BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY

NASA Goddard Space Flight Center, Wallops Island, VA, Activity, and Ronald H. Walsh, An Individual/Petitioner, and American Federation of Government Employees, AFL-CIO, Exclusive Representative	)	WA-RP-13-0052

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American Federation of Government Employees, AFL-CIO,	)	
Exclusive Representative	)	

BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO IN RESPONSE TO THE AUTHORITY'S ORDER IN 67 FLRA No. 65

The American Federation of Government Employees, AFL-CIO ("AFGE") hereby files this brief in response to the Order of the Federal Labor Relations Authority ("Authority") in its decision in NASA Goddard Space Flight Center, 67 FLRA No. 65 (2014). The Authority has asked the parties to this case to address whether §7111(f)(3) of the Statute and §2422.12(d) of the Authority's Regulations apply to decertification petitions filed by individuals.

Section 7111(f) defines the circumstances in which a labor organization shall not be accorded exclusive recognition. It neither describes the type petitions that may be filed, nor how or when petitions may be filed. Section 7111(f) does not apply to individuals who file decertification petitions because §7111(f) only relates to "according" exclusive recognition. Only labor organizations can be accorded exclusive recognition, not agencies or individuals.

Therefore, it is AFGE's view that §7111(f) does not create a bar of any kind—contract, election or certification—to any person filing a petition.

Instead, bars for election petitions filed by any "person"[1]—including decertification petitions filed by individuals pursuant to §7111(b)(1)(B)—are set forth in the Authority's Regulations in 5 C.F.R. §2422.[2] Specifically, §2422.12 describes requirements for the timeliness of election petitions and includes a "contract bar"[3] and "open window period"[4] for election petitions filed by any person, including individuals. As discussed more fully below, the Authority's current parameters for the timeliness of election petitions in §2422.12 continues long standing precedent, regulations and policy considerations that have been in effect for the entirety of the federal sector labor relations program. The consideration of balancing the stability of labor relations with the right under the Statute of "persons" to file election petitions has always included certain time limitations in the filing of those election petitions. Therefore, the Authority should find that the precedent, legislative history and intent, and the policy considerations that have governed during the 50 years of the federal sector labor relations program with regard to "bars" to election petitions remain in effect.

[1] A "person" is defined in 5 U.S.C. §7103(a)(1) as "an individual, labor organization or agency."
[2] Election petitions are filed by any "person" pursuant to §7111(b)(1).
[3] §2422.12(d)
[4] The statutory and regulatory "open window period" is not less than 105 days and not more than 60 days before the expiration date of the collective bargaining agreement.

I. THE FEDERAL LABOR RELATIONS COUNCIL AND ASSISTANT SECRETARY RECOGNIZED THE CONTRACT BAR DOCTRINE

Prior to the passage of the Statute in 1979, the Federal Labor Relations Council ("FLRC") and the Assistant Secretary for Labor-Management Relations of the Department of Labor ("A/SLMR" or "Assistant Secretary") recognized and enforced contract bars in both their decisions and in regulations carrying out the terms of the Executive Orders that governed federal sector labor relations. There was not a contract bar contained in any of the Executive Orders that governed federal sector labor relations prior to passage of the Statute. Bars to the filing of election petitions were only found in the A/SLMR Regulations.

In U.S. Dept. of Interior, Bureau of Reclamation, 3 A/SLMR 570 (1973), the Assistant Secretary dismissed a decertification petition filed by an individual because it was filed outside of the regulatory open window period.[5] The Assistant Secretary's regulations in 29 C.F.R. §202.3(c)(1) stated:

> (c) When an agreement covering claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows:
> (1) Not more than ninety (90) days and not less than sixty (60) days prior to the termination date of an agreement having a term of three (3) years or less from the date it was signed and dated by the activity and the incumbent exclusive representative.

The Assistant Secretary subsequently examined claims of contract bars in other cases and dismissed or processed those cases after determining whether the contract bar and §202.3(c) of his regulations were applicable to the particular factual circumstances of those cases. See, Dept.

