73 FLRA No. 104

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
BLUE RIDGE PARKWAY, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO
(Union)

and

ERIN LAMM, AN INDIVIDUAL
(Petitioner)

AT-RP-22-0007

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DECISION AND ORDER
ON REVIEW

May 22, 2023

_____

Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member
(Member Kiko concurring)

I. Statement of the Case

In the attached decision and order, Regional Director Richard S. Jones (the RD) dismissed, as untimely, the Petitioner's petition seeking to decertify the Union as the exclusive representative of a recently consolidated bargaining unit (the decertification petition). In *U.S. Department of the Interior, National Park Service, Blue Ridge Parkway, North Carolina* (*Blue Ridge*),[1] the Authority addressed the Petitioner's application for review (application) of the RD's decision and order (RD's decision). Applying § 7111(f)(4) of the Federal Service Labor-Management Relations Statute[2] (the Statute) and § 2422.12(b) of the Authority's Regulations,[3] the RD determined that the Union's certification as exclusive representative of the consolidated unit established a twelve-month bar to decertification petitions.

In *Blue Ridge*, the Authority found that the RD's decision raised an issue for which there is an absence of precedent—whether § 7111(f)(4) of the Statute or § 2422.12(b) of the Authority's Regulations bars decertification petitions filed within twelve months of a labor organization's certification as the exclusive representative of a consolidated unit (a consolidation certification), where the Authority did not conduct a secret-ballot election before issuing the consolidation certification. The Authority directed the parties – and, through the subsequent issuance of a Federal Register notice, invited interested persons – to file briefs addressing this question.

Having received and considered the briefs, we now conclude that § 7111(f)(4) of the Statute does not bar decertification petitions filed within twelve months of a consolidation certification, regardless of whether the Authority conducted an election before issuing the certification. However, after reviewing the plain wording and history of § 2422.12(b) of the Authority's Regulations, we find that § 2422.12(b) bars such petitions, even where there was no election. Because the Petitioner filed the decertification petition within twelve months of the Union's consolidation certification, we conclude that the RD did not err in dismissing the petition as untimely under § 2422.12(b).[4]

II. Background

A. The RD's decision.

On September 10, 2021, the RD granted the Union's petition to consolidate two local bargaining units, without an election, under § 7112(d) of the Statute. On the same day, the RD certified the Union as the exclusive representative of the consolidated unit. Approximately

[1] 73 FLRA 120 (2022).
[2] 5 U.S.C. § 7111(f)(4).
[3] 5 C.F.R. § 2422.12(b).
[4] On October 12, 2022, the Petitioner filed a supplemental submission requesting that the Authority permit a different-named individual to substitute as the Petitioner in this case. The Union filed a response on November 10, 2022, noting that the Petitioner failed to request leave under § 2429.26(a) of the Authority's Regulations to file this submission. *See* 5 C.F.R. § 2429.26(a) (the Authority may "grant leave to file other documents as [it] deem[s] appropriate"). On November 16, 2022, the Petitioner filed another supplemental submission in which she (1) again requested petitioner substitution, and (2) attempted to correct any procedural deficiencies in her first supplemental submission. Because we find the decertification petition is untimely under § 2422.12(b), it is unnecessary to consider the petitioner-substitution matter or address the propriety of the parties' various supplemental submissions. *See U.S. Dep't of the Navy, Trident Refit Facility, Kings Bay, Ga.*, 65 FLRA 672, 672 n.1 (2011) (finding it "unnecessary" to address supplemental submissions that pertained to untimely exceptions to an arbitration award).

three months later, on December 23, 2021, the Petitioner filed the decertification petition.[5]

After receiving the decertification petition, the RD provided both the Petitioner and the Union with an opportunity to address the applicability of: § 7111(f)(4) of the Statute; the certification bar in § 2422.12(b) of the Authority's Regulations; and the Office of the General Counsel's Representation Proceedings Case Handling Manual (RCHM).

Section 7111(f)(4) of the Statute states that

> [e]xclusive recognition shall not be accorded to a labor organization . . . if the Authority has, within the previous [twelve] . . . months, conducted a secret[-]ballot election for the unit described in any petition under this section and . . . a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.[6]

The certification bar in § 2422.12(b) of the Authority's Regulations provides that "a petition seeking an election will not be considered timely if filed within twelve . . . months after the certification of the exclusive representative of the employees in an appropriate unit."[7] RCHM 11.3 states, as relevant here, that the certification bar "includes issuance of a certification of consolidation of units."[8]

Before the RD, the Petitioner asserted that § 7111(f)(4) did not bar the decertification petition for two independent reasons: (1) § 7111(f)(4)'s plain wording bars only petitions filed by "a labor organization" seeking exclusive recognition,[9] not decertification petitions filed by an individual; and (2) there had not been an Authority-conducted secret-ballot election for the consolidated unit, as that section requires. Regarding § 2422.12(b), the Petitioner alleged that application of the certification bar in these circumstances would improperly incentivize unions to consolidate local bargaining units in order to prevent the filing of decertification petitions.

In addressing the Petitioner's § 7111(f)(4) argument, the RD relied on *National Aeronautics & Space Administration, Goddard Space Flight Center, Wallops Island, Virginia* (*Wallops Island*).[10] The RD noted that in *Wallops Island*, the Authority found that the contract bar in § 7111(f)(3) of the Statute applied to decertification petitions even though that section – like § 7111(f)(4) – refers only to petitions filed by a labor organization seeking exclusive recognition.[11] Further, the RD held that declining to apply § 7111(f)(4) to decertification petitions "would give preferential treatment" to those petitions, making it easier to decertify than to certify a union – an outcome the Authority in *Wallops Island* found would be inconsistent with the Statute.[12] For these reasons, the RD rejected the Petitioner's argument that § 7111(f)(4) "does not bar th[e decertification] petition."[13]

