No. 98-70866

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY W. EISINGER,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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MISCELLANEOUS

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STATEMENT OF JURISDICTION

The final decision and order under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") in 54 FLRA (No. 58) 562 (June 30, 1998).[1] The Authority exercised jurisdiction over the case pursuant to section 7105(a)(2)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1994 & Supp. II 1996) (Statute).[2]

This Court lacks subject matter jurisdiction to review this Authority decision involving an appropriate unit determination because section 7123(a)(2) of the Statute expressly bars such review. Assuming the Court has subject matter jurisdiction, Jeffrey Eisinger (Eisinger) filed the

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[1] The Authority's decision is found at pp. 9-30 of the Excerpts of Record (ER) submitted with this brief. Petitioner failed to include record excerpts in any form as required by Local Rule 30-1.5.

[2] Pertinent statutory and regulatory provisions are set forth in Addendum A to this brief.

petition for review within the 60-day time limit provided by 5 U.S.C. § 7123.

STATEMENT OF THE ISSUES

I. Whether this Court lacks subject matter jurisdiction, pursuant to section 7123(a)(2), to review the Authority's decision finding that Eisinger lacked standing to file a clarification of unit petition.

II. Assuming, for the sake of argument, that the Court has jurisdiction, whether the Authority properly determined that Eisinger lacked standing to file a clarification of unit petition.

STATEMENT OF THE CASE

This case arose as a proceeding before the Authority concerning Eisinger's petition seeking to clarify the certification of an exclusive representative for a consolidated bargaining unit of employees of the Small Business Administration (SBA). The Authority dismissed Eisinger's petition for lack of standing under section 2422.2(c) of the Authority's regulations, 5 C.F.R. § 2422.2(c) (1998). Eisinger seeks review of the Authority's decision in this Court.

STATEMENT OF THE FACTS

I. The Statutory Scheme

A. The Federal Service Labor-Management Relations Statute

The Statute governs labor-management relations in the federal service.[3] Under the Statute, the responsibilities of the Authority include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representation election matters, and resolving exceptions to arbitration awards. *See* 5 U.S.C. § 7105(a)(1), (2); *see also Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority thus ensures compliance with the statutory rights and obligations of federal employees, labor organizations that represent such federal employees, and federal agencies. The Authority is further empowered to take such actions as are necessary and appropriate to effectively administer the Statute's provisions. *See* 5 U.S.C. § 7105(a)(2)(I); *BATF*, 464 U.S. at 92-93; *U.S. Dep't of Interior, Bur. of Indian Affs. v. FLRA*, 887 F.2d 172, 173 (9th Cir. 1989) (*Dep't of Interior*). Section 7134 of the Statute specifically empowers the Authority to prescribe rules and regulations to carry out the provisions of the Statute. *See* 5 U.S.C. § 7134.

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[3] The Statute was enacted as Section 701 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.), *reprinted in* 5 U.S.C. § 7101 note at 1028-1033 (1994).

The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *See NTEU v. FLRA*, 701 F.2d 781, 782 n.3 (9th Cir. 1983); *see also BATF*, 464 U.S. at 92-93. Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97; *see California Nat'l Guard v. FLRA*, 697 F.2d 874, 876 (9th Cir. 1983).

Section 7111 of the Statute sets out the procedures for representation cases, *i.e.*, cases concerning the creation, termination, or modification of a union's "exclusive recognition" to represent a particular "appropriate unit" of employees. ER 14. Section 7112 of the Statute specifically provides for the determination of appropriate bargaining units. Under section 7112(a), a unit will be found appropriate if it: (1) ensures a clear and identifiable community of interest among the employees in the unit; (2) promotes effective dealings with the agency; and (3) promotes efficiency of the operations of the agency involved. 5 U.S.C. § 7112(a). Appropriate unit questions may arise not only in connection with an initial organizing campaign, but also, as here, with respect to previously certified bargaining units.

B. Part 2422 of the Authority's Regulations

Pursuant to its broad authority under 5 U.S.C. § 7134, the Authority has promulgated regulations governing the processing of cases. Part 2422 of the regulations, 5 C.F.R. Part 2422, provides procedures for representation cases. Standing to file representation petitions is controlled by section 2422.2, which provides, as relevant here, that only an agency (*i.e.*, employer) or a labor organization may file a petition to clarify the scope of an existing bargaining unit.[4]

These regulations were initially promulgated upon the Authority's creation in 1979. *See* 44 FR 44,740 (1979). The standing requirements currently found at section 2422.2 remain as they were originally promulgated. *Compare* 5 C.F.R. § 2422.1 (1980) (45 FR 3,498 (1980)) *with* 5 C.F.R. § 2422.2 (1998). Further, identical standing requirements existed under the Executive Order program that governed federal service labor relations prior to the enactment of the

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[4] Section 2422.2 provides in pertinent part

> § 2422.2 Standing to file a petition.
>
> A representation petition may be filed by: an individual; a labor organization; two or more labor organizations acting as a joint-petitioner; an individual acting on behalf of any employee(s); an agency or activity; or a combination of the above: *Provided, however*, that
>
> * * * * *
>
> (c) Only an agency or a labor organization may file a petition [seeking to clarify and/or amend a recognition of certification in effect and/or any other matter relating to representation] pursuant to section 2422.1(b) or (c).

