# FEDERAL LABOR RELATIONS AUTHORITY
# OFFICE OF THE GENERAL COUNSEL

# REPRESENTATION PROCEEDINGS
# CASE HANDLING MANUAL

## Foreword

The Representation Proceedings Case Handling Manual (REP Manual) provides information on the processing of representation petitions filed under the Federal Service Labor-Management Relations Statute (the Statute). The REP Manual has been prepared by the Federal Labor Relations Authority (FLRA), Office of the General Counsel (OGC) pursuant to section 7104(f) of the Statute. The REP Manual is intended to provide a resource tool for Regional Office employees when processing representation petitions. The REP Manual is divided into two binders. Binder One contains representation case processing information and Binder Two contains reference materials, forms and figures. For more information on substantive representation case law and related issues, see the Representation Case Law Guide. For more information on preparing for and conducting hearings in representation cases, see the Hearing Officer's Guide.

The REP Manual is published in a handbook style format to make it user friendly. The REP Manual will be updated annually. Since party understanding of the representation process and regulatory requirements is critical to the timely and effective processing of representation petitions by the Regional Offices, the REP Manual is available to all parties and individuals who are involved in filing and processing representation petitions. The REP Manual may be accessed from the FLRA web site, www.FLRA.gov, and is available for purchase from the Government Printing Office.

The REP Manual provides guidance for the FLRA, OGC staff when processing representation petitions filed under the Statute. The REP Manual is not intended to be a condensed version of all substantive law, nor it is intended to be a substitute for knowledge of the law. The REP Manual is not a ruling or directive, nor is it binding upon the FLRA General Counsel or the FLRA. Although the Regional Office staff refers to the REP Manual when processing cases, the REP Manual does not encompass all situations that may be encountered in processing representation petitions. Thus, responsible, professional judgment and experience are required in applying and utilizing these guidelines.

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**OTHER OFFICE OF THE GENERAL COUNSEL**
**RESOURCE MANUALS**

The **Hearing Officer's Guide** (HOG) describes techniques for conducting hearings in FLRA representation proceedings. The first part provides instructions and guidance on preparing for and conducting hearings. It includes a sample script and discusses specific procedural issues, some commonplace, others novel, that arise during hearings. The second part discusses a variety of evidentiary representation issues and employee categories. Each topic is defined and includes an outline of issues and questions to assist the Hearing Officer and the parties to develop a complete record.

The **Representation Case Law Guide** (RCL) presents a variety of relevant substantive issues that arise when processing representation petitions and unfair labor practice cases that raise representation issues. The RCL defines each topic, discusses relevant case law and sets forth an analytical framework for deciding each case consistently and properly.

The **Unfair Labor Practice Case Handling Manual** (ULPCHM) provides procedural and operational guidance to the General Counsel's staff when processing unfair labor practice charges filed pursuant to Subpart A Party 2423 of the FLRA's regulations. It is divided into 5 Parts that address various topics/issues that arise during distinct phases of the ULP process-from pre-charge through pre and post investigation. It also codifies the OGC's policies with respect to: Facilitation, Intervention, Training, and Education; Quality of Investigators; Scope of Investigations; Injunctions; Prosecutorial Discretion; Settlements; and Appeals. As appropriate, the ULPCHM references relevant case law and provides for uniformity and best practices; criteria and principles governing Regional discretion and judgment; and model and sample forms and letters.

The **Litigation Manual** (LM) provides comprehensive guidance to regional Trial Attorneys in prosecuting ULP cases. The Manual covers each aspect of the trial process-from the issuance of a complaint and notice of hearing to the Authority's decision and order. Where appropriate, it refers to OGC Policy and relevant case law, and contains many examples of litigation techniques, both in the body of the Manual (Binder I) which concerns substantive litigation guidelines, and in the Attachments section of the Manual (Binder II) which contains a compilation of forms, policies, OGC Guidances, or models relating to the subject matter covered in Binder I.

# HOW TO USE
# THE REPRESENTATION
# CASE HANDLING MANUAL

The Representation Case Handling Manual (or *CHM*) is formatted to help Regional Office personnel identify and resolve representation issues raised by a petition. The subject matter is developed much in the same manner as a petition is processed in a Regional Office: from providing prefiling assistance to filing a petition, from identifying procedural and substantive issues to investigating and resolving the underlying representation matters, and to issuing a certification or taking other final action. The *CHM* tracks, for the most part, the subject matter format in the representation regulations.

**I.** ***CHM* ORGANIZATION:** To help the user of this manual, the *CHM* consists of two parts.

**A.** **Part One** contains the following:

1. The Foreword

2. How to Use the Representation Case Handling Manual

3. A Table of Contents, located directly in front of *CHM 1.* The Table of Contents reflects the chapter heading and its corresponding page number. Page numbers reflect the chapter and page in that chapter on which the topic appears.

4. *CHM 1* through *CHM 65*

   Within the text are "notes." A "***NOTE***" refers to a Statutory requirement, or a pertinent section of the *CHM*, *Representation Case Law Guide (RCL)* or the *Hearing Officer's Guide* (*HOG)*. A "***NOTE"*** may also highlight an Office of the General Counsel (OGC) policy statement set forth in another section of the *CHM*. Significant text within the manual is also bolded. "Bullets" call attention to "examples" used to explain particular passages or peculiarities in applying the section.

5. An Index and Table of Authorities.

**B.** ***CHM 1 through CHM 65*** are organized as follows:

1. ***CHM 1*** includes a general policy statement - citing the Regional Offices' responsibility to take a proactive role in processing representation cases and helping the parties to identify and resolve issues raised by the petition. This section also: (i) describes the quality standards that all Regional Offices will follow when processing representation cases; and (ii) provides an overview of basic representation procedures.

2. ***CHM 2*** **through** ***CHM 13*** discuss initial procedures. These sections provide important information about the regulatory requirements and policies for processing a petition. This guidance is applied in later sections that discuss how to process a petition. Included are prefiling assistance, purposes and types of petitions, filing and service requirements, information on defective petitions and amending petitions.

3. ***CHM 14*** **through** ***CHM 17*** discuss initial communications with the parties. Included are notification to parties, posting and intervention requirements.

4. ***CHM 18*** **and** ***CHM 19*** discuss showing of interest requirements, challenges to the validity of the showing of interest and challenges to the status of a labor organization.

5. ***CHM 20*** **through** ***CHM 27*** describe investigating and taking action on cases. **These sections contain instructions, guidelines, outlines, and checklists for reviewing the sufficiency of petitions and identifying substantive and procedural issues. While many other sections of the *CHM* help define issues, these sections outline how the cases are processed and what actions a Regional Director may take according to the regulations.**

6. ***CHM 28*** discusses election agreements and directed elections.

7. ***CHM 29 through CHM 31*** discuss issuing a Notice of Hearing, incorporate by reference the *HOG,* and summarize posthearing procedures.

8. ***CHM 32*** **through** ***CHM 48*** discuss election procedures.

9. ***CHM 49*** **through** ***CHM 52*** discuss objections and determinative challenged ballots.

10. ***CHM 53* through *CHM 55*** discuss Regional Director Decisions and Orders and subsequent actions.

11. ***CHM 56*** discusses Certifications, Clarifications, Amendments,
Revocations and other final actions pursuant to § 2422.32.

12. ***CHM 57*** outlines procedures for processing petitions filed according to Part 2426 of the regulations.

13. ***CHM 58*** discusses advice matters.

14. ***CHM 59* through *CHM 65*** contain general policy matters.

**The *CHM* is used with the *RCL* and the *HOG*.** The *Representation Case Law Guide (RCL)* presents a variety of substantive topics that are relevant to employees of the Office of the General Counsel (OGC) who are required to process representation petitions and unfair labor practice cases that raise representation issues. The *RCL* defines each topic, discusses relevant case law and sets forth an analytical framework to apply the case law consistently and properly. The *Hearing Officer's Guide (HOG)* describes techniques for conducting hearings in FLRA representation proceedings and contains sections on evidentiary representation matters that can be useful in defining, narrowing, and resolving issues raised by the petition at any stage of a representation proceeding.

References to sections discussed in this Manual are noted as *CHM* followed by the section number (example: *CHM 3* refers to Section 3, Purposes and Types of Petitions). The *RCL* and the *HOG* are cross referenced throughout the *CHM*. References to sections discussed in the *RCL* or the *HOG* are noted as *RCL* or *HOG* followed by the pertinent section number.

C. **Part Two** consists of a Cross Reference Table, Flow Charts, Appendices, FLRA Forms and Documents, and sample Figures.

## II. COMPUTER ACCESS:

A. **OGC Access:** Part One of the *CHM* is available on each Region's servers. Part Two is currently broken into separate subdirectories on the n:\drive. The Cross Reference Table and Flow Charts are located in n:\repref; FLRA forms and documents are located in n:\forms; figures are in n:\figures and each appendix has its own file on the n:\drive.

The Table of Contents, Index, Table of Authorities and any referenced forms, documents and figures are "hypertexted" to the places marked in *CHM* text. Hypertext is a computer term that refers to a document's ability to immediately and automatically display nonsequential text when requested. The Hypertext feature allows the user to link, or connect, one section of a document to other sections of the same document or to sections of a different document. To use this feature, click on "View," then Toolbars, then click on in the box next to the Hyperlink toolbar. A hyperlink feature bar appears beneath the toolbar. Using the hyperlink bar allows you to use the hypertext feature and toggle back and forth between the original point of reference and the document or topic you seek to review. Double-clicking on the highlighted page number in the Table of Contents, Index, or Table of Authorities immediately connects you to the section, topic, or citation sought. If you wish to return to the point where the cursor was located before you performed a hypertext jump, click on

the "back" button.

Sections of the *HOG,* forms, documents and figures referenced within the *CHM* are also hyperlinked to the *HOG* (n:\homanual), forms and documents (n:\forms) and figures (n:\figures). Forms and Figures are hyperlinked in the *CHM* to the forms and figures only where they are first referenced for use. The hypertext link is highlighted in color.

**B.** **Public Access:** Members of the public may obtain a copy of the manual through the Government Printing Office on a subscription basis. The manual is also on the FLRA's Web Site at www.flra.gov. The *Representation Case Handling Manual (REP CHM)* will be updated annually.

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## POLICY AND OBJECTIVES
## CHM 1

1 **GENERAL POLICY:** The 1996 revisions to Part 2422 of the Authority's Rules and Regulations introduce one universal petition to process all representation matters arising under sections 7111, 7112 and 7115 of the Statute. Formerly, seven separate petitions were required. This single petition, FLRA Form 21, streamlines the handling of representation matters and eliminates many problems associated with processing seven separate petitions. The single petition:

a. permits the resolution of all issues raised concerning the representation of employees by labor organization(s);

b. simplifies the filing requirements;

c. avoids the procedural issues that formerly arose when the petitioner filed the wrong petition; and

d. provides a more flexible approach to resolving complicated representational matters.

The 1996 regulations also contain a substantive rule in § 2422.34 to guide the parties' conduct while the petition is processed.

**These changes require Regional Directors to take a proactive role in identifying and resolving issues raised by the petition. Under the revised regulations, issues are not only defined by the results the petitioner seeks, but also by the facts and circumstances that caused the petition to be filed.** The new regulations require petitioners to provide on the new petition form: 1) a clear and concise statement of the issues raised by the petition and 2) the results the parties seek. **They do not require the petitioner to take a particular position or to limit the scope of the petition to one unit.** Significantly, the Regions are responsible for identifying and notifying all parties affected by issues raised by the petition. The regulations also encourage the parties, before filing the petition, and when appropriate, require the parties, after filing the petition, to meet with representatives of the Regional Office to narrow and resolve issues raised in the petition. It is the General Counsel's policy that Regional Directors also take a proactive role when processing petitions filed under Part 2426 of the regulations.

To carry out their responsibilities, Regional Office personnel are prepared to: 1) identify representation issues, 2) discuss applicable case law and 3) process these cases expeditiously. Any assistance rendered by Regional

Office personnel to narrow and resolve issues is consistent with the Statutory requirements for appropriate units and unit eligibility. The Representation Case Handling Manual *(CHM),* Representation Case Law Guide *(RCL)* and the Hearing Officer's Guide *(HOG)* provide the framework for processing representation cases filed under the Statute. The *CHM* offers operational and procedural guidance to ensure consistency and uniformity among the Regional Offices, but does not substitute for professional judgement and experience. As mandated by the 1996 revisions to the regulations, the emphasis is **"an appropriate resolution"** of representation matters.

**1.1** **Quality standards in representation case processing:** Every participant in the processing of a representation petition has the right to expect that case processing procedures will meet basic standards of quality. Petitions may have different purposes, seek different results and be processed differently, but every participant has the right to expect consistent standards of quality, regardless of which Regional Office is processing the case. This subsection describes the standards to be followed by all Regional Offices when processing representation petitions.

**1.1.1** Each region is responsible for developing and implementing procedures to:

a. Ensure that representation petitions are processed in a timely and efficient manner;

b. Enable all Regional Office employees to understand the importance of maintaining a high level of quality in processing representation petitions and to understand the standards for quality in the Office of the General Counsel;

c. Identify any assistance (such as additional training) that Office of the General Counsel employees may require to meet these quality standards;

d. Assess the quality of the processing of every petition in a representation case;

e. Ensure that applicable quality standards have been met before taking any dispositive action; and

f. Provide that high levels of quality are maintained in the processing of all representation cases.

**1.1.2** Essential quality standards required in every representation case include:

**a. The purpose of the petition is properly identified and the region assists the petitioner to ensure that the petition is filed**

**consistent with the Statute and the regulations.** The region takes a proactive role in assisting parties in ensuring representation petitions are properly filed. The purpose of the petition is discussed with the petitioner and identified prior to beginning the investigation. When appropriate, the region is also available to meet with a petitioner prior to filing a petition to provide technical assistance. All parties that may be affected by or have an interest in a petition are also encouraged to meet with the region prior to filing a petition to narrow and resolve issues.

b. **The region identifies all issues including those defined by what the petitioner seeks and those defined by the facts and circumstances giving rise to the petition.** Issues are not only defined by the results that the petitioner seeks, but also by the facts and circumstances that caused the petition to be filed. The region assists the parties in exploring the totality of the facts to better understand the range of issues raised by the situation.

c. **The investigation obtains the best possible relevant evidence.** The region notifies any labor organization and agency it identifies that may be affected by issues raised in the petition and provides an opportunity for that labor organization and agency to participate in the process. All evidence, whether documentary or testimonial, may be relevant. The region obtains evidentiary information relevant to the issues raised by the petition in a manner that expedites the processing of the case. Such evidence is in the form of affidavits, documentation, position statements and/or legal arguments. The region obtains this evidence through either an investigation or a fact-finding hearing. The region informs the parties of the investigative process and its appropriateness.

d. **The case file contains all relevant evidence and information obtained during the investigation that provides a basis for the Regional Director's decision.** The case file contains all relevant documentary and testimonial evidence discovered and submitted during the investigation. The file also reflects the region's decisional process.

e. **All parties are treated fairly and equitably and the representation case handling process is explained to the parties.** The representation process is the cornerstone for establishing the collective bargaining relationship between agencies and labor organizations. The representation proceeding is a nonadversarial process. It is critical that the parties view the Regional Office as neutral and impartial and have confidence that any decision will be consistent with the requirements of the Statute.

The manner in which the case is processed is as important as the evidence it obtains. To achieve this standard, all Regional Office employees:

- conduct meetings to define, narrow and resolve issues;
- clarify, whenever appropriate, the purposes and procedures of the investigation or hearing;
- provide fair, appropriate and impartial technical assistance to all parties, as necessary;
- encourage and assist the parties in entering into resolutions that resolve the issues raised by the parties and are consistent with the Statute; and
- conform to appropriate ethical standards of behavior at all times.

f. **Representation elections are conducted in a fair and impartial manner, so that each eligible voter has an opportunity to cast a secret, uncoerced ballot.** All representation elections, whether conducted on-site or by mail, are conducted in a fair and neutral basis. The sanctity of the ballot is protected at all times and the region takes steps in preparing for and conducting the election to ensure that each eligible voter is afforded an opportunity to cast a secret, uncoerced ballot. The election process is clearly explained to the parties.

g. **Hearings are conducted in a fair and impartial manner and create a complete factual record upon which the Regional Director can make a well reasoned and supportable decision.** Representation hearings are fairly and expeditiously conducted, and

all Hearing Officer rulings are impartial. As a nonadversarial

process, the Hearing Officer ensures that all evidence relevant to the issues raised by the petition is contained in the official record of the hearing.

**h.** **Representation petitions are processed as expeditiously as possible.** Representation cases are processed as expeditiously as possible, taking into consideration the resources available to the Regional Office and the number of pending cases.

**1.2** **Overview of basic representation procedures and glossary:** Although techniques used in processing representation cases do not lend themselves to fixed rules, every Regional Office process representation petitions utilizing certain specified steps. By outlining the sequence of events common to processing representation petitions, this subsection defines terms and phrases used routinely throughout the *CHM*.

a. When a petition is received by the Regional Office, it is **docketed**. **Docketing** includes date-stamping the petition and assigning it a case number (for docketing and case tracking procedures, see *CHM 63*; for filing and service requirements, see *CHM 5 through 10*).

b. Once docketed, a petition is **checked for sufficiency** with the filing requirements set forth in the regulations [see *CHM 12 (defective petitions), 13 (requirements for amendments), 18 (showing of interest requirements) and 20 (preliminary investigative procedures)*].

c. A petition/case is **opened** when the Regional Director takes action to notify the parties of the filing of the petition in accordance with § 2422.6 and § 2422.7 (see *CHM 15 - opening procedures including identifying and notifying parties*).

d. After a case is opened, it is formally **investigated** (see *CHM 18 through 28)*. Investigating a petition includes:

(i) identifying additional parties affected by issues raised by the petition;

(ii) outlining the issues presented by the petition and identified by Regional Director following his analysis (reading) of the petition;

(iii) gathering evidence and information that is crucial to resolving the representation matters underlying the

petition;

(iv) meeting with the parties as necessary to narrow and resolve issues;

(v) conducting a hearing; and/or

(vi) making other determination(s) to assist the Regional Director in reaching a decision or taking appropriate action (see § 2422.30).

e. Regional Director takes **actions** after the investigation and/or hearing. A hearing may be required following the Region's investigation. By taking an **"action,"** the Regional Director resolves the matter in dispute and, when appropriate, directs an election or approves an election agreement, or issues a Decision and Order (see § 2422.30).

f. Subsequent activity in representation cases may include conducting **elections**, **clarifying** or **amending** units, investigating **challenged ballots** or **objections to elections,** issuing a **certification** or **revocation,** or taking any **other action** necessary to resolve the case.

# INITIAL PROCEDURES
# CHM 2 through 13

## 2 PREPETITION ASSISTANCE:

**2.1** **General**: No action with respect to any investigation concerning a representation matter may be undertaken unless an appropriate petition has been docketed in the Regional Office.

**2.2** **Prefiling correspondence:** If no petition has been filed, all incoming and outgoing correspondence relating to representation matters including memoranda and notes concerning potential petitions, are retained in a file designated as "prepetition correspondence." When a case is opened, related prepetition correspondence is removed from the prepetition file and placed in the open case file.

**2.3** **Prefiling assistance to a single party:** When approached by a person seeking guidance and information, the Authority agent (hereinafter agent) determines initially whether, based on the facts proffered, the matter is one covered by the Statute. If the matter appears to be covered by the representation provisions of the Statute, the individual is advised of the right to file a petition and the procedures for filing under the regulations.

If a labor organization seeks information about filing a petition for an election, the region discusses the basic petition-filing requirements. The agent may suggest that the labor organization may consider requesting a list of employees that the agency/activity believes are eligible for inclusion in an appropriate unit as it may be helpful to the labor organization in determining the size of the proposed unit and any required showing of interest. However, the region cannot request this information in the absence of a petition for the labor organization nor can the region force the agency or activity to provide such a list before a petition is filed. The region provides consistent advice if contacted by an agency or activity.

***NOTE: There is no distinction in the type of prefiling assistance given when there is an incumbent labor organization.***

The conversation or meeting is documented in a memorandum to the file. If the person requests additional assistance prior to the filing of the petition, see *CHM 2.4 through 2.6* for guidance.

If the matter is clearly not covered by the Statute, or is clearly untimely pursuant to 5 U.S.C. 7111, the agent informs the individual immediately. However, the individual is informed that s/he has the right to file a petition.

**2.4** **Prefiling assistance pursuant to § 2422.13(a):** Section 2422.13(a) of the regulations encourages parties affected by the representation issues that

**may** be raised in a petition to meet prior to the filing of a petition to discuss their interests and narrow the issues. If requested by **all** parties, a representative of the appropriate Regional Office **will** participate in these meetings. See also *CHM 25 - meetings to narrow and resolve issues*.

When meeting with the parties for the purposes of discussing, defining, and narrowing their interests, agents avoid rendering advisory opinions and legal advice regarding the problem or issues raised. All responses to prepetition inquiries reflect clearly that the information being provided does not obligate the Regional Director, the General Counsel or the Authority to pursue any particular action or to order any particular result. The ultimate result will depend on various factual and legal considerations raised during the investigation/hearing.

**2.5** **Technical assistance as compared with advice:** General information regarding policy and procedure for processing specific petitions may be given to an individual or party seeking assistance under this section. This includes providing citations or copies of Authority cases that may be relevant and copies of subject matter outlines that appear in the *HOG.*

**2.6** **Assistance in preparation:** Assistance may be given to the petitioner to the extent of furnishing appropriate forms and reasonable technical assistance in completing forms, as well as providing the wording on the petition form itself. The petitioner is informed of the regulation's service requirements. See § 2422.4.

## 3 PURPOSES AND TYPES OF PETITIONS:

**3.1 Overview:** Representation cases are initiated by the filing of a petition under appropriate sections of the Statute. **Petitions serve a variety of purposes:**

**3.2 To request:**

a. An election pursuant to 5 U.S.C. 7111(b)(1)(A), to determine if employees in an appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative [see § 2422.1(a)(1)(i)]; and/or

b. A determination of eligibility for dues allotment pursuant to 5 U.S.C. 7115(c), in an appropriate unit without an exclusive representative [see § 2422.1(a)(1)(ii)]); or

c. An election, pursuant to 5 U.S.C. 7111(b)(1)(B), to determine if employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative [see § 2422.1(a)(2)].

***NOTE: The Statute requires that petitions described in CHM 3.2 are accompanied by an appropriate showing of interest.***

**3.3 To clarify and/or amend, pursuant to 5 U.S.C. 7111(b)(2):**

**3.3.1 A recognition or certification then in effect:** After a labor organization has been recognized or certified as the exclusive representative in an appropriate unit, a petition may be filed requesting, for example: 1) clarification of the bargaining unit status of certain employees/positions; and/or 2) amendment of the recognition or certification to conform to technical or nominal changes which have occurred that affected the original designation or identity of either party (such as a change in the name of the exclusive representative, a change in the name or location of the agency or activity, or a change in the title of the employees); [see § 2422.1(b)(1)] **and/or**

**3.3.2 Any other matter relating to representation:** Examples include:

a. questions relating to the continued appropriateness of an existing unit(s) due to a substantial change in the character and scope of the unit(s), (i.e. changes in operations due to a reorganization, realignment or merger); or

b. questions relating to the majority status of the currently recognized or certified labor organization. [see § 2422.1(b)(2)]

**3.4 To consolidate** pursuant to 5 U.S.C. 7112(d), two or more units, with or without an election, in an agency and for which a labor organization is the exclusive representative [see § 2422.1(c)].

**3.5 To grant:**

**3.5.1** **National consultation rights**, pursuant to 5 U.S.C. 7113(a), to a labor organization which is the exclusive representative of a substantial number of employees of the agency (see §2426.1); or

**3.5.2** **Consultation rights**, pursuant to 5 U.S.C. 7117(d), to a labor organization which is the exclusive representative of a substantial number of employees with respect to any government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment (see § 2426.11).

***NOTE: Section 57 of this manual concerns petitions seeking national consultation rights and consultation rights on government-wide rules and regulations filed under Part 2426 of the regulations.***

**3.6** **Petitions raising claims pursuant to 5 U.S.C. 7111(f)(1):** Petitions raising claims pursuant to 5 U.S.C. 7111(f)(1) may be filed and addressed by the Authority even though the regulations do not provide for such a petition. Section 7111(f)(1) states that:

> (f) Exclusive recognition shall not be accorded to a labor organization–
>
> > (1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

Such petitions seek to revoke the certification of an incumbent exclusive representative or claim that a labor organization should not be accorded exclusive recognition in an election proceeding. See *New York National Guard (NYNG)*, 53 FLRA 111 (1997) and *U.S. Information Agency (USIA), Washington, DC*, 53 FLRA 999 (1997). These petitions are based on two tenets: 1) only the Authority has jurisdiction to decide issues relating to the granting of exclusive recognition to labor organizations representing employees in the Federal sector; and 2) freedom from corrupt and anti-democratic influences is a requirement that is be met before the Authority can certify a labor organization as an exclusive representative.

**3.7** **Petitions with multiple purposes or that affect more than one unit:** Note that in accordance with § 2422.1, a petition may serve more than one purpose or affect more than one unit. **Regional Offices review petitions carefully to ensure that the issues raised in the petition are consistent with the Statute.**

**3.7.1** An example of a petition with multiple purposes that is filed consistent with the Statute:

- a petition may be filed for an election to determine the exclusive representative in an appropriate unit as well as for a determination of eligibility for dues allotment, provided it meets all of the criteria established in

the Statute (for instance, the unit does not have an exclusive representative).

**3.7.2** **Reorganizations** may create more difficult questions. When parties have an established bargaining relationship, they have a stake in what happens to the employees they represent when the employees are affected by an agency reorganization or realignment of operations. These parties may file a petition: 1) to clarify or amend a certification in effect or 2) to clarify a matter relating to the representation of employees who comprise any unit(s) that is (are) affected by a reorganization. Some of the employees remain at the agency; while others are transferred to another agency(ies). Normally, petitions to clarify or amend existing recognitions or certifications focus on the status of employees who remain with the existing employer or who are transferred to a single employer. However, a labor organization could file a single petition to resolve questions relating to the status of all its unit members, whether they remained with the employing agency or were acquired by another agency(ies). When the regions assist parties involved in major reorganizations in the filing of petitions, regions may suggest, but cannot require, that the parties confine the issues to a single employer. In that way, the petitions do not involve wholesale clarifications or amendments involving multiple employers.

Examples of petitions with multiple purposes:

- As a result of an agency-wide reorganization, a petition is filed by a newly created or established agency seeking to clarify a matter relating to the representation of any units affected by the reorganization; i.e., any unit transferred to or created by the new entity. This single petition raises a variety of issues relating to representation, including defining a new unit(s), finding successorship, or accretion. Although the appropriateness of the units and the certifications are unclear with respect to each unit transferred to the new entity, the distinguishing factor is that there is a single employer. *See Naval Facilities Engineering Service Center, Port Hueneme, California,* 50 FLRA 363 (1995) and *Navy Public Works Center,* 6 A/SLMR 142 (1976). Note that in the scenario described above, the newly established agency or activity and the labor organizations that represented employees who were transferred to the new entity could file this petition jointly. See *CHM 4.2*.

- At the same agency, a labor organization represents several units that were affected by a transfer of certain employees from those units to a new entity(ies). This labor organization could file separate petitions for each unit to show the status of the employees who remain at the predecessor activity. Or, the labor organization could also file a single petition to clarify the status of all of the units that remain at that one activity. Note that the units are related to each other because they have a common employer. Any of these petitions could be filed jointly by the labor organization and the agency/activity.

- A cumbersome, but not inappropriate, petition is one involving multiple employers, labor organizations and units. Using the example above, a petition is filed by multiple employers and labor organizations to clarify the status of the employees they acquired from a former agency. This petition raises multiple issues regarding the status of employees who remain at the predecessor, the status of employees who transferred to several different entities and the status of the labor organization that represented these employees in one unit. One petition involving questions relating to employees who transferred to different agencies can be difficult to process because it involves multiple employers. In this situation, the region may suggest, but cannot require, that the parties file separate petitions to clarify the status of employees for each agency that acquired employees from previously represented units.

Questions regarding the appropriateness of any petition filed for multiple purposes are treated as **issues** and are processed as part of the case in accordance with *CHM 20 and 23*. **The regions contact the Office of the General Counsel whenever questions arise concerning the appropriateness of petitions with multiple purposes.**

**4** **STANDING TO FILE:** The Statute allows a petition to be filed by any "person." "Person" is defined in 5 U.S.C. 7103(a)(1) as "an individual, labor organization, or agency." An "agency" is defined in 7103(a)(3) as:

> "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veteran's Canteen Service, Department of Veterans Affairs), the Library of Congress, and the Government Printing Office, but does not include--
>
> (A) the General Accounting Office;
> (B) the Federal Bureau of Investigation;
> (C) the Central Intelligence Agency;
> (D) the National Security Agency;
> (E) the Tennessee Valley Authority;
> (F) the Federal Labor Relations Authority;
> (G) the Federal Service Impasses Panel; or
> (H) the Central Imagery Office.

. A "labor organization" is defined in 5 U.S.C. 7103(a)(4). Its definition is set forth in *CHM 19 - challenge to the status of a labor organization*, at *CHM 19.2* and will not be repeated in this section. An "individual" is not defined in the Statute, but see 5 U.S.C. 7103(a) (2), the definition of "employee".

**There are distinctions between the right to file a petition, as opposed to standing to have a petition processed.** The regulations at § 2422.2 clarify a party's standing to have a petition processed. The Ninth Circuit's decision in *Eisinger v. FLRA*, No. 98-70866 (9th Cir. July 17, 2000) (*Eisinger*) that reviewed and reversed the Authority's decision in *Small Business Administration,* 54 FLRA 562 (1998) raised issues concerning the Authority's continued interpretation and application of § 2422.2. Contact the Office of the General Counsel whenever questions arise concerning a party's standing to have a petition processed. Outlined below are the **general** guidelines that are described in the regulations pertaining to standing to file petitions. In several cases issued prior to the *Eisinger* case, the Authority clarified some of these rules as discussed below.

**4.1** **Definition of petitioner:** A "petitioner means the party filing a petition under Part 2422 of the regulations" (see § 2421.18).

**4.2** **Petitions requiring a showing of interest:**

**4.2.1** A petition requesting an election to determine if employees in an appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative may be filed by a labor organization or by two or more labor organizations acting as joint-petitioners. [Regs. § 2422.2(a)]

**4.2.2** A petition requesting a determination of eligibility for dues allotment in an appropriate unit without an exclusive representative may be filed by a labor organization or by two or more labor organizations acting as joint-petitioners. [Regs. § 2422.2(a)]

**4.2.3** A petition requesting an election to determine if employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative may be filed by any employee or group of employees or an individual acting on behalf of any employees. [Regs. § 2422.2(b)]

**4.3** **Petitions seeking to clarify or amend a recognition or certification or a matter relating to representation** may be filed by a labor organization; two or more labor organizations acting as a joint petitioner; an activity or an agency; or any combination of the above. [Regs. § 2422.2(c)]

**4.3.1** In *U.S. Army Reserve Command, 88th Regional Support Command, Fort Snelling, Minnesota, (Fort Snelling),* 53 FLRA 1174 (1998), the Authority dismissed a petition requesting an amendment of certification following a reaffiliation vote, where the new union, rather than the certified union, filed the petition. Petitions to amend a certification or recognition based on a reaffiliation or merger (a *Montrose* case - see *RCL 7* and *HOG 43*) are filed by the certified or recognized incumbent labor organization, not the gaining labor organization. However, in *U.S. Department of the Interior, Bureau of Land Management (BLM),* 56 FLRA 202 (2000), the Authority allowed the gaining union, AFGE, to file the application for review because the Petitioner, NFFE Local 376, had designated AFGE to act as its representative. Therefore, the Authority found that AFGE had authority to act on all matters in the case for NFFE Local 376.

**4.3.2** In *Eisinger v. FLRA*, No. 98-70866 (9th Cir. July 17, 2000) the court reversed and remanded the Authority's decision in *Small Business Administration*, 54 FLRA 562 (1998), which held that individuals did not have standing to file petitions seeking amendments to, or clarifications of, a certification.

**4.3.3** The Authority ruled on the court's remand in the *Eisinger* case in *Small Business Administration,* 56 FLRA ___, 56 FLRA No. 153 (2000) and stated:

> Applying the court's decision to this case, we vacate our decision in 54 FLRA 562, and remand

the matter to the Regional Director for further proceedings consistent with this decision.

If the regions receive any cases filed by an individual that are filed inconsistent with the current regulations at § 2422.2, the regions contact the Office of the General Counsel. *CHM 58.1.2.2*

**4.4** **Petitions raising claims pursuant to 5 U.S.C. 7111(f)(1)** may be filed by an individual; a labor organization; two or more labor organizations acting as a joint petitioner; an activity or an agency; or any combination of the above. See *NYNG*, 53 FLRA 111 (1997) and *USIA*, 53 FLRA 999 (1997). If questions arise about a party's standing to file a petition pursuant to 5 U.S.C. 7111(f)(1), contact the Office of the General Counsel.

**4.5** **Petitions to consolidate existing units** may be filed by a labor organization, or by an activity or agency, or by a labor organization and an activity or agency jointly who are parties to an existing recognition or certification. [Regs. § 2422.2(c)]

**4.6** **Petitions seeking a determination of eligibility for national consultation rights or consultation rights** may be filed by a labor organization. [Regs. § 2426.2(b)(1) or § 2426.12(b)(1)]

**4.7** **Standing to file a petition involving a nationwide exclusive bargaining unit or an agency-level consolidated unit:**

**4.7.1** **Parties listed on the petition:** Petitions filed on a matter relating to the representation of employees who are already part of a nationwide exclusive bargaining unit or an agency-level consolidated unit name the parties to the certification on the petition. Specifically, the petitioner (item #5) is either the certified labor organization or the agency with whom the union holds exclusive recognition or both, if jointly filed. If a labor organization files the petition, the name of the agency in item #6 reflects the name of the agency on the certification, i.e., the agency at the level of recognition.

Examples include:

- Item #5 of the petition, "Name of Petitioner," lists a local labor organization or activity, but the unit and the purpose of the petition reflect that the unit is part of an agency-level consolidated unit or nationwide unit.

- Item #5 of the petition, "Name of Petitioner," lists the proper name of the labor organization that is the certified representative of a nationwide or agency-level consolidated unit, but Item #6 lists a local activity rather than the agency.

The petitions in these examples are defective and cannot be processed without being amended to reflect the proper parties to the petition, i.e., the

agency and labor organization listed on the certification. If the petition is not amended to reflect the proper parties to the certification, the petition is dismissed. (see *CHM 12.3 for defective petitions* and *CHM 20.1.1 for processing*).

**4.7.2 Filing a petition involving a nationwide exclusive bargaining unit or an agency-level consolidated unit:** While a petition involving a nationwide exclusive bargaining unit or an agency-level consolidated unit may be completed properly, the party signing it may not always appear to be an authorized representative of the parties to the exclusive bargaining relationship. Any local or regional activity or labor organization or other entity that files a petition on a matter relating to the representation of employees who are part of a nationwide exclusive bargaining unit or an agency-level consolidated unit must be authorized as a representative of the appropriate party to the recognition/certification. For example,

- Item #5 of the petition, "Name of Petitioner" and Item #6, Activity/Agency, list the proper names of a parties to a nationwide or agency-level consolidated unit, but Item #9 reflects that the representative is a local labor organization or activity, or Regional Vice-President.

The petition in this example is not defective because the proper names on the certification are listed on the petition. The issue is whether the party signing the petition form has been authorized to file the petition on behalf of the parties to the certification. The petition is sufficient if it reflects that the employee signing the petition is authorized to act on behalf of the national party. For example, the signatory line includes "..., President, Local X for ..., President of (*national union*)," or a designation of representative is attached to the petition. If it is not clear that the party signing the petition form is authorized to act for the national party, the region confirms with the petitioner or the national office that the signatory is authorized to file the petition. Once the designation has been confirmed, the parties to the national certification are served with copies of any correspondence relating to the processing of the petition (*CHM 14.2*). If the party is not authorized to file the petition, the region issues an *Order to Show Cause* (see *CHM 20.1.1c*).

**4.8 The impact of trusteeships on petitions:** Standing to file issues may arise when a local union has been placed under trusteeship. Issues may arise regarding the local union officer's standing to file a petition. These issues may concern: 1) when the local union was placed under trusteeship and 2) the provisions in the national constitution relating to the imposition of the trusteeship on the local union. If the local union was placed under trusteeship after the petition was filed, it has standing to file the petition. If the local union was placed in trusteeship before the local officers filed the petition, the local's standing to file the petition may become an issue. Contact the Office of the General Counsel if any issues arise concerning a local union's standing to file a petition after it has been placed under trusteeship.

If a region learns that a local labor organization has been placed in

trusteeship prior to the filing of the petition, the trustee is served with a copy of the petition (see *CHM 6*, *15.7 and 15.8* for service and notification requirements).

**4.9 Standing to file petitions involving units affected by a reorganization:** The Statute in section 7111(b) states that a petition may be filed with the Authority by any "person".... . The regulations at Regs. § 2422.2 clarify which entities have standing to file representation petitions. The Regs. § 2422.2(c) provides that only an agency or a labor organization may file a petition pursuant to Regs. §§ 2422.1(b) or (c). Regs. § 2422.1(b) pertains to petitions seeking to clarify matters relating to representation, including petitions filed to resolve the effects of a reorganization on an existing unit or a newly created unit. Neither the Statute nor the regulations clearly require that only the agency or activity that is a party to an exclusive bargaining relationship may file petitions to resolve matters relating to representation. However, the Authority in *Fort Snelling*, 53 FLRA 1174 (1998) dismissed a petition requesting an amendment of certification following a reaffiliation vote where the gaining union, rather than the certified union, filed the petition. It is unclear how the Authority would decide a similar issue involving an agency-filed petition where the agency is not a party to the certification filed a petition.

Normally, the parties to a certification file their own petitions to clarify or amend a matter relating to the representation of the employees in their bargaining unit. Therefore, if the Activity is still operational, the Activity has standing to file the petition and it is appropriate to name the Activity that is a party to the certification as the petitioner. In such cases, the Personnel Office may be designated to act on behalf of the petitioner.

The regions apply these rules flexibly. For instance, if the Activity was the subject of a base closure, or there are other extenuating circumstances, it is inappropriate to construe the regulation and the decision in *Fort Snelling* too narrowly without more guidance from the Authority. Thus, in base closure situations: (1) where no party raises the issue, or (2) after the initial processing of the petition, a party later challenges the authority of the personnel office to file these petitions, it would not effectuate the purposes of the Statute to dismiss these petitions on the ground that the petitioner did not have standing to file the petitions. The regulations were revised in 1996 "to streamline the regulations and make them more flexible in addressing the representational concerns of agencies, labor organizations, and individuals." In these types of base closure situations, where a party other than a party to the certification files a petition pursuant to § 2422.1(b), that party plays the role of the petitioner/activity. It is not named as the employer. The employer is named on the caption of the case: employer/activity.

If there are any questions about opening these cases, see *CHM 12* for handling defective petitions that can be opened or call the OGC to consult about the case.

**5** **CONTENTS OF A PETITION:** Section 2422.3 sets forth the contents of petitions. This section outlines general information that is required to be submitted with every petition and gives guidance on specific information that the petitioner also submits with petitions filed for different purposes. *CHM 20* includes guidance on opening procedures and general and specific checklists for determining the sufficiency of a petition.

**5.1** **What to file:** A petition is submitted on a form prescribed by the Authority and contains an original signature.

a. Petitions filed pursuant to § 2422.1(a), (b) and (c) that seek:

(i) an election for exclusive recognition; and/or

(ii) a determination of eligibility for dues allotment; or

(iii) an election to decertify an exclusive representative; or

(iv) a clarification of, and/or amendment to, a recognition or certification in effect or any other matter relating to representation; or

(v) a consolidation of existing units

are filed on FLRA Form 21.

b. Petitions filed pursuant to 5 U.S.C. 7111(f)(1) are also filed on FLRA Form 21.

The contents of the petition reflect what the petitioner is seeking and dictate its requirements. See *CHM 5.3 through 5.6*.

c. Petitions filed pursuant to § 2426.1 for national consultation rights are filed on FLRA Form 24.

d. Petitions filed pursuant to § 2426.11 for consultation rights on government-wide rules or regulations are filed on FLRA Form 26.

**5.2** **Basic information required on FLRA Form 21:** In accordance with § 2422.3 there is certain information that is common to all types of petitions that is provided on the petition form. This information includes:

a. The name and mailing address, including street number, city, state and zip code, for each activity or agency affected by issues raised in the petition. If the activity or agency is affiliated with an executive *department, the name of the executive department is provided.*

§2422.3(a)(1)

***NOTE: Section 2421.21 defines the phrase "affected by issues raised" as follows:***

> The phrase "affected by issues raised," as used in Part 2422, should be construed broadly to include parties and other labor organizations, or agencies or activities, that have a connection to employees affected by, or questions presented in, a proceeding.

b. The name, mailing address and work telephone number of the contact person for each activity or agency affected by issues raised in the petition. § 2422.3(a)(2)

c. The name and mailing address, including street number, city, state and zip code, for each labor organization affected by issues raised in the petition. If a labor organization is affiliated with a national organization, the local designation and the national affiliation are both included. If the labor organization is the exclusive representative of any of the employees affected by the issues raised in the petition, item #8A of the petition form includes the date of the recognition or certification, and item #8B includes the date that any collective bargaining agreement covering the unit will expire, or the date that the most recent agreement did expire, if known. § 2422.3(a)(3)

d. The name, mailing address and work telephone number of the contact person for each labor organization affected by issues raised in the petition. § 2422.3(a)(4)

e. The name and mailing address, including street number, city, state and zip code, for the petitioner. If a labor organization is the petitioner and is affiliated with a national organization, the local designation and the national affiliation are both included. § 2422.3(a)(5)

f. A description of the unit(s) affected by issues raised in the petition. The description reflects the geographic locations and the classifications of the employees sought to be included in, and sought to be excluded from, the unit(s). § 2422.3(a)(6)

"Unit affected by issues raised" usually applies to the currently certified or recognized unit. This is particularly relevant in petitions seeking an election in a unit for which a labor organization already holds exclusive recognition. However, petitioners that seek an election in an unrepresented unit or a clarification or amendment [§ 2422.1(b)] may interpret this provision to require a description of

the proposed unit. Either way is acceptable as long as the unit description complies with § 2422.3(a)(6).

g. The approximate number of employees in the unit(s) which is affected by issues raised in the petition. § 2422.3(a)(7)

h. A clear and concise statement of the issues raised by the petition and the results which the petitioner seeks. § 2422.3(a)(8)

i. A declaration by the person signing the petition, under the penalties of the Criminal Code (18 U.S.C. § 1001), that the contents of the petition are true and correct to the best of the person's knowledge and belief. § 2422.3(a)(9)

j. The signature, title, mailing address and telephone number of the person filing the petition. § 2422.3(a)(10)

- The petition requests the person signing the petition to name the party filing the petition also. As required in *CHM 5.2(e)* the petition must distinguish the party filing it from the representative who signs it, as required in 5.2(j) (even though the person signing the petition may be the party filing the petition).

- By signing the petition form, a labor organization/petitioner seeking exclusive recognition certifies that it has complied with 5 U.S.C. 7111(e) by submitting to the agency or activity and to the Department of Labor: 1) a roster of its officers and representatives, 2) a copy of its constitution and bylaws, and 3) a statement of its objectives.[See § 2422.3(b)]

- By signing the petition form, a labor/organization/petitioner also certifies that it has served a copy of the petition on all parties known to be affected by issues raised in the petition (See § 2422.4).

***NOTE: The requirement in § 2422.3(a)(8) to include a clear and concise statement of the issues raised by the petition and the results which a petitioner seeks dictate the purpose of the petition and thus, any other information that may be required. CHM 5.3 through 5.6 clarify additional information that is required for the particular petition being filed. These sections, which are repeated in CHM 20 expedite processing the petition. However, failure to provide this information does not prevent opening the petition, if the information that is provided reasonably complies with § 2422.3. See CHM 12 for "defective petitions" and CHM 20 and 23 for "investigating petitions."***

**5.3 Contents of petitions seeking a representation election:** These petitions seek an election to determine if employees in an appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive

representative:

a. As stated in *CHM 5.2(f)*, the petitioner describes the unit claimed to be appropriate for the purposes of exclusive recognition. The unit description reflects generally the geographic locations and the classifications sought to be included and those to be excluded. See *CHM 28.13* for sample unit descriptions.

b. The petition is accompanied by a showing of interest of not less than thirty percent (30%) of the employees in the unit claimed to be appropriate and estimate the number of employees in the unit.

c. The showing of interest and an alphabetical list are attached to the petition.

See also *CHM 20.1.2* for a supplemental checklist.

**5.4 Contents of petitions seeking a determination of eligibility for dues allotment:** These petitions are filed for a determination of dues allotment in an appropriate unit without an exclusive representative.

a. As stated *CHM 5.2(f)*, the petitioner describes the unit claimed to be appropriate. The unit description reflects generally the geographic locations and the classifications sought to be included and those to be excluded. See *CHM 28.13* for sample unit descriptions.

b. The petition is accompanied by a showing of membership of not less than ten percent (10%) of the employees in the unit claimed to be appropriate and estimate the number of employees in the unit.

c. The showing of membership and an alphabetical list are attached to the petition.

See also *CHM 20.1.3* for a supplemental checklist.

**5.5 Contents of petitions seeking an election to decertify the incumbent exclusive representative:** These petitions seek an election to determine if employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative.

a. As stated in *CHM 5.2(f)*, the petitioner describes the current unit.

b. The petition is accompanied by a showing of interest of not less than thirty percent (30%) of the employees in the unit reflecting that the employees no longer desire to be represented for the purposes

of collective bargaining by the currently recognized or certified labor organization and estimate the number of employees in the unit.

c. The showing of interest and alphabetical list are attached to the petition.

See also *CHM 20.1.4* for a supplemental checklist.

**5.6 Contents of petitions to clarify, and/or amend (1) a certification in effect; and/or (2) any matter relating to representation:** As described in *CHM 3.3.2*, these petitions serve a variety of purposes.

a. As stated in *CHM 5.2(f)*, the petitioner describes the currently certified unit(s) affected by issues raised by the petition.

b. The petitioner identifies all parties affected by issues raised by the petition, including all parties to any exclusive bargaining relationship(s) so that the affected parties receive proper notification of the petition.

c. Section 2422.3(a)(8), as outlined in *CHM 5.2(h)* requires that the petition include a clear and concise statement of the issues raised by the petition and the results the petitioner seeks. Typical information includes, but is not restricted to, the following:

(1) Petitions requesting to clarify the bargaining unit status of certain employees/positions contains a description of the present unit and the date of recognition or certification; the proposed clarification; the title of the position(s) sought to be clarified, and the name(s) of the incumbent(s) currently occupying the positions. The petitioner provides a detailed explanation of the reasons supporting the request. There are certain exceptions to the rule that only positions which are occupied can be clarified. For additional information, see *RCL 15* and *HOG 51*.

(2) Petitions requesting to amend a recognition or certification in effect also contain a description of the present unit(s) and the date(s) of recognition or certification (including the case number if known); the proposed amendment; and a statement of reasons in support of the proposed amendment.

(3) Petitions requesting to clarify or amend any matter relating to representation attach:

(i) a description(s) of the present unit(s) for which the petitioner seeks clarification;

(ii) a detailed explanation of the reasons to support the party's(ies') questions relating to the

continued appropriateness of an existing unit(s);

(iii) a statement outlining the issues raised, if known;

(iv) the proposed results, if known. If the petition is filed jointly, the parties may not agree on the proposed results. In this scenario, the petition reflects the parties' various positions.

See also *CHM 20.1.5* for a supplemental checklist.

**5.7 Contents of petitions to consolidate existing units:** These petitions seek to consolidate two or more units, with or without an election, in an agency and for which a labor organization is the exclusive representative.

a. As stated in *CHM 5.2(f)*, petitioner(s) seeking to consolidate existing units describe the unit claimed appropriate for exclusive representation and estimate the number of employees in the proposed consolidated unit;

b. An attachment includes a description of each existing exclusively recognized unit encompassed by the petition, the dates of recognition or certification (including case number if known), the name(s) and address(es) of the exclusively recognized labor organization(s) involved, and the approximate number of employees in each unit;

See also *CHM 20.1.6* for a supplemental checklist.

**5.8 Information requested on FLRA Form 24, National Consultation Rights, and FLRA Form 26, Consultation Rights on Government-Wide Rules and Regulations:** As noted at *CHM 3.5.2* of this manual, *CHM 57* has been set aside exclusively for a discussion of processing these petitions in accordance with Part 2426 of the regulations.

**5.9 Letters seeking to disclaim interest:** Regional Offices may receive letters from labor organizations that seek to disclaim interest in representing employees in a unit for which they hold exclusive recognition. These letters are, in effect, a request by the exclusive representative to clarify an existing unit to reflect that it no longer represents the employees in a unit for which it was granted exclusive recognition. The Regional Office **may not** docket these letters as a case. The region contacts the labor organization seeking to disclaim representational interest and provides prefiling assistance as discussed in *CHM 2.3*, including assisting in drafting the petition.

In the event a disclaimer is filed properly on a petition form, see *CHM 20.1.7* for a supplemental checklist.

**5.10 Contents of petitions seeking to decertify an incumbent labor**

**organization based on claims that the labor organization is subject to corrupt influences pursuant to 5 U.S.C. 7111(f)(1):** The regulations do not expressly provide for this type of a petition. However, as the Authority's decision in *NYNG*, 53 FLRA 111 (1997) makes clear, the filing of a section 7111(f) petition requesting decertification is consistent with the Statute. In *USIA*, 53 FLRA 999 (1997), the Authority held that a bargaining unit member's petition for decertification pursuant to section 7111(f), unlike a decertification petition filed pursuant to section 7111(b)(1)(B), will be considered to have been properly filed without the need for a showing of interest. In all other respects, such a petition is processed according to the regulations concerning petitions which do not require an election. (*USIA* at 1004).

Follow *CHM 5.6* for contents of petitions seeking to decertify an incumbent exclusive representative pursuant to 5 U.S.C. 7111(f)(1). In addition to the information required on the petition form, the petitioner includes evidence that it has obtained an initial third party determination that establishes a reasonable cause to find corrupt and anti-democratic influences. See *CHM 20.1.8*, *23.9.3*, *RCL 10B* and *HOG 46B*.

# 6 PARTIES' GENERAL SERVICE REQUIREMENTS

**6.1 Overview:** The regulations require that every petition, motion, brief, request, challenge, written objection, or application for review shall be served on all parties affected by issues raised in the filing. The service shall include all documentation in support thereof, with the exception of a showing of interest, evidence supporting challenges to the validity of a showing of interest, and evidence supporting objections to an election. The filer submits a written statement of service to the Regional Director. (See § 2422.4) (Note that the petition form includes a certification of service - see *CHM 7*). All documents filed with the Authority, General Counsel or the Regional Director shall be in accordance with § 2429.24 through § 2429.27 unless directed otherwise in this manual.

Specific requirements are outlined throughout this manual as appropriate.

***NOTE: The service requirements in § 2422.4 are construed to exclude from serving parties with supporting evidence that may identify employees who voted in an election or how they voted; the names of voters or attendees at a Montrose election or any other type of evidence that may reveal the identity of an employee who was engaged in any election proceeding.***

**6.2 Relation to Section 2422.6:** Section 2422.6 also requires the Regional Director to notify all affected parties when a petition has been filed. See *CHM 15* for detailed guidance on this section of the regulations.

**6.3 Service after a party designates a representative:** Once the parties have been notified and the parties designate a representative, copies of all documents and written communications issued thereafter are served on the designated representative, **in addition to the party.** The designated representative is served copies of all correspondence by the Regional Office in accordance with § 2429.12. Designations of representative remain valid in each case until a written revocation is filed. If a case is no longer within the jurisdiction of the Regional Office where such a designation or revocation was filed, the Regional Office immediately notifies the appropriate Regional Office of the designation or revocation.

7 **SERVICE OF THE PETITION BY THE PETITIONER:** Upon filing a petition, the petitioner is responsible for the timely service of a copy of the petition, together with any attachments, on parties known to be affected by issues raised by the petition. Any showing of interest or showing of membership submitted with a petition, however, may not be furnished to any other party. While the regulations require that a written statement of such service be filed with the Regional Director; note that the petition form contains a statement by the petitioner verifying service of the petition on all parties known to be affected by issues raised in the petition. If the petitioner fails to actually serve copies of the petition on affected parties, the petition is defective and could be dismissed if the defect is not cured (see *CHM 12*, *12.4* and *13.8*). *See also U.S. Department of the Army, Headquarters, Sixth United States Army, Presidio of San Francisco, California (Presidio)*, 34 FLRA 1032 (1990) (awareness of parties of filing of an application for review not sufficient-documents must be served).

***NOTE: The service requirements in § 2422.4 are construed to exclude from serving parties with supporting evidence that may identify employees who voted in an election or how they voted; the names of voters or attendees at a Montrose election or any other type of evidence that may reveal the identity of an employee who was engaged in any election proceeding.***

**8** **WHERE TO FILE:** Petitions are filed with the Regional Director for the region in which the unit or employee(s) affected by issues raised in the petition are located. If the unit or employees are located in two or more regions, the petitions are filed with the Regional Director for the region in which the headquarters of the agency or activity is located [§ 2422.5(a)].

**8.1** **Application:** This regulation applies to cases that involve:

a. Nationwide units involving issues that are national in scope;

b. Nationwide units that raise issues that appear to be the result of a local change; or

c. Units that raise issues that extend beyond the region's jurisdiction.

**8.2** **Communication with other regions:** Regional Directors are responsible for: a) notifying other regions about these cases; b) verifying whether or not such cases are pending in their region; and c) reaching a consensus about how and where such cases will be processed.

**8.2.1** **Notifying other Regional Directors:** Whenever a region receives a case involving a nationwide unit in which issues are raised: 1) that may be nationwide in scope, or 2) that may cross regional jurisdictional lines, Regional Directors are required to send an e-mail to the other Directors inquiring about similar cases.

**8.2.2** **Responding to e-mails:** All Regional Directors are required to respond to any e-mails inquiring about a case. The lack of a response is not interpreted as a negative response.

**8.2.3** **Discussion and consensus:** If any case involves issues that cross regional jurisdictional boundaries or raise issues that are nationwide in scope (e.g., impact beyond the region's jurisdiction; result from a nationwide reorganization versus a local change), the affected Regional Director(s) contacts the Regional Director where the Headquarters for the agency is located. Together, the Regional Directors discuss, coordinate and decide where the case(s) will be processed. If the issues appear to affect the entire unit, the case may be transferred to the region where the headquarters is located. If the issues appear to be local in scope, the Regional Directors reach agreement on where the petitions will be processed. If the Regional Directors cannot determine whether to transfer the case(s), contact the Office of the General Counsel for assistance.

In addition, in accordance with the guidelines set forth in OGC Management Memoranda 99-1 and 99-2, the regions may agree to transfer other representation case(s) to other region(s) after they are filed for processing. See *CHM 63.4* for transfer and consolidation policies.

**9** **NUMBER OF COPIES:** An original and two (2) copies of the petition and the accompanying material are filed with the Regional Director. [§ 2422.5(b)]

**10** **DATE OF FILING:** A petition is filed when it is received by the appropriate Regional Director [see § 2422.5(c)]**.** A petition may be properly filed in person, by mail (in accordance with § 2429.24) or by handing it to an agent who is away from the Regional Office. In such circumstances, the date of receipt is inserted in the appropriate space on the face of the petition and also noted on the reverse side of the petition together with the Agent's name.

If a petition is filed in an incorrect Regional Office, the petition is "received by the appropriate Regional Director" in accordance with the regulations when the correct Regional Office is contacted and a case number is obtained (preferably over the phone and on the day of receipt in the wrong office). A copy of the petition is faxed to the appropriate Regional Office and the original is mailed. A copy of the petition is also retained in the incorrect Regional Office's correspondence file. Upon receipt of the petition, the proper Regional Office may proceed with processing the case.

## 11 TIMELINESS OF PETITIONS:

**11.1 General overview:** Timeliness requirements for petitions are prescribed in the Statute at 5 U.S.C. 7111 and implemented at § 2422.12 of the regulations. The Statute's timeliness requirements apply ***only*** to petitions seeking an election, whether filed by labor organizations, by individuals seeking an election to decertify an exclusive representative or by agencies. Petitions filed for the following purposes are subject to the timeliness requirements set forth in § 2422.12:

a. To request an election to determine if employees in an appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative;

b. To request an election to determine if employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative;

c. To clarify any matter relating to representation when a party raises issues relating to the majority status of the currently recognized or certified labor organization (see *CHM 3.3.2).*

This section contains an overview of timeliness requirements. **For a detailed discussion of substantive case law on the timeliness of election petitions, see *RCL 12.*** Exceptions to the timeliness requirements may be warranted in unusual circumstances [§ 2422.12(f) and *CHM 11.6*].

- Certain timeliness requirements may apply to the filing of amended petitions (see *CHM 13.6* and *RCL 12*) and the adequacy of a petitioner's showing of interest.

- Additional bars described in § 2422.14 apply to the filing of petitions seeking elections after the withdrawal or dismissal of a petition or after the filing of a disclaimer of interest by an exclusive representative (see *CHM 11.9*).

- There are also bars related to the processing of election petitions during the pendency of unit consolidation petitions (see *CHM 11.10*).

**11.2 Election Bar:** 5 U.S.C. 7111(b) precludes conducting an election in "any appropriate unit or subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held" [§ 2422.12(a)].

The election bar rule is applicable to units where there is no incumbent exclusive representative. Thus, if a valid election is conducted, and no union is certified, no election may be held in that unit or a subdivision of that unit

within twelve months of the date the election is held. In the private sector, the election is considered to have been held on the date the balloting is completed, rather than the date of issuance of the certification of results of election. *See Mallinckrodt Chemical Works,* 84 NLRB 291 (1949). The Authority has not had the opportunity to issue a decision on this point. The election bar rule does not apply to a petition seeking an election in a broader unit, which includes the unit in which the election was conducted. *See Federal Aviation Administration*, 2 A/SLMR 340 (1972). The election bar rule also does not apply to petitions to consolidate existing units filed under 5 U.S.C. 7112(d).

**11.3** **Certification Bar:** 5 U.S.C. 7111(f) prohibits according exclusive recognition 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.

The certification bar applies during the first year following the issuance of a certification of representative, so long as no collective bargaining agreement has been executed [§ 2422.12(b)]. This includes issuance of a certification of consolidation of units. Once an agreement is executed, the contract bar rule applies to the unit. An exclusive representative voluntarily waives the certification bar when it files a petition for a broader appropriate unit which includes the unit for which the certification was issued. *See U.S. Army Corps of Engineers, Mobile District*, 2 A/SLMR 486 (1972).

**11.4** **Contract Bars:** 5 U.S.C. 7111(f) prohibits according exclusive recognition to a labor organization:

> (3) if there is then in effect a lawful written 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 in the petition, unless --
> (A) the collective bargaining agreement has been in effect for more than 3 years; or
> (B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement. . .

Absent unusual circumstances, the Authority will dismiss an election petition filed for a bargaining unit at a time when the unit is covered by a lawful

written collective bargaining agreement, unless the agreement has been in effect for more than three years or the petition is filed during the 45-day "window period" set out in 5 U.S.C. 7111(f)(3)(B).

There are two basic issues in contract bar cases: (1) whether the agreement asserted to bar a petition is a lawful written collective bargaining agreement and (2) whether the agreement is free from ambiguity regarding its effective date, so that it constitutes a bar to an election petition. **An in-depth discussion of these issues and other issues that arise in contract bar cases can be found in *RCL 12.***

Thus, when a collective bargaining agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition seeking an election or seeking to clarify a matter relating to representation based on a challenge to the recognized or certified labor organization's majority status is considered timely when it is filed as follows:

a. Not more than one hundred and five (105) days and not less than sixty (60) days prior to the expiration date of an agreement having a term of three (3) years or less from the date it became effective [§ 2422.12(d)];

b. Not more than one hundred and five (105) days nor less than sixty (60) days prior to the expiration of the initial three (3) year period of an agreement having a term of more than three (3) years from the date it became effective [§ 2422.12(e)]; or

c . Any time when unusual circumstances exist which substantially affect the unit or the majority representation [§ 2422.12(f) and also *CHM 11.6*].

See Appendix B, Petition Timeliness Guide, for assistance in determining the timeliness of petitions filed during the open period of a contract.

***NOTE: In Department of the Army, III Corps and Fort Hood, Fort Hood, Texas (Fort Hood), 51 FLRA 934, 941 (1996), the Authority decided that where a petition is filed on the same day that an agreement is executed, and all that remains is agency-head review pursuant to 5 U.S.C. 7114(c), the agreement does not act as a bar. The Authority established certain requirements that must be met at the time of execution. The notice to the agency:***

> must be in writing and convey that the petitioning union has taken all steps necessary to file a petition with the Authority. The notice must be served on a person having authority over agency

> negotiations, which could extend to and include the head of the agency, and must be received on the same day that the petition is filed but prior to the point at which the collective bargaining agreement is executed. Receipt of the notice must be verifiable through documentary evidence. (footnotes omitted)

The region decides whether the petitioner followed these requirements. Once it has been established that the petition is timely and met the prima facie showing of interest requirements, it is given equivalent status. *U.S. Department of Defense Dependents School, Panama Region,* 44 FLRA 419 (1992).

**11.5** **Bar during 5 U.S.C. 7114(c) review:** A petition seeking an election is not considered timely if filed during the period of agency head review under 5 U.S.C. 7114(c). This bar expires upon either the passage of thirty (30) days, absent agency head action, or upon the date of any timely agency head action [§ 2422.12(c)].

The Statute at 5 U.S.C. 7114(c) provides for agency head approval of collective bargaining agreements. If the agency head does not approve or disapprove the agreement within 30 days of the date it was executed, the agreement takes effect and is binding on the parties. Section 2422.12(d) imposes a bar on the filing of an election petition during the agency-head review period. *See also Federal Aviation Administration,* 2 A/SLMR 340 (1972); *Federal Aviation Administration*, Case No. 22-3711(RO), 1 Rulings on Requests for Review 258 (1973).

**11.6** **Unusual circumstances:** A petition seeking an election or a determination relating to representation matters may be filed at any time when unusual circumstances exist that substantially affect the unit or majority representation [§ 2422.12(f)].

Petitions seeking resolution of matters related to representation (e.g., petitions that question the appropriateness of an established unit due to a substantial change in the character and scope of the unit) are usually filed at the time of the organizational changes. These events do not necessarily coincide with contractual window periods. The filing of such a petition during the term of a contract is taken as an assertion that unusual circumstances exist, whether or not the petitioner actually uses this term of art. *See Department of State, Bureau of Consular Affairs, Passport Services,* 35 FLRA 1163 (1990); *U.S. Department of the Interior, Indian Health Service, Gallup Indian Health Center, Gallup, New Mexico*, 48 FLRA 890 (1993).

For detailed discussion of specific situations involving unusual circumstances, see *RCL 12, Timeliness.*

**11.7** **Premature extension:** Where a collective bargaining agreement with a term of three (3) years or less has been extended and signed more than sixty (60) days before its expiration date, the extension will not serve as a basis for dismissal of a petition seeking an election filed in accordance with this section [§ 2422.12(g)].

An agreement executed by the parties more than sixty days before the expiration of the current agreement is considered premature for contract bar purposes. Such agreements modify or extinguish the 45-day "window period" established by 5 U.S.C. 7111(f)(3)(B). Accordingly, the Authority will not recognize a premature extension of an agreement as a bar to an election petition. *See Department of Health and Human Services, Boston Regional Office, Region 1,* 12 FLRA 475 (1983) (*DHHS*). The premature extension analysis applies solely to the extension of agreements having a term of three years or less. If an agreement has a term of more than three years, it serves as a bar to an election petition only during its initial three year period [§ 2422.12(e) and *CHM 11.4*].

**11.8** **Contract requirements:** Section 2422.12(h) describes 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, do not constitute a bar to a petition seeking an election under this section unless a clear and unambiguous effective date, renewal date where applicable, duration, and termination date are ascertainable from the agreement and relevant accompanying documentation.

This provision tracks existing case law and places in one section all requirements concerning a contract as a bar to a petition seeking an election. *See U.S. Department of the Interior, Redwood National Park, Crescent City, California,* 48 FLRA 666 (1993); *U.S. Department of Health and Human Services, Social Security Administration,* 44 FLRA 230 (1992); *Florida (Air) National Guard, St. Augustine, Florida,* 43 FLRA 1475 (1992); *U.S. Department of Housing and Urban Development, Newark Office, Newark, New Jersey,* 37 FLRA 1122 (1990); *Department of the Army, U.S. Army Concord District Recruiting Command, Concord, New Hampshire,* 14 FLRA 73 (1984).

**11.9** **Withdrawal or dismissal of petition:** Section 2422.14 describes the consequences of a withdrawal or dismissal of a petition seeking an election.

**11.9.1** **Withdrawal/dismissal less than sixty (60) days before contract expiration or anytime after the expiration of the agreement:** When a timely filed petition seeking an election is withdrawn or dismissed by the Regional Director less than 60 days before the expiration of a contract covering the

employees affected, or anytime after the expiration of the agreement, another petition seeking an election is not considered timely if filed within a ninety (90) day period from either:

a. the date the withdrawal is approved; or

b. the date the petition is dismissed by the Regional Director when no application for review is filed with the Authority; or

c. the date the Authority rules on an application for review.

The section applies to all contracts, not just those having a term of 3 years or less. Other pending petitions that have been timely filed concerning any portion of the incumbent's unit, will continue to be processed [see § 2422.14(a)].

**11.9.2 Withdrawal by petitioner:** A petitioner who submits a withdrawal request for a petition seeking an election that is received by the Regional Director after the notice of hearing issues or after approval of an election agreement, whichever occurs first, is barred from filing another petition seeking an election for the same unit or any subdivision of the unit for six (6) months from the date of the approval of the withdrawal by the Regional Director [§ 2422.14(b)].

**11.9.3 Withdrawal by incumbent:** When an election is not held because the incumbent disclaims any representation interest in a unit, a petition by the incumbent seeking an election involving the same unit or a subdivision of the same unit is not considered timely if filed within six (6) months of cancellation of the election.[§ 2422.14(c)].

**11.10 Timeliness of petitions while other petitions requesting to consolidate existing units are pending:** Petitions affected by the filing of a petition seeking to consolidate existing units are processed as follows:

**11.10.1 Prior petitions seeking an election or resolution of a matter relating to representation due to changes in the character and scope of the unit:** If a petition seeking an election or seeking to resolve a matter relating to representation due to changes in the character and scope of the unit is filed prior to the filing of a related petition to consolidate units, this petition is resolved before the affected unit may be included in the proposed consolidated unit. *See Department of Transportation, Federal Aviation Administration,* 4 FLRA 722 (1980), that provides background information on these provisions.

**11.10.2 Subsequent petitions seeking an election:** Any petition that seeks an election in any existing exclusively recognized unit covered by a pending petition to consolidate existing exclusively recognized units is required to be filed in a timely manner and satisfy the election, certification and agreement bars. Petitions filed after the related unit consolidation petition (is filed) are held in abeyance pending the processing of the petition to consolidate. Upon the issuance of a certification on consolidation of units, the petitioner is given thirty (30) days from the issuance of the certification to submit a sufficient showing of interest in the consolidated unit. If the petitioner obtains a sufficient showing of interest, the petition is processed and an appropriate certification is issued.

**12** **DEFECTIVE PETITIONS:** This section presents an overview of defective petitions. Defective petitions either prevent the case from being opened immediately or prevent the Regional Director from taking action on the case pursuant to § 2422.30(c). The nature of the defect determines whether the petition can be opened and its ultimate disposition. A basic understanding of defective petitions is required before processing any petition. This section distinguishes between defective petitions that prevent a case from being opened and those which prevent the Regional Director from taking action on the petition.

**12.1** **General policy requirements: All petitions are docketed** even though a petition may be defective. It is imperative that the Regional Director review all incoming petitions immediately to identify any defects. Delays in identifying and acting upon defects could eventually affect the processing of a petition. For instance, when a petition seeking an election is filed during the open period of a contract, the Regional Office quickly establishes whether the petitioner has submitted an adequate prima facie showing of interest. If the showing is inadequate, the Region's failure to make a timely determination could deny the petitioner an opportunity to submit additional showing of interest timely (see *CHM 18*).

**12.2** **What is a defective petition:** A petition is defective if it does not comply with the filing requirements set forth in § 2422.3 at the time it is filed. A defective petition differs from one in which it does not appear that it can be processed (for example, when a petition is clearly untimely). See *CHM 15.8.*

**12.2.1** **Defects which prevent a case from being opened:** In certain cases, the petition is docketed, but it cannot be opened because the petitioner has not complied sufficiently with the regulations to warrant further processing of the case. Usually, the petition form is missing crucial information or the showing of interest in election or dues allotment cases is not attached. The Regional Director determines whether a petition is defective and cannot be opened (*CHM 12.3*).

**12.2.2** **Defects which may prevent the Regional Director from taking action on the case:** Some petitions do not comply fully with the filing requirements, but the procedural defects do not warrant delaying opening the case. These petitions are defective, but may be opened (*CHM 12.4*). However, the petitioner corrects the procedural defect before the Regional Director can take action on the case pursuant to § 2422.30.

**12.3 Examples of defective petitions that may not be opened and delay initial communications with the parties:** Such petitions cannot be opened and can only be cured by an amended petition. See *CHM 13* for guidance on amending petitions:

a. The petitioner did not sign the petition form;

b. The petition was not filed on the correct form or a reasonable facsimile of the correct form (FLRA Form 21);

c. The petitioner did not explain the purpose of the petition or the stated purpose is so unclear given the other information provided with the petition that it raises questions about what the petitioner is seeking;

d. The unit description is not provided;

e. In a petition seeking an election, the showing of interest is not provided or in a petition seeking a determination of eligibility for dues allotment, the showing of membership is not provided;

f. The preliminary showing of interest in an election petition cannot be checked because crucial information is missing on the petition form;

g. The petitioner does not identify any parties affected by issues raised by the petition; or

h. A local activity or labor organization files a petition on a matter relating to the representation of employees who are part of a nationwide exclusive bargaining unit or an agency-level consolidated unit. The names of the petitioner and agency affected by issues raised do not reflect the parties to the certification. Additionally, the local activity or local labor organization does not appear to be authorized to represent the party to the recognition/certification. (see *CHM 4.7*, *14.2* and *20.1.1* for handling procedures).

If a petition is defective as described in this subsection, the region notifies the petitioner telephonically (*CHM 20.2*) and the Regional Director sends a confirming letter as set forth in Figure 12.3 (with the exception of showing of interest defects - see below). The letter will advise the petitioner of the defect and state that absent an amended petition that corrects the defect, the petition will be dismissed.

***NOTE: If the petition is defective because the petitioner seeking an election failed to submit a showing of interest or to complete Item #3, the***

***agent contacts the petitioner immediately since Authority case law requires that any showing of interest must be received not later than the last day on which the petition may be filed timely. Similarly, the showing***

***must be adequate. CHM 18.9 establishes unique time limitations for perfecting an inadequate showing of interest.***

**12.4 Examples of defective petitions that may be opened and do not delay initial communications with the parties:**

a. The unit description is unclear or inaccurate;

b. The purpose of the petition and the results the petitioner seeks are unclear, but reasonably comply with §§ 2422.3(a)(8) and 2422.1, or provide sufficient information to warrant opening the case (see also ***NOTE*** at *CHM 5.2*);

c. The petitioner did not serve a copy of the petition on all parties known to the petitioner to be affected by issues raised by the petition;

d. The petitioner did not submit an alphabetized list of names constituting the showing of interest although the showing was attached;

e. Information pertaining to potential parties affected by issues raised appears inadequate.

The petitioner is notified of these defects telephonically which is confirmed by letter signed by the Regional Director as shown in Figure 12.4. See also *CHM 20.2.* The petitioner is provided with specific guidance on the information needed to correct the defect. For instance, if a petitioner fails to serve a copy of the petition on any party that the petitioner knows to be affected by issues raised by the petition, the petitioner is instructed to serve a copy of the petition on all known parties. The case, however, can be opened because the parties can be identified and the petition is clear in other respects. If the petitioner subsequently fails or refuses to comply with the regulations, the petition could be subject to dismissal.

***NOTE: An amended petition may not be necessary to cure the defective petition described in CHM 12.4. The Regional Director has discretion in such instances to decide when an amended petition is required (CHM 13.8.2d).***

**12.5 What happens to defective petitions: A petition will be dismissed if a petitioner does not comply with the Regional Director's request to correct a defective petition either by amending the petition or otherwise complying with the regulations. Regional personnel are available to assist the petitioner in amending the petition. Specific guidelines for processing defective petitions are found in *CHM 13* (*amending a petition*) and *CHM 20* (*reviewing the sufficiency of petitions and***

***processing defective petitions*).**

***NOTE: Ultimately, the Regional Director decides whether to require an amended petition; however, the petitioner decides whether to amend a petition.***

**13** **AMENDING A PETITION:** The petitioner on his/her own initiative may add or delete from the original or last amended petition, irrespective of the developments of the pending investigation. This section provides guidance on determining when to require an amended petition and on assisting petitioners in filing an amended petition.

**13.1** **General requirements:** No change or correction can be made in a petition after it has been filed and docketed unless an amended petition is filed. An amended petition is required when:

a. The petition is defective and cannot be opened as filed;

b. The petitioner changes the identity or size of the unit; or

c. The petitioner significantly changes the purpose(s) of the petition, issues raised by the petition, and/or the results sought by the petition.

**13.2** **Purposes of amending a petition:** There are three (3) basic purposes in amending a petition with respect to the unit:

a. to correct defects due to omissions or ambiguities;

b. to change the identity or size of the unit; and/or

c. to change the purpose(s) of the petition.

**13.3** **How to file:** A petition is amended only by completing the appropriate new form. Thus, except as noted below, a petition cannot be amended by oral or written request. An amended petition is designated by inserting “AMENDED”, “FIRST AMENDED” or “SECOND AMENDED” etc. before the word “petition.” Since an amended petition replaces the original petition, all items in the original petition which are not changed by the amended petition are restated in the amended petition. For example, when filing an amended petition to correct the name of the activity or agency, all remaining entries contained in the original petition are restated, unaltered, in the amended petition. **Any change, however slight, from the original petition, constitutes an amendment with respect to that item**.

An exception to the rule that a petition is amended by submitting a new form occurs when the petitioner seeks to amend its petition during a hearing (see *HOG 18.7*).

**13.4** **Who may file:** An amended petition may be filed only by the petitioner or the petitioner's designated representative.

**13.5 Service and filing requirements:** The service and filing requirements discussed in *CHM 7 through 10* apply to amended petitions.

**13.6 When to file:** The regions contact the Office of the General Counsel whenever questions arise concerning any timeliness issues raised by the filing of an amended petition. See *RCL 12.*

**13.7 Regional Office assistance provided in amending petitions:**

**13.7.1 Policy:** A single petition permits a flexible approach to resolving issues concerning the representation of employees by labor organizations covered by the Statute. Regional Office personnel may render assistance to the petitioner, including soliciting amended petitions when such amendments clarify the purpose for which the petition was originally filed or assist the affected parties in narrowing or resolving the issues raised by the petition. Regional Office personnel exercise the same care and judgement in discussing amending a petition as in any other phase of case processing.

**13.7.2 Assisting the petitioner:** Regional Office personnel may provide assistance to the petitioner, as appropriate, by talking to or meeting separately with the petitioner or jointly with all parties known to be affected by issues raised in the petition. Regional Office personnel may provide reasonable technical assistance by furnishing appropriate forms or suggesting wording on the petition form itself. Regional Office personnel may also assist the petitioner in defining issues consistent with § 2422.13. To the extent the Regional Office personnel utilize alternative dispute resolution techniques to discuss, narrow and if possible, resolve issues, Regional Office personnel are cognizant at all times of the requirement to be consistent with the Statutory requirements for appropriate units and unit eligibility (see also *CHM 1 and 25*, and *HOG 2.3*).

**13.7.3 Ethical considerations:** Regional Office personnel ensure that their actions do not lead to an appearance of undue assistance to a party. Regional Office personnel are the Authority's representative, and that all parties expect objective consideration of their interests and positions.

**13.8 Guidance on determining whether to require an amended petition:**

**13.8.1 Defective petitions that prevent a petition from being opened:** Any omissions from the petition form, or the failure to submit a showing of interest, preclude the case from being opened. As discussed in *CHM 12.3*, such defects are corrected by amending the petition before a case can be opened.

**13.8.2 Defective petitions that may prevent the Regional Director from taking action on a case:** Certain defects as discussed in *CHM 12.4* may be corrected during the initial stages of processing without filing an amended petition. The Regional Director has discretion in these circumstances to require an amended petition. Listed below are some examples of petitions defective because of omissions or ambiguities, and guidance on determining whether to require an amendment.

a. Editing the unit description in an election petition to reflect statutory

exclusions does not require an amended petition, but can be accomplished in the agreement for election and subsequent Notice of Election.

b. Providing proof of service does not require an amended petition (if a party alleges it was not served), but rather a letter certifying that service was effectuated; however, the failure to actually effect service of copies of petitions could be the basis for dismissal of petition (see *CHM 7* and *Presidio*, 34 FLRA at 1034).

c. Clarifying a poorly worded unit description or statement of the purpose of petition may not necessarily require an amended petition if in the Director's view the intent is clear and/or the existing certification is accessible and reflects substantially the same unit.

d. The regulations require the petitioner to submit an alphabetized list constituting the showing of interest with the actual showing of interest(*CHM 18.2 and 18.9*). The Regional Director has discretion to require an amended petition if the petitioner fails to submit an alphabetized list of names. The Regional Director may also exercise discretion in requiring the alphabetized list in cases where the unit is very small. Otherwise, this list is obtained during the investigation.

**13.9 Amendments to change the identity of the unit:** A petition is usually amended when the identity of the unit is changed:

a. A unit changes its identity when there is a change in the scope of a unit. For example:

- an entirely different classification of employees is added to a proposed unit or the geographical boundaries of a proposed unit are expanded, thus changing the scope, i.e., the identity of a unit.

b. A unit may change its identity if the size of the unit changes. Employees may be added to a proposed unit without involving the inclusion of any new job categories. For example:

- a unit of General Schedule employees may be amended to include regular part-time employees each of whom is classified as a General Schedule employee. In this instance, the petition is amended because of a change in the size of the unit. Regional Directors have discretion to decide if changes in the size of a unit affect the identity of a unit and thus, require an amended petition.

Absent an amended petition, parties that may be affected by issues raised in the petition cannot be identified and notified of the petition and be given the opportunity to intervene. Parties already named also have no opportunity to respond to changes in the petition if an amendment is not filed.

**13.9.1 Exceptions to requirement to amend petition:** A labor organization files a petition for a unit of employees and during the course of the investigation, issues are raised with respect to the eligibility of certain employees in the unit pursuant to 5 U.S.C. 7112(b). In these cases, the region has discretion to require the union to amend the petition to exclude the disputed employees if it indicates that it may be willing to proceed to an election on the employees who are found to be eligible. See *National Mediation Board*, 54 FLRA 1474 (1998), where the Authority stated the petitioner was not required to amend its petition when it did not intend to change the unit description. An amendment is not required to exclude positions based on the statutory exclusions if the unit description otherwise remains valid.

Another exception is during a hearing. An amended petition is not required when the Hearing Officer requests the petitioner at a hearing whether it is willing to go to an election on a unit different than what was petitioned for in the event the Regional Director finds an alternative unit appropriate. See *HOG 32.12* and *35.8*.

**13.10 Amendments to change the purpose(s) of the petition:** A petitioner is required to amend the petition when the petitioner changes the purposes for which the petition was initially filed. Examples include:

- A petition is filed to clarify a matter relating to a reorganization following a reorganization. During the processing of the petition, the petitioner realizes the extent of the reorganization and seeks to amend the purpose of the petition to reflect the impact of the reorganization on other units, parties, etc.

- A labor organization files a petition seeking an election to represent a unit of employees without an exclusive representative. While the petition is being processed, the petitioner concludes that it might not have the showing of interest to support its petition, but would have the showing of membership to support a petition for dues allotment.

***NOTE: An amended petition is not required when the petitioner decides to add a proposed unit to an existing unit. The purpose of the petition has not changed nor have the showing of interest requirements regardless of the petitioner's intent to represent the employees in a separate appropriate unit or as part of an existing unit.***

**13.11 Effect of amended petitions on parties, timeliness, posting, showing of interest:** Amended petitions may change the scope or purpose of the petition, and the parties who may be affected by issues raised in the petition. Amended petitions that change the scope of the petition may also change the showing of interest requirements. See applicable sections of this manual for a discussion of the effects of an amended petition on:

a. notification of parties affected by issues raised by an amended petition - *CHM 15.11;*

b. posting requirements - *CHM 16.8*;

c. effect on showing of interest - the showing of interest is re-evaluated whenever there is a change in the size of the unit, due either to an amendment on the petitioner's own motion or to the Regional Director's or Authority's decision on eligibility or unit issues - *CHM 18*; ***NOTE: a petitioner is required to submit the requisite showing of interest at the time the amended petition is filed*** [see *U.S. Department of the Interior, National Park Service, Washington, DC*, 55 FLRA 311, 315 (1999)] and *CHM 18.1* and *CHM 18.13.6*; and

d. timeliness - *RCL 12, HOG 48* and *CHM 11.*

# INITIAL COMMUNICATIONS
# CHM 14 through 17

## 14 GENERAL REQUIREMENTS FOR COMMUNICATING WITH THE PARTIES:

**14.1 Overview:** Immediately after docketing a petition, the Regional Director acknowledges receipt of the petition by sending an appropriate letter to the petitioner and/or any labor organization, agency or activity affected by issues raised by the petition. The contents of opening letters are dependent on the purpose and sufficiency of the petition (*CHM 15 - information about notification*). Normally, a petitioner is not sent a letter acknowledging receipt of the petition unless the petition is defective (*CHM 15.4*). A petition is opened when the region sends letters to affected parties notifying them of the petition (*CHM 15.8*). The petitioner receives copies of these letters (*CHM 15.4.3*). At a minimum, initial correspondence to the parties includes a copy of the petition and a request for a designation of representative (FLRA Form 75). The cover letter also designates the name and telephone number of the agent to whom the case is assigned (*CHM* Figures 15.8A & B, 15.9).

Once the petition is opened and the affected parties are designated, the Regional Director is required to serve copies of every amended or cross petition and any documents emanating from the region on all affected parties.

**14.2 Designation of representative:** As set forth in *CHM 14.1*, a designation of representative, is sent to all parties. FLRA Form 75, Notice of Designation of Representative, is for the convenience of the parties and notifies the Regional Office of the name and address of their counsel or other representative. However, any written designation, signed by a person in an official capacity with authority to bind a party, is sufficient. If an FLRA Form 75 or other written statement of designation is not submitted by a party, the petition is processed utilizing the name and address stated on the petition for that party.

***NOTE: A petition filed by a local activity or labor organization on a matter relating to the representation of employees who are part of a nationwide exclusive bargaining unit or an agency-level consolidated unit is not defective if: (see CHM 4.7 for details and CHM 12.3)***

***1) the parties to the certification appear on the caption of the petition (Items #3 and #4);***

***2) the petition reflects that the parties to the certification are the parties that are filing the petition; and***

***3) the local activity or labor organization that is filing the petition on behalf of the certified representatives confirms it has been designated as the petitioner'(s) representative.***

**14.3 Service of documents on designated representatives:** After a party designates a representative, copies of all documents and subsequent written communications are served on the designated representative and a copy is

sent to the party in accordance with § 2429.12 (service by the Authority and Regional Directors) and § 2429.27 (service by the parties) (see *CHM 6.3*). Such designation remains valid until a written revocation is filed. If a case is no longer within the jurisdiction of the Regional Office where such a designation or revocation was filed, the Regional Office immediately notifies the appropriate Regional Office of the designation or revocation.

**14.4** **Notification of change in assignment:** In the event that a change is made in the agent assigned to the case, the Regional Office promptly notifies the parties by letter (see Figure 14.4).

