

70 FLRA No. 61

COMMODITY FUTURES TRADING COMMISSION
EASTERN REGIONAL OFFICE
NEW YORK, NEW YORK
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO
(Incumbent/Labor Organization)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Petitioner/Labor Organization)

BN-RP-16-0022

ORDER DENYING
APPLICATION FOR REVIEW

July 14, 2017

Before the Authority: Patrick Pizzella, Acting Chairman,
and Ernest DuBester, Member

I. Statement of the Case

The American Federation of Government Employees, American Federation of Labor and Congress of Industrial Organizations (AFGE) has filed an application for review of the attached decision of Federal Labor Relations Authority (FLRA) Regional Director Philip T. Roberts (RD). As relevant here, the National Treasury Employees Union (NTEU) petitioned the RD to represent the Agency's professional employees, and submitted a sufficient showing of interest. AFGE requested that this petition be held in abeyance until AFGE's petition to consolidate a unit of professional and nonprofessional employees at the Agency was resolved. After the RD certified the consolidated unit, he reopened NTEU's case. AFGE objected to an election between the two unions, citing the certification bar of § 7111(f)(4) of the Federal Service Labor-Management Relations Statute (Statute).¹ After a hearing, an election was held and the bargaining-unit employees voted for NTEU.

¹ 5 U.S.C. § 7111(f)(4).

In its application, AFGE argues that the RD failed to apply established law, and that, in the alternative, there is an absence of precedent on this issue. As there is Authority precedent on this issue, and the RD applied it appropriately to this case, we deny AFGE's application for review.

II. Background and RD's Decision**A. Background**

AFGE filed a petition, BN-RP-16-0014, under § 7112(d) of the Statute, to consolidate two local units – one unit comprised of professional employees, the other of nonprofessional employees.² Later that same month, NTEU filed BN-RP-16-0022 to represent the unit containing the professional employees. Shortly thereafter, AFGE requested that the Regional Office follow FLRA Office of the General Counsel Representation Case Handling Manual (CHM) 11.10.2 and suspend processing BN-RP-16-0022, pending resolution of BN-RP-16-0014. The Regional Office then notified the parties that, based on CHM 11.10.2 and *Department of Transportation, FAA (FAA)*,³ BN-RP-16-0022 would be held in abeyance pending resolution of BN-RP-16-0014.

Following a vote by the Agency's professional employees, in which they agreed to be included in a unit with non-professional employees, the RD issued a certification for a consolidated unit in BN-RP-16-0014. The RD also notified the parties that BN-RP-16-0022 was being taken out of abeyance for processing. Per *FAA* and CHM 11.10.2, NTEU had thirty days to submit a showing of interest for the unit newly certified through BN-RP-16-0014. AFGE filed a motion to dismiss BN-RP-16-0022, asserting it was untimely and barred by the certification issued in BN-RP-16-0014. The RD denied AFGE's motion and an election was held. In the election, out of sixty-one eligible voters, twenty-nine votes were cast for NTEU, twenty-one for AFGE, and two for neither.

In accordance with § 2422.26(a) of the Authority's Regulations,⁴ AFGE filed objections to the election. AFGE argued that the election was barred by § 7111(f)(4) of the Statute⁵ and § 2422.12 of the Authority's Regulations⁶ and that the election was procedurally flawed.

² *Id.* § 7112(d).

³ 4 FLRA 722 (1980) (Chairman Haughton dissenting on *retroactively* applying final regulation, but not the substance of the final regulation).

⁴ 5 C.F.R. § 2422.26(a).

⁵ 5 U.S.C. § 7111(f)(4).

⁶ 5 C.F.R. § 2422.12.

B. RD's Decision

In his decision, the RD found that the election was not barred by the Statute or the Authority's Regulations. He found that § 7111(f)(4) was inapplicable as it is expressly limited to petitions seeking an election under § 7111, unlike AFGE's petition to consolidate, which was filed under § 7112(d). The RD found that § 2422.12 of the Authority's Regulations "merely implements" § 7111(f).⁷

He also traced back the history of the Authority's interim regulations, promulgated in 1979, and its final regulations, implemented in 1980. He cited *FAA*, and its discussion of the interim regulation, which provided that if an election petition was filed concerning a unit that was the subject of a consolidation petition, the election petition would be dismissed if the consolidation petition was granted. The final regulation, § 2422.3(j), – mirrored in CHM 11.10.2 – provided that the election petition would be held in abeyance and, after a consolidation certification issued, the election petition would be processed. The commentary on the change explained:

Section 2422.3(j) has been revised to provide that where a timely petition is filed raising a question concerning representation (QCR) in a unit which is included as part of a pending unit consolidation . . . petition, the QCR petition will no longer be automatically dismissed once the consolidated unit is certified. Instead, upon the issuance of a certification on consolidation of units, the QCR petitioner will be given thirty (30) days to secure a sufficient showing of interest in the consolidated unit and in the event such showing of interest is secured, will be given an opportunity to obtain the appropriate certification pursuant to an election. This revision is intended to avoid unfairness to petitioners who have filed timely and otherwise adequately supported election petitions subsequent to the petition for consolidation of units and also will permit pending consolidation petitions to be processed where the consolidated unit sought is deemed to be appropriate.⁸

