

67 FLRA No. 114

FEDERAL DEPOSIT
INSURANCE CORPORATION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union/Petitioner)

WA-RP-12-0062

ORDER GRANTING
APPLICATION FOR REVIEW
AND REMANDING
TO THE REGIONAL DIRECTOR

May 30, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

The Union petitioned Federal Labor Relations Authority Regional Director Barbara Kraft (the RD) to clarify an existing bargaining unit to include, through “accretion,” twenty-seven student interns who currently are expressly excluded from the bargaining unit’s certification.¹ In the petition, the Union argued that accretion is proper because the interns’ job circumstances have undergone “meaningful change[s].”² Without addressing this argument, the RD dismissed the petition.

The main question before us is whether the RD failed to apply established law by dismissing the petition without determining whether there have been meaningful changes in the interns’ job circumstances. Because well-established law required the RD to make that determination, the answer is yes. And because the record does not permit us to resolve the dispute, we remand the petition to the RD to make further findings.

II. Background and RD’s Decision

Over the course of time, Agency employees have participated in representation elections that have

resulted in the Authority certifying the Union as the exclusive representative for several bargaining units of Agency employees. In 2002, the Authority’s Chicago Regional Office granted a Union petition to consolidate units, and certified the Union as the exclusive representative of Agency employees in a consolidated unit – the unit at issue here. The consolidated unit included the Agency’s professional and nonprofessional employees nationwide and, consistent with an agreement between the Agency and the Union to exclude student interns, excluded, as relevant here, “student interns . . . and employees described in § 7112(b)” of the Federal Service Labor-Management Relations Statute (the Statute),³ such as supervisors and confidential employees.⁴

Subsequently, the Union filed the petition at issue here to clarify the unit to include twenty-seven student interns. In its petition, the Union argued that the interns should be included “without an election[,] based on the theory of accretion.”⁵ Accretion is appropriate, the Union argued, because there have been meaningful changes in interns’ job circumstances, as interns have recently developed an “expectation of continued employment” at the Agency.⁶ In response, the Agency argued that student interns do not have an expectation of continued employment.

The RD found that there are only a limited number of circumstances where employees may accrete to a unit from which they previously were expressly excluded. Employees can accrete to such a unit, the RD stated, if there have been “meaningful change[s] in the excluded employees’ employment status, such that the [s]tatutory exclusions in [§] 7112(b) no longer apply.”⁷ But the RD stated that, under *Federal Trade Commission (FTC)*,⁸ employees cannot accrete to such a unit if the parties have “agreed to exclude” the employees “for reasons other than the [§] 7112(b) appropriate[-]unit criteria.”⁹ The RD determined that the interns were excluded for reasons other than § 7112(b), as they were not, for example, supervisors or confidential employees. Thus, the RD found that there is no basis for accreting the interns into the unit. Without determining whether there have been meaningful changes in the interns’ job circumstances, the RD dismissed the Union’s petition.

The Union then filed the application for review at issue here. The Agency filed an opposition to the Union’s application.

³ *Id.* at 2.

⁴ 5 U.S.C. § 7112(b).

⁵ RD’s Decision at 1-2.

⁶ *Id.* at 3.

⁷ *Id.* at 4.

⁸ 35 FLRA 576, 583 (1990).

⁹ RD’s Decision at 4-5.

¹ RD’s Decision at 3.

² *Id.*

III. Analysis and Conclusions

As relevant here, the Union argues that the RD failed to apply established law because the RD did not determine whether there have been meaningful changes in the interns' job circumstances, and thus did not properly consider whether the interns may accrete to the unit.¹⁰

Accretion is a longstanding doctrine that involves the addition of a group of employees to an existing bargaining unit without an election, based on a "triggering event" or change in agency operations or organization.¹¹ Because accretion precludes employee self-determination, the Authority applies the accretion doctrine narrowly.¹² In order for employees to accrete to a unit from which they have been expressly excluded, there must be meaningful changes in the employees' duties, functions, or job circumstances that eliminate the original distinctions that led to their exclusion in the first place.¹³ If there have not been meaningful changes, then accretion is not permitted.¹⁴

In addition, it is well established that the accretion doctrine applies both to employees (such as supervisors) whose exclusions are based on § 7112(b),¹⁵ and to employees (such as wage-grade employees¹⁶ and temporary employees¹⁷) whose exclusions are *not* based on § 7112(b). Moreover, it is well established that the accretion doctrine applies even where the parties have previously expressly agreed to exclude the employees in dispute.¹⁸