[5] Under the A/SLMR's regulations in effect in 1973, the open window period was no more than 90 days and not less than 60 days before the agreement's expiration.

of Housing and Urban Development, 7 A/SLMR 253 (1977) (ordering an election after finding no contract bar to decertification petition); U.S. Army Mortuary, Oakland Army Base, 6 FLRC 330 (1978), reviewing the referral of a major policy question in 7 A/SLMR 519 (1977) (holding that a contract bar remains in effect after a reorganization and dismissing decertification petition); Dept. of the Navy, Great Lakes Naval Base, 7 A/SLMR 1003 (1977) (dismissing a petition as untimely filed under §202.3 of the regulations).

In Dept. of the Navy, Great Lakes Naval Base, the Assistant Secretary discussed the purposes behind §202.3(c) of his regulations:

> The underlying purpose of Section 202.3(c) of the Assistant Secretary's Regulations is to balance the right of employees in an exclusively represented unit to vote whether or not they desire to continue such exclusive representation with the purposes and policies of the Order to foster labor peace and the stability of exclusive representation. Hence, the Assistant Secretary's Regulations provide that a negotiated agreement between an activity and an incumbent exclusive representative would "bar" any petition for an election for a period of no more than three years from the date of its execution by the parties, irrespective of the agreed-upon duration of such agreement. Further, the Regulations provide for an "open" period within the "bar" period of such an agreement in which a petition for an election may be filed timely. The "open" period has been established as 60-90 days prior to the termination of the "bar" period in order to provide an "insulated" period of 60 days prior to the termination of the bar period during which the incumbent exclusive representative and the activity can negotiate a new agreement free from rival claims. 7 A/SLMR at 1004.

This explanation of the purposes of the "open" period and a "bar" are consistent with those discussed by the FLRC in its 1975 Report and Recommendations of the Federal Labor Relations Council. In its Report, the FLRC cited with approval the concept of bars to election petitions, such as contract, certification and election bars:

> In our view, such bars foster desired stability in labor-management relations in that parties to an existing bargaining relationship have a

> reasonable opportunity to deal with matters of mutual concern without the disruption which accompanies the resolution of a question concerning representation. [...] [S]uch bars should be applicable to an attempt by a rival labor organization to replace the existing exclusive representative or **a petition by employees for a vote on whether the labor organization should cease to be the exclusive representative.** Labor-Management Relations in the Federal Service (1975) at 36-7. (emphasis added).

The FLRC cited its 1975 report, and specifically the discussion about bars, in its U.S. Army Mortuary, Oakland Army Base decision when addressing the Assistant Secretary's request for a decision on a major policy question.[6] The Assistant Secretary asked the FLRC to consider the major policy question of whether a contract bar remained in effect when the applicable unit had undergone a reorganization and successorship was applied. The FLRC agreed that the contract bar rule should apply to situations of successorship and that it should insulate the exclusive representative from challenges except during the open window period. 6 FLRC at 332-5. The Council went on to uphold the Assistant Secretary's rationale for finding that a contract bar exists in such circumstances and agreed with his rationale that such a bar would "restore the predictability of periods when representation petitions may be filed; reduce administrative confusion in reorganizations; enable the gaining employer and incumbent representative to engage in long range planning free from unnecessary disruption; and promote effective dealings and efficiency of agency operations." Id. at 335 (internal quotations omitted). Finally, the Council found that such a bar rule would "foster desired stability in labor-management relations [by providing] parties to an existing bargaining relationship . . . a reasonable opportunity to deal with matters of mutual concern without the disruption which accompanies the resolution of a question of representation." Id.

[6] 6 FLRC at 333, n.3.

Pursuant to 5 U.S.C. §7135(b), "policies, regulations, and procedures established under and decisions issued under Executive Orders . . . shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to [the Statute]." Since the holdings of the Assistant Secretary and the FLRC have not been overturned or superseded, the Authority should continue to recognize their applicability to decertification petitions filed under the Statute. In fact, the Authority has continued to cite many of these concepts with approval since the passage of the Statute in case law and in its Regulations.

II. THE NATIONAL LABOR RELATIONS BOARD ENFORCES CONTRACT BARS WITH REGARD TO ELECTION PETITIONS FILED UNDER THE NATIONAL LABOR RELATIONS ACT

The Authority often looks to the rulings of the National Labor Relations Board ("NLRB") for guidance in interpreting the Statute since the Authority and the Statute are patterned after NLRB precedent in many regards. Petitions for elections in the private sector are filed pursuant to Section 9(c) of the National Labor Relations Act. ("the Act") 29 U.S.C. §159 The NLRB has established various bars to petitions, including contract bars that provide open periods in which parties may file election petitions. Hexton Furniture, 111 NLRB 342 (1955); Deluxe Metal Furniture, 121 NLRB 995 (1958).[7] The NLRB has set forth its contract bar rules in case law. Id. The contract bar rules are not published in regulations or contained in the Act.

