

67 FLRA No. 150

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

and

RONALD H. WALSH
(Petitioner)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO
(Exclusive Representative)

WA-RP-13-0052

DECISION AND ORDER
ON REVIEW

September 19, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

In *NASA, Goddard Flight Center, Wallops Island, Virginia (NASA Goddard)*,¹ the Authority addressed the Petitioner’s application for review of the attached decision by Regional Director (RD) Barbara Kraft of the Federal Labor Relations Authority (FLRA). The RD had dismissed as untimely a petition for decertification (decertification petition) filed by the Petitioner, finding that the Agency and the Exclusive Representative (AFGE) had a lawful, written, collective-bargaining agreement (the agreement) in place and that the petition was not filed within the applicable time period before expiration of the agreement (the open period). Accordingly, the RD had found that the agreement constituted a “[c]ontract bar”² to the petition.

Addressing the Petitioner’s application for review, the Authority found an absence of precedent regarding whether the contract bar applies to decertification petitions, which may be filed only by individuals.³ The Authority directed the parties to file briefs addressing this question. The Authority also permitted other interested persons to address the same question.

The main question before us is whether the contract bar applies to decertification petitions. Based on the wording of the Federal Service Labor-Management Relations Statute (the Statute), precedent under both Executive Order 11,491 (the executive order) and the National Labor Relations Act (the Act), several policies, and the Authority’s Regulations, we find that the answer is yes. And we also find that the RD did not err in determining that the agreement is a lawful, written, collective-bargaining agreement under the Statute, and that the agreement bars the petition.

II. Background

In 1998, the Authority certified AFGE, Local 2755 as the exclusive representative of the bargaining unit at issue here. Subsequently, Local 2755 and the Agency executed the agreement, and on October 23, 2000, NASA Headquarters approved it. As relevant here, Article 37 of the agreement provides:

SECTION 37.01[.] This [a]greement shall continue in full force and effect for three . . . years from the date of approval by the NASA Administrator . . . and thereafter shall continue in effect from year to year unless amended, modified[,], or terminated in accordance with this Article.

SECTION 37.02[.] Either party may give written notice and proposed modifications to the other not more than ninety . . . , nor less than sixty . . . [,] calendar days prior to the [three-year] expiration date and each subsequent expiration date. The [a]greement will remain in full force and effect until modifications are agreed upon and approved by the NASA Administrator or his/her designee.⁴

¹ 67 FLRA 258 (2014) (Member DuBester concurring).

² RD’s Decision at 9 (quoting 5 C.F.R. § 2422.12(d) & (e)).

³ See 5 C.F.R. § 2422.2(b) (“Only an individual may file a petition under § 2422.1(a)(2).”); *id.* § 2422.1(a)(2) (discussing petitions for “[a]n election to determine whether employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative”).

⁴ RD’s Decision at 3-4.

In 2008, the Authority amended the bargaining-unit certification to change the Union designation from AFGE, Local 2755 to AFGE, AFL-CIO (AFGE). Shortly thereafter, AFGE designated AFGE, Local 1923 to represent employees in the unit.

On June 17, 2013, the Petitioner, an individual employee of the Agency, filed a petition to decertify AFGE as the exclusive representative of the unit. AFGE filed a motion to dismiss the petition as untimely, claiming that there was an agreement in effect between the Agency and AFGE, and that the petition was filed outside the open period.

The Petitioner opposed AFGE's motion. The Petitioner argued that the Authority has never applied the contract bar to decertification petitions and that, in any event, the parties' agreement cannot serve as a bar because it lacks clear and unambiguous effective and expiration dates, as § 2422.12(h) of the Authority's Regulations⁵ (the wording of which is set forth in Section IV.B. below) requires.

The RD found that Authority precedent supports applying the contract bar to decertification petitions. And the RD rejected the Petitioner's claim that the agreement's effective and expiration dates are not clear and unambiguous. In this regard, she found it "undisputed" that the effective date of the initial, three-year agreement was October 23, 2000 (the date when NASA Headquarters approved it), and that this effective date appears on both the cover and the signature page of the agreement.⁶ She also found that although the agreement initially terminated in October 2003, it "rolled over for one-year terms" each year since then.⁷ In this connection, she determined that Article 37, Section 37.01 of the agreement "clearly and unambiguously" provides that the agreement "renews 'year to year,'" and that Section 37.02 "clearly states that the initial term expiration date and subsequent expiration dates of the [agreement] determine when the parties must notify each other of their intent to modify its terms."⁸ According to the RD, "[a] common[-]sense reading of these two sections is that the reference to 'subsequent expiration dates' is to the expiration dates of the renewed one-year agreements."⁹ Thus, she stated that "the expiration or termination date each year is October 23, and the effective date of the new one-year agreement is October 23, absent the parties having modified that date in a manner consistent with the requirements of" Section 37.02.¹⁰ Noting that "the [p]arties continued to

follow" the agreement after its effective date,¹¹ she concluded that the agreement meets the requirements for serving as a contract bar.

Based on her finding that the agreement expires and renews on an annual basis, the RD found that § 2422.12(d) of the Authority's Regulations – which addresses contracts "for three . . . years or less"¹² – applies in this case. She further found that the open period for filing the petition ran from July 10, 2013, to August 26, 2013. Because the petition was filed on June 17, 2013 – outside that period – the RD found that the petition was untimely, and she dismissed it.

The Petitioner then filed the application for review, and, in *NASA Goddard*, the Authority granted the application in part, finding an absence of Authority precedent on whether the contract bar applies to decertification petitions.¹³ The Authority directed the parties to file briefs addressing the following question:

Do § 7111(f)(3) of the Statute and § 2422.12(d) of the Authority's Regulations apply to decertification petitions . . . ?

In answering that question, the parties should address any pertinent considerations of: (1) statutory construction; (2) legislative history; (3) applicable precedent; and (4) policy.¹⁴

The Authority also published a notice in the Federal Register, allowing interested persons to file briefs as amicus curiae addressing the same question.¹⁵ The Authority found it "premature"¹⁶ at that time to address claims by the Petitioner that the RD committed clear and prejudicial errors concerning substantial factual matters by rejecting certain Petitioner arguments that the agreement lacked necessary attributes to constitute a "lawful, written[,] collective[-]bargaining agreement" under § 7111(f)(3).¹⁷

In response to the Authority's request for briefs, briefs were filed by: the FLRA's Office of the General Counsel (the GC), the Agency, AFGE, the Petitioner, IFPTE, NTEU, NFFE, and an individual, Peter Broida (collectively, briefers).

⁵ 5 C.F.R. § 2422.12(h).

⁶ RD's Decision at 4.

⁷ *Id.* at 2.

⁸ *Id.* at 11.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 4.

¹² 5 C.F.R. § 2422.12(d).

¹³ *NASA Goddard*, 67 FLRA at 260.

¹⁴ *Id.*

¹⁵ 79 Fed. Reg. 10,151, 10,151 (Feb. 24, 2014).

¹⁶ *NASA Goddard*, 67 FLRA at 261.

¹⁷ *Id.* at 258.

III. Preliminary Matter: We will not consider NFFE’s brief, because it is untimely.

The Federal Register notice stated that any briefs “must be *received* [by the Authority] on or before March 31, 2014.”¹⁸ The Authority did not receive NFFE’s brief until April 4, 2014 – after the due date. Accordingly, we find that NFFE’s brief is untimely, and we do not consider it.

IV. Analysis and Conclusions

A. The contract bar applies to decertification petitions.

Some briefers argue that the contract bar applies to decertification petitions;¹⁹ others argue that it does not.²⁰ To resolve the issue, we begin with the plain wording of the Statute, which expressly addresses the contract bar only in § 7111(f)(3).²¹ Section 7111 is entitled “[e]xclusive recognition of labor organizations”²² and provides, in subsection (f)(3), the following:

(f) Exclusive recognition shall not be accorded to a labor organization—

....
(3) if there is then in effect a lawful[,] written[,] collective[-]bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified by the petition, unless—

(A) the collective[-]bargaining agreement has been in effect for more than [three] years, or

(B) the petition for exclusive recognition is filed not more than 105 days and not less than [sixty] days before the expiration date of the collective[-]bargaining agreement
....²³

¹⁸ 79 Fed. Reg. 10,151, 10,151 (Feb. 24, 2014) (emphasis added).

¹⁹ See, e.g., GC Br. at 2, 20; AFGE Br. at 15-16; IFPTE Br. at 1-2; NTEU Br. at 14.

²⁰ See, e.g., Agency Br. at 1; Pet. Br. at 5, 14.

²¹ 5 U.S.C. § 7111(f)(3).

²² *Id.* § 7111.

²³ *Id.* § 7111(f)(3).

