partner
The CM Group (Scrapbooking Company)	2014 – Present	Scrapbook Sales Consultant
Federalist Society	Various years	Member
Reagan/Bush Alumni Association Bush/Quayle Alumni Association	1990 – Present 1994 – Present	Member Member
St. Charles Borromeo Catholic Church	1979 – Present	Parishioner
Arlington County Bar Association Fairfax County Bar Association	1996-2002 1996-2002	Member Member

7. Political Activity

(A) Have you ever been a candidate for or been elected or appointed to a political office?
NO

Name of Office	Elected/Appointed/ Candidate Only	Year(s) Election Held or Appointment Made	Term of Service (if applicable)
N/A			

(B) List any offices held in or services rendered to a political party or election committee during the last ten years that you have not listed elsewhere. None

Name of Party/Election Committee	Office/Services Rendered	Responsibilities	Dates of Service

N/A			

(C) Itemize all individual political contributions of $200 or more that you have made in the past five years to any individual, campaign organization, political party, political action committee, or similar entity. Please list each individual contribution and not the total amount contributed to the person or entity during the year.

Name of Recipient	Amount	Year of Contribution

8. Publications and Speeches

(A) List the titles, publishers and dates of books, articles, reports or other published materials that you have written, including articles published on the Internet. Please provide the Committee with copies of all listed publications. In lieu of hard copies, electronic copies can be provided via e-mail or other digital format.

Title	Publisher	Date(s) of Publication
NONE		

(B) List any formal speeches you have delivered during the last five years and provide the Committee with copies of those speeches relevant to the position for which you have been nominated. Include any testimony to Congress or any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.

Title/Topic	Place/Audience	Date(s) of Speech
NONE		

(C) List all speeches and testimony you have delivered in the past ten years, except for those the text of which you are providing to the Committee.

Title	Place/Audience	Date(s) of Speech
NONE		

9. Criminal History

Since (and including) your 18th birthday, has any of the following happened?

- Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Exclude citations involving traffic infractions where the fine was less than $300 and did not include alcohol or drugs.) NO
- Have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official? NO
- Have you been charged, convicted, or sentenced of a crime in any court? NO
- Have you been or are you currently on probation or parole? NO
- Are you currently on trial or awaiting a trial on criminal charges? NO
- To your knowledge, have you ever been the subject or target of a federal, state or local criminal investigation? NO

If the answer to any of the questions above is yes, please answer the questions below for each criminal event (citation, arrest, investigation, etc.). If the event was an investigation, where the question below asks for information about the offense, please offer information about the offense under investigation (if known).

A) Date of offense:

   a. Is this an estimate (Yes/No):

B) Description of the specific nature of the offense:

C) Did the offense involve any of the following?
   1) Domestic violence or a crime of violence (such as battery or assault) against your child, dependent, cohabitant, spouse, former spouse, or someone with whom you share a child in common: **Yes / No**
   2) Firearms or explosives: **Yes / No**
   3) Alcohol or drugs: **Yes / No**

D) Location where the offense occurred (city, county, state, zip code, country):

E) Were you arrested, summoned, cited or did you receive a ticket to appear as a result of this offense by any police officer, sheriff, marshal or any other type of law enforcement official: **Yes / No**

   1) Name of the law enforcement agency that arrested/cited/summoned you:

   2) Location of the law enforcement agency (city, county, state, zip code, country):

F) As a result of this offense were you charged, convicted, currently awaiting trial, and/or ordered to appear in court in a criminal proceeding against you: **Yes / No**

   1) If yes, provide the name of the court and the location of the court (city, county, state, zip code, country):

2) If yes, provide all the charges brought against you for this offense, and the outcome of each charged offense (such as found guilty, found not-guilty, charge dropped or "nolle pros," etc). If you were found guilty of or pleaded guilty to a lesser offense, list separately both the original charge and the lesser offense:

3) If no, provide explanation:

G) Were you sentenced as a result of this offense: **Yes / No**

H) Provide a description of the sentence:

I) Were you sentenced to imprisonment for a term exceeding one year: **Yes / No**

J) Were you incarcerated as a result of that sentence for not less than one year: **Yes / No**

K) If the conviction resulted in imprisonment, provide the dates that you actually were incarcerated:

L) If conviction resulted in probation or parole, provide the dates of probation or parole:

M) Are you currently on trial, awaiting a trial, or awaiting sentencing on criminal charges for this offense: **Yes / No**

N) Provide explanation:

10. Civil Litigation and Administrative or Legislative Proceedings

(A) Since (and including) your 18th birthday, have you been a party to any public record civil court action or administrative or legislative proceeding of any kind that resulted in (1) a finding of wrongdoing against you, or (2) a settlement agreement for you, or some other person or entity, to make a payment to settle allegations against you, or for you to take, or refrain from taking, some action. Do NOT include small claims proceedings.

Date Claim/Suit Was Filed or Legislative Proceedings Began	Court Name	Name(s) of Principal Parties Involved in Action/Proceeding	Nature of Action/Proceeding	Results of Action/Proceeding
NONE				

(B) In addition to those listed above, have you or any business of which you were an officer, director or owner ever been involved as a party of interest in any administrative agency proceeding or civil litigation? Please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

Date Claim/Suit Was Filed	Court Name	Name(s) of Principal Parties Involved in Action/Proceeding	Nature of Action/Proceeding	Results of Action/Proceeding
2/8/1980	Alexandria, VA Circuit Court	Loren D. Raap Colleen Duffy Raap	Uncontested Divorce	Divorce

(C) For responses to the previous question, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

11. Breach of Professional Ethics

(A) Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, professional association, disciplinary committee, or other professional group? Exclude cases and proceedings already listed. NO

Name of Agency/Association/ Committee/Group	Date Citation/Disciplinary Action/Complaint Issued/Initiated	Describe Citation/Disciplinary Action/Complaint	Results of Disciplinary Action/Complaint

(B) Have you ever been fired from a job, quit a job after being told you would be fired, left a job by mutual agreement following charges or allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy? NO

12. Tax Compliance

(This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

REDACTED

13. Lobbying

In the past ten years, have you registered as a lobbyist? If so, please indicate the state, federal, or local bodies with which you have registered (e.g., House, Senate, California Secretary of State). NO

14. Outside Positions

X See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

For the preceding ten calendar years and the current calendar year, report any positions held, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

Name of Organization	Address of Organization	Type of Organization (corporation, firm, partnership, other business enterprise, other non-profit organization, educational institution)	Position Held	Position Held From (month/year)	Position Held To (month/year)

15. Agreements or Arrangements

X See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

As of the date of filing your OGE Form 278, report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment.

Provide information regarding any agreements or arrangements you have concerning (1) future employment; (2) a leave of absence during your period of Government service; (3) continuation of payments by a former employer other than the United States Government; and (4) continuing participation in an employee welfare or benefit plan maintained by a former employer other than United States Government retirement benefits.

Status and Terms of Any Agreement or Arrangement	Parties	Date (month/year)

16. Additional Financial Data

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

REDACTED

SIGNATURE AND DATE

I hereby state that I have read the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

_____

This 20th **day of** Sept, 2017

Attachment 1

Attachment 1
Colleen Duffy Kiko
HSGAC Biographical Questions for Executive Nominees

Type of Employment	Name of Employer/Duty Station	Most Recent Position/Title	Location	Date Employment Began	Date Employment ended
Non-Governmental	St. Charles Catholic School, Arlington, VA	Finance Officer (part time)	Arlington, VA	8/1991 – est.	2/2002 - est
Not working	Stay at Home Mom		Arlington, VA	11/1989 - est	8/1991 - est
Federal/Congressional	Committee on the Judiciary, Civil and Constitutional Rights Subcommittee	Minority Counsel	Wash., D.C.	3/1989 – est	11/1989 - est
Federal Employment	Department of Justice, U.S. Attorney's Office, Alexandria, VA	Special Assistant United States Attorney (This position was a detail from my position in the Department of Justice)	Alexandria, VA	9/1988 – est	3/1989 - est
Federal Employment	Department of Justice, Civil Rights Division, Washington, D.C.	Attorney/Advisor	Wash., D.C.	12/1986- est	3/1989 - est
State Government	Fairfax County Attorney's Office, Fairfax, VA	Law Clerk (part time)	Fairfax, VA	11/1985 – est	2/1986 – est
Not working	Attended Law School/Had another child		Arlington, VA	8/1983 – est	12/1986 - est
Federal Employment	Federal Labor Relations Authority, Office of Executive Director, Washington, D.C.	Supervisory Labor Relations Specialist	Wash., D.C.	4/1981 – est	8/1983 –est
Federal Employment	Federal Labor Relations Authority, Office of Chief Counsel, Washington, D.C.	Labor Relations Specialist	Wash., D.C.	12/1979 –est.	4/1981- est.
Federal Employment	Federal Labor Relations Authority, Washington Regional Office, Washington, DC	Labor Relations Specialist	Wash., D.C.	1/1979	12/1979 – est

2 | Continued – Colleen Duffy Kiko

Federal Employment	Department of Labor, Labor Mgmt Services Administration, Washington Area Office, Wash., D.C.	Compliance Officer	Wash., D.C.	8/1976 – est.	1/1979
Federal Employment	Department of Treasury, U.S. Customs Service, Office of Personnel, Wash., D.C.	Employee Relations Specialist	Wash., D.C.	8/1975 – est	8/1976 - est
Federal Employment	Department of Treasury, U.S. Customs Service, Office of Personnel, Washington, DC	Labor and Employee Relations Specialist	Wash., D.C.	12/1974 – est	8/1975 - est
Federal Employment	Department of Treasury, U.S. Customs Service, Office of Personnel	Employee Relations Specialist	Wash., D.C.	12/1973 – est	12/1974 – est.
Federal Employment	Department of Treasury, Office of the Secretary, Washington, D.C.	Clerk	Wash., D.C.	3/1973 – est	12/1973 - est
Not working	Moved from North Dakota to Washington, DC			2/1973 - est	3/1973 - est
Non-Federal Employment	Souris River School District, Wawanesa, Manitoba, Canada	Teacher	Wawanesa, Manitoba, Canada	8/1972 –est	2/1973 - est
Non-Federal Employment	Dawson Hail Insurance, Fargo, N.D.	Policy Examiner (summer job)	Fargo, ND	5/1972 – est	8/1972 - est
Non-Federal Employment	North Dakota State University	Resident Assistant (Working on campus during school year)	Fargo, ND	8/1969 – est 8/1971 – est	5/1970 – est 5/1972 - est
Non-Federal Employment	Westhope Swimming Pool, Westhope, ND	Lifeguard (summer job)	Westhope, ND	5/1971 – est	8/1971 – est
Non-Federal Employment	Hall Allen Shoes, Moorhead, MN	Shoe Salesperson (summer job)	Moorhead, MN	5/1969 – est	8/1969 - est

U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-Hearing Questionnaire
For the Nomination of Colleen Duffy Kiko to be a Member of the
Federal Labor Relations Authority

I. Nomination Process and Conflicts of Interest

1. Did the President give you specific reasons why he nominated you to be a member of the Federal Labor Relations Authority (FLRA)? *No.*

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain. *No.*

3. Have you made any commitments with respect to the policies and principles you will attempt to implement as a member of the FLRA? If so, what are they, and to whom were the commitments made? *No.*

4. Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.

In connection with the nomination process, I consulted with the Office of Government Ethics and the FLRA's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of the ethics agreement I signed with FLRA's designated agency ethics official and that has been provided to this Committee. I am unaware of any other potential conflicts of interest at this time.

II. Background of the Nominee

5. What specific background, experience, and attributes qualify you to be a member of the FLRA?

The specific background and experience of my prior positions in the FLRA are most significant in qualifying me to become a Member of the FLRA. I understand and have worked in the organization; I understand and have worked on effectuating the mission of the agency; and I have studied and understand the various issues that come before the FLRA. Most recently, having served as the General Counsel of the FLRA provided me more specific experience in managing a diverse and geographically dispersed staff. My current position as a Judge of the Employees' Compensation Appeals Board, where I have served for 12 years, has polished the attributes necessary to render decisions on issues that would come before the FLRA. Those attributes include reviewing the facts presented, considering arguments provided by the parties,

and applying the existing law to the particular facts of each case. In addition, my prior service as a Special Assistant United States Attorney, as a practicing attorney, and as a counsel for the Subcommittee on Civil and Constitutional Rights in the U.S. House of Representatives provided me hands-on experience as a practitioner before various tribunals. I believe this specific background, this experience, and these attributes have prepared me well to become a member of the FLRA.

6. Please describe:

    a. Your leadership and management style.

My leadership and management style is one of open communication, adherence to established policies, and engagement with staff. I like to see the big picture and find ways to energize and motivate people to lend their best selves to the mission. I like to recognize people for their successes, hold them accountable for shortcomings or failures while offering suggestions for improvement, and reconfigure when shortcomings or failures become a pattern.

    b. Your experience managing personnel.

While serving as General Counsel of the FLRA, I managed approximately 60-70 employees in seven regions geographically dispersed all over the country. This included all aspects of management from budgeting and budget management, instituting performance standards and evaluating performance, leading change, policy development, staff and customer training, etc. I further have experience in managing personnel while serving for many years with the prior Chairman of the Employees' Compensation Appeals Board. As a part of the management team, we managed a staff at the time of approximately 50 employees. The primary focus was to deliver a quality legal decision within a reasonable and efficient time frame, which included updating Board-wide performance standards, initiating mentor programs to assist staff in increasing the quality, quantity, and timeliness of the work, and developing a state-of-the-art case tracking system to more readily track the time it takes for cases to work their way to issuance, to name a few of our initiatives. But my most important personnel management role was raising four children successfully to adulthood.

    c. What is the largest number of people that have worked under you?

In my role as General Counsel of the FLRA I supervised approximately 60 to 70 employees.

7. Please list any positions where you served as a political appointee (i.e. any federal employment position where you were appointed by the President, the Vice President, or agency head) including a position description and the appointing official.

I was previously appointed by President George W. Bush and confirmed by the Senate to serve as General Counsel of the FLRA. The duties of that position are outlined in the Federal Labor Management Relations Statute, 5 U.S.C. §7014(f)(1), (2), and (3).

I was appointed by Secretary Elaine L. Chao to serve in the Department of Labor as a Judge of the Employees' Compensation Appeals Board. A position description is attached.

III. Role of Member, FLRA

8. Please describe your view of the agency's core mission and a member's role in achieving that mission.

The core mission of the FLRA is to "provide leadership in establishing policies and guidance relating to matters under [the Federal Service Labor-Management Relations Statute (the Statute)], and, except as otherwise provided, [to] be responsible for carrying out the purposes of [the Statute]." 5 U.S.C. § 7105(a)(1). "It is the purpose of [the Statute] to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of [the Statute] should be interpreted in a manner consistent with the requirement of an effective and efficient Government." Id. § 7101(b).

The FLRA shall: (1) determine the appropriateness of units for labor organization representation under section 7112 of the Statute; (2) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of the Statute relating to the according of exclusive recognition to labor organizations; (3) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of the Statute; (4) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of the Statute; (5) resolve issues relating to the duty to bargain in good faith under section 7117(c) of the Statute; (6) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of the Statute; (7) conduct hearings and resolve complaints of unfair labor practices under section 7118 of the Statute; (8) resolve exceptions to arbitrators' awards under section 7122 of the Statute; and (9) take such other actions as are necessary and appropriate to effectively administer the provisions of the Statute. See id. § 7102(a)(2).

A Member of the FLRA must render decisions and take actions consistent with the statutory and regulatory requirements of the FLRA.

9. Please describe how you anticipate, if confirmed, working with other FLRA members to promote the agency's core mission.

I am looking forward to working with the other FLRA Members to efficiently and expeditiously rule on matters that come before the Authority. Justice delayed is justice denied. I intend to work collegially with the other two Members in an effort to most effectively fulfill the mission of the agency.

a. Please describe prior work experience that demonstrates your capacity to work with FLRA members of a different party affiliation.

My current position as a Judge of the Employees' Compensation Appeals Board has provided me significant experience demonstrating my capacity to work with individuals of a different party affiliation. Secretaries of Labor under George W. Bush and Barack H. Obama have variously appointed current Judges/Alternate Judges to the Board. My demonstrated ability to work with all of these appointees is reflected in the fact that, in panels of three, I have rendered over 10,000 decisions and orders. It is imperative to me to respect others' opinions, carefully weigh the facts of the case against the law, and work together on a resolution. I intend to bring that same collegial method of doing business to the FLRA.

10. Protecting whistleblower confidentiality is of the utmost importance to this Committee.

a. During your career, how have you addressed whistleblower complaints?

I have not, to my recollection, been responsible for handling any type of whistleblower complaint.

b. How do you plan to implement policies within the FLRA to encourage employees to bring constructive suggestions forward without the fear of reprisal?

I think that will come from the top. Should I am confirmed and designated Chairman I would ensure there was an open avenue of communication for suggestions/comments/complaints and that policies would continue to be published regularly regarding the prohibition of retaliation for whistleblowers. But if I were approached by a whistleblower, I would ensure that the matter were investigated thoroughly in accordance with law and regulation, that the confidentiality of the complainant would be of paramount importance, and that there would be no retaliation against the complainant.

c. Do you commit without reservation to work to ensure that any whistleblower within FLRA does not face retaliation? *Yes*

d. Do you commit without reservation to take all appropriate action if notified about potential whistleblower retaliation? *Yes*

11. What are the most significant challenges facing FLRA as an institution? If confirmed, what steps will you take to address these challenges?

It is difficult to answer this question as I have not been associated with the agency for a few years. However, agencies in general will be facing budgetary restraints while still being expected to handle cases expeditiously. If confirmed and designated Chairman, I would challenge the agency leadership and agency staff to look for ways to reengineer our business model to create efficiencies at all levels. In my early days of working in the Federal government,

the Suggestion Program was well known and well used and some of the best ideas came from that program. I believe this type of program currently exists in the FLRA and I would endeavor to expand that program to encourage recommendations from the leadership and staff to find novel, innovative ways to continue to meet our mission deliverables while conserving resources and working more efficiently. It is my belief that employees are eager to be part of the solution and are often not heard.

IV. Policy Questions

12. What is your assessment of the current state of federal labor-management relations? If you believe that improvements can be made, in what areas should there be improvement and how can this be accomplished?

I believe labor-management relations in the federal sector are relatively stable at this time, with the exception of situations where new managers or newly elected employee representatives are unfamiliar with the rules. With a consistent offering of training for newcomers to the field and for experienced practitioners, FLRA is contributing to that stability by helping parties understand their rights and responsibilities, thereby reducing needless unfair labor practice charges.

13. Given your previous experience as FLRA counsel, do you believe that improvements should be made to the Federal Service Labor-Management Relations statute? If so, what improvements can and should be made?

I have been away from this field for nine years. As such I would defer any specific recommendations on how the current statute is working. However, I respect the legislative process and would be happy to discuss with Congress any ideas or suggestions they may have to amend the statute. As a statute that is nearing its 40th anniversary, it would be prudent to review language to determine if it is consistent with how the federal government does business in the 21st century.

14. The FLRA's 2017 Congressional Budget Justification states that the FLRA "had to overcome significant obstacles in meeting its mission requirements." The Justification notes that in addition to increased case filings in certain agency components, the FLRA experienced a wave of key employee retirements and departures starting in FY 2013 and continuing into FY 2015.

    a. Given your past experience as a counsel to the FLRA, what do you believe is driving the increased case filings at certain components?

Without having been at the FLRA for the last nine years, I can only rely on statistics provided to me by the FLRA.

I have reviewed numbers of case intake for the last 5 years and, although the intake grew slightly in 2015 on the Authority side and grew slightly in 2016 in the OGC side, the intake has gone steadily down in all components of the FLRA. From 2013 to 2017:

- *intake for the Authority has gone down from 192 to 179 cases;*
- *intake for the OALJ has gone down from 271 to 197 cases;*
- *intake for the OGC (ULP cases) has gone down from 4659 to 3655 cases;*
- *intake for the OGC (Rep cases) has gone down from 240 to 208 cases, and*
- *intake for the FSIP has gone down from 194 to 98 cases.*

The numbers as stated do not seem to reflect an increase in case filings in any component. This is a good problem to have when evaluating the state of labor-management relations in the federal workforce; but it will have to be realistically evaluated in terms of future staffing needs.

As for staffing,

- *In September of 2013, the onboard staff was 115 employees.*
- *As of September of 2017, the onboard staff is 119 employees*

There has been a fluctuation of onboard staff from the highest of 132 in December of 2014 to the lowest of 115 in 2013 but the staffing increases do not seem to correlate with the steady decline of case intake.

b. What issues and factors do you believe most frequently give rise to unfair labor practice complaints?

I believe that new supervisors/managers or new employee representatives, changes in the methodology of work practices, shift changes, lack of adequate communication, etc., are some factors that can give rise to labor-management issues. But I believe major factors that can elevate those issues to unfair labor practice charges or complaints are misunderstandings, tempers, challenging personalities, insensitivities, lack of communication, and hard feelings. A key component for resolving these issues is training, not only on labor-management issues, but on managing, communicating, and interacting with others, as well.

c. As unfair labor practices are considered at the Office of General Counsel (OGC) level, do you believe agencies are afforded sufficient information concerning the complaint? Are agencies provided a sufficient opportunity to weigh-in with OGC concerning a given complaint?

I believe both sides should have an opportunity to understand the charge and be provided an opportunity to respond. Only after a charge is found to be meritorious and the GC is willing to file a complaint, should settlement negotiations begin.

d. Are there other obstacles besides increased caseloads and staff departures that hamper the FLRA's ability to fulfill its mission? If so, what are they, and what do you believe should be done to address them?

Please see my answer to Question # 14a regarding increased caseloads and staff departures.

I know that with only two Members of the three-member Authority, there is a growing number of cases awaiting action. That is a real obstacle and damaging to the parties. Once the full Authority's membership has been confirmed, these obstacles will be alleviated. As to what other current obstacles may exist which could hamper FLRA's ability to fulfill its mission, if confirmed and designated Chairman, I would hope to assess the agency and, together with the other Members, leadership, and staff, identify whether and what obstacles might exist and find collaborative methods to overcome them.

15. Are there improvements to the FLRA's internal review process that you believe can be improved upon to ensure fewer cases ultimately are overturned by the courts, and that all evidence is properly considered in a given case?

It will be important to carefully review the higher level court decisions over the last 10-15 years to see what trends are appearing. If the courts are overturning a significant number of cases, we will need to consider whether FLRA's approach has been the appropriate one. The courts generally defer to an agency's interpretation of its own regulations; so if we are being overturned we need to consider whether FLRA is overreaching or whether the facts and law are not being adequately conveyed. That is certainly something that I will evaluate should I be confirmed and designated Chairman.

16. In the 2016 *Best Places to Work* rankings complied by the Partnership for Public Service, and based on the data collected in the Federal Human Capital Survey, the FLRA ranked 5th out of 29 small federal agencies that submitted data. This is a significant improvement over 2009 when it ranked last. The FLRA's 2016 Index Score is down five points compared to 2015, however.

    a. What steps will you take, if confirmed, to maintain progress made by the FLRA in recent years, and to further improve upon employee morale?

It is good to note that FLRA is still quite high in 2017. Having been an employee at almost all the levels of the FLRA, I have experienced disappointment and frustration when changes would be made without adequate explanation as to why the changes were taking place. I will do all in my power to maintain and hopefully improve the progress made by the FLRA in maintaining employee morale. All of FLRA leadership staff needs to find methods to engage employees and connect on a person-to-person basis to best carry out the mission of the agency. As previously stated, I believe employees are eager to make a difference!