As for § 2422.12(b), the RD asserted that the Authority, in *Commodity Futures Trading Commission, Eastern Regional Office, New York, New York* (*CFTC*),[14] already endorsed "the general proposition in . . . RCHM [11.3] that certification bars include certifications of consolidation of units."[15] Additionally, the RD observed that § 2422.12(b) "does not state that a certification bar only attaches to a certification that resulted from an election."[16] Finally, the RD found meritless the Petitioner's policy argument that, if § 2422.12(b) applied, then unions would abuse the consolidation process in order to bar decertification petitions. In this regard, the RD determined that no such abuse could occur because employees maintained the ability to challenge a proposed consolidation by either

[5] The Petitioner filed an amended petition on January 5, 2022, in order to correct deficiencies in the original petition.
[6] 5 U.S.C. § 7111(f)(4).
[7] 5 C.F.R. § 2422.12(b).
[8] RCHM at 11-2 (Feb. 20, 2015), https://www.flra.gov/system/files/webfm/OGC/Manuals/REP%20Proceedings%20CHM.pdf. We note that, "[w]hile the [R]CHM is not a binding rule, it is publicly available guidance on how the Office of the General Counsel process representation petitions." *Commodity Futures Trading Comm'n, E. Reg'l Off., N.Y.C., N.Y.*, 70 FLRA 291, 294 (2017).
[9] 5 U.S.C. § 7111(f)(4).
[10] 67 FLRA 670 (2014) (Member Pizzella concurring).
[11] *See* 5 U.S.C. § 7111(f)(3) (providing, subject to certain exceptions, that "[*e*]*xclusive recognition shall not be accorded to a labor organization* . . . if there is then in effect a lawful written collective[-]bargaining agreement between the agency involved and an exclusive representative" (emphasis added)).
[12] RD's Decision at 3 (citing *Wallops Island*, 67 FLRA at 672-74).
[13] *Id.* at 2.
[14] 70 FLRA 291.
[15] RD's Decision at 3 (citing *CFTC*, 70 FLRA at 295).
[16] *Id.*

timely requesting a consolidation election[17] or filing a decertification petition *before* the consolidation certification.[18]

The RD concluded that the decertification petition was barred because the Petitioner filed it within twelve months of the Union's consolidation certification. Accordingly, the RD dismissed the decertification petition as untimely.

The Petitioner filed the application on May 23, 2022. The Union filed an opposition to the application on June 7, 2022.

B. The Authority's decision in *Blue Ridge*.

In *Blue Ridge*, the Authority addressed the Petitioner's contention that there is an absence of precedent surrounding the application of § 7111(f)(4) and § 2422.12(b) to decertification petitions filed within twelve months of a consolidation certification. The Union, by contrast, argued that § 2422.12(b), the RCHM, and the Authority's decision in *CFTC*, supported the RD's dismissal of the decertification petition.

The Authority in *Blue Ridge* held: there was no clear indication whether § 2422.12(b) was intended to bar a petition that would not otherwise be barred by § 7111(f)(4);[19] the RCHM, by itself, did not adequately support the RD's decision;[20] and, despite the RD stating otherwise, there was "no . . . express finding in *CFTC*" that § 2422.12(b) barred petitions filed after a consolidation certification.[21] Thus, the Authority granted the Petitioner's application in part, finding an absence of precedent.

The Authority directed the parties to file briefs addressing the following questions:

> Does § 7111(f)(4) of the Statute or § 2422.12(b) of the Authority's Regulations apply to bar decertification petitions filed within twelve months after a labor organization is certified, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d) of the Statute?
>
> In answering that question, the parties should address any pertinent considerations of: (1) statutory construction; (2) legislative and regulatory history; (3) applicable precedent, including under the National Labor Relations Act; and (4) policy.[22]

The Authority also published a notice in the Federal Register, allowing interested persons to file briefs as amicus curiae addressing the same questions.[23]

Responsive briefs were filed by: the Union; the Petitioner; the Federal Labor Relations Authority's Office of General Counsel (OGC); the National Treasury Employees Union (NTEU); and the Freedom Foundation (collectively, the briefers).

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[17] Generally speaking, when a party files a consolidation petition, the Federal Labor Relations Authority's Office of General Counsel "will direct the agency . . . to post copies of a notice to all employees in places where notices are normally posted for the employees affected by issues raised in the petition and/or distribute copies of a notice in a manner by which notices are normally distributed." 5 C.F.R. § 2422.7(a). The notice "must advise affected employees about the petition" and be "conspicuously" placed for at least ten days. *Id.* § 2422.7(a)-(b). Within the notice, employees are explicitly informed that "[t]hirty percent . . . or more of the employees in the proposed consolidated unit may request an election on the proposed consolidation prior to the Regional Director taking action on the case pursuant to § 2422.30 of the [R]egulations." RCHM 16.3(5). If employees present a timely and valid showing of interest, then an election will be held on the issue of consolidation. *See* 5 U.S.C. § 7112(d) (consolidations can occur "with or without an election"); RCHM 28.17 ("Elections to consolidate existing units: If an election is sought by thirty . . . percent of the affected employees . . . , an election is conducted or supervised by the Regional Director.").

[18] As discussed further below, in *CFTC*, the Authority held that the certification bar in § 2422.12(b) of the Regulations does not apply to petitions filed *after* a proposed consolidation but *before* the certification. *CFTC*, 70 FLRA at 295.

[19] *Blue Ridge*, 73 FLRA at 122.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Notice of Opportunity to Submit Amici Curiae Briefs in a Representation Proceeding Pending Before the Federal Labor Relations Authority, 87 Fed. Reg. 44,114 (July 25, 2022).

III. Analysis and Conclusions

A. Although § 7111(f)(4) of the Statute applies to decertification petitions as a general matter, it does not bar the decertification petition.

