UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGION

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
Petitioner/Activity

-and-

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
Labor Organization

-and-

NATIONAL TREASURY EMPLOYEES UNION
Labor Organization

CASE NO. WA-RP-04-0067

DECISION AND ORDER DISMISSING OBJECTIONS TO THE CONDUCT OF THE ELECTION

TABLE OF CONTENTS

INTRODUCTION

The election in this case was one of the largest in FLRA history. It was necessitated by the establishment of the Department of Homeland Security (DHS), and in particular, the creation of U.S. Customs and Border Protection (CBP) within DHS in March 2003. The employees who make up CBP came from the Immigration and Naturalization Service, the U.S. Customs Service, and the U.S. Department of Agriculture. The employees from each of these agencies were represented by different unions before being merged within CBP, and these employees are found at the over 300 ports of entry in the United States, as well as foreign ports around the world.

In 2004, various petitions were filed to determine both the exclusive representative and the scope of the unit(s) at CBP. As relevant here, on October 7, 2005, I issued a Decision and Order Directing an Election among all employees of CBP, excluding those assigned to Border Patrol sectors. That decision was upheld by the Authority. *U.S. Dep't of Homeland Sec., Bureau of Customs and Border Prot.*, 61 FLRA 485 (2006), *aff'd sub nom. Nat'l Ass'n of Agric. Employees v. FLRA*, No. 06-71671, 2007 U.S. App. LEXIS 444 (9th Cir. January 10, 2007). A request to stay the election was also denied. *Nat'l Ass'n of Agric. Employees*, 61 FLRA 545 (2006).

Therefore, in accordance with the provisions of an Election Agreement I approved on March 20, 2006, a mail ballot election was conducted among all professional and nonprofessional employees of CBP, excluding those assigned to Border Patrol sectors. On May 9, 2006, ballots were mailed to eligible employees' home addresses and had to be returned no later than June 22, 2006. The count of ballots commenced on June 23, 2006, was completed on June 28, 2006, and the final Tally of Ballots was served on that date. The results of the election, as set forth in the Tally of Ballots, were as follows.

TALLY OF BALLOTS

The ballots of professional employees were counted first, and their ballots had two questions. The first question was whether they desired to be included with the nonprofessional employees in a single unit. A majority of professional employees voted for inclusion:

Approximate number of eligible voters	499
Void ballots	7
Votes cast for inclusion in the nonprofessional unit	181
Votes cast for a separate professional unit	53
Valid votes counted	234
Challenged ballots	25
Valid votes counted plus challenged ballots	259

The second question on the professional ballot asked whether they wanted to be represented by one of the unions in this contest. At this point, the professional ballots were combined with the nonprofessional ballots to determine which union, if any, should represent all the employees in a single bargaining unit:

Approximate number of eligible voters	25,000
Void ballots	235
Votes cast for American Federation of Government Employees, AFL-CIO	3,426
Votes cast for National Treasury Employees Union	7,369
Votes cast against exclusive recognition	211
Valid votes counted	11,006
Challenged ballots	1,734
Valid votes counted plus challenged ballots	12,740

A majority of the valid votes were cast for the National Treasury Employees Union (NTEU). The unresolved challenged ballots were not sufficient in number to affect the results of the election. Accordingly, the professional and nonprofessional employees of CBP indicated their desire to be represented by NTEU.

On July 6, 2006, in accordance with section 2422.26(a) of the Rules and Regulations of the Authority, the American Federation of Government Employees, AFL-CIO (AFGE) submitted timely objections to the procedural conduct of the election or to conduct which may have improperly affected the results of the election. The July 6 submission consisted of a 28-page document on AFGE stationery entitled "Election Protests," as well as a binder entitled "Exhibits in Support of AFGE Election Objections." The binder contained 45 marked exhibits. On July 18, 2006, both NTEU and CBP submitted an opposition to AFGE's objections.

On July 17, 2006, in accordance with section 2422.26(b) of the Regulations, AFGE submitted another binder entitled "Exhibits in Support of AFGE Election Objections," which contained additional exhibits, marked 46 to 53. On July 27, 2006, NTEU submitted a supplemental response addressing exhibits 46 through 53.

Procedural Issue

On September 8, 2006, the Authority agent assigned to investigate the objections prepared a chart which identified each specific objection mentioned in the Election Protests, and included a reference to any supporting exhibits. AFGE was given an opportunity to confirm the accuracy of the chart, and thus the precise nature of the objections enumerated in its Election Protests.

After reviewing the chart and realizing that certain matters had not been explicitly mentioned in the Election Protests, AFGE requested an opportunity to specify additional objections beyond those contained in the Election Protests, identifying the exhibit(s) where such matters appear.

In a letter provided on September 25, 2006, AFGE highlighted four matters found in the exhibits, but not mentioned in its Election Protests. These additional complaints against CBP include: dropping members from dues withholding[1]; allowing NTEU to represent "Quad 7s" at O'Hare Airport; requiring AFGE officers to use leave instead of official time, while NTEU officers were permitted to use official time; and telling certain Agriculture Specialists they were ineligible to vote. In addition to these complaints, there are other matters mentioned in the exhibits but not found in the Election Protests. AFGE insisted that "all evidence submitted in support of its protest on July 6, 2006, whether or not specifically referenced in the narrative explanation is part and parcel to the election protest."

However, AFGE's Election Protests document itself does not state that objections include matters raised in exhibits beyond those specifically referenced in the Election Protests. To the contrary, the conclusion of the Election Protests states:

> The Agency's lack of neutrality as exemplified by its announcement and implementation of a web-based directly [sic] which was completely devoid of AFGE recognition is sufficient in and of itself to set aside the instant election. This, coupled with the numerous other infractions **enumerated herein** can only result in the set aside of this election.

(emphasis added).

The Authority's Regulations establish an orderly process for handling objections to an election, requiring an objecting party to first state its objections, and then provide supporting evidence. Section 2422.26(a) of the Regulations provides, "Objections must be filed and received by the Regional Director within five (5) days after the tally of ballots has been served." This section also states that "objections must be supported by clear and concise reasons." Section 2422.26(b) of the Regulations requires that supporting evidence, in the form of "signed statements, documents and other materials supporting the objections" be submitted.

The other parties to this case are entitled to rely on the procedures found in the Regulations, and there is evidence that they did so in this case. For example, as NTEU pointed out in its initial opposition:

---

[1] AFGE first identified the issue of "dropping AFGE members from dues deductions" in the cover letter to its July 17, 2006 submission.

> AFGE submitted 45 exhibits in support of the objections. Included in those exhibits are affidavits of various AFGE officials which raise a number of issues not cited as bases for AFGE's objections. To the extent not raised in AFGE's formal objections, NTEU will not address these issues.

NTEU reiterated this point at the outset of its supplemental response, stating "AFGE is limited to submitting additional evidence in support of its earlier objections; new objections may not be raised."

AFGE cannot interject new matters by making a general statement that anything and everything mentioned in any exhibit must be considered, as this would be tantamount to allowing new objections at will. It would also be fundamentally unfair to the other parties to allow AFGE to add new matters to its original objections.

Here, the parties submitted responses to the objections raised in the Election Protests in a timely manner. The other parties to this case did not respond to AFGE's new matters because they relied on the procedures found in the Regulations, and confined their responses to matters found in the Election Protests. Public policy requires the expeditious resolution of objections which are clearly enumerated. Such a policy would be frustrated if every remark found in supporting evidence were treated as opening up avenues to potential new objections, particularly when the moving party failed to do so in the first instance.

Accordingly, consistent with section 2422.26(a) of the Regulations, I conclude that AFGE's objections are the Election Protests, as they constitute objections "supported by clear and concise reasons." The objections are not the supporting exhibits.

