Case No. 15-9542

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1592,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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Oral Argument is requested

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GLOSSARY OF ABBREVIATIONS

AFOSI	Air Force Office of Special Investigations
ALJ	Administrative Law Judge
Authority	The Federal Labor Relations Authority's independent and bipartisan three-Member adjudicative body
FLRA	The Federal Labor Relations Authority
Statute	The Federal Service Labor-Management Relations Statute
Tr.	The transcript of the hearing held before the Federal Labor Relations Authority's Chief Administrative Law Judge on March 4, 2010
ULP	Unfair Labor Practice

STATEMENT OF RELATED CASES

There are no related cases, to the best of Respondent's knowledge.

UNITED STATES COURT OF APPEALS
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No. 15-9542

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1592,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is about an unfair labor practice ("ULP") charge that the American Federation of Government Employees, Local 1592 ("the Union") filed against the Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah ("the Agency"). The Union contended that the Agency committed a ULP in violation of 5 U.S.C. § 7116(a)(1) and (8) when the Air Force Office of Special Investigations ("AFOSI") denied an Agency

employee's ("the employee") request to have a union representative present during an investigative interview. The Union now seeks review of the decision of the Federal Labor Relations Authority's ("FLRA") independent and bipartisan three-Member adjudicative body ("the Authority") holding that the Agency did not commit a ULP. Because the unambiguous language of 5 U.S.C. § 7103(b)(1)'s national-security exemption removes AFOSI from coverage of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101 – 7135 ("the Statute"), including from designation as a "representative" of the Agency under the Statute's so-called *Weingarten* provision, § 7114(a)(2)(B), the Authority properly found that the Agency did not commit a ULP. Thus, this Court should deny the petition for review.

The Authority had subject matter jurisdiction over this case pursuant to § 7105(a)(2)(G) of the Statute. 5 U.S.C. § 7105(a)(2)(G). The Authority's decision is published at 68 FLRA (No. 80) 460 (2015). A copy of the decision is included in the Agency Record filed with the Court as Doc. No. 01019465426 ("Rec.")[1] at 617-31. The Union's petition for review was timely filed within 60 days of the Authority's decision. 5 U.S.C. § 7123(a).

[1] For the Court's convenience, the Authority has followed the Union's practice of citing to the consecutively-paginated Agency Record uploaded to CM/ECF.

STATEMENT OF THE ISSUE PRESENTED

Whether the Authority correctly determined that the unambiguous language of the Statute precludes AFOSI from being a "representative" of the Agency for purposes of 5 U.S.C. § 7114(a)(2)(B).

RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are contained in the attached Statutory Addendum. Att. 1.

RELEVANT STATUTORY BACKGROUND

The Statute provides a general framework for regulating labor-management relations for the federal government. It grants federal employees the right to organize, provides for collective bargaining, and defines ULPs. *See* 5 U.S.C. §§ 7114(a)(1), 7116.

The Authority is responsible for implementing the Statute through the exercise of broad adjudicatory, policy-making, and rulemaking powers. Under the Statute, the responsibilities of the Authority are performed by a three-Member independent and bipartisan body. 5 U.S.C. § 7104. The Authority's role is analogous to that of the National Labor Relations Board in the private sector. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 92-93 (1983). The Statute also provides for an independent General Counsel who is responsible for investigating ULP charges and, when the investigation so warrants, filing and prosecuting ULP complaints. 5 U.S.C. § 7104(f).

Section § 7103(b) of the Statute, however, provides that the President may exclude an agency that "has as a primary function intelligence, counterintelligence, investigative, or national security work" from the coverage of Chapter 71 of Title 5 of the U.S. Code (which contains the entire Statute) when he determines that the provisions of Chapter 71 cannot be applied to the agency or subdivision "in a manner consistent with national security requirements and considerations." 5 U.S.C. § 7103(b)(1). In 1979, President Carter issued an executive order under § 7103(b)(1) excluding AFOSI from the Statute's coverage. (Decision, Rec. at 622; *see also* Exec. Order No. 12,171, 44 Fed. Reg. 66565 (Nov. 19, 1979).)

