FEDERAL LABOR RELATIONS AUTHORITY

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION GODDARD SPACE FLIGHT CENTER WALLOPS ISLAND, VIRGINIA,

Agency,

and,

RONALD H. WALSH,

Petitioner,

and,

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

Exclusive Representative.

No. WA-RP-13-0052

BRIEF OF PETITIONER RONALD H. WALSH

Introduction: On February 18, 2014, the Federal Labor Relations Authority ("FLRA" or "Authority") issued an Order granting in part Petitioner Ronald Walsh's Application for Review. The FLRA invited him, other parties, and other interested persons to brief two questions set forth in its Order, and postponed until a later date any briefing on additional issues raised by Mr. Walsh. This is Mr. Walsh's response to that invitation.

FACTS

Forty years after a union became certified as the exclusive bargaining representative for the bargaining unit of which Mr. Walsh is a member, over thirty

percent of the bargaining unit members signed their names to a petition so they could choose whether they wanted continued representation by an agent, or the freedom to speak for themselves with their employer, the National Aeronautics and Space Administration Goddard Space Flight Center ("NASA," "Employer" or "Agency").[1]

During those forty years, the employees in Mr. Walsh's bargaining unit had five[2] exclusive bargaining representatives – with no vote on these changes other than one "add-on" election in which only a limited group of employees could vote. The purpose of the "add-on" election was to add professional employees to the bargaining unit, and therefore only the professional employees were permitted to vote.[3]

The employees' original exclusive bargaining agent, designated in 1971, was the American Federation of Government Employees.[4] In 1996, the bargaining agent was changed through an amendment to the FLRA certification.[5] In 1998, in connection with an "add-on" election, the American Federation of Government Employees, Local 2755 became the bargaining agent. Ten years later, in 2008, the FLRA amended the certification to make the American Federation of Government Employees, AFL-CIO the employees' exclusive bargaining agent. A year later, in 2009, the authority to represent the employees in Mr. Walsh's bargaining unit was handed off to the American

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[1] *National Aeronautics & Space Admin. and AFGE, Local 2755,* 64 FLRA 580 (2010) (AFGE representation election in 1971; add-on election to add professional employees held 1998); Regional Director's decision ("R.D.") pp. 1, 6 & 7.
[2] Two of the representatives appear to be the same union.
[3] 5 U.S.C. § 7112(b)(5). As noted in the previous footnote, the add-on election was held in 1998, but the bargaining representative certification had been amended two years before, in 1996. *AFGE, Local 2755,* 64 FLRA 580, 581 n.3; R.D. p. 5.
[4] *AFGE, Local 2755,* 64 FLRA 580. Whether a local was designated is unclear from the decision.
[5] *Id.* at 581 n.3.

Federation of Government Employees, Local 1923 ("Union") without the consent of the employees, or agreement of the FLRA.[6]

Although the unions in these five representational changes appear related, the unions have apparently decided that they are sufficiently different to require an official change in responsibility for the bargaining unit. Looking at this through the eyes of the unions, the employees in Mr. Walsh's bargaining unit have been represented by several different unions without an employee vote.

While the position of bargaining representative might look like a revolving door, the contract covering the employees in Mr. Walsh's bargaining unit does not. The collective bargaining agreement entered into on October 23, 2000[7] is essentially the same agreement under which the bargaining unit members now labor, almost fourteen years later. The Regional Director identified several memoranda of agreement that modified the 2000 collective bargaining agreement, but noted the Union and NASA "have continued to follow the October 2000 CBA and the subsequently negotiated MOUs" until the present.[8]

With a stale agreement, an election that at best is a faint memory, and a bargaining representative not chosen by the employees or certified by the FLRA, Mr. Walsh believed their bargaining agent was out of tune with the views of the majority of the bargaining unit employees.[9] Proof of his opinion came when he was able, in a few