The NLRB has found that policy considerations when balancing the rights of employees and the stability of labor relations support the contract bar doctrine. In Deluxe Metal Furniture

[7] The Authority has previously cited Deluxe Metal Furniture with approval with regard to the contract bar doctrine. Dept. of the Army, Ft. Hood, 51 FLRA 934 (1996).

the Board established an open window period that would define a period when parties could file petitions. The Board said establishing ". . . a specific period for the timely filing of a petition [is] desirable because it will preserve as much time as possible during the life of a contract free from the disruption caused by organizational activities, [and] employees and any outside unions will be put on notice of the earliest time for the filing of a petition." 121 NLRB at 999. Thus, the NLRB has noted policy considerations in support of its contract bar doctrine that are similar to the policy considerations articulated by the Assistant Secretary, FLRC and Congress when establishing a contract bar doctrine in the Federal sector.

III. CONGRESS RECOGNIZED THE VALUE OF CONTRACT BARS AND INTENDED TO CONTINUE THEM UNDER THE STATUTE

In passing Chapter 71 of the Statute, Congress clearly intended to continue the existing practice of limiting the time periods in which any party—the agency, union or an individual—could file a petition seeking an election for an existing unit. In the Committee Report for H.R. 11280, the Committee discussed the intent behind §7111:

> Subsection (b)(1) of section 7111 sets forth the procedures for initiating a representation proceeding. If any person (meaning an individual, labor organization or agency) files a petition with the Authority alleging that 30 percent of the employees in an appropriate unit wish to be exclusively represented, or, where there currently is an exclusive representative; or, seeking clarification of, or an amendment to, an existing certification or a matter relating to representation, the following procedures apply. [. . .]
>
> Subsection (h) sets forth three specific conditions under which a labor organization shall not be accorded exclusive recognition:
> . . . (3) when there is in effect a lawful collective bargaining agreement between the involved agency and another labor organization covering any employees included in the petitioned for

> unit. The latter prohibition is commonly referred to as a "contract bar". [. . .] **The "contract bar" provision lends stability to collective bargaining relationships by precluding continuous challenges to an exclusive representative's status, while at the same time giving employees the opportunity at reasonable intervals to choose, if they so desire, a new representative.**[8] Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, Report of the Comm. on Post Office and Civil Service, at 690, 92 (Nov. 19, 1979) (emphasis added).

Thus, the legislative history of the Statute clearly adopts and enforces the principles of bars that were seen under the FLRC—bars are necessary for the stability of labor relations in the federal government, and for an effective and efficient government. Congress recognized the policy consideration that allowing any party (agency, labor organization, or individual) to cause elections through the filing of petitions without any reasonable period of stability would cause chaos in labor relations and undermine the overall purposes of the Statute. Such a chaotic scenario would make the negotiation and administration of a collective bargaining agreement essentially impossible.

IV. SECTION 7111(f) 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 AUTORITY'S RIGHT TO ISSUE REGULATIONS TO CARRY OUT §7111(b)

5 U.S.C. §7111(f)(3)(B) states:

> Exclusive recognition shall not be accorded to a labor organization— [. . .]
>
> (3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition unless—

[8] Subsection (h) in the Committee Report became subsection (f) upon final passage of the current Statute.

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

On its face, §7111(f) does not address the procedures for filing petitions of any kind, including the filing of decertification petitions by individuals. Instead, it only applies to the granting of exclusive recognition. Exclusive recognition may only be accorded to labor organizations.

It is AFGE's view, however, that the Authority has the right, as 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 §7111(b).[9] Five U.S.C. §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.

These regulations effectuating §7111(b), found in 5 C.F.R. §2422.12, set forth several bars—contract, election and certification—and are the basis that the Petitioner in this case should have his petition dismissed for being untimely filed.