Thus, § 7111(f)(3) addresses “petition[s] for exclusive recognition.”²⁴ As some briefers note,²⁵ § 7111(f)(3) is silent regarding other petitions, including decertification petitions, which § 7111(b)(1)(B) defines as petitions stating, “in the case of an appropriate unit for which there is an exclusive representative, that [thirty] percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit.”²⁶ We note that § 7111(f)(3) does not state that it applies “only” to petitions for exclusive recognition; it neither provides for its application to decertification petitions nor precludes such application.

The Petitioner argues that because § 7111(f)(3) specifies application of the contract bar only to petitions for exclusive recognition, Congress *implicitly* indicated that it applies only to such petitions.²⁷ And it is well established that “where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”²⁸ But that presumption does not resolve the issue before us. In this regard, the U.S. Supreme Court has stated that

“[n]ot every silence is pregnant.” In some cases, Congress intends silence to rule out a particular statutory application, while in others [Congress’s] silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective. An inference drawn from congressional silence cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.²⁹

The U.S. Supreme Court has also stated that “[s]tatutory construction is a holistic endeavor,” and that a statutory provision that may seem ambiguous in isolation may be clarified by the remainder of the statutory scheme.³⁰ And a plain-meaning interpretation of a statute should be

²⁴ *Id.* § 7111(f)(3)(B).

²⁵ AFGE Br. at 2, 8-9; NTEU Br. at 4.

²⁶ 5 U.S.C. § 7111(b)(1)(B).

²⁷ Pet. Br. at 8 (stating that the wording of § 7111(f)(3) “adds further proof that . . . the contract bar . . . appl[ies] only to labor organizations”).

²⁸ *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

²⁹ *Burns v. United States*, 501 U.S. 129, 136 (1991) (*Burns*) (quoting *Ill. Dep’t of Pub. Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)).

³⁰ *U.S. Sav. Ass’n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).

rejected if that interpretation would produce an “absurd result.”³¹

Inferring that the statutory silence in § 7111(f)(3) precludes application of the contract bar to decertification petitions would be contrary to “other textual and contextual evidence of congressional intent.”³² As an initial matter, declining to find that the contract bar applies to decertification petitions would be – in at least three ways – in serious tension, and even conflict, with other provisions of the Statute.

First, as some briefers argue,³³ there is support in § 7111 itself for applying the contract bar to decertification petitions. In this connection, § 7111(b) of the Statute allows “any person”³⁴ to file a decertification petition.³⁵ If such a petition is filed, then a labor organization that “has been designated by at least [ten] percent of the employees in the unit specified in [the] petition” may intervene and be placed on the ballot in any election with regard to the petition.³⁶ And a labor organization that “receives the majority of the votes . . . shall be certified . . . as the exclusive representative.”³⁷

Thus, if the contract bar did not apply to decertification petitions, then the following scenario could occur, even where there is a lawful, written, collective-bargaining agreement in place: a decertification petition is filed; a non-incumbent union obtains a ten-percent showing of interest and is placed on the ballot; and that union wins the election and is certified as the exclusive representative. Under that scenario, if the contract bar did not apply to the decertification petition, then the non-incumbent union would be able to circumvent § 7111(f)(3)’s express direction that “[e]xclusive recognition shall not be accorded to a labor organization” when a lawful, written, collective-bargaining agreement is in place.³⁸ This would be an “absurd result”³⁹ that is avoided simply by interpreting the Statute’s silence as to application of the contract bar to decertification petitions as not precluding such application. The Supreme Court’s admonition that

absurd results should be rejected⁴⁰ supports an interpretation of § 7111 as applying the contract bar to such petitions.

Second, as some briefers argue,⁴¹ refusing to apply the contract bar to decertification petitions would effectively give preferential treatment to those petitions, thereby making it easier to decertify than to certify a union. As one breifer argues,⁴² interpreting the Statute this way would be inconsistent with § 7101(a) of the Statute, which states that labor organizations and collective bargaining are in the public interest.⁴³

Third, declining to apply the contract bar to decertification petitions would allow an individual to file a decertification petition at any time during the term of a collective-bargaining agreement, perhaps as little as one day before the agreement expires. And this would be permitted even if the parties to the contract had bargained and reached agreement on a new contract. That is, as one breifer notes,⁴⁴ after parties have spent their resources (and perhaps the Authority’s as well) to negotiate and reach agreement, any individual could – at any time – essentially render those efforts meaningless. As another breifer notes,⁴⁵ such a result would be inconsistent with § 7101(b) of the Statute, which states that “[t]he provisions of [the Statute] should be interpreted in a manner consistent with the requirement of an effective and efficient [g]overnment.”⁴⁶

³¹ *United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994) (*Granderson*).

³² *Burns*, 501 U.S. at 136.

³³ *See, e.g.*, GC Br. at 11-12 & 12 n.2 (discussing the interaction of § 7111(f)(3) with other portions of § 7111); *id.* at 14-15; IFPTE Br. at 3-4 (same).

³⁴ 5 U.S.C. § 7111(b).

³⁵ *See id.* § 7111(b)(1)(B) (allowing petitions by any person alleging, “in the case of an appropriate unit for which there is an exclusive representative, that [thirty] percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit”).

³⁶ *Id.* § 7111(c).

³⁷ *Id.* § 7111(d).

³⁸ *Id.* § 7111(f)(3).

³⁹ *Granderson*, 511 U.S. at 47 n.5.

⁴⁰ *Id.*

⁴¹ *See, e.g.*, AFGE Br. at 10 (“individuals would not be held to any timeliness requirements for filing election petitions, but labor organizations and agencies would be held to the timeliness standards”); IFPTE Br. at 5-6 (discussing § 7101 of the Statute and arguing that limiting the contract bar to election petitions filed by labor organizations would not effectuate the Statute’s policies).

⁴² NTEU Br. at 13 (“Allowing any petitioner to challenge the union without being bound by a reasonable and predictable time frame is surely not the result Congress envisioned when it declared that ‘labor organizations and collective bargaining in the civil service are in the public interest’” (quoting 5 U.S.C. § 7101(a))).

⁴³ 5 U.S.C. § 7101(a).

⁴⁴ IFPTE Br. at 6 (discussing the negative consequences of failing to apply the contract bar).

⁴⁵ NTEU Br. at 13 (“the threat of disruptive petitions, unchecked by time constraints of any kind,” would not “promote Congress’s intent that the Statute ‘be interpreted in a manner consistent with the requirements of an effective and efficient [g]overnment.’” (citing 5 U.S.C. § 7101(b))).

⁴⁶ 5 U.S.C. § 7101(b).

Additionally, as several briefers argue,⁴⁷ applying the contract bar to decertification petitions would be consistent with precedent established by the Assistant Secretary of Labor for Labor-Management Relations (the Assistant Secretary) and the Federal Labor Relations Council (the Council) under the executive order – the “predecessor” to the Statute⁴⁸ – as well as private-sector precedent under the Act. We note that, in interpreting the contract bar under § 7111(f)(3) of the Statute, the Authority previously has relied on contract-bar rulings under both the executive order and the Act.⁴⁹

As for the executive order, the Assistant Secretary and the Council applied the contract bar to decertification petitions,⁵⁰ despite the absence of any wording in the executive order providing for such a bar.⁵¹ As some briefers note,⁵² § 7135(b) of the Statute provides, in pertinent part, that “[p]olicies, regulations, . . . procedures . . . and decisions issued under” the executive order “remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of [the Statute] or by regulations or decisions issued pursuant to [the Statute].”⁵³ Although § 7135(b) does not bar the Authority from reevaluating precedent under the executive order, where “Congress adopted the provision in the [e]xecutive [o]rder in virtually unchanged form[,] and nothing in the legislative history suggests any congressional dissatisfaction with the prior application,” the Authority must “treat the administrative precedent with the same deference as it would its own prior . . . decisions” and, “[a]t a minimum, acknowledge the precedent and provide a reason for departure.”⁵⁴

The executive order differs from the Statute in one pertinent way: while the executive order was completely silent regarding a contract bar,⁵⁵ the Statute does expressly recognize one in § 7111(f)(3), which applies (on its face) only to petitions for exclusive recognition.⁵⁶ But § 7111(f)(3) is in a section of the Statute that discusses “[e]xclusive recognition of labor organizations”⁵⁷ generally and addresses several situations in which such recognition shall not be granted.⁵⁸ And, importantly, nothing in the wording of § 7111(f)(3), or any other provision of the Statute, “suggests any congressional dissatisfaction with the prior application” of the contract bar.⁵⁹ As set forth above, § 7111(f)(3)’s silence with regard to decertification petitions does not necessarily indicate a congressional intent to preclude applying the contract bar to such petitions.⁶⁰

As for private-sector precedent, the National Labor Relations Board (the Board) has long applied a contract bar⁶¹ – including to decertification petitions⁶² – even though there is no wording in the Act providing for such a bar.⁶³ And courts have upheld the contract bar.⁶⁴ As the U.S. Court of Appeals for the D.C. Circuit stated, “the structure, role, and functions of the Authority were closely patterned after those of the [Board],” and “relevant precedent developed under the [Act] is . . . due serious consideration.”⁶⁵ And nothing in the Statute’s legislative history indicates a congressional

⁴⁷ See, e.g., GC Br. at 7-10 (discussing application of contract bar under the executive order); *id.* at 15-17 (discussing National Labor Relations Board (Board) precedent); AFGE Br. at 3-8 (discussing the practice under the executive order and the Act); IFPTE Br. at 6-9 (discussing Board precedent); NTEU Br. at 9-11 (discussing Board precedent).