Statute. *See* 29 C.F.R. § 202.1(d) (1975) (40 FR 19,981 (1975)).

II. The Facts

The American Federation of Government Employees, AFL-CIO (AFGE) is the exclusive representative of a nationwide consolidated bargaining unit of employees of the SBA. The unit was consolidated on August 22, 1978 (case no. 22-08517 UC) and on October 15, 1981 (case no. 3-CU-89). Employees of the Fresno District Office are included in the consolidated unit and subject to the collective bargaining agreement between the SBA and AFGE (the Master Agreement). In 1989, the Agency created the Fresno Commercial Loan Servicing Center in Fresno, California (the Fresno Center) and in October 1995 the Fresno Center became a separate office. There are approximately 50 unit employees in the Fresno Center. ER 11.

On October 20, 1997, Eisinger filed a CU petition with the Authority's Regional Office in San Francisco, California. Eisinger sought "a determination" that the professional and nonprofessional employees of the Fresno Center "are not subject to" the Master Agreement, *i.e.*, a determination that the Fresno Center employees have been severed from the consolidated unit. Specifically, Eisinger contended that an agency reorganization modified lines of authority within the SBA and, as a result, it was no longer appropriate to include

the Fresno Center employees in the consolidated unit. ER 1-2.[5]

The Authority's San Francisco Regional Director (RD) dismissed the petition, finding that under 5 C.F.R. § 2422.2(c) Eisinger was without standing to file a CU petition. Section 2422.2(c) provides that only an agency or a labor organization may file such a petition. ER 3.

Pursuant to section 2422.31 of the Authority's regulations (5 C.F.R. § 2422.31), Eisinger filed an application for review of the RD's decision with the Authority. Eisinger acknowledged that the Authority's regulations preclude an individual from filing a CU petition. ER 4. However, Eisinger contended that, notwithstanding the regulation, the terms of the Statute permit an individual to file such a petition. Specifically, Eisinger argued that section 7111(b)(2) of the Statute provides that any "person" may file a clarification of unit petition and that section 7103(a)(1) defines a "person" as "an individual, labor organization, or agency." Citing the lack of precedent on the issue, the Authority granted review on the question of Eisinger's standing. ER 10.

[5] Both the SBA and AFGE assert that these employees are properly included in the consolidated unit. ER 11.

III. The Authority's Decision

On review, the Authority affirmed the RD's finding that Eisinger lacked standing to file a CU petition. ER 12-13. Chair Segal and Member Wasserman filed separate concurring opinions and Member Cabaniss dissented.

Chair Segal concluded that the relevant regulations correctly implemented Congress' intent for participation in the representation process. Chair Segal noted that the Authority's practice is consistent with that established under the precursor to the Statute, Executive Order 11491, as amended and is also consistent with the regulations of the NLRB, after which the Authority was modeled. ER 15. Further, in Chair Segal's view, clarification of unit determinations are institutional, not individual, in nature. ER 16-17.

Chair Segal also found that Eisinger did not establish that the Statute requires that individuals be permitted to file clarification of unit petitions. She first noted that the Statute defines "person" in the disjunctive and therefore "all three types of 'persons' are not necessarily encompassed each and every time the term 'person' is used in the Statute". ER 19-20. In addition, she emphasized that section 7111(b) speaks to the actions the Authority is to take upon the filing of a representation petition, not to the requirements applicable to the filing of a petition itself. ER 20.

Member Wasserman also noted the use of the disjunctive "or" in section 7103(a)(1) of the Statute. In Member Wasserman's opinion, this "presents an ambiguity as to whether the three types of 'persons' are necessarily encompassed each and every time the term 'person' is used in the Statute." Member Wasserman further concluded that this ambiguity constituted a statutory "gap" that the Authority is entitled to fill through regulation. ER 23-24. Finally, in agreement with Chair Segal, Member Wasserman found the regulation to be a reasonable exercise of the Authority's regulatory discretion. ER 26-27.[6]

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A); *Department of Veterans Affairs Med. Ctr. v. FLRA*, 16 F.3d 1526, 1529 (9th Cir. 1994); *Overseas Educ. Ass'n, Inc. v. FLRA*, 858 F.2d 769, 771-72 (D.C. Cir. 1988).

At issue here is the validity of section 2422.2 of the Authority's regulations. As this Court has stated in *Bicycle Trails Council of Marin v. Babbitt*, "regulations promulgated pursuant to [express rulemaking authority] will be upheld

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[6] Member Cabaniss dissented, finding no ambiguity in the pertinent statutory provisions. ER 28-30.

'unless they are arbitrary, capricious, or manifestly contrary to the statute.'" 82 F.3d 1445, 1451 (9th Cir. 1996) (quoting from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (*Chevron*)); *see also American Paper Inst., Inc. v. U.S. E.P.A.*, 996 F.2d 346, 351 (D.C. Cir. 1993) (*American Paper*) (unless a regulation contravenes the unambiguously conveyed intent of Congress, it will be upheld so long as it "appears designed to implement the statutory scheme by reasonable means"). Unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. *See Chevron*, 467 U.S. at 844. A court should defer to the Authority's construction as long as it is reasonable. *See id.* at 845.

