BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE,
BLUE RIDGE PARKWAY, NORTH CAROLINA,
(Agency)

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO
(Union)

and

ERIN LAMM,
(An Individual/Petitioner)

Case No. AT-RP-22-0007

BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO IN RESPONSE TO THE AUTHORITY ORDER IN 73 FLRA 120

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The American Federation of Government Employees, AFL-CIO ("AFGE") hereby responds to the Authority's Order Granting Application for Review issued on July 19, 2022. AFGE's response to the question posed is that § 7111(f)(4) of the Statute does not bar decertification petitions, because it does not apply to petitions filed by individuals. However, decertification petitions are barred by § 2422.12(b) of the Authority's Regulations if filed within twelve months after a labor organization is certified, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d) of the Statute. Therefore, the petition in this matter should be dismissed.

I. Background

In early 2021, Blue Ridge Parkway employees represented by NAGE Local R4-75 approached AFGE and expressed interest in changing their affiliation from NAGE to AFGE. The NAGE membership completed a *Montrose* election and, on February 19, 2021, filed a petition requesting reaffiliation. *Decision and Order*, AT-RP-21-0011 (Mar. 24, 2021) at 1. On March 24, 2021, the FLRA issued a Decision and Order approving the reaffiliation request. *Id.* On June 8, 2021, the FLRA issued a certification formally changing the affiliation of the unit to AFGE, AFL-CIO. *Amended Certification of Representative*, AT-RP-21-0011 (June 8, 2021).

Meanwhile, AFGE Local 446 had long served as the certified exclusive representative of another group of Blue Ridge Parkway employees. *Decision and Order Consolidating Units*, AT-RP-21-0021 (Sept. 10, 2021) at 1-2. On June 16, 2021, based on the interest expressed by both units, and to increase efficiency and seek a comprehensive bargaining unit, AFGE filed a petition requesting to consolidate the employees in two units. *Id*. at 1, 4 (finding that consolidating the units would "promote effective dealings within the Agency and effective Agency operations" and that the consolidated unit would "reduce unit fragmentation"). No bargaining unit employees

requested an election during the consolidation process or otherwise raised objections to the consolidation. *Id.*

On September 10, 2021, in case number AT-RP-21-0021, the FLRA issued a certification consolidating the bargaining units represented by AFGE and AFGE Local 446. *Id.* The newly consolidated unit is certified to AFGE National and is described as follows:

Included:	All professional and nonprofessional employees of the Blue Ridge Parkway, National Park Service.
Excluded:	Management officials, supervisors, and employees described by 5 U.S.C. § 7112(b)(2), (3), (4), (6), and (7).

On December 23, 2021, shortly after the issuance of the consolidated certification, the Petitioner filed a petition seeking to decertify the newly consolidated unit. On March 24, 2022, the Regional Director issued a Decision and Order dismissing the petition as untimely because it was filed less than twelve months after the consolidated unit was certified. *Decision and Order* ("Decision"), AT-RP-22-0007 (Mar. 24, 2022) at 3.

On May 23, 2022, the Petitioner filed an Application for Review of the Regional Director's Decision. On June 7, 2022, AFGE filed its Opposition to the Petitioner's Application for Review. On July 19, 2022, the Authority issued an Order Granting the Application for Review. *U.S. Dep't of the Interior, National Park Service, Blue Ridge Parkway, North Carolina*, 73 FLRA 120 (2022) (*Blue Ridge Parkway*). The Authority found that there was an absence of precedent on the question of "whether § 7111(f)(4) of the Statute or § 2422.12(b) of the Authority's Regulations apply to bar decertification petitions filed within twelve months of a certification, without an election, of a consolidated bargaining unit under § 7112(d) of the Statute." *Id.* The Authority directed the parties to file briefs addressing this issue. *Id.*

Finally, while the Authority's Regulations limit AFGE's response in this brief to the issues referenced in the Authority's Order Granting Review,[1] there has been one development since the first briefs were filed with the Authority that deserves mention.[2] As of July 1, 2022, the Petitioner voluntarily left her bargaining unit position at the Blue Ridge Parkway and accepted a job as a Human Resources Specialist[3] with the Agency's Regional Human Resources Office.[4] Not only is the Petitioner in this matter no longer in the bargaining unit and ineligible to vote in any election ordered in this matter, she is now pursuing decertification of AFGE's unit while simultaneously acting as an agent of the Agency and as part of the Agency's management. This fact is known to the entire bargaining unit because the Agency sent an announcement to the unit discussing the Petitioner's change in position. Ex. 1 (noting also that the Petitioner will have influence over hiring for vacant positions within the Region in her new role).

AFGE believes that the election that is the subject of this petition is irrevocably tainted by these facts and must be dismissed. That the Agency is permitting a management agent to pursue decertification of AFGE's bargaining unit is a blatant violation of the Agency's duty of neutrality and renders the possibility of conducting a free and fair election in this matter impossible.[5] It

[1] 5 C.F.R. § 2422.31(g).

