No. 06-71671

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES,
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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TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS
(Continued)

Page No.

ADDENDA

Page No.

TABLE OF AUTHORITIES

CASES

Page No.

TABLE OF AUTHORITIES
(Continued)

Page No.

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

TABLE OF AUTHORITIES
(Continued)

Page No.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

DECISIONS OF THE ASSISTANT SECRETARY OF LABOR

STATUTES

TABLE OF AUTHORITIES
(Continued)

Page No.

CODE OF FEDERAL REGULATIONS

LEGISLATIVE HISTORY

TABLE OF AUTHORITIES
(Continued)

Page No.

MISCELLANEOUS

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STATEMENT OF JURISDICTION

The Federal Labor Relations Authority (Authority) issued the decision and order under review in this case on February 3, 2006. The Authority's decision is published at 61 F.L.R.A. (No. 92) 485. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1] This Court is without jurisdiction to review final orders of the

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1 Pertinent statutory provisions are set forth in Addendum (Add.) A to this brief.

Authority involving an appropriate unit determination, such as here involved, pursuant to § 7123(a)(2) of the Statute.[2]

STATEMENT OF THE ISSUES

1. Whether this Court has subject matter jurisdiction over the petition for review of the Authority's appropriate unit determination concerning the professional status of a group of employees, in light of the prohibition in 5 U.S.C. § 7123(a)(2) against judicial review of such decisions.

2. Whether the Authority's conclusion that Agriculture Specialist employees of the Department of Homeland Security, Customs and Border Protection, are not professional employees within the meaning of 5 U.S.C. § 7112(b)(5) is reasonable and supported by substantial evidence.

STATEMENT OF THE CASE

This case arose as a representation proceeding before the Authority under § 7112 of the Statute, to determine an appropriate bargaining unit or units. Components of various federal agencies were consolidated into the Department of Homeland Security (DHS) in 2002. One of the agency components making up DHS was part of the Plant Protection and Quarantine

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2 The Authority filed a motion to dismiss the petition for review in this case, for lack of subject matter jurisdiction, on April 15, 2006. By order of the Court dated May 19, 2006, this motion was denied without prejudice to its being renewed to the merits panel in this brief. The Authority hereby so renews its motion to dismiss. The jurisdictional issues in this case are addressed at pp. 20 to 30, below.

division (PPQ) of the Animal and Plant Health Inspection Service (APHIS) of the Department of Agriculture. The management of DHS and the National Association of Agriculture Employees ("NAAE" or "Union") each filed petitions with the Authority to clarify the appropriate bargaining unit structure for the new agency.

The Authority made various appropriate unit determinations in its decision. As particularly relevant to NAAE's petition for review, the Authority held that certain employees coming to DHS from PPQ, designated "Agriculture Specialists" by DHS, were not professional employees within the statutory definition of that term. Thus, they were not entitled to vote on whether they wanted to be in a separate bargaining unit, or in a mixed unit with non-professional employees, under §7112(b)(5) of the Statute. The Union has appealed this appropriate unit determination to the Court in this case.

STATEMENT OF THE FACTS

A. Background

1. Creation of the Department of Homeland Security, Customs and Border Patrol, and Creation of the "Agriculture Specialist" Position -- On March 1, 2003, Customs and Border Protection ("CBP" or "agency") was created within DHS. Pursuant to the Homeland Security Act of 2002, Pub.

L. No. 107-296, 116 Stat. 235, CBP was created as the amalgamation of components of a number of executive agencies. These components included the Department of Treasury's Customs Service; the Department of Justice's Immigration and Naturalization Service (INS) and Border Patrol; and most of the Department of Agriculture's PPQ division. APHIS remained a part of the Department of Agriculture. (SER at 33, 115.)[3]

Prior to the creation of CBP, the Department of Agriculture employed PPQ Officers within APHIS. These employees were responsible for performing inspection and quarantine services, primarily at ports of entry to the United States. (SER at 29-31.) These PPQ Officers were transferred to CBP upon its creation, and were given the new job title "Agriculture Specialist."[4] This new position was created because CBP determined that

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3 "ER" references are to the Excerpts of Record filed by NAAE with its brief. "SER" references are to the Supplemental Excerpts of Record filed by the Authority with this brief.

4 Department of Agriculture employees designated as "PPQ Technicians" were also transferred to CBP. These employees also received a new job title at CBP, "Agriculture Technician." Their function at CBP is to assist Agriculture Specialists in conducting inspections and related support activities such as report preparation. (ER at 7.) It is undisputed that these employees are not professionals within the meaning of the Statute.

other inspection personnel coming from Customs and INS would not have any specialized knowledge of agriculture.[5] (SER at 115.)

The Agriculture Specialist position is responsible for inspecting plant and animal imports, either as cargo or carried by passengers, and denying entry to those items prohibited by APHIS regulations. The two main areas the position focuses on are whether an item is prohibited based on its country of origin, and if not, whether it contains pests that warrant its exclusion. (SER at 25, 92.) Inspection is both for the unintentional introduction of harmful agricultural items, and the intentional introduction of such items as a form of biological warfare against the United States. (SER at 115.) Under an agreement between CBP and APHIS, some responsibilities previously performed by PPQ Officers, such as quarantine activities and fumigation, remain with APHIS. (SER at 1, 115.)

An Agriculture Specialist performs his/her duties reliant on 15 highly descriptive manuals issued by APHIS. (SER at 24, 74-75, 79, 83-85, 133-151.) If a Specialist is at all uncertain as to whether a plant or animal pest is

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5 Employees serving as Customs and Immigration Inspectors before the creation of CBP were placed in a new position designated "CBP Officer." (ER at 157.) A study group looking to create the CBP primary job positions needed at a port of entry concluded that the former Customs and INS Inspectors and the PPQ Officer all had certain analysis and inspection duties in common. (ER at 156-57.) It is undisputed in this case that the CBP Officer position is not a professional position under the Statute. (SER at 73.)

prohibited, he/she must refer the matter to a Department of Agriculture scientist with more expertise for resolution. (SER at 3, 35.) The employee may not deviate from the guidance set out in the manuals. (SER at 1, 80.) Matters established in these manuals include, for example, the percentage of cargo to be inspected, and step-by-step processes for making final admissibility determinations. (SER at 75, 113-14.)