Finally, as the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations." *BATF*, 464 U.S. at 97 (citation omitted); *see also AFGE, Local 2986 v. FLRA*, 775 F.2d 1022, 1025 (9th Cir. 1985).

SUMMARY OF ARGUMENT

Eisinger's petition for review should be dismissed for lack of subject matter jurisdiction. However, even if this Court finds jurisdiction, Eisinger's petition for review must be denied because the Authority properly dismissed Eisinger's CU petition for lack of standing.

I. Section 7123(a)(2) of the Statute expressly precludes judicial review of Authority decisions under

"section 7112 of [the Statute] (involving an appropriate unit determination)." In the case below, the Authority denied Eisinger's request to determine that the employees at the SBA's Fresno Center are not properly included in the nationwide consolidated bargaining unit of SBA employees. Because the Authority's decision clearly involved an appropriate unit determination within the scope of section 7112, this Court is without subject matter jurisdiction to review the Authority's decision.

Eisinger mistakenly claims that the decision arose under section 7111 of the Statute, not section 7112. Even if this case is considered as one arising under section 7111, this Court is still without jurisdiction because Congress intended that all decisions involving representation matters, including those arising under section 7111, are exempt from judicial review. As the legislative history of the Statute makes clear, neither the House of Representatives nor the Senate ever contemplated judicial review of any Authority decisions concerning representation matters.

II. Section 2422.2 of the Authority's regulations provides that only agencies (employers) and labor organizations may file CU petitions. Eisinger, an individual, concedes that he lacks standing to file a CU petition under the Authority's regulations, but argues that the applicable regulation is invalid, as inconsistent with section 7111(b)(2) of the Statute. Eisinger is mistaken. A reviewing court must uphold an agency regulation unless the regulation is manifestly contrary to the statute or contravenes the unambiguously conveyed intent of Congress.

Contrary to Eisinger's contentions, section 2422.2 constitutes a valid exercise of the Authority's broad power to promulgate regulations because it is consistent with the Statute and furthers congressional intent.

First, section 2422.2 of the Authority's regulations is not facially inconsistent with section 7111(b) of the Statute. Section 7111(b) does not establish the requirements for filing a petition but rather prescribes the actions the Authority must undertake upon the filing of a petition. In addition, the Statute's use of the term "any person" is not dispositive because the reach of the term "person" in any one part of the Statute may be limited by context.

Second, the Authority's regulation continues the practice that existed under the Executive Order program that governed federal sector labor relations before the Statute was enacted, a practice of which Congress was presumably aware. Third, the Authority's standing requirements also mirror the practice of the NLRB in the private sector. It is well-established that Congress intended that the representation process practices under the Statute would be patterned after the private sector model.

Finally, by limiting standing to file CU petitions to agencies and unions, the Authority's regulations on standing reasonably advance certain programmatic interests. The interests at stake in unit determinations are institutional, relating in large part to the need for effective dealings between employer agencies and unions. In addition, legitimate individual interests, such as fair representation by a union, are more appropriately addressed in other forums,

including the unfair labor practice procedures in section 7116 of the Statute.

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION, PURSUANT TO SECTION 7123(a)(2) OF THE STATUTE, TO REVIEW THE AUTHORITY'S DECISION FINDING THAT EISINGER LACKED STANDING TO FILE A CLARIFICATION OF UNIT PETITION[7]

A. Section 7123(a)(2) expressly precludes judicial review of Authority decisions involving appropriate unit determinations under section 7112

It is axiomatic that federal court jurisdiction is conferred by Congress and that Congress may limit or foreclose review as it sees fit. *American Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940); *see General Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968 (9th Cir. 1981). As discussed below, section 7123(a)(2) of the Statute expressly excludes from judicial review Authority decisions under section 7112, *i.e.* cases involving the composition of appropriate bargaining units. Because the Authority decision as to which review is sought involved an appropriate unit determination, the petition for review must be dismissed for lack of subject matter jurisdiction.

1. The Authority's decision involved an "appropriate unit determination"

Eisinger sought "a determination" that the employees of the Fresno Center "are not subject to" the Master Agreement, *i.e.*, a determination that the Fresno Center employees have been severed from the consolidated unit. A CU petition is

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[7] The Authority moved to dismiss Eisinger's petition for lack of subject matter jurisdiction. This Court denied the Authority's motion without prejudice to renewing the arguments in its brief on the merits.

the proper procedure to clarify inclusions or exclusions from an existing unit. *Federal Trade Comm'n and American Fed'n of Gov't Employees, Local 2211*, 35 FLRA 576, 583 (1990). In a case like this, where a party seeks to sever an organizational segment from a larger unit, the Authority is "bound by the three criteria for determining the appropriateness of any unit as mandated by section 7112(a)(1)." *International Communication Agency and National Fed'n of Federal Employees, Local 1812*, 5 FLRA 97, 99 (1981).