The RD further explained that when § 2422.3(j) was removed from the Authority's Regulations in 1995, "the purpose and policy remained the same" as there were no substantive changes to the election and certification bars.⁹

Analyzing the CHM sections cited by AFGE, the RD noted that AFGE failed to harmonize the general proposition contained in CHM 11.3 and 23.10.1.4 – that consolidation certifications can serve as the basis for certification bars – with the specific situation of this case, in which a previously filed election petition has been placed in abeyance, pending the outcome of the consolidation petition. He explained that the situation is expressly addressed in CHM 11.10.2 and 23.10.1.1. CHM 11.10.2 states:

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, the petition is processed and an appropriate certification is issued.¹⁰

The RD explained that AFGE's interpretation would render CHM 11.10.2 meaningless. He found that CHM 11.3 and 23.10.1.4 state generally that a consolidation certification can serve as a bar to according exclusive recognition, but do not address the specific situation here, which is addressed by CHM 11.10.2, where a timely election petition was filed prior to the issuance of a consolidation certification. The RD found in this a balancing of a union's rights under § 7112(d) with employees' rights under § 7111 of the Statute. He emphasized that "the employees' statutory right to freely choose a bargaining representative is one of the cornerstone rights[;] . . . [t]o allow the filing of a consolidation petition to thwart the employees' right to choose their bargaining representative would be contrary to a foundational principle of the Statute."¹¹

After investigating AFGE's objections, the RD found that there was insufficient evidence to warrant setting aside the election. He dismissed the objections, and stated an intention to issue a certification based on NTEU's winning ballot tally, absent timely appeal. AFGE filed this application for review¹² and NTEU filed an opposition.

⁷ RD's Decision at 5.

⁸ *Id.* at 6 (quoting 45 Fed. Reg. 3482-83 (Jan. 17, 1980)).

⁹ *Id.*

¹⁰ *Id.* (quoting CHM 11.10.2).

¹¹ *Id.* at 7 (citing *FAA*, 4 FLRA at 722).

¹² As AFGE did not object in its application to the procedural conduct of the election, we do not discuss it further.

III. Preliminary Issues

In its opposition, NTEU argues that the Authority should not consider AFGE's public policy arguments, as they were not previously raised or addressed in the RD's decision.¹³ Section 2429.5 of the Authority's Regulations provides that "[t]he Authority will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented in the proceedings before the" RD.¹⁴ However, AFGE, in its evidence supporting its election objections, did make sufficiently similar public policy arguments to the RD.¹⁵ Accordingly, as AFGE made these arguments to the RD, we do not dismiss them under § 2429.5.¹⁶

Also in its opposition, NTEU requests that the Authority strike the brief that AFGE submitted as part of its application for review.¹⁷ NTEU argues that, at thirty-eight pages, AFGE's "lengthy" application is longer than what is contemplated by § 2422.31(b) of the Authority's Regulations, outlining the permissible contents of an application for review.¹⁸ We note that, by its plain wording, § 2422.31(b) does not include any restriction on the number of pages or otherwise address the length of a party's application for review. Therefore, we deny NTEU's request.¹⁹

IV. Analysis and Conclusions

In its application, AFGE argues that the RD failed to apply established law and that the decision raises an issue for which there is an absence of precedent. Specifically, AFGE argues that the RD failed to apply the certification bar required by § 7111(f)(4) of the Statute and § 2422.12 of the Authority's Regulations.²⁰ AFGE argues that the RD erred in: (1) allowing NTEU to submit a showing of interest for the consolidated unit without amending its petition;²¹ (2) considering § 2422.3(j) because it is no longer in effect; and (3) failing to apply CHM guidance.²² It also argues that public policy – favoring the consolidation of units –

supports the view that the RD failed to apply established law by not applying the certification bar.²³ Further, AFGE argues that if the Authority finds that its certification did not bar the election, then its application should still be granted because there is an absence of precedent on this issue.²⁴

As relevant here, under the Authority's Regulations, the Authority may grant an application for review only when the application demonstrates that review is warranted because the decision raises an issue for which there is an absence of precedent or there is a genuine issue over whether the RD has failed to apply established law.²⁵

A. Adequate Authority precedent exists on this issue.

As cited by the RD in his decision, the Authority has addressed a factual scenario similar to this one in *FAA*.²⁶ In *FAA*, the Authority considered whether to apply its transition, interim, or final rules to two representation petitions.²⁷ While the Authority's transition rules were in effect, a union – the Federal Aviation Science and Technological Association (FASTA) – filed a consolidation petition for several units, including units covered under a renewing collective-bargaining agreement. During the open period and while the interim rules were in effect, another union – the Professional Airways Systems Specialists (PASS) – filed a timely representation petition in two of the units FASTA sought to consolidate. The interim rule had provided that a petition such as the one filed by PASS be dismissed.

In January 1980, during the pendency of the case, the Authority's final rule, § 2422.3(j), took effect:

(j)(1) A petition filed pursuant to § 2422.2(a) and (b) seeking an election in any existing exclusively recognized unit covered by a pending petition to consolidate existing exclusively recognized units must be filed timely in accordance with the requirements set forth in this section. Such petition filed pursuant to § 2422.2(a) and (b) will be held in abeyance pending the processing of the petition to consolidate.

