



FEDERAL LABOR RELATIONS AUTHORITY

[FLRA Docket No. DE-RP-22-0028]

Notice of Opportunity to Submit Amici Curiae Briefs in a Representation

Proceeding Pending Before the Federal Labor Relations Authority

AGENCY: Federal Labor Relations Authority.

ACTION: Notice.

SUMMARY: The Federal Labor Relations Authority (Authority) provides an opportunity for all interested persons to submit briefs as amicus curiae on an issue arising in a case pending before the Authority. The issue concerns the manner in which the Authority, in applying its decision in *Naval Facilities Engineering Service Center, Port Hueneme, California*, 50 FLRA 363 (1995) (*Port Hueneme*), determines whether an election is necessary to determine representation of an appropriate bargaining unit following an agency reorganization. In *Department of the Army, U.S. Army Aviation Missile Command, Redstone Arsenal, Alabama*, 56 FLRA 126 (2000) (*AMCOM*), the Authority applied *Port Hueneme* to conclude that a union that represents more than 70 percent of the employees in a newly combined unit formerly represented by two or more unions is sufficiently predominant to render an election unnecessary to determine representation of the newly combined unit. The Authority seeks amici briefs addressing whether, in making this determination, the Federal Service Labor-Management Relations Statute (the Statute) allows the Authority to combine employees exclusively represented by an affiliate of a parent labor organization with employees exclusively represented by the parent organization or another affiliate of the parent organization. Because this issue is likely to be of concern to agencies, labor organizations, and other interested persons, the Authority finds it appropriate to provide for the filing of amici briefs addressing the questions set forth below.

DATES: To be considered, briefs must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Mail or deliver briefs to Erica Balkum, Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 300, 1400 K Street NW, Washington, DC 20424-0001. For personal delivery of briefs, schedule an appointment at least one business day in advance by calling (771) 444-5805.

FOR FURTHER INFORMATION CONTACT: Erica Balkum, Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, (771) 444-5809.

SUPPLEMENTARY INFORMATION: On September 29, 2023, the Authority issued an order granting the application for review of the Regional Director's (RD's) decision and order (decision), and deferring action on the merits, in *Defense Health Agency, El Paso Market*, Case No. DE-RP-22-0028 (*DHA*). A summary of the case follows.

1. *Background and RD's Decision*

As part of a reorganization, the Department of Defense (DOD) established the Defense Health Agency (DHA) El Paso Market (El Paso Market), which consists of employees who previously worked for Department of the Army (Army) medical and dental treatment facilities in and around El Paso, Texas. Before these employees were transferred to the El Paso Market, the American Federation of Government Employees, Local 2516 (Local 2516 or Local) was certified as the exclusive representative of approximately 1,048 nonprofessional employees and 518 professional employees; the American Federation of Government Employees (AFGE) was certified as the exclusive representative of approximately seventy-seven nonprofessional employees and one professional employee; and the National Federation of Federal Employees (NFFE) was certified as the exclusive representative of approximately eleven nonprofessional employees and eleven professional employees.¹

¹ NFFE has disclaimed interest in representing the transferred employees.

AFGE solicited, and Local 2516 provided, a designation of AFGE as the Local's representative for the purpose of filing a petition with the FLRA to clarify the transferred employees' representation.² However, during the RD's investigation of the petition, Local 2516 withdrew its designation of AFGE as its representative.

Before the RD, AFGE argued that Authority precedent required the RD to combine the number of unit employees that AFGE and Local 2516 represented in the professional and non-professional units, respectively, with AFGE "remain[ing] the successor exclusive representative of" that combined group of employees. Citing *AMCOM*, AFGE argued that Authority precedent "has treated a national union and its constituent locals as one union" by focusing on the number of "unions" involved, rather than the number of "exclusive representatives." AFGE claimed that because AFGE and Local 2516 are part of the same labor organization, the Region should treat them as the same entity for purposes of the petition.

To resolve the petition, the RD applied the three-prong test the Authority set forth in *Port Hueneme*. As to the first prong, the RD found the transferred employees share a community of interest, the proposed professional and nonprofessional units would promote effective dealings and efficiency of operations, and the transferred employees represent a majority of the employees in the proposed units. The RD also found the second *Port Hueneme* prong met because post-transfer, the employees have a substantially similar mission as pre-transfer; and the transferred employees have the same, or substantially similar, job titles, position descriptions, and other general conditions of employment as they had before the transfer.