Under the Statute's *Weingarten*[2] provision, "[a]n exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented" at an "examination" of a bargaining-unit employee "by a representative of the agency" when certain conditions are met. 5 U.S.C. § 7114(a)(2)(B). The Statute further provides that an agency commits a ULP when it fails to comply with the *Weingarten* provision, or when it interferes with, restrains, or coerces any employee in the exercise of his right to union representation under § 7114(a)(2)(B). 5 U.S.C. § 7116(a)(1) and (8).

[2] "*Weingarten*" refers to the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), which affirmed the National Labor Relations Board's similar private-sector rule establishing a right to union representation during investigatory interviews that could lead to employee discipline.

STATEMENT OF THE CASE

This case concerns whether the Agency committed a ULP when AFOSI denied the employee's request to have a union representative present at an investigative interview. (Decision, Rec. at 617.) The Union filed a ULP charge against the Agency on November 20, 2007, and amended the charge on December 27, 2007. (Charge, Rec. at 235; Amended Charge, Rec. at 238.) The FLRA's General Counsel issued a Complaint and Notice of Hearing based on that charge on October 5, 2009. (Complaint, Rec. at 240-43.) The Agency filed an Answer to the complaint on November 2, 2009, and an Amended Answer on November 25, 2009, denying that it committed a ULP. (Answer, Rec. at 245-46; Amended Answer, Rec. at 282-84.) The FLRA's Chief Administrative Law Judge held a hearing on the case on March 4, 2010. (Administrative Law Judge ("ALJ") Decision, Rec. at 12; Transcript ("Tr."), Rec. at 25.) The Administrative Law Judge issued his decision recommending dismissal of the complaint, finding that the Agency did not violate § 7114(a)(2)(B) of the Statute in denying the employee union representation, and therefore did not commit a ULP, on March 19, 2013. (ALJ Decision, Rec. at 22.)

The General Counsel filed exceptions with the Authority on May 13, 2013 (Rec. at 469-87), and the Union filed an opposition to those exceptions on June 11, 2013 (Rec. at 488-507). The Authority issued an order inviting

interested parties to file amicus curiae briefs in the case on August 15, 2014, and published a notice in the Federal Register that same day. (Rec. at 546-47; 79 Fed. Reg. 48156-57 (Aug. 15, 2014).) The Department of Defense filed an amicus brief on behalf of the Agency, and the National Treasury Employees Union (Amicus in this case) filed an amicus brief in support of the Union. (Decision, Rec. at 612.)

The Authority (Chairman Pope and Member Pizzella, Member DuBester dissenting) issued its decision adopting the Administrative Law Judge's recommendation to dismiss the complaint on April 16, 2015. (Decision, Rec. at 617-18.) It found that, because the unambiguous language of § 7103(b)(1) of the Statute precluded AFOSI from being a "representative" of the Agency under § 7114(a)(2)(B), the Agency did not commit a ULP. (Decision at 1, 6-7.) The Union timely filed its petition for review of this decision on June 9, 2015. (Pet. for Review at 1.)

STATEMENT OF THE FACTS

A. AFOSI Investigates the Employee on Suspicion of Criminal Conduct.

AFOSI investigates felony-level crimes for the Inspector General, Office of the Secretary of the Air Force. (ALJ Decision, Rec. at 13; Tr., Rec. at 204, 217-18.) AFOSI's primary mission is to investigate and counter criminal, terrorist, and espionage threats to Air Force personnel and resources. (ALJ

Decision, Rec. at 13.) As noted, President Carter excluded AFOSI from coverage under Chapter 71 of Title 5 of the United States Code by Executive Order in 1979, pursuant to 5 U.S.C. § 7103(b). (Decision, Rec. at 622; *see also* Exec. Order No. 12,171, 44 Fed. Reg. 66565 (Nov. 19, 1979).)

As to the particular facts underlying this case, when a co-worker reported that the employee was "observing pornography" on his Agency-issued computer, one of the employee's supervisors sent him home from work and placed him on administrative leave. (Decision, Rec. at 618 (internal quotation marks omitted); Tr., Rec. at 69.) Sometime after the Agency's information-technology department examined the employee's computer, a "confidential source" reported to AFOSI that the employee "may have accessed child[-]pornography sites." (Decision, Rec. at 618 (internal quotation marks omitted); *see also* Tr., Rec. at 109, 170.)