**15 IDENTIFYING AND NOTIFYING POTENTIAL PARTIES ABOUT PETITION:** This section discusses requirements and procedures for identifying and notifying parties that may be affected by issues raised by the petition. These procedures "begin the opening process."

**15.1 Correlation between petitioner responsibility to serve and Regional Office responsibility to notify:** The regulations require the petitioner to serve a copy of the petition on all parties known to be affected by issues raised by the petition. Section 2422.6(a) places additional responsibilities on the Regional Director to notify any labor organization, agency or activity that the petitioner has named as being affected by issues raised by the petition **and to make reasonable efforts to identify and notify any other labor organization, agency or activity affected by issues raised by the petition (initially discussed in** *CHM 6.2*).

**15.2 Contents of notification:** Section 2422.6(b) requires Regional Directors to notify any labor organization, agency or activity affected by issues raised by the petition of:

a. the name of the petitioner;

b. the description of the unit or employees affected by issues raised in the petition; and

c. a request that all affected parties advise the Regional Director in writing of their interest in the issues raised in the petition.

Sample letters are discussed in *CHM 15.8* and *15.9*.

**15.3 Requirements for notification:** The region takes the following actions prior to notifying any labor organization, agency or activity identified as affected by issues raised in the petition:

a. Review the petition carefully for sufficiency and clarity. The agent reviews the petition for compliance with the filing requirements and verifies that the petition is otherwise sufficient. Any labor organization, agency or activity notified of the petition by the region is entitled to understand from the attached petition what the petitioner is seeking. The purpose of the petition, description of unit

affected by issues raised and the results the petitioner seeks have to "make sense." *CHM 15.4* and *CHM 20.1.*

b. Identify any labor organization, agency or activity that is affected by issues raised by the petition. Only after the petition is examined for sufficiency and clarity can the region properly identify parties that may be affected by issues raised by the petition (*CHM 15.5*).

c. Prepare the letters (*CHM 15.8* and *15.9*). These steps are described more fully below.

**15.4 Notification to petitioner:** The first step determines whether the petition is sufficient and can be opened. For a checklist on reviewing the sufficiency of petitions, see *CHM 5 and 20.*

**15.4.1** If the petition is defective and cannot be opened as described in *CHM 12.3*, the region notifies the petitioner and sends a confirming letter in Figure 12.3 or an Order to Show Cause, as appropriate.

**15.4.2** If the petition is defective, but can be opened as described in *CHM 12.4*, the region notifies the petitioner of the defects and sends a confirming letter as shown in Figure 12.4. Since the petition can be opened, the region proceeds with steps "b" and "c" as outlined in *CHM 15.3*.

**15.4.3** If the petition is not defective, the region is not required to send the petitioner a separate acknowledgment of the filing. A copy of the region's notification letter(s) to the other parties is sufficient notification that the petition has been docketed and opened.

**15.5 Identifying labor organizations, agencies or activities affected by issues raised by the petition:**

**15.5.1 Party as used in § 2422.6(a):** "Party" as used in § 2422.6(a) applies to any labor organization, agency or activity identified by the parties as being affected by issues raised by the petition and any other labor organization, agency or activity that the Regional Director has identified and notified as affected by issues raised by the petition. (See also § 2421.11 for a general definition of party.)

**15.5.2 Definition of "affected by issues raised":** The phrase "affected by issues raised," as used in Part 2422, includes labor organizations, agencies, or activities having a connection to employees affected by, or questions presented in, a proceeding (See § 2421.21 for a general definition).

Examples of labor organizations, agencies or activities that may have a connection to employees affected by, or questions presented in a proceeding include:

a. petitioners in related cases;

b. agencies or activities whose employees are the subject of the petition;

c. agencies or activities whose employees may be affected by issues raised in the petition, such as agencies whose employees were affected by a reorganization;

d. an incumbent labor organization (any labor organization that is the currently recognized or certified exclusive representative);

e. a labor organization that has shown that it has an interest in representing employees in the unit involved, either:

(i) named in the petition;

(ii) designated by the agency or activity as having a possible interest in any of the employees in the unit;

(iii) named previously in a case closed within the past two (2) years involving the same employees;

f. a labor organization that has shown that it has represented employees involved in the subject petition.

g. national unions whose local unions are seeking to re-affiliate (see *New Mexico Army and Air National Guard*, 56 FLRA 145 (2000)).

h. agencies at the departmental or command level when a reorganization emanates from the higher level organization and the reorganization may affect more than the unit that is the subject of the petition.

***NOTE: Based on recent Authority case law there are potentially three types of parties subject to this provision: 1) A labor organization, agency or activity identified as "affected by issues raised" and is automatically permitted to participate in the petition as an incumbent labor organization or employing agency; 2) a labor organization, agency or activity that is required to intervene in the petition in accordance with §2422.8; and 3) parties that are "affected by issues raised" by the petition but who do not qualify as automatic parties or intervenors pursuant to § 2422.8. These parties are considered "interested parties" and are required to request to participate in the petition. See CHM 17 for specific guidance on this issue and Utah Army National Guard, U.S. Department of the Army, Draper, Utah (Utah ARNG), an unnumbered***

***Authority Decision denying an application for review in Case No. DE-RP-80021, (1999) and Long Beach Veterans Administration Medical Center, Long Beach, California, 7 FLRA 434 (1981).***

**15.5.3 Checklist for identifying labor organizations, agencies or activities affected by issues raised by a petition:** What follows is a checklist to aid Regional Office personnel in identifying labor organizations, agencies or activities affected by issues raised by a petition:

a. Review the petition for procedural compliance with filing requirements (see *CHM 5 and 20*). If the petition appears to be filed in accordance with the regulations, make a list of the parties identified by the petitioner.

b. Review the petitioner's statement of the issues raised by the petition and the results the petitioner seeks. Does the statement provided generally explain whether the petition is for one or more of the following purposes (*CHM 3*):

(i) an election to determine if employees in an appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative [§ 2422.1(a)(1)(i) and *CHM 3.2.1a*]; and/or

(ii) a determination of eligibility for dues allotment in an appropriate unit without an exclusive representative [§ 2422.1(a)(1)(ii) and *CHM 3.2.1b*]; or

(iii) an election to determine if employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative [§ 2422.1(a)(2) and *CHM 3.2.2*].

(iv) to clarify, and/or amend [§ 2422.1(b)]:

- a recognition or certification then in effect (*CHM 3.3.1*); and/or
- any other matter relating to representation (*CHM 3.3.2*);

(v) to consolidate two or more units, with or without an election, in an agency and for which a labor organization is the exclusive representative [§ 2422.1(c) and *CHM 3.4*].

(vi) to decertify the exclusive representative pursuant to 5 U.S.C. 7111(f)(1) (*CHM 3.6*);

c. Once the purpose is identified, review the petition and outline the unit:

(i) Does the petition describe the unit affected by issues raised in the petition; name the agency or activity involved; clearly define the geographic locations and classifications of the employees included (or sought to be included) in, and excluded (or sought to be excluded) from, the unit?

(ii) Does the petition reflect that the unit was previously certified?

d. Check the certification database and other case records in the Regional Office for information about parties and an up-to-date description of the unit. Do these records reflect that there were other parties involved in previously filed cases? For instance, if the unit was recently certified, were there any intervenors in the original representation case? Are there other labor organizations at the agency/activity who participated as intervenors?

e. Use the OPM reference, "Union Recognition in the Federal Government" if necessary, to check unit recognitions or certifications.

f. Contact the petitioner and the employing agency/activity in accordance with the guidelines in *CHM 20*. Discuss the petition with both parties (see *CHM 20.2* - *petitioner contact,* *CHM 20.4* - *party contact*) and ask whether either party knows of any other labor organization or agency/activity that could be affected by issues raised by the petition.

g. Document the case file concerning the region's efforts to identify labor organizations, agencies or activities affected by issues raised by the petition, the region's determination/decision with respect to naming affected parties and an explanation of any adverse determination concerning potential parties (see also *CHM 15.12* and *CHM 26.2*).

The Regional Director determines whether a defective petition and/or a petitioner's failure to adequately identify affected parties delays processing the case *(CHM 12*).

If a labor organization, agency or activity is not identified at the outset, it is notified of the petition, in the form and manner indicated below, as soon as its interest becomes apparent. For purposes of initial communications, it is

preferable to err on the side of notifying a potential party rather than on the side of ignoring it.

**15.6 Blanket requests for notice of "all" petitions:** Blanket requests for notice of "all" petitions are not honored. Similarly, blanket requests from National Level Agencies and Labor Organizations to be considered as a "party" in all representation proceedings are denied. **There are two exceptions**, noted below, pertaining to petitions affecting nationwide exclusive or agency-level consolidated bargaining units or petitions filed by a local labor organization placed in trusteeship.

**15.7 Exceptions to blanket requests for all petitions:**

**15.7.1 Petitions affecting nationwide exclusive or agency-level consolidated bargaining units:** Appendix C is a listing of all agencies and labor organizations which have nationwide exclusive recognition or a certification of consolidation of units at an agency level. Whenever a region receives a petition involving employees who are part of either a nationwide exclusive unit or an agency-level consolidated unit, the parties to the respective certifications are notified of the petition and thereafter, served with copies of all correspondence. As discussed in *CHM 4.7* and *14.2*, such petitions are defective and amended if: 1) the parties to the certification are not on the caption of the petition and named as the petitioner(s); and 2) the party filing the petition is not authorized to represent the certified agency or labor organization. Regardless of the status of the petition, the parties to the certification are notified of the filing of the petition.

**15.7.2 Petitions involving local labor organizations that have been placed in trusteeship:** Once a region learns that a local labor organization has been placed in trusteeship, the trustee is served with a copy of the petition (see *CHM 4.8*, *CHM 6* and *15.8*). If the trustee seeks to intervene, s/he is permitted to do so with the right to file an application for review with the Authority (*CHM 17*).

***NOTE: Consistent with the policy set forth in CHM 15.5.2, whenever a petition is filed to amend a recognition or certification to reflect a reaffiliation from one labor organization to another, Regional Offices notify the national union initially of the filing of the petition under § 2422.6. See CHM 17.13.1 for a discussion on party status.***

**15.8 Opening notification letters: The letter notifying parties identified as being affected by issues raised by the petition serves to open the case.** This letter notifies parties about the petition, provides information about participating in processing the petition and seeks specific information

necessary for processing the case. The best practice is when the region contacts parties and potential parties telephonically before the region sends out these letters (*CHM 20.4*).

***NOTE: There may be circumstances where it is not appropriate to send out opening letters even though the petition may not be defective. These cases do not appear as if they can be processed for substantive reasons and it is not be efficient to open them using the standard opening letters unless the petitioner can show why the petition should be processed. For instance:***

***a. If it does not appear that the petition is timely filed, an Order to Show Cause requests the petitioner to explain why the case should be processed is more appropriate than sending out opening letters. All parties are offered an opportunity to file a position.***

***b. An Order to Show Cause is an appropriate procedure to use when the petitioner has not established a question of representation in an election petition (i.e., petitioner seeks to sever a group of employees from an existing unit). The Order requests the petitioner to show cause why the current unit is inappropriate*** (*CHM 59*)***. All parties are offered an opportunity to file a position.***

***In these cases, the Order to Show Cause is the act that "opens" the case. If the response to the Order to Show Cause raises issues that warrant processing the case further, the Regional Director issues the standard opening letters and the notice to employees. If not, the Regional Director issues a Decision and Order that includes sufficient facts and analysis to support the Regional Director's legal conclusion(s) and dismisses the petition.***

**15.8.1** There are three types of notification letters:

a. a joint letter to the employing agency and/or incumbent labor organization in election or dues allotment cases filed pursuant to § 2422.1(a) (*CHM 3.2*), (letter discussed in *CHM 15.9* and Figure 15.9);

b. a joint letter to the employing agency and/or incumbent labor organization in cases filed pursuant to §§ 2422.1(b) and (c) (*CHM 3.3 and 3.4)* (letter discussed in *CHM 15.8.2 and 15.8.3* and Figure 15.8A); and

***Note: an incumbent labor organization and an employing***

***agency or activity are automatic parties to any petition [§§ 2422.8(d) and (e)]. See also CHM 17.7. In a unit consolidation petition that seeks to consolidate units on an agency level or organizational level that is higher than where the current certifications lie, the agency or activity and the union which will be named on a Certification of Consolidation of Units are automatic parties. In addition, the local activities and unions named on the certifications which the petitioner seeks to consolidate are also automatic parties since they are the actual parties to the certification and "hold the cert." These parties are notified of the petition (send a Figure 15.8A letter, but no posting). See also CHM 20.1.6 and 20.4.3.***

c. a joint letter to other labor organizations, agencies or activities identified by the petitioner or the Regional Director as being affected by issues raised in the petition (letter discussed in *CHM 15.8.2 and 15.8.3* and Figure 15.8B). This letter is used for notifying potential parties in petitions filed for any purpose.

***Note: these potential parties are required to intervene pursuant to §§ 2422.8(c) and (f). See also CHM 17.7.***

**15.8.2** Figures 15.8A, 15.8B and 15.9 **are sample notification letters that can be modified if necessary, for any petition or combination of petitions, and/or potential party. *Note* that any of these letters may be combined for petitions consolidated for processing. If the region modifies a sample letter, the region ensures that the letter includes the following, as required by § 2422.6(b):**

a. the name of the petitioner;
b. the description of the unit or employees affected by issues raised in the petition; and

c. a request that all affected parties advise the Regional Director in writing of their interest in the issues raised in the petition.

In addition, the letters:

d. designate whether the addressee is an automatic party to the petition or is a labor organization, agency or activity that may be affected by the issues raised in the petition.

e. provide information that clarifies the processing of and participation in representation proceedings. This includes describing

requirements for intervention. For instance, the letter in Figure 15.8B emphasizes that no party may participate in any proceedings unless it requests to intervene in accordance with § 2422.8 (see *CHM 17*).

f. outline the parties' duty to furnish information (see § 2422.15 and *CHM 21*).

g. request a copy of all relevant correspondence concerning the issues raised in the petition and a copy of any existing or recently expired collective bargaining agreement(s) covering any of the employees affected by the issues raised in the petition.

h. request names, mailing addresses and telephone numbers of all labor organizations, agencies or activities known to be affected by the issues raised in the petition. The letter notes that failure to disclose the existence of another party affected by issues raised in the petition may affect the processing of the petition.

i. emphasize the time limits for filing intervention requests or cross-petitions.

j. direct parties to complete and return FLRA Form 75, Designation of Representative, as appropriate.

**15.8.3** Figure 15.8A is used for an employing agency or activity, and/or an incumbent labor organization in petitions filed pursuant to §§ 2422.1(b) and (c). A cross-petitioner is also sent Figure 15.8A. Figure 15.8B is used for any petition involving other affected labor organizations or agencies/activities. In keeping with the intent of the 1996 revisions to the regulations, these notification letters were intended to be prepared and mailed quickly and easily. One letter is used for all addressees whose potential status is similar; letters to each party are not required. These letters, like the "generic" petition and the notice of petition discussed in *CHM 16* are all part of expedited opening procedures.

**15.9 Notification of employing agency or activity and incumbents in petitions seeking elections or a determination of eligibility for dues allotment:**

**15.9.1 Employing agency notification:** After the region dockets a petition seeking an election or a determination of eligibility for dues allotment (see *CHM 3.2*) and checks the petitioner's prima facie showing of interest, the region telephonically informs the activity about the petition (see *CHM 20.4.2*). The region confirms the conversation by a letter that provides the information described in *CHM 15.8*, and instructs the activity to furnish the following

information to the Regional Director and all affected parties:

a. names and address of any parties that may be affected by issues raised by the petition;

b. a current alphabetized list of employees with their job classifications included in or excluded from the existing unit or claimed unit affected by issues raised in the petition [see § 2422.15(b)]; the letter requests that the list be current as of the payroll period ending immediately preceding the date that the petition was filed;

c. a completed FLRA Form 75, Designation of Representative.

If appropriate, the region also directs the activity to post copies of a notice to all employees. Posting procedures are described in *CHM 16.2* (see § 2422.7).

**15.9.2 Incumbent notification:** If there is an incumbent labor organization, the region informs the representative named on the petition form about the petition. An incumbent is an automatic party to the proceeding unless it files a disclaimer of interest. See *CHM 17.7.3.*

**15.9.3 Written confirmation and notification:** Figure 15.9 is a sample letter to an agency/activity and if appropriate, the incumbent labor organization involved in a petition seeking an election or dues allotment (both parties are automatic parties in the proceeding and are not required to "intervene"). *CHM 20.5*. Note that if the petition is seeking an election in a unit that is currently represented by an exclusive representative, the letter includes a statement that the Regional Director has determined that there was a prima facie showing of interest and that the petitioner has achieved "equivalent status" with the incumbent. *U.S. Department of Defense Dependents School, Panama Region,* 44 FLRA 419 (1992).

**15.10 Parties that may be affected by issues raised but may not qualify under § 2422.8 to intervene:** Parties that may be affected by issues raised but may not qualify under § 2422.8 to intervene may only be served an opening letter under the circumstances described in *CHM 15.5.2g*. In order to participate in the case, these parties are required to request status as interested parties. See *CHM 17.13* for detailed information about "interested parties."

**15.11 Effect of amended petitions:** Amending a petition could change the parties who are affected by issues raised by the petition. Whenever a petition is amended, the region re-examines the potential parties that may be affected by issues raised by the amended petition.

**15.12 Regional Director's responsibility after notification:** The 1996 revisions to the regulations streamline and make more flexible the rules addressing the representational concerns of agencies, labor organizations and individuals.

**15.12.1 Incumbent labor organizations and employing agencies/activities:** If a labor organization, agency or activity has been identified as an incumbent or the employing agency, the party is automatically a party to the case. In such instances, the Regional Director confirms whether or not the party(ies) will participate in the case. *See e.g., U.S. Department of the Interior, National Park Service*, 55 FLRA 466 (1999) where the Regional Director incorrectly identified two labor organizations that represented employees affected by a reorganization as potential intervenors rather than incumbents.

**15.12.2 Potential parties that are required to intervene:** The provision that the Regional Director notify a labor organization, agency or activity that it may be affected by issues raised by the petition does not require the region to confirm a potential party's participation in a petition. To do so could delay processing the case and places a burden on the Regional Director that exceeds the intent of the regulation. See *CHM 20.4* which requires the agent assigned to handle the petition to telephonically contact parties that may be affected by issues raised in a petition as soon as possible, usually prior to sending the opening letters.

Any labor organization, agency or activity notified by the Regional Director that it may be affected by issues raised by a petition is permitted a reasonable opportunity to become a party to the case. For example:

a. if a labor organization, agency or activity has been identified and notified of a petition and contacts the Regional Office for information, the region advises it of the status of the case. If the labor organization, agency or activity states it intends to intervene pursuant to § 2422.8, the agent reviews the requirements for intervention with that party.

b. If, during processing of the case, the Regional Director identifies a substantive issue that affects parties who have not been previously identified as potential parties or that changes the status of a party identified, the Regional Director **notifies** these parties of the changes in the issues before him/her. See *U.S. Department of the*

*Interior, National Park Service*, 55 FLRA 466 (1999).

c. Any labor organization that has been identified that it is the incumbent of the employees in the unit (see *CHM 17.7.3* for a definition of "incumbent") or any employing agency or activity that has been identified as an employing agency pursuant to § 2422.8(e) are automatic parties and the region confirms their participation before taking action pursuant to § 2422.30. (i.e, a disclaimer by the incumbent).

***NOTE: Thus, before taking action pursuant to § 2422.30, the Regional Director has discretion to, and in some cases, is required to follow up with any labor organization, agency or activity that may be affected by issues raised in the petition. See also CHM 17.5 and 20.8.***

## 16 NOTICE OF PETITION:

**16.1** **Purpose:** The purpose of a notice of petition is to inform employees about the petition (see § 2422.7). A notice of petition has no other purpose. The 1996 revisions to the regulations significantly diminished the purpose and effect of the posting requirement. The posting of the notice no longer establishes the time period for filing intervention requests, challenges to the showing of interest or other challenges to the proceeding.

**16.2** **When posting occurs:** The regulations provide that the Regional Director will direct an agency or activity to post a notice of petition "when appropriate." The Office of the General Counsel interprets this provision to require a posting **only when the petition is opened** (see *CHM 1.2 and CHM 12*). Thus, a posting cannot be sent until a petition is amended and the defect is cured. The region mails the notice of petition to the agency/activity when the purpose of the petition is clear and/or the petition appears to merit investigation. If a petition is unclear, i.e., the region is unable to inform the employees adequately about the petition, the notice is not forwarded until the petition is amended. If the petition appears to lack merit, a notice may never be appropriate.

Examples of petitions that never require postings include:

- A petition that is not accompanied by a timely submitted prima facie showing of interest.

- A petition that is clearly untimely because it is filed outside the open period of an agreement covering a claimed unit. In such cases, the Regional Director issues an Order to Show Cause to the petitioner requesting its position on the timeliness issue (see *CHM 20.1*). Copies of the Order to Show Cause is served on all parties. In these circumstances, the Regional Director does not ask the agency/activity to post the notice of petition.

- A petition seeking an election among a group of employees that are part of a consolidated unit is filed by a petitioner who is unaware that the proposed unit is already part of a consolidated unit. In this example the petitioner is not seeking to sever the unit from the consolidated unit.

  Regional Offices err on the side of posting a notice of election if there is any question about whether such posting is appropriate.

**16.3** **Contents of notice:** The regulations require only that the notice of petition advise affected employees about the petition. FLRA Form 30 is used for all

notices of petitions filed under Part 2422 of the regulations. The notice identifies:

a. the name of the agency/activity that employs employees affected by issues raised in the petition;

b. the name of the petitioner; and

c. the purpose of the petition.

**Since no action or right flows from the posting, the Office of the General Counsel standardized the language that the regions use to describe the purpose of the petition. The regions select one of the following statements to reflect the purpose of the petition (the *italics* indicate when the region may add clarifying information). When the petition has more than one purpose, the notice includes all appropriate statements.**

1. an election to determine the exclusive representative of certain employees at the agency (*the region may describe briefly the name and location of the activity*);

2. a determination of eligibility for dues allotment in an appropriate unit without an exclusive representative;

3. an election to determine if employees no longer wish to be represented for the purpose of collective bargaining by the exclusive representative *(the region may describe briefly the name of the labor organization involved)*;

4. to clarify, and/or amend:

   (i) a recognition or certification (then) in effect *(the region may add "for employees at (and name the activity)")*; and/or

   (ii) any other matter relating to representation *(the region may state that the petitioner wishes to disclaim interest for the unit at the "named" activity)*;

5. to consolidate two or more units, with or without an election, in an agency *(the region may name the agency involved)* and for which a labor organization *(the region may name the labor organization involved)* is the exclusive representative. Thirty percent (30%) 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 regulations.

**16.4** **Duration and location of posting:** The regulations require that the Regional Director direct the agency/activity to post the notice conspicuously for ten (10) days in places where notices are normally posted for the employees affected by issues raised in the petition and/or distribute copies of the notice in a manner by which notices are normally distributed. Notices can not be altered, defaced or covered by other material.

The requirement to post the notice in places where notices are normally posted or in a manner by which notices are normally distributed includes faxing notices or forwarding the notices via electronic mail, if other notices to employees are normally distributed in that manner. During the agent's first contact with the agency or activity, the agent discusses how notices are normally delivered to agency personnel. The agent also offers guidance to the agency representative on posting the notice.

If notices are normally distributed to employees by fax or e-mail, the agency is only required to notify the employees once. If notifying by fax, the agency certifies to the Regional Office that it faxed a copy of the notice to all employees and send a copy of it to the Regional Office. If notice is sent via e-mail, the agency certifies to the Regional Office that the e-mail was sent to the employees. A copy of the e-mail is attached to the certification.

**16.5** **Certification of posting:** The agency/activity is not required to provide the Regional Director with a certification of posting.

**16.6** **What happens if the agency refuses to post:** Contact the Office of the General Counsel for guidance if an agency refuses to post the notice of petition.

**16.7** **Status of petition during posting period:** Regional Offices do not delay processing the petition during the posting period.

**16.8** **Effect of amending a petition:** Regional Directors are required to send an amended notice of petition to the activities whenever an amended petition changing the scope and character of the unit or the purpose of the petition is filed (*CHM 13.9 and 13.10*). The "generic" language set forth in *CHM 16.3* is used. The posting of an amended notice of petition does not delay processing the petition.

17 INTERVENTION AND CROSS-PETITIONS: This section discusses the requirements for filing requests for cross-petitions and intervention. 5 U.S.C. 7111(c) provides that a labor organization may intervene in any petition filed pursuant to 5 U.S.C. 7111(b). The regulations provide procedures for requesting intervention by labor organizations and agencies or activities that are affected by issues raised by the petition (see § 2422.8). A party whose intervention has been permitted or directed by the Authority, its agents or representatives in a proceeding is called an intervenor (§ 2421.12).

**17.1 Distinctions between cross-petitions and interventions:** There are two methods for a union and/or an agency to become a party to a case: filing a cross-petition and filing a request to participate in a pending case. The latter is called a request for intervention.

**17.1.1 Cross-petitions:** A cross-petition is a petition that involves any employees in a unit covered by a pending representation petition [§ 2422.8(a)].

**17.1.1.1 Procedures:** A cross-petition is docketed as a new case and is subject to the same standards for review and sufficiency as any petition. In all respects, a cross-petition is treated as any other petition and is processed in the same manner. The only difference is that in order for a petition to be treated as a cross-petition, it must: 1) involve employees covered by a pending representation petition and 2) be filed according to the timeliness requirements for filing requests to intervene. See *CHM 17.6* for a discussion concerning the requirements for filing a cross-petition.

**17.1.1.2 Purpose:** A cross-petition 1) seeks to resolve a question of representation in a **different unit** involving any employees covered by the pending petition; **or** 2) concerns the same

employees in the pending petition, but is filed for a **different purpose** than the initial petition.

**17.1.2 Requests to intervene:** An intervention request is filed by a party seeking to participate in a pending case.

**17.1.2.1 Procedures:** A party that is granted intervention has a different status than a cross-petitioner and is subject to different filing requirements. See *CHM 17.7* for a discussion concerning the requirements for filing intervention requests.

**17.1.2.2 Purpose:** A labor organization request to intervene in a pending petition seeks to participate in an election for the proposed unit, claims to represent certain employees in the proposed bargaining unit, or claims to be affected by issues raised in the pending petition. The labor organization requesting intervention may seek a different result than that proposed by the petitioner. An agency seeks to intervene in a petition if it believes that it is affected by issues raised in the petition.

**17.1.3 Policy on filing cross-petitions versus requests to intervene:** Cross-petitions and intervention requests are filed for different reasons.

a. A labor organization may intervene in any representation proceeding if it claims to represent any employees in a unit covered by the pending representation petition. A labor organization may intervene pursuant to §§ 2422.8(c)(2) or (3) depending on the circumstances (*CHM 17.7*).

b. A labor organization is an automatic intervenor if it is the incumbent labor organization pursuant to § 2422.8(d) (*CHM 17.7.3*).

c. A labor organization may intervene in a petition seeking an election or seeking to resolve a matter of representation when it claims to represent the subject employees or seeks the same unit as proposed by the petitioner (*CHM 17.7*). A cross-petition is required when the labor organization does not claim to represent any of the subject employees and seeks to represent these employees in a different unit than that proposed by the petitioner (*CHM 17.6*).

Examples include:

- A labor organization files a petition seeking an election to represent an unrepresented group of employees. Another labor organization seeks to represent the employees in a different unit. The second labor organization does not claim to represent any of the employees in the pending petition. The second labor organization files a cross-petition with a thirty percent showing of interest rather than intervene with a ten percent showing of interest. A cross-petition with a thirty (30) percent showing of interest in the proposed unit is required to establish that a genuine question of representation exists.

- A labor organization files a petition seeking an election to represent an unrepresented group of employees. Another labor organization seeks to represent the employees in the same unit, but proposes to add these disputed employees to its consolidated unit. The second labor organization requests to intervene in the first petition and submits a ten (10) percent showing of interest. Both parties are seeking the same unit.

- A labor organization files a petition seeking a determination that an agency is a successor employer for certain employees who the agency acquired. A labor organization that has never represented the subject employees files a cross-petition with a thirty (30) percent showing of interest as it seeks an election to represent the employees who are the subject of the "successorship" petition.

- If the incumbent in a decertification election petition or a petition filed by a labor organization to "raid" the incumbent and thereafter contests the appropriateness of the unit for which it holds the certification, it must file a cross-petition with a thirty (30) percent showing of interest for the unit it claims is appropriate.

d. A party (labor organization or agency) claiming to represent or employ employees who are affected by a pending petition may properly intervene or cross-petition. In the following scenarios, the party claims to represent the subject employees currently or claims it represented the subject employees prior to the reorganization. This party, as an intervenor or cross-petitioner, may seek a different result than the petitioner.

- A labor organization files a petition seeking an election to represent an unrepresented group of employees. Another labor organization claims that due to a reorganization it already represents the employees at the agency and that the agency is a successor employer for the unit. The second labor organization may request to

intervene pursuant to § 2422.8(c)(3). That labor organization could also claim to be an automatic party as an incumbent based on its prior representation of "all of the employees in the unit sought by a petition" pursuant to § 2422.8(d) (see *CHM 17.7.2* or *17.7.3* and cases cited therein). The "incumbent" could also file a cross-petition.

- A labor organization files a petition to represent certain employees at an agency or activity. The purpose of the petition could be to seek an election or claim successorship due to a reorganization. A second labor organization claims that the subject employees accreted to its unit. The second labor organization did not previously represent the subject employees. The second labor organization could file a cross-petition or a request to intervene, based on § 2422.8(c)(3).

- A labor organization files a petition to represent certain employees at a newly established agency or activity. The petitioner claims successorship due to a reorganization. Another agency requests to intervene claiming that the employees who are the subject of the petition are still employed by its agency and have not yet transferred to the new agency. The investigation focuses on whether the second agency that claims to continue to employ the employees is an automatic party pursuant to § 2422.8(e) or an intervenor pursuant to § 2422.8(f).

- An agency files a petition seeking to clarify a matter relating to the representation of employees pursuant to §

> 2422.1(b)(2). The agency claims that it has a good faith doubt that the incumbent labor organization continues to represent a majority of the employees in the unit. (See *RCL 4*). A second labor organization may file a ten (10) percent showing of interest to intervene in this petition.

Questions relating to the application of this policy are referred to the Office of the General Counsel. See also *CHM 17.6.1*, *17.7.1* and *17.10.*

**17.2 Who may file: Only a labor organization, agency or activity may intervene in a representation proceeding [§ 2421.11(b)(2)].** An employing agency or activity or an incumbent labor organization are considered automatic parties to the proceeding [§2421.11(b)(1)(iii)]. In unit consolidation petitions, the parties to the certifications are considered incumbents even though the national union or agency is filing the petition at the national level. See *CHM 15.8.1b* at the "Note" and *CHM 20.1.6.*

The regions contact the Office of the General Counsel whenever questions arise concerning a party's status.

**17.3 What and when to file:** Section 2422.8(b) states that a request to intervene or a cross-petition, accompanied by any necessary showing of interest, must be submitted in writing and filed with either the Regional Director or the Hearing Officer before the hearing opens, unless good cause is shown for granting an extension. If no hearing is held, a request to intervene and a cross-petition must be filed prior to action being taken pursuant to § 2422.30. Section 2422.30(c) states that:

> After investigation and/or hearing, when a

hearing has been ordered, the Regional Director will resolve the matter in dispute and, when appropriate, direct an election or approve an election agreement, or issue a Decision and Order.

Thus, any labor organization or agency may intervene or cross-petition prior to the opening of a hearing, or absent a hearing, prior to a direction of election or approval of an election agreement or issuance of a Decision and Order, unless good cause is shown for granting an extension.

**17.3.1 Application of the phrase "unless good cause is shown for granting an extension":** Regional Directors may exercise discretion in accepting an otherwise untimely intervention or cross-petition only in rare and exceptional cases.

**17.3.1.1 Considerations:**

a. whether the region or the petitioner identified the party as being affected by issues raised and properly notified the party of the petition;

b. whether the region knew of a party's existence but did not identify it as being affected by issues raised;

c. whether the party requesting intervention or filing a cross-petition knew, should have known or could have known about the petition;

d. whether there were intervening circumstances that precluded proper identification and notification of the party (such as a last minute amendment or a reorganization occurred that changed the scope of the petition); or

e. other unusual circumstances. See e.g., *U.S. Department of the Interior, National Park Service, Washington, DC*, 55 FLRA 466 (1999).

**17.3.1.2** **Procedures:** If a region receives an intervention request or cross-petition that is filed after a hearing is opened, or after approval of an Election Agreement or issuance of a Direction of Election or Decision and Order, the Regional Director acknowledges receipt of the request or cross-petition and informs the filer that the request appears untimely. The Regional Director thereafter issues an Order to Show Cause to the party and requests an explanation why the intervention request or cross-petition should be accepted. The region serves copies of this Order on all parties. The party is given no more than ten days to respond. See Figure 17.3 for a sample Show Cause Order. *CHM 59.2* also discusses Orders issued by the Regional Director.

At the conclusion of the time period given for the parties' positions, the Regional Director considers the positions of the parties and the reasons supporting the labor organization, agency or activity's untimely request to intervene or cross-petition. If the Regional Director determines to grant the intervention request, the letter in Figure 17.11 is sent. The Director's decision to grant the intervention request does not preclude other parties from challenging the intervention at a subsequent hearing or election agreement meeting (*CHM*

*28.11.2.2*).

If the Director decides to deny the request after receiving the response to the Order to Show Cause, the region follows the procedures in *CHM 17.12* and solicits withdrawal of the request to intervene. If the party refuses to withdraw its intervention request, the region follows the procedures outlined in *CHM 17.14.* In situations where the cross-petition is received untimely with respect to the lead petition, there may be circumstances where the cross-petition may be processed separately from the lead petition if it is otherwise considered timely filed. In these situations, the cross-petition is not dismissed until the Regional Director decides that the lead petition is valid and the cross-petition does not raise any issue that can be processed separately from the first petition (see *CHM 17.6.2*).

**17.3.1.3 Cross-petitions raising claims pursuant to section 7111(f)(1) of the Statute:** petitions raising claims pursuant to section 7111(f)(1) of the Statute allege that a labor organization that is participating in the other petition (as a petitioner or intervenor) is subject to corrupt influences or influences opposed to democratic principles and may be filed at any time. See *CHM 20.1.8* and *RCL 10B* for processing guidelines.

**17.3.2 Interventions and cross-petitions received too late for the region to process prior to the opening of the hearing:**

a. A motion to intervene or cross petition filed immediately prior to opening the hearing is reviewed by the Hearing Officer to determine whether it complies with § 2422.8. If necessary, the Hearing Officer delays opening the hearing to review the request to intervene. The intervention request or cross-petition must be accompanied by evidence of interest as described in

§ 2422.8(c) unless the intervenor claims to be the incumbent [§ 2422.8(d)]. When the petition seeks to clarify or amend a matter relating to representation, a party is required to proffer other appropriate evidence of interest to support its intervention request. If no evidence is submitted to support the intervention request, the request is referred to the Regional Director for action. The party requesting intervention is not permitted to participate in the hearing. See also *HOG 17.4.2 through 17.4.4* for processing procedures and exceptions.

b. If an intervention request is complicated or there is an issue of timeliness, the Regional Director may give permission to the Hearing Officer to grant "conditional intervention" under the limited circumstances discussed in HOG 17.4. Alternatively, the Regional Director may instruct the Hearing Officer to refer the intervention request to him/her for consideration. If the Regional Director grants the party "conditional" intervention, the Hearing Officer announces the Regional Director's decision and follows the procedures in HOG 17.4.4.

17.3.2.1 Interventions and cross-petitions received after the hearing opens: A motion to intervene made during the hearing is untimely. The Hearing Officer asks the party requesting intervention for the grounds for the request and the reasons for the delay in filing. The Hearing Officer then goes off the record and contacts the Regional Director to discuss the intervention request. *HOG 18.4.* A cross-petition received during the hearing is referred to the Regional Director for action. *HOG 23.3.*

**17.3.3 Interventions and cross-petitions filed at the election**

**agreement meeting or prior to the Regional Director's approval of the Election Agreement or Direction of Election:** An intervention request or cross-petition filed at the election agreement meeting or prior to the Regional Director's approval of the Election Agreement or Direction of Election is a threshold issue that is resolved before the Regional Director can approve the Election Agreement or issue the Direction of Election. If the requests are made during the election agreement meeting and cannot be decided quickly, the meeting is adjourned.

The procedures outlined in this section are followed in processing intervention requests or cross-petitions. If the intervention is granted or the cross-petition is consolidated with the petition pending action, the election agreement meeting is reconvened with the intervenor or cross-petitioner as a party to the proceeding (see *CHM 28* for a discussion on election agreements or directed elections).

**17.4 Correlation between "notification" and "intervention":** It is important to distinguish between labor organizations and agencies/activities that are automatically entitled to participate in representation proceedings from labor organizations or agencies/activities who are required to intervene to participate. Any labor organization or agency/activity that may be affected by issues raised by a petition is notified of the filing of a petition (§ 2422.6). But not every labor organization or agency/activity notified pursuant to § 2422.6 by the Regional Director that it may be affected by issues raised by the petition is automatically entitled to participate in the petition. A cross-petitioner, employing agency/activity and/or incumbent labor organization are automatically parties to a representation proceeding and are designated as such in the initial letter notifying them of the petition (see Figure 15.8A or 15.9). Any other agency/activity or labor organization that may be affected

by issues raised by the petition is required to request to intervene or cross-petition according to the requirements set forth in § 2422.8 and § 2421.21 in order to participate in the petition (see Figure 15.8B).

**17.5 Limitations on Regional Director's duty to notify:** The regulations were revised to streamline the representation process and make the rules more flexible. To achieve these objectives, Regional Directors take a proactive role in identifying and notifying parties that may be affected by issues raised by the petition and to ensure that cases are processed expeditiously. This provision does not require the region to routinely confirm a party's participation in a petition. To do so could delay processing the case and places a burden on the Regional Director that exceeds the intent of the regulation. *CHM 20.4* requires the agent assigned to handle the petition to telephonically contact parties that may be affected by issues raised in a petition as soon as possible, usually prior to sending the opening letters.

Any labor organization, agency or activity notified by the Regional Director that it may be affected by issues raised by a petition is permitted a reasonable opportunity to become a party to the case. For example:

a. If a labor organization, agency or activity has been identified and notified of a petition and contacts the Regional Office for information, the region advises it of the status of the case. If the labor organization, agency or activity states it intends to intervene pursuant to § 2422.8 or § 2421.21, the agent reviews the requirements for intervention with the party.

b. If a labor organization, agency or activity has been identified as an incumbent or the employing agency, the

party is automatically a party to the case. In such instances, the Regional Director confirms whether or not the party will participate in the case before taking action pursuant to § 2422.30.

c. If, during processing of the case, the Regional Director identifies a substantive issue that affects parties who have not been previously identified as potential parties or that changes the status of a party identified, the Regional Director notifies these parties of the changes in the issues before him/her. See *U.S. Department of the Interior, National Park Service*, 55 FLRA 466 (1999).

Thus, before taking action pursuant to § 2422.30, the Regional Director has discretion to, and in some cases is required, to follow up with any labor organization, agency or activity that may be affected by issues raised in the petition.

See *CHM 15.12 and 20.8*.

If there is a substantial change in the unit or petition that requires an amendment, the Regional Director follows the procedures in *CHM 15* to identify any other affected labor organization or agency or activity. The region notifies any potential parties in accordance with *CHM 15.11* that an amended petition has been filed.

**17.6 Processing cross-petitions:** A cross-petition is a petition which involves any employees in a unit covered by a pending representation petition [§ 2422.8(a)].

**17.6.1 Filing requirements:** A cross-petition must be filed on a FLRA Form 21 and in accordance with the requirements set forth in *CHM 4 through 10*, concerning procedures for filing. A

cross-petition is filed whenever a party seeks a different unit involving any employees in the unit covered by the pending representation petition [§ 2422.8(a)].

**17.6.2 Timeliness:** Section 2422.8(b) requires that a cross-petition must be filed before a hearing opens, or absent a hearing, prior to action being taken pursuant to § 2422.30. A cross-petition is not subject to the timeliness requirements set forth in § 2422.12; it is dependent on the lead petition. If the lead petition is withdrawn or dismissed, the cross-petition is also be withdrawn or dismissed, unless the cross-petition is otherwise filed timely.

It is important to understand the phrase: "otherwise filed timely." A cross-petition that is filed timely in accordance with § 2422.12 and § 2422.8 is not subject to dismissal or withdrawal if the lead petition is dismissed or withdrawn. Examples include:

- A petition is filed during the open-period of a contract. A cross-petition seeking an election in a unit different from the one petitioned-for does not have to be filed during the open period of a contract, but has to be filed before a hearing opens, or, if no hearing is held, prior to action being taken pursuant to § 2422.30. If the lead petition is withdrawn or dismissed so is the cross-petition as it is nothing more than an intervention for a different unit.

- A petition is filed seeking an election for a unit of employees during the open period of a contract. A cross-petition is filed alleging that certain employees in the lead petition have been transferred to another unit. The cross-petitioner is not seeking an election, but rather a determination of the status of the

transferred employees. The cross-petition is timely filed until such time as a determination is made that the affected employees have or have not been transferred from the unit. If the employees have not been transferred from the unit, the petition is dismissed as untimely. If the employees have been transferred from the unit, the petition is timely and decided on its merits.

- A petition is filed seeking an election for a unit of employees. There is no contract. A cross-petition is filed seeking an election for a different unit that includes employees from the lead petition. The lead petition is withdrawn. The cross-petition is still valid since it was filed timely, irrespective of the lead case.

**17.6.3 Procedures for processing:** A cross-petition is processed with a lead petition until such time as the Regional Director decides the cross-petition does not involve any employees in the unit covered by the lead petition. If the cases are related, they are consolidated for action pursuant to § 2422.30. If they are not related, the Regional Director notifies the parties that the petitions will be processed separately.

**17.6.4 Notification of cross-petition:** Any party to the lead petition and parties that may be affected by issues raised by the cross-petition are notified of the cross-petition in accordance with *CHM 15* and given an opportunity to intervene.

**17.6.5 Status of parties:** Questions may arise concerning the status of the various parties in cross-petitions. If the cross-petition is filed timely, the cross-petitioner is an automatic *party* in the lead petition. The lead petitioner and the employing

agency/activity are automatically *party(ies) to the cross-petition* (*CHM 17.4*) and are notified of their status in a letter opening the cross-petition. A letter is sent to other parties affected by issues raised in the cross-petition, regardless of their status in the lead case, and given the opportunity to intervene (*CHM 15.8*).

***See CHM 17.3.2 and HOG 23 for processing cross-petitions received in the region too late to process prior to the opening of the hearing. See CHM 17.3.3 and CHM 28.34 for processing cross-petitions received at the election agreement meeting or prior to the Regional Director's approval of the Election Agreement or Direction of Election.***

**17.7 Processing intervention requests:** A party requests to participate in a representation proceeding by filing a *request to intervene*.

**17.7.1 Filing requirements:** A request to intervene must be in writing and accompanied by evidence of interest to support its request (§ 2422.8). An intervention request may be filed when a party believes it is affected by the issues raised by the petition. For policy guidance on the difference between filing an intervention request or a cross-petition, see *CHM 17.1.3*. Specific requirements for intervention are repeated in the following sections.

***Note: A labor organization seeking to intervene must present all contentions and arguments to the Regional Director. This was confirmed by the Authority in several cases: "[a] labor organization seeking to intervene must present all contentions and arguments concerning its request, not to the Authority in an application for review." United States Department of the Interior, Bureau of Indian Affairs, Navajo Area Office,***

***Gallup, New Mexico (BIA), 34 FLRA 413 (1990) and cited in National Park Service, Golden Gate National Recreation Area, San Francisco, CA , 41 FLRA 791 (1991) and U.S. Department of Transportation, U.S. Coast Guard Finance Center, Chesapeake, Virginia (Coast Guard), 34 FLRA 946 (1990).***

**17.7.2 Labor organization intervention requests:** Except for incumbent intervenors, § 2422.8(c) provides that a labor organization seeking to intervene shall submit a statement that it has complied with 5 U.S.C. 7111(e) and one of the following:

a. a showing of interest of ten percent (10%) or more of the employees in the unit covered by a petition seeking an election, with an alphabetical list of the names of the employees constituting the showing of interest [§ 2422.8(c)(1)]; or

b. a current or recently expired collective bargaining agreement covering any of the employees in the unit affected by issues raised in the petition [§ 2422.8(c)(2)]; or

**17.01.03 Incumbent:** An incumbent exclusive representative, without regard to the requirements of § 2422.8(c) is considered a party in any representation proceeding raising issues that affect employees the incumbent represents, unless it serves the Regional Director with a written disclaimer of any representation interest in the claimed unit [§ 2422.8(d)].

The Authority has stated that a labor organization may not qualify as an "incumbent" based on representation of some of the petitioned-for employees. Rather, "a union qualifies as an 'incumbent' only when it is the exclusive representative of all the employees in the unit sought by a petition, either in the unit covered by the petition or as part of a larger unit, only a portion of which is involved in the proceeding." *Defense Commissary Agency, Defense Commissary Store, Fort Drum, New York (Fort Drum),* 50 FLRA 249 (1995). When the labor organization formerly represented only some of the employees in the petitioned-for unit, that labor organization must intervene in accordance with § 2422.8(c) of the regulations. See *CHM 17.7.2.*

If an incumbent labor organization declines to participate in a representation proceeding, it must submit a disclaimer of interest (see *CHM 28.10*).

**17.01.04 Unusual situations where a labor organization claims status as an incumbent and an intervenor:** In unusual situations, a labor organization may claim status as both an

incumbent [§ 2422.8(d)] and a qualified intervenor [§ 2422.8(c)]. The labor organization must submit evidence in support of its alternative claims at the time it files its requests. Thereafter, the region offers guidance in the form of advising the party of the applicable case law, the regulations and its options. If the labor organization does not elect its status, its status becomes an issue for the Regional Director to decide in a Decision and Order. In such cases, the labor organization must be prepared to present all evidence and arguments to support its alternative theories. *See United States Department of the Interior, Bureau of Indian Affairs, Navajo Area Office, Gallup, New Mexico (BIA)*, 34 FLRA 413 (1990).

This situation occurs most often in cases involving the effects of a reorganization on an existing unit where the labor organization claims status as an incumbent and an intervenor under § 2422.8(c)(3) and there is a question of successorship.

**17.01.05** **Employing agency:** An agency or activity is considered an automatic party if any of its employees are affected by issues raised in the petition [§ 2422.8(e)].

This provision accords automatic status to an agency or activity that employs any employees who are affected by issues raised in the petition. An employing agency cannot decline to participate in the proceedings (see § 2422.15 and *CHM 21*).

**17.01.06** **Agency or activity intervention:** An agency or activity seeking to intervene in any representation proceeding must submit evidence that one or more employees of the agency or activity may be affected by issues raised in the petition [§ 2422.8(f)]. An agency entitled to intervene pursuant to § 2422.8(f) is usually one that is affected by a reorganization.

**17.08 Failure by a labor organization to submit evidence in**

**support of a request to intervene or cross-petition:** If the request for intervention does not include:

a. a statement of service as required in § 2422.4; and

b. a statement of compliance with 5 U.S.C. 7111(e); and

c. evidence of interest, either

(i) a showing of interest of ten (10) percent or more of the employees in the unit covered by the petition, with an alphabetical list of employees of the names constituting the showing of interest as required in § 2422.8(c)(1); or

(ii) copy of the current or recently expired collective bargaining agreement as required in § 2422.8(c)(2); or

(iii) other supporting evidence § 2422.8(c)(3),

the Regional Director is required to send a letter immediately that notifies the party of its failure to comply with the filing requirements (Figure 17.8). The Regional Director cannot take action on requests for intervention without ensuring the party requesting intervention has complied with the regulations. Cross-petitions submitted without appropriate documentation are processed according to the guidelines outlined in *CHM 12 and 13*.

**17.09 Failure to submit showing of interest:** Any showing of

interest as defined in § 2421.16 to support an intervention request or cross-petition filed in a petition is submitted when the request to intervene is made. The Regional Director has discretion to grant an additional three working days to submit additional showing of interest in an election case if in the Director's view, the additional time will not delay the proceedings and the showing of interest is otherwise timely filed. See *CHM 18.9* for processing.

***NOTE: The terms "showing of interest" and "evidence of interest" are interchangeable. The "common usage" of "showing of interest" refers to authorization cards or petitions to support an election petition; other types of interest are usually referred to as "evidence of interest." See CHM 18.6.1.***

In any petition, an intervenor or cross-petitioner are reminded that if it fails to submit an adequate showing or other evidence of interest, it may always withdraw its request and refile prior to the opening of the hearing or, if no hearing is held, prior to action being taken pursuant to § 2422.30. As long as the request and showing are otherwise timely filed, an intervenor or cross-petitioner may withdraw and refile.

**17.09.01** **Exception:** A request to intervene or cross-petition that is submitted immediately prior to the opening of a hearing or at an election agreement conference must be accompanied by an adequate showing of interest or other acceptable evidence of interest. The party attempting to intervene or cross-petition is not given additional time to obtain a sufficient showing of interest. If the party requesting to intervene or cross-petition fails to submit an adequate showing of interest immediately prior to the opening of a hearing or at an election agreement conference, the party may not participate in either proceeding.

➢ Hearings: If a party fails to submit a showing of interest with a

cross-petition or intervention request filed immediately prior to the opening of a hearing, the party is not permitted to participate in the hearing, and the petition and request for intervention is processed separately.

- Election agreement conference: If the party requesting to intervene or cross-petition fails to submit an adequate showing of interest at an election agreement conference, it may resubmit its request to cross-petition or intervene with supporting evidence of interest prior to the Regional Director's approval of the agreement.

See *CHM 18.13.7* for guidance on checking the showing of interest accompanying interventions/cross-petitions received too late for the region to process prior to opening the hearing; *HOG 17.4* for a discussion relating to processing an intervention request prior to or at the hearing; and *CHM 28.34* that discusses processing a request for intervention/cross-petition and checking the showing of interest at election agreement meetings.

**17.09.02 Determining adequacy of showing of interest:** Where the request for intervention is supported by evidence of interest among the employees in the unit; i.e., signed authorization cards, etc. the determination that the showing of interest is adequate is based upon the activity's payroll list that was used to check the petitioner's showing of interest, unless good cause is shown for using a different list.

The procedures for determining the intervenor's prima facie showing of interest and for making the final check against the payroll list are the same as for determining the showing of interest for a petitioner (see *CHM 18*). A report of the

intervenor's showing of interest is completed on FLRA Form 52. See *CHM 18.15*.

**17.10 Investigating requests to intervene:** The purpose of a petition may not be readily apparent and thus the requirements for intervention may also vary. Because of the generic nature of a petition, Regional Office personnel review all requests for intervention carefully to ensure that the requests are consistent with the purpose of the petition. Issues that arise in intervention requests may become issues in the case (*CHM 17.1.3*). As a result, the region may find it necessary to direct the parties to meet to discuss and narrow the issues before the Regional Director can rule upon a request to intervene or cross-petition (see *CHM 25*).

**17.10.01 Request supported by a collective bargaining agreement:** If a request for intervention is supported by a current or recently expired agreement as described in § 2422.8(c)(2), Regional Office personnel decide whether the agreement covers any of the employees in the unit involved in the petition. This determination is usually based on the description of the bargaining unit which sets forth the categories or classifications of employees represented. If the agreement is ambiguous or silent as to the scope of the unit, the region requests the intervenor and the activity to submit their positions and supporting documentary material regarding the composition of the bargaining unit represented by the intervenor. The certification database is also a resource for checking unit descriptions.

**17.10.02 Request supported by evidence that a labor organization represents or an agency employs affected employees:** A request for intervention that is based on a statement that, prior to a reorganization, a labor organization was the recognized or certified exclusive representative of any

employees affected by issues raised by the petition, must be supported by evidence of the labor organization's previous status [§ 2422.8(c)(3)]. An agency/activity's request for intervention based on a statement that an agency has employees that may be affected by issues raised by the petition must also be supported by evidence. Examples include a copy of the certification or recognition showing the employees' recognized or certified exclusive representative, orders transferring affected bargaining unit employees to the new employer etc..

**17.11 Actions on request for intervention:** When the Regional Director determines that the requirements for intervention have been met, the Director sends a written confirmation to the parties involved. See Figure 17.11. If possible, the Regional Director informs all parties simultaneously that s/he is granting one or more request(s) for intervention in a given case. When granting an intervention, Regional Office personnel ensure that the party and the party's designated representative are named properly. Copies of the letter(s) granting intervention are served on all other parties (see *CHM 14*).

**17.12 Soliciting withdrawal of a request for intervention:** If the Regional Director determines that intervention is not appropriate, the Director solicits withdrawal of the request for intervention in accordance with *CHM 27.4.6* (discussing withdrawal of intervention requests and petitions). If the requesting party does not agree to withdraw its request for intervention over the phone, the Regional Director sends the letter shown in Figure 17.12. The letter includes a modified version of FLRA Form 43. The phrase "intervention in," is inserted after the word "of" so as to read, "This is to request withdrawal of intervention in the above-named case." Copies of the withdrawal solicitation are not served on the other parties.

**17.13 Unusual requests to intervene that are based on § 2421.21:** As discussed at CHM 15.5.2, the phrase "affected by issues raised," as used in Part 2422, should be construed broadly to include labor organizations, agencies, or activities having a connection to employees affected by, or questions presented in, a proceeding." Certain parties that fit this definition are an incumbent labor organization or an employing agency or activity who are considered automatic parties. A second type of party that may be affected by issues raised is a labor organization or activity that requests to intervene pursuant to §§ 2422.8(c) and (f). A third type of party is one that may have a "connection" to employees affected by, or questions presented in, a proceeding, but are not incumbents, employers or parties that can qualify as intervenors pursuant to § 2422.8. These parties are known as "interested parties."

**17.13.01 Examples:**

a. National unions in Montrose cases: Regional Offices notify the national union initially when a petition is filed by a local union that seeks reaffiliation (see *CHM 15.5.2*). Although the case law on trusteeships and Montrose issues continues to be unsettled, a national labor organization that does not have exclusive recognition at the level of recognition involved in the petition is considered to be affected by the issues raised in the petition (see *CHM 15.6 and 15.7*). Regions grant national unions "interested party" status in Montrose cases whether or not the local has been placed in trusteeship. See *New Mexico Army and Air National Guard,* 56 FLRA 145 (2000) at n. 10.

b. Labor organizations that have participated in Montrose proceedings: The Authority's decision in *U.S. Army Reserve Command, 88th Regional Support Command,*

*Fort Snelling, Minnesota (Fort Snelling)*, 53 FLRA 1174 (1998), stated that only the certified exclusive representative may file a petition to amend its certification following a Montrose vote to change its affiliation. Therefore, the gaining union in a Montrose proceeding or any other union that participated in the election, does not meet the requirements to intervene in these petitions. However, these parties may be permitted to participate as an "interested party" since they were affected by issues raised in the proceeding. See *CHM 17.13.2* and *CHM 4.3.1.*

**17.13.2 Policy on handling requests to intervene based on § 2421.21:** In *Utah Army National Guard, U.S. Department of the Army, Draper, Utah (Utah ARNG),* an unnumbered decision dated April 16, 1999, the Authority denied an application for review that was filed by a third party on the Montrose ballot, and the Authority in a footnote, noted that the Regional Director granted both parties on the ballot, LIUNA and ACT "interested party" status. Neither the regulations nor the Statute provide for "interested party" status and the Authority did not differentiate between "interested parties" and intervenors in the footnote.

Until the Authority provides further clarification on the application of §2421.21, the regions construe § 2421.21 broadly and grant parties that request to intervene on the basis that they believe they are affected by issues raised, but cannot qualify as intervenors or incumbents under § 2422.8, "conditional intervenor" status and process the request pursuant to *CHM 15.8.1* and *15.8.2*. Thereafter, the Regional Directors will decide whether or not the party qualifies as an intervenor, or an interested party in the Decision and Order. See also *Long Beach Veterans Administration Medical Center, Long Beach, California,* 7 FLRA 434 (1981). See also *CHM 15.10* and *20.5.2*.

**17.14 Decision and Order denying request for intervention:** If a party fails or refuses to withdraw its request for intervention, the Regional Director issues a Decision and Order. (*CHM 53* discusses Regional Director Decisions and Orders). As indicated in Figure 53.A, supporting reasons are given for the decision, as appropriate. For example, a statement that the intervention was not supported by an adequate showing of interest is self-explanatory and sufficient. A statement that the intervention was not timely filed requires an explanation.

**17.15 Granting of application of review:** In the event that a timely application of review is filed with the Authority, the Regional Office may not transmit the case file, or any other documents, to the Authority unless specifically requested by the Authority, as discussed in *CHM 54*.

**17.16 Action pending review of a Decision and Order denying intervention:** The Decision and Order denying intervention, and/or the filing or granting an application for review will not stay processing of the petition unless specifically ordered by the Regional Director or the Authority (see *CHM 55* for guidance on actions following the Regional Director's Decision and Order). The Regional Director is required to receive clearance from the Office of the General Counsel before deferring a petition pending an appeal of a Decision and Order denying intervention (*CHM 58*).

**17.17 Action upon remand:** A party whose request to intervene or cross-petition is denied by the Regional Director may appeal to have its status reversed. If, pursuant to an application for review, the Authority undertakes review and remands a case based on a finding that the Regional Director improperly denied a party status as an intervenor or cross-petitioner, the party may be entitled to participate fully in the petition. If applicable, the

procedures set forth in *CHM 29.11* discuss procedures for reopening hearings upon remand of a case by the Authority. *CHM 55.1.3* discusses the effects of a reversal in an election proceeding.

# SHOWING OF INTEREST, VALIDITY AND STATUS CHALLENGES

## CHM 18 and 19

**18 SHOWING OF INTEREST:** *CHM 18* concerns petitions and requests for interventions that are supported by **numerical evidence** described in §§ 2422.3(c) and (d) and 2422.8(c)(1). *CHM 18.6* provides a complete definition of a showing of interest, but this section is limited to "numerical" showing of interest.

**18.01 When a showing of interest is required:** The Statute requires that a showing of interest be submitted with certain petitions that seek elections or a determination of eligibility for dues allotment [5 U.S.C. 7111(b)(1), 7112(d) and 7115(c)]. If a labor organization submits an amended petition that seeks an election in a unit that differs from the original petition, the amended petition must be accompanied by a showing of interest. *U.S. Department of the Interior, National Park Service, Washington, DC,* 55 FLRA 311, 315 (1999). See also *CHM 13.11* and *18.13.6*.

18.01.01 Petitions that request: (1)(i) an election to determine if employees in an appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, and/or (ii) a determination of eligibility for dues allotment in an appropriate unit without an exclusive representative; or (2) an election to determine if employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative must be accompanied by an appropriate showing of interest. [§ 2422.1(a)]

18.01.02 A showing of interest is also required if employees in units in an agency and for which a labor organization is the

exclusive representative seek an election on the issue of a proposed consolidation. 5 U.S.C. 7112(d) provides that two or more units in an agency and for which a labor organization is the exclusive representative may be consolidated **with or without** an election. Therefore, although a labor organization, agency or both parties jointly may file a petition to consolidate existing units for which the labor organization has exclusive recognition, the employees may submit a 30 percent showing of interest in the proposed consolidated unit and require and election on the issue of consolidation. Providing employees with an opportunity to gather and submit a showing of interest, while not required by the Statute, is consistent with the intent of the Statute to ensure secret ballot elections under all circumstances prior to imposing a bargaining obligation on any agency. (*CHM 23.8.3 and 28.17*).

**18.02 Why a showing of interest is required:** The requirement that a showing of interest be made "serves an administrative purpose in helping to avoid unnecessary expenditure of time and funds where there is no reasonable assurance that a genuine representation question exists and prevents the parties from abusing the Authority's processes." *North Carolina Army National Guard, Raleigh, North Carolina (North Carolina Army National Guard),* 34 FLRA 377, 383 (1990). The question of union support is conclusively decided by the actual secret ballot election. *Coast Guard,* 34 FLRA at 949 *citing NLRB v. Metro-Truck Body, Inc.,* 613 F.2d 746, 750 (9th Cir. 1979).

**18.03 Definition of "adequacy of showing of interest":** Section 2422.9(a) states that adequacy of a showing of interest refers to the percentage of employees in the unit involved as required by §§ 2422.3(c) and (d) and 2422.8(c)(1).

18.03.01 The Regional Director's determination that a showing of interest is adequate is administrative in nature and not subject to collateral attack at a unit or representation hearing or appeal to the Authority (see also *HOG 33.1*). The Regional Director's determination that a showing of interest is inadequate may be appealed by the petitioner or intervenor if the petitioner/intervenor refuses to withdraw the petition/intervention request and the Regional Director issues a Decision and Order dismissing the petition/intervention request. A challenge to the adequacy of a showing of interest is authorized only under limited circumstances. See § 2422.9(b) and *North Carolina Army National Guard*, 34 FLRA 377 and *Coast Guard,* 34 FLRA 946, 949.

**18.04 Basis of adequacy determinations:** 5 U.S.C. 7111(f)(2) provides in relevant part that exclusive recognition shall not be accorded to a labor organization "if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition[.]"(emphasis added). *See also Office of Hearings and Appeals, Social Security Administration (OHA),*16 FLRA 1175 (1984). Thus, a determination of the adequacy of the showing of interest is based on the number of employees in Item #3 on the petition form. Examples include:

a. A petitioner is required to submit a showing of interest for thirty (30) percent of the entire unit petitioned-for. Thus, in a mixed unit of professional and nonprofessional employees, the petitioner is not required to submit a showing of interest consisting of thirty (30) percent of the professional employees and thirty (30) percent of the nonprofessional employees. The showing consists of thirty (30) percent of the entire unit.

b. In cases where an activity's staffing fluctuates due to the seasonal nature of the work or where a unit is expanding, a showing of interest is required only among those employees employed at the time the petition is filed. *Coast Guard,* 34 FLRA at 950.

***NOTE: In the latter case of an expanding unit, this rule does not resolve whether the petition is premature and can be processed as the proposed unit must meet the substantial and representative complement test. (See RCL 2 and Coast Guard,* 34 FLRA at 954*)***

c. When a petitioner seeks to sever a group of employees from an existing unit, the petition must be accompanied by a thirty (30) percent showing of interest among the employees in the unit sought in the petition. *OHA,* 16 FLRA 1175.

**18.05 What constitutes an adequate showing:**

**18.05.01 Petitioner's interest in a request for a representation election:** A petition seeking an election to determine the exclusive representation of employees in an appropriate unit must be accompanied by a showing of interest of not less than thirty (30) percent of the employees in the unit claimed to be appropriate. The petitioner is also required to submit an alphabetical list of names constituting the showing of interest with the petition.

**18.05.02 Petitioner's interest in a request for a decertification election:** A petition seeking an election to determine whether employees in an existing unit no longer wish to be represented by an exclusive representative must be accompanied by a showing of interest of not less than thirty (30) percent of the

employees in the existing unit. The showing of interest must reflect that the employees no longer desire to be represented for purposes of exclusive recognition by the currently recognized or certified labor organization. The petitioner is also required to submit an alphabetical list of names constituting the showing of interest with the petition.

**18.05.03 Petitioner's interest in requests for a determination of eligibility for dues allotment:** A petition requesting a determination of eligibility for dues allotment must be accompanied by **evidence of membership** of not less than ten (10) percent of the employees in the unit claimed to be appropriate. The petitioner is required to submit an alphabetical list of names constituting the evidence of membership with the petition.

**18.05.04 Cross-petitioner's interest in a request for a representation election:** A petitioner seeking an election in a different unit from that claimed appropriate by another petitioner must be supported by a showing of interest of not less than thirty (30) percent of the employees in the unit claimed to be appropriate in the cross-petition. The petitioner is required to submit with the petition an alphabetical list of names constituting such showing of interest.

**18.05.05 Labor organization seeking to intervene based on a numerical showing of interest:** A labor organization seeking to intervene on the basis of a showing of interest must submit a showing of interest of ten (10) percent or more of the employees in the unit covered by a petition seeking an election, with an alphabetized list of the names of the employees constituting the showing of interest [see 5 U.S.C. 7111(c) and § 2422.8(c)(1)].

**18.05.06 Labor organization that seeks to intervene based on other than a numerical showing of interest:** Some

intervention requests are supported by evidence of interest other than a numerical "showing of interest" as discussed herein. Section 2422.8(c) provides that in addition to a numerical showing of interest, other acceptable evidence includes:

a. a current or recently expired collective bargaining agreement covering any of the employees in the unit affected by issues raised by the petition; or

b. evidence that a labor organization is or was, prior to a reorganization, the recognized or certified exclusive representative of any of the affected employees.

See also *CHM 17.7*.

**18.05.07 Employee request for an election on the issue of a proposed consolidation:** A request by employees (in units in an agency) for which a labor organization is the exclusive representative for an election on the issue of a proposed consolidation must be accompanied by a showing of interest of thirty (30) percent or more of the employees in the proposed consolidated unit (*CHM 20.1.6* discusses processing petitions to consolidate units).

**18.06 Definition of a showing of interest:** *CHM 18* concerns petitions and intervention requests that are supported by numerical evidence described in §§ 2422.3(c) and (d) and 2422.8(c)(1); however, § 2421.16 provides a general definition of showing of interest.

**18.06.01 Types of evidence:** Types of evidence of interest described § 2421.16 include:

a. Evidence of membership in a labor organization;

b. Employees' signed and dated authorization cards or petitions authorizing a labor-organization to represent them for purposes of exclusive recognition;

c. Allotment of dues forms executed by the employee and the labor organization's authorized official;

d. Current dues records;

e. An existing or recently expired agreement;

f. Current exclusive recognition or certification;

g. Employees' signed and dated petitions or cards indicating that they no longer desire to be represented for the purposes of exclusive recognition by the currently recognized or certified labor organization;

h. Employees signed and dated petitions or cards indicating a desire that an election be held on a proposed consolidation of units; or

i. Other evidence approved by the Authority.

**18.06.02** **Photocopies:** The Regional Director may accept photocopies of evidence of interest in place of originals. If necessary, the Regional Director may require the original showing of interest when: (1) there are a significant number of unsigned or undated authorization cards and the region is required to mark "unsigned" or "undated" on the original card (*CHM 18.7.5c*); or (2) anytime there is a challenge to the validity of the showing of interest alleging fraudulent or forged signatures (*CHM 18.19*).

## 18.07 Requirements for acceptable evidence of interest:

**18.07.01 Membership in a labor organization:** Evidence of membership in a labor organization is required to support a dues allotment petition. It is also submitted to support petitions seeking an election for exclusive representation or intervention requests. Evidence of membership consists of a list of current members signed by an authorized representative or official of the particular labor organization that bears a certification that the named individuals are members in good standing. If the region or a party questions the validity of the certified list, the region may require the labor organization to bring the original membership records to the Regional Office for examination.

**18.07.02 Authorization cards:** An authorization card must be signed and dated by the employee. A card may not be counted as part of the interest showing if it contains only the printed name of the employee.

**18.07.03 Authorization petitions:** Authorization petitions must contain a heading or preamble setting forth the purpose of the petition; i.e., that the employees signing the petition authorize the named labor organization to represent them for the purposes of exclusive representation. The absence of a statement authorizing the named labor organization to represent the employees signing the petition does not, however, necessarily constitute a basis for finding a showing of interest inadequate. The Authority has found that a showing of interest that petitioned only for an election to be adequate. In its Decision on Request for Review in *Veterans Administration, Veterans Administration Medical Center, Coatesville, Pennsylvania,* Case No. 2-RO-19 (1980), the Authority stated:

> In view of the fact that the sole purpose of

> "showing of interest" under the Federal Service Labor Management Relations Statute is to obtain a representational election, the Authority finds an interpretation of "showing of interest" which permits the use of cards executed solely for the purpose of an election would effectuate the purposes and intent of the Statute.

The technique of obtaining signatures on dual purpose documents is inherently confusing and the resultant procedures are, therefore, unreliable and unacceptable as evidence of interest. *See Sacramento Army Depot, Sacramento, California,* 49 FLRA 1648 (1994) adopting *U.S. Army Electronics Command, Ft. Monmouth, New Jersey,* Case No. 32-2565(RO), 1 Rulings on Requests for Review 233 (1972), and Report on Ruling Number 52, 2 A/SLMR 641 (1972). Dual purpose forms are authorization petitions forms that bear two or more unrelated headings such as: (1) acknowledging receipt of a publication and (2) authorizing a labor organization to represent employees for purposes of exclusive representation.

**18.07.04** **Decertification showing:** Petitions or cards requesting a decertification election must contain a statement that the signatory employee(s) no longer wishes to be represented for the purpose of collective bargaining by the currently recognized or certified labor organization.

**18.07.05** **Validity of designations:** The showing of interest is checked against the list of employees furnished by the agency/activity in each proposed appropriate unit to see whether the requirements in § 2422.9 are met. Although authorization cards are examined on their face (to check, for example, against signatures in the same handwriting), their validity is presumed unless challenged by the presentation of objective considerations. See *CHM 18.9* for procedures for checking the

showing of interest. **This subsection highlights some, but not all, of the basic requirements for acceptable evidence of interest:**

a. The authorization must run to the party submitting it in support of its interest. This requirement is construed liberally. For example, authorizations designating the "AFL" are accepted as being on behalf of the "AFL-CIO." Similarly, authorizations running to a parent or international organization are accepted as evidence of interest in support of a petition filed by a local of that organization, and vice versa. Designations in blank are not acceptable. The card is not counted if the petitioning labor organization has changed its affiliation from that shown on the authorization card. In addition, petitions filed by a council or by joint-petitioners may be supported by authorization cards signed on behalf of any of the affiliates of the council or on behalf of either joint-petitioner.

b. Dating the authorizations: Each employee must sign his/her name and insert the date at the time of signing the petition. Generally, the date is placed opposite each name. No independent proof of the date of signing is solicited or accepted. A petition-sheet containing a list of signatories and bearing a single date purporting to be the date on which the entire sheet was signed, however, may be accepted by the Regional Director.

c. Undated or unsigned authorization cards may be returned only upon written request by the party that originally submitted the cards as part of its showing of interest. Such cards are not valid if subsequently dated and/or signed and resubmitted. During the initial examination of a party's showing of interest, the

Regional Office marks or stamps "undated" or "unsigned" on any authorization card that does not bear either a date or a signature in the space designated or across the face of the card. Such action precludes an undated or unsigned card from being counted in the event that it is resubmitted. See *CHM 18.6.2*.

d. Current vs. stale interest: The date on authorization cards, petitions and interest showing support of election petitions must be current. Evidence of interest is considered current if it bears a date that is not more than one year prior to the date of filing of an election petition involving a unit of not more than 10,000 employees. If the unit involved is in excess of 10,000 employees, the showing of interest covering a period of not more than two years prior to the filing of the election petition is normally considered current. Thus, any showing of interest bearing a date in excess of such 12-month or 24-month period, as appropriate, is stale and is not counted.

e. Refiling after prejudice period: Where a petition has been withdrawn with prejudice in accordance with § 2422.14, and the same petitioner seeks to refile for the same unit or any subdivision of the unit, the petitioner must support such petition with a current showing of interest. The region contacts the Office of the General Counsel if the petitioner attempts to use the same showing that was submitted with the original petition.

f. Dual signatures: It is not uncommon for the same employee to sign authorization cards or petitions on behalf of different labor organizations in the same election proceeding. Similarly, an employee may sign evidence of interest in support of a decertification

petition while continuing to maintain membership in the currently recognized or certified labor organization that is involved in the decertification petition. While the employee has executed seemingly conflicting evidence of interest on behalf of parties to the same or consolidated representation proceeding(s), the particular authorization or other evidence of interest is counted towards the various parties' respective showing of interest requirements if otherwise valid.

g. Revocation of authorization: An employee attempting to revoke his/her signature on an authorization card or petition does not serve to negate the original designation of a showing of interest since the effective test for ascertaining the real intent of the signer lies in the election process.

h. Effect of supervisory involvement: If the Regional Director finds that agency management participated in the solicitation of interest, the Regional Director determines an appropriate course of action. *See United States Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas (Fort Bliss)*, 55 FLRA 940 (1999) and *U.S. Department of Health and Human Services, Public Health Service, Indian Health Service, Gallup Indian Medical Center, Gallup, New Mexico (Gallup),* 46 FLRA 1421 (1993), where the Regional Director dismissed a petition on the basis of agency management's involvement in the solicitation of the showing of interest. *Compare, Veterans Administration Hospital, Brecksville, Ohio,* 1 FLRC 302 (1971) in which the Federal Labor Relations Council found that a showing of interest may be selectively invalidated where supervisory involvement is isolated, minimal or mitigated. (*CHM 18.19* discusses investigating

challenges to the validity of the showing of interest).

**18.08 Timeliness of submission of a showing of interest:**

**18.08.01 Petitioner's interest:** A showing of interest must be submitted by the petitioner no later than the last day a petition might timely be filed. Thus, if a showing of interest is not submitted with the petition, or if a prima facie showing of interest is inadequate, the petitioner must be notified immediately.

Application of this rule was discussed in *North Carolina Army National Guard*, 34 FLRA 377 (1990). In that case, the Authority affirmed that a petition for certification of representative must be received by the appropriate Regional Director during the open period of a contract. The Authority also found that the petitioner must submit with the petition evidence of a prima facie showing of interest based on the approximate number of employees in the unit claimed to be appropriate. However, the Authority found that in the circumstances of that case, where the petitioner miscalculated the number of employees in the claimed unit, the Regional Director allows the petitioner a reasonable period of time after notice of the deficiency to submit any additional showing of interest it has in its possession. The Authority noted that the showing of interest must be dated and signed before the expiration of the open period, but could be submitted after the contract expired.

**Exception:** If a cross-petitioner fails to submit an adequate showing of interest filed immediately prior to the opening of a hearing, the cross-petitioner is not permitted to participate in the hearing and the petition is processed separately (*CHM 17.9.1 and HOG 23*).

**18.08.02 Intervenor's interest:** The showing of interest must be submitted by the intervenor no later than the last day the intervention might timely be filed. The procedures in *CHM 18.8.1* are applied in assessing the timeliness of an intervenor's showing of interest. Thus, if a request for intervention is filed timely, but without a showing of interest, the intervenor may be given sufficient time to submit the showing, as long as the showing is otherwise timely filed. If the intervention request is supported by a showing of interest that is based on the intervenor's estimate of the number of employees in the claimed unit and the showing is later found to be inadequate, the region allows the intervenor a reasonable period of time after notice of the deficiency to submit any additional showing of interest as long as the showing is otherwise timely filed. An **exception** is when the request to intervene is filed immediately prior to the opening of the hearing or at the election agreement meeting. A request to intervene petition that is submitted immediately prior to the opening of a hearing must be accompanied by an adequate showing of interest. A request to intervene that is filed at an election agreement meeting must be accompanied by a showing of interest or the requestor is not permitted to participate in the meeting. See *CHM 17.9* and *18.9* for procedures for processing an intervenor's showing of interest and *HOG 17.4* for processing intervention requests that are received too late for the region to process prior to the opening of the hearing.

**18.09 General procedures:** This section discusses procedures for notifying the petitioner or intervenor concerning the adequacy of the showing of interest. See *CHM 18.10* and *18.11* for requirements for checking the prima facie showing of interest and *CHM 18.12* for requirements for checking the final showing of interest.

**18.09.01 Failure to submit alphabetized list with petitioner's**

**or intervenor's showing of interest:** As discussed in *CHM 12*, a petition is defective if it is not accompanied by an alphabetized list constituting the showing of interest. The failure to submit an alphabetized list does not prevent the petition from being opened or an intervention request from being investigated (see *CHM 12.4*). It does not, more significantly, prevent completion of the prima facie check. A letter as set forth in Figure 12.4 is sent without delay if the petitioner fails to submit the alphabetized list. Failure to furnish the material in response to a written request by the Regional Director prevents the Director from taking action pursuant to § 2422.30 and may result in dismissal of the petition.

**18.09.02 Failure to submit adequate showing of interest:**

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If the prima facie showing of interest is inadequate, the petitioner is also notified immediately. Any additional showing of interest must also be received not later than the last day on which any petition may be filed timely, except in the circumstances cited in *North Carolina Army National Guard,* 34 FLRA 377 (1990) and *CHM 18.8*. See *CHM 18.9.3* for notification procedures.

**18.09.02.02 By intervenor:** If the written request for intervention is not accompanied by a showing of interest, the intervenor is notified immediately (*CHM 17.8*). The procedure discussed in *CHM 18.9.3* is followed: the initial contact is made by telephone, if possible, and is confirmed by fax or telegram. Any additional showing of interest must also be received not later than the last day on which any intervention may be filed timely.

***Note the exceptions to granting additional time to submit a showing of interest discussed in CHM 18.8.***

**18.09.03 Procedures in notifying petitioner and intervenor when showing is inadequate:** If possible, the agent contacts the petitioner/intervenor by telephone to advise the party that the showing of interest is insufficient. Except in those instances

in which there are less than three (3) days in which to make a timely submission, the agent informs the petitioner/intervenor that the showing of interest must be received not later than three (3) **working** days from the date of the telephone conversation. The agent also states that absent such receipt, the Regional Director will issue a Decision and Order dismissing the petition or denying the intervention. The agent confirms the conversation by fax immediately (or telegram, if a fax is not available) as shown in Figure 18.9A. (See also *CHM 17.9* for intervention.)

If circumstances preclude notifying the petitioner/intervenor by telephone, the Regional Director sends the fax or telegram set forth in Figure 18.9B. The Regional Office confirms receipt of the fax or telegram.

When discussing the submission of additional showing of interest with petitioner's/intervenor's representative, the agent is not authorized to grant more than the three (3) day period.

The region does not send copies of the fax's or telegrams set forth in Figures 18.9A or B to any of the other parties or advise any party regarding the status of the petitioner's/intervenor's showing of interest. Other parties receive appropriate notification of the adequacy of the showing of interest at such time as dismissal may be warranted due to insufficient showing of interest (see *CHM 27 and 53* regarding dismissal of petition).

**18.09.04 Request for extension of time:** Other than the initial three days discussed in *CHM 18.9.3*, no extensions of time are granted to a petitioner or intervenor to submit a showing of interest or any additional showing of interest. Figure 18.9C is a sample fax denying a request for additional time.

**18.09.05 Deferring the petition:**

**18.09.05.01 Failure to submit showing of interest: If the showing of interest is not submitted with the petition, the region cannot open an election petition or a dues allotment petition.** A thirty (30) percent showing of interest is a prerequisite to proceeding with a representation or decertification petition and a ten (10) percent showing of interest (evidence of membership) is a prerequisite to proceeding with a dues allotment petition. Thus, a petition is defective and is not opened prior to receipt of an amended petition and the appropriate showing of interest (see *CHM 18.8* for timeliness requirements). Accordingly, the Regional Director does not send the opening/notification letters discussed in *CHM 15* (see also *CHM 12.3* which discusses defective petitions which delay opening the case).

**Upon receipt of the evidence of interest, further processing of the petition, if any, depends upon whether a prima facie showing of interest is made.**

***NOTE: Generally, an intervenor's failure to provide an adequate showing of interest does not delay processing the case.***

**18.09.05.02 Failure to estimate the number of employees in the proposed unit: If the petitioner omits the estimated number of employees from Item #3 on the petition form, the petition is defective. The region cannot open an election petition or a dues allotment petition.** The prima facie showing of interest cannot be determined if there is no estimate of the number of employees upon which to base a thirty percent (30%) or ten percent (10% - dues allotment petitions) computation (see *CHM 12.3-defective petitions* and *13.8-amending a petition*). An amended petition is served on the other parties (see *CHM 7 and 13.5*). See also *CHM 18.8* for timeliness requirements.

If the petitioner miscalculates the number of employees in the claimed unit, the petition is not defective, but the showing of interest may be inadequate. In such cases, the Regional Director follows the procedures discussed in CHM 18.9.3. See also *North Carolina National Guard,* 34 FLRA 377 (1990).

**18.09.06 Notification when evidence of interest is adequate:** The Regional Director is not required to send a separate letter to notify the petitioner or intervenor when the region determines that the petitioner or intervenor's showing of interest is sufficient. The letter shown in Figure 15.9 that is sent to the employing agency/activity and the incumbent is sufficient notification as copies of that letter are served on the petitioner.

## 18.10 Prima facie check of interest:

**18.10.01 General:** A **prima facie** showing of interest is checked promptly for the following reasons:

a. To determine whether a genuine representation question exists (*CHM 18.2*);

b. To avoid any delay in processing the case that could prejudice the petitioner; *see North Carolina Army National Guard*; and

c. To determine whether the petitioning union acquires equivalent status for the purposes of 5 U.S.C. 7116(a)(3) and to protect the rights of the incumbent union by assuring that a petitioning union does not have access to an agency's facilities and services for campaign purposes based on a facially invalid petition or showing of interest. *See U.S. Department of Defense Dependents School, Panama Region,* 44 FLRA 419 (1992) and *CHM 15.9*.

**18.10.02 Petitioner's prima facie showing of interest in election cases:**

**18.10.02.01 Requirement:** A petitioner must submit with the petition evidence of a prima facie showing of interest based on the approximate number of employees in the unit claimed to be appropriate. *North Carolina Army National Guard*.

**18.10.02.02 Preliminary determination:** Upon the filing of an election petition, the Regional Office makes a preliminary determination of the sufficiency of the showing of interest. The determination of a prima facie showing of interest is made without regard to any payroll list since the prima facie check is made before the opening letter is sent to the activity.

**18.10.02.03 Basis for making determination:** When checking the evidence of interest for prima facie sufficiency, the estimated number of employees shown in Item #3, FLRA Form 21, is used as the total number comprising the unit. Similarly, each signer of the authorization material is considered to be employed within the unit involved. **All authorization material is checked completely to determine the existence of a prima facie showing of interest. Neither a random sample nor a spot check is used in making the count.**

**18.10.02.04 Counting acceptable evidence:** In examining the evidence of interest, the region exercises particular care and counts only those authorization cards and petitions that are signed and dated. Other types of acceptable evidence of interest are listed in *CHM 18.6 and 18.7*.

**18.10.02.05 How to mark the prima facie showing of interest:** The showing of interest and the alphabetized list are marked so that, between them there is a permanent record of the check. Normally the actual showing is not “marked” unless the card is

undated or unsigned (see *CHM 18.7.5c*). A check mark is placed next to each name on the alphabetized list as the name is found on the showing of interest. This mark is usually made with a pen with a distinctive color. If no alphabetized list is submitted at the time the prima facie showing is checked, a visual count of the actual showing is recorded on FLRA Form 52.

**18.10.02.06 Completing** FLRA Form 52**:** Upon completion of the check of the petitioner's evidence of interest for prima facie sufficiency, Part I of FLRA Form 52, Report of Investigation of Showing of Interest, is prepared and retained as part of the case file.

***NOTE: When a final determination of the showing of interest is made, based upon a check against a payroll list submitted by the activity, Part II of FLRA Form 52 is completed.***

**18.10.02.07 Notifying petitioner of insufficient showing of interest:** If the examination results in a finding that the showing of interest is less than the required thirty percent (30%) [or ten percent (10%) in dues allotment petitions] of the estimated number of employees in the unit specified on the petition, the petitioner is notified promptly. Follow the procedures in *CHM 18.9.3*.

**18.10.02.08 Additional showing of interest:** The fax or telegraphic notification initially establishes a due date for the submission of any showing of

interest that the petitioner has in its possession at that time. Any additional showing of interest that is submitted to make up the deficiency is acceptable if received by the due date, provided that in cases where an agreement exists, the showing is signed and dated before the expiration of the open period. *See North Carolina Army National Guard*, 34 FLRA at 382.

**18.11 Intervenor's prima facie showing of interest:** When a request for intervention is supported by evidence of interest among the employees in the unit; i.e., signed authorization cards, etc., the initial determination of the showing of interest is based upon a prima facie sufficiency of ten (10) percent or more of the employees. The procedures for determining the intervenor's prima facie showing of interest are the same as for determining the prima facie showing of interest for a petitioner. A FLRA Form 52 is completed for each intervention request in the same

manner as the form is completed for the petitioner's showing of interest.

