65 FLRA No. 53

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY
ADMINISTRATION
(Agency)

and

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Labor Organization/Petitioner)

WA-RP-10-0033
WA-RP-10-0036

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DECISION AND ORDER ON REVIEW

November 12, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This case is before the Authority on applications for review filed by the American Federation of Government Employees (AFGE) and the National Treasury Employees Union (NTEU) under § 2422.31 of the Authority's Regulations.[2] The Agency filed responses to AFGE's and NTEU's applications, and AFGE filed a response to NTEU's application. In addition, pursuant to § 2429.9 of the Authority's Regulations, the National Right to Work Legal Defense Foundation (the Foundation) requested, and received, permission to file an amicus curiae brief.[3]

AFGE and NTEU filed petitions under § 7111(b)(1)(A) of the Federal Service Labor-Management Relations Statute (the Statute).[4] AFGE's petition seeks "an election for exclusive recognition" of the Agency's transportation security officers (TSOs). AFGE Petition (Feb. 22, 2010). NTEU's petition "requests that a representation election be held[.]" NTEU Petition (March 17, 2010). The Regional Director (RD) found that the Authority's decision in *United States Department of Homeland Security, Border and Transportation Security Directorate, Transportation Security Administration*, 59 FLRA 423 (2003) (then-Member Pope dissenting) (*TSA*), precluded him from processing the petitions. Accordingly, he dismissed the petitions.

In two separate orders issued following the filing of the applications for review, the Authority granted the respective applications and deferred action on their merits. In the second order, the Authority also consolidated the cases.

For the reasons that follow, we reverse the RD's Decision and Order dismissing the petitions and order the RD to take appropriate action consistent with this decision.

II. Background

In November of 2001, Congress passed the Aviation and Transportation Security Act (ATSA), which created the Agency. As relevant here, in 49 U.S.C. § 44935 Note, Congress stated:

> Notwithstanding any other provision of law, the Under Secretary of Transportation for

1. Member Beck's dissenting opinion is set forth at the end of this decision.

2. Section 2422.31 of the Authority's Regulations provides, in pertinent part:

> (c) *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[.]

3. Section 2429.9 of the Authority's Regulations provides, in pertinent part: "Upon petition of an interested person, . . . and as the Authority deems appropriate, the Authority may grant permission for the presentation of written . . . argument at any stage of the proceedings by an amicus curiae[.]"

4. The pertinent wording of § 7111 is set forth *infra*.

> Security [Under Secretary] may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under section 44901 of title 49, United States Code. The Under Secretary shall establish levels of compensation and other benefits for individuals so employed.

Pursuant to this statutory authority, in 2003, the Under Secretary issued a memorandum (the Memo) that states, in pertinent part:

> I hereby determine that individuals carrying out the security screening function under section 44901 of Title 49, United States Code, in light of their critical national security responsibilities, shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization.

TSA, 59 FLRA at 424.

Subsequently, AFGE filed petitions seeking an election to determine whether the TSOs wished to be represented by AFGE for the purpose of collective bargaining. In *TSA*, 59 FLRA 423, the Authority found that § 7111 of the Statute permits employees to select an exclusive representative "for the purpose of collective bargaining[,]" and that "a union obtaining exclusive representative status under § 7111 obtains the full range of exclusive representative rights established by" the Statute. *Id.* at 428. Further, the Authority found that there was "no support for the argument that the Under Secretary meant to permit the creation or recognition of an exclusive representative having less than the full rights accorded to exclusive representatives under" the Statute, and that the Memo "precludes the recognition of an exclusive representative for any and all representational activity permitted by" the Statute. *Id.* at 429. Moreover, the Authority held that there was no evidence of Congressional intent to give the Authority power to determine an appropriate unit and conduct an election for any purpose other than to determine a representative for collective bargaining, or to create "some sort of hybrid exclusive representative[.]" *Id.* Finally, the Authority determined that, even if it agreed that a union could utilize the procedures encompassed by § 7111 to become recognized as a "hybrid exclusive representative having less than the full rights accorded by" the Statute, "the Under Secretary's exercise of his sole and exclusive discretion precludes such an outcome[.]" *Id.*

Later, AFGE and NTEU filed the petitions at issue here. As stated previously, AFGE seeks "an election for exclusive recognition" of the Agency's TSOs, while NTEU "requests that a representation election be held[.]" AFGE Petition (Feb. 22, 2010); NTEU Petition (March 17, 2010).