AFOSI opened an investigation into whether the employee committed a felony. (Decision, Rec. at 618; Tr., Rec. at 171.) At AFOSI's request, one of the employee's supervisors "arranged for the employee to be interviewed." (Decision, Rec. at 618 (internal quotation marks and alteration omitted); *see also* Tr., Rec. at 153, 224.) The employee requested that his Union representative be present at the interview. (Decision, Rec. at 618; Tr., Rec. at 41, 87.) The lead AFOSI investigator denied the request and, together with another AFOSI

investigator, conducted the interview without the employee's supervisor or Union representative present. (Decision, Rec. at 618; Tr., Rec. at 41-42, 87-89.)

After completing its investigation, AFOSI sent a copy of its report to the employee's supervisor and requested that AFOSI be informed of any action taken against the employee. (Decision, Rec. at 618; Tr., Rec. at 58, 158.) Around six weeks later, the Agency proposed the employee's removal based on information from the AFOSI report. (Decision, Rec. at 618; Tr., Rec. at 44, 46, 140; Notice of Proposed Removal, Rec. at 304-07.) To avoid his removal, the employee entered into a settlement agreement with the Agency allowing him to return to duty on the condition that he cease all computer misuse. (Decision, Rec. at 619; Tr., Rec. at 45, 113; Agreement, Rec. at 308-09.) About one month later, however, the employee resigned in the face of his impending removal for violating the settlement agreement. (Decision, Rec. at 619; Tr., Rec. at 46.)

B. The Authority Adopts the Administrative Law Judge's Recommendation to Dismiss the Complaint Because AFOSI is Exempt from the Statute's Coverage.

The FLRA's General Counsel issued a complaint alleging that the Agency committed a ULP in violation of §§ 7114(a)(2)(B) and 7116(a)(1) and (8) of the Statute when AFOSI denied the employee union representation during the interview. (Decision, Rec. at 617.) An FLRA Administrative Law Judge recommended dismissing the complaint, concluding that, because § 7103(b)(1) and Executive Order 12,171 exclude AFOSI from the Statute's

coverage, AFOSI cannot be a "representative" of the Agency for purposes of § 7114(a)(2)(B). (ALJ Decision, Rec. at 641, 643.)

After examining the record and soliciting amicus briefs from interested parties, the Authority adopted the recommendation of the Administrative Law Judge to dismiss the complaint. (Decision, Rec. at 617-18; *see also* Notice of Opportunity to Submit Amici Curiae Briefs, Rec. at 546-47.) The Authority concluded that, because the plain language of § 7103(b)(1) excludes AFOSI from all of the Statute's provisions, the AFOSI investigator in this case could not have acted as a "representative of the agency" for purposes of § 7114(a)(2), and the Agency could not be responsible for the investigator's conduct under the Statute. (Decision, Rec. at 618.)

The Authority reasoned that § 7103(b)(1)'s reference to the entire statutory "chapter" and its use of the plural term "provisions" indicate that an executive order would exclude the agency or subdivision "from the entirety of the Statute." (Decision, Rec. at 621.) It further explained that Congress's use of the singular term "provision" in the following subsection of the Statute, § 7103(b)(2), "indicates that Congress could have" – but did not – grant the President authority in § 7103(b)(1) to issue an executive order suspending the application of particular provisions of the Statute, as opposed to the Statute in its entirety. (*Id.* at 622.) Finally, the Authority found that the wording of Executive Order 12,171 indicates that President Carter excluded AFOSI from

the coverage of the entire Statute, "which necessarily includes" the representative-of-the-agency provision at § 7114(a)(2)(B). (*Id.*)

The Authority rejected the arguments advanced by the General Counsel and the Union. Their claim that § 7103(b)(1) "should be interpreted as authorizing the President to exclude agencies and subdivisions *only* from the Statute's benefits of collective bargaining and exclusive representation" conflicted with the Statute's plain wording, the Authority explained. (Decision, Rec. at 623.) Moreover, the Authority reasoned that Congress "had no need to empower the President" to deny AFOSI investigators only the benefits of collective bargaining and exclusive recognition under § 7103(b)(1) because they already were denied those benefits by virtue of their exclusion from the definition of "appropriate unit" under 5 U.S.C. § 7112. (*Id.*)

The Authority also found unpersuasive the General Counsel's and the Union's claim that § 7114(a)(2)(B)'s legislative history supported their position, explaining that "there is no relevant legislative history" on the intersection of §§ 7103 and 7114. (Decision, Rec. at 623.) Finally, the Authority disagreed that its interpretation of § 7103(b)(1) would "erode" the § 7114(a)(2)(B) representational right. (Decision, Rec. at 624.) It reasoned that, although the Authority has found that individuals who are not employees of an agency may act as "representatives" of the agency for purposes of § 7114(a)(2), the Authority has never recognized that a non-employee working for an entity that

was expressly excluded from the coverage of the Statute by an executive order issued under § 7103(b)(1) may act as an agency's "representative." (*Id.*)

The Union's petition for review in this case followed.

