**UNITED STATES OF AMERICA**
**FEDERAL LABOR RELATIONS AUTHORITY**

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| U.S. Department of the Interior,<br>National Park Service,<br>Blue Ridge Parkway, North Carolina<br>- *Agency*<br><br>*and*<br><br>American Federation of Government Employees, AFL-CIO<br>- *Union*<br><br>*and*<br><br>Erin Lamm<br>- *An Individual* | Case No. AT-RP-22-0007 |

# PETITIONER'S BRIEF ON THE QUESTION FOR REVIEW

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## QUESTION FOR REVIEW

Does § 7111(f)(4) of the Federal Service Labor-Management Relations Statute or § 2422.12(b) of the Federal Labor Relations 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?

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## STATEMENT OF THE CASE

Petitioner Erin Lamm ("Petitioner" or "Lamm") is employed by U.S. Department of the Interior, National Park Service, Blue Ridge Parkway ("Blue Ridge").[1]

Prior to 2021, two unions represented Blue Ridge employees: National Association of Government Employees Local R4-75 ("Local R4-75") represented non-professional maintenance and engineering employees (about 40 employees),

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[1] In the time since Lamm filed her application for review, she accepted a position outside the bargaining unit. As a non-bargaining unit employee, she may no longer be the appropriate petitioner in this proceeding. That said, a current Blue Ridge employee, Proposed Substitute Petitioner Lauren Labrie, is an appropriate petitioner. Labrie is employed by Blue Ridge as a budget analyst, is a member of the bargaining unit, and wishes to be substituted as the Petitioner. The Authority has no express precedent related to substituting petitioners, however, the National Labor Relations Board ("Board") allows such a substitution, and the Authority should follow the Board's practice here. *See Dep't of Just. Fed. Bureau of Prisons Fed. Transfer Ctr. Okla. City*, 67 FLRA 221, 224 (2014) ("When there are comparable provisions under the Statute and the NLRA, decisions of the [Board] and the courts interpreting the NLRA have a high degree of relevance to similar circumstances under the Statute."). The Board regularly allows such substitutions when a petitioner's circumstances change. *See, e.g.*, *Geodis Logistics, LLC*, 371 NLRB 102, n.1 (May 24, 2022) (Order granting petitioner's motion to substitute where the original petitioner had left the bargaining unit); *Jell-Well Dessert Co*., 82 NLRB 101, 102 n.3 (1949) (treating a petition as filed by someone other than the original petitioner*); Nw. Photo Engraving, Co.*, 106 NLRB 1067, 1067 n.1 (1953) (unit employees requested petition continue after the death of petitioner). Such a substitution is warranted because "the petitioner is only a representative of the employees who are interested in a vote on continuing representation." *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1335 n.3 (2004); *Weyerhaeuser Timber Co*., 93 NLRB 842, 844 (1951) (a petitioner acts in a "representational capacity" in petitioning on "behalf of employees of Employer asserting that the Union is no longer the bargaining representative of such employees"). Petitioner Lamm and the Proposed Substitute Petitioner Labrie jointly move the Authority remove Lamm and substitute Labrie as the Petitioner.

and the American Federation of Government Employees ("AFGE") represented all other unionized employees (about 50 employees) (Pet. Resp. to Ord. to Show Cause, at 1).

On February 19, 2021, Local R4-75 petitioned under § 7111(b)(2) of the Statute to change the affiliation of the unit of non-professional maintenance and engineering employees from Local R4-75 to AFGE Local 446. *NAGE, Local R4-75*, Case No. AT-RP-21-0011. The FLRA found the change appropriate and issued a certification changing the affiliation of Local R4-75 to AFGE Local 446. *NAGE*, Local R4-75, Case No. AT-RP-21-0011, Am. Cert. of Rep., at 1 (June 8, 2021).