V. Relations with Congress

17. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed? *Yes*

18. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed? *Yes*

    Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed? *Yes*

VI. Assistance

19. Are these answers your own? Have you consulted with the FLRA or any other interested parties? If so, please indicate which entities.

Each answer is my own; however, I have consulted with FLRA staff to obtain helpful background information.

U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-Hearing Questionnaire
For the Nomination of Colleen Duffy Kiko to be a Member of the
Federal Labor Relations Authority
Minority

I. Nomination Process and Conflicts of Interest

1. Has the President or his staff asked you to sign a confidentiality or non-disclosure agreement? *No*

2. Has the President of his staff asked you to pledge loyalty to the President or the Administration? *No*

3. During your tenure have you asked any federal employee or potential hire to pledge loyalty to the President, Administration or any other government official? *No*

II. Background of Nominee

4. Do you seek out dissenting views and how do you encourage constructive critical dialogue with subordinates? *Yes – see a. below.*

    a. Please give examples of times in your career when a subordinate disagreed with you and aggressively advocated their position.

This happens on a fairly regular basis in my current position. As a Judge of the Employees' Compensation Appeals Board, we receive draft decisions from a staff attorney. After reviewing the case, I may disagree with the findings of the draft. If all of the three Judges (each decision is assigned to a three-Judge panel) determine that the draft needs work, we either send a rewrite memo to the Supervisory Attorney and the staff attorney to advise of our decision, and/or allow the staff attorney to request a conference where we can more fully discuss the case. Through this process, we may learn that the factual presentation was somewhat misleading and, when clarified, agree with the original finding in the draft. Other times, despite input from the staff attorney, we may still determine the draft should be revised to reflect the panel's direction. At all times, the staff attorney is treated respectfully, is provided the opportunity to make his or her argument, and the matter is handled strictly on a legal – not personal - basis. This is a healthy exchange of ideas and legal theories that can only ensure a more thoughtful and well-reasoned decision.

5. Please give examples of times in your career when you disagreed with your superiors and aggressively advocated your position. Were you ever successful?

I have a fairly strong personality and it would not be unusual for me to forcefully advocate my position on matters about which I felt strongly. No specific instances come immediately to mind.

6. Please list and describe examples of when you made politically difficult choices that you thought were in the best interest of the country.

Spending most of my career as a federal civil servant, I have not found myself faced with having to make politically difficult choices. In my current position and in my previous position as FLRA General Counsel, my decisions were focused solely on the law and its interpretation compared to the facts presented.

7. What would you consider your greatest successes as a leader?

I am very proud of the performance metrics that were created at the Employees' Compensations Appeals Board to evaluate the quality, quantity, and timeliness of legal decisions. They were very fair, easily understood and, if utilized properly, provided the staff attorney with immediate feedback on each and every decision submitted.

I am also very proud of the institution of the Office of the General Counsel training programs. These were devised to conserve resources and ensure predictability. Prior to these offerings, training was ad hoc and provided to agencies and labor unions as requested. It demanded a lot of time, preparation, and travel for our staff. The new courses on the Federal Service Labor-Management Relations Statute (beginner and advanced) were provided by OGC staff onsite at the FLRA regional offices or nearby agency space and were offered at each of the seven regional locations at various times throughout the year. We thought: "If we build it – they will come." And it has been well received for nearly a decade now. The training was current, managed without additional travel, and at no cost to attendees. I notice that those programs are still front and center on the FLRA website and I take great pride in that program.

And finally, I consider one of my greatest successes as a leader is to have successfully raised four wonderful children to adulthood.

8. What would you consider your greatest failure as a leader? What lessons did you take away from that experience?

Very early in my career when I first became a supervisor, I occasionally made decisions by relying on the advice of others without doing my own personal research to verify the accuracy of the advice. In one instance, I found out that the advice (which was attributed to me) was inaccurate. I was terribly embarrassed to have been responsible for providing an incorrect answer. Whether that was my greatest failure, I am not sure. But since then I have always been cautious about taking advice without doing my own research first. Trust but verify. Along that same line, it also caused me to dig deeper to find out reasons for things before rendering a judgment and to more fully recognize the implications and ramifications of decisions. Things

are not always as they seem. This has made me more thoughtful in assessing all circumstances and facts before rendering a judgment.

III. Policy Questions

9. During your tenure as FLRA General Counsel, you removed from the agency website all of the guides that that your predecessor created (case Law, 7114 requests, ULPs etc.) that were designed to help agencies and unions understand their respective rights and obligations under the Federal Service Labor Management Relations Statute. Why were these records removed?
    a. If these items were removed, was that decision consistent with federal records retention laws and other authorities? Please explain.

These records were removed from the website because they were outdated, were not consistent with the policies of the Office of the General Counsel at the time, and were not necessarily consistent with FLRA case law at the time. It was misleading to our constituency and I believed the customers should have been steered to our published FLRA decisions for current law and guidance.

    b. If these items were not removed, please indicate where they can be found on FLRA's public website.

These items were removed from the website. To the best of my understanding, all of these documents should still be retained in the Office of the General Counsel's historical records. It is also my understanding that these documents have since been updated and now appear on the agency website.

    c. If confirmed, what do you plan to do to ensure that the FLRA provides helpful guidance to its customers?

The training courses were implemented to ensure that agencies and unions alike would have access to up-to-date training on current case law. If confirmed and designated as Chairman, I would ensure that these programs are maintained. The best guidance the FLRA can offer to its customers, however, is well reasoned, clear, understandable decisions. This will be my highest priority.

10. During your tenure as the FLRA General Counsel, the FLRA was rated at or near the bottom in employee satisfaction and best places to work, based on the Federal Employee Viewpoint Survey (FEVS) and the Partnership for Public Service rankings. Now, the FLRA is rated as one of the top places to work among the small agencies. If confirmed, how do you plan to continue the excellent work done over the past decade to improve and preserve the FLRA as a leader in good personnel management?

Open communication is one of the best methods of helping employees feel like they are part of the agency and as if they have a voice. If confirmed and designated Chairman, I will strive to maintain that posture and will work toward continuing the progress in maintaining FLRA as a great place to work.

11. In October 2017, FLRA summarized what they consider to be the most serious management and performance challenges facing the FLRA in FY 2018. These management challenges include: (1) Information Technology Security; and (2) Proper Handling of Records.

    a. If confirmed, how will you ensure that FLRA is vigilant in establishing an environment to monitor potential Information Technology (IT) risks, threats, and vulnerabilities?

This is a critical, top priority concern. If I am confirmed and designated Chairman, I would immediately assess potential IT risks, threats, and vulnerabilities and, if found, devise and implement mitigation strategies. In FLRA documents I reviewed in response to this question, I noted that just recently the FLRA closed recommendations dating back to 2009, 2011, and 2014 relating to IT and privacy. I am concerned that it has taken so long to close out these recommendations made by the IG. I am aware there are old recommendations that are still pending.

    b. If confirmed, how will you promote and ensure proper handling of records (hard copy and electronic) by staff, and verify that various authorities and capabilities are properly assigned, documented, managed and monitored?

Agency documents indicate that there are open recommendations from the Inspector General on the proper handling of and access to agency records. FLRA has a multi-year plan for compliance with OMB requirements that is to be completed in 2019. If confirmed and designated as Chairman, I will review and assess agency efforts to determine whether this compliance can be expedited. I would ensure that FLRA maintains and manages all records in accordance with Federal law and regulations.

12. Former FLRA member Pizzella, in his dissents and concurrences, frequently criticized union parties to a dispute for pursuing positions or remedies that he viewed as wasting government resources, costing too much, being ill-motivated, or at odds with common sense—factors not grounded in the law.

    a. What is your view on deciding cases based on the facts as established in the record, and the law (the statute and precedent)—as opposed to independent views of right and wrong, how the government ought to work, and/or the role of unions?

In my review of each case before me, I will do as I always have done - consider the facts, apply the law, and render a decision consistent with the statutory and regulatory provisions for which I am held responsible. The Federal Service Labor-Management Relations Statute does provide,

however, that: "The provisions of [the Statute] should be interpreted in a manner consistent with the requirement of an effective and efficient government." 5 U.S.C. § 7101(b).

b. If government efficiency and effectiveness are legitimate considerations in assessing the merits of a dispute, what role do you believe conduct plays in an agency's collective bargaining, grievance procedure, and efficiency?

As I have said previously, I believe many disputes begin with conduct – hurt feelings, insensitive comments, lack of communication, etc., and can be the genesis of larger issues between the parties (labor and management).

13. The Collaboration and Alternative Dispute Resolution Office (CARDO) at FLRA provides intervention and dispute resolution services, which frequently helps parties resolve disputes short of a formal decision, thereby saving the parties' and FLRA's resources (government resources) that would otherwise be devoted to litigating and deciding the dispute. Do you plan to continue supporting CADRO and offering the parties assistance in establishing/ maintaining constructive relationships?

I believe dispute resolution services have been an integral component of the work of the Authority, and I support it. However, if I am confirmed and designated Chairman, I will be in a better position to understand how the program works at FLRA and assess the advantages and disadvantages how the services are offered.

14. Please describe what impact proposed federal budget cuts, if implemented, will have to FLRA's ability to provide training to federal agencies and unions in understanding their rights and responsibilities under the Civil Service Reform Act and other relevant authorities?

As I mentioned earlier, I was very proud of the free training courses that I instituted in the Office of the General Counsel for federal agencies and unions to better understand their rights and responsibilities under the Statute. I am pleased to see they are still very active. If confirmed as a Member and designated Chairman I would work to ensure that online training courses, both in the OGC and in the FLRA headquarters, be maintained, regularly updated, and retained online to reduce travel costs and any other costs associated with providing this training live, while still making them equally available to both unions and federal agencies. I would also look for ways to leverage video-teleconferencing capabilities in order to convey training to a wider audience with less expense to the Government.

15. Please describe what impact proposed budget federal budget cuts, if implemented, will have to federal agencies' ability to train managers and employees regarding their rights and responsibilities under the Civil Service Reform Act and other relevant authorities?

I would refer you to answer #14 above. Our courses, if available online, should be equally accessible to unions and federal agencies for training managers and employees of their rights and responsibilities under the Statute and other relevant authorities.

16. Please describe any previous experience—in the public or private sector—with handling whistleblower complaints, and what steps you took to ensure those individuals did not face retaliation and that their claims were thoroughly investigated?

I do not recall any circumstances where I had to handle any type of whistleblower complaint. I would ensure that the matter would be investigated thoroughly, in accordance with law and regulation, that the confidentiality of the complainant would be of paramount importance, and that there would be no retaliation for the complainant.

17. If confirmed, how will you ensure that whistleblower complaints are properly investigated?

See my answer to #16 above.

IV. Accountability

18. During your career as a federal employee, have you ever used a personal email account or device to conduct official government business? *No.*

    a. If so, please describe your general practice for doing so, and what specific steps you have taken to ensure that federal records created using personal devices and accounts were preserved.

19. During your career, has your conduct as a federal employee ever been subject to an Investigation or Audit by an Inspector General? If so, please describe.

I am quite sure that I have never been the subject of an investigation or audit by an Inspector General focused on my conduct as a Federal employee. However, during my short tenure as General Counsel of the FLRA, there were Inspector General matters not related to my conduct that would come to my attention. I always treated the matters with priority and responded specifically to each and every one.

20. During your career, has your conduct as a federal employee ever been subject to an investigation by the Office of Special Counsel? If so, please describe. *No.*

21. During your career as a federal employee, have you ever declined to implement recommendations made by the Office of Inspector General, the Office of Government Ethics, the Office of Special Counsel or the Government Accountability Office? If so, please describe.

I always took any recommendations seriously and, to the best of my knowledge, implemented any recommendations.

22. If confirmed, do you pledge to implement recommendations made by the Office of Inspector General, the Office of Government Ethics, the Office of Special Counsel and the Government Accountability Office?

Yes, I will take seriously and make every effort to implement every such recommendation provided they are within the purview of my authority, within the budgetary authority of the agency, and are not inconsistent with statutory, regulatory or other agency policy which would warrant otherwise.

V. Relations with Congress and the Public

23. If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?

I will make it my priority.

24. If confirmed, do you agree without reservation to reply to any reasonable request for information from the Ranking Member of any duly constituted committee of the Congress? *Yes*

25. If confirmed, do you agree without reservation to reply to any reasonable request for information from members of Congress? *Yes*

26. If confirmed, do you commit to take all reasonable steps to ensure that you and your agency comply with deadlines established for requested information? *Yes*

27. If confirmed, do you commit to protect subordinate officials or employees from reprisal or retaliation for any testimony, briefings or communications with members of Congress? *Yes*

28. If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Office of Inspector General, Office of Government Ethics, the Office of Special Counsel, the Government Accountability Office (GAO) and the Congressional Research Service? *Yes*

29. If confirmed, will you agree to work with representatives from this Committee and the GAO to promptly implement recommendations for improving [agency's] operations and effectiveness? *Yes*

30. If confirmed, will you direct your staff to fully and promptly respond to Freedom of Information Act requests submitted by the American people?

Yes, in accordance with the parameters of the Freedom of Information Act.

31. If confirmed, will you ensure that political appointees are not inappropriately involved in the review and release of Freedom of Information Act requests?

Yes, I will ensure the agency follows the parameters of the Freedom of Information Act.

VI. Assistance

32. Are these answers your own? Have you consulted with GSA or any other interested parties? If so, please indicate which entities.

Each answer is my own; however, I have consulted with FLRA staff to obtain helpful background information.

I, Colleen Duffy Kiko, hereby state that I have read the foregoing Pre-Hearing Questionnaire and Supplemental Questionnaires and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

(Signature)

This 27th day of October, 2017

Member
Employees' Compensation Appeals Board

I. Nature and Purpose of Work

A. Introduction:

Incumbent serves as a Member of the Employees' Compensation Appeals Board (the Board). The Board was created to decide appeals from final decisions of the Director, Office of Workers' Compensation Programs (the Office) in cases arising under the Federal Employees' Compensation Act. The Chairman and the two Members are appointed by the Secretary of Labor, pursuant to Section 8149 of the Federal Employees' Compensation Act, which provides that "[t]he rules and regulations shall provide for an Employees' Compensation Appeals Board of three individuals designated or appointed by the Secretary with authority to hear and, subject to applicable law and the rules and regulations of the Secretary, make final decisions on appeals taken from determinations and awards with respect to claims of employees." This Act covers all Federal employees and certain other categories of employees, such as local law enforcement Officers who are injured or killed while enforcing Federal law. Appeals may be taken to the Board on all questions of law and fact and on the exercise or failure to exercise discretion.

The Board performs a quasi-judicial function in deciding appealed cases. Decisions of the Board are contained in decisions and orders affirming or modifying the action of the Office, remanding cases for further development or reversing the Office action. The Board does not receive or review new evidence, but decides the case on the basis of the record as it existed when the Office rendered its decision. Decisions of the Board are final and not subject to either administrative or court review. In this respect, the Board is unique among all jurisdictions in the United States.

B. Duties:

As a Member of the Board, incumbent serves as Assistant to the Chairman in all matters of the Board as assigned, including policy decisions, technology proposals, personnel and disciplinary matters, union matters and all other management duties of the Chairman. Incumbent participates in rendering decisions of the Board. Each decision of the Board is set forth in a written opinion which sets forth the basis for the decision. The appeals are assigned by the Chairman to a three-Member panel consisting of no less than one Member (who serves as Chairman of the Panel) and up to two Alternate Members.

The Board is assisted by legal staff. In every case assigned by the Chairman, the incumbent reviews the case record, the pleadings of the parties and the draft decision and order submitted by the staff attorney. The incumbent analyzes and evaluates the legal and factual aspects of each case and conducts or has conducted necessary research. Research includes examination of the law, regulations and procedures, prior Board decisions and workers' compensation cases decided under other jurisdictions or general statutory or common law.

Incumbent participates with the Chairman, Members and Alternate Members at oral argument presented by counsel for the Office and appellants or their authorized representatives. The Chairman designates which Board Member will preside over the oral argument. Incumbent may interrogate those appearing for the purpose of clarifying aspects of the case which need further explanation.

Incumbent participates with the Chairman, Members and Alternate Members in reaching a decision on cases before the Board. Each opinion sets forth salient issues, facts, jurisdiction, legal precedent and analysis.

Board decisions are comprehensive and constitute exclusive precedent to guide the Office in adjudication of claims and serve as reference to injured workers' representatives, workers' compensation specialists, and other individuals. Opinions are published in volume form. Volume sets are maintained by the Workers' Compensation Commission of each State, by university and law libraries, by various government agencies, by employee organizations and by attorneys and other interested in workers' compensation interpretations.

Any petitions for reconsideration are returned to the original panel for review and determination as to whether the original decision should be reopened.

All fees for legal services performed in connection with the appeals require approval of the Board. The Chairman and the Board Members approve such fees based upon what is regarded as fair and reasonable under the circumstances. Incumbent joins with the Chairman and the other Board Member in ruling on all procedural motions, such as motions to dismiss appeals due to lack of jurisdiction, motions to remand for further development by the Office.

Incumbent is instrumental in working with the Chairman and the other Member of the Board in establishing policies to be adopted by the Board. Incumbent advises the Chairman on administrative or procedural rules and methods.

II. Scope and Effect of Work

The jurisdiction of the Board includes all civilian employees of the Federal Government, Federal Corporations, such as the Tennessee Valley Authority and the Federal Deposit Insurance Corporation, U.S. Postal Service as well as local law enforcement officers injured or killed in the enforcement of Federal law. Board decisions represent the majority opinion of the Panel.

The work of the Board is crucial because of the number of employees covered, the amount of compensation involved and the complexity and difficulty of the issues involved. Board decisions, which are final and not subject to review either administratively or judicially, have great impact upon a program which involves every

Federal agency, millions of employees and several billions of dollars in benefits. They serve as precedent setting decisions in the field of Federal Employees' Compensation just as decisions of the Courts serve as legal precedents under State workers' compensation programs. Because of the numbers of employees covered by the Federal Government, decisions of the Board have an important precedent effect upon the administration of State workers' compensation laws.

III. Supervision and Guidance Received:

As a member of a quasi-judicial body, incumbent Board Member exercises completely independent judgment in discharging duties and responsibilities, subject to the applicable law and the rules and regulations of the Secretary of Labor, including any dissenting opinion deemed necessary or desirable. The Chairman of the Board is the administrative supervisor for all other matters, such as leave approval, time and attendance, assignment of work, payroll and all other management issues.

IV. Mental Demands

The position requires ability to appraise, evaluate, and adjudge exceptionally difficult issues presented for judgment, ability to grasp the fundamentals of complex technical subject matter, and to exercise good judgment, judicial temperament, and humane approach. Demonstrated ability and experience in the field of workers' compensation and in-depth professional legal background are required.

V. Personal Work Contacts

It is essential, at Board oral arguments and in arriving at decisions with the Chairman, Board Members and other Alternate Board Members, that the highest standards of judiciousness, objectivity and equanimity be exercised.

Senator Heidi Heitkamp
Post-Hearing Questions for the Record
Submitted to Hon. Colleen D. Kiko

Nominations of Hon. Ernest W. DuBester, Hon. Colleen D. Kiko, and James T. Abbott to be Members, Federal Labor Relations Authority
Tuesday, November 7, 2017

1. In your questionnaire, you seemed to focus on communication challenges as one of the chief challenges that cause unfair labor practice complaints.
    - What role can the FLRA play in improving communication between labor and management?

I believe that the best role the FLRA can play in improving communication between the parties is to speak directly from our decisions and present clear, consistent legal precedent.

We can also play a significant role in improving communication between the parties by offering parties up-to-date, current training presenting the precedent in the FLRA decisions.

- Also, improving communication is a tricky goal since every person has a different definition of what improved communication means. What do you think helps improve communication the most?

I believe that communication can best be improved through respecting each other, appreciating and understanding each other's opinions, and listening to different viewpoints.

2. There is an enormous backlog of cases at FLRA. Please explain what steps you will take to address this and what will you do to foster collaboration among all components of the agency?

Personally, I am unaware of any enormous backlog at the FLRA. FLRA staff has recently advised me that the Authority has a backlog of less than 50 cases. I am also unaware of any backlog pending with the General Counsel. However, when I arrive at the FLRA, I will assess that situation, review current case processing procedures and, together with the other Members and the General Counsel, as appropriate, collaborate on the best practices necessary to move cases and eliminate any backlog. In my current agency, we instituted performance standards that measured quality, quantity, and timeliness of output. That is a difficult feat with legal decisions, but we were successful in improving all three parts of that equation. I will make it a priority to raise the issue of performance standards and metrics for all agency positions with both management and employees to elicit their comments on how to deal with any case backlogs and/or to increase general efficiencies.

- What do you consider the role of the FLRA CG Regions to be in the process?

The Office of the General Counsel is a separate entity from the Authority, with respect to case processing. However, any backlog that exists at the GC level could

ultimately affect the Authority component – as many of their actions continue through the pipeline to the Authority for decision. I would include the General Counsel in the performance/efficiency discussions, to determine the best method to ensure that quality, quantity, and timeliness were aspects of the performance plans.

- How important is it to use these offices to interact with the public?

I will presume that the term "these offices" refers to the Regional Offices of the GC. In that regard, I believe that the staff members in the Regional Offices represent the face of the GC. They have more interaction with our constituents than the Authority and I would consider the interaction of these offices as crucial in interfacing with the public.

- Is it your opinion that the number of regional offices should increase or decrease? Please feel free to explain your answer.

I have been away from the General Counsel's office for nine years, so it would be presumptive of me to have an opinion on whether the number of regional offices should increase or decrease. As the Chairman of the agency, however, it would be my responsibility to manage the funds appropriated to the agency. With that in mind, the General Counsel would be the point person to provide the information necessary to determine whether the number of regional offices was right-sized based on the workload and staffing patterns and the costs of maintaining seven regional offices. These discussions are on my priority list.

3. Would you seek appropriate funding for the FLRA to perform its duties as required under the law and to vigorously enforce federal labor law?

Yes, as Chairman of the agency, I will vigilantly monitor the funding levels of the FLRA in conjunction with the mission that we have been provided in an effort to ensure that the FLRA can vigorously enforce the Federal Labor-Management Relations Statute.

4. Will you please describe the situation that lead to your prior departure from the FLRA in March 2008?

I was offered an opportunity to return to the Employees' Compensation Appeals Board.

- Was there a succession plan created prior to your departure?

Yes. I discussed my employment opportunity with the White House and, shortly after we set my departure date of March 2008, on April 2, 2008 President George W. Bush nominated Brandon Chad Bungard for the FLRA General Counsel position.

5. What are your views are on transparency and communication with the public?

I believe that my role as Chairman of the FLRA is to ensure that the FLRA follows the mandates of the Statute. Our decisions speak for themselves in precedent and legal policy. That is the best way to be transparent and to communicate with the interested public, the parties, and the shareholders (taxpayers). Also, through training courses offered to the parties, we should be helping the parties best understand the guidance that is provided through our decisions.

OPENING STATEMENT OF HON. ERNIE DUBESTER OF VIRGINIA TO BE A MEMBER

OF THE FEDERAL LABOR RELATIONS AUTHORITY

BEFORE THE COMMITTEE ON HOMELAND SECURITY AND

GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

NOVEMBER 7, 2017

Mr. Chairman and Members of the Committee:

I greatly appreciate the opportunity to come before this Committee again for its consideration of my nomination to be a Member of the Federal Labor Relations Authority (FLRA). I also would like to thank the Committee's staff for their work and assistance in reviewing my nomination and scheduling this hearing.