⁴⁸ *Div. of Military & Naval Affairs (N.Y. Nat’l Guard), Latham, N.Y.*, 53 FLRA 111, 118 (1997).

⁴⁹ *U.S. Dep’t of HHS, SSA*, 44 FLRA 230, 238-39 (1992) (*SSA*) (looking to interpretations of the executive order and the Act to determine what constitutes a collective-bargaining agreement within the meaning of § 7111(f)(3)).

⁵⁰ *U.S. Army Mortuary, Oakland Army Base, Oakland, Cal.*, 6 FLRC 329, 333-35 (1978) (*Oakland II*) (reviewing major policy question referred by Assistant Secretary in *U.S. Army Mortuary, Oakland Army Base, Oakland, Cal.*, 7 A/SLMR 520, 522-23 (1977) (*Oakland I*)); *Dep’t of the Navy, Great Lakes Naval Base, Public Works Ctr., Great Lakes, Ill.*, 7 A/SLMR 1003, 1004 (1977); *U.S. Dep’t of Interior, Bureau of Reclamation, Lower Colo. Region*, 3 A/SLMR 571, 572 (1973).

⁵¹ See Exec. Order No. 11,491, § 7.

⁵² See, e.g., GC Br. at 14; AFGE Br. at 6.

⁵³ 5 U.S.C. § 7135(b).

⁵⁴ *NTEU v. FLRA*, 774 F.2d 1181, 1192 (D.C. Cir. 1985).

⁵⁵ See Exec. Order 11,491, § 7.

⁵⁶ 5 U.S.C. § 7111(f)(3).

⁵⁷ *Id.* § 7111.

⁵⁸ *Id.* § 7111(f).

⁵⁹ *NTEU v. FLRA*, 774 F.2d at 1192.

⁶⁰ *Burns*, 501 U.S. at 136.

⁶¹ See, e.g., *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1007 (1958) (*Deluxe Metal Furniture*).

⁶² See, e.g., *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1000-01 (1962) (*Leonard*) (in case involving decertification petition, Board prospectively modified open period for contract bar).

⁶³ E.g., *NLRB v. Circle A & W Products Co.*, 647 F.2d 924, 926 (9th Cir.) (noting that the contract bar “does not find its source in the express language of the [Act]”), *cert. denied*, 454 U.S. 1054 (1981).

⁶⁴ See, e.g., *Leedom v. Int’l Bhd. of Elec. Workers*, 278 F.2d 237, 242 (D.C. Cir. 1960).

⁶⁵ *Library of Cong. v. FLRA*, 699 F.2d 1280, 1287 (D.C. Cir. 1983).

intention to depart from precedent under the executive order or the Act with respect to this issue.⁶⁶

Further, as several briefers argue,⁶⁷ various policies – based on and intertwined with the wording of the Statute, discussed above – support applying the contract bar to decertification petitions. To begin, as the Authority previously has acknowledged,⁶⁸ the Statute’s legislative history indicates that Congress’s intent in enacting the contract bar in § 7111(f)(3) was, among other things, to “lend stability to collective[-]bargaining relationships by precluding continuous challenges to an exclusive representative’s status.”⁶⁹ The bar provides a “period during which . . . parties may negotiate a collective[-]bargaining agreement, free from the disruption of” an election petition.⁷⁰ Further, under the executive order, both the Council and the Assistant Secretary recognized (in the context of applying the contract bar in successorship situations) that the contract bar “restore[s] the predictability of periods when representation petitions may be filed”; “enable[s] the . . . employer and incumbent representative to engage in long[-]range planning free from unnecessary disruption”; and “promote[s] effective dealings and efficiency of agency operations.”⁷¹

⁶⁶ Cf., e.g., *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (“where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms”) (citation omitted); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”).

⁶⁷ See, e.g., GC Br. at 15-17; AFGE Br. at 7-8; IFPTE Br. at 5-9; NTEU Br. at 12-13.

⁶⁸ *Dep’t of the Army, III Corps & Fort Hood, Fort Hood, Tex.*, 51 FLRA 934, 937-38 (1996) (*Fort Hood*) (citing H.R. Rep. No. 95-1403 (1978) (U.S. House Comm. Rep.) (Legislative History), at 692); see also *Kan. Army Nat’l Guard, Topeka, Kan.*, 47 FLRA 937, 941 (1993) (*KANG Topeka*) (noting that “[p]romoting stability in labor-management relations is in harmony with the purposes of the Statute”) (citing § 7111(f)(3) and (4) of the Statute)).

⁶⁹ Legislative History at 692; see also *Oakland II*, 6 FLRC at 335 (Council noted that the contract bar is consistent with purposes and policies of the executive order to “foster desired stability in labor-management relations [by providing] parties to an existing bargaining relationship . . . a reasonable opportunity to deal with matters of mutual concern without the disruption [that] accompanies the resolution of a question of representation”).

⁷⁰ *U.S. Dep’t of the Interior, Indian Health Serv., Gallup Indian Med. Ctr., Gallup, N.M.*, 48 FLRA 890, 897 (1993) (discussing contract bar in context of petition for election of different labor organization).

⁷¹ *Oakland II*, 6 FLRC at 335 (quoting *Oakland I*, 7 A/SLMR at 522-23).

Similarly, in the private sector, the contract bar was adopted, among other reasons, “to protect the bargaining atmosphere”⁷² and to “promote the stability of collective-bargaining agreements.”⁷³ In the latter regard, the Board stated that:

Contracts established the foundation upon which stable labor relations usually are built. As they tend to eliminate strife [that] leads to interruptions of commerce, they are conducive to industrial peace and stability. Therefore, when such a contract has been executed by an employer and a labor organization[,] the Board has held that postponement of the right to select a representative is warranted for a reasonable period of time.⁷⁴

The Board acknowledged that, “from an administrative viewpoint, the establishment of a definite period will have the salutary effect” of permitting the Board’s regional offices, “by obtaining a limited amount of information, to dismiss prematurely filed petitions, thus preventing a large percentage of such cases from being processed until an appropriate time.”⁷⁵ As the Authority has recognized, the purpose of the contract bar is the same in both the federal and private sectors.⁷⁶ Therefore, these private-sector policy considerations are also relevant to application of the contract bar in the federal sector.

As some briefers argue,⁷⁷ declining to apply the contract bar to decertification petitions would make it difficult to administer collective-bargaining agreements. And this would adversely affect both the exclusive representative and management. In this connection, as noted above, declining to apply the contract bar to decertification petitions could result in such a petition being filed on the last day of the term of a contract, even if the parties to the contract had already negotiated a successor agreement. As one breifier argues, “management – having expended time and resources bargaining with the existing union for a collective[-]bargaining agreement – could lose the benefit of its bargain and the predictability and stability that flows from having reached an agreement governing its workforce.”⁷⁸ Also, as one breifier claims, “[d]uring the

⁷² *Pioneer Inn Assocs. v. NLRB*, 578 F.2d 835, 838 (9th Cir. 1978) (citation omitted).

⁷³ *Leonard*, 136 NLRB at 1001.

⁷⁴ *Paragon Products Corp.*, 134 NLRB 662, 663 (1961).

⁷⁵ *Deluxe Metal Furniture*, 121 NLRB at 1000.

⁷⁶ *Fort Hood*, 51 FLRA at 939.

⁷⁷ See, e.g., AFGE Br. at 8; NTEU Br. at 12..

⁷⁸ IFPTE Br. at 6.

term of a contract, the agency must have confidence that the current exclusive representative is the entity [that] it should work with for purposes of administering the contract,” and “[u]ncertainty is injected into that relationship . . . by any decertification petition.”⁷⁹

By contrast, applying the contract bar to decertification petitions would, as one briefer states, allow parties “to engage in meaningful bargaining and build relationships to the benefit of both bargaining[-]unit members and the agency as a whole.”⁸⁰ Such an application would lend stability to collective-bargaining relationships by precluding continuous challenges to an exclusive representative’s status, while at the same time giving employees the opportunity at reasonable intervals to choose a different exclusive representative, or no representative at all. In addition, it restores the predictability of periods when representation petitions may be filed, enables the employer and incumbent representative to engage in long-range planning free from unnecessary disruption, and promotes effective dealings and efficiency of agency operations.⁸¹ Further, from an administrative viewpoint, it would have the “salutary effect” of enabling the Authority’s regional offices, “by obtaining a limited amount of information, to dismiss prematurely filed petitions, thus preventing a large percentage of such cases from being processed until an appropriate time.”⁸²

In sum, the wording of the Statute, precedent under the executive order and the Act, and several policy considerations support applying the contract bar to decertification petitions.