In his Response to the Authority's Motion to Dismiss, Eisinger mistakenly contends that because he claims that section 7111(b)(2) of the Statute grants him standing, the Authority decision is an order under section 7111, not 7112. The fact that the Authority's decision relied in part on sections of the Statute other than section 7112 does not alter the fact that the case involves an appropriate unit determination.[8] Further, and in any event, Congress clearly intended that all decisions involving representation matters, including those arising under section 7111, be exempt from judicial review (see section I.B., below).

Eisinger's petition clearly sought an appropriate unit determination within the meaning of section 7112 of the Statute and the operative effect of the Authority's Decision and Order was to dismiss the petition and retain the Fresno Center within the consolidated unit. Accordingly, the

[8] Further, coverage of sections 7111 and 7112 are not mutually exclusive. Section 7111(b) provides general procedures for the investigation of all representation petitions, including those seeking appropriate unit determinations.

Authority's decision clearly involved an appropriate unit determination.

2. The Statute expressly precludes judicial review of Authority appropriate unit determinations

Section 7123(a) of the Statute defines the jurisdiction of federal circuit courts to review decisions and orders of the Authority. Embodying the strict limits Congress set on judicial review of Authority decisions, that section specifically precludes review of certain Authority decisions and orders, including those involving appropriate unit determinations. Section 7123(a) states, in this connection:

> Any person aggrieved by any final order of the Authority other than an order under--
>
> . . . .
>
> (2) section 7112 of this title (involving an appropriate unit determination)
>
> may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order . . . .

5 U.S.C. § 7123(a).

The Statute's legislative history confirms and places in perspective what section 7123(a)'s plain language states. Although scant, that legislative history indicates that in excluding Authority decisions and orders involving appropriate unit determinations from judicial review, Congress intended to follow private sector practice. *See* H.R. Rep. No. 1717, 95th Cong., 2d Sess. 153 (1978)[9]; *see also*

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[9] *Reprinted in* Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 821 (1978) (*Legis. Hist.*).

U.S. Dep't of Justice v. FLRA, 727 F.2d 481, 490-493 (5th Cir. 1984) (*Justice v. FLRA*) (finding that Congress relied on private sector practice when it precluded judicial review of all representation cases).

Congress' intent to preclude review under section 7123 of appropriate unit determinations is express and unambiguous. Further, the preclusion is complete, there being no statutory or judicially-created exceptions.[10]

B. Even if the Authority's decision is characterized as arising under section 7111 of the Statute, this Court is without jurisdiction because Congress intended to preclude judicial review of all representation case decisions

Although section 7123 only expressly precludes review of Authority representation decisions under section 7112, it is clear that Congress intended that, as in the private sector under the NLRA, all representation cases be exempt from judicial review. In the only case to address the matter, the Fifth Circuit found that Congress's silence in section 7123 with respect to section 7111 matters does not reflect an intent to subject such matters to judicial review, but rather is a result of the evolution of the judicial review provisions through the legislative process. *Justice v. FLRA*, 727 F.2d at 491-92 (dismissing for lack of jurisdiction a

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[10] This Court has recognized exceptions to certain "presumptively unreviewable" administrative agency determinations, specifically enforcement decisions, and has applied those exceptions to the Authority. *See Montana Air Chapter No. 29, Ass'n of Civilian Technicians* v. *FLRA*, 898 F.2d 753, 756 (9th Cir. 1990) (*Montana ACT*). However, Congress's express preclusion of appropriate unit determinations is absolute, not presumptive. Accordingly, the exceptions recognized in *Montana ACT* are not applicable here.

petition for review of an Authority decision under section 7111). As the legislative history of the Statute makes clear, neither the House of Representatives nor the Senate ever contemplated judicial review of Authority decisions concerning representation cases.

The version of the Statute passed by the House of Representatives specifically made subject to appellate court review the following: 1) a final order of the Authority in an unfair labor practice proceeding under section 7116; 2) the award of an arbitrator (which has been reviewed by the Authority under section 7122); and appropriate unit determinations under section 7112. *See* H.R. Rep. No. 1403, 95th Cong. 2d Sess. 57 (1978), reprinted in *Legis. Hist.* at 703; *see also Justice v. FLRA*, 727 F.2d at 491. From this it is clear that under the House version of section 7123, the only representation cases subject to judicial review were appropriate unit determinations. *Justice v. FLRA*, 727 F.2d at 491. Significantly, the Senate version of what became section 7123 was even more restrictive. As reported out of committee, the Senate version made all Authority decisions final and not subject to judicial review. S. Rep. No. 969, 95th Cong. 2d Sess. 102 (1978), reprinted in *Legis. Hist.* at 762. The bill was amended on the Senate floor to provide for judicial review, but the amendment expressly limited such review to unfair labor practice decisions. *See* 124 Cong. Rec. 27,590-591 (1978), reprinted in *Legis. Hist.* at 1037. Accordingly, neither the House nor the Senate version subjected representation cases other than appropriate unit determinations to judicial review.