Before making a brief opening statement, I would like to introduce my wife, Karen Kremer. In a few months, we will celebrate our 30th Anniversary. When I first met Karen, she was working for Senator Howell Heflin on the Senate Judiciary Committee. So this Body will always hold a special, personal meaning in my life.

I also want to recognize the presence here this morning of my colleagues from the FLRA, including those of my personal staff. These dedicated public servants, as well as many FLRA staff who are not present, are the key to the FLRA's many successes in recent years.

I am also pleased to appear with Colleen and James who, hopefully, should the Senate confirm us, will soon be my new colleagues.

Mr. Chairman, this is the fifth time I have had the privilege to come before the Senate after being nominated by a President for a position of public trust. During the nineties, I was nominated twice to serve as Chairman, and Member, of another independent agency, the National Mediation Board. And, this is the third time that I have had the honor to come before this Committee after being re-nominated by President Trump to continue serving as a Member of the FLRA.

I have served as a Member for over eight years. And I served as Chairman for most of 2013.

The last eight years reflect many accomplishments at the FLRA. Exercising our statutory responsibility to provide leadership in labor-management relations, we have engaged in numerous outreach, facilitation and training activities which include the delivery of a variety of training sessions to tens of thousands of labor and management representatives in the Federal Sector community. During this period, we have also made timely issuance of decisions a major priority.

In addition, with an agency focus on human capital initiatives, such as training and development, performance management, and work-life balance, employee morale has improved dramatically. For the last two years, we have ranked in the top 5 overall in the Partnership for Public Service rankings for "Best Places to Work in the Federal Government." And in 2015 and 2016, we received #1 rankings in the specific categories of teamwork and effective leadership.

Mr. Chairman, with over 40 years of experience in labor-management relations, working as a public servant, advocate, mediator, arbitrator, and academic, over 25 of those years are in the Federal sector. I remain strongly committed to the FLRA's mission and to the importance of stable, constructive labor-management relations in the Federal sector. And, if confirmed, I will continue to work tirelessly so that the FLRA is recognized by the Federal sector's labor-management community as one of the most effective and efficient agencies in the Federal government.

Again, I appreciate the opportunity to appear before you and I would be pleased to answer any questions that you have.

REDACTED

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

October 12, 2017

The Honorable Ron Johnson
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Ernest W. DuBester, who has been nominated by President Trump for the position of Member, Federal Labor Relations Authority.

We have reviewed the report and have obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

DAVID APOL Digitally signed by DAVID APOL
DN: c=US, o=U.S. Government, ou=Office of Government Ethics, cn=DAVID APOL, oid.2.5.4.12.1920.8100.100.1.1=95.0100.2981870
Date: 2017.10.12 19:16:57 -04'00'

David J. Apol
Acting Director and General Counsel

Enclosures REDACTED

October 4, 2017

Fred B. Jacob
Solicitor and Designated Agency Ethics Official
Federal Labor Relations Authority
1400 K St., NW
Washington, DC 20424

Dear Mr. Jacob:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Member, Federal Labor Relations Authority.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

I will meet in person with you during the first week of my service in the position of Member in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), or obligations of the United States.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order no. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

Ernest W. DuBester

Ernest W. DuBester

REDACTED

HSGAC BIOGRAPHICAL QUESTIONS FOR EXECUTIVE NOMINEES

1. Basic Biographical Information

Please provide the following information.

Position to Which You Have Been Nominated	
Name of Position	**Date of Nomination**
Member, Federal Labor Relations Authority (FLRA)	October 3, 2017

Current Legal Name			
First Name	**Middle Name**	**Last Name**	**Suffix**
Ernest	William	DuBester	

Addresses					
Residential Address (do not include street address)			**Office Address** (include street address)		
[redacted]			Street: 1400 K Street, NW, Suite 323		
City: Arlington	State: VA	Zip: 22207	City: Washington	State: DC	Zip: 20005

Other Names Used						
First Name	**Middle Name**	**Last Name**	**Suffix**	Check if Maiden Name	**Name Used From** (Month/Year) (Check box if estimate)	**Name Used To** (Month/Year) (Check box if estimate)
Ernie					Est ☐	Est ☐
					Est ☐	Est ☐

Birth Year and Place	
Year of Birth (Do not include month and day.)	**Place of Birth**
1950	Passaic, NJ

Marital Status					
Check All That Describe Your Current Situation:					
Never Married	**Married**	**Separated**	**Annulled**	**Divorced**	**Widowed**
☐	**X**	☐	☐	☐	☐

Spouse's Name (current spouse only)			
Spouse's First Name	**Spouse's Middle Name**	**Spouse's Last Name**	**Spouse's Suffix**
Karen	Marie	Kremer	

Spouse's Other Names Used (current spouse only)						
First Name	**Middle Name**	**Last Name**	**Suffix**	Check if Maiden Name	**Name Used From** (Month/Year) (Check box if estimate)	**Name Used To** (Month/Year) (Check box if estimate)
					Est ☐	Est ☐
					Est ☐	Est ☐

Children's Names (if over 18)			
First Name	Middle Name	Last Name	Suffix

2. Education

List all post-secondary schools attended.

Name of School	Type of School (vocational/technical/trade school, college/university/military college, correspondence/distance/extension/online school)	Date Began School (month/year) (check box if estimate)	Date Ended School (month/year) (check box if estimate) (check "present" box if still in school)	Degree	Date Awarded
Boston College	College	August/1968 Est ☐	May/1972 Est ☐ Present ☐	A.B.	May, 1972
Columbus School of Law, Catholic Univ. of America	University	August/1972 Est ☐	May/1975 Est ☐ Present ☐	J.D.	May 1975
Georgetown Univ. Law Center	University	Sept./1978 Est x	May 1980 Est ☐ Present ☐	LL.M. (Labor Law)	May 1980
		Est ☐	Est ☐ Present ☐		

3. Employment

(A) List all of your employment activities, including unemployment and self-employment. If the employment activity was military duty, list separate employment activity periods to show each change of military duty station. Do not list employment before your 18th birthday unless to provide a minimum of two years of employment history.

Type of Employment (Active Military Duty Station, National Guard/Reserve, USPHS Commissioned Corps, Other Federal employment, State Government (Non-Federal Employment), Self-employment, Unemployment, Federal Contractor, Non-Government Employment (excluding self-employment), Other	Name of Your Employer/ Assigned Duty Station	Most Recent Position Title/Rank	Location (City and State only)	Date Employment Began (month/year) (check box if estimate)	Date Employment Ended (month/year) (check box if estimate) (check "present" box if still employed)
Other federal employment	Federal Labor Relations Authority (FLRA)	Member	DC	August 2009 Est ☐	Present Est ☐
Other federal employment	FLRA	Chairman	DC	January 2017	January 2017
Other federal employment	FLRA	Chairman	DC	Jan. 2013 Est ☐	Nov. 2013 Est ☐
Other federal employment	National Mediation Board (NMB)	Mediator	DC	July 2005 Est ☐	August 2009 Est ☐
Non-Government Employment	George Mason University School of Law (GMUSL) (now Antonin Scalia Law School)	Distinguished Professor of Law (and Chair of Dispute Resolution Program)	Arl., VA	August 2001 Est ☐	July 2005 Est ☐
Self-employment	While at GMUSL	Arbitrator & Mediator	Arl., VA	Aug. 2001 Est ☐	July 2005 Est ☐
Other Federal employment	National Mediation Board	Chairman (and Member)	Wash. DC	Nov. 1993	Aug. 2001
Non-Federal employment	Catholic Univ. School of Law	Adjunct faculty	Wash. DC	1997	2001
Non-Federal employment	AFL-CIO	Legislative counsel	Wash. DC	1984	1993

Non-Federal employment	Law firm of Highsaw & Mahoney	Associate	Wash. DC	1981	1984
Other Federal employment	National Labor Relations Board	Counsel to Chairman (and Member)	Wash. DC	1975	1981
		Field attorney	Los Angeles Regional Office	1978	1978
		Legal Assistant to Board Member	Wash. DC	Summer of 1974 & part-time Fall of 1974	Spring of 1975

(B) List any advisory, consultative, honorary or other part-time service or positions with federal, state, or local governments, not listed elsewhere.

Name of Government Entity	Name of Position	Date Service Began (month/year) (check box if estimate)	Date Service Ended (month/year) (check box if estimate) (check "present" box if still serving)
Taiwan Ministry of Labor & Taipei Economic & Cultural Representatives Office in U.S.	Head of American Delegation (along with 8 State Labor Commissioners)	November 2014 Est ☐	November 2014 Est ☐ Present ☐
International Labor Org.	Chairman, Tripartite Conference on "Consequences for Mgmt. & Personnel of Restructuring of Railways"	April 1994 Est x	April 1994 Est x Present ☐
		Est ☐	Est ☐ Present ☐

4. Potential Conflict of Interest

(A) Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent,

that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

In connection with the nomination process, I consulted with the Office of Government Ethics and the Federal Labor Relations Authority's designated agency ethics officer to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I entered into with the FLRA's designated agency ethics officer and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.

(B) Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.

I have engaged in no such activity.

5. Honors and Awards

List all scholarships, fellowships, honorary degrees, civilian service citations, military medals, academic or professional honors, honorary society memberships and any other special recognition for outstanding service or achievement.

While at the NLRB, I received Distinguished Service and Sustained Superior Performance Awards in 1978, 1979, & 1980.

6. Memberships

List all memberships that you have held in professional, social, business, fraternal, scholarly, civic, or charitable organizations in the last 10 years.

Unless relevant to your nomination, you do NOT need to include memberships in charitable organizations available to the public as a result of a tax deductible donation of $1,000 or less, Parent-Teacher Associations or other organizations connected to schools attended by your children, athletic clubs or teams, automobile support organizations (such as AAA), discounts clubs (such as Groupon or Sam's Club), or affinity memberships/consumer clubs (such as frequent flyer memberships).

Name of Organization	Dates of Your Membership (You may approximate.)	Position(s) Held
U.S. Supreme Court	8/1/80 – Present	Attorney & Counsellor (Member)
District of Columbia Bar Ass'n	Since 1980	Member

New Jersey State Bar Ass'n	Since 1976	Member (now inactive)
Florida State Bar Ass'n	Since 1976	Member (now inactive)
Northern Virginia Mediation Services	2003-2008	Board of Directors
Labor & Employment Relations Ass'n (D.C. Chapter)	On & Off Since 1994	Currently, Member of Executive Advisory Board
American Bar Ass'n	On & Off since 1976 (currently not a member)	Member
Ass'n of Conflict Resolution	2002-2009	Member
Society of Federal Labor & Employee Relations Professionals	2003-Present	Member
Boston College Alumni Club of Metropolitan Washington, DC	Since 1976	Member (and President 1984-92)
Virginia Supreme Court, Richmond, VA	2002-Oct. 2008	Certified Mediator

7. Political Activity

(A) Have you ever been a candidate for or been elected or appointed to a political office?

NO

Name of Office	Elected/Appointed/ Candidate Only	Year(s) Election Held or Appointment Made	Term of Service (if applicable)

(B) List any offices held in or services rendered to a political party or election committee during the last ten years that you have not listed elsewhere.

Name of Party/Election Committee	Office/Services Rendered	Responsibilities	Dates of Service
Presidential Campaign of Barack Obama	Worked as a volunteer in Virginia. Services rendered included phone banks, canvassing, & literature distribution.		2008

(C) Itemize all individual political contributions of $200 or more that you have made in the past five years to any individual, campaign organization, political party, political action committee, or similar entity. Please list each individual contribution and not the total amount contributed to the person or entity during the year.

Name of Recipient	Amount	Year of Contribution
Presidential Campaign of Barack Obama	$600 ($300 twice)	2012

8. Publications and Speeches

(A) List the titles, publishers and dates of books, articles, reports or other published materials that you have written, including articles published on the Internet. Please provide the Committee with copies of all listed publications. In lieu of hard copies, electronic copies can be provided via e-mail or other digital format.

Title	Publisher	Date(s) of Publication
In the magazine "Perspectives on Work", published article entitled: "Collective Bargaining: A Critical Value of a Democracy."	Labor & Employment Relations Ass'n	Summer 2011/Winter 2012 issue
(article attached)		

(B) List any formal speeches you have delivered during the last five years and provide the Committee with copies of those speeches relevant to the position for which you have been nominated. Include any testimony to Congress or any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.

Title/Topic	Place/Audience	Date(s) of Speech
Town Hall Meeting with the Federal Labor Relations Authority (FLRA)	Annual Federal Dispute Resolution (FDR) Training Conference, San Francisco, CA	August 9, 2017
Town Hall Meeting with the Federal Labor Relations Authority (FLRA)	Annual FDR Conference, New Orleans, LA	August 3, 2016
Keynote address-Reprised theme from article cited in my response to 8 (A)	Arlington, VA, to 40th Annual Symposium of the Society of Federal Labor & Employment Relations Professionals	April 18, 2013

(C) List all speeches and testimony you have delivered in the past ten years, except for those the text of which you are providing to the Committee.

Title	Place/Audience	Date(s) of Speech
People-Relationships-Effective Communication. Consistent with Conference's Theme "Back to the Basics", Fundamental Considerations Can Help Make You a Better Practitioner in all Aspects of Labor-Management relations	Office of Personnel Management, Washington, DC. Employee Relations Policy Series.	5/21/13
FLRA Update	American Bar Ass'n, Washington DC.Federal Sector Committee of Labor & Employment Law Section	4/10/13
Why Use of Alternative Dispute Resolution Is So Effective at the FLRA	DC Chapter of Labor & Employment Relations Ass'n	1/22/13
Use of ITEV (Internet,Telephonic& Electronic Voting) in Representaion Matters	NYU School of Law. Technology in Practice & Workplace Committee of Labor & Employment Law Sec. of ABA	4/25/12

FLRA Update	Federal Sector Committee, ABA Labor & Employment Law Sec., Chicago, Ill.	11/4/10
FLRA Update	Federal Sector Committee, ABA Labor & Employment Law Sec., Washington, DC	4/15/10

9. Criminal History

Since (and including) your 18th birthday, has any of the following happened?

- Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Exclude citations involving traffic infractions where the fine was less than $300 and did not include alcohol or drugs.)
  No
- Have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official?
  No
- Have you been charged, convicted, or sentenced of a crime in any court?
  No
- Have you been or are you currently on probation or parole?
  No
- Are you currently on trial or awaiting a trial on criminal charges?
  No
- To your knowledge, have you ever been the subject or target of a federal, state or local criminal investigation?
  No

If the answer to any of the questions above is yes, please answer the questions below for each criminal event (citation, arrest, investigation, etc.). If the event was an investigation,

where the question below asks for information about the offense, please offer information about the offense under investigation (if known).

A) Date of offense:

a. Is this an estimate (Yes/No):

B) Description of the specific nature of the offense:

C) Did the offense involve any of the following?
1) Domestic violence or a crime of violence (such as battery or assault) against your child, dependent, cohabitant, spouse, former spouse, or someone with whom you share a child in common: **Yes / No**
2) Firearms or explosives: **Yes / No**
3) Alcohol or drugs: **Yes / No**

D) Location where the offense occurred (city, county, state, zip code, country):

E) Were you arrested, summoned, cited or did you receive a ticket to appear as a result of this offense by any police officer, sheriff, marshal or any other type of law enforcement official: **Yes / No**

1) Name of the law enforcement agency that arrested/cited/summoned you:

2) Location of the law enforcement agency (city, county, state, zip code, country):

F) As a result of this offense were you charged, convicted, currently awaiting trial, and/or ordered to appear in court in a criminal proceeding against you: **Yes / No**

1) If yes, provide the name of the court and the location of the court (city, county, state, zip code, country):

2) If yes, provide all the charges brought against you for this offense, and the outcome of each charged offense (such as found guilty, found not-guilty, charge dropped or "nolle pros," etc). If you were found guilty of or pleaded guilty to a lesser offense, list separately both the original charge and the lesser offense:

3) If no, provide explanation:

G) Were you sentenced as a result of this offense: **Yes / No**

H) Provide a description of the sentence:

I) Were you sentenced to imprisonment for a term exceeding one year: **Yes / No**

J) Were you incarcerated as a result of that sentence for not less than one year: **Yes / No**

K) If the conviction resulted in imprisonment, provide the dates that you actually were incarcerated:

L) If conviction resulted in probation or parole, provide the dates of probation or parole:

M) Are you currently on trial, awaiting a trial, or awaiting sentencing on criminal charges for this offense: **Yes / No**

N) Provide explanation:

10. Civil Litigation and Administrative or Legislative Proceedings

(A) Since (and including) your 18th birthday, have you been a party to any public record civil court action or administrative or legislative proceeding of any kind that resulted in (1) a finding of wrongdoing against you, or (2) a settlement agreement for you, or some other person or entity, to make a payment to settle allegations against you, or for you to take, or refrain from taking, some action. Do NOT include small claims proceedings.
N/A

Date Claim/Suit Was Filed or Legislative Proceedings Began	Court Name	Name(s) of Principal Parties Involved in Action/Proceeding	Nature of Action/Proceeding	Results of Action/Proceeding

(B) In addition to those listed above, have you or any business of which you were an officer, director or owner ever been involved as a party of interest in any administrative agency proceeding or civil litigation? Please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

Date Claim/Suit Was Filed	Court Name	Name(s) of Principal Parties Involved in Action/Proceeding	Nature of Action/Proceeding	Results of Action/Proceeding
Sept. 2004	Arlington County Circuit Court (VA)	Myself (Plaintiff) and Nicole Arshan (Defendant). My attorney was Patrick Regan, with the firm Regan Zambri &	In January 2002, I was involved in a serious automobile accident. I sued the person responsible for causing the accident to compensate for injuries sustained and related	Matter was settled pre- trial in Feb. of 2005.

		Long, 1919 M St., NW,Ste. 350, Wash., DC 20036; 202-463-3030, Ext. 222.	consequences.	
5/3/13	EEOC, Wash. DC	Robin Davis and Ernie DuBester, Chairman, Federal Labor Relations Agency (FLRA) and FLRA	Appeal to EEOC of Final Agency Action. I am named only in my capacity as Chairman of the FLRA.	Matter settled (closed by EEOC 8/13)

(C) For responses to the previous question, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

None

11. Breach of Professional Ethics

(A) Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, professional association, disciplinary committee, or other professional group? Exclude cases and proceedings already listed.

No

Name of Agency/Association/ Committee/Group	Date Citation/Disciplinary Action/Complaint Issued/Initiated	Describe Citation/Disciplinary Action/Complaint	Results of Disciplinary Action/Complaint
National Mediation Board (NMB)	November 2001	In May of 2001, when I left the NMB and was hired by George Mason University (GMU) Law School, there was an interdisciplinary Academic Center for Dispute Resolution between the Law School & GMU's Institute for Conflict Analysis & Resolution (ICAR). Apparently, questions were raised about the	I was found not to have been involved and, as to me, the matter was dropped (not referred). I continued to teach at GMU for the next four years. And, in 2005, I was rehired by the NMB, the investigative entity,where I worked until August 2009.

		solicitation of funding for the Center which led to an ethics inquiry.	

(B) Have you ever been fired from a job, quit a job after being told you would be fired, left a job by mutual agreement following charges or allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?

No

12. Tax Compliance

(This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

REDACTED

13. Lobbying

In the past ten years, have you registered as a lobbyist? If so, please indicate the state, federal, or local bodies with which you have registered (e.g., House, Senate, California Secretary of State). No

14. Outside Positions

√ See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

For the preceding ten calendar years and the current calendar year, report any positions held, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

Name of Organization	Address of Organization	Type of Organization (corporation, firm, partnership, other business enterprise, other non-profit organization, educational institution)	Position Held	Position Held From (month/year)	Position Held To (month/year)
DC LERA	Washington, DC	Non-profit	Executive Advisory Committee	2015	Present
Virginia Mediation Network	Richmond, VA	Non-profit	Board of Directors	2005	2008
Northern Virginia Mediation Services	Fairfax, VA	Non-profit	Board of Directors	2003	2008

15. Agreements or Arrangements

√ See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

As of the date of filing your OGE Form 278, report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment.

Not applicable

Provide information regarding any agreements or arrangements you have concerning (1) future employment; (2) a leave of absence during your period of Government service; (3) continuation of payments by a former employer other than the United States Government; and (4) continuing participation in an employee welfare or benefit plan maintained by a former employer other than United States Government retirement benefits.

Not applicable

Status and Terms of Any Agreement or Arrangement	Parties	Date (month/year)

16. Additional Financial Data

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing

on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

REDACTED

SIGNATURE AND DATE

I hereby state that I have read the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Ernest W. Dubester

This 12th day of Oct, 2017

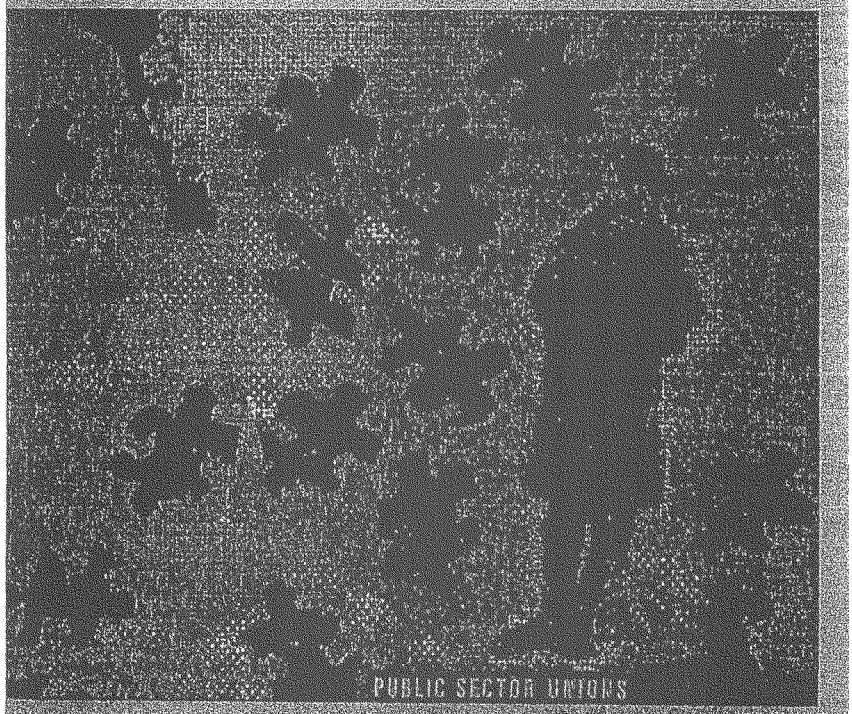
DISTRICT OF COLUMBIA: SS
SUBSCRIBED AND SWORN TO BEFORE ME
THIS 12th DAY OF Oct, 2017
NOTARY PUBLIC
My Commission Expires Nov 30, 2020

NORMA P. PULLEN
NOTARY PUBLIC
Expiration Nov 30, 2020
DISTRICT OF COLUMBIA

ATTACHMENT FOR QUESTION 8

Perspectives on Work

The Magazine of the IERA ■ Summer 2011/Winter 2012 ■ Volume 15 ■ Numbers 1-2



PUBLIC SECTOR UNIONS

Perspectives on Sustainability, International Employment, and more

Also, reflections from W. J. Usery, Jr., former U. S. Secretary of Labor and the Nation's "Super Mediator"

Perspectives on Work is a biannual publication of the Labor and Employment Relations Association and is published by the University of Illinois Press in Champaign, IL. Comments, letters, or suggestions for articles may be sent to Susan C. Cass, editor, at scass@mit.edu.