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[6] R.D. p. 5. Significantly, not even a Montrose Procedure was followed for this change in the exclusive bargaining representative.
[7] How much further back some terms of this contract go is unclear.
[8] R.D. pp. 4-5.
[9] September 2, 2013 Affidavit of Ronald H. Walsh ("Walsh aff'd.") p. 1. ("I and a number of my co-workers believe that the local union ... has made various decisions and taken actions over the past several years

hours spread over three and a half days, to collect 53 signatures out of a total of 147 members of the bargaining unit.[10] He might well have gathered many more signatures, but he stopped seeking additional signatures once he had secured enough to allow the employees to vote.[11] For the first time in 40 years, the employees in the bargaining unit would be permitted a full vote on their bargaining agent.

Mr. Walsh filed the employees' petition seeking an election on June 17, 2013.[12] The Regional Director, applying her understanding of 5 U.S.C. § 7111(f)(3), dismissed the employees' request for a vote on the basis that it was untimely.[13] She believed the window for filing such a petition opened on July 10, 2013 and closed on August 26, 2013.[14] Thus, under the Regional Director's theory, Mr. Walsh filed the employees' petition twenty-three days early.

The Regional Director's office gave the Union until July 12, 2013 to file any objections to the employees' petition.[15] This deadline was two days after the window opened for Mr. Walsh to file his petition. Had the Union filed its objections then, Mr. Walsh would have been on notice that the Union claimed his filing was too early, and he would have been able to re-file within the window period. However, the Regional Director agreed to extend the Union's deadline to July 26, 2013 – still within the window. The Union then asked for a second extension, until August 12, 2013, to which the

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that are not supported by the majority.").
[10] R.D. pp. 6-7.
[11] Walsh aff'd. p. 4.
[12] The Regional Director twice states the date as June 17, 2013 (R.D. pp. 1 & 8), but also states the date of filing as June 13, 2013. (R.D. p. 7). Mr. Walsh will use the June 17 date in his argument.
[13] R.D. p. 12.
[14] *Id.*
[15] Walsh aff'd. p. 6.

Director agreed.[16] The Union did not meet that deadline either, but filed objections a day later, on August 13, 2013.[17]

However, it was not until August 27, 2013 that the Union informed the Regional Director of its objection to the timeliness of Mr. Walsh's petition.[18] This out-of-time objection was filed one day after the Regional Director's window for Mr. Walsh to file his petition had closed. Why the Regional Director permitted the Union to violate the deadline set by her office is a matter of speculation. Had the Region required the Union to file its opposition to Mr. Walsh's petition in accord with the deadline it had set, Mr. Walsh would have been alerted to the timeliness issue with his petition and gained the opportunity to re-file by the close of the Regional Director's window – August 26, 2013.

The employees' opportunity, for the first time in forty years, to have a voice and a vote on their continuing forced representation by a Union they never chose was thwarted by this dubious means. The issue for the Authority is whether individuals should be subject to any window when it comes to their freedom to vote, and that is discussed next.

ARGUMENT

1. SECTION 7111(f)(3) DOES NOT APPLY TO DECERTIFICATION PETITIONS FILED BY INDIVIDUALS.

1.1. *The Plain Language of the Statute Is Inconsistent with the Position of the Regional Director:* The Federal Service Labor-Management Relations Statute, 5 U.S.C.

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[16] *Id.*

[17] *Id.* p. 6. The Regional Director indicates the Union filed its opposition even later – August 19, 2013. R.D. p. 1.

[18] R.D. p. 2. This objection was not properly filed, because the Union failed to follow 5 CFR § 2422.4 of the Authority's regulations which require service on Mr. Walsh and the filing of a certificate of service. The Union never made service of this objection on Mr. Walsh. Walsh aff'd p. 6.

§ 7101 *et seq.* ("Statute") guarantees, in Section 7111(b)(1)(B), that employees have the right to petition and vote to decertify their exclusive bargaining representative.