SUMMARY OF THE ARGUMENT

This case asks whether the Authority erred in applying the unambiguous language of its implementing statute. As set out below, the Authority correctly employed the principle of statutory interpretation that a statute should be interpreted, first and foremost, in accordance with its plain language. When that language is clear, the Authority's inquiry ends.

Section 7103(b)(1) of the Statute provides that the President may exclude an agency with primary functions concerning intelligence, investigation, or national security – like AFOSI – from the coverage of Chapter 71 of Title 5 of the U.S. Code, which encompasses the Statute in its entirety. *See* 5 U.S.C. § 7103(b)(1). In November 1979, mere months after the Statute took effect, President Carter exercised his authority to designate AFOSI as "excluded from coverage under Chapter 71 of Title 5 of the United States Code." Exec. Order No. 12,171, 44 Fed. Reg. 66565 (Nov. 19, 1979). The Authority reasonably interpreted the plain language of § 7103(b) and the Executive Order to preclude the application of any provision of the Statute to AFOSI. Consequently, the Authority found, AFOSI cannot be a "representative of the agency" under § 7114(a)(2)(B) of the Statute, and the Agency did not commit a

ULP in denying the employee representation. As demonstrated below, this conclusion is based on nothing more than the Statute's unambiguous language.

This Court should therefore reject the assertions of the Union and Amicus Curiae that the Authority erred in intrepreting its statute. Those arguments are grounded not in the Staute's text, but in policy positions that cannot trump § 7103(b)(1)'s plain language. The Court should deny the petition for review.

STANDARD OF REVIEW

The Authority "is entitled to considerable deference when interpreting and applying the provisions of its enabling statute." *Am. Fed'n of Gov't Emps., Local 1592 v. FLRA*, 288 F.3d 1238, 1240 (10th Cir. 2002) ("*AFGE*") (internal quotation marks omitted). The Authority's decision "may be set aside only if [it is] arbitrary, capricious, or an abuse of discretion or otherwise not in accordance with law." *Id.* (internal quotation marks omitted). In applying the arbitrary and capricious standard, the Court will uphold the Authority's decision "so long as it is predicated on a reasoned basis." *Adamson v. Unum Ins. Life Co. of Am.*, 455 F.3d 1209, 1212 (10th Cir. 2006) (internal quotation marks omitted).

ARGUMENT

THE AUTHORITY CORRECTLY DETERMINED THAT THE STATUTE'S UNAMBIGUOUS LANGUAGE PRECLUDES AFOSI FROM BEING A "REPRESENTATIVE OF THE AGENCY" UNDER 5 U.S.C. § 7114(a)(2)(B)

A. The Authority reasonably construed the plain language of § 7103(b) to remove all AFOSI operations from the reach of the Statute.

A cardinal principle of statutory construction recognized by this Court and the Supreme Court is "that the statutory language itself must serve as the principal guide in determining statutory meaning." *AFGE*, 288 F.3d at 1240; *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."). When the statutory language is unambiguous, the Court's inquiry ends, and it will give effect to the plain language of the statute. *Toomer v. City Cab*, 443 F.3d 1191, 1194 (10th Cir. 2006); *see also United States v. Gonzales*, 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history."). In evaluating the "plainness or ambiguity of statutory language," a court will examine the language itself, as well as the context in which that language is used. *Toomer*, 443 F.3d at 1194 (internal quotation marks omitted); *see also Robinson*, 519 U.S. at 341.