Editor:
Susan C. Cass

Managing editor:
Paula Wells

Journals production editor:
Heather Munson

Copying information:
Active LERA members who are educators and wish to copy selected articles for classes may do so at no charge. Please visit the LERA website at www.lera.uiuc.edu for information on how to obtain copyright permission or contact the LERA national office. All others seeking permission to reprint an article, please contact the Copyright Clearance Center at www.copyright.com.

Back issues, subscriptions, and address changes:
For subscription information, to update mailing information, or to order copies of back issues, contact the University of Illinois Press, 1325 S. Oak Street, Champaign, IL 61820. Copies may be purchased for $15.00 each; for classroom use, prices are $6.00 each with a ten-copy minimum purchase.

Advertising:
Information on rates, deadlines, and production specifications may be obtained by contacting Jeff McArdle, University of Illinois Press, jmcardle@uillinois.edu.

To learn more about the LERA, visit the association's website at www.lera.illinois.edu, or contact the national office at 121 Labor and Industrial Relations Building, 504 E. Armory Ave., Champaign, IL 61820. Phone: 217/333-0072 Fax: 217/265-5130 email: leraoffice@illinois.edu.

© 2011 Labor and Employee Relations Association, Champaign, IL. Printed in the United States of America. All rights reserved.

ISSN 1534-9276

Cover illustration © Fotosearch

LERA
SHAPING THE WORKPLACE OF THE *FUTURE*

Perspectives on Work

From the Editor
Susan C. Cass 2

POLICY FORUM: THE FUTURE OF PUBLIC SECTOR UNIONS

Public Sector Labor Relations: A System Struggling to Adjust to the Financial Crisis
Robert McKersie 3

Fiscal Crisis and the Future of Public Unions
Barry Bluestone 6

Not Just about Pensions
Dave Low 9

Collective Bargaining: A Critical Value of a Democracy
Ernest DuBester 12

POLICY FORUM: SUSTAINABILITY AND CORPORATE SOCIAL RESPONSIBILITY

Labor Management Partnerships: Working Toward a Sustainable Economy
Nikki Daruwala 15

Business Social Sustainability: Joint Gains for Employers AND Employees
Tom Strong, Mark Popovich, and Barbara Dyer 19

THE CHANGING NATURE OF WORK: INTERNATIONAL EMPLOYMENT

Ensuring Core Labor Standards through International Framework Agreements?
Michael Fichter, Markus Helfen, and Jörg Sydow 23

Privatization of Public Services and Impacts on Employment and Working Conditions—European Experiences
Christoph Hermann and Jörg Flecker 26

The Institutions of Inclusion? The Dynamics of Low-Wage Work in Wealthy Countries
Jérôme Gautié 29

The Globalization of Service Work: Comparative Institutional Perspectives on Call Centers
Rosemary Batt 32

Coercion without Convergence: European Models of Capitalism on the Eve of the Crisis
Steffen Lehndorff 35

FEATURES

Protecting Workers in Fissured Workplaces
David Weil 38

COLLECTIVE BARGAINING:

A Critical Value of a Democracy

ERNEST DUBESTER

I have thirty-six years of experience in labor-management relations. All involve, in some way, the institution of collective bargaining. As a practitioner, I negotiated collective agreements and took grievances to arbitration. Working as a mediator, I resolved hundreds of collective bargaining disputes. And, as an arbitrator, I resolved dozens of grievances and a few interest disputes. Based on my experience, I am an advocate for the institution of collective bargaining.

Public service now constitutes more than one-half of my professional life. I have worked for all three federal government agencies that administer our federal collective bargaining laws. Out of law school, I worked for the National Labor Relations Board, probably the best known of the three, with jurisdiction over the private sector. During President Clinton's administration, I served as Chairman (and Member) of the National Mediation Board, the oldest of the three, which oversees labor relations in the airline and railroad industries. Now, during President Obama's administration, I serve as a Member of the Federal Labor Relations Authority (FLRA). Established in 1978 and the newest of the three, the FLRA oversees labor relations in the federal sector, with jurisdiction over nearly two million employees nationwide.

The Federal Service Labor-Management Relations Statute is modeled on the National Labor Relations Act. Its "Findings and purpose" section states in pertinent part that *Congress* finds that "experience in both private and public employment indicates that . . . labor organizations and collective bargaining in the civil service are in the public interest."[1]

"Collective bargaining" evokes thoughts about the workplace and the relationship among workers, unions, and employers. But collective bargaining has another aspect, namely, its broader and critical role as a reflection of values fundamental to democratic societies.

Barbara Fick, Associate Professor at Notre Dame Law School, writes that trade unions are the "quintessential civil society organization." In this role, Fick states, trade union influence extends beyond the confines of the workplace and affects society as a whole, making a major contribution to creating, maintaining, and rebuilding democratic societies.[2] Hannah Arendt, author of the classic *Origins of Totalitarianism*, had a similar thought. As I recall, Arendt opined that the two institutions that are most reflective of a democratic society are a free press and free trade unions.

"Collective bargaining" evokes thoughts about the workplace and the relationship among workers, unions and employers. But collective bargaining has another aspect, namely, its broader and critical role as a reflection of values fundamental to democratic societies.

Illustrative of this principle is the situation that existed in post–World War II Japan. General Douglas MacArthur was in charge of reforming Japan's government and its constitution. Around that time, many of the most conservative elements in our country were encouraging him to seek the Republican presidential nomination. In Japan, MacArthur was intent on ensuring that Japan would not remain an autocratic form of government and on fending off communism. Toward those objectives, he encouraged the unionization of workers and sweeping constitutional reforms that included provision of collective bargaining rights. He succeeded.[3]

But were those different times, a different era?

Following World War II, our country became embroiled in the Cold War. In 1960, John F. Kennedy called Labor the "key to the Nation's struggle against

Communism." Kennedy stated further that "those who cripple collective bargaining or prevent organization of the unorganized- do a disservice to the cause of democracy."[4]

But were those also different times, a different era?

Flash forward about twenty years to President Reagan's administration. In some circles, Reagan is best known for two reasons. One is his firing of air traffic controllers during the PATCO strike. The other is his comment that government is the problem.

Less known, in 1982, President Reagan addressed a joint session of the British Parliament at Westminster Palace. He predicted the demise of communism, well before the collapse of the Berlin Wall, and he described a "democratic revolution" gathering force around the globe. Going forward, Reagan said, the United States would seek to promote an "infrastructure of democracy," including a free press, independent unions, representative political parties, and universities, which "allows a people to choose their own way, develop their own cultures, and reconcile differences through peaceful means."[5]

A year later, President Reagan's words were a catalyst for Congressional passage of the National Endowment for Democracy (NED), which is dedicated to fostering the growth of a wide range of democratic institutions abroad, including trade unions. The website for NED states that "from its beginning NED has remained steadfastly bipartisan. Created jointly by Republicans and Democrats, NED . . . enjoys Congressional support across the political spectrum."[6]

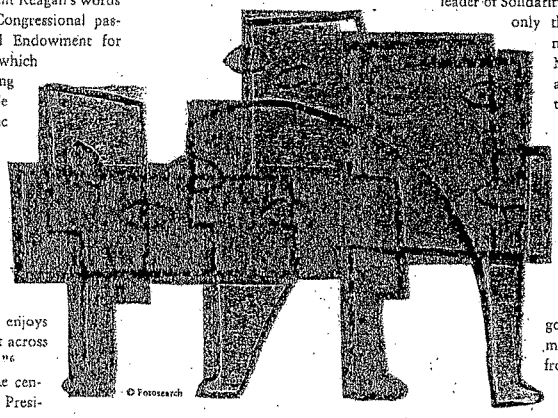
To acknowledge the centennial celebration of President Reagan's birthday earlier this year, two of NED's Board of Directors, former Democratic Congressman Martin Frost (Texas) and former Republican Congressman Vin Weber (Minnesota), wrote an article in *Politico* acknowledging Reagan's role in NED's creation. Their letter suggested further that, at a time when we need a bridge across the divide between the two parties and between the labor-management community, NED can serve as a "model" to find common ground regarding values so important to our democracy.[7]

But did NED's creation during the Reagan administration reflect different times, a different era?

Flash forward again to events of recent months both here and abroad.

In Egypt, tens of thousands of Egyptian workers joined student protesters in the streets and jointly brought down an authoritarian regime. This echoes similar events that have occurred elsewhere, such as Poland, East Germany, and the Philippines.

Throughout the 1980s in Poland, worker protests and strikes led by the Polish trade union Solidarity, defying state-controlled unions, culminated in free, democratic elections and helped precipitate the downfall of Soviet Communism.



© Fotosearch

In Egypt, worker protests beginning in late 2006 led to the creation of two independent unions, defying the officially recognized state-union, and have now culminated in the toppling of its regime. The American Chamber of Commerce in Egypt publishes a *Business Monthly*. Its February 2011 cover story entitled "Workers' Discontent" provides an interesting account of the last four years. That article also states: "While the instinctive reaction of government and employers is to view such developments as a threat, labor leaders might represent an opportunity for dialogue at a time of increased frustration among both workers and the unemployed."[8]

Many Americans—across the political and ideological spectrum—have expressed admiration and support for foreign workers' bravery in protesting and undermining Egypt's authoritarian regime. Recall that, in November 1989, during the administration of President George H. W. Bush, Lech Walesa, the leader of Solidarity in the 1980s, became only the third foreign dignitary in history (after Marquis de Lafayette and Winston Churchill) to address a joint session of the US Congress.

Meanwhile, here at home, workers' collective bargaining rights are under attack on several fronts, most notably Ohio and Wisconsin. It is ironic that our government has received many communiqués from Egyptian groups—and from Solidarity in Poland—expressing

support for American workers in their fight for democracy. As Gerald Beyer (Associate Professor of Christian Social Ethics at St. Joseph's University in Philadelphia), writing in *Politics Daily* argues, there are parallels between the Solidarity Movement in Communist Poland and the efforts of public workers in Wisconsin and other states to resist efforts to curtail their collective bargaining rights.[9]

So, what is going on?

Well, there are certainly serious budget crises in most states. However, it must also be mentioned that many states that do not have collective bargaining rights also face budget crises.

And, it is certainly appropriate to challenge responsible union leaders to help solve the serious problems created by pension and health care obligations. This, apparently, has occurred in Wisconsin.

But, as many observers have recognized, in Wisconsin, the real struggle is over power.

This is regrettable.

Understandably, labor and management will often differ at the workplace and over certain policy issues. However, as the prior discussion illustrates, freedom of association and other democratic values that underlie the institution of collective bargaining, need not be partisan.

But, do we have a double standard as to the democratic values that we promote abroad as opposed to here at home?

Professor Fick observes: "Advocates for democracy have cause for concern in the absence of a vibrant, and independent, domestic trade union movement."[10]

So, I hope that our struggles over budget deficits, both in the states and within the federal government, won't destroy the conditions necessary to support the institution of collective bargaining. In the long term, that would greatly harm our democratic values.

Based essentially on the First Amendment right to freedom of association, the institution of collective bargaining has served as part of our legal framework for nearly a century. It affords workers the opportunity for engagement and a meaningful voice to address work-related concerns. It has provided an impetus toward development of a true middle class at a time when the disparity between richer and poorer Americans is becoming even more pronounced. And, for the most part, through the processes of negotiation and arbitration, it has enabled workers, unions, and employers, alike—as President Reagan suggested nearly thirty years ago—to "reconcile differences through peaceful means." In this sense, on balance, it redounds to the benefit of society as a whole.

Given these considerations, do we really want to eliminate, or even curtail, collective bargaining at this time? And, if so, what does that say about the kind of country that we are willing to become?

What can we do?

Well, people who share my concerns need to speak out. It is particularly important to address our young citizens.

Young people need to learn of the role of collective bargaining in creating a system of justice for the workplace.

But, perhaps even more important, young people need to appreciate the institution of collective bargaining as a reflection of freedom and democratic ideals, not only for democracies abroad, but also for ours here at home.

Notes

This article is adapted from a speech given in Dallas on March 4, 2011, to the National Academy of Arbitrators, SW Region.

1. 5 U.S.C. § 7101(a) (2006).
2. B. J. Fick, "Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining a Democratic Society," *WorkingUSA: The journal of Labor and Society* 12, no. 2 (June 2009), 249.
3. A good account of MacArthur's role in post-World War II Japan is contained in William Manchester's book *American Caesar* (New York: Dell, 1978).
4. J. F. Kennedy, quoted in P. Kihss, "Labor Called Key to Nation's Race with Communism," *New York Times*, September 5, 1960, pp. A-1, A-6.
5. R. Reagan, "Address to Members of the British Parliament, June 8, 1982, http://www.reaganfoundation.org/html/reagan06_08_82.shtml (accessed February 23, 2011).
6. http://www.ned.org/ABOUT (accessed Feb. 23, 2011).
7. M. Frost and V. Weber, "Reagan's Crucial Democratic Legacy," *Politico*, February 7, 2011, http://www.politico.com/news/stories/0211/48946.html (accessed February 28, 2011).
8. A. T. Meuse, "Workers' Discontent," *American Chamber of Commerce in Egypt Business Monthly*, February 2011, http://www.amcham.org.eg/resources_publications/publications/business_monthly/issue.asp?sec=5&cim=2&ciy=2011&subsec= (accessed February 24, 2011).
9. G. Beyer, "Poland in 1980 and Wisconsin in 2011: History Rhymes," *Politics Daily*, February 28, 2011, http://www.politicsdaily.com/2011/02/24/Poland-in-1980-and-wisconsin-2011-history-rhymes/ (accessed February 28, 2011).
10. Fick, "Not Just Collective Bargaining," 249.

Ernest DuBester

Ernest DuBester has served as a Member of the Federal Labor Relations Authority since August 2009, after being nominated by President Obama and unanimously confirmed by the US Senate. He also served as Chairman (and Member) of the National Mediation Board during President Clinton's Administration.

U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-Hearing Questionnaire
For the Nomination of Ernest DuBester to be a Member of the
Federal Labor Relations Authority

I. Nomination Process and Conflicts of Interest

1. Did the President give you specific reasons why he nominated you to be a member of the Federal Labor Relations Authority (FLRA)?

   No.

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

   No.

3. Have you made any commitments with respect to the policies and principles you will attempt to implement as a member of the FLRA? If so, what are they, and to whom were the commitments made?

   No.

4. Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.

   No.

II. Background of the Nominee

5. What specific background, experience, and attributes qualify you to be a member of the FLRA?

   Since August 2009, I have served as a FLRA Member. This includes service as Chairman for most of 2013, a challenging year in which sequestration was in effect. During these last eight years, consistent with Section 7105(a)(1) of the Federal Service Labor-Management Relations Statute (Federal Statute), I have helped to "provide leadership in establishing policies and guidance" that would promote an effective and efficient labor-management relations program. And, consistent with Section 7105(a)(2) of the Federal Statute, I have participated in the issuance of over 1500 decisions. Including this service at the FLRA, I now have over 40 years of experience in labor-management relations, working as a public servant, advocate, mediator, arbitrator,

and academic. Moreover, I have experience with all of the basic federal labor laws, including several years with the National Labor Relations Board (NLRB), and several years working with the Railway Labor Act, including almost eight years as Chairman (and Member) of the National Mediation Board (NMB). I have also earned a Masters of Law in Labor Law from Georgetown University Law Center.

For over 25 years, I have worked for the federal government. From 1993-2001, I managed another independent federal agency when I served as Chairman (and Member) of the NMB. During that time, I was responsible for implementing a goal shared by the Federal Statute, namely, to promote the "efficient accomplishment of the operations of the government."

The FLRA, as the Committee knows, adjudicates disputes arising under the Federal Statute, deciding cases regarding the negotiability of collective-bargaining agreement proposals, appeals concerning unfair labor practices and representation petitions, and exceptions to grievance-arbitration awards. And, even before my FLRA experience, I had experience in each of these areas.

I began my career at the NLRB. There, one of my responsibilities was to draft unfair labor practice decisions that applied and interpreted the National Labor Relations Act – the law on which the Federal Statute is modeled. During both my time at the NLRB, as well as during my tenure at the NMB, I drafted and issued representation decisions, similar to the responsibilities of the FLRA.

Regarding negotiability and impasses, I have 20 years of direct collective-bargaining experience working as a mediator and advocate. In addition, I have taught collective-bargaining and negotiation for many years at two area law schools.

With respect to arbitration awards, I worked for several years as an arbitrator. Moreover, I taught arbitration for several years at a law school.

Finally, I have worked with the Leadership, Committee Chairs, and Members – on a bipartisan basis – of both bodies of Congress. While Chair (and Member) of the NMB, moreover, I worked closely with the White House as well as working collegially with certain Cabinet-level agencies.

6. Please describe:

   a. Your leadership and management style.

      In my view, successful leadership and successful management require effective communication, collaboration, transparency, and, ultimately, accountability.

When serving in a leadership position, it is important to me that managers and employees alike know that their voices and input are valued. The sharing of information, and at the earliest possible time, is important. In my experience, this kind of work

environment translates into high morale which, in turn, translates into high performance. This is one of the best ways to achieve the Federal Statute's objectives of an effective and efficient government.

It is noteworthy, moreover, that when I served as Chairman in 2013, and when I served as NMB Chairman in the nineties, I dealt with my colleagues who were part of the leadership team in a similar way, striving always to make decisions based on consensus.

Ultimately, though, whether from a leadership or manager's perspective, I am always prepared to take responsibility, and be held accountable, for all of my decisions.

b. Your experience managing personnel.

I have had the rewarding privilege of serving in a leadership capacity at two independent agencies for over 16 years. At both the NMB, and now the FLRA, my responsibilities have included budget development and implementation, information technology, strategic planning, case management, and human resources matters.

In managing the personnel at these agencies, I have always focused on improving and maximizing performance by sustaining high levels of employee engagement and job satisfaction. One way to achieve this objective is by providing personnel with opportunities for professional development and skills enhancement. For example, at the FLRA, we have provided a variety of training opportunities, including legal writing and conflict resolution classes. We provide employees with regular case-law updates. We have provided cross-office and cross-component details to develop research, writing, and ADR skills. And, we have conducted regular meetings of the staffs of the respective Members (decision-makers within the Authority component) to discuss case processing innovations and other matters relating to job satisfaction.

For the managers, we have made available several training opportunities to improve performance management responsibilities and to improve strategic thinking. This is critical for preparation of future agency leaders and to address the important challenge of succession planning.

c. What is the largest number of people that have worked under you?

About 140.

III. Role of Member, FLRA

7. Please describe your view of the agency's core mission and a member's role in achieving that mission.

As suggested by the Federal Statute's first section (Section 7101), titled "Findings and purpose," the FLRA's mission is to promote stable, constructive labor-management relations by harmonizing collective-bargaining rights with "the requirement of an effective and efficient Government." How the FLRA best achieves this mission is informed by Section 7105 of the Federal Statute, titled, "Powers and duties of the Authority."

Section 7105(a)(1)

Section 7105's first paragraph requires that the FLRA "provide leadership in establishing policies and guidance" for the administration of the federal government's labor-management relations program. This section serves notice of the importance that all federal agency stakeholders have confidence that the FLRA is performing its mission effectively.

Through its casework, as discussed below, the FLRA has developed expertise in the Federal Statute and those processes that best resolve labor-management disputes. For the last eight years, the FLRA's shared policies and guidance have mostly been in the form of various outreach, facilitation, and training activities, including the extensive offering of Alternative Dispute-Resolution (ADR) services.

(a) Training and Education

Over the last eight years, the FLRA has provided various trainings, including web-based training, to tens of thousands of agency representatives, union representatives, and neutrals, in the Federal Sector labor-management community. This includes training on basic statutory rights and responsibilities.

In recent years, moreover, the FLRA launched initiatives to review the processing of both arbitration and negotiability cases. As part of this initiative, arbitration and negotiability training programs were developed. When offered, these training programs are always filled. And, the Authority also developed a Guide to Arbitration under the Statute and a Guide to Negotiability under the Statute, both of which are posted on the FLRA website.

Over the last eight years, the FLRA has also presented several training sessions at events such as the annual Society for Labor and Employment Relations Professionals (SFLERP) symposium and the Federal Dispute Resolution (FDR) training conference. Both are always well-attended by representatives of the Federal Sector's labor-management relations community.

(b) ADR

In recent years, the FLRA has increasingly recognized the many benefits associated with using ADR to resolve workplace disputes. Accordingly, ADR techniques have become integrated into virtually all aspects of case processing.

The FLRA's Collaboration and Alternative Dispute Resolution Office (CADRO) is a primary deliverer of ADR services. Not only has CADRO helped to resolve or narrow disputes in many cases pending before the Authority, but CADRO has also offered "prevention" services which teach the parties techniques for effectively resolving labor-management issues on their own.

It is noteworthy that successful, voluntary ADR efforts can result in significant savings of staff and budgetary resources for the parties using such services. In this sense, the question is not just about the FLRA from an operational standpoint. Rather, the FLRA's provision of effective ADR services can have a beneficial rippling effect throughout the federal government.

Partly in recognition of this, when the FLRA developed its Strategic Plan for 2015-2018, it reaffirmed ADR's important role in its mission performance. In developing the plan, FLRA undertook a comprehensive process that involved internal input from leaders, managers, and employees. And, in addition, the FLRA sought and received significant feedback from external stakeholders. Among other things, twelve federal agencies and seven federal employee unions participated in a series of focus groups which provided input on FLRA services and performance. A consistent message was that ADR helped the parties to develop constructive workplace relationships that promote better mission performance and quality of work life.

Consistent with this message, the FLRA identified "three strategic goals, which support the agency's ability to fulfill its mission." Goal 2 states: "We will promote stability in the federal labor-management community by providing leadership and guidance through [ADR] and education."

In recent weeks, however, questions have arisen as to whether the FLRA will maintain this view going forward. Changes have already occurred in the extent to which, and, the way in which, CADRO will offer ADR services.

This is regrettable in my view. Based on my experience, including many years of experience before my FLRA tenure, support for ADR is, and should be, a nonpartisan, indeed, bipartisan notion.

Section 7105(a)(2)

Section 7105's second paragraph essentially sets forth the Authority's duty to adjudicate four kinds of disputes: cases regarding the negotiability of collective-bargaining agreement proposals, appeals concerning unfair labor practices, appeals concerning representation matters, and exceptions to grievance-arbitration awards. And, it is the FLRA's mission, not only to decide these cases, but to do so in a timely, impartial manner. The FLRA's primary case-adjudication responsibilities, along with

its responsibility to "provide leadership in establishing policies and guidance" related to the federal sector labor-management relations program, constitute the FLRA's core mission.

Member's Role

Each Member of the three-member Authority has the adjudicative responsibility discussed above. During my eight-year tenure as a FLRA Member (and Chair), I have participated in the issuance of over 1500 decisions.

In addition, while the Chairman serves as "chief executive and administrative officer of the Authority" (5 U.S.C. Section 7104 (b)), each member of the Authority shares responsibility for appointment of an Executive Director, regional directors, and administrative law judges (ALJ's) as deemed necessary (5 U.S.C. Section 7105 (d)). While a Member of the FLRA, I have collegially participated in the selection of several executive directors, regional directors, and ALJ's.

Consistent with our statutory directive to "provide leadership...and guidance," while a Member, I have collaborated with my colleagues in supporting the outreach, facilitation, and training activities discussed above. This includes collaborating with my colleagues on the leadership team, as well as with FLRA career employees, in developing our most recent Strategic Plan.