**18.12 Petitioner's showing of interest in petitions requesting a determination of eligibility for dues allotment:** A petitioner must submit evidence of membership with a petition requesting a determination for eligibility for dues allotment. The requirements for evidence of membership are set forth in *CHM 18.5.3 and 18.7.1*. The procedures for determining the petitioner's prima facie showing of interest are the same as for determining the petitioner's prima facie showing of interest in election cases.

**18.13 Final determination:** The procedures for making the final determination of the adequacy of any petitioner's or intervenor's showing of interest are the same.

**18.13.01 Request for payroll list:** A final determination of a petitioner's or intervenor's showing of interest is made on the basis of a current list of employees in the unit sought (as of the payroll period payroll period immediately preceding the date the petition was filed). The list is requested pursuant to § 2422.15(b) by the Regional Director in his/her initial letter to the activity (see *CHM 15.9* and Figure 15.9).

**18.13.02 Delay in submission of list:** If the activity does not submit the payroll list by the date requested in the letter, the agent contacts the activity. If necessary, the agent advises the activity if the list is unduly delayed or not submitted at all, the final determination of the showing of interest is based upon the petitioner's estimate of the number of employees in the unit; i.e., the test for prima facie showing of interest.

**18.13.03 Complete check vs. random sample:** If the number of names on the payroll submitted by the activity is less than one

thousand (1000), the region makes a complete check of the showing of interest. If the payroll list contains more than 1000 names, the region has the option of conducting a random sample (spot check). This involves checking less than every name submitted by the labor organization; e.g., every 3rd, 5th or 10th name, against the list. However, the sample is large enough to ensure validity. At least thirty percent (30%) of the names on the showing of interest are checked against the payroll list and in no event shall the ratio of the random sample be less than 1 out of 10 among the evidence of interest. A complete check is conducted in "raid" petitions.

**18.13.04 How to make a record of the final check:** The payroll list and the alphabetized list of the showing of interest submitted by the petitioner/intervenor are marked so that, between them, there is a permanent record of the check. A mark is placed against each name on the payroll list as the name is found on the alphabetized list. If the alphabetized list was used to check the prima facie showing, it is used and checked against the payroll list. In this situation, the alphabetized list submitted by the labor organization is also marked to reflect the names found on the payroll list. ***(NOTE: if the alphabetized list was not submitted when the prima facie showing of interest was checked, the payroll list is checked against the actual showing of interest. The alphabetized list is used only if it was checked by the agent against the actual showing.)*** A pen having a different color than the pen used to make the prima facie marking is used to mark the payroll list and the alphabetized list.

The final count is determined by the number of checks that appear on the payroll list. The total number of "checks" is equal to or greater than thirty (30) percent of the total names on the payroll list. If the showing of interest is inadequate based on the payroll list, before contacting the petitioner, the agent

reviews *CHM 18.14* for a discussion concerning disputed size of unit.

No marking is made on the actual evidence of interest to denote whether the particular name was found on the payroll list. This restriction does not apply to marking or stamping "undated," where necessary, or "no signature" on the signature line, as appropriate on any authorization card, etc. which is defective for not being dated or signed.

**18.13.05 Separate checks for each unit involved:** A check is made for each claimed bargaining unit involved. Subsequent rechecks are made if unit positions or the parties' positions change or if the petition is amended.

**18.13.06 Amending the unit at a hearing:** A Hearing Officer rules on a motion to amend the unit at a hearing, like any other motion, after the other parties are asked whether they have any objections to the motion. Before granting a motion to amend the unit, the Hearing Officer takes the following actions (see also *HOG 18.6*):

a. goes off the record and assesses whether the amendment has substantially affected the identity of the unit. Changes in terminology are distinguishable from changes affecting the identity and content of the unit (see *CHM 13.9*, *13.10*, *and 13.11*).

b. checks the showing of interest to determine if it is sufficient to support the proposed amendment. In any instance where additional showing of interest is required, it must be submitted with the amendment. ***NOTE: as discussed in CHM 13, the petitioner may amend its petition at any time; however, in election cases, it must be accompanied by the appropriate***

***showing of interest at the time the amendment is filed.*** See *U.S. Department of the Interior, National Park Service,* 55 FLRA 311, 315 (1999) and *CHM 18.1*.

c. determines whether there are timeliness issues (only in unusual circumstances) (*RCL 12*).

d. calls the Regional Director if it appears that the amendment has changed the identity of the unit. If the Regional Director concludes that the amendment has a substantial effect upon the unit and identifies additional parties that may be affected by issues raised, the Hearing Officer goes back on the record and states: "Upon authorization by the Regional Director, the hearing is adjourned indefinitely pending a review of the amended petition and notification, if necessary of other potential interested parties." (see *HOG script 35.4*) Where the Regional Director concludes that the amendment does not substantially effect the unit, the Hearing Officer continues the hearing.

**18.13.07 Considerations when reviewing a showing of interest accompanying requests to intervene or a cross-petition received too late for the region to process prior to the opening of the hearing:**

a. The showing of interest must accompany any intervention request or cross-petition that is filed immediately prior to the opening of the hearing. If no evidence is proffered, the intervening party or cross-petitioner can not participate and the hearing is not delayed (*CHM 18.8*).

b. Where a request to intervene or cross-petition is based on evidence of interest received too late for the region to

process prior to the opening of the hearing, the showing of interest is not examined by any other party to the proceeding and is not introduced or received into the record. Argument on the adequacy of interest is inappropriate and the Regional Director's eventual ruling on the request is based on the investigation of interest made by the Hearing Officer. The parties are reminded that adequacy of a showing of interest is an administrative matter made by the Regional Director and is not subject to collateral attack by the parties [see § 2422.9(b)].

c. Where requests to intervene or cross-petition are received immediately prior to the opening of a hearing, any accompanying showing of interest is checked on the spot unless the showing is voluminous and the Hearing Officer decides that it would unduly delay the hearing (see *CHM 18.13.6*). If it appears sufficient on its face, the Regional Director instructs the Hearing Officer to grant the motion to intervene, "subject to a subsequent check of the sufficiency of interest" (see *HOG 17.4.4 - guidelines relating to granting "conditional intervention"*). The check is normally made between sessions using the activity/agency list furnished in response to the opening letter. The Hearing Officer is authorized to announce the Regional Director's ruling on the intervention/cross-petition. If the hearing record closes before the Hearing Officer has an opportunity to check the showing of interest, the Hearing Officer [see *HOG 34.4(c)*] reports the results in the Hearing Officer's Report and an amended showing of interest report, FLRA Form 52 (see *CHM 18.15*).

d. If the Hearing Officer's check of the showing of interest reflects that the showing is inadequate and the scope

and size of the unit is not an issue in the proceeding, the Hearing Officer refers the request to intervene or cross-petition to the Regional Director. The party attempting to intervene or cross-petition is not given additional time to obtain sufficient showing of interest. The hearing is not delayed and the party requesting status as an intervenor or cross-petitioner does not participate in the hearing.

e. If the identity or size of the unit is an issue at the hearing and the decision could affect the intervenor's or cross-petitioner's request, the Regional Director may decide to allow the intervenor or cross-petitioner to "conditionally intervene" and participate in the proceedings. See *HOG 17.4.4*. ***NOTE: As discussed in CHM 18.14, if the intervenor's showing of interest is later found to be inadequate based on the Regional Director's Decision, the intervenor is not given time to submit additional showing of interest.***

**See also *HOG 23* for a discussion of cross-petitions made immediately prior to the opening of the hearing.**

**18.13.08 Interventions, cross-petitions and challenges filed at the election agreement meeting or prior to the Regional Director's approval of the Agreement or Direction of Election:** These are threshold issues that are resolved by the Regional Director before s/he approving the Election Agreement or issue a Direction of Election. See *CHM 28.34*.

## 18.14 Disputed size of unit:

**18.14.01 Procedures:** A final check of the showing of interest is always conducted notwithstanding a dispute in the size of the

unit. Where the number of employees on the payroll list exceeds the estimated number of employees in the unit shown in Item #3 of the petition, the region decides the adequacy of the petitioner's submission. If the check reveals less than a thirty (30) percent showing for the larger number, the petitioner is contacted for its position regarding the payroll list--a copy of which it received from the activity.

18.14.01.01 If the petitioner **agrees** that the showing of interest in less than thirty (30) percent of the unit, the region gives the petitioner an opportunity to submit additional showing of interest, providing such additional interest would be considered timely (See *CHM 18.9.3*).

18.14.01.02 If the petitioner **disagrees** that the payroll list conforms to the unit petitioned-for on the basis of eligibility or appropriate unit issues, the region follows procedures outlined below:

a. The region asks the petitioner to identify specific employees on the list whom it contends are ineligible for the unit as submitted by the activity and to provide its position regarding the activity's proposed unit description;

b. The region contacts the activity for its position regarding the eligibility or unit issues;

c. If the status of the disputed employees cannot be readily resolved by the parties, the determination of the showing of interest is based on the total number of employees whom the **petitioner** asserts comprise the unit:

- If the dispute concerns only eligibility issues, the region subtracts those employees whose eligibility the

petitioner disputes from the payroll list. If the showing of interest is still insufficient, the region notifies the petitioner of the inadequacy (see *CHM 18.9.3*). The petitioner is given the opportunity to submit the necessary additional showing of interest providing such additional interest would be considered timely. If the subsequent submissions still results in an insufficient showing, the petition is dismissed, absent withdrawal.

- If the showing of interest is contingent on resolution of eligibility or unit issues, the region notifies the petitioner of:

  (i) the inadequacy;
  (ii) the reasons for the inadequacy;
  (iii) the advisability of supplementing its showing of interest;
  (iv) the possibility of a hearing to resolve the eligibility or unit issues; and
  (v) the effect of potential findings on the showing of interest and the petition.

**18.14.02 Effect of a determination by the Regional Director that a hearing is necessary:** When the region informs the petitioner that a hearing may be necessary to resolve the eligibility or unit issues, the region also advises the petitioner of the consequences of the Regional Director's or Authority's findings. If it is determined that the unit is different than proposed or estimated by the petitioner, the petition could be dismissed following a reevaluation of the showing of interest.

***Note that these procedures apply to "composition issues" (eligibility of certain inclusions or exclusions) and to "unit***

***appropriateness" issues (scope of unit). These procedures apply to intervenors as well as petitioners.***

If, during the hearing, the petitioner seeks to amend the petition to conform to a larger unit, the petitioner or intervenor must submit additional evidence of interest to support alternative eligibility or unit positions. See *HOG 25* for a discussion on processing an amended petition that changes the identity of the unit.

**18.14.03 Effect of finding an enlarged unit appropriate:** When the Regional Director or the Authority directs an election in a unit larger or different in scope than that requested by the petitioner, the direction of election is often conditioned on a reevaluation of the petitioner's/intervenor's showing of interest. This evaluation is based on the showing of interest that was submitted prior to the close of the hearing. If the petitioner/intervenor's showing of interest is insufficient, the petition is dismissed or the request for intervention denied, absent withdrawal. **The petitioner/intervenor is not given additional time to procure additional interest.** The following three examples illustrate how an eligibility or unit determination by the Regional Director or the Authority might affect a showing of interest:

- Inclusion of a category sought to be excluded by the petitioner: Assume that the petitioner seeks a unit of one hundred (100) nonprofessional employees and submits a showing of interest of thirty-three (33) cards. The activity contends that twenty (20) analysts are eligible for inclusion in the unit, while the petitioner maintains that they are ineligible because they are professional employees. The Authority finds that all employees in this category are nonprofessional employees and includes them in the nonprofessional unit found to be

appropriate. The unit now totals one hundred twenty (120) employees, requiring a showing of interest of thirty-six (36) employees, whereas petitioner has a showing of interest of thirty-three (33). The petition is dismissed.

- Exclusion of category sought to be included by the petitioner: Assume that the petitioner seeks a unit of one hundred twenty (120) Wage Board employees, of whom twenty (20) are casual employees. The activity contends that this group of employees do not have a community of interest with the remaining employees involved. Petitioner's showing of interest, totaling forty (40) authorization cards, includes twelve (12) cards signed by casual employees. The Authority excludes the casual employees, resulting in the unit being reduced to one hundred (100) employees. The petitioner's showing of interest also is reduced by 12 cards to a total of twenty-eight (28) cards. Inasmuch as a minimum showing of interest of thirty (30) employees is required, the petition is dismissed.

- Activity contends that the petitioned for unit is not appropriate: Assume a labor organization filed a petition seeking an election at a small field activity and the Agency proposes that the unit include all field activities nationwide. A hearing is held and the Regional Director determines that the small field unit is inappropriate. The Regional Director does not rule on the appropriateness of the larger unit since the petitioner stated it was not willing to proceed to an election in the larger unit. The petition is dismissed.

*See Department of Transportation, National Highway Traffic Safety Administration,* 2 A/SLMR 433 (1972) *and Federal Aviation Administration and Federal Aviation Administration Eastern Region,* 5 A/SLMR 777 (1975).

**18.15 Report on investigation of showing of interest:** A separate FLRA Form 52 is completed for every election or dues allotment petition. Where two or more petitions are filed involving the same activity, whether for the same or different units, a separate FLRA Form 52 is prepared stating the appropriate case number of the petition involved. The showing of interest of any intervenor(s) in a unit covered by a petition is also entered on an appropriate FLRA Form 52.

When more than one report is prepared [such as one reporting the results of the investigation or hearing regarding the impact of eligibility and/or unit disputes on the showing of interest made by the petitioner and any intervenor(s)], the subsequent reports are labeled "amended" or "second amended" as appropriate.

In every instance in which a hearing is held and completed involving a dispute as to the eligibility of any job categories and/or the appropriateness of the unit(s), **a copy of both the original and a supplemental FLRA Form 52 are forwarded to the Authority.**

**18.15.01 Preparing** FLRA Form 52 **after final check of agency's list:** The following items are noted:

a. Name of agency/activity involved, case number and petitioner or intervenor is provided. Note that a different FLRA Form 52 is completed whenever the

petitioner amends the petition and changes the identity of the unit. If more than one intervenor is involved, additional forms are completed.

b. Part I: This section provides information about the prima facie showing of interest. The abbreviated designation of the petitioner is entered in this space.

c. Part II: Designation and payroll information: The procedure used in checking the names on the payroll list is reflected by underlining either "complete" or "spot" (random) where requested. If no payroll list has been submitted, the entry in the blank space following the words, "for the period ending" reads, "No payroll list submitted".

d. Part II also provides information about the final determination of the adequacy of the showing of interest based on the agency's/activity's payroll list.

e. Part III provides information about the intervenor's showing of interest.

**18.16 Regional determination on showing of interest:** The Regional Director's ultimate determination that a petitioner's showing of interest does not support the unit claimed or found to be appropriate results in dismissal of the petition or denial of intervention, absent withdrawal. Decisions and Orders dismissing petitioner for insufficient showing of interest or denying requests for intervention are discussed at *CHM 53.*

**18.17 Ultimate disposition of evidence of interest:** All evidence of interest which is submitted in support of a petition or request for intervention is retained in the case file until the case has

been closed. During the processing of the case the only evidence of interest which may be returned to the submitting party are those cards that are undated and/or unsigned and have been marked or stamped as such before being returned. A request by a party for the return, of any portion of its evidence of interest is denied irrespective of the reasons offered. However, a party is permitted to examine its own evidence of interest at the Regional Office for the purpose of copying names and addresses. Upon closing of the case, at the party's request, the evidence of interest may be returned to the appropriate party by certified mail. If a party prefers to pick up the material at the Regional Office, regional personnel obtain a receipt before releasing the evidence of interest.

**18.18 Challenge to the adequacy of a showing of interest:** As discussed at *CHM 18.3*, no challenge to the adequacy of showing of interest is permitted under § 2422.9(b).

**18.18.01 Limitation on application of review:** An application for review may be filed with the Authority only when the determination of adequacy by the Regional Director results in issuance of a Decision and Order dismissing a petition or denying intervention. Hence, a determination that an adequate showing of interest has been submitted in support of a petition or request for intervention is not subject to the filing of an application for review with the Authority.

**18.18.02 Collateral attack:** No collateral attack of a determination that the showing of interest is adequate can be raised at a representation hearing.

## 18.19 Challenge to the validity of a showing of interest:

**18.19.01 What is a challenge to the validity of a showing of interest:** Section 2422.10(a) states that validity questions are raised by challenges to a showing of interest on grounds other than adequacy. The showing of interest of either a petitioner or an intervenor can be challenged.

**18.19.02 Who may file a challenge to the validity of a showing of interest:** The Regional Director or any party may challenge the validity of a showing of interest (validity challenges).

**18.19.03 When and where validity challenges may be filed:** Challenges to the validity of a showing of interest must be in writing and submitted to the Regional Director or the Hearing Officer before the hearing opens, unless good cause is shown for granting an extension. If no hearing is held, challenges to the validity of a showing of interest must be filed prior to action being taken pursuant to § 2422.30.

**18.19.04 Filing validity challenges received too late in the region to process prior to the opening of the hearing:** Challenges to the validity of the showing of interest **are never referred** to the Hearing Officer, but are handled administratively. Challenges to the validity of the showing of interest that are filed with the Hearing Officer are referred to the Regional Director (see *CHM 26.1g.* and *HOG 17.3*, *24*, *33.2*).

**18.19.04.01 Attempt to litigate validity of the showing of interest at a hearing:** If a party attempts to raise an issue regarding the validity of the showing of interest by the petitioner or intervenor at a hearing, the Hearing Officer denies the challenge or forwards it to the Regional Director for consideration (*HOG 33.2*).

**18.19.05 Filing validity challenges at the election agreement meeting or prior to the Regional Director's approval of the Election Agreement or Direction of Election:** Validity challenges raise a threshold issue that are investigated and decided before the Regional Director can approve the Election Agreement or issue a Direction of Election. If the challenge is made during the election agreement meeting, the meeting is adjourned so that the challenge can be investigated and decided. All evidence must be submitted at the time the challenge is filed.

## OVERVIEW

**18.19.06 Contents of validity challenges:** Section 2422.10(d) requires that challenges to the validity of a showing of interest must be supported with evidence.

**18.19.07 Evidence supporting validity challenges:** Evidence in support of a challenge to the validity of a showing of interest is an absolute requirement before any investigation is undertaken. Evidence must be submitted with the challenge. Such evidence consists of signed statements of employees or other written evidence. If no evidence is filed, the challenge is denied administratively (see *CHM 18.19.15*). Of course, the challenger may always refile the validity challenge with supporting evidence if the challenge is otherwise timely filed.

**18.19.08 Service of validity challenges:** A copy of a validity challenge is served upon all parties. However, evidence supporting challenges to the validity of the showing of interest **is not** served on any party (§ 2422.4).

**18.19.09 Basis of validity challenges:** A validity challenge is concerned with the authenticity of the signatures and/or the circumstances under which the authorization cards were obtained; i.e., fraud, forgery or supervisory involvement. Thus, the fact that an authorization card is not dated or contains the printed name of the employee rather than his/her signature does not involve a question of authenticity of the card. In such circumstances, the authorization card is not counted because of the omission of a date or signature rather than the commission of an act of fraud or forgery.

**18.19.10 Investigating validity challenges:** Investigation of a validity challenge is undertaken promptly. Processing of the petition is held in abeyance until the investigation is completed unless the challenge is filed immediately prior to the hearing. See *HOG 24.2 and 33.2* for guidance in handling challenges filed immediately prior to or during the hearing.

**18.19.11 Report of investigation:** Upon completion of the investigation of a validity challenge and, generally, before the challenged union is contacted, a written final investigative report (FIR) is submitted to the Regional Director.

**18.19.12 Form and content of final investigative report:** A FIR is clear, concise and comprehensive. It is marked as an intra-agency and confidential document. The facts as set forth in the FIR is supported by evidence in the case file that is specifically identified in the FIR. The FIR is a self-contained document to the extent that it is not necessary to refer to file documents for a thorough understanding of the facts and issues in the case. Opinions or conclusions of the parties are not facts and are not reported as such in the FIR. Conflicting statements and disputed

facts are noted.

A FIR includes, but is not necessarily limited to:

a. a statement setting forth the challenge(s) to validity and the evidence submitted in support of the allegation(s);

b. the identification of individuals interviewed and of the major characters involved;

c. a statement of the issues raised by the challenges;

d. a discussion of all facts relevant to each challenge;

e. an analysis of each allegation or issue, including discussion of supporting case law or legal theories and, where applicable, a discussion of defenses raised;

f. recommendations as to the disposition of each allegation; and if appropriate, a recommendation regarding enlarging the scope of the investigation.

**18.19.13 Investigating unfair labor practice charges and challenges to the validity of the showing of interest simultaneously:** If an unfair labor practice charge is filed alleging improper assistance by the agency or improper conduct by the labor organization involving the same conduct that gave rise to the challenge, the ULP and the challenge are investigated simultaneously. Disposition on the merits of the ULP charge also resolves the challenge filed in the REP case to the extent described below:

a. if the investigation results in a finding of no merit, the

Regional Director dismisses the ULP charge, absent withdrawal and issues a letter to the party filing the challenge denying the challenge (see CHM 18.19.15);

b. if the parties settle the ULP, the settlement includes a request to withdraw the challenge to the validity of the showing of interest;

c. if the Regional Director decides the ULP has merit, the Regional Director issues a complaint and further processing of the representation case is blocked. *CHM 60*.

## SCOPE, STANDARDS AND INVESTIGATIVE TECHNIQUES

**18.19.14 Scope of "challenge" investigation:** Initially, the investigation is limited to specific evidence of interest alleged to be invalid. The investigation is based on the evidence submitted and how the evidence was obtained. See *CHM 23.4 and 23.5* for a discussion on investigative techniques. For example, assume that the challenging party has alleged that 30 of the 100 cards submitted by the petitioner are invalid because of forgery and presents written statements from each of the thirty (30) employees involved. In such instance, the investigation is limited to the thirty (30) authorization cards involved.

**If the allegations are substantiated by the investigation, the Regional Director refers the question of whether the investigation is expanded to the Office of the General Counsel. In this example, this issue is whether to expand the investigation to include the remaining seventy (70) cards.**

The investigation includes, but is not limited to:

a. attempts to obtain affidavits from the individual(s) responsible for procuring and submitting the signatures (more than one individual could be involved).

b. making a signature comparison on the authorization cards against reliable records, such as W4 forms held by the agency or activity. The identity of the employees is not be revealed to the agency.

c. questioning the individuals whose names appear on the authorization cards as signatories and taking affidavits, if possible, concerning the authenticity of their signatures.

**18.19.15 Standard to be applied in determining the effect of improper agency conduct on an election petition:** In *United States Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas (Fort Bliss)*, 55 FLRA 940 (1999) the Authority stated that a showing of interest should be disallowed only where necessary to prevent abuse of the election process and to protect the fundamental right of employees to choose their own representative [citing 5 U.S.C. 7102(2)]. Further, the Authority concluded "that a determination to dismiss a petition because of agency misconduct must be based on specific findings concerning both the particular conduct at issue and the effect of that misconduct on the particular petition."

The Authority summarized the standard by stating that:

> In sum, in order to dismiss a representation

> petition supported by a showing of interest, we will require that any improper conduct on the part of the agency actually have affected the validity of the petition. ... if after disallowing the signatures gathered as a result of the Agency's improper grant of access to the organizer, the showing of interest is valid, the petition should not be dismissed. *Fort Bliss* at 943.

**18.19.15.1 Investigating allegations of improper agency conduct:** *Fort Bliss,* 55 FLRA 940, requires the region to focus the investigation not only on the actions of the agency, but also on the resulting effect on employees and the petition. As a result of the investigation, there may be circumstances where the misconduct involves such active involvement or support of the union by agency officials that the misconduct pervades the signature collection process, leading to the conclusion that the petition is dismissed. Where agency misconduct is limited or other reasons mitigate its significance, only those aspects of the petition directly affected by the violation may be invalid. *Fort Bliss*, 55 FLRA 940 and *Veterans Administration Hospital, Brecksville, Ohio,* 1 FLRC 302 (1971).

The Authority did not set forth specific evidence that may be relevant to determining whether an agency's improper grant of access to a rival union affected the free choice of its employees within the meaning of 5 U.S.C. 7102. However, listed below is the type of evidence that the region obtains when investigating these challenges.

a. Whether the activity has knowledge of an outside organizer soliciting a showing of interest

on its premises.

1. If the activity is not aware of such conduct, the inquiry ends since there is no basis for concluding that any cards were tainted based on improper conduct by the activity. An activity cannot be held accountable for controlling an outside organizer's conduct when there is no evidence the activity was, or should have been, aware of the outside organizer's presence.

2. If the investigation discloses that the activity was, or should have been, aware of the improper conduct, the inquiry continues and the second step applies.

b. If the activity was aware of such conduct, the extent of the activity's participation or appearance of participation in the union's organizational activities is assessed. A number of factors are evaluated to determine whether the entire showing of interest or a portion of the showing is tainted. These include:

1. The existence of any legitimate reason for the outside organizer to be present on the activity's premises;

2. The presence of another labor organization as the certified

representative of the employees being solicited or as a rival labor organization;

3. The extent of any policing by the activity on the outside organizers and any restrictions placed by management on the outside organizers;

4. The period of time outside organizers were on the activity's premises and involved in soliciting or collecting employee signatures;

5. The number of authorization cards solicited *during* the period of time the outside organizers were on the activity's premises in relation to the size of the bargaining unit; and

6. When and where the authorization cards were solicited (work area or non-work area, work-time or breaks), and/or the presence of any supervisors or managers during the period of solicitation.

c. Once the evidence has been obtained, it is analyzed to determine the impact of the activity's improper conduct on the right of employees to be "free to choose or reject union representation without coercion and while agency management maintains a posture of neutrality." *Gallup,* 46 FLRA 1421, 1424. If the activity's conduct is sufficiently pervasive it

may reasonably be inferred, as was the case in *Gallup*, that the entire showing of interest was tainted. On the other hand, if mitigating circumstances exist, consistent with the approach adopted in *Fort Bliss,* 55 FLRA 940*,* the facts may warrant the conclusion that either none or only a portion of the petitioning union's showing of interest was tainted.

**18.19.15.2 Submitting the case for advice:** Following the region's investigation and analysis, any case that:

a. involves supervisory conduct and

b. the Regional Director believes may be meritorious,

is submitted for advice. *CHM 58.3.15*

**18.19.16 Guidelines when contacting the petitioner or intervenor whose showing of interest is being challenged on the basis that the signatures were fraudulent or were obtained coercively:** The challenged party is not contacted until after the Regional Director makes a preliminary decision on the merits of the challenge. If the Regional Director determines the challenge has no merit, there is no need to contact the challenged party (*CHM 18.19.17*). If the Regional Director determines that the challenge appears meritorious, the Director contacts the challenged party in accordance with the guidelines set forth in *CHM 18.19.18.* This is both a sensible and fair approach, balancing the challenged union's right to respond to the evidence and the need to protect the employee

witnesses' privacy.

## ACTION

**18.19.17 Action when there is no valid issue:** When the Regional Director decides that no valid issue has been raised by the challenge to the validity of the showing of interest, the Regional Director sends a letter, as set forth in Figure 18.19A, to the party filing the challenge, absent an unsolicited withdrawal by the party of the challenge. A copy is served on all other parties. A withdrawal request is not solicited in such instances. The Regional Director's denial of the challenge to validity is final and not subject to review [§ 2422.10(e)]. Upon issuance of the letter to the challenging party, the region resumes processing the petition.

**18.19.18 Action when a valid issue is raised:** If the investigation establishes that reasonable grounds exist for believing that any part of the showing is fraudulent or was obtained coercively, the Regional Director contacts the challenged party and provides that party with an opportunity to discuss and respond to the evidence.

In situations involving the authenticity of signatures, the region initially sends a letter to the challenged union (with a copy to the international, if the petitioner is a local): 1) advising it of the question as to the authenticity of the authorization cards (without specifics); 2) offering the challenged union an opportunity to meet and review the results of the investigation; and 3) setting forth the provisions of section 1001, Title 18 of the U.S. Code. (see Figure 18.19B).

If the challenged union requests a meeting, the region will meet

with the union and verbally provide the challenged union with a general outline of the evidence submitted and the results of the investigation. It is not permissible to provide the challenged union with copies of the affidavits secured from the signatories who provided evidence in support of the challenge. However, if necessary, the Regional Office may make a copy of the petitioner/intervenor's alphabetized list and sanitize it to delete the invalid names. The union is permitted to respond to the challenge.

If the Regional Director determines that a valid issue has been raised by the challenge, s/he has discretion to determine what action to take.

a. The Regional Director may strike from the showing of interest the names of the individuals whose signatures are invalid. If the remaining valid showing falls below the required amount (30% or 10%), the petition or intervention based on the showing is dismissed or denied, absent withdrawal. The stated ground is that the evidence of interest submitted "was of questionable authenticity." *See, Fort Bliss,* 55 FLRA 940 (1999) and *VA, Brecksville, Ohio,* 1 FLRC 302 (1971) (a showing of interest may be selectively invalidated where supervisory involvement is isolated, minimal or mitigated. *CHM 18.19.15.*

b. If the remaining valid showing satisfies the interest requirement, but an officer or agent of the union was responsible for or had knowledge of and condoned submission of the fraudulent cards, the region requests clearance concerning the appropriate disposition of the petition or request for intervention. *CHM 58.4.3.*

c. If, in the Regional Director's view, the entire showing of interest is tainted because of the extent of the fraud or the method of solicitation, the Director may dismiss the petition or deny the request for intervention, absent withdrawal. Advice is obtained from the Office of the General Counsel (See *CHM 58.3.15* and *CHM 18.7.5h*).

d. If a labor organization has not submitted a withdrawal request within the time limit set by the Regional Director, the Director issues a Decision and Order dismissing the petition and/or denying the request for intervention. The Decision and Order specifies the general grounds for such dismissal or denial without providing specific details of the results of the investigation; i.e., that the showing of interest is of questionable authenticity or that certain of the evidence of interest is of questionable authenticity, the remaining showing of interest being insufficient to meet the requirements of the regulations (See Figure 53.B and *CHM 53* which discusses Decisions and Orders).

If the Regional Director determines that further action may be warranted by a law enforcement agency, s/he contacts the Office of the General Counsel for clearance before forwarding the case to the appropriate authorities.

**18.19.19 Limitation on right of review:** The only action by the Regional Director to which an application for review may be filed is issuance of a Decision and Order dismissing a petition or denying a request for intervention [§ 2422.10(e)]. The grounds

for such dismissal or denial as discussed in *CHM 18.19.18* are set forth in a Decision and Order and served on all parties.

**18.19.20** **Record keeping:** Where a union has submitted evidence of interest of questionable authenticity in prior cases, the agent assigned to the case shall investigate fully the authenticity of the evidence of interest submitted in support on the petition or request for intervention. Such investigation consists of making a comparison check of the signatures against the records of the activity. If it appears on the basis of the examination, that questionable cards or other evidence of interest may be involved, the procedure set forth in this subsection is followed.

**18.19.21** **Duration of listing:** The labor organization's name is retained on the list until such time as the Regional Director is satisfied that the organization has not submitted any invalid showing of interest in at least three (3) consecutive proceedings.

# 19 CHALLENGE TO THE STATUS OF A LABOR ORGANIZATION:

**19.01 Basis for filing a challenge to the status of a labor organization:** Section 2422.11 provides that the only basis on which a challenge to the status of a labor organization may be made is compliance with 5 U.S.C. 7103(a)(4).

The Authority has also construed § 2422.11 to include challenges that a labor organization should not be accorded exclusive recognition under the Statute because the organization is subject to corrupt influences or influences opposed to democratic principles [5 U.S.C. 7111(f)(1)]. *Division of Military and Naval Affairs (New York National Guard), Latham, New York and National Federation of Civilian Technicians (NYNG),* 53 FLRA 111 (1997). In this regard, such challenges, like petitions seeking to revoke the certification of an incumbent labor organization filed pursuant to 5 U.S.C. 7111(f)(1), are based on two tenets: 1) only the Authority has jurisdiction to decide issues relating to the granting of exclusive recognition to labor organizations representing employees in the Federal sector; 2) freedom from corrupt and anti-democratic influences is a requirement that must be met before the Authority can certify a labor organization as an exclusive representative. See also *CHM 3.6* and *5.10.*

**19.02 Definition of labor organization:** A labor organization is defined in 5 U.S.C. 7103(a)(4) as:

> "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has

as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include--

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

**19.03 Who may file a challenge to the status of a labor organization:** The Regional Director or any party may challenge the status of a labor organization.

**19.04 When and where validity challenges may be filed:**

19.04.01 Party challenges to the status of a labor organization based on **5 U.S.C. 7103 (a)(4)** must be in writing and submitted to the Regional Director or the Hearing Officer before the hearing opens, unless good cause is shown for granting an extension. If no hearing is held, status challenges must be filed prior to action being taken pursuant to § 2422.30.

19.04.02 Challenges alleging that the labor organization should not be accorded exclusive recognition because it is subject to corrupt influences or influences opposed to democratic principles [**5 U.S.C. 7111(f)(1)**] may be filed at any time either as a petition or as a challenge.

**19.05 Challenge to the status of a labor organization filed pursuant to 5 USC 7103 (a)(4) received too late for the region to investigate prior to the opening of the hearing:** Challenges to the status of a labor organization are normally processed in the Regional Office. If the challenge is filed too late for the Regional Director to investigate and decide prior to the hearing, it is referred to the Hearing Officer. Status challenges may also be filed with the Hearing Officer prior to the opening of the hearing. See *CHM 19.7* for requirements to submit supporting evidence.

**19.05.01 Timely receipt of challenge immediately prior to the opening of the hearing:** When received immediately prior to the opening of the hearing, challenges to the status of a labor organization are treated as a threshold issue when the Hearing Officer goes on the record. Evidence on this issue is taken before proceeding with the remainder of the hearing. The Hearing Officer discusses the issues and handling the status challenge with the Regional Director prior to opening the

hearing. If the Regional Director gives the Hearing Officer permission to make a recommendation on the record regarding the challenge, the Hearing Officer goes on the record, receives evidence, and makes his/her recommendation in accordance with *HOG 35.13* **before** proceeding with the rest of the hearing. If the Regional Director does not give permission to the Hearing Officer to make a recommendation, the Hearing Officer takes evidence on the status challenge and then proceeds with the other issues. In either situation, the investigation conducted on the record is the same as discussed in *CHM 19.9* and the Regional Director decides the status issue as part of his/her Decision and Order. *HOG 24.3.1 and 33.3*.

**19.05.02 Attempt to litigate challenge to status of a labor organization at a hearing:** Status challenges that are filed after the hearing opens are untimely unless the challenging party can establish good cause for granting an extension. See *CHM 17.3.1.3* (cross-petitions raising claims pursuant to section 7111(f)(1)). *HOG 24.3.2* provides complete guidance for considering status challenges filed during the hearing (see also *HOG 33.3*).

**19.06 Filing status challenge at the election agreement meeting or prior to the Regional Director's approval of the Election Agreement or Direction of Election:** Status challenges raise a threshold issue that are investigated before the Regional Director approves an election agreement or issues a Direction of Election. If the challenge is made during the election agreement meeting and is not resolved or withdrawn, the Regional Director provides an opportunity for a hearing on other than procedural matters [§ 2422.16(c)]. A challenge to the status of a labor organization is considered an "other than procedural matter." Absent a stipulation and a waiver of the parties' right to a

hearing, the Regional Director issues a notice of hearing on the issues raised by the status challenge. Thereafter, if there are no questions regarding unit appropriateness, the Regional Director may issue a Direction of Election without a Decision and Order [§ 2422.16(c)(2)].

By issuing the Direction of Election, the Regional Director is stating, in effect, that the status challenge does not interfere with the conduct of the election. Although the status challenge is not technically "resolved" prior to the election, the Direction of Election is issued without prejudice to the right of a party to file a challenge to the eligibility of any person participating in the election and/or objections to the election. *CHM 28.11 and 28.12* provide more information on § 2422.16. If objections are subsequently filed after the election concerning the status of the labor organization, the Regional Director has a record that forms the basis of the objections investigation (See *CHM 50*).

***NOTE: The Regional Director has discretion to issue either a Direction of Election or a Decision and Order in this situation. Considerations include the relevance and weight of the evidence to support the challenge.***

**19.07 Contents of status challenge:** A challenge to the status of a labor organization contains a clear and concise statement of the challenge and the reasons for the challenge.

**19.08 Evidence supporting challenge to the status of a labor organization:** An investigation is not undertaken without evidence. If no evidence is filed, the challenge is denied in a Decision and Order (*CHM 19.14*). The challenger may always refile the status challenge with supporting evidence if such challenge is otherwise timely filed. See *CHM 19.10* for scope

of investigation and evidence required to support the challenge.

**19.09 Service of challenge to the status of a labor organization:** A copy of the status challenge, including all supporting evidence, is served upon all parties.

**19.10 Scope of investigation:** The 1996 revisions to the regulations stated that the only basis on which a challenge to the status of a labor organization may be made is compliance with 5 U.S.C. 7103(a)(4). However, the Authority decisions in *NYNG*, 53 FLRA 111 (1997) expanded the application of this section to include claims made pursuant to 5 U.S.C. 7111(f)(1). The facts and circumstances of each case are examined to determine whether a petitioner or intervenor is a labor organization within the meaning of 5 U.S.C. 7103(a)(4) or is subject to corrupt influences pursuant to 5 U.S.C. 7111(f)(1).

**19.10.01 When the challenge strictly concerns compliance with 5 U.S.C. 7103(a)(4):** See *HOG 46A* and *RCL 10A* for types of evidence needed if the challenge strictly concerns compliance with 5 U.S.C. 7103(a)(4). Representation hearings on status challenges are very rare; but not prohibited. The issue, of course, is whether the petitioning or intervening labor organization is a "labor organization" within 5 U.S.C. 7103(a)(4). See *CHM 23.4 and 23.5* for a discussion on investigative techniques.

**19.10.02 Attempt to litigate noncompliance with 5 U.S.C. 7111(f):** Timely challenges alleging that a labor organization is subject to corrupt or anti-democratic influences pursuant to 5 U.S.C. 7111(f) are treated as a challenge to the status of a labor organization. See *NYNG*, 53 FLRA 111 (1997). Since these challenges can also be raised in a petition filed by an individual bargaining unit member (or a labor organization or agency)

seeking to decertify an incumbent, without an election, the challenge is investigated in the same manner as a petition raising these issues is investigated [*USIA,* 53 FLRA 999 (1997)]. See *CHM 20.1.8* for evidentiary requirements and *RCL 10B* for substantive guidelines. See also *CHM 23.4*, *23.5*, and *23.9.3* for a discussion on investigative requirements.

**19.10.03 Attempt to litigate noncompliance with 5 U.S.C. 7111(e):** In a section 7111(f)(1) proceeding, the presumption in section 7120(a) (that a labor organization is free from corrupt influences or influences opposed to democratic principles) attaches if the labor organization is subject to the governing requirements set out in section 7120(a)(1) through (4). This may be demonstrated by the submission of a constitution and bylaws that meet the criteria set forth in section 7120(a).

Section 7111(e) provides that a labor organization seeking exclusive recognition must submit to the Authority (the OGC has interpreted this to apply to submissions to the Department of Labor) and to the activity/agency a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives. Thus, when the region determines that a petitioner has complied with § 2422.3(b), the region is making a finding that the petitioner is not subject to corrupt or anti-democratic influences.

Compliance with 5 U.S.C. 7111(e) is an administrative matter determined by the Regional Director and not subject to collateral attack at a representation hearing. *See U.S. Department of Transportation, U.S. Coast Guard Finance Center, Chesapeake, Virginia,* 34 FLRA 946 at 949 (1990). *HOG 33.4.* Allegations that the petitioning or intervening labor organization is subject to corrupt influences or to influences opposed to democratic principles should be filed as a challenge

to the status of a labor organization or a petition under section 7111(f)(1).

**19.10.04 Attempt to litigate noncompliance with 5 U.S.C. 7120:** 5 U.S.C. 7120 establishes the internal union standards of conduct applicable to labor organizations that are the exclusive representative under the Statute or seek that status. 5 U.S.C. 7120(d) commits standards of conduct issues to the exclusive jurisdiction to the Assistant Secretary of Labor, unless they are raised as part of a claim that a labor organization is subject to corrupt influences within the meaning of 5 U.S.C. 7111(f)(1). The challenging party must provide evidence that the Department of Labor or other third party has found a violation of standards of conduct such that there is reasonable cause to believe that the challenged labor organization: 1) was suspended or expelled from, or was otherwise sanctioned by, a parent organization, or federation of organizations with which it had been affiliated, based on its demonstrated unwillingness or inability to comply with the governing procedures set out in section 7120(a)(1) through (4); or 2) is in fact subject to corrupt or anti-democratic influences. If evidence is filed, follow the procedures discussed in *CHM 19.10.2*.

If the challenging party is only alleging a violation of the Standards of Conduct described in 5 U.S.C. 7120, the Regional Director issues a letter to the challenging party referring that party to the Department of Labor with an explanation of the procedures and time limits for filing a claim that the union is subject to corrupt practices pursuant to 5 U.S.C. 7111(f)(1). See *HOG* for procedures to follow when handling these allegations at hearing. *HOG 33.5*.

**19.11 Contact with the labor organization whose status is being**

**challenged:** Upon receipt of the challenge by the Regional Office, the Regional Director immediately requests the challenged union's position. A copy of the Director's letter and the challenged union's response thereto are served on all parties. In addition to the evidence supporting the challenge, the Regional Director may request specific information from the challenging party and the union being challenged. See *HOG 46A* (also *RCL 10A*) for information relating to 5 U.S.C. 7103(a)(4) challenges and *CHM 20.1.8* and *23.9.3* and *HOG 46B* (also *RCL 10B*) for challenges in which the challenging party claims the labor organization is subject to corrupt or anti-democratic influences under 5 U.S.C. 7111(f)(1). If the challenge is made pursuant to section 7111(f)(1) of the Statute and the challenging party evidences that it has filed a complaint with the appropriate third party, the case will be held in abeyance pending the third party's action. See *CHM 23.9.3.3.* The Regional Director may also contact any other party that the Director decides has relevant information.

**19.12 Report of investigation:** Upon completion of the investigation of a challenge to validity of interest, a written final investigative report (FIR) is prepared for the Regional Director. Such FIR's may take the form of a draft Decision and Order (see also *CHM 26.3*).

**19.13 Form and content of final investigative report:** A FIR is clear, concise and comprehensive. It is marked intra-agency and confidential. The facts set forth in the FIR are supported by evidence in the case file and specifically identified in the FIR. The FIR is a self-contained document to the extent that it is not necessary to refer to file documents for a thorough understanding of the facts and issues in the case. Opinions or conclusions of the parties are not facts and is not reported as

such in the FIR.

A FIR includes, but is not limited to:

a. a statement setting forth the challenge(s) to validity and the evidence submitted in support of the allegation(s);

b. a statement of the issues raised by the challenges;

c. a discussion of all facts relevant to each challenge;

d. an analysis of each allegation or issue, including discussion of supporting case law or legal theories and, where applicable, a discussion of defenses raised;

e. recommendations as to the disposition of each allegation; and if appropriate a recommendation regarding enlarging the scope of the investigation.

**19.14 Action on challenge to status of a labor organization:** Upon completion of the investigation, the Regional Director issues a Decision and Order or a Direction of Election (see *CHM 19.6*) sustaining or denying the challenge. The parties are afforded an opportunity to appeal the Regional Director's Decision and Order to the Authority. The Decision sets forth the Regional Director's finding that the challenged party, i.e., the petitioning or intervening labor organization *is or is not* a labor organization under 5 U.S.C. 7103(a)(4) or *is* or *is not* subject to corrupt influences or influences opposed to democratic principles pursuant to 5 U.S.C. 7111(f)(1). See *CHM 53* for a discussion on Decisions and Orders. A Direction of Election is not appealable to the Authority but is issued without prejudice to the right of the party to file an objection to the election [§

2422.16(d)].

**19.15 Right of review:** A party may appeal the Regional Director's Decision and Order in accordance with § 2422.31. See *CHM 54*.

**19.16 Action pending review of a Decision and Order on a status challenge:** A Decision and Order that:

a. denies a status challenge in the case of a petitioning or intervening labor organization, or

b. grants the challenge in the case of the intervening labor organization

does not stay processing the petition. If the Decision and Order is appealed to the Authority, the filing or granting of an application for review also does not stay processing the petition unless specifically ordered by the Authority.
The regions contact the Office of the General Counsel whenever questions arise concerning deferring a petition pending an appeal of a decision based on a challenge to the status of a labor organization. See also *CHM 55*.

# REGIONAL INVESTIGATIONS AND ACTIONS
# CHM 20 through 28

**20 PRELIMINARY INVESTIGATION:** Section 2422.30(a) provides that the "Regional Director will make such investigation of the petition and any other matter as the Regional Director deems necessary." A regional investigation is the nonadversarial process that occurs after the petition is opened.

**This section offers guidance for reviewing petitions for sufficiency and initial processing procedures.** *CHM 23* **discusses issue identification and investigating techniques.** *CHM 24* **covers issue analysis.**

**20.1 Purpose:** The purpose of the preliminary investigation is to:

a. determine whether the case can be opened;

b. identify related cases;

c. outline the purposes of the petition and obtain information concerning the results the petitioner is seeking;

d. discuss the preliminary telephonic contact with the petitioner and other preliminary investigative procedures.

The preliminary investigation also helps the region:

a. identify any party that may be affected by issues raised by the petition;

b. discuss procedures for contacting potential parties prior to opening the case.

**20.1.1 General checklist for determining sufficiency of a petition:** After a case is assigned, the agent reviews the petition and any accompanying papers. Use the checklist below and refer to *CHM 5.2 (basic requirements for petitions regardless of their stated purpose).*

***NOTE: CHM 20.1.2 through 20.1.7 describe in detail requirements for filing and processing petitions having distinct purposes discussed in § 2422.1. CHM 20.1.8 describes the requirements for filing a petition pursuant to 5 U.S.C. 7111(f)(1) that seeks to decertify the incumbent labor organization based on an allegation that the labor organization is subject to corrupt influences or influences opposed to democratic principles.*** If required information is not attached to the petition when it is initially filed, the petition may be defective as discussed in *CHM 12*. Other information may be obtained by the agent during the investigation. *CHM 20.2 through 20.9* discuss initial procedures after reviewing a petition for sufficiency.

a. Was the petition filed on the proper form as required by § 2422.3(a)? (*CHM 5.1*) *If not, the region dockets the petition, but cannot open it. The region contacts the petitioner immediately via telephone or fax followed by a confirming letter. An amended petition is required (CHM 13).*

b. What is the stated purpose of the petition (*CHM 3*)? Is the petitioner's statement of the issues raised by the

petition and the results the petitioner seeks sufficient to warrant opening the case? *If the purpose of the petition appears to be inconsistent with the purposes of the Statute, the region contacts the petitioner at once. CHM 20.2. The agent asks the petitioner what it is that the petitioner is seeking and why. The agent may assist the petitioner in clarifying the purpose of the petition (see CHM 3) and amending the petition as required in CHM 13 (noted particularly in CHM 13.7). A confirming letter is sent as appropriate. If, after talking to the petitioner, the purpose of the petition still appears to be inconsistent with the Statute, the Regional Director issues an Order to Show Cause why the petition should be processed (see Figure 20.1A). Copies are served on all parties.*

c. Who filed the petition? (*CHM 4*) Does the petitioner have standing to file the petition as set forth in *CHM 4*? *If the person does not appear to have standing to file the petition, the agent contacts the petitioner to discuss the petition and the petitioner's reasons for filing the petition. The agent suggests alternatives if necessary, and appropriate to do so (CHM 13.7). If, after discussing the petition, the petitioner clearly has no standing to file the petition, the agent discusses the matter with the Regional Director. Thereafter, the Regional Director issues an Order to Show Cause asking why the petition should be processed (see Figure 20.1A). The Regional Director serves copies of this Order on all parties who are otherwise notified of the petition. If it is not clear whether the petitioner has standing to file, the petition is opened and the Regional Director requests the parties' positions.*

*If the issue does not appear to be the petitioner's standing to file the petition, but rather a question of its authorization to file the petition, the petitioner may need a designation of representative (see CHM 4.7 - policy and examples). There may be a jurisdiction question and/or the petition may be defective and cannot be opened. The agent contacts the petitioner to confirm it has been designated to act on behalf of the parties to the certification. If the petitioner is unable to obtain the designation, the Regional Director contacts the certified exclusive representative to confirm the designation. Absent such confirmation, it may be necessary to dismiss the petition for lack of standing.*

*All conversations concerning the authorization to file are confirmed in writing to the petitioner.*

d. Is all information provided as required by § 2422.3? (*CHM 5*) *If not, the agent, with the concurrence of the Regional Director, decides if the petition is defective and defines the requirements for correcting the defect. See CHM 12 and 13 for guidance on identifying defective petitions and amending petitions.*

e. Was the petition served? (*CHM 6*) *The statement of service on the petition form is sufficient evidence that the petitioner served the petition on all parties named on the form. If any of the parties contact the region to advise that they did not receive the petition, the region sends a letter to the petitioner advising it to serve copies of the petition on all parties. (Modify Figure 12.4).*

f. Make a list of the party(ies) that the petitioner identifies as affected by issues raised by the petition and note why the petitioner lists them. *Check for related or current cases to identify commonality of parties and issues, and for related cases to identify parties that may be affected by issues raised by the petition. CHM 15.5 provides guidance and a checklist for identifying affected parties.*

g. Was the petition filed in the proper office? *If the petition involves a nationwide unit or a portion of an agency-level consolidated unit, see CHM 8 for guidance. If necessary, the Regional Director will obtain clearance from the Office of the General Counsel to process such cases.*

h. Copies of the petition are forwarded to other Regional Offices when they:

(i) involve nationwide or agency-level consolidated units and appear to involve matters having national impact (*CHM 8*); or

(ii) request to consolidate existing units that extend beyond the region's jurisdiction to other Regional Offices

Regional Directors notify other Regional Directors of the petition by sending them an e-mail. See *CHM 8* and *63* for general policies regarding transfer, service, consolidation and severance. Cases may be pending in the other regions that could affect processing the petitions and vice versa. It is imperative that all Regional Directors respond to e-mails requesting

information about related cases. For example:

- *a reorganization of an SSA Branch Office in El Paso could be part of a nationwide reorganization; the Regional Director e-mails information about the petition to other Regional Directors to ensure consistent processing of the case and to determine whether to consolidate the cases for processing (see CHM 8);*

- *a petition to consolidate existing units is filed in the Washington Region; shortly thereafter, another petition seeking an election in one of the units covered by the pending petition is filed in another region. The representation petition is blocked pending processing the consolidation petition (CHM 11.11.2). However, the second region has no way of knowing about the consolidation petition if it is not been notified of the petition pending in the Washington Region.*

i. How many copies of the petition were filed? *The petitioner is required to file an original and two copies of the petition and accompanying material with the Regional Office (CHM 9). Failure to serve the prerequisite copies is not a defect that requires any written notification. This type of "defect" does not normally become an issue. The Regional Office simply contacts the petitioner, reviews the filing requirements and cautions the petitioner about filing the appropriate*

*number in the future.*

j. Is the petition timely filed? *See CHM 11 and RCL 12 for guidance on identifying timeliness issues. If timeliness appears to be an issue, the agent discusses this during his/her initial contact with the petitioner. If necessary, an Order to Show Cause is sent to the petitioner and copies are served on all known parties (see Figure 20.1B). A timeliness issue could become an issue for a hearing.*

**20.1.2 Supplemental checklist for petitions seeking a representation election:** Petitions filed by a labor organization, or labor organizations acting as joint petitioners, for an election to determine if employees in an appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative require additional information (see also *CHM 5.3*):

a. Is the petition accompanied by a showing of interest and an alphabetized list? *Failure to submit a showing of interest is a defect that prevents the petition from being opened and could also affect the timeliness of the petition. An amended petition is required. Failure to submit an alphabetized list of the names constituting the showing of interest is also a defect, but may not prevent the petition from being opened. CHM 12, 13 and 18.9. In a situation where the agency's operations are expanding or fluctuating due to the seasonal nature of the work, the showing of interest is required only among employees employed at the time the petition is filed. See Coast Guard, 34 FLRA 946, 950 (1990) and CHM 18.4.b.*

b. Does the petition state that the petition is accompanied by a showing of interest of not less than thirty (30) percent of the employees in the unit claimed to be appropriate and estimate the number of employees in the unit specified on the petition? *If the information is not provided, the petition is defective and cannot be opened (CHM 12.3). It must be amended if the petitioner fails to estimate the number of employees in the unit in Item #3 of the form. CHM 18.4 and 18.9.5.*

c. Does the petition describe a unit claimed to be appropriate for the purposes of exclusive recognition? Does the unit reflect generally the geographic locations and the classifications sought to be included and those to be excluded? *If the petitioner does not describe the unit claimed to be appropriate, the petition cannot be opened. The agent contacts the petitioner immediately to discuss the defect. The agent may assist the petitioner in describing the unit, clarifying the purpose of the petition (see CHM 3) and amending the petition as required in CHM 13.7. A confirming letter is sent. Suggested unit language is discussed in CHM 28.13.*

d. Is the prima facie showing of interest adequate? *See CHM 18.10 for instructions.*

e. Identify potential substantive, procedural or eligibility issues. *See CHM 23.*

**20.1.3 Supplemental checklist for petitions seeking a determination of eligibility for dues allotment:** Dues allotment petitions are reviewed in much the same manner as election petitions. Their

requirements are described in *CHM 5.4*.

a. Does the information requested on the petition form describe the unit claimed to be appropriate? Does the unit description reflect generally the geographic locations and the classifications sought to be included and those to be excluded?

b. Does the petition reflect that the petition is accompanied by evidence of membership of not less than ten (10) percent of the employees in the unit claimed to be appropriate and provide an estimate of the number of employees in the unit claimed to be appropriate?

c. Are the evidence of membership and alphabetical list attached to the petition?

d. Is the prima facie showing of membership adequate? *See CHM 18.12*.

e. Identify potential substantive, procedural or eligibility issues. *See CHM 23*.

*Follow the guidelines set forth in CHM 20.1.2 if the supplementary information described above is not submitted with the petition.*

**20.1.4 Supplemental checklist for petitions seeking an election to determine if employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative:** See *CHM 5.5* for requirements.

a. Does the petition describe the current unit?

b. Does the petition reflect that the petition is accompanied by a showing of interest of not less than thirty (30) percent of the employees in the unit stating that the employees no longer desire to be represented for the purposes of exclusive recognition by the currently recognized or certified labor organization? Is the petitioner's estimate of the number of employees specified on the petition form?

c. Are the showing of interest and alphabetical list attached to the petition?

d. Is the prima facie showing of interest adequate? *See CHM 18.10*.

e. Identify any potential substantive, procedural or eligibility issues. *See CHM 23*.

*Follow the guidelines set forth in CHM 20.1.2 if the supplementary information described above is not submitted with the petition*.

**20.1.5 Supplemental checklist for petitions to clarify and/or amend (1) a certification in effect; and/or (2) any matter relating to representation:** As noted in *CHM 3.3*, such petitions serve a variety of purposes and the requirements may appear at first somewhat unclear (see *CHM 5.6*) or are guided by case law. The agent assists the petitioner within the guidelines of *CHM 1*, *2 and 13.7*. These cases are also a good example of when it may be helpful to provide case citations to the petitioner to assist the petitioner in gathering information and complying with the filing requirements.

If the information discussed in *CHM 5.6* is not included with the petition, use the outline below as a guide in conversations with the petitioner(s) or when preparing a letter requesting additional information. It may also help identify issues and the results the petitioner(s) seeks and provide guidance when amending the petition. Failure to submit the information in *CHM 20.1.5* may delay opening and/or processing the petition, but see *CHM 12* for guidance in identifying defects and *CHM 13.7* for guidance on assisting the parties when amending the petition. The agent confirms any conversation with the petitioner(s) in writing. This letter assists the petitioner(s) in compiling the information, confirms the agent's and the petitioner(s)' understanding of the requirements, and ultimately expedites processing the case.

a. Does the petition describe the unit(s) affected by issues raised by the petition? *The regulations require the petitioner to describe the unit affected by issues raised in the petition. This may be interpreted two ways, by: 1) describing the currently certified or recognized unit; or 2) describing the proposed unit. As long as the unit description complies with § 2422.3(a)(6), the petition may be processed. The region may assist the parties when describing the proposed unit (CHM 2) and obtain copies of the certification or recognition during the investigation (CHM 15). If the parties are unable to agree on a proposed unit description, it becomes an issue that the Regional Director decides as part of his/her decision.*

b. Does the petition identify parties affected by issues raised by the petition, including all parties to any exclusive bargaining relationships affected by the petition identified by the petitioner(s)?

c. Does the petition include a clear and concise statement of the issues raised by the petition and the results the petitioner(s) seeks? *Typical information includes, but is not restricted to, the following noted below.*

*(1) Petitions requesting a clarification of the bargaining unit status of certain employees/positions describe the present unit and the date of recognition or certification; the proposed clarification; the title(s) of the position(s) to be clarified, and the name of the incumbent(s) currently occupying the positions. The petition explains the reasons supporting the request. There are certain exceptions to the rule that only positions which are occupied can be clarified. For additional information, see RCL 15 and HOG 51.*

*(2) Petitions to amend a recognition or certification in effect also describes the present unit and the date of recognition or certification; the proposed amendment; and a statement of reasons in support of the proposed amendment. As noted, some of the requirements in these cases are not specifically spelled out in the regulations, but rather described in case law. When necessary, refer to the substantive sections of the HOG for assistance. Examples include technical name changes in the agency or activity, union designation, reaffiliations or mergers (Montrose RCL 7B and HOG 43)and certain successorship situations where the entire*

*unit is transferred to a gaining employer (RCL 3B and HOG 39).*

*(3) Petitions requesting clarification of or an amendment to a matter relating to representation include:*

*(i) a description(s) of the present unit(s) for which the petitioner(s) seeks clarification;* ***NOTE: the region is responsible for obtaining copies of appropriate certifications, amendments and clarifications from its files if the parties do not furnish them with the petition;***

*(ii) a detailed explanation of the reasons to support the question relating to the continued appropriateness of an existing unit(s);*

*(iii) a statement outlining the issues raised, if known;*

*(iv) the proposed results if known; if the petition is filed jointly, the petitioners may not agree on the proposed results and the petition must reflect the petitioners' various positions.*

*Examples of these kinds of petitions includes resolving issues related to the effect of a reorganization on an existing unit (RCL 3 ) or when the agency asserts a good*

*faith doubt of continued majority status based on the extent of the union activity and representation (RCL 4). If the purpose of the petition is unclear, a meeting with all potential parties pursuant to § 2422.13(b) may be instructive. In such situations, the standard opening and notification procedures may be modified or delayed (see CHM 25.7).*

d. Identify potential substantive, procedural or eligibility issues. See *CHM 23*.

**20.1.6 Supplemental checklist for petitions to consolidate two or more units in an agency and for which a labor organization is the exclusive representative:** See *CHM 5.7*.

a. Does the petition to consolidate existing units contain a description of the proposed consolidated unit claimed to be appropriate for the purpose of exclusive representation?

b. Are copies of the original recognitions or certifications attached?

If so, are the descriptions changed in some manner from the original certifications?

Do the descriptions reflect generally the geographic locations and the classifications of employees sought to be included and those sought to be excluded and the approximate number of employees in the consolidated unit claimed to be appropriate for the purpose of exclusive recognition?

c. Do the attachments include the name(s) and address(es) of the exclusively recognized labor organization(s) involved in each unit sought to be consolidated, the name and address of the activity representative and the approximate number and types of employees in each unit sought to be included? *Each of the parties to the certifications are affected by issues raised in the petition and are automatic parties to the petition CHM 17.2. They receive a letter described in CHM 15.8.1.*

*The agent also requests the information outlined below and explains that it will expedite case processing:*

d. Do the attachments contain a statement, as appropriate:

(1) that the labor organization(s), activity(ies) or agency was contacted prior to the filing of the petition and agrees to consolidate existing exclusively recognized units;

(2) that the labor organization(s), activity(ies) or agency was not contacted prior to the filing of the petition?

e. If a certification were issued, are the name(s) of the labor organization(s), activity(ies) and agency as they are to appear on the certification on consolidation of units reflected in an attachment?

f. Identify potential substantive, or procedural issues. See *CHM 23*.

*Failure to submit this information with the petition does not delay opening the petition, but the agent is responsible for obtaining this information prior to the Regional Director taking action pursuant to § 2422.30.*

***Note: As noted in CHM 23.10, the regulations do not include a provision that permits an agency or a labor organization to request an election to decide the consolidation issue. If, after the Regional Director issues a Decision and Order, either the agency or labor organization requests an election, contact the Office of the General Counsel. See CHM 28.17 for election procedures involving unit consolidations.***

**20.1.7 Supplemental requirements for petitions that seek to disclaim interest:** These petitions normally include the following information:

a. A description of the unit(s) for which the labor organization holds exclusive recognition and seeks to disclaim interest. The description reflects the name of the activity or agency affected, the geographic locations and classifications of the employees included in the current certification. A copy of the recognition or Certification of Representative is attached if available.

b. There is no special form for a disclaimer. In general, a letter is attached to the petition stating that the disclaiming union "waives and disclaims any right to represent ... (*describe unit of employees*)" or "employees for which (*name of union*) was certified as the exclusive representative in Case No. ...." See *CHM 20.9* for specific processing guidelines and information about disclaimers.

c. The name and mailing address for each activity or agency for which the labor organization holds exclusive recognition and seeks to disclaim interest, including street number, city, state and zip code.

d. The name and mailing address of the labor organization which holds exclusive recognition, including street number, city, state, and zip code.

e. The name, mailing address and work telephone number of the contact person for the labor organization which is recognized or certified for the unit being disclaimed, if other than the party filing the request to disclaim.

f. The signature, title, mailing address and telephone number of the person filing the letter of disclaimer. See also *CHM 20.9* for processing guidelines.

**20.1.8 Supplemental checklist for petitions filed pursuant to 5 U.S.C. 7111 (f)(1) seeking to decertify an incumbent labor organizations based on allegations that the labor organization is subject to corrupt influences or influences opposed to democratic principles:**

a. Does the petition describe the unit(s) affected by issues raised by the petition? *The regulations require the petitioner to describe the unit affected by issues raised in the petition. The current unit description is described in petitions claiming that the incumbent labor organization should be decertified based on allegations that the labor organization is subject to corrupt practices or influences opposed to democratic*

*principles. The region may assist the petitioner in obtaining a copy(ies) of the certification or recognition during the investigation (CHM 15).*

b. Does the petition identify parties affected by issues raised by the petition, including all parties to any exclusive bargaining relationships affected by the petition identified by the petitioner(s)?

c. Does the petition include a clear and concise statement of the issues raised by the petition and the results the petitioner(s) seeks? *Typical information normally includes, but is not restricted to, the following noted below.*

*(1) If there has been, or is currently pending, a proceeding before a third party that is based on the same or substantially similar allegations that support the section 7111(f)(1) claim, the petition should include all documents filed with the third party, evidence submitted and any decisions rendered in that proceeding.*
*The party must establish why the allegations in that proceeding are the same or substantially similar to the allegations that support the section 7111(f) claim. The party must further establish that a finding of a violation in that proceeding requires a determination under the Statute that the challenged labor organization is subject to corrupt or anti-democratic influences.*

*(2) The petition should reflect the third party's decision if it found no violation based on the*

*same or substantially similar conduct, and provide evidence why the challenge or petition should not be dismissed, absent withdrawal.*

*The petition should include all documents filed, evidence submitted and decisions rendered in that proceeding.*

*(3) The petition should reflect if a third party has found a violation based on the same or substantially similar conduct and include an explanation why that violation establishes under the Statute that a labor organization is subject to corrupt or anti-democratic influences requiring the denial or revocation of certification.*

*The petition should include all documents filed, evidence submitted and decisions rendered in that proceeding.*

*(4) The petition should reflect whether a third party proceeding is pending and provide a rationale, assuming the allegations before the third party are true, why they establish under the Statute that a labor organization is subject to corrupt or anti-democratic influences requiring the denial or revocation of certification.*

*The petition should include all documents filed, evidence submitted and ruling issued in that proceeding.*

*(5) If the petitioner has not filed a proceeding*

*before a third party and none is pending at the time the petition is filed, the petitioner should include an explanation why the challenge or petition should not be dismissed, absent withdrawal. The petition should include all evidence to support the challenge.*

If necessary, the Regional Director issues an *Order to Show Cause* ordering the petitioner to establish why that evidence requires a determination under the Statute that the challenged labor organization is subject to corrupt or anti-democratic influences.

d. If any of the information discussed above is missing, the Regional Director issues an *Order to Show Cause* when a Challenge or Petition is filed. See *CHM 23.9.3.2.*

e. See *CHM 23.9.3* for investigation requirements, when stays are appropriate and obtaining clearance when processing these cases. See also *CHM 19.*

**20.2 Preliminary contact with petitioner in all cases:** After the petition is reviewed for sufficiency, the agent contacts the petitioner(s) via telephone to discuss the case, any defects in the petition, and explains processing procedures as noted below. A telephone contact usually sets the tone for processing the case and provides useful information to both parties: the agent and the petitioner. If the agent is unable to contact the petitioner by telephone and the petition is defective, a letter setting forth the defect is sent immediately (*CHM 12.3*). If the petition alleges that the incumbent labor organization is subject to corrupt influences or influences opposed to democratic principles pursuant to section 7111(f)(1) and does not include the

information required in *CHM 20.1.8*, the petitioner is not sent a letter described in *CHM 12.3*. Rather the petitioner is sent an *Order to Show Cause* as discussed in *CHM 15.8* and *CHM 23.9.3.2.*

The agent makes the first telephone calls regarding the petition as soon as possible after the petition is filed. Remember any delay by the Regional Office could adversely affect the petitioner or other parties.(see *CHM 18*).

a. The agent advises the petitioner of the regulations and basic case processing procedures. Next, the agent reviews the petition and confirms the contents of the petition, its purpose and the results the petitioner seeks.

b. The agent also confirms the names of the parties listed on the petition form and asks if there are any parties not listed.

c. The agent is prepared to discuss any issues gleaned from the preliminary examination of the petition with the petitioner.

d. The agent also advises the petitioner(s) of any defects and their effect on case processing. If an amendment is required to cure the defect or to clarify the petition, the agent provides necessary assistance as appropriate (CHM 13.7).

*CHM 15.4* discusses notifying the petitioner of the receipt of the petition and procedures when the petition is defective, and provides sample letters.

**20.3 Identifying parties that may be affected by issues raised by the petition:** The guidelines and checklists set forth in *CHM 15.5* are followed to ensure the Regional Director complies with § 2422.6.

**20.4 Preliminary contact with potential parties prior to opening the case:** Potential parties are contacted and notified in writing as soon as possible after the region dockets the case, i.e., checks the petition for sufficiency, obtains any required amendments and identifies affected parties (*CHM 15*). **The Regional Office also contacts all potential parties telephonically prior to opening the case (sending written notification of the petition) with the exception of parties to local certifications when a national union is seeking to consolidate all of its units nationwide.** While it may not be possible to contact all potential parties prior to sending written notification of the petition, every potential party is normally contacted telephonically in the early stages of case processing. This section suggests guidelines to follow during the initial telephone call with the parties.

**20.4.1 Preliminary contact when the case cannot be opened:** If the petition is defective and cannot be opened until the petition is amended but the Regional Director believes the defects will be cured, the Regional Director **has discretion** to begin exploring issues with the parties. S/he may send a letter to the parties named by the petitioner to inform them that a petition has been filed. Ultimately, the Regional Director has discretion to open the case.

**20.4.2 Preliminary contact with the employing activity/agency, if other than the petitioner, when the case can be opened:** If

possible, a non-petitioning activity or agency is contacted first and by telephone if possible. Contact by telephone to discuss the petition and preliminary issues may save time and identify any procedural issues that could be resolved without resort to formal procedures. Discussion with the activity representative includes:

a. The agent introduces him/herself and states the reason for the call. The agent confirms that the name and position of the person is the appropriate activity/agency contact.

b. The agent describes the petition and asks if the activity/agency has received a copy of it.

c. The agent describes general case processing procedures, the apparent purpose of the petition as filed, and the parties involved. The agent also asks if the activity has any knowledge of any other party that may be affected by issues raised. If the petition involves a reorganization, the agent asks about the reorganization: how it came about, who was affected, etc.

d. The agent informs the activity that the Regional Director will send a letter asking for specific information related to the case and requesting the activity to post a notice to employees informing them of the petition. The agent also outlines the basic procedures and requirements for processing the particular petition that has been filed and answers any questions about case processing procedures.

### 20.4.3 Preliminary contact with labor organizations, agencies and

**activities that may be affected by issues raised by the petition:** The agent contacts other labor organizations, agencies or activities named by the petitioner or determined by the Regional Director to be affected by issues raised by the petition. Often, such contact sets the tone for the proceedings and defines and resolves issues in the preliminary stages of handling the petitions. Contact with these potential parties includes:

a. The agent introduces him/herself and states the reason for the call. The agent states that a petition has been filed, describes its purpose and that the labor organization, agency or activity, as appropriate, may be affected by issues raised by the petition.

b. The agent explains applicable representation case handling procedures including procedures for and timeliness of intervention/cross-petition.

c. The agent explains whether the labor organization, agency or activity is automatically entitled to participate in the case pursuant to §§ 2422.8(d) or (e), or whether it is entitled to request intervention pursuant to §§ 2422.8(c)(1),(2)(3) or (f), or § 2421.21.

d. The agent confirms the name, address and telephone number of the potential party and its representative. The agent states that the Regional Director will notify it of the petition via letter in accordance with § 2422.6 (*CHM 15.8*).

**20.5 Written notification of potential and automatic parties after preliminary review of petition:** All telephone conversations

with potential parties prior to opening the case are confirmed by letter(s) described in *CHM 15.8 and 15.9*. The letters in Figures 15.8A, 15.8B and 15.9 are modified if necessary (see *CHM 15.8.2* and *CHM 20.5*).

Regardless of any telephone contacts, the Regional Director is required to make reasonable efforts to notify any labor organization, agency or activity identified by the parties or the Regional Director as being affected by issues raised by the petition (§ 2422.6). The guidelines set forth in *CHM 15* are used for identifying and contacting any parties that may be affected by issues raised by the petition. If appropriate, the Notice to Employees accompanies the letter to the employing activity/agency as set forth in *CHM 16*.

**20.5.1 Automatic parties:** Parties that qualify as automatic parties pursuant to §§ 2422.8(d) and (e) receive either Figure 15.8A or 15.9, depending on the purpose of the petition.

Note that in petitions seeking to consolidate existing units, the parties to the certifications are automatic parties to the proceeding even though the national union may have filed the petition on the local's behalf. The local parties to the certification are served with the appropriate letters. See *CHM 15.8.1.*

**20.5.2 Potential parties:** Parties that may be affected by issues raised by the petition are notified of the petition and given an opportunity to request intervention. These parties are described in §§ 2422.8(c) and (f) and receive Figure 15.8B, regardless of the purpose of the petition. ***Note that these preliminary actions take place simultaneously and within days of receipt of the petition in the Regional Office.*** There are some exceptions to

this practice including notifying "interested parties" - parties that may not qualify as intervenors, but claim they are affected by issues raised by the petition pursuant to § 2421.21. These parties are not invited to intervene and may not be copied with opening letters to the employing agency. See *CHM 15.10* and *CHM 17.13* for case processing guidelines.

**20.6 Action after notification letters are sent:** After sending the initial notification letters, the agent continues to process the petition. As set forth in *CHM 15.12*, Regional Director's are not generally required to confirm a party's participation in a proceeding after notification of the petition has been sent. However, see *CHM 20.8, 15.12 and 17.5* for policy guidance.

**20.6.1 Outlining issues raised by the petition:** After the region forwards the notification letters to the parties, the agent assigned to the case continues to develop and outline the issues raised by the petition. This section summarizes the preliminary procedures that the agent takes while waiting to hear from the parties and as information is received. *CHM 23 - issue identification and investigative techniques* - discusses specific investigative procedures for each petition.

a. Define the issues and outline the facts needed to resolve the issues.

b. Review information as it is received to: (i) assess whether there are new issues and/or additional information is required; (ii) ensure that all potential parties have been identified. *CHM 15.5.3*.

c. After the region receives the activity's payroll list in an election petition, complete the final check of the

showing of interest. *CHM 18.13*.

d. After the activity's payroll list is received in a petition seeking a determination of eligibility for dues allotment, confirm that the names on the petitioner's certified showing of membership are actually employees of the activity. *CHM 18.13*.

e. If the petition requests clarification of or an amendment of a recognition or certification or to a matter relating to representation, compile information/evidence to support the petition. Specific information is discussed in *CHM 23 generally and 23.5 and 23.8*.

f. Check on related cases in the Regional Office and if appropriate, pending in other Regional Offices (see *CHM 20.1.1*).

**20.6.2 Investigating the petition:** The agent is also expected to obtain evidentiary information relevant to the issues raised by the petition in a manner that minimizes disruption to the affected parties and expedites the processing of the case. Such evidence may be in the form of affidavits, documentation, position statements and legal arguments. The region may obtain this evidence by an investigation or a fact-finding hearing (see *CHM 23.4* for investigative techniques and *CHM 30* and the *HOG* for guidance in conducting a hearing). The region informs the parties of the investigative process and its appropriateness.

**20.7 Follow-up with petitioner:** The agent ensures that the petitioner complies with any request to submit an amended petition or secures additional information to correct defects.

**20.8 Regional Director's responsibility after notification:** This subsection is taken from *CHM 15.12* and *17.5* that discuss the Regional Director's responsibilities after sending affected parties the notification letter. Note also the discussion in *CHM 17.4* discussing the correlation between notification and intervention. Generally, keep in mind that:

a. Any labor organization, agency or activity that may be affected by issues raised by a petition is notified of the filing of a petition (§ 2422.6). But, not every labor organization, agency or activity that is notified by Regional Directors pursuant to § 2422.6 that it may be affected by issues raised by the petition is automatically entitled to participate in the petition. A cross-petitioner, employing agency/activity and/or incumbent labor organization are automatic parties in a representation proceeding and are designated as such in the initial letter notifying them of the petition (see Figures 15.8A or 15.9). Any other agency/activity or labor organization that may be affected by issues raised by the petition must request to intervene or cross-petition according to the requirements set forth in § 2422.8 in order to participate in the petition (see Figure 15.8B). *CHM 17.4*.

b. After the potential parties are notified of the petition by letter, the Regional Director is not required to follow up and confirm a labor organization, agency or activity's participation in a proceeding. However, the region balances its responsibility to notify potential parties that may be affected by issues raised by the petition with the right of any affected labor organization, agency or activity to have a reasonable opportunity to intervene in the proceeding. CHM 15.12.

c. The time limits for intervention, cross-petitions and challenges are not dependent on the posting of the notice to employees (which has a fixed duration) but rather on actions being taken according to § 2422.30. Any labor organization, agency or activity notified that it may be affected by issues raised by a petition has a reasonable opportunity to participate in the case. For instance, if a potential party has been identified and notified of a petition and contacts the Regional Office for information, it is advised of the status of the case. If the labor organization, agency or activity states it intends to intervene pursuant to § 2422.8, the agent reminds it of the requirements for intervention. Before taking action pursuant to § 2422.30, the Regional Director has discretion to, and is required (where a labor organization incumbent or employing agency are automatic parties) to follow up with any labor organization, agency or activity that has telephonically inquired about a case.

**20.9 Disclaimer of interest:** Any labor organization holding exclusive recognition for a unit of employees may disclaim any representational interest in those employees at any time. Disclaimers of interest may be filed by the recognized or certified exclusive representative in the following situations:

a. as a "petitioner," a labor organization may file a petition seeking to disclaim any representational interest in a unit for which it is the exclusive representative (*CHM 5.9*).

b. as an incumbent union named in a petition that requests an election or seeks to clarify a matter relating to representation;

c. as an intervenor in a petition that seeks to clarify a matter related to the representation of employees it represented prior to a reorganization or realignment of agency operations.

To be effective, a disclaimer must be made in good faith, be clear and unequivocal, and leave no doubt that a matter relating to the incumbent's representation does not exist with respect to the bargaining unit. *Department of Defense, Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire,* 14 FLRA 76 (1984). A union's bare statement is not sufficient to establish that it has abandoned its claim to representation if the surrounding circumstances justify an inference to the contrary. Its conduct, judged in its entirety, must not be inconsistent with its alleged disclaimer. A disclaimer filed under questionable circumstances is submitted for case handling advice.

**20.9.1 Processing petitions where a labor organization files a disclaimer:** When the region receives a petition from a labor organization that seeks to disclaim representational interest, or as part of processing a petition, receives a letter from the incumbent seeking to disclaim representational interest, the region:

a. confirms that the party filing the disclaimer is the recognized or certified exclusive representative of the employees in the unit. A significant requirement is the letter of recognition or the Certification of Representative. If the union seeking to disclaim does not submit a copy of the recognition or certification, the region obtains a copy from the certification database, the

activity or if possible, the international union; and

b. confirms that the only purpose of the petition or letter is to disclaim representational interest in the unit.

If the certification was issued to a local union and the international attempts to challenge the disclaimer, the region contact the Office of the General Counsel.

**If an incumbent** files a petition to disclaim representational interest and the disclaimer appears to have been properly filed, the region issues a Decision and Order approving the disclaimer. The region also tries to obtain from the petitioner a waiver of its right to appeal the Decision and Order. However, if no waiver is submitted, when the Decision and Order becomes the final action of the Authority under § 2422.31(e), the Regional Director issues a Revocation of Recognition or Certification (see *CHM 56.6.1 - revocation issued upon a disclaimer by an incumbent exclusive representative*).

If an incumbent files a disclaimer in a petition filed by another party, the region takes appropriate action consistent with the purpose of the petition.

a. In a base closure situation, the incumbent may agree that the base closure resulted in the termination of the unit and file a disclaimer.

b. In a petition filed by an employing agency that contends that it has a good faith doubt that the incumbent represents a majority of the employees in the unit, the disclaimer obviates the need for a determination on the merits, i.e., whether or not the incumbent continues to represent a majority of employees in the unit. In such

cases, the Regional Director issues a Decision and Order stating his/her intent to issue a Revocation of Recognition or Certification.

c. In a raiding situation, a disclaimer by the incumbent results in the election without the incumbent on the ballot [note however, § 2422.14(c)].

d. In a decertification proceeding, a disclaimer by the incumbent obviates the need for an election unless there is an intervenor. See § 2422.23(f) and *CHM 28.37.*

**20.9.2 Effect of disclaimer on petitions seeking an election in a unit currently represented by an incumbent:**

a. If a labor organization properly disclaims interest in the unit for which another labor organization has filed a timely petition seeking an election, the incumbent is not regarded as a party.

b. If a labor organization properly disclaims interest in the unit which is the subject of a decertification petition, the election is not held [unless another labor organization has intervened - § 2422.23(f) and *CHM 28.37*]. In cases where there is no intervenor, the Regional Director dismisses the petition on the basis of the disclaimer, stating that no question of representation exists (absent a withdrawal), and issues a Revocation of Recognition or Certification at the time the petitioner's withdrawal is approved or the case is dismissed (see *CHM 53* for Decisions and Orders).

When an election is not held because the incumbent has filed a disclaimer of interest, § 2422.14(c) imposes a six month bar on

the incumbent from filing a petition seeking an election involving the same unit or a subdivision thereof. See also *CHM 11.10*.

**20.9.3 Effect of disclaimer on petitions that seek to clarify or amend a matter relating to representation:** A disclaimer by a labor organization named as an incumbent or an intervenor in a representation petition based on its current or prior representation of employees affected by a reorganization may affect the issues raised by the petition. In this situation, the region is not required to issue a separate Decision and Order as a result of the incumbent's disclaimer. During the processing of the petition, the incumbent labor organization is simply not a party and the affected employees are not represented. If, however, the issues reflect that the unit remains appropriate, the Regional Director goes back to the incumbent to confirm in writing that it still seeks to disclaim interest. If the incumbent continues to disclaim, the Regional Director issues a Decision and Order that includes a statement that the incumbent disclaimed interest in representing the employees in the unit and states his/her intent in issuing a Revocation of Recognition or Certification. Thereafter, the Regional Director issues a Revocation of Recognition or Certification to reflect that the exclusive representative has disclaimed interest for an appropriate unit of employees (see *CHM 56.6.1* - *revocation issued upon a disclaimer by an incumbent exclusive representative*).

**21 DUTY TO FURNISH INFORMATION:** Section 2422.15(a) states:

> After a petition is filed, all parties must, upon request of the Regional Director, furnish the Regional Director and serve all parties affected by issues raised in the petition with information concerning parties, issues, and agreements raised in or affected by the petition.

The Regional Director's letter notifying affected parties of a petition includes a reminder of the parties' duty to furnish information under this section (*CHM 15.8*).

**21.1 Agency's or activity's duty to provide a list of inclusions and exclusions:** After a petition seeking an election is filed, the Regional Director may direct the agency or activity to furnish the Regional Director and all parties affected by issues raised in the petition with a current alphabetized list of employees and job classifications included in and/or excluded from the existing or claimed unit affected by issues raised in the petition [§ 2422.15(b)]. The employing agency is requested to provide this information in the initial letter notifying it that a petition has been filed. See *CHM 15.9* for a discussion about opening letters and *CHM 18.13* for a discussion on the effects of the activity's failure or refusal to provide an eligibility list.

**21.2 Using subpoenas to obtain information:** Investigatory subpoenas are rarely used in representation proceedings but there may be situations that require the use of an investigative subpoena. See *CHM 23.5.3* for guidance and instructions.

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outcomes include:

a. Failure of the petitioner to make available necessary facts that are in his/her possession may result in prompt dismissal.

b. Failure of other parties to furnish the "best evidence" available on an issue or particular matter may result in the acceptance of other information available on that point.

c. Failure of the intervenor or incumbent to sign an election agreement because of a disagreement on the matters contained in § 2422.16(b) or because the

incumbent simply refuses to cooperate may result in a Direction of Election or denial of status as a party.

d. Failure of the intervenor or the incumbent to appear at the hearing held pursuant to § 2422.17, does not result in denial of its status as a party. The hearing simply proceeds without the party; but the record reflects that the party failed to make an appearance.

***NOTE: The Authority has not had an opportunity to rule on issues that arise from a party's failure to comply with § 2422.15(a), Duty to Furnish Information or § 2422.15(c), Duty to Cooperate. The regions contact the Office of the General Counsel whenever questions arise concerning a party's compliance with § 2422.15.***

**23** **ISSUE IDENTIFICATION AND INVESTIGATIVE TECHNIQUES:** This section discusses basic investigative procedures and techniques. It also includes guidelines on investigating specific types of cases. *CHM 24* discusses issue analysis and *CHM 26* discusses preparing the case for the Regional Director's decision.

**23.1** **Responsibility of Regional Director:** The regulations streamline the case handling process and make the rules flexible in addressing the representation concerns of agencies, activities, labor organizations and individuals. The Regional Director takes a proactive role and ensures that the procedures followed result in an appropriate resolution of the representation issues *(CHM 1)*. **The Regional Director is responsible for defining and resolving all underlying issues presented by the filing of the representation petition whether or not identified by the petitioner**. Issues are not only defined by the results the petitioner seeks, but also by the facts and circumstances that caused the petition to be filed.

The Regional Director acts to resolve the issues and the underlying representation matter in a manner consistent with the Statutory requirements for appropriate units and unit eligibility. For instance, the Statute and the regulations require that when the Regional Director has reasonable cause to believe a question exists regarding unit appropriateness, the Regional Director provides the parties with an opportunity for a hearing and issue a Decision and Order on the unit issues, absent an election agreement. Certain significant eligibility issues may also require a hearing while other representation issues may not. Thus, defining issues ensures proper application of the regulations, uniform case handling practices among the regions and decisions that are consistent with the Statute.

**23.2** **Identifying issues and developing a checklist for additional information:** Once the region identifies the parties, the agent can begin defining and outlining the issues for resolution. See also *CHM 20.6.1*.