[2] In other cases where the Authority has issued a similar Order, the Authority has subsequently reached the merits of a case after resolving the question raised in the Order. *See, e.g.*, *National Aeronautics and Space Administration, Goddard Space Flight Center, Wallops Island, Virginia*, 67 FLRA 670, 680 (2014); *U.S. Army Aviation Missile Comm., Redstone Arsenal Ala.*, 56 FLRA 126, 132 (2000). If the Authority reaches the merits here and does not dismiss the petition based on the certification bar, AFGE takes the position that, based on these facts, the petition must be dismissed. Alternatively, if the Authority finds further development of the record is needed on this issue, AFGE requests that the case be remanded to the Regional Director.

[3] *See* Exhibit 1, Email from Rachel Stasny, Chief of Administration & Chief of Staff, Blue Ridge Parkway, "Congratulations and best wishes to Erin Lamm!" dated June 29, 2022.

[4] It appears that the Petitioner may now work for the same office as the Agency's own representative in this case.

[5] *See U.S. Dep't of the Army, Army Corps of Engineers, Engineering and Support Center, Huntsville, Alabama*, 68 FLRA 649 (2015) ("Agencies are required to remain neutral during the course of a representation election campaign"); *Dep't of the Air Force, Air Force Plant Representative Office, Detachment 27, Fort Worth, Texas*, 5 FLRA 492 (1981) (Agency violates duty of neutrality when its attempts to express personal views "may reasonably be interpreted as the Activity's official position and views do not accurately "convey the government's views on labor-management relations").

would make a mockery of the federal labor relations program—not to mention any Authority guarantees of fair elections—to allow individuals to pursue decertification petitions while simultaneously acting as management agents. No agency would permit a management agent and excluded employee to seek an election or actively support an organizing campaign; the same principles should apply employees in agency management seeking to decertifying a unit. If this conduct is permitted, every Human Resources Office in the federal government will use this loophole as a smokescreen to bring decertification petitions while simultaneously pleading that they are neutral in the matter. The continued processing of a petition to decertify a union brought by a management agent should not be permitted and this petition must be dismissed.

II. Response to Authority's Order

In its July 19, 2022, Order Granting Application for Review, the Authority directed the parties to file briefs addressing the following question:

> Does § 7111(f)(4) of the Statute or § 2422.12(b) of the Authority's Regulations apply to bar decertification petitions filed within twelve months after a labor organization is certified, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d) of the Statute? In answering that question, the parties should address any pertinent considerations of: (1) statutory construction; (2) legislative and regulatory history; (3) applicable precedent, including under the National Labor Relations Act; and (4) policy.

Section 7111(f)(4) does not apply because this matter concerns a decertification petition and that section of the Statute only relates to "according" exclusive recognition. Only labor organizations can be accorded exclusive recognition, not agencies or individuals. Therefore, it is AFGE's position that § 7111(f) does not create a bar of any kind—contract, election, or certification—to an individual filing a petition.

Instead, bars for election petitions filed by any "person"[6]—including decertification petitions filed by individuals pursuant to § 7111(b)(1)(B)—are set forth in the Authority's Regulations at 5 C.F.R. § 2422.[7] Specifically, § 2422.12 describes requirements for the timeliness of election petitions and includes a "certification bar" for election petitions filed by any person, including individuals.[8] The Authority has long-sought to balance the parallel statutory interests in promoting stable and efficient labor relations with the right of "persons" under the Statute to file election petitions, and that balancing has long-included certain time limitations on filing those election petitions. The Authority should find that compelling policy interests that have governed during the decades of the federal sector labor relations program, regulatory history, precedent, and applicable principles of statutory interpretation all support the finding that decertification petitions may not be filed within twelve months of a consolidated unit certification and uphold the Regional Director's decision dismissing the petition in this matter.

a. Section 7111(f)(4) pertains to the granting of exclusive recognition to labor organizations, does not address the filing of petitions by individuals, and does not conflict with the Authority's right to issue regulations to carry out § 7111(b).

Five U.S.C. § 7111(f)(4) states:

> Exclusive recognition shall not be accorded to a labor organization—[. . .]
>
> (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.

On its face, § 7111(f) does not apply to the filing of decertification petitions by individuals. Instead, the plain language of the Section demonstrates that it applies only to the granting of exclusive recognition. The decertification petition at issue in this matter does not seek to "accord"

[6] A "person" is defined in 5 U.S.C. § 7103(a)(1) as "an individual, labor organization, or agency."
[7] Election petitions are filed by any "person" pursuant to § 7111(b)(1).
[8] 5 C.F.R. § 2422.12(b).

exclusive recognition to any labor organization. This Section neither provides for nor precludes application of the certification bar to decertification petitions.

While § 7111(f) is silent as to the issue of decertification petitions, it is AFGE's view that the Authority has the right, discussed more fully below, to issue reasonable regulations to govern the timely filing of election petitions, and those regulations apply to any "person" who files an election petition pursuant to another part of the Statute: 5 U.S.C. § 7111(b).[9] Specifically, Section 7111(b)(1)(B) states:

> If a petition is filed with the Authority—
> (1) By any person alleging—
> (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 . . . the Authority shall investigate the petition [and] supervise or conduct an election on the question by secret ballot and shall certify the results thereof.