Subsequently, on June 16, 2021, AFGE petitioned to consolidate the now two AFGE bargaining units. *AFGE*, Case No. AT-RP-21-0021. On September 10, 2021, the Regional Director issued a decision and order consolidating the two units, without an election, under Section 7112(a) and (d) of the Statute. *AFGE*, Case No. AT-RP-21-0021, FLRA Dec. and Ord. Consolidating Units, at 3 (FLRA Sept. 10, 2021). At the same time, the Federal Labor Relations Authority ("Authority") issued a Clarification of Unit certifying the AFGE as the exclusive representative of all professional and non-professional employees of Blue Ridge. The unions, consolidated or otherwise, have not renegotiated collective bargaining agreements in decades (AFGE Local 446's agreement is from 1988 and NAGE Local R4-75's is from 2000). (Nat'l Park Serv. Statement of Interest, AT-RP-22-0007, Jan. 21,

2022, at 2). Before consolidation, neither union expressed interest in renegotiating an agreement—AFGE specifically for thirty-four years. *Id.* While AFGE submitted notice of its intent to negotiate a new collective bargaining agreement after consolidation, as of January 2022, AFGE and Blue Ridge had not yet engaged in negotiations. *Id.*

On December 23, 2021, Lamm filed a decertification petition with the Authority seeking to decertify AFGE as the exclusive representative of the consolidated unit of Blue Ridge employees. On March 24, 2022, the Regional Director issued a Decision and Order, dismissing the decertification petition. He found the petition was untimely because Lamm filed it less than twelve months after the FLRA certified the consolidated unit without an election. (Regional Director Decision & Order, at 1) (hereafter, "RD Decision").

Under 5 U.S.C. § 7105(f) and section 2422.3l(a) of the Authority's Regulations, Lamm applied for review of the RD Decision. Finding the RD Decision raised an issue for which there is a lack of precedent, the Authority granted Lamm's application for review on July 19, 2022.

## ARGUMENT

### I. Imposing an election bar after a unit consolidation violates both the text and the purpose of the Statute.

#### A. The election bar in Section 7111(f)(4) cannot be applied to unit consolidations under Section 7112.

The Regional Director found Lamm's petition was barred by an election bar imposed after a Section 7112(d) consolidation. Section 7112(d) does not impose an election bar after a unit consolidation. The Regional Director, however, found an election bar was imposed after a unit consolidation by Section 7111(f)(4) of the Statute. The election bar in Federal Service Labor-Management Relations Statute ("Statute") Section 7111(f)(4) cannot bar the instant decertification petition based on a Section 7112 unit certification. Section 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.

5 U.S.C. § 7111(f)(4) (emphases added).

By this unambiguous language, the election bar in Section 7111(f)(4) applies *only* when labor organization is certified by the Authority: (1) via a secret ballot election; and (2) under Section 7111. The Authority correctly recognized this principle in *Commodity Futures Trading Comm'n*, 70 FLRA 291 (2017) ("*CFTC*") by declining

to impose an election bar on the basis of a Section 7112 unit consolidation. In that case, the Authority stated the certification bar in Section 7111(f) did *not* apply to the Section 7112 consolidation certification because "the conditions necessary for § 7111(f)(4) to apply were not met." *Id.* at 295. Specifically, the Authority recognized that when Congress said "this section" it limited the certification bar to those certifications filed under 7111 and excluded petitions for consolidation filed pursuant to Section 7112. *Id.*

The Authority's decision in *CFTC* tracks both the text and context of the Statute. Under the Statute, unit consolidations are governed by Section 7112(d). 5 U.S.C. § 7112(d). Pursuant to that Section, when a union exclusively represents two or more bargaining units in an agency, "upon petition by the agency or labor organization" the Authority may consolidate the two units with or without an election, if "appropriate." *Id.* If the Authority determines the unit to be "appropriate" it certifies the union as the exclusive representative of the consolidated unit. *Id.* Unlike Section 7111, Section 7112 does not impose any additional statutory election bars.