At Conference, the Senate and House conferees agreed to submit the Authority's unfair labor practice decisions, including review of arbitrators' awards involving unfair labor practices, to judicial review. The House, however, receded to the Senate with respect to other arbitration awards and unit determinations. H. R. Rep. No. 1717, 95th Cong. 2d Sess. 153, reprinted in *Legis. Hist.* at 821. As the Fifth Circuit concluded, the most natural reading of the enacted version of section 7123(a) is as a clarification that matters arising under sections 7112 and 7122 were not, as originally proposed by the House, to be subject to judicial review. *Justice v. FLRA*, 727 F.2d at 492. The notion that section 7123's silence with respect to section 7111 matters is indicative of Congress's intent to submit representation decisions other than appropriate unit determinations to direct judicial review is directly undercut by the fact that neither the Senate nor the House had ever considered section 7111 representation decisions as directly appealable orders. *Justice v. FLRA*, 727 F.2d at 492.

Further evidence that Congress did not intend section 7123(a) to provide judicial review for representation cases comes from an examination of private sector practice. This and other courts have recognized that in many respects the Statute is modeled on the NLRA, and that practices developed under the NLRA are appropriately considered in interpreting the Statute. *NTEU*, 701 F.2d at 782 n.3; *see also Turgeon v. FLRA*, 677 F.2d 937, 939-40 (D.C. Cir. 1982).

With particular reference to judicial review, it is clear that the Statute was modeled after the NLRA. First, the

wording of section 7123 of the Statute is, in significant part, essentially identical to that found in the analogous section of the National Labor Relations Act (NLRA).[11] Second, the legislative history of the Statute constitutes further evidence of Congress's intent to follow private sector practice. The Conference Report recognized that the right of court review was to be based on "established practices of the National Labor Relations Board in the 'private sector'". *See Justice v. FLRA*, 727 F.2d at 492 (citing H.R. Rep. No. 1717, 95th Cong. 2d Sess. 153, reprinted in *Legis. Hist.* at 821). Further, Congressman Ford, a co-sponsor of the House bill upon which the Statute is based, stated that "judicial review of the Authority's decision [was to be] similar to that provided under the National Labor Relations Act . . . ." 124 Cong. Rec. 25,722 (1978), reprinted in *Legis. Hist.* at 856; *see also* remarks of Senator Stevens, 124 Cong. Rec. 27,590 (1978), reprinted in *Legis. Hist.* at 1037. There can be little doubt, therefore, of the relevance of private sector precedent in interpreting the judicial review provisions of the Statute.

It is well settled that orders emanating from NLRB representation proceedings are not directly reviewable in court. *See Idaho Falls Consolidated Hospitals, Inc. v. NLRB*, 731 F.2d 1384, 1388 (9th Cir. 1984); *see also Hartz Mountain Corporation v. Dotson*, 727 F.2d 1308, 1310 (D.C. Cir. 1984)(*Hartz Mountain*) (cases so holding are "legion"); *Justice v. FLRA*, 727 F.2d at 492-93, and cases cited. In

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[11] The judicial review provisions of the NLRA are found at section 10(e) and (f), 29 U.S.C. § 160(e) and (f).

American Fed'n of Labor, the Supreme Court examined the legislative history of the NLRA, and concluded that NLRB representation determinations are not "final orders" within the meaning of section 10(f) of the NLRA, 29 U.S.C. 160(f). 308 U.S. at 411. There the Supreme Court found that Congress had made a policy determination favoring finality with respect to employees choosing their exclusive bargaining representatives. *Id.* at 411-12; *see also Hartz Mountain*, 727 F.2d at 1310-11. When it modeled the judicial review provisions of the Statute after those found in the NLRA, Congress presumably had these same policy considerations in mind.[12]

Accordingly, it is clear that Congress did not intend section 7123(a) of the Statute to provide this Court with jurisdiction to review directly an Authority decision, like that in the instant case, concerning representation matters.[13]

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[12] Indeed, this policy is reflected in section 7105(f) of the Statute where the Authority is required to act on applications for review of representation cases within 60 days. This is the only statutorily imposed time limit on Authority action.

[13] Courts have fashioned and applied a limited exception to this rule where judicial review is unavailable *and* where the NLRB has plainly exceeded its statutory authority by violating a "clear and mandatory provision" of the NLRA. *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (*Leedom*); *see also, NTEU v. FLRA*, 112 F.3d 402, 406 (9th Cir. 1997) (*NTEU*). But even if Eisinger's claim can be construed as an assertion that the promulgation of 5 C.F.R. § 2422.2 was in excess of the FLRA's statutory authority, jurisdiction still does not lie in this Court. A suit under *Leedom* is based on original federal jurisdiction and the proper forum to address it in the first instance would be the federal district court. *Leedom*, 358 U.S. at 189; *NTEU*, 112 F.3d at 406.