Specialists also perform a substantial amount of manual labor in the course of performing their job duties. For example, they enter cargo holds, open crates, handle hammers and crowbars, operate x-ray equipment, and lift and move objects. (SER at 27, 76-77.) They also must prepare numerous reports and other paperwork detailing their inspection and related activities. (SER at 18-20. 88-91.) This paperwork can consume several hours of a workday. (SER at 23.)

Some other determinations made by Agriculture Specialists consist of such matters as deciding which airplanes to board for compliance checks, or which passengers to refer for search. These determinations are typically made by the Specialist based largely on his/her previous experience and training. (SER at 106-09.) Also, penalty determinations by Specialists for the attempted importation of prohibited items involve deciding, for example, whether the attempted unlawful importation was intentional, and the volume

of goods involved. (SER at 21-22, 86-87, 97-98.) However, these penalty determinations, limited to several hundred dollars, are subject to subsequent approval by the Specialist's supervisor. (SER at 22, 86-87.)

2. The Representation Petitions At Issue In This Case -- At the time of their transfer to DHS, and continuing to the present, separate unions represent each of the transferred components' employees as part of distinct bargaining units. (ER at 135-36.) The National Treasury Employees Union (NTEU) represents both professional and non-professional former Customs employees in separate units; the American Federation of Government Employees (AFGE) represents former INS professional and non-professional employees in separate units, as well as Border Patrol employees; and the NAAE represents former Department of Agriculture employees in separate professional and non-professional units. (*Id.*)

Roughly a year after the formation of CBP, agency management filed a petition with the Authority under § 7112 of the Statute, seeking to have these piecemeal bargaining units consolidated into larger units reflecting the merger of the numerous agencies into the unitary CBP. (ER at 135-36.) Specifically, CBP asked the Authority to recognize two appropriate units:

the first, a unit of Border Patrol employees; and the second, a "wall-to-wall" unit of all other CBP employees.[6] (*Id*.)

In support of its petition, CBP argued that "based on the merger of functions, duties, operating methods, personnel policies, and supervisory lines of authority," the Authority should consolidate all employees with port-of-entry responsibilities into a single appropriate bargaining unit.[7] (ER at 137.) Although NTEU and AFGE agreed with CBP's proposed "wall-to-wall" unit, NAAE demurred. NAAE petitioned the Authority to recognize two separate appropriate units composed only of agricultural employees: the first, a unit of nonprofessional Agriculture Technicians; and the second, a unit of purportedly professional Agriculture Specialists. (ER at 137-38.)

CBP objected to NAAE's proposed units, arguing first that separating agricultural employees from other employees within CBP was not

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[6] All parties before the Authority, including NAAE, have stipulated that the separate Border Patrol unit is appropriate. Accordingly, that issue will not be addressed further.

[7] Under the Statute, the Authority has exclusive jurisdiction to "determine the appropriateness of any unit . . . and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved." 5 U.S.C. § 7112(a). Further requirements for an appropriate unit are set out in § 7112(b). The Authority had delegated this statutory power to its Regional Directors, subject to Authority review, pursuant to § 7105(e)(1)(A) of the Statute.

appropriate; and, second, that NAAE's Agriculture Specialists were not "professional" employees under §§ 7103(a)(15) and 7112(b)(5) of the Statute and, thus, could not be organized as such into a separate unit. (ER at 138.)

B. The Authority Regional Director's Decision and Order

The Authority's Regional Director granted CBP's application for two bargaining units, i.e., Border Patrol and all other CBP employees, finding those units to be appropriate (ER at 170-72); held that NAAE's requested separate bargaining unit of only agriculture employees was not an appropriate bargaining unit (ER at 171-72); and held that Agriculture Specialists were not professional employees (ER at 168-170).

Focusing on the professional status of Agriculture Specialists, the only matter that NAAE challenges on its merits in this case, the Regional Director applied §§ 7103(a)(15) and 7112(b)(5) of the Statute, and held that Agriculture Specialists did not meet the statutory criteria for this designation. (ER at 171.) Section 7112(b)(5) of the Statute provides that the Authority cannot hold a bargaining unit to be appropriate if it contains professional employees, and they have not been allowed to vote on whether or not they wish to be included in a mixed unit of professionals and non-professionals. In the absence of such a vote, any proposed unit that

commingles professional and non-professional employees is by law inappropriate.

Section 7103(a)(15) provides the definition of "professional employees." That section describes them as employees engaged in work that: 1) requires advanced and specialized knowledge usually acquired by prolonged study in an institution of higher learning; 2) requires the "consistent exercise of discretion and judgment"; 3) is "predominantly intellectual and varied in character," as opposed to routine and repetitive; and 4) whose work output cannot be standardized in relation to a given time period. All four criteria must be satisfied to be considered a professional employee.

The Regional Director found that Agriculture Specialists did not exercise the requisite discretion and judgment; and that the work they performed was standardized, routine, and involved manual labor. (ER at 170.) In this regard, the Regional Director noted that any discretion they exercised was significantly limited. (ER at 169.) He observed that the various APHIS manuals "significantly prescribe the protocol" that Specialists must follow when examining agricultural items. (*Id.*) Further, the Specialists must refer items to employees with greater expertise before difficult decisions about granting entry to items can be made. (ER at 170.)

Thus, the Regional Director concluded from such record findings, the Specialist job called for only "routine mental work," and did not entail the kind of "predominantly intellectual and varied" work that was required for a professional designation under § 7103(a)(15) of the Statute. (ER at 169.)

The Regional Director also noted that, despite the assistance of Agriculture Technicians, there was a considerable amount of manual labor involved in Specialist work, such as opening crates, running samples through a grinder, etc. (ER at 170.) Further, the Regional Director stated that the output or result of the Specialist's work was standardized, that is, all Specialists should apply the governing work manuals to come up with the exact same regulatory decision in any given situation. (*Id*.)

