

33 **Special admissibility matters:** In addition to the normal considerations bearing on admissibility of evidence -- relevance, form, etc., -- there are a number of admissibility problems peculiar to the representation hearing.

33.1 **Attempt to litigate adequacy of showing of interest:** If a party attempts to raise an issue regarding the adequacy of the showing of interest by the petitioner or intervenor(s) (i.e., whether the requisite minimum thirty percent (30%) or ten percent (10%), respectively, has been submitted), the Hearing Officer reads the following statement into the record:

MR./MS. ..., SECTION 2422.9(b) OF THE regulations PROVIDES THAT THE REGIONAL DIRECTOR SHALL DETERMINE THE ADEQUACY OF THE SHOWING OF INTEREST ADMINISTRATIVELY, AND SUCH DECISION SHALL NOT BE SUBJECT TO COLLATERAL ATTACK AT A REPRESENTATION HEARING OR ON APPEAL TO THE AUTHORITY.

For showings of interest submitted prior to the hearing, add:

THE REGIONAL DIRECTOR DETERMINED THAT THE SHOWING OF INTEREST SUPPORTING THE (PETITION) (INTERVENTION) WAS ADEQUATE.

For showings of interest submitted immediately prior to the opening of the hearing and not checked for adequacy, add:

THE SHOWING OF INTEREST WILL BE CHECKED AS SOON AS POSSIBLE AND WILL NOT BE MADE PART OF THE RECORD.

33.2 **Attempt to litigate validity of showing of interest:**

a) If a party attempts to raise an issue regarding the validity of the showing of interest by the petitioner or intervenor(s); i.e., procurement of the evidence of interest by fraud, forgery, etc. that the Regional Director has already acted on, the Hearing Officer reads the following statement into the record:

MR./MS. ..., SECTION 2422.10 OF THE regulations PROVIDES THAT ANY PARTY CHALLENGING THE VALIDITY OF THE SHOWING OF INTEREST OF THE PETITIONER, CROSS-PETITIONER, OR AN INTERVENOR MAY FILE ITS CHALLENGE WITH THE REGIONAL DIRECTOR OR THE HEARING OFFICER PRIOR TO THE OPENING OF THE HEARING.

THE CHALLENGE SHALL BE SUPPORTED WITH EVIDENCE. THE REGIONAL DIRECTOR SHALL INVESTIGATE THE CHALLENGE AND TAKE SUCH ACTION AS DEEMED APPROPRIATE. SUCH ACTION SHALL BE FINAL AND NOT SUBJECT TO REVIEW BY THE AUTHORITY, UNLESS THE PETITION IS DISMISSED OR THE INTERVENTION IS DENIED ON THE BASIS OF THE CHALLENGE.

PRIOR TO THE OPENING OF THIS HEARING, THE REGIONAL DIRECTOR ADMINISTRATIVELY DETERMINED THAT THE SHOWING OF INTEREST SUPPORTING THE (PETITION) (INTERVENTION) WAS VALID.

- b) For challenges received too late for the region to process prior to the opening of the hearing, the Hearing Officer reads the following statement into the record:

IMMEDIATELY PRIOR TO THE OPENING OF THIS HEARING, THE (name party) FILED A CHALLENGE TO THE VALIDITY OF THE (name party)'S SHOWING OF INTEREST. I AM REFERRING THE CHALLENGE AND SUPPORTING DOCUMENTATION TO THE REGIONAL DIRECTOR FOR CONSIDERATION AND DECISION PRIOR TO ISSUANCE OF THE DECISION AND ORDER PERTAINING TO THIS HEARING. THE CHALLENGE WILL NOT DELAY THE CONTINUATION OF THIS HEARING AT THIS TIME. NO EVIDENCE REGARDING THE CHALLENGE MAY BE INTRODUCED OR LITIGATED AT THIS HEARING.

- c) For challenges filed during the hearing, the Hearing Officer reads the following statement into the record:

THE (name party) FILED A CHALLENGE TO THE VALIDITY OF THE (name party)'S SHOWING OF INTEREST. MR./MS., SECTION 2422.10 OF THE REGULATIONS PROVIDES THAT ANY PARTY CHALLENGING THE VALIDITY OF THE SHOWING OF INTEREST OF THE PETITIONER, CROSS-PETITIONER, OR AN INTERVENOR MAY FILE ITS CHALLENGE WITH THE REGIONAL DIRECTOR OR THE HEARING OFFICER PRIOR TO THE OPENING OF THE HEARING, UNLESS GOOD CAUSE IS SHOWN FOR GRANTING AN EXTENSION. I AM REFERRING THE CHALLENGE AND SUPPORTING DOCUMENTATION TO THE REGIONAL DIRECTOR FOR CONSIDERATION ON TIMELINESS AND THE MERITS OF THE CHALLENGE. THE CHALLENGE WILL NOT DELAY THE CONTINUATION OF THIS HEARING AT THIS TIME. NO EVIDENCE REGARDING THE CHALLENGE MAY BE INTRODUCED OR LITIGATED AT THIS HEARING.