I have spoken many times while a Member to various conferences attended by representatives of the federal sector labor-management community. Particularly at the arbitration and negotiability trainings, I often speak and afford the attendees the opportunity to ask questions. And, given my background and strong interest in our arbitration initiative, as well as my strong relationships with the arbitral community, I have appeared three times at annual meetings of the National Academy of Arbitrators, to actually train those experienced arbitrators on what I characterize as the "unique attributes of federal sector labor-management arbitration."

8. Please describe how you anticipate, if confirmed, working with other FLRA members to promote the agency's core mission.

For the last eight years, all Members and all Presidentials (including General Counsel and FSIP Chair) have had regular meetings. The regular Presidentials meetings are good opportunities to discuss matters that fall within the agency's responsibility to "provide leadership and guidance," as discussed in my response to question 7. The Members' meetings are a good opportunity to discuss matters that are the Members' responsibility relative to case handling and processing, also as discussed briefly in my response to question 7. Hopefully, those meetings will continue.

It is my instinct and style to work collaboratively with all my colleagues. If given the opportunity to do so, which means being given prior notice of intentions, being asked

for my opinion and then afforded the opportunity for discussion, then I will always act collaboratively.

a. Please describe prior work experience that demonstrates your capacity to work with FLRA members of a different party affiliation.

My eight-year tenure with the FLRA, and also my prior eight-year tenure as Chairman (and Member) of the NMB, demonstrate my capacity to work with members of a different party affiliation.

During my FLRA tenure, I have served with two Republican Members. Throughout that entire period, we have always held the Presidentials and Members meetings mentioned above. I had a friendly, collegial relationship with my prior Republican colleague, who previously had served as FLRA Chair. On a couple significant decisions, our offices worked together to achieve similar positions, on which my Democratic colleague had a dissenting view. Also, during the initial days of the Arbitration Initiative, discussed in my response to question 7, my Republican colleague and I attended a meeting together at the National Academy of Arbitrators to seek their input and to discuss our intentions. When he left the FLRA, we were friendly and remain friendly.

My current Republican colleague is serving as Acting Chair. And, the President has nominated him to be Deputy Secretary of Labor. As a gesture of collegial support, I attended his confirmation hearing. While we have disagreements, we, too, are friendly. In recent weeks, moreover, we collaboratively hired a new Executive Director and a new Chief Administrative Law Judge, per my response regarding Member's Role in question 7.

Also noteworthy is my NMB experience. Per statute, the Chair rotates every year. So all Members, Republican and Democratic alike, serve as Chair every third year. As intended, this facilitates a collaborative and collegial working environment. In addition, many of the matters that we handled involved high-profile disputes in the transportation sector with the potential for a large impact on the public. While each Member usually assumed responsibility for a particular case, we always discussed the case with our colleagues before making important decisions. During my NMB tenure, I served with two Republican colleagues. When our respective tenures ended, we were friendly and remain friendly.

Finally, also worth mentioning is my trip to Taiwan in November 2014. I was the only federal official and the head of the delegation. The delegation consisted of eight Labor Secretaries from various states. Four, from the states of Oklahoma, Texas, New Jersey and Utah, were appointed by Republican Governors. While we may have had certain political differences, and some differing policy views, during our trip, which included meetings with many high-ranking officials, we were collegial and friendly.

Both during and after the trip, I had friendly conversations with the entire delegation, Republicans and Democrats alike.

9. Protecting whistleblower confidentiality is of the utmost importance to this Committee.

   a. During your career, how have you addressed whistleblower complaints?

      It is my personal view to encourage employees to bring constructive suggestions forward without fear of reprisal, even aside from the legal "Whistleblower Retaliation" prohibitions contained in 5.U.S.C. Section 2302 (b)(8). However, during my career, I have never personally had to address any whistleblower complaints.

   b. How do you plan to implement policies within the FLRA to encourage employees to bring constructive suggestions forward without the fear of reprisal?

      On all public bulletin boards within the Agency, we have "Whistleblower Retaliation" notices posted which, among other things, advise employees how to disclose concerns or allegations confidentially to the Office of Special Counsel. In addition, on the FLRA's "internal" website, we have a place for employees to post anonymous comments – The Comments/Questions Message Board. This Board is monitored only by the agency's EEO officer.

   c. Do you commit without reservation to work to ensure that any whistleblower within FLRA does not face retaliation?

      Yes.

   d. Do you commit without reservation to take all appropriate action if notified about potential whistleblower retaliation?

      Yes.

10. What are the most significant challenges facing FLRA as an institution? If confirmed, what steps will you take to address these challenges?

    In my view, the most significant challenges facing FLRA as an institution have both an "internal" and "external" dimension.

    Internally, discussed in question 15 below, in recent years the FLRA has scored very well in Best Places to Work rankings. The FLRA has ranked in the Top 5 or higher overall and has even ranked #1 in several categories including employee engagement

and leadership. Going forward, a most significant challenge is how to keep employee morale, employee engagement, and employee performance, on this positive arc.

How best to address this challenge requires adhering to certain policies, many of which are suggested in my responses to Questions 5, 6, and 7. First, employees should feel that their work is important and appreciated and that FLRA leadership is committed to the agency's mission. Second, employees should feel that they have a "voice" and meaningful opportunity to weigh in on matters affecting the FLRA workplace. Third, FLRA's leadership team (and managers) should continue to show concern for employees' professional development by, among other things, providing meaningful training opportunities. And, FLRA's leadership team should also continue to ensure that managers are equipped to handle their supervisory responsibilities, particularly regarding the performance-management system. This includes training in the skill of artfully giving and receiving feedback.

The "external" dimension concerns FLRA stakeholders, particularly representatives from the Federal Sector labor-management community. How best to address this dimension is also fairly basic and also largely addressed in my response to questions 5 and 7. Stakeholders should know that the FLRA continues to support its mission of facilitating stable, constructive labor-management relations which, in turn, enables other agencies to more effectively deal with their own mission-related needs. First, FLRA's leadership team should continue outreach activities, such as appearing at conferences. With such appearances, the "state" of the FLRA, including new directions or policies, can be discussed. Second, the FLRA should continue to post on its website information and resources that help practitioners perform their jobs better. Third, the FLRA should continue to offer training, which can both help stakeholders to perform their jobs better and to improve the quality of labor-management relations within their agencies. And, the FLRA should continue to offer meaningful ADR services, and, in a meaningful way. Affording labor and management representatives the opportunity to resolve more of their disputes voluntarily is one of the best ways to improve the quality of labor-management relations.

IV. Policy Questions

11. What is your assessment of the current state of federal labor-management relations? If you believe that improvements can be made, in what areas should there be improvement and how can this be accomplished?

At any moment in time, I am quite sure that the relationships among various agencies and federal sector unions vary. Even the state of labor-management relations within an agency may not be uniform.

Based on my experience, what I know more certainly is that, when discussing labor-management relations, the key, often overlooked, word is relations. I am a strong

advocate for any mechanisms that place an emphasis on the importance of the relationship, particularly through more effective communication and dialogue.

My extensive experience as a mediator informs and supports this view. Working as a mediator, I have helped to resolve hundreds of collective-bargaining disputes. It was not unusual that, at my initial meeting with the parties, the employer's negotiating committee would tell me something like: "the Union does not care what we have to say. They never listen. So, we don't talk." And, then I would meet with the Union's committee and, what would they tell me? Essentially, the same thing. So, my mediatory role would certainly entail the facilitation of effective communication.

My FLRA experience provides similar lessons. This is reflected by the Best Places to Work Rankings and, particularly by agencies, like the FLRA, that were previously ranked very low and then became ranked very high. It is also reflected by the "best practices" stories that came from the National Council on Labor-Management Relations over the last eight years. Agency and union representatives would come together to tell the story of dramatically improved performance. Almost always, the simple message was: "We didn't talk. And now we do."

For the FLRA, one of the best ways to promote effective communication and dialogue is through the provision of its ADR services.

12. Given your experience as a counsel at the FLRA, do you believe that improvements should be made to the Federal Service Labor-Management Relations statute? If so, what improvements can and should be made?

As a Member (and former Chair), I have always worked to the best of my ability within the existing statutory framework. In my view, it is within the purview of Congress and the Administration to determine what changes, if any, should be made to the Federal Statute. If asked by Congress for my view regarding a possible reform, I would be responsive.

13. The FLRA's 2017 Congressional Budget Justification states that the FLRA "had to overcome significant obstacles in meeting its mission requirements." The Justification notes that in addition to increased case filings in certain agency components, the FLRA experienced a wave of key employee retirements and departures starting in FY 2013 and continuing into FY 2015.

    a. Given your experience as a counsel to the FLRA, what do you believe is driving the increased case filings at certain components?

In the last couple of FY's, I believe that case filings have slightly declined or leveled off. As I recall, the reference to FY 2015 reflected the agency's targeted efforts to reduce a backlog within the Office of the Administrative Law Judges through details and other temporary staff assignments. This was reflected by an

increase in ULP cases decided by the Authority. But again, this was driven by resolving an OALJ backlog and not by a dramatic change in ULP filings by the parties.

b. What issues and factors do you believe most frequently give rise to unfair labor practice complaints?

Of course, various issues and factors give rise to ULPs. Certainly, allegations of "failing to bargain" is a frequent subject of ULP complaints. And, where this occurs, often it can be explained by a poor labor-management relationship. As discussed in prior responses, including question 11, effective communication and dialogue is the best antidote.

c. As unfair labor practices are considered at the Office of General Counsel (OGC) level, do you believe agencies are afforded sufficient information concerning the complaint? Are agencies provided a sufficient opportunity to weigh-in with OGC concerning a given complaint?

Given that the OGC's investigative and prosecutorial roles are distinct from the Authority's quasi-judicial role, there is a necessary operational wall between the two components. This question is a matter for the OGC and better asked of the General Counsel.

d. Are there other obstacles besides increased caseloads and staff departures that hamper the FLRA's ability to fulfil its mission? If so, please identify them and explain what you believe should be done to address them.

There may be various obstacles at a particular moment in time. Even in an environment of "doing more with less," having adequate resources through the budget and appropriations process is always a concern. I like to say that, while we are a small agency, we have a large mission. Our work can have positive, rippling effects throughout the federal government.

14. Are there improvements to the FLRA's internal review process that you believe can be improved upon to ensure fewer cases ultimately are overturned by the courts, and that all evidence is properly considered in a given case?

For context, over time the FLRA is upheld by the courts in about three-fourths of cases that are appealed. Given the FLRA's keen interest in being upheld, a thorough internal review is always performed. In an attempt to improve this percentage, perhaps a more formalized internal review, to ensure that all applicable court precedent is considered, may be in order

15. In the 2016 *Best Places to Work* rankings complied by the Partnership for Public Service, and based on the data collected in the Federal Human Capital Survey, the FLRA

ranked 5th out of 29 small federal agencies that submitted data. This is a significant improvement over 2009 when it ranked last. The FLRA's 2016 Index Score is down five points compared to 2015, however.

a. What steps will you take, if confirmed, to maintain progress made by the FLRA in recent years, and to further improve upon employee morale?

As the question suggests, in my first full-year at the FLRA, we went from last to most improved in the Best Places to Work Rankings and have experienced continued success since then. For the last three years, (2014-2016), the FLRA has ranked in the top 5 overall, and the top 3 in the categories of effective leadership and teamwork, ranking #1 in Leadership and Teamwork in 2015 and 2016.

This success story began in 2009 when a new leadership team committed to focusing on employee morale. The leadership team recognized that meeting human capital objectives has a direct relationship to organizational performance. As many of my prior responses suggest, addressing employee needs involves fairly basic activities, such as investing in our employees through training, including leadership training, and collaborating with our employees in developing new initiatives that improve our performance and better serve our customers. And, it requires a commitment of leadership to manage the agency with transparency, accountability, and employee engagement as core values.

In my view, if our new leadership team is to maintain progress and continue to improve employee morale, then it will need to embrace these values.

V. Relations with Congress

16. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Yes.

17. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed?

Yes, assuming such subordinate official or employee are under my supervision.

18. Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed?

Yes.

VI. Assistance

19. Are these answers your own? Have you consulted with the FLRA or any other interested parties? If so, please indicate which entities.

    Yes. These answers are my own.

U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-Hearing Questionnaire
For the Nomination of Ernest Dubester to be a Member of the
Federal Labor Relations Authority
Minority

I. Nomination Process and Conflicts of Interest

1. Has the President or his staff asked you to sign a confidentiality or non-disclosure agreement?

   No.

2. Has the President of his staff asked you to pledge loyalty to the President or the Administration?

   No.

3. During your tenure have you asked any federal employee or potential hire to pledge loyalty to the President, Administration or any other government official?

   No.

II. Background of Nominee

4. Do you seek out dissenting views and how do you encourage constructive critical dialogue with subordinates?

   Yes. Throughout my entire career I have always encouraged and actively sought to create an environment in which subordinates could freely express their views. A simple but effective way to encourage constructive dialogue with subordinates is to practice the art of "active listening." If you want subordinates to listen to you, and even follow you, then listen to them first. Ask subordinates, or even peers, what do you think? People really appreciate it when they are asked their views. And, it is regrettable that leaders, or managers, do not seek the input of subordinates more frequently.

a. Please give examples of times in your career when a subordinate disagreed with you and aggressively advocated their position.

In my current position as a FLRA Member, I have personal staff which includes a Chief Counsel and a Deputy Chief Counsel (my staff's management team). Both of them frequently offer advice on cases and, occasionally on policy-related matters. Sometimes their advice is contrary to my inclinations and they may disagree between themselves. And, sometimes they change my mind. In any event, they are both comfortable in knowing that they can freely express their opinions at least until the point I make it clear that I have reached a final decision.

Another example comes from my prior experience as NMB Chairman (and Member). I often intervened and took responsibility for particular collective-bargaining disputes. It was customary that a staff mediator, a subordinate, would work with me. Staff mediators from time to time expressed views disagreeing with my thoughts on how best to proceed. The mediators understood that I welcomed their input and often accepted their advice. But, once I decided on a course of action, it was understood that their role was to assist me in effectuating the plan.

5. Please give examples of times in your career when you disagreed with your superiors and aggressively advocated your position. Were you ever successful?

There are certainly times in my career when I disagreed with my supervisors. Perhaps the best examples again come from my experiences as NMB Chairman (and Member). During my NMB tenure, I was involved in many high profile collective-bargaining disputes. Some had a potential national impact, or at least the potential to affect a significant portion of the country. Under the federal labor law that applies to the airline and railroad industries, the NMB has statutory discretion to control when, if ever, the parties can resort to economic weapons (strike, lockout, unilateral implementation). Moreover, if certain conditions are met, the NMB can request that the President create an Emergency Board (PEB) to investigate and make recommendations. During the existence of a PEB, the status quo remains in effect. During these disputes, I was in regular contact with the White House. Such contacts included my report and recommendations as to how best to proceed. The White House often followed my advice; but, not always.

6. Please list and describe examples of when you made politically difficult choices that you thought were in the best interest of the country.

I have made many difficult choices during my career. And, that would certainly apply to the 16-plus years in which I have held leadership positions. But, I would not characterize those difficult choices as "political." Perhaps the situations described in response to question 5 would apply.

7. What would you consider your greatest successes as a leader?

I would like to think that I have had many successes as a leader. When serving in a leadership capacity, my highest priority is to engage and motivate employees. Considering the question in that context, I would have to say that being part of a FLRA leadership team that was ranked #1 in Leadership in 2015 and 2016 in the Best Places to Work rankings is certainly one of the most gratifying successes.

8. What would you consider your greatest failure as a leader? What lessons did you take away from that experience?

Given your authority as a leader, there are often occasions when you feel it necessary to act quickly. During my years serving in a leadership capacity, I know there were a few occasions in which I made decisions to implement new policies or standards without seeking the prior input of employees. Almost always, the lesson learned from that experience is that it is usually worth taking the extra time to seek employee input. First, investing employees in a decision, even if you do not follow their input or advice, is good for morale, which translates into better performance and productivity. Second, involving employees in a collaborative decision-making process enhances the likelihood that the new decision will be accepted and enduring, without much pushback or conflict.

III. Policy Questions

9. In October 2017, FLRA summarized what they consider to the most serious management and performance challenges facing the FLRA in FY 2018. These management challenges include: (1) Information Technology Security; and (2) Proper Handling of Records.

   a. If confirmed, how will you ensure that FLRA is vigilant in establishing an environment to monitor potential Information Technology (IT) risks, threats, and vulnerabilities?

      Over the past three years, our IT staff has taken huge strides in implementing our monitoring program and has become much more pro-active regarding IT security. If confirmed, I will advocate that adequate budgetary resources be committed to the IT department to deal with this important concern.

   b. If confirmed, how will you promote and ensure proper handling of records (hard copy and electronic) by staff, and verify that various authorities and capabilities are properly assigned, documented, managed and monitored?

Our records need to be fully electronic by 2019. We are in the process of updating our records management policy which, regrettably, was last updated in 1986. As part of that update, we are reviewing our records schedule (how long to keep various records). And, we are reviewing our records by groups, rather than individually. This is likely to improve accuracy and efficiency.

10. Former FLRA member Pizzella, in his dissents and concurrences, frequently criticized union parties to a dispute for pursuing positions or remedies that he viewed as wasting government resources, costing too much, being ill-motivated, or at odds with common sense—factors not grounded in the law.

    a. What is your view on deciding cases based on the facts as established in the record, and the law (the statute and precedent)—as opposed to independent views of right and wrong, how the government ought to work, and/or the role of unions?

       During my eight-year tenure at the FLRA, I have participated in over 1500 decisions. In making these decisions, I apply pertinent principles of law to the particular facts of each case.

    b. If government efficiency and effectiveness are legitimate considerations in assessing the merits of a dispute, what role do you believe conduct plays in an agency's collective-bargaining, grievance procedure, and efficiency?

       To the extent that conduct implicates particular principles of law, then it should be considered.

11. Please describe what impact proposed federal budget cuts, if implemented, will have to FLRA's ability to provide training to federal agencies and unions in understanding their rights and responsibilities under the Civil Service Reform Act and other relevant authorities?

    Budgetary matters, and certainly budget cuts, involve priorities and choices. In my view, outreach and training is a very important way in which the FLRA promotes and maintains stakeholder confidence in mission performance. When I was Chairman in 2013, the first year of sequestration, the possibility of having to cut training was certainly on the table. At the time, the FLRA had several unfilled vacancies. In collaboration with our leadership team, I decided that training was so important that we would not make cuts. We were able to avoid such cuts by delaying, and then staggering, the schedule for filling those vacancies.

12. Please describe what impact proposed budget federal budget cuts, if implemented, will have to federal agencies' ability to train managers and employees regarding their rights and responsibilities under the Civil Service Reform Act and other relevant authorities?

It is noteworthy that the FLRA's various training programs (basic statutory rights, arbitration training, negotiability training, and training in problem – solving techniques) are free for federal government employees. So, this is a good example of the FLRA being a small agency with a large mission and impact. If budget cuts force the FLRA to cut back on external trainings, there will be adverse rippling effects throughout the federal government. The quality of other agencies' labor-management relations will be impaired.

13. Please describe any previous experience—in the public or private sector—with handling whistleblower complaints, and what steps you took to ensure those individuals did not face retaliation and that their claims were thoroughly investigated?

    Please see my response to the Majority's question 9 above.

14. If confirmed, how will you ensure that whistleblower complaints are properly investigated?

    Please see my response to the Majority's question 9 above.

IV. Accountability

15. During your career as a federal employee, have you ever used a personal email account or device to conduct official government business?

    No.

    a. If so, please describe your general practice for doing so, and what specific steps you have taken to ensure that federal records created using personal devices and accounts were preserved.

16. During your career, has your conduct as a federal employee ever been subject to an Investigation or Audit by an Inspector General? If so, please describe.

    No.

17. During your career, has your conduct as a federal employee ever been subject to an investigation by the Office of Special Counsel? If so, please describe.

    No.

18. During your career as a federal employee, have you ever declined to implement recommendations made by the Office of Inspector General, the Office of Government Ethics, the Office of Special Counsel or the Government Accountability Office? If so, please describe.

    No.

19. If confirmed, do you pledge to implement recommendations made by the Office of Inspector General, the Office of Government Ethics, the Office of Special Counsel and the Government Accountability Office?

Yes.

V. Relations with Congress and the Public

20. If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?

By responding immediately.

21. If confirmed, do you agree without reservation to reply to any reasonable request for information from the Ranking Member of any duly constituted committee of the Congress?

Yes.

22. If confirmed, do you agree without reservation to reply to any reasonable request for information from members of Congress?

Yes.

23. If confirmed, do you commit to take all reasonable steps to ensure that you and your agency comply with deadlines established for requested information?

Yes.

24. If confirmed, do you commit to protect subordinate officials or employees from reprisal or retaliation for any testimony, briefings or communications with members of Congress?

Yes.

25. If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Office of Inspector General, Office of Government Ethics, the Office of Special Counsel, the Government Accountability Office (GAO) and the Congressional Research Service?

Yes.

26. If confirmed, will you agree to work with representatives from this Committee and the GAO to promptly implement recommendations for improving [agency's] operations and effectiveness?

    If confirmed, I agree to work with representatives from this committee and the GAO to promptly evaluate, and then implement, recommendations that would improve operations and effectiveness.

27. If confirmed, will you direct your staff to fully and promptly respond to Freedom of Information Act requests submitted by the American people?

    Yes.

28. If confirmed, will you ensure that political appointees are not inappropriately involved in the review and release of Freedom of Information Act requests?

    Yes.

VI. Assistance

29. Are these answers your own? Have you consulted with GSA or any other interested parties? If so, please indicate which entities.

    These answers are my own.

I, Ernest DuBester, hereby state that I have read the foregoing Pre-Hearing Questionnaire and Supplemental Questionnaires and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Ernest DuBester
(Signature)

This 27th day of October, 2017

DISTRICT OF COLUMBIA: SS
SUBSCRIBED AND SWORN TO BEFORE ME
THIS 27th DAY OF Oct, 2017
NOTARY PUBLIC
My Commission Expires 2020

Senator Heidi Heitkamp
Post-Hearing Questions for the Record
Submitted to Hon. Ernest W. DuBester

Nominations of Hon. Ernest W. DuBester, Hon. Colleen D. Kiko, and James T. Abbott to be Members, Federal Labor Relations Authority
Tuesday, November 7, 2017

1. There is an enormous backlog of cases at FLRA. Please explain what steps you will take to address this and what will you do to foster collaboration among all components of the agency?

    - What do you consider the role of the FLRA CG Regions to be in the process?

    At the hearing, there appeared to be confusion regarding the nature and extent of the current backlog of cases at the FLRA. There also appeared to be a misunderstanding about the difference between a backlog of cases pending before the three-member decisional component, called the Authority, and a backlog of pending charges that arise within the Office of General Counsel. These charges are filed with our various Regional Offices. And, the General Counsel's role is to decide whether a charge warrants the issuance of a complaint.

    I do not think it is accurate to say that the current backlog of cases is "enormous." Within the Authority component, there are currently about 45 cases awaiting decision. Because the Authority currently lacks the full complement of three Members, when there is a split between the two sitting Members, those cases go into abeyance. In all of these pending cases, recommendations have been drafted. So, as soon as there is a full complement of Members, deliberation can begin immediately. I am confident that this rather small backlog can be eliminated within a few months.