As to the third *Port Hueneme* prong, the RD found that Local 2516 represented approximately ninety-two percent of the nonprofessional employees and ninety-eight

² DHA filed a cross-petition, seeking a finding that the employees are in two separate, appropriate units – one professional, one nonprofessional – at DHA El Paso Market. AFGE did not object to the separate units.

percent of the professional employees. Therefore, the RD concluded Local 2516 was sufficiently predominant with regard to both units, rendering it unnecessary to conduct elections to determine the units' exclusive representatives. In reaching this conclusion, the RD rejected AFGE's argument that it should be treated as the same labor organization as Local 2516 for purposes of resolving the petitions. Specifically, the RD rejected AFGE's argument that *AMCOM* focused on the number of "unions" involved, and not the number of "exclusive representatives," in determining whether a union was sufficiently predominant. The RD further noted that Local 2516 "vehemently object[ed]" to AFGE's assertion that AFGE and Local 2516 should be treated as one entity for the purposes of the petition.

Based on these findings, the RD concluded that: (1) DHA, El Paso Market is the transferred employees' successor employer; (2) the transferred employees are in two appropriate units – one professional, one nonprofessional – under section 7112(a) of the Statute; and (3) Local 2516 is the exclusive representative of those units.

2. Application for Review

In an application for review of the RD's decision, AFGE argued that the RD failed to follow Authority precedent; the RD's decision raises an issue for which there is an absence of precedent; and the RD committed prejudicial procedural errors. AFGE contends the RD erred by treating AFGE and Local 2516 as separate unions for the purpose of determining who would represent the successor bargaining units. According to AFGE, both *AMCOM* and the Statute support treating AFGE and Local 2516 as one "union" or "labor organization" for purposes of applying *Port Hueneme*'s third prong.

3. Questions on Which Briefs are Solicited

In *DHA*, the Authority issued an unpublished order dated September 29, 2023 and concluded, upon preliminary review of the record, that AFGE's application raised issues warranting further review. The Authority deferred action on the application's merits. In

order to assist with such action, the Authority now solicits additional briefs.

As noted above, when applying the third prong of the *Port Hueneme* test to determine whether it has been demonstrated that an election is necessary, the Authority has held that a union that represents more than 70 percent of the employees in a newly combined unit formerly represented by two or more unions is sufficiently predominant to render an election unnecessary. *AMCOM*, 56 FLRA at 131.

The Authority directs the parties, and invites all interested persons, to file briefs addressing the following questions:

1. For purposes of assessing whether a union represents more than 70 percent of the employees, does the Statute allow the Authority to combine employees exclusively represented by an affiliate of a parent labor organization with employees exclusively represented by the parent organization or another affiliate of the parent organization?
2. If the answer to Question 1 is yes and the combined employees represented by related entities are more than 70 percent of the employees in a newly combined unit, then which of the related entities becomes the certified exclusive representative?
3. Does the answer to either of these questions depend on whether the affiliate(s) have designated the parent organization to act as their representative for successorship proceedings?

For purposes of addressing these questions, the term “parent organization” should be interpreted to mean the national or international union with which a subsidiary union, acting as a bargaining unit’s exclusive representative, is affiliated.

4. Required Format for Briefs

All briefs shall be captioned “*Defense Health Agency, El Paso Market*, Case No. DE-RP-22-0028.” Briefs shall contain separate headings for each issue covered.

Interested persons must submit an original of each amicus brief, with any enclosures, on 8½ x 11 inch paper. Briefs must include a signed and dated statement of service that complies with the Authority’s Regulations showing service of one copy of the brief on all counsel of record or other designated representatives as well as the Federal Labor Relations Authority Regional Director involved in this case. 5 CFR 2429.27.

Accordingly, briefs must be served on: Jennifer Giambastiani, Chief, Labor and Employment Law Branch, Defense Health Agency, Office of the General Counsel, 7700 Arlington Blvd, Falls Church, VA 22042; Sam Romirowsky, Labor Management Employee Relations, Defense Health Agency, Human Capital Division, 7700 Arlington Blvd, Falls Church, VA 22042; Felicia Sharp, Legal Administrative Specialist, Defense Health Agency, Office of the General Counsel, 7700 Arlington Blvd, Falls Church, VA 22042; Jessica Clarke, Assistant General Counsel, Office of the General Counsel American Federation of Government Employees, 80 F Street NW, Washington, D.C. 20001; Julian Patrick, President, AFGE Local 2516, 3135 Forney Ln, El Paso, TX 79935; and Timothy Sullivan, Regional Director, Denver Regional Office, Federal Labor Relations Authority, 1244 Speer Blvd., Suite 446, Denver, CO 80204. Interested persons may obtain copies of the Authority's decision granting the application for review in this case by contacting Erica Balkum, Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, (771) 444-5809.

Dated: July 11, 2024.

Thomas Tso,

Solicitor and Federal Register Liaison,

Federal Labor Relations Authority.

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