Here, the Union petitioned the RD to clarify the unit to include the interns based on the claim that there have been meaningful changes in the interns' job circumstances.¹⁹ Applying the precedent discussed

above, the RD should have determined whether such meaningful changes have occurred.²⁰

Although the Agency claims that the RD "rejected" the Union's claim that meaningful changes have occurred,²¹ the RD actually found it unnecessary to make this determination.²² In this regard, the RD stated that, under *FTC*, employees who have been excluded from a unit "for reasons other than . . . [§] 7112(b) appropriate[-]unit criteria" may not accrete to that unit.²³ But *FTC* does not distinguish between § 7112(b)-based and non-§ 7112(b)-based exclusions.²⁴ Rather, *FTC* states that "[e]mployees . . . who are specifically excluded from the unit description in a bargaining certificate . . . may only be accreted into that unit where there have been 'meaningful changes' in the employees' duties, functions, or job circumstances that eliminate the original distinctions between employees."²⁵

And, contrary to the dissent's characterization of *FTC*, that decision does *not* hold that accretion is "*not appropriate* for including employees *who were excluded* from the original certification *pursuant to a voluntary pre-election agreement* . . . because they were temporary employees, supervisors, management officials[,] or confidential employees."²⁶ In this regard, the dissent's selective quotation notwithstanding, what *FTC* actually held is that such accretions are inappropriate "*in the absence of a demonstration that meaningful changes have occurred*" in job duties, functions, or circumstances.²⁷

Similarly, contrary to the dissent's characterization of *FTC*, that decision does *not* hold that "when a union seeks to represent employees, to whom a § 7112(b) exclusion applies and who were previously excluded by agreement, the appropriate course is for the [RD] to 'direct *an election* to determine whether the petitioned-for employees (1) *desire to be represented* by the certified exclusive representative in the existing unit or (2) *desire to remain unrepresented*.'"²⁸ Rather, in *FTC*, the Authority held that the union in that case "should be given an opportunity, upon request, to demonstrate that the [employees at issue there] should be included in the existing unit because of meaningful changes" in their job duties, functions, or

¹⁰ See Application at 5-6; see also *id.* at 4.

¹¹ *U.S. Dep't of the Interior, Bureau of Reclamation, Columbia-Cascades Area Office, Yakima, Wash.*, 65 FLRA 491, 493 (2011) (*Interior*) (citing *U.S. Dep't of the Interior, Bureau of Reclamation, Pacific Nw. Region, Grand Coulee Power Office, Wash.*, 62 FLRA 522, 524 (2008)); see also *U.S. Dep't of the Navy, Naval Supply Ctr., Oakland, Cal.*, 5 FLRA 775, 777-78 (1981) (*Naval Supply*) (finding accretion after reorganization).

¹² *Id.* at 493.

¹³ *Id.* (citing *Def. Logistics Agency, Def. Supply Ctr. Columbus, Columbus, Ohio*, 53 FLRA 1114, 1123-24 (1998) (*DLA*)); see also *U.S. Dep't of VA, Neb./W. Iowa VA Health Care Sys., Omaha, Neb.*, 66 FLRA 462, 465 (2012).

¹⁴ *DLA*, 53 FLRA at 1124-25.

¹⁵ *Fed. Trade Comm'n*, 15 FLRA 247, 247-49 (1984).

¹⁶ *Interior*, 65 FLRA at 491, 493-94.

¹⁷ *U.S. Dep't of VA, VA Med. Ctr., Allen Park, Mich.*, 43 FLRA 264, 264-66 (1991) (*VA*).

¹⁸ See *id.*; *FTC*, 35 FLRA at 583-85.

¹⁹ See RD's Decision at 3.

²⁰ *Interior*, 65 FLRA at 493.

²¹ Opp'n at 3 (citing RD's Decision at 5).

²² See RD's Decision at 4-5.

²³ *Id.*

²⁴ *FTC*, 35 FLRA at 584.

²⁵ *DLA*, 53 FLRA at 1123-24 (citing *FTC*, 35 FLRA at 583-85).

²⁶ Dissent at 10 (selectively quoting *FTC*, 35 FLRA at 584) (emphasis added by dissent).

²⁷ *FTC*, 35 FLRA at 584 (emphasis added).

