



FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Parts 2421, 2422, 2426, and 2429

Meaning of Terms as Used in This Subchapter; Representation Proceedings; National Consultation Rights and Consultation Rights on Government-wide Rules or Regulations; Miscellaneous and General Requirements

AGENCY: Federal Labor Relations Authority.

ACTION: Interim final rule with request for comments.

SUMMARY: The Federal Labor Relations Authority (FLRA) intends to revise the regulations governing representation proceedings, as well as other related regulations, so as to provide parties in most cases with decisions from the Authority on all consequential issues in representation proceedings. Further, these changes will optimize the FLRA's workforce by streamlining the decision-making process in representation proceedings, consistent with E.O. 14,210. The FLRA finds that this interim final rule is not a substantive rule. Certain parts of this interim final rule concern interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. Other parts of this interim final rule concern minor or technical changes for which good cause exists to make notice and comment unnecessary.

DATES: This interim final rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

Comments will be accepted if received by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: You may send comments, which must include the caption “Representation Proceedings,” by emailing FedRegComments@flra.gov. Include “Representation Proceedings” in the subject line of the message.

- If you require an alternative means to comment, please contact Erica Balkum, Chief, Case Intake and Publication, at (771) 444-5805, Monday through Friday (except federal holidays), between 9:00 a.m. and 5:00 p.m. ET.

FOR FURTHER INFORMATION CONTACT: Thomas Tso, Solicitor, at ttso@flra.gov or at (771) 444-5779.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. 7101-7135, grants the Authority the power and responsibility to “determine the appropriateness of units,” *id.* 7105(a)(2)(A); “supervise or conduct elections” and “otherwise administer the provisions . . . [of the Statute] relating to the according of exclusive recognition,” *id.* 7105(a)(2)(B); “prescribe criteria and resolve issues relating to the granting of national consultation rights,” *id.* 7105(a)(2)(C); “prescribe criteria relating to the granting of consultation rights with respect to conditions of employment,” *id.* 7105(a)(2)(F); and “take such other actions as are necessary and appropriate to effectively administer [the Statute],” *id.* 7105(a)(2)(I). From 1979 until 1983, the Authority exercised those powers directly. But since 1983, the Authority has delegated to Regional Directors (RDs) its power and responsibility to determine whether a group of employees is an appropriate bargaining unit, to conduct investigations and to provide for hearings in representation matters, to determine whether a question of representation exists

and to direct an election, and to supervise or conduct secret ballot elections and certify the results thereof. *See id.* 7105(e)(1); *Amendment to Memo. Describing the Authority & Assigned Responsibilities of the General Counsel of the FLRA*, 48 FR 28814 (June 23, 1983) (amending memorandum so as to delegate authority and responsibility to RDs in representation cases); *Processing of Cases; General Requirements*, 48 FR 40189 (Sept. 6, 1983) (revising regulations to implement the amendment to the memorandum). The Authority established a process to review the actions of RDs in those areas of delegated responsibility. *See* 5 U.S.C. 7105(f); *Processing of Cases; General Requirements*, 48 FR at 40190-95 (establishing § 7105(f) appeals process).

The delegation of authority to the RDs appears in section I.C. of a memorandum published as Appendix B to 5 CFR Chapter XIV. An amendment to section I.C. of Appendix B – published elsewhere in this issue of the *Federal Register* – will be effective on the date on which this interim final rule is effective.

The associated regulations appear in 5 CFR part 2421, which defines certain terms used in other regulations; parts 2422 and 2426, which, respectively, govern the processing of representation cases and consultation-rights cases by the Authority and the RDs; and part 2429, which establishes miscellaneous and general requirements for parties in cases before the Authority and the RDs. To simplify the discussion of these regulations, in the SUPPLEMENTARY INFORMATION only, both representation and consultation-rights cases will be referred to as “representation matters.”

Under the current regulations, the Authority may review RDs' initial decisions in representation matters if an appeal is filed with the Authority. (Although the Authority's regulations refer to this appeal as an "application for review," again for simplicity in the SUPPLEMENTARY INFORMATION only, "appeal" is sometimes used instead of "application for review.") However, the scope of the Authority's review is limited to the grounds set forth at 5 CFR 2422.31(c), and parties generally may not raise issues for review that they did not already present to the RD. In addition, under the existing process, in a representation matter that is appealed to the Authority, the parties must make their arguments twice – once to the RD before an initial decision, and again to the Authority on appeal of that decision.

After reexamination of its practices, the FLRA finds that the memorandum of delegated authorities and responsibilities to the RDs, and the related regulations governing representation matters, merit revision. The FLRA envisions a streamlined process in which representation matters are resolved through the collaborative efforts of the regional offices and the Authority – rather than a strict separation of an initial decision by an RD, followed by a possible appeal to, and potentially duplicative decision by, the Authority.

In this new process, parties will continue filing all representation petitions with the regional offices, who will begin processing those petitions. When the processing of a case requires the exercise of one of the Authority's statutory responsibilities

under § 7105(a) of the Statute, the Authority will make any determinations under § 7105(a)(2) that are required for the subsequent disposition of the case. Some representation matters may require the involvement of the Authority at several points in a case, whereas others may require a decision from the Authority only at the case's conclusion – such as when a decision and order issues.

Identifying the points within a case that require a decision by the Authority will be based on case-by-case considerations, but will always include the determinations specified in 5 U.S.C. 7105(e)(1). In the new process – after consultation with the regional offices – the Authority will: “determine whether a group of employees is an appropriate unit,” 5 U.S.C. 7105(e)(1)(A); authorize the regional offices or Authority staff to conduct all investigations and hearings, *see id.* 7105(e)(1)(B); “determine whether a question of representation exists and . . . direct an election,” *id.* 7105(e)(1)(C); and authorize the regional offices or Authority staff to “supervise or conduct elections,” after which the Authority will “certify the results thereof,” *id.* 7105(e)(1)(D).

Because the Authority will be performing these statutory functions itself, rather than delegating them to the RDs, an appeals process will no longer be necessary under § 7105(f) (except in no-quorum situations, which are addressed separately).

In addition, parties will benefit from review by the Authority on all issues of importance in representation matters, without the parties needing to make their arguments twice, and without the need to file an appeal of an initial decision.

While the locus of ultimate decision-making will rest with the Authority, the Authority and regional offices will work collaboratively to resolve representation matters. For example, the Authority will consider the views of the regional offices when making decisions. As a result, the collective insights and experience of the regional offices and the Authority will shape the decisions that parties receive.

The FLRA anticipates that the regional offices will continue to conduct most investigations and hearings in representation matters after receiving the Authority's authorization, but Authority staff may also be assigned those duties as needed, consistent with § 7105(d) of the Statute. Further, the FLRA intends, in most cases, for the regional offices to continue conducting elections with the Authority's authorization, but the Authority will make decisions on election agreements and directions of election. Whereas, in most elections, the regional offices will continue to tally ballots and make determinations on election observers, the Authority will certify the results of elections. The Authority will address determinative challenged ballots in elections, and will decide all election objections concerning either the election process itself, or conduct that may have otherwise improperly affected the results of the election.

The FLRA recognizes, however, that this new process will not function as intended if the Authority loses a quorum – that is, in the event that the Authority has one or zero Members. This circumstance is a “special and temporary” condition. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 22 (2021) (citing *United States v. Eaton*, 169 U.S. 331, 343 (1898)). Consequently, the Authority is

maintaining the current two-layered structure of initial decision and potential appeal only for representation matters that arise when the Authority lacks a quorum. In this way, the loss of an Authority quorum will not prevent parties from having their representation matters addressed.

Parties involved in representation matters that arise when the Authority lacks a quorum will have the right to file an appeal of an RD's action under 5 U.S.C. 7105(f), but that appeal can be addressed only when an Authority quorum is restored. *See FDIC*, 68 FLRA 260, 262 (2015) (finding that the Authority has sixty days while having a quorum to “undertake to grant review of [an] RD’s decision,” or else “the RD’s decision bec[o]me[s] ‘the action of the Authority’” (quoting 5 U.S.C. 7105(f))), *vacating on reconsideration*, 67 FLRA 430 (2014).

So that parties do not need to read through all the regulations to find the rules that apply only to matters that arise when the Authority lacks a quorum, the Authority has collected all of these special rules into their own sections in parts 2422 and 2426.

To implement the new process for representation matters, the FLRA must revise its regulations. Further, the FLRA is amending some regulations to make explicit how they operate. These changes, including those that make explicit the operation of some regulations, are set forth in this document.

In addition, the Authority must revoke its current delegation to the RDs in representation matters, and adopt a new delegation that is tailored to representation matters that arise when the Authority lacks a quorum. To accomplish those purposes, as previously stated, an amendment to section I.C. of Appendix B to 5 CFR Chapter XIV – published elsewhere in this issue of the *Federal Register* – will be effective on the date on which this interim final rule is effective.

The FLRA is also currently reexamining the manner in which it adjudicates unfair labor practices (ULPs), including who will hold hearings and draft recommended decisions in ULP cases. Nevertheless, the FLRA anticipates that those topics could be the subject of separate rulemaking. Accordingly, some of the regulations in parts 2421 and 2429 that concern administrative law judges (ALJs) and ULPs are left unchanged at this time because they could be addressed in future rulemaking, if necessary. There are two regulations concerning ALJs and ULPs that are being revised in this rulemaking because those regulations appear in part 2422, which primarily concerns representation matters. But all other changes concerning ALJs and ULPs will await possible future rulemaking.

The section below explains each change to the regulations in greater detail. The explanation of the amendment to section I.C. of Appendix B to 5 CFR Chapter XIV appears in the separate document published elsewhere in this issue of the *Federal Register* concerning that amendment.

II. Interim Rule and Analysis

Almost all of the explanations below assume that the Authority is functioning with a quorum, and the explanations should be read with that assumption in mind. But for regulations that apply *only* to representation matters that arise when the Authority lacks a quorum – that is, when the Authority has one or zero Members – see the discussions under §§ 2422.35 and 2426.21.

PART 2421

Section 2421.6 Regional Director

Section 2421.6 adds a sentence to the definition of “Regional Director.” This additional sentence explicitly reflects that when an RD acts to process representation matters on the Authority’s behalf, the RD acts pursuant to an assignment of duties from the Authority under 5 U.S.C. 7105(d). Section 7105(d) allows the Authority to “delegate to officers and employees . . . authority to perform such duties . . . as may be necessary.” 5 U.S.C. 7105(d).

Section 2421.20 Election agreement

“FLRA” replaces “Regional Director” as the entity approving an election agreement to reflect that, while RDs will continue processing petitions that prompt elections and RDs will continue assisting parties in drafting election agreements, the Authority will make all final decisions on approving election agreements.

Section 2421.23 FLRA

Section 2421.23 adds a new definition of “FLRA” that applies only to § 2421.20 and parts 2422 and 2426. This definition explains that, as a matter of agency

organization, the use of “FLRA” in these places could indicate the involvement of employees or officials from either the Authority (including Members) or the regional offices (including RDs), or a combination of the two. Parties should generally file all documents with the appropriate RD, and parties will be informed in the course of their specific cases if they must file their documents with, or serve their documents on the Authority – instead of, or in addition to – the regional office (or RD). The one exception is motions for reconsideration under § 2429.17, which must always be filed directly with the Authority.

