



FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Chapter XIV

Amendment to Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the Federal Labor Relations Authority

AGENCY: Federal Labor Relations Authority.

ACTION: Final rule.

SUMMARY: The Federal Labor Relations Authority (FLRA) amends Appendix B titled “Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the Federal Labor Relations Authority.” The amendment revokes and deletes Appendix B’s current section I.C., which delegates to Regional Directors (RDs) authority to process and determine representation matters. The amendment also adopts a new section I.C., which delegates to RDs authority to process and determine representation matters that arise when the Authority lacks a quorum.

DATES: The effective date of this amendment is [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

SUPPLEMENTARY INFORMATION: The Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. 7101-7135, grants Members of 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 Members 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* 5 U.S.C. 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 also 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.

For the reasons further explained in the interim final rule amending the FLRA’s regulations – which is also published elsewhere in this issue of the

Federal Register– the FLRA finds that the memorandum of delegated authorities and responsibilities to the RDs merits revision.

Accordingly, the FLRA, pursuant to a vote by the Members of the Authority, revokes and deletes the text of section I.C. of Appendix B to 5 CFR Chapter XIV – entitled “Representation cases.” Further, the FLRA adopts a new section I.C. of Appendix B to 5 CFR Chapter XIV that delegates authority and responsibility to RDs only in representation matters that arise when the Authority lacks a quorum. The text of the new section I.C. is set forth later in this notice.

The new section I.C. will be effective on the effective date of the interim final rule – published elsewhere in this issue of the *Federal Register* – amending parts 2421, 2422, 2426, and 2429 of the FLRA’s regulations.

Further, the FLRA is reformatting the title of section III of Appendix B to 5 CFR Chapter XIV – “Personnel.” This reformatting is intended to render the title text bold and italicized so that it mirrors the formatting of all other section titles in the Appendix. Two terms in section III are also updated to reflect the FLRA’s current structure. Specifically, the term “field offices” is changed to “Regional Offices,” and “Office of Administration” is changed to “Office of the Executive Director.” No substantive changes are intended for this section.

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 amendment of an internal delegation deals with “agency organization, management, or personnel matters,” and, therefore, E.O. 12,866 does 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 amendment of an internal delegation is expected to be a deregulatory action for purposes of E.O. 14,192. This amendment of an internal delegation 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 amendment of an internal delegation will not have a significant impact on a substantial number of small entities, because this 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 amendment of an internal delegation 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 amendment of an

internal delegation does not have sufficient federalism implications to warrant preparation of a federalism assessment.

Executive Order 12,988, Civil Justice Reform

This amendment of an internal delegation meets the applicable standard set forth in section 3(a) and (b)(2) of E.O. 12,988.

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

This amendment of an internal delegation 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 amendment of an internal delegation 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 amendment of an internal delegation 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 amendment of an internal delegation 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 internal delegation contains 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 in Appendix B to 5 CFR Chapter XIV

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

For the reasons stated in the preamble, the Federal Labor Relations Authority amends appendix B to 5 CFR chapter XIV as follows:

Appendix B to 5 CFR Chapter XIV—Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the Federal Labor Relations Authority

1. Add an authority citation for appendix B to read follows:

Authority: 3 U.S.C. 431; 5 U.S.C. 7105(d), 7134.

Section I.C. also issued under 5 U.S.C. 7105(e)(1), (f).

2. Amend appendix B by revising sections I.C. and III to read as follows:

Appendix B to 5 CFR Chapter XIV—Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the Federal Labor Relations Authority

I. ***

C. Representation cases. The statutory authority of the Federal Labor Relations Authority to delegate to Regional Directors its authority to process and determine representation matters is set forth in section 7105(e)(1) and (f) of the Statute.

The Authority lacks a quorum when the Authority has one or zero Members. In proceedings that arise when the Authority lacks a quorum, in accordance with section 7105(e)(1) and (f) of the Statute, Regional Directors, who are directed and supervised by the General Counsel as provided by section III of this memorandum, are hereby delegated the authority to determine whether a group of employees is an appropriate unit, to conduct investigations and to provide for hearings, 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.

In proceedings that arise when the Authority lacks a quorum, Regional Directors are authorized and have responsibility to receive and process, in accordance with decisions of the Authority and the rules and regulations of the Authority and the General Counsel, all petitions filed pursuant to sections 7111, 7112(d), 7113, 7115 and 7117(d) of the Statute.

