

12 **Timeliness of election petitions**

Timeliness requirements for petitions are imposed by section 7111 of the Statute and implemented in section 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 decertification of an exclusive representative or by agencies.

1. Exceptions to the timeliness requirements may be warranted in unusual circumstances.
2. Certain timeliness requirements may apply to the filing of amended petitions and the adequacy of a petitioner's showing of interest. See *CHM 18.8*.
3. Additional bars set out in section 2422.14 of the regulations 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.i*

A. Election and Certification Bars

Election Bar: Section 7111(b) precludes conducting an election in "any appropriate unit or subdivision thereof within which, in the preceding 12 calendar months, a valid election...has been held."

The election bar 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. The Authority has not had the opportunity to issue a decision on this point. 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 election bar rule does not apply to a petition seeking an election in a broader unit which includes the unit in which an election previously was conducted, because the broader unit is not the same unit or a subdivision of the unit in which the election was held. See *Federal Aviation Administration, 2 A/SLMR 340 (1972)*. The election bar rule does not apply to petitions to consolidate existing units filed under section 7111(g).

Certification Bar: Section 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 and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.
4. The certification bar applies during the first year following the issuance of a certification of representative, including a certification on consolidation of units, if no collective bargaining agreement has been executed. Once an agreement is executed, the contract bar rule applies to the unit.
5. 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)*. In such cases, in order to obtain an election in the broader unit, the exclusive representative must be willing to waive its exclusive recognition status by putting it "on the line" at the election.
6. A union that seeks an election to displace an incumbent may not circumvent the certification bar rule by petitioning for a broader unit. *See Bureau of Indian Affairs, Navajo Area, New Mexico, 1 A/SLMR 459 (1971)*.

If during the period normally covered by a certification bar, a collective bargaining agreement covering the claimed unit is pending agency head review under 5 U.S.C. 7114(c) or is in effect, other timeliness provisions in the regulations apply [see section 2422.12(b) of the regulations].

Assertions of Election and Certification Bars at Hearing: The determination of whether an election or certification bar precludes further processing of a petition is normally made during the initial processing of a petition since the FLRA Regional Offices maintain the records necessary to establish the pertinent dates. Thus, it is unusual to conduct a hearing on an election or certification bar issue. However, a party is not precluded from asserting an election or certification bar at hearing.

Claims of Certification Bars in Successorship: The Authority has not had an opportunity to rule on certification bar issues that arise following the finding that a new employing entity is a successor to a previous one in which a labor organization retains its status as the exclusive representative of the employees who transferred to the successor. This issue is unresolved. **See CHM 58.3.21.** NLRB cases may prove helpful in this area when researching the issue. See *Citisteel USA*, 312 NLRB 815 (1993); *NLRB v. Bums Security Services*, 406 U.S. 272 at 280 (1972); and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, at 37 (1987).

B. Contract Bars

Section 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 section 7111(f)(3)(B) of the Statute.

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. *U.S. Department of Health and Human Services, Social Security Administration (SSA)*, 44 FLRA 230 (1992), *citing Appalachian Shale Products*, 121 NLRB 1160 (1958) and *Department of the Navy, Navy Exchange, Miramar, California*, 6 A/SLMR 44 (1976).

1. Lawful written agreement:

In *SSA*, the Authority stated that in order for an agreement to constitute a collective bargaining agreement that can bar the filing of a petition for exclusive recognition:

an agreement must contain substantial terms and conditions of employment sufficient to stabilize the bargaining relationship between the parties to the agreement.

The Authority found that:

7. the mere fact that an agreement contains language allowing the parties to reopen and modify the agreement's provisions does not automatically disqualify the agreement as a bar.
8. contracts need not delineate every possible provision in order to contain sufficient terms to constitute a bar.