The Petitioner argues that § 7111(b) of the Statute supports a contrary conclusion because “[t]he only limit on the right to petition for decertification is found in [§] 7111(b)(2), which provides for a twelve-month election bar.”⁸³ In this connection, § 7111(b) provides that when a decertification petition is filed, and the Authority finds that a question concerning representation exists, the Authority must conduct an election unless “a valid election” under § 7111 of the Statute has been held “in the preceding [twelve] calendar months.”⁸⁴ But for reasons stated above, § 7111(b)’s silence with respect to the contract bar is not dispositive.⁸⁵ Further, the Act – which, as also stated above, has been interpreted to provide a contract bar to

decertification petitions⁸⁶ – contains wording that is nearly identical to § 7111(b) of the Statute. Specifically, § 9(c)(1) of the Act provides, in pertinent part, that if the Board “finds upon the record of [a] hearing that a question of representation exists, it shall direct an election,”⁸⁷ with only one exception: when, during the preceding twelve months, a “valid election” was held.⁸⁸ And the Authority and the courts have stated that “[w]hen there are comparable provisions under the Statute and the [Act], decisions of the [Board] and the courts interpreting the [Act] have a high degree of relevance to similar circumstances under the Statute.”⁸⁹ That § 9(c)(1) of the Act has not been found to preclude application of the contract bar supports finding that § 7111(b) of the Statute also does not preclude such an application.

Moreover, as one briefer notes,⁹⁰ the Statute is silent as to when an individual may file a decertification petition. But, as some briefers acknowledge,⁹¹ Congress gave the Authority the powers to: (1) “establish rules governing any . . . election” under § 7111 of the Statute;⁹² (2) prescribe “regulations to carry out the provisions of [the Statute]”;⁹³ (3) “supervise or conduct elections . . . and otherwise administer the provisions of [§] 7111 . . . relating to the according of exclusive recognition to labor organizations”;⁹⁴ and (4) “take such other actions as are necessary and appropriate to effectively administer the provisions of” the Statute.⁹⁵ In this connection, as the U.S. Supreme Court has stated, the Statute makes the Authority “responsible for implementing the Statute through the exercise of broad adjudicatory, policymaking, and rulemaking powers.”⁹⁶

And the Authority has exercised these powers by promulgating a regulation that applies the contract bar to all petitions for elections. Specifically, § 2422.12 of the Authority’s Regulations provides, in pertinent part:

(d) *Contract bar where the contract is for three . . . years or less.* Where a collective[-]bargaining agreement is in effect covering the claimed unit and has a term of three . . . years or less from the date it became

⁷⁹ NTEU Br. at 12.

⁸⁰ IFPTE Br. at 6.

⁸¹ *Oakland II*, 6 FLRC at 335; see also *Oakland I*, 7 A/SLMR at 522-23.

⁸² *Deluxe Metal Furniture*, 121 NLRB at 1000.

⁸³ Pet. Br. at 6.

⁸⁴ 5 U.S.C. § 7111(b).

⁸⁵ *Burns*, 508 U.S. at 136.

⁸⁶ See, e.g., *Leonard*, 136 NLRB at 1000-01.

⁸⁷ 29 U.S.C. § 159(c)(1).

⁸⁸ *Id.* § 159(c)(3).

⁸⁹ *U.S. DOL, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1381 (1990) (citing *Library of Cong.*, 699 F.2d at 1287).

⁹⁰ NTEU Br. at 2-3.

⁹¹ See, e.g., *AFGE Br.* at 10-11; NTEU Br. at 5-6.

⁹² 5 U.S.C. § 7111(d).

⁹³ *Id.* § 7134.

⁹⁴ *Id.* § 7105(a)(2)(B).

⁹⁵ *Id.* § 7105(a)(2)(I).

⁹⁶ *NFFE, Local 1309 v. Dep’t of the Interior*, 526 U.S. 86, 88 (1999).

effective, a petition seeking an election will be considered timely if filed not more than [105] and not less than sixty . . . days before the expiration of the agreement.⁹⁷

As one briefer argues,⁹⁸ the plain wording of § 2422.12(d) provides that the contract bar applies to “a petition seeking an election.”⁹⁹ Without question, a decertification petition is a petition seeking an election: a decertification election.¹⁰⁰ Thus, by its plain terms, the contract bar in § 2422.12(d) applies the contract bar to decertification petitions. We note, in this regard, that the Petitioner acknowledges that § 2422.12(d) “does not plainly state that it applies only to labor organizations,” but contends that “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.”¹⁰¹ However, for the reasons discussed above, the plain wording of the Statute does not preclude applying the contract bar to decertification petitions, and the Statute expressly gives the Authority broad power to promulgate regulations in representation matters. Accordingly, the Petitioner’s claim does not provide a basis for declining to apply § 2422.12(d) to decertification petitions.

The Agency asserts that the Office of Personnel Management’s (OPM’s) “Glossary of Federal Sector Labor Management Relations Terms” provides that a contract bar applies only to petitions for exclusive recognition.¹⁰² But OPM’s opinion on this matter is not authoritative, because the issue here involves an interpretation of the Authority’s own Statute.¹⁰³ And we note that OPM has taken no position in this case.

The Petitioner argues that interpreting the Statute to apply the contract bar to decertification petitions would be inconsistent with the First Amendment to the U.S. Constitution.¹⁰⁴ Specifically, the Petitioner contends that the Petitioner and other unit employees are “being forced to associate with the Union and have it speak on their behalf in collective bargaining,” which is “forced speech” that “implicat[es] both the employees’

right to speak and to petition the government.”¹⁰⁵ According to the Petitioner, this results in unit employees being “[g]agged from presenting to the government their own views about collective bargaining” because “[t]heir views are presented by a [u]nion they never had an opportunity to vote upon.”¹⁰⁶

In support, the Petitioner cites (only) U.S. Supreme Court decisions involving compulsory union fees or dues,¹⁰⁷ Board jurisdiction over religiously affiliated schools,¹⁰⁸ and a state statute requiring an organization to admit women as voting members.¹⁰⁹ But these decisions have nothing to do with either the facts of this case or the statutory and regulatory provisions involved here. Further, the Petitioner cites no authority for its claim that being exclusively represented by a union violates the First Amendment. In fact, the Supreme Court has held that public employees have no constitutional right, as either members of the public or as employees, to have the government listen to or bargain with them, apart from the government’s dealings with their exclusive representative.¹¹⁰ In this regard, the Court stated that “[a] person’s right to speak is not infringed when government simply ignores that person while listening to others,” and employees’ “associational freedom” is not impaired when a public-sector employer deals only with an exclusive representative on certain matters.¹¹¹

Moreover, as the Authority,¹¹² the Board,¹¹³ the courts,¹¹⁴ and several briefers¹¹⁵ recognize, the contract bar strikes an appropriate balance between ensuring stability in labor relations, on the one hand, and the right of individual employees to change or decertify their representative, on the other. The contract bar ensures that individuals need not wait more than three years to file decertification petitions.¹¹⁶ And, during those three years, petitions are not limited solely to the open period; they also “may be filed at any time when unusual circumstances exist that substantially affect the unit or

¹⁰⁵ *Id.* at 10.

¹⁰⁶ *Id.*

¹⁰⁷ *See id.* at 9-10 (citing *Knox v. SEIU*, 132 S.Ct. 2277 (2012); *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781 (1988); *Ellis v. Bhd. of Ry., Airline, & S.S. Clerks*, 466 U.S. 435 (1984)).

¹⁰⁸ *See id.* at 8 (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979)).

¹⁰⁹ *See id.* at 10 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)).

¹¹⁰ *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 286-92 (1984).

¹¹¹ *Id.* at 289-90.

¹¹² *Fort Hood*, 51 FLRA at 939.

¹¹³ *Deluxe Metal Furniture*, 121 NLRB at 1001.

¹¹⁴ *Leedom*, 278 F.2d at 241-42.

¹¹⁵ *See, e.g.*, GC Br. at 12; AFGC Br. at 13-14; IFPTE Br. at 7-8; NTEU Br. at 12.

¹¹⁶ *See* 5 C.F.R. § 2422.12(d)-(e) (discussing time limitations on contract bar).

⁹⁷ 5 C.F.R. § 2422.12(d).

⁹⁸ GC Br. at 13.

⁹⁹ 5 C.F.R. § 2422.12(d) & (e).

