

UNITED STATES OF AMERICA  
FEDERAL LABOR RELATIONS AUTHORITY  
WASHINGTON, D.C., REGION

UNITED STATES DEPARTMENT OF HOMELAND )  
SECURITY, TRANSPORTATION SECURITY )  
ADMINISTRATION, )  
AND ) Case No.  
AMERICAN FEDERATION OF ) WA-RP-10-0033  
GOVERNMENT EMPLOYEES, AFL-CIO. )

AGENCY’S RESPONSE TO MARCH 16, 2010 LETTER FROM ACTING REGIONAL DIRECTOR

The Transportation Security Administration, U.S. Department of Homeland Security (“TSA” or “Agency”), responds to the March 16, 2010 letter to the Agency from the Acting Regional Director of the Washington, D.C., Region (“Acting Regional Director”) of the Federal Labor Relations Authority (“FLRA” or “Authority”) in the above-captioned matter.

A. Background

1. American Federation of Government Employees’ Petition

On February 22, 2010, the American Federation of Government Employees (“AFGE”) filed a petition with the FLRA. In its petition, AFGE stated that it “seeks an election for exclusive recognition for all [TSA] non-supervisory Transportation Security Officers (TSOs) in pay bands D, E, F and G.” Petition at 1. AFGE further stated that the proposed unit included “all TSA non-Supervisory TSOs in pay bands D, E, F, and G” and excluded “all TSA headquarters employees and employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6), and (7).” *Id.*

2. March 2, 2010 FLRA Letter

On March 2, 2010, the Acting Regional Director sent a letter to TSA concerning the petition. See March 2, 2010 Letter from Peter A. Sutton to Richard A. Whitford (March 2 FLRA Letter). In the letter, the Acting Regional Director stated that the petition “request[s] an election to determine whether certain non-supervisory employees of the Transportation Security Administration wish to be

represented for the purpose of collective bargaining." Id. The Acting Regional Director instructed the Agency to respond to the March 2 FLRA Letter by March 12, 2010.

3. March 16, 2010 FLRA Letter

The Agency filed an unopposed request for extension of time to respond to the March 2 FLRA Letter. On March 16, 2010, the Acting Regional Director granted the Agency's request. See March 16, 2010 Letter from Peter A. Sutton to Marc Pilcher ("March 16 FLRA Letter"). The Acting Regional Director instructed the Agency to provide the following to the Authority by April 12, 2010:

- a) A current alphabetized list of employees included in the unit described in the petition, together with their job classifications for the payroll period immediately preceding February 22, 2010, the date the petition was filed. This list should be sent as an Excel spreadsheet, a paper copy is not necessary;
- b) A current alphabetized list of employees described in the petition as excluded from the unit, together with their job classifications for the same payroll period. This list should be sent as an Excel spreadsheet, a paper copy is not necessary;
- c) The Agency's position on the petition, including the appropriateness of the unit sought, and copies of all relevant documentation concerning issues raised by the petition;
- d) The Agency's position on posting the Notice of Petition; and
- e) Names and addresses of any labor organizations, other than the National Treasury Employees Union, who are affected by the issues raised in the petition.<sup>1</sup>

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<sup>1</sup>In its Petition, AFGE identified that National Treasury Employees Union (NTEU) as an affected labor organization. On March 17, 2010, NTEU filed a separate petition involving a proposed unit coextensive with the unit proposed by AFGE.

B. Agency's Response to March 16 FLRA Letter

The Agency responds to the March 16 FLRA Letter as follows:

1. A current alphabetized list of employees included in the unit described in the petition, together with their job classifications for the payroll period immediately preceding February 22, 2010<sup>2</sup>

An Excel spreadsheet containing the requested information for employees in TSO positions is attached.

TSA interprets the proposed unit as intended to include the Agency's Bomb Appraisal Officer positions (BAOs).<sup>3</sup> These positions are not properly included in a unit with TSOs. BAOs are in the H and I pay bands and therefore are not within the proposed unit definition, which is limited to D, E, F, and G Bands. Furthermore, BAOs do not share a community of interest with TSOs and therefore should not be in the same unit. See, e.g., Dep't of Agriculture & AFSCME, Council 26, NTEU, NFFE, IAM & AW, AFGE, Local 3354, 61 FLRA 879 (2006) (standards for assessing "community of interests"). Specifically, while TSOs are governed by 49 U.S.C. § 44935 note and the personnel policies and directives adopted under that provision, BAOs are governed by the Agency's personnel management system adopted under 49 U.S.C. § 40122(g). The job duties of TSOs, on the one hand, and BAOs, on the other, also are very different: TSOs are responsible for security screening activities while BAOs are responsible for ensuring