In reaching this conclusion, I am mindful that the Authority has allowed a party to add new objections after the initial five-day period, but this is only in very limited circumstances not present here. As the Authority has stated:

> [W]e agree with the policy of the National Labor Relations Board . . . that if . . . evidence of misconduct unrelated to the timely filed objections comes to the Regional Director's attention during the investigation at the initiative of the objecting party after the time for filing objections has expired, the new evidence should not be considered as a basis for setting aside the election unless the objecting party has provided clear and convincing proof that the evidence was not only newly discovered, but also previously unavailable.

U.S. Dep't of the Navy, Naval Station, Ingleside, Tex., 46 FLRA 1011, 1021 (1992)(*Ingleside*)(internal quotations omitted).

In this case, AFGE cannot establish that its evidence in connection with objections it would now like to add was newly discovered or previously unavailable, given that the matters were contained in the supporting exhibits it initially supplied. As AFGE failed to explicitly raise such matters in its formal objections, i.e., the Election Protests, when it had an opportunity to do so, those matters are not properly before me. As the Authority stated in *Ingleside*, "such a limitation is essential to . . . prevent investigations into election misconduct from being unduly prolonged." 46 FLRA at 1022. Accordingly, I will not consider the four specific matters AFGE identified on September 25, 2006, or any other matters found in the exhibits which were not raised in the Election Protests document itself.

OBJECTIONS

All alleged objectionable matters raised in the Election Protests have been investigated and are summarized below. The objections as stated in the Election Protests have been reordered, as well as renumbered, for discussion purposes. The supporting evidence AFGE provided for each of its objections has been considered, as well as the responses, if any, from CBP or NTEU. What follows is a discussion of the resulting investigation and my conclusion as to the merits of each objection.

In general, AFGE's objections fall into categories, primarily consisting of conduct alleged to have improperly affected the results of the election. First, there are allegations that CBP's internal processes are geared in favor of NTEU. Second, CBP and its managers have a bias toward NTEU. Third, CBP thwarted AFGE's negotiated grievance procedure. Fourth, CBP made changes to working conditions during the pendency of the petition. Fifth, CBP improperly withheld information from AFGE that would have benefitted its campaign efforts. Sixth, CBP interfered with AFGE's attempts to meet with employees as part of its campaign. The final category consists of two objections to the procedural conduct of the election itself.

I have carefully considered all evidence and arguments presented. As to the first category of objections, which include allegations that certain internal CBP processes favor NTEU, I find AFGE has not met its burden of proving CBP's conduct was improper and/or interfered with the free choice of the voters. AFGE alleges in the second category of objections that CBP managers were biased toward NTEU. I conclude AFGE has failed to meet the burden of substantiating the allegations or has failed to show how CBP's conduct interfered with the free choice of the voters. As to the third category of objections, which include allegations that CBP thwarted AFGE's negotiated grievance procedure, I find AFGE has failed to produce evidence to substantiate the allegations. In the fourth category of objections, AFGE alleges CBP made changes in working conditions during the pendency of the petition. I conclude that AFGE has failed to show CBP's conduct interfered with the free choice of the voters or affected the outcome of the election.

The fifth category involves allegations that CBP improperly withheld information from AFGE that would have benefited its campaign efforts. More specifically, these objections concern a request by AFGE for a pre-election mailing by the unions to all voters and disclosure of certain information to AFGE regarding potential voters. As to this category of objections, I conclude AFGE has failed to meet its burden of showing that CBP's conduct interfered with the free choice of voters or affected the outcome of the election. The objections that comprise the sixth category allege CBP interfered with AFGE's attempts to meet with employees during the election campaign period. I have determined CBP did not violate its obligation to remain neutral, and AFGE has not met its burden of showing CBP's conduct interfered with the free choice of the voters and/or affected the outcome of the election. While CBP's conduct as to AFGE's attempts to schedule a lunch and learn at National Place raised concerns, I find that CBP's conduct could not have affected the outcome of the election, since there were so few voters at the National Place site. In the last, or seventh, category of objections, AFGE alleges there were procedural defects with the election. I conclude these objections lack merit, as AFGE has failed to produce evidence to substantiate the allegations.

Allegations CBP's Internal Processes Favor NTEU

1. CBP Placed NTEU Contact Information on its Intranet Directory but Not AFGE Information; and CBP Published a User Guide Listing NTEU but Not AFGE

These related objections appear in the Election Protests as item 1.a., and Exhibits[2] 6 and 23 were identified as support. In essence, AFGE argues that CBP demonstrated a lack of neutrality because in "April 2006, a mere month before the election ballots were mailed, the Agency notified all of the approximately 25,000 employees eligible to vote in this election by e-mail of its implementation of a new employee phone directory found on the Agency's intranet." NTEU information appears in this directory, but AFGE's does not.

In a submission dated August 28, 2006, AFGE argued that the WebTELE should not be considered as akin to a bulletin board which must be negotiated like other agency facilities for access to be granted. AFGE contends:

> [T]he better analogy. . . is a CBP published telephone book. Like any telephone book, the publisher simply lists all of the individuals or businesses who are within the named scope of the telephone book. In this case CBP was publishing on its intranet a telephone book of the contact information for all of its employees and organizations, including but not limited to unions. It is therefore unreasonable to suggest that AFGE should have had to negotiate its place in a telephone book that lists "Union[s]" within CBP.

---

[2] Throughout this decision, the documents provided by AFGE with its objections are referred to as "exhibits", while those from NTEU are "attachments."

NTEU Response

NTEU said that it "bargained for representatives' contact information to be included in CBP's telephone directory in its term agreement with the U.S. Customs Service," where it was the sole exclusive representative. NTEU argued that "[i]t is not a violation of the Statute or neutrality principles to provide incumbent unions with bargained for benefits or services during a representation proceeding," citing *DOD, Dep't of the Army, U.S. Army Air Def. Ctr. and Ft. Bliss, Ft. Bliss, Tex.*, 29 FLRA 362 (1987) (*Ft. Bliss*). NTEU further argued there is no evidence that similar listings were negotiated as part of AFGE's agreement with the INS,[3] nor has AFGE produced any evidence showing that such listings were customary and routine, or that AFGE even asked CBP to list their contacts in the directory.

CBP Response

Similar to the claim made by NTEU, CBP stated that:

> [T]hrough negotiation and past-practice, NTEU was provided the benefit of a union representative directory on the U.S. Customs' electronic telephone directory (TELE). In accordance with applicable law. . . this benefit transferred to CBP and must continue. . . . [W]hen CBP determined AFGE employees would be included [in the directory], the Agency fulfilled its notice and bargaining obligation. Although AFGE representatives could have proposed a union representative directory similar to NTEU's during negotiations, they failed to do so. As a result, it is the Agency's position that the differences in benefits provided to AFGE and NTEU through TELE have been legally implemented.

Investigation

The phone directory on CBP's intranet is called the WebTELE. Exhibit 6 is the WebTELE Quick Reference Card, and NTEU is listed under the heading "OTHER INFO." There is no corresponding listing for AFGE, or the National Association of Agriculture Employees (NAAE), the union that had represented CBP's Agriculture Specialists.

Exhibit 23 is CBP's User Guide for the TELE and WebTELE, a 65-page document issued on May 26, 2006. The Introduction to TELE and WebTELE indicates that the TELE and WebTELE directories are automated systems used by CBP to locate employees in emergencies and maintain current contact information for those employees. CBP had relied on its TELE mainframe system to serve this purpose.

---

[3] As part of its response, NTEU provided the entire AFGE-INS collective bargaining agreement (attachment 6), also known as Agreement 2000.

However, TELE was limited and was replaced with a more modern web-based version called WebTELE. WebTELE is the single directory system for all CBP employees and contractors.