A more difficult hearing situation is presented when a party, usually the petitioner, alleges that an agreement is not **lawful**. If the petitioner's claims amount to allegations of unfair labor practice conduct, they are not appropriate for resolution in a representation proceeding. See *Veterans Administration Center, Togus, Maine*, 3 A/SLMR 568, n.1 (1973). The Hearing Officer **does not accept** any testimony or other evidence purportedly bearing on the motivation of a party or allegations involving unlawful considerations or actions in obtaining an agreement. If in doubt as to the nature and purpose of the offered evidence, the Hearing Officer questions the offering party on the record about his/her intentions and ask the party to make an offer of proof. See *HOG 28, Objections*; *HOG 29, Offers of Proof*; and *HOG 33.6, Attempt to litigate unfair labor practices*.

2. Effective Date:

The effective date and duration of agreements are addressed in § 2422.12(h) of the regulations, which states that collective bargaining agreements:

...including those 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 1995 addition to the regulations tracks existing Authority case law, holding that any potential challenging party must be able to determine when the statutory open period will occur. *Department of the Army, Concord District Recruiting Command, Concord, New Hampshire*, 14 FLRA 73, 75 (1984). It is appropriate to read other documents in conjunction with the collective bargaining agreement such as the agency head's approval of it in determining if the agreement contains a clear and unambiguous effective date. *SSA*, 44 FLRA 230 (1992).

An agreement to extend the terms of a collective bargaining agreement during negotiations for a successor agreement does not qualify as a bar to an election petition because "a temporary stopgap agreement does not constitute a final agreement of fixed duration and lacks the stability sought to be achieved by the agreement bar principle." *Department of the Army, Corpus Christi Army Depot, Corpus Christi, Texas*, 16 FLRA 281, 282-83 (1984).

3. Time of filing a petition:

Existing contracts: When there is a contract having a valid effective date, a contract is considered timely if filed during the open period as described in section 7111(f) of the Statute and §§ 2422.12(d) and (e) of the regulations. NOTE: For calculating the window period of a contract for deciding whether a petition is timely, see [Appendix B](#).

New contracts: 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 if certain requirements that are met at the time of execution. The notice to the agency:

9. must be in writing and convey that the petitioning union has taken all steps necessary to file a petition with the Authority.
10. must be served on a person having authority over agency negotiations, which could extend to and include the head of the agency,
11. 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).

4. Effect of successorship on contract bars:

No cases have yet been filed in the Regions that raise issues concerning the effect of the predecessor's agreement with the former exclusive representative on the gaining entity that has been found to be a successor employer under *NFESC*, 50 FLRA 363. This includes petitions raising issues regarding the effect of the parties prior agreement on the gaining entity and contract bar provisions. See **CHM 58.3.22**. Note however, under the former successorship rules, the Assistant Secretary sought case handling advice from the Federal Labor Relations Council on the following issue:

Whether the Assistant Secretary can find that in a successorship situation the agreement bar which

existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the successor employer and the exclusive representative a period of stability free from rival claims or other questions concerning majority status? *U.S. Mortuary, Oakland Army Base, Oakland, California (U.S. Army Mortuary)*, 8 A/SLMR 593 (1978).

The FLRC stated that “[w]hile the gaining employer, as here, may not have assumed the predecessor’s agreement,¹ and therefore no ‘agreement bar’ as such exists, we see no inconsistency with the purposes of the Order in the Assistant Secretary concluding that similar ‘bar’ principles preclude the raising of a rival claim or other questions concerning majority status.” *U.S. Mortuary, Oakland Army Base, Oakland, California (U.S. Army Mortuary)*, 6 FLRC 330 (1978). The FLRC provided the Assistant Secretary with the following advice:

the Assistant Secretary may interpret and apply his existing agreement bar rules or prescribe analogous rules to find that in a successorship situation the agreement bar which existed pursuant to the predecessor ‘s negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the gaining employer and the exclusive representative a period of stability free from rival claims or other questions concerning representation. *U.S. Army Mortuary*, 6 FLRC at 335; and 8 A/SLMR at 595.