¹⁰⁰ *See id.* § 2422.1(a)(2) (noting that a petition may be filed for “[a]n election to determine whether employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative”) (emphasis added).

¹⁰¹ Pet. Br. at 12.

¹⁰² Agency Br. at 2.

¹⁰³ *Cf. U.S. Dep’t of the Air Force, Air Force Materiel Command*, 67 FLRA 117, 119 (2013) (in interpreting § 7103(a) of the Statute, Authority declined to defer to OPM guidance).

¹⁰⁴ Petitioner’s Br. at 8-11.

majority representation.”¹¹⁷ Additionally, as discussed below, in order to serve as a bar, an agreement must meet certain requirements that are designed to ensure that petitioners know when they are able to file.¹¹⁸ Moreover, § 7114(a)(1) of the Statute requires the exclusive representative to “represent[] the interests of all employees in the unit it represents without discrimination and without regard to labor[-]organization membership.”¹¹⁹ This duty of fair representation is protection for employees whose “individual rights” may be affected by the “grant of power to a union to act as [their] exclusive bargaining representative.”¹²⁰ Thus, although the contract bar places a time limitation on when employees may exercise their right to choose a different exclusive representative, or no representative at all, that limitation is not absolute – and the Statute provides protections for employees who are exclusively represented by a union.

Additionally, in its brief responding to the Federal Register notice, the Petitioner claims – for the first time before the Authority – that the plain wording of § 7111(f)(3) of the Statute does not allow the contract bar to “apply beyond the initial three-year term of . . . an agreement.”¹²¹ But it is well established in Authority precedent that the contract bar applies to agreements that automatically renew.¹²² And the Petitioner could have argued – but did not argue – in its application for review that this “[e]stablished law or policy warrants reconsideration.”¹²³ Further, the Federal Register notice did not invite the parties and amici to address this issue.

But, even assuming that this argument is properly before us at this late stage, § 7111(f)(3) of the Statute does not expressly address agreements that automatically renew, and, thus, does not expressly preclude applying the contract bar to such agreements. Further, as the Authority has stated in the context of applying the contract bar to such agreements:

Preserving the ability of parties to avail themselves of the benefit of automatic renewal of agreements is consistent with the purposes and policies of the Statute. In addition to promoting labor[-]management stability, a policy permitting automatic renewal is consistent with effective and efficient [g]overnment in that it preserves the

time and resources that would be expended in renegotiating collective[-]bargaining agreements where renegotiation is otherwise deemed unnecessary by the parties.¹²⁴

Consistent with these well-established policies, which the Petitioner has not shown to conflict with § 7111(f)(3) of the Statute, we reject the Petitioner’s claim regarding this issue.

Finally, one briefer who filed his brief as an amicus curiae argues that “the Authority should permit decertification petitions to be adjudicated at times other than the open period upon a regional determination that the incumbent union is defunct.”¹²⁵ But the parties to this case have not made this argument. And the Authority considers amicus briefs only to the extent that they address issues raised by the parties.¹²⁶ Consistent with this practice, we do not resolve the merits of that issue.

For the foregoing reasons, we find that the contract bar applies to decertification petitions.

As stated previously, in *NASA Goddard*, the Authority found it premature to address the Petitioner’s claims that the RD committed clear and prejudicial errors concerning substantial factual matters when she found that the agreement bars the petition.¹²⁷ Given our finding to find that the contract bar applies generally, it is necessary to resolve the Petitioner’s arguments here.

B. The RD did not commit clear and prejudicial errors concerning substantial factual matters.

In order to bar a petition, an agreement must contain a clear and unambiguous effective date and must clearly set forth its duration so that any potential challenging party may determine when the open period will occur.¹²⁸ In this regard, § 2422.12(h) of the Authority’s Regulations provides that collective-bargaining agreements, including agreements that automatically renew without further action by the parties, “are not a bar to a petition seeking an election . . . unless a clear effective date, renewal date where applicable, duration, and termination date are ascertainable from the agreement and relevant accompanying documentation.”¹²⁹ The effective date of an agreement that automatically renews is “the date

¹¹⁷ *Id.* § 2422.12(f).

¹¹⁸ *U.S. Dep’t of the Interior, Redwood Nat’l Park, Crescent City, Cal.*, 48 FLRA 666, 671 (1993).

¹¹⁹ 5 U.S.C. § 7114(a)(1).

¹²⁰ *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

¹²¹ *Pet. Br.* at 13.

¹²² *See, e.g., KANG Topeka*, 47 FLRA at 944.

¹²³ 5 C.F.R. § 2422.31(c)(2).

¹²⁴ *KANG Topeka*, 47 FLRA at 941-42.

¹²⁵ *Peter Broida Br.* at 2.

¹²⁶ *Broad. Bd. of Governors*, 66 FLRA 380, 386 n.18 (2011).

¹²⁷ 67 FLRA at 261.

¹²⁸ *SSA*, 44 FLRA at 242; *U.S. Dep’t of HHS, Newark Office, Newark, N.J.*, 37 FLRA 1122, 1126 (1990).

¹²⁹ 5 C.F.R. § 2422.12(h).

previously set by the parties for the renewal of the agreement.”¹³⁰

The Petitioner claims that the RD erred by failing to find that the agreement lacks a clear and unambiguous effective date.¹³¹ For support, the Petitioner asserts that Article 37, Section 37.02’s “use of the term ‘expiration date’ is in direct conflict with Section 37.01’s use of the term ‘continue in effect from year to year.’”¹³² In addition, the Petitioner claims that the RD erred by finding that the agreement renews from year to year.¹³³ In this connection, the Petitioner notes that the agreement states that it “shall continue in effect from year to year unless amended, modified, or terminated,”¹³⁴ and does not use the words “renew, renewal, or rollover.”¹³⁵ According to the Petitioner, there are “significant legal difference[s]” between these various terms.¹³⁶ Specifically, the Petitioner contends that the term “continue” does not imply that the agreement “expires annually and then automatically renews with a new effective date every year.”¹³⁷ Instead, the Petitioner asserts, “the effective date of the [agreement] remains October 23, 2000,” and the agreement’s “duration is seamless and has no expiration date.”¹³⁸

As stated above, the RD found it “undisputed” that the effective date of the initial, three-year agreement was October 23, 2000, the date when NASA Headquarters approved it, and that this effective date appears on the cover and the signature page of the agreement.¹³⁹ And, contrary to the Petitioner’s claim, the terms of the agreement are not in conflict. In this regard, Article 37, Section 37.01 provides that the agreement continues “in full force and effect for three . . . years from the date of approval by the NASA Administrator” – October 23, 2000 – “and thereafter shall continue in effect from year to year unless amended, modified[,] or terminated in accordance with this Article.”¹⁴⁰ Article 37, Section 37.02 provides that either party may give written notice and proposed modifications “not more than ninety . . . , nor less than sixty . . . [,] calendar days prior to the [three-year] expiration date and each subsequent expiration date,”¹⁴¹ and that the agreement

“will remain in full force and effect until modifications are agreed upon and approved by the NASA Administrator or his/her designee.”¹⁴² Nothing in these two contractual sections, alone or in combination, is unclear. And the Petitioner cites no authority for the proposition that an agreement must use such words “renew, renewal, or rollover”¹⁴³ in order to be considered agreements that terminate and then automatically renew. Accordingly, the Petitioner’s arguments are without merit.

In addition, the Petitioner argues that the RD erroneously failed to find that AFGE cannot be regarded as having exclusive representation, based on the fact that the agreement is with AFGE, Local 2755.¹⁴⁴ In this connection, the Petitioner claims that since Local 2755 has not been active at the Agency since February of 2009, “AFGE no longer exclusively represents the employees.”¹⁴⁵ The Petitioner states that the Agency and AFGE “have informally been following the terms of the” agreement, but claims that this “current arrangement . . . [is] an informal and non-binding extension of the original” agreement.¹⁴⁶ Citing *National Park Service, Harpers Ferry, West Virginia (Park Service)*,¹⁴⁷ the Petitioner claims that “there [is] no lawful [agreement] between [the Agency] and AFGE[,] Local 1923.”¹⁴⁸ And, citing *Department of the Army, Corpus Christi Army Depot, Corpus Christi, Texas (Army Depot)*,¹⁴⁹ the Petitioner claims that the Agency and AFGE, Local 1923 “are operating on a verbal[,] temporary agreement” that is not a bar to the petition.¹⁵⁰

These arguments focus solely on the identities of the parties who signed the agreement. But, as AFGE argues,¹⁵¹ and the Petitioner does not dispute, AFGE was properly certified to replace AFGE, Local 2755 following the procedures set forth in *Veterans Administration Hospital, Montrose, New York*¹⁵² – which include a secret-ballot election.¹⁵³ And there likewise is no dispute that AFGE thereafter designated AFGE, Local 1923 to serve as the representative.¹⁵⁴ Unions are permitted to

¹³⁰ *KANG Topeka*, 47 FLRA at 943.