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<sup>2</sup>TSA has included the names of Behavior Detection Officers (BDOs) in the attached Excel spreadsheet of petitioned-for employees. TSA currently employs approximately 3000 employees as BDOs. BDOs specialize in identifying behaviors indicative of potential terrorist activity and have distinct duties, procedures, and certification requirements. They receive additional and different training, and TSA is in the process of granting security clearances to all employees in these positions based on the employees' job-related need for regular briefings on classified information. The nature of the duties of employees in these positions is in transition and BDOs may need to be removed from the unit on national security grounds once other issues have been resolved. See 5 U.S.C. § 7112(b)(6).

<sup>3</sup>The BAO designation recently was replaced by the job title Transportation Security Inspectors but these positions are referred to herein as BAOs for ease of reference.

identification and disabling of explosive devices. Finally, BAOs require a security clearance at the Secret level and regularly review classified materials while TSOs do not presently require clearances. See 5 U.S.C. § 7112(b)(6); United States Dep't of Justice, 52 FLRA 1093 (1997); Dep't of Energy, Oak Ridge Operations, 4 FLRA 644 (1980), For these reasons, the Agency has provided a separate Excel spreadsheet with the names of employees in BAO positions as of the relevant payroll period.

2. A current alphabetized list of employees described in the petition as excluded from the unit, together with their job classifications for the same payroll period

An Excel spreadsheet containing the requested information is attached.

3. The Agency's position on the petition, including the appropriateness of the unit sought, and copies of all relevant documentation concerning issues raised by the petition

AFGE previously filed petitions to hold an election involving "security screeners," the predecessor job title for TSOs. The Authority issued a decision stating that, based on 49 U.S.C. § 44935 note and a related Agency administrative determination (attached), the FLRA did not have jurisdiction to hold the requested election. See Dep't of Homeland Security, Border and Transportation Security Directorate, Transportation Security Administration & American Federation of Government Employees, 59 FLRA 63 (2003).<sup>4</sup> The statutory provisions and determination discussed in the FLRA's decision have not been amended and remain in effect. Therefore, before taking any other action, the Acting Regional Director should address his authority to process the petition.<sup>5</sup>

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<sup>4</sup>The decision also referred to 49 U.S.C. § 44935 note as § 111(d) of the Aviation and Transportation Security Act, Pub. L. 107-71 (Nov. 19, 2001).

<sup>5</sup>In this regard, the purpose of the requested election bears on the jurisdictional analysis. While AFGE states that the election involves "exclusive recognition" of AFGE for the proposed unit, see Petition at 1, by contrast, the Acting Regional Director describes the petition as seeking "to determine whether [unit members] . . . wish to be represented for the purpose of collective bargaining." March 2 FLRA Letter.

4. The Agency's position on posting the notice of petition

The Acting Regional Director should suspend his direction to the Agency to post the petition pending examination of the issue pertaining to jurisdiction discussed in § 3 above. Moreover, as discussed in footnote 5 above, there is a discrepancy between how the Acting Regional Director characterizes the purpose of AFGE's petition and the purpose stated in the petition itself. Compare AFGE Petition and March 2 FLRA Letter.<sup>6</sup> Suspending the Agency's posting obligation is appropriate because Agency employees identified in the proposed unit are the nation's first line of defense against catastrophic terrorist attacks on aviation and other modes of transportation, numbering over 43,000 working in over 450 different work sites located throughout the United States and its territories. While a certain amount of employee interest and debate are to be expected in a union campaign and election, unnecessary confusion and distraction within the ranks of these frontline employees must be avoided. This goal is best attained by addressing and resolving the question of jurisdiction before the petition is posted.

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<sup>6</sup>The posting provided by the Acting Regional Director states that the "petition is to request an election to determine whether [employees in the proposed unit] wish to be represented for the purpose of collective bargaining by AFGE."

5. Names and addresses of any labor organizations, other than the National Treasury Employees Union, who are affected by the issues raised in the petition

The Agency is not aware of any labor organizations other than AFGE and NTEU that might potentially be affected by the petition.

Dated: April 12, 2010

Respectfully submitted,



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**STATEMENT OF SERVICE**

On this 12th day of April, 2010, I caused to be filed the foregoing AGENCY'S RESPONSE TO MARCH 16, 2010 LETTER FROM ACTING REGIONAL DIRECTOR with the Washington DC Regional Office of the Federal Labor Relations Authority, and copies of the same to be sent to the parties and representatives listed below by electronic and first-class mail:

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