5. Effect of Section 7114(c) Agency Head Review:

The Statute provides for agency head approval of collective bargaining agreements in section 7114(c). Section 2422.12(c) of the regulations 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

¹As the Council stated in DSA (3 FLRA at 803), a ‘successor’ is not ‘required to adopt and be bound by any agreement which may have been entered into between the losing employer and the incumbent union.’ (Rather, the successor is enjoined to maintain recognition and to adhere to the terms of the prior agreement to the maximum extent possible.”

on Requests for Review 258 (1973). Pursuant to section 7114(c) of the Statute, if the agency head does not approve or disapprove the agreement within 30 days of the date it was executed, the agreement takes effect automatically on the thirty-first day after execution. The Authority has held that for purposes of triggering the time targets for section 7114(c) review, the date of execution is the date on which no further action is necessary to finalize a complete agreement. *Fort Bragg Association of Teachers and U.S. Department of the Army, Fort Bragg Schools, Fort Bragg, North Carolina*, 44 FLRA 852 (1992).

Issues concerning agency head approval of an agreement may arise in contract bar cases. Contracts may take effect either upon the date of the agency head approval provided for in section 7114(c) of the Statute **or**, as noted previously, in cases where the agency head fails to act within the 30-day period specified by section 7114(c), on the 31st day after the contract was executed by the local parties. The date on which the contract was approved by the agency head may have to be discovered from another document, typically a letter giving agency head approval.

If the agency head timely disapproves the agreement or a portion of the agreement, there is no agreement that is binding on the local parties and, consequently, no bar to an election petition. *U.S. Department of the Army, Watervliet Arsenal, Watervliet, New York (Watervliet)*, 34 FLRA 98, 105 (1989). The parties may agree to implement all portions of their local agreement not specifically disapproved by the agency head. If the parties agree to revise the disapproved portions, rather than implementing the portions of the agreement which were approved, no bar exists until a full and final agreement is executed that triggers the 7114(c) process. See *Watervliet* at 105.

6. Contracts Containing Automatic Renewal Clauses:

Generally, an automatic renewal clause in a collective bargaining agreement provides that the agreement continues in effect after its expiration date, if no action to amend or terminate the agreement is taken within a specified period prior to its expiration date. The presence of automatic renewal language in an agreement creates special problems in contract bar situations that the Authority addressed in *Kansas Army National Guard, Topeka, Kansas (Kansas ARNG)*, 47 FLRA 937 (1993).

Automatically renewed agreements, like initial agreements, are subject to section 7114(c) agency head review. The determination of and relationship between the execution and effective dates of an automatically

renewed agreement often operate differently than those involved in an initial or renegotiated agreement. The principles that apply to the operation of section 7114(c) in the context of an initial or renegotiated agreement are incompatible with some of the fundamental aspects of agreements that are the result of automatic renewal. See *Kansas ARNG*, at 942.

In the context of an agreement that is being negotiated for the first time or one that is being renegotiated, the Authority has held that for purposes of triggering the time limits for section 7114(c) review, the execution date is the date on which no further action is necessary to finalize a complete agreement. In initial or renegotiated agreements, this is the date the parties sign off on the agreement. Once execution occurs, if the agency head neither approves nor disapproves the agreement within the prescribed 30-day period, the agreement takes effect automatically on the thirty-first day after execution. *Fort Bragg Association of Teachers and U.S. Department of the Army, Fort Bragg Schools, Fort Bragg, North Carolina*, 44 FLRA 852 (1992).

Generally, an automatic renewal provision of a contract provides that the contract shall continue in effect after its expiration date if no action to amend or terminate it is taken within a specified period prior to its expiration date. In *Kansas ARNG*, the date which triggered agency head review was the point at which the time limits for making a request to negotiate the agreement expired with no timely request forthcoming. Thus, the period for agency head review commenced on the day after the expiration of the contractual window period for requesting renegotiation of the expiring agreement, and ended thirty days thereafter, well before the effective date of the renewed agreement. Unlike initial or renegotiated agreements, the effective date of the agreement is not necessarily the date of approval or the thirty-first day after execution. Rather, the effective date is the date previously set by the parties for the renewal of the agreement. The Authority found that this interpretation of section 7114(c) preserves the uniformity of the anniversary date and permits the orderly and predictable operation of automatic renewal provisions of collective bargaining agreements.