In practice, when a union or agency petitions for a consolidation, an election to determine if the employees support the consolidation election does not automatically occur. Instead, the Case Handling Manual allows employees to collect a 30% showing of interest to require a vote on whether to consolidate. RCHM 23.11.1. However, even if employees collect such a showing and the Authority conducts an

election, the result does not change the representative status of the union. Even if the employees vote against the consolidation the union continues to represent all the employees, just in the original in two separate units.

This result makes Section 7112(d) distinct from representation elections held under Section 7111. *See* 5 U.S.C. § 7111. Section 7111 elections concern employees exercising their right to designate, or not to designate, an exclusive representative to bargain on their behalf. The right to "participate through labor organizations *of their own choosing*" is a central purpose of the Statute. 5 U.S.C. § 7101(a)(1). Congress has therefore imposed election bars that attach after a representation election reflecting its desire to only have one such election per year. *See* 5 U.S.C. § 7111(b), (f)(4). By contrast, in Section 7112(d) consolidations, employees are not consulted unless they affirmatively collect a showing of interest. Even then, employees do not cast a vote to choose their representative, but rather, are only asked if they wish to expand their bargaining unit. *See CFTC*, 70 FLRA at 295 n.43 (Chairman Pizzella noting in a consolidation election that employees do not designate an exclusive representative, but merely vote on the propriety of consolidation.). In other words, Section 7112(d) consolidation elections have nothing to do with employees' designation of a representative. Given this distinction between unit certifications under Section 7111 and 7112, Congress' choice not to attach an election bar to

Section 7112(d) consolidations makes perfect sense and the Authority correctly recognized this in *CFTC*. *See id.* at 295.

Here, the Regional Director dismissed the decertification petition because he concluded Section 7111(f)(4) and Section 2422.12 of the Authority's regulations imposed an election bar based on a Section 7112(d) consolidation. RD Decision at 2–3. To the extent the Regional Director relied on Section 7111(f)(4) to dismiss Petitioner's decertification petition based on the prior consolidation under Section 7112, he erred.[2]

### B. Creating an election bar for unit consolidations through Section 2422.12(b) contravenes Congress's express creation of election bars in the Statute.

The remaining basis for the Regional Director's refusal to process Lamm's Section 7111 decertification petition is a bar ostensibly imposed by Section 2422.12(b) of the Authority's Regulations. The wholesale creation of a non-statutory election bar applicable to Section 7112(d) is not consistent with the text of the Statute.

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[2] The Regional Director may have relied on Section 7111(f)(4) and Section 2422.12 in conjunction to dismiss the petition. *See* Order Granting App. for Rev. at 5. However, as discussed in detail below, since Congress expressly limited the election bar in Section 7111(f)(4) to certifications under Section 7111, the Authority is not permitted to expand this bar to certifications in other sections by regulation.

Section 2422.12(b) of the Authority's Regulations provides: "a petition seeking an election will not be considered timely if filed within twelve . . . months after the certification of the exclusive representative of the employees in an appropriate unit." 5 C.F.R. § 2422.12(b). The Representation Case Handling Manual instructs Regional Directors to apply this bar to certifications issued after Section 7112(d) consolidations. RCHM 11.3. The Authority, however, has never applied Section 2422.12(b) of its Regulations to a Section 7112(d) consolidation. Order Granting App. for Rev. at 5.

The Authority should take this opportunity to engage in the best reading of its regulations, namely, that Section 2422.12 does not create additional bars, but merely implements the bars Congress created in Section 7111. The Authority should take this approach for three reasons.