The Authority's Regulations effectuating § 7111(b) contain numerous provisions that go beyond the express statutory language and provide guidance on the conduct of elections. One part of this regulatory scheme is found in part at 5 C.F.R. § 2422.12. This provision establishes several bars—contract, election, and certification—to elections. It also leads to the conclusion that the instant petition should be summarily dismissed as untimely filed and precluded by the certification bar in 5 C.F.R. § 2422.12(b).

Since the Statute provides the opportunity for any "person" to file an election petition, but the Statute does not provide timeliness rules for any "person" except labor organizations in § 7111(f), it is reasonable for the Authority to promulgate regulations applying the same timeliness rules to other "persons" who seek to file election petitions under § 7111(b). Section 2422.12 is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law

[9] 5 U.S.C. § 7105(a)(2)(B).

because it creates a uniform standard applicable to all "persons" filing election petitions under § 7111(b). 5 U.S.C. § 706(2)(A). Moreover, § 2422.12 effectively provides clear and predictable guidance to all parties seeking elections as to when petitions may be filed. Thus, while § 7111(f) may not apply, there is still ample support to be found in the Statute for the Authority to promulgate reasonable regulations relating to the conduct of elections, including decertification elections.

b. The Authority's Regulations establishing procedures for filing election petitions effectuate the purposes of the Statute and conform to Congressional intent.

While the Statute itself is silent as to the timing of decertification petitions, this silence is not dispositive. Understanding that the Authority would have the technical expertise to address certain issues relating to elections, Congress gave the Authority broad powers to: (1) "establish rules governing any **. . .** election" under § 7111 of the Statute;[10] (2) prescribe "regulations to carry out the provisions of [the Statute];[11] (3) "supervise or conduct elections . . . and otherwise administer the provisions of [§] 7111 . . . relating to the according of exclusive recognition to labor organizations;"[12] and (4) "take such other actions as are necessary and appropriate to effectively administer the provisions of" the Statute.[13] The Supreme Court has recognized that the Statute makes the Authority "responsible for implementing the Statute through the exercise of broad adjudicatory, policymaking, and rulemaking powers." *NFFE, Local 1309 v. Dep't of the Interior*, 526 U.S. 86, 88 (1999).

The Statute clearly provides the Authority with the right to issue regulations that administer the provisions of § 7111. The Authority's Regulations are entitled to deference provided that its actions are not "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with

[10] 5 U.S.C. § 7111(d).
[11] *Id.* at § 7134.
[12] *Id.* at § 7105(a)(2)(b).
[13] *Id.* at § 7105(a)(2)(I).

the law." 5 U.S.C. § 706(2)(A). As discussed below, the application of § 2422.12(b) to consolidation petitions is neither arbitrary nor capricious, but rather consistent with long-standing policy interests, Congressional intent, and relevant principles of statutory construction. Additionally, extending the certification bar to consolidation petitions strikes the appropriate balance between the statutory interests in avoiding fragmentation, promoting comprehensive bargaining unit structures, fair elections, and providing stability and peace during the bargaining process while respecting the parallel statutory interest of ensuring employee free choice in their exclusive representative.

i. There is a strong statutory and policy interest in extending the certification bar to consolidated units.

There is a long-standing policy in federal sector labor relations supporting the consolidation of bargaining units where the resulting consolidated unit is appropriate.[14] This policy effectuates the Statute's mandate that the provisions in the Statute "be interpreted in a manner consistent with the requirement[s] of an effective and efficient Government." 5 U.S.C. § 7101(b). The Authority should find that the certification bar applies to consolidated unit certifications because applying the bar to those certifications both supports the Statute's interest in consolidation of bargaining units and recognizes that such units face challenges similar to other newly certified units to which the bar applies. Specifically, like other newly certified units, consolidation requires a new collective bargaining agreement be negotiated. Those negotiations are taking place between a unit that has changed in scope and other meaningful ways by the consolidation process thereby meriting the application of the bar. By contrast, failing to extend the bar to consolidated units would disincentivize consolidation—frustrating Congressional intent and the relevant public policy interests.

[14] *See* 5 U.S.C. § 7112(d) (mandating the certification of an appropriate consolidated unit, with or without an election).

The Statute permits two or more bargaining units represented by the same labor organization to be consolidated "if the Authority considers the larger unit to be appropriate." 5 U.S.C. § 7112(d). The Statute's provision for consolidation was intended by Congress to "better facilitate the consolidation of small units" into more comprehensive ones, thereby "serving the statutory interest in reducing fragmentation and promoting an effective, comprehensive bargaining unit structure." *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio,* 55 FLRA 399, 361 (2010); *Air Force Logistics Command, U.S. Air Force, Wright-Patterson Air Force Base, Ohio*, 7 FLRA 210, 214 (1981); *Army and Air Force Exchange Service, Dallas, Texas*, 5 FLRA 657, 661-62 (1981).