The Petitioner and other briefers argue that § 7111(f)(4) of the Statute does not bar decertification petitions filed within twelve months of a consolidation certification.[24] As noted above, § 7111(f)(4) provides, in pertinent part, that "[e]xclusive recognition shall not be accorded to a labor organization . . . if the Authority has, within the previous [twelve] . . . months, conducted a secret[-]ballot election for the unit described in any petition under this section."[25]

Some briefers allege that § 7111(f)(4) applies only to petitions filed by labor organizations seeking exclusive recognition.[26] As one briefer argues, because decertification petitions "do not seek exclusive recognition" – but, instead, "seek the opposite" – § 7111(f)(4) cannot bar such petitions.[27] The OGC suggests that § 7111(f)(4) applies to decertification petitions for the same reasons that the Authority applies § 7111(f)(3) to decertification petitions.[28] Like § 7111(f)(4), § 7111(f)(3) refers to "[e]xclusive recognition . . . [of] labor organization[s]," but is silent regarding petitions seeking decertification.[29]

In *Wallops Island*, the Authority considered the argument that the contract bar in § 7111(f)(3), by omitting any reference to decertification petitions, "implicitly indicated" Congress's intent to preclude applying that bar to decertification petitions.[30] After acknowledging the general presumption "that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of statutory language,[31] the Authority noted the U.S. Supreme Court's statement that "[n]ot every silence is pregnant."[32] On this point, the Authority explained that "an inference drawn from congressional silence cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent."[33]

Relying on these principles, the Authority found that applying § 7111(f)(3) to bar decertification petitions would avoid "absurd result[s]" and outcomes inconsistent with other sections of the Statute.[34] Additionally, the Authority concluded that "applying the contract bar to decertification petitions would be consistent with precedent established by the Assistant Secretary of Labor for Labor-Management Relations . . . and the Federal Labor Relations Council (the Council) . . . under the executive order" predating the Statute, "as well as private-sector precedent under the [National Labor Relations] Act."[35] From a policy perspective, the Authority determined that applying the contract bar to decertification petitions "would lend stability to collective-bargaining relations . . . while at the same time giving employees the opportunity at reasonable intervals to choose a new exclusive representative."[36] Emphasizing the importance of the Statute's labor-stability interest, the Authority found that such application would enable incumbent unions and agencies "to engage in long-range planning free from unnecessary disruption, and promote[] effective dealings and efficiency of agency operations."[37] Based on these findings, the Authority held that § 7111(f)(3) applies to decertification petitions.[38]

Subject to an exception detailed below, the Authority's rationale in *Wallops Island* for applying § 7111(f)(3) to decertification petitions applies equally to § 7111(f)(4). Although one briefer contends that *Wallops Island* was wrongly decided,[39] we see no reason to reexamine that precedent. Accordingly, for the reasons set forth in *Wallops Island*, we hold that § 7111(f)(4) applies to decertification petitions as a general matter.

More relevant to this case, however, is whether § 7111(f)(4) bars decertification petitions filed within twelve months *of a consolidation certification*. For a petition to be untimely under § 7111(f)(4), the Authority must have previously "conducted a secret[-]ballot election for the unit described in any petition *under this section*"[40]

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[24] *See, e.g.*, Pet'r's Br. at 4-7, Freedom Foundation Br. at 4-10; Union Br. at 7-9; NTEU Br. at 2-3.
[25] 5 U.S.C. § 7111(f)(4).
[26] *See, e.g.*, Union Br. at 7-8; Freedom Foundation Br. at 4-6.
[27] Freedom Foundation Br. at 6; *see also* Union Br. at 7-8 (arguing that § 7111(f) "applies only to the granting of exclusive recognition," and the Petitioner's decertification petition "does not seek to 'accord' exclusive recognition to any labor organization").
[28] OGC Br. at 3-4.
[29] 5 U.S.C. § 7111(f)(3).
[30] 67 FLRA at 672 (emphasis omitted).
[31] *Id.* (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)).
[32] *Id.* (quoting *Burns v. United States*, 501 U.S. 129, 136 (1991) (*Burns*)).
[33] *Id.* (quoting *Burns*, 501 U.S. at 136).
[34] *Id.* at 673.
[35] *Id.* at 674.
[36] *Id.* at 675 (citation omitted).
[37] *Id.* (citation omitted).
[38] *Id.* at 676.
[39] *See* Freedom Foundation Br. at 5-10 (arguing that the Authority in *Wallops Island* "failed to analyze the lead-in language of § 7111(f)" and, therefore, "the reasoning of [*Wallops Island*] sheds no light on the question presented regarding subsection (f)(4)").
[40] 5 U.S.C. § 7111(f)(4) (emphasis added).

– in other words, under § 7111. As some briefers note,[41] consolidations occur under § 7112(d) of the Statute – not § 7111 – and the Authority may approve a proposed consolidation without first holding a secret-ballot election.[42]

In *CFTC*, the Authority addressed the timeliness of an intervening union's petition to decertify a bargaining unit that, within the previous twelve months, had held a consolidation election.[43] Although the Authority had not yet issued a consolidation certification, the incumbent union asserted that the election itself rendered the intervening union's decertification petition untimely under § 7111(f)(4).[44] However, the Authority found that "the conditions necessary for § 7111[(f)(4)] to apply were not met" because the consolidation election "was not petitioned for under 'this section'—§ 7111," but "under a different section of the Statute, § 7112."[45]

Consequently, even assuming that § 7111(f)(4) could apply in the absence of an election, it bars a decertification petition only if the earlier-filed representation petition was filed under § 7111. As consolidation petitions are filed under § 7112(d), not § 7111, § 7111(f)(4) does not bar decertification petitions filed within twelve months of a consolidation certification, regardless of whether the Authority conducted an election before issuing the certification. Thus, § 7111(f)(4) does not bar the Petitioner's decertification petition, and the RD erred by concluding otherwise.[46]

B. Section 2422.12(b) of the Authority's Regulations bars the decertification petition.

Section 2422.12 establishes various bars the Authority will apply in determining whether a representation petition is timely.[47] The certification bar in subsection (b) provides that "a petition seeking an election will not be considered timely if filed within twelve . . . months after the certification of the exclusive representative of the employees in an appropriate unit."[48]