*First*, Section 7111 contains three bars: (1) an bar in Section 7111(b) preventing more than one secret ballot election per year, *see* 5 U.S.C. § 7111(b) ("An election [to determine exclusive representation] shall not be conducted in any appropriate unit . . . within which, in the preceding 12 calendar months, a valid election under this subsection has been held."); (2) a contract bar in Section 7111(f)(3), *see* 5 U.S.C. § 7111(f)(3); and (3) a certification bar that attaches only after a secret ballot election conducted under Section 7111, *see* 5 U.S.C. § 7111(f)(4). Section 2422.12 perfectly tracts Section 7111's three bars. Section 2422.12(a) implements the statutory

election bar in Section 7111(b). Section 2422.12(b) implements the statutory certification bar in Section 7111(f)(4). Sections 2422.12(c), (d), (e), and (g) implements the statutory contract bar in Section 7111(f)(3). These complementary provisions demonstrate the purpose of Section 2422.12(b) was to implement, rather than expand, Section 7111(f)(4)'s election bar. Indeed, at least one Regional Director has recognized that Section 2422.12(b) "merely implements the provisions of Section 7111(f)." *CFTC*, 70 FLRA at 299 (RD Dec.).

The Regulation does not indicate that it applies to Section 7112(d) unit consolidations. Nor does the Regulation indicate any power or intention to create new bars not mentioned in the Statute. Moreover, as the authority found over 40 years ago, Section 7112(d) "was intended to facilitate larger bargaining units, not to shackle employees in the selection of a bargaining representative in those larger units." *Dep't of Transp., Fed. Aviation Admin*, 4 FLRA 722, 729 n.8 (1980). Yet, applying Section 2422.12(b) to Section 7112(d) accomplishes exactly the opposite—a bar imposed after a unit consolidation shackles employees to a union they may not want and deprives them of the opportunity for an election.

*Second*, the Statute provides no authority for applying an election bar to Section 7112. The Authority is granted regulatory power to "carry out the provisions" of the statute, 5 U.S.C. § 7134, however, the Authority has no power to contravene the statute or go beyond its mandate. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–

14 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."). Under the principles of statutory interpretation, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291, 1301–02 (11th Cir. 2015) (internal quotations and citations omitted).

And while noting in the statute specifically disallows an election bar to be imposed after a unit consolidation, the Supreme Court "has firmly rejected the suggestion that a regulation is to be sustained simply because it is not 'technically inconsistent' with the statutory language, when that regulation is fundamentally at odds with the manifest congressional design." *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982). Thus, even with no explicit prohibition, agencies may not issue rules that are "inconsisten[t] with the design and structure of the statute as a whole." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013); *see also Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 322 (2014) (agencies may not issue regulations "incompatible" with "the substance of Congress' regulatory scheme") (citation omitted). And it is, of course, a "core administrative-law principle that an

agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Univ. of Tex. Sw. Med. Ctr.*, 570 U.S. at 328.

Here, Congress spoke directly to when a bar should be applied and when it should not. Each bar in the Statute specifically applies to secret ballot representation elections held "under [7111]." 5 U.S.C. §§ 7111(b), (f)(3)–(4). Section 7112 is a different subsection of the Statute. *See CFTC*, 70 FLRA at 295. Thus, not only did Congress refrain from imposing an election bar to a Section 7112 unit consolidation, but it also explicitly *excluded* Section 7112 from the bars it created by limiting the Section 7111 bars to the particular subsection. Thus, the Authority should presume the Congress meant what it said—that election bars may only block petitions filed under Section 7111. If Congress wanted to impose a similar bar for Section 7112 petitions it would have done so, and not included language excluding these petitions from its statutory bars. Any attempt to interpret Section 2422.12(b) to expand an election bar to Section 7112 would be inconsistent with the Statute as a whole and an impermissible attempt to "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Univ. of Tex. Sw. Med. Ctr.*, 570 U.S. at 328.