II. ASSUMING, FOR THE SAKE OF ARGUMENT, THAT THE COURT HAS JURISDICTION, THE AUTHORITY PROPERLY DETERMINED THAT EISINGER LACKED STANDING TO FILE A CLARIFICATION OF UNIT PETITION

Eisinger does not, and indeed cannot, contend that under the Authority's regulations he has standing to file a CU petition. Instead, Eisinger challenges the validity of the Authority's regulation on standing, alleging that it is inconsistent with section 7111(b)(2) of the Statute. Eisinger is mistaken. Section 2422.2 constitutes a valid exercise of the Authority's broad power to promulgate regulations under section 7134 of the Statute.

As noted above (p. 9), a reviewing court must uphold an agency regulation unless the regulation is manifestly contrary to the statute or contravenes the unambiguously conveyed intent of Congress. As discussed below, and as the Authority found, section 7111(b) of the Statute does not, by its terms, grant individuals standing to file CU petitions and the Authority's regulation implements Congress's intent that representation proceedings under the Statute be conducted in a manner similar to those in the private sector. Moreover, the regulation furthers significant programmatic interests.

A. Section 7111(b) of the Statute does not grant individuals standing to file CU petitions

Eisinger mistakenly reads section 7111(b) as granting individuals standing to file CU petitions. However, the intent of section 7111(b) was not to delineate the standing requirements for filing representation petitions. Rather than establishing the requirements of the petition itself, section 7111(b) prescribes the actions the Authority must undertake upon the

filing of a petition. Section 7111(b)'s focus on post-filing procedure is evident from its structure, which provides only: "*If* a petition is filed with the Authority (1) by any person[,]" then the Authority shall investigate the matter. 5 U.S.C. § 7111(b)(2) (emphasis added). Thus, by its terms, the provision reflects Congress' expectations as to Authority action *after* a petition -- presumably a proper petition -- has been filed. It does not speak to, and thus does not preclude the Authority's regulation of, requirements applicable to the filing of a petition itself.

Further, the mere reference to "any person" in section 7111(b) is insufficient to establish that the Statute requires that an individual be granted standing to file a CU petition. As noted in the concurring opinions, the reach of the term "person" may be limited by context. For example, section 7111(b)(1)(A) provides that the Authority shall investigate a petition calling for a representation election filed by "any person" alleging a proper showing of interest among unit employees. However, as section 7116(a)(3) makes it an unfair labor practice for an agency to sponsor, control or otherwise assist any labor organization, an agency could not be included in the category of "person" referred to in section 7111(b)(1)(A).

In addition, the Authority's regulation limiting standing to file CU petitions continues the practice which governed such petitions under the Executive Order program (see n.3, *supra*). *See Fort Stewart Schools v. FLRA*, 860 F.2d 396, 402 (11th Cir. 1988), *aff'd* 495 U.S. 641 (1990) (Congress presumed to be aware of Executive Order practices); *see also NLRBU v. FLRA*, 834 F.2d 191, 201 (D.C. Cir. 1987) (Executive Order practice not explicitly eliminated in Statute

constitutes "guidance" with respect to congressional intent). The aspect of the Executive Order program relevant here was administered by the Assistant Secretary of Labor for Labor Management Relations (the Assistant Secretary). The Assistant Secretary's regulations implementing this aspect of the program provided that amendment and unit clarification petitions could be filed by "an activity or agency or by a labor organization which is currently recognized. . . ." 29 C.F.R. § 202.1(d)(1975); *see Headquarters, U.S. Army Aviation Systems Command*, 2 A/SLMR 279, 280 (1972).

Finally, the Authority's standing requirements as set forth in section 2422.2(c) of its regulations mirror the practice of the NLRB in the private sector. Like section 2422.2 of the Authority's regulations, the NLRB's regulations concerning amendment and clarification petitions provide that such petitions can be filed only by a labor organization or an employer. 29 C.F.R. § 102.60(b). The NLRB regulations do not provide for the filing of either type of petition by individuals.[14] Congress intended that the representation process practices under the Statute would be patterned after the private sector model. *See Naval Facilities Eng'g Serv. Ctr., Port Hueneme, Cal.*, 50 FLRA 363, 367 (1995); *see also NTEU v. FLRA*, 810 F.2d 295, 299 (D.C. Cir.

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[14] Section 102.60(b) provides, in pertinent part:

> (b) A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer. . . .

29 C.F.R § 102.60(b).

1987) (Statute crafted either by "analogy or contrast" with NLRA).

Because section 2422.2 of the Authority's regulations does not "contravene[] the unambiguously conveyed intent of Congress," it must be upheld so long as it "appears designed to implement the statutory scheme by reasonable means." *American Paper*, 996 F.2d at 351. As discussed immediately below, section 2422 of the Authority's regulations constitutes a reasonable exercise of the authority to take such actions as are necessary and appropriate to effectively administer the Statute's provisions (5 U.S.C. § 7105(a)(2)(I)) and to prescribe rules and regulations to carry out the provisions of the Statute (5 U.S.C. § 7134).

B. Limiting standing to file CU petitions was a reasonable exercise of the Authority's rulemaking authority

The Authority discharged its special function of applying the general provisions of the Statute to the complexities of federal labor relations by reasonably continuing the long-standing practice in both the private and federal sectors of limiting standing to file CU petitions to employers (agencies in the federal sector) and labor organizations. The "compelling program and practical considerations" supporting the Authority's position were enumerated in Chair Segal's opinion and endorsed by Member Wasserman. ER 16-18; 26-27.