    Within the OGC, there is currently no backlog. We have had an Acting General Counsel who is disposing of all charges filed. It is noteworthy, however, that the Acting GC's statutory authority ends on November 16, absent a GC nominee. So, hopefully, there will be a GC nominee soon.

    The current situation stands in stark contrast to that which existed in August of 2009, when I began my tenure as a Member, and, on the same day, as a new GC. At that time, there was an "enormous" backlog of over 400 cases. With the implementation of a multi-year corrective action plan, that backlog was eliminated by the end of FY 2012. It is noteworthy, moreover, that at the end of FY 2012, not only had we eliminated the huge backlog of old cases, we also did not have any overage cases among the "new" cases filed after August 2009. The GC had also eliminated the backlog of a comparable number of pending charges even before the end of FY 2012.

At the beginning of 2013, the Authority again lost its quorum. My Republican colleague left the FLRA. And, my Democratic colleague's term expired. As Chairman, but sole Member, I was unable to issue decisions and a backlog of about 150 cases developed by the end of FY 2013. This backlog was eliminated by the end of FY 2015.

2. Throughout your interviews you have made mention of the importance of training and education. You have also made mention of Alternative Dispute Resolution (ADR) and its use in the labor relations context.

   - Do you feel that alternative methods of resolution should become required actions attempted prior to bringing a claim before FLRA? Please explain in your answer how the efficiency of the Authority will be affected.

At yesterday's hearing, at the prior Staff interview, and in responses to my questionnaire, I have stressed the importance of offering, and using where appropriate, ADR services to help the Federal Sector's labor-management community improve their labor relations programs. As mentioned, this is consistent with the FLRA's responsibility under Section 7105(a)(1), to "provide leadership and guidance." And, as also mentioned, in the FLRA's most recent Strategic Plan, which is supposed to be in effect from 2015-2018, the FLRA reaffirmed the importance of ADR to the FLRA's mission by stating in Strategic Goal Two (of only three goals): "We will promote stability in the Federal labor-management community by providing leadership and guidance through [ADR] and education."

As I mentioned in my response to Question 7 (of the Committee's questionnaire), "successful, voluntary ADR efforts can result in significant savings of staff and budgetary resources" for those in the labor-management community who use such services. That is one reason why "FLRA's provision of effective ADR services can have a beneficial rippling effect throughout the Federal government." And, this includes training in matters such as effective use of problem-solving techniques, building teamwork, and best practices for improving relationships. Not only do these subjects have a bearing on the FLRA's mission, they are central to its responsibility of helping the labor-management community to improve its labor-management <u>relations</u> program (emphasis added).

That is why it is regrettable, in my view, that in recent months, the work of our Collaboration and ADR Office (CADRO) has been cut back. Outreach and training have almost been eliminated. And, the nature and extent to which CADRO is allowed to intervene in existing disputes, has been significantly curtailed. Based on my prior experience, I would find it hard to believe that a majority of this Committee, both Republicans and Democrats alike, would approve of these cutbacks.

Notwithstanding the foregoing, I would tend to oppose that ADR becomes "required" before allowing matters to be brought before the FLRA. Such a requirement undermines the important "volitional" nature of ADR in the labor relations context. With collective bargaining, for example, I think it is important that the representatives from the labor-

management community truly feel that they are the "decision-makers" even with the assistance of an intervening mediator. If agreements reached are to be enduring, it is important that the parties with the collective-bargaining relationship feel truly invested in the outcome and not feel that they were "compelled" to reach such an outcome.

By the same token, that is why the FLRA's outreach and training is so important. For those in the labor-management community who do not have experience with ADR, the natural, if not automatic, inclination is to "dispute" through litigation and adjudication.

Before I conclude, I think it is worthwhile to share that there are examples in the labor relations context where ADR-type activity is required before the exercise of certain rights.

For example, under the Railway Labor Act, the oldest of our three Federal labor-management relations laws with jurisdiction over the airline and railroad industries, the parties are required to engage in "mandatory mediation," often protracted in nature, before an impasse is declared. And, even under Section 7119 of our Federal Statute, "agencies and exclusive representatives" are required to use the services of the Federal Mediation and Conciliation Service before bringing a collective bargaining dispute to the FLRA's Federal Services Impasses Panel (FSIP). And, even then, the FSIP may use a ADR process, such as the FSIP from 2009-2016 which used exclusively the ADR "med-arb" process, to resolve collective bargaining disputes in the Federal sector. In this sense, Section 7119 allows for a "double dose" of ADR before disputes are resolved.

OPENING STATEMENT OF JAMES T. ABBOTT OF VIRGINIA

TO BE A MEMBER OF THE FEDERAL LABOR RELATIONS AUTHORITY

BEFORE THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

NOVEMBER 7, 2017

Good morning. Mr. Chairman, Members of the Committee, Senator Lankford and Senator Heitkamp. I want to thank you for conducting this hearing at a time when so many other pressing issues are competing for your time and attention. I would also like to thank your Committee staff for the outstanding support which they provided to me as I prepared for this hearing. I appreciate your warm reception.

I am honored and humbled to have been nominated by President Trump to become a Member of the Federal Labor Relations Authority. If confirmed, it will be, for me, the highest privilege of my professional life.

With me today are my husband of 21 years, Daniel Gri, and our sons, Caleb and Alfred who are the pride of my life. That Daniel is able to join me today is nothing short of a miracle. Just four months ago, he was on life support following a serious automobile accident. This is his first public outing since that accident and is testament to his indomitable spirit. I rely upon that spirit every day. My sister and brother-in-law, Linda and Don Walde, and my niece, Heather Legore, are here as well.

My professional career has spanned 34 years, 33 devoted to public service. I learned about service and hard work from my parents and grandparents. Grandfather Whipple worked as a farmhand in Kansas in the 1910s, until he saved enough money to buy his own land. His farm survived the Great Depression through hard work and determination. He continued to farm well into his 80s. Grandfather Abbott singlehandedly operated a grist mill. He hired helpers only when, in his words, "I could pay a fair wage for a fair day of work." My mother, a nurse, and my father, a minister, served as missionaries in Congo where they built churches, to serve not just as centers of worship but to also serve as local medical clinics and schools. But, for me, the ultimate example of public service was my brother, Denis Abbott, who gave his life in service to his country in Pleiku, Vietnam.

My 18 years as a labor and employment attorney with Department of Defense activities throughout the country, my four years as Deputy General Counsel for the Office of Compliance, and my ten years as Chief Counsel to three Members (and Chairmen) of the FLRA have prepared me to immediately assume all of the responsibilities of this important position.

Before joining the FLRA as Chief Counsel, I sat at dozens of bargaining tables negotiating local and nationwide collective-bargaining agreements. Through those experiences, I learned firsthand how differences can be constructively resolved but also how they can end up in dispute. I have represented agencies before each regional office of the FLRA's Office of General Counsel, and I have litigated cases before the Merit Systems Protection Board, the Equal Employment Opportunity Commission, and Federal Court. I have witnessed the dynamics of labor relations at work between first-line supervisors

and hard-working union stewards in a variety of settings, such as work floors where artillery equipment and attack helicopters are serviced and repaired. I have met with employees and union stewards at sites where the working conditions were difficult, even dangerous. I have had to tell first-line supervisors and generals that they were wrong and what they must do to comply with the Statute. Therefore, I understand why the protections of our Statute are so important to Federal employees.

I believe that we can all agree that the Federal workforce in 2017 looks very different than it did in 1978 when our Statute was enacted. For example, advances in technology have dramatically changed how Federal agencies carry out their day-to-day business. In 1978, computers were rare; email did not exist; and enemies of the United States did not have the means to instantaneously compromise entire swaths of records. In this changed environment, the Authority must clearly define what matters "affect working conditions" and those which constitute negotiable "conditions of employment."

The Statute mandates that the Authority provide leadership to the labor-management relations community. But the Authority has been reluctant to address these important questions. In the past two years, the Authority's majority has dismissed part or all of the arguments raised by parties in 52% of its published decisions and those dismissals have impacted the outcome in one-fourth of those cases. It is difficult for the Authority to remain relevant and to provide leadership when it goes out of its way to avoid addressing difficult questions.

In other areas, though, the Authority has gone too far. Five times since 2010, the Court of Appeals for the District of Columbia Circuit has reversed the Authority for going beyond the parameters of our Statute to interpret other statutes that do not fall within our area of expertise or power. In one notable example, the Court scolded the majority when it took upon itself to determine how much discretion Title 10 of the United States Code gave to the Secretary of the Air Force, a statute that concerns military preparedness. To remain relevant, the Authority must heed the cautions of Federal Courts.

To that end, I pledge that, if I am confirmed, I will adjudicate all matters fairly and impartially, enforce the Statute as it is written, and respect judicial precedent. I look forward to working with my colleagues to ensure that the FLRA remains relevant and to drafting decisions that can be understood by laypersons as well as attorneys.

It is my privilege to appear before you today. I am happy to answer any questions. Thank you.

REDACTED

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

September 8, 2017

The Honorable Ron Johnson
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by James T. Abbott, who has been nominated by President Trump for the position of Member, Federal Labor Relations Authority.

We have reviewed the report and have obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

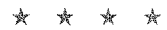
Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

DAVID APOL Digitally signed by DAVID APOL
DN: c=US, o=U.S. Government, ou=Office of Government Ethics, cn=DAVID APOL, 0.9.2342.19200300.100.1.1=0349700209010870
Date: 2017.09.08 14:15:51 -04'00'

David J. Apol
Acting Director and General Counsel

Enclosures REDACTED



September 6, 2017

Fred B. Jacob
Solicitor and Designated Agency Ethics Official
Federal Labor Relations Authority
1400 K St., NW
Washington, DC 20424

Dear Mr. Jacob:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Member, Federal Labor Relations Authority.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

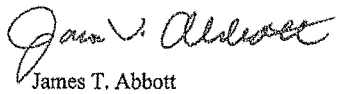
I will meet in person with you during the first week of my service in the position of Member in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will also document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), or obligations of the United States.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order no. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,



James T. Abbott

REDACTED

HSGAC BIOGRAPHICAL QUESTIONS FOR EXECUTIVE NOMINEES

1. Basic Biographical Information

Please provide the following information.

Position to Which You Have Been Nominated	
Name of Position	**Date of Nomination**
Member, Federal Labor Relations Authority	

Current Legal Name			
First Name	**Middle Name**	**Last Name**	**Suffix**
James	**Thomas**	**Abbott**	

Addresses					
Residential Address (do not include street address)			**Office Address** (include street address)		
[redacted]			**Street:** **1400 K Street, NW**		
City: **Oakton**	**State:** **VA**	**Zip:** **22124**	**City:** **Washington**	**State:** **DC**	**Zip:** **22124**

Other Names Used						
First Name	**Middle Name**	**Last Name**	**Suffix**	Check if Maiden Name	**Name Used From** (Month/Year) (Check box if estimate)	**Name Used To** (Month/Year) (Check box if estimate)
N/A					Est ☐	Est ☐
					Est ☐	Est ☐

Birth Year and Place	
Year of Birth (Do not include month and day.)	Place of Birth
1958	Phillipsburg, Pennsylvania

Marital Status					
Check All That Describe Your Current Situation:					
Never Married	Married	Separated	Annulled	Divorced	Widowed
☐	X	☐	☐	☐	☐

Spouse's Name (current spouse only)			
Spouse's First Name	Spouse's Middle Name	Spouse's Last Name	Spouse's Suffix
Daniel	William	Gri	

Spouse's Other Names Used (current spouse only)						
First Name	Middle Name	Last Name	Suffix	Check if Maiden Name	Name Used From (Month/Year) (Check box if estimate)	Name Used To (Month/Year) (Check box if estimate)
N/A					Est ☐	Est ☐
					Est ☐	Est ☐

Children's Names (if over 18)			
First Name	**Middle Name**	**Last Name**	**Suffix**
Caleb	Nathanial	Gri-Abbott	

2. Education

List all post-secondary schools attended.

Name of School	Type of School (vocational/technical/trade school, college/university/military college, correspondence/distance/extension/online school)	Date Began School (month/year) (check box if estimate)	Date Ended School (month/year) (check box if estimate) (check "present" box if still in school)	Degree	Date Awarded
Temple University Beasley School of Law	School of Law	08-1980 Est ☐	05/1983 Est ☐ Present ☐	JD	05/1983
Malone College (now University)	College/University	09/1976 Est ☐	05/1980 Est ☐ Present ☐	BA	05/1980
		Est ☐	Est ☐ Present ☐		
		Est ☐	Est ☐ Present ☐		

3. Employment

(A) List all of your employment activities, including unemployment and self-employment. If the employment activity was military duty, list separate employment activity periods to show each change of military duty station. Do not list employment before your 18th birthday unless to provide a minimum of two years of employment history.

Type of Employment (Active Military Duty Station, National Guard/Reserve, USPHS Commissioned Corps, Other Federal employment, State Government (Non-Federal Employment), Self-employment, Unemployment, Federal Contractor, Non-Government Employment (excluding self-employment), Other	Name of Your Employer/ Assigned Duty Station	Most Recent Position Title/Rank	Location (City and State only)	Date Employment Began (month/year) (check box if estimate)	Date Employment Ended (month/year) (check box if estimate) (check "present" box if still employed)
Other Federal	Federal Labor Relations Authority	Chief Counsel to the Chairman	Washington, DC	9/2007	Present
Other Federal	Congressional Office of Compliance	Deputy General Counsel	Washington, DC	10/04	9/07
Other Federal	Defense Contract Management Agency	Senior Associate District Counsel, Personnel and Ethics	Carson, CA	8/96	10/04
Other Federal	Corpus Christi Army Depot	Chief Counsel	Corpus Christi, TX	1/90	8/96
Other Federal	U.S. Army Depot Systems Command	Labor and Ethics Counsel	Chambersburg, PA	8/96	1/90
Non-Govt Employment	Nitterhouse Corporation	Staff Attorney	Chambersburg, PA	3/85	5/86
County Government	39th Judicial District Court of Common Pleas	Judicial Law Clerk to the President Judge	Chambersburg, PA	8/83	2/85

(B) List any advisory, consultative, honorary or other part-time service or positions with federal, state, or local governments, not listed elsewhere.

Name of Government Entity	Name of Position	Date Service Began (month/year) (check box if estimate)	Date Service Ended (month/year) (check box if estimate) (check "present" box if still serving)
N/A		Est ☐	Est ☐ Present ☐
		Est ☐	Est ☐ Present ☐
		Est ☐	Est ☐ Present ☐

4. Potential Conflict of Interest

(A) Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

None.

(B) Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.

None.

5. Honors and Awards

List all scholarships, fellowships, honorary degrees, civilian service citations, military medals, academic or professional honors, honorary society memberships and any other special recognition for outstanding service or achievement.

Commander's Award for Civilian Service – Department of the Army (8/96)

Meritorious Civilian Service Award – U.S. Defense Contract Management Agency (8/2002)

6. Memberships

List all memberships that you have held in professional, social, business, fraternal, scholarly, civic, or charitable organizations in the last 10 years.

Unless relevant to your nomination, you do NOT need to include memberships in charitable organizations available to the public as a result of a tax deductible donation of $1,000 or less, Parent-Teacher Associations or other organizations connected to schools attended by your children, athletic clubs or teams, automobile support organizations (such as AAA), discounts clubs (such as Groupon or Sam's Club), or affinity memberships/consumer clubs (such as frequent flyer memberships).

Name of Organization	Dates of Your Membership (You may approximate.)	Position(s) Held
Church of the Holy Comforter, Vienna, Virginia	7/2016 – Present	Stewardship Committee, Lay Liturgist
Senior Executives Association	8/2010 – Present	Member; Mentor in SEA's mentoring program with Young Government Leaders Association
M3 for Veterans	5/2017	December 2017 Event Planning Committee
Log Cabin Republicans, DC	2005 – Present	Member; Board of Directors (2014-16)
Log Cabin Republicans, Northern Virginia	2005 – Present	Member; Board of Directors (@2009-10)
LGBT Bar Association of DC	(@2012 – Present)	Member
Federal GLOBE	(2004-Present)	Member; Board of Directors (2008-Present)
Foundry United Methodist Church, Washington, DC	(2004-2015)	Member; Governance Board (@2012-15)
Society of Federal Labor & Employee Professionals	(2007-Present)	Member
Dulles Triangles	(2005-2015)	Member
D.C. Partners	(@2007-11)	Member

7. Political Activity

(A) Have you ever been a candidate for or been elected or appointed to a political office?

No.

Name of Office	Elected/Appointed/ Candidate Only	Year(s) Election Held or Appointment Made	Term of Service (if applicable)

(B) List any offices held in or services rendered to a political party or election committee during the last ten years that you have not listed elsewhere.

None.

Name of Party/Election Committee	Office/Services Rendered	Responsibilities	Dates of Service

(C) Itemize all individual political contributions of $200 or more that you have made in the past five years to any individual, campaign organization, political party, political action committee, or similar entity. Please list each individual contribution and not the total amount contributed to the person or entity during the year.

Name of Recipient	Amount	Year of Contribution
Donald J. Trump	$100.00	10/2016
Donald J. Trump	$100.00	10/2016
Donald J. Trump	$250.00	10/2016
Donald J. Trump	$250.00	9/2016
Donald J. Trump	$250.00	9/2016
Barbara Comstock for Congress	$100.00	9/2016
Donald J. Trump	$100	8/2016
Donald J. Trump	$150.00	8/2016
Donald J. Trump	$150.00	8/2016
Donald J. Trump	$100.00	8/2016
Log Cabin Republicans	$224.00	8/2016
Donald J. Trump	$250.00	8/2016
Donald J. Trump	$250.00	8/2016
Donald J. Trump	$150.00	8/2016

Log Cabin Republicans	$220.00	7/2016
Donald J. Trump	$200.00	7/2016
Trump for President	$100.00	5/2016
Randy Forbes for Congress	$50.00	5/2016
Log Cabin Republicans	$10.00	5/2016
Trump for President	$50.00	5/2016
Randy Forbes for Congress	$50.00	4/2016
Cruz for President	$50.00	3/2016
Trump for President	$50.00	2/2106
Rubio for President	$25.00	2/2016
Cruz for President	$25.00	1/2016
Carly Fiorina for President	$25.00	1/2016
Cruz for President	$25.00	12/2015
Carly Fiorina for President	$25.00	12/2015
Cruz for President	$25.00	11/2015
Carly Fiorina for President	$25.00	11/2015
Carly Fiorina for President	$50.00	9/2015

Cruz for President	$100.00	4/2016
Friends of Scott Walker	$100.00	1/2016
Friends of Scott Walker	$100.00	12/2015
Friends of Scott Walker	$100.00	11/2015
Friends of Scott Walker	$100.00	10/2015
Friends of Scott Walker	$100.00	9/2015
Friends of Scott Walker	$100.00	8/2015
Friends of Scott Walker	$100.00	7/2015
Friends of Scott Walker	$100.00	6/2015
Friends of Scott Walker	$100.00	5/2015
Friends of Scott Walker	$100.00	4/2015
Friends of Scott Walker	$100.00	3/2015
Fairfax County Republican Committee	$85.00	2/2013
Defend our Nation PAC	$250.00	12/2015
Jeannemarie Devolites Davis for Lieutenant Governor	$100.00	2/2013
GOP Proud	$100.00	1/2013
Log Cabin Republicans	$50.00	1/2013

Log Cabin Republicans	$100.00	11/2012
Log Cabin Republicans	$100.00	10/2012
Log Cabin Republicans	$700.00	9/2012
Log Cabin Republicans	$100.00	8/2012
Log Cabin Republicans	$100.00	7/2012
Log Cabin Republicans	$100.00	6/2012
Romney for President	$2000.00	8/2012

8. Publications and Speeches

(A) List the titles, publishers and dates of books, articles, reports or other published materials that you have written, including articles published on the Internet. Please provide the Committee with copies of all listed publications. In lieu of hard copies, electronic copies can be provided via e-mail or other digital format.

None.

Title	Publisher	Date(s) of Publication

(B) List any formal speeches you have delivered during the last five years and provide the Committee with copies of those speeches relevant to the position for which you have been nominated. Include any testimony to Congress or any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.

None.

Title/Topic	Place/Audience	Date(s) of Speech

(C) List all speeches and testimony you have delivered in the past ten years, except for those the text of which you are providing to the Committee.

None.

Title	Place/Audience	Date(s) of Speech

9. Criminal History

Since (and including) your 18th birthday, has any of the following happened?

No.

- Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Exclude citations involving traffic infractions where the fine was less than $300 and did not include alcohol or drugs.) No.
- Have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official? No.
- Have you been charged, convicted, or sentenced of a crime in any court? No.
- Have you been or are you currently on probation or parole? No.
- Are you currently on trial or awaiting a trial on criminal charges? No.
- To your knowledge, have you ever been the subject or target of a federal, state or local criminal investigation? No.

If the answer to any of the questions above is yes, please answer the questions below for each criminal event (citation, arrest, investigation, etc.). If the event was an investigation, where the question below asks for information about the offense, please offer information about the offense under investigation (if known).

N/A.

A) Date of offense:

a. Is this an estimate (Yes/No):

B) Description of the specific nature of the offense:

C) Did the offense involve any of the following?
1) Domestic violence or a crime of violence (such as battery or assault) against your child, dependent, cohabitant, spouse, former spouse, or someone with whom you share a child in common: **Yes / No**
2) Firearms or explosives: **Yes / No**
3) Alcohol or drugs: **Yes / No**

D) Location where the offense occurred (city, county, state, zip code, country):

E) Were you arrested, summoned, cited or did you receive a ticket to appear as a result of this offense by any police officer, sheriff, marshal or any other type of law enforcement official: **Yes / No**

1) Name of the law enforcement agency that arrested/cited/summoned you:

2) Location of the law enforcement agency (city, county, state, zip code, country):

F) As a result of this offense were you charged, convicted, currently awaiting trial, and/or ordered to appear in court in a criminal proceeding against you: **Yes / No**

1) If yes, provide the name of the court and the location of the court (city, county, state, zip code, country):

2) If yes, provide all the charges brought against you for this offense, and the outcome of each charged offense (such as found guilty, found not-guilty, charge dropped or "nolle pros," etc). If you were found guilty of or pleaded guilty to a lesser offense, list separately both the original charge and the lesser offense:

3) If no, provide explanation:

G) Were you sentenced as a result of this offense: **Yes / No**

H) Provide a description of the sentence:

I) Were you sentenced to imprisonment for a term exceeding one year: **Yes / No**

J) Were you incarcerated as a result of that sentence for not less than one year: **Yes / No**

K) If the conviction resulted in imprisonment, provide the dates that you actually were incarcerated:

L) If conviction resulted in probation or parole, provide the dates of probation or parole:

M) Are you currently on trial, awaiting a trial, or awaiting sentencing on criminal charges for this offense: **Yes / No**

N) Provide explanation:

10. Civil Litigation and Administrative or Legislative Proceedings

(A) Since (and including) your 18th birthday, have you been a party to any public record civil court action or administrative or legislative proceeding of any kind that resulted in (1) a finding of wrongdoing against you, or (2) a settlement agreement for you, or some other person or entity, to make a payment to settle allegations against you, or for you to take, or refrain from taking, some action. Do NOT include small claims proceedings.