The table of contents to the User Guide shows there are three pages devoted to NTEU features in WebTELE, pages 43-45. These pages describe how authorized users may update NTEU contact information and general users may locate NTEU representatives "at any listed CBP location." Again, there is no corresponding information about AFGE.

NTEU provided attachment 5C, a copy of Article 34, Access to Facilities and Services, from its collective bargaining agreement with the U.S. Customs Service, which is dated February 1, 1997. Section 14 states:

> The Employer agrees to list the name, office telephone number, home or Union office telephone number of each Chapter President and NTEU National Vice-Presidents (2) in the telephone directory.

CBP assumed the collective bargaining agreements of the unions that were transferred to it after the Department of Homeland Security was established. For example, on March 12, 2003, Janet Hale, Under Secretary for DHS, issued a memo entitled, "Collective Bargaining Obligations." Hale's memo instructed all managers that they must honor negotiated agreements that existed in the various components that were transferred to DHS. The investigation shows that the U.S. Customs Service had a computerized staff directory called TELE, and CBP maintained it.

As part of the investigation, CBP was asked to provide the notice it sent to AFGE regarding inclusion in the directory. CBP produced a letter addressed to the Acting AFGE Council 117[4] President, dated February 26, 2004, which has the subject line "Notification of Updating Customs and Border Protection Telephone Directory." This notice explained that CBP uses the TELE directory and AFGE's legacy INS employees[5] would soon be required to provide their information for the TELE database directory. The notice added that "having this employee information available in TELE proved to be an extremely valuable asset during the events that took place on September 11, 2001, as the U.S. Customs Service was able to rapidly account for all its employees." However, the AFGE officials who should have received this notice say they never did.

---

[4] Council 117, or the National Immigration and Naturalization Service Council (NINSC), both refer to AFGE, and reflect its status as the exclusive representative of former INS employees who are part of this petition. Council 117 and NINSC are used interchangeably with AFGE in this decision.

[5] The parties to this case routinely refer to employees from the predecessor agencies, including U.S. Customs Service and INS, as "legacy employees."

In April 2006, CBP made the transition to the WebTELE format. This contained the same information as the TELE system, but was displayed in a more modern way as a web page on the CBP intranet. CBP provided a "print screen" from the old TELE mainframe database system. The screen background is black, and the text is either light blue or white. NTEU is listed as item 10 on the screen.

As part of the move to WebTELE, CBP stated it did not notify or provide any of its unions the opportunity to bargain because "it merely constituted a change in platform (mainframe to intranet). For employees, there were no changes in substance, content or functionality." CBP argues that the information contained in WebTELE was no different than that found in TELE, and in 2004, AFGE's legacy INS employees were told to add their information to the system.

AFGE was asked, what, if anything, it did upon discovering that its information did not appear in WebTELE. In particular, AFGE was asked if someone such as the President of Council 117, or a higher-level official, ever submitted a request to CBP, to bargain or otherwise. In response, AFGE said no such thing occurred.

Analysis and Conclusion

"The standard for determining whether conduct is of an objectionable nature so as to require that an election be set aside is its potential for interfering with the free choice of the voters." *U.S. Army Eng'r Activity, Capital Area Fort Myer, Va.*, 34 FLRA 38, 42 (1989)(*Ft. Myer*). In making this determination, the Authority has stated that "[d]uring an election campaign, management has the duty to remain neutral. Management actions during an election which deviate from this required neutrality and which have the potential to interfere with the free choice of the voters require the election to be set aside." *Id.* at 43. In *Ft. Bliss*, the Authority held that "it is reasonable to expect that an incumbent labor organization will have acquired some advantages in agency services and facilities over a rival union through collective bargaining. The Statute does not require that an agency equalize their positions." 29 FLRA at 366.

The information provided by CBP and NTEU makes it clear that NTEU had bargained for the privilege of having its listings in the CBP directory, which extended to both TELE and WebTELE. Therefore, as NTEU's collective bargaining agreement provides for listings in an agency directory, but AFGE's does not, CBP did not violate neutrality principles by including NTEU. I reach a similar conclusion regarding the User Guide to the TELE and WebTELE. I note that the Department of Homeland Security was established in 2003, and ever since, regardless of whether AFGE received the February 2004 notice from CBP, AFGE did not request listings in TELE or WebTELE.

As it was not improper for CBP to adhere to contractual obligations to NTEU, I conclude, consistent with section 2422.27(b) of the Regulations, AFGE has not met its burden of proving the allegations of improper conduct. *Ingleside*. Therefore, the objections as to WebTELE and the User Guide are dismissed.

2. CBP Allowed NTEU to Use Its Email System to Campaign but Not AFGE

This objection is found in the Election Protests as item 1.c., and is supported by Exhibits 1-5, 7, 8, 46, 50 and 51. AFGE claims CBP demonstrated a lack of neutrality by allowing NTEU to engage in electioneering on the Agency's email system while denying AFGE similar access for its electioneering or representational matters. The alleged objectionable emails NTEU sent were on October 12, 19, and December 15, 2005; March 4, April 26, and May 28, 2006. An additional message is undated.

NTEU Response

NTEU has a three-fold response. First, CBP broadly permits personal use of its email system, and therefore cannot discriminate against union related communications when it allows personal messages. Second, the majority of emails provided by AFGE "are representational in nature," and by contract, NTEU bargained for the right to send such messages. Finally, AFGE's objection is fundamentally about a lack of neutrality on CBP's part, and there is no evidence that NTEU was favored in this regard.

In general, NTEU asserts it is disingenuous for AFGE to now argue that CBP refused its requests to use CBP's email system when AFGE complained about NTEU's usage of that same system. Moreover, "that some election-related materials were sent to CBP employees over the government email system, without any showing that CBP knew of or condoned the activity, does not establish lack of neutrality on CBP's part."

CBP Response

CBP said "throughout the campaign and election period, AFGE maintained that in order to remedy NTEU contract violations (an incident of inappropriate use of CBP's email system, for example) CBP must permit AFGE to engage in a similar violation." CBP asserted that to the contrary, its obligation, when made aware of incidents where its email system was being used for campaign purposes, was to:

> [T]ake reasonable steps to curtail those violations. . . CBP not only cautioned NTEU representatives at both the national and local levels, but implemented systemic controls (i.e. blocking specific outside email addresses from crossing into CBP's electronic mail system) in an effort to prevent such incidents from occurring. . . . Furthermore, in response to similar violations committed by AFGE, CBP took similar corrective action.

Investigation

On August 9, 2005, AFGE sent a letter to Janet Hale, Under Secretary for DHS, which was signed by John Gage and the former President of Council 117 (Exhibit 46). In this letter AFGE pointed out that NTEU had access to CBP's email system, and in particular "NTEU is being allowed to post news and share information about its union

with all bargaining unit employees, even those represented by AFGE." Therefore, AFGE requested "the same access." AFGE did not provide the response, if any, from CBP to this letter.

AFGE provided several email messages from NTEU supporters, declarations from those who received such messages, as well as a dismissal letter from an unfair labor practice charge AFGE filed over the distribution of one such message, Case No. AT-CA-06-0032. The dismissal of this charge was never appealed. The dismissal letter is Exhibit 1, and outlines the earliest example of a campaign-related message raised by AFGE, an email message sent in Florida.

On October 12, 2005, an NTEU Chapter 137 activist in Florida used CBP's email system to send a message to "All South Florida CBP Employees (including legacy INS and Agriculture)." This message announced an upcoming visit by NTEU National President Colleen Kelley to the Miami International Airport.

The following day, the local AFGE President forwarded the message to CBP labor relations officials, and she requested to send a similar message regarding an upcoming visit by AFGE National President John Gage. Her request was denied, and CBP said the policy prohibiting such mass mailings "would be applied equally to all unions in South Florida."