²⁸ Dissent at 10 (selectively quoting *FTC*, 35 FLRA at 586) (emphasis added by dissent).

circumstances,²⁹ and for “employees of the petitioned-for unit whose eligibility for inclusion in the existing unit cannot be determined”³⁰ based on a “meaningful[-]changes” analysis,³¹ that an election would be appropriate.³² *FTC* does not hold that an election is required, without regard to whether there have been meaningful changes that warrant accretion.

For the foregoing reasons, *FTC* does not support the RD’s refusal to determine whether there have been any meaningful changes in this case. Further, the Agency does not dispute that Authority precedent requires an analysis of whether “meaningful changes” have occurred.³³ While the Agency claims that the RD did not fail to apply established law – asserting that a change “could not have occurred”³⁴ and that a hearing was not required³⁵ – the Agency does not argue that the meaningful-change analysis does not apply.³⁶

Because the RD did not determine whether the interns have undergone meaningful changes, the RD failed to apply established law. And the record does not permit us to resolve the question of whether there have been meaningful changes. Accordingly, we remand the petition to the RD.³⁷

In remanding the petition, we note that the Union also argues that established policy warrants reconsideration of the RD’s denial of a hearing.³⁸ The Agency contends that the Union did not request a hearing below, and that § 2429.5 of the Authority’s Regulations precludes the Union from raising any claims that it did not raise below.³⁹ But even assuming that the Union’s argument is properly before us, the Union does not explain why established policy warrants reconsideration.⁴⁰ Instead, the Union argues that the RD should have held a hearing because it is “established policy that the [Authority] convenes a hearing to establish record evidence when questions regarding the factual basis of a [clarification] petition arise.”⁴¹ However, as the Agency suggests,⁴² Authority precedent establishes

that RDs have broad discretion to determine whether a hearing is necessary.⁴³ As such, and as the Union does not demonstrate that the RD abused this discretion,⁴⁴ there is no basis for finding that established policy warrants reconsideration.

Further, the Union argues that an election could result in fragmentation that would violate the Statute.⁴⁵ But it is unclear at this time whether, on remand, the RD would direct an election – particularly given that there is no pending petition for an election. Therefore, the Union’s argument is premature, and we do not consider it at this time.⁴⁶

Finally, we note the following. First, as set forth above, the accretion doctrine is a well-settled, longstanding doctrine in the federal sector.⁴⁷ And the doctrine is even longer-standing in the private sector.⁴⁸ Thus, our action today is consistent with – and not at all an extension of – existing precedent.⁴⁹ Second, the accretion doctrine has nothing whatsoever to do with union shops (where covered employees must join the union)⁵⁰ or agency shops (where covered employees must join the union or pay the union a service fee).⁵¹ These are banned by the Statute in § 7102, which provides that employees have the right to “form, join, or assist any labor organization, or to refrain from any such activity.”⁵² Consistent with § 7102, Authority precedent – beginning thirty-five years ago – confirms that exclusive representatives under the Statute may not compel

²⁹ *FTC*, 35 FLRA at 586.

³⁰ *Id.* at 587 (emphasis added).

³¹ *Id.* at 586.

³² *Id.* at 587.

³³ *Opp’n* at 5.

³⁴ *Id.* at 6.

³⁵ *Id.* at 5-6.

³⁶ *See id.* at 5 (citing *Interior*, 65 FLRA at 493).

³⁷ *U.S. Dep’t of the Interior, Bureau of Ocean Energy Mgmt. & U.S. Dep’t of the Interior, Bureau of Safety & Env’tl. Enforcement, New Orleans, La.*, 67 FLRA 98, 100 (2012) (*Safety*).

³⁸ *Application* at 4.

³⁹ *Opp’n* at 4 n.5.

⁴⁰ *See Application* at 4-5.

⁴¹ *Id.* at 5.

⁴² *See Opp’n* at 4 n.4.

⁴³ *E.g., U.S. EPA*, 61 FLRA 417, 420 (2005).

⁴⁴ *See Application* at 4-5.

⁴⁵ *Id.* at 7.

⁴⁶ *Cf. Safety*, 67 FLRA at 100 (premature to address arguments that could become moot after remand).