Simply put, contracts containing automatic renewal clauses are effective on the day the parties previously established for renewal. They are not dependent on the date of approval of the contract under section 7114(c) of the Statute as are initial agreements. For example, in *Kansas ARNG* the parties negotiated an agreement in 1989 that included a duration clause that stated:

This agreement shall be in full force and effect for three (3) years from the date of National Guard approval or thirty-one (31) days after the date of the signature of the parties, whichever is earlier. This agreement shall be renewed for an additional three year period on each third anniversary date thereafter, subject to NGB re-review and approval, unless either party gives written notice to the other, not more than 90 days or less than 60 days prior to the expiration date, of their desires to renegotiate provisions of the agreement.

The agreement was approved by the NGB on April 11, 1989. The contractual window period for requesting to renegotiate the contract expired on February 10, 1992. The period for agency head review commenced on February 11, 1992, and ended 30 days thereafter on March 11, 1992, well before the effective date of the renewed agreement. The record in *Kansas ARNG* does not establish that the parties intended finalizing the agreement to be dependent on further action. Therefore, the renewed agreement between the parties was for a 3-year term, beginning on April 11, 1992.

It is important to note that in all contract bar cases, including those involving automatic renewal clauses, decisions on timeliness are based on the specific contract, facts and circumstances present in the particular case. A petitioning union may have to consult a source other than the agreement itself to determine whether the agreement was automatically renewed. Consistent with SSA, 44 FLRA 230 (1992), the necessity of checking other sources does not preclude an automatically renewed agreement from serving as a bar to an election petition that is not filed within the section 7111(f)(3)(B) "window period." Thus, a petitioner may have to obtain documents in addition to the collective bargaining agreement to decide, for example, if there was a timely request to renegotiate or timely disapproval by the agency head. *Kansas ARNG* at 944.

7. Requests To Renegotiate:

Certain contracts provide for automatic renewal if neither party requests to renegotiate the agreement within a specified period of time. A timely request by either party to renegotiate or modify the agreement prevents automatic renewal and precludes the agreement from serving as a bar to an election petition filed after the expiration of the agreement, even if no negotiations ever take place. *U.S. Department of Defense, Army National Guard, Camp Keyes, Augusta, Maine*, 34 FLRA 59 (1989).

8. Ratification Votes:

Ratification of a contract by the union's membership is not a requirement under the Statute in order for an agreement to become effective.

However, this issue may arise at hearings involving contract bar or automatic renewal issues, when the parties have agreed either by written agreement, such as a ground rules agreement, or through acquiescence that the agreement must be ratified to become effective. *Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia*, 13 FLRA 571 (1984); *U.S. Department of Commerce, Bureau of the Census*, 17 FLRA 667 (1985).

9. Premature Extensions:

An agreement executed by the parties more than sixty days before the expiration of the current agreement is premature for contract bar purposes since it would modify or extinguish the 45-day "window period" established by section 7111(f)(3)(B) of the Statute. Section 2422.12(g) of the regulations provides that:

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.

Accordingly, the Authority does not recognize such a premature extension of an agreement as a bar to an election petition. See *Department of Health and Human Services, Boston Regional Office, Region I*, 12 FLRA 475 (1983). 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. See section 2422.12(e) of the regulations.

C. Unusual Circumstances

Section 2422.12(f) of the regulations states "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." 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).

Petitions seeking resolution of matters related to representation (e.g., petitions questioning if a current unit continues to be appropriate because of a substantial change in the character and scope of the unit) are usually filed at the time of the organizational changes, events not necessarily timed to 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.

For detailed discussion of specific situations involving unusual circumstances, see *RCL 4 - Good Faith Doubt of Majority Status* and *RCL 3C - Accretion*.

D. Effect of Dismissal, Withdrawal or Disclaimer on Subsequent Petitions

Certain time bars to the filing of petitions apply in situations where a party previously filed and then withdrew a petition for an election.