¹³ Opp'n at 12.

¹⁴ 5 C.F.R. § 2429.5; *see also id.* § 2422.31(b).

¹⁵ Evidence Supporting Objections to Election at 20-25 (Dec. 30, 2016).

¹⁶ *NASA, Goddard Space Flight Ctr., Wallops Flight Facility, Wallops Island, Va.*, 68 FLRA 622, 624 (2015); *U.S. Dep't of the Army, Womack Army Med. Ctr., Ft. Bragg, N.C.*, 63 FLRA 22, 24 n.4 (2008).

¹⁷ Opp'n at 2, 14-15.

¹⁸ *Id.* at 15.

¹⁹ *See U.S. Dep't of VA, VA St. Louis Healthcare Sys., St. Louis, Mo.*, 70 FLRA 247, 248 (2017) (denying opposing party's request to dismiss application under failure to meet content requirements of § 2422.31(b)).

²⁰ Application at 10-19.

²¹ *Id.* at 12 n.2.

²² *Id.* at 19-27.

²³ *Id.* at 27-32.

²⁴ *Id.* at 33-36.

²⁵ 5 C.F.R. § 2422.31(c).

²⁶ RD's Decision at 5 (citing *FAA*, 4 FLRA at 723-31).

²⁷ 4 FLRA at 722-23.

(2) Upon the issuance of a certification on consolidation of units, the petitioner under § 2422.2(a) and (b) shall be given thirty (30) days from the issuance of the certification to submit a sufficient showing of interest in such consolidated unit. Upon the timely submission of such adequate showing of interest, petitions filed pursuant to § 2422.2(a) and (b) will be processed, and an appropriate certification will issue.²⁸

The Authority explained that “no longer will timely filed [representation] petitions be automatically dismissed upon the issuance of a certification in the consolidated unit Instead, a petitioner will have an opportunity to compete for the consolidated unit providing it timely submits a sufficient showing of interest in the consolidated unit.”²⁹

The Authority decided to apply the final rule to the pending petitions, finding that

[o]bviously, the Authority did not intend to maintain the unfairness of [§] 2422.3(j) of the interim rules by continuing its application in pending cases after the final rules became effective. . . . [I]t cannot be seriously argued that the Authority intended to continue applying the procedures of the interim rules to the instant cases where . . . the very unfairness which prompted the revision of [§] 2422.3(j) of the interim rules is so graphically demonstrated.³⁰

The units at issue in FASTA’s consolidation petition likewise included both professional and nonprofessional employees and the professional employees voted to be included with nonprofessional employees. The Authority explained that PASS had supported its petition with an adequate showing of interest. However, a certification and contract bar existed from early 1977 until December 1979, and if the interim rather than the final rule were applied, then it would deny employees in the consolidated unit the opportunity to freely choose their bargaining representative for a period of up to seven years.

In *FAA*, the Authority also considered §§ 7101(a)(1) and 7102 of the Statute, which highlight

the importance of an employee’s right to participate in labor organizations of their own choosing. The Authority found that the final rule of § 2422.3(j) “plainly effectuate[d] th[e] democratic principle of freedom of choice sought to be accomplished by the Statute.”³¹ The Authority explained that § 7112(d) of the Statute “was intended to facilitate larger bargaining units, *not* to shackle employees in the selection of a bargaining representative in those larger units.”³²

While *FAA* issued in 1980, it remains the law of the Authority. In its opposition, NTEU observes that if the Authority granted AFGE’s application and AFGE entered into a contract early next year, employees would be denied the opportunity to vote on their exclusive representative from May 2015 until March 2021.³³ That nearly six-year span is comparable to what the Authority found to be unfair and unreasonable in *FAA*.³⁴

As the RD discussed in his decision, CHM 11.10.2 addresses the specific situation at issue here and instructs that the Regional Office will hold the second petition in abeyance while the consolidation petition is processed with the petitioner later given thirty days to demonstrate a sufficient showing of interest.³⁵ The RD followed this process. While the CHM is not a binding rule, it is publicly available guidance on how the Office of the General Counsel processes representation petitions.³⁶ The CHM has been in place since at least 2000 and is routinely relied upon by the Office of the General Counsel.³⁷ As such – and in part due to its own request – AFGE had clear notice of how the petitions would be handled. *FAA* and CHM 11.10.2 demonstrate that there is adequate precedent on this issue. Hence, AFGE has not demonstrated that the RD’s decision raises an issue for which there is an absence of precedent and we decline to grant review under § 2422.31(c)(1) of the Authority’s Regulations.³⁸

B. The RD applied established law.

AFGE contends that the RD’s decision is contrary to § 7111(f)(4) of the Statute and § 2422.12 of the Authority’s Regulations.³⁹ However, a plain reading

³¹ *Id.* at 729.

³² *Id.* at 729 n.8.

³³ Opp’n at 14.

³⁴ 4 FLRA at 727.

³⁵ RD’s Decision at 6.

³⁶ CHM at i, (February 20, 2015), <https://www.flra.gov/system/files/webfm/OGC/Manuals/REP%20Proceedings%20CHM.pdf>.