PART 2422

Section 2422.3 What information should you include in your petition?

Section 2422.3(c) is amended to correct an inadvertent typographical error. The current regulation refers to the U.S. Code, but it should refer to the *Code of Federal Regulations*. Specifically, the current regulation says that “showing of interest” is “defined at 5 U.S.C. 2421.16,” but no such section exists. The reference should be to “5 CFR 2421.16,” so this correction is adopted in the revised paragraph (c).

Section 2422.4 What service requirements must you meet when filing a petition or other documents?

Section 2422.4’s heading is amended to clarify that, as a matter of agency procedure, the section applies to not only petitions, but also supporting documents. The wording of the section is amended to clarify certain information that a party should *not* serve on other parties in order to protect the identities of individuals

engaged in specified protected activities. “Application for review” is removed from the list of documents covered by the section because applications for review are no longer necessary. A separate regulation – § 2422.35(f) – addresses service requirements for applications for review in representation matters that arise when the Authority lacks a quorum.

Section 2422.5 Where do you file petitions?

Section 2422.5(c) is amended to clarify, as a matter of agency procedure, how an RD will determine when a petition is deemed filed based on whether the filing is electronic or by facsimile or other method, the time and date on which the filing is received, and whether a petition is received on a business day or during the region’s business hours.

Section 2422.6 How are parties notified of the filing of a petition?

Section 2422.6(a) is amended to state explicitly that, although the RD makes reasonable efforts to identify or notify parties affected by the issues raised in a petition, parties have their own, independent notification and service obligations that they must satisfy. The regulations have never suggested that the RD’s reasonable efforts relieve a party of its own notification and service obligations.

Section 2422.7 Will an activity or agency post a notice of filing of a petition?

Section 2422.7(a) is amended to replace “Regional Director” with “FLRA” to account for the possibility that the Authority may direct the posting of notices.

Section 2422.9 How is the adequacy of a showing of interest determined?

Section 2422.9(b) replaces “Regional Director” in all the places it appears with “FLRA” to account for the Authority approving all investigations, and the Authority issuing all decisions and orders in such cases. The possibility of an appeal is deleted because appeals are no longer necessary. However, it remains true that a determination on the adequacy of a showing of interest is not subject to collateral or direct challenge to the RD or the Authority.

Section 2422.10 How do you challenge the validity of a showing of interest?

Section 2422.10(b) is amended to replace “Regional Director” with “FLRA” to account for the Authority potentially challenging the validity of a showing of interest.

Section 2422.10(e) replaces “Regional Director” in all the places it appears with “FLRA” to account for the Authority approving all investigations, and the Authority issuing all decisions and orders in such cases. The possibility of an appeal is deleted because appeals are no longer necessary. However, it remains true that a determination on the validity of a showing of interest is not subject to collateral or direct challenge to the RD or the Authority.

Section 2422.12 What circumstances does the FLRA consider to determine whether your petition is timely filed?

Section 2422.12's heading is amended to replace "Region" with "FLRA" to account for the possibility of the Authority making determinations regarding the timeliness of a petition.

The regulations have always contemplated that the general term "election" may cover a "decertification election," where appropriate. Paragraphs (a), (b), (c), (d), (e), (g), and (h) are amended to reflect where, in the provisions governing the various bars to petitions seeking elections, "election" includes a "decertification election." This matter was raised and settled in *NASA, Goddard Space Flight Center, Wallops Island, Virginia*, 67 FLRA 670, 676-77 (2014) (*Wallops Island*). *See id.* at 677 (referring to "the plain wording of § 2422.12(d)"). Although that decision concerned only the "contract bar," the decision's rationale applies equally to other sections of § 2422.12 with the same "plain wording." *See U.S. Dep't of the Interior, Nat'l Park Serv., Blue Ridge Parkway, N.C.*, 73 FLRA 526, 530-31 (2023) (*Blue Ridge*) (applying *Wallops Island* to the "certification bar"). The FLRA wants to make explicit in these regulations when the term "election," as a matter of plain wording, includes a "decertification election" so as to avoid confusion on this point. However, the clarification that "election" includes a "decertification election" does not preclude the Authority from making case-specific determinations in future representation matters about how *other* regulations that refer to elections apply to decertification elections.

Section 2422.12(b) is further amended to reflect *Blue Ridge*'s holding that "§ 2422.12(b) . . . applies – and has applied – to petitions filed within twelve months

of a consolidation certification, *regardless* of whether the Authority conducted an election before issuing the certification.” *Id.* at 532 (emphasis added) (footnote omitted).

Section 2422.13 How are issues raised by your petition resolved?

Section 2422.13(a) is amended to replace “a representative of the appropriate Regional Office” with “an FLRA representative” to account for the possibility that the Authority may participate in meetings before a representation petition is filed. The choice about which officers or employees will participate in any such meeting lies exclusively with the FLRA.

Section 2422.13(b) is amended to replace “Regional Director” with “FLRA” to account for the possibility of the Authority requiring parties to meet to narrow and resolve issues after a petition is filed.

Section 2422.14 What is the effect of your withdrawal or the FLRA’s dismissal of a petition?

Section 2422.14’s heading is amended to replace “Regional Director” with “FLRA” to account for the Authority dismissing petitions.

Paragraphs (a)(1) and (b) are amended to clarify where “election” includes a “decertification election,” for substantially similar reasons as those discussed in connection with § 2422.12 above.

Elsewhere in § 2422.14, “FLRA” replaces “Regional Director” to account for the change in the internal decision-making structure in the new process for representation matters. However, “Regional Director” is purposely maintained where it first appears in § 2422.14(b) because the FLRA anticipates that parties will always submit withdrawal requests to an RD.

Paragraph (a)(1) is further amended to make clear that the reference to “another petition” plainly means “another petition from you” – that is, the same party that withdraws a timely filed petition, or whose timely filed petition the FLRA dismisses, within the meaning of § 2422.14(a)(1). This procedural clarification reflects that the rule is not intended to allow one party’s withdrawn or dismissed petition to render another party’s petition untimely within the meaning of § 2422.14(a)(1).

Paragraph (a)(1)(ii) is amended to remove the possibility of an appeal as a consequence of the revocation of the current delegation to the RDs in representation matters, and paragraph (a)(1)(iii) is deleted for the same reason.

Section 2422.15 Do parties have a duty to provide information and cooperate after a petition is filed?

Section 2422.15 is amended so that “FLRA” replaces “Regional Director” to account for the change in the internal decision-making structure in the new process for representation matters. However, “Regional Director” is purposely maintained where it appeared (before revisions) for the second time in § 2422.15(b) because

the FLRA anticipates that parties will always submit alphabetized lists of employees to an RD.

Section 2422.16 May parties enter into election agreements, and if they do not, will the FLRA direct an election?

Section 2422.16's heading, and paragraphs (b) and (c), replace "Regional Director" with "FLRA" because the Authority will now decide directions of elections and decide whether to conduct hearings. The Authority will also issue decisions and orders. When the Authority decides a hearing is warranted, the Authority will most often authorize regional office staff to conduct those hearings, although Authority staff may also conduct hearings.

Section 2422.17 What are a Notice of Hearing and prehearing conference?

In § 2422.17, paragraphs (a) and (b) are amended so that "FLRA" replaces "Regional Director" to account for the change in the internal decision-making structure in the new process for representation matters.

Paragraph (d) is deleted because it refers to appeals, which are no longer necessary.

Section 2422.18 What is the purpose of a representation hearing and what procedures are followed?

Section 2422.18(c) is amended so that the "FLRA assigns a Hearing Officer," rather than the "Regional Director appoints a Hearing Officer," to account for the

change in the internal decision-making structure in the new process for representation matters. In § 2422.18(d), the phrase “working hours” is changed to its equivalent term, “business hours,” to be consistent with other uses of “business hours” in this part of the regulations.

Section 2422.19 When is it appropriate for a party to file a motion at a representation hearing?

Section 2422.19 is amended so that “FLRA” replaces “Regional Director” to account for the change in the internal decision-making structure in the new process for representation matters.

In § 2422.19(a), the sentence “The Regional Director or Hearing Officer may treat challenges and other filings referenced in other sections of this subpart as a motion” is deleted because regulatory authorization is not procedurally required to treat challenges or other filings as motions, and the provision already places full discretion for this determination with the FLRA. This deletion should not change the way hearings are conducted.

In § 2422.19(b), the sentence “The Regional Director may rule on the motion or refer the motion to the Hearing Officer” is deleted because the process for deciding motions or referring them to a Hearing Officer need not be specified in regulation, and the provision already places full discretion for this determination with the FLRA. This deletion should not change the way hearings are conducted.

In § 2422.19(c), the sentence “When appropriate, the Hearing Officer will rule on motions made at the hearing or referred to the Hearing Officer by the Regional Director” is deleted because this matter need not be specified in regulation, and the provision already places full discretion for this determination with the FLRA. This deletion should not change the way hearings are conducted.

Section 2422.20 What rights do parties have at a hearing?

Section 2422.20(d) is amended so that “FLRA” replaces “Regional Director” to account for the change in the internal decision-making structure in the new process for representation matters. Section 2422.20(d) is further amended so that parties will now be provided the opportunity to file reply briefs as a matter of course, without requesting permission first. Parties will have ten days from another party’s filing of an initial brief to file a reply brief. In each case, parties will be notified whether to file their briefs with the Hearing Officer, the RD, or the Authority. The requirement to file multiple copies of briefs is eliminated.

Section 2422.21 What are the duties and powers of the Hearing Officer?

Section 2422.21(a) is amended to delete the sentence “The Hearing Officer may make recommendations on the record to the Regional Director.” This matter need not be specified in regulation, as the determination is committed fully to the FLRA’s discretion.

Section 2422.21(b) is amended so that “FLRA” replaces “Regional Director” to account for the change in the internal decision-making structure in the new process for representation matters.

Section 2422.23 What election procedures are followed?

In § 2422.23, paragraph (a); paragraph (b); paragraph (c); paragraph (e)’s last sentence; paragraph (f)’s last sentence; paragraph (g)’s last sentence; and paragraph (h)(5) are amended so that “FLRA” replaces “Regional Director” to account for the change in the internal decision-making structure in the new process for representation matters. However, “Regional Director” is purposely maintained in the following paragraphs for the following reasons: the first two places it appears in § 2422.23(e) because parties are still expected to file withdrawal requests with an RD; the first sentence of § 2422.23(f) because parties are still expected to file disclaimers of interest with an RD; the first sentence of § 2422.23(g) because parties are still expected to file withdrawal requests with an RD; those paragraphs of § 2422.23(h) where it appears (except for (h)(5)) because the FLRA intends for RDs to handle most matters concerning election observers in order to prevent delays to elections. However, “FLRA” has replaced “Regional Director” in § 2422.23(h)(5) because the Authority will decide any formal objections that are filed in accordance with § 2422.23(h)(4). Section 2422.23(h)(5) is further amended to remove the reference to an application for review because appeals are no longer necessary.

Section 2422.24 What are challenged ballots?

Section 2422.24 is amended so that “FLRA” replaces “Regional Director” and “Region” because the Authority may challenge voter eligibility, for good cause, under § 2422.24(a); and because the Authority may be involved in addressing challenged ballots under § 2422.24(b). The Authority will always be involved in addressing determinative challenged ballots.

Section 2422.25 When does the FLRA tally the ballots?