In support of his decision, the Regional Director cited a decision by an Assistant Secretary of Labor under Executive Order 11,491, as amended, which governed federal sector labor relations before the Statute was enacted in 1979.[8] (ER at 169-170.) In this decision, *United States Army Safeguard Logistics Command, Huntsville, Ala.*, 2 A/SLMR 582 (1972) (*Army Safeguard*) (Addendum (Add.) B to this brief), the Regional Director found

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8 Although decisions of the Assistant Secretary of Labor under the Executive Order do not bar the Authority from reevaluating those decisions, they remain in effect under § 7135(b) of the Statute until the Authority undertakes such re-evaluation. *E.g., National Treasury Employees Union* v. *FLRA*, 774 F.2d 1181, 1192 (D.C. Cir. 1985).

that a Librarian was not a professional employee under the Executive Order. Although requiring specialized education, like the Agriculture Specialists here, the Librarian's work in *Army Safeguard* required the application of established standards, and technical questions of any complexity were referred to an employee with greater expertise for decision. (*Id.*)

Because the Regional Director determined that CBP's Agriculture Specialists were non-professional employees, he included them in a "wall-to-wall" unit of all non-professional, non-Border Patrol, CBP employees, rather than in a separate professional unit as requested by NAAE. (ER at 176.) The Regional Director further ordered an election within the "wall-to-wall" unit for the purpose of determining which union – NAAE, NTEU, or AFGE – would be the exclusive representative of the unit's employees.[9] (*Id.*)

NAAE applied to the Authority for review of the Regional Director's decision, arguing, as it did before the Regional Director, that agricultural employees should not be organized within the larger "wall-to-wall" unit, and

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9 NAAE subsequently informed the Authority that it did not wish to be placed on the ballot for the election if, as occurred here, Agriculture Specialists were determined not to be professional employees, and separate units of former Agriculture Department employees were found to be inappropriate. (ER at 218.)

that its Agriculture Specialists should be entitled to vote separately, as professional employees. (ER at 180.)

C. The Authority's Decision on Review

The Authority held that NAAE had not shown any basis for reviewing the Regional Director's decision. (ER at 209.) As the Authority held regarding the Regional Director's determination that Agriculture Specialists were not professional employees, "NAAE has not demonstrated that the [Regional Director] failed to follow established law or committed a clear and prejudicial error concerning substantial factual matters."[10] (ER at 210.) *See* 5 C.F.R. § 2422.31(c) (setting forth the grounds on which the Authority will grant an application for review of a Regional Director decision and order in a representation case). The Authority also affirmed the Regional Director's conclusion that NAAE's petitioned for separate unit of agriculture employees at CBP was not appropriate. (ER at 212.)

The Authority first rejected NAAE's claim that the Regional Director failed to follow Authority precedent in finding Agriculture Specialists not to be professionals. (ER at 209.) In this connection, the Authority stated that NAAE had not shown that either the Assistant Secretary under the Executive

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10 Other determinations of the Authority concerning the Regional Director's decision, such as appropriateness of a separate bargaining unit for former Agriculture Department employees of CBP, are not at issue before the Court. They accordingly will not be addressed further in this brief.

Order, or the Authority under the Statute, had ever determined that PPQ Officers of the Department of Agriculture were professionals. (*Id.*) The fact that Agriculture and NAAE had in the past chosen to so consider those employees did not bind the Authority on this issue. (*Id.*)

The Authority next held that NAAE had not shown that the factual record failed to support the Regional Director's decision concerning the role of manuals in Specialists' work. (ER at 210.) The Authority recognized that Agriculture Specialists did have to make decisions in the course of their work. However, the Authority said, the kinds of decisions that "require judgment and extensive educational background, the hallmark of professional employees," were made by other employees. (*Id.*) The mere exercise of some discretion by employees in the course of their work is not sufficient in itself to find them to be professionals within the meaning of the Statute. (*Id.*)

Finally, the Authority held that the Regional Director did not err by relying on the Assistant Secretary's decision in *Army Safeguard.* (ER at 210.) In this connection, the Authority noted that it has, in appropriate

cases, consistently followed Assistant Secretary precedent under the Executive Order as required pursuant to § 7135(b) of the Statute.[11] (*Id.*)

STANDARD OF REVIEW

The Court determines its subject matter jurisdiction in this case *de novo.* *Ruiz-Morales* v. *Ashcroft*, 361 F.3d 1219, 1221 (9th Cir. 2004).

As to the merits, Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Dep't of Veterans Affairs Med. Ctr., Long Beach, Cal.* v. *FLRA*, 16 F.3d 1526, 1529 (9th Cir. 1994).

A reviewing court of appeals' "scope of review is limited." *Pension Benefit Guaranty Corp.* v. *FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992). So long as the Authority provides a rational explanation for its decision, it will be sustained on appeal. *Am. Fed'n of Gov't Employees, Local 2986* v. *FLRA*, 775 F.2d 1022, 1025 (9th Cir. 1985) (*AFGE v. FLRA*).

[11] Following the Authority's decision, the Authority's Washington Regional Office began to lay the groundwork for a mail ballot election involving NTEU and AFGE. On March 20, 2006, the Regional Office reached agreement with all participating parties on an election schedule under which ballots will be mailed to bargaining unit employees on May 9, 2006, but the ballots will not be opened and counted until June 27, 2006, with certification of the result to follow at a later date. The Court denied NAAE's motion to stay the conduct of this election in its May 19, 2006, order.

Where, as here, the Authority interprets its own enabling statute, courts "owe great deference to the expertise of the Authority as it exercises its special function of applying the general provisions of the Act to the complexities of federal labor relations." *Ass'n of Civilian Technicians* v. *FLRA*, 269 F.3d 1112, 1115 (D.C. Cir. 2001) (internal quotations omitted). Similarly, courts "defer to the Authority's interpretation of its own precedent." *Nat'l Treas. Employees Union* v. *FLRA*, 399 F.3d 334, 339 (D.C. Cir. 2005).

Review of the Authority's factual determinations is narrow. Reviewing courts "are to affirm the FLRA's findings of fact 'if supported by substantial evidence on the record considered as a whole.'" *Pension Benefit Guaranty Corp.*, 967 F.2d at 665 (internal citations omitted); *NLRB* v. *Springfield Hosp.*, 899 F.2d 1305, 1313 (2nd Cir. 1990) (determination that an employee is a "professional" under the National Labor Relations Act must be affirmed if supported by substantial evidence); *see also* 5 U.S.C. § 7123(c) ("[t]he 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"). The Authority is entitled to have reasonable inferences it draws from its findings of fact not be displaced, even if the court might have reached a different view had the matter been before it *de novo*. *Cf., Am.*

Distrib. Co., Inc. v. *NLRB*, 715 F.2d 446, 452 (9th Cir. 1983), *cert. denied* 466 U.S. 958 (1984) (same with respect to the National Labor Relations Board).

SUMMARY OF ARGUMENT

A. The Court is without subject matter jurisdiction over the petition for review in this case. Section 7123(a)(2) of the Statute bars judicial review of Authority orders under § 7112 "involving an appropriate unit determination." The instant case constitutes a request for direct judicial review of such an Authority appropriate unit determination. However, as this Court recognized in *Eisinger* v. *FLRA*, 218 F.3d 1097, 1101 (9th Cir. 2000), Congress in §7123(a)(2) of the Statute expressly prohibited direct judicial review of such Authority determinations.