In proceedings that arise when the Authority lacks a quorum, the authority and responsibility of Regional Directors shall extend to all phases of the investigation of petitions through the conclusion of the hearing to be conducted by a Regional Office employee (if a hearing should be necessary to resolve disputed issues), including decisional action by the Regional Director after such investigation or hearing.

In proceedings that arise when the Authority lacks a quorum, Regional Directors also are authorized and have responsibility to direct an election after a hearing pursuant to sections 7111 and 7112(d) of the Statute and to approve consent election agreements in accordance with section 7111(g) of the Statute.

In the event the Authority or a Regional Director directs an election or approves a consent election agreement, the Regional Director is authorized to supervise or conduct the election pursuant to sections 7111 and 7112(d) of the Statute when the Authority lacks a quorum. In such instances, Regional Directors are authorized and have responsibility to determine the validity of determinative challenges and objections to the conduct of the election and other similar matters. This authority and responsibility extends to all phases of the investigation of such

determinative challenges and objections through the conclusion of a hearing to be conducted by a Regional Office employee (if a hearing should be necessary to resolve disputed issues), including decisional action by the Regional Director after such investigation or hearing.

In proceedings that arise when the Authority lacks a quorum, Decisions and Orders of Regional Directors made pursuant to this delegation of authority become the action of the Authority when:

(1) No interested person 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) An interested person 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) An interested person 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.

If no interested person files an application for review with the Authority within sixty (60) days after the date of the Regional Director's Decision and Order; or if an interested person 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 if an interested person 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, then the Regional Director's Decision and Order will become final and binding, and the Regional Director will certify to the parties the results of any election held or issue any clarification of unit, amendment of recognition or certification, determination of eligibility for dues allotment, or certification on consolidation of units as required.

The Authority will undertake to grant review of a Regional Director's Decision and Order upon the timely filing of an application for review only where compelling reasons exist therefor as set forth in the rules and regulations.

Neither an interested person filing, nor the Authority granting, an application for review of a Regional Director's Decision and Order will stay any action ordered by the Regional Director, unless specifically ordered by the Authority. If the Authority grants review, then the Authority may affirm, modify, or reverse any action reviewed.

III. *Personnel*. Under 5 U.S.C. 7105(d), the Authority is authorized to appoint Regional Directors. In order better to ensure the effective exercise of the duties and responsibilities of the General Counsel, the General Counsel is delegated authority to recommend the appointment, transfer, demotion, or discharge of any Regional Director. However, such actions may be taken only with the approval of the Authority. In the event of a vacant Regional Director position, the General Counsel may, without the approval of the Authority, detail personnel as acting Regional Director for a total period of up to 120 days commencing on the day the position becomes vacant. If the position remains vacant for more than 120 days, a

detail must be approved by the Authority. Other details of personnel to act as Regional Director during periods when there is an incumbent in the position shall be accomplished by the General Counsel without the approval of the Authority. The General Counsel shall have authority to direct and supervise the Regional Directors. Under 5 U.S.C. 7104(f)(3), the General Counsel shall have direct authority over, and responsibility for all employees in the Office of the General Counsel and all personnel of the General Counsel in the Regional Offices of the Authority. This includes full and final authority subject to applicable laws and rules, regulations, and procedures of the Office of Personnel Management and the Authority over the selection, retention, transfer, promotion, demotion, discipline, discharge, and in all other respects of such personnel except the detail in the event of a vacancy for a period in excess of 120 days, appointment, transfer, demotion, or discharge of any Regional Director. Further, the establishment, transfer, or elimination of any Regional Office or non-Regional Office duty location may be accomplished only with the approval of the Authority. The Authority will provide such administrative support functions, including personnel management, financial management, and procurement functions, through the Office of the Executive Director of the Authority as are required by the General Counsel to carry out the General Counsel's statutory and prescribed functions.

By the Authority

Thomas Tso,
Solicitor

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

Dissenting View of Member Anne Wagner:

As discussed in my dissent to today's interim final rule completely overhauling the Federal Labor Relations Authority's (FLRA's) representation regulations, I would give the FLRA's stakeholders an opportunity to comment before we modify those regulations. Consequently, I would not revise the existing delegation to the FLRA's Regional Directors in representation matters until we have received and reviewed comments on the regulations. Accordingly, I dissent from today's amendment to Appendix B to 5 CFR Chapter XIV.

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