Applying those long-entrenched rules of statutory construction, the Authority correctly determined that, because the President excluded AFOSI from coverage of Chapter 71 of Title 5, AFOSI cannot be a "representative" of the Agency under the Statute. Section 7103(b) provides, in full, that:

> (1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that--
>
> (A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and
>
> (B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.
>
> (2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

5 U.S.C. § 7103(b). The Authority properly found that, under the section's plain language, an executive order issued under § 7103(b)(1) removes an agency or subdivision like AFOSI "from *all* of Chapter 71 of Title 5 of the U.S. Code – i.e., *all* of the Statute" based on a Presidential determination that "the 'provisions of th[e] chapter *cannot be applied*'" to that agency or subdivision. (Decision, Rec. at 621 (quoting 5 U.S.C. § 7103(b)(1)) (emphasis in Decision).) Section 7103(b)(1)'s reference to the entire statutory "chapter" and its use of

the plural term "provisions" indicate that such an executive order would exclude the agency or subdivision "from the entirety of the Statute." (*Id.*)

The context of § 7103(b)(1)'s exclusionary language supports this reading of its plain language. As the Authority noted, the very next subsection permits the President to "issue an order suspending any *provision* of the Statute." 5 U.S.C. § 7103(b)(2) (emphasis added); *see* Decision, Rec. at 622. Congress's use of the singular term "provision" in § 7103(b)(2) indicates that Congress could have – but did not – grant the President authority in § 7103(b)(1) to exclude an agency or subdivision only from certain provisions of the Statute. Instead, Congress drafted § 7103(b)(1) to allow the President to exclude an agency or subdivision from the coverage of "this chapter." 5 U.S.C. § 7103(b)(1). As the Authority correctly reasoned, when "'Congress includes particular language in one section of a statute but omits it in another section of the same'" statute, the courts "'presume[] that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (Decision, Rec. at 614 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).) Thus, the Authority's interpretation of § 7103(b)(1) is "directly supported by the applicable statutory language." *AFGE*, 288 F.3d at 1240.

Moreover, as the Authority recognized, the language of Executive Order 12,171 confirms this interpretation. (Decision, Rec. at 622.) The Executive Order specifically provides that AFOSI is "excluded from coverage under

Chapter 71 of Title 5 of the United States Code" and, therefore, that "Chapter 71 of Title 5 of the United States Code cannot be applied" to AFOSI. Exec. Order No. 12,171, 44 Fed. Reg. 66565 (Nov. 19, 1979); *see* Decision, Rec. at 622. In other words, President Carter excluded AFOSI from the coverage of all of the Statute's provisions, including status as a representative under § 7114(a)(2)(B)'s *Weingarten* rule, consistent with the scope of § 7103(b)(1)'s mandate.

None of the Union's claims cast doubt on the Authority's interpretation of the Statute. The Union's arguments turn on its belief that § 7103(b) excludes AFOSI from the Statute only in its capacity as an employer, but does not otherwise limit AFOSI's obligations as an investigator-representative of another agency's personnel. But in arguing that § 7103(b)(1) "does not place any limitation on the application of the Statute to non-excluded entities" with which AFOSI might engage (*see* Union Br. at 21), the Union fails to reconcile the unambiguous language of § 7103(b)(1) providing that an executive order will "exclud[e]" an agency or subdivision "from coverage under" *each and every provision* of Chapter 71. 5 U.S.C. § 7103(b)(1). If the President excludes an agency from the Statute's coverage, that exclusion, by definition, precludes designation as a "representative" of a covered agency under § 7114(a)(2)(B).

Further supporting its refusal to accept the Union's claim that § 7103(b) only limits AFOSI in its role as employer (Union Br. at 23), the Authority

explained that "Congress had no need to empower the President in section 7103(b)(1) to deny AFOSI investigators the benefits of collective bargaining and exclusive recognition" because those investigators would have been excluded from the definition of an appropriate unit under § 7112(b)(6) and (7).[3] (Decision, Rec. at 623.) Thus, it would render § 7103(b) superfluous to interpret it to merely repeat the limitation on bargaining unit composition already contained in § 7112(b)(6) and (7).

The Union incorrectly argues that this reasoning is "inaccurate" because AFOSI employees who are not investigators would not be excluded under § 7112(b), thus requiring § 7103(b) to fully exclude all AFOSI employees. (Union Br. at 23.) But employees who support investigative work may also be excluded from bargaining after a case-by-case analysis under § 7112(b)(6) and (7), so the Union's reasoning fails. *See, e.g., U.S. Dep't of Justice, Wash., D.C.,* 62 FLRA 286, 294-96 (2007) (evaluating whether administrative and technical support staff for the Department of Justice's criminal booking system should be excluded from bargaining units under § 7112(b)(6)); *U.S. Small Business*

[3] Under § 7112(b), "a unit shall not be determined to be appropriate if it includes: . . . (6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or (7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity." 5 U.S.C. § 7112(b)(6), (7).