More specifically, petitioner concedes, albeit as to a portion of the Authority's decision that petitioner does not challenge, that the Authority's decision involves an appropriate unit determination. Moreover, the portion of the Authority's decision that petitioner seeks to challenge before this Court also involves an appropriate unit determination. In this latter connection, the Authority, affirming its Regional Director, held in relevant part that Agriculture Specialists of Customs and Border Protection, Department of Homeland Security (DHS), are not "professional" employees

within the meaning of § 7112(b)(5) of the Statute. Thus, they cannot vote to be represented separately in a professionals-only bargaining unit. Section 7112(b)(5) expressly makes such an Authority ruling an aspect of an appropriate unit determination under § 7112. The legislative history of the Statute also establishes this connection.

The Union erroneously claims that the Authority's decision does not involve an appropriate unit determination, but rather merely the Authority's "revo[cation]" of the Agriculture Specialists' purported right to vote for separate representation as professionals. However, in order for employees to exercise the right to vote for union representation in a separate unit of professionals that would be appropriate, those employees must first be found to satisfy the Statute's definition of a professional employee. That was one of the merits issues before the Authority in this case. The Union therefore cannot use this merits claim as a basis for establishing jurisdiction.

B. As to the merits, the Authority, affirming its Regional Director's holding that Agriculture Specialists were not professional employees under the Statute, correctly made three underlying merits rulings.

First, the Authority rejected NAAE's claim that the Regional Director failed to follow precedent. This claim is based on the fact that, prior to the creation of the Agriculture Specialist position at DHS, the Department of

Agriculture and the Union agreed to consider as professionals Plant Protection and Quarantine (PPQ) Officers (the forerunner of the Agriculture Specialist position at DHS). However, as the Authority noted, such past practice of the parties does not bind the Authority. Further, the Authority Regional Director's certification in 1985 of a bargaining unit including PPQ Officers as professionals, referenced by the Union, is not precedent from which the Authority may not depart without explanation. The professional status of the employees was not at issue in that proceeding.

Second, the Authority correctly ruled that the Regional Director's holding, that Agriculture Specialists do not satisfy the Statute's definition of a professional employee, is supported by the evidentiary record. In this connection, the Authority accurately determined that the record supported a finding that Agriculture Specialists do not exercise the kind of discretion that marks a professional. Numerous manuals directing how work is to be done extensively govern Specialists' work, and difficult or complex questions that may arise are referred to more expert staff for resolution. Further, the Authority held that the record shows that Specialists' work is routine, as opposed to varied and intellectual in nature. In particular, there are substantial amounts of paper work and manual labor associated with the position.

Finally, the Authority correctly held that it was not error for the Regional Director to analogize the present case to precedent established by the Assistant Secretary of Labor under Executive Order 11,491, as amended. This Executive Order governed federal sector labor relations prior to the Statute, and precedent under the Order is by law applicable to cases arising under the Statute. Contrary to NAAE's claim, the Authority did not "abandon" this Assistant Secretary precedent in later cases, because the later Authority cases dealt with job positions that were different than those at issue in the Assistant Secretary's decision on which the Regional Director relied.

ARGUMENT

I. THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE PETITION FOR REVIEW OF THE AUTHORITY'S APPROPRIATE UNIT DETERMINATION CONCERNING THE PROFESSIONAL STATUS OF A GROUP OF EMPLOYEES, IN LIGHT OF THE PROHIBITION IN 5 U.S.C. § 7123(a)(2) ON JUDICIAL REVIEW OF SUCH AUTHORITY DECISIONS.

It is axiomatic that Congress confers federal court jurisdiction, and that Congress may limit or foreclose judicial review as it sees fit. *Am. Fed'n of Labor* v. *NLRB*, 308 U.S. 401 (1940) (*Am. Fed'n of Labor*); *State of California* v. *Bennett*, 833 F.2d 827, 833 n.14 (9th Cir. 1987). As discussed below, § 7123(a)(2) of the Statute expressly excludes from judicial review

Authority decisions under §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.

A. 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—
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> * * * * *
>
> (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 § 7123(a)'s plain language states. Although limited, 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. 95-1717 at 153 (1978)[12]; *see also 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).

As this Court has recognized, private sector practice bars direct judicial review of National Labor Relations Board (NLRB) representation decisions that are analogous to the Authority's appropriate unit determination and election order at issue in this case. *E.g., Raley's, Inc.* v. *NLRB*, 725 F.2d 1204, 1206 (9th Cir. 1984). In *Am. Fed'n of Labor*, the Supreme Court examined the legislative history of the National Labor Relations Act (NLRA), and concluded that NLRB representation determinations are not "final orders" within the meaning of § 10(f) of the NLRA, 29 U.S.C. § 160(f). 308 U.S. at 411. There the Supreme Court

[12] 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.*).

found that Congress had made a policy determination favoring speedy finality with respect to employees choosing their exclusive bargaining representatives.[13] *Id.* at 411-12; *see also Hartz Mountain Corp.* v. *Dotson*, 727 F.2d 1308, 1310-11 (D.C. Cir. 1984).

Representation determinations of the NLRB are judicially reviewable indirectly as an unfair labor practice, only after a labor organization is certified and an employer refuses to bargain with that labor organization. *Am. Fed'n of Labor*, 308 U.S. at 409. 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.

Congress' intent to preclude review under § 7123 of appropriate unit determinations is express and unambiguous. Further, the preclusion is complete, there being no statutory or judicially-created exceptions. Accordingly, it is clear that Congress did not intend § 7123(a) of the Statute to provide this Court with jurisdiction to review directly an Authority

[13] Indeed, this policy is reflected in § 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.

decision, like that in the instant case, involving an appropriate unit determination.[14]

B. The Authority's decision involves an "appropriate unit determination"

The Union has made clear that the sole issue it seeks to present to this Court for review on the merits is whether the Authority properly held that Agriculture Specialists are not "professional" employees within the meaning of § 7112(b)(5) of the Statute. (NAAE Brief (Br.) at 19.) However, the Union concedes (*id.*) that the Authority decision it seeks to have reviewed in this Court "involves an appropriate unit determination" under § 7112 of the Statute, i.e., whether a separate unit of agriculture employees at CBP is appropriate. Accordingly, noting this concession and for this reason alone, based on the plain language of § 7123(a)(2) of the Statute, the Court is without jurisdiction.