1. Bar after Withdrawal or Dismissal of Petition:

Section 2422.14(a) of the regulations provides that, when a petition seeking an election that has been timely filed is withdrawn by the petitioner or dismissed by the Regional Director less than sixty (60) days prior to or following the expiration of an existing agreement, another petition seeking an election is not 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. Other pending petitions that have been timely filed continue to be processed.

2. Bar after Withdrawal of Petition after Issuance of Notice of Hearing:

Section 2422.14(b) of the regulations provides that a petitioner who submits a withdrawal request for a petition seeking an election that is received by the Regional Director after issuance of a notice of hearing or approval of an election agreement, whichever comes first, will be barred from filing another petition seeking an election in the same unit or any subdivision of the unit for six (6) months of the date of approval of the withdrawal by the Regional Director. This provision applies whenever an election agreement is approved, including those approved after the close of a hearing.

3. Bar after the Filing of a Disclaimer:

Section 2422.14(c) provides that when an election is not held because the incumbent disclaims any representational interest in a unit, a petition by the incumbent seeking an election in the same unit or a subdivision of the same unit will not be timely if filed within six (6) months of cancellation of the election.

E. The effect of a contract on other timeliness issues that may arise in election cases.

There are no Authority decisions on the issues identified below.

Thus, these issues are unresolved. See CHM 58.3.23. The Region obtains all pertinent information informally from the parties. In considering representation case issues for which no Authority precedent exists, under section 7135(b) of the Statute, a decision of the Assistant Secretary of Labor for Labor Management Relations remains in full force and effect unless it has been revised or superseded by decisions issued pursuant to the Statute. *FNG I*, 25 FLRA 728 (1987). In addition, the Authority has stated that it may be appropriate to consider case law developed under the National Labor Relations Act. *Coast Guard*, 34 at 952, 953.

Filing a petition untimely: Section 2422.14(a) discusses bars for refiling petitions that are timely filed initially and later withdrawn or dismissed. This regulation does not discuss petitions which are untimely filed initially.

Amendment of petition: Regional Directors may be required to consider the timeliness of amended petitions. See *General Services Administration, Region 4*, 6 A/SLMR 272 (1976). Cases decided by the NLRB reflect that the filing date of the original petition is controlling as to timeliness where the amendment does not substantially enlarge the character or size of the unit or number of employees in the unit and where the employers, operations and employees were contemplated in the original petition. *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958); *Illinois Bell Telephone Co.*, 77 NLRB 1073 (1948). However, where the amendment materially changes the unit, the Board found the date of the amended petition controlling when the original petition sought a single craft in a departmental unit, but was amended to seek a broader production and maintenance unit. *Hyster Co.*, 72 NLRB 937 (1947). In *Allied Beverage Distributing Co.*, 143 NLRB 149 (1963) the Board used the date of the amended petition as the date of filing when the original petition misnamed the employer in a material manner.

See HOG 48 for specific guidance on developing a record about this topic at hearing.

References:

Where agreements to extend a collective bargaining agreement during negotiations do not serve as a bar:

Department of Health and Human Services, Region IX, San Francisco, California, 12 FLRA 183 (1983).

U.S. Department of Defense, Army National Guard, Camp Keyes, Augusta, Maine, 34 FLRA 59 (1989).

Where by the terms of a collective bargaining agreement, a request to renegotiate an agreement prevented the automatic renewal of the contract:

Office of the Secretary, Headquarters, Department of Health and Human Services, 11 FLRA 681 (1983).

Ambiguity as to effective date of contract:

U.S. Department of the Interior, Redwood National Park, Crescent City, California, 48 FLRA 666 (1993) (a contract that became effective when it was approved by the agency head on June 2, 1998 was not a bar because

of a reproduction error that made the effective date in the published copy of the agreement appear to read, "June 12, 1988").

Florida Air National Guard, St. Augustine, Florida, 43 FLRA 1475 (1992) (an agreement showing two different dates of approval by the agency head was not a bar to a petition).

Other considerations:

Although parties may waive their right to assert a contract bar, a contract bar may not be waived unilaterally by one of the parties to the collective bargaining agreement. *Department of Defense, Overseas Dependent Schools*, 1 A/SLMR 516 (1971).