33.3 ***Attempt to litigate challenge to status of labor organization:*** A challenge to the status of a labor organization may be based on compliance with 5 U.S.C. 7103(a)(4) or claims that the labor organization is subject to corrupt influences or influences opposed to democratic principles pursuant to 5 U.S.C. 7111(f)(1).

- a) If a party attempts to raise an issue regarding the status of the petitioner and/or any intervenor as a labor organization within the meaning of the Statute that has been considered and decided by the Regional Director prior to the hearing, the Hearing Officer reads the following statement into record:

MR./MS. ..., SECTION 2422.11 OF THE REGULATIONS PROVIDES THAT ANY PARTY CHALLENGING THE STATUS OF A LABOR ORGANIZATION MAY FILE ITS CHALLENGE WITH THE REGIONAL DIRECTOR OR THE HEARING OFFICER PRIOR TO THE OPENING OF THE HEARING.

THE REGIONAL DIRECTOR SHALL INVESTIGATE THE CHALLENGE AND TAKE SUCH ACTION AS DEEMED APPROPRIATE.

PRIOR TO THE OPENING OF THIS HEARING, THE REGIONAL DIRECTOR ISSUED A DECISION AND ORDER DETERMINING THAT THE (name) . . . IS A LABOR ORGANIZATION WITHIN THE MEANING OF THE STATUTE.

The foregoing restrictions, of course, do not apply in any instance in which the issue of labor organization status was raised timely by challenge and which the Regional Director concluded required a hearing and issuance of a Decision and Order. In such cases, the status issue becomes a threshold issue at the hearing.

- b) For challenges filed too late to be investigated and decided by the Regional Director prior to the hearing or filed with the Hearing Officer at the hearing, the Hearing Officer contacts the Regional Director to discuss the issues and procedures for handling. The challenging party is required to submit all supporting evidence with the challenge and be prepared to proceed on the issue at the hearing. The Hearing Officer takes evidence on before proceeding with the rest of the hearing. Ultimately, the status issue is decided by the Regional Director when s/he issues the Decision and Order or Direction of Election. The Hearing Officer reads the following statement into the record:

IMMEDIATELY PRIOR TO THE OPENING OF THIS HEARING, THE (name party) FILED A CHALLENGE TO THE STATUS OF THE (name party). BECAUSE THE ISSUE OF THE STATUS OF THE (name party) IS A THRESHOLD ISSUE THAT IS CONSIDERED BEFORE PROCEEDING WITH THIS HEARING, I AM PREPARED TO HEAR TESTIMONY AND TAKE EVIDENCE ON (name of challenging party)'S STATUS CHALLENGE. THE ISSUE OF THE (name party)'S STATUS AS A LABOR ORGANIZATION WILL BE DECIDED BY THE REGIONAL DIRECTOR AS PART OF THE DECISION AND ORDER OR DIRECTION OF ELECTION. At this point, the Hearing Officer states that the challenging party is required to 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 was:

- (i) 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 procedures set out in § §7120(a)(1) through (4); or
 - (ii) is in fact subject to corrupt or anti-democratic influences. If evidence is filed, follow the procedures discussed in *CHM 19.10.2 and CHM 23.9.3*.
- c) If the challenge is filed during the hearing, the Hearing Officer asks the challenger to state the grounds for the status challenge and the reasons for the delay in filing. The Hearing Officer then contacts the Regional Director (or acting RD) to discuss the reasons for the party's delay in filing. If the Regional Director determines that the challenger has established good cause for extending the time limits, the Director instructs the Hearing Officer to take evidence on the issue.

MR./MS.... HAS JUST CHALLENGED THE STATUS OF THE (name party) AS A LABOR ORGANIZATION. SECTION 2422.11 OF THE REGULATIONS PROVIDES THAT ANY PARTY CHALLENGING THE STATUS OF A LABOR ORGANIZATION MAY FILE ITS CHALLENGE WITH THE REGIONAL DIRECTOR OR THE HEARING OFFICER PRIOR TO THE OPENING OF THE HEARING, UNLESS GOOD CAUSE IS SHOWN FOR GRANTING AN EXTENSION. MR./MS ..., YOUR CHALLENGE HAS BEEN FILED AFTER THE HEARING HAS BEEN OPENED. WHAT IS YOUR POSITION WITH RESPECT TO THE TIMELINESS OF YOUR CHALLENGE? ON WHAT BASIS DO YOU ARGUE THAT THERE IS GOOD CAUSE FOR GRANTING

YOU AN EXTENSION OF TIME FOR FILING THE CHALLENGE TO THE STATUS OF THE (name party)? WHAT ARE THE GROUNDS ON WHICH YOU BASE YOUR CHALLENGE? DO YOU HAVE EVIDENCE TO SUPPORT THE CHALLENGE? [Timeliness does not apply to claims filed pursuant to 5 U.S.C. 7111(f)(1).]