**23.3** **Basic requirements for resolving representation issues:** Issues arise in nearly every representation case,

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al Director may identify issues that are crucial to resolution of the petition that the parties do not consider relevant

Analyzing issues in a representation case is an evolving process with new issues becoming apparent as facts are gathered. Simply identifying the issues from the face of the petition and collecting evidence is not adequate. Assembling the facts is as important as identifying the issues. A suggested guideline follows:

a. Review the petition to identify issues that surface from the petition;

   (i) outline the procedural issues;

   (ii) outline the potential substantive ones;

b. Begin gathering the relevant facts. Developing a complete picture of the facts and applying them is crucial to analyzing issues;

c. Attempt to resolve the procedural issues as quickly as possible:

   (i) will an amended petition or supplemental information resolve the procedural issue?

   (ii) are the positions of the other parties required? (For example, timeliness at first may appear to be a procedural matter; showing of interest issues are often resolved simply by discussing the eligibility list with the concerned parties.)

   (iii) is an informal meeting pursuant to § 2422.13 advantageous at this point?

d. Decide whether a procedural issue is a potential issue for hearing; if so, begin conducting research and preparing for a meeting pursuant to § 2422.13 (*CHM 25*);

e. Identify all affected parties and categorize them as automatic parties versus potential intervenors; consider whether any of the affected parties may raise issues in addition to those presented by the petition; anticipate the issues, procedural or substantive; and outline possible appropriate solutions based on existing policy and Authority case law;

f. Outline and research the substantive issues identified from the petition or raised by the parties; consider whether the issues are related (in a reorganization, the petitioner could file a petition seeking an election, but

another party could claim successorship and yet another party that represents other employees at the activity could claim accretion);

g. Review the substantive section discussions in the *RCL*; the outlines and questions in the *HOG*; and develop an outline for processing the petition including the standards and facts required to resolve the issues raised by the petition;

***Note:*** ***An outline is crucial to the identification of the issues and the development of the case. (CHM 23.4 and 23.5). The outline:***

***(i)*** ***enables the agent to become well acquainted with appropriate unit criteria and the factors considered in making such determinations;***

***(ii)*** ***assists the parties when they compile information that is necessary for the Regional Director's decision;***

***(iii)*** ***is required when a notice of hearing is issued;***

***(iv)*** ***helps the Hearing Officer narrow and resolve issues during the prehearing conference; and***

***(v)*** ***ensures a complete record at the hearing.***

h. Review the facts that have been gathered during the investigation and apply them to the standards/factors necessary for resolution of the issues; secure any additional facts required;

i. Consider whether a meeting to discuss and define the issues is appropriate and useful to resolve any of the issues (*CHM 25*);

j. Consider the issues and determine whether a hearing is required under the Statute and the regulations; [see § 2422.30(b) and *CHM 28.11.2.2* or eligibility issues];

k. "Look at the big picture" when reviewing the issues and the facts; do the issues affect a larger unit or affect more employees than those covered by the petition?

l. Continually reassess the issues and apply the standards to the facts obtained during the investigation; what appeared to be an issue may disappear, similarly a new issue may appear as new facts unfold; and

m. Begin preparing the case to present to the Regional Director for decision and action. See *CHM 26* for guidelines and requirements.

**23.4 Investigative procedures:**

**23.4.1 General policy:** The region will notify any labor organization and agency it identifies as being affected by issues raised in the petition and provide an opportunity for that labor reorganization and agency to participate in the case. All evidence, whether documentary or testimonial, must be relevant. The region will obtain evidentiary information relevant to the issues raised by the petition in a manner that minimizes disruption to the affected parties and expedites the processing of the case. Such evidence may be in the form of affidavits, documentation, position statements and legal arguments. The region may obtain this evidence through either an investigation or a fact-finding hearing. The region will inform the parties of the investigative process and its appropriateness.

**23.5 Evidentiary considerations:**

**23.5.1 Choosing between documentary and testimonial evidence:**

**23.5.1.1 Documentary evidence** is evidence which has been reduced to writing prior to the investigation for purposes unrelated to the investigation itself. This type of evidence, when available, is almost always preferable to testimonial evidence on the same point. In a fact-finding hearing, it is used to support testimony from a qualified witness. The agent always determines whether relevant documentary evidence exists and emphasizes to the parties who have access to that evidence its importance. When it is clear that the parties are unable to produce documents which are known to exist, the agent attempts to reproduce that evidence through testimony. In some cases, documentary evidence may be so critical that no decision on the merits can be made without it, regardless of testimony. For example, in an election case where a contract is alleged to bar the petition, the issue cannot be decided without the contract.

**23.5.1.2 Sworn testimony** is taken from a witness in a formal fact-finding hearing to authenticate documentary evidence or provide additional relevant evidence that does not exist in documents. A region may also obtain affidavits or interrogatories as part of an investigation in lieu of a hearing. Affidavits are frequently taken during a region's investigation of certain objections to an election, challenges to the validity of a showing of interest, challenged ballots and petitions raising unit eligibility issues.

**23.5.1.3 Unsworn information** not supported by documentary evidence can be useful in processing a petition when the agent is identifying issues and the parties' positions. Unsworn information usually provides leads in determining a direction for processing a case. If the information will be used in the decisional process, i.e., as a basis for the Regional Director's decision, the agent confirms any relevant substantive information

received about the case in a letter to the party who provided it. Confirming letters state clearly the information received from the party or witness, explain that information may be considered by the Regional Director in deciding the representation petition, and give the party or witness a reasonable period of time to advise the agent of any inaccuracies or changes in the information.

**23.5.1.4** Evidence **obtained from the employing agency** is crucial to processing any representation petition. As discussed in *CHM 15*, the agency is the party that provides most of the documentary information in petitions involving questions of unit appropriateness. **The employing agency must be contacted in every case that is opened and requested to cooperate in the investigation.** Information obtained from the employing agency often determines how the case will be resolved, i.e., hearing, election agreement or Decision and Order without hearing.

**23.5.2** **Assessing the relevance and weight of evidence:** The purpose of an investigation in a representation petition is to define and narrow issues, ascertain and inquire into the respective positions of the parties, and obtain sufficient facts regarding all matters at issue so the Regional Director can make a well-reasoned and appropriate decision.

The Regional Director relies only on **relevant** evidence, whether documentary or testimonial, in his/her decision. Evidence is relevant if it can reasonably be expected to assist the Regional Director in reaching a proper disposition of the case. The agent or Hearing Officer insists that the parties produce witnesses or evidence that is probative. However, significant hearsay statements are sometimes accepted during the investigation or during a hearing even though their use is limited. The agent has no obligation to accept evidence that clearly makes no independent contribution to an understanding of the case or its resolution. Evidence of this sort includes not only obviously irrelevant material but material that merely duplicates evidence already obtained. Although the agent, not the parties, is responsible for deciding during the investigation whether proffered evidence is relevant, any doubts are resolved by accepting the documents.

The **weight** of the evidence is ultimately a matter for the Regional Director to decide. Therefore, agents ensure that any investigation or fact-finding hearing obtains a complete record which the Regional Director can consider while analyzing applicable case law. The agent's responsibility is to develop all factual evidence that assists the Regional Director in assessing the weight of the evidence. This means, among other things, that the agent inquires into the source of all evidence whenever that source is not otherwise apparent. In the case of documentary evidence, for example, the agent establishes the purpose for which the documents were originally prepared and the circumstances of their preparation. In the case of testimonial evidence, the agent establishes the competence of the witness and the witness's interests, if any, in the case. **The agent's neutrality while taking evidence is critical to maintain the integrity of the decision making process.**

***NOTE: HOG 12 through 21 discusses evidentiary and procedural matters that may be relevant in an investigation or at a fact-finding hearing.***

**23.5.3** **Subpoenas:** Investigatory subpoenas are rarely used in representation proceedings but there may be situations that require the use of an investigative subpoena.

Subpoenas issued in preparation for a hearing are discussed at *HOG 27.*

Subpoenas may also be issued during an investigation prior to issuing a notice of hearing. A Regional Director who is unable to secure information, documentary or testimonial, that s/he deems necessary to a case investigation before a notice of hearing can be issued or an election agreement can be approved may consider issuing a subpoena for the information. For example, a region that is unable to obtain an employee eligibility listing for an election, may consider issuing an investigative subpoena. When investigating a challenge to the validity of a showing of interest, a union representative who is accused of soliciting a showing of interest on work time and in work locations who refuses to provide a statement may be subpoenaed.

**23.5.3.1** **Statutory basis of issuing subpoenas:** The General Counsel and Regional Directors have authority under section 7132(a) of the Statute to issue an investigative subpoena and under 7132(b) to enforce an investigatory subpoena in an appropriate United States district court. Section 2429.7 of the regulations addresses the issuance and enforcement of investigatory subpoenas.

**23.5.3.2** **When subpoenas are appropriate during an investigation:** The *Unfair Labor Practice Case Handling Manual* at Part 3, Section K outlines criteria for Regional Director's to apply in deciding whether to request permission to issue an investigatory subpoena. Many of these criteria are applicable to representation proceedings. A Regional Director obtains advice about issuing an investigatory subpoena when the employing agency or other party to the representation proceeding fails or refuses to cooperate during an investigation and a notice of hearing or an election agreement signed cannot be issued without the required information.

a. ***NOTE: an investigative subpoena is not necessary if the agency refuses to turn over an eligibility list that is needed solely to check the showing of interest as compared to the eligibility list used to conduct an election. CHM 18.13.2 provides that if the agency's payroll list is not submitted, the final determination may be based upon the petitioner's estimate of the number of employees in the unit.***

b. An investigative subpoena is not necessary if the Regional Director can issue a notice of hearing and subpoena the information in a formal proceeding pursuant to *HOG 27.*

c, An investigatory subpoena is not necessary when the petitioner fails or refuses to furnish requested material as the petition can be dismissed for lack of cooperation [§ 2422.15(c)].

**23.5.3.3 Procedures for issuing an investigatory subpoena:** The process for obtaining an investigatory subpoena in a representation proceeding is the same as in an unfair labor practice proceeding. See the *Unfair Labor Practice Case Handling Manual* at Part 3, Section K for detailed procedures.

a. The Regional Office drafts a memorandum to the Deputy General Counsel requesting advice on issuing an investigatory subpoena. The memorandum states the purpose of the petition, the circumstances surrounding the party's failure to provide the necessary information and the reasons why an investigatory subpoena is required.

b. If the Office of the General Counsel gives clearance to the Regional Director to issue the investigatory subpoena, the Regional Director follows the procedures in *HOG 27*, although the Regional Director is the party issuing and serving the subpoena, not the General Counsel.

**23.6 Issues that may develop in petitions seeking an election, a determination of eligibility for dues allotment, certain petitions that seek to clarify or amend a matter relating to representation and any petition seeking to consolidate existing units:**

The *RCL* provides significant guidance on the substantive issues listed below. Subject matter areas are presented in the *RCL* in a distinct format. The concept is described and includes: (1) its definition and the statutory basis, if applicable; (2) the standards or criteria on which a decision is based; and (3) the factors and relevant information required for decision. Potential outcomes are also discussed in many instances. The *HOG* may also be useful as it includes a brief identification of the topic and the outline or relevant questions required to ensure a complete record.

a. *RCL 1 and HOG 37* - Appropriate unit determinations

Appropriate unit questions arise in nearly every representation case. Appropriate unit(s) are defined before resolving any other representational issue raised in a petition. Since many petitions involve unit determination questions, an outline is a mandatory tool for processing petitions properly. Sample investigative outline formats are contained in Figures 37.1 through 37.3. Figure 37.1 is the most thorough and is the outline to be forwarded to the parties in the event an appropriate unit determination is required.

b. *RCL 2 and HOG 38* - Scope of unit (including residual units, add-ons,

expanding and contracting units).

Investigation of these issues is conducted similarly to the investigation of appropriate unit issues.

c. *RCL 3 and HOG 39* - Effect of changes in the character and scope of a unit due to a reorganization or realignment in agency operations.

These issues usually result from reorganizations and are all-inclusive in that reorganization-related issues concern appropriate unit questions, accretion and successorship issues. *RCL 3* provides a discussion of the potential scenarios and issues that may result from agency reorganizations. When investigating and analyzing questions resulting from agency reorganizations, the agent refers to this section and *RCL 1*. The cases cited in *RCL 1* also provide an outline of issue and evidence requirements for resolution of reorganization related issues.

d. *RCL 3C* and *HOG 39C* - Accretion

e. *RCL 8* and *HOG 44* - Schism

f. *RCL 9* and *HOG 45* - Severance

g. *RCL 10* and *HOG 46* - Status of a labor organization (see also *CHM 19* and *CHM 23. 9.3* for procedures for processing)

h. *RCL 3B* and *HOG 39* -Successorship

i. *RCL 14* and *HOG 50* - Units including supervisors

j. Procedural issues: Procedural issues such as proper service, timeliness, and inadequate showing of interest are often corrected without resort to formal litigation; they are however, be resolved. Many of these issues are resolved by amending the petition, or as a result of discussions with the parties pursuant to § 2422.13. Refer to appropriate sections of the *CHM* or *HOG* for discussions on these issues.

k. Issues relating to identifying parties that may be affected by issues raised by the petition: The failure to identify a labor organization, agency or activity that may be affected by issues raised by a petition could nullify a certification or other action taken on a case. **Follow the checklist outlined in *CHM 15.5* and be sure to document the file on these matters.**

**23.7** **Unique issues in petitions seeking an election:** In addition to those issues discussed in *CHM 23.5*, the following issues are unique to petitions seeking an election.

a. *RCL 12* and *HOG 48* - Timeliness of election petitions, amendments etc.

b. *CHM 18* - Showing of interest

c. Challenges to the validity of the showing of interest or the status of a labor organization may be filed prior to the opening of the hearing, or if there is no hearing, prior to issuance of the Regional Director's Decision and Order. See *CHM 18.19* and *CHM 19* for procedures for investigating and processing these challenges.

d. Status of a party that believes it is affected by issues raised in the petition (*CHM 15.5.2* at "NOTE").

e. Is the unit is the process of being expanded or does it include employees who are seasonal, thus raising election timing issues? See *CHM 20.1.2.*

**23.8** **Unique issues in petitions requesting a determination of eligibility for dues allotment:** Petitions for dues allotment are governed by 5 U.S.C. 7115(c) and § 2422.1(a)(ii). *See also RCL 6 - dues allotment.* The three requirements include:

a. the petition must be for a unit for which there is no exclusive representative;

b. the claimed unit must be appropriate for exclusive recognition; **and**

c. the petitioner must provide a showing of ***membership*** of not less than 10 percent in the unit claimed to be appropriate.

During the region's investigation, the agent ensures that none of the employees in the proposed unit are already part of an existing certified unit. The agent checks the certification files, certification database, and OPM's "Union Recognition in the Federal Government" for any evidence that the unit was previously certified. Once the agent receives the agency's statement, if there are no intervenors or a dispute about unit or eligibility issues, the agent prepares a stipulation for use by the Regional Director in preparing the Decision and Order (see *HOG 26* for stipulations).

**23.9** **Unique issues in petitions to clarify, and/or amend:**

**23.9.1** **A certification in effect:** Such cases usually include petitions to:

a. clarify the bargaining unit status of certain employees/positions after a labor organization has been recognized or certified as the exclusive representative in an appropriate unit; and/or

b. amend the original recognition or certification to conform to technical or nominal changes which have occurred affecting the original designation or identity of either party ( such as a change in the name of the exclusive representative, a change in the name or location of the agency or activity, or a change in the title of the employees).

Clarifying the bargaining unit status of certain employees involves eligibility issues. *RCL 15 through 28* includes an extensive discussion of employees categories, including definitions, coverage, an analysis of relevant cases and references. For hearing, *HOG 51 through 64* includes a short discussion of the definition of the employee categories and information required for a decision. When there are eligibility issues, the agent makes a list of the disputed positions and prepare outlines or checklists of significant cases to share with the parties. Eventually, the agent will be required to make a recommendation to the Regional Director concerning whether to hold a hearing (see *CHM 26 and 28*).

Changing the designation or identity of either party to the recognition or certification usually involves verifying, in the case of the activity, that the change in the name was technical and the unit or the representation of the unit was not affected in any way. Changing the name of the exclusive representative may be purely technical or more complicated if the union merged or affiliated with another labor organization. In the latter situation, the *Montrose* factors are applied. For a discussion of technical changes vs. the *Montrose* requirements, see *RCL 7*.

***NOTE: In a Montrose case, see also CHM 17.13.1 re "Interested Parties" and CHM 7 for limitations on the service requirements.***

**23.9.2 Or any matter relating to representation:** Examples of these cases include:

a. questions relating to the continued appropriateness of an existing unit(s).

Questions arising in this context usually concern the effects of a reorganization or realignment of agency operations on established units. As noted in *CHM 23.5,* appropriate unit issues, accretion and successorship issues usually factor into the determination of these cases. See *RCL 3.* These cases may also include the effects of base closures on existing units or disclaimers of representational interest submitted by the incumbent. Start by asking the parties what happened, what units were affected and how. Once it is determined what happened, the issues are usually identified.

b. questions relating to the majority status of the currently recognized or certified labor organization.

These petitions are usually filed by the agency or activity that is a party to the existing bargaining relationship. The agency states that it has a good faith doubt based on objective considerations that the certified labor organization represents a majority of employees in the existing unit. The agency petitions the Authority for an election among employees in the unit. These cases are subject to the timeliness consideration that apply to other petitions seeking an election. See *RCL 4* for a detailed discussion of these cases and *HOG 40* relevant information that is necessary for making a determination of the merits of the case.

***NOTE: Regional Directors are required to issue a notice of hearing whenever a majority status petition is filed by an agency, activity or labor organization that is not a party to the exclusive bargaining relationship. The issue in this situation is the standing of the petitioner to file such a petition.***

**23.9.3 Petitions seeking to decertify the incumbent exclusive representative pursuant to section 7111(f)(1):**

**23.9.3.1 Basis for filing:** In *USIA*, 53 FLRA 999, 1004 (1997) the Authority stated that the filing of a section 7111(f) petition requesting decertification is consistent with the Statute. Further, the Authority held that a bargaining unit member's petition for decertification pursuant to section 7111(f), unlike a decertification petition filed pursuant to section 7111(b)(1)(B), will be considered to have been properly filed without the need for a showing of interest. "In all other respects, such a petition should be processed according to the regulations concerning petitions which do not require an election." *USIA*, 53 FLRA at 1004. Therefore, petitions filed pursuant to section 7111(f) are processed similarly to petitions filed pursuant to section 7111(b)(2) of the Statute or § 2422.1(b) of the regulations.

**23.9.3.2 Processing guidelines:** The issue of freedom from corrupt or anti-democratic influences can arise in every representation case. The issue can arise when a party in a pending representation proceeding files a **timely** challenge alleging corrupt or anti-democratic influences against a union party in the same proceeding, as in *NYNG*, 53 FLRA 111 (see *CHM 19.10.2*). In addition, based on *USIA*, any bargaining unit member may at any time file a petition seeking decertification of the incumbent union based on an allegation of corrupt or anti-democratic influences. Regardless of the method utilized to raise the challenge, the legal analysis remains the same.

a. Violations of Standards of Conduct Do Not Automatically Establish

Corrupt Influences Warranting Revocation or Denial of Certification.

It is significant to note the difference between the traditional remedies ordered in standards of conduct cases and the remedy which the Authority is required to order if it finds that a union is subject to corrupt or anti-democratic influences. For example, the Department of Labor may order a respondent to cease and desist from violative conduct and may require a respondent to take such affirmative action as is deemed appropriate to effectuate the policies of the Statute. Under the Statute, however, a labor organization that is found to be subject to corrupt or anti-democratic influences may not be recognized under the Statute as an exclusive representative and thus, either loses its existing recognition for any bargaining unit it may represent or is precluded from being recognized as the representative for any new bargaining unit.

If a third party with jurisdiction over conduct alleged to constitute reasonable cause to believe that a labor organization is subject to corrupt or anti-democratic influences find a violation, that finding establishes only reasonable cause to believe that the presumption of freedom from corrupt or anti-democratic influences has been rebutted. That finding does not establish that, in fact, the union is subject to corrupt and anti-democratic influences. Rather, that is the Authority's sole province. Thus, even though certain conduct may be found to be violations of standards of conduct requiring an affirmative remedy, that same conduct may or may not establish that a union is subject to corrupt or anti-democratic influences requiring the denial or revocation of certification. Moreover, if a union is found to be subject to corrupt or anti-democratic influences, it is unclear whether any revocation of certification extends to all bargaining units represented by that union under the Statute. For example, some locals and nationals represent more than one bargaining unit. See *RCL 10B and HOG 46B*.

b. As discussed in *CHM 20.1.8*, petitions seeking to decertify the incumbent labor organization are accompanied by specific information. **If the information is not included with the petition, the Regional Director issues an *Order to Show Cause* as it is the most effective manner of processing challenges and petitions alleging that a labor organization is subject to corrupt or anti-democratic influences warranting the denial or revocation of certification.** There are no Authority decisions on when a labor organization is, in fact, subject to corrupt or anti-democratic influences. Further, there is no guidance in the legislative history on this issue. The Authority has recognized "the damage to representation rights that can be caused by delay in processing a representation petition." *NYNG*, 53 FLRA 111, 124 at n. 14. Moreover, the Authority has found that an

order to show cause is a proper procedure in a representation proceeding. (*U.S. Army Corps of Engineers, Seattle, Washington and United Power Trades Organization and NFFE Local 8*, unnumbered application of review denied (March 12, 1998) finding that an *Order to Show Cause* is a proper procedure where petition sought to sever a group of employees from a bargaining unit: "We have reviewed the record and find nothing improper in the RD's use of the *Order to Show Cause*."
Using an order to show cause process will screen out any challenges which do not present a sufficient basis to rebut the presumption that a labor organization, which is subject to governing requirements that meet the specified standards in section 7120(a)(1) through (4) of the Statute, is free from corrupt and anti-democratic influences.

The order to show cause requires the party filing the corrupt influences challenge to establish a basis upon which to conclude that the challenged labor organization is subject to corrupt or anti-democratic influences. The order requires the challenging party to submit the following information, documents and argument:

**1. Whether there has been, or is currently pending, a proceeding before a third party that is based on the same or substantially similar allegations that support the section 7111(f) claim.**

The party is ordered to submit all documents filed, evidence submitted and rulings issued in that proceeding. The party is ordered to establish why the allegations in that proceeding are the same or substantially similar to the allegations that support the section 7111(f) claim. The party is ordered to establish that a finding of a violation in that proceeding requires a determination under the Statute that the challenged labor organization is subject to corrupt or anti-democratic influences.

**2. If a third party has found no violation based on the same or substantially similar conduct, why the challenge or petition should not be dismissed, absent withdrawal.**

The party is ordered to submit all documents filed, evidence submitted and decisions rendered in that proceeding. The party is ordered to establish why the finding of no violation in that proceeding should not result in the dismissal, absent withdrawal, of the challenge filed under the Statute of corrupt or anti-democratic influences.

**3. If a third party has found a violation based on the same or substantially similar conduct, why that violation establishes**

**under the Statute that a labor organization is subject to corrupt or anti-democratic influences requiring the denial or revocation of certification.**

The party is ordered to submit all documents filed, evidence submitted and decisions rendered in that proceeding. The party is ordered to establish why the allegations in that proceeding are the same or substantially similar to the allegations that support the section 7111(f) claim. The party is ordered to establish why a finding of a violation in that proceeding requires a determination under the Statute that the challenged labor organization is subject to corrupt or anti-democratic influences.

**4. If a third party proceeding is pending, assuming the allegations before the third party are true, why they establish under the Statute that a labor organization is subject to corrupt or anti-democratic influences requiring the denial or revocation of certification.**

The party is ordered to submit all documents filed, evidence submitted and ruling issued in that proceeding. The party is ordered to establish why the allegations in that proceeding are the same or substantially similar to the allegations that support the section 7111(f) claim. The party is also ordered to establish why a finding of a violation in that proceeding requires a determination under the Statute that the challenged labor organization is subject to corrupt or anti-democratic influences.

**5. If there has been no proceeding before a third party and none is currently pending based on the same or substantially similar conduct, why the challenge or petition should not be dismissed, absent withdrawal.**

The party is ordered to submit all evidence to support the challenge. The party is ordered to establish why that evidence requires a determination under the Statute that the challenged labor organization is subject to corrupt or anti-democratic influences.

**23.9.3.3 Office of the General Counsel clearance:**

Normally, if the allegation has been properly filed before a third party, based on the Authority's decisions in *NYNG*, 53 FLRA 111, 123-124 and *USIA*, 53 FLRA 999, 1004, the region stays processing a petition which was filed to decertify the incumbent labor organization pursuant to section 7111(f)(1) or in which a challenge to the status of the labor organization is raised. However, the Authority cited certain exceptions to this "rule" in its decisions. Therefore, based on the Authority's desire to avoid "unwarranted delay in the processing of representation cases," the Regions obtain clearance from the Office of the General Counsel prior to staying any pending

representation proceeding because of a challenge raising corrupt or anti-democratic issues. Similarly, in view of the small number of cases raising this issue and the absence of Authority decisions and legislative history, the Regions obtain clearance from the Office of the General Counsel prior to taking action on any challenge or petition raising the corrupt or anti-democratic influences issue after receipt of response to an order to show cause. *CHM 58.3.3*

**23.9.3.4 Making a determination on the merits:** See *RCL 10B* for substantive issues and guidance on making a decision on the merits of the case.

**23.10 Unique considerations in petitions to consolidate two or more units in an agency and for which a labor organization is the exclusive representative:** *RCL 13* describes unit consolidations processed pursuant to 5 U.S.C. 7112(d), the statutory basis for the procedure, and factors considered in determining whether a consolidation is appropriate. *HOG 49* is a shorter version used at hearings. Other considerations include:

**23.10.1 Bars:** The election, certification and agreement "bars" with respect to any of the units proposed for consolidation do not act as a bar to the filing of a petition to consolidate existing units (*CHM 11*, *RCL 13B* and *HOG 49*).

**23.10.1.1** Subsequent petitions seeking an election or clarification of a matter relating to representation in any existing exclusively recognized unit covered by a pending petition to consolidate existing exclusively recognized units must be filed in a timely manner and satisfy the election, certification and agreement bars. Petitions for an election filed after the filing of the related unit consolidated petition are held in abeyance pending the processing of the petition to consolidate. Upon the issuance of a certification on consolidation of units, the petitioner is given thirty (30) days from the issuance of the certification to submit an adequate showing of interest for the consolidated unit. If an adequate showing is filed, the petition will be processed and an appropriate certification will issue (*CHM 11.10.2*).

**23.10.1.2** Petitions seeking an election or clarification of a matter relating to representation in any existing exclusively recognized unit, due to a substantial change in the character and scope of the unit, that is covered by a subsequently filed unit consolidation petition are resolved before the affected unit may be included in the proposed consolidated unit (*CHM 11.10.2*).

**23.10.1.3** A valid election on a proposed consolidation that does not result in the issuance of a certification on consolidation of units acts as a bar for a twelve (12) month period with respect to any petition for consolidation of the same unit or any subdivision thereof (*CHM 11.2*).

**23.10.1.4** 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. However, after an agreement has been signed and dated for the claimed consolidated unit, the agreement bar provisions discussed in *CHM 11* and § 2422.12(b) apply.

**23.10.2 Disputes regarding authority to file unit consolidation petitions:** The Office of the General Counsel is contacted whenever an issue develops involving a dispute regarding the authority of a party to file a petition to consolidate existing units. Examples include:

a. When a local holds exclusive recognition for a unit that the national office of a labor organization seeks to consolidate into an agency-level consolidated unit. *See Internal Revenue Service,* 7 A/SLMR 357 (1977) and *U.S. Customs*, 8 A/SLMR 220 at 224 (1978) (when disputes arise the region may be required to review the constitution and bylaws).

b. When an agency or activity seeks to consolidate two or more units represented by different locals of the same national union.

**23.10.3 Investigation:** In addition to issues discussed at *CHM 23.6*, investigation of the issues raised by the petition is generally confined to:

a. ensuring all units for which the union holds exclusive recognition are included in the proposed consolidation; if not, a statement from the petitioner explaining why all of the units are not included [see *Air Force Materiel Command*, 55 FLRA No. 58 (1999) where the Authority stated that the purpose of a proposed consolidation is not to eliminate fragmentation, thus the fact that one unit was not included in the proposed consolidation does not establish that the proposed unit does not reduce fragmentation].

b. an attempt to clarify areas of disagreement, if any, such as the nature of a bilateral agreement, and the position of the parties with respect to the appropriateness of the proposed consolidated unit including scope and eligibility questions.

c. a determination of the appropriateness of the proposed consolidated unit.

**23.10.4 Automatic parties:** As discussed in CHM 15.7.1 and 15.8.1, when a national labor organization seeks to consolidate all of the units for which its constituent locals hold exclusive recognition in an agency, the local unions and the activities that are on the certification are automatic parties to the proceeding pursuant to § 2422.8(d).

**23.11 Requirement for an election in consolidation petitions:**

**23.11.1 Employee request:** In unit consolidation proceedings, the employees are given the opportunity to submit in writing a thirty (30) percent showing of interest to the Regional Director, stating that the employees desire an election on the issue of the proposed consolidation (see also *CHM 18.1 and 18.5.7*). No special notice other than the notice set forth in *CHM 16* is required. The notice includes instructions that the showing of interest must be timely, i.e., prior to opening a hearing, if one is held, or prior to the Regional Director taking action on the case, pursuant to § 2422.30.

If employees submit a showing of interest, they do not become a party to the case. No individual may seek to represent the employees' interest regarding election arrangements, participate in a hearing, have observers at the election, challenge ballots, or file objections to any election. If the agent receives a call from any employees in the unit proposed for consolidation, the agent apprises the employees of this right and the procedures for submitting the showing of interest. Note that the showing of interest must constitute thirty (30) percent of the proposed consolidated unit.

**23.11.2 Agency or labor organization request:** The current regulations do not have a provision that permits an agency or a labor organization in consolidation petitions to request an election. [Provisions in the former regulations at § 2422.2(h)(ii) were deleted.] If the parties agree on the appropriateness of the consolidated unit and/or if the Regional Director finds in a Decision and Order that the proposed consolidated unit is appropriate, neither party may request an election. Contact the Office of the General Counsel if the region receives a request from an agency or labor organization to conduct an election.

**23.11.3 Professionals vote on consolidation:** An election is required when the parties propose to consolidate professional employees with nonprofessional employees if:

a. the professionals have never had the opportunity to vote on the issue of being included in a unit with nonprofessionals; or

b. the professionals previously voted to be in a separate unit and the parties propose a mixed consolidated unit of professionals and nonprofessionals.

See *CHM 28.17* for details on elections to consolidate existing units.

24 **ISSUE ANALYSIS:** Once the agent gathers all of the facts, obtains the positions of the parties, outlines the issues and the relevant facts needed to decide the representation matters, the agent is ready to analyze the case. This analysis becomes the basis for the agent's recommendation (*CHM 26*). Agents also analyze the case as part of his/her preparation for any meeting held pursuant to § 2422.13 to identify, narrow and resolve issues prior to the Regional Director's decision, or as part of the prehearing process (*CHM 25*). The same process is used when writing the Decision and Order (*CHM 53*).

Although there is no set formula for issue analysis, having a complete picture of the facts and a thorough understanding of the issue(s), standards and factors makes it possible to apply the facts and resolve the representation matter. This subsection offers guidance on analyzing issues that arise in representation matters. Refer to *CHM 23* for a discussion on identifying issues.

a. Ensure the facts are complete.

b. Ensure that all affected parties have been notified of the petition; obtain positions from those parties who have responded to the notification letters. Confirm whether incumbent labor organizations, employing agencies or other potential automatic parties are participating in the case.

***NOTE: if an automatic party or employing agency fails or refuses to respond to the Region's efforts to secure a position or participate, contact the Office of the General Counsel.*** *CHM 58.3.5.*

c. Identify all issues presented by the petition and identified by the region during its investigation.

***NOTE: at this point, nearly all procedural issues, such as curing defective petitions, are resolved. Any procedural issues that are not resolved, such as timeliness, standing to file, become threshold issues of the case analysis.***

d. Conduct appropriate research; **the primary source are Authority decisions**. The Assistant Secretary Decisions are a secondary source and decisions of the National Labor Relations Board are a third resource. The *RCL* provides background and an overview of the issues and relevant cases for substantive and certain procedural issues. The *HOG* is used at hearings after the preliminary work is completed and the agent has a complete grasp of all of the issues.

(i) Read all cases relating to the specific issue. Cross reference and

"shepardize" cases to ascertain whether the Authority has changed its standards. *See e.g. Naval Facilities Engineering Service Center, Port Hueneme, California,* 50 FLRA 363 (1995); *compare with Department of Energy, Western Area Power Administration,* 3 FLRA 77 (1980).

(ii) Read a variety of related cases to obtain a perspective of the factors considered by the Authority when making specific findings on a case.

***NOTE: If there are no Authority decisions on the issues, remember that 5 U.S.C. 7135(b) provides that policies, regulations and procedures established under prior Executive Orders remain in full force and effect until revised or revoked by the President or unless superceded by the provisions of the Statute, regulations or decisions issued by the Authority.*** See *CHM 53.4f* for further discussion.

e. Use the outline prepared for the investigation (*CHM 23.3*), noting the Authority-established issues and standards required for decision (*CHM 23.6*). Determine which facts are relevant, weigh and apply them to the standards (*CHM 23.5*). Note when the factors are applicable and when they are not, based on the facts presented.

f. Consider whether a meeting pursuant to § 2422.13(b) would help the parties narrow and resolve the issues. If not appropriate, prepare the case for the Regional Director's determination. *CHM 26.*

g. If a § 2422.13(b) meeting is held and does not result in an election agreement or stipulation, the agent prepares the case to present to the Regional Director in accordance with the quality standards outlined in *CHM 1.1*, the region's practice and *CHM 26.*

**25 MEETINGS TO NARROW AND RESOLVE REPRESENTATION ISSUES:** Section 2422.13 of the regulations codifies the use of alternate methods for resolving representation matters to minimize procedural issues and assist the parties in defining and resolving substantive issues. This section highlights:

a. the importance of discussions among the parties to narrow and resolve issues raised in a representational matter; and

b. the role of Regional Office personnel in assisting parties in these discussions, both before and after the filing of a petition.

**25.1 Overview:** Section 2422.13 of the regulations is titled "Resolution of issues raised by a petition" and states:

> (a) *Meetings prior to filing a representation petition*. All parties affected by the representation issues that may be raised in a petition are encouraged to meet prior to the filing of the petition to discuss their interests and narrow and resolve the issues. If requested by all parties a representative of the appropriate Regional Office will participate in these meetings.
>
> (b) *Meetings to narrow and resolve the issues after the petition is filed*. After a petition is filed, the Regional Director may require all affected parties to meet to narrow and resolve the issues raised in the petition.

**25.2 Prefiling assistance pursuant to § 2422.13(a):** Section 2422.13(a) encourages parties affected by representation issues that may be raised in a petition to meet prior to the filing of a petition to discuss their interests and narrow the issues. If requested by all parties, a representative of the appropriate Regional Office will participate in these meetings (see *CHM 2*). These meetings are usually instructive, rather than investigatory. Parties attend to discuss matters that affect exclusive bargaining relationships.

The role of the agent is to assist the parties in:

a. sharing relevant information;

b. defining issues;

c. understanding their interests;

d. learning about the standards that are applied; and

e. exploring options available to the parties for resolving representation matters.

The agent ensures that the discussion does not bind nor give the appearance of binding the Regional Director to a course of action or a decision, or advocate a particular position (see *CHM 25.11.2*).

**25.3** **Postfiling policy and requirements:** After a petition is filed, § 2422.13(b) provides that the Regional Director may require all affected parties to meet to narrow and resolve the issues raised in the petition. In appropriate cases, the agent makes every effort to actively pursue resolution of the issues raised by the petition through the use of one or more meetings with the parties pursuant to § 2422.13(b).

Whenever the agent utilizes alternative dispute resolution techniques to discuss, narrow and if possible, resolve these issues, the agent's recommendations or actions are consistent with the Statutory requirements for appropriate units and unit eligibility.

**25.4** **Meetings held pursuant to § 2422.13(b):**

**25.4.1** **When meetings are held:** After the petition is filed, a meeting may be held at any time. Frequently, they occur prior to the Regional Director taking action pursuant to § 2422.30(c) or issuing a notice of hearing.

**25.4.2** **Who may request a meeting:** Meetings held to discuss, narrow and resolve issues raised by the petition are held at any party's request or at the direction of the Regional Director.

**25.5** **Primary objective of the meeting:** The primary objective of a meeting held pursuant to § 2422.13(b) is to:

a. identify representation issues;

b. discuss interests, options and bargaining obligations during the pendency of representation proceedings; and

c. endeavor to resolve the underlying representation issues without resort to formal litigation.

The role of the agent at these meetings is similar to § 2422.13(a) meetings except that the petition has been filed and its purpose identified. The Regional Director is now responsible for processing the petition. While the filing of the petition initially sets the parameters for the meeting, the facts, issues and parties' interests that are discussed during the meeting may affect the issues and purposes of the petition.

**25.6 Purpose of the meetings:** These meetings may resolve many procedural issues, narrow and/or resolve the substantive issues or identify new issues. Many procedural matters are resolved simply by explaining the issue and the requirements for correcting any perceived problem (such as service or information to be submitted). More significant procedural matters, such as timeliness or intervention requirements, often result when the parties are unaware of the regulations. Once the agent explains the regulations, the parties are likely to comply with the procedural requirements or, if necessary, withdraw the petition or the request for intervention.

Where there are substantive issues, these meetings allow the parties to review the facts, define and narrow the issues and discuss options for resolution. These meetings also afford the agent and the parties the opportunity to review applicable case law and the factors considered by the Regional Director and the Authority in reaching a decision. This often results in a stipulation in lieu of a hearing or a better hearing record that includes relevant, rather than extraneous or superfluous information.

**25.7 Matters that are not generally conducive to meetings conducted pursuant to § 2422.13(b):** Meetings to discuss: 1) the petitioner's or intervenor's showing of interest; 2) challenges to the validity of the showing of interest; or 3) the status of a labor organization are not appropriate under this section. The agent conducts these meetings privately with the appropriate party whose showing of interest or labor organization status is an issue.

Meetings to discuss objections to an election are not generally appropriate under this section. Since the objecting party bears the burden of proof in objections cases, the Regional Director does not schedule a meeting unless s/he determines that the objections have merit or unless the meeting is scheduled as:

a. a prehearing conference; or

b. as part of a discussion concerning procedural irregularities discovered by the Regional Director pursuant to § 2422.29(a)(4) and a rerun election appears appropriate.

**25.8 Matters that are generally conducive to meetings conducted pursuant to § 2422.13(b):** Meetings contemplated under § 2422.13(b) take a variety of forms, serving several purposes: instructive, investigatory and/or exploratory as an alternative method to resolve the underlying representation issues. All meetings incorporate interest-based techniques for defining, discussing and narrowing the

issues. Examples include:

a. Those that focus on clarifying the purpose of the petition and the parties who may be affected by the petition. These meetings occur very early in processing the case. They are useful to get the parties together and organize the proceedings. These meetings are usually more instructive than investigatory in nature. If the case involves the effects of a reorganization, the parties can articulate the facts surrounding the reorganization. These parties, however, are not usually ready to define issues or take a position.

b. The new regulations allow the parties to file a single petition having multiple purposes. This revision permits a variety of options when considering representation matters involving unit(s) affected by a reorganization. Meetings contemplated under § 2422.13(b) are essential in helping the parties sort out the issues and focus the parties on the facts and their interests. See *CHM 3.6.*

c. Another type of meeting occurs when the region is about ready to issue a notice of hearing or take other appropriate action pursuant to § 2422.30. These meetings are generally investigatory and focus on the substantive issues, the parties' interests and the appropriate procedures for resolution.

To prepare for the meeting the agent prepares an outline, as discussed in *CHM 23,* to serve as a guide or checklist for the meeting. The agent shares this outline with the parties at the meeting. At this stage, the issues may still not be clear because the parties do not yet have all of the facts.

These meetings provide the parties with the opportunity to review the facts and narrow the issues together. These meetings may lead to resolution of all issues or identify other appropriate alternatives for resolving the representation issues. Or, if the parties are unable to resolve all issues, they may explore using stipulations, develop joint exhibits, etc.

In the event the issues are not resolved at the meeting, the agent updates the outline and provides a copy of it to the parties if a notice of hearing is issued.

d. A prehearing conference that is required in § 2422.17(c) lends itself to the type of meeting contemplated under § 2422.13(b). These conferences are "combination" meetings, serving to instruct, investigate and explore options of resolution. See HOG 8.1 for more detail on prehearing conferences.

25.9 Preparing and conducting the meeting: The following is a guide to assist the agent

when preparing for a meeting held pursuant to § 2422.13(b). The agent also reviews *CHM 23* and applicable sections of the *RCL* and *HOG* when drafting the substantive outlines.

**25.9.1 Preparing for the meeting:** The agent:

a. Compiles copies of the petition, certifications and other documents that are considered "formal documents" in the event a hearing were conducted on the representation issues;

b. Prepares a preliminary list of issues and an agenda for the meeting;

c. Makes copies of applicable substantive chapters from the *RCL*; outlines from the *HOG* and copies of relevant Authority or A/SLMR cases (when there are no applicable Authority cases) to distribute to the attendees;

d. Asks the agency, activity or labor organization to prepare and forward documents related to the issues identified for discussion. This may take the form of a briefing book. Examples include:

i) in petitions seeking to resolve matters related to representation following a reorganization, the activity submits documentation to show the origin of the reorganization or realignment, the bargaining units affected and the number of employees affected.

ii) in meetings to discuss eligibility questions, the agency brings personnel who are qualified to discuss the disputed positions and copies of the position descriptions. Copies of these documents are served on all parties.

**25.9.2 Agenda for conducting the meeting:**

a. The meeting usually begins with the agent stating the purpose of the meeting and asking the petitioner to review the petition and its purpose. The agent reviews the agenda for the meeting.

b. The agent briefly reviews the regulations and general case processing procedures. For participants not familiar with the regulations, the agent is prepared to discuss the pertinent provisions. In meetings that are mostly instructive, the agent may spend more time on this discussion than any other matter.

c. All parties need to have a common understanding of the facts before the issues and interests can be discussed. Since the parties are in the best position to know the facts, they normally lead the discussion. Agents exercise caution when summarizing facts before obtaining a complete picture from the parties. In a reorganization, for example, the agency discusses the background and events that lead to a reorganization. This is normally followed by a description of the bargaining unit(s) affected. The agent asks the agency to distribute copies of all documentation relied upon in the discussion.

d. After the agency's briefing and any comments by the parties, the agent and the parties define the representation issues. As part of this discussion, the agent briefs the parties on the representation process, inherent representation issues (appropriate unit questions, accretions, successorships, etc.,) and potential outcomes (for example, options/scenarios/ramifications of the reorganization on existing units).

e. Using an interest-based approach, the agent leads the parties in a discussion of their interests and options. The agent is also prepared to discuss the parties' bargaining obligations pre- and post-implementation (§ 2422.34). Finally, the parties discuss alternatives to standard case handling procedures utilizing an interest-based approach.

**25.10 Attendance:**

**25.10.1 Attendance by Authority personnel:** If the meeting is held during the investigation and prior to action by the Regional Director pursuant to § 2422.30, the agent assigned

to the case attends the meeting. If the meeting is held after the notice of hearing is issued, the Hearing Officer who will hear the case attends the meeting. When appropriate, the Regional Director has discretion to attend meetings held pursuant to § 2422.13(b), particularly when the meetings are strictly instructive or investigatory. Examples: the region has a number of related cases involving a significant or novel issue.

If the cases concern issues or matters that are nationwide in scope, a representative of the Office of the General Counsel may also attend these meetings if requested by the Regional Director or directed by the Office of the General Counsel (see *CHM 63 - consolidation and transfer policies*).

**25.10.2** **Attendance by the parties:** Designated representatives of all affected parties are required to attend meetings held pursuant to § 2422.13(b). If a person appears at the meeting purporting to represent an activity or labor organization that has not been named as a party or potential intervenor, that party must provide the agent evidence of its status as an intervenor (§ 2422.8) or as an "interested party" (*CHM 17.13*).

**25.10.3** **Failure to attend or cooperate:** If the petitioner or intervenor refuses to participate in a § 2422.13(b) meeting, the petition may be dismissed or the intervention denied [see § 2422.15(c) and *CHM 22*]. When a party other than the petitioner or intervenor refuses or fails to attend a § 2422.13(b) meeting, and their participation is crucial to the proceedings, the region has the option of issuing an investigatory subpoena in accordance with *CHM 23.5.3*, a notice of hearing and if necessary, a subpoena(s) to obtain documentary or testimonial evidence.

**25.11** **Decorum issues:**

**25.11.1** **Agent's demeanor towards parties:** The meeting is a formal proceeding and the agent conducts this meeting as if s/he were conducting a representation hearing. The agent's demeanor sets the tone for the remainder of the case. By dressing and conducting himself/herself in a manner consistent with the formality of the proceeding, the agent lends credibility to the Authority's processes. The parties' representatives are treated with courtesy and respect. They are addressed in the same manner at all times. For example, if one party is addressed by his/her surname, they are all addressed by his/her surname.

**25.11.2** **Parties and witnesses:** Parties are expected to conduct themselves appropriately at all times and to cooperate with the agent. If necessary, the agent instructs any individual(s), who is offensive or uncooperative, that his/her behavior will not be tolerated. If the misconduct or lack of cooperation continues, the agent contacts his/her supervisor.

**25.12** **If the agent is uncertain how to proceed:** If at any point during the meeting, the

agent is uncertain on how to proceed, he or she recesses the meeting and contact the Regional Director. It is never wrong to "call home."

**25.13 Caution:**

**25.13.1 Deals versus solutions:** Discussions among the parties to narrow and resolve issues raised in a representation matter are important and beneficial. There are several significant points to remember when conducting these meetings:

a. All parties are required to attend a meeting conducted pursuant to § 2422.13(b); if a labor organization, agency or activity's status has not yet been decided because of procedural or substantive issues, it is invited to attend on the conditional basis that the meeting may resolve its status.

b. Any resolution obtained during these meetings is required to be consistent with the Statutory requirements for appropriate units and unit eligibility. For example, only in rare and exceptional circumstances would the Authority permit severance of one unit from a consolidated unit and allow an accretion of that severed unit to another consolidated unit. While the parties may agree to the proposal, the Regional Director is required to find a statutory basis for the action.

c. Before any resolution is reached, the agent makes sure that the "resolution" resolves all outstanding issues and that the interests of all parties affected by issues raised by the petition or related petitions are considered. For example, the parties in one petition reach an agreement for an election and the unit appears appropriate. However, before approving the agreement, the Regional Director also considers the impact of the resolution on any related cases.

d. If the parties are inclined to enter into an agreement and, in effect, withdraw the petition, the agent explains the difference between a "deal" and a "solution." "Deals" are not enforceable since the parties simply withdraw a case. "Solutions" resolve representation issues in a manner that effectuates the purposes and policies of the Statute and are enforceable. An example includes a representation proceeding involving the eligibility of disputed positions. If the parties agree informally on the status of each position and seek to withdraw the petition or the eligibility issue, their "deal" is not enforceable or binding. The agent explains that a stipulation and Decision and Order provides a written binding document that resolves the underlying representation issues and satisfies the parties' interests to avoid a hearing. The region cannot prevent the parties from making a deal and withdrawing the case; however, **the agent ensures the parties are aware that a "deal" and a withdrawal are not binding on the FLRA or**

**either party.**

**25.13.2 Communications with the parties:** The agent ensures that his/her actions do not lead to an appearance of undue assistance to any party. The agent is the Authority's representative and that the parties expect objective consideration of their interests and positions. The services of the agent are equally available to all parties to the proceeding in the development of the evidence. Thus, an agent is extremely cautious, when assisting the parties in resolving their dispute prior to the Regional Director's decision on the merits, about maintaining his/her neutrality and convey to the parties that, absent an appropriate resolution of the representation matter, the Regional Director will render a decision on the merits of the petition.

**25.13.3 Ex parte communications:** During the investigation, the agent may engage in separate discussions with the parties regarding the status of the case including issues, evidence, relevant law, and general evidentiary procedures. At all times, the agent avoids the appearance that s/he is advocating a particular position, favoring a party or assisting a party in developing its position for the case.

After a hearing opens, the agent refrains from engaging in separate discussions. To do so could lead to the improper appearance of undue assistance to a party. Generally, any discussion about any facet of the proceeding at this stage is held in the presence of all parties.

**26 PREPARING AND PRESENTING A CASE FOR THE REGIONAL DIRECTOR'S CONSIDERATION AND DECISION:** Each region will ensure that the quality standards set forth in *CHM 1.1* have been met before taking any dispositive action.

**26.1 Checklist for determining whether a case is ready for decision:** The agent reviews the actions it has taken to determine whether all procedural requirements, such as checking the showing of interest, ruling on challenges to the validity of the showing of interest, etc., have been completed. The following is a checklist to assist the agent in deciding whether s/he is prepared to present the case to the Regional Director. These guidelines also help the Regional Director consider whether a meeting as contemplated in § 2422.13(b) will assist the parties in narrowing and resolving any issues raised in the petition.

a. Has the petition been amended and/or defect(s) corrected? *Before the Regional Director can take action pursuant to § 2422.30, the petition is cured of any defects (see CHM 12, 13 and 20). As noted in prior sections, some petitions cannot be opened without an amended petition. Agents review the file to ensure that there are no uncorrected filing procedural defects.*

b. Has the agency or activity provided the payroll list in election cases and/or other pertinent material? *The agency/activity's information is critical to moving the case to decision. Frequently, the agency/activity responds with some of the information, but neglects to provide all of the necessary information.*

*(i) If the agency fails or refuses to furnish the eligibility list, the final showing of interest may be decided by the petitioner's estimate. See CHM 18.13.2.*

*(ii) If the agency or activity is slow or dilatory in responding to the region's request for information, the agent explores options with the Regional Director such as requiring a meeting pursuant to § 2422.13(b), issuing an investigatory subpoena (CHM 23.5.3), preparing a notice of hearing and subpoenas as appropriate. See CHM 15.8 (initial contact), CHM 20 (preliminary investigation) and (CHM 23 - issue identification and investigative techniques).*

c. Have all potential affected parties been identified and notified of the petition? Do amendments to the petition require a review and

reconsideration of any additional parties that may be affected by new issues? *CHM 15 and 20.*

d. Have all requests for intervention, or any cross-petitions been acted on? If not, is there a substantive issue related to a request for intervention?

(i) *CHM 17* discusses interventions and cross-petitions, the requirements and procedures for processing. *There are potentially four types of intervenors:*

- *Cross-petitioners: A cross-petitioner is a party that files a petition which involves any employees in a unit covered by a pending representation petition [§ 2422.8(a)].*

- *Labor organizations and agencies or activities that are automatic parties because:*

  - *the labor organization is an incumbent [§ 2422.8(d)];*

  - *the agency or activity employs any employees who are affected by issues raised by the petition [§ 2422.8(e)];*

- *Labor organizations and agencies or activities that are required to file a request to intervene in order to participate in the case [§§ 2422.8(c) and (f)].*

- *Labor organizations and agencies or activities that are affected by issues raised pursuant to § 2421.21 but have no basis to intervene under § 2422.8. Such parties are considered "interested parties."*

(ii) Ruling on requests to intervene: *Ruling on specific requests to intervene as required in § 2422.8(c) is discussed in CHM 17. As a request is received, the Regional Director makes a specific finding regarding the intervenor's status. If the intervention is dependent on checking the showing of interest, the activity is contacted to determine the status of the list - see CHM 18.13.2. If the intervention is based on other evidence of interest, the agent decides whether the evidence supports the request to intervene. Note that the Authority requires a labor organization*

*seeking to intervene in a representation proceeding to present all contentions and arguments concerning its request to the Regional Director.* BIA, 34 FLRA 413 (1990). *See also CHM 17.7.4. Thus, a party desiring to intervene may amend its request to intervene and change the basis for the intervention if the intervention is otherwise timely filed [see § 2422.8(b)].*

(iii) Parties that are designated automatic parties: ***If a labor organization or agency/activity is considered an automatic party to the proceeding, the agent confirms the party's involvement.*** *See § 2422.8(d) and (e). See CHM 17.5 on limitations following initial notification. If the incumbent refuses to participate in the petition seeking an election, the agent requests a disclaimer of interest. If the incumbent refuses to provide the disclaimer, the Regional Director obtains case handling advice (CHM 22 - cooperation, CHM 58.3.4 - advice).*

(iv) Cross-petitions are discussed in *CHM 17.6*: *If the Regional Director decides a petition fulfills the filing requirements and designates the petition as a cross-petition, the parties to both cases are notified. Note that new issues may be raised. The cases may be consolidated prior to taking action pursuant to § 2422.30(c) or combined with the action taken pursuant to § 2422.30.*

(v) Notifying the parties: *The Regional Director responds to all cross-petitions or parties' requests for intervention. The region is responsible for making the parties fully aware of the status and the identity of all parties participating in a representation proceeding.*

***NOTE: Provisions in CHM 17.13 for parties that request interested party status pursuant to § 2421.21.***

e. Can any procedural issues be resolved without hearing? *For example, issues relating to proper service of the petition. A meeting held pursuant to § 2422.13(b) may expedite resolution of these or other issues. Other procedural issues in election cases may be resolved pursuant to § 2422.16(c). See CHM 28.11.2.*

f. In petitions seeking an election, has the showing of interest been checked for adequacy (prima facie showing requires a full check and the final check is dependent on the size of the unit)? *If the showing of interest is inadequate, describe the reasons for the inadequacy and outline any*

*outstanding issues to resolve (CHM 18.14).*

g. Has any party filed a challenge to the validity of the showing of interest or filed a challenge to the status of a labor organization? If so, what is the status?

*In accordance with the procedures set forth in CHM 18.19, the region investigates all validity challenges and takes appropriate action as soon as possible. Validity challenges raise threshold issues that are resolved before the Regional Director takes action on a petition. If the challenges are received too late for the region to process prior to the opening of the hearing, the challenge is forwarded to the Regional Director for investigation. A decision on a challenge to the validity of a showing of interest is made before any other issue can be decided. If the hearing involves complicated issues, the Regional Director has discretion to postpone it depending on the seriousness and supporting evidence to the challenges and in consideration of the best use of the Region's resources. Otherwise, the hearing can proceed simultaneously with the investigation of challenge to the validity of the showing of interest. In such cases, the validity challenge is decided first. See CHM 18.19.4 for processing validity challenges received too late for the region to process prior to the opening of the hearing, or immediately prior to or after the opening of a hearing (also HOG 17.3 and HOG 33.2).*

*Status challenges require an investigation and may be considered as a threshold issue in a hearing. See CHM 19.5 for processing challenges to the status of a labor organization received immediately prior to or after the opening of a hearing (also HOG 17.3 and HOG 33.3). Section 2422.16(c) provides for special procedures when status challenges are raised as an issue at election agreement meetings (CHM 19.6 and CHM 28.11).*

h. Are the issues defined; have any subsequent amendments changed the purpose or any issues of the petition? If so, was a new posting required and completed? Do the parties understand the purpose of the petition?

i. Did the parties' submissions identify other issues not previously considered by the agent or the Regional Director? Has the Regional Director identified any issues not raised by the parties, but are defined by the facts and circumstances of the case?

j. Has the agent prepared an outline of the issues presented by the petition?

k. Has the agent considered the merits of directing a meeting pursuant to §

2422.13(b)?

l. If a meeting was conducted, did it assist in identifying, narrowing and resolving the issues? How? Would additional meetings be advantageous?

m. Did the region obtain the best possible relevant evidence necessary for a determination? (See *CHM 1.1 - policy and CHM 23.4 - investigative techniques*)

**26.2** **Case file documentation:** Proper case file documentation is a quality standard. See *CHM 1.1.2d*.

**26.2.1** **Minimum requirements for case files:** The case file contains all relevant documentary evidence discovered and submitted during the investigation; i.e., sufficient documentation to permit the Regional Director to make a well-reasoned decision.

The file reflects the Region's decisional process. The case file is organized in a manner that reflects an understanding of the purpose of the petition, issues and standards/factors required for decision. The file reflects the region's decisional process including:

a. identifying novel or precedential decisions requiring advice or clearance;
b. explaining the Director's decision and rationale at each milestone, including precedent for it; and
c. noting action to be taken.

**26.2.2** **Specific requirements:** Files are organized so that specific material may be easily found. The originals of all correspondence are maintained in the file, including all related pre-petition correspondence, all other documents received or obtained during the investigation and copies of all correspondence and documents issued by the region. The original set of formal papers used in a hearing are also maintained in the case file (*HOG 4.1*).

In addition to formal papers and the relevant documentary evidence obtained from the parties, each case file contains at least the following items:

a. A case log recording the essential elements of each substantive discussion about the case between anyone in the region and any of the parties and/or their representatives. The case log lists, in chronological order, the dates of all substantive contacts, the name of each person contacted, and either a brief description of each discussion or a reference to a separate file memorandum. (Evidence or substantive information bearing on the petition does not appear in the case log, but is documented elsewhere in the

file.) The case log also contains notations on any case processing decisions made by the region during the processing of the case; such as references to documentation supporting the region' s efforts to identify parties affected by issues raised by the petition (*CHM 15.5.3*).

b. Sufficient documentation to provide a history of the case and any other relevant documentary evidence to assist the Regional Director in making a proper decision. Testimonial evidence is required in cases not proceeding solely on documentary evidence or those that require a hearing. Examples include petitions involving eligibility issues, or a challenge to the validity of the showing of interest. In cases where the region conducts an investigation rather than a hearing, the agent often obtains evidence in the form of affidavits. In addition, if objections or challenges are filed with sufficient evidence to warrant a regional investigation, the region may require the objecting party to provide an affidavit or answer an interrogatory. If the file does not contain a signed statement, affidavit or interrogatory from a party when one is called for, it contains an explanation of the region's decision to proceed without one (see also *CHM 23.4 and 23.5*). The file also documents steps the region has taken to obtain evidence or information from the parties. This is particularly significant when information appears to be missing from the file.

c. Except in cases whose disposition (usually on technical grounds) is unmistakable, a written predecisional investigative report by the agent and/or a written postdecisional report (or agenda minute) for every action taken by the Regional Director pursuant to § 2422.30(c). Either report, whether it precedes or follows the region's decision, addresses procedural and substantive issues raised by the filing of the petition (see *CHM 26.3 for sample information*). If the Regional Director's decision differs from the agent's predecisional recommendation and/or following a hearing, an agenda minute is also required. (*CHM 26.4*).

These items are the minimum requirements for each case file. The regions include in their case files any other internal documents they consider material to the disposition of the case.

**26.3 Predecisional investigative report:** *CHM 26.2.2c* states that the Regional Director has discre

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analysis in representation cases is brief, but pointed. A predecisional report (FIR) is submitted in any representation

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in the case file that is specifically identified and referenced in the FIR.

The FIR is a self-contained document

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A FIR is an intra-agency document and is not discloseable to any party. It generally includes, but is not limited to:

a. Compliance with filing requirements;

b. Petitioner's purpose of the petition;

c. Evidence to support the petition;

d. In election or dues allotment cases, a report on the showing of interest (attach the FLRA Form 52);

e. A list of all parties named by the petitioner as affected by issues raised by the petition and a list of any other parties identified by the Regional Director as affected by issues raised by the petition;

f. A summary of efforts to identify parties affected by the petition;

g. A status report of any requests to intervene, etc.

h. A discussion of the unit, including the petitioner's and any affected parties' positions on the petition;

i. Related cases;

j. Pertinent facts surrounding the representation question (such as the agency/activity's mission, organization, etc., see *HOG* outlines);

k. Bargaining history;

l. Issues presented by the petition and those that surfaced during the investigation (see *CHM 23*);

m. A discussion of efforts to narrow and resolve issues, including whether a meeting was conducted pursuant to § 2422.13(b) and the results obtained from those meetings; if a meeting was not conducted, a recommendation on the viability of such a meeting;

n. A discussion of the applicable case law or absence thereof;

o. An analysis of the facts as applied to the issues and standards for deciding the representation matters (see *RCL* for guidance on analyzing the issues);

p. A recommendation concerning the status of any labor organization, agency or activity whose intervention has not been approved; and

q. A recommendation on the issues. As necessary, note statutory and regulatory requirements concerning when it is appropriate to provide an opportunity for a hearing versus when it is appropriate to issue a notice of hearing § 2422.30(b) and CHM 27.

See *CHM 53.4* for a basic outline for draft Decisions and Orders.

**26.4 Requirements for agenda meeting:** An agenda meeting is held when:

a. the Regional Director disagrees with the agent's predecisional recommendation;

b. a predecisional report is not submitted;

c. after a hearing; or

d. the Regional Director decides to require such a meeting.

**26.4.1 Requirements for agenda minutes:** An agenda minute is required to record the

Regional Director's decision whenever there is an agenda meeting. Its purpose is to confirm that the Regional Director understood the purpose of the petition, the facts, issues and the file documentation. If no agenda meeting is held, an agenda minute is required if the Regional Director's decision and the decisional process is not otherwise clear from the file.

**26.4.2** **Contents of an agenda minute:** The agenda minute summarizes the Regional Director's decision on issues raised by the filing of the petition. Every agenda minute documents the Regional Director's decision, and, if the Director decides to issue a notice of hearing, the agenda minute includes an outline of the issues the Director establishes for the hearing. If an agenda meeting is held in lieu of an FIR, the agenda minute confirms that the Regional Director was fully informed of the facts, issues and results of the investigation. It identifies and analyzes the issues presented to the Regional Director for decision and fully documents the briefing. If an FIR is prepared, the agenda minute can be less detailed as long as it documents the Regional Director's decision.

**27** **REGIONAL DIRECTOR DETERMINATION AND ACTIONS:** This section describes the process of making a regional determination and provides an overview of the actions the Regional Director may take following investigation.

**27.1** **General policy:** Two purposes of the regulations are to: (1) streamline the representation regulations, and (2) make the rules more flexible in addressing the representational concerns of the parties. To achieve those objectives, Regional Directors act on representation cases quickly and consistently with the Statutory requirements for appropriate units and unit eligibility.

**27.2** **Responsibility fixed:** The agents engage in initial dealings and propose appropriate case disposition to the parties and the Regional Director, but the ultimate responsibility for any action taken is the Regional Director's.

**27.3** **General determinations:** The Regional Director may:

a. Request additional information;

b. Approve a withdrawal request (*CHM 27.4.6*);

c. Approve an election agreement or issue a Direction of Election (*CHM 28*);

d. Contact the Office of the General Counsel to discuss a novel issue or obtain clearance on processing issues (*CHM 58.1 or 58.4* - provides examples and cross references to specific *CHM* sections);

e. Submit the case to the Office of the General Counsel for advice (CHM 58.3 - provides examples and cross references to specific CHM sections);

f. Recommend that the case be held in abeyance pending action on a blocking ULP (*CHM 60*) or action by the AFL-CIO in a raiding case (*CHM 65*);

g. Issue a letter denying a challenge to the validity of the showing of interest (*CHM 18.19*);

h. Issue a Decision and Order to dismiss a petition, deny an intervention request, decide a challenge to the status of a labor organization or resolve any other representation matter (*CHM 53*);

i. Issue an appropriate certification or revocation as appropriate (*CHM 56*); and/or

j. Issue a notice of hearing (*CHM 29*).

**27.4** **Regional Director actions THAT DO NOT REQUIRE A NOTICE OF**

**HEARING:**

**27.4.1 Approve:**

a. a request to intervene (see *CHM 17* and *20*) or grant conditional intervention;

b. an election agreement if the unit meets the appropriate unit criteria set forth in 5 U.S.C. 7112(a)(1) (see *CHM 28*);

**27.4.2 Issue a certification, clarification, amendment or revocation:**

a. Section 2422.32(a) provides that the Regional Director will issue an appropriate certification when:

(1) after an election, runoff, or rerun,

(i) no objections are filed and/or challenged ballots are not determinative,

or

(ii) objections and determinative challenged ballots are decided and resolved; or

(2) the Regional Director issues a Decision and Order requiring a certification and the Decision and Order becomes the action of the Authority under § 2422.31(e) or the Authority otherwise directs the issuance of a certification.

b. Section 2422.32(b) states that, without prejudice to any rights and obligations which may exist under the Statute, the Regional Director will revoke a recognition or certification, as appropriate, and provide a written statement of reasons when:

(1) an incumbent exclusive representative files, during a representation proceeding, a disclaimer of any representational interest in the unit;

or

(2) due to a substantial change in the character and scope of the unit, the unit is no longer appropriate and an election is not warranted.

Before issuing a Revocation of Recognition or Certification under this provision, the Regional Director will issue a Decision and Order (*CHM 27.4.5*). See also *CHM 56* for guidance on issuing certifications, clarifications, amendments and revocations.

**27.4.3 Deny a challenge to the validity of a showing of interest:** see *CHM 18.19*.

**27.4.4 Establish election procedures:** If the parties are unable to agree on procedural matters, specifically, the eligibility period, method of election, dates, hours or locations of the election, the Regional Director can decide election procedures and issue a Direction of Election without prejudice to the rights of a party to file objections to the procedural conduct of the election [§ 2422.16(b)]. See *CHM 28.11* and *28.12* for guidance.

**27.4.5 Issue a Decision and Order:** The Regional Director may issue a Decision and Order without a hearing *when there are no material issues of fact and/or there no unresolved questions regarding unit appropriateness*. Examples include a Decision and Order that:

a. Dismisses a petition or denies a request for intervention based on inadequate showing of interest or other procedural defect; (see *CHM 27.4.6* - before the Regional Director dismisses a petition or denies an intervention request, the petitioner or intervenor is given the opportunity to withdraw.)

b. Decides matters such as objections to an election, determinative challenged ballots, allegations of an agency's good faith doubt based on majority status; etc.;

c. Resolves a challenge to the status of a labor organization;

d. Clarifies or amends a recognition or a certification in effect if there is no question of unit appropriateness;

e. Determines that a labor organization is eligible for dues allotment; existing units are appropriate for consolidation if there is no question of unit appropriateness; etc..

***Note:*** ***See CHM 53 for case handling guidance on issuing Regional Director Decisions and Orders.***

**27.4.6 Approve a request to withdraw the petition or intervention request:**

**27.4.6.1 Solicited withdrawal:** If the Regional Director determines that the petition or

intervention request does not warrant further processing, the petitioner or intervenor is given an opportunity to withdraw the petition voluntarily prior to dismissing the petition. If necessary, the petitioner or intervenor is advised in writing of the reasons for soliciting the withdrawal. The petitioner or intervenor is permitted to withdraw the petition verbally. If the party declines to withdraw verbally, the petitioner or intervenor is advised that the withdrawal request must be received promptly. Absent such a request, the Regional Director issues a Decision and Order stating the reasons for dismissal. A copy of the Decision and Order is served on all parties (*CHM 53. 9*).

A copy of FLRA Form 43, Withdrawal Request, is enclosed with any letter soliciting withdrawal. Copies of this letter are not served on any other party. Any written expression, in addition to the FLRA Form 43, indicating an unqualified withdrawal of the petition is acceptable as a withdrawal request.

**27.4.6.2 Unsolicited withdrawal:** The petitioner may voluntarily request to withdraw the petition without being requested to do so by the Regional Director.

**27.4.6.3 Notification to parties:** If a withdrawal request is received pursuant to the Regional Office's solicitation, the other parties are not informed of the Regional Director's decision to dismiss the petition or deny the intervention request.

Following approval of a **solicited or unsolicited withdrawal request**, the Regional Director notifies all parties of the approved withdrawal request; however, no reasons for the withdrawal or approval are given in the notification. A letter as set forth in Figure 27.4A is sent to the petitioner. A copy of this letter is also served on all other parties and serves as their notification that the matter is closed. Regs. § 2422.14 and *CHM 27.4.6.4* discuss the effects of a withdrawal with prejudice.

**27.4.6.4 Withdrawal with prejudice:** *CHM 11.9* discusses the effects of withdrawing a petition for an election less than sixty (60) days before a contract expires or anytime after the expiration of the agreement [§ 2422.14(a)]; or after notice of hearing is issued in a petition seeking an election or approval of an election agreement [§ 2422.14(b)]. Figures 27.4B and C are sample letters approving withdrawal of petitions in such cases.

**27.5 NOTICE OF HEARING:**

**27.5.1 Section 2422.16(c) requirement:** When discussing arrangements for an election, if the parties are unable to agree on "other than procedural matters," the Regional Director "shall provide an opportunity for a hearing" [§ 2422.16(c) and *CHM 28.11.2 - guidance in applying this section of the regulations*].

**27.5.2 Section 2422.30(b) requirement:** Section 2422.30(b) requires that a "Regional Director will issue a notice of hearing to inquire into any matter about which a

material issue of fact exists, and any time there is reasonable cause to believe a question exists regarding unit appropriateness."

**27.5.3** **Background:** 5 U.S.C. 7111(b)(2) requires that the Authority "shall" provide an opportunity for a hearing whenever it has reasonable cause to believe that a question of representation exists. As interpreted in the regulations, the Regional Director provides for a hearing:

a. when the parties fail to agree on other than procedural matters at an election agreement meeting [§ 2422.16(c)];

b. any time there is a question regarding unit appropriateness [§ 2422.30(b)];

c. whenever there is a material issue of fact [§ 2422.30(b)].

***NOTE: Before providing the parties with an opportunity for a hearing, the Regional Director makes a determination that:***

***1)*** ***s/he has a reasonable cause to believe that a question of representation exists;*** *See, e.g., Office of Hearings and Appeals, Social Security Administration,* 16 FLRA 1175 (1984), a case in which the petitioner sought to sever a unit of attorneys who were part of an existing consolidated bargaining unit. In that case, the Authority stated that the petitioner failed to establish that the existing unit was no longer appropriate, thus giving rise to a question of representation. The Authority found that the petitioner failed to establish a reasonable cause to believe that a question of representation existed to warrant a notice of hearing. Questions concerning the application of the regulations to similar cases are referred to the Office of the General Counsel.

***2)*** ***or that a material issue of fact exists that warrants a hearing.*** *See Federal Mediation and Conciliation Service*, 52 FLRA 1509 (1997). *Federal Deposit Insurance Corporation, Washington, D.C.*, 38 FLRA 952, 963-64 (1990). The Authority stated that a hearing is not required in all cases in which questions of fact are raised. Rather, the Regional Director may determine, on the basis of the investigation or by stipulation of the parties, that "there are sufficient facts not in dispute to form the basis for a decision or that, even where some facts are in dispute, the record contains sufficient evidence on which to base a decision." *U.S. Department of Agriculture, Forest Service, Apache-Sitgreaves National Forest, Springerville, Arizona,* 47 FLRA 945, 952 (1993). *See also Federal Deposit Insurance Corporation*, 40 FLRA 775 (1991), *enf'd sub nom. FLRA v. Federal Deposit Insurance Corporation*, No. 91-1207 (D.C. Cir.

Sept. 1, 1992).

**27.6** **Policy considerations that may warrant a hearing:** Some petitions present novel or unique issues for which there is no Authority precedent. While the Statute or the regulations may not require a hearing as the petition does not raise a question of representation, the issues are such that guidance is necessary to process the case. Normally, such cases are submitted for case handling advice before the notice of hearing is issued (see *CHM 58* for a discussion of matters to be submitted for case handling advice).

**27.7** **STIPULATIONS IN LIEU OF HEARINGS:** Stipulations in lieu of hearings are permissible and encouraged in most representation matters. Section 2422.30(b) states that when the Regional Director has reasonable cause to believe a question exists regarding unit appropriateness, the Regional Director "will issue a notice of hearing." This section does not preclude the parties from entering into a stipulation in appropriate circumstances. See also *HOG 26.1*.

**27.7.1** **Waiving hearings by entering into election agreements:** In accordance with 5 U.S.C. 7111(g), the parties may waive a hearing by entering into a stipulation for the purpose of a consent election, i.e., enter into an election agreement. However, 5 U.S.C. 7111(g) is balanced against 5 U.S.C. 7112(a)(1) which requires that the Authority determine the appropriateness of any unit.

Thus, **in cases involving questions regarding unit appropriateness, a hearing may be waived by the parties upon their agreement to an election; however, the Regional Director may approve such agreement only if the unit meets the appropriate unit criteria set forth in 5 U.S.C. 7112(a)(1).** *See United States Army Safeguard Logistics, Command, Huntsville, Alabama,* 2 A/SLMR 582 (1972); *Department of Transportation, National Highway Traffic Safety Administration,* 2 A/SLMR 433 (1972); *citing Army and Air Force Exchange Service, White Sands Missile Range Exchange White Sands Missile Range, New Mexico,* 1 A/SLMR 147 (1971).

**27.7.2** **Waiving hearings by entering into a stipulation of facts: It is the policy of the OGC that the parties may enter into a stipulation addressing all appropriate unit issues in lieu of a hearing if the stipulation includes a waiver of the parties' right to a hearing.** See also *HOG 9* and *CHM 28.11.3.1*. An example of a stipulation that was attached to a Decision and Order can be found in *USA DARCOM Materiel Readiness Support Activity (MRSA), Lexington, Kentucky,* 1 FLRA 430 (1979).

***NOTE: See CHM 29, Issuing the Notice of Hearing, CHM 30 and the HOG for guidance in conducting hearings.***

**28** **ELECTION AGREEMENTS OR DIRECTED ELECTIONS:** *CHM 28* addresses election agreements and directed elections. This section provides general requirements for agreements, and offers guidance in drafting election agreements and direction when the parties refuse to sign agreements.

**28.1** **Overview:** 5 U.S.C. 7111(a) of the Statute provides that "an agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in the appropriate unit who cast valid ballots in the election."

A "secret ballot" is defined at § 2421.15:

> *Secret ballot* means the expression by ballot, voting machine or otherwise, but in no event by proxy, of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed, except in that instance in which any determinative challenged ballot is opened.

The representation process is the foundation for all bargaining relationships in the Federal sector. Presidential policies governing relationships between employee organizations and agency management in the executive branch were first established by Executive Order 10988 in January 1962. That Executive Order permitted agencies to "recognize" labor organizations as the exclusive bargaining representative for certain units of employees without an election. Executive Order 11491 abolished informal and formal recognition and required that exclusive recognition be determined by secret ballot election. Labor organizations were "certified" as the exclusive representative for purposes of collective bargaining following an election among eligible employees who cast valid ballots. The Statute continues the policies initiated under Executive Order 11491. (For additional background information, see the "Reports and Recommendations of the Federal Labor Relations Council," 1971)

5 U.S.C. 7111(d) provides that:

> [t]he Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose–
>
> > (1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

> (2) not to be represented by a labor organization.
>
> In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

There is no requirement that a specific percentage or number of eligible voters cast ballots in order for the election to be valid. See *U.S. Department of the Interior, Bureau of Indian Affairs, Rosebud, South Dakota,* 34 FLRA 67 (1989) and *CHM 47.1.*

**28.3** **Priority:** Efforts to assist the parties in obtaining an election agreement begin at the outset of the investigation. The opening letters to the parties encourage the parties to meet as soon as possible to discuss and resolve any issues. During the agent's first contacts with the parties, the agent reviews the election agreement procedures as part of the discussion of general representation procedures. It is usually during this discussion that the agent learns whether there may be problems in obtaining an agreement or whether there are issues for consideration by the Regional Director pursuant to §§ 2422.30(b) and (c). Representation petitions seeking elections are given priority as they raise questions concerning representation that, if left unresolved, may cause considerable disruption to the affected employees and agency operations (*CHM 64* discusses priority of representation cases).

**28.4** **Purpose of election agreements:** All parties desiring to participate in an election conducted pursuant to §§ 2422.16 or 2422.30, including parties that have met the requirement for intervention pursuant to § 2422.8, must sign an agreement providing for an election on a form prescribed by the Authority.

**28.5** **Forms:**

**28.5.1** FLRA Form 33 is used for petitions that seek:

a. an election for exclusive recognition;

b. an election to decertify an exclusive representative;

c. an election resulting from a significant change in the character and scope of the unit and the Regional Director decides an election is appropriate to resolve questions relating to the representative status of the affected employees; or

d. an election to determine whether the incumbent labor organization continues to represent a majority of the employees in the existing unit.

**28.5.2** FLRA Form 34 is used when an election is held to determine whether employees in existing units wish to be consolidated for the purposes of exclusive recognition. See *CHM 20.1.6* and *CHM 23.10* for discussions concerning when elections are conducted in petitions to consolidate existing units.

**28.6** **Responsibility and role of the Regional Office:**

**28.6.1** **Role:** The 1996 revisions to the regulations require Regional Offices to take a proactive role in facilitating early and appropriate resolutions of representation questions. The Regional Office's role in assisting the parties is explained by the agent during the initial contacts with the parties as having two purposes: (1) to facilitate an election agreement and ensure that it conforms with the policies and practices of the Authority and the requirements of the Statute; and (2) to assist the parties prepare for an election agreement meeting and the election.

**28.6.2** **Responsibility:** Election agreements are required to: a) provide all eligible voters with an opportunity to cast a free and secret ballot during working hours; b)establish voting procedures that assure the individual voter of the **secrecy** of his/her ballot; and c) protect the ballots and ballot box at all times. All employees and all parties must be satisfied that the true sentiments of the employees have been demonstrated at the election. It is not enough that the election was fair and honest. The arrangements, procedures, and safeguards must convince the parties and employees of

this fact. Subject matters to discuss at election agreement conferences include:

a. purpose of election (*CHM 28.1*);

b. description of the unit and the effect of the vote (*CHM 28.13 and 14*); the eligibility list and its potential binding effects (*CHM 28.18.3*); use of the challenged ballot procedure(*CHM 28.11.3.3*);

c. use of manual, mail and/or absentee ballot procedure (*CHM 28.19*);

d. payroll period for eligibility (*CHM 28.18.3*);

e. date of election (*CHM 28.20 - manual ballot, CHM 28.23 - mail ballot*);

f. hours of election (*CHM 28.20*);

g. place of election (*CHM 28.20*);

h. type, names and positions on the ballot (*CHM 28.18*);

i. requirements for voter identification (*CHM 28.22*);

j. service of the tally of ballots (*CHM 28.28*);

k. provision for observers (*CHM 37*);

l. notice of election and period for posting (*CHM 33*);

m. updating and checking of eligibility list (*CHM 35*);

n. custody of the ballots and ballot box (*CHM 40*);

o. electioneering (*CHM 46*); and the

p. challenge ballot procedure (*CHM 44*).

***NOTE:** Figure 28.6 **is a checklist that may be used in conjunction with this CHM when preparing for and conducting an election agreement meeting. See also** CHM 28.18 through 28.31 **which cover matters discussed at election agreement meetings.***

**28.7** **Participating in and scheduling of election conference:** An election conference is held with the parties as soon as possible after the region notifies the parties of the

petition, allows sufficient time for their response or intervention, receives the information requested from the activity and completes the final check of the petitioner's and/or intervenor's showing of interest. It is not necessary to wait for the expiration of the posting period.
The agent participates in the conference whether it is held onsite or via teleconference. The agent's duties include:

a. establishing the purpose and goals of the meeting;

b. preparing an agenda checklist prior to the meeting or teleconference to ensure all election procedures are discussed;

c. providing instructions and information about election agreements, elections, and election procedures;

d. offering suggestions to resolve any differences in procedural matters;

e. discussing issues related to eligibility and unit disputes;

f. narrowing and resolving all underlying representation issues; and, if possible

g. consummating an election agreement.

The agent explains the requirements in § 2422.16 if the parties fail to reach agreement and the procedures for resolving such disputes (see *CHM 28.11*).

**28.8** **Decision to supervise or conduct the election:** In 1981, the Authority issued a memorandum to the General Counsel stating its views on conducting multi-union elections:

> .... on the matter of multi-union elections, we believe that it will best effectuate the purposes and policies of the Statute to modify in certain respects the existing procedures in such elections. More specifically, it is our view that in multi-union situations, Authority-conducted rather than agency-conducted elections, and manual rather than mail ballots, would provide the most effective means for assuring the sanctity of the ballot; for obtaining the fullest participation of eligible voters; and for generally fostering the democratic processes whereby employees have the opportunity to select their bargaining representatives.

> The nominal costs involved of conducting these elections by Authority personnel under the foregoing procedures will be offset by the benefits to be gained and will be in conformance with our current austerity program.
>
> Therefore, effective immediately, all multi-union elections should, to the extent possible, be conducted by Authority personnel and shall provide for the casting of ballots on a manual basis, unless the parties agree to a mail ballot procedure and the Regional Director approves such agreement.
>
> In our judgement, these changes in our election procedures will constitute a substantial experimental step which will enable us to evaluate the entire spectrum of election processes. Based on this experience, and depending on the circumstances then existing, it may be advisable and feasible to extend these procedures to other representation elections conducted by the Authority.

Federal Register, Volume 46, Number 27, page 11655 (February 10, 1981).

The 1996 revisions to the regulations stating in § 2422.16(b) that the Regional Director can decide procedural matters, including the method of election, do not supersede this policy regarding conducting versus supervising elections. It is still the policy of the Office of the General Counsel that, unless there are unusual circumstances, regions shall **conduct rather than supervise all representation elections** irrespective of the number of labor organizations on the ballot. Regions are required to obtain clearance from the Office of the General Counsel for approval to supervise, rather than conduct, any election [§ 2422.23(a) - describes the difference between conducting and supervising an election].

The decision to supervise or conduct the election is made prior to the election agreement conference so that the parties know before the meeting who will conduct the election and secure the ballots.

***NOTE: See also CHM 28.19, policy considerations for conducting manual ballot elections.***

**28.9** **Preparation for the meeting:** Prior to any meeting, and irrespective of the parties' agreement on the unit, the agent requests that the activity and/or the petitioner prepare the essential facts regarding the activity's organizational structure, functions and operations, personnel policies and practices, etc. and make them available to the agent and the parties prior to the meeting. This information provides the basis upon which the Regional Director can evaluate the appropriateness of the unit when

considering whether to approve the Election Agreement. The information also helps expedite the meeting or teleconference call. At a minimum, the activity must furnish information relating to, and be prepared to discuss the following:

**28.9.1** **Appropriate unit considerations:** *RCL 1* discusses appropriate unit factors, including:

a. activity/agency mission and organization;

b. the proposed unit structure as compared to the overall activity structure; explore whether there is a community of interest separate and distinct from other employees at the activity;

c. working conditions of the employees and other information involving the employees' day to day operations; and

d. geographic location of the employees in the unit claimed to be appropriate; explore whether the employees are geographically distinct from other similarly situated employees; *Defense Logistics Agency, Defense Contract Management Command, Defense Contract Management District, North Central, Defense Plant Representative Office-Thiokol, Brigham City, Utah,* 41 FLRA 316 (1991).

**28.9.2** **Eligibility matters:** The agent asks the activity to provide an updated proposed eligibility list of the employees in the unit claimed to be appropriate. If the activity is unable to provide an updated list before the meeting, the list submitted to check the showing of interest is used. The parties will review the list at the meeting and discuss any eligibility issues. The agent is prepared to discuss the effect of the parties' agreement on the list and cite appropriate case law. If the agent knows in advance that there are significant eligibility issues, the agent prepares the parties to discuss the disputed positions in accordance with *CHM 28.11*. (see also *CHM 28.18.3 - eligibility matters; CHM 35.1- discussion of eligibility list at pre-election conference*).

The agent also asks questions about the overall employee complement of the activity. For instance, if the petitioner seeks a unit of all employees, does the activity employ temporary employees and did the parties consider this category of employees. Do not assume that the petitioned-for unit covers all employees at the activity that are eligible for the unit. See Figure 28.6 for assistance.

**28.9.3** **Work schedules of employees:** The activity is also required to provide information

regarding the work schedules of the employees in the unit claimed to be appropriate so that the agent can be prepared to discuss election details: manual versus mail ballot, absentee ballot etc. Information includes:

a. whether the employees work a seven day, multiple shift operation;

b. whether employees go on travel status (regularly or infrequently, and the purpose of the travel); if employees travel, can the dates of the travel be anticipated or is the travel required on short notice?

c. information concerning where the employees work; what is the proximity of the voters to one another? Are the employees scattered over an activity or large geographic area, thus making multiple polling sites necessary? Can the election be scheduled on one day; if not, is a mail or mixed mail/manual ballot preferable and/or appropriate? If it appears that the election will include a manual ballot with multiple polls, the agent asks the activity prepare in advance of the election agreement meeting, a list of buildings where employees are assigned, showing the number of eligible employees at each location, breakdown of hours and days of work and potential room designations for each polling site. From this information, the agent/parties are prepared to discuss polling sites and polling hours. (*CHM 28.21*).