Section 2422.25’s heading, and paragraphs (a) and (b), are amended so that “FLRA” replaces “Regional Director” and “Region” because the Authority may tally ballots or serve the tally of ballots in some elections.

Section 2422.26 How are objections to the election processed?

In § 2422.26, paragraphs (a) and (b) maintain the use of “Regional Director” rather than “FLRA” because the FLRA intends for parties to continue filing election objections and supporting evidence with the regional offices.

Paragraph (a) is amended to eliminate the requirement for filing duplicate copies of objections.

Section 2422.27 How does the FLRA address determinative challenged ballots and objections?

Section 2422.27’s heading, and paragraphs (a) and (c), replace “Regional Director” and “Region” with “FLRA” to account for the Authority approving all

investigations, and taking appropriate action on determinative challenged ballots and objections.

Paragraph (d), concerning consolidated hearings, is deleted. As discussed in greater detail earlier, the FLRA is reexamining the manner in which it adjudicates unfair labor practices (ULPs), and this paragraph concerns hearings about both determinative challenged ballots and ULPs. Whether to provide this type of hearing is committed fully to the FLRA's discretion. If necessary, the FLRA will revisit this topic in future rulemaking, once the reexamination of ULP adjudication is complete. Paragraph (e) is deleted for similar reasons because it concerns filing exceptions to a recommended decision that resolves ULP allegations.

Section 2422.28 When is a runoff election required?

Section 2422.28(a) replaces "Regional Director" with "FLRA" to account for the Authority ruling on all objections to elections and determinative challenged ballots.

Section 2422.29 How does the FLRA address an inconclusive election?

Section 2422.29's heading – and paragraphs (a)(4), (b), (c), and (d) – replace "Regional Director" and "Region" with "FLRA" to account for the Authority's involvement in elections and the certification of results.

Section 2422.30 When does the FLRA investigate a petition, issue a Notice of Hearing, take action, and issue a Decision and Order?

Section 2422.30's heading – and paragraphs (a), (b), and (c) – replace “Regional Director” with “FLRA” because the Authority will approve all investigations and hearings, as well as direct all elections, approve all election agreements, and issue all decisions and orders, in furtherance of its responsibilities under § 7105(a)(2) of the Statute.

Paragraphs (d) and (e) are deleted because they concern appeals, which are no longer necessary. The substance of paragraphs (d) and (e) is being transferred to the new § 2422.35, which will address how the new delegation of authority for representation proceedings applies when the Authority lacks a quorum. The specifics of those transferred provisions will be discussed in the analysis of § 2422.35 below.

Section 2422.31 [Reserved]

Section 2422.31 is currently titled “When do you file an application for review of a Regional Director Decision and Order?” Because applications for review are no longer necessary, the heading and text of this section are being deleted, and the section is reserved. However, the substance of many of this section's provisions are being transferred to the new § 2422.35, which will address how the new delegation of authority for representation proceedings applies when the Authority lacks a quorum. The specifics of those transferred provisions will be discussed in the analysis of § 2422.35 below.

Section 2422.32 When does the FLRA issue a certification or a revocation of certification?

Section 2422.32's heading, and paragraphs (a) and (b), replace "Regional Director" and "Region" with "FLRA" because the Authority will be taking appropriate action on all certifications, addressing election objections and determinative challenged ballots, issuing decisions and orders, and revoking recognitions or certifications.

Paragraph (a)(2) is further amended to delete certain wording because RDs will no longer be issuing decisions and orders that may "become the action of the Authority."

Paragraph (b)(2) is further amended to make explicit that the FLRA will not revoke a recognition or certification due to a substantial change in the character and scope of a unit that renders the unit no longer appropriate, unless a party first files a petition that gives rise to a representation proceeding concerning that unit. This amendment merely codifies existing procedural practice in the regulation.

Section 2422.33 Relief under part 2423 of this chapter.

Section 2422.33 is amended to remove the reference to consolidated hearings, for the same reasons stated earlier in connection with § 2422.27(d).

Section 2422.34 What are the parties' rights and obligations when a representation proceeding is pending?

Section 2422.34 is amended to clarify its operation and reformat certain citations.

The existing wording of § 2422.34(a) is amended, and redesignated as § 2422.34(a)(1), to make explicit that the reference to the period “when a representation proceeding is pending” means when such a proceeding is pending “before the FLRA.” This amendment makes explicit that the section does not apply when a representation matter has been appealed to court, or raised in any other forum over which the FLRA lacks jurisdiction. Further, the newly designated § 2422.34(a)(1) is amended so that it is subject to the clarification that appears in newly created § 2422.34(a)(2).

Section 2422.34(a)(2) makes explicit that the principles set forth in 5 CFR 2429.17 – concerning motions for reconsideration – apply to the operation of § 2422.34. Thus, the filing of a motion for reconsideration or stay does not relieve the parties of their obligations to comply with a final decision or order of the Authority, unless so ordered by the Authority. For example, § 2422.34 does not require parties to maintain existing recognitions, follow the terms and conditions of existing collective-bargaining agreements, or fulfill other representational and bargaining responsibilities, when a final decision or order of the Authority permits or directs the parties to do otherwise – even when a party files a motion for reconsideration or stay of that final decision or order. In addition, this amendment makes explicit that, if a final decision or order of the Authority issues, or directs the issuance of, a certification, then the parties are required to act consistent with

that certification, even if a party filed a motion for reconsideration or stay of the final decision or order.

Section 2422.34(b) is amended to change citation formatting. The statutory cites in § 2422.34(b) are being rewritten as “3 U.S.C. 431(d)(2), and 5 U.S.C. 7103(a)(2), 7112(b), and 7112(c).” However, these are the same cites that appeared before, in a different format.

Section 2422.35 How do representation proceedings change when the Authority lacks a quorum?

This newly created section addresses how the FLRA’s new delegation of authority for processing representation matters will apply in proceedings that arise when the Authority lacks a quorum. The Authority lacks a quorum when it has one or zero Members. *See* 5 U.S.C. 7104(a) (“The Federal Labor Relations Authority is composed of three members”), (d) (“A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.”). The FLRA has determined that, in order to avoid delay in the processing of representation matters when the Authority lacks a quorum, under such special and temporary circumstances, RDs are delegated the power and responsibility to process representation matters under 5 U.S.C. 7105(e)(1). But parties involved in representation matters that arise when the Authority lacks a quorum will have the right to file an appeal of an RD’s action under 5 U.S.C. 7105(f). That appeal can be addressed only when an Authority quorum is restored, however. Almost all of the provisions of this section closely resemble the

regulations that govern the current two-layered structure of RD initial decisions and potential Authority review.

Section 2422.35(a) explains that the section applies to representation matters that arise when the Authority lacks a quorum, and it explains that the Authority lacks a quorum when it has one or zero Members. Further, paragraph (a) explains that the section is intended to operate in a manner consistent with the newly adopted section I.C. of Appendix B to 5 CFR Chapter IV. That appendix is titled, “Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the Federal Labor Relations Authority,” and newly adopted section I.C. concerns case handling in representation matters that arise when the Authority lacks a quorum.

Section 2422.35(b) replaces § 2422.14(a) in representation matters that arise when the Authority lacks a quorum. Note that § 2422.14(b) and (c) will still apply to representation matters that arise when the Authority lacks a quorum.

Section 2422.35(b)(2) explains the circumstances under which the withdrawal or dismissal of a petition less than sixty days before a contract expiration will render a later filed petition untimely, and paragraphs (b)(2)(i) through (b)(2)(iv) provide the four possible actions that could trigger the running of the ninety-day period of untimeliness discussed in (b)(2). Unlike the actions described in § 2422.14(a)(1), those set forth in § 2422.35(b)(2) account for the possibility of appeals because appeals will be available for representation matters that arise when the Authority

lacks a quorum. Thus, the circumstances described in § 2422.35(b)(2) are similar to those described in § 2422.14(a)(1)'s procedural rule, but the circumstances in § 2422.35(b)(2) are adapted to a no-quorum situation.

Section 2422.35(c) is intended to have the same effect as current § 2422.17(d) – which is being deleted.

Section 2422.35(d) is intended to have the same effect as current § 2422.30(d) – which is being deleted.

Section 2422.35(e) is intended to have the same effect as current § 2422.30(e) – which is being deleted. But the FLRA has determined, as a matter of procedure, that the first sentence – providing that “all material submitted to, and considered by, the Regional Director during an investigation becomes part of the record” – will not be limited to cases “when there has not been a hearing,” as it was limited in current § 2422.30(e). The introductory description has been changed from “Contents of the Record” to “Contents of the record for appeal” for clarity.

Section 2422.35(f) is intended to have the same effect as current § 2422.31(a) – which is being deleted.

Section 2422.35(g) is intended to have the same effect as current § 2422.31(b) – which is being deleted. However, the introductory description has been changed from “Contents” to “Contents of the Application for Review” for clarity. Note

that, just as current § 2422.31(b) does, § 2422.35(g) will prohibit an application from “rais[ing] any issue or rely[ing] on any facts not timely presented to the Hearing Officer or Regional Director.”

Section 2422.35(h) is intended to have the same effect as current § 2422.31(c) – which is being deleted.

With one exception, § 2422.35(i) (concerning oppositions to applications to review) is intended to have the same effect as current § 2422.31(d) – which is being deleted. The exception is that the FLRA is adding a new procedural prohibition to § 2422.35(i) that does not appear in current § 2422.31(d). Under § 2422.35(i), an opposition “may not raise any issue or rely on any facts not timely presented to the Hearing Officer or Regional Director.” This prohibition is intended to mirror a restriction that applies to applications for review. The effect of this prohibition is currently achieved through the application of 5 CFR 2429.5 to oppositions, but as will be discussed later in connection with that section, the FLRA is revising § 2429.5 so that it will no longer apply to matters not previously presented to a Hearing Officer or Regional Director. Thus, as applied to oppositions, the FLRA is relocating this prohibition from § 2429.5 to § 2422.35(i).

Section 2422.35(j) is intended to have the same effect as current § 2422.31(e) – which is being deleted – but two clarifications are provided. In the first clarification, § 2422.35(j)(2), which is modeled after current § 2422.31(e)(2), states that the sixty-day period during which the Authority must undertake to grant

review of an RD's decision and order – in order to prevent the RD's action from becoming the action of the Authority by operation of law – runs only while the Authority has a quorum. *See FDIC*, 68 FLRA at 262 (finding that the Authority has sixty days while having a quorum to “undertake to grant review of [an] RD's decision,” or else “the RD's decision bec[o]me[s] ‘the action of the Authority’” (quoting 5 U.S.C. 7105(f))). In the second clarification, § 2422.35(j)(3), which is modeled after current § 2422.31(e)(3), explains that when an application for review is filed while the Authority lacks a quorum, the Authority cannot resolve the application for review until it has a quorum.

Section 2422.35(k) is intended to have the same effect as current § 2422.31(f) – which is being deleted – but one clarification is adopted. For clarity, whereas § 2422.31(f)'s second sentence says, “Neither filing nor granting an application for review will stay any action ordered by the Regional Director unless specifically ordered by the Authority,” § 2422.35(k)'s second sentence says, “Neither a party filing, nor the Authority granting, an application for review will stay any action ordered by the Regional Director unless specifically ordered by the Authority.”