¹³¹ Application for Review (Application) at 6.

¹³² *Id.* at 5-6.

¹³³ *Id.* at 5.

¹³⁴ *Id.* (quoting Art. 37 § 37.01) (emphasis and internal quotation marks omitted).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ RD’s Decision at 4.

¹⁴⁰ *Id.* at 3.

¹⁴¹ *Id.* at 3-4.

¹⁴² *Id.* at 4.

¹⁴³ *Id.* at 5.

¹⁴⁴ Application at 5.

¹⁴⁵ *Id.* at 4.

¹⁴⁶ *Id.*

¹⁴⁷ 15 FLRA 786 (1984).

¹⁴⁸ Application at 4.

¹⁴⁹ 16 FLRA 281 (1984).

¹⁵⁰ Application at 4-5.

¹⁵¹ AFGE Opp’n to Application at 3 (stating, without dispute, that AFGE, Local 2755 “was replaced by AFGE as the exclusive representative through a properly approved *Montrose* procedure”).

¹⁵² 4 A/SLMR 858 (1974), *review denied*, 3 FLRC 259 (1975).

¹⁵³ 4 A/SLMR at 860.

¹⁵⁴ RD’s Decision at 5.

make such designations.¹⁵⁵ As such, the arguments are meritless. We note, in this connection, that under the executive order, the contract bar applied to agreements that carried over in cases of successorship,¹⁵⁶ which necessarily involve changes in the designation of one of the parties to the agreement.¹⁵⁷ Further, the Authority decisions that the Petitioner cites are inapposite: *Park Service* involved an agreement that had been disapproved by an agency head,¹⁵⁸ and *Army Depot* involved a situation where an agreement expired, and, rather than extending it for another year, as the agreement allowed them to do, the parties merely corresponded that they had an *intention* to negotiate.¹⁵⁹

For the foregoing reasons, we conclude that the RD did not err in finding that the agreement bars the

¹⁵⁵ See *Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 FLRA 495, 498 (2001) (“A union’s right to designate its own representatives is a statutory right under § 7114 of the Statute.”) (citations omitted); cf. *Fed. Emergency Mgmt. Agency, Headquarters, Wash., D.C.*, 49 FLRA 1189, 1201 (1994) (in decision adopted by Authority, judge stated that “where the level of recognition is at the national level, an agency does not commit an unfair labor practice by refusing to negotiate with the president of a union local *where it has not been shown that any authority has been delegated to the local*”) (citation omitted) (emphasis added); *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1013 (1993) (finding that “the local president was a properly designated agent of AFGE for the purpose of initiating bargaining at the level of exclusive recognition” and that “the [r]espondent had an obligation to bargain at the national level with a properly authorized designee of AFGE.”); *Dep't of the Navy, Navy Pub. Works Ctr., Honolulu, Haw.*, 30 FLRA 290, 290-91 (1987) (noting that the Hawaii Federal Employees Metal Trades Council, AFL-CIO (HFEMTC), was the exclusive representative of employees, and that IFPTE, Local 121, “an affiliated local union of [HFEMTC], has been designated and functions as contract administrator for the unit.”); *Dep't of the Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Haw.*, 28 FLRA 172, 172-73 (1987) (noting that the HFEMTC was the exclusive representative of employees, and that SEIU, Local 556, AFL-CIO, “a constituent local of the HFEMTC, act[ed] as administrator of HFEMTC’s collective[-]bargaining agreement with the [a]ctivity, and [was] responsible for the representation of the employees in the . . . unit”); *Health Care Fin. Admin.*, 17 FLRA 650, 651 (1985) (noting that AFGE was the certified, exclusive representative, and that “AFGE Local 1923 . . . has been the designated agent of AFGE for handling collective[-]bargaining issues arising within” certain locations).

¹⁵⁶ *Oakland II*, 6 FLRC at 333-35; *Oakland I*, 7 A/SLMR at 522-23.

¹⁵⁷ See, e.g., *U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys., Biloxi, Miss.*, 64 FLRA 452, 454 (2010) (“The successorship doctrine applies to determine whether, following a reorganization, a new employing entity is the successor to a previous one such that a secret[-]ballot election is not necessary to determine representation rights of employees who were transferred to the successor.”) (emphasis added).

¹⁵⁸ 15 FLRA at 788-89.

¹⁵⁹ 16 FLRA at 282-83.

Petitioner’s petition. In reaching this conclusion, we note that the Petitioner admits that he was aware of the general statutory requirements to file his petition during the statutory-bar period, and that, on the petition form, he intentionally chose not to fill in the appropriate block that is provided “for the expiration date of the current agreement.”¹⁶⁰ In other words, the Petitioner was aware of the § 7111(f)(3) requirement but chose, instead, to make an alternative argument that the term “continue” in the parties’ agreement “does not imply that the [agreement] expires annually and then automatically renews.”¹⁶¹ We further note that because the agreement originally terminated in October of 2003, and has renewed once a year, every year, since then, the Petitioner has had the opportunity to file a petition every year since 2003. And unless circumstances change (for example, if the Agency and AFGE negotiate a new agreement with a longer duration), the Petitioner will continue to have the opportunity to do so, including next year, during the statutory time frame specified in § 7111(f)(3).

V. Order

We dismiss the Petitioner’s petition.

¹⁶⁰ Application at 5.

¹⁶¹ *Id.*

Member Pizzella, concurring:

I join my colleagues and agree that the contract bar of 5 U.S.C. § 7111(f)(3) applies to decertification petitions¹ and that the Regional Director did not err by finding that the petition was filed untimely.²

I write separately, however, to highlight an important issue that is raised by the Petitioner in his application for review that is lost in the technical disposition of this case.

The Petitioner notes that many aspects of the representation procedures contained in the Federal Service Labor-Management Relations Statute (our Statute)³ are skewed heavily towards the interests of the Union at the expense of bargaining-unit employees. Specifically, the Petitioner argues that unit employees are effectively “gagged from presenting to the government their own views about collective bargaining”⁴ and “are . . . forced to associate with the Union and have it speak on their behalf.”⁵

The Petitioner’s concerns are valid. I spoke to those same concerns in *FDIC*, when I observed that bargaining-unit “employees are essentially excluded from the entire [representation] process” and, once collectively incorporated into a union, “have no option to ever opt out” short of resorting to the heavy burden of “decertification.”⁶ In that respect, I am concerned whether the Authority’s precedent properly balances our Statute’s “guarantee[] [that] federal employees [retain] the right ‘to organize, bargain collectively, and participate through labor organizations *of their own choosing*’”⁷ with the rights of federal unions that are also enumerated therein. Far too frequently, the Authority has considered only the interests of the union, or unions, without considering “the concomitant right [of federal employees] ‘*not to associate*’ and ‘*to refrain from any such activity*’ that ‘assist[s]’ a labor organization.”⁸

Because the Petitioner filed his decertification petition prematurely, however, we are unable to balance those competing interests here.

Thank you.

¹ Majority at 14-15.

² RD’s Decision at 12.

³ 5 U.S.C. §§ 7111-7112.

⁴ Petitioner’s Br. at 10.

⁵ *Id.*

⁶ 67 FLRA 430, 435 (2014) (Dissenting Opinion of Member Pizzella).

⁷ *NFFE, FD-1, IMAAW, AFL-CIO*, 67 FLRA 643, 647 (2014) (*NFFE, FD-1*) (Dissenting Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)).

⁸ *Id.* (citing *Mulhall v. Unite Here Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010) (internal citations omitted); 5 U.S.C. § 7102).

**BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE**

National Aeronautics
and Space Administration (NASA)
Goddard Space Flight Center
Wallops Island, Virginia
(Agency)

and

Ronald H. Walsh, An Individual
(Petitioner)

and

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

Case No. WA-RP-13-0052

DECISION AND ORDER DISMISSING PETITION

I. Statement of the Case

Ronald H. Walsh (Mr. Walsh or the Petitioner) is a Senior Project Manager at National Aeronautics and Space Administration (NASA), Goddard Space Flight Center, Wallops Flight Facility (WFF), Wallops Island, Virginia. He has worked as a NASA employee since December 30, 2002. On June 17, 2013, Mr. Walsh filed a petition with the Federal Labor Relations Authority (Authority) under section 7111(b) of the Federal Labor-Management Relations Statute (Statute), seeking an election to determine whether WFF employees wished to decertify the American Federation of Government Employees, AFL-CIO (AFGE or the Union), which represents a unit that includes Petitioner's position.

On August 19, 2013, AFGE informed the Regional Office of its position that Petitioner's showing of interest was invalid because the Agency had unlawfully assisted in the collection of signatures to support the showing of interest. AFGE filed an unfair labor practice charge, in Case No. WA-CA-13-0676, alleging unlawful assistance. The Region has blocked that charge pending resolution of this petition.