III. RD's Decision

The RD found that the decision in *TSA* required him to dismiss AFGE's and NTEU's petitions. RD's Decision at 4. In this connection, the RD determined that the ATSA, the Memo, and *TSA* "remain in full force and effect[,]" and that he was "bound to follow and apply" *TSA* because it is "the established precedent of the Authority." *Id.* In addition, the RD rejected an argument by AFGE that the Memo violates the United States Constitution. *Id.* at 4-5.

IV. Positions of the Parties

A. AFGE's Application

AFGE argues that established law or policy -- specifically, the Authority's decision in *TSA* -- warrants reconsideration. According to AFGE, the right to organize is a right that is "separate and distinct" from the right to engage in collective bargaining, and the ATSA does not deprive the Authority of jurisdiction to conduct an election and certify an exclusive representative for "any of several purposes under the Statute." AFGE's Application at 4. For support, AFGE cites *Firstline Transportation Security, Inc.*, 347 NLRB 447 (2006) (*Firstline*).[5]

AFGE also argues that, since the Authority issued its decision in *TSA*, the Agency has recognized AFGE for a variety of representational purposes. In this connection, AFGE alleges that: (1) the Agency

5. We note that AFGE also argues that the RD failed to apply established law when he "failed to examine" *Firstline*. AFGE's Application at 2 n.3. However, the RD did examine *Firstline* and found it not to apply because it involved private-sector screeners to whom the Memo does not apply. RD's Decision at 3 n.4. Thus, AFGE's argument is misplaced.

has established a "Partnership Office" that has met with, shared information with, and established an email address to solicit concerns from AFGE; (2) "AFGE has formed 37 Locals that represent employees at airports across the country[,]" and "[t]he leadership and membership from these Locals participate in meetings with the TSA Partnership Office, local airport management and Congressional representatives to discuss issues of importance to TSOs[;]" (3) the Agency provides for dues deduction to AFGE on behalf of TSOs; (4) the Agency has created its own grievance procedure in which AFGE represents employees, "and the [A]gency has recognized the right of employees to have representation in grievance proceedings, EEO cases, adverse action cases and peer review[;]" and (5) the Agency trains supervisors and managers to maintain neutrality in union-related matters and to refrain from discriminating against employees for their union activities, and "has issued guidance that makes it clear [that] employees can engage in union activities." AFGE's Application at 9-10. Thus, AFGE contends that it is "already functioning as the representative on behalf of TSOs" in these processes to the extent permitted by the Agency, and "it cannot be claimed that . . . there would be some barrier to TSOs exercising" statutory rights that do not involve collective bargaining. *Id.* at 10. AFGE also asserts that the Agency "has denied certain non-collective bargaining rights such as *Weingarten* rights," which underscores the importance of allowing employees to choose an exclusive representative.[6] *Id.*

Finally, AFGE contends that the RD failed to apply established law when he found that the Memo does not violate the Constitution. In this connection, AFGE asserts that the Memo's "prohibition of [TSOs] associating together for the purposes of collective discussion with their employer violates their right of free speech and association" under the First Amendment. *Id.* at 13. According to AFGE, the Memo improperly treats the Agency's TSOs differently from other Agency employees and airport screeners who work for private-sector companies. *Id.* at 15-17.

B. Agency's Response to AFGE's Application

The Agency argues that, given the Authority's decision in *TSA*, the RD correctly dismissed the petitions. However, the Agency asserts that if AFGE's petition seeks an election for purposes that do not include the right to bargain collectively, then *TSA* is not controlling, and the Agency does not object to an election for such limited purposes. Agency's Response to AFGE's Application at 3, 5. In this connection, the Agency concedes that it "provides, and has provided for some time, representation to TSOs -- separate and apart from collective bargaining[,]" and that this has "not been detrimental to the critical security responsibilities of TSOs or [the Agency's] mission imperatives to ensure transportation security." *Id.* at 4-5.

The Agency also argues that, if the Authority directs an election, then the Authority should also provide "a clear and full articulation of the legal authorization and implications of such a hybrid election[.]" *Id.* at 6 n.4. Further, the Agency states that it is "likely that [it] soon will conduct a thorough review of labor relations, including the issue of collective bargaining among TSOs" and that "the Authority should consider whether an election . . . should await the outcome of the Agency's review." *Id.* at 5-6. Finally, the Agency claims that, if the Authority grants review on the ground that it has authority to conduct an election for the purpose of collective bargaining or on grounds related to the constitutionality of the Memo, then the Authority should grant the Agency an opportunity to provide full briefing under § 2422.31(g) of the Authority's Regulations.[7] *Id.* at 4 n.2.