According to the Petitioner, § 2422.12(b) "merely implements" § 7111(f)(4), which—as stated above—does not apply to consolidation certifications.[49] The Petitioner contends that Congress intended to "explicitly *exclude*[] [§] 7112 from the bars" it established in § 7111, and that extending the regulatory certification bar to consolidations would violate that alleged intent.[50] Conversely, several briefers suggest that § 2422.12(b) applies to consolidations and that such an interpretation is consistent with the Statute.[51]

To determine whether a consolidation certification triggers the certification bar in § 2422.12(b), we begin by examining § 7112(d)—the statutory provision authorizing unit consolidations. Section 7112(d) states that the Authority "shall certify" a labor organization as exclusive representative of an appropriate consolidated unit.[52] Unlike § 7111, Congress did not explicitly establish any bars in § 7112(d). Although the Petitioner argues that § 7112(d)'s omission of a certification bar precludes the Authority from applying § 2422.12(b) to consolidations,[53] § 7112(d)'s statutory silence is not dispositive of § 2422.12(b)'s meaning. In fact, that silence distinguishes this case from *Eisinger v. FLRA*,[54] in which the court held that the Authority erred by interpreting a different regulatory section in a manner that contravened statutory language that was "neither silent nor ambiguous."[55]

Section 7112(d)'s plain wording neither supports nor prohibits attaching a certification bar to a consolidation certification. Thus, the question before us cannot be resolved by simply "giv[ing] effect to the unambiguously expressed intent of Congress."[56] Instead, we must consider the extent to which applying the regulatory certification bar to consolidation certifications is reasonably within the Authority's statutorily granted discretion to regulate representation proceedings.

As noted in *Wallops Island*, "the Statute expressly gives the Authority broad power to promulgate regulations in representation matters,"[57] including the power to: (1) "establish rules governing any . . . election" under § 7111 of the Statute;[58] (2) prescribe "regulations to

[41] *See, e.g.*, Pet'r's Br. at 4-6; NTEU Br. at 2-3.
[42] 5 U.S.C. § 7112(d) (permitting the Authority to consolidate two or more bargaining units, "with or without an election . . . if the Authority considers the larger unit to be appropriate").
[43] 70 FLRA at 291.
[44] *Id.* at 294-95.
[45] *Id.* at 295.
[46] RD's Decision at 2-3 (rejecting Petitioner's argument that § 7111(f)(4) did not bar the decertification petition).
[47] 5 C.F.R. § 2422.12.
[48] *Id.* § 2422.12(b).
[49] Pet'r's Br. at 8.
[50] *Id.* at 11.
[51] *See, e.g.*, Union Br. at 9-10; NTEU Br. at 3-4; OGC Br. at 4.
[52] 5 U.S.C. § 7112(d).
[53] *See* Pet'r's Br. at 11 (arguing that Congress "explicitly *excluded* [§] 7112 from . . . the [§] 7111 bars" and "[i]f Congress wanted to impose a similar bar for [§] 7112 petitions it would have done so").
[54] 218 F.3d 1097 (9th Cir. 2000).
[55] *Id.* at 1105.
[56] *Id.*
[57] 67 FLRA at 677.
[58] 5 U.S.C. § 7111(d).

carry out the provisions of [the Statute]";[59] (3) "supervise or conduct elections . . . and otherwise administer the provisions of [§] 7111 . . . relating to the according of exclusive recognition to labor organizations";[60] and (4) "take such other actions as are necessary and appropriate to effectively administer the provisions of" the Statute.[61] Further, the Supreme Court has affirmed that the Authority is "responsible for implementing the Statute through the exercise of broad adjudicatory, policymaking, and rulemaking powers."[62]

Exercising its regulatory powers, the Authority promulgated a certification bar that applies following "the certification of the exclusive representative of the employees in an appropriate unit."[63] By not distinguishing between certifications arising from § 7111 or § 7112(d) petitions, § 2422.12(b)'s plain wording supports a certification bar that encompasses *all* certifications under the Statute. The Petitioner disputes this interpretation on the basis that § 2422.12(b) "does not indicate that it applies to [§] 7112(d) unit consolidations" or reflect an "intention to create new bars not mentioned in the Statute."[64] However, § 2422's regulatory history confirms its application to consolidation certifications.

Before the Authority amended its Regulations in 1995, the Regulations expressly stated that "[w]hen there is a certification *on consolidation of units*, a petition will not be considered timely if filed within twelve (12) months after the certification . . . has been issued."[65] Although the 1995 amendment to the Regulations removed the language specific to consolidations, the Authority stated in its notice of proposed rulemaking, "There are no substantive changes [to] . . . the certification bar in [§ 2422.12] subsection (b)."[66] Further, upon finalizing the amendment, the Authority clarified that § 2422.12's "general guidance concerning timeliness . . . will apply, as appropriate, in consolidation situations."[67] Therefore, the 1995 amendment's modification of certain language did not substantively change the certification bar but, instead, reflected the Authority's intent of "streamlining the regulations and making the rules more flexible in addressing the representational concerns of agencies, labor organizations, and individuals."[68] Consistent with this regulatory history, we find that § 2422.12(b)'s reference to "certification" applies to consolidation certifications, regardless of whether the Authority conducted an election before issuing the certification.[69]

On policy grounds, the Petitioner contends that applying the certification bar to consolidation certifications conflicts with employees' statutory right to self-determination, including the right to select, or refrain from selecting, an exclusive representative.[70] Indeed, § 7112(d) "was intended to facilitate larger bargaining units, *not* to shackle employees in the selection of a bargaining representative in those larger units."[71] However, it is equally evident that the Statute – in which Congress deliberately included restrictions on the filing of election petitions – does not grant employees an unlimited right to representation elections. Rather, as one briefer states, the various bars to an election "balance[] the employees' right to vote and the parties' need for stability and repose in the labor-management relationship."[72]