As the concurring opinions noted, representation issues, which concern decisions of employees to be represented by, or not to be represented by, a union are collective rather than individual in nature. Similarly, the interests and relevant considerations in determining an appropriate bargaining unit,

whether in the initial certification process or in the clarification of an existing unit, are institutional rather than individual. Under section 7112(a) a unit is appropriate if it "will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of operations of the agency involved." 5 U.S.C. § 7112(a). Principal considerations, such as the effectiveness of labor relations and governmental efficiency, relate to the institutions involved, the union and the agency; and it is these parties who are uniquely qualified to raise such issues and assist the Authority in reaching a proper determination.[15]

Further, CU petitions by their nature seek to clarify the status not of an individual, but of a class of employees, often those who occupy a certain position. *See, e.g., U.S. Dep't of Justice and AFSCME, Local 3719,* 52 FLRA 1093 (1997) (CU petition filed seeking determination that certain employees should be excluded from the bargaining unit because they were engaged in national security work within the meaning of section 7112(b)(6)). Here, Eisinger seeks to exclude employees of the Fresno Center from the consolidated unit represented by AFGE. Eisinger's request is not limited to his interests; it encompasses the interests of all employees at the Fresno Center currently represented by AFGE. The effect of the petition would be to terminate the right of all of those employees to be represented by the Union.

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[15] This is particularly true in the case of CU petitions because the clarification petition is "intended to clarify, *consistent with the* [*union and agency's*] *intent* as well as statutory definitions, the unit inclusions or exclusions after the basic question of representation has been resolved." *U.S. Department of the Treasury, United States Mint*, 32 FLRA 508, 510 (1988) (emphasis added).

In contrast to the institutional interests that are appropriately raised through CU petitions, the Statute provides other mechanisms to protect the individual interests and rights of the participants in the government's labor relations program. Chief among these mechanisms are the unfair labor practice provisions in section 7116 of the Statute. For example, where an employee alleges that his current exclusive representative has failed to provide adequate representation as required by the Statute, the employee has recourse by filing an unfair labor practice charge asserting that the union failed to satisfy its duty of fair representation in violation of section 7116(b). *See generally Karahalios v. NFFE*, 489 U.S. 527 (1989).[16]

Finally, there are potential administrative consequences attendant to permitting individuals to file such petitions. Allowing individual employees, whose interest may only be personal dissatisfaction with their exclusive representative, to file CU petitions potentially could result in a significant number of unnecessary petitions.[17] It is, therefore, reasonable to preclude such filings unless, by doing so, significant interests are likely

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[16] In addition, where accompanied by a showing of interest of not less than 30 per cent of unit employees, an employee may petition for an election to determine if employees in a unit no longer wish to be represented by a union. 5 U.S.C. § 7111(b)(1)(B); 5 C.F.R. § 2422.1(a).

[17] There are approximately 1.1 million employees in exclusive units throughout the government. United States Office of Personnel Management, *Union Recognition in the Federal Government* 23, Table H (1997).

Further, taken to its logical extension, Eisinger's argument would permit any individual, even one with no connection whatsoever to the bargaining unit, to file a petition.

to be left unprotected. There has been, however, no such showing made here. Moreover, the Statute amply protects individual employees' interests through the procedures it makes available.

CONCLUSION

The petition for review should be dismissed for lack of subject matter jurisdiction. In the event that the court reaches the merits of the case, the petition for review should be denied.

Respectfully submitted,

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January 1999

CERTIFICATION PURSUANT TO FRAP RULE 32 AND CIRCUIT RULE 32(e)(4), FORM OF BRIEF

Pursuant to Federal Rule of Appellate Procedure 32 and Ninth Circuit Rule 32(e)(4), I certify that the attached brief is monospaced, has 10.5 or less characters per inch, and contains 6397 words.

January 15, 1999

_____
James F. Blandford

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY W.EISINGER, Petitioner	)	
v.	)	No. 98-70866
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relations Authority, have been served this day, by mail, upon the following:

Jeffrey W. Eisinger
286 N. College Avenue
Fresno, CA 93701

Jennifer A. Baker
Paralegal Specialist

January 15, 1999

STATUTORY AND REGULATORY ADDENDUM

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§ 7103. Definitions; application

(a) For the purpose of this chapter—

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual—

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include—

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the United States International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, and the Government Printing Office, but does not include—

(A) the General Accounting Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority; or

(G) the Federal Service Impasses Panel.

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include—

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document

incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means—

(A) an employee engaged in the performance of work—

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A) (i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which—

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit—

(i) on the basis of an election; or

(ii) on any basis other than an election, and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) 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 this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of

its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e)(1) The Authority may delegate to any regional director its authority under this chapter—

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of—

(1) the date of the action; or

(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may—

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion

concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

§ 7111. Exclusive recognition of labor organizations

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

(b) If a petition is filed with the Authority—

(1) by any person alleging—

(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or

(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit; or

(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation;

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after a reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

(c) A labor organization which—

(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;

(2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or

(3) has submitted other evidence that it is the exclusive representative of the employees involved;

may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose—

(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

(2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

(f) Exclusive recognition shall not be accorded to a labor organization—

(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

(2) in the case of a petition filed pursuant to subsection (b)(1)(A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition;

(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless—

(A) the collective bargaining agreement has been in effect for more than 3 years, or

(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement; or

(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority.