C. NTEU's Application

NTEU argues that there is "absolutely no precedent that squarely addresses basic statutory rights and obligations in a regime where there is exclusive representation without collective bargaining." NTEU's Application at 5. According to NTEU, if the Authority revisits *TSA*, then it "must address [several specific] basic questions about what exclusive representation without collective bargaining means" for the Agency's employees. *Id.* at 4.

D. Agency's Response to NTEU's Application

The Agency asserts that, if the Authority determines that it may conduct an election for a union

6. *Weingarten* rights are explained and discussed further below.

7. Section 2422.31(g) provides:

> *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, afford the parties an opportunity to file briefs. The briefs will be limited to the issue(s) referenced in the Authority's order granting review.

that would lack collective-bargaining rights, then the Authority should address the issues raised by NTEU's application. Agency's Response to NTEU's Application at 3. In addition, the Agency reiterates that its Administrator is conducting a review of the issues, and that it would be "prudent to defer a decision on the novel approach that AFGE proposes" until the Administrator completes that review. *Id.*

E. AFGE's Response to NTEU's Application

AFGE asserts that addressing the issues raised by NTEU's application is unnecessary and "would only serve to delay" employees' opportunity to vote. AFGE's Response to NTEU's Application at 2. In addition, AFGE asserts that it is unnecessary for the Authority to wait for the Administrator to make a determination regarding collective bargaining before the Authority can direct an election. *Id.* at 4.

V. The Foundation's Amicus Curiae Brief

The Foundation argues that the Authority has no statutory authority to certify an exclusive representative because, under the ATSA, the Under Secretary continues to have unfettered discretion to decide whether TSOs can bargain collectively. Amicus Brief at 5-6. The Foundation also argues that TSOs are "the last line of defense against a terrorist boarding an airplane with a bomb or a weapon[,]" and that certifying TSOs would pose an "unacceptable threat to national security." *Id.* at 7, 6. In this regard, the Foundation asserts that ensuring national security requires flexibility and the ability to adapt quickly to threats, and that, if an exclusive representative is certified and a new security threat emerges, then "any changes to current . . . screening procedures would have to be negotiated[.]" *Id.* at 7-8. The Foundation also asserts that these same concerns prompted Congress not to allow unionization by members of the military and employees at the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), and the Secret Service. *Id.* Further, the Foundation contends that, although the law prohibits TSOs from striking, the TSOs could ignore that prohibition and thereby "endanger vital public services[.]" *Id.* at 9. Moreover, the Foundation asserts that only twenty-five percent of TSOs voluntarily pay dues to AFGE or have joined AFGE Locals, and granting AFGE's petition would "force 75% of the proposed bargaining unit to be represented by an organization to which they clearly have no interest in belonging." *Id.* at 12. Finally, the Foundation contends that "[f]reedom of choice is the cornerstone of the United States Constitution[,]" and granting the petition would violate TSOs' "fundamental right . . . to speak for themselves in their workplace[]" and resolve workplace disputes on their own without relying on an exclusive representative. *Id.* at 12-13.

VI. Analysis and Conclusions

As discussed previously, in *TSA*, the Authority found, among other things, that there was "no support for the argument that the Under Secretary meant to permit the creation or recognition of an exclusive representative having less than the full rights accorded to exclusive representatives under" the Statute, and that the Memo "precludes the recognition of an exclusive representative for any and all representational activity permitted by" the Statute. 59 FLRA at 429.

It is undisputed that, since *TSA*, the Agency has recognized AFGE and NTEU as representatives of some employees for purposes of non-collective-bargaining activity. In fact, as noted previously, the Agency expressly states that it does not oppose an election for an exclusive representative, as long as the election is not for the purposes of certifying a union that could engage in collective bargaining. *See* Agency's Response to AFGE's Petition at 3-4. Thus, the premise of the decision in *TSA* -- that the Memo "precludes the recognition of an exclusive representative for any and all representational activity permitted by" the Statute, 59 FLRA at 429 -- is inconsistent with all parties' interpretations of the Memo as well as their current practice. Accordingly, we find it appropriate to reconsider *TSA* and reassess whether § 7111 of the Statute precludes processing election petitions with respect to TSOs.