Even before the Statute's enactment, the Council recognized the need to balance these competing interests in applying the Statute's predecessor, Executive Order 11,491. Reporting on the general purpose of the bars, the Council found that the "bars foster desired stability in labor-management relations in that parties to an existing bargaining relationship have a reasonable opportunity to deal with matters of mutual concern without the disruption which accompanies the resolution of a question of representation."[73] Addressing consolidations specifically, the Council concluded that "a proposed consolidation . . . should not constitute a waiver of the existing labor organization's certification and agreement bars."[74]

The Petitioner also claims that applying the certification bar to consolidations "does not further the purpose of the election bars in the Statute" because the bars were not intended to "creat[e] greater efficiencies for unions through larger bargaining units."[75] This argument

[59] *Id.* § 7134.
[60] *Id.* § 7105(a)(2)(B).
[61] *Id.* § 7105(a)(2)(I).
[62] *NFFE, Loc. 1309 v. Dep't of the Interior*, 526 U.S. 86, 88 (1999).
[63] 5 C.F.R. § 2422.12(b).
[64] Pet'r's Br. at 9.
[65] 5 C.F.R. § 2422.3(h) (1994) (emphasis added).
[66] Meaning of Terms as Used in this Subchapter; Representation Proceedings, 60 Fed. Reg. 39,878, 39,879 (August 4, 1995).
[67] Meaning of Terms as Used in this Subchapter; Representation Proceedings; Miscellaneous and General Requirements, 60 Fed. Reg. 67,288, 67,289 (Dec. 29, 1995).
[68] *Id.* at 67,288.
[69] *See NTEU*, 73 FLRA 428, 428 (2023) (Chairman Grundmann concurring) (examining "regulatory history" of an Authority Regulation in rejecting petitioner's proposed interpretation); *see also Exp.-Imp. Bank of the U.S.*, 70 FLRA 907, 907 n.2 (2018) (Member DuBester concurring) (holding that 1995 amendment's removal of other language also did not constitute a substantive change to the Regulations).
[70] Pet'r's Br. at 13-14.
[71] *CFTC*, 70 FLRA at 294 (quoting *Dep't of Transp., FAA*, 4 FLRA 722, 729 n.8 (1980)).
[72] OGC Br. at 6.
[73] U.S. Federal Labor Relations Council, *Labor-Management Relations in the Federal Service, Executive Order 11491, as Amended Feb. 6, 1975, Reports and Recommendations*, at 36 (1975).
[74] *Id.* at 36-37.
[75] Pet'r's Br. at 17.

fails to account for the Statute unambiguously favoring unit consolidation. Not only may the Authority certify a consolidation without an election, but § 7112(d) requires the Authority to certify an appropriate consolidated unit regardless of whether that unit is less appropriate than the unconsolidated units.[76] As for § 7112(d)'s legislative history, the Authority has observed that "[§] 7112(d) was intended by Congress 'to better facilitate the consolidation of small units' into more comprehensive ones."[77] In this connection, "consolidation serves a statutory interest in reducing unit fragmentation and in promoting an effective, comprehensive bargaining[-]unit structure."[78]

Looking to the private sector,[79] the National Labor Relations Board (the Board) has long recognized a one-year bar on representation elections following a certification.[80] Like the Statute, the National Labor Relations Act (NLRA) does not explicitly establish a certification bar. Yet the Board adopted a certification bar to give the certified representative "ample time for carrying out its mandate" and mitigate any "exigent pressure to produce hot-house results or be turned out."[81] The Board's reasoning derives from the NLRA's overarching objective of "industrial peace,"[82] and the corollary principle that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."[83]

The Petitioner correctly notes that the NLRA does not contain a consolidation provision comparable to § 7112(d) of the Statute.[84] This difference reflects Congress's intent, discussed above, regarding the federal sector. To the extent that private-sector precedent has any relevance to the question presented here, the Board's policy basis for applying a certification bar supports § 2422.12(b)'s application to consolidation certifications arising under the Statute. Like any other newly certified representative, a consolidated-unit representative cannot "concentrate on obtaining and fairly administering a collective-bargaining agreement" if it is "worrying about the immediate risk of decertification."[85] Similarly, without a certification bar, a consolidated-unit representative must continuously guard against the "temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees."[86]

Additionally, the Petitioner argues that applying the certification bar to consolidations would, in conjunction with other statutory bars, unreasonably delay employees seeking a representation election.[87] Once again, we note that the Statute not only allows, but expressly mandates, temporal restrictions on the right to file an election petition. Moreover, as the Petitioner acknowledges, the certification bar does not prevent employees from opposing a proposed consolidation or filing a decertification petition prior to certification.[88]

In sum, we hold that § 2422.12(b) of the Authority's Regulations applies – and has applied[89] – to petitions filed within twelve months of a consolidation certification, regardless of whether the Authority conducted an election before issuing the certification. Because the Petitioner filed the decertification petition within twelve months of the Union's consolidation certification, the RD appropriately dismissed the petition

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[76] *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 55 FLRA 359, 364 (1999) (*Air Force*) ("There is no requirement in the Statute that the consolidated unit be more appropriate than the unconsolidated units."); *see also Miss. Army Nat'l Guard, Jackson, Miss.*, 57 FLRA 337, 341 (2001) ("The Statute does not require that the proposed unit be the only appropriate unit or the most appropriate unit.").

[77] *U.S. Dep't of Transp., FAA*, 63 FLRA 356, 359 (2009) (*FAA*) (citing *NLRB, Wash., D.C.*, 63 FLRA 47, 50 (2008) (quoting 124 Cong. Rec. H9364 (daily ed. Sept. 13, 1978) (statement of Rep. Udall))).

[78] *FAA*, 63 FLRA at 359; *Air Force*, 55 FLRA at 361.

[79] *See U.S. Army Armament Rsch. Dev. & Eng'g Ctr., Picatinny Arsenal, N.J.*, 52 FLRA 527, 533 (1996) (noting that "where there are comparable provisions under the Statute and the [NLRA] . . . decisions of the Board and the courts interpreting the NLRA have a high degree of relevance to similar circumstances under the Statute" (quoting *U.S. Geological Surv. & Caribbean Dist. Off., San Juan, P.R.*, 50 FLRA 548, 550 (1995) (internal quotation marks omitted))).