CBP was unaware of NTEU's intention to send the email in advance, and afterwards, a local labor relations representative sent a letter to the NTEU activist advising that it was "an improper, inappropriate, and unauthorized use of the Agency's electronic mail system." CBP's Director of Labor and Employee Relations Policy also sent a letter to NTEU's National Counsel, advising that NTEU "should not be using the Agency's internal email system for internal union business, which included disseminating any information regarding NTEU's campaign for the upcoming election between NTEU and AFGE."

On December 15, 2005, a different NTEU Chapter 137 activist sent another email (Exhibit 2). This one contains a summary of general membership meeting notes, and says the "predominant issue discussed during this meeting was the upcoming election. . . . [T]he NTEU attorney for this region, spoke of the many victories won by the Union and of struggles still pending."

On October 19, 2005, an NTEU steward sent an email through CBP's system in Dallas-Fort Worth (Exhibit 3). The subject of this email is "NTEU DHS Update," and the body of the message shows that it highlights the activities of NTEU over a particular period of time. It includes a reference to an arbitration victory in the area of grooming standards, a visit by Kelley, and NTEU's comments on a DHS performance management directive, among other things.

An email from another NTEU activist, dated April 26, 2006, with the subject "election," compares how AFGE and NTEU might differ on particular issues (Exhibit 7). An email sent by a NTEU Chapter 123 steward on May 28, 2006, asks respondents to confirm they received a ballot, that they voted, and that they voted for NTEU (Exhibit 8).

Exhibit 4 is an email from an AFGE member, dated June 12, 2006, alleging that "the NTEU shop steward regularly and very often is permitted to use the CC Mail system to distribute NTEU propaganda. I get anywhere from 4-10 emails a day from him. . . the AFGE steward isn't permitted to use the CC Mail system for union business at all." No such NTEU emails were included, nor was a declaration from the AFGE steward allegedly unable to use the email system.

Exhibit 50 includes a declaration from the AFGE Local President in Chicago. As relevant to this objection, the declaration contains one sentence to the effect that unlike AFGE, NTEU was allowed to use the government email for union purposes, including the election. Attached to the declaration are various documents, and among them are emails from the NTEU Chapter President in Chicago. One is dated March 4, 2006, with the heading "Legislative Updates." The email shows that NTEU officials attended an annual legislative conference in Washington, D.C., and outlines matters discussed. Another message is undated, but contains notes of the NTEU representative's meetings with management to discuss general working conditions, including overtime wheels, annual leave, and shift start times.

The AFGE Local President in Chicago was contacted during the investigation, and she said her NTEU counterpart sent email messages on CBP's system to nearly all employees, including those represented by AFGE, between February and June 2006. Several examples were submitted. She also stated her belief that Agreement 2000 prohibited use of government email for union business, such as for campaign-related purposes, and because of that she did not send out such messages as NTEU did. Instead, she would provide information to her stewards to distribute. In February or March 2006, she recalled sending an email to local management asking whether it was fair for NTEU to be using its email system as it was. That email, and response, if any, were not provided.

Exhibit 51 includes a declaration from an AFGE steward in Champlain, New York. Item E of the declaration alleges unrestricted use of government email by NTEU. However, the only supporting documentation attached to the declaration addressing this objection was an email dated April 10, 2006, but written by AFGE's declarant to all bargaining unit employees at his Port of Entry, including those represented by NTEU. This email contains his handwritten notation of a "complaint [he] received. . . concerning abuse of cc-mail by AFGE."

The Champlain steward explained that in connection with the email he sent on April 10, 2006, provided as part of Exhibit 51, beforehand, he told local managers he intended to send the message to "everyone at the Port of Entry by email," and they

never told him he could not. Other than the complaint he received from an NTEU representative that he had abused CBP's system, which he had noted on the email AFGE provided, he never heard from any member of management about the email he sent on April 10. In particular, he was never told to stop using the email as he had. Nonetheless, the AFGE steward explained this was the only such message. He never used the CBP system to send other campaign-related emails to his coworkers. Instead, he set up a private email from home to send such messages to the personal email accounts of other employees.

Attached to his declaration was another email dated April 10, 2006, but this one was directed to his Port Director. In it, he noted "a lot of traffic on CC-mail related to the upcoming vote," and requested written guidance "as to what will or will not be tolerated in terms of promoting the election within the confines of the [Port of Entry] and its electronic message services?" At the bottom of the message, he noted a verbal response from two supervisors. When asked the particulars during the investigation, he said the supervisors told him the NTEU representative was well aware of what he could and could not do legally, and if he did more than that, he would be in trouble.

Meanwhile, in February 2006, an AFGE national organizer and a CBP labor relations representative had an email exchange (Exhibit 5). The exchange was initiated by the labor relations representative who was documenting a telephone conversation on February 16, 2006 about a meeting AFGE wanted to arrange with headquarters employees in the Ronald Reagan Federal Building. In particular, the CBP representative stated "AFGE would not be allowed CBP email access to all employees in the Ronald Reagan Federal Building."

According to the email, on February 14, the labor relations representative said AFGE would be able to post an invitation on an easel in the front and rear entrances for an election meeting on February 16, or at a later date if the meeting was to be rescheduled. However, the CBP representative told AFGE it could not use the CBP email system to advise employees of the meeting, nor could AFGE do a desk drop. The CBP representative offered that since AFGE had no bulletin board in the space, it would allow postings in its entrances.

In a response submitted on February 16, the AFGE representative quoted from Article 8, Facilities and Services, Section K, Electronic Mail, of Agreement 2000, which provides:

> Union officials are authorized the use [of] the Service's email system. The Union may use the email system to communicate informally with employees and the Service, but not for strictly internal union business. The parties agree that internal union business is prohibited when using government-provided access to the Internet.

The AFGE representative then stated he was requesting use of the email system to communicate with headquarters employees "on other than internal business, including to notify them of a meeting at the Reagan building on some future date to discuss matters referenced in the article above."

From the email exchange provided, the CBP representative apparently did not respond until February 22. The request was denied on the basis that "the reason you are requesting the use of the CBP email system is for discussion with CBP employees regarding the upcoming election. This would be considered as internal union business and not in compliance with the contract article you address." Additionally, it was noted that AFGE "is not the exclusive representative of the employees who work at CBP and we do not have an easy ability to discern who each employee is specifically represented by." The CBP representative reiterated his offer to allow easels at the front and rear entrances to notify employees of any meeting that might be scheduled at a future date, stating that "[t]his offer remains open to you to take advantage of."

Evidence Provided by NTEU

In support of its claim that CBP broadly permits personal use of its email system, NTEU provided attachment 8, a U.S. Customs Service Directive entitled "Limited Personal Use of Government Office Equipment Including Information Technology." Although the first page of this directive is stamped "DRAFT," it does state that "limited personal use of government office equipment by employees during non-work time is considered to be an 'authorized use.'" One caveat to this policy is that such use must not "interfere with the mission or operations" or "overburden any . . . resources."

To support the argument that representational emails are allowed, NTEU offered attachment 5, an excerpt from its contract. Article 34, Section 8.A. permits "the Union's use of agency equipment, supplies, or media for communications concerning Employer-Union business. . . . [including] electronic mail." Section 8.C. of the same article provides that "the Union's use of agency equipment or supplies for internal Union matters or business is strictly prohibited."