Turning to that issue, § 7111 provides, in pertinent part:

> If a petition is filed with the Authority . . . by any person *alleging* . . . in the case of an appropriate unit for which there is no exclusive representative, *that 30 percent of the employees* in the appropriate unit *wish to be represented for the purpose of collective bargaining by an exclusive representative* . . . the Authority *shall* investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it *shall* provide an opportunity for a hearing (for which a transcript shall be kept) after a reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority *shall* supervise or conduct an

> election on the question by secret ballot and shall certify the results thereof.

5 U.S.C. § 7111 (emphasis added).

In other words, in order for the Authority to be obligated to process a representation petition seeking an election, the petition must include an allegation that thirty percent of employees in an appropriate unit "wish to be represented for the purpose of collective bargaining by an exclusive representative[.]" *Id.* The plain wording of § 7111 focuses on the wishes of *employees*, not the wishes or intentions of *employers*. Therefore, nothing in the plain wording of § 7111 indicates that the Authority may refuse to meet its statutory obligation to process representation petitions solely because an employer does not intend to accord its employees' exclusive representative the full range of collective-bargaining rights.[8]

In fact, such an interpretation of § 7111 would be inconsistent with the fact that the Authority consistently recognizes labor organizations as exclusive representatives even where those representatives have less than full collective bargaining rights under the Statute. *E.g., NAGE, Local R1-187, SEIU*, 64 FLRA 627, 628-29 (2010) (under 38 U.S.C. § 7422, Secretary of Veterans Affairs or designee has unreviewable discretion to determine that a matter concerns or arises out of professional conduct or competence and, thus, is not subject to collective bargaining); *NTEU*, 61 FLRA 871, 877 (2006) (then-Member Pope writing separately) (sole and exclusive discretion of Comptroller of the Currency barred negotiation over some, but not other, matters); *U.S. Dep't of the Interior, Bureau of Indian Affairs, S.W. Indian Polytechnic Inst., Albuquerque, N.M.*, 58 FLRA 246, 248-50 (2002) (agency had sole and exclusive discretion to determine whether to bargain over a demonstration project prior to its implementation); *Ass'n of Civilian Technicians, Tex. Lone Star Chapter 100*, 55 FLRA 1226, 1228 (2000), *aff'd* 250 F.3d 778, 784 (D.C. Cir. 2001) (National Guard technicians may not bargain concerning military aspects of civilian technician employment); *AFGE, Local 884*, 47 FLRA 884, 893-98 (1993) (Member Talkin dissenting in part), *aff'd sub nom. AFGE, Local 3295 v. FLRA*, 46 F.3d 73, 76 (D.C. Cir. 1995) (under 12 U.S.C. § 1462a(g), Director of Office of Thrift Supervision has sole and exclusive discretion to set pay and benefits, subject to a limited exception).[9]

Although the instant case is distinguishable from the above-cited decisions, in that the TSOs at issue here currently lack any right -- rather than a limited right -- to engage in collective bargaining, we find this to be a distinction without a meaningful difference in terms of whether the election petitions should be processed. In this regard, even if one of the labor organizations is certified but precluded from engaging in collective bargaining, the Statute provides exclusive representatives with several rights separate from negotiating collective bargaining agreements.[10] For example, § 7114(a)(1) provides exclusive representatives with not only the right to "negotiate collective bargaining agreements covering" unit employees, but also a separate right to "act for[]" those employees. Additionally, § 7117(d)(1) gives certain exclusive representatives the right to "consultation rights[,]" separate and apart from the right to engage in collective bargaining. Further, § 7114(a)(2)(A) entitles the exclusive representative to be represented at certain "formal discussion[s] . . . concerning any grievance or any personnel policy or practices or other general condition of employment[.]" In this connection, the Authority has held that the definition of "grievance" is not dependent on the scope of a negotiated grievance procedure. *See Luke Air Force Base, Ariz.*,

8. Nothing in the wording of AFGE's or NTEU's petitions precludes the Authority from processing those petitions. In this regard, as stated previously, AFGE's petition seeks "an election for exclusive recognition" of the TSOs, AFGE's Petition (Feb. 22, 2010), and NTEU's petition "requests that a representation election be held[.]" NTEU's Petition (March 17, 2010). We construe these broad statements as expressing an interest by TSOs to have the respective labor organizations represent them for purposes including, but not limited to, collective bargaining. In addition, although the parties argue that it would be appropriate to conduct an election for non-collective-bargaining purposes, they do not concede that they are seeking an election solely for such purposes. Thus, there is no basis for the dissent's assertion that, if an election is conducted, then employees will have selected an exclusive representative "for very limited purposes having nothing to do with collective bargaining[.]" Dissent at 14.