**28.9.4** **Service of information:** Prior to the meeting, the activity is required to serve copies of any information furnished to the agent on the other parties. The agent confirms that the parties received the information, ascertains whether there are any issues to discuss, and explores the parties' interests relating to the election procedures.

**28.10** **Refusal by a party to participate in the election agreement conference:** If a party does not participate in an election agreement meeting, the region contacts the Office of the General Counsel for advice (*CHM 58.3.4*).

**28.11** **Section 2422.16 requirements:** To prepare for the election agreement meeting, the agent reviews § 2422.16. The agent is responsible for explaining how it is applied. While § 2422.16(a) encourages the parties to enter into election agreements, §§ 2422.16(b) and (c) provide procedures that apply when the parties are unable to agree voluntarily to certain matters contained in an election agreement or when the Regional Director is unable to approve an election agreement because of questions relating to unit appropriateness.

This subsection gives an overview of §§ 2422.16(b) and (c). *CHM 28.12* discusses drafting Directions of Election when the parties are unable to enter into an election agreement pursuant to §§ 2422.16(b) and (c).

**28.11.1 Section 2422.16(b):** This section states that "If the parties are unable to agree on procedural matters: specifically, the eligibility period, method of election, dates, hours, or locations of the election, the Regional Director will decide election procedures and issue a Direction of Election, without prejudice to the rights of a party to file objections to the procedural conduct of the election."

This provision applies to disagreements over the date, time, place, hours, eligibility period, and method of election (mail versus manual ballots) that are set forth in Items #9, #10, and #13 of the election agreement form, FLRA Form 33 and Items #7, #8, and #11 of the unit consolidation election agreement form, FLRA Form 34.

If the agent is unable to obtain an election agreement because the parties cannot agree on procedural matters, the agent has the parties initial the sections of the agreement on which they agree. These include the appropriate unit section, eligibility issues, and other non-procedural matters. If the conference is not onsite, but conducted via teleconference, the agreement is faxed to all parties. The parties also note the disputed procedural issues on the agreement form. The parties sign the agreement before returning it.

Following or during the meeting or teleconference, the agent sends a letter to or confirms with the parties the issues about which the parties disagree. In the letter or during the meeting, the agent requests the parties to state their position in writing on each unresolved matter, and asks for reasons to support their position. The agent also asks the parties for acceptable alternative procedures and whether there are any other unresolved issues. The letter or the agent verbally sets a deadline for the parties' submissions. After the parties' positions are received, the agent assesses the responses to see whether there is any common ground. If it appears that there is "common ground," i.e., the parties could agree on alternative procedures, the agent discusses with the Regional Director rescheduling the meeting or teleconference.

If the parties are unable to agree to alternative election procedures, the Regional Director considers the following criteria when issuing a Direction of Election on procedural matters pursuant to § 2422.16(b):

a. the best interests of the employees affected by the election; for example,

- the parties involved in a representation petition seeking an election are opposed to a mail ballot election. They want a manual ballot election even though a significant number of employees are on travel status at any given time. The parties are willing to waive filing objections over not providing a voting procedure for these employees. The Regional Director decides that a significant number of employees would be disenfranchised and, irrespective of the parties' agreement and waiver, it would not effectuate the purposes and policies of the Statute to deny these eligible employees the right to vote. Absent the parties' agreement, the Regional Director directs a mail ballot election for all of the employees, or an manual ballot with an absentee ballot or mail ballot procedure for the employees on travel status. See *CHM 28.19* for policy guidance on conducting manual versus mail ballot elections.

b. positions of the parties; for example,

- a petition is filed seeking to represent a unit of seasonal employees who work on tugboats. Most of the employees have no permanent address which makes a mail ballot election difficult, but since the tugboats are usually at sea, there is little opportunity to conduct a manual ballot election all at one time. The activity proposes that the election be conducted at the docks over a period of several days so that the agent can meet the tugboats when they dock. This is costly and time consuming for the region, but the region acquiesces acknowledging that the manual procedure will ensure

that all eligible voters have an opportunity to receive a ballot. The parties enter into an election agreement.

c. resources of the region; for example,

- the petition seeks an election among firefighters who work in the Yellowstone National Park. These employees are on multiple shifts and based in stations throughout the park. There are thirty eligible voters. The parties want a manual ballot election. The region directs a mail ballot because of the costs and time associated with requiring one agent to run a multiple site election over a period of several days, particularly, when a fire could call all voters away from the station for an indefinite period of time.

d. policy considerations: There may be policy considerations when directing procedures in a significant election that warrant considering a novel approach to conducting the election; for example,

- in a worldwide mail ballot election involving employees who have temporary addresses, it may be appropriate to mail the ballot to the employee's place of employment.

See *CHM 28.12.2* for guidance on drafting Directions of Elections on § 2422.16(b) matters.

**28.11.2 Section 2422.16(c):** This section states: "before directing an election, the Regional Director shall provide affected parties an opportunity for a hearing on other than procedural matters, and thereafter may:

(1) Issue a Decision and Order; or

(2) If there are no questions regarding unit appropriateness, issue a Direction of Election without a Decision and Order."

This section is applicable when the parties are unable to enter into an election agreement or the Regional Director will not approve the agreement because s/he has reasonable cause to believe a question of representation exists (*CHM 27.5.3*). Section 2422.16(c) raises two issues:

a. when a hearing is required; and

b. when a Decision and Order is required.

The phrase, "on other than procedural matters" pertains to appropriate unit questions,

eligibility questions, timeliness issues, challenges to the status of a labor organization (*CHM 19.6*) and any other matter not considered "procedural." It does not include challenges to the validity of the showing of interest which are resolved prior to any action taken on a case (*CHM 18.19.5* and *28.34.2*).

**28.11.2.1** Where there are **questions regarding unit appropriateness, the Regional Director "shall provide the parties with an opportunity for a hearing" and thereafter, issue a Decision and Order.** § 2422.16(c)(1). A party may file an application for review of the Regional Director's Decision and Order (§ 2422.31). See *CHM 28.29* and *CHM 55* for guidance on processing cases while the appeal is pending before the Authority.

In cases involving questions regarding unit appropriateness, the agent terminates the election agreement conference and continues to process the case according to *CHM 26 and 27*. If the Regional Director issues a notice of hearing, the agent processes the case according to *CHM 29*.

**28.11.2.2** Where there are **no questions regarding unit appropriateness and absent an election agreement, the Regional Director shall provide the parties with an opportunity for a hearing on other than procedural matters.**

a. "Other than procedural matters" in this context applies to situations where the parties are unable to agree on voter eligibility, timeliness of the petition, challenges to the status of the labor organization or other nonprocedural or non-unit related matters. This section of the regulation does not pertain to situations where the parties refuse or fail to cooperate in the election agreement proceedings (See CHM 22, 28.10 and 58.3.4).

b. Before concluding the election agreement meeting and prior to issuing a notice of hearing pursuant to § 2422.16(c), the agent has the parties complete and initial those portions of the agreement on which they agree. If conducted by teleconference, the agreement is faxed to all parties. These items include the unit description, effect of the vote and the procedural matters. If the parties refuse to complete those portions of the agreement, the agent asks the parties for their objections and proceeds according to *CHM 28.11.1* or *CHM 28.11.2.1*.

c. Section 2422.16(c) provides that the Regional Director shall provide an opportunity for a hearing. Following the hearing, however, the Regional Director has discretion to issue a Direction of Election rather than a Decision and Order when there are no unit appropriateness issues. While there is no appeal of a Direction of Election; the Direction of Election provides that the election is directed without prejudice to the right of a party to file a challenge to the

eligibility of any person participating in the election and/or objections to the election [see § 2422.16(d) and CHM 28.12.4].

d. Hearings on "other than procedural matters" are conducted as soon as possible after the parties' refusal to enter into an election agreement. Thereafter, the Direction of Election are issued timely and consistent with strategic plan goals. See *CHM 28.12* for guidance on issuing Directions of Election and *CHM 29* for guidance on scheduling hearing conducted pursuant to § 2422.16(c)(2).

**28.11.3 Policy on providing an opportunity for a hearing:** Notices of hearing are issued according to the guidelines set forth in *CHM 27 and 29*. When a Direction of Election is contemplated, **the Hearing Officer does not make recommendations on the record.** The Regional Director has the discretion to issue the notice of hearing immediately or explore alternatives to the hearing, as discussed below. **The**

**regulations provide an opportunity for a hearing, they do not require a hearing.**

**28.11.3.1 Stipulations in lieu of hearings:** Stipulations in lieu of hearing are encouraged and permissible. (see *CHM 27.7*):

**In cases involving questions regarding unit appropriateness, a hearing may be waived by the parties upon their agreement to an election; however, the Regional Director may approve such agreement only if the unit meets the appropriate unit criteria set forth in 5 U.S.C. 7112(a)(1).** *See United States Army Safeguard Logistics, Command, Huntsville, Alabama,* 2 A/SLMR 582 (1972); *Department of Transportation, National Highway Traffic Safety Administration,* 2 A/SLMR 433 (1972); *citing Army and Air Force Exchange Service, White Sands Missile Range Exchange White Sands Missile Range, New Mexico,* 1 A/SLMR 147 (1971). **The parties may also enter into a stipulation addressing all appropriate unit issues in lieu of a hearing if the stipulation includes a waiver of the parties' right to a hearing. The region is still required to issue a Decision and Order in such cases.**

Stipulations on other than unit issues are also encouraged. See *HOG 26* for a discussion about stipulations. They are particularly useful in deciding employee eligibility issues. Any stipulations that are obtained in lieu of a hearing pursuant to § 2422.16(c) include a waiver of the parties' right to a hearing (*CHM 27.7.2*).

**28.11.3.2 Waiving a hearing in order to proceed to an election:** The region may not accept a "partial" waiver from the parties. A "partial" waiver is one in which the parties disagree on a matter within § 2422.16(c) but want to proceed to an election. As a result, they ask the region to approve a waiver of their right to a hearing, but intend to raise the matter again posthearing as an objection or challenge. The parties may not waive their right to a hearing in order to proceed to an election and bypass the § 2422.16(c) procedures. In other words, the parties can only waive a hearing on a § 2422.16(c) matter by: 1) entering into a stipulation that addresses all § 2422.16(c) issues and includes a waiver of the parties' right to a hearing, or 2) signing

an election agreement. **An exception is discussed in** *CHM 28.11.3.3* **below.**

**28.11.3.3 Procedures for resolving eligibility issues without hearing:** The Regional Director has discretion in applying § 2422.16(c)(2) to situations where the parties dispute the eligibility of certain employees, normally comprising **not more than** fifteen percent (15%) of the unit that the parties agree is appropriate. Before discussing this option with the parties, the agent reviews the eligibility list with the parties in accordance with the guidance set forth in CHM 28.18.3 and discusses the impact of the parties' agreement on any inclusions and exclusions.

a. Rule:

Eligibility issues fall within the "other than procedural issues" that are covered by § 2422.16(c). Thus, the parties are provided with an opportunity for a hearing if the parties cannot agree on the eligibility of certain employees in the bargaining unit. The Regional Director has discretion, however, to issue a Direction of Election instead of a Decision and Order pursuant to § 2422.16(c)(2), if the number of eligible employees in dispute is not significant and does not raise issues concerning the appropriateness (identity, scope or size) of the bargaining unit.

The Office of the General Counsel has established an alternative for the parties to consider when there are eligibility issues and the parties do not seek to delay the election.

b. Option:

As an alternative to a hearing to resolve eligibility issues, the agent discusses the use of the challenged ballot procedure and/or the filing of a petition to clarify the unit after the election. This option is only available if the number of employees whose eligibility is in dispute does not comprise more than fifteen percent of the proposed unit. If the parties agree to use this option, the parties "agree to disagree" on the disputed positions and agree that the the voter's eligibility will be challenged at the election. If the voter whose eligibility is being challenged: 1) fails to vote; or 2) votes a challenged ballot that is not resolved but is not determinative of the outcome of the election, the parties can file a petition to clarify the status of the disputed employees after the election. **Any agreement to use the challenged ballot procedure for employees whose eligibility is in dispute and who comprise not more than fifteen percent of the unit is**

**memorialized in an attachment/appendix to the Election Agreement. See** Figure 28.11 **for a sample memorandum.**

**The attachment:**

**(1)** **gives an introduction of the regulatory basis for the agreement;** (i.e.," in accordance with § 2422.16(c), the parties agree to the following")

**(2)** **spells out exactly what the parties agree to and what the Regional Director is approving;**

**(3)** **includes the following information:**

(i) describes the unit and includes a statement that the eligibility issues do not affect the appropriateness of the unit (see part "c" below);

(ii) includes the parties' waiver of a right to a hearing; and

(iii) lists the names of the employees and their positions about which the parties dispute the eligibility; since employee names are included, the parties must agree not to disclose or publish the agreement.

**(4) spells out the procedures for dealing with the challenges as follows:**

(i) regardless of the type of election, the ballots of employees who are in the 15% group and named in the appendix will be challenged automatically by the Regional Agent, if not challenged by one of the parties.

(ii) in a manual ballot election, the parties agree to specific procedures in the Appendix for annotating the eligibility lists as described in the options in **section "c"** of this part. The voter's eligibility becomes an issue if the voter appears to vote and one of the observers or the agent challenges the voter's ballot before the employee votes.

(iii) in mail ballot elections, the parties agree to specific procedures in the Appendix for annotating the eligibility lists as described in the options in **section "c"** of this part. The region mails the voter a ballot, annotates the list with a "c," but the issue is resolved only if the ballot is returned. The ballot is automatically challenged if it is returned. See also *CHM 35.1* concerning the eligibility list.

When discussing this option with the parties, the agent stresses that the delay inherent in resolving issues involving a small number of employees by hearing automatically denies a larger number of employees the opportunity to express their wish at the ballot box for an extended period of time. **The agent also reminds the parties that they may not discuss, publish or reveal the names of the positions or employees whose eligibility is in dispute.**

c. Application of the option:

**Where the number of employees in dispute is less than fifteen percent and the parties agree to utilize the challenged ballot procedure**, the voting unit is carefully set forth in the Election Agreement. The unit description is silent as to the inclusion or exclusion of the classification(s) in dispute. For example, if the classification of shop chief is in dispute, the description does not contain an express inclusion or exclusion of this classification. In this regard, irrespective of any understanding between the parties regarding employees in this classification being subject to challenge, if the parties expressly include or exclude this classification in the unit description, it becomes binding on the parties. *See Federal Trade Commission (FTC I)*, 15 FLRA 247 (1984) and *Federal Trade Commission (FTC II)*, 35 FLRA 576 (1990) where the parties agreed to exclude a number of employees and later attempted to file a clarification of unit petition.

The regions have the following options for annotating the eligibility lists with the names of the disputed employees:

**(1)** names of the disputed employees remain on the eligibility list (included or excluded) where the agency put them. Each name on the appendix is marked on these lists with a "c" for challenge.

**(2)** names of the disputed employees are all placed either on the included or excluded list as agreed by the parties. Each name on the appendix is marked on the list with a "c" for challenge.

**(3)** the parties may agree to delete the disputed names from the included or excluded lists and use the appendix list as the list for challenges.

There may be other acceptable variations on the options listed above; **the objective** is to ensure that employees whose eligibility is in dispute are afforded the same opportunity to vote in manual or mail ballot elections. The parties' agreement on how the eligibility list will be annotated should be included in the appendix. This is also true when there are no disputes as to eligibility.

d. To determine whether the total number of challenged ballots are not more than fifteen percent (15%) of the unit agreed to, for the purpose of resolving eligibility issues by the challenge ballot procedure, the following ratio is used:

$$\frac{\text{Total number or employees subject to challenge}}{\text{Total number of employees agreed to plus number of employees subject to challenge}}$$

Example 1: the petitioner claims that the unit consists of 100 employees, whereas the activity contends that classification X, involving 50 employees, are also eligible for the unit. Here, the ratio is 50/150, or approximately 33 percent.

Example 2: the petitioner claims that the unit consists of 95 employees, but the activity asserts that the unit consists of 100 employees. The ratio is therefore 5/100, or 5 percent.

In example #1, an election agreement may not be approved since a significant question exists concerning employee eligibility affecting the scope of the unit. The region issues a notice of hearing, and holds the hearing, absent a stipulation. A Decision and Order is required rather than a Direction of Election because the number of challenges exceeds fifteen percent and therefore affects the scope of the unit.

In example #2, the number of challenged ballots is less than fifteen (15) percent. The parties may either elect to use the challenge ballot procedure or exercise their right to a hearing. (If the parties elect to use the

challenged ballot procedure, the agent prepares an agreement to attach to the Election Agreement as discussed in part "b" above). If a hearing is held, § 2422.16(c)(2) allows the region the option of issuing a Direction of Election (*CHM 28.12*). The record obtained by the region at the hearing may be used as evidence if challenged ballots are sufficient in number to affect the results of the election.

***NOTE: if the total number of employees whose eligibility is in dispute exceeds 15% of the total number of employees agreed to plus the number of employees subject to challenge, or if parties are unwilling to execute an Election Agreement because of eligibility issues, the region shall issue a notice of hearing. The region cannot impose the 15% rule in lieu of a hearing. The parties are not precluded from challenging other voters after executing this Appendix to the Election Agreement. However, if the region learns that other employees will be challenged, the region checks the math to determine whether the number of potential challenged ballots remains under 15%.***

**28.12 Direction of Election:** There are essentially three types of Directions of Election.

**28.12.1 Unit found appropriate by the Regional Director:** Following a hearing on questions relating to unit appropriateness, the Regional Director is required to issue a Decision and Order (see *CHM 53 - guidance on issuing Decisions and Orders*). If the Regional Director finds that an election is appropriate, s/he issues a **Decision and Order and Direction of Election.** Thereafter, the parties meet to work out the details of an election agreement. The description of the unit and the effect of the vote is described in the Agreement **precisely** as found in the Decision and Order and is binding on the parties unless the Regional Director modifies it in a Supplemental Decision and Order or it is modified by the Authority. This requirement applies irrespective of any changed circumstances occurring subsequent to the close of the hearing and not considered by the Regional Director. Any party seeking to alter the unit description after issuance by the Regional Director of a Decision and Order and Direction of Election, files a written request with the Regional Director with supporting reasons. Normally, execution of the Election Agreement is not delayed pending the filing or disposition of such request.

**28.12.2 Direction of Election on § 2422.16(b) procedural matters:** When the parties are unable to agree on procedural matters, the Regional Director issues a **Direction of Election** and decides the disputed details of the election. See *CHM 28.11.1*. The Direction of Election will state the purpose of the directed election (such as "the parties were unable to agree on the following ..."). The Direction of Election incorporates the Election Agreement that contains the provisions upon which the parties agreed and initialed. The Regional Director signs the Agreement noting the details decided in the Direction of Election. Item #14 on FLRA Form 33 and Item #12 on FLRA Form 34, reflects the election details that the Regional Director decided. The Regional Director does not state the reasons for his/her ruling, but

references § 2422.16(d) (see *CHM 28.12.4*). See Figure 28.12A for a sample Direction of Election.

**28.12.3 Direction of Election on § 2422.16(c)(2): other than procedural matters:** When there are no questions regarding unit appropriateness, the Regional Director shall provide the parties with an opportunity for a hearing. Following the hearing, however, the Regional Director may issue a **Direction of Election**, without a Decision and Order. A Direction of Election is issued as soon as possible after the close of the hearing and within time targets that are consistent with strategic plan goals *(CHM 29.7*). Note that the Regional Director has the **option** to issue a Direction of Election, rather than a Decision and Order. If the eligibility issues or other nonprocedural issues appear to affect unit appropriateness, the Regional Director is required to issue a Decision and Order.

A Direction of Election issued under this subsection reflects the nature of the dispute, the issues presented at the hearing and a statement that the issues raised do not interfere with conducting the election. The Direction of Election incorporates the Election Agreement that contains the provisions upon which the parties agreed and initialed. The Regional Director signs the Agreement noting the details s/he decided. Item #14 on FLRA Form 33 and Item #12 on FLRA Form 34, reflect the election details that the Regional Director decided. In the Direction of Election, the Regional Director is not required to decide the procedural issues such as eligibility issues or status issues. Rather, the Regional Director states in the Direction of Election that "these matters (or state issues) will not be resolved at this time." Section 2422.16(d) is also set forth in the Direction of Election. See Figure 28.12B, *CHM 19.6 and CHM 28.34.3* for a Direction of Election involving a challenge to the status of a labor organization.

***NOTE:*** ***1.*** ***If a challenge to the status of a labor organization is filed pursuant to section 7103(a)(4) or pursuant to section 7111(f)(1) of the Statute alleging that the labor organization is subject to corrupt influences or influences opposed to democratic principles, the region investigates the challenge prior to executing the election agreement.*** See *CHM 19* for investigating challenges filed pursuant section 7103(a)(4). See *CHM 20.1.8* and *CHM 23.9.3* for investigating challenges based on 7111(f)(1).

***2.*** ***Remember that a challenge to the validity of the showing of interest is not considered an "other than a procedural matter" under § 2422.16(c) and is investigated and resolved prior to the election agreement meeting.*** See *CHM 18.19.5*, *CHM 28.11.2* and *CHM 28.34.2.*

**28.12.4 Challenges or objections to a directed election:** Section 2422.16(d) provides that a Direction of Election issued pursuant to § 2422.16 will be issued without prejudice to the right of a party to file a challenge to the eligibility of any person participating in the election and/or objections to the election. **This statement appears in every Direction of Election.** Section 2422.16(d) does not pertain to challenges or

objections based on a Decision and Order which may be appealed pursuant to § 2422.31.

**28.13** **Basic requirements for unit descriptions in election agreements:** Every unit approved by the Regional Director in an Election Agreement constitutes "an appropriate unit" under the criteria contained in 5 U.S.C. 7112 of the Statute and excludes, as appropriate, the categories of employees as set forth in 5 U.S.C. 7112(b)(1) through (7). The unit and the effect of the vote are the **first substantive matters** discussed in an election agreement conference. Item # 11 on FLRA Form 33 and Item # 9 on FLRA Form 34 describes the appropriate unit. **This section also includes a statement regarding the effect of the vote**.

**28.13.1** **Appropriate unit criteria:** An appropriate unit as defined in 5 U.S.C. 7112(a)(1) is one which will ensure a clear and identifiable community of interest among the concerned employees and will promote effective dealings with, and efficiency of the operations of, the agency involved. The Authority has applied these criteria in a wide range of decisions involving unit determinations. These criteria are applied when establishing any unit in any election agreement; i.e., by the parties in formulating and agreeing upon the unit, by the agent in seeking out the relevant information and by the Regional Director in determining the appropriateness of the unit for the purpose of approving an election agreement [see *RCL 1, appropriate unit determinations*). *CHM 28.15* - *self-determination elections* - covers situations where the affected employees determine their own unit; and *RCL 2 - scope of unit issues* - discusses unusual circumstances when elections may be held in units that do not comply with the appropriate unit criteria (residual units)].

**28.13.2** **Required exclusions:** 5 U.S.C. 7112(b) requires that certain categories or classifications of employees be specifically excluded from all units, namely:

a. 5 U.S.C. 7112(b)(1): Supervisors as defined in 5 U.S.C. 7103(a)(10) [unless covered by 5 U.S.C. 7135(a)(2)]; *RCL 26 and 14.*

b. 5 U.S.C. 7112(b)(1): Management officials as defined in 5 U.S.C. 7103(a)(11) [unless covered by 5 U.S.C. 7135(a)(2)]; *RCL 22.*

c. 5 U.S.C. 7112(b)(2): Confidential employees as defined in 5 U.S.C. 7103 (a) (13) ; *RCL 19.*

d. 5 U.S.C. 7112(b)(3): Employees engaged in personnel work in other than a purely clerical capacity; *RCL 20.*

e. 5 U.S.C. 7112(b)(4): Employees engaged in administering the provisions

of the Statute; *RCL 18.*

f. 5 U.S.C. 7112(b)(5): Professional employees from a unit of nonprofessional employees - unless a majority of the professional employees vote for inclusion in a unit of nonprofessional employees; *RCL 23.*

g. 5 U.S.C. 7112(b)(6): Any employee engaged in intelligence, counter-intelligence, investigative, or security work which directly affects national security; *RCL 25* or

h. 5 U.S.C. 7112(b)(7): Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity. *RCL 17.*

Irrespective of any agreement among the parties, the Regional Director may not approve an election agreement in which s/he knowingly includes in the unit description, any employees that are required to be excluded under the Statute.

**28.13.3 Formats for stating the inclusions and standard statutory exclusions:** The following format **is used** in any election agreement approved by Regional Directors or in any Decision and Order which directs an election or finds a unit appropriate for purposes of collective bargaining:

a. Nonprofessional unit:

Included: All .....

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

b. Professional unit:

Included: All professional ....

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

c. Mixed unit:

Included: All professional and nonprofessional ....
or
All employees of ....

Excluded: Management officials; supervisors; and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

**28.14** **Describing the unit:** The description of the appropriate unit expresses the intent of the parties, both as to the level of recognition, the inclusions and the nonmandatory exclusions. Carefully defining the scope and composition of the unit minimizes:

1. Problems between the parties after a certification is issued regarding the level of recognition; and

2. Eligibility issues.

**28.14.1** **Differences in the caption and the unit description on the certification: When a Certification is issued that reflects the results of an election by either certifying a labor** organization as the exclusive representative of an appropriate unit of employees or certifying the results of the election if the employees vote against representation, the caption on the case lists the parties one way - for record keeping purposes - and the unit may reflect the unit approved by the Regional Director another way.

**a.** **The caption reflects the executive agency first, followed by the activity, and location.**

**b.** **The unit description reflects the level at which recognition is granted. Unless the unit is nationwide in scope, the activity is listed first, and the agency is listed second, if at all.**

**28.14.2** **Level of recognition:** The **level of recognition** establishes the level at which bargaining must take place. The level of recognition at the agency/activity is a consideration when determining the appropriateness of any proposed unit or when assessing the effects of a reorganization on an existing unit. The level of recognition for the union, i.e., whether the national or local union holds the certification has no bearing on the appropriateness of the unit.

**28.14.2.1** **Agent's responsibility:** It is the agent's responsibility to review the level of recognition proposed by the petitioner to ensure that it is appropriate given other facts and criteria used to determine the appropriateness of any unit. The agent ensures that the parties understand and consider the level of recognition. **As a policy matter, it is**

**not the agent's role to dictate to the parties where the level of recognition lies. However, the Authority agent makes the parties aware of potential issues and urges the parties to draft the unit description carefully to avoid any confusion. If the proposed level of recognition raises questions as to the appropriateness of the unit, the agent reports the issue to the Regional Director. A hearing on the issue may be appropriate.** *See VA Medical Center, Brooklyn, NY,* 8 FLRA 289 (1982); *Headquarters, 1947th Administrative Support Group, U.S. Air Force, Washington, DC*, 14 FLRA 220, 221 (1884).

**28.14.2.2 Ramifications:** The level of recognition is important because it:

a. establishes the level at which bargaining must take place;
b. may be a factor in a reorganization;
c. reflects who controls decision-making and governance of the unit;
d. affects who has standing to file certain petitions, and
e. from the union perspective, controls who may file for reaffiliation and merger.

**28.14.2.3 Rule: If the Agency is named first, that is an indication that the level of bargaining is at the agency level. If the Activity is named first, the level of recognition is at the activity level. Regions are consistent when drafting unit descriptions and follow this protocol.**

For example, if a unit description is written: "All employees of the U.S. Department of the Navy, XXX Naval Shipyard," the level of recognition is at the Department of Navy. If the description is written: "All employees of the XXX Naval Shipyard, U.S. Department of the Navy," the level of recognition is at the Shipyard.

Authority agents explain to the parties that the level of recognition, if not clear to the parties at the time of the election agreement meeting, may become an issue between the parties later on. See also *CHM 56* which distinguishes between captions on cases where the agency is always named first and the unit description.

**28.14.3 Carefully drawn unit descriptions** greatly facilitate the investigation of any future petition(s) to amend or clarify a certified unit. At a minimum the unit description includes:

a. Geographic locations of the affected employees;

b. Classifications of the employees sought to be included (if the unit proposes to include all employees of an activity or agency, the description is described "as all employees of ..."); and

c. The name of the agency and activity, if applicable that employs the employees sought to be included in the unit.

A unit description that is clear states: "All ... employees [use '*employed by'* or *'of'*] ...." **The description is drafted as follows:**

**"Included: ..."**

**"Excluded: ...."**

***NOTE: To ensure consistency among the regions the "one paragraph" unit description, such as "All employees of Agency X excluding ... ." is avoided.***

**28.14.4 Use of current classifications and effect of drafting unit description too broadly or narrowly:** The scope and composition of any unit is based upon current classifications or categories of employees at the time of approval of the consent agreement for election. A nonexistent classification is not included in the unit even though the activity contemplates establishing such classification in the near future. Similarly, a nonexistent classification is not specifically excluded for the purpose of showing that if or when such a classification were to be established, the parties agree that these employees would be excluded from the unit. In either of these instances, the proper vehicle to resolve the issue is a petition to clarify the unit when the particular classification is established and employees are hired. Normally, if the unit description is written "broadly," i.e., "all employees of" and a classification is added to the unit, it is automatically included in the unit unless it's exclusion is statutorily based. "New employees are automatically included in an existing bargaining unit where their positions fall within the express terms of a bargaining certificate and where their inclusion does not render the bargaining unit inappropriate." *Department of the Army, Headquarters, Fort Dix, Fort Dix, New Jersey,* 53 FLRA 287 (1997). See also *U.S. Department of the Air Force, Carswell Air Force Base, Texas*, 40 FLRA 221, 229-30 (1991) *(Carswell Air Force Base*); *U.S. Army Air Defense Artillery Center and Fort Bliss*, 31 FLRA 938 (1988); *U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Northeast Region,* 24 FLRA 922, 926 (1986) (*NOAA*).

Conversely, if a unit description is too narrowly defined, it may result in many

requests to clarify units or additional elections to add-on more employees. **The point is that the parties, with the assistance of the Authority agent, define the unit description to minimize future questions about inclusions and exclusions and the scope of the unit.**

**28.14.5** **Use of names of employees:** Names of employees are **never** used to denote inclusion or exclusion from the unit. A unit is defined only in terms of the one or more classifications or categories of which it is composed, as well as the exclusions. The scope and composition of the unit must be clear and identifiable if the unit is subsequently certified.

**28.14.6** **Use of vague or unclear phrases:** Phrases such as "serviced by" or "located at" to describe a unit are not permitted. Unit descriptions include the name of the employing agency/activity and the employees eligible for inclusion in the unit. Experience has shown that a unit described by the servicing administrative or personnel office or the location of the employees that does not include the name of the employer causes a variety of representation issues, particularly if the unit is subject to a reorganization or realignment of operations. For example a unit described as: "All employees serviced by the Civilian Personnel Office located in Fort XXX" does not identify the employing agency. It is impossible to distinguish employees in this unit from a similarly described unit covering different employees.

**28.15** **Details on special voting procedures for self-determination elections:** There are certain situations where the eligible voters select the unit as well as their representative. For instance, as required in 5 U.S.C. 7112(a)(5), professional employees determine their unit as well as their exclusive representative. These elections are commonly called self-determination elections because the final determination of the unit is contingent upon the outcome of the election. As noted in *CHM 28.13*, election agreements describe the appropriate unit and discuss the effect of the vote. This is particularly important in self-determination elections. In self-determination elections, election agreements: 1) describe the purpose of the election and the voting groups; 2) discuss the effect of the vote; and 3) provide a description(s) of the potential appropriate units.

Because of the extensive details involved, the required information is set forth in an Appendix to the Agreement, with the following statement inserted in paragraph 11, "The Appropriate Unit" of FLRA Form 33, or paragraph 9 in FLRA Form 34: "See Appendix attached to and made a part of this... ." **In addition, all such information contained in the Appendix is set forth, verbatim, in the Notice of Election and cannot be changed without clearance from the OGC.** For sample ballots used in the special elections discussed below, see *CHM 34.4* and Appendix E.

***NOTE: if the self-determination election results from findings raised as a result of a reorganization, contact the OGC for case handling advice.*** See e.g., *Defense Logistics Agency, Defense Supply Center Columbus, Columbus, Ohio*, 53 FLRA 1114 (1998).

**28.15.1 Considerations when establishing units involving professional employees:** Professional employees have the right of unit self-determination under 5 U.S.C. 7112(b)(5). This provision of the Statute provides that a unit of both professional and nonprofessional employees may not be established unless a majority of the professional employees vote for inclusion in the same unit as the nonprofessional employees. Professionals vote on whether the bargaining unit will consist solely of professional employees or be a combined professional/nonprofessional unit and on whether they wish to be represented by a union in a bargaining unit. For a discussion on the definition of a professional employee, see 5 U.S.C. 7103(a)(15) and *RCL 23*.

a. **Detailing special voting procedures**: 5 U.S.C. 7112(b)(5) requires that the Election Agreement set forth details concerning the election, including a description of the unit and the effect of the vote and the following:

(i) A description of the **voting groups** involved;

(ii) An explanation of the choices to be voted on by each of the groups; and

(iii) An explanation of the alternative effect upon the determination of the appropriate unit(s) in the event that a majority of the professional employees vote in favor of, or against, inclusion in the same unit of nonprofessional employees.

b. **Significance of self-determination by professional employees**: As previously noted, a self-determination election, such as one involving professional and nonprofessional employees, is fundamentally different from other elections in that the final determination of the unit is contingent upon the outcome of the election. Thus, the election may result in an appropriate unit consisting of both professional and nonprofessional employees or it may result in separate units of professional and nonprofessional employees, depending upon whether a majority of the professional employees vote in favor of, or against, inclusion in the same unit as nonprofessional employees.

c. **Description of voting groups**: Paragraph 11 of the Appendix of the Agreement is entitled, "Voting Groups" and not "Appropriate Unit." As set forth in Figure 28.15A, the professional employees are designated as voting group (a) and the nonprofessional employees as voting group (b). Nonprofessional employees are expressly excluded from voting group (a) and professional employees are expressly excluded from voting group (b).

d. **Explanation of choices on respective ballots**: After setting forth the description of the two (2) voting groups, the third and fourth paragraphs of the Appendix are devoted to an explanation of the choices upon which the professional and nonprofessional employees will vote in casting their respective ballots. Thus, in the example shown, the nonprofessional employees are informed that they ". . . will be polled whether or not they desire to be represented by the (Union)." Similarly, professional employees are informed that they will be asked two (2) questions, namely:

(i) Do you desire the professional employees to be included with the (description of the nonprofessional unit) for the purpose of exclusive recognition?; and

(ii) Do you desire to be represented for the purpose of exclusive recognition by the (Union)?

e. **Explanation of appropriate units**: The remaining portion of the Appendix explains the alternative unit determinations based upon whether or not a majority of the professional employees vote for inclusion in the same unit as nonprofessional employees and the issuance of an appropriate certification by the Regional Director. See Figure 28.15A. For tallying procedures, see *CHM 47.11*.

**28.15.1.1 Unique situations involving professional employees in petitions:** Self-determination elections involving established units consisting of professionals and nonprofessionals may be inappropriate in certain circumstances.

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b. Add-on: Until the Authority rules differently, when petitions are filed to add a unit of professional employees to a consolidated unit of professionals and nonprofessionals, the professionals have the opportunity to decide whether or not they wish to be included with the nonprofessionals. In add-on elections, the proposed unit, in this case the unrepresented professionals, constitute an appropriate unit and thus the section 7112 (b)(5) right to self-determination applies.

c. Clarify matters relating to representation: Unique situations involving professional employees may arise in petitions seeking to clarify matters relating to the representation of employees following a reorganization or realignment. It may be appropriate to accrete, combine or find a successorship among professional employees who are not in mixed units, but who will become part of a unit that already includes professional and nonprofessional employees without an election. A finding of successorship or accretion does not raise a question concerning representation and, thus, no election is required. Contact the Office of the General Counsel if this issue arises.

*CHM 58.3 - advice issues* and *CHM 28.17.4 - consolidated units.*

**28.15.2 Inclusion of unrepresented professional employees in an existing unit of nonprofessional employees:** Where a labor organization currently represents a unit of nonprofessional employees, a unit of unrepresented professional employees may be included in the same unit of nonprofessional employees by a self-determination election. If an incumbent labor organization files a petition to represent professional employees and requests that the professional employees be included in the existing represented nonprofessional unit, the professional employees are given the opportunity to decide whether they wish to be included in the nonprofessional unit.

In drafting the Appendix to the agreement as set forth in Figure 28.15B, paragraph 11 of the Appendix is designated as "Appropriate Unit" since there is only one group of employees voting in this type of self-determination election. Moreover, in the event the professionals vote to be included in the nonprofessional unit, a Certification of Representative is not issued to the petitioner. Instead, a Certification of Inclusion in Existing Unit, FLRA Form 192, is issued, as discussed in *CHM 56*, in which case the ballots cast for the second question are not counted.

In the event that the professional employees vote against inclusion on the first

question, the second question on the ballot is tallied and if a majority is cast for the petitioner as the exclusive representative, a Certification of Representative, FLRA Form 28, is issued in behalf of the petitioner for a separate unit. If a majority is cast against exclusive recognition, a Certification of Results, FLRA Form 27, is issued. See *CHM 47.13* for tallying procedures.

If a petitioner does not seek to include a unit of professional employees in the represented unit of nonprofessional employees, no Appendix to the Election Agreement is prepared since no self-determination election is involved. In this situation, the union seeks to represent the professional employees in a separate unit. No special voting procedures are required and the employees are asked only if they wish to be represented for the purposes of exclusive recognition by the labor organization(s) involved.

**28.15.3 Inclusion of residual nonprofessional employees in an existing unit:** If a labor organization that currently represents a unit of nonprofessional employees files a petition seeking to represent a unit of unrepresented residual employees of the same activity, the incumbent, as the petitioner, has an option of seeking to represent these employees in the currently represented unit or as a separate unit. A **residual unit** is a unit of all unrepresented employees of the type covered by the petition (or, in some descriptions) who are not already covered in existing units. *General Services Administration, Las Vegas Fleet Management Center, Sparks Field Office, Sparks, Nevada*, 49 FLRA 1258, 1261 (1993). If a proposed unit is a residual unit, strict application of the appropriateness criteria is not applied (see *RCL 2*).

The Regional Office elicits the petitioner's position so that the Appendix to the Agreement is worded accordingly (Figure 28.15C for wording when the petitioner seeks to include the residual unit in its existing unit). Paragraph "b" in Figure 28.15C is applicable in instances in which the incumbent-petitioner and one or more intervenors are on the ballot. If the employees vote to be included in the existing unit, a Certification of Inclusion in Existing Unit is issued (*CHM 56*).

Note, as in other self-determination elections, the Notice of Election describes the effect of the vote. In this instance if there is no intervenor, the Notice of Election states whether or not the selection of the petitioner will result in their being included in the existing unit. Tallying procedures are discussed in *CHM 47.14*. Note there are not many Authority cases on residual units. If there are any questions about how to handle the proposed unit or the options for self-determination, contact the Office of the General Counsel for case handling advice.

**.4 Residual elections involving two groups a**

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agreement as an Appendix:

> If a majority of valid ballots in the residual unit are cast for the incumbent union, separate units could be appropriate or the incumbent could elect to combine them. If a majority of the employees in the existing unit do not select the incumbent, then the two voting groups shall be combined in a single overall unit and their votes shall be pooled. In either event, the appropriate certification will be issued.

**Since very few cases are filed involving the issues where votes are "pooled," the region contacts the Office of the General Counsel to discuss such cases (see also** *CHM 28.15.5*).

**28.15.5 Other types of self-determination elections:** Other self-determination elections that may involve pooling of ballots include:

a. A functional or craft unit constituting a portion of a larger appropriate unit, either of which may be an appropriate unit; i.e., petitioner (A) seeks to

represent an appropriate unit which includes the craft or functional group and petitioner (B) seeks to represent only the smaller craft or functional group of employees; or

b. Global type elections. See *Department of Defense Dependent Schools*, 6 FLRA 297 (1981); the Authority found a worldwide unit and six region-wide units appropriate.

Drafting the Appendix to the agreement for the election: The same procedure as discussed in *CHM 28.15.1 and 28.15.4* regarding the preparation and attachment of an Appendix to the Election Agreement is applicable regarding all types of self-determination elections. For example, the Appendix set forth in Figure 28.15D is an example of the circumstances under which either of two (2) units petitioned-for by different labor organizations may be appropriate, requiring a self-determination election where the votes may be pooled. This particular sample Appendix is used in conjunction with an election agreement for self-determination elections involving functional or craft units but is easily adapted for other similar self-determination elections. The procedures in counting the ballots of the respective voting groups in self-determination elections that involve pooling ballots are discussed in *CHM 47.12*.

**28.15.6** **Severance elections:** Where parties agree to a severance election, the Regional Director contacts the Office of the General Counsel before approving the Election Agreement.

**28.16** **Add-on elections:** When a union petitions for an election to add employees to an existing unit, the inclusion of such employees results in an overall unit which meets the criteria for appropriateness of unit set forth in 5 U.S.C. 7112(a)(1). If the proposed unit to be added is not a residual unit (covering all unrepresented employees), it **constitutes independently an appropriate unit**. Thus, in any case involving an add-on to an existing unit, if the unit is not a residual unit, the three appropriate unit criteria are applied (*RCL 2*). Add-ons usually occur in one of two circumstances:

a. when a labor organization seeks to add to its existing unit a group of unrepresented employees in an activity or agency. For example, a labor organization has an agency-level certification for a consolidated unit and seeks to add a group of unrepresented employees to the consolidated unit.

b. when a labor organization seeks to add to its existing unit a group of represented employees. For example, a labor organization holds exclusive recognition for part of an activity (Unit A) and raids another unit (Unit B) to add these employees to its existing unit (Unit A). Both units (A and B) are appropriate and a combined unit is also appropriate. Thus, the resultant election could be a self-determination election and the effect of a vote for the petitioner could be to add Unit B to Unit A. A vote for the

incumbent is a vote to remain in Unit B. *U.S. Department of Labor, Pension and Welfare Benefits Administration,* 38 FLRA 65, 73 (1990).

**28.16.1 Policy considerations in add-ons to consolidated units:**

**28.16.1.1 Local union files a petition:** A local labor organization seeks an election to represent employees at an agency where its national union is certified as the exclusive representative of a single agency/activity-level consolidated unit of employees. This filing may raise standing to file issues as discussed in *CHM 4.7* and unit fragmentation issues.

a Standing to file issues: Such petitions normally seek to add the unrepresented employees to the existing consolidated unit. The petition is defective if the local union is not authorized by the parties to the certification to file the petition to add the unit to the consolidated unit (see *CHM 4.7 and 12.3*). The parties to the nationwide consolidated certification are notified of the petition (see *CHM 14.2*).

b. Unit fragmentation issues: These situations occur when a party other than the national labor organization holding the certification for a consolidated unit files the election petition, but does not seek to add the unit to the national consolidated unit. If the petitioner, such as a local union, refuses to add the petitioned-for unit to the consolidated unit for which the national union is the exclusive representative, the region contacts the Office of the General Counsel. This scenario does not raise standing to file issues, but rather unit fragmentation issues as the unit, standing alone, may not be appropriate.

**28.16.1.2 Petition filed to add professionals to a consolidated unit of professionals and nonprofessionals:** see *CHM 28.15.1.1b*.

**28.16.2 Appendix to Election Agreement:** The Election Agreement and the Notice of Election reflects the effect of the vote in an add-on election. See Figure 28.16.

**28.16.3 Certifications for inclusion in existing unit:** When employees in a representation election vote for inclusion in an existing unit, a Certification of Inclusion in Existing Unit, FLRA Form 192, is issued. See *CHM 56* for guidance and samples.

**28.17 Elections to consolidate existing units:** If an election is sought by thirty (30) percent of the affected employees (see *CHM 23.10*), an election is conducted or supervised by the Regional Director.

**28.17.1 Parties do not agree on election procedures:** In a consolidation case, the basis and procedures for obtaining an election agreement are identical with those in other representation cases. When either party refuses to sign the Election Agreement because of issues related to the appropriateness of consolidating the existing units [§§ 2422.16(c) and 2422.30], the parties are afforded an opportunity for a hearing and a Decision and Order is required (*CHM 28.11.2.1*). If the parties refuse to sign the Election Agreement for procedural or other issues unrelated to unit appropriateness, the procedures discussed in *CHM 28.11.1 and 28.11.2.2* are followed.

**28.17.2 Limitations on employee participation:** Employees may not intervene in a unit consolidation petition even though they have submitted a 30 percent showing of interest and seek an election. No individual may seek to represent the employees' interest regarding election arrangements, participate in a hearing, have observers at the election, challenge ballots, or file objections to any election. (Policy carried over from Executive Order 11491.)

**28.17.3 Election procedures:** The consolidation procedure is the only procedure under the Statute whereby an exclusive representative may be certified without an election. However, certain situations require that consolidation elections be held. As noted earlier (*CHM 23.11.1*), the employees are given the opportunity to show an interest in having an election on the issue of consolidation. If thirty percent (30%) of the affected employees request an election, the Regional Office secures an election agreement (FLRA Form 34, Agreement for Unit Consolidation Election) and conducts the election, using the procedures available for other representation elections, with the exceptions noted below (See FLRA Form 36A and 36B, Notice of Election). There is no provision for runoff elections.

**28.17.4 Requiring elections when consolidating professional employees into mixed units:** The status of professional employees presents some unique problems when conducting consolidation elections. The Statute requires that professionals be given a self-determination election when they are sought to be included in a unit with nonprofessional employees. Therefore, professional employees are given a self-determination election in consolidation proceedings when:

a. the professionals are voting with nonprofessional employees on the issue of the proposed consolidation;

b. the petition seeks to consolidate existing units of professional employees with existing units of nonprofessional employees;

c. some of the units included in the proposed consolidation include professionals in mixed units, but not all of the units include professionals. All of the professionals, including those in mixed units, get the opportunity to vote in an election to determine their unit (i.e., whether there will be a separate, professional consolidated unit or one professional nonprofessional-professional consolidated unit). Such self-determination elections are required even if thirty percent (30%) of the employees do not request an election.

See also *CHM 28.15.1.1* for a discussion on related issues.

**28.17.5 Types of consolidation elections:** Three types of elections are possible under the consolidation procedure:

a. The employees in the proposed consolidated unit are all either professionals or nonprofessionals. This election takes place when requested by an employee showing of interest. The employees choose whether they wish to be represented in a consolidated unit or wish to remain in their existing units. The Sample Ballot in Figure 28.17A is utilized in this type of election. The tally of ballots for this type of election is prepared on FLRA Form 39, Tally of Ballots, and is modified for consolidation elections. If the employees vote for the consolidated unit, the Regional Director will issue, absent a timely objection to the election or determinative challenged ballots, FLRA Form 29, Certification on Consolidation of Units. If the employees reject consolidation, the Regional Office issues FLRA Form 27, Certification of Results of Election. In such cases, the employees continue to be represented in their existing units. See *CHM 56* for guidance in preparing certifications.

b. The proposed consolidated unit includes both professional and nonprofessional employees, but a general election of all the employees is not sought by an employee showing of interest. In this instance, only the professionals participate in an election. They have one issue to decide, whether they desire to be represented in a consolidated professional unit or a consolidated mixed unit. The Sample Ballot in Figure 28.17B is utilized in this type of election. The tally of ballots for this procedure is prepared on the first section of FLRA Form 41. If the professionals vote to be in a mixed consolidated unit, the Regional Office will issue one certification covering the mixed consolidated unit. If they vote for a separate professional unit, two certifications, one for the professional consolidated unit and one for the nonprofessional consolidated unit, are issued by the Regional Director.

c. The proposed consolidated unit consists of both professional and nonprofessional employees and the affected employees file a sufficient

showing of interest to warrant an election. The professionals are given two questions on their ballot. The first question is identical to that asked of all the employees in the proposed unit; i.e., whether or not they wish to be represented in a consolidated unit or remain in their existing units. The ballots of all the employees, both professional and nonprofessional, are tallied first with respect to this question. A modified FLRA Form 39 is used for the tally. If a majority of all of the voting employees vote to be represented in a consolidated unit, the ballots of the professional employees are then tallied separately with respect to the second question; i.e., whether they wish to be in a separate professional consolidated unit or to be part of a mixed consolidated unit. In this type of election, the ballot format for the nonprofessional will be similar to the ballot in Figure 28.17A while the professional will use the format shown in Figure 28.17C. The separate professional tally is recorded on FLRA Form 41. If a majority of all the employees vote against consolidation, a certification of the results of the election is issued by the Regional Director, FLRA Form 27. If the employees vote for consolidation and the professionals vote for a mixed unit, one certification on consolidation is issued for the mixed unit. However, if the professionals choose to be represented in a separate consolidated professional unit, separate Certifications on Consolidation are issued by the Regional Director for both the professional and nonprofessional units.

***NOTE: Any election agreement obtained for a unit consolidation election includes the same Appendices that describe the units, voting groups and the effect of the vote as previously discussed in CHM 28.15.***

## *CHM 28.18* THROUGH *CHM 28.31* COVER ELECTION DETAILS DISCUSSED AT ELECTION AGREEMENT MEETINGS

**28.18** **Details of the election agreement form:** Except where specifically noted, this subsection applies to all election agreements (FLRA Forms 33 and 34). Election agreement meetings are held onsite or conducted telephonically.

**28.18.1** **Names of parties:** The correct and complete name(s) of the parties are inserted in the Election Agreement.

a. Agency / Activity: The correct and complete name of the agency and activity are included in the unit description in the order in which the parties agree that will reflect the level of recognition (see *CHM 28.14*). **The agency designation in the unit description are reflected in the caption on the ballot.** "Agency" as defined in 5 U.S.C. 7103(a)(3) means an Executive agency, the Library of Congress, and the Government Printing Office. Exceptions are reflected in 5 U.S.C 7103(a)(3). "Activity" as

defined in § 2421.4 of the regulations means any facility, organizational entity, or geographical subdivision or combination thereof, of any agency.

b. Labor organization(s): The correct and complete names of any labor organizations are inserted in the paragraph headed "Wording on the Ballot" in Item #8 on FLRA Form 33. If a shortened name is requested, it is shown in addition to the full name and is placed in parentheses. The wording on the ballot will reflect the wording on the Certification of Representative, if one issues. Where there is only one labor organization on the ballot, and the question asks for a "yes" or "no" response, the name of the labor organization is placed next to the heading "first."

In unit consolidation elections, the correct and complete name of the agency and/or activity and the labor organization(s) are inserted in the paragraph discussing the effect of the vote. This wording is used on the ballot and will reflect the wording on the Certification of Representative, if one issues.

**28.18.2 Positions on the ballot:**

a. Where two (2) or more labor organizations are on the same ballot, the position of their names on the ballot is generally determined by agreement of the labor organizations involved. The petitioning labor organization does not enjoy any special privilege or preference in determining position on the ballot. If the labor organizations are unable to reach agreement, they may resort to a toss of the coin, drawing of lots; or the Regional Director decides the matter.

b. The wording of the negative choice on the ballot depends upon the number of labor organizations appearing on the ballot:

(i) single labor organization -- "Yes" and "No" choices;

(ii) two labor organizations -- The name of each and a "Neither" choice; or

(iii) three or more labor organizations -- the name of each and a "No Union" choice.

c. The specific negative designation, "Neither" or "No Union" is used where two or more labor organizations are involved. There is no fixed position for either of these negative choices on the ballot, and therefore, it is determined as part of the sequence of all choices reading from left to right on the ballot.

**28.18.3 Eligibility period for participating in the election and preparation of voting list:**

Section 2421.19 defines "eligibility period" as the payroll period during which an employee must be in an employment status with an agency or activity to be eligible to vote in a representation election.

**28.18.3.1 Eligibility:** Eligibility to vote is based upon: 1) employment in the unit as of a specified payroll period and 2) the employment status of the employee on the date the ballots are counted. To be eligible to vote in an election, an employee must be eligible to vote both on the cutoff date for eligibility established in the Election Agreement and on the date the election is held. *U.S. Army Corps of Engineers, Headquarters, South Pacific Division, San Francisco, California,* 39 FLRA 1445 (1991).

a. In an election agreement, eligible employees are those employees who were employed during the payroll period that ends immediately preceding the execution of the agreement.

b. In a directed election, the eligibility period is fixed by the Decision and Order and Direction of Election, or in certain circumstances and absent the parties' agreement, the Direction of Election. The eligibility period for participating in an election in the Regional Director's Decision and Order and Direction of Election is the payroll period immediately preceding the date of the decision. If the Authority directs an election, the eligibility period is the payroll period immediately preceding the date of the Authority's Decision or the date set by the Authority in its decision. See Department of Defense Dependent Schools, 6 FLRA 297 (1981).

In no event is the payroll period one that is after the parties have signed the agreement. If questions arise concerning **setting an eligibility date which follows the date that the Election Agreement is approved, e.g., due to an expansion or contraction of the unit, the region contacts the Office of the General Counsel.**

**28.18.3.2 Employment during the designated payroll period:** Employees in the unit who are employed during the designated payroll period include: 1) those who did not work during that period because of illness, vacation or furlough; 2) employees on military leave if they appear at the polls; and 3) any employee who has been removed and is appealing such adverse action may vote under challenge. Ineligible to vote are employees who have quit or been discharged after the designated payroll period and who are not rehired before the date of the election.

**28.18.3.3 Posting of eligibility list:** The list of employees who are eligible to vote **may not** be posted with the Notice of Election or in any other manner. The inadvertent omission of a name may discourage an employee from appearing at the

voting place where the opportunity to vote by challenged ballot is available. The agent reminds the parties not to distribute copies of the eligibility list.

**28.18.3.4 Reviewing the eligibility list at the election agreement meeting:** The parties review the most current list prepared by the activity during the election agreement meeting.

Role of Agent:

a. Make sure parties understand consequences of their agreements.

b. Take efforts to reduce any future inclusion/exclusion questions.

c. Take an active role setting out case law and help parties apply that law, including suggesting inclusions/exclusions.

d. Raise with the parties whether a particular position is eligible or ineligible for the unit (regardless of the parties' agreement) when:

(i) the agent's review of the list reveals that the title of the position or the grade level raises a question of the status, or
(ii) the agent has independent knowledge that brings into question the status.

If the agent's questions (based on face of the list or independent knowledge) are not resolved to the satisfaction of the agent, the agent reports to the RD who can decide to approve the parties' agreed upon list or hold a hearing.

The list:

Usually this is the same list, or an updated list, that the activity furnished to the region to check the showing of interest (*CHM 28.9.2*). It is preferable to use an updated eligibility list as of the date of the proposed cutoff period for eligibility. The parties and the agent review the list for inaccuracies and raise any eligibility issues during the meeting. If the parties are unable to resolve the eligibility issues, follow the guidelines described in *CHM 28.11 and 28.12*. If the election agreement meeting is held onsite and the parties agree to the list, the parties initial the list signifying that it is the official eligibility list. The agent takes custody of

the list and it is the official list used during the election. An exception is when there are multiple polls and separate voting lists of voters assigned to each polling site are prepared (*CHM 28.21.1*).

If an updated list is not available at the election agreement meeting, the activity provides an updated list to all parties immediately following the election agreement meeting or teleconference, but in no event later than the pre-election conference. Prior to the election, the agent has the parties check and approve the list promptly.

**28.18.3.5 Impact of the parties agreement on the eligibility list on future eligibility issues:** If parties agree on inclusions and exclusions, and the Regional Director approves an election agreement, those inclusions and exclusions are binding unless:

a. If ineligible - stay ineligible unless:

(i) changed circumstances, see *Federal Trade Commission (FTC I)*, 15 FLRA 247 (1984) (the parties can show that the duties and functions of established positions or job classifications covered in such agreements have undergone meaningful changes after the unit was certified), or

(ii) positions were eligible in the first instance and constitute a residual unit. See *Federal Trade Commission (FTC II)*, 35 FLRA 576 (1990).

b. If eligible - stay eligible unless:

(i) changed circumstances, or

(ii) position was ineligible in the first instance under 7112(b)(1) thru (7) statutory exclusions. See *U.S. Department of the Army, U.S. Army Law Enforcement Command Pacific, Fort Shafter, Hawaii*, 53 FLRA 1602 (1998) (the parties improperly agreed to include positions that were not in conformance with the Statute and were subject to statutory exclusions).

If parties agreed under 15% rule to disagree and allow the vote, and if not resolved as a challenge before tally or resolved as a determinative challenge after tally - either party can file a petition to clarify a particular position covered by the 15% agreement.

**28.18.3.6 Contents of eligibility list:** A typical voting list is divided into two parts: one part lists the names of all employees who are eligible to vote; the second part lists all employees who are not eligible to vote. In addition to the employee's name, other identifying information includes the employee's position, title and grade, and the activity code or shop number where the employee works. This information assists the observers in identifying anyone not known to them. Identifying information is particularly important if two voters have the same name.

If there are professional employees voting with nonprofessional employees, the list is annotated to reflect the professional employees.

**28.18.3.7 Updating the list before the election:** The agent reminds the activity in the letter transmitting the approved Election Agreement that the activity is required to update the eligibility list prior to the manual election or before the mail-out of the ballots. This can be done several ways. Guidance is found at *CHM 35.2 - 35.6.*

**28.19 Considerations in deciding the type of election:** The Authority's 1981 policy states that manual elections should, "to the extent possible," be held in multi-union elections unless the parties agree to a mail ballot election approved by the Regional Director. Manual ballot elections are encouraged in all elections, regardless of the number of labor organizations on the ballot (see *CHM 28.8)*. The 1996 revisions to the Representation regulations give Regional Directors the discretion in § 2422.16(b) to decide the method of elections. Regional Directors consider the following in deciding whether to conduct a mail or manual ballot election:

a. location and size of the voting unit; a mail ballot election is used if most of the employees in the unit are widely dispersed or whose work stations are in isolated or remote locations;

b. significance of the election to the community;

c. availability of regional resources; and

d. other factors, such as temporary addresses, summer vacations, etc.

*See also Army and Air Force Exchange Service, Dallas, Texas*, 55 FLRA 1239 (1999).

**28.20 Manual ballot procedures:**

**28.20.1 Date of manual ballot election:** The date selected is one that balances the desires of the parties, operational considerations, facilitating employee participation, and a prompt the election. Avoid dates near holidays or heavy vacation

schedules.

An election is held as soon as possible, but the region ensures there is ample time to prepare the materials, obtain an updated eligibility list and have the notice of election posted. The notice of election is posted at least three working days prior to the date of the election (see *CHM 33*).

**28.20.2 Date of election following Decision and Order and Direction of Election:** After issuing a Decision and Order and Direction of Election, absent a stay, the agent, on behalf of the Regional Director, meets with the parties, and schedules and conducts the election following procedures outlined below. **Regions are not authorized to impound ballots.** See § 2422.31(f) that states "neither filing nor granting an application for review shall stay any action ordered by the Regional Director unless specifically ordered by the Authority." See also *CHM 28.29* for processing elections during the period for filing an application for review of the Regional Director's decision and potential Authority action.

***NOTE: If possible, the region will provide for a potential runoff election in the original Election Agreement. Such provisions include the date, time and place of the election. See CHM 48.1.6.***

**28.20.3 Selection of hours:** The hours of the election depend on the circumstances of each case. The agent and the parties are responsible for scheduling every polling session to guarantee the time of day and length of time is adequate for all voters to cast their votes on official time. It is essential that all eligible employees be afforded sufficient opportunity to vote. The polling hours are based on the total number of employees eligible to vote and the nature of the operations of the activity involved. Thus, where the operations are such as to require that a certain number of employees be on the job at any given time or that certain tasks be completed before an employee can leave to vote, the duration of the voting period is adjusted accordingly. As a general rule, about two hundred (200) employees can vote per hour per polling place, assuming a continuous flow using one checking table and four booths.

**28.20.3.1 Multiple voting periods:** Where the activity operates one or more shifts, the number of voting periods are established as follows:

a. 1-shift operation -- one voting period, usually at the beginning of the shift;

b. 2-shift operation -- one voting period overlapping the end of the first shift and the beginning of the second shift; or

c. 3-shift operation -- one voting period overlapping the third and first shifts and a second voting period overlapping the first and

second shifts.

Any other combination of voting periods may be agreed upon if deemed desirable or necessary by the parties.

**28.20.3.2 Scheduling election when polling hours cannot be set:** In very rare circumstances, it may not be possible to set the polling hours in the Election Agreement. An example includes employees who work on floating barges dredging rivers and the Activity cannot predict when the barge will dock. These circumstances are detailed carefully in the Election Agreement so that the Agreement clearly reflects the circumstances as well as the parties' agreement and arrangement to vote the eligible employees.

**28.21 Selection of place to hold election:** The agent and the parties select a polling place that is: a) within easy access to the employees (see *CHM 28.9.3*); b) is spatially and visually separated from the scene of any other activity during the voting period; and c) has adequate space for all equipment and all personnel. A convenient location facilitates greater participation in the election. An office, conference room, shipping room etc., are examples of appropriate places. Often, a polling site has two doors, one to use for an entrance and one to use as an exit. This arrangement minimizes potential objectionable conduct by voters (see also *CHM 38.5*). If possible, elections are not scheduled outdoors.

The location of the polling place is also based on such factors as freedom from noises and interference due to nearby operating machinery, heavy traffic of people or equipment, etc. and enough space to accommodate a steady flow of voters.

**28.21.1 Multiple polling places:** In large installations, involving several thousand employees and/or where the employees are widely dispersed, multiple polling places are required. It is important, however, that a separate voting list be prepared, alphabetically, for each polling place in order to preclude the possibility of multiple voting. If the activity is unable to divide the eligibility list or limit the accessibility of the polling sites to the voters, the agent includes arrangements in the Election Agreement for ensuring that multiple voting does not occur. One alternative is to provide the voters with voting cards prior to the election. The Agreement will reflect that the activity will ensure the cards are distributed and that to vote unchallenged, the voter hands in the card and show his/her identification.

The Notice of Election reflects the locations of all of the polling places and the parties' agreement as to the procedures for voting the employees. The Notice of Election also states that any employee who is unable to vote at the designated polling place or fails to receive special identification, etc., may vote at any other location by challenge.

**28.22 Policy on voter identification: Procedures for identifying voters are included in the Election Agreement and the Notice of Election describes the voter identification procedures.** As part of the Election Agreement Conference, the Agent raises the issue of voter identification with the parties. The Regional Director has the discretion initially to determine whether identification is necessary under the circumstances, considering such factors as the size of the election, the number of voting locations, whether roving polls are used, the parties' interests, etc.

a. If the Regional Director and the parties agree that voters are not required to show identification, the agreement reflects that identification is not required in order to vote. This does not preclude an observer from challenging a voter s/he believes is not eligible to vote. The voting list includes identifying information such as the employee's position title and grade, the activity code or shop number where the employee works (CHM 28.18.3.5). This information will assist the observers in identifying anyone who they do not know. This is particularly important if there are two voters with the same name.

b. If the parties agree that employees show identification in order to vote, the agreement defines the acceptable identification. The agreement also reflects that if a voter does not bring identification to the polling site, the observers may require the voter to get the identification. Additionally, the agreement may state that the voter may be allowed to vote as long as one of the observer's knows the voter by name and the other observers do not challenge the voter's eligibility.

c. If the parties agree that some form of identification is required in a multiple polling site election, the Election Agreement includes identification procedures that describe the types of identification that are acceptable to the observers.

**Procedures for identifying voters are included on the Notice of Election.**

d. When the parties can not agree on procedures for identifying voters, voter identification will be required. The issue is treated as a procedural matter pursuant to § 2422.16(b) and the Regional Director issues a Direction of Election (CHM 28.11 and 28.12). For voting procedures, see CHM 40.5.

**28.23 Mail ballot elections:** Where the parties agree upon an all mail ballot election, the details are set forth in an Appendix to the Election Agreement. Item #10 of FLRA Form 33 and Item #8 of FLRA Form 34 state, "See Appendix attached to and made a part of this ... ." The Appendix:

a. provides:

(i) the date of mailing of the ballots and accompanying material to the employees;

(ii) the date by which the ballots must be received in order to be counted;

(iii) the date and place of the count of the mail ballots; and

(iv) procedures when an eligible employee fails to receive a ballot.

Generally, a period of about three to four weeks is allowed for the forwarding and return of the mail ballots.

b. includes the return mail address for the mail ballots. The address is usually the region's office address or a post office box that the region rents for mail ballot elections;

c. describes the activity's responsibility to prepare mailing labels for eligible voters at their home addresses and provide them to the Regional Office by a date certain; and

d. includes any other details which are pertinent to the circumstances of the particular mail ballot election.

See Figure 28.23 for a sample Mail Ballot Appendix.

**28.23.1** **Eligibility list:** The eligibility list for use in a mail ballot election is usually prepared alphabetically, unless there are other unique organizational concerns that warrant organizing the list another way. It contains the same information as discussed in *CHM 28.18.3.* Where a dispute arises regarding the eligibility of any employee(s) (the participating labor organization(s) contending that the employee(s) are eligible and the activity asserting a contrary position) the activity includes the disputed name(s) on the list in accordance with the parties agreement (see *CHM 28.11.3.2*). The list is due in the Regional Office by a date established in the Election Agreement. The Election Agreement also sets forth the activity's duty to furnish the region by a date certain, the names and home addresses of all eligible employees on mailing labels. **If an activity refuses to provide the employees' mailing addresses, contact the Office of the General Counsel immediately. Provide the name and telephone number of the activity representative who made the decision.**

***NOTE: The region may not give a copy of the employees' home addresses to the union under any circumstances. Questions are referred to the Office of the***

***General Counsel.***

**28.23.2 Eligibility statement and signature:** An eligibility statement and space for the voter's signature appear on the outer envelope in which the mail ballot is returned.

This envelope includes

the following statement of voting eligibility on the left side of the return envelope:

"I believe I am an eligible voter in this election. I personally voted the within ballot."

_____
(Signature of Voter)

_____
(Print name)

The mail ballot is void if the signature of the voter does not appear on the return envelope when received. This requirement is included in the Appendix to the Election Agreement. See Figure 28.23.

**28.23.3 Use of key numbers:** In mail ballot elections involving a substantial number of

employees, the use of key numbers as a means of facilitating identification of the voters is encouraged. This procedure involves:

a. Each name on the eligibility list is numbered in sequence, this number being placed immediately adjacent to the name on the list;

b. The number assigned to each employee is entered immediately above the typed statement of voting eligibility on the return envelope being forwarded to that employee; and

c. When checking the returned mail ballots against the eligibility list, the signature and number appearing on the outer envelope is compared with the name and number on the list.

**28.23.4 Material accompanying the mail ballot:** The following items accompany the mail ballot when forwarded to the voter's residence:

a. Notice of Election and Instructions To Eligible Employees Voting By United States Mail, FLRA Document 1013;

b. Copy of the Notice of Mail Ballot Election, FLRA Forms 125B , 210B (3 blank panels) or 36B (consolidation election only) or Notice of Election [FLRA Form 125A, 210A(3 blank panels) or 36A in mixed mail/manual elections] or a facsimile thereof;

c. Envelope marked "Secret Ballot" (FLRA Form 1280); and

d. Self-addressed business reply envelope that is signed by the voter and used to return the ballot in the secret ballot envelope (FLRA Form number by region).

The envelope used to mail the election materials to eligible voters is clearly marked with instructions to open upon receipt.

**28.23.5 Alerting regional staff:** To ensure proper handling and safeguarding of the returned mail ballots**,** the agent alerts the regional staff about the election when mail ballots are sent out, placing particular emphasis on the fact that such mail is not opened.

**28.24 Mixed manual and mail ballot election:** An election may be conducted under the terms of an election agreement in which a major portion of the employees vote manually; i.e., in person, and the remainder by mail ballot. The mail ballot procedure in such instances is limited to those eligible employees who will not be able to vote manually because they are absent on official business on the day of the election, or are located in remote sites (*CHM 28.19 and 43.7*). Mail ballots are **not** sent to any eligible employee for any other reason such as illness, vacation or furlough that may

preclude the employee from being able to vote on the day of the election.

In the event that the parties agree to use mail ballots in conjunction with a manually conducted election, the mail ballot procedure is set forth in an Appendix to the agreement, as discussed in *CHM 28.23*. The last day for receipt of the mail ballots is generally the day before or the day of the manual election so both groups of ballots can be counted at the same time. Under no circumstances are the mail ballots counted separately from the manually cast ballots. **Exceptions are cleared with the Office of the General Counsel.** In all instances, the mail ballot is identical in all respects with the ballot used in the manual portion of the mixed election (assuming both groups of employees are included in the same voting unit - see *CHM 34* for ballot preparation).

***NOTE: The Notice of Election used for a mixed mail/manual ballot election is** FLRA Form 125A **or FLRA Form 210A (3 blank panels). The ballots used are the same.***

**28.25** **Absentee ballots:** Absentee ballots are used when the parties anticipate that employees will be away from the activity on official business on the day of the manual ballot election (TDY), but are unable to predict the date of their departure or return. As a result, a mail ballot procedure is impractical. Employees who are absent for any other reason including illness, vacation, furlough (see *CHM 28.18.3.2*), are not eligible for the absentee ballot procedure.

The absentee ballot procedure is handled by representatives of the parties designated at the time of the Election Agreement, whose names are included in the Agreement as points of contact. An Appendix to Item #10 is prepared similar to an Appendix describing the Mail Ballot Procedure. The Appendix includes a description of the employees who are eligible to receive an absentee ballot, procedures for obtaining an absentee ballot, and instructions to the activity and labor organization(s) for conducting an absentee ballot. See Figure 28.25 for a sample Appendix that outlines the procedures for handling absentee ballots. Absentee ballots are considered challenged ballots to ensure that employees who receive absentee ballots do not also vote in the manual ballot election (*CHM 47.7.3*).

During the election agreement meeting the agent:

a. explains the purpose of the Absentee Ballot procedure to the parties;

b. obtains information on the number of employees who could be eligible for the procedure; and

c. offers the procedure to the parties for voting eligible employees.

**The use of absentee balloting is required when there are a significant number of employees on "TDY" who will be disenfranchised from the election.** The

procedure is discretionary only if the region agrees that the number of employees who may be on "TDY" is so insignificant that the absentee ballot procedure is impractical. If the parties decline the Absentee Ballot procedure in these circumstances, the Election Agreement reflects that the parties do not wish to use the procedure and waive their right to file objections on this matter.

Unusual elections may provide for a manual, mail and absentee ballot procedure. As in Mail Ballot Procedures, information about Absentee Balloting is included in the Notice of Election.

**28.26** **Custody of ballots between voting sessions:** The FLRA agent assigned to conduct the election always maintains control of the ballots, the eligibility list and the ballot box between voting sessions. This information is recorded in Item #12 of FLRA Form 33 and Item #10 of FLRA Form # 34.

**28.27** **Tally of ballots:** In manual ballot elections, the count of the ballots usually occurs immediately after the polls are closed; or in a mail ballot election, the day after the ballots are due to be returned or on the day the ballots are due. Absentee ballots are counted with other ballots. (See also *CHM 28.24*). The Election Agreement includes the time and place of the count of the ballots in Item # 13 (FLRA Form 33) and Item # 11 (FLRA Form 34). *CHM 47* discusses procedures for tallying ballots and *CHM 47.16* discusses completing the Certification of Tally.

**28.28** **Service of the tally:** Section 2422.25(b) requires the tally to be served in accordance with the Election Agreement or Direction of Election. Since objections must be received within five (5) days after the tally has been served [§ 2422.26(a)], the regions are responsible for serving the tally consistent with the Election Agreement or Direction of Election. Item #15 (FLRA Form 33) and Item #13 (FLRA Form 34) require the parties to state how the tally will be served. The region honors each parties' request for service of the tally.

**28.29** **Processing elections during appeal period or while appeal is pending:** After issuing a Decision and Order and Direction of Election, absent a stay, the agent on behalf of the Regional Director, meets with the parties, and schedules and conducts the election following procedures outlined below.

**28.29.1** **Authority action after an application for review is filed:** When an application for review is filed, the party seeking review may request the Authority to stay the election until such time as it rules on the application. The Authority may deny a stay, grant the stay (but has not yet done so), or grant the Regional Director discretion to stay the election on his/her own initiative. In cases where discretion is granted, the Authority has ordered the region, in the event an election is conducted, to impound the ballots. See *CHM 55.2* for standards that the Authority has adopted for deciding whether to stay an election. *Department of the Army, U.S. Army Aviation Missile Command (AMCOM I), Redstone Arsenal, Alabama,* 55 FLRA 640 at 644 (1999). See *CHM*

*55.2.1* for procedures for impounding ballots.

If the Authority grants the Regional Director discretion to conduct the election, contact the OGC. *CHM 58.3.12.*

**28.29.2 If the Authority denies a request for a stay:**

a) conducts the election,
b) counts the ballots,
c) issues and serves the tally of ballots,
d) investigates any determinative challenged ballots or timely objections to preserve the evidence,
e) contacts the Office of the General Counsel prior to issuing the Decision and Order,
f) if appropriate, issues and serves the tally of ballots; but
g) delays issuing the certification until such time as the Authority rules on any pending application for review.

See also *CHM 55.1.2 and 55.1.3 - policy considerations.*

**28.29.3 Regional Directors are not authorized to impound ballots on their own initiative:** Section 2422.31(f) states "neither filing nor granting an application for review shall stay any action ordered by the Regional Director unless specifically ordered by the Authority." If no stay is requested, the region:

a) conducts the election,
b) counts the ballots,
c) issues and serves the tally of ballots,
d) investigates any determinative challenged ballots or timely objections to preserve the evidence; and
e) contacts the Office of the General Counsel prior to issuing the Decision and Order if one is required.

If there are no determinative challenged ballots or objections, the case is held in abeyance. Regional Directors may not issue the certification while an appeal is pending since issuing a certification constitutes a final action by the Authority.

**28.30 Waiver of right to file an application for review:** The region informs the parties during the election agreement meeting that, as part of the Election Agreement, they may waive their right to file an application for review with the Authority of the Regional Director's Decision and Order that may issue on objections and/or determinative challenged ballots.

**28.31 Side agreements:** Parties may enter into a separate side agreement setting out the ground rules regarding various aspects of pre-election activities, such as

campaigning, distribution of election materials, etc. **Under no circumstances shall such agreement be made a part of the Election Agreement or Direction of Election by incorporation by reference, attachment, or otherwise.** The Authority does not police such agreements. The regions, however, investigate any conduct constituting an objection that allegedly improperly affected the conduct or the results of the election, regardless of whether it is included in the party's side agreement. *Veterans Administration Hospital, Jamaica Plain, Massachusetts,* Case No. 31-3178, 1 Rulings on Requests for Review 85 (1970), Report on Ruling Number 20, 1 A/SLMR 615 (1970). Also discussed in *CHM 46.1.2.*

**28.32 Election Agreement obtained immediately preceding or during a hearing:** Election Agreements may be obtained anytime after the notice of hearing issues and during the hearing. Follow the guidance described in this section for negotiating the details of the agreement. For procedural guidance on processing election agreements obtained immediately prior to or during a hearing, see *HOG 31*. Approval of the Election Agreement constitutes withdrawal of the Notice of Hearing (*CHM 29.10*).

**28.33 Election agreements obtained after the close of a hearing:** When an election agreement is reached after a hearing is closed, the Regional Director will review the Election Agreement to ensure that any unit claimed to be appropriate meets the appropriate unit criteria as set forth in 5 U.S.C. 7112(a)(1). Approval of the Election Agreement constitutes withdrawal of the Notice of Hearing (*CHM 31.7)*.

**28.34 Interventions, cross-petitions and challenges filed at the election agreement meeting or prior to the Regional Director's approval of the Agreement or Direction of Election:** These are threshold issues that are considered by the Regional Director before s/he can approve the Election Agreement or issue a Direction of Election.

**28.34.1 Interventions or cross-petitions:** An intervention request or cross-petition filed at the election agreement meeting or prior to the Regional Director's approval of the Election Agreement or Direction of Election is a threshold issue that is resolved before the Regional Director can approve the Election Agreement or issue the Direction of Election. If the requests are made during the election agreement meeting, and if the intervention request or cross-petition cannot be decided quickly, the meeting is adjourned.

The procedures outlined in *CHM 17* are followed in processing intervention requests or cross-petitions. If the intervention is granted or the cross-petition is consolidated with the petition pending action, the election agreement meeting is reconvened with the intervenor or cross-petitioner as a party to the proceeding.

There are three possible scenarios when interventions or cross-petitions are filed at the election agreement meeting:

a. The agent checks the sufficiency of the intervention request or cross-petition and contacts the Regional Director for approval to approve the intervention or cross-petition. In this situation, the intervenor or cross-petitioner is permitted to participate in the election agreement meeting as a party.

b. The agent checks the sufficiency of the intervention request or cross-petition and determines that the intervention or cross-petition is not supported by adequate evidence. The agent contacts the Regional Director to discuss the evidence. The Regional Director directs the agent to refer the intervention request or cross-petition to him/her for processing and disposition. In this scenario, neither the party requesting intervention nor the cross-petitioner may participate in the election agreement conference.

c. The agent checks the sufficiency of the intervention request or cross-petition and cannot make a recommendation to the Regional Director because the request or petition may raise issues that cannot be resolved immediately. The Regional Director will instruct the agent to postpone the election agreement meeting until s/he decides the merits of the request to intervene or cross-petition. If the Regional Director decides to grant intervenor or cross-petitioner status, the election agreement meeting is reconvened. If the Regional Directordecides to deny the intervenor or cross-petitioner status, s/he may issue a Decision and Order denying the intervention or dismissing the cross-petition at the same time s/he approves the Election Agreement or issues the Direction of Election.

**28.34.2 Validity challenges:** Challenges to the validity of the showing of interest raise a threshold issue that is resolved before the Regional Director approves an election

agreement or issues a Direction of Election. If the challenge is made during the election agreement meeting, the meeting is adjourned so that the challenge can be investigated and decided. All evidence is submitted at the time the challenge is filed. A determination that the challenge does not raise a valid issue is handled administratively and will not delay further proceedings. A decision that a valid challenge has been raised to the petitioner's showing of interest may result in the dismissal of the petition (see *CHM 18.19.16*). In such cases, absent withdrawal, the Regional Director issues a Decision and Order dismissing the petition. A Decision and Order finding that the challenge to the intervenor's showing of interest is valid will not stay processing the case unless specifically ordered by the Authority.

**28.34.3** **Status challenges:** A status challenge raises a threshold issue that the Regional Director investigates before approving an election agreement or issuing a Direction of Election. If a challenge to the status of a labor organization is filed pursuant to section 7103(a)(4) or pursuant to section 7111(f)(1) of the Statute alleging that the labor organization is subject to corrupt influences or influences opposed to democratic principles, the region investigates the challenge prior to executing the election agreement. See *CHM 19* for investigating challenges filed pursuant section 7103(a)(4). See *CHM 20.1.8* and *CHM 23.9.3* for investigating challenges based on 7111(f)(1). Note that a status challenge filed pursuant to section 7111(f)(1) may block the case if the challenging party shows that a complaint has been filed properly with a third party. See *CHM 23.9.3.3.*

Any status challenge made prior to or during the election agreement meeting is treated as an "other than procedural matter" pursuant to § 2422.16(c). Pursuant to § 2422.16(c) the Regional Director is required to provide the parties an opportunity for a hearing on other than procedural matters (*CHM 28.11.2.2*). If there are no questions regarding unit appropriateness, the Regional Director may issue a Direction of Election without a Decision and Order (*CHM 19.6*).

By issuing the Direction of Election, the Regional Director decides that the status issue does not interfere with conducting the election. The Direction of Election is issued without prejudice to a party's right to file a challenge to the eligibility of any person participating in the election and/or objections to the election. If objections concerning the status of the labor organization are filed after the election, the Regional Director has a record that forms the basis of the objection's investigation (*CHM 50*).

Neither a Decision and Order: a) denying a status challenge in the case of a petitioning or intervening labor organization; or b) granting the challenge in the case of the intervening labor organization; nor the filing or granting of an application for review will stay processing the petition unless specifically ordered by the Authority. The regions contact the Office of the General Counsel whenever questions arise concerning deferring a petition pending an appeal of a decision based on a challenge to the status of a labor organization. See also *CHM 55*.

**28.35 Forwarding the Election Agreement to the Regional Director for approval:** The agent prepares a recommendation to the Regional Director and submits it with the parties' Election Agreement for approval. These recommendations may be in the form of checklists or a report, as directed by the Regional Director. The "recommendation" describes the matters about which the parties agree and/or dispute. The agent references the agreement, if any, concerning the appropriateness of the unit and any agreement concerning the eligibility of particular classifications of employees. If the parties disagree with the appropriateness of the unit, the agent makes a recommendation as described in *CHM 26.2 and 26.3*. If the parties disagree as to other matters, the report provides the basis for the disagreement and analyzes the issues and appropriate requirements in § 2422.16.

**28.35.1 Action by Regional Director:** If the Regional Director approves the Election Agreement, the parties are notified in writing and a copy of the Election Agreement is attached. If the Regional Director does not approve the Election Agreement, s/he issues a notice of hearing (*CHM 28.11.2 and 27*) or takes other appropriate action. Figure 28.35 is a sample letter in which the Regional Director disapproves an election agreement.

**28.35.2 Action upon approval of Agreement and/or Issuance of Direction of Election:** A copy of the Election Agreement is forwarded to the parties with a cover letter confirming the details of the election. The letter is signed by the agent assigned to conduct the election and includes a summary of matters discussed at the conference and the following information (see also *CHM 32 through 37*):

a. how the election will be conducted:

(i) if the region conducts the election, the letter states the information for which the region and the parties are responsible;

(ii) if the region supervises the election, the letter provides specific details concerning the responsibilities of the parties;

b. notice of election: requirements to reproduce and post, period for posting;

c. rules for obtaining observers [cite § 2422.23(h)];

d. requirement to update eligibility list, how to do it and a reminder not to post the eligibility list;

e. pre-election conference: time, date and place; what will be discussed and attendance requirements;

f. any other specific arrangements that were not provided in the election

agreement (such as arrangements for the count, transportation to multiple site polls); and

g. reminder about campaign rules.

**28.35.3 Regional Director may revoke approval of Election Agreement:** The Regional Director retains authority to revoke his/her approval, for cause, at any time before the election. Examples that may provide a basis for revoking approval include: 1) a reorganization occurs that appears to affect the unit or the eligibility list; 2) the activity fails to follow though with certain election procedures that may cause serious disruption or affect the conduct of the election. *See U.S. Army Electronics Command, Procurement and Production Directorate, Fort Monmouth, Red Bank, New Jersey,* 1 Rulings on Requests for Review 166 (1971), Report on Ruling Number 42, 1 A/SLMR 627 (1971).

**28.36 Pre-election rulings:** The Regional Director rules on all requests or motions of the parties made subsequent to approval of the Election Agreement. His/her rulings with respect to the Election Agreement are final, subject to the right of the parties to file appropriate objections to the election.

**28.37 Withdrawal from election agreements:**

**28.37.1 Effect on timeliness of refiling:**

**28.37.1.1 Withdrawal by petitioner:** A petitioner who submits a withdrawal request for a petition seeking an election that is received by the Regional Director after the notice of hearing issues or after approval of an election agreement, whichever occurs first, will be barred from filing another petition seeking an election for the same unit or any subdivision of the unit for six (6) months from the date of the approval of the withdrawal by the Regional Director.[§ 2422.14(b)]. *CHM 11.9.2*

**28.37.1.2 Withdrawal by incumbent:** When an election is not held because the incumbent disclaims any representation interest in a unit, a petition by the incumbent seeking an election involving the same unit or a subdivision of the same unit will not be considered timely if filed within six (6) months of cancellation of the election.[§ 2422.14(c)]. *CHM 11.9.3*

**28.37.2 Effect on processing:**

**28.37.2.1 Intervenor withdrawal from ballot:** When two or more labor organizations are included as choices in an election, an intervening labor organization may, prior to the approval of an election agreement or before the direction of an election, file a written request with the Regional Director to remove its name from the ballot. If the request is not received prior to the approval of an election agreement or before the direction of an election, unless the

parties and the Regional Director agree otherwise, the intervening labor organization will remain on the ballot. The Regional Director's decision on the request is final and not subject to the filing of an application for review with the Authority. [§ 2422.23(e)]

**28.37.2.2 Incumbent withdrawal from ballot in an election to decertify an incumbent representative:** When there is no intervening labor organization, an election to decertify an incumbent exclusive representative will not be held if the incumbent provides the Regional Director with a written disclaimer of any representation interest in the unit.