The Authority and its predecessors have consistently expressed a strong preference for consolidation, as it reduces unit fragmentation. In *Veterans Administration and AFGE National Office*, 1 FLRA 458 (1979) (*Veterans Administration*), AFGE petitioned to consolidate its bargaining units into consolidated units. In its decision, the Authority cited with approval the policy of the Federal Labor Relations Council ("FLRC"), going as far back as Executive Order 11838, issued in 1975, stating that ". . . the creation of more comprehensive units is a necessary evolutionary step in the development of a program which best meets the needs of the parties in the Federal labor-management relations program and best serves the public interest." *Report and Recommendations of the Federal Labor Relations Council* at 35 (1975); *see also Education Division, Department of Health, Education, and Welfare, Washington, D.C.*, 6 FLRC 281, 286 at n.4 (1978) (affirming "the strong policy in the Federal labor-management relations program of facilitating the consolidation of existing bargaining units . . .").

Failing to extend the protections of the certification bar to consolidated unit certifications would frustrate the Statute's interest in encouraging the consolidation of smaller units into more

comprehensive units. Consolidation is not a mere administrative exercise. Far from merely "shuffling" employees between existing representatives with minimal impact, the reality is that many unit consolidations result in significant changes to the affected bargaining units that are strikingly similar to those faced by other new units. This is consistent with the Authority's recognition that employees should have an opportunity to vote on the question of consolidation if they so choose. § 7112(d) (permitting election on question of consolidation if requested). The right to vote on the issue would not be bestowed if the changes arising out of consolidations were trivial. A unit consolidation changes the scope and composition of the unit itself. It brings together employees who were formerly under separate units—and under separate collective bargaining agreements—under a single certification for the first time.

The consolidation of bargaining units has a significant impact on bargaining. For one, consolidation of units requires the parties to negotiate a new collective bargaining agreement covering the new, broader unit. As the parties undertake this new round of bargaining, the parties to the new round of negotiations are often different than when the units were separate—for example, on the Agency side, the consolidation may have the effect of changing the level of recognition, resulting in entirely new agency representatives being involved in bargaining. Consolidations often result in changes to internal union operations and may change the named exclusive representative for the labor organization as well. Practically speaking, consolidations can result in a merger of local leadership or the creation of new bargaining councils to manage the responsibilities of administering a larger unit. Consolidation also requires parties to reevaluate their approach to bargaining. For one, the parties generally must shift from units operating under multiple, different contracts to one contract that covers a broader group of employees and balances their interests. This can significantly impact the parties' approach to bargaining and the issues

raised at the table. Far from a shuffling of paper, pursuing consolidation is, in reality, fraught with challenges and perils that are strikingly similar to those faced by other new units. As a result of these numerous challenges and changes, the creation of a consolidated unit often requires enormous investment of time and resources by the union, and frequently the FLRA and agency as well, in order to reap the potential benefits that come with the creation of larger units.

A review of Authority cases underscores that consolidation is not merely an administrative exercise and that, as with other new units, a certification bar is essential to allow the new unit a fair and reasonable chance to succeed. For one, the Authority has decided numerous cases where one or more of the constituent units affected by the consolidation of units have opposed the petition to consolidate. *See, e.g.*, *U.S. Dep't of Defense, Defense Information Systems Agency*, 70 FLRA 482 (2018) (local affected by proposed consolidated unit filed objections to unit); *U.S. Dep't of the Navy, Commander Region Southeast, Jacksonville, Florida*, 62 FLRA 11 (2007) (local opposed to consolidation filed objections to unit). National unions have, at times, also opposed consolidation petitions by refusing to serve as the exclusive representative of a newly consolidated unit. *See Dep't of the Navy, Commander, Navy Region Mid-Atlantic*, 72 FLRA 510, 511 (2021) (national union refusing to serve as exclusive representative for proposed consolidated unit where units held by locals objected); *Sheppard Air Force Base, Wichita Falls, Texas*, 57 FLRA 148, 149 n.4 (2001) (national union refusing to serve as exclusive representative for proposed consolidated unit where all involved locals objected to consolidation). These cases exist because consolidation indisputably and significantly impacts the bargaining units involved. At minimum, consolidation alters the scope of the units. Often, it also brings substantial changes the unit's level of recognition, leadership, and relationship with the agency.

These significant substantive changes, combined with the fact that there may be units or individuals who are opposed consolidation, make the immediate post-consolidation period a time of marked risk for the exclusive representative. A newly consolidated unit is, in fact, under enormous pressure to produce results to demonstrate to the employees that the change will benefit them and not adversely affect their rights or representation. This requires, as with any new unit, a fair opportunity to demonstrate to employees the benefits of consolidation. The application of the certification bar to consolidated units provides a period of stability where the exclusive representative can seek to demonstrate these benefits to employees. Absent such a bar, any unhappy local, officer, or employee affected by the consolidation can file a decertification petition and place the exclusive representative in a defensive position before it has had any chance to demonstrate the benefits of consolidation to the broader unit. This prejudices the union by placing it at a severe disadvantage in any decertification election that occurs during the immediate period following consolidation—in effect, decertification during this period allows a referendum on the union's abilities as exclusive representative before it ever has a chance to actually demonstrate those abilities to the bargaining unit. The application of the certification bar to consolidated units allows an exclusive representative to fairly compete in any subsequent elections and also ensures that employees are able to make an informed choice in any election. Thus, application of the certification bar to consolidated certifications is consistent with the goals behind the bar in other new units.