Date Claim/Suit Was Filed or Legislative Proceedings Began	Court Name	Name(s) of Principal Parties Involved in Action/Proceeding	Nature of Action/Proceeding	Results of Action/Proceeding
@7-8/98	MSPB	Sheila Gray/Anthony Carr/Defense Contract Management Agency	To the best of my recollection (on or around July – August 1998), a former direct report made various assertions about me when she challenged her removal from the Federal service for poor performance before the Merit Systems Protection Board (Sheila Gray v. DOD, #SF-0432-98-0614-I-1). As I recall, the deciding official in the removal action was my supervisor (Anthony Carr, General Counsel). I was the proposing official after Gray failed to improve her performance during a performance improvement period (PIP). As I recall, she alleged in her appeal to the MSPB that Carr's removal action was in retaliation for an earlier (I believe Office of Special Counsel) complaint she had previously filed against Carr. As I mentioned above, I believe she made some various assertions that Carr permitted other Agency officials, including a military JAG officer and me, to "harass" her. To the best of my knowledge, the case was never adjudicated. As I recall, the agency negotiated a nuisance lump-sum settlement in exchange for Gray's resignation and an agreement that she would never apply for future Federal employment.	Settlement Agreement

(B) In addition to those listed above, have you or any business of which you were an officer, director or owner ever been involved as a party of interest in any administrative agency proceeding or civil litigation? Please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

None.

Date Claim/Suit Was Filed	Court Name	Name(s) of Principal Parties Involved in Action/Proceeding	Nature of Action/Proceeding	Results of Action/Proceeding

11. Breach of Professional Ethics

(A) Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, professional association, disciplinary committee, or other professional group? Exclude cases and proceedings already listed.

No.

Name of Agency/Association/ Committee/Group	Date Citation/Disciplinary Action/Complaint Issued/Initiated	Describe Citation/Disciplinary Action/Complaint	Results of Disciplinary Action/Complaint

(C) Have you ever been fired from a job, quit a job after being told you would be fired, left a job by mutual agreement following charges or allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?

No.

12. Tax Compliance

(This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

REDACTED

13. Lobbying

In the past ten years, have you registered as a lobbyist? If so, please indicate the state, federal, or local bodies with which you have registered (e.g., House, Senate, California Secretary of State).

No.

14. Outside Positions

X See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

For the preceding ten calendar years and the current calendar year, report any positions held, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

Name of Organization	Address of Organization	Type of Organization (corporation, firm, partnership, other business enterprise, other non-profit organization, educational institution)	Position Held	Position Held From (month/year)	Position Held To (month/year)

15. Agreements or Arrangements

X See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

As of the date of filing your OGE Form 278, report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment.

Provide information regarding any agreements or arrangements you have concerning (1) future employment; (2) a leave of absence during your period of Government service; (3) continuation of payments by a former employer other than the United States Government; and (4) continuing participation in an employee welfare or benefit plan maintained by a former employer other than United States Government retirement benefits.

Status and Terms of Any Agreement or Arrangement	Parties	Date (month/year)

16. Additional Financial Data

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

REDACTED

SIGNATURE AND DATE

I hereby state that I have read the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

This 24th day of Aug, 2017

U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-Hearing Questionnaire
For the Nomination of James Thomas Abbott to be a Member of the
Federal Labor Relations Authority

I. Nomination Process and Conflicts of Interest

1. Did the President give you specific reasons why he nominated you to be a member of the Federal Labor Relations Authority (FLRA)?

   No.

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

   No.

3. Have you made any commitments with respect to the policies and principles you will attempt to implement as a member of the FLRA? If so, what are they, and to whom were the commitments made?

   No.

4. Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.

   No. I have completed the Executive Branch Public Financial Disclosure Form. The form was reviewed, and approved, by the Solicitor of the Federal Labor Relations Authority (Designated Agency Ethics Official) and the Office of Government Ethics.

II. Background of the Nominee

5. What specific background, experience, and attributes qualify you to be a member of the FLRA?

   Since 2007, I have served as Chief Counsel to three Members/Chairmen of the FLRA. During my time in these key leadership positions, I have championed the FLRA's strategic goals to promote efficient case processing, employee engagement, and outreach to the Federal labor-management community.

   But, from my perspective, the most valuable experience that I bring to the position of Member is the breadth, depth, and scope of twenty-one (21) years of experience (preceding the FLRA)

during which I engaged in collective bargaining and labor-management relations at industrial military worksites, major-subordinate commands, and headquarters complexes. Throughout those experiences, I have sat at the bargaining table to negotiate local and nationwide collective bargaining agreements and have litigated every category of case which comes to the FLRA for resolution and before every regional office of the FLRA as well as before our sister agencies, the MSPB and EEOC. I began my Federal attorney career as a personnel and labor attorney working with first-line supervisors and union stewards in industrial settings such as Letterkenny Army Depot and as Chief Counsel at Corpus Christi Army Depot (often meeting on the work floor in coveralls or climbing into an airplane fuselage in protective gear amidst hazardous materials and working conditions to evaluate the merits of a pending grievance or unfair labor practice charge) to creatively resolve workplace disputes before they became grievances. Later, in senior positions with the Defense Logistics Agency and Defense Contract Management Agency, I engaged with agency heads and national union leaders to achieve consensus on some of the most significant labor issues of the time including implementation of the Department of Defense National Security Personnel System.

The opportunities to serve in locales as diverse as Central Pennsylvania, South Texas, Los Angeles, California, and then in Washington, DC also gave me a unique perspective on how legislation and policies established in the nation's capital affect, foster, or impede positive working relationships in real work environments and impact the day-to-day working life of employees and supervisors. For me, the impact and effect of the law and Authority decisions are not simply abstract concepts or legal issues to be debated but are realities that are lived out every day by federal employees in their workplaces.

6. Please describe:

   a. Your leadership and management style.

Managing least is managing best. In my experience and in practice, an effective manager establishes priorities and direction but creates an environment in which their employees are afforded wide latitude and discretion to do their job. For me, as a leader, this environment fosters creativity among those who serve on my team and leads to effective and productive results and decisions which are far better than I could have reached on my own.

   b. Your experience managing personnel.

Chief Counsel, Corpus Christi Army Depot – 5 employees

Senior Associate District Counsel, Personnel and Ethics, Defense Contract Management Agency West – directly supervised military and civilian staff of Immediate Office of DCMAW and managed the Personnel/Labor and Ethics Program – 35 attorneys at field activities west of Mississippi River

Deputy General Counsel, Office of Compliance – 5 employees, 8 contractors

Chief Counsel to the Member, Federal Labor Relations Authority – 6 employees

- As Chief Counsel to the Acting Chairman (2017) – additional duties include supervising staffs of Vacant Member, Case Intake and Publication, and Collaboration and Alternative Dispute Resolution Office – 12 employees
- As Chief Counsel to the Chairman (2007-08) – supervised a consolidated staff of attorneys and Case Intake and Publication – 21 employees

c. What is the largest number of people that have worked under you?

35

III. Role of Member, FLRA

7. Please describe your view of the agency's core mission and a member's role in achieving that mission.

The FLRA's core mission is clearly defined by Statute (5 U.S.C. §§ 7101-7135)). Under the construct of our Statute, the FLRA is to promote stable and constructive labor relations in the Federal Government because positive relationships between labor organizations and Federal agencies contribute to an effective and efficient Government.

A Member's role is similarly defined by the Statute. Collectively, the three Members serve as a quasi-judicial panel which makes final determinations on the appropriateness of bargaining units and adjudicates unfair labor practices (ULPs), exceptions (appeals) from arbitration awards, and matters concerning the negotiability of various matters.

8. Please describe how you anticipate, if confirmed, working with other FLRA members to promote the agency's core mission.

Members carry the responsibility to carefully and independently consider the entire record and positions of the parties, to apply the Statute, and arrive at a fair and impartial decision on any matter that is brought before the FLRA. In order to carry out this responsibility, effectively and efficiently, it is imperative that Members work together on strategies to promptly adjudicate cases and to ensure that his/her staff complies with the timeliness goals established by, and in conjunction with, the Chairperson. I have known, and collegially worked with, Member DuBester since 2009 and previously worked with Member/Chair-designee Kiko when she served as General Counsel of the FLRA. Therefore, I have every confidence that immediately we will be able to work constructively together to tackle the existing backlog of cases.

a. Please describe prior work experience that demonstrates your capacity to work with FLRA members of a different party affiliation.

As Chief Counsel to three Members of the FLRA, I routinely discussed positions, alternatives, and approaches in cases of first impression and those with potentially broad Governmental

impact with my colleague Chief Counsels in order to find areas of agreement, consensus, and common ground. During two extended periods when my Member office was vacant (without a confirmed Member), I reported to and prepared decisions in accordance with the priorities and perspectives of the sitting Chairperson. In both instances, the Chairpersons, to whom I reported, were of different political affiliation than the Member I had previously served.

9. Protecting whistleblower confidentiality is of the utmost importance to this Committee.

   a. During your career, how have you addressed whistleblower complaints?

      I have not had the opportunity to address whistleblower complaints.

   b. How do you plan to implement policies within the FLRA to encourage employees to bring constructive suggestions forward without the fear of reprisal?

      The Authority is in full compliance with the annual notification requirements set forth in 5 U.S.C. § 2302(c). An annual notice (most recently issued on January 12, 2017) reminds employees of their rights under the Civil Service Reform Act, the Whistleblower Protection Act, and the Whistleblower Protection and Enhancement Act and informs how employees may address or raise such matters. I will continue to ensure that our policies and practices comply with all statutory and regulatory protections.

   c. Do you commit without reservation to work to ensure that any whistleblower within FLRA does not face retaliation?

      Yes.

   d. Do you commit without reservation to take all appropriate action if notified about potential whistleblower retaliation?

      Yes.

10. What are the most significant challenges facing FLRA as an institution? If confirmed, what steps will you take to address these challenges?

    The most significant internal challenge is to ensure that the FLRA's most important resource – its employees – are appropriately classified and that staffing is appropriately distributed. As of this date, in the Authority component of the FLRA, 41.6% of staffed positions are classified as supervisors and 12.5% as SES (agency-wide 30.8% and 11.6% respectively). The leadership of the Authority needs to reassess and ensure that staffing decisions are prioritized, that the most critical positions are filled, that positions are appropriately classified, and that the organizational structure contributes to effective operations and the timely issuance of impartial, clear, and quality decisions.

The most significant external challenge faced by the FLRA is what I would describe as a credibility and relevance gap with the Federal labor-management community. It is telling that for at least two years, there has been a decrease in filings with the FLRA. I believe that this decline has resulted, in part, from the increased reliance by the immediate-past majority on procedural technicalities to dismiss an inordinate number of cases without any consideration of the actual merits of the parties' arguments *(see e.g., U.S. DOD Education Activity, U.S. DOD Dependent Schools,* 70 FLRA 84 (2016) (then-Member Pizzella dissenting); *U.S. Dep't of HHS, Nat'l Institute of Environmental Health Sciences,* 68 FLRA 1049 (2015) (then-Member Pizzella dissenting); *AFGE, Local 1897,* 67 FLRA 239 (2014) (then-Member Pizzella dissenting); *AFGE, Local 1897,* 67 FLRA 239 (2014) (then-Member Pizzella concurring); *AFGE, Local 3955, Council of Prisons Local 33,* 65 FLRA 887 (2011) (Member Beck dissenting)).

IV. Policy Questions

11. The Collaboration and Alternative Dispute Resolution Office (CARDO) at FLRA provides intervention and dispute resolution services, which frequently helps parties resolve disputes short of a formal decision, thereby saving the parties' and FLRA's resources (Government resources) that would otherwise be devoted to litigating and deciding the dispute. Do you plan to continue supporting CADRO and offering the parties assistance in establishing/ maintaining constructive relationships?

    Yes.

12. What is your assessment of the current state of federal labor-management relations? If you believe that improvements can be made, in what areas should there be improvement and how can this be accomplished?

    I would describe the current state of federal labor-management relations as in transition with the advent of a new Administration and new leadership coming to the Office of Personnel Management. The FLRA can contribute immediately by addressing the backlog of cases, which has grown without a full complement of Members, by issuing timely and clear decisions.

13. Given your experience as a counsel at the FLRA, do you believe that improvements should be made to the Federal Service Labor-Management Relations statute? If so, what improvements can and should be made?

    For nearly 38 years, the Statute for the most part has served the federal labor-management community quite well. However, the Federal workforce in 2017 looks very different and faces very different challenges than did the federal workforce in 1978 when the Statute was enacted. When the Statute was enacted, computers were not common, and email was unheard of, in the Federal workplace. The ability of countries, groups, and individuals to immediately access and cause substantial harm to the Government's cyber systems is just one dynamic that Congress could not have contemplated in laying out the framework of the Statute.

Thus, at least a limited refresh of the Statute is warranted. Several examples:

- Section 7106(a)(1) reserves to Federal agencies the right to determine their "internal security practices" and § 7112(b)(6) excludes from bargaining-unit eligibility employees who are engaged in work that "directly affects national security." Disagreements concerning what matters concern "internal security" and what duties "directly affect" national security are frequently disputed before the FLRA. Federal Courts have questioned whether the FLRA should have any role in determining what matters concern internal security practices, what matters affect national security, or the scope of military authority and readiness because those matters do not fall within the expertise of the FLRA. *See e.g., U.S. DOJ, INS v. FLRA,* 975 F.2d 218, 223 (5th Cir. 1992)*; U.S. Dep't of the Navy v. FLRA,* 665 F.3d 1339, 1348 (D.C. Cir. 2012)*; U.S. Dep't of the Air Force, Luke AFB v. FLRA,* 844 F.3d 957, 961 (D.C. Cir. 2016).

- Within Title V, Congress established various avenues of redress for Federal employees, including the right to file grievances for collective bargaining agreement (CBA) violations, to file charges with the FLRA's Office of the General Counsel (OGC) regional offices for alleged ULPs, and to file appeals of adverse disciplinary or performance-based actions. Just as with Title VII, Congress established choice-of-forum provisions so that employees and union representatives would have the right to challenge grievances or ULPs in ***one*** forum or the other but not in more than one. The Statute includes two such choice-of-forum provisions. Section 7116(d) precludes the filing of a grievance and a ULP charge over the same "issue"; section 7121(e)(1) precludes the filing of a grievance and appeal to the MSPB over the same "matter." Noting the different terms used in § 7116(d) and § 7121(e)(1), the FLRA has routinely interpreted that the use of two similar, but different, terms permits a grievant and/or union to file concurrent complaints for a contractual ULP through grievance procedures and a statutory ULP charge before a FLRA regional office even when both actions arise out of the same facts and circumstances. Congress should clarify whether the term "issue" in § 7116(d) and the term "matter" in § 7121(e)(1) were intended to mean different things or were intended to preclude duplicative filings that arise out of the same facts and circumstances as with all other choice-of-forum provisions contained throughout Title V and Title VII.

- FLRA decisions concerning exceptions from arbitral awards generally are not appealable to Federal court as are decisions concerning ULP charges and negotiability disputes. *See* 5 U.S.C. § 7123(a). But, as noted above, the challenges faced by Federal agencies in 2017 are very different than the challenges in 1978. I doubt that when the Statute was enacted in 1978 that Congress anticipated that arbitrators would be called upon to make determinations such as: when, how, and whether a Federal agency may restrict employees from accessing personal accounts on their Government computers following repeated cyber attacks on its computer systems *(see e.g., U.S. DHS U.S. ICE,* 67 FLRA 501 (2014) (then-Member Pizzella dissenting); how a Federal agency allocates its budget *(see e.g., U.S. Department of Treasury, IRS, Ogden Service Center,* 69 FLRA 599 (2016) (then-Member Pizzella dissenting); or to pay bonuses in such a manner that contravenes Congressional appropriation *(see e.g., U.S. Dep't of HHS, Nat'l Institute of Environmental*

Health Sciences, 68 FLRA 1049 (2015) (then-Member Pizzella dissenting). Congress should consider whether it is appropriate to permit judicial review of Authority decisions concerning arbitral awards which impact the internal security of agencies or national security and awards which impact Congressional appropriations to a significant degree.

14. The FLRA's 2017 Congressional Budget Justification states that the FLRA "had to overcome significant obstacles in meeting its mission requirements." The Justification notes that in addition to increased case filings in certain agency components, the FLRA experienced a wave of key employee retirements and departures starting in FY 2013 and continuing into FY 2015.

    a. Given your experience as a counsel to the FLRA, what do you believe is driving the increased case filings at certain components?

    The 2017 budget justification was prepared by the former Chairperson and the former Executive Director in 2015. I did not personally participate in, and was not consulted about, the language contained in the justification. Therefore, I cannot speak to the basis for those assertions. However, the current case-intake reports indicate that filings in each FLRA component have decreased each of the past two fiscal years (except for a slight increase for the Office of Administrative Law Judges in FY 17). In the Authority component, case filings decreased by 20% between FYs 15 and 16 and 8% between FYs 16 and 17. The OGC experienced similar declines in ULP filings (2% and 19%) and in representation petitions (4% and 27%).

    b. What issues and factors do you believe most frequently give rise to unfair labor practice complaints?

    ULP complaints are issued when the General Counsel determines that there is merit to a ULP charge filed by a union or Federal agency. Charges are typically filed because the union or Federal agency believes that the other has failed to carry out a statutory responsibility, such as the duty to bargain or to provide fair representation. The early resolution of workplace disputes is impeded when either party ignores or is unwilling to fulfill their statutory responsibilities.

    However, I believe that two factors contribute to the large number of charges. First, there is no disincentive to avoid raising frivolous charges. Regardless of merit, union representatives and witnesses are on official time when preparing or pursuing a charge; agency officials are on duty time when preparing or responding to a charge; and attorneys of the OGC are paid to investigate the merits of each and every charge filed. In other words, every stage of the process is paid for out of the agency's appropriated funds (taxpayer dollars), regardless of merit or success. Second, by interpreting the term "issue" in § 7116(d) (see second bullet in answer to question 13 above) as permitting a party to file a contractual ULP charge under a negotiated grievance procedure (and ultimately to arbitration) and a statutory ULP charge with the OGC (and ultimately to an ALJ) over the

same facts and circumstances, parties are not required to make a choice and in practice get "two bites of the apple" (which taxpayers pay for ... twice) over what is for all practical purposes the same action.

c. As unfair labor practices are considered at the Office of General Counsel (OGC) level, do you believe agencies are afforded sufficient information concerning the complaint? Are agencies provided a sufficient opportunity to weigh-in with OGC concerning a given complaint?

The procedures established by the OGC for investigating ULP charges give OGC attorneys broad discretion in determining how to investigate a charge. Those procedures include steps to apprise the agency of the charge and to afford agency representatives an opportunity to respond. Although the OGC provides the charged party with a copy of the charge, the charge itself provides little detail. To my knowledge, however, the OGC's procedures do not specify at what stage, or how early in the process, the agency must be apprised of the facts of the charge.

During the time that I served as an agency representative and oversaw all legal matters pertaining to the agency's labor-management program (1986 – 2004), I had numerous opportunities to engage with OGC attorneys from each Region of the FLRA concerning ULP charges filed by local, consolidated local, and national union representatives. In my experience, the agency was frequently pressured to negotiate a settlement even where no investigation of, and without full knowledge of, the facts and merits of the charge. Also, it was not uncommon for the OGC to not provide any details of a charge, or afford an opportunity for the agency to respond, until after the union's version of events was presented in full.

d. Are there other obstacles besides increased caseloads and staff departures that hamper the FLRA's ability to fulfil its mission? If so, please identify them and explain what you believe should be done to address them.

As explained in response to section 14.a. above, I do not agree that the FLRA is currently experiencing an "increased caseload" or an unusual or unanticipated spate of staff departures. In my view, the FLRA is adequately staffed at this time to fulfill its statutory responsibilities. But, as explained in response to question 10 above, I am convinced that, as leaders of the FLRA, we can do a better job at more prudently allocating our existing personnel resources.

The most significant obstacle for the FLRA at this time is to reexamine our internal case production goals and processes to ensure that the existing backlog of cases are expeditiously resolved and that moving forward each Member office is held equally accountable for the timely issuance of case decisions.

15. Are there improvements to the FLRA's internal review process that you believe can be improved upon to ensure fewer cases ultimately are overturned by the courts, and that all evidence is properly considered in a given case?

    Members should carefully heed the most recent decisions of the Federal Circuit Courts of Appeals to ensure that decisions acknowledge and comply with the warnings, guidance, and rulings of those Courts.

16. In the 2016 Best Places to Work rankings complied by the Partnership for Public Service, and based on the data collected in the Federal Human Capital Survey, the FLRA ranked 5th out of 29 small Federal agencies that submitted data. This is a significant improvement over 2009 when it ranked last. The FLRA's 2016 Index Score is down five points compared to 2015, however.

    a. What steps will you take, if confirmed, to maintain progress made by the FLRA in recent years, and to further improve upon employee morale?

       2017 has been a significant year of transition for the FLRA. The Authority component and the OGC have not had a full complement of leaders. Thus, the decline, while noticeable and should not be ignored, is not unexpected. It is also worth noting that the FLRA ranked well above the Government-wide average in 70 of 71 questions.

       I believe it would be shortsighted for the FLRA, or any Federal agency, to presume that the EVS should be the only barometer of employee satisfaction, employee morale, or how well an agency is performing with respect to employee relations. There are many other factors which ought to be considered in assessing those results. For example, one might consider whether employees are being mentored and prepared for advancement within the agency, to other agencies, or even to the private sector.

V. Relations with Congress

17. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

    Yes.

18. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed?

    Yes.

19. Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed?

    Yes.

VI. Assistance

20. Are these answers your own? Have you consulted with the FLRA or any other interested parties? If so, please indicate which entities.

    Yes, these answers are my own. In preparing to answer these questions, I consulted with FLRA staff to ensure technical accuracy.

U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-Hearing Questionnaire
For the Nomination of James Thomas Abbott to be a Member of the
Federal Labor Relations Authority
Minority

I. Nomination Process and Conflicts of Interest

1. Has the President or his staff asked you to sign a confidentiality or non-disclosure agreement?

   No.

2. Has the President of his staff asked you to pledge loyalty to the President or the Administration?

   No.

3. During your tenure have you asked any federal employee or potential hire to pledge loyalty to the President, Administration or any other government official?

   No.

II. Background of Nominee

4. Do you seek out dissenting views and how do you encourage constructive critical dialogue with subordinates?

   My philosophy on management has always been: managing least is managing best. In my experience and in practice, I believe that an effective leader establishes priorities and direction but affords employees wide latitude and discretion in carrying out their responsibilities, in particular, when those employees are promoted to higher grades. As Chief Counsel to a Member, I regularly meet with attorneys on assigned cases to thoroughly discuss facts, issues, precedent, and questions that have not yet been addressed by the FLRA. While it is expected that attorneys understand the perspective of the Member, attorneys are evaluated, in large part, on how well they have considered, and can articulate, all perspectives of any given issue and clearly articulate their own conclusions.

   a. Please give examples of times in your career when a subordinate disagreed with you and aggressively advocated their position.

      Expression of differing positions need not be, and never should be, aggressive. Differing perspectives should be thoughtfully considered, discussed, and resolved.

In January 2017, the responsibilities of my role as Chief Counsel expanded when the Member became Acting Chairman. With that change, I assumed an oversight role for several offices. During FY 16, one of those offices had added two attorneys within a matter of several months in anticipation of a program expansion that never occurred. After evaluating workload data for several months, it was readily apparent that the workload of this office was in decline and did not support (and never had supported) a staffing increase of 200%. The Acting Chairman agreed with my recommendation that one of the FTEs should be shifted to the OGC that was, and is, operating with numerous staff vacancies. The program manager of the impacted office strongly disagreed with this recommendation. Ongoing discussions, with the manager and the impacted staff attorneys, led to a constructive resolution whereby the attorneys themselves chose which of them would transfer to OGC and accommodations were made to avoid the necessity of a physical relocation and to permit the transferring attorney to work from a local office.