Section 2422.35(l) is intended to have the same effect as current § 2422.31(g) – which is being deleted – but one additional procedural requirement is mentioned. The procedural requirement is that a party filing a brief under § 2422.35(l) “must serve a copy on the Regional Director and all other parties, and must also file a statement of service with the Authority.” The same procedural requirement is

mentioned in § 2422.35(f) concerning filing an application for review, and in § 2422.35(i) concerning filing an opposition.

Section 2422.35(m) explains that the provisions governing the service and processing of papers in § 2429.12(a), (b), and (c) will apply to RDs' decisions and orders in representation matters that arise when the Authority lacks a quorum. As will be discussed later in connection with § 2429.12, the FLRA is revising that section so that it will no longer explicitly refer to RDs' decisions and orders. However, through the operation of § 2422.35(m), § 2429.12(a), (b), and (c) will apply to RDs' decisions and orders in representation matters that arise when the Authority lacks a quorum.

Section 2422.35(n) replaces § 2422.32(a) in representation matters that arise when the Authority lacks a quorum. Note that § 2422.32(b) will still apply to representation matters that arise when the Authority lacks a quorum.

Section 2422.35(n)(1) is intended to have the same effect as current § 2422.32(a)(1). Within § 2422.35, paragraphs (n)(2) and (3) are intended to have the same effect as similar wording in current § 2422.32(a)(2), except that current § 2422.32(a)(2)'s reference to 5 CFR 2422.31(e) is replaced with a reference to new section § 2422.35(j). Because current § 2422.32(a)(2) describes two different circumstances, those circumstances were divided into two new paragraphs: § 2422.35(n)(2) and (3).

PART 2426

Section 2426.2 Requests; petition and procedures for determination of eligibility for national consultation rights.

Section 2426.2(b) currently says that consultation-rights issues will be referred “to the Authority” for determination. The phrase “to the Authority” is deleted because, in instances where the Authority lacks a quorum, this determination will be made in the first instance by an RD, just as occurs under the current process. However, in instances where the Authority has a quorum, the Authority will make this determination under the new process.

Section 2426.2(b)(2) changes “Authority” to “FLRA” to conform to the new definition of “FLRA” added in § 2421.23.

Paragraphs (b)(2)(i), (b)(2)(iv), and (b)(2)(v) are updated to require the petitioner to provide email addresses.

Section 2426.2(b)(3)(ii) is amended to eliminate the need to file multiple copies.

Section 2426.2(b)(3)(vii) changes “Regional Director” to “FLRA” to account for the Authority approving all investigations, issuing all decisions and orders, and determining whether hearings are warranted. The paragraph is further amended to delete the reference to appeals because appeals are no longer necessary. The final sentence of (b)(3)(vii) is further amended to correct the citations to other

regulations in the subchapter because those citations have been incorrect since revised representation regulations took effect in 1996.

Section 2426.12 Requests; petition and procedures for determination of eligibility for consultation rights on Government-wide rules or regulations.

Section 2426.12(b) currently says that consultation-rights issues will be referred “to the Authority” for determination. The phrase “to the Authority” is deleted because, in instances when the Authority lacks a quorum, this determination will be made in the first instance by an RD, just as occurs under the current process. However, in instances where the Authority has a quorum, the Authority will make this determination under the new process.

Section 2426.12(b)(2) changes “Authority” to “FLRA” to conform to the new definition of “FLRA” added in § 2421.23.

Paragraphs (b)(2)(i), (b)(2)(iv), and (b)(2)(v) are updated to require the petitioner to provide email addresses.

Section 2426.12(b)(3)(ii) is amended to eliminate the need for multiple copies.

Section 2426.12(b)(3)(vii) changes “Regional Director” to “FLRA” to account for the Authority approving all investigations, issuing all decisions and orders, and determining whether hearings are warranted. The paragraph is further amended to delete the reference to appeals because appeals are no longer necessary. The final

sentence of (b)(3)(vii) is further amended to correct the citations to other regulations in the subchapter because those citations have been incorrect since revised representation regulations took effect in 1996.

Subpart C—Consultation Rights when the Authority Lacks a Quorum

Section 2426.21 Changes when the Authority lacks a quorum.

This newly created section, within a newly created subpart, addresses how the FLRA's new delegation of authority for processing representation matters will apply in proceedings that arise when the Authority lacks a quorum, but this section is specific to consultation-rights cases. The Authority lacks a quorum when it has one or zero Members. The FLRA has determined that, in order to avoid delay in the processing of representation matters when the Authority lacks a quorum, under such special and temporary circumstances, RDs are delegated the power and responsibility to process representation matters under 5 U.S.C. 7105(e)(1). But parties involved in representation matters that arise when the Authority lacks a quorum will have the right to file an appeal of an RD's action under 5 U.S.C. 7105(f). That appeal can be addressed only when an Authority quorum is restored, however. Almost all of the provisions of this section closely resemble the regulations that govern the current two-layered structure of RD initial decisions and potential Authority review.

Section 2426.21(a) explains that the section applies to representation matters that arise when the Authority lacks a quorum, and it explains that the Authority lacks a quorum when it has one or zero Members. Further, paragraph (a) explains that the

section is intended to operate in a manner consistent with the newly adopted section I.C. of Appendix B to 5 CFR Chapter IV. That appendix is titled, “Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the Federal Labor Relations Authority,” and newly adopted section I.C. concerns case handling in representation matters that arise when the Authority lacks a quorum.

Section 2426.21(b) replaces current § 2426.2(b)(3)(vii) in representation matters that arise when the Authority lacks a quorum. Note that the remaining paragraphs of § 2426.2(b), as well as § 2426.2(a), will still apply to representation matters that arise when the Authority lacks a quorum.

Further, § 2426.21(b) is intended to have the same effect as current § 2426.2(b)(3)(vii) (before the revisions discussed in this document). However, § 2426.21(b) changes citations to other regulations in the subchapter because the relevant provisions are being relocated as part of this interim final rule, or because the citations currently in § 2426.2(b)(3)(vii) have been incorrect since revised representation regulations took effect in 1996.

Section 2426.21(c) is intended to have the same effect as current § 2426.12(b)(3)(vii) (before the revisions discussed in this document). However, § 2426.21(c) changes citations to other regulations in the subchapter because the relevant provisions are being relocated as part of this interim final rule, or because

the citations currently in § 2426.12(b)(3)(vii) have been incorrect since revised representation regulations took effect in 1996.

PART 2429

Section 2429.2 Transfer and consolidation of cases.

Section 2429.2 replaces “Regional Director” with “the FLRA” to allow for the possibility that the Authority will be consolidating or transferring cases.

Section 2429.5 Matters not previously presented; official notice.

Section 2429.5 is amended so that it no longer applies to matters not previously presented to a “Regional Director” or “Hearing Officer.” This general regulation is not needed to enforce its prohibitions in representation matters because the same prohibitions have been incorporated into the more-specific regulations that govern applications for review and oppositions (in representation matters that arise when the Authority lacks a quorum) – new § 2422.35(g) and (i), respectively.

Section 2429.7 Subpoenas.

Within § 2429.7, paragraphs (c) and (e)(1) are amended to make explicit that those procedural provisions concerning subpoenas in representation matters arising under part 2422 also apply to representation matters arising under part 2426.

Section 2429.12 Service of process and papers by the Authority.

Section 2429.12(a) is amended to remove a reference to “decisions and orders of Regional Directors” because the Authority will issue decisions and orders.

However, as discussed earlier in connection with new § 2422.35(m), § 2422.35(m) makes § 2429.12(a), (b), and (c) applicable to RDs' decisions and orders in representation matters that arise when the Authority lacks a quorum.

Section 2429.22 Additional time for filing with the FLRA if you are filing in response to a document that has been served on you by first-class mail or commercial delivery.

Section 2429.22(c) is amended to change the citation in “applications for review filed under 5 CFR 2422.31” so that the citation now refers to “applications for review filed under 5 CFR 2422.35.” New § 2422.35 will contain the provisions governing applications for review in representation matters that arise when the Authority lacks a quorum.

Section 2429.24 Place and method of filing; acknowledgement.

Within § 2429.24, paragraphs (f)(1) and (2) are amended so that their citations refer to the correct paragraphs after the changes in this document take effect.

Paragraphs (f)(7) and (9) change “Agency statement” and “Agency replies” to “Agencies’ statements” and “Agencies’ replies” for grammatical correctness.

III. Procedural Issues and Regulatory Review

The FLRA finds that this interim final rule is not a substantive rule. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979) (citing 5 U.S.C. 553(b), (d)) (stating that a substantive or legislative rule is one that “affect[s] individual rights or

obligations” (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (internal quotations marks omitted)). The FLRA finds that the revisions in this interim final rule are excepted from 5 U.S.C. 553’s requirements for notice and comment as “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” 5 U.S.C. 553(b)(A), or because “good cause” applies, *id.* 553(b)(B). The revisions necessary to reflect a changed delegation of authority to perform defined duties within the FLRA are rules of “agency organization.” *Id.* 553(b)(A). Similarly, the revisions that alter the manner in which parties present their positions to the FLRA are rules of “agency . . . procedure.” *Id.* Further, § 553 provides an exception from notice and comment if an agency finds good cause that notice and comment are “unnecessary.” *Id.* 553(b)(B). The FLRA has determined that certain revisions are merely minor or technical changes, and “good cause” for an exception under § 553(b)(B) exists. Such revisions primarily correct inadvertent errors and omissions, and make minor wording changes to improve clarity and consistency. These technical revisions do not impose any new material requirements or increase compliance obligations.

Nevertheless, the FLRA will accept comments on this interim final rule.

Executive Order 12,866

Pursuant to E.O. 12,866 (“Regulatory Planning and Review”), as amended by E.O. 14,215, a determination must be made whether a regulatory action is significant and therefore subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the Executive Order.

E.O. 13,563 (“Improving Regulation and Regulatory Review”) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in E.O. 12,866.

This interim final rule was drafted and reviewed in accordance with E.O. 12,866 and E.O. 13,563. OMB has determined that this interim final rule is not a “significant regulatory action” as defined in section 3(f)(1) of E.O. 12,866. This interim final rule will reduce the burden on parties to brief issues twice before obtaining a decision from the Authority and reduce prior limitations on parties seeking review. Moreover, the majority of this interim final rule deals with “agency organization, management, or personnel matters” and, therefore, E.O. 12,866 would not apply.

E.O. 14,192 (“Unleashing Prosperity Through Deregulation”) requires that any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least 10 prior regulations. This interim final rule is expected to be a deregulatory action for purposes of E.O. 14,192. This interim final rule is also not significant under E.O. 12,866.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Chairman of the FLRA has determined that this interim final rule will not have a

significant impact on a substantial number of small entities, because this interim final rule applies only to federal agencies, federal employees, and labor organizations representing those employees.

Executive Order 13,132, Federalism

The FLRA is an independent regulatory agency, and as such, is not subject to the requirements of E.O. 13,132.

This interim final rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with E.O. 13,132, this interim final rule does not have sufficient federalism implications to warrant preparation of a federalism assessment.

Executive Order 12,988, Civil Justice Reform

This interim final rule meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12,988.

Executive Order 13,175, Consultation and Coordination With Indian Tribal Governments

This interim final rule does not have tribal implications under E.O. 13,175, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the

distribution of power and responsibilities between the federal government and Indian tribes.