The Petitioner's argument that an agency would not ever refuse to deal in good faith with newly consolidated units simply ignores reality. There are numerous examples of Authority cases where the consolidation of bargaining units has been strenuously opposed by the Agency. *See*, *e.g.*, *U.S. Dep't of Defense, Defense Information Systems Agency*, 70 FLRA 482 (2018); *U.S. Dep't*

of the Interior, National Park Service, Northeast Region, 69 FLRA 89 (2015); *U.S. Dep't of the Air Force, Dover Air Force Base, Delaware*, 66 FLRA 916 (2012); *U.S. Dep't of Commerce, U.S. Census Bureau*, 64 FLRA 399 (2010); *U.S. Dep't of the Air Force, Travis Air Force Base, California*, 64 FLRA 1 (2009); *National Labor Relations Board, Washington, D.C.*, 63 FLRA 47 (2008); *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 55 FLRA 359 (1999); *Dep't of the Navy, U.S. Marine Corps*, 8 FLRA 15 (1982); *Army and Air Force Service, Dallas, Texas*, 5 FLRA 657 (1981); *Veterans Administration, Washington, D.C.* 1 FLRA 458 (1979). If, as the Petitioner suggests, a consolidation involves a mere "shuffling" of employees and no substantial changes that would provoke agency opposition to the consolidated unit, the extent of litigation over the question of consolidation defies reason. Where the union prevails in a consolidation request over agency opposition, the agency's opposition to the consolidated unit often does not simply cease when the certification is issued.[15] Moreover, even where there was no prior opposition, the prospect of a decertification election during the period where the new exclusive representative is attempting to negotiate the first contract for the consolidated unit can provide the agency an incentive to cease acting in good faith in order to surreptitiously support a decertification effort. Thus, as with other new units, the application of the certification bar serves to ensure that agencies have the same incentive to operate in good faith in bargaining and other matters with a newly consolidated unit.

The facts of this case also plainly illustrate why a certification bar is needed following the issuance of a consolidated certification. Here, the prologue to the consolidation was the decision by the former NAGE unit to essentially decertify its existing exclusive representative by

[15] Likewise, Agency hostility towards the individual units may carry over to the new consolidated unit. *See, e.g.*, AFR at Appendix, Exhibit 8, pp. 40-42 (Agency criticizing former representatives and new unit representation and complaining about use of grievance process to assist local officers).

conducting a *Montrose* vote and changing its affiliation to AFGE. Upon completion of that case, AFGE sought to avoid duplicative bargaining and increase efficiency in its two Blue Ridge Parkway units and requested consolidation. The FLRA gave the employees notice of the consolidation petition and no objections were raised, nor was any election requested. The FLRA issued the certification of consolidation and then—as the Local sought to begin negotiating a new agreement—the Petitioner filed her petition seeking a decertification election. AFGE's Local was thereafter forced to file an unfair labor practice charge alleging that the Agency has engaged in a pattern of bad faith bargaining by failing to respond or significantly and unreasonably delaying its responses to the Union's invocation of bargaining and attempts to negotiate—the very conduct the bar is engineered to discourage.[16] The Agency's refusal to engage in bargaining following the decertification petition gives the appearance, whether intentional or not, that it is supporting the decertification campaign by undermining the Union's ability to demonstrate capable representation of the new unit. In other words, the very case behind this Order shows that concerns that an Agency could engage in bad faith bargaining to support a decertification effort are not merely hypothetical—it is actually happening here in real time.

Contrary to what the Petitioner argues, the reality is that AFGE is under tremendous pressure to produce results to show the benefits of its representation—and its ability to produce results has been actively undermined by this petition. As noted previously, the timing of the decertification petition also prejudices AFGE and places AFGE at a substantial and serious disadvantage in any election, as it has not had a reasonable opportunity, much less a fair opportunity, to produce results for the electorate, including the former NAGE employees, before being placed in the position of having to defend its representation. As with any newly established

[16] *See* AT-RP-22-0407. This charge is currently under investigation by the FLRA's Atlanta Regional Office.

unit, the certification bar is essential to provide AFGE a period in which the employees can fairly evaluate its representation and the results its produces before making an informed decision about whether its representation should continue.

Finally, the certification bar should be extended to consolidated units because the failure to do so will disincentivize unions from consolidating units—or result in unions opposing an Agency's proposal to consolidate units—in situations where consolidation would otherwise effectuate the Statute's goals. The case at hand serves, again, as a prime illustration of this concern. If AFGE did not believe the certification bar applied to consolidated units, it would not have sought to pursue consolidation of its Blue Ridge Parkway bargaining unit. It would have left the units as separate appropriate units and, at the appropriate intervals, sought to bargain separate contracts for each of the units, particularly while seeking to deepen and grow its relationship with the employees from the former NAGE unit who have very little experience with AFGE or its representation. Going forward, if the certification bar does not apply, this will remain a consideration for all federal sector unions when determining when to pursue or support a unit consolidation. If consolidation merely serves to expose a union to an election in which it cannot fairly compete and in which the employees are deprived of the opportunity to make an informed choice as to the adequacy of their representation in their new unit, unions will both cease to seek consolidation and actively oppose consolidation petition in many more circumstances. Thus, any finding that the certification bar should not apply to consolidated units will only serve to roundly frustrate the Statute's interests in an efficient and effective government and comprehensive bargaining units.

ii. A review of the NLRB's case law concerning its own one-year bar supports applying the certification bar to consolidated unit certifications.