Since the Statue provides the opportunity for any "person" to file an election petition, it is reasonable for the Authority to promulgate regulations applying the same timeliness rules to all "persons" who seek to file election petitions, including decertification petitions, under §7111(b). Since the regulatory bars in §2422.12 create the same rules for all "persons" filing election

[9] §7105(a)(2)(B)

petitions under §7111(b), the regulation is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. §706(2)(A).

On the other hand, the Petitioner here seeks a standard that would differentiate between which "person" files an election petition with regard to timeliness requirements—individuals would not be held to any timeliness requirements for filing election petitions, but labor organizations and agencies would be held to the timeliness standards. Such a standard or regulation would be arbitrary and capricious since there is no basis in the law, policy or legislative intent of the Statute for creating different timeliness standards for "persons" based on whether the "person" under §7111(b) is an individual, a labor organization or an agency.

V. THE AUTHORITY'S REGULATIONS ESTABLISHING PROCEDURES FOR FILING ELECTION PETITIONS EFFECTUATE THE PURPOSES OF THE STATUTE AND CONFORM TO CONGRESSIONAL INTENT

"The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974). Where a statutory scheme is silent on an issue, or deliberately leaves a gap, agencies are considered to have delegated authority to address that issue through the regulatory process. Chevron U.S.A., Inc. v. Nat'l Resources Def. Council, Inc., 467 U.S. 837, 843-4 (1984).

Pursuant to 5 U.S.C. §7134, the Authority has the responsibility of ". . . prescrib[ing] rules and regulations to carry out the provisions of [Chapter 71] . . .." As it relates specifically to §7111, the Authority:

> shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority . . .
> (B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations. 5 U.S.C. §7105(a)(2)(B).

Thus, 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 law." 5 U.S.C. §706(2)(A). It is clear that the Assistant Secretary's Regulations, the Authority's historical Regulations and its current Regulations have all consistently recognized the contract bar doctrine and applied it uniformly to all persons. The Authority has issued Regulations pursuant to §7134 and §7105 to carry out and administer the election provisions of §7111.

Where the Authority's current regulations are the same in "all material respects" to the Assistant Secretary's regulations, the Authority will look to the rationale behind the Assistant Secretary's regulations when interpreting the Authority's current regulations. Navy Resale and Services Support Office, 26 FLRA 580 (1987). Since the passage of the Statute, the Authority's regulations with respect to a contract bar have remained substantially identical to the Assistant Secretary's regulations. The Assistant Secretary's Regulations recognized a contract bar and the need for a balanced between the rights of employees and the need for a period of stability in a labor management relationship.

Previous versions of the Authority's regulations regarding contract bars tracked the language of the Assistant Secretary's regulations almost word for word. For example, the regulations that were revised and in effect as of January 1, 1988 at 5 C.F.R. §2422.3(d) read:

> (d) A petition for exclusive recognition or other election petition will be considered timely when filed as follows:
>
> (1) Not more than one hundred and five (105) days and not less than sixty (60) days prior to the expiration date of an agreement having a term of three (3) years or less from the date it became effective.

Even though the Authority's Regulations were rewritten substantially in 1995, the concept of the contract bar doctrine remains to this day. Section 2422.12 of the current Regulations is entitled "What circumstances does the Region consider to determine if your petition is timely filed?" and sets forth criteria for the timeliness of petitions that seek an election. Section 2422.12(d) states:

> (d) *Contract bar where the contract is for three (3) years or less.* Where a collective bargaining agreement is in effect covering the claimed unit and has a term of three (3) years or less from the date it became effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days prior to the expiration of the agreement.

The Authority should also consider the language in §2422.12(b) of its Regulations. While section (b) primarily discusses certification bars, the last sentence reads: "If a collective bargaining agreement covering the claimed unit . . . is in effect, paragraphs (c), (d), or (e) of this section apply." Section (d) sets forth the contract bar, above. Thus, not only does section (d) define a contract bar for an agreement 3 years or less in duration, but section (b) also states that if an agreement is effect for a petitioned unit, sections (c), (d) or (e) apply.

The legislative history clearly shows that Congress recognized the contract bar doctrine, that it saw the specific value of it and intended that the contract bar doctrine continue. The

contract bar doctrine existed under NLRB precedent for over 20 years prior to the Statute. In addition, the contract bar doctrine had existed in the federal sector under the A/SLMR Regulations and had been applied to decertification petitions filed under the Executive Orders. Given the well-established nature of the contract bar doctrine in both the private and public sectors and its application to petitions filed by individual petitioners, had Congress intended to change the doctrine to allow individual petitioners to file petitions at any time, Congress would have so stated in the Statute or its legislative history. There is, however, not a single shred of evidence that Congress intended to deprive the Authority of the ability to have reasonable regulations, including the contract bar doctrine, to govern the timeliness of the filing of election petitions.

