



FMCS

FEDERAL MEDIATION & CONCILIATION SERVICE

MEMORANDUM

TO: Office of Management and Budget
FROM: Allison Beck, Director
DATE: September 25, 2015
RE: Contingency Plan for Agency Operations in the Absence of Appropriations

This memorandum sets forth a contingency plan that will be operational in the event of a lapse in appropriations to fund current Federal Mediation and Conciliation Service activities. The plan provides for an orderly suspension of agency operations and for continuation of those agency operations deemed to be excepted from suspension.

Summary of Agency Functions

FMCS is an independent executive agency whose primary mission is to assist parties to labor disputes in industries affecting commerce, to settle such disputes through conciliation and mediation and thus avoid or minimize the disruptive effects of strikes and/or lockouts. FMCS provides employment-based mediation services, alternative dispute resolution programs, and promotes and establishes labor-management programs. The agency also maintains and provides parties with rosters of arbitrators. FMCS provides its services variously to the private and public sectors, including Federal agencies and state and local governments. FMCS's international work in collaboration with the U.S. State Department and the Department of Labor includes assisting other nations and foreign organizations with issues relating to effective labor relations systems.

Summary of Contingency Plan

FMCS will suspend all core operations and services and all activities of supporting internal offices, with the following exception: FMCS will continue to provide collective bargaining mediation services to parties in certain critical industries, including most particularly the defense, health care, and power generation industries, where the Director determines that mediation services are essential activities necessary to protect life or property and where such threat to life or property can reasonably be said to be near at hand and demanding an immediate response to avoid or minimize the disruptive effects of a strike and/or lockout.

The Director will make a determination of the need for such mediation services on a case-by-case basis, pursuant to applicable legal standards and this plan, from among a very limited scope of cases. The scope of cases she will consider will be limited by the following criteria, among other considerations: (1) it will include only cases involving either an expired collective bargaining agreement or a collective bargaining agreement scheduled to expire on or before January 31, 2016; (2) it will include only cases where, in the Director's professional judgment as a mediator, a work stoppage or lockout is likely without the assistance of a mediator; and (3) it

will include only cases arising in a hospital care setting, in or directly impacting the defense industry, in the power generation industry, or in such other critical industry where the Director determines that a work stoppage will have a comparable effect.

The scope of cases the Director will consider is presently limited to fewer than 3 percent of open, ongoing cases that, absent a lapse in funding, are otherwise eligible for mediation services. From among these cases, the Director will provide mediation services only where she determines that failure to offer mediation services poses an imminent threat to life or property. She estimates that, in order to provide such emergency excepted services, she will need to retain employees in the job categories and numbers as follows: one (1) Executive Assistant to the Director; one (1) Deputy Director; one (1) Manager of Field Operations; one (1) Manager of National Office Operations; eight (8) Mediators and/or Regional Directors; one (1) IT Director; and one (1) IT Specialist.

The number of employees retained to protect life and property will be in the range of 5 percent of the total number of employees employed at the beginning of the lapse in funding. The total number of employees employed at the time of the lapse in funding is 240.

Legal Standards Applicable to Determinations Under the Contingency Plan

The United States Constitution provides that "no money shall be drawn from the treasury, but in consequence of appropriations made by law." U.S. Const. art. I, 9, cl. 7. The Antideficiency Act permits officers and employees of the Federal government to incur obligations in advance of appropriations where such obligations are authorized by law, whether expressly or by necessary implication. 31 U.S.C. §1341. The Act prohibits officers and employees of the Federal government from employing personal services exceeding those authorized by law except for emergencies involving the safety of human life or the protection of property. Such emergencies do not include ongoing regular functions of government, the suspension of which would not imminently threaten the safety of human life or the protection of property. 31 U.S.C. §1342.

The Attorney General has determined that the exception for emergencies under the Antideficiency Act is narrow, and must be applied only where there is: (1) a reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property; and (2) some reasonable likelihood that the safety of human life or the protection of property would be compromised in some significant degree by delay in the performance of the function in question. Accordingly, "the emergencies exception applies only to cases of threat to human life or property where the threat can be reasonably said to be [sic] near at hand and demanding of immediate response." *Memorandum for Alice Rivlin, Director, Office of Management and Budget*, August 16, 1995.

The Attorney General has also opined that agencies are by necessary implication authorized to incur those minimal obligations necessary for the orderly termination of functions that may not continue during a period of lapsed appropriations. See "Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriations," 4A Op. O.L.C. 16 (1980); "Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations," 5 Op. O.L.C. 1 (1981). The Attorney General has further noted that, with respect to any short lapse in appropriations, it is appropriate for an agency to assume in its analysis of emergencies that the private economy will continue operating during the lapse. *Memorandum to Alice Rivlin, ibid.*

Agency Functions

FMCS's core program areas and services include the following:

- Collective bargaining mediation
- Grievance mediation
- Relationship development and training programs and outreach activities
- Arbitration services
- Notice processing
- Employment and regulatory mediation
- FMCS Institute for Conflict Management
- Labor-management committee grants
- International training and exchange
- FIFRA arbitration administration

FMCS conducts its core program operations at its Washington, DC, headquarters and in 67 field offices located in ten regions across the country.