³⁷ *Id.*

³⁸ 5 C.F.R. § 2422.31(c)(1).

³⁹ Application at 10-19.

²⁸ *Id.* at 724-25 (quoting 5 C.F.R. § 2422.3(j) (1980)).

²⁹ *Id.* at 725.

³⁰ *Id.* at 727.

of the Statute and Regulations fails to support AFGE's contentions. Section 7111(f)(4) provides that

[e]xclusive recognition shall not be accorded to a labor organization . . .

. . .

. . . 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.⁴⁰

AFGE argues that an election "for the unit described in any petition under this section" occurred and "in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative."⁴¹ But, the election AFGE refers to was not petitioned for under "this section"— § 7111. Instead AFGE's petition was filed under a different section of the Statute, § 7112.⁴² ⁴³ Thus, the conditions necessary for § 7111(f)(4) to apply were not met.⁴⁴

Under § 2422.12(b) of the Authority's Regulations, "[w]here there is a certified exclusive representative of employees, a petition seeking an election will not be considered timely if filed within twelve (12) months *after* the certification."⁴⁵ The record is clear that NTEU filed its petition three and a half months *before* the consolidation certification was issued.⁴⁶ Therefore, § 2422.12(b) is not applicable.

AFGE claims that the RD erred in allowing NTEU to demonstrate a showing of interest in the consolidated unit without amending its original petition.⁴⁷ As outlined above, *FAA* and CHM 11.10.2 provide a petitioning union the opportunity to submit a revised showing of interest in a consolidated unit.⁴⁸ Furthermore,

in order to demonstrate it had a sufficient thirty percent showing of interest in the consolidated unit, NTEU would need signatures from nineteen employees.⁴⁹ While NTEU provided additional signatures after the RD reopened the case, its petition already included signatures from twenty employees.⁵⁰ So, NTEU had demonstrated a sufficient showing of interest in the unit and the RD did not err.⁵¹

AFGE also argues that the RD erred in applying an outdated regulation, § 2422.3(j), which was removed during the Authority's revisions to its regulations in 1995. AFGE misunderstands the RD's decision.⁵² The RD did not apply § 2422.3(j) – he discussed its history and the interim and final rules as part of his explanation of *FAA* and the CHM.⁵³ Hence, the RD did not err in discussing the history of § 2422.3(j).

Additionally, AFGE argues that the RD failed to apply CHM 11.3 and 21.10.11.4. As relevant here, CHM 11.3 provides that the certification bar includes the issuance of a certification of a consolidation of units.⁵⁴ CHM 23.10.1.4 states that a certification on consolidation acts as a bar for a twelve-month period.⁵⁵ However, as the RD explained in his decision, CHM 11.3 and 23.10.1.4 stand for general propositions that are distinguished by the more detailed and specific guidance outlined in CHM 11.10.2 and 23.10.1.1.⁵⁶ Consequently, the RD did not err in focusing on the specificity provided by CHM 11.10.2 and 23.10.1.1.

Finally, AFGE contends that its position here is supported by public policy, specifically an interest in consolidation and reducing unit fragmentation.⁵⁷ However, the Authority in *FAA* addressed this specifically. As quoted above, the Authority found that § 7112(d) of the Statute "was intended to facilitate larger bargaining units, *not* to shackle employees in the selection of a bargaining representative in those larger units."⁵⁸ Accordingly, AFGE does not demonstrate that the RD erred in his application of established law.

⁴⁰ 5 U.S.C. § 7111(f)(4).

⁴¹ Application at 11-13 (citing 5 U.S.C. § 7111(f)(4)).

⁴² RD's Decision at 5.

⁴³ Acting Chairman Pizzella notes that the professional employees alone voted on the question of whether they wished to be included in a consolidated unit with nonprofessional employees; the professional bargaining-unit employees were not choosing a labor organization as their representative. *Id.* at 2; Application at 13.

⁴⁴ See generally *NTEU*, 66 FLRA 611, 611 n.1 (2012) (discussing § 7111(f)(4)).

⁴⁵ 5 C.F.R. § 2422.12(b) (emphasis added).

⁴⁶ RD's Decision at 2.

⁴⁷ Application at 12 n.2.

⁴⁸ *FAA*, 4 FLRA at 726, 731 & n.12; CHM 11.10.2.

⁴⁹ Showing of Interest II at 1.

⁵⁰ Showing of Interest I at 1.

⁵¹ See also *U.S. Dep't of Transp., U.S. Coast Guard Fin. Ctr., Chesapeake, Va.*, 34 FLRA 946, 949 (1990) (a regional director's "determination of the adequacy of the showing of interest is administrative in nature and is not subject to collateral attack").

⁵² See *SSA*, 68 FLRA 710, 711-12 (2015) (union's misunderstanding of regional director's decision could not serve as basis for granting application on grounds that the decision was contrary to law).

⁵³ RD's Decision at 5-6.

⁵⁴ CHM 11.3.

⁵⁵ *Id.* at § 23.10.1.4.

⁵⁶ RD's Decision at 6-7.

⁵⁷ Application at 27-32.

⁵⁸ *FAA*, 4 FLRA at 729 n.8.