In fact, the legislative history specifically shows that Congress contemplated and considered the need to have a balance between stability of collective bargaining relationships and the rights of employees to remove their representative at reasonable intervals. The contract bar doctrine strikes this balance and is, therefore, completely in conformance with congressional intent. The fact that the contract bar doctrine as it applies to individuals appears in the Regulations instead of the Statute has no effect on its validity since the Authority is empowered to issue such Regulations to carry out the purposes of the Statute. These purposes include that the Statute is in the public interest, the Statute facilitates the effective conduct of public business and facilitating and encouraging the amicable settlement of disputes. 5 U.S.C. §7101(a)(1). To allow individual employees to file petitions at any time would directly contradict the purposes of the Statute. It would also result in an inability to administer collective bargaining agreements since there would be no period in which the labor organization and the agency could negotiate and carry out the collective bargaining agreements free from challenges to the continued

recognition of the exclusive representative. There is absolutely nothing in public sector precedent, private sector precedent or the legislative history of the Statute that supports upsetting the balance the contract bar doctrine supplies by allowing individual petitioners to seek to decertify an exclusive representative at any time.

VI. CONCLUSION

Both the FLRC and the Assistant Secretary recognized that bars that establish reasonable timelines in which any person may file a petition had important considerations. These considerations furthered the purposes of the Executive Orders. The FLRC specifically recommended in 1975 that bars, including the contract bar, continue. The FLRC recognized that it was important to give the exclusive representative and the agency the opportunity to bargain and administer the collective bargaining agreement without disruption. In addition, the FLRC also recognized that the Order gave employees the right to vote whether to continue or change an exclusive representative. The contract bar doctrine presented a way to balance these two interests, and the balancing of these same interests remains important today under the Statute. The Authority should continue to maintain a contract bar for these same reasons.

Similarly, the NLRB has recognized these interests in the private sector. Congress has also cited the importance of the balancing of employee rights and a labor organization's ability to bargain and administer a collective bargaining agreement in continuing the concept of bars in the Statute. The legislative history favorably mentions contract bars and the balancing that contract bars created between employee rights and stability in labor management relations.

It is clear that the contract bar doctrine has been recognized favorably in the public sector, private sector and by Congress. The Authority's Regulations continuing the contract bar doctrine as it applies to individuals who file decertification petitions, therefore, conforms with federal and private sector precedent and Congressional intent. To decide to remove a contract bar (or any of the other regulatory bars that apply to petitions filed by individuals) would destroy the oft- cited balance achieved by these bars.

Section 7111(f) only relates to the according of exclusive recognition to labor organizations and not to establishing timelines for any person to file a petition under §7111(b). The Authority has properly promulgated regulations in §2422.12 to govern the timeliness of filing petitions. The time limits and "bars" as they relate to all "persons" who file petitions are set forth in the Authority's Regulations.

To create different rules for individual petitioners that would allow individual employees to continuously file decertification petitions causing elections would make the negotiation and administration of a collective bargaining agreements essentially impossible. Moreover, it would undermine the purposes of the Statute. Finally, there is no support in policy, precedent or legislative history to treat one "person" who files a petition under §7111 differently than any other "person" as defined by the Statute.

In sum, to allow an individual to file a decertification petition at any time would require the Authority to ignore and abandon 50 years of federal sector policy and precedent; more than 50 years of private sector policy and precedent; and the legislative history of the Statute as it relates to the necessity of timeliness bars in the filing of election petitions. The Authority has the right and the responsibility as conferred statutorily by Congress to issue reasonable regulations to carry out the purposes of the Statute. The contract bar doctrine is one of these reasonable

regulations regarding the timeliness of the filing of election petitions. The Authority should uphold and continue the contract bar doctrine by upholding the Regional Director's decision to dismiss the petition.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing **BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO IN RESPONSE TO THE AUTHORITY'S ORDER IN 67 FLRA No. 65** was served this 31st day of March, 2014 upon the following:

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