The only limit on the right to petition for decertification is found in Section 7111(b)(2), which provides for a twelve-month election bar. Both the right to file a decertification petition in Section 7111(b)(1) and the election-bar provision in Section 7111(b)(2) state that these rules apply to "any person."

Despite this language, the Regional Director reached down to Section 7111(f) of the Statute to thwart the employees' attempt to have a long-overdue vote on their current Union – a Union that imposed itself on the bargaining unit without either benefit of election or approval by the FLRA. Section 7111(f) regulates when exclusive recognition "shall not be accorded to a labor organization." In describing the situations in which exclusive recognition shall not be given to a labor union, Section 7111(f)(3) provides for a contract bar when a different union ("other than the labor organization seeking exclusive representation") has an existing collective bargaining agreement covering that bargaining unit.

However, the contract bar does not apply to a rival union if the collective bargaining agreement has been in effect more than three years or if the rival union files during a statutory window period.

This contract bar that, under the plain language of the Statute, applies to rival unions, is the tool the Regional Director used to thwart the employees' desire for a voice and a vote on their bargaining agent for the first time in forty years.

In its February 18, 2014 Order, the Authority determined the Regional Director

was incorrect in stating the contract bar (rather than election bar) provisions had previously been applied to decertification petitions filed by individuals. Rather, the Authority stated it had not resolved the contract bar question.[19]

When Congress has plainly spoken on a subject, courts and agencies may not substitute their judgment for that of Congress. Thus, no resort to legislative history or policy is appropriate in such situations. "[W]hen words are free from doubt, they must be taken as the final expression of legislative intent." *Caminetti v. United States,* 242 U.S. 470, 490 (1917). More recently, the Supreme Court ruled that "when the words of a statute are unambigious, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citing *Rubin v. United States,* 449 U.S. 424, 430 (1981)).

Congress has plainly spoken here. Congress knows the difference between "any person" and a "labor organization." In 5 U.S.C. § 7103(a)(1), Congress defined "person" to include individuals, labor organizations or agencies. But, Congress did not do the reverse and include individuals in the definition of labor organizations or agencies. Congress defined "labor organization" as an "organization," not an individual. 5 U.S.C. § 7103(a)(4).

Congress provided that individuals seeking to decertify a union are subject to a twelve-month election bar rule, while rival labor unions seeking to become the exclusive representative are subject to several limitations contained in Section 7111(f), one of which is the contract bar provision.

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[19] *National Aeronautics & Space Admin. and Walsh and AFGE,* 67 FLRA at 260.

The specific contract bar language in Section 7111(f) reinforces the fact that it applies only to labor organizations. Consider the language of the two contract bar exceptions found in Section 7111(f)(3). The first applies to "the labor organization seeking exclusive representation" where "the collective bargaining agreement has been in effect for more than 3 years." 5 U.S.C. §§ 7111(f)(3) & (3)(A). The second exception is where "the petition for exclusive recognition is filed [within a window period]." *Id.* at 7111(f)(3)(B). No individual would be petitioning to become the exclusive bargaining representative. This adds further proof that the plain language of the Statute is clear – the contract bar provisions apply only to labor organizations.

The Authority's February 18, 2014 Order noted "an absence of precedent," not an absence of clarity in the Statute.[20] In the absence of some ambiguity in the Statute, the language of Congress must be accorded its plain meaning. Contract bar provisions apply only to labor organizations seeking to replace the current exclusive bargaining representative. Contract bar, as opposed to election bar, does not apply to individuals like Mr. Walsh.

1.2. *Constitutional Considerations Prohibit Construing the Statute to Limit Individuals:* In the previous section, Mr. Walsh showed the plain language of the Statute does not apply contract bar provisions to individual decertification petitions. Should Mr. Walsh have overstated the matter and some ambiguity exists, Mr. Walsh still prevails for the reasons explained next.