V. Order

We deny AFGE's application for review.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
BOSTON REGION

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BN-RP-16-0022

DECISION AND ORDER ON OBJECTIONS TO THE
ELECTION

I. Statement of the Case

On March 28, 2016, the National Treasury Employees Union (NTEU) filed the petition in this proceeding to represent the professional employees of the Commodity Futures Trading Commission, Eastern Regional Office, New York, New York (Agency). The Region conducted an election in which the majority of voters selected NTEU. The American Federation of Government Employees, AFL-CIO (AFGE) objects to the election on two grounds: (1) the election should be barred as a result of a June 17, 2016, certification that the Region issued consolidating AFGE's existing bargaining units of the Agency's professional and non-professional employees, and (2) the Region's conduct during the election warrants overturning the election results.

The Region investigated the objections pursuant to section 2422.27(a) of the Regulations. AFGE, as the objecting party, bears the burden of proving that the results of the election should be set aside. *FDIC*, 38 FLRA 952, 963 (1990). For the reasons that follow, I find that AFGE has not established sufficient grounds to set aside the December 13, 2016, election.

II. Findings

A. Procedural History

On March 2, 2016, AFGE filed a petition pursuant to section 7112(d) of the Federal Service Labor Management Relations Statute (Statute) to consolidate two existing AFGE local units at the Agency, the first, a unit of professional employees and the second, a separate unit of non-professional employees.¹ This petition was assigned FLRA case number BN-RP-16-0014.

On March 28, 2016, NTEU filed a petition pursuant to section 7111 of the Statute to represent the professional employees at the Agency.² This petition was assigned FLRA case number BN-RP-16-0022.

On April 11, 2016, a representative of AFGE communicated with the FLRA agent handling BN-RP-16-0022 to inquire if the Region was going to hold that case in abeyance pending the resolution of BN-RP-16-0014. The Region responded, in part, that it intended to treat BN-RP-16-0022 as a cross-petition under section 2422.8(a) of the Authority's Regulations and section 17 of the FLRA Office of General Counsel Representation Case Handling Manual (CHM). On April 12, 2016, an AFGE representative informed the FLRA agent that section 11.10.2 of the CHM may be relevant.³ On April 14, 2016, AFGE requested that the Region follow CHM 11.10.2 and suspend processing of NTEU's election petition pending resolution of AFGE's unit consolidation petition.

On April 15, 2016, AFGE filed a challenge to NTEU's showing of interest for BN-RP-16-0022.

On April 19, 2016, the Region notified the parties that, pursuant to *Dep't of Transp., Fed. Aviation Admin.*, 4 FLRA 722 (1980)(FAA), and CHM 11.10.2, the processing of BN-RP-16-0022 would be held in abeyance until the completion of the processing of BN-RP-16-0014.

¹ At the time the petition was filed, AFGE, at the national level, was not the certified representative of either professional or non-professional units. Instead, the certifications were respectively held by two separate AFGE locals.

² BN-RP-16-0022 represents the second petition that NTEU filed to represent the professional employees at the Agency. In December 2015, NTEU filed a similar petition, but withdrew that petition because an initial review of the matter indicated that the petition was subject to a contract bar under section 7111(f)(3) of the Statute and was filed outside of the open window period.

³ CHM 11.10.2. concerns petitions that seek an election in an existing unit that is the subject of a pending petition to consolidate existing exclusively recognized units.

On June 17, 2016, following a vote by the Agency's professional employees to be included with the non-professionals in the consolidated unit, the Region completed the processing of BN-RP-16-0014 by issuing certification of AFGE as the exclusive representative of a consolidated unit of professional and non-professional Agency employees.⁴ That same day, the Region notified the parties that BN-RP-16-0022 was no longer held in abeyance and would be subject to further processing. In particular, per *FAA* and CHM 11.10.2, NTEU was provided thirty days to submit a showing of interest for the unit newly certified through BN-RP-16-0014. NTEU submitted a timely showing of interest for the expanded unit. On August 1, 2016, the Region notified AFGE that it was denying AFGE's April 15, 2016 challenge to NTEU's showing of interest.

On August 10, 2016, AFGE filed a Motion to Dismiss BN-RP-16-0022 asserting that the petition was untimely and barred due to the certification issued for BN-RP-16-0014. The Region denied the Motion to Dismiss on August 15, 2016, and continued to process the election for BN-RP-16-0022. AFGE declined to enter into an election agreement. As the parties were unable to agree to the procedure for the election, the Boston Region conducted a hearing on September 12, 2016, in accordance with section 2422.16(b) and (c) of the Regulations.

On October 24, 2016, the Region issued a corrected Direction of Election for BN-RP-16-0022.⁵ The corrected Direction of Election provided the eligible voters the choice of selecting AFGE or NTEU as their designated representative, or voting for no representation.

The corrected Direction of Election provided for a mail ballot election in which the ballots would be mailed on November 4, 2016, and tallied on December 2, 2016. The corrected Direction of Election stated that the mail ballot package would include a postage-paid return-ballot envelope. On November 4, 2016, the Region mailed the ballot packages, however, the Region failed to make the return-ballot envelopes postage-paid. On November 10, 2016, the parties alerted the Region to the return-ballot envelope postage issue.

