73 FLRA No. 28

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

_____

ORDER GRANTING
APPLICATION FOR REVIEW

July 19, 2022

_____

Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members

I. Statement of the Case

Regional Director Richard S. Jones (the RD) found that the Petitioner untimely filed a petition seeking an election to decertify the Union (decertification petition). The RD determined that the Union's earlier certification as exclusive representative of a consolidated bargaining unit, without an election, established a twelve-month bar to such petitions under § 7111(f)(4) of the Federal Service Labor-Management Relations Statute (the Statute)[1] and § 2422.12(b) of the Authority's Regulations.[2] Because the Petitioner filed its decertification petition within twelve months of the Union's certification, the RD dismissed the petition.

In the Petitioner's application for review (application), the Petitioner argues that the RD's decision and order (RD's decision) raises an issue for which there is an absence of precedent. As the Authority has never explicitly addressed whether § 7111(f)(4) of the Statute or § 2422.12(b) of the Authority's Regulations apply to bar decertification petitions filed within twelve months of a certification, without an election, of a consolidated bargaining unit under § 7112(d) of the Statute, we find that there is an absence of precedent. Therefore, we grant review of the application, in part. In accordance with the instructions set forth below, we direct the parties to submit briefs addressing this issue, and we invite other interested persons to address this issue as well.

II. Background and RD's Decision

The Union filed a petition under § 7112(d) of the Statute to consolidate two local bargaining units: one unit of professional employees and one unit of nonprofessional employees.[3] On September 10, 2021, the RD – without holding an election – found consolidation appropriate and certified the Union as exclusive representative of the consolidated unit.

On December 23, 2021, the Petitioner filed a decertification petition challenging the Union's status as exclusive representative of the consolidated unit.[4] Subsequently, the RD issued an order directing the Petitioner to show cause why its petition – filed less than twelve months after the RD certified the Union – should not be subject to the certification bar in § 7111(f)(4) of the Statute, § 2422.12(b) of the Authority's Regulations, and the Office of the General Counsel's Representation Case Handling Manual (RCHM).[5]

Under § 7111(f)(4) of the Statute:

> Exclusive 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

[1] 5 U.S.C. § 7111(f)(4).
[2] 5 C.F.R. § 2422.12(b).
[3] *See* 5 U.S.C. § 7112(d) ("Two or more units . . . may . . . be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate.").
[4] On January 5, 2022, the Petitioner filed an amended petition to correct deficiencies in the original petition. Section 7111(b)(1)(B) of the Statute states that a person may file a petition with the Authority 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." 5 U.S.C. § 7111(b)(1)(B).
[5] The RCHM "provides guidance for the [Federal Labor Relations Authority (FLRA)] . . . when processing representation petitions filed under the Statute." RCHM at i, (Feb. 20, 2015), https://www.flra.gov/system/files/webfm/OGC/Manuals/REP%20Proceedings%20CHM.pdf.

a labor organization for certification as the unit's exclusive representative.[6]

Section 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 in § 2422.12(b) of the Authority's Regulations "includes issuance of a certification of consolidation of units."[8]

In the Petitioner's response to the show-cause order, the Petitioner asserted that § 7111(f)(4) of the Statute did not bar the decertification petition, because there had not been an Authority-conducted secret-ballot election for the consolidated unit. On policy grounds, the Petitioner argued that applying the certification bar to consolidations would improperly incentivize unions to consolidate local bargaining units in order to prevent the filing of decertification petitions.

Ultimately, the RD found that "[a] certification bar arises from a certification of consolidation of units."[9] The RD stated that in *Commodity Futures Trading Commission, Eastern Regional Office, New York, New York* (*CFTC*),[10] the Authority endorsed "the general proposition in . . . RCHM [11.3] that certification bars include certifications of consolidation of units."[11] The RD explained that the Authority in *CFTC* did not apply the certification bar, because the relevant petition was filed "*before* [the] certification . . . issued."[12] Because, here, the Petitioner filed its decertification petition *after* the consolidation certification issued to the Union, the RD determined that the certification bar applied.

Addressing whether the certification bar can be triggered in the absence of an election, the RD found that § 2422.12(b) of the Authority's Regulations "does not state that a certification bar only attaches to a certification that resulted from an election."[13] With respect to the Petitioner's policy argument, the RD stated that the Statute, by requiring that consolidations be "appropriate," prevents unions from consolidating units to suppress decertification efforts.[14] Further, the RD noted that employees "may challenge [a] consolidation by submitting a [thirty-percent] showing of interest before the certification is issued."[15] The RD emphasized that the Petitioner "failed to utilize that mechanism before the certification was issued."[16]

Based on these findings, the RD dismissed the Petitioner's decertification petition as untimely.

