

19 CHALLENGE TO THE STATUS OF A LABOR ORGANIZATION:

19.1 Basis for filing a challenge to the status of a labor organization: Section 2422.11 provides that the only basis on which a challenge to the status of a labor organization may be made is compliance with 5 U.S.C. 7103(a)(4).

The Authority has also construed § 2422.11 to include challenges that a labor organization should not be accorded exclusive recognition under the Statute because the organization is subject to corrupt influences or influences opposed to democratic principles [5 U.S.C. 7111(f)(1)]. *Division of Military and Naval Affairs (New York National Guard), Latham, New York and National Federation of Civilian Technicians (NYNG)*, 53 FLRA 111 (1997). In this regard, such challenges, like petitions seeking to revoke the certification of an incumbent labor organization filed pursuant to 5 U.S.C. 7111(f)(1), are based on two tenets: 1) only the Authority has jurisdiction to decide issues relating to the granting of exclusive recognition to labor organizations representing employees in the Federal sector; 2) freedom from corrupt and anti-democratic influences is a requirement that must be met before the Authority can certify a labor organization as an exclusive representative. See also [CHM 3.6](#) and [5.10](#).

19.2 Definition of labor organization: A labor organization is defined in 5 U.S.C. 7103(a)(4) as:

“labor organization” means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include--

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

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- (C) an organization sponsored by an agency; or
- (D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

- 19.3 Who may file a challenge to the status of a labor organization:** The Regional Director or any party may challenge the status of a labor organization.
- 19.4 When and where validity challenges may be filed:**
- 19.4.1** Party challenges to the status of a labor organization based on **5 U.S.C. 7103 (a)(4)** must be in writing and submitted to the Regional Director or the Hearing Officer before the hearing opens, unless good cause is shown for granting an extension. If no hearing is held, status challenges must be filed prior to action being taken pursuant to § 2422.30.
- 19.4.2** Challenges alleging that the labor organization should not be accorded exclusive recognition because it is subject to corrupt influences or influences opposed to democratic principles [**5 U.S.C. 7111(f)(1)**] may be filed at any time either as a petition or as a challenge.
- 19.5 Challenge to the status of a labor organization filed pursuant to 5 USC 7103 (a)(4) received too late for the region to investigate prior to the opening of the hearing:** Challenges to the status of a labor organization are normally processed in the Regional Office. If the challenge is filed too late for the Regional Director to investigate and decide prior to the hearing, it is referred to the Hearing Officer. Status challenges may also be filed with the Hearing Officer prior to the opening of the hearing. See [CHM 19.7](#) for requirements to submit supporting evidence.
- 19.5.1 Timely receipt of challenge immediately prior to the opening of the hearing:** When received immediately prior to the opening of the hearing, challenges to the status of a labor organization are treated as a threshold issue when the Hearing Officer goes on the record. Evidence on this issue is taken before proceeding with the remainder of the hearing. The Hearing Officer discusses the issues and handling the status challenge with the Regional Director prior to opening the hearing. If the Regional Director gives

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the Hearing Officer permission to make a recommendation on the record regarding the challenge, the Hearing Officer goes on the record, receives evidence, and makes his/her recommendation in accordance with [HOG 35.13](#) before proceeding with the rest of the hearing. If the Regional Director does not give permission to the Hearing Officer to make a recommendation, the Hearing Officer takes evidence on the status challenge and then proceeds with the other issues. In either situation, the investigation conducted on the record is the same as discussed in [CHM 19.9](#) and the Regional Director decides the status issue as part of his/her Decision and Order. [HOG 24.3.1](#) and [33.3](#).

19.5.2 Attempt to litigate challenge to status of a labor organization at a hearing: Status challenges that are filed after the hearing opens are untimely unless the challenging party can establish good cause for granting an extension. See [CHM 17.3.1.3](#) (cross-petitions raising claims pursuant to section 7111(f)(1)). [HOG 24.3.2](#) provides complete guidance for considering status challenges filed during the hearing (see also [HOG 33.3](#)).

19.6 Filing status challenge at the election agreement meeting or prior to the Regional Director's approval of the Election Agreement or Direction of Election: Status challenges raise a threshold issue that are investigated before the Regional Director approves an election agreement or issues a Direction of Election. If the challenge is made during the election agreement meeting and is not resolved or withdrawn, the Regional Director provides an opportunity for a hearing on other than procedural matters [§ 2422.16(c)]. A challenge to the status of a labor organization is considered an "other than procedural matter." Absent a stipulation and a waiver of the parties' right to a hearing, the Regional Director issues a notice of hearing on the issues raised by the status challenge. Thereafter, if there are no questions regarding unit appropriateness, the Regional Director may issue a Direction of Election without a Decision and Order [§ 2422.16(c)(2)].