9 We acknowledge that the cited decisions are not representation decisions. Nevertheless, they demonstrate that labor organizations may be exclusive representatives under the Statute even if they have limited collective-bargaining rights.

10 We agree with the dissent that there is a difference between "*some* collective bargaining and *no* collective bargaining." Dissent at 13. However, in our view, there is an even more critical difference between being represented for all statutory purposes (including collective bargaining) and being unable to be represented for *any statutory purposes at all*.

54 FLRA 716, 730 (1998), *rev'd* 208 F.3d 221 (9th Cir. 1999). As such, the right of an exclusive representative to attend formal discussions under § 7114(a)(2)(A) does not require the existence of a collective bargaining agreement.

Moreover, § 7114(a)(2)(B) entitles the exclusive representative to be represented at any agency representative's examination of a unit employee (*Weingarten* discussion) if "the employee reasonably believes that the examination may result in disciplinary action" and "the employee requests representation." In this regard, the Authority has held that the rights regarding *Weingarten* discussions under § 7114(a)(2)(B) "are not tied to collective bargaining." *Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Jackson, Miss.*, 48 FLRA 787, 793 (1993), *recons. denied*, 49 FLRA 701 (1994). Thus, the fact that an exclusive representative lacks collective bargaining rights does not nullify *Weingarten* rights under § 7114(a)(2)(B).

In sum, a certified, exclusive representative has several rights under the Statute that are not dependent on the right to negotiate collective bargaining agreements.[11] *Cf. U.S. Dep't of Veterans Affairs, Wash., D.C. v. FLRA*, 1 F.3d 19, 21 (D.C. Cir. 1993) (although certain employees of the Veterans Administration "had no statutorily-protected right to negotiate collective bargaining agreements, or to administer such agreements through grievance arbitration procedures, they had and retain other rights protected by the [Statute], including 'the right to form, join, or assist a labor organization without fear of penalty or reprisal.'" (citation omitted)). The existence of these rights supports a conclusion that the Statute does not preclude the Authority from processing AFGE's and NTEU's election petitions merely because the Under Secretary exercised his statutory discretion to decline to accord exclusive representatives the right to engage in collective bargaining. Thus, we find no statutory basis for declining to process the petitions in this case.

Nothing in the Foundation's amicus brief supports a contrary conclusion. With regard to the Foundation's security-related concerns, even if AFGE or NTEU ultimately is certified as the TSOs' exclusive representative, that would not alter the Under Secretary's authority under the ATSA to set TSOs' conditions of employment and to decide whether and how to conduct collective bargaining. With regard to the Foundation's discussion of members of the military and employees of the FBI, CIA, and Secret Service, Congress specifically exempted "member[s] of the uniformed services" from the definition of "employee" under § 7103(a)(2)(B)(ii) of the Statute, and specifically exempted the FBI, CIA, and Secret Service from the definition of "agency" under § 7103(a)(3)(B), (C), and (H) of the Statute. The fact that Congress could have, but did not, specifically exempt TSOs or the Agency from the coverage of the Statute supports, rather than undercuts, a conclusion that Congress intended the Statute -- including § 7111 -- to apply to TSOs. *See AFGE, Local 3529*, 59 FLRA 619, 622 (2004) (noting that Congress expressly exempted one agency from coverage of a law and stating that, "had Congress intended to exclude [another agency], it would have done so"). With regard to the Foundation's argument that granting the petition would "force 75% of the proposed bargaining unit to be represented by" a labor organization, Amicus Brief at 12, that argument ignores the fact that, if that percentage of employees votes for no labor organization, then no labor organization will be certified. *See* 5 U.S.C. § 7111(a) (to be entitled to exclusive recognition, labor organization must be chosen by "a majority" of unit employees who vote). Finally, with regard to the Foundation's claim that processing the petition would violate TSOs' "fundamental right" to resolve workplace disputes without relying on an exclusive representative, the Foundation does not explain how the Statute's election procedures do not adequately protect the alleged right. Amicus Brief at 12. As such, the Foundation's arguments are misplaced.