Admin., 34 FLRA 392, 400 (1990) (upholding exclusion of Inspector General's non-investigator employees under § 7112(b)(7)); *Dep't of Labor, Office of Inspector Gen., Region 1, Boston, Mass.*, 7 FLRA 834, 835 (1982) (excluding all professional *and* nonprofessional employees of Inspector General's Office of Audit pursuant to § 7112(b)(7)).

Finally, citing two prior Authority decisions where AFOSI was required to comply with § 7114(a)(2)(B)'s *Weingarten* rule, the Union argues that the "proper interpretation of section 7103 vis a vis [*sic*] the issue presented here is the one applied by the Authority prior to this case." (*Id.* at 24.) But the Authority did not apply – or even cite – § 7103 in the decisions the Union cites, nor is there any indication that the agency in question raised § 7103(b) as a defense in either case. (*See id.* (citing *U.S. Dep't of the Air Force, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 36 FLRA 748 (1990) and *Lackland Air Force Base Exch., Lackland Air Force Base, Tex.*, 5 FLRA 473 (1981)).) Thus, those cases have no bearing on the interpretation of the unambiguous language of § 7103(b)(1). *See, e.g.*, *Springer v. Comm'r of Internal Revenue*, 416 F. App'x 681, 683 (10th Cir. 2011) (cases that do not address the issue in the instant case are inapposite); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Med. Ctr., Lexington, Ky.*, 68 FLRA 932, 940 (2015) (Authority cases that address the same legal doctrine, but not the particular regulation raised in the instant case, are inapposite).

Amicus Curiae's arguments also fall short. In addition to echoing the Union's claims, Amicus alleges that the Authority "failed to recognize" that § 7103(b)(1)'s exclusion only applies to the agencies and subdivisions set out in the Executive Order, "and not to any covered entities on whose behalf those excluded entities might act." (*Id.* at 7.) But Amicus fails to appreciate the scope of that exclusion: Amicus identifies no support in the Statute's text for its claim that the "representative of the agency" provision in § 7114(a)(2)(B), unlike every other provision of the Statute, *may* be applied to an entity excluded from the Statute's coverage under § 7103(b)(1).[4] (*See id.* at 7-8.)

B. The policy considerations the Union and Amicus Curiae identify do not trump the unambiguous language of the Statute.

The Union and Amicus argue that the Authority's interpretation of § 7103(b)(1) conflicts with the "overall purpose" of the Statute and congressional intent. (Union Br. at 25; *see also id.* at 25-30; Amicus Br. at 12-16.) But, as the Authority recognized, this case turned on the intersection of §§ 7103 and 7114, and the Statute's legislative history sheds no light on how Congress intended §§ 7103(b)(1) and 7114(a)(2)(B) to interact. (Decision, Rec.

[4] Amicus also contends (Amicus Br. at 12) that the Authority's decision is arbitrary and capricious to the extent it cites *U.S. Department of Homeland Security, U.S. Customs & Border Protection v. FLRA*, 751 F.3d 665 (D.C. Cir. 2014), because Chairman Pope expressed concerns about the citation in a concurring footnote. There is no doubt, however, that, despite her concerns, Chairman Pope agreed to the citation. (*See* Decision, Rec. at 621 n.25.) And, in any event, that one case does not control the Authority's decision.

at 623 ("[T]here is no relevant legislative history regarding § 7103(b)(1) on this point.").) Nor are the Union and Amicus able to identify language from any other section of the Statute that would call the Authority's interpretation of § 7103(b)(1) into question. Instead, they rely on case law holding, generally, that individuals who are not employees of an agency may still act as its "representative" for purposes of § 7114(a)(2)(B). (*See* Union Br. at 27-29; Amicus Br. at 13-15.) In none of those cases, however, was the "representative" in question an agency or subdivision that was excluded from the Statute's coverage in its entirety for national security reasons due to its intelligence or investigative function by operation of an executive order under § 7103(b)(1). Instead, the representative was an agency or subdivision excluded only from the Statute's collective-bargaining obligations under § 7112(b)(7). *See, e.g.*, *NASA v. FLRA*, 527 U.S. 229, 252 (1999). Thus, that precedent is not controlling.