In *NLRB v. Catholic Bishop,* 440 U.S. 490 (1979), the Supreme Court wrestled

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[20] 67 FLRA at 260.

with the issue of the National Labor Relations Board's ("NLRB") jurisdiction over religiously affiliated schools. Resolving the issue involved a review of statutory construction in the face of a First Amendment defense. The Court noted the NLRB implicitly admitted that asserting jurisdiction over religiously affiliated schools "could run afoul of the Religion Clauses." *Id.* at 499.

Because of that possibility, the Supreme Court held the appropriate statutory construction standard should be "that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Id.* at 500. Thus, the Court must find in the labor statute "the affirmative intention of the Congress clearly expressed," that jurisdiction exists over religiously affiliated schools. *Id.* at 501.

This created a unique rule of statutory construction where a First Amendment claim exists. To win, those aligned against a constitutional claim must show the statute admits to no other interpretation. For those aligned against a constitutional claim, arguing an ambiguity exists in the statute that should be resolved through the application of common sense, legislative history or public policy, is insufficient to win. They must show that their view of the statute reflects "the affirmative intention of the Congress clearly expressed." *Id.* (citation omitted). Nothing less will do.

In the United States Supreme Court's recent decision in *Knox v. SEIU, Local 1000,* _ U.S. _, 132 S.Ct. 2277 (2012), the Court frankly discussed the First Amendment difficulties with compelling employees to give up their freedom of speech to a labor union. The Court noted that in the labor context the "ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." *Id.*

at 2288 (citing *Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 797 (1988). The First Amendment right to freedom of association "plainly presupposes a freedom not to associate." *Knox,* 132 S. Ct. at 2288 (citing *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984)).

Mr. Walsh and his fellow petitioners are currently being forced to associate with the Union and have it speak on their behalf in collective bargaining. This forced speech is to the federal government itself, thus implicating both the employees' right to speak and to petition the government:

> Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences ... compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'

Knox, 132 S. Ct. at 2289 (citing *Ellis v. BRAC,* 466 U.S. 435, 455 (1984)).

Although *Knox* referred to "compulsory fees" because they were at issue in that case, the statement of the Court applies equally to exclusive representation. If forced fees for collective bargaining raise serious constitutional questions, then forced speech for collective bargaining is equally suspect. Mr. Walsh is not required to pay the Union for its compulsory collective bargaining activity on his behalf, but he is required to accept the Union's speech as his speech because he is part of the bargaining unit and the Union's representation of him is exclusive. 5 U.S.C. § 7114(a)(1).

Mr. Walsh and his co-petitioners are gagged from presenting to the government their own views about collective bargaining. Instead, their views are presented by a Union they never had an opportunity to vote upon. Worse, as shown above, it has been forty years since the employees in Mr. Walsh's bargaining unit have been afforded a

full-on vote on the issue of exclusive representation. The Regional Director would bar one now. In the face of the First Amendment, this repression of individual freedom would seem appropriate only for some dank gulag.

Admittedly, some of the *Knox* pronouncements on the constitutional problems with fees for bargaining are new. But the issue before the FLRA is not what the First Amendment permits, but rather as *Catholic Bishop* noted, whether one construction would mean "we would be required to decide whether that was constitutionally permissible under ... the First Amendment." 440 U.S. at 499.[21]

Since exclusive representation for collective bargaining is now questionable under *Knox*, and the dark facts of this case show that employees were never given a vote on this Union as their bargaining agent, and have not had a full-on vote for decades, a First Amendment issue is present in any construction of the Statute that presently denies Mr. Walsh and his fellow employees a voice and a vote on who represents them.

For the Regional Director's view to prevail, the Authority would have to find that her reading of the Statute reflects "the affirmative intention of the Congress clearly expressed." That is not possible.