This result is buttressed by the Ninth Circuit's decision in *Eisinger v. FLRA*, 218 F.3d 1097 (9th Cir. 2000). In *Eisinger*, the issue presented was whether an individual could petition seeking to clarify a bargaining under § 7111 of the Statute. The Authority's Regulations expressly held only unions and agencies could file such

petitions. The Authority determined the Authority's Regulations precluded an individual from filing a clarification of unit petition and that the Regulations were not inconsistent with the statutory definition of "person." The court reversed the Authority's decision, finding that the statutory language was unambiguous and that an individual could petition, including a clarification of unit petition. The court held that the Authority's regulation denying individuals standing to file such petitions was "invalid" because the regulation "contravenes the unambiguous intent of Congress." 218 F.3d at 1105. Here, Congress intended election bars only attach to Section 7111 elections. Otherwise, Congress would have included a certification bar in Section 7112(b).

Third, this is the only practical reading of the statute that makes sense. By its own terms, Section 7111 elections do not bar subsequent Section 7112 unit consolidations. The Authority confirmed as much in *CFTC*. 70 FLRA at 295. This is because even if employees have made a representational choice, the statute may want to consolidate units to promote greater efficiencies. Yet, by the Regional Director's reading, unions may use Section 7112 consolidations as a one-way ratchet to bar a subsequent Section 7111 election. There is nothing in the statute suggesting it was Congress' goal to authorize Section 7112 consolidations blocking Section 7111 elections, but not the other way around. If it were Congress' goal to accomplish

this, they would have placed a bar in Section 7112 disallowing 7111 elections for a period after a consolidation.

In short, the imposition of an election bar after a unit consolidation contravenes the text and structure of the Statute. Imposing such a bar through Section 2422.12 would be *ultra vires*. The Authority should clearly state Section 2422.12's election bar provisions implement the parallel provisions of Section 7111 and do not apply to Section 7112.

### C. Expanding Section 2422.12(b) to include a bar to a unit consolidation contravenes Congress' intent to promote employee free choice through secret ballot elections.

Even if the text and structure of the statute does not disallow an election bar to be imposed after a Section 7112(d) unit consolidation, such a result still contravenes the purpose of the Statute. In passing the Statute, Congress' intent was to promote secret ballot elections and employees' freedom to choose their representative under the Statute. Not allowing employees to exercise their free choice because the Authority administratively combined two bargaining units undermines Congress' goal of promoting the democratic right of employees to select their own agent.

Congress specifically enacted the Statute to protect the democratic principle of employee free choice—employees' right to either select, or refrain from selecting, a union to represent them in the workplace. "As . . . mentioned many times during debate on the labor reform bill, it is our duty in Congress to protect the rights of the

individual." 124 Cong. Rec. S 14311 (daily ed. August 24, 1978). Congress accomplished these ends by enacting Sections 7101, 7012, and Section 7111. 5 U.S.C. §§ 7101, 7012, 7111. The Statute gives employees the right "to organize, bargain collectively, and participate through labor organizations *of their own choosing*." 5 U.S.C. § 7101(a)(1) (emphasis added). The right of employee self-determination in selecting a union also presupposes a right not to associate and to "refrain" from assisting a union. 5 U.S.C. § 7012; *see also SEIU*, *AFL-CIO, Local 556,* 1 FLRA 563, 563 (1979) (*SEIU*) (recognizing employees have the right to join, not join, maintain, or drop their membership). When employees seek to designate or decertify a union, they can only do so through Section 7111 of the Statute. And conversely, Section 7111 grants a union "exclusive recognition" only if a majority of employees have selected it through "a secret ballot election." 5 U.S.C. § 7111(a). The Authority has recognized the importance of this employee self-determination, finding that "to decide whether to be represented and, if so, by what union" is the "employees' most fundamental right under the [S]tatute." *NAGE/SEIU, Local 5000*, 52 FLRA 1068 (1997).