Moreover, in investigating the employee's potential criminal activity, AFOSI indisputably was acting within the scope of its legal authority and mission. Thus, as the Authority recognized, this is not a case "where agencies use entities otherwise excluded from the coverage of the Statute by executive order to conduct investigations that are outside the scope of those entities' legal authority." (Decision, Rec. at 617.) That would present a different question.

* * *

When statutory language is clear, the Court does not look past that language to consider congressional intent and policy considerations. *See, e.g.*, *United States v. Husted*, 545 F.3d 1240, 1247 (10th Cir. 2008) ("[I]t is a longstanding principle that absent ambiguity we cannot rely on legislative history to interpret a statute."). In the decision at issue, the Authority correctly interpreted the language of its enabling Statute to find that § 7103(b), and the Executive Order issued thereafter, precluded the application of any provision of the Statute to AFOSI. Because the Union and Amicus have failed to show that the Authority erred in finding the Statute's language unambiguous, their policy-driven arguments are immaterial, and the Court should deny the petition for review.[5]

[5] If, however, the Court finds ambiguity in the language of § 7103(b)(1), the Court should remand this case to the Authority to interpret the Statute in light of that ambiguity in the first instance. *See, e.g.*, *Cajun Elec. Power Coop., Inc. v. F.E.R.C.*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) ("[I]f an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see."); *accord Gila River Indian Community v. United States*, 729 F.3d 1139, 1147 (9th Cir. 2013), as amended (July 9, 2013); *Teva Pharm. USA, Inc. v. Food & Drug Admin.*, 441 F.3d 1, 4 (D.C. Cir. 2006). After interpreting that ambiguity, the Authority would be able to exercise its discretion under the Statute to determine whether an examination of the degree of cooperation between AFOSI and the Agency was warranted. *See also Hospice of N.M., LLC v. Sebelius*, 435 F. App'x 749, 755 (10th Cir. 2011) (courts should generally "remand a case to an agency for decision of a matter that statutes place primarily in agency hands"); *I.N.S. v. Ventura*, 537 U.S. 12, 16 (2002); *see also* Union Br. at 33 (requesting remand).

CONCLUSION

The Authority respectfully requests that the Court deny the petition for review.

STATEMENT REGARDING ORAL ARGUMENT

The Authority believes that this case presents a straightforward question of statutory interpretation, but agrees with the Union that oral argument may assist the Court in considering this issue of first impression.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 4,843 words, excluding exempt material.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that, with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Circuit Rule 25.5;

(2) the ECF submission is an exact copy of the written documents filed with the Clerk; and

(3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection, Version 12, and according to the program is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on the following counsel of record via the CM/ECF system:

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ATTACHMENT 1

STATUTORY ADDENDUM

5 U.S.C. § 7103(b). Definitions; Application

(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that--

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

5 U.S.C. § 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. The term of any member shall not expire before the earlier of--

(1) the date on which the member's successor takes office, or

(2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

(2) The General Counsel may--

(A) investigate alleged unfair labor practices under this chapter,

(B) file and prosecute complaints under this chapter, and

(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

5 U.S.C. § 7105(a). Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority--

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(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;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

5 U.S.C. § 7112(b). Determination of appropriate units for labor organization representation

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes--

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

5 U.S.C. § 7114(a). Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

5 U.S.C. § 7116. Unfair Labor Practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions

of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure--

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which--

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

5 U.S.C. § 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under:

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination), may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree

affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Executive Order 12171

Exclusions From the Federal Labor-Management Relations Program

November 19, 1979

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Section 7103(b) of Title 5 of the United States Code, and in order to exempt certain agencies or subdivisions thereof from coverage of the Federal Labor-Management Relations Program, it is hereby ordered as follows:

1-1. Determinations.

1-101. The agencies or subdivisions thereof set forth in Section 1-2 of this Order are hereby determined to have as a primary function intelligence, counterintelligence, investigative, or national security work. It is also hereby determined that Chapter 71 of Title 5 of the United States Code cannot be applied to those agencies or subdivisions in a manner consistent with national security requirements and considerations. The agencies or subdivisions thereof set forth in Section 1-2 of this Chapter are hereby excluded from coverage under Chapter 71 of Title 5 of the United States Code.