2. FLRA REGULATION 2422.12(d) DOES NOT APPLY TO THE DECERTIFICATION PETITION FILED BY MR. WALSH.

2.1. *FLRA Regulations Must Be Consistent with The Plain Language of the Statute:* The FLRA's authority in writing and interpreting its own regulations is also

[21] A serious question arises whether any pre-*Knox* Supreme Court decisions dealing with exclusive representation or forced speech about bargaining apply to labor relations for federal employees. The scope of bargaining is so limited under Section 7117 of the Statute that a much different First Amendment calculation would be required than under more typical collective bargaining statutes.

constrained by Mr. Walsh's foregoing argument about the authority of the judiciary to interpret statutes. If Congress has directly spoken to the precise question at issue, so that its intent is clear, both the judiciary and agencies must give effect to the express intent of Congress. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Mr. Walsh has shown that the plain language of the Statute precludes application of the contract bar doctrine to individuals filing decertification petitions. And more, he has shown that when First Amendment rights are at issue, the judiciary should adopt an interpretation that accords with protection of the First Amendment unless the judiciary can find "an affirmative intention of the Congress clearly expressed" that runs counter to the constitutional claim. *Catholic Bishop,* 440 U.S. at 501.

Section 2422.12(d) of the FLRA's regulations does not plainly state that it applies only to labor organizations. However, because it was created to enforce a statutory right that is plainly limited to labor organizations, the regulation is constrained by the plain language of the Statute. *Chevron,* 467 U.S. at 842-43.

2.2. *FLRA Regulations Are Contrary to the Contract Bar Language of the Statute:* Mr. Walsh previously showed that the plain language of the Statute applied election bar, but not contract bar, limitations on petitions filed by individuals. Thus, Section 2422.12(d) of FLRA's regulations may not be applied to individuals. This is not the only way in which FLRA regulations on decertification petitions depart from the plain language of the Statute. Even the contract bar language of the regulations applicable to labor organizations departs from the plain language of the Statute.

Section 7111(f)(3) of the Statute states that rival labor organizations face no contract bar limitations in two situations: first, where "the collective bargaining agreement has been in effect for more than 3 years" (Section 7111(f)(3)(A)); and, second, where "the petition for exclusive recognition is filed [during a window period]" (7111(f)(3)(B)). Reading these two statutory provisions together results in the following: contract bar applies to labor organizations during the initial three years of a collective bargaining agreement, except for the window period. Any petition filed beyond the initial three years of the contract faces no contract bar problem.

Section 2422.12(h) of the FLRA Regulations greatly expands the contract bar limitations. Instead of limiting the bar to the initial three years of a contract, Section 2422.12(h) allows a contract bar to apply to automatic renewals of collective bargaining agreements if certain details of the renewal are clear. The Statute brooks no contract bar limitations beyond the initial three years of the contract, regardless of the clarity of details of the renewal.

The Regional Director's reading of the Regulations would never be permitted if the plain language of the Statute controlled. The Regional Director found that a Section 2422.12(d) contract bar applied to any three-year renewal of the original term of the collective bargaining agreement.[22] Contract bar, under the plain language of the Statute, cannot apply beyond the initial three-year term of such an agreement. Thus, after the first three years that a labor union is the exclusive representative with a contract in place, rival labor organizations may file to become the exclusive bargaining

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[22] R.D. p. 10.

representative. No extension of the original three-year contract, regardless of duration or clarity, can bar a rival organization seeking to represent the employees.

Applying the plain language of the Statute gives employees great freedom of choice. No longer will they be chained, as here, to a forty-year sentence without the opportunity for a full-on vote, or find themselves restrained by a stagnant fourteen-year-old contract. The oppression of the old and stale will be replaced with the freedom that comes from an opportunity for a voice and vote. Whether to have a different bargaining representative, or to speak for themselves, the employees will have the freedom to choose.

CONCLUSION

For these reasons, the Authority should hold that neither 5 U.S.C. § 7111(f) nor 5 CFR § 2422.12 creates a contract bar for individuals, and Mr. Walsh's petition on behalf of his fellow employees was timely filed.

Respectfully submitted,

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Dated: March 31, 2014

CERTIFICATE OF SERVICE

I certify that I served the foregoing Brief upon the interested parties in this action in the manner indicated below:

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