On August 27, 2013, AFGE informed the Regional Office that the petition was untimely under the Statute and the Authority's Regulations. Thereafter, on November 18, 2013, AFGE filed a Motion to Dismiss the petition, arguing that the Petitioner filed it while a collective bargaining agreement (CBA) between AFGE and Agency was in effect, and that the filing was outside

the 45-day open period described in section 7111(f)(3)(B) of the Statute. Specifically, AFGE asserts that the CBA expired on October 23, 2013, that the 105th day before expiration was July 10, 2013, the 60th day before expiration was August 26, 2013, and that the petition, filed on June 17, 2013, outside that window, was therefore untimely.

On November 18, 2013, the Petitioner filed an Opposition to AFGE's Motion. The Opposition argues that the Authority has never specifically held that the window period described in section 7111(f)(3)(B) applies to decertification petitions filed by individuals. The Petitioner also asserts that the collective bargaining agreement (CBA) currently in effect, which had an initial 3 year term that expired October 23, 2003 and has rolled over for one-year terms since then, does not bar the petition; he argues that any contract bar ended on August 24, 2003, 60 days before that initial 3 year term expired, and that under Section 2422.12(e) of the Authority's Regulations, a petition filed any time after October 23, 2003 is timely. Finally, he argues that the CBA lacks clear and unambiguous effective and expiration dates as required by Section 2422.12(h) of the Regulations, and therefore that the CBA cannot bar the petition.

After having carefully considered the facts and the Parties' positions, I have decided for the following reasons to dismiss the petition.

II. Issues raised by Petition

The petition raises two issues: (1) whether the showing of interest is valid; and (2) whether the petition is timely.

III. Background and Pertinent Facts

Bargaining Unit and Collective Bargaining Agreement

On November 30, 1998, in Case No. WA-RP-08116, the Authority certified the American Federation of Government Employees, Local 2755 as the exclusive representative of the following bargaining unit:

Included:

All professional scientists, engineers and mathematicians and non-supervisory wage grade class act employees of NASA Goddard Space Flight Center, Wallops Flight Facility,

Wallops Island,
Virginia.

the NASA Administrator or his/her
designee.

Excluded:

All supervisors,
management
officials, guards, and
employees described
in 5 U.S.C.
§7112(b)(2), (3), (4),
(6) and (7).

SECTION 37.05 The waiver of any
breach or condition of this Agreement
by either party shall not constitute a
precedent in the future enforcement of
all the terms and conditions herein.

SECTION 37.06 This Agreement shall
terminate automatically effective on
any date on which it is determined that
the Union is no longer entitled to
exclusive recognition in accordance
with the provisions of 5 USC
Chapter 71.

On October 23, 2000, NASA Headquarters
approved a CBA between Goddard Space Flight Center
(GSFC) and AFGE, Local 2755, AFL-CIO covering
WFF employees. That date, October 23, 2000, appears
on the CBA's cover and on its signature page. Article 37
of the CBA provided as follows:

SECTION 37.01 This Agreement shall
continue in full force and effect *for
three (3) years from the date of
approval by the NASA Administrator or
his/her designee* and thereafter shall
continue in effect from year to year
unless amended, modified or
terminated in accordance with this
Article. (emphasis added)

SECTION 37.02 Either party may give
written notice and proposed
modifications to the other not more
than ninety (90), nor less than sixty
(60) calendar days prior to the three (3)
year expiration date and each
subsequent expiration date. The
Agreement will remain in full force and
effect until modifications are agreed
upon and approved by the NASA
Administrator or his/her designee.

SECTION 37.03 This Agreement may
be reopened for amendment or change
at any time by mutual agreement of the
Union and Management.

SECTION 37.04 No agreement,
alteration, understanding, variation,
waiver, or modification of any terms or
conditions contained herein shall be
made by any employee or group of
employees with Management, and in no
case shall it be binding upon the parties
hereto unless such agreement is made
and executed in writing between the
parties hereto and the same has been
ratified by the Union and approved by

It is undisputed that the effective date of the initial 3 year
contract was October 23, 2000, the date NASA
Headquarters approved it, and the date that appears on its
signature page and its cover. Furthermore, Section 37.02
provided for automatic renewal for one year, both at the
end of the initial 3 year term, i.e. October 23, 2003, and
thereafter at the end of each one year renewal, unless the
parties amended, modified or terminated it.

Subsequent to October 23, 2000, the Parties
continued to follow the CBA, and negotiated subsequent
memoranda of understanding: e.g. a February 7, 2008
MOU on Homeland Security Presidential Directive 12
concerning Personal Identification Verification (PIV)
cards; a February 14, 2008 MOU for ground rules for
negotiations between GSFC and AFGE, Local 2755
applicable to each time the Union requested bargaining
under the agreement and under the Statute; and a June 30,
2008 MOU which incorporated language replacing
Article 20, regarding Performance Appraisals.

On December 27, 2008, in
Case No. WA-CA-RP-08-0040, the Authority amended
the certification granted to AFGE, Local 2755, AFL-CIO
to change the Union's designation to the
American Federation of Government Employees,
AFL-CIO. The Authority certified the following
bargaining unit:

Included: All professional scientists,
engineers and mathematicians and
non-supervisory wage grade and class
act employees of NASA Goddard
Space Flight Center, Wallops Flight
Facility, Wallops Island, Virginia.

Excluded: All supervisors, management
officials, guards, and employees
defined in 5 U.S.C. § 7112 (b)(2), (3),
(4), (6), and (7).

On February 3, 2009, AFGE designated AFGE, Local 1923 to represent employees in this bargaining unit. Local 1923 and the Agency continued to follow the October 2000 collective bargaining agreement and negotiated subsequent memoranda of understanding: e.g. a February 25, 2009 MOU on the implementation of a promotion process; a June 25, 2009 MOU on Closed Circuit Television; a June 9, 2010 MOU on a Lab Management Program; a March 29, 2012 MOU on a Traffic Management Policy; and a September 20, 2012 MOU on a Non-Competitive Promotion Process.

Thereafter, the Union and GSFC have continued to follow the October 2000 CBA and the subsequently negotiated MOUs.

Petitioner's Showing of Interest in Support of the Petition

Pursuant to 5 CFR Section 2422.10, AFGE challenged the validity of the Petitioner's showing of interest because the Petitioner collected the showing of interest during his and the signatory employees' work time. AFGE also appears to allege that the showing is invalid because the Petitioner violated the Agency's computer use policy by using Agency computers to solicit signatures. The Region's investigation into the showing of interest disclosed the following:

Sometime in May or June 2013, Mr. Walsh made a FOIA request, seeking the names of bargaining unit employees at WFF. Management provided that information. The investigation further disclosed that the Agency was aware of Mr. Walsh's efforts to decertify the Union and informed him that it could not assist him in the decertification process. Upon receiving the information in response to his FOIA request, Mr. Walsh contacted the Authority and learned that he needed a 30% showing of interest to file a petition for a decertification election.

On Sunday, June 9, 2013, Mr. Walsh filled out the FLRA petition form on his home computer and printed it out. He also printed 147 individual pages (the number of employees in the bargaining unit), each displaying an employee's name, and each bearing the statement that the person signing was interested in having the FLRA conduct an election to determine if employees no longer wished to be represented by the Union. The text was the same on all the pages. Each page had a signature line along with the printed name of the employee.

On Monday, June 10, 2013 at a roughly 12:00 p.m., Mr. Walsh began asking his co-workers to sign the pages. He did not record the times of his contacts with co-workers. He asked each employee to sign and date his or her page. Mr. Walsh canvassed the

buildings at WFF, and spoke with people he knew. Some co-workers said "Yes" on the spot, and signed. Some said, "No, I really like the Union." Some wanted to think about it before signing. A significant number wanted to sign immediately, in Mr. Walsh's presence. He also produced a "FAQ" sheet at home, and distributed it at WFF along with the signature pages.

Mr. Walsh collected signatures primarily on Monday, Tuesday and Wednesday, June 10-12, 2013, and a few on Thursday, June 13, 2013. According to Mr. Walsh, he spent an hour or so, off and on, collecting signatures, and performed his regular duties at other times. Two other employees assisted him in gathering signatures. He acknowledges that he contacted employees during his and their work hours.

Ultimately, Mr. Walsh collected 53 signatures in three and a half days. On Thursday, June 13, 2013, he filed the petition with the Washington Regional Office via certified mail.

During the investigation of the petition, and to support its claim that the showing of interest was invalid, AFGE submitted documentation of the Agency's computer use policy, and copies of mass emails Mr. Walsh sent to bargaining unit employees on July 26, July 30, August 7, and August 18, 2013, after he filed the petition.