Executive Order 14,294, Overcriminalization of Federal Regulations

E.O. 14,294 requires agencies promulgating regulations with criminal regulatory offenses potentially subject to criminal enforcement to explicitly describe the conduct subject to criminal enforcement, the authorizing statutes, and the mens rea standard applicable to each element of those offenses. This interim final rule does not impose a criminal regulatory penalty and is thus exempt from E.O. 14,924's requirements.

Unfunded Mandates Reform Act of 1995

This interim final rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This interim final rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United

States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The amended regulations contain no additional information collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, et seq.

List of Subjects

5 CFR Part 2421

Federal employees, Labor management relations, Administrative practice and procedure, Meaning of Terms as Used in This Subchapter, Federal Labor Relations Authority.

5 CFR Part 2422

Federal employees, Labor management relations, Administrative practice and procedure, Representation Proceedings, Federal Labor Relations Authority.

5 CFR Part 2426

Federal employees, Labor management relations, Administrative practice and procedure, National Consultation Rights and Consultation Rights on Government-wide Rules or Regulations, Federal Labor Relations Authority.

5 CFR Part 2429

Federal employees, Labor management relations, Administrative practice and procedure, Miscellaneous and General Requirements, Federal Labor Relations Authority.

For the reasons stated in the preamble, the Federal Labor Relations Authority amends 5 CFR parts 2421, 2422, 2426, and 2429 as follows:

PART 2421—MEANING OF TERMS AS USED IN THIS SUBCHAPTER

1. The authority citation for part 2421 continues to read as follows:

Authority: 3 U.S.C. 431; 5 U.S.C. 7134.

2. Revise § 2421.6 to read as follows:

§ 2421.6 Regional Director.

Regional Director means the Director of a region of the Authority with geographical boundaries as fixed by the Authority. When used in parts 2422 and 2426 of this subchapter, a *Regional Director* performs duties on behalf of the Authority, consistent with the Authority's assignment of those duties under 5 U.S.C. 7105(d).

3. Revise § 2421.20 to read as follows:

§ 2421.20 Election agreement.

Election agreement means an agreement under part 2422 of this subchapter signed by all the parties, and approved by the FLRA, concerning the details and procedures of a representation election in an appropriate unit.

4. Add § 2421.23 to read as follows:

§ 2421.23 FLRA.

When used in § 2421.20 and in parts 2422 and 2426 of this subchapter, the term *FLRA* means employees or officials of the Authority (including Members of the Authority) or of the Office of the General Counsel (including Regional Directors).

PART 2422—REPRESENTATION PROCEEDINGS

5. The authority citation for part 2422 continues to read as follows:

Authority: 3 U.S.C. 431; 5 U.S.C. 7134.

6. Amend § 2422.3 by revising paragraph (c) to read as follows:

§ 2422.3 What information should you include in your petition?

* * * * *

(c) *Showing of interest supporting a representation petition (defined at 5 CFR 2421.16).* When filing a petition requiring a showing of interest, you must:

- (1) So indicate on the petition form;
- (2) Submit with the petition a showing of interest of not less than thirty percent (30%) of the employees in the unit involved in the petition; and
- (3) Include an alphabetical list of the names constituting the showing of interest.

* * * * *

7. Revise § 2422.4 to read as follows:

§ 2422.4 What service requirements must you meet when filing a petition or other documents?

You must serve every petition, motion, brief, request, challenge, or written objection – as well as all supporting documentation – on all parties affected by issues raised in the filing. But the service should *not* include any of the following: a showing of interest; evidence supporting challenges to the validity of a showing of interest; evidence supporting objections to an election; the names of voters or attendees at an election to effectuate a merger or change in affiliation; or other

evidence that would reveal the identity of an employee engaged in an election proceeding. You must submit a statement of service to the Regional Director.

8. Amend § 2422.5 by revising paragraph (c) to read as follows:

§ 2422.5 Where do you file petitions?

* * * * *

(c) *Date of filing.* When a Regional Director receives a petition, it is deemed filed, subject to the following conditions. A petition received electronically or by facsimile on a business day – even if it is received outside a Region’s business hours – is deemed filed on the day on which it is received (either by the Regional Office fax machine or by the eFiling system), using the local time in the Region where it is filed. A petition received electronically or by facsimile on a non-business day is deemed filed on the next business day after it is received (either by the Regional Office fax machine or by the eFiling system), using the local time in the Region where it is filed. When a Region receives a petition by any other method during its business hours, it is deemed filed that day. But when a Region receives a petition by any other method after the close of the business day, or on a non-business day, it will be deemed filed on the next business day after it is received. The business hours for each of the Regional Offices are set forth at <https://www.flra.gov>.

9. Amend § 2422.6 by revising paragraph (a) to read as follows:

§ 2422.6 How are parties notified of the filing of a petition?

(a) *Notification to parties.* After you file a petition, the Regional Director will notify any labor organization, agency, or activity identified as being affected by issues raised by the petition, that a petition has been filed. The Regional

Director will also make reasonable efforts to identify and notify any other party affected by the issues raised by the petition. However, the Regional Director's reasonable efforts do not relieve you of your own notification and service obligations.

* * * * *

10. Amend § 2422.7 by revising paragraph (a) to read as follows:

§ 2422.7 Will an activity or agency post a notice of filing of a petition?

(a) *Posting notice of petition.* After you file a petition, when appropriate, the FLRA will direct the agency or activity to post copies of a notice to all employees in places where notices are normally posted for the employees affected by issues raised in the petition and/or distribute copies of a notice in a manner by which notices are normally distributed.

* * * * *

11. Amend § 2422.9 by revising paragraph (b) to read as follows:

§ 2422.9 How is the adequacy of a showing of interest determined?

* * * * *

(b) *FLRA investigation of showing of interest and Decision and Order.* The FLRA will conduct an investigation if deemed appropriate. An FLRA determination that the showing of interest is adequate is not subject to collateral or direct attack. If the FLRA determines that a showing of interest is inadequate, then the FLRA will issue a Decision and Order dismissing the petition, or denying the request to intervene.

12. Amend § 2422.10 by revising paragraphs (b) and (e) to read as follows:

§ 2422.10 How do you challenge the validity of a showing of interest?

* * * * *

(b) *Validity challenge.* The FLRA or any party may challenge the validity of a showing of interest.

* * * * *

(e) *FLRA investigation and Decision and Order.* The FLRA will conduct an investigation if deemed appropriate. An FLRA determination that a showing of interest is valid is not subject to collateral or direct attack. If the FLRA finds that the showing of interest is not valid, the FLRA will issue a Decision and Order dismissing the petition, or denying the request to intervene.

13. Amend § 2422.12 by revising the section heading and paragraphs (a) through (e), (g), and (h) to read as follows:

§ 2422.12 What circumstances does the FLRA consider to determine whether your petition is timely filed?

(a) *Election bar.* Where there is no certified exclusive representative, a petition seeking an election will not be considered timely if filed within twelve (12) months of a valid election, including a decertification election, involving the same unit or a subdivision of the same unit.

(b) *Certification bar.* Where there is a certified exclusive representative of employees, a petition seeking an election, including a decertification election, will not be considered timely if filed within twelve (12) months after the certification – with or without an election – of the exclusive representative of the employees in an appropriate unit. If a collective bargaining agreement covering the claimed unit is pending agency head review under 5 U.S.C. 7114(c) or is in effect, paragraphs (c), (d), or (e) of this section apply.

(c) *Bar during 5 U.S.C. 7114(c) agency head review.* A petition seeking an election, including a decertification election, will not be considered timely if filed during the period of agency head review under 5 U.S.C. 7114(c). This bar expires upon either the passage of thirty (30) days absent agency head action, or upon the date of any timely agency head action.

(d) *Contract bar where the contract is for three (3) years or less.* Where a collective bargaining agreement is in effect covering the claimed unit and has a term of three (3) years or less from the date it became effective, a petition seeking an election, including a decertification election, will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days before the expiration of the agreement.

(e) *Contract bar where the contract is for more than three (3) years.* Where a collective bargaining agreement is in effect covering the claimed unit and has a term of more than three (3) years from the date on which it became effective, a petition seeking an election, including a decertification election, will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days before the expiration of the initial three (3) year period, and any time after the expiration of the initial three (3) year period.

* * * * *

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

(h) *Contract requirements.* Collective bargaining agreements, including agreements that go into effect under 5 U.S.C. 7114(c) and those that automatically renew without further action by the parties, are not a bar to a petition seeking an election, including a decertification election, under this section unless a clear effective date, renewal date where applicable, duration, and termination date are ascertainable from the agreement and relevant accompanying documentation.

14. Revise § 2422.13 to read as follows:

§ 2422.13 How are issues raised by your petition resolved?

(a) *Meetings before filing a representation petition.* All parties affected by the representation issues that may be raised in a petition are encouraged to meet before the filing of the petition to discuss their interests and narrow and resolve the issues. If requested by all parties, an FLRA representative will participate in these meetings.

(b) *Meetings to narrow and resolve the issues after the petition is filed.* The FLRA may require all affected parties to meet to narrow and resolve the issues raised in the petition.

15. Amend § 2422.14 by revising the section heading and paragraphs (a) and (b) to read as follows:

§ 2422.14 What is the effect of your withdrawal or the FLRA's dismissal of a petition?

(a) *Withdrawal/dismissal less than sixty (60) days before contract expiration.* (1) If you withdraw a timely filed petition seeking an election, including a decertification election, or the FLRA dismisses the petition less than sixty (60) days before the existing agreement between the incumbent exclusive

representative and the agency or activity expires, or any time after the agreement expires, another petition from you that seeks an election will not be considered timely if filed within a ninety (90) day period beginning with either:

- (i) The date on which the FLRA approves the withdrawal; or
- (ii) The date on which the FLRA dismisses the petition.

(2) Other pending petitions that have been timely filed under this part will continue to be processed.

(b) *Withdrawal by petitioner.* If you submit a withdrawal request for a petition seeking an election, including a decertification election, that the Regional Director receives after the Notice of Hearing issues or after approval of an election agreement, whichever occurs first, you will be barred from filing another petition seeking an election for the same unit or any subdivision of the unit for six (6) months from the date on which the FLRA approves the withdrawal.

* * * * *

16. Revise § 2422.15 to read as follows:

§ 2422.15 Do parties have a duty to provide information and cooperate after a petition is filed?

(a) *Relevant information.* After you file a petition, all parties must, upon request of the FLRA, provide the FLRA and serve all parties affected by issues raised in the petition with information concerning parties, issues, and agreements raised in or affected by the petition.

(b) *Inclusions and exclusions.* After you file a petition seeking an election, the FLRA may direct the agency or activity to provide the Regional Director and all parties affected by issues raised in the petition with a current alphabetized list

of employees and job classifications included in and/or excluded from the existing or claimed unit affected by issues raised in the petition.

(c) *Cooperation.* All parties are required to cooperate in every aspect of the representation process. This obligation includes cooperating fully with the FLRA, submitting all required and requested information, and participating in prehearing conferences and hearings. The FLRA may take appropriate action, including dismissal of the petition or denial of intervention, if parties fail to cooperate in the representation process.

17. Amend § 2422.16 by revising the section heading and paragraphs (b) and (c) to read as follows:

§ 2422.16 May parties enter into election agreements, and if they do not, will the FLRA direct an election?