For the foregoing reasons, we find that the decision in *TSA* warrants reconsideration, and, on reconsideration, we overrule *TSA* and reverse the RD's decision.[12]

11. The dissent claims that these statutory rights are merely "secondary" or "ancillary" to the right to engage in collective bargaining. Dissent at 13. We agree that the right to engage in collective bargaining, including the right to negotiate collective bargaining agreements, is significant. However, the other statutory rights discussed above also are significant, and neither the dissent nor the wording of the Statute provides any support for a conclusion that these rights are less significant than, or wholly dependent on, the right to engage in collective bargaining.

12. With regard to AFGE's additional argument -- that the RD failed to apply established law by failing to declare the Memo unconstitutional -- we note that the narrow issue before us in this case is whether the Memo precludes the Authority from conducting an election. We have found that it does not. As such, it is unnecessary to resolve whether the RD failed to apply established law by declining to

In so finding, we acknowledge NTEU's and the Agency's argument that, in directing an election, we should explain what exclusive representation means absent the right to engage in collective bargaining. To the extent that this argument suggests that we should articulate all of the details regarding how the Agency would be required to deal with AFGE or NTEU should either of those labor organizations be certified, it is neither necessary nor prudent to do so here. In this regard, although issues have been raised and questions posed, the record does not include the parties' arguments on these matters.[13] Moreover, although the parties' positions on these issues and questions could be obtained, doing so at this point would delay the election, and such delay is contrary to the purposes of the Statute. In this connection, the Authority has held that there is a "public interest[]" in "allowing employees to vote for the representative of their choice, without undue delay or the possible influence of extraneous factors caused by the passage of time[.]" *Dep't of the Army, U.S. Army Aviation Missile Command (AMCOM), Redstone Arsenal, Ala.*, 55 FLRA 640, 645 (1999) (Member Wasserman dissenting in part). *Accord Nat'l Ass'n of Agric. Emps.*, 61 FLRA 545, 548 (2006), *review dismissed*, 473 F.3d 983 (9th Cir. 2007) (denying request for stay of election). Thus, we reject NTEU's and the Agency's argument in this regard.

We also acknowledge the Agency's statement that we should await the outcome of the Agency's review of labor relations, including the issue of collective bargaining among TSOs and, potentially, the Memo. However, the Agency does not indicate how long this review will take.[14] Thus, granting the Agency's request could indefinitely preclude the TSOs from exercising the important statutory right discussed above, and we find it inappropriate to do so.

Finally, with regard to the Agency's request to provide further briefing, the Agency has had an opportunity to, and did, provide full briefing. In addition, granting the Agency's request also would unnecessarily delay the TSOs from exercising their statutory right to vote. Accordingly, we deny the Agency's request to provide additional briefing.

For the foregoing reasons, we reconsider and overrule *TSA*, reverse the RD's decision, and remand to the RD to process AFGE's and NTEU's petitions.

VII. Order

The RD is directed to take appropriate action consistent with this decision.

declare the Memo unconstitutional, and we do not resolve that issue.

13. We note that the dissent also poses several questions regarding what will occur if the petitions are processed, and asserts that the questions "demonstrate that our Statute does not countenance the election of an exclusive representative that has no collective bargaining rights." Dissent at 15. However, the dissent's questions do not have such far-reaching implications. They simply "demonstrate" that recognizing an exclusive representative with less than full collective bargaining rights has the potential to raise complex legal issues – the type of issues that the Authority frequently is faced with under the Statute. We may not abdicate our statutory responsibility to effect statutory rights merely because doing so may raise additional, complex questions.

14. Quoting the September 23, 2010 committee-hearing testimony of the Agency's Administrator, the dissent notes that the Agency has almost completed reviewing the issue of TSOs' collective-bargaining rights. *See* Dissent at 12 n.1. However, even assuming that a decision on this issue is imminent, we find no basis for further delaying the TSOs' exercise of their right to determine whether to select an exclusive representative, even if the contours of that exclusive representative's authority may change as a consequence of the Administrator's review.