On November 18, 2016, the Region issued an Amended Direction of Election which provided procedures by which the Region would deliver replacement postage-paid return-ballot envelopes to those

voters whose return envelopes had not been received by that date. That same day, the Region mailed replacement return-ballot envelopes to the aforementioned voters. Through the Amended Direction of Election, the Region also postponed the date of the tally to December 13, 2016.

B. The Tally of Ballots for BN-RP-16-0022

On December 13, 2016, the Region conducted the count for BN-RP-16-0022. The tally shows that out of 61 eligible voters, 29 votes were cast for NTEU, 21 votes were cast for AFGE, 2 votes for neither, and no challenged ballots. The Region served a copy of the Tally of Ballots on the parties immediately following the count.

C. Objections to Election for BN-RP-16-0022

On December 20, 2016, in accordance with section 2422.26(a) of the Regulations, AFGE timely filed objections to the election. On January 4, 2017, AFGE timely submitted evidence in support of the objections pursuant to section 2422.26(b) of the Regulations. AFGE contends (1) in light of the certification issued for BN-RP-16-0014, the election for BN-RP-16-0022 should be barred under section 2422.12 of the Regulations, (2) the election is similarly barred under section 7111(f) of the Statute, and (3) the Region's conduct of the election was procedurally flawed in relation to the return-ballot envelopes requiring a rerun election.

D. Results of Investigation

After learning of the administrative error related to the return postage, the Region took a number of immediate actions to remedy the mistake. The Region postponed the election tally from December 2, 2016, to December 13, 2016 so as to allow voters additional time to return ballots. Also, on November 18, 2016, the Region mailed a new return ballot envelope with postage paid to every voter whose ballot had not yet been received by the Region.⁶ Included in this mailing was a letter to the voter explaining the purpose of the replacement envelope, informing them of the new deadline of December 13 for return of ballots, and providing the name and phone number of the Regional Office agent assigned to the case, for any employees with questions. Additionally, the Region provided the Agency with a supplementary page to the election Notice to Employees explaining the replacement envelope process and providing the assigned agent's name and phone number for employees with questions.

⁴ Under section 7112(b)(5) of the Statute, professionals must be afforded the opportunity to vote to be included in a unit with non-professionals. *U.S. Dep't of the Air Force, AFLC, Wright-Patterson AFB, Ohio*, 1 FLRA 217, 218-219 (1979).

⁵ The Region issued a corrected Direction of Election to address an error in the stated date of tally in the initial Direction of Election that was issued on October 24, 2016.

⁶ At this point, nineteen ballots had been returned.

From November 18, 2016, through December 8, 2016, the region received and responded to inquiries from ten voters that ranged from confirming the Region's receipt of a voter's return ballot envelope to providing replacement ballot packages. One voter, whose vote was counted at the tally, asserts that he contacted the Region and did not ultimately receive a response. Of the voters who failed to timely return their ballot, or failed to vote at all, there is no evidence that any of these voters attempted to contact the Region concerning the election.

There were sixty-one eligible voters for the BN-RP-16-0022 election. By the extended date of December 13, 2016, the Region received return-ballot envelopes from fifty-two voters. Of the timely-returned envelopes, the United States Postal Service delivered thirteen of the original return-ballot envelopes that lacked paid postage. There is no evidence that the Region failed to timely receive any ballots due to a lack of postage.

The Region received three return-ballot envelopes after the December 13, 2016, tally. One of the three envelopes was unsigned and was not received until December 19, 2016. Another of the three returned envelopes was postmarked on December 12, 2016, and received by the Region on December 14, 2016. The voter whose envelope was postmarked December 12 informed the Region that he received his ballot package and replacement envelope in a timely manner, but that he waited until a day or two before December 13, 2016, to mail his return-ballot envelope.⁷ This voter indicated that he was not confused by the voting process and that any delay in his mailing of the ballot was due to his own delay in mailing. The third envelope was postmarked December 13, 2016, and received by the Region on December 15, 2016.

In connection with its objections, AFGE offered the names of twelve witnesses who were eligible to vote in the election in question. Out of the twelve witnesses, four were eligible voters whose votes were not counted at the December 13, 2016 tally. Of these four, two returned mail ballot envelopes that were not received until after the tally. As described above, one of those two voters returned an unsigned envelope and the other did not mail his ballot until December 12 due to his own delay. As to the two other witnesses, they did not return ballots before or after the tally, and neither witness provided any evidence to support AFGE's objections. The Region contacted each witness by phone and email to request their participation in the investigation of AFGE's objections, however, neither witness responded.

⁷ The Region spoke to this employee as part of the Region's investigation of AFGE's objections to the election. The employee provided an email to the Region confirming the information referenced in this Decision and Order.

A number of AFGE's witnesses whose votes were counted did provide sworn affidavits for the investigation. Through those statements, the witnesses indicated that a number of eligible voters expressed confusion and frustration with the Region's voting process.