* * * * *

(b) *FLRA directed election.* If the parties are unable to agree on procedural matters, specifically, the eligibility period, method of election, dates, hours, or locations of the election, the FLRA will decide election procedures and issue a Direction of Election, without prejudice to the rights of a party to file objections to the procedural conduct of the election.

(c) *Opportunity for a hearing.* Before directing an election, the FLRA will provide affected parties an opportunity for a hearing on non-procedural matters, and then may:

- (1) Issue a Decision and Order; or
- (2) If there are no questions regarding unit appropriateness, issue a Direction of Election without a Decision and Order.

* * * * *

18. Amend § 2422.17 by revising the section heading and paragraphs (a) and (b), and removing paragraph (d) to read as follows:

§ 2422.17 What are a Notice of Hearing and prehearing conference?

(a) *Purpose of a Notice of Hearing.* The FLRA may issue a Notice of Hearing involving any issues raised in the petition.

(b) *Contents.* The Notice of Hearing will advise affected parties about the hearing. The FLRA will also notify affected parties of the issues raised in the petition and establish a date for the prehearing conference.

* * * * *

19. Amend § 2422.18 by revising paragraphs (c) and (d) to read as follows:

§ 2422.18 What is the purpose of a representation hearing and what procedures are followed?

* * * * *

(c) *Hearing Officer.* The FLRA assigns a Hearing Officer to conduct a hearing. Another Hearing Officer may be substituted for the presiding Hearing Officer at any time.

(d) *Transcript.* An official reporter will make the official transcript of the hearing. Copies of the official transcript may be examined in the appropriate Regional Office during normal business hours. Parties should contact the official hearing reporter to purchase copies of the official transcript.

20. Revise § 2422.19 to read as follows:

§ 2422.19 When is it appropriate for a party to file a motion at a representation hearing?

(a) *Purpose of a motion.* After the FLRA issues a Notice of Hearing in a representation proceeding, a party who seeks a ruling, an order, or relief must do so by filing or raising a motion stating the ruling, order, or relief sought and the grounds in support.

(b) *Prehearing motions.* Parties must file prehearing motions in writing with the FLRA. Any response must be filed with the FLRA within five (5) days after service of the motion.

(c) *Motions made at the hearing.* During the hearing, parties may make oral motions on the record to the Hearing Officer unless required to be in writing. Responses may be oral on the record or in writing, but must be provided before the hearing closes, absent permission of the Hearing Officer.

(d) *Posthearing motions.* Parties must file motions made after the hearing closes in writing with the FLRA. Any response to a posthearing motion must be filed with the FLRA within five (5) days after service of the motion.

21. Amend § 2422.20 by revising paragraph (d) to read as follows:

§ 2422.20 What rights do parties have at a hearing?

* * * * *

(d) *Briefs.* A party will be given an opportunity to file briefs with the FLRA.

(1) A party must file an initial brief with the FLRA within thirty (30) days from the close of the hearing.

(2) Within ten (10) days from a party's filing of an initial brief, any other party may file with the FLRA a reply brief concerning the initial brief.

(3) A request for an extension of time to file a brief must be in writing and must be received by the FLRA no later than five (5) days before the date the brief is due.

22. Revise § 2422.21 to read as follows:

§ 2422.21 What are the duties and powers of the Hearing Officer?

(a) *Duties of the Hearing Officer.* The Hearing Officer receives evidence and inquires fully into the relevant and material facts concerning the matters that are the subject of the hearing.

(b) *Powers of the Hearing Officer.* After the FLRA assigns a case to a Hearing Officer and before the close of the hearing, the Hearing Officer may take any action necessary to schedule, conduct, continue, control, and regulate the hearing, including ruling on motions when appropriate.

23. Amend § 2422.23 by revising paragraphs (a) through (c) and (e) through (h) to read as follows:

§ 2422.23 What election procedures are followed?

(a) *FLRA conducts or supervises election.* The FLRA will decide to either conduct or supervise the election. In supervised elections, agencies will perform all acts as specified in the election agreement or Direction of Election.

(b) *Notice of Election.* Before the election, the activity posts a Notice of Election, prepared by the FLRA. The notice is posted in places where notices to employees are customarily posted and/or distributed in a manner by which notices are normally distributed. The Notice of Election contains the details and procedures of the election, including the appropriate unit; the eligibility period; the

date(s), hour(s), and location(s) of the election; a sample ballot; and the effect of the vote.

(c) *Sample ballot.* The reproduction of any document that claims to be a copy of the official ballot and that suggests either directly or indirectly to employees that the FLRA endorses a particular choice in the election may constitute grounds for setting aside an election if objections are filed under § 2422.26.

* * * * *

(e) *Intervenor withdraws from ballot.* When two or more labor organizations are included as choices in an election, an intervening labor organization may, before the approval of an election agreement or before the Direction of Election, file a written request with the Regional Director to remove its name from the ballot. If the Regional Director does not receive the request before the approval of an election agreement or before the Direction of Election, the intervening labor organization will remain on the ballot, unless the parties and the FLRA agree otherwise.

(f) *Incumbent withdrawal from ballot in an election to decertify an incumbent representative.* When there is no intervening labor organization, an election to decertify an incumbent exclusive representative is not held if the incumbent provides the Regional Director with a written disclaimer of any representational interest in the unit. When there is an intervenor, an election is held if the intervening labor organization proffers a thirty percent (30%) showing of interest within the time period established by the FLRA.

(g) *Petitioner withdraws from ballot in an election.* When there is no intervening labor organization, an election is not held if the petitioner provides the Regional Director with a written request to withdraw the petition. When there is an intervenor, an election is held if the intervening labor organization presents a thirty percent (30%) showing of interest within the time period established by the FLRA.

(h) *Observers.* Subject to the Regional Director's approval, all parties may select representatives to observe at the polling location(s).

(1) A party who wants to name observers must file a written request with specific names with the Regional Director. This request must be filed at least fifteen (15) days before an election. The Regional Director may grant an extension of time to file a request for named observers for good cause where a party requests an extension or on the Regional Director's own motion. The request must name and identify the observers requested.

(2) An agency or activity may use as its observers any employees who are not eligible to vote in the election, except:

(i) Supervisors or management officials;

(ii) Employees who have any official connection with any of the labor organizations involved; or

(iii) Non-employees of the Federal government.

(3) A labor organization may use as its observers any employees eligible to vote in the election, except:

(i) Employees on leave without pay status who are working for the labor organization involved; or

(ii) Employees who hold an elected office in the labor organization.

(4) Within five (5) days after service of the request for observers, any party that objects must file an objection with the Regional Director that states the reasons.

(5) The FLRA's ruling on requests for and objections to observers is final and binding.

24. Revise § 2422.24 to read as follows:

§ 2422.24 What are challenged ballots?

(a) *Filing challenges.* A party or the FLRA may, for good cause, challenge the eligibility of any person to participate in the election.

(b) *Challenged ballot procedure.* An individual whose eligibility to vote is in dispute will be given the opportunity to vote a challenged ballot. If the parties and the FLRA are unable to resolve the challenged ballot(s) before the tally of ballots, then the FLRA will impound and preserve the unresolved challenged ballot(s) until the FLRA makes a determination, if necessary.

25. Amend § 2422.25 by revising the section heading and paragraphs (a) and (b) to read as follows:

§ 2422.25 When does the FLRA tally the ballots?

(a) *Tallying the ballots.* When the election is concluded, the FLRA will tally the ballots.

(b) *Service of the tally.* When the tally is completed, the FLRA will serve the tally of ballots on the parties in accordance with the election agreement or direction of election.

* * * * *

26. Amend § 2422.26 by revising paragraph (a) to read as follows:

§ 2422.26 How are objections to the election processed?

(a) *Filing objections to the election.* Any party may file objections to the procedural conduct of the election or to conduct that may have improperly affected the results of the election. A party must file an objection and the Regional Director must receive it within five (5) days after the tally of ballots has been served. Any objections must be timely regardless of whether the challenged ballots are sufficient in number to affect the results of the election. The objections must be supported by clear and concise reasons.

* * * * *

27. Amend § 2422.27 by revising the section heading and paragraphs (a) and (c), and removing paragraphs (d) and (e) to read as follows:

§ 2422.27 How does the FLRA address determinative challenged ballots and objections?

(a) *Investigation.* The FLRA investigates objections and/or determinative challenged ballots that are sufficient in number to affect the results of the election.

* * * * *

(c) *FLRA action.* After investigation, the FLRA takes appropriate action consistent with § 2422.30.

28. Amend § 2422.28 by revising paragraph (a) to read as follows:

§ 2422.28 When is a runoff election required?

(a) *When a runoff may be held.* A runoff election is required in an election involving at least three (3) choices, one of which is “no union” or “neither,” when no choice receives a majority of the valid ballots cast. However, a runoff may not

be held until the FLRA has ruled on objections to the election and determinative challenged ballots.

* * * * *

29. Revise § 2422.29 to read as follows:

§ 2422.29 How does the FLRA address an inconclusive election?

(a) *Inconclusive elections.* An inconclusive election is one where challenged ballots are not sufficient to affect the outcome of the election and one of the following occurs:

(1) The ballot provides for at least three (3) choices, one of which is “no union” or “neither,” and the votes are equally divided; or

(2) The ballot provides for at least three (3) choices, the choice receiving the highest number of votes does not receive a majority, and at least two other choices receive the next highest and same number of votes; or

(3) When a runoff ballot provides for a choice between two labor organizations and results in the votes being equally divided; or

(4) When the FLRA determines that there have been significant procedural irregularities.

(b) *Eligibility to vote in a rerun election.* The FLRA uses the latest payroll period to determine eligibility to vote in a rerun election.

(c) *Ballot.* If the FLRA determines that the election is inconclusive, then the election will be rerun with all the choices that appeared on the original ballot.

(d) *Number of reruns.* There will be only one rerun of an inconclusive election. If the rerun results in another inconclusive election, then the tally of ballots will show a majority of valid ballots has not been cast for any choice, and

the FLRA will issue a certification of results. If necessary, a runoff may be held when an original election is rerun.

30. Revise § 2422.30 to read as follows:

§ 2422.30 When does the FLRA investigate a petition, issue a Notice of Hearing, take action, and issue a Decision and Order?

(a) *FLRA investigation.* The FLRA will investigate the petition and any other matter as the FLRA deems necessary.

(b) *FLRA Notice of Hearing.* The FLRA will issue a Notice of Hearing to inquire into any matter about which a material issue of fact exists, and any time there is reasonable cause to believe a question exists regarding unit appropriateness.

(c) *FLRA action.* After investigation or hearing, the FLRA can direct an election, or approve an election agreement, or issue a Decision and Order.

§ 2422.31 [Removed and Reserved]

31. Remove and reserve § 2422.31.

32. Revise § 2422.32 to read as follows:

§ 2422.32 When does the FLRA issue a certification or a revocation of certification?

(a) *Certifications.* The FLRA issues an appropriate certification when:

(1) After an election, runoff, or rerun:

(i) No party files an objection or challenged ballots are not determinative;

or

(ii) The FLRA decides and resolves objections and determinative

challenged ballots; or

(2) The FLRA issues a Decision and Order requiring a certification.