These provisions of the Statute are modeled on National Labor Relations Act ("NLRA") Sections 7 and 9(c). 29 U.S.C. §§ 157, 159(c); *U.S. Geological Surv., Caribbean Dist. Off., San Juan, P.R.*, 53 FLRA 1006, 1019 (1997) (concluding that § 7111(f)(4) of the Statute "is substantially similar to [§] 9(c)(3) of the NLRA"); *INS*

*v. FLRA*, 855 F.2d 1454, 1460–61 (9th Cir. 1988) (describing similarities between Section 7102 and Section 7). NLRA Section 7 grants private sector employees the right to select or reject a union. 29 U.S.C. § 157. Courts have recognized "[e]mployee self-determination in the collective bargaining process is perhaps the [NLRA's] most fundamental promise." *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001). Like the Statute, Congress through the NLRA gave private sector employees the right to select their own representative— "the rule is that the employees pick the union; the union does not pick the employees." *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018). Consequently, the NLRA, like the Statute, "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all." *Baltimore Sun Co.*, 257 F.3d at 426. The NLRA is structured to prevent minority unions because "[t]here could be no clearer abridgment of § 7 of the Act" than for an employer to grant "exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority." *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961).

While the Statute is modeled after the NLRA, the Statute is even more protective of employee free choice. For example, the NLRA allows unions to represent employees without an election if the union can show majority support among employees through authorization cards or a majority petition. *See NLRB v. Gissel*

*Packing Co.*, 395 U.S. 575, 598–99 (1969). Not so under the Statute—the only way for a union become exclusive representative under the Statute is through the secret ballot. *Dep't of the Army*, 55 FLRA 640, 643 n.6, n.10 (1999) (noting the Statute does not allow voluntary recognition). Both the Statute and the NLRA contain election bars after representation elections. Congress imposed these limited bars—and exceptions to the rule of employee freedom to choose their representative—to underscore that a representation election is a "solemn" occasion. *See Brooks v. NLRB*, 348 U.S. 96, 99, 100 n.8 (1954). As the right to select a representative though a secret ballot election is the "employees' most fundamental right under the [S]tatute." *NAGE/SEIU, Local 5000*, 52 FLRA 1068, . any restraint imposed on that right must be narrowly construed. Imposing an election bar after a unit consolidation is contrary to this principle in at least three ways.

*First*, an election bar after a unit consolidation conflicts with Congressional design. If the overriding purpose of the Statute is employee free choice, a bar preventing employees from making a representational choice based on circumstances largely out of employees' control undermines that purpose.

A unit consolidation has nothing to do with employees choosing a representative. Employees cannot even request consolidation—only unions and agencies may request consolidation under the Statute. *See* Section 7112(d). Even after a union or agency petitions for consolidation, employees are not consulted unless they are on

notice that the consolidation is pending and can quickly collect a sufficient showing of interest to request a secret ballot election. This election, however, merely asks employees if they wish to consolidate or not. Regardless of the outcome of the election, the employees continue to be represented by the union. And while employees are informed that they may seek an election to challenge the consolidation by collecting a sufficient showing of interest, employees who may not want to be represented at all may not realize they will be barred from later exercising that right if they do not first oppose the consolidation by seeking a consolidation election.

*Second*, imposing an election bar for a unit consolidation does not further the purpose of the election bars in the Statute. These bars were imposed to encourage employee choice of representative to be a solemn occasion, or to give stability to contracts. But unit consolidations do not further these ends—unit consolidations are about creating greater efficiencies for unions through larger bargaining units. There is thus no need for a bar because the bar does not promote the end goal of efficiency. *Dep't of Transp., Fed. Aviation Admin*, 4 FLRA 722, 729 n.8 (1980) (observing § 7112(d) "was intended to facilitate larger bargaining units, not to shackle employees in the selection of a bargaining representative in those larger units."). While efficiency in bargaining units may be a secondary goal of some provisions of the Act, efficiency is in no way enhanced through an election bar.

*Finally*, a consolidation bar undermines employee free choice because such a bar erects too many hurdles to a representation election and unions will use it with other statutory bars to deny employees the ability to seek a representation election for a significant amount of time.