By issuing the Direction of Election, the Regional Director is stating, in effect, that the status challenge does not interfere with the conduct of the election. Although the status challenge is not technically "resolved" prior to the election, the Direction of Election is issued without prejudice to the right of a party to file a challenge to the eligibility of any person participating in the election and/or objections to the election. [CHM 28.11](#) and [28.12](#) provide more information on § 2422.16. If objections are subsequently filed after the election concerning the status of the labor organization, the Regional Director has a record that forms the basis of the objections investigation (See [CHM 50](#)).

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NOTE: The Regional Director has discretion to issue either a Direction of Election or a Decision and Order in this situation. Considerations include the relevance and weight of the evidence to support the challenge.

- 19.7 Contents of status challenge:** A challenge to the status of a labor organization contains a clear and concise statement of the challenge and the reasons for the challenge.
- 19.8 Evidence supporting challenge to the status of a labor organization:** An investigation is not undertaken without evidence. If no evidence is filed, the challenge is denied in a Decision and Order ([CHM 19.14](#)). The challenger may always refile the status challenge with supporting evidence if such challenge is otherwise timely filed. See [CHM 19.10](#) for scope of investigation and evidence required to support the challenge.
- 19.9 Service of challenge to the status of a labor organization:** A copy of the status challenge, including all supporting evidence, is served upon all parties.
- 19.10 Scope of investigation:** The 1996 revisions to the regulations stated that the only basis on which a challenge to the status of a labor organization may be made is compliance with 5 U.S.C. 7103(a)(4). However, the Authority decisions in *NYNG*, 53 FLRA 111 (1997) expanded the application of this section to include claims made pursuant to 5 U.S.C. 7111(f)(1). The facts and circumstances of each case are examined to determine whether a petitioner or intervenor is a labor organization within the meaning of 5 U.S.C. 7103(a)(4) or is subject to corrupt influences pursuant to 5 U.S.C. 7111(f)(1).
- 19.10.1 When the challenge strictly concerns compliance with 5 U.S.C. 7103(a)(4):** See *HOG 46A* and *RCL 10A* for types of evidence needed if the challenge strictly concerns compliance with 5 U.S.C. 7103(a)(4). Representation hearings on status challenges are very rare; but not prohibited. The issue, of course, is whether the petitioning or intervening labor organization is a “labor organization” within 5 U.S.C. 7103(a)(4). See [CHM 23.4](#) and [23.5](#) for a discussion on investigative techniques.
- 19.10.2 Attempt to litigate noncompliance with 5 U.S.C. 7111(f):** Timely challenges alleging that a labor organization is subject to corrupt or anti-democratic influences pursuant to 5 U.S.C. 7111(f) are treated as a challenge to the status of a labor organization. See *NYNG*, 53 FLRA 111 (1997). Since these challenges can also be raised in a petition filed by an individual bargaining unit member (or a labor organization or agency) seeking to decertify an incumbent, without an election, the challenge is investigated in the same

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manner as a petition raising these issues is investigated [*USIA*, 53 FLRA 999 (1997)]. See [CHM 20.1.8](#) for evidentiary requirements and *RCL 10B* for substantive guidelines. See also [CHM 23.4](#), [23.5](#), and [23.9.3](#) for a discussion on investigative requirements.

- 19.10.3 Attempt to litigate noncompliance with 5 U.S.C. 7111(e):** In a section 7111(f)(1) proceeding, the presumption in section 7120(a) (that a labor organization is free from corrupt influences or influences opposed to democratic principles) attaches if the labor organization is subject to the governing requirements set out in section 7120(a)(1) through (4). This may be demonstrated by the submission of a constitution and bylaws that meet the criteria set forth in section 7120(a).

Section 7111(e) provides that a labor organization seeking exclusive recognition must submit to the Authority (the OGC has interpreted this to apply to submissions to the Department of Labor) and to the activity/agency a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives. Thus, when the region determines that a petitioner has complied with § 2422.3(b), the region is making a finding that the petitioner is not subject to corrupt or anti-democratic influences.

Compliance with 5 U.S.C. 7111(e) is an administrative matter determined by the Regional Director and not subject to collateral attack at a representation hearing. See *U.S. Department of Transportation, U.S. Coast Guard Finance Center, Chesapeake, Virginia*, 34 FLRA 946 at 949 (1990). [HOG 33.4](#). Allegations that the petitioning or intervening labor organization is subject to corrupt influences or to influences opposed to democratic principles should be filed as a challenge to the status of a labor organization or a petition under section 7111(f)(1).