(b) *Revocations*. Without prejudice to any rights and obligations that may exist under the Statute, the FLRA revokes a recognition or certification, as appropriate, and provides a written statement of reasons when:

(1) An incumbent exclusive representative files, during a representation proceeding, a disclaimer of any representational interest in the unit; or

(2) A petition is filed and, due to a substantial change in the character and scope of the unit, the unit is no longer appropriate and an election is not warranted.

33. Revise § 2422.33 to read as follows:

§ 2422.33 Relief under part 2423 of this chapter.

Remedial relief that was or could have been obtained as a result of a motion, objection, or challenge filed or raised under this subpart, may not be the basis for similar relief under part 2423 of this chapter.

34. Revise § 2422.34 to read as follows:

§ 2422.34 What are the parties' rights and obligations when a representation proceeding is pending?

(a) *Existing recognitions, agreements, and obligations under the Statute*. (1)

Except for the circumstances described in paragraph (a)(2) of this section, when a representation proceeding is pending before the FLRA, parties must maintain existing recognitions, follow the terms and conditions of existing collective bargaining agreements, and fulfill all other representational and bargaining responsibilities under the Statute.

(2) The filing of a motion for reconsideration or motion for a stay does not relieve parties of their obligations to comply with a final decision or order of the Authority, unless so ordered by the Authority.

(b) *Unit status of individual employees.* A party may take action based on its position regarding the bargaining unit status of individual employees, under 3 U.S.C. 431(d)(2), and 5 U.S.C. 7103(a)(2), 7112(b), and 7112(c), but its actions may be challenged, reviewed, and remedied where appropriate.

35. Add § 2422.35 to read as follows:

§ 2422.35 How do representation proceedings change when the Authority lacks a quorum?

(a) *When the Authority lacks a quorum.* The Authority lacks a quorum when the Authority has one or zero Members. The provisions of this section apply to proceedings that arise when the Authority lacks a quorum, consistent with section I.C. of appendix B to 5 CFR chapter XIV.

(b) *Withdrawal/dismissal of a petition less than sixty (60) days before contract expiration.* (1) Instead of § 2422.14(a), this paragraph (b) applies to proceedings that arise when the Authority lacks a quorum.

(2) If you withdraw a timely filed petition seeking an election, including a decertification election, or the FLRA dismisses the petition less than sixty (60) days before the existing agreement between the incumbent exclusive representative and the agency or activity expires, or any time after the agreement expires, another petition from you that seeks an election will not be considered timely if filed within a ninety (90) day period beginning with either:

(i) The date on which the FLRA approves the withdrawal; or

- (ii) The date on which the Authority dismisses the petition; or
- (iii) The date on which the Regional Director dismisses the petition when the Authority does not receive an application for review; or
- (iv) The date on which the Authority rules on an application for review.

(3) Other pending petitions that have been timely filed under this part will continue to be processed.

(c) *No interlocutory appeal of hearing determination.* No party may file an interlocutory appeal with the Authority concerning a Regional Director's determination of whether to issue a Notice of Hearing.

(d) *Appeal of Regional Director's Decision and Order.* A party may file with the Authority an application for review of a Regional Director's Decision and Order.

(e) *Contents of the record for appeal.* All material submitted to, and considered by, the Regional Director during an investigation becomes part of the record. In addition, when a hearing has been held, the transcript and all material entered in evidence, as well as any posthearing briefs, become part of the record.

(f) *Filing an application for review.* A party must file an application for review with the Authority within sixty (60) days of a Regional Director's Decision and Order. The sixty (60) day time limit under 5 U.S.C. 7105(f) may not be extended or waived. The filing party must serve a copy on the Regional Director and all other parties, and must also file a statement of service with the Authority.

(g) *Contents of the application for review.* An application for review must be sufficient for the Authority to rule on the application without looking at the record. However, the Authority may, in its discretion, examine the record in

evaluating the application. An application must specify the matters and rulings to which exception is taken, include a summary of evidence relating to any issue raised in the application, and cite specific pages in the transcript if a hearing was held. An application may not raise any issue or rely on any facts not timely presented to the Hearing Officer or Regional Director.

(h) *Review.* The Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds:

(1) The decision raises an issue for which there is an absence of precedent;

(2) Established law or policy warrants reconsideration; or,

(3) There is a genuine issue over whether the Regional Director has:

(i) Failed to apply established law;

(ii) Committed a prejudicial procedural error; or

(iii) Committed a clear and prejudicial error concerning a substantial factual matter.

(i) *Opposition.* A party may file with the Authority an opposition to an application for review within ten (10) days after the party is served with the application. An opposition may not raise any issue or rely on any facts not timely presented to the Hearing Officer or Regional Director. The opposing party must serve a copy on the Regional Director and all other parties, and must also file a statement of service with the Authority.

(j) *Regional Director's Decision and Order becomes the Authority's action.*

A Decision and Order of a Regional Director becomes the action of the Authority when:

(1) No party files an application for review with the Authority within sixty (60) days after the date of the Regional Director's Decision and Order; or

(2) A party files a timely application for review with the Authority and, while the Authority has a quorum, the Authority does not undertake to grant review of the Regional Director's Decision and Order within sixty (60) days; or

(3) A party files a timely application for review with the Authority and, after the Authority regains a quorum, the Authority denies an application for review of the Regional Director's Decision and Order.

(k) *Authority grant of review and stay.* The Authority may rule on the issue(s) in an application for review in its order granting the application for review. Neither a party filing, nor the Authority granting, an application for review will stay any action ordered by the Regional Director unless specifically ordered by the Authority.

(l) *Briefs if review is granted.* If the Authority does not rule on the issue(s) in the application for review in its order granting review, the Authority may, in its discretion, give the parties an opportunity to file briefs. The briefs will be limited to the issue(s) referenced in the Authority's order granting review. A party filing such a brief must serve a copy on the Regional Director and all other parties, and must also file a statement of service with the Authority.

(m) *Service of process and Regional Directors' Decisions and Orders.* Decisions and Orders of Regional Directors are subject to the requirements of § 2429.12(a), (b), and (c) of this subchapter.

(n) *Certifications*. Instead of § 2422.32(a), this paragraph (n) applies to proceedings that arise when the Authority lacks a quorum. The Regional Director issues an appropriate certification when:

(1) After an election, runoff, or rerun,

(i) No party files an objection or challenged ballots are not determinative,

or

(ii) The Regional Director decides and resolves objections and determinative challenged ballots; or

(2) The Regional Director issues a Decision and Order requiring a certification, and the Decision and Order becomes the action of the Authority under paragraph (j) of this section; or

(3) The Authority directs the issuance of a certification.

**PART 2426—NATIONAL CONSULTATION RIGHTS AND
CONSULTATION RIGHTS ON GOVERNMENT-WIDE RULES OR
REGULATIONS**

36. The authority citation for part 2426 continues to read as follows:

Authority: 5 U.S.C. 7134.

37. Amend § 2426.2 by revising paragraph (b) to read as follows:

§ 2426.2 Requests; petition and procedures for determination of eligibility for national consultation rights.

* * * * *

(b) Issues relating to a labor organization's eligibility for, or continuation of, national consultation rights shall be referred for determination as follows:

(1) A petition for determination of the eligibility of a labor organization for national consultation rights under criteria set forth in § 2426.1 may be filed by a labor organization.

(2) A petition for determination of eligibility for national consultation rights shall be submitted on a form prescribed by the FLRA and shall set forth the following information:

(i) Name and affiliation, if any, of the petitioner and its address, telephone number, and email address;

(ii) A statement that the petitioner has submitted to the agency or the primary national subdivision and to the Assistant Secretary a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives;

(iii) A declaration by the person signing the petition, under the penalties of the Criminal Code (18 U.S.C. 1001), that its contents are true and correct to the best of such person's knowledge and belief;

(iv) The signature of the petitioner's representative, including such person's title, telephone number, and email address;

(v) The name, address, telephone number, and email address of the agency or primary national subdivision in which the petitioner seeks to obtain or retain national consultation rights, and the persons to contact and their titles, if known;

(vi) A showing that the petitioner holds adequate exclusive recognition as required by § 2426.1; and

(vii) A statement as appropriate:

(A) That such showing has been made to and rejected by the agency or primary national subdivision, together with a statement of the reasons for rejection, if any, offered by that agency or primary national subdivision;

(B) That the agency or primary national subdivision has served notice of its intent to terminate existing national consultation rights, together with a statement of the reasons for termination; or

(C) That the agency or primary national subdivision has failed to respond in writing to a request for national consultation rights made under § 2426.2(a) within fifteen (15) days after the date the request is served on the agency or primary national subdivision.

(3) The following paragraphs (b)(3)(i) through (vii) of this section govern petitions filed under this section:

(i) A petition for determination of eligibility for national consultation rights shall be filed with the Regional Director for the region wherein the headquarters of the agency or the agency's primary national subdivision is located.

(ii) A statement of any other relevant facts and of all correspondence shall be filed.

(iii) Copies of the petition together with the attachments referred to in paragraph (b)(3)(ii) of this section shall be served by the petitioner on all known interested parties, and a written statement of such service shall be filed with the Regional Director.

(iv) A petition shall be filed within thirty (30) days after the service of written notice by the agency or primary national subdivision of its refusal to accord national consultation rights pursuant to a request under § 2426.2(a) or its

intention to terminate existing national consultation rights. If an agency or a primary national subdivision fails to respond in writing to a request for national consultation rights made under § 2426.2(a) within fifteen (15) days after the date the request is served on the agency or primary national subdivision, a petition shall be filed within thirty (30) days after the expiration of such fifteen (15) day period.

(v) If an agency or primary national subdivision wishes to terminate national consultation rights, notice of its intention to do so shall include a statement of its reasons and shall be served not less than thirty (30) days prior to the intended termination date. A labor organization, after receiving such notice, may file a petition within the time period prescribed, and thereby cause to be stayed further action by the agency or primary national subdivision pending disposition of the petition. If no petition has been filed within the provided time period, an agency or primary national subdivision may terminate national consultation rights.

(vi) Within fifteen (15) days after the receipt of a copy of the petition, the agency or primary national subdivision shall file a response thereto with the Regional Director raising any matter which is relevant to the petition.

(vii) The FLRA shall make such investigations as the FLRA deems necessary and thereafter shall issue and serve on the parties a Decision and Order with respect to the eligibility for national consultation rights. The FLRA, if appropriate, may cause a Notice of Hearing to be issued to all interested parties where substantial factual issues exist warranting a hearing. Hearings shall be conducted by a Hearing Officer in accordance with §§ 2422.17 through 2422.22 of

this subchapter, and after the close of the hearing, the FLRA shall issue a Decision and Order in accordance with § 2422.30 of this subchapter.

38. Amend § 2426.12 by revising paragraph (b) to read as follows:

§ 2426.12 Requests; petition and procedures for determination of eligibility for consultation rights on Government-wide rules or regulations.

* * * * *

(b) Issues relating to a labor organization's eligibility for, or continuation of, consultation rights on Government-wide rules or regulations shall be referred for determination as follows:

(1) A petition for determination of the eligibility of a labor organization for consultation rights under criteria set forth in § 2426.11 may be filed by a labor organization.