Imposing an election bar in this instance could create a situation where employees cannot petition for a representation election for over 7 years. Consider the following scenario: A union petitions to consolidate employees in two units represented by the same union. Unit A is a unit of 100 employees and there is a three-year collective bargaining agreement that expires in 8 months. In unit B, a unit of 10 employees, there is no collective bargaining agreement in effect. The Regional Director consolidates the units and certifies the union as the representative of the combined unit. According to the Regional Director's interpretation of Section 2422.12(b), a bar preventing Section 7111 elections would attach post certification, and the employees in the combined unit would be prevented from decertifying the union for up to one year. The 100 employees in unit A would have had no recent opportunity to decertify the union before the consolidation because the CBA would have prevented them from decertifying the union during the prior three-year period. Even if employees could petition for an election during the open period at the end of the CBA, *see* Section 7111(f)(3), they would be barred from doing so by the newly imposed certification bar. And, if the union agrees to a new contract before the

expiration of the certification year the 100 employees in Unit A could be denied an opportunity to decertify for up to nearly 8 years. The union in this example could have had the one-year certification bar after an initial election victory in a Section 7111 election, a 3-year bar during its first contract, a 1-year bar after the consolidation certification, and 3 years during the second contract—just because 10 employees were added to the unit. In addition, this does not consider that a union may attempt strategically timed unit consolidations near the end of a contract to avoid an election.

In this hypothetical, if a group of enterprising employees did want to assert their rights to seek a decertification election, those employees would have to actually seek and win two elections. First, they would have to collect a showing of interest to call for consolidation election after the union petitioned for consolidation. Second, assuming the employees voted against consolidation, those same employees would now have to seek another election under Section 7111 to decertify the union. Congress could not have possibly intended such a Kafkaesque process.

## II. Imposition of an election bar departs from analogous NLRB precedent.

When there are comparable provisions under the Statute and the NLRA, decisions of the National Labor Relations Board ("NLRB") and the courts interpreting the NLRA have a high degree of relevance to similar circumstances under the Statute. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221, 224

(2014). The Authority has found Section 7111(f)(4) of the Statute "substantially similar" to Section 9(c)(3) of the NLRA. *U.S. Geological Surv., Caribbean Dist. Off., San Juan, P.R.*, 53 FLRA 1006, 1019 (Dec. 22, 1997). NLRA Section 9(c)(3) provides that "[n]o election shall be directed in any bargaining unit or any subdivision within which the preceding twelve-month period, a valid election shall have been held." 29 U.S.C. § 159.

The Regional Director's imposition of a twelve-month election bar based on a unit consolidation creates an outlier in federal labor law. Other than a secret ballot election, no other procedure (except for a collective bargaining agreement) creates an immutable one-year bar. *See U.S. Dep't of Treasury, IRS v. FLRA*, 996 F.2d 1246, 1252 (D.C. Cir. 1993) ("[W]e look to generally accepted principles of labor law developed under the National Labor Relations Act to inform our understanding of the language Congress uses.").[3] In the most analogous situation under the NLRA, the NLRB does not impose any bar.

[3] The Union may argue that some of the bars created in the NLRB are not found in the NLRA. However, while Section 9(c) is substantially similar to Section 7111(f)(4), there are differences between the statutes, including the specificity of election bars in the respective statutes. For the reasons discussed above, the extra-statutory bar imposed here is contrary to the Statute, regardless of how election bars were created by the NLRB.

The NLRB does not have a consolidation procedure, but the closest analogue is a unit clarification procedure. A unit clarification is the NLRB's procedure to add employees into a unit or change the composition of a unit without an election. *See* 29 U.S.C. § 10(d); 29 C.F.R. § 102.60(b). Unit clarification petitions are generally filed in two situations: (1) when an employer and the union disagree on whether a job classification is in the unit, *see, e.g. Boston Gas Co.*, 136 NLRB 219 (1962); or (2) when an employer expands and the union seeks to accrete the new employees into the unit without an election, *see, e.g.*, *Schuylkill Medical Center*, 367 NLRB 100 (Feb. 28, 2019).