[80] *See In re Vincent Indus. Plastics, Inc.*, 336 NLRB 697, 697 (2001) ("The Board has long recognized that a newly[-]certified union needs a year to establish itself in the eyes of the employees it represents."); *Kirkhill Rubber Co.*, 306 NLRB 559, 559 (1992) ("The Board dismisses representation petitions filed during the certification year . . . to provide stability and peace in the bargaining process by affording the employer and the union a full opportunity to achieve a collective-bargaining agreement.").

[81] *Brooks v. NLRB*, 348 U.S. 96, 100 (1954).

[82] *Id.* at 103.

[83] *In re Lamons Gasket Co.*, 357 NLRB 739, 744 (2011) (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944)).

[84] Pet'r's Br. at 21.

[85] *Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 79 (D.C. Cir. 2018) (quoting *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996)).

[86] *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987).

[87] Pet'r's Br. at 18-19.

[88] *Id.* at 19 (recognizing that employees can request a "consolidation election after the union petition[s] for consolidation" and "seek another election under [§] 7111 to decertify the union"); *see* notes 17 & 18 above.

[89] *See* 5 C.F.R. § 2422.3(h) (1994).

under § 2422.12(b). Therefore, we now consider the Petitioner's arguments that the Authority found "premature" to address in *Blue Ridge*.[90]

C. The Petitioner's remaining arguments are meritless.

The Petitioner contends that the RD failed to apply established law and that established law warrants reconsideration of the RD's decision.[91]

The Petitioner asserts that in *CFTC* the Authority held that "the certification bar . . . does *not* apply to consolidation certifications," and, thus, the RD's decision conflicts with *CFTC*.[92] In *CFTC*, the Authority stated that § 2422.12(b) bars only petitions that are filed "*after* . . . certification," and found that regulation inapplicable because the union filed its petition "*before* the consolidation certification was issued."[93] As the Petitioner's decertification petition was filed *after* the consolidation certification issued in this case, *CFTC* is not controlling here and provides no basis for finding the RD failed to apply established law.

To the extent the Petitioner alleges that the RD erroneously relied on § 7111(f) or RCHM 11.3,[94] the RD's application of § 2422.12(b) sufficiently supports the dismissal of the decertification petition as untimely. Thus, the RD's reliance on § 7111(f) provides no basis for setting aside his decision.[95] With regard to the RD's reliance on RCHM 11.3, as noted above, that provision pertinently states that the certification bar "includes issuance of a certification of consolidation of units."[96] As that provision is wholly consistent with our holding here, the RD's reliance on it does not demonstrate that he failed to apply established law. In addition, for the reasons discussed above, we reject the Petitioner's allegation that the RD's decision conflicts with the Authority's decision in *Wallops Island*.[97]

Finally, the Petitioner argues that if established law supports applying the certification bar to the decertification petition, then "the Authority should overrule its decisions creating such a bar after a consolidation of units without an election."[98] This argument relies on policy arguments that we have considered, and rejected, above.[99] Therefore, this argument fails to establish that the RD's decision is deficient.

IV. Order

We dismiss the Petitioner's decertification petition.

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[90] 73 FLRA at 123 (noting existence of Petitioner's additional arguments, but finding consideration of the arguments "premature" at that time).
[91] Application Br. at 4, 9-10.
[92] *Id.* at 5 (citing *CFTC*, 70 FLRA at 295).
[93] 70 FLRA at 295.
[94] Application Br. at 7-9.
[95] *See U.S. Dep't of the Air Force, Air Force Materiel Command*, 67 FLRA 117, 120-21 (2013) (denying challenge to Regional Director's decision where alleged legal error, even if proven, provided "no basis for finding that [the Regional Director] would have reached a different conclusion").
[96] RCHM at 11.3.
[97] Application Br. at 6-7 (citing *Wallops Island*, 67 FLRA at 670).
[98] *Id.* at 10.
[99] *Id.* at 12 (arguing that "[n]one of the reasons why Congress created a year-long certification bar apply to a consolidation"), 12-15 (alleging that applying a one-year certification bar to consolidation certifications is inconsistent with private-sector precedent under the Act), 15 (arguing that "an internal union consolidation conducted without an Authority-supervised election" cannot subvert the employee's right to decertify their exclusive representative).

Member Kiko, concurring:

I agree with the majority's decision that 5 C.F.R. § 2422.12(b) bars decertification petitions filed within twelve months of a consolidation certification.[1] I write separately only to reiterate my concern that, in administering the Federal Service Labor-Management Relations Statute (the Statute) and the Authority's Regulations, the Authority must take care to balance unions' institutional interests with employees' right to self-determination. After all, employees' statutory right "to form, join, or assist any labor organization" includes the concomitant right *not* to associate and to "*refrain* from any such activity."[2]

But in order to exercise that right to decertify a union, employees must satisfy a multitude of procedural requirements that do not apply to similar union actions when it decides to no longer represent employees. To initiate a decertification petition, an employee must file a petition that has thirty-percent approval from the bargaining unit,[3] and the petition itself must comply with several time bars. Collectively, these bars prevent employees from filing such decertification election petitions: within twelve months of an election;[4] within twelve months of a certification;[5] during agency-head review;[6] more than 105 days before an effective agreement expires;[7] or within sixty days of an effective agreement's expiration.[8] The Regulations refer to these bars, respectively, as the "[e]lection bar";[9] the "[c]ertification bar";[10] the "[b]ar during . . . agency[-]head review";[11] and the "[c]ontract bar," which has different standards depending on whether "the contract is for three . . . years or less"[12] or "is for more than three . . . years."[13]

Further, if an employee withdraws an election petition, or a Regional Director dismisses the petition, "less than sixty . . . days before" an existing agreement expires or "any time after the agreement expires," then the employee is barred from filing another petition for ninety days beginning on either: (1) the date on which the Regional Director approves the withdrawal; (2) the date on which the Regional Director dismisses the petition when the Authority does not receive an application for review; or (3) the date on which the Authority rules on an application for review.[14]

These bars are anything but straightforward. As this case and several others demonstrate, even the Authority has had difficulty determining whether certain bars apply to a particular petition.[15]

Even assuming employees succeed in navigating around the various bars, they are likely to find that they have, at most, forty-five days every three years during which to file an election petition.[16] This filing period becomes even more elusive when a union consolidates bargaining units and subsequently bargains a new agreement.