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

III. Analysis and Conclusion: The RD's decision raises an issue for which there is an absence of precedent.

In its application, the Petitioner asserts that there is a lack of precedent on the issue of whether the certification bar applies to decertification petitions filed after the certification of a union as exclusive representative of a consolidated unit.[17] Specifically, the Petitioner contends that the RD incorrectly "extrapolated that the Authority [in *CFTC*] would have imposed a [certification] bar had the petition . . . been filed [after] the consolidation," even though "the Authority did not make such a pronouncement."[18] The Petitioner also argues that the Authority's Regulations and the RCHM fail to provide a basis for the RD's application of the certification bar.[19]

Under § 2422.31(c)(1) of the Authority's Regulations, the Authority may grant review of an application if "[t]he decision raises an issue for which there is an absence of precedent."[20]

In *CFTC*, the incumbent union filed a petition, under § 7112(d) of the Statute, to consolidate two local units.[21] Later in the same month, an intervening union filed a petition seeking to represent one of the local units. The intervening union's petition was held in abeyance pending an election on consolidation. That election resulted in the consolidation of the two units, and the incumbent union was certified as the exclusive representative. The intervening union's petition was then taken out of abeyance, and an election was held to determine which union would represent the consolidated unit. After the intervening union received more votes than

[6] 5 U.S.C. § 7111(f)(4).
[7] 5 C.F.R. § 2422.12(b).
[8] RCHM at 11-2.
[9] RD's Decision at 2 (citing *Commodity Futures Trading Comm'n, E. Reg'l Off., N.Y.C., N.Y.*, 70 FLRA 291, 295 (2017) (*CFTC*)).
[10] 70 FLRA 291.
[11] RD's Decision at 3 (citing *CFTC*, 70 FLRA at 295).
[12] *Id.*
[13] *Id.*
[14] *Id.* (quoting 5 U.S.C. § 7112(a), (d)).
[15] *Id.*
[16] *Id.*
[17] Application Br. at 7-9; *see also id.* at 5 (arguing that § 7111(f)(4) of the Statute "does not apply a bar where . . . a union is certified through consolidation" under § 7112 of the Statute and "without an election").
[18] *Id.* at 8.
[19] *Id.* at 7-8.
[20] 5 C.F.R. § 2422.31(c)(1).
[21] *CFTC*, 70 FLRA at 291.

the incumbent union, the incumbent union filed objections to the election.

The Authority considered whether § 7111(f)(4) of the Statute or § 2422.12(b) of the Authority's Regulations barred the intervening union's petition. Based on a "plain reading" of § 7111(f)(4), the Authority found that it operates to bar a petition only when there has been, in the previous twelve months, an election that was petitioned for "under 'this section' – § 7111."[22] Although an election had taken place in *CFTC*, it resulted from the incumbent union's consolidation petition – a petition filed under § 7112. Thus, the Authority concluded that "the conditions necessary for § 7111(f)(4) to apply were not met."[23] Regarding § 2422.12(b), the Authority observed that the regulation barred only petitions filed "*after* . . . certification."[24] Because the intervening union filed its petition "*before* the consolidation certification was issued" to the incumbent union, the Authority found that § 2422.12(b) was not applicable.[25]

Here, the RD inferred from *CFTC* that § 2422.12(b) of the Authority's Regulations would bar a decertification petition filed *after* a union's certification as exclusive representative of a consolidated unit.[26] However, the Authority made no such express finding in *CFTC*. Because *CFTC* concerned different facts and legal arguments, it provides limited precedential value for resolving the issues raised in the RD's decision.[27]

In its opposition, the Union contends that § 2422.12(b) of the Authority's Regulations provides an adequate basis for the RD's decision.[28] However, the RD did not apply § 2422.12(b) independently but, rather, in conjunction with § 7111(f)(4) of the Statute. Moreover, to the extent that the meaning of the Statute and the Authority's Regulations differ as to the necessity of an election to trigger the certification bar,[29] no precedent directly addresses whether § 2422.12(b) of the Regulations can bar a petition that would not otherwise be barred by § 7111(f)(4) of the Statute.[30]

Next, the Union argues that the RCHM adequately supports the RD's decision because it provides "guidance . . . consistent with the applicable regulations and case law."[31] As discussed above, the Authority's decision in *CFTC*, the Statute, and the Authority's Regulations fail to provide clear guidance for determining whether the certification bar applies to the Petitioner's decertification petition. Further, the Authority has never explicitly addressed whether the RCHM, standing alone, can demonstrate adequate precedent for purposes of § 2422.31(c)(1) of the Authority's Regulations.[32]

Based on the above, we find that the RD's decision raises an issue for which there is an absence of precedent. Section 2422.31(g) of the Authority's Regulations provides, in relevant part, that "[if] the Authority does not rule on the issue(s) in the application for review, the Authority may, in its discretion, give the parties an opportunity to file briefs."[33] Consistent with § 2422.31(g) of the Authority's Regulations, we direct the parties to file briefs addressing the following question:

> **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**

---

[22] *Id.* at 294-95.

[23] *Id.* at 295.

[24] *Id.* (quoting 5 C.F.R. § 2422.12(b)) (internal quotation mark omitted).