The following offices support FMCS' core program areas and services:

- Office of Field Operations
- Notice Processing Unit
- Information Technology
- General Counsel
- Public Affairs
- Office of National Programs and Initiatives
- Education & Training
- Field Programs and Innovation
- Arbitration
- Administrative Services
- Budget
- Finance
- Human Resources
- EEO Office

Agency Functions that will Cease upon a Lapse in Funding

The following core programs will cease upon a lapse in funding:

- Collective bargaining mediation, except as described below
- Grievance mediation
- Relationship development and training programs and outreach activities
- Arbitration services
- Notice processing
- Employment and regulatory mediation
- FMCS Institute for Conflict Management
- Labor-management committee grants
- International training and exchange
- FIFRA arbitration administration

Activities in the following offices will cease upon a lapse in funding:

- Office Field Operations, except as described below
- Notice Processing Unit
- Information Technology, except as provided below
- General Counsel
- Public Affairs
- Office of National Programs and Initiatives
- Education & Training
- Field Programs and Innovation
- Arbitration
- Administrative Services
- Budget
- Finance
- Human Resources
- EEO Office

Agency Functions that Will Continue During a Lapse in Funding as Excepted Activities

FMCS will continue to provide collective bargaining mediation services to parties involved in certain critical industries, including most particularly the defense, health care, and power generation industries, where the Director determines that mediation services are essential activities necessary to protect life or property, and where such threat to life or property can reasonably be said to be near at hand and demanding of immediate response, to avoid or minimize the disruptive effect of strikes and/or lockouts. The Director will make determinations that mediation services are essential and excepted on a case-by-case basis, pursuant to applicable legal standards and this plan, from among a very limited scope of cases.

The scope of cases she will consider will be limited by the following criteria, among other considerations: (1) it will include only cases involving either an expired collective bargaining agreement or a collective bargaining agreement scheduled to expire on or before January 31, 2016; (2) it will include only cases where, in the Director's professional judgment as a mediator, a work stoppage or lockout is likely without the assistance of a mediator; and (3) it will include only cases arising in a hospital care setting, in or directly impacting the defense industry, in the power generation industry, or in such other critical industry where the Director determines that a work stoppage will have a comparable effect.

The scope of cases the Director will consider is presently limited to fewer than 3 percent of open, ongoing cases that, absent a lapse in funding, are otherwise eligible for mediation services. From among these cases, the Director will provide mediation services only where she determines that failure to offer mediation services poses an imminent threat to life or property. She estimates that, in order to provide such emergency excepted services, she will need to retain employees in the job categories and numbers as follows: one (1) Executive Assistant to the Director; one (1) Deputy Director; one (1) Manager of Field Operations; one (1) Manager of National Office Operations; eight (8) Mediators and/or Regional Directors; one (1) IT Director; and one (1) IT Specialist.

Orderly Shutdown Activities

In the event of a funding hiatus, the agency will proceed with the orderly shutdown of non-excepted activities beginning on the first day of the hiatus. The Director will authorize only

actions that will contribute to an orderly shutdown, with primary consideration given to protecting life and safeguarding Government property and records.

The Director estimates that the orderly shutdown of non-excepted operations will require not more than one-half workday. The Director's intention is to accomplish shutdown in a way that will facilitate prompt reactivation when funds are made available.

1. The Director or her designee will notify the Office of Management and Budget immediately when shutdown activities are being initiated, by notice to OMB Labor Branch Chief Melissa Bomberger at mbenton@omb.eop.gov or 202-395-7887.
2. The Director will limit obligations incurred to those needed to maintain the minimum level of essential activities necessary to protect life and property; to process necessary personnel actions; and to process the personnel payroll for all periods prior to fund interruption.
3. The Director or her designee will notify agency senior managers (Deputy Director, Chief Financial Officer, General Counsel, National Office Managers, Manager of Field Operations, and Regional Directors) of the hiatus and will direct them to begin shutdown activities.
4. The Director will determine what specific mediation activities and personnel are essential and therefore excepted from suspension, and, where applicable, the duration of each exception. She will notify affected senior managers of her determinations.
5. The Director will instruct the Director of Human Resources to take necessary personnel actions to notify employees of the suspension of agency operations and to release employees in accordance with law and OPM regulations, including the preparation of notices of furlough and processing of personnel and pay records in connection with furlough.
6. The Director of Human Resources will notify all employees that they should report to work as scheduled on the first workday of the hiatus. Managers or supervisors will inform employees of the status of funding and instruct them to limit their work activities to those functions necessary for the orderly cessation of operations. The Director of Human Resources will notify all employees that no work can be performed on a voluntary basis. She will also provide employees with electronic links to OPM guidance.
7. The Director of Human Resources will notify all employees of the impact of the furlough on all employee benefits, including unemployment compensation, health insurance, leave accrual, retirement, and life insurance. They will advise all employees to follow public news broadcasts and the OPM and/or OMB websites for notice of the end of the hiatus.
8. The manager of each office or division will notify absent employees of the furlough as soon as possible. Managers should contact employees in travel status, including those on travel in connection with training, and advise them to return to their duty station immediately.

Termination of Hiatus in Funding

OMB will notify the Director of FMCS when the hiatus of appropriations has ended, and she or her designee in turn will advise all senior managers. Each manager will contact employees that he or she supervises by e-mail to inform them that the hiatus has ended and to advise them that employees are required to return to work on their next regular duty day.