1-102. Having determined that it is necessary in the interest of national security, the provisions of Chapter 71 of Title 5 of the United States Code are suspended with respect to any agency, installation, or activity listed in Section 1-3 of this Order. However, such suspension shall be applicable only to that portion of the agency, installation, or activity which is located outside the 50 States and the District of Columbia.

1-2. Exclusions.

1-201. The Information Security Oversight Office, General Services Administration.

1-202. The Federal Research Division, Research Services, the Library of Congress.

1-203. Agencies or subdivisions of the Department of the Treasury:

(a) The U.S. Secret Service.
(b) The U.S. Secret Service Uniformed Division.
(c) The Office of Special Assistant to the Secretary (National Security).
(d) The Office of Intelligence Support (OIS).

(e) The Office of the Assistant Secretary (Enforcement and Operations) (OEO).

(f) The Office of Criminal Enforcement, Bureau of Alcohol, Tobacco, and Firearms.

(g) The Office of Investigations, U.S. Customs Service.

(h) The Criminal Investigation Division, Internal Revenue Service.

1-204. Agencies or subdivisions of the Department of the Army, Department of Defense:

(a) Office of Assistant Chief of Staff for Intelligence.

(b) U.S. Army Intelligence and Security Command.

(c) U.S. Army Foreign Science and Technology Center.

(d) U.S. Army Intelligence Center and School.

(e) U.S. Army Missile Intelligence Agency.

(f) Foreign Intelligence Office, U.S. Army Missile Research and Development Command.

1-205. Agencies or subdivisions of the Department of the Navy, Department of Defense:

(a) Office of Naval Intelligence.

(b) Naval Intelligence Command Headquarters and Subordinate Commands.

(c) Headquarters, Naval Security Group Command.

(d) Naval Security Group Activities and Detachments.

(e) Fleet Intelligence Center, Europe and Atlantic (FICEURLANT).

(f) Fleet Intelligence Center, Pacific (FICPAC).

(g) Units composed primarily of employees engaged in the operation, repair, and/or maintenance of 'off line' or 'on line' cryptographic equipment.

(h) Units composed primarily of employees of naval telecommunications activities in positions which require a cryptographic authorization.

1-206. Agencies or subdivisions of the Department of the Air Force, Department of Defense:

(a) Office of Space Systems, Office of the Secretary of the Air Force.

(b) Office of Special Projects, Office of the Secretary of the Air Force.

(c) Engineering Office, Space and Missile Systems Organization (Air Force Systems Command).

(d) Program Control Office, Space and Missile Systems Organization (Air Force Systems Command).

(e) Detachment 3, Space and Missile Systems Organization (Air Force Systems Command).

(f) Defense Dissemination Systems Program Office, Space and Missile Systems Organization (Air Force Systems Command).

(g) Satellite Data System Program Office, Space and Missile Systems Organization (Air Force Systems Command).

(h) Project Office at El Segundo, California, Office of the Secretary of the Air Force.

(i) Project Office at Patrick Air Force Base, Florida, Office of the Secretary of the Air Force.

(j) Project Office at Fort Myer, Virginia, Office of the Secretary of the Air Force.

(k) Air Force Office of Special Investigations.

(l) U.S. Air Force Security Service.

(m) Foreign Technology Division, Air Force Systems Command, Wright-Patterson Air Force Base.

(n) 1035 Technical Operations Group (Air Force Technical Applications Center), Air Force Systems Command, and subordinate units.

(o) 3480 Technical Training Wing, Air Training Command, Goodfellow Air Force Base, Texas.

1-207. The Defense Intelligence Agency, Department of Defense.

1-208. The Defense Investigative Service, Department of Defense.

1-209. The Office of Enforcement and the Office of Intelligence, including all domestic field offices and intelligence units, of the Drug Enforcement Administration, Department of Justice.

1-210. Offices of the Assistant Secretary for Defense Programs, Department of Energy.

1-211. Offices within the Agency for International Development:

(a) The Immediate Office of the Auditor General.

(b) The Office of Inspections and Investigations.

(c) The Office of Security.

(d) The Office of the Area Auditor General/Washington.

1-3. Units outside the 50 States and the District of Columbia.

1-301. The Drug Enforcement Administration, Department of Justice.