The investigation disclosed that, during the June 10-13, 2013 period he was gathering signatures, Mr. Walsh's use of Agency email was minimal. He did not send out a mass email during that period. He followed up with a brief email to a few individuals who were not at their desks when he stopped by.

The investigation further disclosed that after Mr. Walsh filed the petition, he and AFGE Local 1923 Vice President Ben Robbins engaged in mass emails to bargaining unit employees about the petition, and that they sent those emails during work hours.

IV. Analysis and Conclusions

Showing of Interest

The Authority disallows a showing of interest only where doing so is necessary to prevent abuse of the election process and to protect the statutory right of employees to choose their own representative. *See Fort Bliss, 55 FLRA 940, 943 (1999); 5 U.S.C. § 7102(2)*. Before dismissing a petition supported by a showing of interest, the Authority requires evidence that improper conduct affected the validity of the showing of interest. *Fort Bliss, 55 FLRA 940*.

The investigation here did not disclose any improper conduct on the Agency's part. There was no evidence that the Agency supported or encouraged Mr. Walsh's efforts. To the contrary, management specifically informed Mr. Walsh that it could not assist him in filing a petition for a decertification election. Under *Fort Bliss*, furthermore, the existence of a question as to whether Mr. Walsh violated a computer use policy does not invalidate the showing of interest. Nor does the question of whether he properly collected signatures during work time. There is no evidence that any of the signatures was invalid or fraudulent or obtained under duress or coercion. For that reason, I have determined that the showing of interest was valid.

Timeliness

Notwithstanding the validity of the showing of interest, I find, for the reasons explained below, that the petition was untimely.

AFGE contends the petition, filed June 17, 2013, was untimely under section 7111(f)(3)(B) of the Statute because the CBA barred a petition filed outside the window between 105 days and 60 days prior to October 23, 2013, the date of expiration of the CBA's most recent one-year term.

Mr. Walsh contends that section 2422.12(e) of the Authority's regulations applies. That section provides that where a contract term is for more than 3 years, a petition is timely if filed no more than 105 days and no fewer than 60 days before the expiration of the *initial* 3 year period or at any time after the expiration of the initial 3 year period. He argues that beginning on August 24, 2003, which was 60 days prior to the end of the initial three year period, the CBA no longer barred a petition. He also asserts the CBA lacks a clear and unambiguous effective date, and alleges that there is an inconsistency between Section 37.01, which provides that the CBA will continue in effect from year to year, and Section 37.02, which refers to "subsequent" expiration dates used to determine when the parties may propose modifications to the CBA.

Section 7111(f)(3)(A) provides that a petition for an election must be filed not more than 105 days and not less than 60 days before the expiration of a collective bargaining agreement. Section 2422.12(d), (e) and (h) of the Authority's Regulations, in turn, provide as follows:

(d) *Contract bar where the contract is for three (3) years or less.* Where a collective bargaining agreement is in effect covering the claimed unit and has a term of three (3) years or less from the date it became effective, a petition

seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days before the expiration of the agreement.

(e) *Contract bar where the contract is for more than three (3) years.* Where a collective bargaining agreement is in effect covering the claimed unit and has a term of more than three (3) years from the date on which it became effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days before the expiration of the initial three (3) year period, and any time after the expiration of the initial three (3) year period.

(h) *Contract requirements.* Collective bargaining agreements, including agreements that go into effect under 5 U.S.C. 7114(c) and those that automatically renew without further action by the parties, are not a bar to a petition seeking an election under this section unless a clear effective date, renewal date where applicable, duration, and termination date are ascertainable from the agreement and relevant accompanying documentation

The Authority has held that where a contract automatically renews, its effective date is the date previously set by the parties for the renewal. *Kansas Army Nat'l Guard, Topeka, Kan.*, 47 FLRA 937 (1993). Here, the CBA was effective October 23, 2000 and has renewed annually, each October 23, pursuant to Section 37.01. Notably, even following the amendment of the unit certification from AFGE, Local 2755 to AFGE, and AFGE's designation of AFGE, Local 1923, the Parties have continued to adhere to the CBA, and have negotiated memoranda of understanding that incorporate the CBA by reference.

I find that, because the CBA expires and renews each year on October 23 (absent timely notice required by section 37.2 of the CBA), *Kansas Army Nat'l Guard* applies, and Section 2422.12(d) of the Authority's Regulations, *not* Section 2422.12(e), governs a determination as to whether this petition is timely. That is, subsection (d) applies to agreements, such as the CBA here, with a term of less than three years. Accordingly, I am declining to apply subsection (e), which provides

more liberally for election petitions where the CBA term is more than three years.

I find without merit the Petitioner's argument that the CBA's effective and expiration dates are not clear and unambiguous as required by Section 2422.12(h) of the Authority's Regulations. There is no dispute that NASA Headquarters approved the initial three-year term agreement on October 23, 2000, the date that appears on the CBA's signature page. Article 37, section 37.1 clearly and unambiguously states that the CBA renews "year to year." Section 37.2 clearly states that the initial term expiration date and subsequent expiration dates of the CBA determine when the parties must notify each other of their intent to modify its terms. A common sense reading of these two sections is that the reference to "subsequent expiration dates" is to the expiration dates of the renewed one-year agreements. In other words, the expiration or termination date each year is October 23, and the effective date of the new one-year agreement is October 23, absent the parties having modified that date in a manner consistent with the requirements of section 37.2. I have considered the parties' negotiated memoranda of understanding incorporating language in the CBA. I have concluded that the October 23 expiration and renewal date is clear and unambiguous, and that the CBA meets the requirements of Section 2422.12(h) of the Regulations that such dates be ascertainable from the agreement.¹

Lastly, the Petitioner argues that the Authority has never held that the window period described in section 7111(f)(3) applies to a decertification petition filed by an individual, and that the window should not apply to his petition. The Authority has, however, applied section 7111(f)(3) to decertification petitions filed by individuals. See, for ex., *Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Texas*, 16 FLRA 281, 283 (1984); *National Park Service, Harpers Ferry, West Virginia*, 15 FLRA 786, 788-89 (1984); *Dep't of the Army, U.S. Army Concord District Recruiting Command, Concord, New Hampshire*, 14 FLRA 73, 75 (1984).

In sum, I have concluded that the petition, filed June 17, 2013, was untimely because it was filed outside the period between July 10, 2013, the 105th day prior to the CBA's clear and unambiguous October 23, 2013

expiration date, and August 26, 2013, the 60th day prior to the October 23, 2013 expiration date. For that reason, I am dismissing the petition.

IV. Order

In accordance with section 7105(e) of the Federal Service Labor-Management Relations Statute, and for the above reasons, the petition is hereby dismissed.

V. Right to File an Application for Review

Pursuant to section 2422.31 of the Authority's Rules and Regulations, a party may file an **application for review of this Decision and Order** within sixty (60) days of the date of this Decision and Order. This sixty (60) day time limit may not be extended or waived. Copies of the application for review must be served on the undersigned and on all other parties. A statement of such service must be filed with the application for review.

The application for review must be a self-contained document enabling the Authority to rule on the basis of its contents without the necessity of recourse to the record. The Authority will grant review only upon one or more of the grounds set forth in section 2422.31(c) of the Rules and Regulations. Any application filed must contain a summary of all evidence or rulings relating to the issues raised, along with supporting arguments. An application may not raise any issue or allege any facts not timely presented to the Regional Director.

The application for review must be filed with the Chief, Case Intake & Publications, Federal Labor Relations Authority, Docket Room, 1400 K Street, N.W., Suite 201, Washington, D.C. 20424 **by February 14, 2014**. Pursuant to section 2422.31(3)(f) of the Regulations, neither filing nor granting an application for review shall stay any action ordered by the Regional Director unless specifically ordered by the Authority.

Pursuant to section 2429.21(b) of the Rules and Regulations, the date of filing is the date of mailing indicated by the postmark date. If no postmark date is evident on the mailing, the application shall be presumed to have been mailed five days prior to receipt.

If a party files an application for review by personal or commercial delivery, it shall be considered filed on the date the Federal Labor Relations Authority receives it.

¹ *U.S. Dep't of Interior Redwood Nat'l Park*, 48 F.L.R.A. 666 (1993) is distinguishable. The Authority there upheld a Region's determination that the CBA did not contain a clear and unambiguous effective date because a reasonable person could have read the date, which was smudged, as either June 2 or June 12. In the instant case, no dispute exists that the Agency head approved the CBA on October 23, 2000, the date that appears on the signature page.

A party may also file an application for review using the Authority's electronic case filing system. Consult the Authority's website, <http://www.flra.gov/eFiling>. If a party files an application for review using the electronic case filing system, the Authority considers the application filed on the date the Authority receives it.

Dated this 16th of December, 2013.

Barbara Kraft, Regional Director
Washington Regional Office
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20224-0001