Contrast that complicated maze of procedures with a union's unilateral right to disclaim interest in a bargaining unit at any time – without explanation, without employee input, and without time bars.[17] It is "plainly inequitable" that the Authority's representation procedures endorse such an unrestricted union disclaimer right while subjecting employee decertification petitions

[1] Although I continue to believe that the Authority's representation processes deserve further scrutiny, *see, e.g.*, *U.S. DHS, ICE*, 73 FLRA 299, 303-05 (2022) (*ICE*) (Dissenting Opinion of Member Kiko), § 2422.12(b), as currently written, "is reasonably within the Authority's statutorily granted discretion to regulate representation proceedings." Majority at 9.

[2] 5 U.S.C. § 7102 (emphasis added); *see FDIC*, 67 FLRA 430, 433 (2014) (Dissenting Opinion of Member Pizzella) (citing *Mulhall v. Unite Here Loc. 355*, 618 F.3d 1279, 1287 (11th Cir. 2010); *SEIU, AFL-CIO, Loc. 556*, 1 FLRA 563 (1979)); *see also Nat'l Aeronautics & Space Admin., Goddard Space Flight Ctr., Wallops Island, Va.*, 67 FLRA 670, 681 (2014) (*Wallops Island*) (Concurring Opinion of Member Pizzella).

[3] 5 U.S.C. § 7111(b)(1)(B).

[4] *Id.* § 7111(f)(4); 5 C.F.R. § 2422.12(a).

[5] 5 C.F.R. § 2422.12(b).

[6] *Id.* § 2422.12(c).

[7] 5 U.S.C. § 7111(f)(3)(B); 5 C.F.R. § 2422.12(d)-(e).

[8] 5 U.S.C. § 7111(f)(3)(B); 5 C.F.R. § 2422.12(d)-(e).

[9] 5 C.F.R. § 2422.12(a).

[10] *Id.* § 2422.12(b).

[11] *Id.* § 2422.12(c).

[12] *Id.* § 2422.12(d).

[13] *Id.* § 2422.12(e).

[14] *Id.* § 2422.14(a)(1).

[15] *U.S. Dep't of the Interior, Nat'l Park Serv., Blue Ridge Parkway, N.C.*, 73 FLRA 120, 122 (2022) (finding absence of precedent as to whether Statute or Regulations bar decertification petitions filed within one year of consolidation certification); *see also Nat'l Aeronautics & Space Admin., Goddard Space Flight Ctr., Wallops Island, Va.*, 67 FLRA 258, 260 (2014) (Member DuBester concurring) (finding absence of precedent on question of whether contract bar applies to decertification petitions).

[16] *See* 5 U.S.C. § 7111(f)(3) (where collective-bargaining agreement has been in effect for three years or less, petition is barred unless petition is filed "not more than 105 days and not less than [sixty] days before the expiration date" of agreement).

[17] *See ICE*, 73 FLRA at 303-04 (Dissenting Opinion of Member Kiko).

to a "significantly more arduous" and, frankly, confusing path.[18]

The Statute and Regulations cannot "safeguard[] the public interest"[19] if the Authority enforces them in a manner that restrains employee self-determination through fleeting and unclear windows of time.[20] I remain committed to rectifying this imbalance through all available means, including proposing regulatory changes. In particular, I invite the Chairman to join me in addressing a regulatory discrepancy that we agreed deserved further attention.[21]

[18] *Id.* at 303; *see also Wallops Island*, 67 FLRA at 681 (Concurring Opinion of Member Pizzella) (expressing concern as to whether the Authority "properly balances" rights of federal unions with rights of federal employees).

[19] 5 U.S.C. § 7101(a)(1)(A).

[20] *See OPM*, 71 FLRA 571, 573 (2020) (Member Abbott concurring; Member DuBester dissenting) (initiating rulemaking where Authority's existing dues-revocation policy failed to strike "a reasonable balance" between "employees' rights and freedoms" and "unions' institutional interests"); *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 70 FLRA 995, 999 (2018) (Member DuBester dissenting) (cautioning that interest in preventing unit fragmentation should not outweigh "employee interests, concerns, and self-determination"); *Exp.-Imp. Bank of the U.S.*, 70 FLRA 907, 909 (2018) (Member DuBester concurring) ("Employee self-determination is an essential tenet of our Statute." (internal quotation mark omitted)); *U.S. Dep't of the Interior, Bureau of Reclamation, Columbia-Cascades Area Off., Yakima, Wash.*, 65 FLRA 491, 493 (2011) (applying the Authority's accretion doctrine "narrowly" because "accretion precludes employee self-determination); *see also* Miscellaneous and General Requirements, 85 Fed. Reg. 41,169, 41,171 (July 9, 2020) (adopting regulation to reduce "employee confusion or frustration" when calculating anniversary dates and window periods for dues-assignment revocation).

[21] *ICE*, 73 FLRA at 302 (Concurring Opinion of then-Member Grundmann) (recognizing that "if the Authority's current Regulations and practices governing disclaimer proceedings do not permit *anyone* – including the *President* of the Council that has been representing employees – to represent those employees' interests to the extent they diverge from [the union's], then it makes [sense to] question whether those Regulations and practices should be reconsidered"); *id.* at 305 (Dissenting Opinion of Member Kiko) (asserting that "the Authority's Regulations must be amended to enshrine an affected employee's right to participate in disclaimer proceedings").