NTEU's DHS Update

In particular, NTEU takes issue with AFGE's Exhibit 5, the exchange between a CBP labor relations representative and an AFGE organizer requesting use of CBP's email system to notify employees of an event at the Ronald Reagan Federal Building. NTEU submitted attachment 10, a letter from CBP to NTEU, dated January 26, 2006. This letter says the collective bargaining agreement between NTEU and the former U.S. Customs Service, "limits NTEU's use of CBP's electronic mail system to person-to-person communications related to Employer-Union business, and explicitly prohibits the use of agency equipment for internal union matters or business." The type of email message that CBP was addressing was NTEU's electronic newsletter entitled "DHS

Update," which according to the letter, "has been distributed to a significant number of employees over CBP's electronic mail system." CBP advised NTEU it "must take the necessary steps to curtail further communications of this type" on its email system, and CBP "intends to implement systemic safeguards."

NTEU's attachment 11 shows it filed a national grievance on February 13, 2006, over the content of CBP's January 26 letter. NTEU provided no further information about what happened with this grievance. During the investigation, CBP confirmed it blocked three email addresses, one from NTEU and two from AFGE. On January 27, 2006, all emails from NTEUDHSUpdate@nteu.org were blocked. CBP also confirmed that on May 11, 2006, it blocked comments@afge.org and eryan@afge.org.

NTEU Provided AFGE Emails

As evidence neutrality principles were not violated, NTEU offered attachments 12 and 13, affidavits of two NTEU officials that include emails sent on behalf of AFGE. One affidavit states that a CBP employee regularly forwarded "spam" emails received at her work address from the President of Council 117. Some of these are attached to the affidavit. One was sent on March 7, 2006 (subject: SEIU helping with some of our issues); March 22, 2006 (Every Vote Counts!); and another on April 25, 2006 (Congressional Testimony on Homeland Security).

The affidavit of an NTEU national attorney states that he personally received messages from the "email listserve" of the President of Council 117, and one such message, sent on April 24, 2006 (Email address update request), was included. The body of this message indicates it is directed "[t]o all users of DHS email addresses." Other messages NTEU provided that were sent on behalf of AFGE over CBP's email system include one on March 4, 2006 (subject: CBP Flyer), which had an AFGE campaign flyer an attachment; and one sent on May 16, 2006 (Bird-Smuggling Incident at JFK... Union Vote).

Moreover, additional documentary evidence submitted by NTEU with attachments 12 and 13 show that AFGE was being allowed to utilize CBP's email system to notify employees of meetings in two locations, Indianapolis and Detroit. On March 9, 2006, an email with the subject "AFGE Lunch and Learn Meetings" was sent to all bargaining unit employees in Indianapolis. The body of this message includes the statement, "[c]ome out and hear what AFGE can do for you." At AFGE's request, this message was sent by a management and program analyst in Indianapolis who is not in the bargaining unit. On April 27, 2006, an email entitled "Meet With AFGE Again" was sent to employees in Detroit. A bargaining unit employee in Detroit sent this message. The body of the message invites employees to "[c]ome hear what AFGE National president John Gage has to say about the right to choose: AFGE or NTEU and other CBP issues."

Analysis and Conclusion

In this objection, AFGE alleges CBP allowed NTEU to send emails while it was not. The evidence shows that representatives of both AFGE and NTEU made use of CBP's email system and sent messages to potential voters, and CBP had only limited success in its efforts to curtail such activities. CBP blocked certain messages from both AFGE and NTEU, refused to allow some emails when asked in advance, and advised union activists to stop sending emails it discovered after the fact. However, both sides took advantage of opportunities to use CBP's email system during the election campaign and were treated similarly by CBP. Accordingly, it cannot be said that CBP favored NTEU by allowing only its emails but not any of AFGE's as claimed. Therefore, CBP did not breach its obligation to remain neutral. *Ft. Myer.* Further, I do not find that CBP's conduct interfered with the free choice of the voters. *Ingleside.* As AFGE has not met its burden of proving the allegations of improper conduct in connection with these emails, I am dismissing the objection.

3. CBP Has a Special Code in its Timekeeping System That Spotlights NTEU

This objection appears as item 1.d. in AFGE's Election Protests, and it includes Exhibit 9 as its sole support. The essence of this objection is a claim that NTEU is featured more prominently than AFGE in CBP's computerized timekeeping system, COSS (Customs Overtime Scheduling System). Specifically, NTEU is mentioned by name while AFGE is not.

AFGE argues CBP "highlighted NTEU's representative status. . . [and] wiped away any direct reference to AFGE. This underhanded coding system sent a direct message to employees to vote for NTEU." In support of this argument, AFGE stated that "[u]pon information and belief, all CBPOs have access to COSS. Therefore, any employee voting in the instant election had the ability to view COSS, and its lack of mention of AFGE, and be reasonably influenced by the lack of Agency neutrality." AFGE did not identify anyone who believed that CBP's mention of NTEU in the time codes rather than AFGE showed favoritism.

NTEU Response

NTEU asserts that "AFGE appears to have been misinformed. Evidently CBP does have similar codes to track AFGE official time, at least in some ports." In addition, NTEU argues "[t]here is no evidence that any employees were aware of a separate tracking system. And if any were, it could just as easily be surmised that a separate system would be viewed as CBP scrutinizing NTEU official's time more closely than AFGE's."

Investigation

The only evidence AFGE submitted to support this objection was 30 pages of time codes. Each page appears to capture a computer screen image of the COSS system, one page at a time. Fourteen separate time codes are listed per page. At the bottom of each page, there is the following message "MORE....PRESS PF8 TO VIEW MORE DATA."

The codes are in alphabetical order, and one would have to go through eight pages of time codes to reach the "DUNI UNION - BARGAINING UNIT - NEW" code; the code for AFGE official time. AFGE complains this disadvantaged it in the eyes of voters because the code fails to mention AFGE specifically.

In comparison, once one has gone through 30 pages of computer screen codes, or nearly 420 individual time codes, "UNFPF UNION-NTEU BARGAINING UNIT ACTIVITIES FP&F" is reached. The bottom of the screen where NTEU's code appears indicates that a user can still "PRESS PF8 TO VIEW MORE DATA." Accordingly, there are apparently even more pages of time codes. Based on the evidence AFGE submitted, NTEU is only mentioned one time throughout.

Information supplied by NTEU (attachment 14) shows that at John F. Kennedy International Airport (JFK), official time for AFGE in COSS is recorded under "AFGE," while NTEU official time is coded "LMUOT."

Analysis and Conclusion

AFGE is not mentioned by name in over 400 time code entries in the COSS system, while NTEU is mentioned once, and 30 pages in. I cannot conclude this demonstrates a lack of neutrality by CBP, particularly where at least one location, JFK, is the opposite. AFGE has failed to present any evidence it ever went to CBP to correct the perceived imbalance by arranging for a time code that mentions AFGE by name. Moreover, AFGE has not offered any employee witness who was even aware of the perceived slight to AFGE in the time codes. As the Authority has previously stated, "the burden is on the objecting party to make a record that shows the potential impact the alleged conduct had on the election." *U.S. Dep't of Defense, Nat'l Guard Bureau, North Carolina Air Nat'l Guard, Charlotte, N.C.*, 48 FLRA 1140, 1147 (1993)(*NGB Charlotte*). Accordingly, AFGE has not met its burden to present evidence of how the time code descriptions interfered with the free choice of voters. *Ingleside.* This objection is therefore dismissed.

Objections Alleging CBP Managers Favor NTEU

4. A CBP Supervisor in Chicago Exhibited a Lack of Neutrality

This objection is found on page three of the Election Protests, under the Lack of Neutrality heading, and Exhibit 39 is the supporting evidence. AFGE claims that CBP's lack of neutrality was widespread, but also manifested in a manner that affected employees locally, particularly in Chicago. Neither CBP nor NTEU submitted a response to this objection.

Investigation

Exhibit 39 is an email from one CBP Officer at Chicago O'Hare International Airport describing a conversation she overheard between a supervisor and another CBP Officer about one month before the election. According to the officer, the supervisor said NTEU was a better Union and was explaining the supposed advantage of NTEU over AFGE.