The decisions of the National Labor Relations Board ("NLRB" or "Board") discussing its "one-year certification rule" that is similar to the certification bar found in § 2422.12(b) also

support extending the certification bar to newly consolidated units in the federal sector. The Board decisions emphasize that the one-year certification rule is designed to support the opportunity for a union and employer to reach a first collective bargaining agreement and provide the unit a fair opportunity to succeed. The Authority should find that the certification bar extends to consolidated units in the federal sector to support these same goals.

The Board has a long-established and strictly applied one-year certification rule similar to the FLRA's certification bar. *See Brooks v. NLRB*, 348 U.S. 96, 103 (1954); *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507, 1508 (1952) ("*Centr-O-Cast*"). The Board's long-standing policy behind its one-year rule is that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 725 (1944). The Board has recognized that "claims questioning the continued viability of a . . . certification within a year after issuance not only does violence to that principle but also disrupts the orderly and stable labor relations that a certification is designated to promote." *Firestone Tire & Rubber Co.*, 185 NLRB 63 (1970). Thus, the Board "dismisses representation petitions filed during the certification year, whether they be initiated by the union, employer, or employee, to provide stability and peace in the bargaining process by affording the employer and the union a full opportunity to achieve a collective bargaining agreement." *Kirkhill Rubber Co.*, 306 NLRB 559 (1992) ("*Kirkhill*"). This includes all decertification petitions filed during the one-year certification period. *Centr-O-Cast*, 100 NLRB at 1508-09. The Board only grants an exception to the one-year certification rule to allow for the processing of unit clarification petitions and distinguishes those petitions on the grounds that, unlike other types of representation petitions, unit clarifications "look 'toward the continuation of the collective-bargaining relationship' that exists before the certified employee

representative and the employer." *Kirkhill*, 306 NLRB at 559-60. In other words, unit clarifications do not alter the scope of a unit or otherwise alter an established bargaining relationship, they only concern the interpretation of the already existing unit, and thus may be permitted. However, the Board mandates that all other types of representation petitions be dismissed during the one-year certification period. *Id.* at 560.

The NLRA does not contain identical provisions to the Statute concerning consolidation of bargaining units. The Statute's interest in consolidation is unique to the federal sector and Congress's stated interest in comprehensive and efficient bargaining units. The very fact that Congress included the Statute's consolidation provision set forth in § 7112(d), despite the lack of similar language in the NLRA, demonstrates the importance of the provision. However, certain conclusions can still be drawn from the Board's case law concerning when a certification bar should or should not apply following the issuance of a consolidated certification.

The Board's jurisprudence on the one-year rule demonstrates that applying the certification bar to consolidation certifications would be consistent with the principles and goals underlying the one-year rule. The Board's case law demonstrates that the application of the rule is designed to support the parties in executing an initial agreement at a time where there is a new collective bargaining relationship. The Board recognizes that any new relationship must have a reasonable and fair chance to succeed and that any pending decertification petition is inimical to success. As discussed previously, unit consolidation changes the scope of a unit and the parties' bargaining relationship. Consolidated unit certifications are distinct from other types of cases, such as unit clarification petitions, in that they bring with them the obligation for the parties to bargain a new collective bargaining agreement—the first one covering the broader unit and with the new parties at the table. This makes newly consolidated units more similar to new units than existing units

when it comes to bargaining. Their efforts to reach their first agreement deserve the same protections as other types of new units and should be protected by the certification bar.

The Board's case law recognizes that the certification bar is essential because if an employer believes that there is a question raised concerning a union's viability during the period in which the parties are seeking to reach their first agreement, that could lead the employer to refuse to bargain in good faith and generally lead to instability and disruption in the bargaining process. These concerns also exist in the federal sector and are being confirmed in real time in this case. To wit, since the Petitioner's decertification petition was filed, the union has encountered great difficulty in bringing the Agency to the table to bargain a new agreement in good faith. This is exactly the type of conduct a certification bar exists to prevent. Applying the certification bar to newly consolidated units is essential because it will prevent agencies from failing to engage in productive bargaining while bargaining a first agreement for a newly consolidated unit because they believe a decertification petition will relieve them of the obligation or that failing to bargain will surreptitiously provide support to the effort to relieve the agency of an otherwise unwanted union. On the other hand, failing to extend the bar will only encourage this type of misconduct. The foregoing demonstrates that the interests underpinning the Board's one-year rule are also present in the initial period following unit consolidation and that the certification bar is essential to ensure fairness and stability.

iii. The Authority's decision in this case has broad implications for the stability of labor relations and the Authority should consider the potential impact of its decision on other types of certifications issued without elections.