Member Beck, Dissenting:

The question presented in this matter is not whether transportation security officers (TSOs) *should* enjoy collective bargaining rights, nor whether TSOs *should* be represented for certain purposes by one or more labor organizations. These are questions of policy that fall, in the first instance, to the Congress. When it created the Transportation Security Administration (TSA) in 2001, Congress left it to the Executive Branch, in the person of the TSA Administrator (formerly known as the "Under Secretary"), to answer these questions. *See* § 111(d) of the Aviation and Transportation Security Act, Pub. L. No. 107-71, *codified as* 49 U.S.C. § 44935 Note 2001.[1]

The crucial question presented by AFGE's and NTEU's petitions here is strictly a legal question: Does our Statute authorize the Authority to conduct an election through which employees may select an exclusive representative that is prohibited from engaging in any collective bargaining on their behalf? I conclude that it does not. Therefore, I disagree with my colleagues that the circumstances of this case require us to overrule *United States Department of Homeland Security, Border and Transportation Security Directorate, Transportation Security Administration*, 59 FLRA 423 (2003) (then-Member Pope dissenting) (*TSA*) and to reverse the Regional Director's decision.

Our Statute sets forth three propositions that are relevant to this question:

- The sole purpose of an election is to determine whether employees will be represented by an "exclusive representative." 5 U.S.C. § 7105(a)(2)(B). The Authority is not authorized to conduct an election for any other purpose.

- An election is held only to determine whether employees wish to select an exclusive representative "for the purpose of collective bargaining." 5 U.S.C. §§ 7111(b)(1)(A), 7111(f)(2). An election to select a representative that will engage in no collective bargaining is not contemplated by the Statute, and therefore is not authorized.

- The principal attribute of an "exclusive representative" is its ability to "negotiate collective bargaining agreements" for employees in the unit. 5 U.S.C. § 7114(a)(1). The Statute mandates that "any agency and any exclusive representative ... *shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement."* 5 U.S.C. § 7114(a)(4) (emphasis added). Collective bargaining is the *sine qua non* of any exclusive representative. A labor organization that is unable to engage in any collective bargaining on behalf of the employees whom it purports to represent cannot be considered an "exclusive representative" within the meaning of our Statute.

In other words, the Authority may conduct an election only for the purpose of permitting employees to select an entity to act as their exclusive representative. An exclusive representative must be able to engage in collective bargaining. Consequently, the Authority may not conduct an election for the purpose of permitting employees to select an entity to represent them in some fashion that entirely excludes collective bargaining.

To this extent, I agree with the central holding of *TSA* -- that "[t]here is no evidence of Congressional intent to confer on the Authority the power to determine an appropriate unit and to conduct an election for any purpose other than to determine a representative for collective bargaining." 59 FLRA at 429.

The Majority correctly notes that exclusive representatives of employees in certain other agencies, such as the Comptroller of the Currency, Bureau of Indian Affairs, and Office of Thrift Supervision, have "less than full collective bargaining rights." Majority at 8. However, these exclusive representatives are able to engage in at least some collective bargaining on behalf of employees. There is not only a quantitative difference, but also a critical qualitative difference, between *some* collective bargaining and *no* collective

1. On September 23, 2010, in testimony before the Congress, TSA Administrator John Pistole stated that he is currently conducting a review on the question of whether TSOs should be given collective bargaining rights, that the review is "nearly complete," and that he expects to complete the review "in the near future" -- within "weeks rather than months." *Securing America's Transportation Systems: The Target of Terrorists and TSA's New Direction before the H. Subcomm. on Transp. Sec. & Infrastructure Prof.*, 111th Cong. (2010) (statement of John S. Pistole, Administrator, TSA).

bargaining. So long as a labor organization is able to engage in some collective bargaining on behalf of employees, it is carrying out the core function and responsibility of an "exclusive representative" within the meaning of our Statute. The same cannot be said of a labor organization that is able to engage in *zero* collective bargaining, which is the case for any labor organization seeking to represent TSOs as long as the Under Secretary's 2003 Memo is in effect.[2]

The Majority also correctly notes, as do the Unions in their respective Applications, that the Statute grants to exclusive representatives some rights and entitlements that are in addition to collective bargaining, such as the right to be present at formal discussions and, in certain circumstances, national consultation rights. However, the existence of such secondary rights enjoyed by an exclusive representative sheds no light on the question raised by the petitions. These rights are ancillary to – not instead of – collective bargaining, and they arise only if there is a collective bargaining relationship in place between the exclusive representative and the agency. A labor organization must first be an exclusive representative before it can enjoy these ancillary rights. As explained above, a labor organization cannot be an exclusive representative if it cannot engage in collective bargaining on behalf of the employees whom it purports to represent.[3]