When there is an intervenor, an election will be held if the intervening labor organization proffers a thirty percent (30%) showing of interest within the time period established by the Regional Director. [§ 2422.23(f)]

**28.37.2.3 Petitioner withdraws from ballot in an election:** When there is no intervening labor organization, an election will not be held if the petitioner provides the Regional Director with a written request to withdraw the petition.

When there is an intervenor, an election will be held if the intervening labor organization proffers a thirty percent (30%) showing of interest within the time period established by the Regional Director. [§ 2422.23(g)]

**HEARINGS**
**CHM 29 through 31**

29 NOTICE OF REPRESENTATION HEARING: As required in § 2422.30(b) and discussed in *CHM 27.5*, the Regional Director will issue a notice of representation hearing (notice of hearing) to inquire into any matter about which a material issue of fact exists, or any time there is reasonable cause to believe a question exists regarding unit appropriateness.

29.01 Purpose of notice of representation hearing: The Regional Director may issue a Notice of Representation Hearing involving any issues raised in the petition [§ 2422.17(a)].

29.02 Contents: The regulations provide that the notice of hearing will advise affected parties about the hearing. The Regional Director will also notify affected parties of the issues raised in the petition and establish a date for the prehearing conference [§ 2422.17(b)].

29.02.01 FLRA Form 46**:** FLRA Form 46 is the Notice of Representation Hearing and is used when the Regional Director is prepared to issue all accompanying material described in CHM 29.2.2 and 29.3 with the notice. This form, or when necessary, a modified version of it includes:

a. the name of the agency or activity, petitioner and any intervenor.

b. the date, location and time of the hearing. *There is no minimum notice requirement for setting a date for the hearing, but a date is set when the notice issues. The agent obtains the positions of the parties regarding the date and location of the hearing and prehearing*

*conference. If the parties agree on a reasonably prompt date, the Regional Director considers their recommendations. However, the fact that the parties agree on the date of the hearing is not controlling.*

and

c. a statement of the authority and jurisdiction under which the hearing is held.

If the information outlined in CHM 29.3 is not available when the Notice of Hearing is issued, the region issues FLRA Form 46A, which is a different version of the general Notice of Hearing. FLRA Form 46A notifies the parties that documents containing the information required by the regulations and the Manual will be sent by the region to the parties in sufficient time to allow the parties to prepare adequately for the hearing.

***NOTE: in either case, materials that are described in CHM 29.3 are "attachments" to the Notice of Hearing, either FLRA Form 46 or 46A, and are attached as part of the formal exhibits for the hearing record. See HOG 4.1.***

29.03 Materials to accompany notice of hearing: Attached to the notice of hearing are:

29.03.01 A copy of the petition and any amended petition. In cases requesting a clarification of, or an amendment to, a recognition or certification in effect, or any other matter relating to representation, a copy of all attachments to the petition in support of the clarification, amendment, good faith doubt, successorship, etc., are attached to the petition.

29.03.02 A letter signed by the Regional Director to:

a. establish the time, date and location of the prehearing conference;

b. describe known issues raised by the petition;

c. address unusual prehearing and hearing procedures and evidentiary requirements if not otherwise covered in the Statement of Standard Procedures In Representation Proceedings Before Hearing Officers, FLRA Doc. 1014;

d. request the parties to furnish the Hearing Officer and each other with a list of prospective witnesses by a date certain, normally not less than five (5) days prior to the start of the hearing;

e. include a copy of any stipulation reflecting the parties' agreement on any matter on which the parties reached agreement. The substance of the matter(s) agreed to by the parties is described with particularity because the statement is used as:

(i) a basis for the Hearing Officer's determination that it is unnecessary to take evidence on the matter(s);

(ii) a formal exhibit by the Regional Director; and

(iii) a basis for acceptance of such agreement by the Regional Director in issuing its decision in the matter.

f. include a statement that the Regional Director's determination to issue a notice of hearing is not

appealable to the Authority [§ 2422.17(d)].

See Figure 29.3 for a sample letter.

29.03.03 An outline or checklist of the information necessary 1) to address adequately the issues raised by the petition and 2) to ensure a full and complete record (see substantive and employee categories in *HOG* for assistance in preparing this outline).

29.03.04 FLRA Doc. 1014, Statement of Standard Procedures In Representation Proceedings Before Hearing Officers.

**29.04** Assigning the Hearing Officer: Assignments are made with a view towards the most efficient and expeditious handling of the case. If the Hearing Officer is not the same agent who investigated the petition initially, the Regional Director and the agent assigned to investigate the case inform the Hearing Officer about the case as discussed in *HOG 3*.

29.05 Hearing logistics:

29.05.01 Obtaining a court reporter: An official reporter makes the only official transcript of representation hearings. It is the responsibility of the Regional Office to obtain a court reporter as soon as possible and according to procedures established by the Administrative Services Division. The reporting service is notified promptly when there is a change in the date, time or place of the hearing, or where the hearing is canceled by withdrawal of the notice of hearing. Whenever possible, initial notification of any change is given to the reporting service by telephone at least twenty-four (24) hours before the hearing is scheduled to open and confirmed by fax.

29.05.02 Arranging for the hearing room: Representation hearings

are usually scheduled on the activity's premises. The hearing is a nonadversarial proceeding and many of the witnesses can be pulled from their work site on notice. If the region asks the activity to schedule a hearing room, the region checks its acceptability with the other parties before issuing the notice of hearing. Locations other than onsite are also acceptable.

29.06 Serving the notice of hearing: The Regional Director serves a copy of the Notice, FLRA Form 46, together with all accompanying material on all parties in accordance with § 2429.12.

29.07 Scheduling and conducting hearings on § 2422.16(c) matters unrelated to unit appropriateness: Where there are no questions regarding unit appropriateness, but the parties are unable to agree on an election agreement on other than procedural matters, the Regional Director shall provide the parties with an opportunity for a hearing. Following the hearing, however, the Regional Director may issue a Direction of Election, without a Decision and Order. There is no appeal of a Direction of Election and the election is conducted without delay. The Direction of Election includes a provision that the election is directed without prejudice to the right of a party to file a challenge to the eligibility of any person participating in the election or objections to the election or both [see § 2422.16(d) and *CHM 28.12.4*].

29.07.01 Issuing the Notice of Representation Hearing: When there are no unit appropriateness questions, notices of hearing pursuant to § 2422.16(c) are issued only because the parties are unable to agree to the election details. The Regional Director is required to issue the notice pursuant to § 2422.30. **These notices are issued, and the hearing held, as soon as possible**

**after the parties state their refusal to enter into an election agreement** on other than appropriate unit issues, or strictly procedural matters (*CHM 28.11.2.2*).

29.07.02 Issuing the Direction of Election: Any Direction of Election issued following a hearing held pursuant to § 2422.16(c)(2) **is issued timely and consistent with the strategic plan goals** (see *CHM 28.12.3*).

29.08 Prehearing procedures: Prehearing matters are discussed in detail in *HOG 17*. General information is provided in this subsection. Prior to the opening of the hearing, the Regional Director retains authority to amend the notice of hearing by changing the date, place(s), or hour of the hearing; or by consolidating for hearing the instant case and any related case, whether or not a notice has been issued thus far on that case. Authority to withdraw the notice of hearing and, if appropriate, to dismiss the petition remains with the Regional Director unless s/he transfers the case to the Authority. The Regional Director may act in these respects on his/her own initiative or on motion or request by any party.

29.08.01 Amending the notice of hearing: A notice of hearing may be amended at any time prior to the opening of the hearing. The purpose of amending the notice is to correct an error in the date, time, or place of hearing established in the original notice, and not for the purpose of rescheduling a hearing. The word "Amended" is inserted in the title of the notice so as to read, "Amended Notice of Representation Hearing." If another amendment becomes necessary, the title reads, "Second Amended Notice of Hearing," etc. In addition, the following language is inserted in the blank space immediately below the title of the notice, namely, "Upon motion by the undersigned Regional Director, the notice of hearing dated (...) is amended to

read as follows: . . .” The date, time and place of hearing is also restated, making the appropriate correction.

The same service requirements as discussed in *CHM 29.6* are applicable to an amended notice of hearing. However, the region is not required to attach the material that accompanied the original notice of hearing unless the information in the attachments is changed.

29.08.02 Petition amended subsequent to notice of hearing: If a petition is amended following issuance of the notice of hearing but before the opening of the hearing, the Regional Director amends the notice accordingly, unless the nature of the amendment calls for some other action *(CHM 13.9, 13.10* and *13.11* and *HOG 25*).

29.08.03 Order setting time or location of hearing: Occasionally, the notice of hearing is issued without a time or location of the hearing. Once the logistics are confirmed, the Regional Director issues an Order Setting ... (*time or location, as appropriate*). Copies are served on all parties and the Court Reporting Service. See Figure 29.8B.

29.08.04 Prehearing motions to postpone: A motion for postponement of the hearing is filed with the Regional Director and a copy served on each of the other parties. The request is specific as to the reason(s) for the desired postponement, and sets forth the suggested date(s) for rescheduling the hearing. The moving party also ascertains in advance, and set forth in the request, the respective positions of the parties regarding the request (see FLRA Document 1014).

***NOTE: It is the policy of the OGC that cases set for hearing are heard on the day set, and that postponements are granted***

***only for good cause shown.*** See *HOG 17.2* for a complete discussion on prehearing motions to postpone and procedures for granting or denying them.

FLRA Form 48 is an Order Rescheduling Hearing and Figure 29.8C is a sample Order Rescheduling Hearing after an indefinite postponement.

29.08.05 Consolidation of cases within a region: Whenever it appears necessary to effectuate the purposes of the Statute, or to avoid unnecessary costs or delay, the Regional Director will consolidate cases for hearing within the region. For example, the Regional Director may consolidate cases where separate representation petitions involving the same activity have been filed in the same region. Regional Directors are required to consolidate cross-petitions. Cases are consolidated by issuing a FLRA Form 45, Order Consolidating Cases.

Cases may be consolidated at the same time the Regional Director issues a notice of hearing. This is accomplished through the issuance of an Order Consolidating Cases and Notice of Hearing (Figure 29.8A).

29.08.06 Transfer and consolidation of cases in different regions: Whenever it appears necessary to effectuate the purposes of the Statute, or to avoid unnecessary costs or delay, the Regional Director may transfer a case to another region for hearing. The region transferring the case issues an Order Transferring the Case. When a transferred case is consolidated with another case pending in the region, a FLRA Form 45, Order Consolidating Cases, is issued by the region receiving the case. *CHM 63.4*.

29.08.07 Severance of cases: At any time prior to the close of the hearing, the Regional Director, by issuance of an appropriate

Order, may sever cases which were previously ordered consolidated.

***NOTE: see CHM 63 for a discussion of general policy considerations relating to service, transfer, consolidation and severance of cases between regions.***

29.09 Prehearing conference: The Hearing Officer is required to conduct a prehearing conference, either by meeting or teleconference [§ 2422.17(c)]. All parties are required to participate in the prehearing conference and be prepared to fully discuss, narrow, and resolve the issues set forth in the notification of the prehearing conference. See *HOG 8*.

29.10 Withdrawal of notice of hearing: A notice of hearing may be withdrawn by the Regional Director any time after the notice issues. A notice of hearing may be withdrawn for a variety of reasons.

29.10.01 Request to withdraw petition: If there are no intervenors, and a petitioner files a request to withdraw a petition after the notice of hearing issues, the Regional Director issues a Withdrawal of Notice of Hearing and Approval of Request to Withdraw Petition, FLRA Form 49. See *HOG 19* for processing withdrawal requests submitted prior to the opening of the hearing, during the hearing or posthearing or both.

A petitioner who submits a withdrawal request for a petition seeking an election after a notice of hearing issues will be barred from filing another petition seeking an election for the same unit or any subdivision of the unit for six (6) months from the date the Regional Director approves the withdrawal [§ 2422.14(b)]. This provision is added to the approval of the withdrawal request. *CHM 11.9.2*. **Note that this regulation applies only**

**to petitions seeking an election.**

When there is an intervenor, an election will be held if the intervening labor organization proffers a thirty percent (30%) showing of interest within the time period established by the Regional Director [§ 2422.23(g)].

29.10.02 Withdrawal upon motion of Regional Director: The Regional Director retains authority to withdraw a notice of hearing on the Regional Director's own motion at any time. Withdrawal of the notice of hearing may be due to a number of reasons, such as:

a. Failure of the petitioner, after amending the petition, to submit an adequate showing of interest;

b. Upon further review of the case, the Regional Director decides to withdraw the notice of hearing due to inadequate showing of interest, untimely filing of the petition, etc.;

c. The case is being transferred to another region; or

d. The parties enter into a stipulation approved by the Regional Director.

Where the Regional Director decides to withdraw a notice of hearing on the Regional Director's own motion, the parties and the reporting service are served with a copy of a "Withdrawal of Notice of Hearing," as set forth in Figure 29.10A.

29.10.03 Withdrawal prior to dismissal of petition: The Regional Director follows the procedures outlined below when dismissing a petition.

a. If the case has been consolidated with another case, issues an Order Severing Cases;

b. Issues a Withdrawal of Notice of Hearing;

c. Solicits withdrawal request as discussed in *CHM 27.4.6;* and

d. Absent withdrawal, issues a Decision and Order as discussed in *CHM 53*.

29.10.04 Approval of an election agreement: The Regional Director's approval of an election agreement also constitutes a withdrawal of a notice of hearing (see FLRA Form 33 and *CHM 28.32 and 28.33*).

29.11 Notice of hearing on remand: If, upon the filing of an application for review of the Regional Director's Decision and Order, the Authority directs that a hearing be held or reopened, a notice of hearing on remand is issued by the Regional Office as soon as possible. The notice of hearing on remand as set forth in Figure 29.11 is specially prepared.

30 HEARING PROCEDURES: The ***Hearing Officer's Guide (HOG)*** describes the techniques of conducting the hearing and developing a complete record. The *HOG* provides procedural and operational guidance for the period between the time that the notice of hearing is issued until after the Hearing Officer closes the hearing and submits the Hearing Officer's Report. It begins by discussing the purpose of a hearing and proceeds to discuss the Hearing Officer's responsibilities. It describes, in detail, preparing for and conducting a hearing. The *RCL* is useful in preparing for the hearing, and defining, narrowing and resolving issues raised by the petition at any stage prior to the hearing. The substantive and employee categories of the *HOG* are useful at the hearing to ensure a complete record.

31 POSTHEARING MATTERS: This section concerns posthearing procedures prior to issuance of the Decision and Order. For a discussion about Decision and Orders, see *CHM 53*.

**31.01** Contents of the record: The hearing record considered by the Regional Director differs from that considered by the Authority if the posthearing Decision and Order is appealed. The record considered by the Regional Director consists of the transcript, formal exhibits, party exhibits, including any motions and responses thereto, and the parties' briefs and the Hearing Officer's Report. The Court Reporting Service forwards the transcript and exhibits directly to the Regional Director. The parties submit their briefs directly to the Regional Director and the Hearing Officer submits his/her Report (discussed in *HOG 34*) directly to the Regional Director. **The Regional Director considers the entire record and the Hearing Officer's report when making his/her decision on the merits of the case.**

See § 2422.30(e) and *CHM 54.1.2* for contents of the record that is transferred to the Authority upon the filing of an application for review.

31.02 Regional agenda meeting: After the close of a hearing, and before making a decision on issues raised in the representation hearing, the Regional Director conducts an agenda to discuss the procedural and substantive issues, the facts on the record, positions of the parties, motions, rulings by the Hearing Officer, any alternative positions offered by the parties and to make a preliminary decision on the case.

31.03 Requests for additional time to file briefs: Section 2422.20(d) requires that an original and two copies of a brief must be filed with the Regional Director within thirty (30) days from the close

of the hearing. Requests for additional time to file a brief must be submitted in writing and received by the Regional Director no later than five days before the date the brief is due. The requesting party includes the positions of the other parties in the request. Regional Directors have discretion in granting additional time for submitting briefs. Considerations include:

a. complexity of the issues;

b. length of the record;

c. number of parties involved;

d. age of the case;

e. impact of any delay on the affected employees;

f. number of related unfair labor practice or other representation cases pending resolution of the instant case; and

g. significance or precedential nature of the case.

31.04 Assignment of personnel to draft the Decision and Order: Regional Directors have three options when assigning personnel to draft the Decision and Order:

a. The Hearing Officer drafts the decision;

b. The decision is assigned to another professional within the region; or

c. The case is transferred to a different region for the purpose of deciding, drafting and issuing the Decision

and Order.

31.05 Posthearing motions: Motions filed after the close of the hearing, but prior to the issuance of the Decision and Order, are submitted to the Regional Director. The party filing the motion states succinctly the order or relief sought and the reasons for the motion. A copy of the motion is served on all other parties. [see § 2422.19(d), and *HOG 16.2*]. The regulations require that any response to a posthearing motion must be filed with the Regional Director within five (5) days after service of the motion. The Regional Director may rule on posthearing motions, either by Order or as part of the Decision and Order.

31.06 Correcting the transcript: As stated in *HOG 32.15*, since the decision and further proceedings are based on the record, it is important that the record is accurate. The Hearing Officer listens carefully to the record and initiates efforts to correct or clarify material errors. Corrections may be made by stipulation or by motion inserted in the record as it is still in session.

Following the close of the hearing, the parties may file with the Regional Director motions to correct the transcript [§ 2422.19(d)]. Copies of motions to correct the transcript must be served upon the other parties and proof of such service furnished to the Regional Office. The purpose of correcting the transcript is to correct mistakes made by the reporter in taking or transcribing the record and not to afford the parties an opportunity to add new matter to the record or to correct errors of omission or commission made by any of the parties during the hearing. The Regional Director may rule on the motions separately or as part of his/her Decision and Order.

31.07 Election agreements obtained after the close of a hearing: When

an election agreement is reached after a hearing is closed, the Regional Director reviews the Election Agreement to ensure that any unit claimed to be appropriate meets the appropriate unit criteria as set forth in 5 U.S.C. 7112(a)(1). Approval of the Election Agreement constitutes withdrawal of the Notice of Hearing (*CHM 28.33*). See *CHM 28* for a discussion of election agreements.

31.08 Regional Director's Decision and Order after the close of the hearing: Upon the close of the hearing and after receipt of any briefs that are filed, the Regional Director issues a Decision and Order in accordance with § 2422.30. The Decision and Order is written in the same format as Authority decisions for similar type cases. Every Decision and Order describes fully the parties' rights to file an application for review with the Authority and the filing requirements for those applications [§§ 2422.30(d) and 2422.31].

31.09 Regional Director's Decision and Order in § 2422.16(c)(1) matters: A Decision and Order involving a petition for an election is an absolute requirement whenever there are issues regarding unit appropriateness.

***NOTE:*** *CHM 53* ***describes the purposes, contents and formats of all Decisions and Orders issued pursuant to §§ 2422.16(c)(1) and 2422.30.***

# ELECTION PROCEDURES
# CHM 32 through 48

32 STATUTORY BASIS FOR ELECTIONS: 5 U.S.C. 7111(a) states that "[a]n agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election."

32.01 Policy to conduct elections: Section 2422.23 of the regulations concerns election procedures. Section 2422.23(a) provides that the Regional Director will decide to conduct or supervise the election. As discussed in *CHM 28.8*, it is the policy of the General Counsel that Regional Directors conduct all elections. Clearance is obtained from the Office of the General Counsel for approval to supervise, rather than to conduct, any election.

32.02 Secret ballot: All elections will be by secret ballot [§ 2422.23(d)]. A secret ballot is defined at § 2421.15 as "the expression by ballot, voting machine or otherwise, but in no event by proxy, of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed, except in that instance in which any determinative challenged ballot is opened."

**32.03 Requirements:** 5 U.S.C. 7111(d) provides that:

> [t]he Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election,

which shall include rules allowing employees eligible to vote the opportunity to choose–

(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

(2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

There is no requirement that a specific percentage or number of eligible voters cast ballots in order for the election to be valid. See *U.S. Department of the Interior, Bureau of Indian Affairs, Rosebud, South Dakota,* 34 FLRA 67 (1989) and *CHM 47.1.*

33 NOTICE OF ELECTION: A notice of election informs eligible employees about the election. There are six standard FLRA forms available:

a. FLRA Form 125A - Notice of Election for use in manual ballot or mixed mail/manual ballot elections with two blank panels;

b. FLRA Form 125B - Notice of Mail Ballot Election for use in all-mail ballot elections with two blank panels;

c. FLRA Form 210A - Notice of Election for use in manual ballot or mixed mail/manual ballot elections with three blank panels; this notice has the same language on the right and left panels as FLRA Form 125A.

d. FLRA Form 210B - Notice of Mail Ballot Election for use in all-mail ballot elections with three blank panels; this notice has the same language on the right and left panels as FLRA Form 125B.

c. FLRA Form 36A - Notice of Election for use in manual ballot or mixed mail/manual ballot elections to consolidate existing units; and

d. FLRA Form 36B - Notice of Mail Ballot Election for use in all-mail ballot elections to consolidate existing units.

33.01 Preparation and distribution of the notice of election: Section 2422.23(b) states that prior to the election, the Regional Director will prepare a notice of election.

33.02 Contents of the notice of election: The contents of the notice of election are based upon, and consistent with, the terms of the Election Agreement or Direction of Election. At a minimum, a notice of election includes:

a. The name of the agency and/or activity involved.

b. The appropriate unit including a description of the inclusions and exclusions comprising the unit or voting groups involved. This language is taken directly from the Election Agreement, Decision and Order and Direction of Election, or Direction of Election.

c. A statement concerning the effect(s) of the vote. This language is also taken directly from the Election Agreement, Decision and Order and Direction of Election, or Direction of Election.

d. The eligibility period. The eligibility period is included in the notice either: 1) as part of the description of those eligible to vote. For instance, "Those eligible to vote: all .... who were employed during the payroll period ending (date). Excluded..."; or 2) as a separate provision.

e. The date(s), hour(s), and location(s) of the manual election. If multiple sites or times or both, are used, the notice sets forth in full, the sites, times and locations. If certain employees are assigned to vote at specified sites, the notice reflects the parties' agreements regarding access to polling sites.

f. In a mail ballot election: the notice includes the date for mailing out the ballots; the date for returning the ballots; and procedures for eligible employees who fail to receive a ballot. The entire Appendix that is set forth in the election agreement may be abbreviated for the Notice as long as it includes the information described above. This information is crucial to the voter.

g. If an absentee ballot procedure is used, a description of who is eligible to receive an absentee ballot and the procedures for obtaining an absentee ballot. The information in the Appendix for Absentee Balloting in the election agreement may be abbreviated for the Notice as long as the Notice includes sufficient information to enable an employee to understand the requirements for, eligibility for, and the procedures to follow to request and receive an absentee ballot.

***NOTE: If the election is a combination of mail, manual and/or absentee balloting, all procedures are spelled out in the Notice.***

h. The date, time and place where ballots will be counted.

i. Voter identification procedures for manual ballot elections; and

j. A sample ballot, clearly marked as such, with the word "Sample" appearing diagonally across the ballot.

Any other information that is contained in the Election Agreement, Decision and Order and Direction of Election, or Direction of Election that informs the voter about the election,

the effect of the vote, and the appropriate unit are also be included in the notice.

**33.03** Responsibility for printing notices: The ultimate responsibility for preparing and reproducing the notice is the region's. If the activity has suitable reproduction facilities, the region may request the activity to reproduce the required number of copies to satisfy the posting requirements. The activity uses the original notice prepared by the region.

**33.04** Distribution of the notice of election: Section 2422.23(b) requires the activity or agency to post the notice of election in places where notices to employees are customarily posted and/or in a manner by which notices are normally distributed. Normally, notices to employees are posted on bulletin boards; however, many activities or agencies also communicate with their employees through regular or electronic mail. During the election agreement conference, the agent discusses suitable arrangements for posting and distributing the notice of election with the parties.

33.04.01 Number of notices: If notices are normally posted on bulletin boards, at least one copy of the notice to employees is posted at each location in the facility where notices to employees are customarily posted. A reasonable number of extra copies are prepared for use at the election, to replace defaced copies and to include in the case file.

33.04.02 Distribution of notices other than by posting: If notices to employees are normally distributed electronically at an agency, the region prepares a copy of the notice or a facsimile, including a sample ballot, on a diskette for the agency. The sample ballot is secured so that it cannot be copied. If the

agency cannot secure the sample ballot on the electronic version, the region prepares a version without a sample ballot. In these circumstances, the agency also posts the complete notice, including the sample ballot.

33.05 Posting period:

33.05.01 Manual ballot elections: The minimum period for posting the notice of election in a manually conducted election (FLRA Form 125A, FLRA Form 210A or 36A) is three (3) working days prior to, but not including, the date of the election. ***Note that the right and left panels of the notice of a manual ballot election are available at n:\forms\f125a.wpd.)***

33.05.02 Mail ballot or mixed mail/manual ballot elections: A notice of election in an all-mail ballot election (FLRA Form 125B, FLRA Form 210B or FLRA Form 36B) or a mixed mail\manual ballot election (FLRA Form 125A, FLRA Form 210A or FLRA Form 36A) is posted no later than the date of the mail-out of the ballots to eligible voters. The Notice remains posted through the date of the count of the ballots. **In addition, copies of the notice or a reasonable facsimile of it are included with the ballot materials that are mailed to eligible voters** ***(CHM 28.23.4 and CHM 43.1.1). (Note that the right and left panels of the notice of mail ballot election are available at n:\forms\f125b.wpd or n:\forms\f125a.wpd for mixed mail and manual.)***

33.06 Defaced Notices: The agent informs the activity during the election agreement conference that if the posted notice is defaced in any way, particularly with markings made on the sample ballot, the notice is removed without delay and replaced [see also § 2422.23(c) about reproducing sample ballots and

*CHM 33.12*].

33.07 Foreign languages: When necessary, foreign-language notices are prepared and posted. If a foreign language notice is used, the ballot is also printed in that foreign language.

33.08 Separate notices of election in self-determination elections: In a self-determination election where there are separate voting groups [such as voting groups (a) and (b)], the Regional Office prepares a notice of election that clearly articulates each voting group, the choices on each ballot, the effect of the vote on each voting group and the election details. This applies to professional-nonprofessional elections and other self-determination elections. The region has the option of preparing separate notices of election for each voting group or placing all of the information on one notice. Separate notices may be the better choice, since each voting group has a different unit description, different choices on the ballot and a different sample ballot. It is important that every employee understand the notice, voting groups, his/her choices on the ballot, effect of the vote, and the time, date and place of the election.

To aid the voters, the Regional Office enters the caption "Voting Group (a)" on the notice of election for each separate voting group.

33.09 Service of notice of election of all parties: Copies of the notice(s) of election are served on all parties to the election. The notice furnished to the parties is identical to the notice of election that is posted and includes a copy of the sample ballot.

**33.10** Posting eligibility lists: The publication of eligibility lists by the parties to an election has the effect of disrupting orderly

procedures. It creates confusion in the minds of employees and thereby interferes with the conduct of the election. *Department of the Army, U.S. Army Aviation Systems Command, St. Louis, Missouri,* 3 A/SLMR 559 (1973). Therefore, during the election conference, the agent reminds the parties that they cannot post or distribute the voting list in any way (*CHM 28.18.3.3)* or any other list of employees (*CHM 28.11.3.3*).

**33.11** Investigating the posting: Agents are not required to investigate the activity's posting of the notice of election unless s/he receives a complaint from a party concerning the posting. If a complaint is filed, the agent obtains clearance from the Regional Director and the activity before entering the activity's premises to investigate the posting.

**33.12** Sample ballot: The parties are reminded that the reproduction of any document purporting to be a copy of the official ballot that suggests either directly or indirectly to employees that the Authority endorses a particular choice in the election may constitute grounds for setting aside an election if objections are filed under § 2422.26. See § 2422.23(c).

**34 BALLOT PREPARATION:** The ballots, in all cases, are prepared and secured by the agent. The agent may **not** permit anyone to handle any ballot except the individual who casts that ballot.

**34.01 Question(s) on the ballot:** The question(s) on the ballot conform to the Election Agreement, Decision and Order and Direction of Election, or Direction of Election. The choices on the ballot are also dictated by the Election Agreement, Decision and Order and Direction of Election, or Direction of Election (*CHM 28*).

**34.02 Shortened name request:** As discussed in CHM 28.18, the correct and complete name(s) of the labor organization(s) is (are) inserted in the paragraph headed "Wording on the Ballot" in Item #8 on FLRA Form 33. If a shortened name is requested, it is shown *in addition to* the full name and is placed in parentheses. **The wording on the ballot will reflect the wording on the Certification of Representative, if one issues.** Where there is only one labor organization on the ballot, and the question asks for a "yes" or "no" response, the name of the labor organization is placed next to the heading "first" in the election agreement.

***NOTE: the name of the agency and/or activity as it appears in the unit description also appears in the caption on the ballot* (*CHM 28.18.1* - also includes a definition of "agency" and "activity").**

In a unit consolidation election, the correct and complete name of the agency and/or activity and the labor organization(s) are inserted in the paragraph discussing the effect of the vote. This wording is used on the ballot and will reflect the wording on the

Certification of Representative, if one issues.

**34.03 Places on the ballot:** Where two (2) or more labor organizations are on the same ballot, the position of their names on the ballot is generally determined by agreement of the labor organizations involved. The petitioning labor organization does not enjoy any special privilege or preference in determining position on the ballot. If the labor organizations are unable to reach agreement, they may resort to a toss of the coin, drawing of lots, etc., absent which, the matter is decided by the Regional Director.

The wording of the negative choice on the ballot depends upon the number of labor organizations appearing on the ballot:

a. Single labor organization -- "Yes" and "No" choices;

b. Two labor organizations -- The name of each and a "Neither" choice; or

c. Three or more labor organizations -- the name of each and a "No Union" choice.

There is no fixed position for the negative choice on a ballot when there is more than one labor organization, and, therefore, its place is determined as part of the sequence of choices reading from left to right on the ballot. See also *CHM 28.18.2*.

**34.04 Ballot formats:** Examples of the variations in the ballot(s)'s format required for different types of elections are set forth in Figures B28.17A through B28.17C and Figures B34.2A through B34.2G. Each ballot and its use is described below. Note the cross reference to the appropriate sections of *CHM 28* that discuss the units and the effect of the vote.

| Ballot | Use and Cross Reference to *CHM* |
|---|---|
| B28.17A | Yes/No ballot for a unit consolidation election - *CHM 28.17.5a* |
| B28.17B | Ballot for pros in a unit consolidation election where nonpros are not voting - *CHM 28.17.5b* |
| B28.17C | Ballot for pros in a pro/nonpro unit consolidation election - *CHM 28.17.5c* |
| B34.2A | Ballot used in a pro/nonpro elections, accompanying Figure 28.15A- voting group (a): pros - *CHM 28.15.1* |
| B34.2B | Ballot used in a pro/nonpro elections, accompanying Figure 28.15A - voting group (b): nonpros - *CHM 28.15.1* |
| B34.2C | Ballot for a self-determination election, voting group (a) accompanying Figure 28.15D - *CHM 28.15.5* |
| B34.2D | Ballot for a self-determination election, voting group (b) accompanying Figure 28.15D - *CHM 28.15.5* |
| B34.2E | Ballot for an election to include unrepresented pros in existing pro unit, see Figure 28.15B and *CHM 28.15.2* |
| B34.2F | Ballot for an election involving one labor organization; or a residual (*CHM 28.15.3* and |

Figure 28.15C) or add-on election (*CHM 28.16* and Figure 28.16) having no labor organization intervenors

B34.2G Ballot for an election involving more than one labor organization; or a residual (*CHM 28.15.3* and Figure 28.15C) or an add-on election (*CHM 28.16* and Figure 28.16) having labor organization intervenors

**34.05 Color of the ballot:** Any color but white is used for ballots. The color of the ballot is not disclosed to any of the parties prior to the opening of the polls. Different colors are used for the ballots of different voting groups or units voting at the same time.

Also, the color(s) may not be the same as that used at the last election involving the same employees (as in a rerun or runoff election - see *CHM 48*).

In "mixed" mail\manual elections, the color for the mail ballot is the same as that used in the manual ballot.

# 35 PREPARATION AND CHECKING OF ELIGIBILITY LIST:

**35.01 Discussion at election agreement meeting or teleconference:** At the election agreement meeting, the parties review a current list of employees that the activity claims are eligible to vote in the election (*CHM 28.18.3.5*). If the parties agree on the eligibility list at the election agreement conference, the agent's copy of the list is used as the official voting list unless there is multi-site voting (see *CHM 35.2*). Absent the parties' agreement, the procedures discussed in *CHM 28.11* *and* *28.12* are followed.

If the eligibility list is not current as of the payroll period ending prior to the date of the election agreement meeting, it is updated and furnished to all parties immediately following the meeting, but prior to the pre-election conference.

The list actually consists of several lists:

a. one includes the names of all employees whom the activity claims are eligible to vote in the election, and
b. the other includes employees whom the activity claims are ineligible to vote in the election. (see *CHM 28.18.3.4, 28.18.3.5 and .6*).
c. ballots of employees whose eligibility is not resolved prior to the election may be on a third list (the appendix to the Election Agreement) or annotated on the other two lists. (*CHM 28.11.3.3*).

The list is prepared alphabetically, or if not feasible, by clock number sequence, alphabetical by voting location, or other numerical system used to identify the employees. The complete

first name, rather than the first initial, is used as a means of facilitating identification, particularly in instances of duplicate last names. The names also contain additional information, such as job classification, job title, etc.

If there are professional employees voting with nonprofessional employees, the list is annotated to reflect the professional employees.

**35.02 Preparation of the list for the election:** Upon approval of the Election Agreement, or upon issuance of the Direction of Election, the activity is required to update the eligibility list before the manual ballot election or the mail-out. Updating the list involves annotating which employees are no longer eligible for inclusion in the unit due to promotion, termination or retirement and adding employees that parties agree are in the unit in accordance with the Election Agreement (e.g., an employee is a temporary supervisor at the cut-off date, but is back in the unit on the date of the election).

The region's copy of the list is used as the official voting list in the election unless the election is multi-site. If the election is held at multiple sites where voters are assigned to vote at specific polls, the activity updates the master list of all employees who are included and excluded and prepares separate voting site lists. These separate lists consist only of the names of employees who are eligible to vote at each designated polling site.

The activity also maintains a "running" list of all employees whose employment in the unit has been terminated (due to resignation, retirement, permanent transfer) during the period between the end of the payroll period for eligibility and the date

of the manual election. These names are stricken from the voting list at the pre-election conference, prior to opening the polls at the manual election; and/or prior to counting the ballots in an all mail ballot election (see *CHM 35.5*).

**35.03 Providing a copy of the updated eligibility list:** A copy of an updated eligibility list or changes to the list and any voting sites lists are provided by the activity to the parties and the Regional Office at least one week prior to the date of the manual election or mail-out. This will enable the petitioner and any intervenor(s) to check the list and make inquiries regarding any employees whose eligibility may be questioned.

**35.04 Agent's responsibility: Whenever the eligibility list is updated, the agent reviews it to ensure that changes do not raise issues regarding the identity, size or scope of the unit and that any changes are consistent with the Statute. The responsibility for the quality of the eligibility list rests with the agent, not the parties. The region's copy of the updated list becomes the official voting list unless the election is multi-site. In such cases, the activity is responsible for preparing the actual voting list(s), and the agent is responsible for ensuring that the lists are complete, accurate, current, and prepared in time for the election.**

**35.04.01 Resolution of eligibility issues:** Normally, a joint conference is not necessary to discuss changes in the eligibility lists, except in large elections. Generally, the activity contacts the parties and the agent and informs them about changes to the list. In large elections, however, especially those involving agencies where there is a history of high turnover or personnel changes, a joint onsite or teleconference is encouraged just before the election to review the list and discuss any changes.

Such discussions minimize challenged ballots. As questions are resolved, the necessary changes are made on the voting list(s) in the presence of the parties and the agent prior to the start of the election. If there are disputes, the agent decides whether the dispute affects the size and scope of the unit and raises an appropriateness of the unit question or whether the challenged ballot procedure is appropriate (*CHM 28.11.3.2*, *28.18.3.4* ,*28.18.3.5* *and* *35.2*).

**35.05 Last minute update:** Just prior to the start of the election, the original eligibility list is updated one more time. If present before the polls open, the authorized representative of each of the parties sign or initial the list and/or any changes. Initialing or signing the list before the polls open reflects only that the list is the official voting list. It does not preclude any party from challenging any employee whose name appears on the list at the polls or the agent from challenging any employee whose name does not appear on the list and seeks to vote during the election. A representative's refusal to sign or initial the list will not delay the election. See also *CHM 39.6*.

# 36 AUTHORITY PERSONNEL:

**36.01 Generally:** The responsibility for the proper conduct of an election is the Regional Director's, acting through the assigned agent(s). The agent(s) are cognizant at all times that the representation process is one of the most important aspects to the Authority's work. Extreme care is exercised both in the preparation for and in the conduct of an election.

**36.02 Role:** Agents are responsible for conducting elections in a fair and impartial manner, so that each voter has a fair and equal opportunity to cast a secret, uncoerced ballot. Duties include:

a. Ensuring the eligibility list is updated and accurate; *CHM 35 and 39.6*

b. Checking in with appropriate officials when arriving at the activity; *CHM 39*

c. Ensuring that the Notice of Election has been properly posted and/or distributed in a manner by which notices are normally distributed; *CHM 33 and 39.4*

d. Ensuring the voting sites correspond to those established in the Election Agreement or Direction of Election and are prepared for the election; *CHM 28, 33 and 39*

e. Posting "Voting Place" or other FLRA notices in appropriate places that remind the employees of the election; *CHM 39.3*

f. Preparing sufficient election supplies and equipment; *CHM 38*

g. Briefing the observers and instructing them on their role; this includes not only distributing Instructions to Election Observer, FLRA Doc. 1013, but also actually instructing the observers on checking in voters, directing voters to the polling booth, challenging voters, and filling out challenged ballot envelopes; *CHM 37 and 39.7*

h. Constructing and sealing the ballot box before the polls open; CHM 39.9

i. Opening the polls on time; *CHM 40.1*

j. Conducting the election by ensuring the voters are identified properly and the election is conducted in an orderly and formal manner; *CHM 40*

k. Safeguarding the ballots and the ballot box; **the agent has sole responsibility for the ballots and the ballot box.** Although the observers may offer to assist the agent if the poll gets busy, the agent may not relinquish his/her responsibility for handling the ballots; *CHM 40.10*

l. Securing spoiled or unused ballots; *CHM 40.6.2*

m. Ensuring that voters, whose eligibility is challenged, are given an opportunity to vote a challenged ballot and that the challenged ballot procedure is explained to the voter; *CHM 44*

n. Maintaining an orderly flow of voters including ensuring

that voters waiting in line to vote do not campaign or otherwise disrupt the election; *CHM 46*

o. Sealing the ballot box at the conclusion of the voting period; sealing the unused ballots and securing the eligibility list, spoiled ballots, and election supplies; *CHM 40.12*

p. Obtaining a signed Certification of Conduct of Election from the Observers, FLRA Form 42; if the observers refuse to sign the certification, the agent immediately obtains affidavits and other relevant information concerning the observers' refusal to sign the certification; *CHM 40.13*

q. Conducting the count of the ballots including ensuring observers are present, resolving challenged ballots before the count, and otherwise ensuring the ballots are secured; *CHM 47;* and

r. Completing the appropriate tally forms and serving copies of the tally in accordance with the Election Agreement. *CHM 47*

Details of these responsibilities are discussed more fully in referenced chapters.

**36.03 Determining the number of Authority personnel:** The number of agents involved depends, among other things, on the size, complexity, and duration of the election. The agent in charge of the election supervises the conduct of the election, anticipates and solves any logistical or resource problems, and responds to any potential emergencies that may interfere with the proper conduct of the election.

**37 OBSERVERS:** All parties are entitled to representation at the polling location(s) by observers of their own selection, subject to the approval of the Regional Director [§ 2422.23(h)]. This regulation also applies to mail ballot elections that a region processes in the Regional Office.

**37.01 Function:** The observers represent their principals when assisting the agent(s) in conducting the election. The observers are responsible for seeing that the election is conducted in a fair and impartial manner so that each voter may cast a secret ballot in a free and uncoerced atmosphere. Their principal duties include identifying the voters; marking the eligibility list of those voting; challenging, for good cause, the eligibility of particular voters; observing the voting booths; safeguarding the ballot box; and verifying the accuracy of the counting of the ballots. Specific instructions for observers, including types of prohibited conduct, are set forth in FLRA Document 1012, Instructions to Election Observers (see also *CHM 39.7*). Unless specifically authorized by the principle representatives, observers do not have the authority to act on the representative's behalf in making decisions at the count, e.g., resolving challenged ballots, deciding to void ballots, etc. (see *CHM 47.7.3*).

**37.02 Number:** The provision for observers is usually discussed during the election agreement conference (*CHM 28.6*). During this conference, the agent explains that parties are permitted to station an equal number of authorized observers in the polling place at any given time. Alternative observers may be used during relief periods or as replacements. (See *CHM 40.13* regarding all observers signing the Certification of Conduct of Election). Normally, one set of observers sits at the checking table and marks off the voters on the eligibility list. In elections

exceeding 200 voters voting per hour, a second set of observers is assigned to sit near the ballot box to assure that only one voter at a time enters the booth and that all ballots are deposited in the ballot box. The observers may not deposit a ballot for any voter or otherwise handle any ballots.

The Regional Director ultimately determines the number of observers and their entitlement to official time pursuant to 5 U.S.C. 7131(c). The party requesting the observer(s) is responsible for payment of any travel and per diem expenses (§ 2429.14(b)). Any questions about changing the observer's official working schedule or working overtime while as an observer is resolved at the election agreement meeting. The agent does not get involved in these discussions as the Authority cannot require the agency to change an employee's duty hours or to pay the employee(s) overtime.

**37.03 Request for observers:** Absent agreement by the parties, the parties make their request to the Regional Director for named observers in writing not less than fifteen (15) days prior to the election [§ 2422.23(h)(1)]. The regulations require the request to name and identify the observers requested. Copies are served on the other parties and a written statement of such service is filed with the Regional Director. The Regional Director may grant an extension of time for filing a request for specifically named observers for good cause where a party requests such an extension or on the Regional Director's own motion. Objections to a request for specific observers are filed with the Regional Director with supporting reasons within five (5) days after service of a copy of the request. Copies are served on the other parties and a written statement of such service is filed with the Regional Director.

The Regional Director's ruling on requests for, and objections to, observers is final and binding and is not subject to the filing of an application for review with the Authority. Absent agreement, the parties use the FLRA Form 60, Request for Appearance of Authorized Observers when making their request.

**37.04 Eligibility to act:** Sections 2422.23(h)(2) and (3) of the regulations set forth who may act as an observer.

37.04.01 An agency or activity may use as its observers any employees who are not eligible to vote in the election, except:

a. Supervisors or management officials;

b. Employees who have any official connection with any of the labor organizations involved (such as hold an office in the labor organization); or

c. Non-employees of the Federal government.

37.04.02 A labor organization may use as its observers any employees eligible to vote in the election, except:

a. Employees on leave without pay status who are working for the labor organization involved; or

b. Employees who hold an elected office in the union.

**A party may not use as an observer any person who is not authorized to act under the regulations even though the other parties agree to waive their right to file an objection on the use of an unauthorized observer.**

**37.05 Military personnel on active duty:** Military personnel on active duty are not considered employees of the Executive Branch of the Federal government and are not eligible to act as observers. However, where such personnel are also regularly employed in a civilian capacity in the unit involved, they are considered eligible employees and may be utilized as observers for a labor organization in civilian attire.

**37.06 Head observer:** Where each party is represented by more than one observer, one of them is designated "head observer." This observer is empowered by the party s/he represents to enter into binding agreements regarding election questions that may arise during the election. In addition, this observer serves as a communication link with the party's designated representative, or completes other tasks as they arise (such as finding replacement observers for the ones who fail to appear at the assigned poll).

**37.07 Waiver of right to have an observer:** Parties may waive the opportunity to be represented by observers, either expressly or by default (no observer appearing). Agents ensure that all parties are aware of their right to have an observer present at every stage of the election process (*CHM 39* - responsibility when observer fails to appear for election).

**37.08 Mail ballot elections:** Parties are entitled to have observers present in the Regional Office when ballots are mailed and counted pursuant to an election agreement. The region actually prepares the mail ballot packages. If all parties have an observer present at the mail-out, the observers check-off the eligibility list as the mail ballot package is prepared for each eligible employee

and otherwise observe the mailing and count of the ballots. If all of the parties are not represented by an observer, the observer's only function is to observe the mailing and count of ballots. Any observer present is asked to sign a Certification of Conduct of Election (*CHM 43*).

**37.09 Instructing the observers:** Prior to the opening of the polls, the agent instructs the observers about their duties. All observers, including alternates, are assembled at the same time to be briefed concerning all aspects of the election. These meetings usually occur at least 30 minutes prior to the opening of the polls. In large elections, however, the region may schedule the observer meeting on the day before the election is scheduled.

Observers are given a copy of the Instructions to Election Observers, FLRA Doc. 1012. In addition to the instructions outlined in FLRA Doc. 1012, principal areas of instruction relate to the procedure for checking off the names of the voters as they appear to vote, the challenged ballot procedure, assistance to handicapped voters, disposition of the marked ballots and safeguarding the ballot box. Each of these topics is discussed in subsequent sections in this *CHM* and the agent reviews them prior to instructing the observers (*CHM 39.7*).

Observers are required to wear an official FLRA Observer badge. The agent provides the badges before the polls are opened and collects them when the polls close, or after the count of the ballots. No other insignia including any type of electioneering campaign material may be worn or exhibited by observers during their service as observers. *CHM 46.2.* This restriction does not apply to Federal government identification badges which are required to be worn at all times at certain

agencies or activities.

# 38 EQUIPMENT AND POLLING PLACE:

**38.01 Election kit:** Each agent prepares and maintain an "election kit" containing, at a minimum, the following supplies:

a. One FLRA official agent badge;

b. At least four Observer badges and blank inserts for the badges;

c. Two voting place signs (FLRA Form 126);

d. Two blank "Time to Vote" signs (FLRA Doc. 1098);

e. A supply of Instructions to Election Observers (FLRA Doc. 1012);

f. A supply of challenged ballot envelopes (FLRA Doc. 1279);

g. A supply of secret ballot envelopes (FLRA Doc. 1280);

h. Official ballot box stickers (FLRA Doc. 1096);

i. Blank Certification of Conduct of Election forms (FLRA Form 42);

j. Blank Tally sheets (FLRA Forms 39, 40 and when necessary, 41);

k. A supply of sharpened pencils for the voting booth;

l. A supply of different colored pens for the observers to

use when checking the eligibility lists;

m. Challenged ballot sheets, including envelopes for determinative challenged ballots (FLRA Doc. 1201) and an envelope for spoiled ballots; and

n. A supply of note paper, scotch tape (for sealing challenged ballot envelopes), masking tape (for sealing the ballot box) and rubber bands.

**38.02 Equipment maintained in the Regional Office:** The Regional Office maintains a supply of the items listed in *CHM 38.1* and the following:

a. Portable voting booths;

b. Portable (cardboard flattened) ballot boxes;

c. Business reply mail ballot envelopes (FLRA Doc. number dependent on the region);

d. Absentee ballot envelopes (FLRA Doc. 1470);

e. Blank notices of election (FLRA Forms 125A and B, FLRA Forms 210A and B and FLRA Forms 36A and B); and

f. Instructions to Eligible Employees Voting by U.S. Mail (FLRA Doc. 1013).

**38.03 Voting booths:** When one voting booth is adequate for an election, the agent uses the region's collapsible portable booth. When more than one booth is needed, the agency or activity

may, if possible, supply facilities affording privacy to voters for marking their ballots. Municipal or other governmental units may loan polling booths; or booths are easily constructed from partitions or cardboard boxes. **What is required is that the compartment or cubicle, not only provides privacy, but also demonstrates the appearance of providing privacy.**

**38.04 Equipment for a specific election:** In addition to the equipment and supplies discussed above, in any given election the agent also includes in his/her election kit, the following:

a. Case file;

b. Several notices of election that were specifically prepared for the election;

c. Ballots;

d. Certification of conduct of election, filled out to the extent possible;

e. Appropriate tally of ballots, filled out to the extent possible; and

f. Blank affidavit forms if the observers refuse to sign the certification of conduct of election (*CHM 36.2*).

Equipment and furnishings for the election include a table to accommodate an observer for each of the parties, chairs for the observers and agent, an extra table for supplies, etc., and a stand upon which to place the ballot box.

**38.05 Size and arrangement of polling place:** The size of the polling place depends on the nature of the election. The number of voters and the time period established for voting are

controlling. Preparations are made on the basis of a "peak load." With a good eligibility list and cooperative voters and observers, one checking table can process 200-400 voters per hour. In these circumstances, each checking table requires four voting booths. With these guides in mind, election needs are scaled up or down according to the election. In elections involving less than 25 voters, no more than one or two booths, and one checking table are necessary.

The polling place is arranged so that the voters may enter, stop at the checking table, get a ballot from the agent, proceed to a voting booth, deposit the ballot in the ballot box and then leave the voting area without any confusion. The agent should make sure there is sufficient space between the entrance and checking table(s) so that the voters may form a uniform and controlled line. In addition, the agent ensures that sufficient space is provided in the polling area so the voters can do what is expected of them with a minimum of conversation and supervised assistance.

Adequate light and heat are required. A typical floor plan for a small election is illustrated in Figure 38.5A. This sample shows an "ideal" floor plan, one having a separate exit and entrance. A typical floor plan for a large election is illustrated in Figure 38.5B.

**38.06 Ballot box:** The ballot box is not constructed and sealed until after the observers arrive and immediately prior to the start of the election (see *CHM 39* - *when observers are not present*). The observers watch the agent seal the box so that they can inspect the box to see that it is empty. The box is not opened for any reason while the election is in progress. See *CHM 39.9* for specific instructions for constructing the ballot box.

**39 PREOPENING PROCEDURES:** The agent and the observers assemble at the polling place at least 15 minutes (when the observers received their instructions previously) to 45 minutes prior to the opening of the polls (depending on the complexity of the election). The agent ensures that all observers are present. If an observer is not present, the party's representative, if available, may secure a substitute. Neither the agent nor any other party may arrange for a substitute observer for another party. If a replacement observer does not arrive before the polls are scheduled to open, the agent proceeds with election preparations and opens the polls on time.

**39.01 Checking the voting site:** The agent ensures that the polling site is the polling site that the parties agreed to in the Election Agreement and that it conforms to the notice of election. Under no circumstances are polling sites changed from those cited in the Election Agreement without permission of all parties and approval of the Regional Director. In such circumstances, agreement to change a polling site is dependent on whether the change is justified, whether the employees have adequate notice of the change, and whether the change is at a site that is conducive to voter turnout.

**39.02 Checking the equipment:** The agent is responsible for ensuring that all equipment is available and in place. Often overlooked are sharpened pencils in the voting booth.

**39.03 Posting Voting Place signs:** The agent is responsible for posting "Voting Place" signs (FLRA Form 126). The agent may not use signs prepared by any of the parties unless the parties all approve the wording and format on the signs prior to the election.

**39.04 Checking the Notice of Election:** The agent confirms that notices of election have been posted in accordance with the parties' agreement, or distributed in a manner consistent with the distribution of other employee notices. If the agent identifies a problem, s/he records it for the file. After the election, the agent obtains a copy of the posted notice from the activity for the case file.

***NOTE: While the agent is checking the site, notice, etc., s/he may not leave the ballots and eligibility list unattended. S/he keeps the ballots and eligibility list with her/him at all times.***

**39.05 Distribution of badges:** Agents wear the official FLRA Badge. Observer badges are prepared and distributed to the observers, with instruction for their return. Observers may not wear these badges when they are not acting as observers.

**39.06 Reviewing the eligibility list and last minute updates:** As discussed in *CHM 35*, the parties confirm any last minute changes in the eligibility list unless there is a dispute as to the affected employee's eligibility (see *CHM 28.11.3.2*, *28.18.3.5 and 35.5*).

**39.07 Instructions to Observers:** If the observers have not received instructions previously, the agent gives each observer a copy of the Instructions to Election Observers, FLRA Doc. 1012 at this time. *CHM 36.2 and 37.9*. The observers are given the opportunity to read the instructions and ask questions. The agent also instructs the observers as to their specific tasks for the day. The observers are instructed on the matters summarized below. **Complete details are described more fully in the cited *CHM* sections.**

a. Identification procedures: The agent advises the observers that upon entering the polling area, the voter is asked to state his/her full name and provide identification in accordance with the parties' agreement on voter identification requirements (see *CHM 40.5*). If the Election Agreement requires identification and the voter appears with no identification, the voter is asked to go get his/her identification and return, unless the Election Agreement provides alternative procedures. The observers are instructed to remind the voter of the voting hours. If the Election Agreement requires no identification, and one of the observers questions the eligibility of the voter, the observer may ask the voter for his/her job title, and job site. (*CHM 28.22 and 40.5 for voter identification procedures; see CHM 28.18.3 for eligibility list requirements*).

b. Checking the name on the eligibility list: Each observer is given a pen of a different color (they can decide which color they want). As a voter is identified and his/her name is found on the eligibility list, each observer marks a "dash," "check" or an "x" in front of the voter's name (the marks are consistent). Every observer makes a mark next to the name of every employee who votes. *CHM 40.5.2*

c. Challenged ballot procedures: See *CHM 44 - challenged ballot procedure.*

(i) If an employee enters the polls to vote, and his/her name is not on the list or is on the excluded list, the observers inform the employee of their findings. The observers ask the voter if

s/he is a new employee and if so, provide information about the eligibility date for voting. If the employee's name appears on the excluded list because s/he is a supervisor or management official, the observers ask the employee if s/he is a supervisor or management official. If the employee confirms his/her status is supervisory or managerial, the observers can tell the voter that s/he is ineligible to vote. Normally, the supervisor or management official leaves the voting area. If the employee insists on voting and does not appear on the list or otherwise appears ineligible, the voter may cast a challenged ballot. *CHM 44.6*. ***Note: in any situation where the employee is clearly ineligible, neither the agent nor the observers may argue with the employee if the employee insists on voting.*** The agent allows the employee to vote by challenged ballot to expedite the process. Arguing with an employee who is clearly ineligible to vote could be disruptive; thus, agents are encouraged to act quickly. See *CHM 44.6 through 44.9*.

(ii) The observers may also challenge specific employees whose names appear on the eligibility list.

***NOTE: The agent oversees these conversations particularly at the beginning of the election. If necessary, the agent can talk to the voter, ascertain the voter's status and desire to vote and instruct the observers on filling out the challenged ballot envelope.***

The only envelope observers are allowed to handle is the challenged ballot envelope, and this occurs only when the polling area is extremely busy. It is better to hold up the voters waiting to check in, than to allow the polling area to get congested. After entering the required information on the challenged ballot envelope, the observers direct the voter to proceed to the agent for a ballot and the secret ballot envelope. The agent instructs the voter on the challenged ballot procedure in accordance with *CHM 44.6.3*.

When voting an employee by challenged ballot, the observers annotate the list to show the voter was challenged. There are three possible scenarios:

(i) If the voter's name was not on the eligibility list, all of the observers add the voter's name to the bottom of the list and place a small "c" next to the employee's name to denote the vote was challenged.

(ii) Only the observer who challenges a voter's name that is on the list marks a "c" next to that voter's name. This denotes the party filing the challenge. The other observers make a regular mark unless they too are challenging the voter.

(iii) The observers all mark a "c" next to any voter's name that appeared on the excluded list but insisted on voting.

d. Assistance to handicapped voters: Observers do not

assist handicapped voters except as they check-in to vote. Agents assist any handicapped voter to the voting booth and inside the voting booth when requested to do so (see *CHM 40.9* for a discussion about assisting handicapped voters).

e. Safeguarding the ballot box: The agent has primary responsibility for safeguarding the ballot box, but observers are instructed to report anything unusual occurring at the ballot box or to ask voters to leave the polling area once they have voted. Observers also ensure that all ballots are deposited in the ballot box and that no voter leaves the polling area with their ballot. *CHM 40.10*

f. Chatting with co-workers: Chatting with co-workers and friends who come to vote is discouraged. Observers are reminded that, as observers, their primary function is to ensure that the election is fairly and impartially conducted.

**39.08 Outside representatives:** Depending on the activity's access rules, party representatives who are not acting as observers are permitted to inspect the polling place before the polls open. These representatives may also be present while the ballot box is constructed and sealed. **They are required to leave before the polls open as their presence in the polling area could be grounds for setting aside the election.**

**39.09 Constructing the ballot box:** Constructing the ballot box is a formal procedure. The agent asks all observers to watch while s/he "constructs" the box, i.e., folds it and tapes it together. Before the box is closed and taped, the agent asks the observers

to look into it - while it is open - and to affirm that it is empty. Then the box is closed and the sides are securely sealed with tape. The agent places an Official Ballot Box sticker, FLRA Doc. 1096, on the side of the ballot box. Finally, the agent informs the observers to stand clear of the ballot box for the duration of the election (except when those observers who are eligible to vote actually vote and deposit their ballot into the box).

**39.10 Voters who arrive before opening of the polls:** Voters who arrive to vote before the polls open are not permitted to vote prior to the time scheduled. Those who arrive early are not sent away but rather asked to form a line and wait for the polls to open. If an employee leaves, s/he is informed of the voting hours.

# 40 CONDUCTING THE ELECTION:

**40.01 Opening the polls: The polls are opened on time.** If there is a clock in the polling area, it is used as the official timepiece. If an activity clock is not available, the agent and the observers usually agree on an official timepiece. Absent agreement, the agent selects it. Failure to open at the scheduled hour is not cured by extending the voting period beyond the closing time contained in the Election Agreement.

If the polls open late, the agent records the time and the details, including whether, and how many, individuals came to vote and left without voting. If no one left, it is good practice to secure the signatures of all observers on a statement to that effect.

**40.02 Announcements on intercom or e-mail:** Arrangements for announcements on the intercom or e-mail are discussed at the election agreement meeting. However, in the event that the activity offers to announce the opening of the polls on an intercom or to send an e-mail on the computer network, the agent drafts the language for the intercom announcement or e-mail. Although allowing one of the parties to draft an announcement is not prohibited, it could lead to the appearance of partiality if the message is not written properly.

**40.03 Releasing employees to vote:** Unless the Election Agreement or Direction of Election contains provisions for releasing employees to vote in staggered shifts on duty hours, the employees are permitted to vote at any time during the polling hours.

**40.04 Entering the polling area:** Upon entering the voting area, a voter proceeds to the check-in table. In large elections, guide

ropes anchored to stanchions may be necessary. If more than one check-in table is used, information signs reflecting where voters check-in are posted (i.e., “last names A - F vote here”).

## 40.05 Procedure at check-in table:

**40.05.01 Voter identification:** A voter is properly identified when the voter states his/her full name to the observers and/or presents identification pursuant to the arrangements set forth by the parties in the Election Agreement and on the Notice of Election. The requirement that the voter state his/her full name is rigidly enforced. That a voter may be recognized by, or known to, one or more of the observers, does not relieve the employee from having to state his/her name in full to the observers.

In the event that the Election Agreement states that voters are not required to show identification and one of the observers cannot identify a voter, the voter then states his/her job title, activity code or other identifying information contained on the voting list. If the agreement requires voters to show identification and the voter did not carry the identification to the polling site, the observers may require the voter to get the identification. As an alternative, and if contained in the agreement, the voter may be allowed to vote as long as one of the observers knows the voter by name and the other observers do not challenge the voter’s eligibility (*CHM 28.22*).

**40.05.02 Marking the list:** Once a voter's name has been located on the eligibility list, all observers are satisfied as to the voter's identity, and no one questions the voter's eligibility, each observer at the check-in table places a mark in pens of different colors beside the name. The mark may be a dash, a check or an

"x" and may be made on either side of the name, depending upon the space available on the list. All marks and where they are placed for each voter are consistent.

Observers are not permitted to maintain separate lists of those who have or have not voted. The official eligibility list is the only record made and shows whether a person named thereon has voted.

For information pertaining to voter eligibility and challenged ballots, see *CHM 44*.

**40.06 Releasing the ballot to the voter:** Once a voter has been identified and checked-off, the observers - or one of them designated by the others - informs the agent that the voter has been identified and the list so marked. Often the observer simply states "okay" to the agent signaling that the voter is eligible. The agent then hands a single ballot to the voter and when doing so, checks the ballot for any defects.

**40.06.01 Instructing the voter:** As the agent hands the voter his/her ballot, the agent instructs the voter to:

a. enter the voting booth;

b. mark, but do not sign the ballot;

c. fold it before leaving the booth; and

d. deposit it into the ballot box before exiting the polls.

The agent also instructs a voter who spoils a ballot to return it to the agent. The agent will then provide the voter with another ballot.

**40.06.02 Spoiled ballots:** A voter who spoils his/her ballot and returns it to the agent is given a fresh ballot. The spoiled ballot is torn or folded, marked "void," and placed in the "Spoiled Ballot" envelope. This envelope is preserved as part of the election records until the case is closed.

**40.07 Proceeding to the voting booth:** The voter proceeds from the check-in table to a voting booth. The agent periodically polices the booths to ensure there: 1) are no cross-conversations between occupants in adjacent booths; 2) is no more than one occupant per booth; and 3) is no campaign material in the booth.

Secrecy in the casting of a ballot requires that the booth be occupied only by one voter. A voter who requests assistance or information regarding the wording on the ballot leaves the booth and receives any explanation from the agent in the presence of the observers. The only exception to this rule is when rendering assistance to a handicapped voter who also needs assistance in marking his/her ballot (see *CHM 40.9*).

**40.08 Depositing the ballot into the ballot box:** The voter leaves the booth and drops the folded ballot into the ballot box. Unless the voter is handicapped, and then, only in unusual circumstances, no one but the voter may touch the used ballot. If the ballot does not slip through the slot, the voter is instructed to force the ballot into the box. The voter then leaves the polling place. Voters are not permitted to loiter or to wait for other voters in the polling area.

Once the ballot, whether or not it is challenged, is deposited in the ballot box, the voter loses control over its disposition. To permit the withdrawal of ballots places, in most cases, the

finality of the election in the hands of such voters. Moreover, allowing such practices may open elections to possible abuses since, once the election results were known, pressures of various kinds could be exerted upon voters to withdraw their ballots to achieve a desired election result. *Great Eastern Color Lithographic Corp.*, 131 NLRB 1139 (1961).

**40.09 Assisting handicapped voters:** Agents assist handicapped voters. The agent offers to:

a. accompany a blind voter into a booth; read the ballot to the voter and place the voter's hand holding the pencil on each box noting the choice on the box. The agent explains all of the choices even though the voter may state "up front" his/her choice;

b. accompany a paraplegic voter into the booth and assist the voter in accordance with his/her request;

c. move the booth or set up a different booth to accommodate a handicapped voter; and/or

d. take any other action required to assist the handicapped voter.

**40.10 Safeguarding the ballot box:**

**40.10.01 Ballot box(es):** The ballot box(es) are under the constant surveillance of the agent and the observers in the polling place(s) throughout the one or more voting periods involved. As discussed in *CHM 37.2*, a separate set of observers are assigned to watch the ballot box in any election involving 200 employees voting per hour. During the election,

as the ballot box fills up, the agent shakes it occasionally to compress the ballots in the box.

**40.10.02 Sealing the ballot box:** During the election, after a ballot box has been filled, it is removed and sealed promptly by the observers. A strip of masking tape is placed over the slot where the ballots were deposited. Each observer signs his/her name across the sealing tape, with the first name begun off the strip and a portion of the last name ending off the strip on the opposite side. Transparent tape is placed over each of the signatures. The sealed box is placed in a location where it is under constant custody and surveillance by the agent and observers during the remainder of the voting period. A new box is constructed as discussed in *CHM 39.9*.

**40.10.03 Custody between voting periods:** See also *CHM 42* for a discussion on split voting sessions. Item #12 of the election agreement, FLRA Form 33 and Item #10 of the election agreement for unit consolidation elections, FLRA Form 34, specify that the ballot box will be securely stored between voting sessions by the agent. The unused ballots are placed in an envelope or suitable box and sealed and signed over in the same manner as described in *CHM 40.10.2*. Ballot boxes are sealed and signed over in the same manner.

In carrying out his/her responsibility to secure the ballots and ballot box between voting sessions, the agent remains with the election materials at all times. Locking the ballots and the ballot box in the trunk of one's car or in a hotel room is unacceptable as it could lead to an objection pursuant to § 2422.29 of the regulations.

**40.11 Closing the polls:** The polls are closed exactly at the scheduled time as determined by the agent, referring to the timepiece selected prior to the opening of the polls. Those employees who are waiting in line outside the polling area to vote when the polls close are permitted to vote without challenge. In these circumstances, the agent notes who the last voter is in line and seals the ballot box and the unused ballots after that voter casts his/her ballot.

There may be situations where voters join the line after the polls close, but before the ballot box is opened for the count. If the voter insists on voting, the agent allows the voter to cast a challenged ballot and includes on the challenged ballot envelope a statement of why the voter appeared late at the polls. This allows an orderly investigation of the circumstances surrounding the matter in postelection proceedings (*CHM 47.6*).

In situations where it appears that everyone listed on the eligibility list has voted, the agent may not close the polls before the time established in the Election Agreement. The names on the list are not conclusive of the eligibility of all of the employees in the unit; e.g., omission of name(s) due to clerical error. Thus, the full voting period is available for any employee who desires to vote.

**40.12 Sealing the ballot box and the unused ballots:** Once the polls are closed, the agent seals both the ballot box across the slot where the ballots were deposited and the unused ballots before doing anything else. **The ballot box is sealed even if the count of the ballots is being held at the polling site immediately following the close of the polls.** The ballot box is sealed as described in *CHM 40.10.2*. The unused ballots are sealed in a

separate envelope in the same manner.

**40.13 Certification of conduct of election:** At the close of the election, the agent asks the observers to sign a Certification of Conduct of Election, FLRA Form 42. Each observer notes the specific times s/he served as an observer and the party represented. If a party has no observer, the agent writes "No Observer" in the appropriate space. Any observer who leaves the polling place prior to the close of the election is requested to sign the Certification form showing the time spent at the polling place. Where multiple polling places are used, a separate Certification of Conduct of Election is prepared by the Regional Office for each of the locations.

If an observer refuses to sign the Certification, the agent asks the observer to prepare a written signed statement (affidavit) setting forth the reason(s) for such refusal. The agent is responsible for ensuring the affidavit is complete. This statement is retained with the Certification form signed by the remaining observers. (*CHM 36.2p*).

If there are no observers at the polling site, the agent conducting the election proceeds with the election and notes on the Certification of Conduct that the election was conducted with no observers present. (See also *CHM 43.4* for mail-out elections.)

**40.14 Securing other election supplies:** All election materials pertaining to the election are secured and returned to the Regional Office. This includes the unused ballots, the voting list(s), certification(s) of conduct of election and original tally of ballots. Spoiled ballots are also sealed in a separate envelope. The agent also takes custody of any other challenged ballot lists that s/he instructed the parties to maintain. The observers return

their badges to the agent even if the same observers act at the count. The agent is responsible for cleaning up the polling area and removing all election supplies. The secured election supplies (pens, tape, etc.), the unopened ballot box and the voting eligibility lists are used at the count.

**40.15 Transferring ballots from ballot box:** In certain rare and exceptional circumstances, the count may not take place immediately following the close of the polls. For example, if the ballots are impounded or the election is held in a remote location, the parties may agree in the Election Agreement to count the ballots elsewhere. (See *CHM 55.2* for a discussion about impounding ballots: circumstances concerning the decision to impound and procedures for impounding.)

In such situations, the ballots may be removed from the ballot box in front of all observers and transferred in their folded condition to a mailing envelope or other repository. The envelope/box is sealed and signed by all of the observers and transparent tape is placed over each of the signatures. The envelope/box is marked clearly to reflect the case number, date of election and polling place. The envelope/box is also labeled to reflect that it contains ballots and that the envelope may not be opened. If more than one envelope is being used, each envelope is marked in sequence; e.g., “Envelope 1 of 2" or “Envelope 2 of 2”, etc. Employees at the receiving location are alerted regarding receipt of the material and that it cannot be opened when received.

# 41 MULTIPLE VOTING SITE ELECTIONS:

**41.01 Fixed sites:** Where more than one polling place is open, either simultaneously, at different times, or with overlapping periods, the procedures are basically the same as those applying to a single polling place. Each polling place is set up and run like those described in *CHM 39 and 40*.

Where the polls are opened simultaneously, a voter is normally required to vote at a specific place cited in the Election Agreement or Direction of Election and posted in the Notice of Election. The voter's name appears on the eligibility list only at that location. If the voter wants to vote at another site, s/he votes a challenged ballot at the site where his/her name does not appear on the list. This challenge is resolved prior to the count to ensure the voter only voted once.

***NOTE: The agent and the observer may request the voter go to his/her assigned polling site to vote, but s/he cannot require it. The agent and the observers can not say anything to the voter that could be perceived to discourage the employee from voting.***

If the parties cannot "assign" voters to a particular site (such as truck drivers or roving work crews), alternative identification procedures are discussed at the election agreement meeting (*CHM 28.21*). Voters and observers follow the voter-identification procedures set forth in the Election Agreement; otherwise, the voters cast challenged ballots at any of the polls designated and the challenges are resolved before any votes are counted. *CHM 28.22*

A separate certification of conduct of election is used for each polling place. Other closing procedures, such as sealing the ballot box, are also observed at each polling place. At the close of the voting, the ballot boxes used at all polls are brought together and the contents of the boxes are thoroughly mixed before the count takes place (*CHM 47*).

**41.02 Traveling elections:** Some elections require the polls to move from place to place. This usually occurs where there are small numbers of eligible employees spread out over a large facility and it is not practical to set up permanent polls at each location. In traveling elections, the entire election is usually conducted in the back of a truck with the observers at the front and the voting booths set up in the back.

The election is conducted by an agent, who travels with observers representing each party. The opening and closing of each voting period is as formal as those involving a regular polling place. The ballot box is quickly sealed between voting sessions and the unused ballots are also secured. The only difference is that the certification of conduct is signed only once and at the end of the day, assuming all of the same observers are present for the traveling election.

Like other multiple polling places, the voting hours at each place are scheduled in advance and appear on the Notice of Election. When scheduling traveling elections, potential weather, road, and automobile problems are considered.

In very rare circumstances, it may not be possible to set the polling hours in the Election Agreement. An example includes employees who work on floating barges dredging rivers and the Activity cannot predict when the barge docks. These

circumstances are carefully described in the Election Agreement so that the Agreement clearly reflects the circumstances as well as the parties' agreement and arrangement to vote the eligible employees (*CHM 28.20.3.2*).

**42** **SPLIT SESSION ELECTIONS:** Split session elections are elections involving multiple voting sessions at a fixed site. An example is a three-shift work operation where the polls are opened during the periods where the employees change shifts. Each session is conducted like a separate election. The same instructions apply to opening and closing the polls in split-session elections as in elections generally. Polls are opened and closed in accordance with the times designated in the Election Agreement and Notice of Election.

At the close of each voting session, observers are asked to sign the certification of conduct of election with the added notation "session #1 of __" and reflect when the session was opened and closed. The ballot box is securely sealed as described in *CHM 40.10*. Badges are collected. As discussed in *CHM 40.10*, the agent is solely responsible for the custody of the box and election supplies. This procedure is repeated for every session.

If the same observers are returning for another session, the agent cautions the observers about their conduct between sessions. See *CHM 46*.

43 CONDUCTING MAIL BALLOT ELECTIONS: When conducting mail ballot elections, the Regional Office performs all of the functions performed at manual ballot elections. As noted in *CHM 28.23*, the details of mail ballot elections are set forth in the Election Agreement or Direction of Election. See also Figure 28.23. The Regional Office is required to prepare all materials, obtain the eligibility list and mailing labels of eligible employees' home addresses from the activity, and mail ballots to all eligible employees.

43.01 Materials required for the mail-out:

43.01.01 Notice of Election: In an all mail ballot election, a Notice of Mail Ballot Election, FLRA Form 125B, 210B or 36B (unit consolidation election) is used; in a mixed mail/manual ballot election, FLRA Form 125A, 210A or 36A is used, as appropriate. See *CHM 33* for contents and preparation of the notice.

43.01.02 Instructions to Eligible Employees Voting by U.S. Mail, FLRA Doc. 1013**:** This document states the purpose of the election and instructs voters on marking their ballots and sealing them in the appropriate envelopes. The region completes the line concerning the date ballots are due to be returned to the Regional Office.

43.01.03 Official secret ballot: The same ballots used in manual ballot elections are used in mail ballot elections. See *CHM 34* for guidance on ballots, their preparation and format.

**43.01.04 Secret ballot envelope:** The region has a supply of Secret Ballot envelopes, FLRA Doc. 1280. The voter is instructed to seal his/her ballot in the secret ballot envelope before placing it in the return business reply envelope. If a

ballot is not sealed in the secret ballot envelope, but rather is sealed directly in the business reply envelope, the agent announces that the ballot will be counted. In *Veterans Administration Regional Office, Newark, New Jersey,* 1 A/SLMR 207 (1971), the Assistant Secretary concluded that the failure to enclose the ballot in a sealed envelope is not sufficient grounds for invalidating the eligible voter's ballot. If a party objects to counting the ballot, the ballot is considered a challenged ballot. See also *CHM 47.7.4 and 47.10* for a discussion of similar issues.

43.01.05 Return business reply envelope with signature statement and return address: Each region has its own supply of preprinted return business reply envelopes that contain the statement: "I believe I am an eligible voter in this election. I personally voted the within secret ballot." The voter is instructed on the FLRA Form 1013 to sign this statement and to certify that s/he voted the within ballot.

43.01.06 Envelope to mail election package to the voter: This envelope is large enough to hold the election materials. The envelope is marked "Personal, To Be Opened By Addressee Only" and "Open Immediately." It is addressed to each eligible voter at their home address unless there are unusual circumstances warranting a different procedure.

43.02 Eligibility list: The same procedures are used to prepare and check the eligibility list as discussed in *CHM 35*. The requirement to furnish the eligibility list with home addresses of all eligible employees on mailing labels is included in the Election Agreement. The Election Agreement also includes a date for submitting these materials to the Regional Office. The list is due in the Regional Office before the date of the mail-out of the ballots. **If an activity refuses to provide the employees'**

**mailing addresses, contact the Office of the General Counsel immediately. Provide the name and telephone number of the activity representative who made the decision. See also** *CHM 28.23.1*.

43.03 Conducting the mail-out: Prior to the date of the mail-out, the region prepares all supplies. If no party intends to have an observer present, the region may also compile the packages of materials described in *CHM 43.1* and place these materials in the envelope containing the voter's name and home address before the mail-out date. As each envelope is being prepared, the agent assigned to the case is responsible for checking the voter's name against the eligibility list. If key numbers are used as a means of facilitating identification of the voters, the agent ensures that the key number next to the voter's name on the eligibility list corresponds to the key number on the return envelope.

[Technical information on how to number return envelopes for a large election: on WP8 do a page set-up for envelope size document, and do a footer in order to align the numbers in the appropriate box. This task requires changing margins, line spacing, etc. after which the case number will fit on the designated line. Center the case number on the margin. To number the envelopes select format, page, numbering and then select (set value) type the number and wp8 will automatically number the envelopes consecutively.]

If the party(s) intends to have an observer present, the agent schedules a time for the region to compile the mail ballot package before the actual date of the mailing. All unused ballots and materials are secured by the agent in

an envelope similar to sealing ballots at a manual election. Tape is placed across the seal and the agent signs across the tape so the signature crosses the tape onto the envelope. Transparent tape is placed over the signatures. If the agent believes that additional ballots will be requested and mailed to voters after the original mail-out date, these procedures may be relaxed as long as the ballots, eligibility list and election materials are secured in a safe place. See also *CHM 43.9* and *CHM 47.9* for securing returned mail ballots.

43.04 Certification of conduct of election: After the materials are placed into the mail-out envelopes, the eligibility list checked and envelopes sealed, the agent and any observer(s) present sign a certification of conduct of election. Unlike manually conducted elections where only the observers sign the certification, when no observers are present or where all of the parties are not represented by observers, the agent signs the certification or prepares a memorandum to the file certifying the conduct of the mail-out.

43.05 Depositing the mail ballot packages in the U.S. Mail: The ballots are deposited in the mail on the day established by the parties in the Election Agreement. Since the regions meter their own mail, the regions ensure that the mail is metered and picked up on the date designated for the mail-out. The agent notes on the certification of conduct, or in a memorandum to the file, that the ballots were properly mailed.

43.06 Posting the Notice of Election: A notice of election in an all-mail ballot election (FLRA Form 125B, 210B or FLRA Form 36B) or a mixed mail\manual ballot election (FLRA Form 125A, 210A or FLRA Form 36A) is posted no later than the date of the mailing of the ballots. The notice remains posted

through the date of the count of the ballots.

43.07 Mixed mail/manual ballot elections: In a mixed mail/manual ballot election, ballots are sent only to those employees who cannot vote in person because they are absent on official business on the day of the election, their duty station is in a remote area, and/or the parties agree that a mail ballot election is appropriate under the circumstances (*CHM 28.19*).

As noted in *CHM 28.24*, mail ballots are not sent to any eligible employee for reasons such as illness, vacation, or furlough which may preclude the employee from being able to vote on the day of the election.

**43.08** Ballots returned by the post office as "undeliverable": If the post office returns ballots because of an incorrect address, the region verifies that the address was the last known address maintained by the activity for the employee. If the address originally given was incorrect, the region mails another ballot to the correct address. If the activity verifies that the address given was the last known address, the region records this information on the envelope. The returned envelope is secured with the remainder of the election supplies.

**43.09** Securing returned mail ballots before the count: Upon receipt in the Regional Office, all envelopes are date-stamped to establish the date of receipt. **Returned mail ballots are placed in a secure location, either in a "ballot box" that is sealed or in a locked drawer.** Envelopes received after the close of business on the return date, but prior to the time set for the count, are kept separated from those timely received. See also *CHM 47.9.2.*

**43.10 Counting mail ballots:** see *CHM 47.9*.

# 44 CHALLENGED BALLOT PROCEDURE:

44.01 Purpose: Eligibility to vote in any election is based upon the voter's employment in the unit during a specified payroll period and at the time of the election. The challenged ballot procedure affords an individual whose eligibility is an issue the opportunity to vote, while preserving the ballot until a determination is made, if necessary by the Regional Director or the Authority. *See U.S. Department of the Navy, Naval Station, Ingleside, Texas,* 46 FLRA 1011, 1024 n.9 (1992).

44.02 Filing challenges: Any party through its authorized observer or the Regional Director, or through his/her agent, may, for good cause, challenge the eligibility of any person to participate in the election prior to the employee voting [§ 2422.24(a)]. *CHM 44.4*

44.03 Basis for challenge: A party challenges the eligibility of a voter who may not be in the unit or employed during the specified payroll period. Examples of such challenges are based on the following grounds:

a. Supervisory or managerial status;

b. Employed in, or transferred permanently to, a classification outside of the unit involved in the election;

c. Employed in a position not encompassed in the unit;

d. Hired into the unit after the designated payroll period;

e. Promoted out of the unit or reassigned after the designated payroll period;

f. Employee's name is not on the list;

g. The employee's name is on the eligibility list, but one party contests the voter's eligibility; or

h. In a mixed pro/nonpro election, the voter insists on voting a professional ballot even though the eligibility list reflects the voter is a nonprofessional employee.

44.04 Who may challenge: The agent **may not** make challenges on behalf of the parties, whether or not the parties have observers present at a manual or mail ballot election. The agent makes it very clear to the parties that s/he does not assume responsibility for assuring a voter's ballot is challenged. (see *CHM 28.11.3.2*).

**44.04.01 Manual ballot election:**

a. Any observer at a manual election has the right to challenge a voter for cause.

b. The Authority agent is required to challenge any employee whose name is not on the eligibility list, regardless of whether the observers know the voter. The agent also challenges a voter if s/he knows, or has reason to believe, that the voter is ineligible to vote, even if none of the observers voices a challenge on that ground.

**44.4.2 Mail ballot election:**

In a **mail ballot election**, a party challenges the eligibility of a voter at the count and only if the ballot is returned (see *CHM 44.10*). An observer for the party or the party representative may challenge the eligibility of a voter who returns a mail ballot in one of two ways:

a. Be present at the count;

b. Stand by on the phone to answer questions, make challenges and resolve them before the count. A party representative who is on the phone during the count can challenge the eligibility of an employee who returns a ballot in one of two ways:

(i) The agent may be required to read the names of all employees who returned a mail ballot so that the party representative makes the challenge as s/he hears the names read; or

(ii) The party representative may simply read the names of those employees whom it seeks to challenge after the returned envelopes are checked in and before they are opened.

***NOTE: A party can not send a letter to the Regional Office designating those employees whom it wishes to challenge. In essence, such a request is tantamount to the agent filing the challenge on the party's behalf. It is important to discuss these procedures at the election agreement meeting so that there is no confusion at the count.*** See also *CHM 44.10.*

44.05 When to challenge at a manual election: An observer or the agent challenge(s) a voter's eligibility **before** the voter receives a ballot from the agent. A challenge is made immediately after the voter has given his/her name to the observers. If a party

raises a challenge for the first time after the voter receives the ballot, the challenge is not entertained. **Therefore, during the pre-election observer's meeting, the agent instructs the observers carefully on the challenged ballot procedure (*CHM 39.7*).** *See also U.S. Army Advanced Ballistic Missile Defense Agency, Huntsville Office, Huntsville, Alabama,* Case No. 40-3672(RO), 1 Ruling on Request for Review 234 (1972), Report on Ruling Number 57, 4 A/SLMR 867 (1972).

44.06 Challenge ballot procedure: An individual whose eligibility to vote is in dispute is given the opportunity to vote a challenged ballot [§ 2422.24(b)].

44.06.01 Marking the eligibility list: The eligibility list is marked in a particular manner to reflect that the voter cast a challenged ballot.

a. When an observer challenges a voter whose name appears on the included list, the observer making the challenge marks a small "c" beside his/her name. The other observers make their usual mark.

b. If the agent is making the challenge or the voter's name is on the excluded list, the observers all mark a small "c" next to the voter's name.

c. If the voter's name does not appear on the list, it is added at the bottom of the list or on a supplemental sheet and a "c" inserted by all observers.

The agent has discretion to maintain a separate list of voters challenged to facilitate obtaining information from the activity and to expedite resolving challenged ballots before the count. In large elections where there may be a significant number of

challenged ballots, the list of challenged voters may be forwarded to the activity representative periodically during the election so that the information can be retrieved and made available as soon as possible after the close of the election.

44.06.02 Completing the challenged ballot envelope: The agent at the check-in table (or at a large election, at a separate table) fills out the information on the challenged ballot envelope, FLRA Form 1279. This information includes the voter's name, identification number, job title and reason for the challenge, the identity of the challenger and the agent's initials. If time permits, the agent may elicit specific information surrounding the voter's status. The voter initials any supplementary information.

***NOTE: In busy elections, the agent has discretion to allow the observers to fill out the challenged ballot envelope and then hand it to the agent. The agent ensures that the information is complete and accurate before allowing the voter to vote.***

44.06.03 Instructing the voter: The agent hands the voter the challenged ballot envelope, a secret ballot envelope and a ballot. The following is a suggested procedure to follow:

The agent instructs the voter to enter the booth and:

a. Mark the ballot;

b. Fold the ballot and seal it in the secret ballot envelope;

c. Place the secret ballot envelope in the challenged ballot

envelope and return to the agent without sealing it.