The Authority's decision here will likely have broad consequences beyond consolidated unit certifications. Under the Authority's case law, there are other scenarios where certifications are issued, without an election, covering a unit that is altered in scope and/or in its relationship

with the agency. For one, the Authority's decision as to how to determine when a certification bar should apply could very well impact other types of certifications, such as certifications issued pursuant to the Authority's successorship doctrine. *U.S. Navy, Naval Facilities Eng'g Serv., Port Hueneme*, 50 FLRA 363 (1995) (*Port Hueneme*). Just as a consolidated certification can be issued without an election, the Authority's successorship doctrine permits a "sufficiently predominant" union to be certified the exclusive representative, if it otherwise satisfies the Authority's successorship criteria, without an election. *Interior, Bureau of Land Management, Sacramento, Cal. and Interior Bureau of Land Management, Ukiah District Office, Ukiah, Cal.*, 53 FLRA 1417, 1422 (1998) (no election needed if only one union involved and the employees transferred from a bargaining unit exceed 50%); *U.S. Army Aviation Missile Comm., Redstone Arsenal Ala.*, 56 FLRA 126, 131 (2000) (if more than one union involved, no election necessary if one union represents more than 70% of post-transfer unit). As with consolidated units, while there is some degree in continuity in the unit's representation—to the extent that the employees never lose union representation—in successor units, the newly certified unit may also be changed in scope and face significant changes to the parties' collective bargaining relationship. For example, in successorship, the newly certified unit may be dealing with a new agency organization entirely (the "gaining entity"). As with consolidated units, the first contract bargaining after a finding of successorship is the first time the parties are dealing with the changes to the unit wrought by the reorganization that triggered the successorship case.

The Petitioner seeks a bright line rule that the certification bar will never apply unless it was preceded by a self-determination election. If the Authority adopts that principle, this opens the door to much broader destabilization of labor relations. Under that rule, successor units that were certified due to sufficient predominance would be penalized by having to deal with the

immediate threat of a decertification petition while simultaneously attempting to establish a bargaining relationship with the successor employer and find its footing as the exclusive representative of a larger unit.[17] Meanwhile, similarly situated units where the only difference was that no union was predominant, and an election was therefore required, would enjoy the certification bar's protection while pursuing the same goals. This distinction would be arbitrary, have the potential to broadly destabilize labor relations, and fail to effectuate the Statute's goals.

The better rule here, again, is to look not simply at how the unit was certified but what changes required the issuance of a new certification and how those changes impacted the collective bargaining relationship. If a certification has been reissued due to a change that has the potential to impact the scope of a unit, the parties to a bargaining agreement, or requires the negotiation of a new "first" agreement to address the changes to a unit—in other words, if the goals of the bar would be effectuated by its application, the certification bar should apply. Consolidations and successorship petitions generally not only alter the scope of the unit, but they both require new rounds of bargaining for agreements, and they both have the potential to substantially change the parties involved in that bargaining. Thus, the certification bar should be applied in these types of situations, as it would advance the goals of supporting a bargaining relationship and allowing a period for an exclusive representative to establish a relationship with the agency and its own altered unit.

These situations are different than, as the NLRB recognizes in its application of its one-year rule, a clarification petition. Clarification petitions do not trigger changes in the parties' bargaining relationship or trigger a new round of bargaining. In contrast with consolidation

[17] Successorship cases can be as fraught as consolidation cases for unions, even when there is sufficient predominance. If decertification petitions are permitted immediately following the issuance of a successor certification, any disgruntled officer, member, or bargaining unit employee of a union that lacked sufficient predominance will have an additional avenue to express their displeasure with the outcome of the petition under the Authority's case law.

petitions, they do not change the scope of a unit and instead decide who falls within the parameters of an already existing unit certification. Therefore, the bar reasonably does not apply to clarification petitions. The Authority should adopt these considerations as to when the certification bar should apply to decertification elections, as they better effectuate the Statute's goals than the Petitioner's rule, and find that the bar should apply to consolidated unit certifications.

iv. Principles of statutory construction support the extension of the certification bar to consolidated units.

The U.S. Supreme Court considers statutory construction to be a "holistic endeavor." *U.S. Sav. Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). Thus, "a statutory provision that may seem ambiguous in isolation may be clarified by the remainder of the statutory scheme." *National Aeronautics and Space Administration, Goddard Space Flight Center, Wallops Island, Virginia*, 67 FLRA 670, 672 (2014) (*NASA Goddard*). Moreover, a plain-meaning interpretation of the Statute should be rejected if that interpretation would produce an "absurd result." *Id.* at 672-73 (citing *United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994)). The whole of the statutory scheme at issue supports the application of the certification bar to consolidated certifications and failing to extend the bar in such situations would both undermine the statutory scheme and lead to absurd results.