The now former CBP Officer who provided the email above was contacted and provided a supplemental statement. She said the incident took place in approximately April 2006 at the NSEERS (National Security Exit and Entry Registration System) station, where certain arriving passengers are directed immediately following primary inspection. On the day in question, this officer and one other were in adjacent booths. A first-level supervisor came up and was engaged in a conversation with the other CBP Officer. No one else was present during the exchange.

At one point, the CBP Officer overheard the supervisor tell her coworker that NTEU was a better union than AFGE. When that happened, she told the supervisor he should not be talking about the election because management was supposed to remain neutral. She also said he was biased because his wife was the NTEU Chapter President. The supervisor denied he was biased and continued his conversation with the other officer for about five minutes.

Later that day, the CBP Officer who had overheard the conversation told the floor supervisor what had happened. He said he was glad she had brought it to his attention and would speak to the supervisor. According to the CBP Officer, she was unaware of any further discussions by the supervisor with employees to the effect that NTEU was a superior union. In the course of this investigation, the AFGE Local President in Chicago provided an email sent by the Assistant Port Director, Passenger Operations, of the Port of Chicago. This email is dated April 4, 2006, has a subject line "Union Elections," and was addressed to several individuals, including the supervisor in question. The email states the following:

Supervisors:

Please refrain from making any comments regarding which union you may believe should be elected as the representative for CBP. It is inappropriate to do this as a supervisor or manager.

Analysis and Conclusion

"During an election campaign, management has the duty to remain neutral." *Fort Myer,* 34 FLRA at 43. The investigation shows that only two of approximately 25,000 potential voters heard the supervisor's comments. Moreover, upon hearing of the inappropriate comments made by this supervisor, CBP quickly took corrective measures. As the Authority stated in *Ft. Myer*:

> [W]here the alleged objectionable conduct was isolated in nature and where the Activity acted quickly to stop the possible objectionable conduct, we cannot find that the alleged conduct had the potential for interfering with the free choice of the voters, so as to present a basis for setting aside the election.

Id. I conclude that AFGE has failed to meet its burden of proving that a conversation heard by two potential voters affected the free choice of the voters. First, one employee who heard the conversation corrected the supervisor. Then CBP admonished its supervisors not to talk about which union they preferred. *Ingleside.* Moreover, given that the margin of victory in this election was nearly 4,000 votes, the outcome of the election could not have been affected. *Id.* The objection is dismissed.

5. Another Supervisor Said the NTEU Contract Is the Only Contract

AFGE provided Exhibit 51 to support its argument that "CBP management has continually referred to the NTEU contract as the 'only' contract governing the day to day activities of the Champlain," New York Port of Entry. Although NTEU addressed certain claims found in Exhibit 51, it did not address this one, and neither did CBP.

Investigation

Exhibit 51, the declaration from the AFGE steward in Champlain, supports this objection at two points. First, the declaration states that Administrative Staff quoted the NTEU contract whenever a potential violation of the rights of AFGE members were in question. Second, CBP management, first line supervisors and above, have continually referred to the NTEU contract as the only contract. The AFGE steward provided additional information in connection with this objection.

The first example of an alleged inappropriate comment about the primacy of the NTEU contract took place in December 2005, after the AFGE steward saw a leave schedule for all bargaining unit members, including both legacy INS and Customs employees, that would have placed legacy INS employees under scheduling provisions observed by NTEU pursuant to a local agreement. When the AFGE steward told the Shift Supervisor this would violate AFGE's contract, his response was, "and your point is?" The AFGE steward did not reply, but the following day, the traditional leave schedule that followed Agreement 2000 was posted.

The second instance took place in the office of the Assistant Port Director in approximately April 2006. While trying to make a point about a requirement contained in Agreement 2000, the AFGE steward provided a hard copy to the Assistant Port Director, who said he had never seen this document, and "this is not our contract." Then the Assistant Port Director said he would have to read it. The AFGE steward left the office at this point without saying another word. Only one other person was present during this exchange, and it was another supervisor.

The remaining instance that took place during the objection period was in May 2006. A legacy INS employee had complained to the AFGE steward that his two days off had been split up in violation of Agreement 2000. The AFGE steward highlighted Article 29, Section A(1), which says that two days off shall be consecutive. According to the AFGE steward, the employee showed it to his supervisor when the steward was not present. Afterwards, the employee told him the supervisor said "our contract allows me to schedule you this way." He was not told any more about their conversation.

Analysis and Conclusion

None of the instances provided show that CBP management officials actually mentioned the NTEU contract, or that supervisors said it was more significant than the AFGE contract. In fact, the first example cited showed that after the AFGE steward complained, management observed the provisions of Agreement 2000 regarding the scheduling of leave. The second example does perhaps demonstrate that the Assistant Port Director had not seen the AFGE contract, and yet he added he would have to read it. In the final example, putting aside the fact that the comments of the supervisor are secondhand, these comments do not necessarily show that the supervisor was applying NTEU's contract. Arguably, his comments show that he did not agree with the interpretation of the contract being advanced by the AFGE steward. AFGE has not met its burden of proving the actual comments by supervisors, heard by a handful of employees, had the potential to interfere with the free choice of the voters and require the election to be set aside. *Ingleside*. The objection is dismissed.

6. CBP Adopted NTEU Standards and Applied Them Agency-Wide

These objections appear under the heading of Lack of Neutrality, at item 1.e. in the Election Protests. AFGE has raised three issues in connection with its claim that CBP "unilaterally adopted standards for personnel actions that stem from the NTEU negotiated agreement" and implemented them Agency-wide. These include changes to annual leave policies, compassionate transfers and swap standards. Each issue will be discussed in order.

Annual Leave

AFGE provided Exhibits 24 and 25 to support the allegation that CBP adopted an NTEU and Customs agreement with regard to carry over leave, criteria for approval of annual leave for competing requests, the deadline for requesting annual leave of five days or less, and the date of the annual leave schedule.

NTEU Response

NTEU argues that AFGE's evidence does not support the "premise that CBP applied the annual leave provisions in the NTEU contract to all employees nationwide, much less the ultimate conclusion, that the outcome of the election may have been affected." NTEU provided the annual leave article from its national agreement with the U.S. Customs Service and asserts it "does not address carrying over annual leave," nor does it set a deadline for requesting leave of any amount of time. In addition, resolution of competing annual leave requests is "left to local bargaining, again making it difficult to understand how such criteria could be implemented nationwide." NTEU argues that "CBP may have adopted leave standards that differed from what is found in AFGE's INS contract, but those standards were not adopted from NTEU's contract." Moreover, NTEU contends that AFGE failed to present evidence of how this change, which "became effective 17 months before the election," swayed employees to vote for NTEU.

Investigation

Exhibit 24 is a declaration from the AFGE Local President in San Diego, and paragraphs 41 and 42 speak to this issue. The declaration states that "[i]n Fall 2005, management changed the established past practice of legacy INS [employees] and the AFGE and INS contract with regard to annual leave." The next paragraph states "management adopted the NTEU and Customs Agreement with regard to carry over leave, criteria for approval of annual leave for competing requests, the deadline for requesting annual leave of five days or less, and the date of the annual leave schedule." In a supplemental statement, the Local President described the change, stating in the Fall of 2005, CBP issued an announcement changing the leave policy for legacy INS employees, requiring them to submit all leave requests that are three days or more by the previous November, as legacy Customs employees had always done.

The Local President said that during a muster in the Fall of 2005, CBP management at the San Diego ports of entry issued an announcement affecting all annual leave. That announcement has not been provided. The Local President maintained that the announcement from 2004, Exhibit 25, is similar, though he conceded it only applied to legacy Customs employees.