⁴⁷ *See U.S. Dep’t of the Navy, Commander, Navy Region Mid-Atl. Program Dir., Fleet & Family Readiness, Norfolk, Va.*, 64 FLRA 782, 785 (2010); *U.S. Dep’t of the Army, Corps of Eng’rs, U.S. Army Eng’r Dist., Vicksburg, Miss.*, 57 FLRA 620, 620-23 (2001); *U.S. Dep’t of the Navy, Naval Warfare Command, Aircraft Div., Patuxent River, Md.*, 56 FLRA 1005, 1006-08 (2000); *U.S. DOD Dependents Sch.*, 48 FLRA 1076, 1085-86 (1993); *Dep’t of HHS, Region II, N.Y.C., N.Y.*, 43 FLRA 1245, 1254-56 (1992); *Naval Supply*, 5 FLRA at 777-78.

⁴⁸ *See E.I. Du Pont de Nemours, Inc.*, 341 NLRB 607, 608-09 (2004); *Am. Med. Response, Inc.*, 335 NLRB 1176, 1176-78 (2001); *Cent. Soya Co.*, 281 NLRB 1308, 1309-10 (1986), *aff’d*, 867 F.2d 1245 (10th Cir. 1988); *Safeway Stores, Inc.*, 256 NLRB 918, 918-19 (1981); *Westinghouse Elec. Corp.*, 173 NLRB 319, 319-20 (1968), *enforced*, 440 F.2d 7 (2d Cir. 1971).

⁴⁹ *See Interior*, 65 FLRA at 491, 493-94; *DLA*, 53 FLRA at 1123-24; *VA*, 43 FLRA at 264-66; *FTC*, 35 FLRA at 583-85.

⁵⁰ 2 *The Developing Labor Law* 2217 (John E. Higgins, Jr. et al. eds., 6th ed. 2012).

⁵¹ *Id.* at 2257.

⁵² 5 U.S.C. § 7102 (emphasis added).

members of the units they represent to pay service fees.⁵³ For these reasons, a suggestion that inclusion in a unit through accretion is akin, in any way, to creation of a union shop or agency shop, while undoubtedly provocative, is both rash and wrong.

IV. Order

We grant the Union's application for review and remand the petition to the RD.

Member Pizzella, dissenting:

I am concerned whether the accretion process, in general, and the manner in which that doctrine is applied in this case, is consistent with the underpinnings of the Federal Service Labor-Management Relations Statute (the Statute)¹ and the concomitant guarantee of employee self-determination that courts² and the Authority³ have embraced repeatedly.

The right of employees "to organize, bargain collectively, and participate through labor organizations of their own choosing"⁴ is an essential tenet of our Statute. And that right also "presupposes" the concomitant right "not to associate"⁵ and "to refrain from any such activity" that "assist[s]" a labor organization.⁶ In seeming contradiction to these basic precepts, our precedent (but not the Statute) has adopted a procedure whereby a union may petition to accrete employees into an existing bargaining unit.⁷

Without a doubt, the concept of accretion has been around for a long time.⁸ In fact, the original Members recognized the accretion doctrine, as it was applied by the former Federal Labor Relations Council, but they applied it sparingly and only where it would prevent or reduce "fragmentation[]" – for example, following a significant divisional reorganization⁹ or organizational transfer of entire units of employees.¹⁰ (As discussed below, however, none of those circumstances is present in this case.) Later, the original Members held unanimously that "accretion . . . without an election is not justified," particularly when transfers occur "over a period of time" and even when the unit would remain "appropriate" despite the inclusion of the unrepresented employees.¹¹

¹ 5 U.S.C. §§ 7101-7135.

² *Mulhall v. Unite Here Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010).

³ Majority at 3 (citing *U.S. Dep't of the Interior, Bureau of Reclamation, Columbia-Cascades Area Office, Yakima, Wash.*, 65 FLRA 491, 491 (2011) (*Interior*)).

⁴ 5 U.S.C. § 7101(a)(1).

⁵ *Mulhall*, 618 F.3d at 1287 (emphases added) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977)).

⁶ 5 U.S.C. § 7102 (emphases added); see also *SEIU, AFL-CIO, Local 556*, 1 FLRA 563, 563 (1979) (*SEIU*) (employees have the right to join, not join, maintain, or drop their membership).

⁷ *Interior*, 65 FLRA at 493.

⁸ Majority at 3 (citing *Interior*, 65 FLRA at 493).

⁹ *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal.*, 1 FLRA 1004, 1007 (1979).

¹⁰ *Norfolk Naval Shipyard, Portsmouth, Va.*, 1 FLRA 961, 968 (1979).