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
ATLANTA REGION

_____

NATIONAL PARK SERVICE
BLUE RIDGE PARKWAY, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO
(Union)

And

ERIN LAMM, an individual
(Petitioner)

_____

AT-RP-22-0007

_____

DECISION AND ORDER

I. Statement of the Case

On December 23, 2021, Erin Lamm (the Petitioner) filed a petition seeking an election to decertify the American Federation of Government Employees, AFL-CIO (the Union), as the exclusive representative of employees of the National Park Service, Blue Ridge Parkway, North Carolina (the Agency). On January 5, 2022, the Petitioner filed an amended petition.

On January 14, 2022, I issued an Order to Show Cause giving the parties an opportunity to provide evidence or analysis to address my conclusion that the petition should be dismissed because it was filed less than twelve months after the unit was certified. The Petitioner and the Union submitted responses.[1] For the reasons stated below, I am dismissing this petition because it was filed less than twelve months after the unit was certified.

II. Findings

On September 10, 2021, the Union was certified, without an election, as the exclusive representative of the following consolidated unit of employees (Case No. AT-RP-21-0021):

> **Included**: All professional and nonprofessional employees of the Blue Ridge Parkway, National Park Service.
>
> **Excluded**: Management officials, supervisors, and employees described by 5 U.S.C. § 7112(b)(2), (3), (4), (6) and (7).

III. Analysis and Conclusions

Petitions seeking an election must be dismissed if they are filed less than twelve months after the issuance of a certification. This is known as the certification bar. According to 5 U.S.C. § 7111(f):

> Exclusive recognition shall not be accorded to a labor organization--
>
> (4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

Furthermore, 5 C.F.R. § 2422.12(b) states that:

> Where there is a certified exclusive representative of employees, a petition seeking an election will not be considered timely if filed within twelve (12) months after the certification of the exclusive representative of the employees in an appropriate unit. If a collective bargaining agreement covering the claimed unit is pending agency head review under 5 U.S.C. 7114(c) or is in effect, paragraphs (c), (d), or (e) of this section apply.

A certification bar arises from a certification of consolidation of units. *Commodity Futures Trading Comm'n, E. Reg'l Office, N.Y.C., N.Y.*, 70 FLRA 291, 295 (2017) (*Commodity Futures*). The Office of the General Counsel, Representation Case Handling Manual (RCHM),

[1] On February 8, 2022, the Union filed a supplemental response asserting that the petition should be dismissed because the petition is barred by an existing collective bargaining agreement. The Petitioner filed a motion to strike the supplemental response. I do not need to address the contract bar argument because the petition is being dismissed based on the certification bar.

at 11.3 states that a certification bar attaches to a "certification of consolidation of unit". Also, RCHM 23.10.1.4 provides that a "certification on consolidation of units acts as a bar to a petition seeking an election for the same unit or any subdivision thereof for a twelve (12) month period after the certification on consolidation of units has been issued".

The Petitioner asserts that, based on the first sentence of 5 U.S.C. § 7111(f), the certification bar only blocks petitions filed by a labor organization seeking to be accorded exclusive recognition. Therefore, reasons the Petitioner, it does not bar this petition since the Petitioner is not seeking to be accorded exclusive recognition. However, in *Nat'l Aeronautics and Space Admin., Goddard Space Flt. Ctr., Wallops Island, Va.*, 67 FLRA 670 (2014), the Authority rejected this same argument and held that an existing contract barred a decertification petition because, in part, it would give preferential treatment to decertification petitions and allow a labor organization to circumvent the bar by filing a decertification petition and then petitioning to intervene. 67 FLRA at 672-74.[2]

Next, the Petitioner asserts that the certification bar does not attach to the September 10, 2021 certification since it was not issued following an *election*. In support of this contention, the Petitioner cites *Commodity Futures* because in that case an election was held. However, there is an important distinction – in *Commodity Futures*, the election petition was filed *before* a certification was issued. Thus, the certification bar did not apply in that case. Indeed, the Authority specifically noted the general proposition in section 11.3 of the RCHM that certification bars include certifications of consolidation of units. 70 FLRA at 295. Moreover, 5 CFR § 2422.12(b) does not state that a certification bar only attaches to a certification that resulted from an election.

Finally, notwithstanding the fact that 5 CFR § 2422.12(b) does not limit a certification bar to certifications that resulted from an election, the Petitioner speculates that, if certification bar applies, unions will consolidate with smaller units to protect themselves from potential decertification petitions. However, this assumes that the union represents another unit and that consolidation of those units will meet the criteria to be an appropriate unit. 5 U.S.C. § 7112(a) & (d). Moreover, there is already a mechanism to prevent such abuse. Employees are notified when a petition seeking consolidation is filed and any employee may challenge the consolidation by submitting a 30% showing of interest before the certification is issued. 5 CFR § 2422.7; RCHM 18.1.2. The Petitioner, in this case, failed to utilize that mechanism before the certification was issued.

IV. Order

Therefore, it is ORDERED that the petition in Case No. AT-RP-22-0007 be and is hereby dismissed.

V. Right to Seek Review

Under section 7105(f) of the Statute and section 2422.31(a) of the Authority's Regulations, a party may file an application for review with the Authority within sixty days of this Decision. The application for review must be filed with the Authority by **May 23, 2022**, and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, NW, Washington, DC 20424–0001. The parties are encouraged to file an application for review electronically through the Authority's website, www.flra.gov.[3]

Dated: March 24, 2022

Richard S. Jones
Regional Director, Atlanta Region
Federal Labor Relations Authority

[2] Although, in *NASA*, the Authority specifically addressed contract bars, under 5 U.S.C. § 7111(f)(3), the language relied upon by the Petitioner applies to both contract bars and certification bars.

[3] To file an application for review electronically, go to the Authority's website at **www.flra.gov**, select **eFile** under the **Filing a Case** tab and follow the instructions.