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[14] 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 the Union sought to assert *Leedom* jurisdiction, which it has not done, jurisdiction still does not lie in this Court. First, the Authority acted well within its statutory powers in reaching its decision in this case. Second, 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.

Further, the plain language of the Statute makes clear that the Authority's professional employee determination, which NAAE challenges on its merits, is in itself precisely the kind of appropriate unit determination that this Court has recognized cannot be reviewed directly by a court of appeals under § 7123(a) of the Statute. *Eisinger* v. *FLRA*, 218 F.3d 1097, 1101 (9th Cir. 2000).

Section 7112(b)(5) of the Statute provides in relevant part as follows:

> (b) A unit *shall not be determined to be appropriate* under this section . . . if it includes –
>
> * * * * * *
>
> (5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit.

5 U.S.C. § 7112(b)(5) (emphasis supplied). [15]

Thus, the face of the Statute itself explicitly links a determination of an employee's status as a professional employee with an appropriate unit determination. That is, a bargaining unit with both professional and non-professional employees cannot be deemed appropriate unless the

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15 The Union states (Br. 19) that the Authority in this case was "exercising its authority under § 7111(d)" of the Statute. That section concerns Authority determinations about which employees are eligible to vote in an election. However, there is no issue here that Specialists are eligible to vote in the election currently underway, nor did the Authority make any reference in its decision to § 7111(d). The Authority's decision focused solely on appropriate unit issues under § 7112 of the Statute. Accordingly, NAAE's reference to § 7111(d) is inapposite.

professionals have been given the opportunity to vote on whether they wished to be included in such a mixed unit. Such an election for professional employees obviously cannot be provided unless there is first a determination that those employees are in fact professionals within the meaning of § 7112(b)(5). *See, e.g., NLRB* v. *HMO Int'l/Cal. Med. Group Health Plan, Inc.*, 678 F.2d 806, 810 (9th Cir. 1982) (explicitly recognizing the connection between an appropriate unit determination and employees' professional status).

Put another way, an Authority determination as to whether an employee is a professional is no different, for appropriate unit purposes, than a determination as to whether an employee is, for example, a supervisor (§ 7112(b)(1)); a confidential employee (§ 7112(b)(2)); or engaged in personnel work (§ 7112(b)(3)). All of these determinations are directly related to, and constituent aspects of, the Authority's responsibility under § 7112 to determine unit appropriateness under the specified statutory standards.

Thus, as § 7112(b) of the Statute makes clear, determinations as to whether employees are of a type requiring their exclusion from a bargaining unit (e.g., supervisors, professionals in a mixed unit who have not chosen to be part of such a unit, etc.) under that subsection are as much appropriate

unit determinations as is a determination about whether a group of employees share a community of interest under § 7112(a) of the Statute.

Moreover, the Authority has in its case law recognized Congress' clear understanding, as stated in the legislative history of the Statute, that determination of an employee's status as a professional is an appropriate unit determination under § 7112(b) of the Statute. *Int'l Fed'n of Prof'l and Technical Eng'rs, Local 25 and Dep't of the Navy, Mare Island Naval Shipyard*, 13 F.L.R.A. 433, 438 (1983). In *Int'l Fed'n*, the Authority referred to a portion of H.R. Rep. No. 95-1403 at 41 (1978), which states in relevant part:

> Subsection (a)(15) of section 7103 sets forth the criteria for determining whether an employee is a "professional employee." The term is relevant primarily to the determination of appropriate bargaining units under section 7112.

This passage from the legislative history of the Statute could hardly make clearer the fact that an Authority determination concerning whether an employee is a professional within the meaning of § 7112(b)(5) of the Statute involves an appropriate unit determination. Indeed, neither the Statute nor case law precedent suggest that the professional employee determination under § 7112(b)(5) has any significance aside from an appropriate unit determination.

C. NAAE's Jurisdictional Arguments Are Without Merit

1. The Union argues that it does not seek review of the Authority's appropriate unit determination combining various U.S. Department of Homeland Security, Customs and Border Patrol (CBP) workers into a single "wall to wall" bargaining unit. Rather, it only seeks review of the Authority's purported "revo[cation]" of the Agriculture Specialists' status as professional employees that they enjoyed as a result of concurrence by the Department of Agriculture and NAAE when the Specialists were PPQ Officers at Agriculture. (Br. at 19.)

However, NAAE attempts to put the cart before the horse by use of this linguistic sleight-of-hand. The Union first addresses a legal issue that goes to the merits of the Authority's ruling, i.e., whether the Authority is irrevocably bound as a matter of law by the past practice at Agriculture concerning PPQ Officers' professional status.[16] It then attempts to use this issue to bootstrap itself into a conclusion that this Court has jurisdiction in the case. That is, it asserts as a jurisdictional basis the alleged deprivation of the statutory right for Specialists to vote for a separate professional unit, while the entire premise for the existence of that right, i.e., Specialists' status as professionals, is at issue in this case.

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16 This issue is discussed on the merits at pp. 32 to 35, below.

The claim cannot stand. As set out at p. 24, n.14, above, the only direct judicial review route for an Authority representation decision is based on *Leedom*, i.e., whether the Authority has failed to follow a "clear and mandatory" provision of the Statute. The Union has not even attempted to assert this very limited form of review jurisdiction. In short, NAAE's argument is nothing more than a thinly veiled effort to get the Court to review the merits of the Authority's appropriate unit determination. This is precisely the result that Congress prohibited in § 7123(a)(2) of the Statute.

2. The Union is simply incorrect when it stated in its Response to the Authority's previously filed Motion to Dismiss (Un. Resp. at 7) that determining whether the Agriculture Specialists at issue in this case were professionals was "not a necessary finding the FLRA was required to make in making its appropriate unit determination." In this connection, the Union mistakenly claims that the only appropriate unit determination the Authority made in this case was regarding the "wall-to-wall" unit of all non-Border Patrol CBP employees.

Determining whether such a unit meets the appropriate unit criteria under § 7112(a) of the Statute is certainly an important part of the overall appropriate unit determination made by the Authority in this case. However, that does not imply that there are no other considerations that the Authority

must address, such as the professional status of employees, when the Authority makes its final decision as to what bargaining unit is appropriate under § 7112 of the Statute. As the plain language of § 7112 makes clear, an appropriate unit determination can have both an organizational component (§ 7112(a)) and an employee content component (§ 7112(b)).