Exhibit 25 is a memo from an unnamed "Scheduling Supervisor" dated October 2004, with the subject "Annual Leave Selection Info, January 2, 2005 through January 7, 2006." The memo describes how employees are to request annual leave for 2005, including submitting requests by November 12, 2004. The memo references the "National Agreement, Article 13, Part I," regarding requests for two weeks of consecutive annual leave. In the objections, AFGE argues that "any AFGE represented employee would recognize that the 'Article 13' quoted was not that of AFGE's negotiated agreement."

NTEU provided part of its national agreement, attachment 5A, Article 13, Part I: Annual Leave. NTEU agreed that where Exhibit 25 mentions two weeks of consecutive annual leave, it is a reference to its article, though the memo does not mention NTEU by name. However, no other changes alleged by AFGE are found therein. For example, Article 13, Section 3.A. states:

> All requests for annual leave in excess of three (3) days shall be requested in advance and in writing. All other requests for annual leave shall be in advance whenever possible.

No deadline for annual leave requests is found in the NTEU Annual Leave article. Section 4 states that such matters were "established pursuant to Regional supplemental negotiations under the previous Agreement" for local areas.

In contrast, Agreement 2000, Article 35, Section E, requires employees to submit leave requests for the year by February 15, but only if they are over five days. The AFGE Local President said that at the time, legacy INS employees did not realize the alleged Customs practice of submitting leave requests by November was being applied to them for 2006, until February or April 2006, when legacy INS employees found they were being denied leave because legacy Customs employees had already requested leave for those days.

The Local President said he filed a grievance in approximately December 2005 on behalf of one CBP Officer who was denied 15 days of annual leave, expanding it to all legacy INS employees in San Diego affected by this change.[6] The Local President

---

[6] Elsewhere in its objections, AFGE estimated that "approximately 1,300 eligible voters work within the San Diego" District Field Office, though it is not clear AFGE is asserting that all of those are legacy INS.

said arbitration has been invoked, but a copy of the grievance and/or arbitration documentation has not been provided. In February 2006, at a labor management relations meeting, when the Local President raised the annual leave issue, including the grievant's situation, he said the NTEU steward attending the meeting stated they were handling leave requests the same as they had in the past.

Analysis and Conclusions

To the extent AFGE argued in its objections that NTEU's contractual annual leave provisions were being applied to all the employees it represents nationwide, insufficient evidence has been provided to reach that conclusion. While it is true that Exhibit 25 references the NTEU agreement, AFGE's witness said Exhibit 25 was for the previous year (2005) and applied only to employees represented by NTEU. The document from 2006 describing the change to AFGE represented employees has not been provided, nor has the grievance/arbitration documentation covering its employees. Thus, whatever policy with respect to annual leave was announced in the Fall of 2005 and applied in 2006, it has not been established that CBP applied the NTEU contract to all legacy INS employees nationwide, as alleged in the objections. The evidence also does not establish that an NTEU practice was being applied in San Diego. Accordingly, AFGE has not met its burden of proving a nationwide change, or a change in San Diego, affecting the free choice of the voters and requiring that the election be set aside. *NGB Charlotte; Ingleside.* The objection is hereby dismissed.

Compassionate Transfers

AFGE's objection here is that one of its officials received a call from a CBP labor and employee relations specialist, who told him that absent a nationwide CBP policy on when an employee was entitled to a compassionate transfer, the Agency had adopted the NTEU negotiated standard. Exhibit 28, a declaration from a CBP Officer in Corpus Christi, Texas, was offered in support of the objection.

NTEU Response

NTEU notes that "[t]he AFGE contract does not appear to contain a hardship transfer clause," and the situation involves "a non-legacy CBPO," meaning one who was hired after the petition was filed in this case and who did not come from either INS or the U.S. Customs Service. As such "AFGE had no right to bargain or complain about the application in that situation, which may explain the absence of any evidence that AFGE sought to do so."

NTEU also points out that the labor and employee relations specialist's comment was made "three weeks after the ballots were mailed out, [and] there is no evidence the affected employee was even privy to it, much less influenced by it." Moreover, there has been no showing that CBP publicly announced it was applying an NTEU provision

in all such situations or to AFGE represented employees. This is "merely the application of an existing policy in the absence of any other to apply." Thus, there is no evidence this isolated incident "had any effect on the election outcome."

Investigation

The AFGE representative was contacted and provided an affidavit. He explained that in April 2006, he represented a CBP Officer seeking a compassionate transfer from Roma to Eagle Pass, Texas, which was denied. Although the Port Director in Eagle Pass was willing to accept him, the Port Director in Roma would not let him leave. On April 26, he helped the officer write a memo requesting reconsideration pursuant to Agreement 2000. Two different CBP officials discussed the matter with the AFGE representative. He had two conversations, one on June 1, 2006, and one the following day.

On June 1, 2006, he received a call from an HR official, who said the Agency is not denying the officer's request, but at this time, CBP is unable to relocate him but would in the future. He said the headquarters element could not assist, but he understood the situation and recommended the local labor and employee relations department be contacted.

The AFGE representative left messages with that department, and on June 2, he received a phone call from a Labor and Employee Relations Specialist. She started talking about NTEU's standard for compassionate transfers, which requires three years on station, two medical opinions and other criteria. The CBP Officer met all criteria except for being there for three years. The AFGE representative asked why the three year standard could not be waived. The LER Specialist said that absent a nationwide policy, Laredo had adopted the NTEU standard. She added that based on service needs, he could not be transferred. When he mentioned that the Port Director in Eagle Pass was willing to accept him, she said he should bring it to the attention of the DFO (Director of Field Operations). No one else heard his conversation with the LER Specialist, and the AFGE representative did not discuss it with his bargaining unit members.

Analysis and Conclusions

Here AFGE alleges CBP is applying the compassionate transfer standards found in the NTEU contract nationwide. However, the CBP headquarters official did not say the NTEU standard was applicable. Some comments of the Laredo LER Specialist suggest the NTEU three year standard was a consideration. Other comments the LER Specialist made, such as those related to service needs, as well as the fact that the Port Director did not want to give up his employee, make it less clear the transfer was denied due to the application of NTEU's standard. AFGE has not met its burden of proving the conduct alleged in the objection, or any conduct that interfered with the free choice of the voters. *Ingleside*. Accordingly, the objection regarding compassionate transfers is dismissed.

Swaps

AFGE argues that Exhibit 53, a statement from a CBP Officer who made a request to swap locations with another CBP Officer, shows a lack of neutrality, specifically that a supervisor applied the NTEU contract. The statement AFGE supplied says he was told his union agreement did not provide for swaps, and since he was an AFGE employee, not NTEU, which has a swap provision, his request was denied.

NTEU Response

NTEU argues "this claim is flatly inconsistent with one of AFGE's primary objections; that CBP engaged in objectionable conduct by 'adopt[ing] NTEU standards and implement[ing] them Agency-wide." Moreover, NTEU states that "[e]ven if the officer was influenced to vote for NTEU because NTEU's agreement contained a beneficial provision that AFGE's did not, that is no basis for objecting to the election."

Investigation

The CBP Officer in Florida provided an affidavit. In it he confirmed he is a legacy INS employee, and though he had not seen any swaps in his area, INS had a liberal transfer policy. He explained that CBP's TECS system administrative messages bulletin can be read by everyone. This bulletin contains things such as vacancy announcements, requests to donate leave, and other personnel matters. He asked a supervisor to add a message to the bulletin advising that he wanted to swap positions with another officer closer to Birmingham, Alabama.

He found another CBP Officer in North Carolina who agreed to swap with him, and their supervisors agreed. However, the Director of Field Operations in Florida did not. In February 2006, the CBP Officer's Port Director showed him an email from a labor relations person who works for the DFO. He was not given a copy of the email, but it said the DFO's position was that swaps were not in the INS contract with AFGE, and even NTEU's contract requires one to be at the port for at least three years before a swap is allowed.