When the voter emerges from the voting booth, the agent asks the voter to confirm that the ballot was sealed in the secret ballot envelope and placed in the challenged ballot envelope. The agent explains to the voter that by sealing his/her ballot in the secret ballot envelope, the sanctity of the ballot is secured while allowing the parties to resolve the voter's eligibility status. **The agent responds to any concerns raised by the voter and then asks the voter to seal the challenged ballot envelope and deposit it in the ballot box.**

44.07 Voter's name found already marked: An employee may appear at the check-in table to vote and it is found that the name of that person has already been marked off on the eligibility list as having voted. If the employee asserts that s/he did not previously vote, the employee is allowed to cast a challenged ballot. The circumstances under which the name was marked off earlier can be determined, if necessary, in a post-election investigation. The observers add the voter's name to the list, mark it as a challenged ballot and note that there is a claim of duplicate voting.

44.08 Notation of potential challenges: Observers may bring lists to the election of employees they intend to challenge. The observers may not place any marks on these lists to denote if an employee actually voted. The agent collects all lists when the polls close.

44.09 Merit of challenge or eligibility may not be argued: Arguments on the merits of a challenge or a voter's eligibility are not permitted (see *CHM 39.7*)**.** The challenge steps outlined above are taken quietly and quickly, and the agent makes every effort

to ensure that the regular voting flow is not impeded. If an employee who is clearly ineligible insists on voting, it is easier to have the employee vote a challenged ballot rather than engage in a debate that could disrupt the election. See also *CHM 45 - handling challenging situations.*

**44.10 Mail ballot voting:** In mail ballot elections, an employee's eligibility may be challenged by a party when a ballot is returned. However, the challenge is only resolved if the ballot is returned and the challenging party is available at the count (either in person or via phone) to resolve the challenge. Thus, the actual challenge occurs when the return envelope, containing the ballot, is checked off against the eligibility list.

**44.11 Mixed mail/manual ballot election:** In a mixed mail/manual election, if any employee to whom a mail ballot has been sent seeks to vote in the manual portion of the election, s/he may be permitted to do so, but only by challenged ballot, i.e, not on the list. In resolving the latter type of challenged ballot, if examination of the returned mail ballots reveals that the challenged voter did not vote by mail ballot, the challenge to the manually-cast ballot is withdrawn and the ballot counted. If a voter casts both a mail ballot and a challenged manual ballot, the mail ballot is declared void by the agent. The mail ballot envelope is marked "void" and the reason is noted on the envelope. The challenged manual ballot is declared valid and opened and counted.

**44.12 Resolving challenged ballots:** The agent makes every effort to resolve challenged ballots. Challenged ballots are resolved **after the polls close and when the parties gather for the tally, but before the actual count of the ballots.** See *CHM 47.6* for procedures for resolving challenged ballots before the

count.

**45 HANDLING CHALLENGING SITUATIONS:** Agents recognize that the election is a formal proceeding and that the representation election process often sets the stage for the parties' future relationship. By dressing and conducting him/herself in a manner consistent with the formality of the proceeding, the agent lends credibility to the Authority's processes and assists the parties in forging their relationship.

In a hotly contested election, the agent handles any unforeseen situations in a manner that maintains the dignity and formality of the process. Of paramount importance is that the election is conducted fairly and impartially, so that each eligible employee is given the opportunity to cast a secret, uncoerced ballot.

Many issues can be anticipated and avoided with careful pre-election planning. Some cannot. Examples of issues that may arise during the election include:

a. The activity wants to change the polling site immediately before the polls open or during the election. The agent may not agree to change the site at this late date except in rare and unusual circumstances as described in *CHM 39.1*. If the activity representative becomes insistent about changing the polling site, the agent may not engage in an argument, but instead, refuses. If the problem continues, the agent calls the Regional Director.

b. A voter has no identification and none of the observers know him/her. The voter refuses to get the identification and insists on voting. Vote the employee under challenge; obviously there is no way the voter's identification can be verified and the challenge will be

resolved as ineligible. The point in this scenario is to avoid a confrontation in the polling area.

c. A supervisor insists on entering the polling area and attempts to disrupt the balloting. The supervisor does not dispute that s/he is ineligible to vote. The agent asks the supervisor to leave and the supervisor challenges the agent's authority. The agent asks for the supervisor's name and the name of his/her supervisor. The agent then calmly explains to the supervisor that s/he wants to make sure that the activity knows the identity of the supervisor who caused the rerun of the election. This usually ends the matter as the supervisor retreats quickly.

d. The polls open late because the building is locked or the agent and observers cannot obtain access to the polling area. Often the observers know someone to call. In either event, the agent records the circumstances that caused the polls to open late and whether any voters were disenfranchised. This situation can usually be avoided by verifying access to the building when planning the election.

e. The agent learns during the election that the voters are being released in staggered shifts to vote. This was not a procedure that was considered or made part of the Election Agreement. The agent contacts the activity representative from a phone at the polling site or asks one of the voters to call the activity representative and apprise the representative of the situation. If the agent has to leave the voting area to talk to the activity representative responsible for this action, the agent waits for a lull in the voting. The agent and the observers seal

the ballot box and the unused ballots. The agent takes the unused ballots and the ballot box with him/her and leave the observers at the polling site. The observers are instructed to ask any incoming voter to wait a few minutes. The agent goes to the nearest phone and contacts the activity representative.

While there are no hard and fast rules for handling these and other situations, the scenarios described above illustrate how some potentially tense situations can be diffused very quickly and professionally.

**46 ELECTIONEERING:** No electioneering is permitted at or near the polling place during the voting hours. The polling area includes the polling place and the line in which employees wait to vote. Agents of the parties (other than observers) are not allowed in the polling area at all during the election hours.

46.01 Agency's role and pre-election campaign side agreements:

**46.01.01 Agency's role:** It is the Agency's duty to remain neutral during the election campaign. See *Department of the Air Force, Air Force Plant Representative Office, Detachment 27, Fort Worth, Texas,* 5 FLRA 492 (1981); *U.S. Army Engineer Activity, Capital Area, Fort Myer, VA,* 34 FLRA 38 (1989); *Fort Campbell Dependents Schools, Fort Campbell, Kentucky,* 46 FLRA 219 (1992).

**46.01.02 Pre-election campaign side agreements:** The parties may reach pre-election campaign side agreements regarding electioneering. The Authority does not police such agreements. The regions, however, investigate any conduct constituting an objection that allegedly improperly affected the conduct or the results of the election, regardless of whether it is included in the party's side agreement. *Veterans Administration Hospital, Jamaica Plain, Massachusetts,* Case No. 31-3178, 1 Rulings on Requests for Review 85 (1970), Report on Ruling Number 20, 1 A/SLMR 615 (1970). (*CHM 28.31*).

In the absence of the filing of a charge, complaints of improper electioneering are not investigated prior to the election, unless and only to the extent that they involve abuse of the Authority's processes. For example, defaced notices of election are replaced, if brought to the region's attention, by the posting of fresh copies. If the

region learns that an entire group of eligible employees was not provided with an opportunity to vote in the Election Agreement, the Regional Director may cancel the election by issuing an Order Canceling the Election.

The agent records all electioneering conduct that may be objectionable in a case file memorandum.

46.02 Observer rules:

46.02.01 Insignia: Observers wear the official FLRA Observer's badge. They may not wear any campaign insignia.

46.02.02 Electioneering by observers: Observers may not electioneer during their hours on duty as an observer, whether at or away from the polling place. Observers also may not converse with incoming voters other than the normal conversation that occurs as the voter is checking in. Finally, if an observer takes a break, the agent cautions him/her against seeking out colleagues who have not yet voted to encourage them to vote.

46.03 Voters: Voters may wear campaign insignia, even though it constitutes electioneering material. A voter may not campaign or discuss his/her choice in the polling area. If a voter carries campaign flyers or other campaign material in his/her hand into the polling area, s/he is asked to put the material out of sight. The observers cannot offer to take the material from the voter or allow it to remain in the polling area. The agent checks the polling area and voting booths periodically and removes any election literature that may have been left by a voter.

Voters may talk among themselves in line. The agent is not

required to police their conversations unless the talk becomes loud and/or disruptive.

**46.04** Area around polling place: In some contested elections, the agent may discuss with the parties the boundary area around the polling place in which the parties may not electioneer during polling hours. The agent cannot agree to set a boundary that cannot be policed.

**46.05** Distribution of literature and sound trucks: The distribution of campaign material on election day cannot be prohibited by the Authority, even though it takes place during polling hours, unless it occurs within the polling area. The agent may take steps to stop a sound truck from campaigning near the polls if the sound is heard in the polling area.

47 TALLY OF BALLOTS: Regulations Section 2422.25(a) provides that at the conclusion of the election, the Regional Director will tally the ballots. The agent in charge of the election acts on the Regional Director's behalf. The Regional Director does not attend the count as s/he rules on any objections that may be filed regarding conduct occurring at the count and on any determinative challenged ballots the parties are unable to resolve at the count.

47.01 Valid ballots cast: Representation is determined by the majority of the valid ballots cast [§ 2422.25(c)]. A majority is determined on the basis of the valid votes cast and not on the basis of those eligible to vote. There is no requirement that a specific percentage or number of eligible voters cast ballots in order for an election to be valid. See *U.S. Department of the Interior, Bureau of Indian Affairs, Rosebud, South Dakota,* 34 FLRA 67 (1989) *CHM 28.1.*

This section concerns procedures for resolving challenged ballots and tallying ballots. The procedures are equally applicable to manual, mail or mixed mail/manual ballot elections.

47.02 Designating the time and place for the tally: Item #13 of the election agreement (FLRA Form 33) and Item #11 of the election agreement for unit consolidation elections (FLRA Form 34) specifies the time and place for tallying the ballots (*CHM 28.27*). In most instances, the count is conducted in the same place and on the same date as the election is held. However, in circumstances where the voting places are widely dispersed, the parties may have to allow additional time for the return of the ballots by mail or by the agent.

The count cannot begin until all ballot boxes have been

collected. If voting hours have been long and arduous and the count is expected to be drawn out, the parties may agree in the Election Agreement to allow a rest period between the close of the polls and the count. Where there is an intervening interval, the agent is responsible for safeguarding the ballot box(es) and letting the parties know that the ballot box(es) is (are) safe.

The place for tallying the ballots is large enough to accommodate the representatives of the parties and to provide ample working area for handling ballot boxes and tallying the ballots. In large elections, separate tables are set up to handle elections involving more than 1000 voters. A team of one caller, two "unfolders" (all agents) can tally approximately 1000 ballots an hour.

***NOTE: If the Authority orders the ballots impounded, see CHM 55.2.***

47.03 Arranging the layout: All activities concerned with the handling of the ballots are contained within an enclosed area. For example, by using a U-shaped table configuration, the entire tallying procedure, from opening the box(es) to issuing the Tally of Ballots, can be conducted inside this area and be totally separated from spectators. The sealed ballot box(es) can also be stored inside the area, under the continuous observation of the observers seated around the table.

47.04 Persons present in the room: The actual participants in the count are the agent(s) and official observers.

Representatives of the parties may also be present but may not participate in the process. In large or hotly contested elections, the agent may be asked to allow the press to observe or record the count. Clearance is obtained from the Office of the General

Counsel before allowing the press into the area.

47.05 Who conducts the tally: Agents are the only persons permitted to tally the ballots. Observers are designated to watch the count and ensure its accuracy.

**47.06 Pre-tally resolution of challenged ballots:** The agent makes every effort to resolve challenged ballots before the ballots are tallied in accordance with the procedures outlined in CHM 47.7. This section discusses basic policy considerations regarding resolving challenged ballots. A challenged ballot is considered a valid ballot cast, and the parties agree either to "resolve" the challenge or to leave the challenge "unresolved" prior to counting the ballots (before the tally).

Disposition of challenged ballots requires the agreement of all of the parties to the election. Pre-tally discussions concerning challenged ballots often set the tone for conduct of the tally. The agent discusses the procedures outlined in this manual for conducting the count including:

a. roles of the Authority agent(s), observers and party representatives;
b. why the challenged ballots are resolved first, the procedure for "resolving" them, and the potential consequences of not resolving them;
c. the tallying procedure and responsibilities of the agent(s), parties and their observers;
d. spoiled ballots;
e. tallying procedures and completion of the certification of the tally; and if necessary,
f. regulatory requirements for filing objections (citing to regulation).

**47.6.1 Role of agent:** The agent:

a. Explains that he/she has no authority to make any ruling as to the eligibility of any voter whose ballot has been challenged.

b. Makes sure parties understand consequences of their agreements.

c. Takes efforts to resolve all outstanding challenges and avoid future inclusion/exclusion questions.

d. Takes an active role setting out case law and helps parties apply that law, including suggesting inclusions/exclusions. Suggests that each party discuss the reasons for making their own challenges as each is addressed.

e. Raises with the parties whether a particular position is eligible or ineligible for the unit (regardless of the parties' agreement) when the agent has independent knowledge that brings into question the status.

If the agent's questions (based on face of the list or independent knowledge) are not resolved to the satisfaction of the agent, the agent reports to the RD who can decide to approve the parties' agreed upon list or hold a hearing.

The fewer the number of unresolved challenged ballots remaining at the count, the less likely that the challenged ballots are determinative of the outcome of the election.

**47.6.2 Consequences of the parties' agreement:** The agent is responsible for ensuring that the parties understand the consequences of their agreement. The parties' agreement on challenged ballots is binding unless:

a. If the parties agree the position is ineligible, the position stays ineligible unless: i) there are changed circumstances, or ii) the position(s) should have been included in the first instance and constitutes a residual unit. *FTC II,* 35 FLRA 576 (1990).

b. If the parties agree that the position is eligible for inclusion in the unit, the position remains eligible unless: i) there are changed circumstances; or ii) the position(s) was ineligible in the first instance based on 5 U.S.C. 7112(b)(1) through (7) statutory exclusions. See *U.S. Department of the Army, U.S. Army Law Enforcement Command Pacific, Fort Shafter, Hawaii*, 53 FLRA 1602 (1998) (the parties improperly agreed to include positions that were not in conformance with the Statute and were subject to statutory exclusions). (See *CHM 28.18.3.5.*)

***NOTE:***

***1. The agent may raise certain questions with the parties to obtain factual information concerning a challenged voter. If the agent's questions are not resolved to the agent's satisfaction (based on independent knowledge), the agent checks with the Regional Director before allowing the parties to resolve the challenge.***

***2. If the parties and the agent are unable to resolve the challenged ballot(s) before the tally of the ballots, see CHM 47.18 for a discussion on "post-tally party resolution" of determinative challenged ballots.***

***3. If post-tally, the parties are unable to resolve the determinative challenges pursuant to CHM 47.18, the determinative challenged ballots are impounded and preserved until a determination is made, if necessary, by the Regional Director [§ 2422.24(b)]. See CHM 49.***

47.07 Procedure:

**47.07.01** Opening the ballot boxes: All ballot boxes are opened at the same time by the agent(s). Challenged ballot envelopes are removed and handed to the agent in charge or placed in a pile by the agent opening the boxes. The other ballots remain in the box. In large elections where the ballot boxes are filled, it is easier to empty the contents of the box on a table so the agent can locate the challenged ballot envelopes. See *CHM 47.8* for instructions on emptying the ballot box(es).

47.07.02 Separating the challenged ballots by voting groups: The challenged ballot envelope reflects the reason for the challenge. In elections involving multiple voting groups, the information on the challenged ballot envelope usually identifies the voter's voting group. In cases involving multiple voting groups, the challenged ballots are separated by voting groups. This process is used because if the challenges in the first voting group are determinative, the ballots in the second voting group cannot be tallied until the challenged ballots from the first voting group are resolved (*CHM 47.17.2*).

47.07.03 Conferring about the challenged ballots: At a **manual ballot count**, an authorized representative for each of the parties, rather than an observer, confers with the agent about challenged ballots, unless the observer has been designated to act for the party. If the election is conducted by **mail ballot**, and the parties do not intend to be present for the count, at the election agreement conference the agent discusses procedures for making the parties available by telephone at the count to afford the party an opportunity to challenge an employee whose ballot has been returned. See also *CHM 44.4.*

The following procedures apply to resolving challenged ballots in either a manual or mail ballot election. These procedures apply to ballots challenged by the parties and the agent. Note that ballots cast under the "Absentee Ballot Procedure" are considered challenged ballots to ensure that employees who vote by absentee do not also appear at the polls to vote.

a. Each challenge is handled separately. The agent calls out the name of the challenged voter and states the reason for the challenge. Following the discussion, the challenging party may withdraw his/her position on the basis of discussion with the agent or other parties. It is important that the activity representative be prepared to discuss the personnel records of any employees who have been challenged based on eligibility to vote.

b. Each challenged ballot envelope is annotated to reflect whether it was resolved or remains unresolved. A short explanation is also written on the envelope and the party representatives sign or initial the envelope signifying its status.

(i) If the parties agree that the voter is eligible, the

challenged ballot envelope is marked "resolved - eligible," with an explanation. Each party signs or initials the envelope signifying its resolution. The outer challenged ballot envelope is removed and preserved. The secret ballot envelope is not opened until all of the challenged ballots are declared "resolved" or "unresolved" (see *CHM 47.7.4*).

(ii) If the parties agree that the voter is ineligible, the challenged ballot envelope is marked "resolved - ineligible" and the reason noted (e.g., "resolved - ineligible - supervisor"). Each party signs or initials the envelope signifying its resolution. These unopened envelopes are preserved and become part of the election records.

(iii) If the parties are unable to resolve the status of a challenged ballot, the envelope is marked "unresolved," with an explanation of the unresolved issue. Each party signs or initials the envelope, signifying that the challenge is unresolved. **Unresolved challenged ballots are recorded on the tally of ballots on the line titled "challenged ballots."** The Tally of Ballots reflects whether the unresolved challenged ballots are determinative of the outcome of the election. Thereafter, the region investigates each unresolved challenged ballot, (*CHM 49*) and the Regional Director issues his/her decision in a Decision and Order (*CHM 53*).

c. Examples:

(i) In cases where the employee's name was not on the list, the personnel or payroll information should reflect when the employee was hired, promoted, the job classification, etc., or any other information that may clarify why the name was not on the list. If the records reflect, and the parties agree, that the omission of the name was inadvertent, and that the voter in question is eligible in all respects, the challenge is "resolved - eligible." All parties initial the envelope and note on the envelope that the omission was inadvertent. The envelope is opened and the secret ballot envelope is set aside until all of the resolved challenged ballot envelopes are opened.

(ii) In cases where the employee voted at the wrong site in a multiple poll election, the name of the voter is located on the correct eligibility list and any other site list. If the lists reflect that the employee voted only once, and as a challenged ballot, the challenged is "resolved - eligible," the parties initial or sign the envelope, provide an explanation and the ballot is tallied.

(iii) In cases where a voter's name was marked off the eligibility list and the voter claims that s/he never voted, the parties may agree that an error was made and to tally the ballot. In such cases, the envelope is marked "resolved - eligible" with an explanation. The parties may also agree that the voter is ineligible solely on the ground that

the name of the voter was marked off the list as having voted. In such cases, the envelope is marked "resolved - ineligible" with an explanation. Absent agreement by the parties as to eligibility, the ballot remains "unresolved," is impounded and is included in the tally of ballots as an unresolved challenged ballot.

(iv) A challenged ballot is resolved by the parties as having been cast by an ineligible voter. The challenge is "resolved - ineligible" and the reason is provided. ***NOTE: the ballot is not considered a "void" ballot, but a resolved challenged ballot; and it is not entered on the tally of ballots.***

(v) An observer challenges the ballot of an employee who was acting as a supervisor on the day of the election. The parties are unable to resolve the voter's eligibility and the challenged ballot envelope is marked "unresolved." The parties initial the envelope, note the reasons for their failure to reach agreement and it is impounded. It is counted on the tally as an "unresolved challenged ballot." See *CHM 47.7.4.*

47.07.04 Disposition of challenged ballot materials: Before proceeding with the tally of ballots, the agent ensures that all resolved and unresolved challenged ballots are accounted for.

a. The *unresolved challenged ballot envelopes* are designated as "unresolved," the reason is noted, and the parties initial the envelope. **The total number of unresolved challenged ballots is recorded on the appropriate tally form.** These ballots are secured by the agent. Regardless of the outcome of the election, they are maintained as part of the election materials until after the Regional Director issues an appropriate certification.

b. The *"resolved - eligible" challenged ballot envelopes* are opened; the outer envelope is secured with the other election materials, and the secret ballot envelopes are commingled and then opened. The ballot that is taken from the secret ballot envelope is not unfolded, but commingled with the other folded ballots from the ballot box. The empty secret ballot envelopes are also retained with the election materials.

c. The "resolved - ineligible" challenged ballot envelopes are secured with the other election supplies and taken back to the Regional Office unopened.

***NOTE: When opening challenged ballot envelopes, if the voter did not seal the ballot in the secret ballot envelope, the agent states that the ballot will be counted unless any party objects.*** If a party objects, the ballot is treated as an unresolved challenged ballot (see *CHM 43.1.4* for a similar discussion regarding returned mail ballots).

47.08 Tallying the ballots:

47.08.01 Removal of ballots from ballot box: The ballots are removed from the box before the tally begins. If there are observers present, the ballots are removed in their presence. Before any ballot box is opened, the observers are shown the seal over the slot to confirm that the boxes were not tampered with. In an election involving two or more polling places, the ballots from the separate ballot boxes are commingled before being unfolded. After all the ballots have been removed from the ballot box(es), the inside of the ballot box(es) is (are) shown to the observers. Once the observers are assured that there are no ballots remaining in the box, the box is broken down and flattened.

47.08.02 Mechanics of tallying: There are two methods of tallying ballots. The informal method is usually used in two-party elections, the formal method is used in multi-party elections. The agent in charge of the election elects which method to use, but it is suggested that the agent use the formal method when the election is hotly contested.

47.08.02.01 Preliminary announcements and instructions: Before beginning the count, the agent makes the following announcements:

a. A majority of the valid votes decides the election.

b. The observers' duties include: to observe the count; to ensure the tally is accurate; and to question markings on ballots. The observers are also told that they may not touch the ballots.

c. The party representatives may not stand or linger near the table, but they should be available if any questions arise concerning markings on the ballot.

d. Any ballot that clearly reflects the voter's intent is counted in accordance with the apparent intention, even though the marking is unorthodox - for example, the voter makes a check, rather than an "x" or writes "yes" in a box; the mark appears within the outer box rather than the inner box; there are erasers in the box(es); or there are markings in more than one box. But a ballot in which the voter's intent is not clear is voided (see also *CHM 47.10*).

e. Any ballot that identifies the voter in any way is voided.

The agent also provides instructions on the tallying procedures, and, certification upon completion of the tally and service of the tally.

47.08.03 Informal method: After resolving the challenged ballots, the agent stands on the inside of the table, removes all of the ballots from the ballot box and unfolds them. As the agent unfolds the ballots s/he places them face side up in piles according to the preferences expressed. The observers stand on the other side of the table. When this process is finished, the agent counts out loud the different piles, displaying each ballot to the observers as it is being counted. Ballots are packaged according to their preference in piles of 50 (use paper clips or rubber bands). If any observer questions the accuracy of the tally, the pile is recounted. Each bundle is placed in separate piles in the presence of the observers.

47.08.04 Formal method: Usually more than one agent works at a table when the formal procedure is used. As one or more agents unfold the ballots, another agent places them face down in piles according to their preference. Once the ballots are unfolded and separated, they are turned over. Ballots reflecting the same preference are tallied at the same table. The observers stand on the other side of the table. They may maintain tally sheets. In very large elections, an additional agent also maintains a tally sheet. The agent responsible for actually counting the ballots starts counting the ballots out loud, displaying each ballot to the observers as it is being tallied. A second agent stands next to the counting agent to verify the party for whom the ballot is cast and that the ballot does not contain any unusual markings that the counter may have missed. Ballots are packaged according to their preference in piles of 50 (use paper clips or rubber bands). If any observer questions the accuracy of the tally, the pile is recounted. Each bundle is placed in separate piles in the presence of the observers.

47.08.05 Verifying the tally: Whether a formal or informal method is used, the tally is verified when the observers agree that each pile contains 50 ballots and the agent notes "50" on the ballot at the top of the pile and circles the number. The bundle is placed in a pile with other bundled ballots reflecting that preference. The tallying procedure is continued in this fashion until all the ballots of that choice are counted. The final pile, which is usually other than an even multiple of 50, is counted and the figure is placed on the top of the first ballot and circled.

At the conclusion of the tally of a particular choice, the agent recounts the bundles of fifty as a final check of the accuracy of the figures. The entries on the tally sheet are completed,

showing the choice tallied: i.e., "yes," "no," the name of the labor organization, "neither" or "none." Where there is only a sufficient number of agents to count one choice at a time, one of the agents guards the ballots not being counted. If there is only one agent, the uncounted ballots are sealed in a box until they are tallied.

When all of the ballots are counted, the agent completes the tally sheet, noting the votes cast for the various choices and the number of void ballots. The number of unresolved challenged ballots was entered on the tally sheet before the count. All of the counted ballots are secured with other election materials and maintained until after the Regional Director issues the appropriate certification.

47.09 Tallying mail ballots:

47.09.01 Overview: When counting mail ballots, whether cast in an all-mail ballot or mixed mail/manual election (*CHM 43*), the signature and the key number of the voter on the mail ballot envelope is checked initially against the name and number on the separate mail ballot eligibility list. If the envelope does not bear a signature, the mail ballot is declared void. The signature of a voter is presumed valid, absent a party raising an issue of forgery. Thus, the signature is not compared against any official records as a matter of uniform practice.

**47.09.02** Timely receipt of mail ballots: Upon receipt in the Regional Office, all envelopes are date-stamped to establish the date of receipt. **Returned mail ballots are placed in a secure location, either in a "ballot box" that is sealed or in a locked drawer.**

Envelopes received after the close of business on the return date, but prior to the time set for the count, are kept separated from those timely received. If all parties agree to waive the deadline, such ballots are opened and counted or voided as appropriate. If the parties do not agree, the ballots are challenged. *U.S. Department of Health and Human Services, Social Security Administration District Office, Greenville, North Carolina,* 36 FLRA 824 (1990).

***NOTE: The count of the ballots usually occurs in the Regional Office and is not always attended by representatives of the parties. CHM 44.4 and 47.7.3. In such cases, the agent pre-arranges with the parties whether they will contact the region to challenge voters and resolved issues such as late received ballots. Any agreement regarding late received ballots must be confirmed in writing by fax. See also CHM 47.9.3.***

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*47.9.1*, if the outer envelope is

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As discussed above, the agent normally makes arrangements at the election agreement meeting to have a party representative to be available by phone if s/he cannot attend the count.

47.09.04 Counting ballots in a mixed mail/manual ballot election: Returned mail ballots in a mixed mail/manual ballot election are checked against the mail ballot eligibility list and the manual ballot voting list before the ballot box is opened and any challenged ballots are discussed and "resolved."

In mixed mail/manual ballot elections, the returned mail ballots are checked against the separate mail ballot eligibility list to

verify that the voter who signed the envelope is an eligible voter in the election. The returned mail ballots are also checked against the manual ballot eligibility list to verify that voters who returned mail ballots did not also appear at the polls to vote. (The agent ensures the parties have deleted or annotated the names of voters who received mail ballots from the manual ballot eligibility list, but it is still a good practice to verify that the voter did not vote twice. If a voter appears at the polls also received a mail ballot, the agent follows the procedures discussed in *CHM 44.11.*

Once the mail ballots are checked in, the outer envelope is opened at the same time and in the same manner as the "resolved eligible" challenged ballots are opened. The outer return mail ballot envelope is maintained as part of the election materials. Returned mail ballots are commingled with ballots cast in the manual election at the same time as the "resolved eligible" challenged ballots.

47.10 Construing ballot markings: As discussed in *CHM 47.8.2.1*, when construing a ballot marking, the test is whether the intent of the voter is readily ascertained. If the intent is clear, despite unorthodox markings or erasures, the ballot is construed in accordance with the voter's intent. As a general rule, a ballot is valid if it contains a mark in only one of the possible choices and does not contain the voter's name or other form of identification. Conversely, a ballot is "void" if the intent of the voter is not readily ascertained. For example:

a. Two or both of the possible choices are marked;

b. Neither or none of the two or more possible choices is marked;

c. "No" is written in the "Yes" square or "Yes" is written in the "No" square; or

d. A name or other form of identification appears on the ballot.

If a ballot bears a name or other form of identification, the agent displays to the observers only that portion of the ballot on which the name or identification appears, taking special care not to reveal how the ballot is marked. Such ballots (or any other type of ballot which is declared void) are marked "Void" on the reverse side of the ballot, initialed by the parties, and retained in a separate grouping of such ballots.

The observers have the right to object to the interpretation given by the agent as to the manner in which a ballot is marked. If an objection is raised by one of the parties, the observers for all of the parties are afforded the opportunity to reach agreement in construing the voter's intent. Disputes involving the question of ballot validity are treated the same as a ballot challenge. The ballot is placed in a challenge envelope and treated as an unresolved challenged ballot and not as a void ballot. *General Services Administration, Region 5, Public Building Service, Chicago, Illinois,* Case No. 50-13-31(RO), 2 Rulings on Requests for Review 469 (1976), Report on Ruling Number 59, 6 A/SLMR 747 (1976).

***NOTE: If a returned mail ballot or a challenged ballot is not sealed in a secret ballot envelope, it is not a void ballot. See CHM 43.1.4 and 47.7.4.***

47.11 Professional-nonprofessional elections: In a self-determination election involving separate voting groups for professional and nonprofessional employees, i.e., voting groups (a) and (b) respectively, the ballots cast by the professional employees regarding Question 1 on the professional's ballot **are counted first** (see Figure B34.2A). Upon conclusion of the count, the results are entered on FLRA Form 40, Tally of Ballots for Professional Employees (see FLRA Form 40).

If a majority of the valid votes in voting group (a) plus challenged ballots, if any, are cast for inclusion in the same unit as the nonprofessional employees, the second half of FLRA Form 40, i.e., lines 10 through 18, **is not completed**. A vote for inclusion requires that the ballots of voting group (a) be combined (pooled) with the ballots cast by the nonprofessional employees in voting group (b). The votes cast by the professional employees under Question 2 (See Figure B34.2A) and by the nonprofessional employees for the same labor organization are tallied as one total. Similarly, votes cast against exclusive representation by both groups are also tallied as one total. The results of the combined count are entered on FLRA Form 39, Tally of Ballots.

If the Tally of Ballots for Professional Employees indicates that a majority of the valid votes, plus challenged ballots, if any, were **not** cast for inclusion in the nonprofessional unit, the ballots in voting groups (a) and (b) are counted separately. The votes cast for or against the labor organization(s) appearing on the professional employees ballot, Question 2, are counted and the results entered on FLRA Form 40, lines 10 through 18. Similarly, after the count of the ballots in the voting group (b) is completed, the results are entered on FLRA Form 39, the title of which is modified to read, "Tally of Ballots For Voting Group

(b)."

***NOTE: To cast a valid vote in an election involving professionals and nonprofessionals, a professional employee are required to answer both questions on the ballot. The failure to follow the instructions contained on the ballot to answer both questions voids the ballot. Department of Housing and Urban Development, Unit II, Boston Area Office, Boston, Massachusetts, Case No. 31-4380 E.O, 1 Rulings on Requests for Review 161 (1971), Report on Ruling Number 40, 1 A/SLMR 626 (1971).***

47.12 Other types of self-determination elections where votes are pooled: As discussed in *CHM 28.15.4 and 28.15.5*, separate ballots are used in self-determination elections involving different voting groups. In *CHM 28.15.5*, self-determination elections were discussed using a scenario involving Union A that seeks to represent a large unit that includes a craft or functional group and Union B seeks to represent only the smaller craft or functional group of employees. The craft or functional unit is referred to as voting group (a) and the larger, overall unit is referred to as voting group (b).

The ballots cast in voting group (a) (see Figure 28.15D) are counted first and the results entered on FLRA Form 39, the title of which is modified to read, "Tally of Ballots for Voting Group (a)." If line 11 of the Tally indicates that a majority of the valid votes plus challenged ballots has been cast for Union B, the ballots in voting group (b) are counted separately. In the latter event, a separate Tally of Ballots is completed for voting groups (a) and (b) respectively on separate FLRA Forms 39.

In the event that line 11 of the Tally of Ballots indicates that a

majority of the valid votes plus challenged ballots has not been cast for Union B (see Figure 47.12A which sets forth an example of FLRA Form 39), the ballots of voting groups (a) and (b) are combined and counted. The votes cast for Union A in both voting groups (a) and (b) are then counted in favor of Union A (see Figure 47.12B which is a modified version of FLRA Form 39). The votes for the "Neither" choice in voting group (a) and the "No" choice in voting group (b) are counted as votes against exclusive recognition and entered on line 6. With respect to the votes cast for (Union B) in voting group (a), a special tallying procedure providing for the pooling of votes is utilized as follows: if the votes are pooled, the votes for the Union B are counted as part of the total number of valid votes cast but neither for nor against Union A which is seeking a more comprehensive unit. All other votes are accorded their face value. Accordingly, the votes cast for Union B in voting group (a) (taken from Figure 47.12A) is entered on line 6a of Figure 47.12B. Line 7 is modified also by adding "6a."

In the example used in Figure 47.12B, the 244 votes cast for the Union A is based upon a pooling of the 25 votes cast for Union A in voting group (a) plus 219 votes cast in voting group (b) for Union A. Similarly, the 135 votes cast against exclusive recognition derives from the 5 "Neither" votes cast in (a) plus 130 "No" votes cast in (b). The total number of valid votes counted plus challenged ballots, 397, consists of the combined votes for Union A, the combined "neither" or "none" votes, and the number of votes cast for Union B. There were no unresolved challenged ballots.

47.13 Inclusion of unrepresented professional employees in existing unit of nonprofessional employees: In an election in which the petitioner seeks to include unrepresented professional

employees in a unit of nonprofessional employees which it currently represents, FLRA Form 40 is used to tally the ballots. The procedure in tallying the ballots regarding Question 1 on the two part ballot is the same as discussed in *CHM 47.11*. In the event that the professionals vote for inclusion in the nonprofessional unit, tallying the second question on the ballot is not required. The vote reflects that the professional employees desire to be included in the existing nonprofessional unit currently represented by the petitioner. See *CHM 28.15.2* and Figure 28.15B.

However, where a petitioner seeks to include the professional employees in the existing unit of nonprofessional employees, the petitioner must nevertheless represent the professional employees in a separate unit if a majority of the professional employees do not vote for inclusion in the existing unit. In that event, the results of the second question on the ballot are tallied and entered on FLRA Form 40, lines 10 through 18.

47.14 Inclusion of nonprofessional employees in existing unit of nonprofessional employees: FLRA Form 39 is used for tallying the results of an election in which the petitioner seeks to include unrepresented nonprofessional employees in an existing unit of nonprofessional employees currently represented by the petitioner. Since this type of election involves the use of the standard "Yes-No" ballot as set forth in Figure B34.2F, or one involving the petitioner and one or more intervenors as set forth in Figure B34.2G, FLRA Form 39 is appropriate for use as the Tally of Ballots. It is not necessary for the Tally of Ballots to reflect whether a majority of the nonprofessional employees voted for inclusion in the existing unit. Both the Election Agreement and the Notice of Election contain a specific provision that in the event that the petitioner is selected by a

majority of those voting, their vote reflects their desire to be included in the existing unit represented by the petitioner, or by any intervenor, if selected (see *CHM 28.15.3* and Figure 28.15C, *CHM 28.16* and Figure 28.16).

47.15 Severance elections: *reserved*

**47.16** Issuing the tally of ballots: The agent is responsible for preparing the Tally of Ballots appropriate to the particular election involved, i.e., FLRA Form 39, 40 or 41. The entries are completed in the presence of the observers who participated in the counting of the ballots. In large elections, the various tallying sheets, if used, are collected, and the figures consolidated with respect to each of the choices on the ballot. All entries are made in ink.

47.16.01 Completing the tally form: Particular care is taken when completing the Tally of Ballots. Service of a properly completed tally marks the beginning of the period for filing objections to the election. If the tally is completed improperly, a revised tally is issued and served on the parties and a new time period begins for filing objections. Note the following on the tally forms:

a. Item #1 on all tally sheets: "Approximate number of voters" is based on the number originally submitted by the activity with the eligibility list;

b. Item #2: "Void ballots" is the number of ballots voided by the parties because of irregular or inappropriate markings or the voter's choice is not clear; *CHM 47.10*

c. Complete sections pertaining to the number of ballots

cast for particular choices;

d. Challenged ballots: enter the number of unresolved challenged ballots only; *CHM 47.7.4a*

e. The agent completes the questions pertaining to whether a majority of valid ballots cast plus challenged ballots has or has not been cast for a particular choice. If none of the choices on the ballot receives a majority of the valid ballots cast plus challenged ballots, the word "not" is underlined in the sentence: "A majority of valid votes counted plus challenged ballots has not been cast for ... ." The sentence is completed by inserting the phrase "any of the choices on the ballot." The tally reflects whether the election results are indeterminate because of determinative challenged ballots (§ 2422.27), the results require a runoff election (§ 2422.28) or the results are inconclusive (§ 2422.29). *CHM 47.17*

47.16.02 Signing the tally: After completing the tally, the agent dates and signs the original on behalf of the Regional Director. Each of the observers is requested to examine the Tally of Ballots for accuracy of entries and to read the concluding paragraph. Each observer signs the original Tally on behalf of the party represented. If an observer refuses to sign the Tally of Ballots, the agent takes a signed statement from the observer immediately. The statement reflects the reasons why the observer refuses to sign the tally. If it appears that the observer is alleging that objectionable conduct occurred, the agent also advises the observer of its representative's right to file objections to the election pursuant to § 2422.26. *CHM 50*

47.16.03 Service of the Tally: After the Tally of Ballots has been

signed by the various observers, a copy of the tally is served immediately upon an authorized representative of each of the parties involved in the election. The method of service is recorded on the Tally. **Service is made in accordance with the parties' instructions as set forth in the Election Agreement.**

***NOTE: Status as an observer on behalf of a party does not make that individual an agent of the party for purposes of service unless specifically designated by the party to receive the tally.***

47.16.04 Refusal to accept service of the Tally: The five (5) day period provided for in § 2422.26 is computed on the basis of actual rather than constructive furnishing of the tally of ballots. However, the failure or refusal of an authorized representative of a party to accept service of the tally of ballots in accordance with his/her own instructions as set forth in the Election Agreement does not operate to extend the period for filing objections.

47.17 Indeterminate results: The results of an election may not be decisive. In such elections, the results are indeterminate. Indeterminate results occur in the following situations:

47.17.01 Determinative challenged ballots: An election in any voting group or unit is indeterminate if the challenged ballots are sufficient in number to affect the results of the election. Determinative challenged ballots are challenges that are unresolved prior to the tally and sufficient in number after the tally to affect the results of the election (§ 2421.22).

When the parties to an election cannot agree on the eligibility of a challenged ballot voter, the challenged ballot is considered

unresolved. The validity of unresolved challenged ballots is not decided at the tally. In order to calculate the number of votes needed for a majority, unresolved challenged ballots are assumed to be valid votes. An election may have indeterminate results if there are a sufficient number of unresolved challenged ballots.

When tallying unresolved challenged ballots, the number of votes needed to constitute a simple majority is determined by adding the total number of unresolved challenged ballots to the total number of valid votes cast. If any ballot choice receives a simple majority (50% plus 1, of the valid votes cast plus challenged ballots), the unresolved challenges are not determinative of the results of the election. The Tally of Ballots is issued reflecting the election results in Item #11 of FLRA Form 39, Item #18 of FLRA Form 40 and Item #41of FLRA Form 41. The following chart illustrates situations involving both determinative and nondeterminative challenged ballots. An explanation of each scenario follows.

Examples of Determinative and Nondeterminative Challenged Ballots

| | ***A*** | ***B*** | ***C*** | ***D*** | ***E*** | ***F*** | |
|---|---|---|---|---|---|---|---|
| | Not Det. | Not Det. | Not Det. | Det. | Det. | Det. | |
| Votes cast for Union A | | 5 | 43 | 30 | 30<br>30 | 38 | |
| Votes cast for Union B | | 3 | 51 | 45 | 50 | 46<br>35 | |
| Votes cast against exclusive rep. | 0 | 1 | 20 | 25 | 11 | 30 | |
| Valid votes cast | | 8 | 95 | 95 | 105 | 95 | 95 |
| Challenged ballots | 1 | 5 | 5 | 6 | 5 | 5 | |
| Valid votes plus challenged | | | | | | | |

***A.*** The total number of valid ballots cast plus challenged ballots is 9. Fifty percent (50%) of 9 is 4.5; thus, the majority is 5. The challenged ballot, therefore, is not determinative because Union A has obtained a majority of the valid ballots cast plus the challenged ballot.

***B.*** The total number of valid ballots cast plus challenged ballots is 100. The 5 challenged ballots are not determinative because Union B received a majority of the valid ballots cast plus challenged ballots (100).

***C.*** The total number of valid ballots cast plus challenged ballots is 100. No choice received a majority of the valid ballots cast plus challenged ballots. The challenged ballots are not determinative of the election because regardless of their resolution, they have no affect on the overall results. The total number of unresolved challenged ballots is added to the valid votes cast for each of the ballot choices and none of the resulting sums constitutes a simple majority. In this example, there will be a runoff election between Union A and Union B.

***D.*** The total number of valid ballots cast plus challenged ballots is 111. No choice received a majority of the valid ballots cast plus challenged ballots. The challenged ballots are determinative: (1)

there is no simple majority; and (2) the sum of the total number of unresolved challenged ballots and the valid votes cast for **any of the ballot choices** is equal to or greater than a simple majority. The challenges are resolved to determine either (1) whether Union B received a majority of the valid votes cast or (2) whether a rerun or runoff election is required.

***E.*** The total number of valid ballots cast plus challenged ballots is 100. No choice received a majority of the valid ballots cast plus challenged ballots. The challenged ballots are determinative. They are resolved to determine whether Union B receives a majority of the valid ballots cast plus challenged ballots, or whether the election results in a runoff election between Union A and Union B. See *CHM 47.17.3 - indeterminate results requiring a runoff election.*

***F.*** The total number of valid ballots cast plus challenged ballots is 100. No choice received a majority of the valid ballots cast plus challenged ballots. The 5 challenged ballots are determinative. Whether the election is rerun, due to a nullity, or runoff depends upon the disposition of some or all of the challenged ballots. If all of the challenged ballots were counted, and if they were cast for Union A, a runoff election is required between the 2 labor organizations. If none of the challenged ballots are opened, the election results are inconclusive, and the election is declared a nullity. A rerun election is required. See *CHM 47.17.4 - inconclusive results requiring an election to be rerun.*

When the tally reflects that challenges are sufficient to affect the results of the election, see *CHM 47.16.1e* for completing the tally form.

***NOTE: See CHM 47.18 for a discussion about post-tally***

***resolution of determinative challenged ballots and CHM 49 for a discussion about investigating and resolving determinative challenged ballots in accordance with § 2422.27 when the parties are unable to resolve them post-tally.***

47.17.02 Determinative challenged ballots in self-determination elections: In any self-determination election involving two or more voting groups, if the challenges are determinative in the first voting group (a), the ballots in the other voting groups, such as (b), are not counted until the challenged ballots are resolved. Specifically, in a professional/nonprofessional election, the ballots cast by the nonprofessional employees in voting group (b) are not counted when the challenges are determinative in voting group (a). The same action is taken in a self-determination election involving a craft or functional voting group and a larger, overall voting group.

47.17.03 Indeterminate results requiring a runoff election: A runoff election is required in an election involving at least three (3) choices, one of which is "no union" or "neither," when no choice receives a majority of the valid ballots cast. However, a runoff election may not be held until the Regional Director has ruled on objections to the election and determinative challenged ballots [§ 2422.28(a)]. See *CHM 48.1* for a discussion on runoff elections. Where the original election results in a runoff; i.e., no determinative challenged ballots and none of the 3 or more choices has received a majority of the valid votes plus challenged ballots, if any, Item #11 of FLRA Form 39, Tally of Ballots, (and similar lines on other appropriate forms) is modified by adding the phrase in the blank space, "...any choice."

***NOTE: There can be no runoff of an election in which there***

***is only one labor organization on the ballot and the question on the ballot asks whether or not employees wish to be represented by the petitioning union.*** A tie vote in this election results in a certification of results in that the petitioning union did not receive a majority of the valid ballots cast [§ 2422.25(c)]. *Department of Health, Education and Welfare, Division of Indian Health, Public Health Service, Intermountain Indiana School Health Center,* Case No. 61-1077, 1 Rulings on Requests for Review 79 (1970), Report on Ruling Number 19, 1 A/SLMR 614 (1970). A decision of the Assistant Secretary remains in full force and effect unless the Authority revises or supersedes it by a decision under the Statute. *U.S. Army Corps of Engineers, Headquarters South Pacific Division, San Francisco, California,* 39 FLRA 1445, 1450 (1991).

a. The ballot provides for at least 3 choices, one of which

is "no union" or "neither" and the votes are equally divided; or

b. The ballot provides for at least 3 choices, the choice receiving the highest number of votes does not receive a majority, and at least two other choices receive the next highest and same number of votes; or

c. When a runoff ballot provides for a choice between two labor organizations and results in the votes being equally divided; or

d. When the Regional Director determines that there have been significant procedural irregularities.

In inconclusive elections based on "a through c" above, the tally reflects that the election is declared a *nullity* and the election is rerun providing for a selection from among the choices afforded on the previous ballot. See *CHM 48.2* for a discussion of rerun elections and *CHM 48.2.1* through *CHM 48.2.6* for more information about inconclusive elections.

**47.18 Post-tally party resolution:** After the tally is served, the parties may voluntarily resolve some or all of the determinative challenged ballots while the region is investigating the determinative challenged ballots. **The region is not involved in helping the parties resolve challenges under this procedure.** The parties can meet on site after the tally has been certified and the Authority personnel have left. **The parties need not resolve all of the determinative challenges, just enough to render the number of remaining unresolved**

**challenges nondeterminative.**

**47.18.01 Role of agent:**

a. The agent makes sure parties understand consequences of their agreements.

b. The agent **does not** get involved in helping the parties resolve challenges.

c. The agent affords parties the opportunity to resolve challenges among themselves to eliminate determinative status of challenges.

d. The agent **informs parties** that neither party can inquire as to how an employee voted.

e. If the parties notify the agent that they may have reached agreement on the challenged ballot, the agent raises with the parties whether a particular position is eligible or ineligible (regardless of the parties' agreement) when the agent has independent knowledge that brings into question the status.

f. If the agent's questions (based on independent knowledge) are not resolved to the satisfaction of the agent, the agent checks with the region before not allowing the challenge to be withdrawn or resolved.

**47.18.02 The effect of the parties' agreement:** The parties' agreement on challenged ballots is binding unless:

a. If the parties agree the position is ineligible for inclusion in the unit, the position stays ineligible unless: i) there

are changed circumstances, or ii) the position(s) were eligible in the first instance and constitute a residual unit. *FTC II,* 35 FLRA 576 (1990).

b. If the parties agree that the position is eligible for inclusion in the unit, the position remains eligible unless: i) there are changed circumstances; or ii) the position(s) was ineligible in the first instance based on the section 7112(b)(1) through (7) statutory exclusions.

**47.18.03 Post-tally resolution of determinative challenged ballots**: are the same as resolving the challenges pre-tally except that the region is removed from the process.

a. An individual party may withdraw a challenge. The Regional Director may approve such withdrawal, notwithstanding the objection of any other party.

b. In the event objections to the election are also filed, the parties may continue to attempt to resolve the determinative challenged ballots informally unless the nature of the objections goes to the basis of the eligibility issues. For example, the objection alleges that the entire eligibility list was "bad" or inaccurate.

c. In the absence of objections or when the objections do not involve eligibility issues, the parties may by agreement voluntarily withdraw their challenge to determinative challenged ballots under the following circumstances:

(i) The parties sign a written agreement acknowledging resolution of each challenge. It is

not necessary to state the basis of the agreement, the result is sufficient.

(ii) There can be no evidence that the parties colluded on the eligibility of the challenged voters, or interfered with the challenged voter in any way.

(iii) In the agreement, the party(ies) waive their rights under the FLRA's rules to a Regional Director's Decision and Order, to file objections, to request review and to any right to a hearing in the matter or to a FLRA decision. The agreement provides that upon its approval by the Regional Director, s/he may proceed to issue a revised tally and, when appropriate, a certification.

**47.19 Procedures for securing determinative challenged ballots:** After the tally is served, determinative challenged ballots are placed in a large envelope or box in the presence of the parties. After the envelope/box is sealed, the agent and the parties' representatives sign and secure the envelope/box by signing across the tape so that their signatures extend across the tape and onto the envelope/box. Transparent tape is placed across each signature. The envelope is stored in the office safe or other secure place. The agent completes Figure 47.18, tapes a copy to the face of the envelope/box and places the original in the case file. When more than one envelope/box is required, this procedure is repeated for each envelope/box used to store unresolved determinative challenged ballots.

Determinative challenged ballots are stored in this manner even if the parties state they intend to discuss post tally party resolution. If the Regional Director ultimately issues a Decision

and Order on Determinative Challenged Ballots and any appeal is decided by the Authority, thereafter the region contacts representatives of the parties and affords them the opportunity to be present when the ballots are removed for counting (*CHM 49.8 and 49.9*).

# 48 CONDUCTING RUNOFF AND RERUN ELECTIONS:

## 48.01 Runoff elections:

48.01.01 What is a runoff: A runoff election is required in an election involving at least 3 choices, one of which is "no union" or "neither," when no choice receives a majority of the valid ballots cast plus unresolved challenged ballots. However, a runoff is not held until the Regional Director has ruled on objections to the election and determinative challenged ballots [§ 2422.28(a)].

**48.01.02 Examples of a runoff election:** The following chart illustrates examples of election results requiring a runoff:

Runoff Election Required

| Total Eligible | Union A | Union B | Neither | Void |
|---|---|---|---|---|
| 16 | 0 | 8 | 8 | -- |
| 17 | 7 | 5 | 3 | -- |
| 17 | 8 | 8 | 1 | -- |
| 18 | 9 | 5 | 4 | -- |
| 19 | 9 | 9 | 0 | -- |
| 77 | 36 | 0 | 36 | 1 |

As noted in *CHM 47.17.3*, there can be no runoff of an original election in which there are only two choices on the ballot.

**48.01.03** **What happens in a runoff:** The two choices on the ballot in the runoff election are those receiving the largest and second largest number of votes in the original election.

**48.01.04** Eligibility to vote in a runoff: Absent unusual circumstances, the payroll period for eligibility in a runoff election is the same as in the original election. Employees who were eligible to vote in the original election and who are also eligible to vote on the date of the runoff election may vote in the runoff election [§ 2422.28(b)].

**48.01.05** Eligibility list: When the original payroll period is used for the runoff election, a copy of the original eligibility list is used as the voting list in the runoff election. The names of those employees whose employment in the unit or voting group ceased between the date of the original election and the runoff election are stricken from the list. If a new voting list is prepared by the activity, the names of any such employees are omitted.

48.01.06 Election Agreement: If possible, the region provides for a potential runoff election in the original Election Agreement. Such provisions include the date, time and place of the election. If the parties agree to include provisions for a runoff in the original Election Agreement, the region also suggests that the parties waive their right to file an application for review of the Regional Director's Decision and Order (which may issue on objections and/or determinative challenged ballots) (*CHM 28.30*).

If the original Election Agreement did not contain provisions for

the runoff election, the parties are required to enter into a new Election Agreement. The time and place of the runoff election are the same as the original election; only the date is changed. Any changes made in the procedural arrangements for the election are limited to minor adjustments in polling areas or hours.

48.01.07 Notice of runoff election: Employees are informed when a runoff election is being held. The region inserts the caption "Runoff Election" in the upper right-hand corner of the Notice of Election, FLRA Form 125A or 125B, as appropriate. This caption is also inserted on the Tally of Ballots and the Certification of Conduct of Election. However, no such reference is made on the sample ballot or the ballots used in the election.

48.01.08 Ballot: The ballot in the runoff election provides for a selection between two choices receiving the largest and second largest number of votes in the election [§ 2422.28(c)].

48.01.09 When a runoff is held: The date of the runoff election may not be posted, nor may a runoff election be held, before the expiration of the 5 day period for filing objections to the election, or until the resolution of determinative challenged ballots.

a. If objections are filed to the original election, no runoff election is held unless the objections are either withdrawn or overruled by the Regional Director. If the Regional Director overrules the objections, s/he normally conducts the runoff election during the period established for filing an application for review (§ 2422.31 and *CHM 55.1.3*). If one or more of the

objections are sustained, a rerun election, rather than a runoff election of the prior election, is conducted.

b. Any challenged ballots that are determinative of the results of the original election are resolved to determine whether a runoff election is required. In such situations, the choices receiving the highest and second highest number of votes resulting from the disposition of the challenged ballots appear on the runoff ballot (see *CHM 49 through 52* for a discussion concerning determinative challenged ballots and objections to the election).

**48.01.10** Conducting the runoff election: The mechanics of conducting the runoff election with respect to arrangement of the polling place(s), duties and responsibilities of observers, challenge ballot procedure, counting the ballots, etc. are the same as those used during the original election (*CHM 40*).

48.01.11 Results: A Tally of Ballots is issued to record the results of a runoff election

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There can be no runoff of a runoff. If the runoff election results in a tie between two labor organizations, the results are inconclusive and the election is declared a nullity [§ 2422.29(a)(3)]. If the runoff includes as one choice, a labor organization, and the second choice is "no union," a Certification of Results is issued as no choice received a majority of the valid ballots cast. However, any objections or determinative challenged ballots are resolved prior to issuing the Certification.

*48.01.12* Objection period for runoff election: The critical period preceding a runoff election, during which conduct of one party may be used as grounds for setting aside the election, begins running from the date of the first election. *Naval Air Rework Facility, Norfolk, Virginia,* Case No. 22-2568, 1 Rulings on Requests for Review 193 (1972), Report on Ruling Number 50, 2 A/SLMR 640 (1972).

**48.01.13 Period of time for filing objections to a runoff:** The period of time for filing objections to a runoff is the same for any election: in accordance with § 2422.26(a) of the regulations, objections to the procedural conduct of the election or to conduct that may have improperly affected the results of the election must be filed and received within five (5) days after the tally of ballots has been served.

48.02 Rerun elections: A rerun election is required when:

a. the results of the original election are inconclusive (*CHM 47.17.4*); or

b. the Regional Director or the Authority sets aside the original election based on valid objections or procedural irregularities.

All parties appearing on the ballot in the original election are entitled to participate in the rerun election.

48.02.01 What is an inconclusive election: An election is inconclusive when the following occurs (§ 2422.29):

a. Challenged ballots are not sufficient to affect the outcome of the election; **and**

b. The ballot provides for at least 3 choices, one of which is "no union" or "neither" and the votes are equally divided [§ 2422.29(a)(1)]; **or**

c. The ballot provides for at least 3 choices, the choice receiving the highest number of votes does not receive a majority, and at least two other choices receive the next highest and same number of votes [§ 2422.29(a)(2)]; **or**

d. When a runoff ballot provides for a choice between two labor organizations and results in the votes being equally divided [§ 2422.29(a)(3)]; **or**

e. When the Regional Director determines that there have

been significant procedural irregularities [§ 2422.29(a)(4) and see *CHM 48.2.4*].

**In these instances, the election is declared a *nullity* and the election is rerun providing for a selection from among the choices afforded on the previous ballot.**

48.02.02 Examples of an inconclusive election: The following chart illustrates examples of inconclusive election results requiring a rerun [see § 2422.29(a) - examples correspond to cited sections in the regulations]:

| | Inconclusive results requiring a rerun | | |
|---|---|---|---|
| Total | Union A | Union B | None Void |
| Eligible | | | |

2422.29(a)(1)

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| | | | | |
|---|---|---|---|---|
| § 2422.29(a)(2) | 40 | 15 | 10 | 10 |
| § 2422.29(a)(3) | 17 | 5 | 5 | -- |

48.02.03 What happens when there is an inconclusive election: Whenever an election results in a nullity, the election is rerun with all choices which appeared on the previous ballot.

48.02.04 Inconclusive elections based on § 2422.29(a)(4): When the Regional Director determin

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include:

a. acts or conduct taken by the Regional Office that were not in accordance with the Election Agreement;

b. acts by the Regional Office giving the effect or appearance that the election was unfairly conducted, thus interfering with the free choice of the voters;

c. conduct by other parties that interfered with the procedural conduct of the election.

48.02.05 Investigating and taking action on significant procedural irregularities: If

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48.02.05.01 The Regional Director conducts whatever investigation is necessary to resolve issues related to the proper conduct of the election. If objections to the election have also been filed, investigation of the objections and the procedural irregularities may be combined. See *CHM 50.2*.

48.02.05.02 If the Regional Director concludes that the procedural irregularities are significant and finds the election results inconclusive, **the Regional Director issues an Order Setting Aside the Election.** The Order declares the first election a nullity and orders a rerun. **This Order is not subject to appeal.**

48.02.05.03 If the Regional Director decides that the procedural

irregularities are insignificant, the Regional Director issues a letter setting forth his decision to take action consistent with the Tally of Ballots.

***NOTE: See CHM 50 for a discussion about filing and investigating objections to an election and handling procedural irregularities pursuant to § 2422.29(a)(4).***

48.02.07 Eligibility to vote in a rerun election: Regs. § 2422.29(b) requires that a current payroll period be used to determine eligibility to vote in a rerun election. This differs from a runoff election that uses the payroll period in the original election to determine eligibility to vote.

48.02.08 Eligibility list: The procedures for preparing the eligibility list are the same as if the election were being conducted for the first time (*CHM 28.11 and 28.13, and CHM 35*) unless new eligibility issues surface. The agent and the parties are required to review the newly prepared eligibility list, discuss issues and initial any approved list in accordance with the procedures discussed in *CHM 35*.

48.02.09 Election Agreement:

**48.02.09.01 Inconclusive election:** Absent disagreement by the parties on any of the election details, the parties enter into a new election agreement. If the parties are unable to reach agreement, the procedures in CHM *28.11 and 28.12* are followed.

**48.02.09.02 Rerun based on sustained objections to the election:** When the Regional Director issues a Decision and Order on Objections sustaining objections to an election, the Decision and Order includes a Direction of Election. The Decision establishes a new eligibility date and orders the parties to convene an election conference (*CHM 53.6*).

**48.02.10 Ballot:** The election is rerun with all choices that appeared on the original ballot [§ 2422.29(c)].

48.02.11 Notice of rerun election: The employees are notified that the original election is being rerun by inserting the wording "Rerun Election" in the upper right-hand corner of the Notice of Election. This entry is also made on the Tally of Ballots and the Certification on Conduct of Election.

48.02.12 When a rerun is held:

48.02.12.01 Inconclusive election: The date of the rerun election may not be posted, nor may a rerun election be held, before the expiration of the five (5) day period for filing objections to the election, or if filed, until the resolution of such objections. If objections are filed to the original election, no rerun election is held unless the objections are either withdrawn or overruled by the Regional Director. If the Regional Director overrules the

objections, s/he has the option to conduct the rerun during the period established for filing an application for review (§ 2422.31 and *CHM 55.1.3*).

**48.02.12.02 Rerun based on valid objections:** Following issuance of a Decision and Order on Objections in which the Regional Director sustains the objections, the Director conducts the rerun during the period established for filing an application for review in accordance with the procedures outlined in *CHM 55.1.2 and 55.1.3*.

48.02.13 Conducting the rerun: The mechanics of conducting the rerun election with respect to arrangement of the polling place(s), duties and responsibilities of observers, challenge ballot procedure, counting the ballots, etc. are the same as those used during the original election (*CHM 40 and 47*.).

48.02.14 Results: A Tally of Ballots is issued to record the results of a rerun election. See *CHM 50* for procedures for filing objections.

48.02.15 Further elections:

**48.02.15.01 Inconclusive results:** Only one rerun of a nullity is conducted [§ 2422.29(d)). Thus, if the rerun election results in another inconclusive election, the Tally of Ballots reflects that a majority of valid ballots has not been cast for any choice, and a certification of results is issued. If necessary, a runoff may be held when the original election is rerun.

**48.02.15.02 Rerun based on sustained objections:** Unlike inconclusive elections, a rerun based on valid objections is treated as if it were the first election. Thus, under these circumstances, a rerun could result in a runoff or be inconclusive based on indeterminate results. As a result, a rerun based on sustained objections may be rerun if the election is declared a nullity.

# OBJECTIONS AND DETERMINATIVE CHALLENGED BALLOTS

## CHM 49 through 52

49 INVESTIGATION AND DISPOSITION OF DETERMINATIVE CHALLENGED BALLOTS:

49.01 Basis for investigation: To warrant consideration as determinative challenged ballots, the ballots are:

a. challenged before the voter deposits his/her ballot into the ballot box;

b. unresolved by the parties prior to the tally; and

c. sufficient in number after the tally to affect the results of the election.

Section 2421.22 defines determinative challenged ballots, § 2422.27(a) discusses investigation procedures and *CHM 47.17.1* provides an overview of determinative challenged ballots.

*CHM 47.18* discusses post-tally party resolution of determinative ballots. In the event the parties do not resolve a sufficient number of determinative challenges to render the remaining challenges nondeterminative, the Regional Director investigates the challenges and decides their eligibility.

*CHM 49* concerns the Regional Director's formal investigation of determinative challenged ballots and procedures for resolving them. If objections to an election are filed, they are investigated

simultaneously with the determinative challenged ballots (*CHM 50*).

49.02 Nature and scope of investigation: The investigation of challenged ballots is nonadversarial, and no party bears a burden of proof [§ 2422.27(b)]. The agent is responsible for gathering all available facts. Resolving challenged ballots involves the same eligibility issues that may be raised during the initial stages of the representation proceeding. **All unresolved determinative challenged ballots are investigated and resolved by Decision and Order (*CHM 49.6*).**

49.03 Investigation procedure: Investigation of determinative challenged ballots is undertaken promptly by the Regional Office. A letter is sent to all parties to the election as soon as possible (preferably within 48 hours) after the Tally of Ballots is issued. The letter advises the parties that challenges are sufficient in number to affect the outcome of the election, lists the names of the employees whose ballots are unresolved and requests the parties' position and supporting evidence. The parties are given ten days to submit their positions. See Figure 49.3 for a sample letter.

The agent interviews the employees whose ballots have been challenged and, if relevant, obtains copies of personnel records concerning the employee's employment status. The agent also interviews other employees of the activity if they can contribute relevant and material information about the eligibility of the employee. For instance, if a voter is challenged based on alleged confidentiality, the agent interviews the employee's supervisor. Requests that counsel or a representative be present during the interview of employees or witnesses whose statements could bind that party are handled in accordance with

similar procedures in unfair labor practice investigations.

Once the agent gathers sufficient facts, the agent prepares the case for the Regional Director's consideration in accordance with *CHM 26.2*. Any recommendation is supported by affidavits, memoranda, and correspondence in the file and include a legal analysis. An agenda meeting may be required pursuant to *CHM 26.3 and CHM 26.4*.

49.04 Authority to conduct a hearing: The Regional Director has the authority to issue a notice of hearing in accordance with § 2422.17 when:

a. a material issue of fact is raised regarding the eligibility of any voter whose challenged ballot is determinative of the outcome of the election; or

b. the Director concludes that a hearing, rather than an investigation, is the most expeditious and cost effective method of gathering evidence and resolving the issues raised by the determinative challenged ballots.

A hearing may be held in lieu of, or in addition to, a regional investigation. *CHM 29* sets forth procedures for issuing a notice of hearing. See *CHM 52* for guidance on holding hearings on determinative challenged ballots.

Following the hearing, the agent submits a Hearing Officer's Report to the Regional Director. The Regional Director conducts an agenda before issuing a Decision and Order on Determinative Challenged Ballots (*CHM 26.3 and 26.4*).

49.05 Resolution by agreement and stipulation: If the parties cannot

resolve a sufficient number of the challenged ballots pre or post tally, the Regional Director is responsible for investigating and deciding all remaining challenged ballots.

A meeting held pursuant to § 2422.13(b) may be conducive to resolving determinative challenged ballots. This may even occur prior to any regional investigation. This meeting differs from the post-tally party resolution discussed in *CHM 47.18* because it is conducted as part of the region's formal investigation and includes an agent of the region. Thus, the informal resolutions discussed in *CHM 47.18* are not applicable here unless they are consistent with the procedures outlined herein.

A § 2422.13(b) meeting brings together all of the parties to discuss the positions in dispute and the evidence needed to resolve the eligibility dispute(s). It is held after the tally has been issued and the parties have submitted their positions and supporting evidence. If the election was contested, the parties' "hard-line" positions at the count may subside by the time the meeting is scheduled.

The agent's preparation and conduct of this meeting is similar to the outline set forth in *CHM 25*. When conducting this meeting, the agent reminds the parties that any resolution must be in the form of a stipulation containing sufficient facts to support a Regional Director on the merits. Thereafter, the Regional Director issues a Decision and Order on Determinative Challenged Ballots that must be consistent with the Statute and existing Authority case law on the challenged positions.

49.06 Regional Director Decision and Order: The Regional Director issues a Decision and Order following an investigation or hearing. *CHM 53* provides guidelines for issuing a Decision

and Order and specifically discusses at *CHM 53.7*, a Decision and Order on Determinative Challenged Ballots.

The Regional Director decides all determinative challenged ballots by sustaining or overruling the challenges, or both, depending on the particular challenged ballot. **The Regional Director is not authorized to defer decision on any challenged ballots.** Although the parties may withdraw or resolve certain challenges by stipulation, the Regional Director decides all challenges in the Decision and Order. Such ballots are considered valid ballots cast, and to open some, without others, suggests that the votes may be manipulated.

**49.07** Waiver of right to file an application for review: As part of the investigation, or during the hearing, the parties may waive their right to file an application for review of a Regional Director's Decision and Order which may issue on determinative challenged ballots.

49.08 Procedures for handling determinative challenged ballots after Regional Director's decision: Agents may not remove determinative challenged ballots from the safe or open the sealed envelopes without express approval of the Regional Director.

In addition, the Regional Director gives written approval to the agent before any determinative challenged ballots that have been counted are discarded or destroyed. This memorandum is placed in the case file.

The following procedures are established for securing and maintaining determinative challenged ballots:

a. Uncounted determinative challenged ballots are maintained in a secure place until the Regional Director issues a Decision and Order on Determinative Challenged Ballots or any appeal is decided by the Authority or both (see *CHM 55* for guidance on stays).

b. Counted determinative challenged ballots are maintained for a year following issuance of the appropriate certification by the Regional Director.

49.09 Revised tally of ballots: A Revised Tally of Ballots is issued to the parties following the opening and counting of any determinative challenged ballots as directed by the Regional Director. These ballots are counted and tabulated in the presence of authorized observers for the parties if the parties choose to have an observer present. The tally of the results of the original election is entered in the first column, entitled, "Original Tally." The valid ballots cast in the original election are not recounted prior to counting the challenged ballots. A sample Revised Tally is shown in Figure 49.8.

**A revised tally does not establish a new objection period.** In accordance with § 2422.26, the critical period for filing objections to the procedural conduct of the election or to conduct that may have affected the results of the election, is the five day period after the initial tally of ballots has been served.

The challenged ballots involved are not checked off on the eligibility list. After opening and counting the ballots, the distribution of the votes cast among the various choices is entered in the second column. In the sample in Figure 49.8, the counting of the eight (8) challenged ballots resulted in a final

tally of 51 votes cast for Union B constituting a majority of the valid ballots cast. The third column totals the original tally with the challenged ballots counted.

# 50 OBJECTIONS TO THE ELECTION:

50.01 Filing objections to the election: Section 2422.26 states that objections to the procedural conduct of the election or to conduct that may have improperly affected the results of the election may be filed by any party. The objections must be supported by clear and concise reasons. An original and two (2) copies of the objections must be filed with the Regional Director.

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50.02.01 Action on objections when the Regional Director

determines that there have been significant procedural irregularities: The Regional Director does not investigate objections to an election filed pursuant to § 2422.26 when s/he finds that significant procedural election irregularities exist pursuant to § 2422.29(a)(4). The Regional Director sets aside the election, as discussed in *CHM 48.2.5*, based on a finding that significant procedural irregularities exist and the results of the election are inconclusive. It is therefore not necessary to investigate objections filed by a party. Compare *CHM 50.14*, when there is no evidence of significant procedural irregularities, the Regional Director is required to decide all objections.

50.03 Timeliness of objections: Objections must be filed and received by the Regional Director within five (5) working days after the tally of ballots has been served [§ 2422.26(a)]. Any objections must be filed and received timely regardless of whether the challenged ballots are sufficient in number to affect the results of the election. Note that the Election Agreement requires in Item #15 (Form 33) and Item #13 (Form 34) that the parties state how the tally will be served. *Compare U.S. Department of Agriculture, Forest Service, Apache-Sitgreaves National Forest, Springerville, Arizona*, 47 FLRA 945 (1993). **The provisions in §§ 2429.24 do not provide for filing objections by facsimile equipment.**

50.04 Supporting evidence: The objecting party must file with the Regional Director evidence, including signed statements, documents, and other materials supporting the objections within 10 days after the objections are filed [§ 2422.26(b)]. *Department of Veterans Affairs, Chattanooga National Cemetery, Chattanooga, Tennessee,* 45 FLRA 263 (1992); and *U.S. Department of Housing and Urban Development, Washington,*

*D.C.,* 34 FLRA 307, 309 (1990) (the Authority held that parties dealing with the Government are charged with knowledge of, and are bound by statutes and lawfully promulgated regulations even if they have relied on, to their detriment, upon incorrect information received from a Government agent or employee).

50.05 Service requirements: The objecting party is required to serve copies of objections, without supporting evidence on all parties (§ 2422.4). Service must be made simultaneously on the parties. See Report on Ruling Number 14, 1 A/SLMR 612 (1970) (no other citation available) and *Department of the Air Force, Electronics System Division,* Case No. 31-3338, 1 Rulings on Requests for Review 165, (1971), Report on Ruling Number 41, 1 A/SLMR 626 (1971).

**50.06 Letter to other parties:** Upon receipt of the objections, the Regional Director sends a letter to the other parties. The letter notifies the parties of the objections, the name of the objecting party and the date objections were received in the Regional Office. The letter also requests the parties' positions and allows the parties 5 days from the date the objections were served by the objecting party on them to submit their positions and any supporting evidence. See Figure 50.6. **This letter is mailed on the day the objections are received in the Regional Office. A copy is sent to the objecting party.**

**50.07 Burden of proof:** A party filing objections to the election bears the burden of proof by a preponderance of the evidence concerning those objections [§ 2422.27(b)]. *See also U.S. Department of the Navy, Naval Station, Ingleside, Texas (Naval Station Ingleside),* 46 FLRA 1011 at n.7, (1992) which stated that "the burden is clearly upon the objecting party to provide the evidence necessary to support its allegations of improper

conduct and to demonstrate that the conduct may have improperly affected the results of the election."

**50.08 Who may file objections:** Objections may only be filed by parties to the election. See § 2422.26(a) and *Department of Housing and Urban Development, Region IX, San Francisco, California*, 50 FLRA 334 (1995) (*DHUD, Region IX*), motion for reconsideration denied in *Department of Housing and Urban Development, Region IX, San Francisco, California*, 50 FLRA 575 (1995).

**50.08.01 Issues concerning standing to file objections:** When objections to an election are filed, the Regions apply Authority precedent and determine if the filer is a party eligible to file objections under the regulations. The region initially determines whether the objecting party is a "party" because it either filed the petition, was named in the petition, or is an "incumbent intervenor" because it represents all of the employees in the unit sought in the petition. Consistent with the holding in *Fort Drum*, 50 FLRA 249, 253 (1995) the region also determines whether the objecting party should have been notified as a party that may have been affected by issues raised under § 2422.8 of the regulations and whether it should have been served with a copy of the petition. If the region determines that the objecting party has no standing to file objections and was not denied the right to intervene, the region issues a Decision and Order dismissing the objections based on *DHUD, Region IX*, 50 FLRA 334 (1995).

**50.08.02 Action:** Although the Authority in *DHUD, Region IX* stated that the region should issue a Decision and

Order allowing for an application for review to be filed with the Authority even when a party filing objections to an election is found not to be a party, and also provided guidance in *Fort Drum,* 50 FLRA 249 (1995) on the criteria to determine who is an intervenor in a representation proceeding, the Authority has not yet addressed whether a Regional Director is required to delay issuance of the Certification of Representative during the application for review process.

In the absence of clear precedent on the procedure to be followed when objections to the conduct of an election are filed by a non-party, the region contacts the Office of the General Counsel and requests clearance to issue a Certification of Representative prior to expiration of the application for review period and while any application is pending before the Authority. Delaying issuance of the Certification of Representative during the application for review process is not warranted when objections are dismissed because they are filed by a non-party. Such a delay is inconsistent with the OGC's policy that questions concerning representation are resolved quickly in order to achieve the statutory objectives of fostering collective bargaining and ensuring stability in labor-management relations. This course of action also balances the competing interests of allowing the non-party to challenge the region's determination while not delaying issuance of the Certification of Representative.

Thus, the region issues a Decision and Order dismissing the objections and simultaneously issues a Certification of Representative. In addition to supporting the determination that the filer is not a party to the

proceeding, the Decision and Order sets forth the above explanation why the region is issuing the Certification while at the same time issuing a Decision and Order with a right to file an application for review with the Authority. The region notes the competing interests of fairness to the winner of the election and the employees who voted for representation and the interest of due process for the filer of the objections to present its position to the Authority. The Decision and Order also states that the region has taken this action to present the Authority with an opportunity to clarify the procedure the regions should follow when objections to the conduct of an election are filed by a non-party, and discusses the reasons why the alternative of deferring issuance of the Certification was rejected.

Until the Authority provides guidance on this issue, the regions will continue to contact the Office of the General Counsel when this issues arises.

**50.09 Standard for determining whether conduct is of an objectionable nature:** The standard for determining whether conduct is of an objectionable nature so as to require that an election be set aside is its potential for interfering with the free choice of voters. *Naval Station Ingleside,* 46 FLRA 1011 (1992) *citing Marine Corps Logistics Base, Barstow, California,* 9 FLRA 1046 (1982); *see also U.S. Army Engineer Activity, Capital Area, Fort Myer, Virginia*, 34 FLRA 38 (1989).

**50.09.01 Period of time when conduct may be the basis for an objection:** The critical period preceding the election, during which objectionable conduct of one party

may be used as grounds for setting aside the election, is generally the period between the filing of the petition and service of the tally. See *Report on Ruling Number 58*, 5 A/SLMR 789 (1975) (no other citation available). This does not preclude the filing of a timely unfair labor practice charge without regard to the date of the election petition. *See also Colorado Air National Guard,* Case No. 61-1024(RO), 1 Rulings on Requests for Review 76 (1970), *Report on Ruling Number 12,* 1 A/SLMR 611 (1970).

**50.09.02 Runoff elections:** The critical period preceding a runoff election during which conduct of one party may be used as grounds for setting aside the election begins running from the date of the first election. *See Naval Air Rework Facility, Norfolk, Virginia,* Case No. 22-2568, 1 Rulings on Requests for Review 193 (1972), Report on Ruling Number 50, 1 A/SLMR 640 (1972) (*CHM 48.1.12*).

**50.10 Scope of investigation:** The Regional Director has discretion to determine the scope of the investigation of objections. Although the investigation is limited normally to matters raised timely by the objecting party, the Regional Director cannot ignore evidence relevant to the conduct of the election simply because the objecting party did not specifically raise such conduct in its objections. Section 2422.29(a)(4) allows the Regional Director to rerun an election when s/he "determines that there have been significant procedural irregularities." *CHM 48.2.4*. The Regional Director may set aside an election based on conduct s/he discovers during the investigation, even though that particular conduct was not the subject of a specific objection. For additional information, *see also American Safety Equipment Corporation*, 234 NLRB 501 (1978).

50.10.01 Limitations on the scope of the objecting party's evidence: In *Naval Station Ingleside,* 46 FLRA 1011 (1992), the Authority adopted the National Labor Relations Board's (Board) policy that states "if ... evidence of misconduct unrelated to the timely objections comes to the Regional Director's attention during the investigation at the initiative of the objecting party after the time for filing objections has expired, the new evidence should not be considered as a basis for setting aside the election unless the objecting party has proof that the evidence was 'not only newly discovered, but also previously unavailable.'" *John W. Galbreath & Company (Galbreath)*, 288 NLRB 876, 878 (1988), quoting *Burns Security Services*, 256 NLRB 959, 960 (1981). The Authority limited its discussion in *Naval Station Ingleside*, 46 FLRA 1011 to additional matters raised by the objecting party and did not

discuss appropriate circumstances when the Regional Director discovers evidence on his/her own. The region submits any case for advice that concerns the Regional Director's authority pursuant to § 2422.29(a)(4) when the parties raise new objections during the investigation (*CHM 58*).

50.10.02 Investigation: As part of the investigation, the region requests the parties' positions on each objection and the names of witnesses. The objecting party is required to cooperate fully and provide whatever evidence it may have in its possession. Its failure to produce any evidence obviates further investigation.

The agent interviews witnesses and obtains affidavits, if possible. If a witness refuses to provide an affidavit, the agent writes a memorandum to the file. If applicable, records are examined. Requests by a party that counsel or a representative be present during the interview of employees or witnesses whose statements could bind that party are handled in accordance with similar procedures in unfair labor practice investigations.

Once the agent gathers sufficient facts, the agent prepares the case for the Regional Director's consideration in accordance with *CHM 26.2*. Any recommendation is supported by affidavits, memoranda, and correspondence in the file and includes a legal analysis. An agenda meeting may be required pursuant to *CHM 26.3* *and* *CHM 26.4*.

50.11 Authority to conduct a hearing: The Regional Director has the authority to issue a notice of hearing pursuant to § 2422.17 of the regulations when:

a. a material issue of fact is raised; or

b. the Director concludes that a hearing, rather than an investigation, is the most expeditious and cost effective method of gathering evidence and deciding the objections.

A hearing may be held in lieu of, or in addition to, a regional investigation.

***NOTE: The regulations provide that a Regional Director's determination of whether to issue a notice of hearing is not appealable to the Authority [§ 2422.17(d)]. However, if the Regional Director decides that a hearing on objections is not warranted, the Director affords the parties an opportunity to make an offer of proof sufficient to raise a substantial and material factual issue warranting a hearing. Federal Deposit Insurance Corporation, 40 FLRA 775 at 782 - 784, (1991).***

*CHM 29* sets forth procedures for issuing a notice of hearing. *CHM 51 and HOG 36* provides guidance on holding hearings on objections to the election.

Following the hearing, the agent submits a Hearing Officer's Report to the Regional Director and the Regional Director conducts an agenda before issuing a Decision and Order on Objections (*CHM 26.3 and 26.4*).

50.12 Withdrawal of objections or agreement to rerun election: A meeting held pursuant to § 2422.13(b) is not generally appropriate when investigating objections to an election unless the meeting is scheduled as a prehearing conference (*CHM 25.7*).

If objections are withdrawn before the Regional Director issues a Decision and Order on Objections, the Regional Director may approve the withdrawal request and issue the appropriate certification.

If the parties agree to set aside an election, the region obtains the agreement in the form of a written stipulation. In the agreement, the parties waive: a) their right to a hearing; b) a Decision and Order on the objections; and c) their right to file an appeal or a request for review. The parties also stipulate that if the Regional Director approves the stipulation, s/he may set the election aside and conduct a rerun election. If the Regional Director approves the stipulation and agreement, s/he issues an Order Setting Aside the Election and Ordering a Rerun.

50.13 Regional Director Decision and Order on Objections: The Regional Director issues a Decision and Order following an investigation or hearing. *CHM 53* provides guidelines for issuing a Decision and Order and specifically discusses at *CHM 53.6*, a Decision and Order on Objections.

50.14 The Regional Director decides all objections: The Director does not have the authority to rule on one objection and then, based on his/her decision on the one objection, decide it is unnecessary to rule on the other objections. If the Regional Director overrules the objections, the Director does not issue the appropriate certification until after the appeal period expires (see *CHM 55*). If the Regional Director sustains the objections, the Decision includes a Direction of Election setting forth the election details or stating the election will be held "at a time and place to be determined."

***NOTE: The Regional Director is not required to investigate***

***objections to an inconclusive election based on his/her decision that procedural irregularities exist pursuant to § 2422.29(a)(4). See CHM 48.2.6 and CHM 50.2.***

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50.16 Investigation of and Decision and Order on objections and determinative challenged ballots: Where a case involves both objections and challenged ballots, the Regional Director may issue a Decision and Order on Objections and Challenged

Ballots. In such cases, the Decision may be based either on an investigation or a hearing. However, if the Regional Director decides that a material issue of fact exists for one issue, then both issues are set for hearing. In any event, except in unusual circumstances, a hearing in both matters is the most expeditious and cost effective resolution. See *CHM 53.8.*

51 HEARINGS ON OBJECTIONS: *HOG 36* discusses Hearings on Objections and sets forth procedures for handling credibility disputes. *CHM 51* discusses issuing a notice of hearing and other procedural matters relating to the conduct of the hearing.

51.01 General: There are significant distinctions between hearings on objections and hearings on other representation matters:

a. The objecting party bears the burden of proof in a hearing on objections, unless the Regional Director decides pursuant to § 2422.29(a)(4) to expand the scope of the hearing;

b. In cases where the objections involve the conduct of Authority personnel, the Regional Director may assign an attorney, designated as Counsel for the Regional Director, to appear at the hearing (*HOG 36.4 and 36.7*);

c. The Regional Director has discretion only to allow the Hearing Officer to make recommendations on credibility issues, not the objections themselves (*HOG 36.6 and 36.8*).

51.02 Notice of hearing: The Notice of Representation Hearing, FLRA Form 46, is appropriate for a hearing notice on objections or determinative challenged ballots. The letter accompanying the notice of hearing advises the parties of the nature of the hearing and the date for the prehearing conference. In objections cases the region attach a copy of the objections to the election, rather than an outline of the information necessary to address the issues raised by the objections. In the rare exception when the Regional Director decides to issue a notice of hearing

pursuant to § 2422.29(a)(4) on matters that raise questions relating to the conduct of the election, the region informs the parties of the issues it intends to explore. See *CHM 29* for guidance on issuing a notice of hearing.

51.03 Conducting the hearing: See *HOG and HOG 36*.

51.04 Hearing Officer's Report: The Hearing Officer is required to prepare a Hearing Officer's Report and submit it to the Regional Director with the record. The report is a modified version of the Hearing Officer's Report submitted in other representation matters (*HOG 34*). Specifically, it includes:

a. Item 1(c)--Pleadings and Parties: Enter the name of each party as stated on the record. If amended, the name is shown as amended. Note the date(s) of the hearing and its location.

b. Item 2--Objection(s): Summarize the objections that were in issue at the hearing and the pertinent evidence presented with respect to each objection. Any objection or issue litigated, other than those listed, is checked under the heading "Other" and discussed in Item 8.

c. Item 3 --Procedure: Discuss any unusual or significant procedural problems affecting the proceeding and/or any rulings made about which the Hearing Officer is in doubt.

d. Item 4--Stipulations: List the stipulations.

e. Item 5--Recommendations made on the record regarding credibility issues: Review the Regional Director's

instructions regarding recommendations on the record. Note the issue and the recommendation made.

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g. Item 7--Briefs: State whether the parties intend to file briefs and the due date established for filing any brief(s).

h. Item 8--Reporter's estimate of transcript pages: Insert the number of estimated pages.

51.05 Consolidated hearing on objections and/or determinative challenged ballots and an unfair labor practice complaint: There may be situations in which an unfair labor practice case is filed alleging violations of the Statute based on conduct that could also constitute a valid objection to an election [§ 2422.27(d)]. When such cases are filed, and there are also pending objections and/or determinative challenged ballots, the Regional Director

may consolidate the representation case(s) and the unfair labor practice case(s) for hearing. The Regional Director consolidates all of the objections and/or determinative challenged ballots with the unfair labor practice case; the Director may not bifurcate any objections and deal with them separately. The only exception is when there is independent conduct that warrants setting aside the election that is unrelated to the unfair labor practice case [such as § 2422.29(a)(4)].