3. The Union also errs when it relied (Un. Resp. at 6-7) on this Court's decision in *Eisinger* v. *FLRA*, 218 F.3d 1097 (9th Cir. 2000). That case involved the standing of an individual employee to file a representation petition under § 7111 of the Statute. The Court held, in relevant part, that the jurisdictional bar to judicial review in § 7123(a)(2) of the Statute did not apply to Authority decisions solely implicating § 7111. However, the Court made clear that it recognized that Authority decisions such as the current one, involving appropriate unit determinations under § 7112 of the Statute, are barred from judicial review under § 7123(a)(2) of the Statute. *Eisinger*, 218 F.3d at 1102-03. Thus, *Eisinger* supports the Authority's position on jurisdiction, not the Union's.

II. THE AUTHORITY'S CONCLUSION THAT AGRICULTURE SPECIALIST EMPLOYEES OF THE DEPARTMENT OF HOMELAND SECURITY, CUSTOMS AND BORDER PROTECTION, ARE NOT PROFESSIONAL EMPLOYEES WITHIN THE MEANING OF 5 U.S.C. § 7112(b)(5) IS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Authority made three holdings that NAAE seeks to challenge in this Court: 1) the past practice of the Department of Agriculture and NAAE, treating PPQ Officers as professional employees, does not bind the Authority to hold that Agriculture Specialists are also professionals; 2) the record supports the Regional Director's conclusion that Specialists are not professional employees; and 3) the Regional Director properly relied on the Assistant Secretary of Labor's decision in *Army Safeguard*. These Authority rulings are reasonable and supported by substantial evidence, and should therefore be affirmed.[17] Moreover, NAAE's claims for reversal are without merit and should be rejected. Accordingly, the petition for review should be denied.

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17 The Union does not attack another Authority holding (ER at 210), that Agriculture Specialists' classification as professional employees under other laws such as the Fair Labor Standards Act does not bind the Authority in this case. This issue will accordingly not be addressed in this brief.

A. The Authority Correctly Held That Past Practice at the Department of Agriculture Concerning the Professional Status of PPQ Officers Does Not Bind the Authority

The Authority recognized its obligation to either follow its own precedent, or provide a reasoned decision for departing therefrom. (ER at 209.) However, the Authority correctly noted that NAAE did not show that the Regional Director had failed to adhere to relevant Authority precedent in this case. (*Id.*)

As the Authority noted (*id.*), NAAE never showed that either the Authority or the Assistant Secretary of Labor under Executive Order 11,491, as amended, ever determined that PPQ Officers at the Department of Agriculture were professional employees within the meaning of that term in the Statute or the Executive Order, which employed the identical definition of professional employees as does the Statute. *See Dep't of the Interior, Bureau of Land Mgm't, Riverside District and Land Office and Nat'l Fed'n of Fed'l Employees, Local119*, 2 A/SLMR 329, 332-33 (1972) (Add. B hereto).

In the absence of such adjudication by the Authority or the Assistant Secretary, NAAE could only rely on the past practice, created by the Department of Agriculture and NAAE prior to creation of CBP, of treating PPQ Officers as professionals. This, the Authority correctly held (ER at

209), was insufficient to bind it to finding Agriculture Specialists to be professionals under the Statute. *E.g., U.S. Dep't of Transportation, FAA, and Nat'l Air Traffic Controllers Ass'n*, 60 F.L.R.A. 20, 24 (2004) (past practice cannot bind adjudicator to a result that is contrary to law).

The Authority's holding on this point is fully consistent with the case law of this Court. For example, in *California* v. *Federal Communications Commission*, 39 F.3d 919, 925 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995), the Court stated the rule that an agency must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *See also NLRB* v. *Great Western Produce, Inc.*, 839 F.2d 555, 557 (9th Cir. 1988) (NLRB must explain "departures from established agency policy").

The clear upshot of these cases is that there must be some prior agency "policy" that is inexplicably being deviated from, in order for the consistency rule to warrant reversal. The Court's use of the term "policy" connotes an agency's deliberate and calculated consideration of a matter. *See* Webster's Third New International Dictionary 1754 (1986) ("policy" defined in relevant part as "a definite course or method of action selected . . . from among alternatives").

As the Authority noted here, there simply is no such "policy" the Authority announced previously as to the professional status of PPQ Officers. Thus, there is nothing for the Authority to have deviated from in this case. The Authority therefore could not have violated the consistency rule, contrary to NAAE's claim (Br. 20-22).

The Union points to an Amendment of Certification issued by an Authority Regional Director in 1986 (ER at 124-25), as the supposed "precedent" the Authority is supposed to adhere to. However, the Amendment merely effected a name change for NAAE from a previous title; and also recognized a job title change for PPQ Officers from a previous job title. (ER at 125.)

It is very clear, however, that the parties did not raise the issue of PPQ Officers' professional status as part of the certification amendment process, nor did the Regional Director make any considered or deliberate decision concerning such status. Rather, the Regional Director merely undertook what amounts to a ministerial action, i.e., changing the name of the union and the job title of the employees it was representing. To assert that this action constitutes a "precedent," from which the Authority must explain any deviation, suggests a fundamental misunderstanding of the underlying legal

doctrine. Indeed, the Union cites no case law calling for such a result.[18] Its claim in this regard should therefore be rejected.

B. Substantial Record Evidence Supports The Authority's Affirmance Of The Regional Director's Holding That Agriculture Specialists Are Not Professional Employees

The Regional Director (ER at 169-70), as affirmed by the Authority (ER at 210), correctly determined that Agriculture Specialists failed to meet three of the four criteria for establishing professional employee status under § 7103(a)(15) of the Statute. First, although Specialists do exercise some discretion and independent decision-making in performing their job duties, it is not the kind of discretion that marks a professional employee under § 7103(a)(15)(A)(ii); and second, Specialists' work is routine in nature, as opposed to intellectual, and involves some manual labor under § 7103(a)(15)(A)(iii).[19] The Authority's affirmance of the Regional

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18 As the foregoing discussion makes clear, NAAE's cite (Br. 21) to *Department of the Army, Headquarters, Fort Dix, N.J.*, 53 F.L.R.A. 287 (1997), is of no moment. The Authority did not base its decision on the age of the certification.