¹¹ *Dep't of the Air Force, 6th Missile Warning Squadron, Otis Air Force Base, Mass.*, 3 FLRA 112, 114 (1980).

⁵³ See *AFGE, Local 1857*, 44 FLRA 98, 101-02 (1992); *NTEU*, 38 FLRA 615, 625 (1990); *U.S. Army, U.S. Army Materiel Dev. & Readiness Command, Warren, Mich.*, 7 FLRA 194, 198 & n.14 (1981); *SEIU, AFL-CIO, Local 556*, 1 FLRA 563, 564-68 (1979).

In practice, accretion petitions typically are initiated by, and work primarily to the benefit of, a union following some sort of “triggering event” such as a change in agency operations or organization.¹² In some cases, the petition may even support agency objectives, and the agency may (or may not) oppose the petition. Consequently, the union never has to demonstrate even a minimal showing of interest and avoids the inconvenience of facing a secret-ballot election. Instead, a petition is simply filed with the Authority and, after hearing from union and agency representatives, a regional director determines whether accretion is warranted.¹³ The Authority weighs in only when the union or the agency disagrees with the regional director’s determination.¹⁴

But the employees, who will be directly impacted by the outcome, are effectively excluded from all phases of the process and are provided no opportunity whatsoever to vote for, or against, representation, regardless of whether all, or a majority, of the employees would rather not have representation. Typically, their concerns are not sought or even considered.¹⁵

In that respect, accretion, though not identical to, shares some of the same attributes of “agency shop” or “union shop” provisions, that require employees to pay dues or provide indirect support to a union as a condition of public employment.¹⁶ In *Knox v. SEIU, Local 1000*, the Supreme Court recently noted that “acquiescence in the loss of fundamental rights” should never be “presume[d]”¹⁷ and rejected the notion that employees should be required to “opt out” of processes that support union activities with which they do not agree any more than those employees may be required to “opt in” and be required to participate in such activities.¹⁸

Knox and the Authority’s earliest decisions affirm that the choice to “belong to,”¹⁹ or to become a part of, a bargaining unit is a matter that may not be “presume[d]”²⁰ on behalf of employees, but is a decision that should be left to them through a showing of interest and secret-ballot election. In one of the Authority’s first decisions, the original Members affirmed that Congress sought to prohibit any type of workplace “arrangement[]”²¹ that had any semblance to an “agency shop or union shop provision”²² or that would otherwise interfere with employees’ “right to join, *not join*, maintain, or *drop their membership* in the [u]nion as they see fit.”²³ As the Members noted in *SEIU*, “the Conference Report accompanying the final version of [the Statute] which was subsequently enacted and signed into law”²⁴ “emphasize[d] . . . that nothing in the conference report authorizes, or is intended to authorize, the negotiations of an agency shop or union shop provision.”²⁵

Here, the Regional Director found quite simply that no “meaningful change[s]” analysis was warranted, under the specific circumstances of this case, because the Union and the Agency had “previously *agreed to exclude* [student interns] from [the bargaining] unit.”²⁶ The Regional Director acknowledged that, consistent with Authority precedent, had the parties “originally agreed that the interns were *excluded under [§] 7112(b)*,” she would have been able to consider “if there [was] evidence of a meaningful change . . . such that the [s]tatutory exclusion no longer appl[ied].”²⁷ But these employees were excluded, not because of a statutory exclusion but because *the Union had previously agreed to exclude them*²⁸ (in fact, they could have been included all along but for the Union’s agreement).

On the one hand, my colleagues affirm that the accretion doctrine must be applied “narrowly” because it “precludes employee self-determination.”²⁹ That is a simple proposition with which I wholeheartedly agree. But, then, the majority unexpectedly changes course and unnecessarily expands the circumstances to which the accretion doctrine will apply. This is the point at which I must go in a different direction.

¹² *Interior*, 65 FLRA at 493.

¹³ 5 U.S.C. § 7105(e).

¹⁴ *Id.* § 7105(f).

¹⁵ On rare occasions, the Authority has offered “[i]nterested persons” the opportunity “to submit briefs as *amicus curiae*” seeking their opinion on a specific question – i.e., such as whether a union may “continue to represent employees who have been geographically relocated . . . and the positions they encumber are specifically both excluded from the unit represented by that union and included in the description of a unit represented by another union.” *Def. Logistics Agency, Def. Supply Ctr., Columbus, Ohio*, 53 FLRA 1114, 1115 (1998) (*DLA*). But those invitations are rare and are directed, primarily, to other unions and other agencies, not to impacted employees.