(2) A petition for determination of eligibility for consultation rights shall be submitted on a form prescribed by the FLRA and shall set forth the following information:

(i) Name and affiliation, if any, of the petitioner and its address, telephone number, and email address;

(ii) A statement that the petitioner has submitted to the agency and to the Assistant Secretary a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives;

(iii) A declaration by the person signing the petition, under the penalties of the Criminal Code (18 U.S.C. 1001), that its contents are true and correct to the best of such person's knowledge and belief;

(iv) The signature of the petitioner's representative, including such person's title, telephone number, and email address;

(v) The name, address, telephone number, and email address of the agency in which the petitioner seeks to obtain or retain consultation rights on Government-wide rules or regulations, and the persons to contact and their titles, if known;

(vi) A showing that the petitioner meets the criteria as required by § 2426.11; and

(vii) A statement, as appropriate:

(A) That such showing has been made to and rejected by the agency, together with a statement of the reasons for rejection, if any, offered by that agency;

(B) That the agency has served notice of its intent to terminate existing consultation rights on Government-wide rules or regulations, together with a statement of the reasons for termination; or

(C) That the agency has failed to respond in writing to a request for consultation rights on Government-wide rules or regulations made under § 2426.12(a) within fifteen (15) days after the date the request is served on the agency.

(3) The following paragraphs (b)(3)(i) through (vii) of this section govern petitions filed under this section:

(i) A petition for determination of eligibility for consultation rights on Government-wide rules or regulations shall be filed with the Regional Director for the region wherein the headquarters of the agency is located.

(ii) A statement of any other relevant facts and of all correspondence shall be filed.

(iii) Copies of the petition together with the attachments referred to in paragraph (b)(3)(ii) of this section shall be served by the petitioner on the agency, and a written statement of such service shall be filed with the Regional Director.

(iv) A petition shall be filed within thirty (30) days after the service of written notice by the agency of its refusal to accord consultation rights on Government-wide rules or regulations pursuant to a request under § 2426.12(a) or its intention to terminate such existing consultation rights. If an agency fails to respond in writing to a request for consultation rights on Government-wide rules or regulations made under § 2426.12(a) within fifteen (15) days after the date the request is served on the agency, a petition shall be filed within thirty (30) days after the expiration of such fifteen (15) day period.

(v) If an agency wishes to terminate consultation rights on Government-wide rules or regulations, notice of its intention to do so shall be served not less than thirty (30) days prior to the intended termination date. A labor organization, after receiving such notice, may file a petition within the time period prescribed, and thereby cause to be stayed further action by the agency pending disposition of the petition. If no petition has been filed within the provided time period, an agency may terminate such consultation rights.

(vi) Within fifteen (15) days after the receipt of a copy of the petition, the agency shall file a response thereto with the Regional Director raising any matter which is relevant to the petition.

(vii) The FLRA shall make such investigations as the FLRA deems necessary and thereafter shall issue and serve on the parties a Decision and Order with respect to the eligibility for consultation rights. The FLRA, if appropriate, may cause a Notice of Hearing to be issued where substantial factual issues exist warranting a hearing. Hearings shall be conducted by a Hearing Officer in accordance with §§ 2422.17 through 2422.22 of this subchapter, and after the close of the hearing, the FLRA shall issue a Decision and Order in accordance with § 2422.30 of this subchapter.

39. Add subpart C, consisting of § 2426.21, to read as follows:

Subpart C—Consultation Rights when the Authority Lacks a Quorum

§ 2426.21 Changes when the Authority lacks a quorum.

(a) The Authority lacks a quorum when the Authority has one or zero Members. The provisions of this section apply to proceedings that arise when the Authority lacks a quorum, consistent with section I.C. of appendix B to 5 CFR chapter XIV.

(b) Instead of § 2426.2(b)(3)(vii), this paragraph (b) applies to proceedings that arise when the Authority lacks a quorum. The Regional Director shall make such investigations as the Regional Director deems necessary and thereafter shall issue and serve on the parties a Decision and Order with respect to the eligibility for national consultation rights that shall be final: *Provided, however*, that an application for review of the Regional Director's Decision and Order may be filed with the Authority in accordance with the procedure set forth in § 2422.35 of this subchapter. A determination by the Regional Director to issue a Notice of Hearing shall not be subject to the filing of an application for review. The Regional

Director, if appropriate, may cause a Notice of Hearing to be issued to all interested parties where substantial factual issues exist warranting a hearing. Hearings shall be conducted by a Hearing Officer in accordance with §§ 2422.17 through 2422.22 of this subchapter, and after the close of the hearing, the Regional Director shall issue a Decision and Order in accordance with § 2422.30 of this subchapter.

(c) Instead of § 2426.12(b)(3)(vii), this paragraph (c) applies to proceedings that arise when the Authority lacks a quorum. The Regional Director shall make such investigations as the Regional Director deems necessary and thereafter shall issue and serve on the parties a Decision and Order with respect to the eligibility for consultation rights that shall be final: *Provided, however*, that an application for review of the Regional Director's Decision and Order may be filed with the Authority in accordance with the procedure set forth in § 2422.35 of this subchapter. A determination by the Regional Director to issue a Notice of Hearing shall not be subject to the filing of an application for review. The Regional Director, if appropriate, may cause a Notice of Hearing to be issued where substantial factual issues exist warranting a hearing. Hearings shall be conducted by a Hearing Officer in accordance with §§ 2422.17 through 2422.22 of this subchapter, and after the close of the hearing, the Regional Director shall issue a Decision and Order in accordance with § 2422.30 of this subchapter.

PART 2429—MISCELLANEOUS AND GENERAL REQUIREMENTS

40. The authority citation for part 2429 continues to read as follows:

Authority: 5 U.S.C. 7134; § 2429.18 also issued under 28 U.S.C. 2112(a).

41. Revise § 2429.2 to read as follows:

§ 2429.2 Transfer and consolidation of cases.

In any matter arising pursuant to parts 2422, 2423, and 2426 of this subchapter, whenever it appears necessary in order to effectuate the purposes of the Federal Service Labor-Management Relations Statute or to avoid unnecessary costs or delay, the FLRA may consolidate cases or may transfer cases to another region, for the purpose of investigation or consolidation with any proceedings which may have been instituted in, or transferred to, such region.

42. Revise § 2429.5 to read as follows:

§ 2429.5 Matters not previously presented; official notice.

The Authority will not consider any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the Administrative Law Judge or arbitrator. The Authority may, however, take official notice of such matters as would be proper.

43. Amend § 2429.7 by revising paragraphs (c) and (e)(1) to read as follows:

§ 2429.7 Subpoenas.

* * * * *

(c) A request for a subpoena by any person, as defined in 5 U.S.C. 7103(a)(1), shall be in writing and filed with the Regional Director, in proceedings arising under parts 2422 and 2426 of this subchapter, or with the Authority, in proceedings arising under parts 2424 and 2425 of this subchapter, not less than 10 days prior to the hearing, or with the appropriate presiding official(s) during the hearing. Requests for subpoenas made less than 10 days prior to the opening of the

hearing shall be granted on sufficient explanation of why the request was not timely filed.

* * * * *

(e)(1) Any person served with a subpoena who does not intend to comply, shall, within 5 days after the date of service of the subpoena upon such person, petition in writing to revoke the subpoena. A copy of any petition to revoke a subpoena shall be served on the party on whose behalf the subpoena was issued. Such petition to revoke, if made prior to the hearing, and a written statement of service, shall be filed with the Regional Director in proceedings arising under parts 2422 and 2426 of this subchapter, and with the Authority, in proceedings arising under parts 2424 and 2425 of this subchapter, for ruling. A petition to revoke a subpoena filed during the hearing, and a written statement of service, shall be filed with the appropriate presiding official(s).

* * * * *

44. Amend § 2429.12 by revising paragraph (a) to read as follows:

§ 2429.12 Service of process and papers by the Authority.

(a) *Methods of service.* Notices of hearings, decisions and recommended orders of Administrative Law Judges, decisions of the Authority, complaints, amended complaints, withdrawals of complaints, written rulings on motions, and all other papers required by this subchapter to be issued by the Authority, the General Counsel, Regional Directors, Hearing Officers, Administrative Law Judges, and Regional Directors when not acting as a party under part 2423 of this subchapter, shall be served personally, by first-class mail, by facsimile transmission, by certified mail, or, as described in the final sentence of this

paragraph (a) with respect to documents issued by the Authority, by electronic mail (“email”). Where facsimile equipment is available, rulings on motions; information pertaining to prehearing disclosure, conferences, orders, or hearing dates and locations; information pertaining to subpoenas; and other similar or time sensitive matters may be served by facsimile transmission. Where a party using the FLRA’s eFiling system has consented to electronic service of documents issued by the Authority in a particular case, the Authority shall serve documents on that party exclusively by email to the email address provided by the party.

* * * * *

45. Amend § 2429.22 by revising paragraph (c) to read as follows:

§ 2429.22 Additional time for filing with the FLRA if you are filing in response to a document that has been served on you by first-class mail or commercial delivery.

* * * * *

(c) Exception for applications for review filed under 5 CFR 2422.35. You do not get an additional 5 days to file an application for review of a Regional Director’s Decision and Order under 5 CFR 2422.35, regardless of the method of service of that Decision and Order.

* * * * *

46. Amend § 2429.24 by revising paragraphs (f)(1), (2), (7), and (9) to read as follows:

§ 2429.24 Place and method of filing; acknowledgement.

* * * * *

(f) * * *

(1) Applications for review under 5 CFR 2422.35(f) through (h);

(2) Oppositions to applications for review under 5 CFR 2422.35(i);

* * * * *

(7) Agencies' statements of position under 5 CFR 2424.24;

* * * * *

(9) Agencies' replies under 5 CFR 2424.26;

* * * * *

By the Authority

Thomas Tso,

Solicitor.

Note: The following will not appear in the *Code of Federal Regulations*.

Dissenting View of Member Anne Wagner:

I support exploring revisions to the Federal Labor Relations Authority's (FLRA's) representation regulations, largely along the lines of those in today's rule (with exceptions noted below). However, I do not agree that we should make revisions using interim final rulemaking. Today's revisions reflect the biggest changes to the FLRA's representation case processing in nearly 43 years. I believe that our stakeholders deserve an opportunity to review and comment on *proposed* regulations, and that we should consider such comments, before we make such sweeping operational changes.

Using interim final rulemaking effectively tells our stakeholders that, although we welcome their comments, we will not necessarily consider them. In my view, this risks generating potentially undue skepticism among our stakeholders, and raising the likelihood of challenges. It also may weaken the end product. Comments on proposed regulations often improve those regulations, including by raising issues that the drafters have not considered. Absent a need for nearly immediate implementation – which is not present here – I believe we should engage in notice-and-comment rulemaking. I note, in this regard, that the draft notice does not contain a detailed description of how representation cases will be processed internally at the FLRA under the new regulations – undoubtedly because we are still in the process of making those determinations. That is another reason not to rush the process.

As for the contents of the rule, in the context of cases that arise when the Authority lacks a quorum (“no-quorum” cases), I am not inclined to continue the current practice of prohibiting parties from raising issues that they did not raise before Regional Directors or Hearing Officers. The revised regulations – correctly, in my view – do not contain such a prohibition in representation cases that are processed when the Authority has a quorum. It thus seems incongruous to me to have such a prohibition in “no-quorum” cases. Therefore, I disagree with the pertinent wording in sections 2422.35(g) (concerning applications for review) and 2422.35(i) (concerning oppositions to such applications).

For the above reasons, I dissent from the majority’s action today.

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