19 The Union did not raise to the Authority in its Application for Review the third Regional Director finding (ER at 170), concerning the standardized output of Specialists' work under § 7103(a)(15)(A)(iv). Accordingly, pursuant to § 7123(c) of the Statute, it may not do so now to this Court. *Equal Employment Opportunity Comm'n* v. *FLRA*, 476 U.S. 19 (1986) (an issue not raised to the Authority may not be considered on judicial review, unless excused by "extraordinary circumstances.") In any event, contrary to

Director's factual holdings is supported by substantial evidence, and should be affirmed.

1. Discretion Exercised by Specialists – The Regional Director (ER at 169), as affirmed by the Authority (ER at 210), relied on two points in support of his holding that Specialists do not exercise the discretion of a professional employee: 1) their work requirements are prescribed by detailed manuals; and 2) difficult or complex matters must be handed off to more expert employees for decision. Both holdings are supported by substantial evidence and should be affirmed.

There are 15 different manuals identifying prohibited items that govern Specialists' performance of their work. (SER at 74.) These manuals are very descriptive, and provide Specialists with detailed instruction on how they are to perform their duties. For example, they set out detailed processes for making final admissibility determinations, and flow charts providing the correct regulatory decision to make in any given situation. (SER at 75; 113-14.) Specialists are required to follow these manuals. (SER at 1; 80.) The

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the Union's claim (Br. 27-28), the Regional Director did not disregard the temporal nature of the "standardized" output requirement in § 7103(a)(15)(A)(iv). The Regional Director held (ER at 170) in effect that the same set of facts would always lead to the same result under applicable regulations. Implicit in this uniformity of effort is the notion that output can be standardized over time. This is all that is required to support a non-professional finding under this criterion. *See Twin City Hosp. Corp.* v. *NLRB*, 889 F.2d 1557, 1563 (6th Cir. 1989) (*Twin City*).

Regional Director gave the example of a table in one of the manuals that prescribed what decision Specialists should make in varying circumstances, as regards imported canned meat items. (ER at 165.)

The existence of such a highly prescriptive manual system to govern most work decisions is intended to, and does, prevent Specialists from exercising the kind of discretion and judgment that is the hallmark of a professional. *Cf. 934th Tactical Airlift Group (AFRES), Minneapolis-St. Paul Int'l Airport, Minneapolis, Minn. and Local 1997, Am. Fed'n of Gov't Employees*, 13 F.L.R.A. 549, 553 (1983) (Director of Aerospace Education is a professional employee due to "broad discretion" exercised and "little supervision" received in performance of his duties).

The record also makes abundantly clear that APHIS employees such as a Veterinary Medical Officer or Identifier, not the Agriculture Specialist, make decisions of any complexity, or not specifically addressed by a manual, especially as to the identification of pests. In this connection, the record shows (SER at 34-35; 42), for example, that when an item is contaminated with insects, a CBP Officer will quarantine it, and hold it for an Agriculture Specialist. The Specialist will then ship the item for final identification to an AHPIS employee. This deferral of difficult questions to more expert employees, who are exercising considerable discretion based on

an advanced educational background, further establishes the limited type of discretion exercised by Specialists.[20]

The Union argues (Br. at 24) that the Authority demonstrates a "fundamental misunderstanding" of the record, because the manuals are used only for "tools and guidance." However, the highly prescriptive and mandatory nature of these manuals is indisputable. The discretion that Specialists exercise pursuant to these manuals is limited to decisions such as determining which passengers to select for inspection and the amount of cargo to inspect. (SER at 67-71.) It is certainly not the Authority's intention to "denigrate" the importance of these decisions, as NAAE suggests (Br. at 25). However, the fact remains that exercise of this sort of discretion is based on a Specialist's own previous individual work experience, or on the manuals themselves. It is not exercised based on application of knowledge acquired through a long course of advanced study at a specialized institution,

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20 The Union's claim (Br. 24), that Agriculture Specialists do not refer prohibited commodities to APHIS employees, is of little consequence. As set out at p. 5, above, Specialist work focuses on two main questions: Is an agricultural item on a list of prohibited items? If the item itself is not prohibited, is it nonetheless infested with prohibited pests? The second issue entails the exercise of more discretion than does the first, as prohibited items are specified for Specialists. (SER at 25; ER at 68-69.) As the Regional Director made clear (ER at 166-67), referrals to APHIS personnel are with regard to the second question. Thus, NAAE's statement as regards the first question does not undermine the Regional Director's holding, as affirmed by the Authority.

as is the hallmark of discretion exercised by a professional employee. *Cf.*, *Aeronca, Inc.*, 221 N.L.R.B. 326, 327 (1975).[21]

In sum, as the former CBP Commissioner testified at the hearing below, the job of Agriculture Specialists is to "ask[] questions . . . and inspecting." (SER at 114a-114b.) That is, their job duties are very comparable to CBP Officers, who also inspect incoming passengers and cargo, albeit for customs and immigration purposes. Indeed, Specialists and CBP Officers work closely together at ports of entry as the first line of defense against various types of threats from international commerce and travel. (SER at 38-44; 81-82.) Yet no one, including their union representatives, has contended that CBP Officers are professional employees. The same result should obtain as to Agriculture Specialists.

2. Routine Nature of Specialist Work – The Regional Director (ER at 169-70), as affirmed by the Authority (ER at 210), also found that Agriculture Specialists performed routine, as opposed to varied and intellectual, work under § 7103(a)(15)(A)(iii) of the Statute. The Regional Director based his holding on record evidence showing the highly prescriptive manuals that govern Specialist job performance; that Specialists

21 The definition of a professional employee under the National Labor Relations Act (NLRA), 29 U.S.C. § 152(12), is virtually identical to the Statute's definition of the term. Accordingly, it is appropriate to consider National Labor Relations Board (NLRB) precedent on this issue.

must complete substantial amounts of paperwork; and that there is also a significant amount of manual labor necessary for the performance of their job duties. These factors contributed to the Regional Director's conclusion that Specialist work is routine, as opposed to varied and intellectual in nature. Substantial evidence supports all these holdings.

The role of the manuals in Specialist work was discussed at pp. 36 to 37, above, and will not be repeated here. As to the paperwork component of their job, the record shows that they must use a number of forms for data collection on a daily basis. These include, for example, reports on random inspection of passengers and vehicles (SER at 114m-114n); daily activity reports showing the number of inspections and commodities intercepted (SER at 18-23; 88-91); referrals to APHIS for pest identification (SER at 114f); a reimbursable overtime report, for billing to an importer (SER at 114j-114k); and entry of penalties into a data base (SER at 18-23; 66-67). One witness testified that Specialists could spend up the 3 hours a day on such paper work. (SER at 23.) These examples from the record amply establish substantial evidence supporting the Regional Director's and Authority's factual holding on this point.