¹⁶ See *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2289 (2012) (*Knox*).

¹⁷ *Id.* at 2290 (emphasis added).

¹⁸ *Id.*

¹⁹ See *Mulhall*, 618 F.3d at 1288 (citing *Romero v. Colegio de Abogados de P.R.*, 204 F.3d 291, 300 (1st Cir. 2000) (*Romero*)).

²⁰ *Knox*, 132 S.Ct. at 2290.

²¹ *SEIU*, 1 FLRA at 564.

²² *Id.* at 566 n.6.

²³ *Id.* at 563 (emphases added).

²⁴ *Id.* at 566.

²⁵ *Id.* at 566 n.6 (emphases added) (quoting S. Conf. Rep. No. 95-1272, at 159 (1978)).

²⁶ Regional Director’s Decision at 5 (emphasis added).

²⁷ *Id.* (emphasis added).

²⁸ *Id.* at 5.

²⁹ Majority at 3 (citing *Interior*, 65 FLRA at 493).

My colleagues apparently believe “that the accretion doctrine applies both to employees . . . whose exclusions are based on § 7112(b) and employees . . . whose exclusions are *not* based on § 7112(b)”³⁰ and thus conclude that the Regional Director erred. But that conclusion ignores the most important fact on which this case turns (and of which the Regional Director took appropriate note) – that these interns were not excluded *because of* § 7112(b); rather, they were excluded because the Union *agreed to exclude* them despite the fact that they always could have been included in the unit consistent with § 7112(b).

That fact distinguishes this case, in all respects, from the three cases relied upon by the majority. To the contrary, those cases do not establish that the Regional Director erred. In fact, they support the Regional Director’s conclusion that accretion does not apply under these circumstances. In *U.S. Department of the Interior, Bureau of Reclamation, Columbia-Cascades Area Office, Yakima, Washington (Interior)*,³¹ the Authority considered only whether two wage-grade employees could be accreted into a bargaining unit at a new regional office, to which the employees were directed to report after the regional office to which they previously had reported was closed and even though the new bargaining unit excluded wage-grade employees.³² Similarly, in *U.S. Department of VA, VA Medical Center, Allen Park, Michigan*,³³ the Authority concluded only that no “meaningful changes” occurred in the duties of temporary employees, who were no longer excluded by a current agreement even though an earlier agreement specifically excluded them.³⁴ And, contrary to my colleagues today (and despite their mistaken protestations that I have “selectively quot[ed]”³⁵ from the Authority’s rambling decision in *FTC*), the Authority in *FTC*,³⁶ indeed determined (in those portions that are pertinent to this case) that “a [clarification of unit] petition is *not appropriate* for including employees *who were excluded* from the original certification *pursuant to a voluntary pre-election agreement* . . . because they were temporary employees, supervisors, management officials or confidential employees;”³⁷ and, later, also determined that when a union seeks to represent employees, to whom a § 7112(b) exclusion applies and who were previously excluded by agreement, the appropriate course is for the regional director to “direct *an election* to determine whether the petitioned-for employees (1) *desire to be*

represented by the certified exclusive representative in the existing unit or (2) *desire to remain unrepresented*.”³⁸

Unlike the majority, therefore, I would conclude that the Regional Director did not err and that she applied established law.

As noted above, I am concerned whether the accretion process is consistent with the Statute and its underpinnings that guarantee employee self-determination. I am also concerned because impacted employees are essentially excluded from the entire process and, if accreted, become a part of the bargaining unit and have no option to ever opt out (short of cajoling a substantial number of one’s coworkers to join a decertification petition), whether or not they ultimately choose to pay dues.

Because this matter goes to the underpinnings of our Statute and the right of employee self-determination, I intend to continue to address these matters in future cases of similar nature.

Thank you.

³⁰ *Id.* at 3 (internal citations omitted).

³¹ 65 FLRA 491 (2011).

³² *Id.* at 493-94.

³³ 43 FLRA 264 (1991).

³⁴ *Id.* at 266.

³⁵ Majority at 4 nn. 26 & 28.

³⁶ 35 FLRA 576 (1990).

³⁷ *Id.* at 584.

³⁸ *Id.* at 586 (emphases added).