If the certification bar is not extended to decertification petitions, the following scenario could result. A union could seek, as here, to consolidate certain bargaining units and receive a new certification. The union and the agency could then invest time and resources to negotiate an initial collective bargaining agreement to cover the new unit. As the parties seek to conclude bargaining, some individual or faction that is dissatisfied with some provision of the contract could decide the best way to deal with that dissatisfaction is to file a decertification petition. At that point, another union could intervene and win by promising to restart the bargaining process. That

union could win and force the agency to engage in an entirely new round of collective bargaining with the exact same unit. If this round of bargaining dragged out for some time due to the new union's harder stance on certain issues, and exceeded a period of a year, yet another election or decertification petition could be filed by the faction of employees who supported the first contract. The end result would be that all parties would waste tremendous time and resources attempting to bargain while the agency deals with an endless merry-go-round of unions and becomes less and less inclined to bargain a contract that would never come to fruition. This does not support the Statute's goals of an efficient and effective government.

v. The Authority has demonstrated the intent for the certification bars to apply to consolidated units in prior versions of its Regulations.

The Authority should find it has both the ability to promulgate regulations concerning a certification for a consolidated unit and that the existing certification bar should apply to consolidated units because historical versions of the Authority's regulations contained certification bars that applied to consolidated units. For example, the 1988 version of the Authority's Regulations contain the following provision at 5 C.F.R. § 2422.3(h):

> Where there is a certification on consolidation of units, a petition will not be considered timely if filed within twelve (12) months after the certification on consolidation units has been issued: *Provided, however*, That after an agreement has been signed and dated for a claimed consolidated unit, the provisions of paragraphs (c) and (d) of this section shall apply.

It appears that prior versions of the Authority's Regulations did recognize that a certification bar should extend to consolidated unit certifications and explicitly extended the bar to such certifications. While the regulatory history is not entirely clear, it appears this section may have been merged with the more general language concerning certification bars that was issued in 1995. Absent evidence to the contrary, the Authority should continue to find that the more general certification bar found in § 2422.12(b) continues to apply to consolidated unit certifications.

vi. Application of the certification bar to consolidated certifications in no way frustrates employee free choice.

Despite what the Petitioner may argue, the application of the certification bar to consolidated unit certifications will not frustrate employee free choice nor will it force an unwanted bargaining agent upon employees. The Authority has crafted a careful balance in consolidation cases that respects both the Statute's interest in employees' rights to choose their exclusive representative and its interests in an efficient and effective government. The certification bar is also essential to ensuring stability in labor relations.

The Statute and the Authority have already ensured there are numerous mechanisms in place to balance employee free choice with the need for stability served by the extension of the certification bar to consolidated units. For one, a bargaining unit employee can file a petition seeking to decertify the unit at any appropriate time before a consolidated certification is issued—and even while the consolidation petition is pending. *See Commodity Futures Trading Comm'n, E. Reg'l Office, N.Y.C., N.Y.*, 70 FLRA 291, 295 (2017) (*CFTC*); *Dep't of Transportation, Federal Aviation Administration*, 4 FLRA 722 (1980). In this case, the Petitioner or any unit employee could have filed a decertification for any number of years preceding the consolidation, up until the consolidation certification itself was issued. They did not, despite the numerous opportunities.

Additionally, if employees object to a proposed consolidation or believe that a union is pursuing consolidation to avoid a potential decertification, there are additional mechanisms in place to protect employees. For example, employees must be affirmatively notified of any consolidation petitions and employees are permitted to challenge consolidations during the pendency of any petition. 5 C.F.R. § 2422,7; Representation Case Handling Manual 18.1.2. Thus, if a union is seeking to circumvent decertification through consolidation, the employees can force

the units to remain separate so that they retain the opportunity to file their petition. And again, the Authority has held that timely election petitions filed *before* consolidated certifications are issued will be processed even if a consolidation certification is later issued. *CFTC*, 70 FLRA at 295.

Finally, outside of any applicable bars, employees in consolidated units have the same rights to seek elections as employees in any non-consolidated unit. For example, even while a certification bar is in place, individuals are permitted to file election petitions "at any time when unusual circumstances exist that substantially affect the unit or majority representation." 5 C.F.R. § 2422.12(f). Thus, even when there are bars in place, the employees still have a mechanism to seek an election if circumstances warrant the change. Consequently, it is abundantly evident that applying the certification bar to consolidation would not hinder the rights of employees and any contention by the Petitioner otherwise should be rejected.

III. Conclusion

The foregoing demonstrates that the Authority should find that the certification bar found in § 2422.12(b) of the Authority's Regulations should apply to consolidated unit certifications. The application of the bar to consolidated unit certifications is amply supported by policy considerations, precedent, history, and principles of statutory interpretation. Additionally, a finding that the bar applies to consolidated unit certifications strikes the appropriate balance of promoting bargaining relationships and stable labor relations while also respecting the right of employees to seek self-determination elections. The Authority should therefore find that the certification bar applies in this matter and dismiss the petition.

Respectfully Submitted,

Julia Turner
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AFGE, AFL-CIO

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO IN RESPONSE TO THE AUTHORITY ORDER IN 73 FLRA 120 were served this 29th day of August, 2022 upon the following:

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