The record also contains substantial evidence as to the manual labor required by Specialist work. For example, as the Regional Director pointed

out (ER at 170), Specialists frequently have to open luggage or crates (SER at 76; 114i; 114g; 114h); cut open fruit and vegetables to look for pests (SER at 42; 114c-114d), run samples through a grinder or x-ray machine; bag up seized material for disposal, and disinfect shoes worn by the traveling public (SER at 82). Again, these examples from the record amply establish substantial evidence supporting the Regional Director's and Authority's factual holding on this point.

The Union attacks (Br. at 26-27) the Regional Director's and the Authority's holding as to the routine nature of Specialists' work by arguing that the Authority has ignored the supposed requirement in § 7103(a)(15)(A)(iii) of the Statute, that work must be "predominantly" routine, manual, etc., in order for it to be deemed non-professional. In fact, NAAE does not state the statutory requirement accurately. The requirement of § 7103(a)(15)(A)(iii) is that the work be "predominantly intellectual and varied in character" in order to be deemed professional. Thus, it is possible to construe this subsection to mean that although the job does not involve predominantly physical or routine work, there is enough of that kind of work, perhaps combined with non-professional technical work,[22] so that the

22 *See Twin City*, 889 F.2d at 1561 (discussing the nature of technical work, which involves independent judgment and training, but is not professional work).

intellectual and varied part of the work is not predominant. Stated differently, the relevant inquiry under § 7112(b)(5) is whether an employee's *professional* work is predominant, regardless of the type of work that makes up the balance of the employee's duties.

Notwithstanding this semantic point, the record set out at pp. 40 to 41, above, does establish, contrary to NAAE's claim, that the Specialists' job does involve predominantly routine mental, as well as some physical or mechanical, work. Thus, the manuals that govern so much of Specialist work serve to make their work routine, as well as to limit the amount of discretion they exercise in doing their jobs under § 7103(a)(15)(A)(ii). The considerable amount of routine paper work they are required to perform also contributes to the routine mental work called for by the job. Finally, the significant amount of physical or manual labor required of Specialists also contributes to the overall absence of intellectual and varied work. Taken in its totality, these factors clearly establish that the Specialist job is, as the Regional Director and Authority held, not predominantly intellectual in nature.

The Union relies in this regard (Br. 26-27) on the NLRB's decision in *Group Health Association*, 317 N.L.R.B. 238 (1995). In relevant part, the NLRB found in that case that medical technologists were professional

employees within the meaning of the NLRA. As relevant here, the NLRB held that the "predominantly intellectual nature" of the technologists' work warranted finding these employees to be professionals. 317 N.L.R.B. at 242. The NLRB set out a number of job duties, such as pre- and post-test analysis, that established these employees as engaging in predominantly intellectual work. 317 N.L.R.B. at 243-44. In short, Agriculture Specialists and the medical technologists in *Group Health Association* are not comparable as far as the intellectual nature of their work is concerned. Accordingly, this NLRB precedent in no way detracts from the reasonableness of the Regional Director's and Authority's conclusion on this issue in the present case.[23]

C. The Authority Correctly Held That The Regional Director Did Not Err In Relying on Precedent of the Assistant Secretary of Labor Under Executive Order 11,491, As Amended

There is no dispute in this case that the Authority properly considers precedent of the Assistant Secretary of Labor under Executive Order 11,491, as amended. Section 7135(b) of the Statute explicitly preserves the full force and effect of such decisions under the Statute, until changed by the

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23 The other private sector cases cited by NAAE (Br. at 27) do not aid their case either. In neither *Highway, Inc.*, 223 N.L.R.B. 646 (1976), nor *Broadhead–Garrett Co.*, 96 N.L.R.B. 669 (1951), were there employees at all comparable to Agriculture Specialists.

Authority. *See Nat'l Treasury Employees Union* v. FLRA, 774 F.2d 1181, 1192 (D.C. Cir. 1985). Accordingly, the Regional Director's analogy (ER at 169-70), as approved by the Authority (ER at 210), to the librarian in the Assistant Secretary's decision in *Army Safeguard* is in itself completely appropriate.

The Union's only attack (Br. 25) on the Regional Director's and Authority's reliance on *Army Safeguard* is that the Authority supposedly "abandoned" it, as regards librarians, in *Fort Knox Dependent Schools and Fort Knox Teachers Association*, 5 F.L.R.A. 33, 37 (1981) (*Fort Knox*). This claim, however, is mistaken. The librarians in *Fort Knox* worked closely with teachers, who were professionals, in curriculum planning, and were required to meet all certification requirements of teachers. In contrast, the librarian in *Army Safeguard* was in charge of a library of technical information and regulations for use by employees at the facility, and thus was not required to work in coordination with teachers in this way.[24]

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24 The same distinction can be made as regards *West Point Elementary School, United States Military Academy, West Point, N.Y. and West Point Elementary School Teachers Association*, 6 F.L.R.A. 70 (1981), also relied on by NAAE (Br. 25 n.6). In *Panama Canal Commission and American Federation of Government Employees, Local 1805*, 5 F.L.R.A. 104, 119 n.6 (1981), the parties stipulated to the professional status of the librarians there at issue. Accordingly, there is no basis to conclude that it is inconsistent with *Army Safeguard*.

Accordingly, the two cases are distinguishable, and the Authority did not "abandon" *Army Safeguard.*

CONCLUSION

The Court is without subject matter jurisdiction over the case, and the petition for review should be dismissed. In the event that the Court finds itself with jurisdiction, the petition for review should be denied on the merits.

Respectfully submitted,

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JUNE 2006

CERTIFICATION OF COMPLIANCE
Pursuant To Fed. R. App. P. 32(a)(7)(C) and Cir. R. 32-1
For No. 06-71671

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit R. 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 9,725 words.

_____
William E. Persina

June 26, 2006

STATEMENT OF RELATED CASES

Pursuant to Cir. R. 28-2.6, counsel for respondent is unaware of any related case pending in this Court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES,	)	
Petitioner	)	
v.	)	No. 06-71671
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief and Supplemental Excerpts Of Record For The Federal Labor Relation Authority have been served this day, by mail, upon the following:

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June 26, 2006