Where a representation case has been consolidated with an unfair labor practice case for purposes of hearing, the consolidated hearing is conducted and decisions issued by an Administrative Law Judge in accordance with § 2422.27(d) of the regulations. In such circumstances, the Notice of Hearing discussed in *CHM 29* is modified. The procedures for obtaining an Administrative Law Judge and arranging for an official reporter, described in the Unfair Labor Practice Case Handling Manual, are followed in these consolidated hearings. Exceptions and related submissions are filed with the Authority, and the Authority issues a decision in accordance with Part 2423 of this chapter, except for the following:

a. Sections 2423.18 and 2423.19(j) of the regulations concerning the burden of proof and settlement conferences are not applicable;

b. The Administrative Law Judge may recommend a decision; he may not recommend remedial action to be taken or notices to be posted as provided by § 2423.26(a); and,

c. References to “charge” and “complaint” in § 2423.26(b) will be omitted.

52 HEARINGS ON DETERMINATIVE CHALLENGED BALLOTS: Determinative challenged ballots raise issues related to the eligibility of the voter to cast a ballot. If the Regional Director decides to issue a notice of hearing on determinative challenged ballots, the hearing is conducted as any other representation hearing. The *HOG* describes techniques of conducting the hearing and developing a complete record. It also includes Employee Category Sections to assist the Hearing Officer and the parties in defining, narrowing and resolving determinative challenged ballots related to eligibility and employment issues.

52.01 Duties of the Hearing Officer: A hearing on determinative challenged ballots is nonadversarial, and no party bears a burden of proof. The Hearing Officer is responsible for obtaining a complete factual record (*HOG 2*). A complete outline of the Hearing Officer's responsibilities is listed in *HOG 2.2*. Note that, unlike objections cases, the Hearing Officer, at the discretion of the Regional Director, may make recommendations on the record about the eligibility of voters whose ballots are the subject of the hearing.

52.02 Stipulations on the record: During the hearing, the parties are encouraged to enter into a stipulation(s) regarding the bargaining unit eligibility of employees who have cast determinative challenged ballots. The Hearing Officer recesses the hearing and contacts the Regional Director to discuss potential stipulations and seek permission to entertain them. Acceptance of the stipulation is a discretionary matter with the Regional Director. *Veterans Administration Medical Center, Fayetteville, North Carolina,* 8 FLRA 651 (1982). *HOG 26.6.2*.

52.03 Outlining the issues on the record: The Hearing Officer

exercises care in outlining the issues on the record (*HOG 35.7 and HOG 35.7.5 - sample script*). The Hearing Officer:

a. States the purpose of the hearing;

b. States the name of each employee whose ballot was challenged and the title of the employee's position;

c. Asks the challenging party(s) to confirm the names of the employees whose ballots were challenged;

d. States the name of the party that filed the challenge and asks the party to provide a statement of the reason for each challenge; and

e. Describes the procedures for counting the ballots of any employees found eligible to vote and provisions for issuing a revised tally of ballots.

52.04 Obtaining the record: Once the issues are outlined and explained to the parties, the Hearing Officer proceeds with the hearing by receiving stipulations, summarizing the parties' positions, and proceeding with the presentation of evidence. See *HOG 32* which includes an outline of a hearing and *HOG 35* for a sample script.

52.05 Hearing Officer's Report: The Hearing Officer is required to complete a Hearing Officer's Report after the hearing is closed. This report is submitted with the record to the Regional Director (*HOG 34* and Figure H34.4 for the format for the report).

# REGIONAL DIRECTOR DECISIONS AND ORDERS, APPLICATIONS FOR REVIEW, POSTDECISIONAL ACTIONS CHM 53 through 55

53 REGIONAL DIRECTOR DECISIONS AND ORDERS: Pursuant to the provisions of section 7105(e)(1) of the Statute, the Authority delegated its authority to process and determine representation matters to the Regional Directors in Appendix B to 5 CFR Chapter XIV - Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the Federal Labor Relations Authority (45 FR 3523, Jan. 17, 1980, as amended at 48 FR 28814, June 23, 1983; 61 FR 16043, Apr. 11, 1996).

Section 2422.30(c) of the regulations states that:

> After investigation and/or hearing, when a hearing has been ordered, the Regional Director will resolve the matter in dispute and, when appropriate, direct an election or approve an election agreement, or issue a Decision and Order.

53.01 General guidelines: The Regional Director issues a Decision and Order:

53.01.01 Without a hearing when there are no material issues of fact and no unresolved questions regarding unit appropriateness (*CHM 27.4.5*);

**53.01.02** Without a hearing, when the parties enter into a stipulation that 1) addresses all appropriate unit issues; 2)

includes a waiver of the parties right to a hearing; and 3) is approved by the Regional Director;(*CHM 27.7*); or

53.01.03 After a hearing (*CHM 27.5 and 27.6* discuss when hearings are required).

53.02 Purposes of a Decision and Order: This subsection discusses the variety of issues that the Regional Director may decide in a Decision and Order. In a single Decision and Order, the Regional Director decides all issues raised **initially by petitions, including those serving multiple purposes. In addition, the Regional Director decides jurisdictional and threshold issues in the same Decision and Order as the substantive issues are decided.**

In a Decision and Order the Regional Director may:

53.02.01 Determine an appropriate unit; see *RCL 1*.

53.02.02 Determine an appropriate unit and direct an election;

53.02.03 Dismiss a petition or a request to intervene; (based on timelines, standin

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53.02.04 Decide a challenge to the status of a labor organization;

Note that a status challenge is a threshold issue. The Regional Director's decision that a challenge to the status of a labor

organization petitioner is meritorious may obviate the need for deciding any other issues present in the case. If the Regional Director decides the status challenge lacks merit or the party being challenged is not the petitioner, the Director may also decide the other issues in the case. See *CHM 19*, *20.1.8*, *and 23.9.3*.

53.02.05 Determine that due to a change in the character and scope of the unit(s):

a. a bargaining unit(s) is (are) no longer appropriate; and/or

b. an exclusive representative(s) of an appropriate unit(s) ceases to be the exclusive representative of that unit.

53.02.06 Determine that in spite of a change in the character and scope of the unit(s),:

a. a bargaining unit continues to be appropriate; and

b. an exclusive representative of an appropriate unit continues to be the exclusive representative of that unit;

*53.02.07* Determine that due to a change in the character and scope of the unit, certain employees are unrepresented;

For a discussion on *CHM 53.2.5 through 53.2.7* *see RCL 3* citing *Morale, Welfare and Recreation Directorate, Marine Corps Air Station, Cherry Point, North Carolina,* 45 FLRA 281 (1992) and other cases therein.

53.02.08 Decide whether successorship, accretion, schism and/or severance exists and order appropriate action (*RCL 3, 8 and 9*);

See *Naval Facilities Engineering Service Center, Port Hueneme, California,* 50 FLRA 363 (1995), concerning successorship; *United States Department of the Navy, Fleet and Industrial Supply Center, Norfolk, Virginia*, 52 FLRA 950 (1997) concerning competing claims of successorship and accretion; *Department of the Army. U.S. Army Aviation Missile Command (AMCOM II), Redstone Arsenal, Alabama,* 56 FLRA 126 (2000) for issues relating to successorship and accretion, and *National Association of Government Employees/Service Employees International Union, Local 5000, ALF-CIO-CLC and Service Employees International Union, ALF-CIO-CLC and Department of Veterans Affairs, Washington, DC,* 52 FLRA 1068 (1997) concerning severance.

53.02.09 Decide whether a question has arisen concerning the representation of the employees in an appropriate unit(s) and:

a. order an election;

b. dismiss the petition; or

c. revoke the certification.

Note that such decisions could be based on two different situations:

(i) questions related to substantial changes in the character and scope of the unit due to a reorganization or realignment of agency operations (see *CHM 53.7, and RCL 3*); or

(ii) issues related to the majority status of the currently

recognized or certified labor organization and/or defunctness (*RCL 4*).

53.02.10 Decide that certain positions are included in or excluded from an appropriate unit; See *RCL 15 through 28 and HOG 51 through 64.*

53.02.11 Decide whether the certification or recognition of an existing unit should be amended;

53.02.12 Decide whether a labor organization is eligible for dues allotment under 5 U.S.C. 7115(c) *(RCL 6* and *HOG 42)*;

53.02.13 Decide whether to grant a labor organization national consultation rights or consultation rights under 5 U.S.C. 7113 and 7117 respectively (see *CHM 57*);

***53.02.14*** Decide whether existing units are appropriate for consolidation under 5 U.S.C. 7112(d) (*RCL 13* and *HOG 49*); A Decision and Order is required if: 1) the parties agree on the proposed consolidation and no election is required; or 2) the parties disagree on the proposed consolidation. In the latter circumstances, see *CHM 29* for requirements for Hearings or stipulations in lieu of hearings.

***NOTE: if an election is required because either thirty percent of the employees submitted a showing of interest, or the professionals are required to vote on inclusion in the nonprofessional unit, a Decision and Order is not required where the parties agree on the proposed unit. In such cases, the Election Agreement constitutes the Regional Director's finding the proposed consolidated unit appropriate.***

53.02.15 Determine that an incumbent union has disclaimed representational interest in a unit for which it is the exclusive representative (*CHM 20.9*);

53.02.16 Rule on objections and/or determinative challenged ballots (*CHM 49 and 50*); and/or

53.02.17 Resolve any other issues before the Regional Director.

**53.03** Contents of a Decision and Order: A Decision and Order contains sufficient facts, legal authority and rationale to support the Regional Director's decision.

53.04 Basic outline of a Decision and Order: A Decision and Order contains the following information:

a. Jurisdiction statement setting forth the Regional Director's authority for processing and deciding the representation petition pursuant to 5 U.S.C. 7105(e)(1); and that the Decision and Order is issued pursuant to § 2422.30(c) of the regulations;

b. Petitioner's stated purpose of the petition;

c. Identification of the parties; briefly name the parties setting forth their party status and provide a short statement of their positions on the issues;

d. Background and pertinent facts; reference and detail any stipulations submitted by the parties. The factual portion of the Decision and Order is detailed. Although the parties may stipulate the facts, if the Decision and Order refers to the stipulation, it may only refer to the

stipulated facts, not the parties' stipulated legal conclusions based on the facts. The Regional Director's Decision and Order is based on facts, not the parties' conclusions.

Examples of facts in a Decision and Order include:

(i) if the petition involves an appropriate unit question, the Decision and Order describes the mission, organization, functions, delegations of authority, bargaining history, personnel information, working conditions and other facts that are considered when making unit determinations; (official organizational charts may be attached to Decisions and Orders to assist the reader. *See Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, AFL-CIO,* 5 FLRA 657 (1981).

(ii) if the petition involves matters relating to the representation of employees, such as a reorganization, the Decision reflects all of the facts considered in making an appropriate unit determination both before and after the reorganization, so that the Decision reflects what has happened to the affected employees;

(iii) if the petition involves matters relating to unit eligibility, the Decision describes the duties and authorities of the contested employees and their relationships with their superiors and colleagues;

e. Issues presented for resolution; **these issues are not only defined by the results the petitioner seeks, but also by the facts and circumstances that caused the petition to be filed** *(CHM 23.1*)**.**

f. Applicable case law; Authority decisions are considered first, followed by Decisions of the Federal Labor Relations Council and the Assistant Secretary for Labor Management Relations, and finally, Decisions of the National Labor Relations Board. See also *CHM 24*.

*(i) 5 U.S.C. 7135(b) states that:*

> *Policies, regulations and procedures established under Executive Orders 11491, 11616, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superceded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.*

See also *Florida National Guard, St. Augustine, Florida,* 25 FLRA 728 (1987) and *U.S. Army Corps of Engineers, Headquarters, South Pacific Division, San Francisco, California,* 39 FLRA 1445, 1449 (1991) (a decision of the Assistant Secretary remains in full force and effect unless superceded by decisions issued pursuant to the Statute).

*(ii)* *References to private sector precedent decided under the National Labor Relations Act are appropriate where there are no prior decisions, and where analogies to comparable legal developments in the private sector may be relevant and useful. See Turgeon v. FLRA*, 677 F.2d 937, 939-940 (D.C. Cir. 1982); *Library of Congress v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983), *enforcing American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477 and Library of Congress, Washington, D.C.*, 7 FLRA 578 (1982); and *U.S. Department of Transportation, U.S. Coast Guard Finance Center, Chesapeake, Virginia (Coast Guard),* 34 FLRA 946, (1990).

g. An analysis of the case law as applied to the facts of the case;

h. Results: the action that the Regional Director is taking to resolve the issues presented by the petition; for example, order an election, clarify a unit, etc.

i. The Decision and Order also states that, pursuant to Section 2422.31(e), if no application for review is filed with the Authority, or if one is filed and denied, or if the Authority does not undertake to grant review of the Decision and Order within sixty (60) days after the filing of an application for review, the Decision and Order becomes the final action of the Authority *(as in dismissals when no further action is required)* or the Regional Director will: *set forth appropriate action:*

(i) direct an election; and/or, if appropriate

(ii) prepare and serve on all parties an Amendment of Recognition, Clarification of Unit, the appropriate Certification or Revocation of Recognition or Certification or Certification of Consolidation of existing Units (*CHM 56*).

***NOTE: If the Regional Director decides to issue a certification, clarification, amendment or revocation in the Decision and Order, it is not issued as part of the Decision and Order. It is issued as a separate document.***

j. Every Decision and Order concludes by informing the parties of their rights to file an application for review with the Authority and the filing requirements [§§ 2422.30(d) and 2422.31]. *CHM 53.10* states that the parties may waive their right to file an application for review.

53.05 Decision and Order and Direction of Election: When the Regional Director issues a Decision and Order finding a unit appropriate and directs an election, the decision is titled: Decision and Order and Direction of Election. In addition to the information set forth in *CHM 53.4*, the Decision also contains (*CHM 28.12.1*):

a. a complete description of the unit(s) found appropriate;

b. a direction of the election explaining the purpose of the election;

c. the effect of the vote;

d. general statement of eligibility;

e. the eligibility date for participating in the election - the payroll period ending prior to the date of the Decision (CHM 28.18.3.1b);

This information is included in the subsequent Election Agreement and on the Notice of Election. See *CHM 28.12.1*.

***NOTE: In a Decision and Order involving an appropriate unit question in an election petition, the Regional Director decides only whether the unit petitioned for in an election case or any alternative unit the petitioner has agreed to is appropriate. The Regional Director does not decide whether there is a more appropriate unit or whether the Activity's proposed unit is appropriate if s/he finds that the petitioner's unit(s) is not appropriate. Department of Transportation, Federal Aviation Administration, New England Region (FAA), 20 FLRA 224 (1985).***

53.06 Decision and Order on Objections: The introduction to a Decision and Order on Objections to the procedural conduct of an election, or to conduct that may have improperly affected the results of the election, includes: 1) the tally of ballots; 2) the date the objections to the procedural conduct of the election and/or conduct improperly affecting the results of the election were filed; and 3) the relevant portion of each objection. The best practice is to quote each objection, if possible. If the

objection is too lengthy, it may be paraphrased or attached to the Decision and Order.

The Decision and Order addresses each objection separately except when several objections involve similar or closely related matters. These objections may be treated together. A discussion of each objection includes:

a. Allegation(s);

b. Positions of the other party or parties regarding the objection;

c. Summary and analysis of evidence;

   All relevant evidence submitted during the investigation is summarized. The analysis of the evidence includes the application of Authority case law to the facts revealed by the investigation.

d. Findings;

e. Conclusion, setting forth the action ordered; and

   The summary and analysis is followed by the conclusion that the particular conduct engaged in did, or did not, as alleged, interfere with the employees' freedom of choice, and therefore the election is or is not set aside.

f. A final paragraph informing an aggrieved party of the right to file an application for review with the Authority [§§ 2422.30(d) and 2422.31].

See also *CHM 50*.

53.07 Decision and Order on Determinative Challenged Ballots: The introduction to a Decision and Order on Determinative Challenged Ballots states the results of the election as set forth in the tally of ballots and provides a complete description of the unit or voting group involved as described in the Election Agreement or Direction of Election. For each of the individuals whose ballots were challenged, the Decision and Order discusses:

a. The basis for the challenge and the position of the challenging party;

b. The respective position(s) of the other party(ies) regarding the eligibility of the challenged voter;

c. A summary of the relevant evidence obtained in the investigation or included in a stipulation if submitted by the parties, and an analysis of such evidence, based on Authority case law;

d. Determinations of eligibility;

e. The action ordered; and

f. A final paragraph informing an aggrieved party of the right to file an application for review with the Authority [§§ 2422.30(d) and 2422.31].

See also *CHM 49*.

53.08 Decision and Order on Objections and Determinative Challenged Ballots: Where a case involves both objections and

challenged ballots, the Regional Director may decide the issues in the same Decision and Order. The Decisions discussed in *CHM 53.6 and 53.7* are combined.

53.09 Service of a Decision and Order: A Decision and Order of the Regional Director is served on all parties according to § 2422.4. A Decision and Order is served in accordance with § 2429.12.

**53.10** Waiver of right to file application for review: The parties may, at any time, waive the right to file an application for review. See also *CHM 54.7.1*.

54 APPLICATION FOR REVIEW OF A REGIONAL DIRECTOR DECISION AND ORDER: Section 2422.30(d) states that a party may file with the Authority an application for review of a Regional Director Decision and Order.

54.01 Contents of the record: Section 2422.30(e) sets forth the requirements for forwarding documents to the Authority when an application for review is filed/granted:

> When no hearing has been conducted all material submitted to and considered by the Regional Director during the investigation becomes a part of the record. When a hearing has been conducted, the transcript and all material entered into evidence, including any posthearing briefs, become a part of the record.

***NOTE: Section 2422.30(e) does not instruct the regions to forward automatically the contents of the record to the Authority whenever an application for review is filed of a Regional Director's Decision and Order. Thus, when an application for review is filed with the Authority, neither the case file nor any other documents are forwarded to the Authority UNLESS specifically requested by the Authority.***

54.01.01 When no hearing is held, the region does not wait for the Authority to request the file. Rather, the region transmits the representation case file directly to the Authority as follows:

a. The representation case file is forwarded directly to the Office of Case Control by certified mail; nothing is removed from the file except as noted in part “b”;

b. The showing of interest is not forwarded with the file; FLRA Form 52, summarizing the report on the showing of interest, is the only record of the showing of interest transmitted to the Authority; and

c. Regional Offices may not submit "comments," sua sponte, addressing issues raised in applications for review.

54.01.02 When a hearing has been held, the region waits for the Authority to request the record. The transcript, all material entered into evidence, including formal documents, exhibits, post hearing motions and briefs, become part of the record. **Neither the case file nor the Hearing Officer's Report is part of the official record and are not submitted to the Authority.** See *HOG 4.1* and *17.1*.

54.02 Filing an application for review: Section 2422.31(a) requires that a party must file an application for review with the Authority within sixty (60) days of the Regional Director's Decision and Order. The sixty (60) day time limit provided for in 5 U.S.C. 7105(f) may not be extended or waived.

54.03 Contents of applications for review: Section 2422.31(b) provides that an application for review must be sufficient to enable the Authority to rule on the application without recourse to the record. However, the Authority may, in its discretion, examine the record in evaluating the application. An application must specify the matters and rulings to which exceptions are taken, include a summary of evidence relating to any issue raised in the application, and make specific reference to page citations in the transcript if a hearing was held. An application may not raise any issue or rely on any facts not

timely presented to the Hearing Officer or Regional Director.

54.04 Grounds for review: Section 2422.31(c) states the Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds:

a. The decision raises an issue for which there is an absence of precedent;

b. Established law or policy warrants reconsideration; or,

c. There is a genuine issue over whether the Regional Director has:

(i) Failed to apply established law;

(ii) Committed a prejudicial procedural error;

(iii) Committed a clear and prejudicial error concerning a substantial factual matter.

**54.05** Amicus briefs to the Authority: Occasionally the Authority provides interested parties, including the Office of the General Counsel, the opportunity to file briefs as amici curiae in a pending representation proceeding. On appropriate occasions, the Office of the General Counsel will submit a brief to the Authority on matters of concern to the Authority (see *Notice* in *Federal Register* dated November 22, 1994, providing interested parties with the opportunity to file briefs as amici curiae in *Naval Facilities Engineering Center, Port Hueneme, California* and the General Counsel's subsequent brief). Regions may be called upon to prepare a brief to the Authority on behalf of the

Office of the General Counsel.

54.06 Opposition to application for review: Section 2422.31(d) provides that a party may file with the Authority an opposition to an application for review within ten (10) days after the party is served with the application. A copy must be served on the Regional Director and all other parties, and a statement of service must be filed with the Authority.

54.07 Regional Director Decision and Order becomes the Authority's action: Section 2422.31(e) states that a Decision and Order of a Regional Director becomes the action of the Authority when:

a. No application for review is filed with the Authority within sixty (60) days after the date of the Regional Director's Decision and Order; or

b. A timely application for review is filed with the Authority, and the Authority does not undertake to grant review of the Regional Director's Decision and Order within sixty (60) days of the filing of the application; or

c. The Authority denies an application for review of the Regional Director's Decision and Order.

For additional discussion concerning when the Regional Director's action becomes the final action of the Authority, *see Morale, Welfare and Recreation Directorate, Marine Corps Air Station, Cherry Point, North Carolina,* 48 FLRA 686 (1993).

54.07.01 A waiver by the parties of their right to file an application for review of the Regional Director’s Decision and Order is the equivalent of no application being filed at all

[§ 2422.31(e)(1)]. See *CHM 53.10*.

55 REGIONAL ACTION SUBSEQUENT TO THE REGIONAL DIRECTOR'S DECISION AND ORDER: Section 2422.31(f) provides that: "The Authority may rule on the issue(s) in an application for review in its order granting the application for review. Neither filing nor granting an application for review shall stay any action ordered by the Regional Director unless specifically ordered by the Authority."

**55.01** Considerations when scheduling elections or taking other action during the sixty day appeal period: As discussed in *CHM 53*, the Regional Director's Decision and Order may result in a direction of election or a direction to open challenged ballots. Subsequent actions include issuing a revised tally of ballots, scheduling a rerun or runoff election, or issuing an appropriate certification, clarification, amendment or revocation.

**55.01.01 Actions that constitute final actions by the Authority and are deferred:** Certifications, clarifications, amendments and revocations are issued by the Regional Director and constitute final actions by the Authority. As such, they cannot be issued until the case is finished. Exceptions may be allowed in unusual circumstances after obtaining clearance from the Office of the General Counsel. See, for example, *CHM 50.8.2.*

55.01.02 Elections are not deferred: Absent a stay by the Authority pursuant to § 2422.31(f), the region conducts all

elections even though the case may be pending on appeal before the Authority. (*CHM 55.2* discusses stays and impounding ballots ordered by the Authority.) However, if the region believes that one of the following circumstances exists, warranting deferring the election, contact the Office of the General Counsel for clearance:

a. An election requires the expenditure of substantial financial and human resources;

b. A unique legal issue was raised in the representation proceeding; or

c. The issue involves the denial of intervention. (see CHM 17.16 and 58.4.2)

55.01.03 Processing elections: After issuing a Decision and Order and Direction of Election, absent a stay, the agent, on behalf of the Regional Director, meets with the parties, and schedules and conducts the election following the procedures outlined below. **Regions are not authorized to impound ballots in accordance with § 2422.31(f) unless ordered by the Authority.** This section states "neither filing nor granting an application for review shall stay any action ordered by the Regional Director unless

specifically ordered by the Authority.". The region: a) conducts the election, b) counts the ballots, c) issues and serves the tally of ballots, d) investigates any determinative challenged ballots or timely objections to preserve the evidence; and e) contacts the Office of the General Counsel prior to issuing the Decision and Order.

In cases where the Regional Director issued a Decision and Order and Direction of Election that is appealed, the parties may either: 1) fail to request a stay when filing an appeal; or 2) request a stay which the Authority denies, grants, or gives the region the option to conduct or stay the election. If the region opts to conduct the election and has not been ordered to impound the ballots and there are no determinative challenged ballots or objections filed, the region: a) counts the ballots, b) issues and serves the tally of ballots, but c) delays issuing the certification until such time as the Authority rules on any pending application for review. See also *CHM 28.29.*

**55.2 Stays of Election and Procedures for Impounding Ballots:** In an election case, after issuing a Decision and Order and Direction of Election, if an application for review is filed and the applicant requests a stay in the election, the Authority may stay the election, deny the stay or give the region the option of staying or proceeding with the election. In the latter option, the Authority has usually ordered the ballots impounded if the

region decides to proceed with the election. See *Department of the Army, Headquarters, Fort Dix, Fort Dix, New Jersey*, 53 FLRA 287 (1997) (The election ordered by the Regional Director was held prior to the Authority's receipt of AFGE's application, mooting AFGE's request for a stay. The Authority stated that: "It is, of course, not possible, for the Authority to act on stay motions where the request is not filed prior to the act to be stayed.")

In *Department of the Army, U.S. Army Aviation Missile Command (AMCOM I), Redstone Arsenal, Alabama*, 55 FLRA 640 at 644 (1999) the Authority established standards for evaluating requests for stays of Regional Director's decisions. The Authority stated that it would be guided by the standards used by appellate courts to evaluate requests to stay district court orders. The Authority cited the standards as set out in the D.C. Circuit's Rule 8(a)(1) as follows:

a. The likelihood that the moving party will prevail on the merits;

b. The prospect of irreparable injury to the moving party if relief is withheld;

c. The possibility of harm to other parties if relief is granted; and

d. The public interest.

Whenever the Authority's gives a region the option of staying an election or conducting it, the Regional Director obtains advice from the OGC about whether to conduct or stay the

election (*CHM 58.3.12*).

**55.2.1 Procedures for impounding ballots:**

If possible, when the Authority orders the ballots impounded, the procedures for impounding the ballots are described in detail in the Election Agreement or Direction of Election.

If a Regional Director is ordered to impound the ballots after the Election Agreement is approved, the Director will discuss with the parties how the ballots will be impounded. All impounded ballots will be placed in a large envelope or envelopes in the presence of the parties. The envelope/box is sealed and signed by all of the observers and transparent tape is placed over each of the signatures. The envelope/box is marked clearly to reflect the case number, date of election and polling place. The envelope/box is also labeled to reflect that it contains ballots and that the envelope may not be opened. If more than one envelope is being used, each envelope is marked in sequence; e.g., “Envelope 1 of 2" or “Envelope 2 of 2”, etc. The envelope(s) is (are) stored in the office safe or other secure place that the parties agree upon and a photocopy of the envelope face, along with a memorandum of where the envelope(s) is (are) stored is placed in the case file. (See also *CHM 40.15*.)

When the impounded ballot envelope is removed from the secured place, the region contacts representatives of the parties and affords them the opportunity to be present when the ballots are removed for counting.

**55.2.2 Safeguarding impounded ballots:** Authority agents may not remove impounded ballots from the safe or open the envelopes without express approval of the Regional Director.

In addition, the Regional Director gives written approval to the agent before any impounded ballots that have been counted are discarded or destroyed. This memorandum is placed in the case file.

The following procedures are established for safeguarding impounded ballots:

a. Uncounted impounded ballots remain in a secure place until the Authority decides the related appeal or any blocking unfair labor practice case is decided and action ordered by the Authority is remedied.

b. Counted impounded ballots are maintained for a year following issuance of the appropriate certification by the Regional Director.

# CERTIFICATIONS AND REVOCATIONS
# CHM 56

56 CERTIFICATIONS AND REVOCATIONS: Section 2422.32 concerns certifications and revocations.

56.01 Requirements for certifications: Section 2422.32(a) states that the Regional Director will issue an appropriate certification when:

a. After an election, runoff, or rerun,

(i) No objections are filed, or challenged ballots are not determinative, or

(ii) Objections and determinative challenged ballots are decided and resolved; or

b. The Regional Director issues a Decision and Order requiring a certification, and the Decision and Order becomes the action of the Authority under § 2422.31(e) or the Authority otherwise directs the issuance of a certification.

***NOTE: 1) CHM 55 for policy considerations when scheduling elections or taking other action during the sixty day appeal period. 2) The certification, clarification, amendment or revocation is issued as a separate document. It is not included as part of the Decision and Order (CHM 53.4i).***

56.02 Types of certifications:

56.02.01 Certification of Representative: FLRA Form 28, Certification of Representative, is used to:

a. certify that a majority of the employees have selected the named labor organization as exclusive representative of the employees in the unit involved; or

b. reflect that a new agency has acquired employees who were previously represented by a labor organization in an appropriate unit, and the acquiring employer has satisfied the successorship criteria (RCL 3). In this scenario: 1) the predecessor unit may be disestablished and the region also may revoke the original certification; or 2) the predecessor unit still exists and continues to be appropriate, but a new unit consisting of the portion of the employees acquired from the old employer is also appropriate. A Certification of Representative is issued for the new unit.

56.02.01.01 Names appearing on the caption of the certification: **This section applies to all certifications, clarifications, amendments or revocations.**

The full name of the agency, then the activity and the labor organization as it appears on the Election Agreement or in the Decision and Order, including the designation of the local, if any, appears in the caption of the certification and in the unit description (*CHM 28.18.1*). **The order of the agency and the activity, if there is one, may differ from the order of these parties in the unit description. The level of recognition is controlled by the unit description (*CHM 28.14.2*). The caption is significant for record-keeping purposes.**

***NOTE: Particular care is taken to ensure that when a consolidated unit is involved, the certification of consolidated units which issues sets forth in full the designation of the exclusive representative of the consolidated unit.***

56.02.01.02 Unit description: The unit as agreed to by the parties in the Election Agreement or Direction of Election or as found appropriate by the Regional Director in the Decision and Order and Direction of Election, or the Decision and Order in successorship cases, is the unit described in the certification.

***NOTE: It is important to track the unit description in the certification as it appeared in the election agreement or the Decision and Order. The unit description includes the name of the agency as appropriate and depending on the level of certification. (CHM 28.14).***

**56.02.01.03 Maintaining a record of the unresolved challenged ballots:** Prior to issuing the Certification for Inclusion in Existing Unit, the Regions insure that a list of the employees in the 15% "agree to disagree" group, whose status was not resolved as part of reaching the certification or any other unresolved challenged ballot of an employee whose challenge was based on unit status, are clearly listed in the case file. **This list is also maintained with the certification in the Regional Office and added to the certification database when the certification is entered.**

56.02.02 Certification of Results: FLRA Form 27, Certification of Results of Election, is issued to certify that a majority of the

valid ballots has not been cast for any labor organization appearing on the ballot. Follow the instruction in *CHM 56.2.1.1* and *56.2.1.2* for completing the certification. Normally, Certifications of Results are not entered into the Certification Database.

If, in a raid situation, neither the petitioning labor organization nor the incumbent win the election, the Regional Director issues a Certification of Results. However, in this situation the certification of the incumbent is also revoked. Thus, such certification of results are added to the Certification Database to reflect that the certification origianlly issued to the incumbent is revoked.

56.02.03 Certification for Inclusion in Existing Unit: This type of certification (FLRA Form 192) is limited to two instances:

a. Residual elections where a majority of the valid ballots has been cast by residual professional or nonprofessional employees for inclusion in the unit currently represented by the petitioner (*CHM 28.15.4*); or

b. Add-on elections: where a union petitions for an election to add employees to an existing unit and the majority of valid ballots has been cast by the employees for inclusion in the unit currently represented by the petitioner (*CHM 28.16*).

FLRA Form 192 requires a description of the unit in which the election was held and a description of the newly defined existing unit. Note that when completing a Certification for Inclusion in an Existing Unit for a nationwide or agency-level consolidated

unit, it is not necessary to add the unit to the n:\drive document which holds the certifications for these documents or to rewrite the broader unit description. The unit is described on FLRA Form 192. FLRA Form 192 is issued with a copy of the current nationwide or consolidated unit description printed from the n:\drive attached to it. OGC Headquarters will add the unit to the main document.

Similar to the Certification of Representative, prior to issuing the Certification for Inclusion in Existing Unit, the Regions insure that a list of the employees in the 15% "agree to disagree" group, whose status was not resolved as part of reaching the certification or any other unresolved challenged ballot of an employee whose challenge was based on unit status, are clearly listed in the case file. **This list is also maintained with the certification in the Regional Office and added to the certification database when the certification is entered.**

56.02.03.01 Certification bar limitations: Where the unit currently represented by the petitioner was established by a previous certification, the issuance of a Certification for Inclusion in Existing Unit does not constitute a recertification. Thus, no one year certification bar arises with respect to the newly defined unit. The timeliness requirements for filing another petition seeking the larger unit is based upon the expiration of the current agreement covering the employees in the overall unit. When listing components of a consolidated unit, list the components alphabetically by state, and then alphabetically by city within each state.

**56.02.04 Certification of Consolidation of Existing Units:** FLRA Form 29 is used to issue a certification when an agency

and a labor organization consolidate units for which the union currently holds exclusive recognition. Each unit originally certified included in the consolidation is listed in the certification unless the parties rewrite a comprehensive unit description that is approved by the Regional Director. When listing components of a consolidated unit, list the components alphabetically by state, and then alphabetically by city within each state.

56.03 Conditions precedent to issuance of certification after election: Issuance of any certification after an election does not occur until all of the following conditions are met:

a. The five (5) day period for filing objections to an election has expired and no objections to the election have been received by the Regional Director from any of the parties within five days after the tally of ballots has been served;

b. A rerun or runoff election has been conducted, when necessary, and no objections were received timely within the five (5) day period;

c. Challenged ballots, if any, are not sufficient to affect the results of the election; and

d. The Authority has decided any application for review pending before it pursuant to § 2422.31(e).

56.04 Clarifications of Units and Amendments of Recognitions and Certifications: These documents are not "certifications" as defined in § 2421.13 in that they do not determine "the results of

an election, or the results of a petition to consolidate existing exclusively recognized units." However, they constitute a permanent record of changes to existing appropriate units resulting from petitions to clarify or amend a recognition or certification then in effect and/or any other matter relating to representation. They are also entered into the Certification Database. There are no preprinted FLRA Forms for amendments or clarifications since they are subject to modification depending on the circumstances of the case.

There are, however, certain requirements for any Clarification or Amendment. These requirements are illustrated in Figure 56.C, Clarifications, and Figure 56.A, Amendments. Clarifications and Amendments include:

a. the date and case number of the original certification of representative or recognition and the dates and case numbers of any certifications, clarifications or amendments that updated the original document;

b. a description of the existing unit before the petition was filed; and

c. the action taken, including the revised unit description, and the clarification and amendment ordered. For example:

➢ A clarification stating that the certification will "include Secretary, GS-6" refers to the original certification, including case number and unit description. If the unit description as clarified or amended, the revised unit description is also reflected on the clarification. Note

that a clarification of positions includes the name of the position, title, series and grade. Including the name of the incumbent is avoided. Exceptions include: when the clarification is limited to one person or several persons who are part of a major classification of employees.

and

- Any amendment reflecting a change in affiliation references the case number, certified representative and unit description originally certified and the change in the designation of the unit as a result of the reaffiliation or merger. **Further, the labor organization originally granted recognition and the new certified representative (listed as "Interested Party") are referenced in the caption.**

***NOTE: 1. When necessary and appropriate, these forms are combined to clarify and amend units as a result of a substantial change in the unit.***

***NOTE: 2. As discussed in CHM 56.2.3, when completing a Clarification or Amendment of an existing Unit for a nationwide or agency-level consolidated unit, it is not necessary to add the clarified or amended unit to the n:\drive document which holds the certifications for these documents. The unit is described in a formal Clarification or Amendment. This document is then issued with a copy of the current nationwide or consolidated unit description printed from the n:\drive attached to it. OGC Headquarters will add the unit to***

***the main document.***

**56.05** Determination of Eligibility for Dues Allotment: This certification is issued when the Regional Director determines that a labor organization has complied with 5 U.S.C. 7115 and is eligible for dues allotment in an appropriate unit without an exclusive representative. There are no preprinted forms for a certification of eligibility for dues allotment.

56.06 Revocations: The regulations also provide at § 2422.32(b) that without prejudice to any rights and obligations which may exist under the Statute, the Regional Director will revoke a recognition or certification, as appropriate, and provide a written statement of reasons when:

a. An incumbent exclusive representative files, during a representation proceeding, a disclaimer of any representational interest in the unit; or

b. Due to a substantial change in the character and scope of the unit, the unit is no longer appropriate and an election is not warranted.

56.06.01 Revocations issued upon a disclaimer by an incumbent exclusive representative: If a labor organization files a disclaimer of any representational interest in a unit for which it holds exclusive recognition, a Revocation of Recognition or Certification, FLRA Form 191, is issued by the Regional Director under the following circumstances:

a. Following investigation of a petition filed by an incumbent labor organization seeking to disclaim

representational interest, the Regional Director issues a Decision and Order. The region encourages the petitioner to waive its right to appeal the decision. If the Regional Director issues a Decision and Order finding that the disclaimer is valid, s/he will state his/her intent to issue a Revocation of Recognition or Certification, FLRA Form 191 (*CHM 5.9 and 20.9*).

b. During the processing of a representation petition, the incumbent labor organization files a disclaimer of any representational interest in the unit. As discussed in *CHM 20.9.2*, a FLRA Form 191, Revocation of Recognition or Certification is issued when:

(i) The incumbent labor organization disclaims interest in the unit for which another labor organization has filed a timely petition seeking an election. In this instance if an election is held, a Certification of Representative or Results is issued, as appropriate, and a Revocation is not issued. If the election is not held, a Revocation of Recognition or Certification is issued after the Regional Director issues a Decision and Order approving the disclaimer in accordance with *CHM 20.9.1*.

(ii) The incumbent labor organization disclaims interest in the unit which is the subject of a decertification petition and the election is not held [unless another labor organization has intervened - § 2422.23(f) and *CHM 28.37.2.2*]. In cases where there is no intervenor and the the

petitioner has withdrawn the petition, the Regional Director approves the withdrawal of the petition and issues a Revocation of the Recognition or Certification. In cases where there is no intervenor and the petitioner has not withdrawn the petition, the Regional Director dismisses the petition on the basis of the disclaimer, s*tating* that no question of representation exists. Following the exhaustion of the appeal procedures [§2422.31(e)], the Regional Director issues a Revocation of Recognition or Certification (CHM 53 Decisions and Orders).

(iii) A disclaimer by a labor organization that is named as an incumbent or an intervenor in a representation petition based on its current or prior representation of employees affected by a reorganization may have no affect on the processing of the petition. The disclaimer may, however, affect the issues raised by the petition. In this situation, the region is not required to issue a Decision and Order as a result of the incumbent's disclaimer. The case continues to be processed, but the incumbent labor organization is simply not a party and the affected employees are not represented by it. If the Regional Director finds in a Decision and Order, however, that the reorganization did not affect the continued appropriateness of the existing unit, the Regional Director contacts the incumbent to confirm that it still seeks to

disclaim interest. If the incumbent continues to disclaim, the Regional Director issues a Decision and Order that includes a statement that the incumbent disclaimed interest in representing the employees in the unit and states his/her intent in issuing a Revocation of Recognition or Certification. Thereafter, the Regional Director issues a Revocation of Recognition or Certification to reflect that the exclusive representative has disclaimed interest for an appropriate unit of employees. *CHM 20.9.3*.

56.06.02 Revocations issued when the unit is no longer appropriate due to a substantial change in the character and scope of the unit and an election is not warranted: Following investigation and/or hearing, the Regional Director may issue a Decision and Order finding that due to a substantial change in the character and scope of the unit, the unit is no longer appropriate. If the Regional Director decides that an election is not warranted, s/he may revoke the recognition or certification by issuing a FLRA Form 191, Revocation of Recognition or Certification. See also *CHM 20.9.3*.

56.07 Correcting a Certification or Revocation: A corrected certification or revocation is issued only to correct a typographical error. It is not used to correct a party designation or to amend a unit description that had been described incorrectly throughout a proceedings. Rather, any such changes must be made by filing a new petition.

56.08 Permanent copy of certification: A copy of any certification,

clarification, amendment or revocation issued by the Regional Director is retained in a permanent certification file by the region.

56.09 Certification database: A copy of any certification, clarification, amendment or revocation issued by the Regional Director is forwarded to the Office of the General Counsel to be entered onto the Certification Database.

56.10 Copies to Other Regional Offices: Copies of certification, clarifications, amendments and revocations are sent to other Regional Offices when:

a. any certification involves a unit or portion of a unit which falls within the geographic jurisdiction of a region other than the region issuing the certification, clarification etc.;

b. any certification, clarification, amendment or revocation involves units that are part of nationwide units for which a labor organization holds exclusive recognition or are part of agency-level consolidated units.

# NATIONAL CONSULTATION RIGHTS AND CONSULTATION RIGHTS FOR GOVERNMENT-WIDE RULES AND REGULATIONS CHM 57

57 NATIONAL CONSULTATION RIGHTS AND CONSULTATION RIGHTS FOR GOVERNMENT-WIDE RULES AND REGULATIONS:

57.01 Statutory basis:

57.01.01 National Consultation Rights: 5 U.S.C. 7113 provides that:

> (a) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be accorded national consultation rights by the agency. ...

57.01.02 Consultation rights on Government-wide rules and regulations: 5 U.S.C. 7117(d)(1) provides that:

> A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted

> consultation rights by an agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. ...

**57.02** Relevant regulations for processing NCR and CR petitions: Petitions seeking national consultation rights (NCR) and consultation rights for government-wide rules and regulations (CR) are processed in accordance with Part 2426 of the Authority's regulations.

**57.03** Standing to file: Only labor organizations may file a petition for NCR or CR according to the requirements set forth in § 2426.1 (NCR) and § 2426.11 (CR).

57.04 Requirements for filing an NCR petition: Prior to filing a petition for determination of eligibility for NCR, a labor organization:

a. Must hold exclusive recognition for either:

(i) Ten percent (10%) or more of the total number of civilian personnel employed by the agency or by the primary national subdivision and the nonappropriated fund Federal instrumentalities under its jurisdiction, excluding foreign nationals; or

(ii) 3,500 or more employees of the agency or the primary national subdivision.

and

b. Must have:

(i) Made such required showing of exclusive recognition to the agency or primary national subdivision; and, such request for NCR must have been rejected by the agency or primary national subdivision or, must not have been responded to within fifteen (15) days after being requested; or

(ii) Been notified that the agency or primary national subdivision intends to terminate existing NCR.

57.05 Requirements for filing CR petition: Prior to filing a petition for determination of eligibility for CR, a labor organization:

a. Must hold exclusive recognition for 3,500 or more employees and

b. Must have:

(i) Made such required showing of exclusive recognition to the agency; and such request for CR must have been rejected by the agency, or must not have been responded to within fifteen (15) days after being requested; or

(ii) Been notified by the agency that it intends to terminate existing CR.

57.06 When to file: NCR and CR petitions shall be filed within thirty (30) days after the service of a written notice by the agency or primary national subdivision (NCR only) of either:

a. Its refusal to accord NCR or CR pursuant to a request by a labor organization; or

b. Its intent to terminate existing NCR or CR.

If the labor organization files an NCR or CR petition within thirty (30) days prior to the intended termination date, the termination is stayed until final disposition of the petition. If no petition is filed during this period, the agency or primary national subdivision (NCR only) may terminate NCR and CR.

If an agency or a primary national subdivision fails to respond in writing to a request for national consultation rights within fifteen (15) days after the date the request is served on the agency or primary national subdivision, an NCR or CR petition shall be filed within thirty (30) days after the expiration of such fifteen (15) day period.

57.07 What to file -- NCR petition: A petition for determination of eligibility for NCR is submitted on FLRA Form 24 and sets forth the following information:

a. Name and affiliation, if any, of the petitioner and its address and telephone number;

b. A statement that the petitioner has submitted to the agency or the primary national subdivision and to the

Assistant Secretary a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives;

c. A declaration by the person signing the petition, under the penalties of the Criminal Code (18 U.S.C. 1001), that its contents are true and correct to the best of such person's knowledge and belief;

d. The signature of the petitioner's representative, including such person's title and telephone number;

e. The name, address, and telephone number of the agency or primary national subdivision in which the petitioner seeks to obtain or retain national consultation rights, and the persons to contact and their titles, if known;

f. A showing that petitioner holds adequate exclusive recognition as required by § 2426.1; and

g. A statement as appropriate:

(i) That such showing has been made to and rejected by the agency or primary national subdivision, together with a statement of the reasons for rejection offered by that agency or primary national subdivision;

(ii) That the agency or primary national subdivision has served notice of its intent to terminate existing national consultation rights, together with a statement of the reasons for termination;

or

(iii) That the agency or primary national subdivision has failed to respond in writing to a request for national consultation rights made under § 2426.2(a) within fifteen (15) days after the date the request is served on the agency or primary national subdivision.

57.08 What to file -- CR petition: A petition for determination of eligibility for CR is submitted on FLRA Form 26 and sets forth the following information:

a. Name and affiliation, if any, of the petitioner and its address and telephone number;

b. A statement that the petitioner submitted to the agency and to the Assistant Secretary a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives;

c. A declaration by the person signing the petition, under the penalties of the Criminal Code (18 U.S.C. 1001), that its contents are true and correct to the best of such person's knowledge and belief;

d. The signature of the petitioner's representative, including such person's title and telephone number;

e. The name, address, and telephone number of the agency in which the petitioner seeks to obtain or retain consultation rights on Government-wide rules or

regulations, and the persons to contact and their titles, if known;

f. A showing that petitioner meets the criteria as required by §2426.11; and

g. A statement, as appropriate:

(i) That such showing has been made to and rejected by the agency together with a statement of the reasons for rejection offered by that agency;

(ii) That the agency has served notice of its intent to terminate existing consultation rights on Government-wide rules or regulations, together with a statement of the reasons for termination; or

(iii) That the agency has failed to respond in writing to a request for consultation rights on Government-wide rules or regulations made under § 2426.12(a) within fifteen (15) days after the date the request is served on the agency.

**57.09 Material to accompany petition:** An original and four copies of an NCR and CR petition are accompanied by:

a. An original and four copies of a statement of any relevant facts not contained in the petition and of all correspondence relating to the matter of NCR or CR; and

b. A written statement of service of a copy of the petition and any accompanying material upon all known interested parties. [§§ 2426.2(b)(3)(ii) and (iii) and 2426.12(b)(3)(ii) and (iii)].

57.10 Where to file: NCR and CR petitions are filed with the Regional Director for the region in which the headquarters of the agency or primary national subdivision (refers to NCR petitions only) is located. [§§ 2426.2(b)(3)(i) and 2426.12(b)(3)(i)].

57.11 Service of petition: With the filing of NCR and CR petitions, a copy of the petition, together with any accompanying material, are served on all known interested parties.

57.12 Docketing NCR petition: When an NCR petition is docketed, the name of the case is based upon the organizational level for which the petitioner seeks NCR; i.e., agency or primary national subdivision. This is ascertained from Item #1 of the petition which reflects either the agency or the primary national subdivision of the agency. Because this entry is very important to the processing of the petition, if Item #1 of the petition is not checked, an amended petition is required (see also *CHM 63* for docketing procedures).

57.13 Adequacy of Showing:

57.13.01 Basis upon which NCR claimed: After ascertaining the level of NCR covered by the petition; i.e., agency or primary national subdivision, Item #4 of the petition is examined to determine whether the petitioner claims to hold exclusive

recognition for:

a. Ten percent (10%) or more of the total number of civilian personnel employed by the level covered by the petition and the nonappropriated fund Federal instrumentalities under its jurisdiction, excluding foreign nationals; or

b. 3,500 or more employees of the level covered by the petition.

In determining whether a labor organization meets the exclusive recognition requirements for NCR, the following will not be counted:

a. At the agency level, employees represented by the labor organization under nationwide exclusive recognition granted at the agency level.

b. At the primary national subdivision level, employees represented by the labor organization under nationwide exclusive recognition granted at the agency level or at that primary national subdivision level.

57.13.02 Basis upon which a CR petition is claimed: A CR petition can only be based on the exclusive recognition of 3,500 or more employees and not on a percentage of total civilian employment.

57.13.03 Adequacy of showing of exclusive recognition: Unlike a petition filed under Part 2422, no list of employees constituting a showing of interest is required to be submitted when an NCR

or CR petition is filed. Rather, the petitioning labor organization is required only to indicate in Items #4A and #3A of Forms 24 and 26 respectively whether it meets the criteria established by the Authority and the date on which it made its adequate showing to the agency or primary national subdivision (NCR only).

57.14 Material accompanying petition: In the absence of any required submission of showing, the Regional Office looks to the material accompanying the petition as the initial source of information regarding the adequacy of showing of exclusive recognition by the petitioner. For example, this information may be found in the exchange or correspondence between the parties relating to a request for NCR or CR. In this correspondence, the labor organization describes the unit(s) for which it holds exclusive recognition, the number of employees in such unit(s) and whether such employees constitute ten percent (10%) or more of the employment of the agency or primary national subdivision (NCR only) or totals 3,500 or more employees. On the other hand, the response by the agency or primary national subdivision (NCR only) giving reasons for denying the request for NCR or CR will likely show the basis upon which it concluded that the criteria for NCR or CR have been met.

Similarly, where a petition has been filed because of notice to terminate existing NCR or CR, the statement of reasons by the agency or primary national subdivision (NCR only) is expected to give relevant details as to why the labor organization no longer qualifies for NCR or CR.

**57.15 Notifying the parties:**

a. Initial contact with agency (NCR or CR petitions) or primary national subdivision (NCR only): If the material accompanying the petition is insufficient, particularly with respect to the adequacy of showing of exclusive recognition, the Regional Office contacts either the labor organization or agency or primary national subdivision (NCR only) by telephone as soon as possible. The regulations require that the agency or primary national subdivision (NCR only) shall respond within fifteen (15) days of receipt of a copy of the petition, raising any matter relevant to the petition. The Regional Office immediately contacts the agency or primary national subdivision to assist it in responding within the fifteen (15) day period. Examples of opening letters to the parties are set forth in Figures 57.A and 57.B.

b. If the correspondence accompanying the petition establishes that the agency or primary national subdivision (NCR only) does not dispute the assertion that the petitioners satisfied the NCR or CR criteria, there is no need for the Regional Office to require any further substantiation by requesting a list of employees in the unit(s). A request for further information is limited to the actual challenge to the fulfillment of the NCR or CR criteria.

**57.16 Posting requirements:** The regulations do not require the posting of a notice to employees of the filing of an NCR or CR petition. As compared to petitions filed under Part 2422 of the regulations, an NCR and CR petition covers an agency or primary national subdivision (NCR only) level and are wholly unrelated to any question concerning representation, determination of appropriate unit, clarification of unit,

amendment of certification or recognition, dues allotment determination or consolidation of units.

**57.17 Notifying labor organizations where the unit(s) is (are) in dispute:** Where a dispute arises between the petitioner and the agency or the primary national subdivision (NCR only) as to whether certain job classifications or employees are included in the unit(s) represented by the petitioner or by another labor organization, the latter organization is notified by the Regional Office of the filing of the NCR or CR petition. For example, the activity might contend that certain employees whom the petitioner asserts are in the unit for which it holds exclusive recognition are in a different unit represented by another labor organization. According to the activity, these employees could not be counted in computing the petitioner's showing for eligibility under the criteria of the Authority. In a dispute of this nature, the position of the other labor organization is solicited in a letter as set forth in Figure 57.C.

In the event that the Regional Director determines that a hearing is necessary to resolve issues, the other labor organization is served with a copy of the notice of hearing.

**57.18 Final investigative report:** See also *CHM 26*.

**57.18.01 No burden of proof:** NCR and CR petition investigations are conducted as nonadversary proceedings, similar to other types of representation cases. Thus, the petitioner does not have the burden of proving that it holds adequate exclusive recognition required by the Authority's NCR and CR criteria. Similarly, in giving notice of intent to terminate NCR or CR, or in rejecting a request for NCR or CR, the agency

or primary national subdivision (NCR only) has no burden of proving that the labor organization does not have an adequate showing of exclusive recognition.

**57.18.02** **Final investigative report:** Upon completion of the investigation, a written final investigative report (FIR) or draft Decision and Order is submitted to the Regional Director. The FIR is clear, concise and comprehensive. The facts are specifically identified in the FIR and are supported by evidence in the case file. The FIR is a self-contained document - in that it is not necessary to refer to file documents for a thorough understanding of the facts and issues in the case. Opinions or conclusions of the parties are not facts and are not reported as such in the FIR. Conflicting statements and disputed facts are noted.

The FIR includes, but not necessarily limited to:

a. Compliance with filing requirements;

b. Level of NCR sought to be (obtained) (retained);

c. Positions of the parties regarding (refusal to accord) (intent to terminate) NCR or CR;

d. Adequacy of showing of exclusive recognition; and

e. Recommendations for determination of eligibility for NCR or CR.

**57.18.03** **Decision and Order by Regional Director:** The regulations provide that the Regional Director issues and serves on the parties a Decision and Order with respect to the

determination on eligibility for NCR or CR. There are essentially two types of Decisions and Orders: 1) those where the parties are in dispute as to the facts; and 2) those based upon a stipulation of facts, in which the Regional Director adopts the stipulation and makes an eligibility determination. See *CHM 53* for guidance in drafting Decisions and Orders.

**57.18.03.01 Hearing on substantial issue of fact:** If the Regional Director determines that a substantial issue of fact exists, a notice of hearing is issued accompanied by a letter setting forth the issue(s) which are the subject of the hearing. See *CHM 27* for guidance in preparing the notice of hearing. FLRA Form 46 is not used as it is not applicable to NCR or CR hearings.

**57.18.03.02 No application for review of issuance of notice of hearing:** The regulations do not provide for an application for review of a determination by the Regional Director to issue a notice of hearing involving a substantial issue of fact.

**57.18.03.03 Hearings before Hearing Officers:** Hearings are conducted by a Hearing Officer in accordance with section 2422.17 through 2422.21 of the 1996 regulations. The procedures outlined in the *HOG* are applicable to hearings held in NCR and CR petitions. After the close of the hearing, a Decision and Order is issued by the Regional Director in accordance with section 2422.30 (see *CHM 53* for guidance). ***NOTE: Part 2426 of the 1996 regulations did not update the references in Part 2422 regarding conducting hearings. Sections 2426.2(b)(3)(vii) and 2426.12(b)(3)(vii) mistakenly cite to the previous regulations.***

**57.19 Order Granting National Consultation Rights and**

**Consultation Rights on Government-wide Rules and Regulations:** The Regional Director issues an Order Granting NCR or CR after determining a labor organization is eligible for NCR or CR. There are no preprinted FLRA Forms to formally grant NCR or CR.

# CONSULTATION, ADVICE, AND CLEARANCE
# CHM 58

## 58 CONSULTATION, ADVICE, AND CLEARANCE:

### 58.01 Consultation:

58.01.01 The regions are encouraged to call the Office of the General Counsel to discuss novel issues or questions relating to the Case Handling Manual or the Hearing Officer's Guide. The discussions serve as a mutual exchange of ideas.

58.01.02 Throughout the CHM certain procedural matters are discussed that raise unique representation issues. An informal discussion between the regions and headquarters is beneficial to determine

whether there is a need for a national policy on the issue.

Listed below are some, but not all, of the issues that regions "run by" the Office of the General Counsel if they arise during the processing of representation cases.

58.01.02.01 questions concerning the appropriateness of petitions with multiple purposes (*CHM 3.7*);

58.01.02.02 questions concerning a party's standing to have a petition processed (*CHM 4*);

58.01.02.03 issues concerning a local union's standing to file a petition after it has been placed in trusteeship (*CHM 4.8*);

58.01.02.04 questions about timeliness issues raised by filing an amended petition (*CHM 13.6*);

58.01.02.05 questions about notifying and serving copies of opening letters on potential "interested parties" (*CHM 15.5*, *15.7*, and *17.13*);

58.01.02.06 guidance when an agency refuses to post the notice of petition (*CHM 16.6*);

58.01.02.07 questions about the policy on filing cross-petitions versus interventions (*CHM 17.1.3*);

58.01.02.08 questions concerning a party's standing to intervene or cross-petition (*CHM 17.2*);

58.01.02.09 issues related to the petitioner's attempts to use the same showing that was submitted with an original petition (*CHM 18.7.5*);

58.01.02.10 when a national union challenges a local union's disclaimer of interest in representing its certified unit (*CHM 20.9.1*);

58.01.02.11 questions concerning deferring a petition pending an appeal of a decision based on a challenge to the status of a labor organization (*CHM 19.6*, *28.34* *and* *55*);

58.01.02.12 questions concerning a party's compliance with § 2422.15 (*CHM 22*);

58.01.02.13 when an issue develops involving a dispute regarding the authority of a party to file a petition to consolidate existing units (such as between a local which has exclusive recognition and the national office of a labor organization purportedly acting on behalf of its various exclusive representatives) (*CHM 23.10.2*);

58.01.02.14 when the agency or the labor organization requests an election in a unit consolidation case (*CHM 20.1.6* *and* *23.11.2*);

58.01.02.15 guidance on pooling ballots (*CHM 28.15.4*);

58.01.02.16 if the petitioner, a local union, refuses to add the petitioned-for unit to the consolidated unit for which the national union is the exclusive representative (*CHM 28.16.1*);

58.01.02.17 whenever questions arise concerning setting an eligibility date that is after the date the Election Agreement is approved, e.g., due to an expansion or contraction of the unit (*CHM 28.18.3.1*);

58.01.02.18 when the region is assisting the parties in a major reorganization (*CHM 62.5*); or

58.01.02.19 when the region receives an inquiry concerning AFL-CIO no-raiding, Article XX or XXI issues (*CHM 65*).

**58.02 Submission for advice or clearance:** A request for case handling advice or clearance is presented to the Office of the General Counsel by memorandum or telephone, as the circumstances require. A request by memorandum sets forth the issue, relevant facts, applicable law, an analysis of fact and law, and a recommendation.

**58.03 Advice** is requested by the regions when unique or novel issues arise in a representation proceeding requiring guidance and direction from the Office of the General Counsel. Regions are required to submit a case for advice if it involves:

58.03.01 novel legal questions or factual situations (*CHM 27.6*);

58.03.02 issues involving nationwide policy;

58.03.03 issues related to claims made pursuant to section 7111(f)(1) of the Statute (*CHM 20.1.8*, *23.9.3*, *28.34.3*)

58.03.04 disclaimers of interest that are filed by an exclusive representative under questionable circumstances as discussed in *CHM 20.9*;

58.03.05 an agency's refusal to cooperate or an incumbent's refusal to cooperate (while failing to disclaim interest in representing employees) in any representation proceeding (*CHM 24b* and *CHM 28.10 involving election proceedings)*);

58.03.06 claims of accretion where the investigation establishes that the acquired employees constitute a separate appropriate unit and also could be included properly in the existing unit

(*RCL 3*);

58.03.07 issues relating to professionals voting in certain elections (*CHM 28.15.1.1*);

58.03.08 questions about handling complicated elections involving groups of residual employees when there is an intervenor (*CHM 28.15.3 and 4*);

58.03.09 self-determination elections resulting from a reorganization (*CHM 28.15*);

58.03.10 issues concerning the Regional Director's authority pursuant to § 2422.29(a)(4) when additional objections are raised by a party during an objections investigation (*CHM 50.10.1*);

58.03.11 permission to issue a certification when a non-party files an objection to an election (*CHM 50.8*);

**58.03.12** action on an Authority decision to give option to region to stay an election and/or impound ballots (*CHM 28.29.2* and *CHM 55.2*);

58.03.13 allegations in unfair labor practice cases or objections that any of the parties failed to comply with § 2422.34(a) during the pendency of a representation proceeding (*CHM 62.3 and 62.4*);

58.03.14 issue an investigatory subpoena (*CHM 23.5.3*);

**58.03.15** challenges to the validity of the showing of

interest (*CHM 18.19.11.2c*);

58.03.16 an election involving a group of residual employees when there is an intervenor (*RCL 2B*);

58.03.17 questions related to a self-determination election in a reorganization, where the acquired employees constitute an appropriate unit, but there are competing claims for representation. Combining the acquired employees with employees in an existing unit is also appropriate (*RCL 3C*);

58.03.18 in a reorganization involving more than two unions in which competing claims of successorship and accretion are raised and prong 2 of the successorship criteria is not met (*RCL 3F*);

58.03.19 technical or nominal changes in the name of the exclusive representative without following the *Montrose* criteria (*RCL 7A2*);

58.03.20 Montrose cases: (*RCL 7D*)

a. involving an agency's failure to recognize the incumbent when a trusteeship is imposed after a *Montrose* petition is filed.
b. raising issues of the continuation of NFFE as a labor organization.
c. where the Region determines that a trusteeship imposed prior to the filing of a *Montrose* petition is invalid, procedurally or substantively.
d. in which the national labor organization revokes the charter of the local union that holds the

certification during a *Montrose* proceeding.

e. where a very small percentage of the employees are union members and vote for reaffiliation, raising the possibility that there is a question as to continued majority status that affects the continuity of representation criteria.

58.03.21 claims of certification bars in successorship (*RCL 12A*);

58.03.22 effect of a finding of successorship on contract bars (*RCL 12B4*);

58.03.23 effect of a contract on timeliness issues such as: (*RCL 12E*);

a. filing a petition untimely
b. timeliness of amending a petition in unique circumstances;

**58.04** Clearance means that the Regional Director obtains approval before taking the following actions:

58.04.01 issue a certification, clarification, amendment, or revocation while a case is pending appeal before the Authority (*CHM 53.4.1*);

58.04.02 defer an election pending an appeal of a Decision and Order and the Authority has not issued a stay (*CHM 55.1.2*);

58.04.03 dismiss a petition or deny a request for intervention, after investigating a validity challenge and finding that the

extent of fraud or improper method of solicitation tainted the entire showing of interest (*CHM 18.19.16b)*;

58.04.04 supervise, rather than conduct, any election *(CHM 28.8 and 32.1)*;

**58.04.05** decide procedures for conducting an election when an activity refuses to provide the employees' mailing addresses (*CHM 28.23 and 43.2*);

58.04.06 set a new eligibility date in runoff elections *(CHM 48)*;

58.04.07 enforce an investigatory subpoena (*CHM 23.5.3*) or a subpoena issued during a hearing *(HOG 27.9)*; or

58.04.08 transfer a petition that raises geographical jurisdiction issues (*CHM 8, 20.1.1, 63*).

# GENERAL POLICY MATTERS
# CHM 59 through 65

## 59 MOTIONS AND ORDERS:

**59.01** Motions:

59.01.01 Purpose of a motion: Section 2422.19(a) states: "Subsequent to the issuance of a Notice of Hearing in a representation proceeding, a party seeking a ruling, order, or relief must do so by filing or raising a motion stating the order or relief sought and the grounds therefor. Challenges and other filings referenced in other sections of this subpart may, in the discretion of the Regional Director or Hearing Officer, be treated as a motion."

59.01.02 Service of motion: Motions are served according to §§ 2422.4 and 2429.25.

59.01.03 Specific rule: An original and four (4) copies of any motion must be filed with the Regional Director or the Hearing Officer by the party filing the motion (§ 2429.25). Copies must be served by the filing party on all other parties to the proceeding. A statement of service must accompany the original motion. See *HOG 16 through 19* for a discussion of motions filed prior to and during the hearing. *CHM 31.5* discusses posthearing motions.

59.02 Orders: Orders are issued by the Regional Director to rule on a motion or to issue a direction or instruction to the party(ies). A Hearing Officers is authorized to issue Orders closing a hearing when the record has been held open to except an exhibit or after an indefinite postponement.

59.02.01 Examples of Orders that respond to motions include:

a. *Order Denying a Motion to Postpone*;

b. *Order Denying a Motion to Dismiss*;

c. *Order Granting a Motion to Postpone*; or

d. *Order Closing a Hearing* (two types: Figures 59.2 and 59.3).

59.02.02 Examples of Orders issued by the Regional Director without a party motion:

a. *Order Consolidating Cases* (FLRA Form 45);

b. *Order to Reschedule a Hearing* (FLRA Form 48);

c. *Order Setting Time or Location of Hearing*;

d. *Order to Show Cause*: these Orders are sent by the Regional Director to a particular party or all parties (if necessary and appropriate) when an issue is raised that requires the affected party(ies) to state a position immediately. Copies are sent to the other parties who may respond to the Order. See *Federal Mediation and Conciliation Service,* 52 FLRA 1509 (1997), in which the Authority found that the Regional Director's resolution of the petition, based on an *Order to Show Cause*, did not constitute a prejudicial or substantial factual error. See also *U.S. Army Corps of Engineers, Seattle, Washington*, Case No. SF-RP-70066, (1998), an unnumbered Authority Decision in which the Authority denied an application for review stating that it found "nothing improper in the RD's use of the *Order to Show Cause*." See also *CHM 15.8* that discusses issuing an *Order to Show Cause* to a Petitioner.

59.03 Minimum requirements for Orders: Orders issued by the Regional Director include the following information:

a. Jurisdiction and purpose of the Order;

b. The material facts and issues (see, e.g., the sample *Orders to Show Cause* in Figures 20.1A and 20.1B);

c. The region's analysis;

d. The decision (i.e., that the hearing is rescheduled) or the direction/instruction (i.e., that the party to whom the Order is directed is required to furnish information or provide a position on the issue raised in the Order);

e. If appropriate, a date for the response to the Order.

Attached to the Order is a statement of service that the Order is being served on all parties. See also Figures 59.2 and 59.3 for samples.

# 60 CONCURRENT REPRESENTATION AND UNFAIR LABOR PRACTICE CASES:

60.01 General Policy and Procedures: Absent the filing of a request to proceed, an election is not held when an unfair labor practice charge is filed by a party to the representation case and is based on conduct which has a tendency to interfere with the free choice of the employees in the election.

60.02 Priority of blocking unfair labor practice charges: Because the speedy resolution of representation questions is of the utmost importance, an unfair labor practice charge that blocks a representation election petition is given the highest priority by Regional Offices both in the investigatory and, where necessary, the litigation phases of a case. In the latter situation, regions request expeditious trial dates from the Office of Administrative Law Judges. Moreover, in meritorious cases, every effort is made to obtain an early settlement of the issues.

60.03 Closure of the unfair labor practice charge unblocks the representation case: Disposition of a charge does not serve to "unblock" the representation proceeding until the appeal period expires and no appeal is filed, or after an appeal is filed, and the General Counsel decides the appeal. If the case is remanded, the representation case continues to be blocked. If the appeal is denied, the unfair labor practice case is closed and the representation case is unblocked and processed.

***NOTE: The Deputy General Counsel and the Assistant General Counsel for Appeals are notified of a pending representation case that is blocked because of an appeal of an unfair labor practice charge. In such case, the Office of***

***Appeals expedites processing the appeal. While the appeal is pending the region has discretion to take preliminary steps in processing the representation case, short of dispositive action.***

60.04 Conducting elections: Where unfair labor practice charges are filed too late to permit an adequate investigation before a scheduled election, the Regional Director: 1) conducts the election, 2) issues a tally of ballots, 3) investigates any determinative challenged ballots or objections, and 4) contacts the Office of the General Counsel prior to taking action on the determinative challenged ballots or objections or issuing an appropriate certification. The region investigates the charges after tallying the ballots.

60.05 Situations where an unfair labor practice charge does not block the representation proceeding: There may be some situations where resolution of the unfair labor practice may be resolved by processing the representation petition first. In such cases, the Regional Director has discretion to decide which case to block and which case to process. For example,

60.05.01 Unit eligibility: There may be situations where the alleged unfair labor practice is so related to an unresolved representation matter that the processing of the representation case will resolve significant common issues. For example, a pending unfair labor practice case having a threshold issue of unit eligibility may be deferred pending resolution of a petition that seeks to clarify the unit status of the individual employee(s) who are the subject of the unfair labor practice charge. By deferring the unfair labor practice charge, the region provides for retention of jurisdiction over the charge while resolving the

question concerning the employee(s)' s bargaining unit status through the appropriate representation proceedings. Figure 60 is a sample of a deferral letter used in these cases.

60.05.02 Refusal to negotiate after a reorganization when representation of employees is unclear.

60.05.03 Requests to proceed: When the parties in a representation proceeding submit a FLRA Form 44, Request to Proceed, the region has discretion to defer the unfair labor practice charge pending resolution of the representation proceeding.

60.06 Processing representation issues in unfair labor practice charges:

a. Although all representation issues are best resolved by the filing of a representation petition, certain representation issues may arise in an unfair labor practice charge. Examples include questions related to unit eligibility (an employee is denied dues checkoff because the agency states s/he is excluded from the unit) and successorship (refusal to negotiate following a reorganization where the union claims it continues to represent employees affected by the reorganization). In these examples, resolving the representation issue is a preliminary consideration necessary to determine the outcome of the ULP proceeding.

b. A unit certification may not be altered in an unfair labor practice proceeding. See Department of Health and Human Services, Washington, D.C., 16 FLRA 586, 590 (1983); Internal Revenue Service, Seattle District, et. al.,12 FLRA 324 (1983); North Carolina Air National Guard, Charlotte, North Carolina, 4 FLRA 348 (1980);

The Adjutant General - Georgia, Georgia National Guard, Department of Defense, Atlanta, Georgia, 2 FLRA 712 (1980); U.S. Department of Energy, Western Area Power Administration, Golden, Colorado and International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959 and 2159, Case No. 7-CA-1229, OALJ-82-119 (1982).

c. Regional Offices encourage and solicit representation petitions whenever they receive an unfair labor practice charge that raises a representation issue. If a representation petition is filed, the region defers the unfair labor practice case while the representation proceeding is pending. Section 2422.34(a) applies whenever a petition is filed and guides the parties' conduct during the pendency of the petition except when the petition concerns a simple straight forward eligibility issue. See § 2422.34(b). (CHM 62).

d. Resolving the representation issue, however, does not necessarily resolve the unfair labor practice. Once the representation issue is decided and resolved, the region re-evaluates the merits of the unfair labor practice charge.

61 RELIEF OBTAINABLE UNDER PART 2423: Section 2422.33 provides: Remedial relief that was or could have been obtained as a result of a motion, objection, or challenge filed or raised under this subpart, may not be the basis for similar relief if filed or raised as an unfair labor practice under Part 2423 of this Chapter: *Provided, however,* that related matters may be consolidated for hearing as noted in § 2422.27(d) of this subpart.

62 RIGHTS AND OBLIGATIONS DURING THE PENDENCY OF REPRESENTATION PROCEEDINGS: Section 2422.34 of the 1996 representation regulations sets forth a rule regulating the parties' rights and obligations while a representation petition is being processed. Portions of this substantive rule reflect a reaffirmation of case law existing prior to March 15, 1996. Other portions of the rule change the practice under case law existing prior to March 15, 1996. The failure to comply with this rule may constitute an unfair labor practice and/or conduct which interferes with an election.

62.01 Substantive Rule: The rule provides:

> **Section 2422.34: Rights and obligations during the pendency of representation proceedings.**
>
> (*a) Existing recognitions, agreement, and obligations under the Statute.* During the pendency of any representation proceeding, parties are obligated to maintain existing recognitions, adhere to the terms and conditions of existing collective bargaining agreements, and fulfill all other representational and bargaining responsibilities under the Statute.
>
> (b) *Unit status of individual employees.* Notwithstanding paragraph (a) of this section and except as otherwise prohibited by law, a party may take action based on its position regarding the bargaining unit status of individual employees, pursuant to 5 U.S.C 7103(a)(2), 7112(b) and (c); *Provided, however,* that its

actions may be challenged, reviewed, and remedied where appropriate.

62.02 Unit status actions during the processing of a representation petition: Paragraph (b) makes no change from the current case law. A party may continue to act at its peril in taking actions based on its position regarding an employee's unit status. Thus, under this rule, an agency may refuse to process a grievance under a negotiated grievance procedure filed by an employee who it claims is outside the recognized bargaining unit. Although the refusal to process the grievance is subject to challenge by the exclusive representative of the relevant unit and may constitute an unfair labor practice, the action of not processing the grievance is not inconsistent with this rule. The reference to sections 7103(a)(2) and 7112(b) and (c) of the Statute was added to the final regulations to make it clear that the types of actions allowed to be taken at a party's peril involve only those based on a party's position that an employee is included or excluded from a bargaining unit based on the criteria in those sections. Thus, parties may continue to act at their peril in unit status situations.

62.03 Maintain existing recognitions, adhere to the terms and conditions of existing collective bargaining agreements and fulfill all other representational responsibilities under the statute during the processing of a representation petition:

Paragraph (a) requires that during the pendency of any representation petition, the parties are obligated to maintain existing recognitions, adhere to the terms and conditions of existing collective bargaining agreements, and fulfill all other representational responsibilities. These requirements are consistent with existing case law.

In the supplemental information accompanying the proposed regulation, the Authority cited two cases to illustrate that these aspects of the section reflect existing case law requirements:

a. *U.S. Department of the Navy, Naval Air Engineering Center, Lakehurst, New Jersey,* 3 FLRA 567 (1980) where the Authority found a violation of Executive Order 11491, as amended, when the agency withdrew recognition and terminated an agreement, including refusing to process grievances, while a representation case (former RA) concerning the status of the unit was pending; and

b. *Department of Energy,* 2 FLRA 838 (1980) where the Authority ruled in an Executive Order case that until any issues raised by a reorganization are decided (e.g., questions concerning representation, unit questions, or the like), a gaining employer is enjoined, in order to assure stability of labor relations and the well-being of its employees, to maintain recognition and to adhere to the terms of the prior agreement, including dues withholding, to the maximum extent possible. The Authority found that a gaining employer's failure to accept new dues withholding requests from a union which represented the employees prior to the reorganization between the time the new employer was created until such time as the Assistant Secretary ruled in a representation proceeding that the new employer was **not** a successor employer, was an unfair labor practice.

Thus, until the issues raised by a petition are resolved, the

parties continue to deal with each other as if the petition had not been filed; i.e. continue recognition, maintain existing terms and conditions of employment (such as dues checkoff, access to the negotiated grievance procedure, official time) and fulfill all other representational responsibilities (such as the right to representation at formal discussions and investigatory examinations, and the duty to fairly represent employees).

The regions submit for case handling advice any case where the region determines that during the pendency of any representation proceeding an agency or a union has failed to maintain existing recognitions, adhere to the terms and conditions of existing collective bargaining agreements, or fulfill any other representational responsibilities under the Statute. The region's investigation includes any evidence which may explain why the obligation was not fulfilled. The region's submission also addresses whether, in the region's view, the party took all actions possible to fulfill the obligation.

62.04 The right to make changes and the duty to bargain during the processing of a representation petition:

Paragraph (a) also makes substantive changes in the case law existing prior to March 15, 1996, by requiring that during the pendency of any representation proceeding, parties also are obligated to fulfill all other bargaining responsibilities under the Statute.

Thus, contrary to case law existing prior to March 15, 1996, an agency may make changes in conditions of employment after fulfilling their bargaining obligation with the incumbent representative. For example, during the processing of a petition seeking an election, an agency may make changes in conditions

of employment by giving notice to the incumbent exclusive representative and fulfilling its bargaining obligation under the Statute. Similarly, during the pendency of a representation petition, the parties may continue negotiations for a new contract. Accordingly, the filing of a petition does not bar an agency from making changes, but merely requires the agency to fulfill its bargaining obligations as if there was no pending petition.

The regions similarly submit for case handling advice any case where the region determines that during the pendency of any representation proceeding an agency or a union has failed to fulfill any bargaining responsibilities under the Statute. The region's investigation includes any evidence which may explain why the bargaining obligation was not fulfilled, and the region's submission addresses whether, in the region's view, the party took all actions possible to fulfill the bargaining obligation.

62.05 Interim agreements while a representation petition is pending:

Section 2422.13 of the new regulations encourages the parties to meet prior to the filing of a petition to discuss their interests and narrow and resolve issues. The parties may request that a representative of the Regional Office participate in these meetings. Even after a petition is filed, this section empowers the Regional Director to require the parties to meet to narrow and resolve the issues raised in the petition.

Based on our experience working with parties in reorganization situations, it is possible that these meetings in reorganization situations may result in the parties coming to agreement on the manner in which they will deal with each other during the pendency of a representation petition(s) raising complicated

factual patterns and issues; such as what union, if any, continues to represent which employees, if any, and in what unit(s), if any. The Regional Office representative utilizes an interest based problem solving approach in assisting the parties in coming to an interim agreement. The Regional Office representative assists the parties in the same manner as when assisting the parties in reaching party settlements in unfair labor practice cases (PSIWOCs) which are not approved by the Regional Director. These interim agreements will have the same effect as other memoranda of understandings or PSIWOCs agreed to by the parties; repudiations of lawful agreements may constitute an unfair labor practice under Authority case law and disputes over their interpretation and application that do not constitute repudiations would not rise to the level of an unfair labor practice.

When possible, the regions encourage the parties to enter into these type of interim agreements. These type of consensual agreements enables all parties to have the same common understanding of their rights and responsibilities during the pendency of the representation proceeding. These agreements consider the particular circumstances to satisfy all of the parties' interests during this interim period and to ensure stability in the labor management relationship and in the workplace while the representation proceeding is in process. **Contact the Office of the General Counsel when the region assists the parties when discussing the impact of a major reorganization.**

# 63 CASE MATERIALS AND CASE REPORTING:

63.01 Prepetition correspondence: All incoming and outgoing correspondence relating to representation matters for which no petition has been filed, and other memoranda and notes concerning potential petitions, is retained in a file designated as "prepetition correspondence." When a case is opened, related prepetition correspondence is removed from the prepetition file and placed in the open case file (*CHM 2*).

63.02 Docketing a petition:

63.02.01 Date stamping: All incoming mail is date-stamped on the back of the first page. Letters, documents, etc. of two or more pages are also date-stamped on the back of the last page. Each incoming envelope is date stamped and retained with the correspondence until such time as the correspondence becomes a part of the case file and it is determined that the envelope is not needed to resolve any timeliness issue. The date of receipt is inserted on the top of the petition form in the space provided.

63.02.02 Assigning a case number:

63.02.02.01 FLRA Form 21: All petitions filed on FLRA Form 21 are assigned a case number consisting of the two letter designation of the region, followed by the letters **"RP"**, followed by a five digit number. The first digit reflects the last digit of the fiscal year in which the petition is filed and the other four digits reflect the last sequential number for representation cases filed in the region during the fiscal year.

63.02.02.02 FLRA Form 24: Petitions for national consultation rights are filed on FLRA Form 24 and are assigned a case

number consisting of the two letter designation of the region, followed by the letters **"NCR"**, followed by a five digit number. The first digit reflects the last digit of the fiscal year in which the petition is filed and the other four digits reflect the last sequential number for representation cases filed during the fiscal year in the region.

63.02.02.03 FLRA Form 26: Petitions for consultation rights for government-wide rules and regulations are filed on FLRA Form 26 and are assigned a case number consisting of the two letter designation of the region, followed by the letters **"CR"**, followed by a five digit number. The first digit reflects the last digit of the fiscal year in which the petition is filed and the other four digits reflect the last sequential number for representation cases filed in the region during the fiscal year.

For example, if four petitions were filed on the same day Fiscal Year 1996 in the Atlanta Region, they are assigned numbers as follows:

a. Petition seeking an election: AT-RP-60001;

b. Petition seeking clarification of a matter relating to representation: AT-RP-60002;

c. Petition seeking a determination for eligibility for dues allotment: AT-RP-60003; and

d. Petition seeking national consultation rights: AT-NCR-60004.

63.03 Petition filed in the wrong office: *CHM 8 and 10* discuss where to file petitions and the date of filing. If a petition is filed in the

wrong Regional Office, that petition is "received by the appropriate Regional Director" in accordance with the regulations when the correct Regional Office is contacted and a case number is obtained (if possible, over the phone and on the day of receipt in the wrong office). A copy of the petition is faxed to the appropriate Regional Office and the original mailed. A copy of the petition is retained in the incorrect Regional Office's correspondence file. Upon receipt of the petition, the proper Regional Office may proceed with processing the case.

63.04 Transfer, service and consolidation policies between regions:

63.04.01 Duty to provide copies of petitions to other regions: When petitions are filed that:

a. involve nationwide or agency-level consolidated units and appear to involve matters having national impact (*CHM 8*);

b. request to consolidate existing units that extend beyond the region's jurisdiction to other Regional Offices (*CHM 8*);

c. seek an election in a nationwide bargaining unit; or

d. seek an election in a unit that the agency contends is inappropriate because a nationwide unit is appropriate,

Regional Directors send copies of these petitions to other Regional Offices. Cases may be pending in the other regions

that could affect processing the petitions and vice versa (see also *CHM 20.1.1*).

**63.04.02** Consolidation of cases within a region: Whenever it appears necessary in order to effectuate the purposes of the Statute or to avoid unnecessary costs or delay, the Regional Director will consolidate cases within the region (FLRA Form 45). For example, the Regional Director may consolidate cases where separate representation petitions involving the same activity have been filed in the same region. When the Regional Director decides to consolidate cases and issue a notice of hearing at the same time, s/he issues an Order Consolidating Cases and Notice of Hearing (Figure 29.8A).

63.04.03 Transfer and consolidation of cases in different regions: Whenever it appears necessary in order to effectuate the purposes of the Statute or to avoid unnecessary costs or delay, Regional Directors may consolidate cases within their own region or may transfer cases to any region for investigation and/or consolidation with any proceeding pending in the other region. § 2429.2. See GC Management Memoranda 99-1 and 99-2 for further guidance. See also *CHM 8.*

63.04.04 Transferring cases: When a region transfers a case, the region issues an Order Transferring Case. If a transferred case is consolidated with another case pending in the new region, a FLRA Form 45, Order Consolidating Cases, is issued by the region receiving the case.

63.05 Case file contents: See *CHM 26.2*.

63.06 Submission of documents to the Office of the General Counsel:

The Regional Office is required to send copies of the following documents to the Office of the General Counsel:

a. A copy of each petition, including attachments which explain the purpose of the petition and the results the petitioner seeks, and any amendments;

b. A copy of an approved Election Agreement or Direction of Election;

c. Decisions and Orders;

d. Notice of Representation Hearing and any attachments to the Notice including the letter outlining issues for the hearing, other than FLRA Form 1014;

e. Orders; and

f. Certifications, clarifications, amendments and revocations.

64 PRIORITY OF CASES: All cases are processed expeditiously; certain types of issues are prioritized:

64.01 All petitions seeking an election. Because of the timeliness requirement and the equivalent status concerns, these cases are reviewed for sufficiency on the day they are received.

64.02 Challenges to the validity of the showing of interest. The Regional Director cannot take action on a petition seeking an election without deciding validity challenges (*CHM 18.19*).

64.03 A challenge to the status of a labor organization is a threshold issue that is investigated before any action pursuant to § 2422.30(c) can be taken on a petition (*CHM 19* and related *HOG 24* sections).

64.04 Scheduling and conducting hearings and issuing a Direction of Election when the parties are unable to agree to an election agreement on nonunit matters pursuant to § 2422.16(c)(2). See *CHM 31*.

64.05 Investigating and deciding blocking unfair labor practice charges (*CHM 60*).

64.06 Investigating and deciding objections to an election; and

64.07 Scheduling runoff and rerun elections.

# 65 IMPACT OF AFL-CIO NO-RAIDING CLAUSES ON REPRESENTATION PROCEEDINGS:

65.01 Generally: There is a program established within the AFL-CIO for handling disputes between affiliates of the AFL-CIO.

65.02 AFL-CIO no-raiding procedure: The program is designed to discourage an organizational raid by one AFL-CIO affiliate on another. Known as Article XX and XXI complaints, one AFL-CIO affiliate files charges within the AFL-CIO when 1) one affiliate is raiding a unit for which another AFL-CIO has recognition; or (2) one affiliate is accused of trying to represent a group of employees for which another affiliate under AFL-CIO policy has already begun an organizing campaign.

65.03 Procedures in representation cases involving allegations of raiding: When the region receives a case involving two or more AFL-CIO affiliates, the region processes it using standard procedures. If the region receives a request from the President of the AFL-CIO to defer processing the case pending resolution of an Article XX or XXI complaint, the region contacts the Office of the General Counsel immediately. The General Counsel normally grants the AFL-CIO's request to defer processing the petition for thirty days to allow the parties to settle their dispute through the AFL-CIO's internal dispute resolution procedures.

However, if a request to defer a case is filed after a Notice of Hearing has been issued and the hearing is imminent or has begun, or an election agreement has been signed and the election is imminent, the General Counsel will not defer the hearing or the election unless there are extraordinary circumstances that warrant the deferral.

All correspondence with the President of the AFL-CIO is handled by the Office of the General Counsel. If the case is deferred, the Office of the General Counsel will request the region to contact the affected labor organizations to ascertain the status of the dispute after the initial thirty day deferral period.

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