III. Analysis and Conclusions

1. The election for BN-RP-16-0022 was not barred by the Statute or Regulations.

AFGE argues that the certification that issued pursuant to its unit consolidation petition in BN-RP-16-0014 triggers the certification bar provisions of section 7111(f) of the Statute. Section 7111(f)(4) of the Statute provides that "[e]xclusive recognition shall not be accorded to a labor organization . . . 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." (emphasis added.) Thus, section 7111(f)(4) is expressly limited to petitions which seek an election to determine an exclusive representative under section 7111 of the Statute, as opposed to a petition seeking to consolidate existing units, which is addressed in a separate section of the Statute, namely, section 7112(d). Here, the petition that AFGE asserts serves as the basis for the Statute's 12-month certification bar was a petition to consolidate existing units under section 7112(d), not a petition filed under section 7111(b). Accordingly, based on the plain language of the Statute, section 7111(f)(4) is inapplicable and does not serve as a basis to bar NTEU's petition.

AFGE also cites to section 2422.12 of the Regulations to assert that a certification bar for BN-RP-16-0014 precludes the processing of BN-RP-16-0022. While that section of the Regulations does not contain restrictive language such as that found in section 7111(f) of the Statute, it is clear that section 2422.12 of the Regulations merely implements the provisions of section 7111(f) of the Statute and does not expand upon the provisions of the Statute or nullify the restrictions contained therein. In order to properly understand the meaning of this section of the regulations, one must trace its history back to the interim regulations originally promulgated when the FLRA was created in 1979. As the Authority noted in *FAA*, the interim regulations provided that if an election petition was filed concerning a unit that was the subject of a consolidation petition, the election petition would be dismissed if the consolidation petition was granted. The final regulations, issued in 1980, implemented a process similar to that described in CHM Section 11.10.2 whereby the election

petition would be held in abeyance and after issuance of a consolidation petition, processing of the election petition would resume. The analysis of the final regulations make it clear that consolidation certifications did not result in a certification bar in such situations.

Section 2422.3(j) has been revised to provide that where a timely petition is filed raising a question concerning representation (QCR) in a unit which is included as part of a pending unit consolidation (UC) petition, the QCR petition *will no longer be automatically dismissed once the consolidated unit is certified*. Instead, upon the issuance of a certification on consolidation of units, the QCR petitioner will be given thirty (30) days to secure a sufficient showing of interest in the consolidated unit and in the event such showing of interest is secured, will be given an opportunity to obtain the appropriate certification pursuant to an election. This revision is intended to avoid unfairness to petitioners who have filed timely and otherwise adequately supported election petitions subsequent to the petition for consolidation of units and also will permit pending consolidation petitions to be processed where the consolidated unit sought is determined to be appropriate.

45 Fed. Reg. 3482 (Jan. 17, 1980)(emphasis added).

In 1995, when Section 2422.3(j) was replaced by the timeliness provisions of Section 2422.12, the purpose and policy remained the same. The analysis of Section 2422.12 indicates that “[t]here are no substantive changes in the election bar in subsection (a), the certification bar in subsection (b) or the bar rules in subsections (d) through (f).” 60 Fed. Reg. 39878, 39879 (Aug. 4, 1995). Thus it is clear that the current regulations, which track the 1995 amendments, do not support AFGE’s claim that a certification bar applies in cases concerning the processing of an election petition filed during the pendency of a unit consolidation proceeding.

AFGE also points to the Case Handling Manual as supporting its position that a certification bar applies following the consolidation of units. AFGE correctly notes that two sections of the CHM, 11.3 and 23.10.1.4, state, as a general proposition, that consolidation certifications can serve as the basis for certification bars. However, AFGE fails to harmonize that general proposition with the specific situation involved in this case, namely, a petition for an election involving an existing unit that is the subject of a pending consolidation petition. This specific situation is expressly addressed in CHM sections 11.10.2 and 23.10.1.1. Section 11.10.2 states as follows:

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.⁸

AFGE’s broad interpretation of CHM sections 11.3 and 23.10.1.4 would render sections 11.10.2 and 23.10.1.1 meaningless and without effect. If a consolidation certification acted as a one-year bar to any election petition, why would the petitioner be given 30 days (and only 30 days) to submit a showing of interest for a petition that could not be processed until a year later? Why would the CHM say that if the petitioner obtains a sufficient showing of interest, the petition is processed and an appropriate certification is issued? How, exactly, would the petition be “processed”? To dismiss it as untimely? If so, then what does the CHM mean by saying that an “appropriate certification is issued”? All of these questions are easily disposed of when it is recognized that CHM sections 11.3 and 23.10.1.4 state the general proposition that a consolidation certification can serve as a certification bar, but in the specific situation where a timely election petition has been filed concerning a unit that is the subject of a consolidation petition, the election petition is held in abeyance until the consolidation petition is resolved, and then the election petition is taken out of abeyance and processing resumed as would be the case with any other election petition. This then harmonizes the union’s right to seek a consolidation of its existing units under section 7112(d) of the Statute with the right of employees to determine their exclusive representative, if any, pursuant to a secret ballot election under section 7111 of the Statute. In this regard, the employees’ statutory right to freely choose a bargaining representative is one of the cornerstone rights of the Statute. To allow the filing of a consolidation petition to thwart the employees’ right to choose their bargaining representative would be contrary to a foundational principle of the Statute. *FAA*, 4 FLRA 722.