Because these unit clarifications are done without a vote, the NLRB narrowly construes its authority in this area because "it is reluctant to deprive employees of their basic right to select their own bargaining representative." *Gitano Group, Inc.*, 308 NLRB 1172 (1992). The Board considers accretion to be the exception to the rule of employee self-determination, applying it "restrictively, so as not to tread too heavily on the right of employees to choose their own collective bargaining representative." *N.Y. Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (citing *Local 627, Int'l Union of Operating Eng'rs v. NLRB*, 595 F.2d 844, 851 (D.C. Cir. 1979); *Passavant Ret. & Health Ctr., Inc.*, 313 NLRB 1216, 1218 (1994)). "And because misuse of accretion poses a significant threat to the self-determination rights of employees guaranteed by § 7 of the NLRA, courts have been

particularly vigilant in assuring that the Board observes in practice the strict standards it has adopted for accretion orders. If there is any substantial doubt, *the policy of the NLRA requires that an election be conducted*." *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 429 (4th Cir. 2001) (internal citations omitted) (emphasis added). In short, the NLRB recognizes changes to unit composition done without employee vote should be used sparingly and interpreted narrowly, so the fundamental principle of employee free choice is protected. In keeping with this principle, the NLRB imposes no election bar because of a unit clarification petition. The same is true of accretions conducted under the FLRA. *See Dep't of Navy*, 56 FLRA 1005, 1006 (2000) (accretion is narrowly applied because it precludes employee self-determination). Yet, the Regional Director found a bar under nearly identical circumstances simply because *represented* employees were added to a unit. If there is no election bar when unrepresented employees are accreted into a unit, there is no justification for a bar when represented employees are added through a unit consolidation.[4] When the "Authority departs from a familiar principle rooted in

[4] The other election bars imposed by the NLRA are not analogous to this situation. Moreover, even if they were analogous, none of the rationales supporting the NLRA's other election bars supports imposing a bar after a unit consolidation. The voluntary recognition bar is inapplicable because the Statute does not permit voluntary recognitions. Even so, voluntary recognition does not accord a recognized

private sector precedent, it should either identify practical distinctions between private and governmental need that justify the departure, or offer some evidence in the language, history, or structure of that statue suggesting Congress intended a different result." *AFGE, Local 32 v. FLRA*, 853 F.2d 986, 992 (D.C. Cir. 1988) (cleaned up). No such necessary conditions exist here.

## CONCLUSION

For the reasons mentioned above, the Regional Director erred in his dismissal of Petitioner's decertification petition. The Authority should reverse the Regional

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union with protection equal to a union that has won a secret ballot election. *See Lamons Gasket Co.*, 357 NLRB 739, 742 (2011) (finding a secret ballot election victory provides a union with more "attendant legal advantages . . . (including a 12-month bar) than voluntary recognition"). Imposing an election bar after a consolidation that is equal to the bar imposed after a secret ballot election undermines not only the Statute, but cheapens the election process itself. Similarly, while the NLRB has sometimes imposed a successor bar *UGL-UNICCO Serv. Co.*, 357 NLRB 801 (2011), *but see MV Transportation*, 337 NLRB 770, 772 (2002) (overturning successor bar), that bar has nothing to do with unit consolidations. The NLRB has imposed a successor bar to ensure "stability" after there is a change of employers. *See NLRB v. Lily Transportation Corp.*, 853 F.3d 31, 38 (1st Cir. 2017) (noting the successor bar is about giving the new employer and union's relationship "a chance to settle down."). Here, no employer has changed; the only thing that has changed is that two units in the same agency represented by the same union have become one. Section 7112(d) consolidations are about ensuring efficiency in operations, not about stability in bargaining after a change in employer. Regardless, in both situations, the NLRB has never granted an election bar that is equal to the bar granted unions after they win a secret ballot election. By contrast, the Regional Director has given this union a bar equal to that as if it had won a representation election.

Director's dismissal and direct the Region to immediately process the petition and hold an election.

_____/s/_____
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