- 19.10.4 Attempt to litigate noncompliance with 5 U.S.C. 7120:** 5 U.S.C. 7120 establishes the internal union standards of conduct applicable to labor organizations that are the exclusive representative under the Statute or seek that status. 5 U.S.C. 7120(d) commits standards of conduct issues to the exclusive jurisdiction to the Assistant Secretary of Labor, unless they are raised as part of a claim that a labor organization is subject to corrupt influences within the meaning of 5 U.S.C. 7111(f)(1). The challenging party must provide evidence that the Department of Labor or other third party has found a violation of standards of conduct such that there is reasonable cause to believe that the challenged labor organization: 1) was suspended or expelled from, or was otherwise sanctioned by, a parent organization, or federation of organizations with which it had been affiliated, based on its demonstrated unwillingness or inability to comply with the governing

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procedures set out in section 7120(a)(1) through (4); or 2) is in fact subject to corrupt or anti-democratic influences. If evidence is filed, follow the procedures discussed in *CHM 19.10.2*.

If the challenging party is only alleging a violation of the Standards of Conduct described in 5 U.S.C. 7120, the Regional Director issues a letter to the challenging party referring that party to the Department of Labor with an explanation of the procedures and time limits for filing a claim that the union is subject to corrupt practices pursuant to 5 U.S.C. 7111(f)(1). See *HOG* for procedures to follow when handling these allegations at hearing. [HOG 33.5](#).

- 19.11 Contact with the labor organization whose status is being challenged:** Upon receipt of the challenge by the Regional Office, the Regional Director immediately requests the challenged union's position. A copy of the Director's letter and the challenged union's response thereto are served on all parties. In addition to the evidence supporting the challenge, the Regional Director may request specific information from the challenging party and the union being challenged. See *HOG 46A* (also *RCL 10A*) for information relating to 5 U.S.C. 7103(a)(4) challenges and [CHM 20.1.8](#) and [23.9.3](#) and *HOG 46B* (also *RCL 10B*) for challenges in which the challenging party claims the labor organization is subject to corrupt or anti-democratic influences under 5 U.S.C. 7111(f)(1). If the challenge is made pursuant to section 7111(f)(1) of the Statute and the challenging party evidences that it has filed a complaint with the appropriate third party, the case will be held in abeyance pending the third party's action. See [CHM 23.9.3.3](#). The Regional Director may also contact any other party that the Director decides has relevant information.
- 19.12 Report of investigation:** Upon completion of the investigation of a challenge to validity of interest, a written final investigative report (FIR) is prepared for the Regional Director. Such FIR's may take the form of a draft Decision and Order (see also [CHM 26.3](#)).
- 19.13 Form and content of final investigative report:** A FIR is clear, concise and comprehensive. It is marked intra-agency and confidential. The facts set forth in the FIR are supported by evidence in the case file and specifically identified in the FIR. The FIR is a self-contained document to the extent that it is not necessary to refer to file documents for a thorough understanding of the facts and issues in the case. Opinions or conclusions of the parties are not facts and is not reported as such in the FIR.

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A FIR includes, but is not limited to:

- a. a statement setting forth the challenge(s) to validity and the evidence submitted in support of the allegation(s);
- b. a statement of the issues raised by the challenges;
- c. a discussion of all facts relevant to each challenge;
- d. an analysis of each allegation or issue, including discussion of supporting case law or legal theories and, where applicable, a discussion of defenses raised;
- e. recommendations as to the disposition of each allegation; and if appropriate a recommendation regarding enlarging the scope of the investigation.

19.14 Action on challenge to status of a labor organization: Upon completion of the investigation, the Regional Director issues a Decision and Order or a Direction of Election (see [CHM 19.6](#)) sustaining or denying the challenge. The parties are afforded an opportunity to appeal the Regional Director's Decision and Order to the Authority. The Decision sets forth the Regional Director's finding that the challenged party, i.e., the petitioning or intervening labor organization *is or is not* a labor organization under 5 U.S.C. 7103(a)(4) or *is or is not* subject to corrupt influences or influences opposed to democratic principles pursuant to 5 U.S.C. 7111(f)(1). See [CHM 53](#) for a discussion on Decisions and Orders. A Direction of Election is not appealable to the Authority but is issued without prejudice to the right of the party to file an objection to the election [§ 2422.16(d)].

19.15 Right of review: A party may appeal the Regional Director's Decision and Order in accordance with § 2422.31. See [CHM 54](#).

19.16 Action pending review of a Decision and Order on a status challenge: A Decision and Order that:

- a. denies a status challenge in the case of a petitioning or intervening labor organization, or
- b. grants the challenge in the case of the intervening labor organization

does not stay processing the petition. If the Decision and Order is appealed to the Authority, the filing or granting of an application for review also does not

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stay processing the petition unless specifically ordered by the Authority.

The regions contact the Office of the General Counsel whenever questions arise concerning deferring a petition pending an appeal of a decision based on a challenge to the status of a labor organization. See also [CHM 55](#).