In sum, the Statute, Regulations, and Authority case law do not support AFGE’s request that NTEU’s timely filed representation petition, supported by the employees’ submission of a showing of interest and subsequent votes, should be denied. Had NTEU not timely filed BN-RP-16-0022 prior to the issuance of the

⁸ Section 23.10.1.1 of the CHM contains similar language to the same effect.

consolidated certification, a bar would now apply per section 7111(f) of the Statute. However, because NTEU filed its petition prior to the issuance of the consolidated certification, the certification bar does not retroactively invalidate or bar NTEU's timely filed petition. As discussed above, the Statute requires that the employees in this circumstance be given the opportunity to vote. *FAA*. Accordingly, AFGE's objections asserting a certification bar are without merit and cannot be relied upon to invalidate the results of the election.

2. The Region's conduct during the election does not warrant setting aside the election results.

The standard for determining whether conduct is of an objectionable nature as to require that an election be set aside is the conduct's potential for interfering with the free choice of the voters. *U.S. Dep't of Defense, Stateside Dependents Schs., Fort Benning Schs., Fort Benning, Ga*, 48 FLRA 471, 464 (1993). In *Nat'l Park Serv., Santa Monica Mtns. Recreation Area, Agoura Hills, Cal.*, 50 FLRA 164, 166 (1995) (*Nat'l Park Serv.*), the Authority adopted a three-element test to determine whether a party's conduct, including that of an Authority agent, warrants setting aside election results. Specifically, the Authority found that a party's conduct warrants overturning an election if: (1) A party to the election (agency, union, or Authority) causes an employee to miss the opportunity to vote; (2) The vote could be determinative of the outcome of the election; and (3) The employee was deprived of the opportunity to vote through no fault of his/her own.

Applying *Nat'l Park Serv.* to the facts at hand, there is insufficient evidence to conclude that the election results should be overturned. While it is undisputed that the Region did not initially mail return envelopes with postage paid per the terms of the corrected Direction of Election, there is no evidence that the Region's administrative oversight caused any employee to miss the opportunity to vote. Instead, the evidence fully supports the conclusion that the Region took immediate remedial steps to ensure that every employee had the *opportunity* to submit a timely ballot. Notably, over 85% of the eligible voters returned a timely ballot by the extended deadline of December 13, 2016.

As to those voters who did not submit a timely ballot, the available evidence and information suggests that those employees had the opportunity to timely vote, but chose not to. One voter, whose envelope was received after the tally, confirmed that he simply waited too long before mailing his ballot. With regard to the second-hand information provided by AFGE witnesses about the reasons why other eligible voters did not vote, none of the information establishes that the employees

lacked the opportunity to vote – instead, they ultimately chose not to vote. Given that the vast majority of the eligible voters used the approximately six-week voting period to timely return ballots, and that employees were permitted to and did contact the Region with questions, and that all employees who contacted the Region timely returned their ballots, the argument that several voters were too confused or too busy to vote lacks merit. There is no evidence that any eligible voter failed to receive a ballot or was deprived of the opportunity to timely submit that ballot.

Significantly, there is also no evidence that a determinative number of voters were denied the opportunity to vote. The tally resulted in NTEU receiving eight more votes than AFGE. Given that the margin between NTEU and AFGE was eight votes, the fact that nine voters did not have their votes counted suggested the theoretical possibility that a dispositive number of outstanding votes remained. That theoretical possibility is quickly eliminated in light of the evidence that two voters who returned ballots did so in an improper or untimely manner that resulted in the proper exclusion of the votes. In particular, one voter returned an untimely, unsigned ballot envelope thus voiding her ballot under any circumstances. See section 47.9.1 of the CHM and Paragraph 10 of the corrected Direction of Election. The second voter, whose return ballot envelope was not received until after the tally, expressly admits that responsibility for the delay in the return of the ballot lay with him as compared to the Region's conduct. Considering those two ballots, the number of remaining ballots at issue, now seven, falls below the eight votes necessary to alter the outcome of the election. Moreover, to the extent some of the other eligible voters did not vote, as explained above, there is no evidence that they were denied the opportunity to vote. Accordingly, there is no evidence that a determinative number of voters were denied the opportunity to vote and there is insufficient evidence to find that the election results should be set aside. As a result, AFGE's objections related to the Region's conduct of the election are dismissed.

IV. Order

The Region's investigation of AFGE's objections, supporting evidence and documentation yielded insufficient evidence to warrant setting aside the election. Accordingly, I am dismissing the objections, and will issue, absent a timely appeal, an appropriate certification based on the Tally of Ballots in BN-RP-16-0022.

V. Right to Seek Review

Under section 7105(f) of the Statute and section 2422.31(a) of the Regulations, a party may file an

application for review with the Authority within sixty days of this Decision. The application for review must be filed with the Authority by **May 23, 2017**, and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, NW, Washington, DC 20424-0001. The parties are encouraged to file an application for review electronically through the Authority's website, www.flra.gov.⁹

Philip T. Roberts
Regional Director
Boston Region
Federal Labor Relations Authority
10 Causeway Street, Suite 472
Boston, MA 02222

Dated: March 24, 2017

⁹ To file an application for review electronically, go to the Authority's website at www.flra.gov, select eFile under the Filing a Case tab and follow the instructions.