

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.

62.1 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.

62.2 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.

62.3 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.

62.4 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.

62.5 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.**