[25] *Id.* The Authority also noted the RD's finding that "§ 2422.12 of the Authority's Regulations 'merely implements' § 7111(f)." *Id.* at 292 (citation omitted).

[26] RD's Decision at 3.

[27] *See Nat'l Aeronautics & Space Admin., Goddard Space Flight Ctr., Wallops Island, Va.*, 67 FLRA 258, 260 (2014) (*NASA*) (then-Member DuBester concurring) (finding absence of precedent where, in previous decisions, "the Authority presumed . . . but did not expressly find" that § 7111(f)(3) of the Statute applied to decertification petitions).

[28] Opp'n Br. at 5.

[29] *Compare* 5 U.S.C. § 7111(f)(4) ("Exclusive recognition shall not be accorded to a labor organization . . . if the Authority has, within the previous [twelve] . . . months, *conducted a secret ballot election* . . . ." (emphasis added)), *with* 5 C.F.R. § 2422.12(b) (providing that a "petition seeking an election will not be considered timely if filed within twelve . . . months after the certification of the exclusive representative"), *and* RD's Decision at 3 (finding that § 2422.12(b) of the Authority's Regulations, per its plain wording, "does not state that a certification bar only attaches to a certification that resulted from an election").

[30] *See generally Eisinger v. FLRA*, 218 F.3d 1097, 1104-05 (9th Cir. 2000) (invalidating Authority Regulation that "contravene[d] the unambiguous intent of Congress" by precluding individuals from filing clarification-of-unit petitions when the Statute unambiguously permitted individuals to file such petitions).

[31] Opp'n Br. at 6-7.

[32] *Cf. CFTC*, 70 FLRA at 294 (holding that the RCHM, in combination with relevant Authority case law, "demonstrate[d] that there [wa]s adequate precedent"). *Contra* RCHM at i (noting that the RCHM was created by the FLRA's Office of the General Counsel – not the Authority – and is "not a ruling or directive, nor is it binding").

[33] 5 C.F.R. § 2422.31(g).

considerations of: (1) statutory construction; (2) legislative and regulatory history; (3) applicable precedent, including under the National Labor Relations Act;[34] and (4) policy.

Under similar circumstances, the Authority has permitted third parties to submit briefs where an application for review presents an issue "likely to be of concern to agencies, labor organizations, and other interested persons."[35] Accordingly, the Authority will publish a Federal Register notice inviting interested persons to address the above question. Interested persons may obtain copies of the notice from the Authority's website, www.flra.gov, once the notice has been published.

The Authority will consider briefs—from both parties and other interested persons—that the Authority receives on or before **August 30, 2022.** The Authority will not grant extensions of time. The parties should submit briefs to:

Brandon Bradley
Chief, Office of Case Intake and Publication
Federal Labor Relations Authority
Docket Room, Suite 200
1400 K Street NW.
Washington, D.C. 20424-0001

We note that the Petitioner and Union raise additional arguments as to whether: (1) the RD failed to apply established law;[36] or (2) established law or policy warrants reconsideration of the RD's decision.[37] In addition, the Union argues that the Authority should remand the case to the RD if "the Authority finds a certification bar is not applicable" so that the RD may consider whether the decertification petition was "barred by an existing collective[-]bargaining agreement."[38] However, it may not be necessary to address these arguments depending on how the Authority resolves the question stated above. Accordingly, it is premature to address the parties' additional arguments at this time.[39]

IV. Order

We grant the application for review, defer action on the application's merits until a later date, and direct the parties to address the question discussed in section III above.

---

[34] *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221, 224 (2014) (noting that "[w]hen there are comparable provisions under the Statute and the [National Labor Relations Act (NLRA)], decisions of the [National Labor Relations Board] and the courts interpreting the NLRA have a high degree of relevance to similar circumstances under the Statute"); *U.S. Geological Surv., Caribbean Dist. Off., San Juan, P.R.*, 53 FLRA 1006, 1019 (1997) (concluding that § 7111(f)(4) of the Statute "is substantially similar to [§] 9(c)(3) of the NLRA").

[35] *NASA*, 67 FLRA at 260; *see, e.g.*, *90th Reg'l Support Command, Little Rock, Ark.*, 56 FLRA 1041, 1041 & n.4 (2000) (Member Wasserman concurring).

[36] Application Br. at 4-7; Opp'n Br. at 4-9.

[37] Application Br. at 9-16; Opp'n Br. at 10-16.

[38] Opp'n Br. at 16-17.

[39] *See NASA*, 67 FLRA at 261 (finding it premature to address additional arguments where the Authority granted application for review on absence-of-precedent grounds and invited briefing); *U.S. Dep't of the Interior, Bureau of Ocean Energy Mgmt. & U.S. Dep't of the Interior, Bureau of Safety & Env't Enf't, New Orleans, La.*, 67 FLRA 98, 100 (2012) (then-Member DuBester concurring) (declining to address certain issues in application for review where further proceedings could render those issues moot).