Unprecedented and insuperable questions would flow from holding an election that results in the selection of a so-called "exclusive representative" that is completely prohibited from engaging in collective bargaining on behalf of employees. For example:

- Suppose an election were held and it resulted in one of the petitioning unions becoming the "exclusive representative" of TSOs. In the circumstances as they currently stand, the employees who voted in favor of that union would have done so understanding that they were voting for a union that lacks the status and legal authority to bargain collectively on their behalf. Thus, one could hardly conclude that employees either expected or wanted that union to represent them in collective bargaining.[4] If and when the new TSA Administrator reverses the extant Memo and grants collective bargaining rights to TSOs, what then is the status of this union? Should it be presumed that, because employees selected this union as their "exclusive representative" for very limited purposes having nothing to do with collective bargaining, these employees would also want the union to represent them in collective bargaining? What would be the basis for indulging in this assumption? Why would it be appropriate to assume that an entity selected by employees for certain very limited purposes would be selected by employees for different -- and much broader and consequential -- purposes?

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2. This Memo may not remain in effect much longer. *See supra* n.1.

3. The Majority relies on *United States Department of Veterans Affairs, Washington, D.C v. FLRA*, 1 F.3d 19 (D.C. Cir. 1993) (*VA*) to support the proposition that "a certified, exclusive representative has several rights under the Statute that are not dependent on the right to negotiate collective bargaining agreements." Majority at 9. However, in that case, there was, nevertheless, an ongoing collective bargaining relationship between the union and the agency, and the historical circumstances underlying that relationship make it anomalous as a practical matter, and certainly inapposite to the question presented here. Long before the enactment of our Statute in 1978, the Veterans Administration voluntarily engaged in collective bargaining with, and entered into collective bargaining agreements with, various unions representing medical professionals. *See AFGE, Local 3884 v. FLRA*, 930 F.2d 1315, 1318 (8th Cir. 1991). This pre-1978 bargaining occurred, and these agreements were put in place, without the benefit of an election to select an "exclusive representative" within the meaning of our Statute. In stark contrast to the situation that evolved at the Department of Veterans Affairs, the instant petitions present the question of whether, *under our Statute*, we may hold an election to certify an exclusive representative that currently has no collective bargaining relationship with the agency, has no collective bargaining agreements in place, and is prohibited from engaging in any collective bargaining whatsoever.

4. There is no basis for the Majority's decision to "construe" the petitions as "expressing an interest by TSOs to have the respective labor organizations represent them for purposes of . . . collective bargaining." Majority at n. 8. Despite our Statute's explicit requirement that a petition must allege that employees in the affected unit "wish to be represented *for the purpose of collective bargaining*" (5 U.S.C. § 7111(b)(1)(A) (emphasis added)), these petitions pointedly omit such an allegation. More importantly, as all parties and my colleagues in the Majority agree, so long as the 2003 Memo is in effect, it is a legal impossibility for TSOs to be represented for purposes of collective bargaining. Therefore, the Majority's casual assumption that the petitions signify anything about TSOs' wishes with respect to collective bargaining can only be characterized as a profound mis-reading of both the petitions and the legal landscape in which the petitions are presented.

- Suppose that an election results in one of the petitioning unions becoming the "exclusive representative" with no authority, and therefore no apparent mandate from employees, to engage in collective bargaining. If and when the new TSA Administrator reverses the extant Memo and grants collective bargaining rights to TSOs, may a different union petition for a new election to determine which labor organization should represent employees for purposes of *collective bargaining*? What would be the Authority's response to such a petition? Would we treat the unit as one that is not currently represented for the purpose of collective bargaining (5 U.S.C. § 7111(b)(1)(a)), or would we treat the unit as one that is currently represented for purposes of collective bargaining (5 U.S.C. § 7111(b)(1)(b))? Would the election of an exclusive representative with no collective bargaining rights constitute a "valid election" for purposes of the 12-month election bar (5 U.S.C. § 7111(b)(2))?

To pose these questions is to demonstrate that our Statute does not countenance the election of an exclusive representative that has no collective bargaining rights.

Because, as a matter of law, there can be no exclusive representative that is entirely bereft of collective bargaining rights and responsibilities, the Authority is not permitted to conduct an election for such an entity. Accordingly, I disagree with the determination of my colleagues to overrule *TSA* and to reverse the Regional Director's decision.