5. Please give examples of times in your career when you disagreed with your superiors and aggressively advocated your position. Were you ever successful?

I do not believe that advocacy should ever be aggressive. Advocacy should always be constructive; passionate perhaps, but never aggressive. The Chief Counsel supports the priorities of their Member and offers constructive advice, recognizing that final decisions on policy and legal matters belong to the Member.

Upon assuming my role as Chief Counsel to the Chairman in 2007, the Authority had just been reorganized to consolidate the three Member staffs into a consolidated case-writing unit. My responsibilities included oversight of the consolidated unit. After observing operations for several months, it became apparent that the consolidation was not improving case productivity and was having a deleterious effect on employee morale. I believed that a return to the Member staff structure would be most constructive and began to advocate for that adjustment. The then-Chairman was initially reluctant to reconsider the consolidation. Over time, I continued to present data to demonstrate how long-term case-productivity continued to suffer. This data was instrumental in convincing the new Chairman, in one of his first actions, to revert to individual Member staffs. The change was effected and proved to be instrumental in the Authority's success in reducing, and ultimately eliminating, its significant backlog of overage cases.

6. Please list and describe examples of when you made politically difficult choices that you thought were in the best interest of the country.

To date I have served as a career General Schedule (GS) and Senior Executive Service (SES) employee. As such, I am precluded from making political choices or making decisions that could be perceived as political.

7. What would you consider your greatest successes as a leader?

As a supervisor, I am most proud of my successes in mentoring employees to assess and discover their strengths and potential and how to utilize those strengths to achieve promotions and

advancement in their careers. I am always proud when an employee achieves a career-enhancing promotion into a supervisory or leadership position which matches their career goals and strengths. In this respect, it is important to recognize that longevity within any organization is not necessarily in the best interests of the career-progression of all employees.

While serving as the senior labor/personnel attorney for Defense Contract Management Agency, I led a dual-agency (DCMA and DLA) litigation taskforce to defend those agencies in a nationwide Fair Labor Standards Act case that had been filed by Federal unions at 30 DOD activities and supply centers impacting over 15,000 bargaining unit employees with an assessed liability exceeding $178 million. I formed a three-pronged litigation team – litigation strategy, discovery and evidence maintenance, and witness preparation – comprised of chiefs of staff, general counsels and attorneys, HR directors and specialists, and senior subject-matter experts from both agencies. After developing a comprehensive, consolidated strategy supported by both agencies, I successfully negotiated the framework for a dual-agency, consolidated-union mediation effort with the national union representatives and legal teams which lasted over four months but resulted in the reclassification of approximately 12,000 employees to non-exempt status as part of a negotiated settlement for $12.7 million in FLSA back pay.

However, my proudest leadership success dates back to 1991-92 when I worked and lived in Corpus Christi, Texas. I had been recently promoted to Chief Counsel at Corpus Christi Army Depot. I did not see myself as a community leader, but I volunteered to serve on the Mayor's Commission on AIDS awareness which was formed to look at ways to address the growing epidemic in south Texas. There were no hospice facilities in the entire area south of San Antonio that would care for AIDS patients. Many others within the military, local LGBT, and faith communities were reluctant to take a leadership role to address the crisis. I had the unique opportunity, and many invaluable connections, between my senior role at the army depot, my affiliation with business leaders of the community through my church, and my visibility in the LGBT community to bring together these apparent divergent interests to forge a founding board of directors, which was able to raise the seed monies and volunteers that were necessary to fund and open The Passage, the first AIDS hospice, in South Texas. This effort was not without risk, professionally or personally, but it was a challenge that I believed in. That it became a valuable community resource still ranks for me as one of my proudest personal accomplishments.

8. What would you consider your greatest failure as a leader? What lessons did you take away from that experience?

As a leader and mentor, I have been frustrated by my inability to find that surefire balance for knowing just how far to challenge employees to fully develop their career-development potential. This is particularly challenging when leading an office in a small agency such as the FLRA. Beyond the career-ladder progression available to staff attorneys, there are limited options for upward mobility for attorneys who demonstrate tremendous leadership potential. Without a doubt, case-productivity and corporate memory is enhanced by retaining attorneys who have achieved journeyman-level status. On the other hand, because of the limited upward-mobility available within a small agency, creative, smart, and excellent attorneys typically will best achieve their full potential within larger agencies, Federal unions, or in the private sector. If I succeed as a

mentor, the agency loses a tremendous talent and resource. If I succeed as an agency leader in retaining talented attorneys or employees, I may not be helping the employee to achieve their full potential. The lesson that I have learned from this leadership dilemma is that ultimately these are decisions that must be made by the employee and that my responsibility is to create an environment that encourages them to head in either direction.

9. In response to question 10(A) on your biographical questionnaire, you mentioned that you were a subject in a direct report making various assertions about you when a former employee challenged her removal from the Federal service for poor performance before the Merit Systems Protection Board (MSPB). The matter was entitled, *Sheila Gray v. DoD, #SF-0432-98-0614-I-1)*. You indicated that you were the proposing official after Gray failed to improve her performance during a performance improvement period, and Gray alleged that your superior, Anthony Carr, permitted you and other agency officials to "harass" her. You also indicated that to the best of your knowledge, the case was never adjudicated and the agency negotiated a nuisance lump-sum settlement in exchange for Gray's resignation and agreement that she would never apply for future Federal employment.

   This response does not sufficiently identify or provide details of the alleged actions taken or omitted by you for the proceedings. For example, it does not fully explain what actions and/or comments the complainant alleged that gave rise to the complaint.

   a. Please supplement your response with documents and/or information sufficient to identify the details for this proceeding including a description of the actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your capacity including, but not limited to the complaint in this matter.

      For the record, I note that I was not a party to, or a witness in, this proceeding which occurred twenty years ago. Other than my limited recollection, which I set forth in my answers to the biographical questionnaire, I do not recall or have any additional information. I was not the deciding official in the removal. When the matter was appealed to the MSPB, I was never consulted. It is my recollection that the matter was assigned to an attorney(s) who worked in another subordinate command of the Defense Logistics Agency. I do not recall being advised of any of the specifics of, or allegations contained in, the appeal other than what I previously summarized in response to the question framed in the biographical questionnaire.

III. Policy Questions

10. In October 2017, FLRA summarized what they consider to be the most serious management and performance challenges facing the FLRA in FY 2018. These management challenges include: (1) Information Technology Security; and (2) Proper Handling of Records.

    a. What is your view on deciding cases based on the facts as established in the record, and the law (the statute and precedent)—as opposed to independent views of right and wrong, how the government ought to work, and/or the role of unions?

Members of the Authority should render impartial decisions after considering the entirety of the record, the arguments and submissions of the parties, the plain wording of the Statute, court decisions, and FLRA precedent. I do believe that, in making an impartial decision, the Authority should exercise the utmost restraint before dismissing arguments or issues on technicalities rather than considering those arguments on their merits.

b. If government efficiency and effectiveness are legitimate considerations in assessing the merits of a dispute, what role do you believe conduct plays in an agency's collective bargaining, grievance procedure, and efficiency?

The Statute is founded on the fundamental premise that collective bargaining "contributes to the effective conduct of public business" and "facilitates and encourages the amicable settlements of disputes." But the Statute's first mandate is that *all* of its provisions "should be interpreted in a manner consistent with the *requirement* of an *effective* and *efficient Government*." As the first mandate set forth in the Statute, it must be considered.

11. Former FLRA member Pizzella, in his dissents and concurrences, frequently criticized union parties to a dispute for pursuing positions or remedies that he viewed as wasting government resources, costing too much, being ill-motivated, or at odds with common sense -- factors not grounded in the law.

a. What is your view on deciding cases based on the facts, as established in the record, and the law (the statute and precedent), as opposed to one's independent views of right and wrong, how the government ought to work, or the role of unions?

As I note in my answer to question 10.a. above, Authority Members should render impartial *decisions* after considering the entirety of the record, the arguments and submissions of the parties, the plain wording of the Statute, court decisions, and FLRA precedent without dismissing valid arguments on technicalities. Dissents and concurrences, however, are *not* decisions of the Authority. Our nation's jurisprudence is peppered with thoughtful and colorful dissents and concurrences wherein a dissenting justice, judge, commissioner, or member observes ironies, discusses evolving matters, issues cautions, or attempts to redirect a debate. Justice William Douglas observed that "[i]t is *the right of dissent*, not the right or duty to conform [without which] . . . *the affairs of government could not be conducted*." (*See* William D. Blake & Hans J. Hacker, "*The Brooding Spirit of the Law*": *Supreme Court Justices Reading Dissents from the Bench*, 31 *Jus. Sys. J.* 1, 1 (2010) (emphasis added)). Discourse of the nature used by Acting Chairman Pizzella, in separate opinions, served to educate the public and put difficult legal concepts into language that is easily understood by parties who are not legal professionals. In that context, I believe similar observations may, in certain circumstances, serve a valuable purpose.

b. If government efficiency and effectiveness are legitimate considerations in assessing the merits of a dispute, do you believe that obstreperous conduct on the part of an

agency in collective bargaining, including the grievance procedure, also undermines government efficiency and effectiveness?

Civil and polite discourse should always be expected in the Federal workplace or any workplace for that matter. Conduct that is obstreperous or flagrant is never acceptable, and should never be tolerated, regardless of whether it comes from an agency head, division-chief, supervisor, union official, or employee.

12. Please describe what impact proposed Federal budget cuts, if implemented, will have to FLRA's ability to provide training to Federal agencies and unions in understanding their rights and responsibilities under the Civil Service Reform Act and other relevant authorities?

The FLRA has been fortunate insofar as its budget has remained relatively static for three years. Therefore, I would not anticipate any immediate impact on training priorities. The primary mission of the FLRA is to adjudicate disputes that are filed and to make a final determination on those disputes. However, § 7105(a)(1) also challenges the FLRA to "provide leadership in establishing policies and guidance." In that respect, the FLRA provides annual trainings on arbitration, negotiability, and unfair labor practices. In the event the FLRA's budget is adjusted, I will work with the Chairperson, my colleague Member, the General Counsel, and other senior leaders to determine how to best fulfill all of our statutory responsibilities.

13. Please describe what impact proposed budget Federal budget cuts, if implemented, will have to Federal agencies' ability to train managers and employees regarding their rights and responsibilities under the Civil Service Reform Act and other relevant authorities?

It would not be appropriate for me to comment on other Federal agencies' priorities concerning the training of their managers and employees. As I noted in my answer to question 12, the FLRA has been fortunate insofar as its budget has remained relatively static for three years. Training has been allocated according to the priorities established by the FLRA leadership. For FLRA employees, a broad understanding of the Civil Service Reform Act, from my perspective, is an important tool in career development.

14. Please describe any previous experience—in the public or private sector—with handling whistleblower complaints, and what steps you took to ensure those individuals did not face retaliation and that their claims were thoroughly investigated?

I have not participated directly or indirectly in any whistleblower complaints.

15. If confirmed, how will you ensure that whistleblower complaints are properly investigated?

Whistleblower complaints should be investigated through appropriate channels. I will work with my colleagues to ensure that the FLRA continues to comply with all aspects of whistleblower laws, procedures, and protections.

IV. Accountability

16. During your career as a Federal employee, have you ever used a personal email account or device to conduct official government business?

    No.

    a. If so, please describe your general practice for doing so, and what specific steps you have taken to ensure that Federal records created using personal devices and accounts were preserved.

17. During your career, has your conduct as a Federal employee ever been subject to an Investigation or Audit by an Inspector General? If so, please describe.

    To the best of my recollection, an anonymous allegation was made to the Inspector General for the FLRA sometime in late 2010 – 2011 that asserted the Office of then-Member Beck was not complying with several new internal timekeeping, teleworking, and credit hour policies. As Chief Counsel, I was the approving official for time reports and telework schedules. After implementation of the new policies there was a great deal of confusion concerning how those new policies should be applied and implemented. I sought advice of the HR Director in October 2009 and followed her advice and interpretation. The IG's report indicated, based on new interpretations of those policies by a new HR director (hired by former-Chairman Pope), that certain approvals of credit hours, leave, and telework for the senior attorney were not entirely compliant with the FLRA's policies implemented in 2009.

18. During your career, has your conduct as a Federal employee ever been subject to an investigation by the Office of Special Counsel? If so, please describe.

    No.

19. During your career as a federal employee, have you ever declined to implement recommendations made by the Office of Inspector General, the Office of Government Ethics, the Office of Special Counsel or the Government Accountability Office? If so, please describe.

    No.

20. If confirmed, do you pledge to implement recommendations made by the Office of Inspector General, the Office of Government Ethics, the Office of Special Counsel and the Government Accountability Office?

    Yes.

V. Relations with Congress and the Public

21. If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?

Yes. I will respond in a timely manner to any requests for information.

22. If confirmed, do you agree without reservation to reply to any reasonable request for information from the Ranking Member of any duly constituted committee of the Congress?

Yes. I will reply in a timely manner to any reasonable request for information.

23. If confirmed, do you agree without reservation to reply to any reasonable request for information from members of Congress?

Yes. I will reply in a timely manner to any reasonable request for information.

24. If confirmed, do you commit to take all reasonable steps to ensure that you and your agency comply with deadlines established for requested information?

Yes.

25. If confirmed, do you commit to protect subordinate officials or employees from reprisal or retaliation for any testimony, briefings or communications with members of Congress?

Yes.

26. If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Office of Inspector General, Office of Government Ethics, the Office of Special Counsel, the Government Accountability Office (GAO) and the Congressional Research Service?

Yes.

27. If confirmed, will you agree to work with representatives from this Committee and the GAO to promptly implement recommendations for improving [agency's] operations and effectiveness?

Yes.

28. If confirmed, will you direct your staff to fully and promptly respond to Freedom of Information Act requests submitted by the American people?

Yes.

29. If confirmed, will you ensure that political appointees are not inappropriately involved in the review and release of Freedom of Information Act requests?

Yes.

VI. Assistance

30. Are these answers your own? Have you consulted with GSA or any other interested parties? If so, please indicate which entities.

Yes, these answers are my own. No, I did not consult with GSA or other interested parties, except FLRA staff to ensure technical accuracy.

I, JAMES T. ABBOTT, hereby state that I have read the foregoing Pre-Hearing Questionnaire and Supplemental Questionnaires and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

James T. Abbott
(Signature)

This 27th day of OCTOBER, 2017

Senator Heidi Heitkamp
Post-Hearing Questions for the Record
Submitted to James T. Abbott

Nominations of Hon. Ernest W. DuBester, Hon. Colleen D. Kiko, and James T. Abbott to be Members, Federal Labor Relations Authority
Tuesday, November 7, 2017

1. During the staff interview and in your questionnaire, you brought up concerns that the FLRA might be top heavy with too many supervisors, and that a goal of yours is to help ensure that the FLRA staff is appropriately distributed. Since you will be hearing cases and complaints from across the federal government and the FLRA plays a critical role in the efficiency of the government, I wanted to know if you feel, in general terms, that other federal agencies are also top heavy and need to realign their staffs so that employees are more "appropriately distributed."
   - What do you mean by "appropriately distributed"?

     My comment about the appropriate distribution of staff referred to my answer to Question 10 from the Committee. That question concerned "the most significant challenges facing FLRA as an institution?" I identified as the most significant ***internal*** challenge, the FLRA must ensure that employees are "appropriately classified" AND THAT "staffing is appropriately distributed". I noted that 41.6% of the employees in the Authority component are classified as supervisors and 12.5% are SES, figures which are not sustainable. I believe it is sound management to ensure that staffing decisions are prioritized based on need and that the most critical positions are filled first. Hand in hand with establishing priorities and filling critical positions, it is a basic responsibility to ensure that positions are appropriately classified.

     Therefore, to me, "appropriate distribution" of staffing ensures that the most critical positions are filled, first with the employees and skills already on board. That goal may entail shifting employees from work units with insufficient workload to other units which are understaffed. Decisions of that nature must be based on the assessment of available reports and data including the evaluation of current workload and existing needs.

     As to classification, I am not convinced that the work of the senior positions in the FLRA support an SES classification, or in some cases, a GS-15 classification or supervisory status. In a small agency such as the FLRA, the misclassification of just a handful of employees may seriously impact its ability to issue timely and quality decisions – the primary function of the Authority component.

     As a potential Member of the FLRA, however, it would not be appropriate for me to comment on the staffing needs or priorities of other federal agencies. Section 7106 of Title 5 reserves exclusively to the discretion of management (and

excludes from the coverage of our Statute) matters concerning the "number of employees" (7106(a)(1)), whether to "hire, assign and retain employees" (7106(a)(2)(A)), "the personnel by which agency operations should be conducted" (7106(a)(2)(B)), and "with respect to filling positions" (7106(a)(2)(C)).

2. Your questionnaire clearly says that in your opinion "Managing least is managing best." Yet, you also say a manager has to establish clear priorities and goals.
   - Can you explain how those two statements align?

     A leader must share and discuss expectations and a vision for the organization and what goals are important for the organization. However, employees thrive and are most productive when, in performing their day-to-day responsibilities, they are afforded wide latitude in how they perform their day-to-day responsibilities. This is particularly important in a small agency such as the FLRA whose employees, for the most part, are degreed professionals (i.e. attorneys).

   - When does a manager need to move away from "managing least" and get deeply into something so they can ensure a proper outcome?

     Managing least does not mean ignoring employees. It means permitting employees wide latitude in how they perform their day-to-day responsibilities. An effective leader makes herself / himself available to provide feedback and guidance as needed and requested.

     New employees require attention, guidance, and training. As employees develop, they may need higher-level guidance in order to get to the next level - as they begin to develop long-range plans, ambitions, and career plans.

     Similarly, employees who are struggling to meet either quality or timeliness standards may require additional attention.

   - Can you give me an example from your days at the FLRA where "managing least" worked out well?

     I employ this approach within the Office of Acting Chairman Pizzella. For two years, the Office has operated with three staff attorneys instead of four (the number maintained by each of the other Member offices and has been standard practice for some years among Members in the Authority component). Despite the loss of two GS-14 attorneys – one to take a promotion to a senior position at the NLRB and, for another, accommodating a transfer to the FLRA Office of the General Counsel Regional Office in Denver (at the employee's request to address a family need), I chose not to continue not to fill the fourth position. Two attorneys were hired to fill vacancies at the GS-11 level. One attorney came with substantial experience in quasi-judicial adjudication and quickly developed into

an effective staff attorney. The second hire, had limited and no recent legal experience, required more attention and guidance. Despite, these challenges and a staffing level 75% of the other two Member offices, the Office of the Acting Chairman has for three years reduced its average age of cases in inventory (a significant marker) and maintained the lowest average age of cases assigned to the three Member offices for the past two years.

3. If you were to update or change the FLRA authorizing statute, what sections would you change and what would be the language changes?

   I stated, in response to Policy Question 13 of the Committee's questionnaire, that the Statute for the most part has served the federal labor-management community quite well. However, the federal workforce in 2017 looks very different and faces very different challenges than did the federal workforce in 1978 when the Statute was enacted.

   I have no additional examples other than those I set out in response to that question.

4. You mentioned in your questionnaire that there was a "credibility and relevance gap" with the Federal labor-management community. In a different section, you also seemed to imply that there is no disincentive to avoid raising frivolous charges to the FLRA.
   - Do you worry that implying that frivolous charges are a regular part of the FLRA case load will negatively affect that "credibility and relevance gap" you mentioned?

     No. In response to Question 10 from the Committee, I explained that I believe that the Authority creates a possible credibility and relevance gap when we dismiss too many cases on procedural technicalities rather than addressing the issues brought to us by the parties. However, in response to Policy Question 14.b., I stated that I believe that the filing and investigation of frivolous charges *contributes* to the large number of charges. It is the OGC that carries the *responsibility* under the Statute to investigate every charge that is filed regardless of the charge's merit. Therefore, under the Statute, Authority Members have no control, individually or collectively, over the number of *charges* that are filed by parties. It is the sole responsibility of the OGC, not the Members of the Authority, to determine which charges have sufficient merit to warrant the issuance of a complaint.

   - Will you commit today to correctly and fairly consider investigate and hear any Unfair Labor Practices (ULP) Complaint filed by a union or Federal agency that comes before you?

     With respect to ULP complaints, I can only commit to fairly and impartially adjudicate any appeals filed by a party from a final decision of an ALJ.

As explained below, Members of the Authority do not investigate ULP complaints and may only hear appeals from ULP complaints which have been heard and decided by an FLRA ALJ. *See 5 C.F.R. §§ 2423.40 – 2423.41.*

Only the Office of the General Counsel has jurisdiction to consider and investigate ULP charges. *See 5 U.S.C. §§ 7118(a)(1) – (4)(B).* The decision, whether or not to file a ULP complaint, lies with the sole discretion of the General Counsel and may not be appealed to the Authority. *See 5 U.S.C. § 7118(a)(1); 5 C.F.R. § 2423.11(g).* When the General Counsel issues a complaint, a hearing is held before an ALJ of the FLRA. The complaint is prosecuted by the OGC. *See 5 C.F.R. §§ 2423.20 – 2423.34.* After hearing and the filing of briefs, the ALJ issues a decision. *See 5 C.F.R. § 2423.34.* Members of the Authority only have jurisdiction after the ALJ issues a final decision and one party (agency, union, or OGC) files an appeal (exceptions) to the Authority. *See 5 C.F.R. §§ 2423.40 – 2423.41.*

5. In your questionnaire, you said will respond in a timely manner to any reasonable request for information by any Member of Congress.

   - What would be an unreasonable request for information?

     Question 21 (Minority questionnaire), asked if I "will respond in a timely manner to Member requests for information." I stated that "I will respond to ***any*** Member requests for information." I commit to do so. Questions 22 and 23, however, asked if I would "reply to any ***reasonable*** request for information from the Ranking Member ..." and "reply to any ***reasonable*** request from members of Congress." As I stated in my responses to those questions, I commit to do so. It is difficult for me to imagine that any request for information from the Committee, the Ranking Member, or from Congress would be "unreasonable".

   - Will you commit to responding to all requests from all Members of Congress to the best of your ability?

     I commit to responding to all requests from all Members of Congress to the best of my ability.

1990 Vermont Avenue, NW | Suite 850
Washington, DC 20005

November 2, 2017

The Honorable Ron Johnson
Chairman, United States Senate Committee on Homeland Security & Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

Chairman Johnson,

The United States Senate Committee on Homeland Security & Governmental Affairs is scheduled to consider the nomination of James Abbott for Member of the Federal Labor Relations Authority next week. Log Cabin Republicans, the country's original and largest organization of LGBT conservatives and straight allies, stands in support of his confirmation.

Mr. Abbott has a demonstrated knowledge of the Federal Service Labor-Management Relations Statute, having served for the past 10 years as Chief Counsel to three Members — and Chairmen — of the Federal Labor Relations Authority, encompassing the terms of both Republican and Democratic administrations.

Over the years, he has amassed a distinguished career in public service, with tenures at the Congressional Office of Compliance, Defense Contract Management Agency, and other governmental entities serving the American people.

As a member of Log Cabin Republicans, Mr. Abbott has maintained an unwavering commitment to LGBT equality and the principles of non-discrimination that are at the core of our values as a nation.

In matters concerning both professional expertise and personal character, Mr. Abbott is unassailable — and deserving of a swift confirmation by the United States Senate to the Federal Labor Relations Authority.

Sincerely,

Gregory T. Angelo
President

cc: United States Senate Committee on Homeland Security & Governmental Affairs members