§ 7112. Determination of appropriate units for labor organization representation

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—

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

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

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

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

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which—

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat or reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any

provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if

supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

§ 7134. Regulations

The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations, and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision, or repeal of any such rule or regulation.

§ 2422.1 Purposes of a petition.

A petition may be filed for the following purposes:

(a) Elections or Eligibility for dues allotment.

To request:

(1) (i) An election to determine if employees in an appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, and/or

(ii) A determination of eligibility for dues allotment in an appropriate unit without an exclusive representative; or

(2) an election to determine if employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative.

(3) Petitions under this subsection must be accompanied by an appropriate showing of interest.

(b) Clarification or Amendment.

To clarify, and/or amend:

(1) A recognition or certification then in effect; and/or

(2) Any other matter relating to representation.

(c) Consolidation.

To consolidate two or more units, with or without an election, in an agency and for which a labor organization is the exclusive representative.

§ 2422.2 Standing to file a petition.

A representation petition may be filed by: an individual; a labor organization; two or more labor organizations acting as a joint-petitioner; an individual acting on behalf of any employee(s); an agency or activity; or a combination of the above: Provided, however, that

(a) Only a labor organization has standing to file a petition pursuant to section 2422.1(a)(1);

(b) Only an individual has standing to file a petition pursuant to section 2422.1(a)(2); and

(c) Only an agency or a labor organization may file a petition pursuant to section 2422.1(b) or (c).

§ 2422.31 Application for review of a Regional Director Decision and Order.

(a) Filing an application for review.

A party must file an application for review with the Authority within sixty (60) days of the Regional Director's Decision and Order. The sixty (60) day time limit provided for in 5 U.S.C. 7105(f) may not be extended or waived.

(b) Contents.

An application for review must be sufficient to enable the Authority to rule on the application without recourse to the record; however, the Authority may, in its discretion, examine the record in evaluating the application. An application must specify the matters and rulings to which exception(s) is taken, include a summary of evidence relating to any issue raised in the application, and make specific reference to page citations in the transcript if a hearing was held. An application may not raise any issue or rely on any facts not timely presented to the Hearing Officer or Regional Director.

(c) Review.

The Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds:

(1) The decision raises an issue for which there is an absence of precedent;

(2) Established law or policy warrants reconsideration; or,

(3) There is a genuine issue over whether the Regional Director has:

(i) Failed to apply established law;

(ii) Committed a prejudicial procedural error;

(iii) Committed a clear and prejudicial error concerning a substantial factual matter.

(d) Opposition.

A party may file with the Authority an opposition to an application for review within ten (10) days after the party is served with the application. A copy must be served on the Regional Director and all other parties and a statement of service must be filed with the Authority.

(e) Regional Director Decision and Order becomes the Authority's action.

A Decision and Order of a Regional Director becomes the action of the Authority when:

(1) No application for review is filed with the Authority within sixty (60) days after the date of the Regional Director's Decision and Order; or

(2) A timely application for review is filed with the Authority and the Authority does not undertake to grant review of the Regional Director's Decision and Order within sixty (60) days of the filing of the application; or

(3) The Authority denies an application for review of the Regional Director's Decision and Order.

(f) Authority grant of review and stay.

The Authority may rule on the issue(s) in an application for review in its order granting the application for review. Neither filing nor granting an application for review shall stay any action ordered by the Regional Director unless specifically ordered by the Authority.

(g) Briefs if review is granted.

If the Authority does not rule on the issue(s) in the application for review in its order granting review, the Authority may, in its discretion, afford the parties an opportunity to file briefs. The briefs will be limited to the issue(s) referenced in the Authority's order granting review.

§ 102.60 Petitions.

Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

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\3\Procedure under the first proviso to sec. 8(b)(7)(C) of the Act is governed by subpart D.

(a) Petition for certification or decertification; who may file; where to file; withdrawal.

A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct (see 28 U.S.C. 1746). An original and four copies of the petition shall be filed. A person filing a petition by facsimile pursuant to Sec. 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile pursuant to Sec. 102.114(f). Except as provided in Sec. 102.72, such petitions shall be filed with the Regional Director for the Region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more Regions, with the Regional Director for any of such Regions. Prior to the transfer of the case to the Board, pursuant to Sec. 102.67, the petition may be withdrawn only with the consent of the Regional Director with whom such petition was filed. After the transfer of the case to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the Regional Director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

(b) Petition for clarification of bargaining unit or petition for amendment of certification under section 9(b) of the Act; who may file; where to file; withdrawal.

A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed

by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed. [29 FR 15919, Nov. 28, 1964, as amended at 60 FR 56235, Nov. 8, 1995]