WHAT ARE THE POSITIONS OF THE OTHER PARTIES?

At this point, the Hearing Officer asks the challenging party the same questions asked in “(b)” above; then goes off the record to contact the Regional Director and obtain instructions on how to proceed. **See HOG 24.3 and HOG 46A [status challenges pertaining to compliance with 5 U.S.C. 7103(a)(4)] and HOG 46B [status challenges pertaining to claims made pursuant to 5 U.S.C. 7111(f)(1)]. See also RCL 10A and 10B.**

33.4 Attempt to litigate noncompliance with 5 U.S.C. 7111(e): Challenges alleging that a labor organization failed to submit the materials required by 5 U.S.C. 7111(e) may not be litigated in either an unfair labor practice proceeding or a representation proceeding. 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 (1990).

33.5 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 hold exclusive representation 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). *HOG 33.3.*

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 (if the challenge is filed prior to the hearing). If such allegations are raised at a hearing, the Hearing Officer allows an offer of proof on the record and then sustains any objection to the admission of testimony or documentary evidence bearing on this issue. If no objection is made, the Hearing Officer on his/her own, excludes such evidence. See *American Federation of Government Employees, Local 2000, AFL-CIO*, 8 FLRA 718 (1982); *National Association of Government Employees, Local R5-66*, 17 FLRA 796 at 813

(1985) and *American Federation of Government Employees, Local 2419*, 53 FLRA 835, 841-842 (1997). See also *CHM 19.10.4*.

- 33.6** *Attempt to litigate unfair labor practices:* Evidence of unfair labor practices by any of the parties involved in the proceedings is not admissible. Any line of questioning or exhibits that seek to establish or inquire into conduct by the activity, petitioner or any intervenor, which allegedly violated 5 U.S.C. 7116 are wholly inadmissible. The Hearing Officer is particularly alert to interject, even if there are no objections, and to disallow such questioning, including striking any such testimony, if necessary.
- 33.7** *Attempt to litigate supervisory assistance:* Evidence of conduct by a supervisor or management official with respect to soliciting or obtaining any showing of interest in support of a petition or intervention seeking an election or a determination of eligibility for dues allotment is not admissible unless it is an issue of the hearing. See *United States Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas*, 55 FLRA 940 (1999). Such hearings are very rare and are avoided. See *CHM 18.19*.
- 33.8** *Attempt to litigate petitioner's unit eligibility:* In an election petition requiring a showing of interest, an issue that may be litigated is whether the petitioner in a decertification case or the petitioner's representative in a representation election case is bargaining unit eligible (e.g., supervisor or management official). However, only evidence which relates to the criteria set forth in 5 U.S.C. 7103(a) and 7112(b) is relevant. Testimony is not permitted regarding any alleged conduct in obtaining any showing of interest in support of these petitions except when the issue of supervisory involvement is the issue in a hearing concerning a challenge to the validity of the showing of interest (such hearings are very rare and are avoided - See *CHM 18.19*).
- 33.9** *Evidence with respect to the appropriateness of potential appropriate units other than those which may be identified in the petition:* Pursuant to § 2422.3 of the regulations, a petitioner is only required to describe the unit(s) affected by the issues raised in the petition and provide a clear and concise statement of the issues raised by the petition and the results the petitioner seeks. Normally, in petitions that seek elections, petitioners describe the unit they seek to represent.

NOTE: *In a Decision and Order involving an appropriate unit question in an election petition, the Regional Director decides only whether the unit petitioned for in an election case or any alternative unit the petitioner has agreed to is appropriate. The Regional Director does not*

decide whether there is a more appropriate unit or whether the Activity's proposed unit is appropriate if s/he finds that the petitioner's unit(s) are not appropriate. See Department of Transportation, Federal Aviation Administration, New England Region (FAA), 20 FLRA 224 (1985).

However, in cases where the scope of any resulting unit is unclear (e.g., reorganizations, election versus accretion cases), the petitioner may not be able to describe the proposed unit(s) with any specificity. In such cases, the evidence taken during the hearing is broad enough to encompass all potential appropriate units, whether identified as such by the parties, the Regional Director, or the Hearing Officer. See RCL 3 and HOG 39.

NOTE: In a petition in which the parties are not sure what happened to their unit as a result of a reorganization, the Regional Director's decision is based on the facts and the issues not only defined by the petitioner but also by the facts and circumstances that resulted in the petition. CHM 1.1.