The local Port Director did try to assist however. Following an inquiry, another labor relations official in Miami sent the Port Director an email, which he showed to the CBP Officer, though again he was not given a copy. This email indicated that while it was correct that AFGE's contract did not mention swaps, the DFOs could agree to a mutual exchange of duty stations without calling it a swap. Nonetheless, he was later told that his request had been denied, as they were sticking to their earlier position.

Analysis and Conclusions

It does appear that the DFO concluded only the NTEU contract had a swap provision, and in the absence of a comparable provision in the AFGE contract, the swap was not allowed. However, CBP is not required to equalize the contracts of rival unions. *Ft. Bliss.* AFGE has not met its burden of proving the NTEU contract was applied to the CBP Officer who sought a swap. *NGB Charlotte.* Moreover, AFGE has not established this one denial affected the outcome of the election or interfered with the free choice of the voters. *Ingleside.* Thus, I am dismissing this objection.

7. CBP Favored NTEU By Allowing it to Use CBP's Email To Publicize Grievance Victories and Processed NTEU Grievances

This objection is found at page 21 of AFGE's Election Protests, under the heading 3.a. (Interference with Representation, Failure to Adhere to the Contractual Grievance and Arbitration Provisions), and is supported by documentary evidence, Exhibits 3, 33, and 38. AFGE argues these documents show that while CBP "ignored AFGE grievances and delayed arbitrations. . . at the same time the Agency and NTEU were settling national and well publicized grievances." The settlement of those grievances were further publicized on CBP's email system.

NTEU Response

NTEU responds that the matters raised by AFGE "were not settlements, as AFGE implies, but arbitration decisions issued after CBP refused to settle grievances over the matters." Further, NTEU's notes "CBP has filed exceptions to both decisions with the FLRA, eliminating any basis for arguing that CBP somehow took a dive in the cases to bolster NTEU's election prospects." NTEU adds that under Article 34, Section 8.A. of its contract, it had the right to use CBP's email system to communicate with employees about representational matters such as these arbitration decisions, citing *Ft. Bliss.* In sum, NTEU argues that:

> It is absurd to suggest that CBP was proscribed from dealing with [NTEU] to resolve pending grievances during the QCR period, if that is what AFGE is saying here. That AFGE may not have had similar success in cases affecting large numbers of eligible voters, and therefore nothing to publicize along those lines, does not provide a basis for claiming that CBP demonstrated favoritism to NTEU.

Investigation

Exhibit 3 is the October 2005 NTEU DHS Update email of the type CBP began to block in January 2006, which was grieved by NTEU, and previously discussed in number two in this decision. The portion of the DHS Update highlighted by AFGE in

connection with this objection is the first section, which announces an arbitration ruling upholding a complaint made "[l]ast fall. . . [by] NTEU, and NTEU only, that challenged the grooming standards CBP unilaterally implemented despite widespread objections by employees." NTEU provided an arbitration decision which concerns "Agency Implementation of Personal Grooming Standards Without Completing Bargaining," dated October 14, 2005, that does show NTEU prevailed in large measure. (attachment 16).

An email dated February 2, 2006, from the NTEU National President, with the subject "Flier on Favorable CBP Awards Decision" and an attachment is Exhibit 38. The attachment includes a letter from Colleen Kelley informing Chapter Presidents "of a significant arbitration decision NTEU won that could mean additional millions of dollars in awards for CBP employees." The attachment also includes a flyer on the awards program, which explains that NTEU negotiated the program in 1997, CBP unilaterally terminated it in 2005, implementing its own awards program, but the arbitrator ordered CBP to rerun its awards process for 2005. The flier ends with the statement "CBP can appeal this decision or do the right thing and follow the law." NTEU provided an arbitration decision regarding a "Joint Awards Committee Grievance." (attachment 17). The decision of the arbitrator reflects that he granted a status quo ante remedy because CBP unilaterally implemented a new awards policy.

On May 4, 2006, an email from CBP's Office of Field Operations announced an agreement between NTEU and CBP allowing CBP Officers who attended basic training at the Federal Law Enforcement Training Center (FLETC) to receive compensation for participation in Saturday training sessions (Exhibit 33). This message explained that after the increased demand for training following September 11, FLETC expanded its training schedule from five to six days per week. The message further stated that "[p]ayments will be issued to CBP Officers represented by NTEU who attended FLETC basic training over a nearly three-year period ending in October 2004. . . . Payments are expected to issue this summer."

In connection with the FLETC six-day pay matter, NTEU provided attachment 18, an affidavit from an NTEU attorney who averred that the negotiations with CBP on the issue "followed the filing of a national grievance in 2003 and decisions from an arbitrator in 2005 and 2006. . . The two arbitration decisions established CBP's liability for uncompensated overtime at FLETC." This NTEU attorney was personally involved in the negotiations with CBP, and he confirmed that one of the matters agreed upon was that CBP would send an email message about the settlement, which was jointly drafted by NTEU and CBP, to employees in CBP's Office of Field Operations. His affidavit further reflects that he recognizes AFGE's Exhibit 33 as that email message.

Analysis and Conclusions

AFGE did not provide evidence that it complained to CBP about these specific emails. The only exception being subsequent issues of NTEU's DHS Update, which CBP began to block, as discussed in objection two of this decision. The contract article cited by NTEU, Article 34, Section 8.A., permits "the Union's use of agency equipment, supplies, or media for communications concerning Employer-Union business. . . . [including] electronic mail." Arbitration decisions certainly concern employer-union business, and would thus fit within this contract language. I find no improper actions on CBP's part by virtue of the fact that these emails went out on its system. *Ft. Bliss.*

Moreover, under section 2422.34(a) of the Regulations, "an agency is required to continue to recognize the existing exclusive representative, and to fulfill its obligations to that exclusive representative, until the issues raised by a representation petition are resolved." *Dep't of the Navy, Naval Weapons Station, Yorktown, Va.*, 55 FLRA 1112, 1114 (1999)(*Yorktown*). I therefore conclude that by processing NTEU grievances, including resolving one of them, CBP did not violate its obligation to remain neutral in this regard. *Ft. Myer.* AFGE has not met its burden of proving the allegations of improper conduct affecting the free choice of the voters in this election. *Ingleside.* These objections are dismissed in their entirety.

Objections Alleging that CBP Thwarted AFGE's Negotiated Grievance Procedure

8. CBP Ignored AFGE Grievances and Engaged in Stall Tactics, Including Delaying Arbitration

This objection appears within part 3.a. of the Election Protests. AFGE argues that while "the Agency and NTEU were settling national and well publicized grievances, the Agency. . . ignored [AFGE] grievances, and delayed arbitrations." AFGE points to the following examples: four arbitration requests made by a San Diego representative that have not been heard; an arbitration in El Paso over the "FLAP" issue, which has been delayed, as was a national FLAP grievance; a national grievance filed over denial of official time; and a step 2 grievance in Champlain, New York which has gone unanswered. Each of these issues will be discussed in order.

San Diego Arbitration Requests

Here, AFGE alleges that CBP's "failure to process these arbitrations is an unfair labor practice which impacted the outcome of this election as it made AFGE appear powerless in the eyes of the electorate." AFGE cites to Exhibit 24 to support its claim that four arbitration requests by a representative in San Diego have not been heard.

NTEU Response

NTEU says that AFGE failed to show either that the San Diego "cases concern any issues of widespread concern to employees or how the parties' inability to schedule the cases to date, assuming wrongdoing on CBP's part, affected the election." In particular, NTEU points to the arbitration provision found in Article 48 of AFGE's Agreement 2000 and argues it "doesn't specify how [arbitration] cases are to be assigned. . . . [n]or does the article dictate who is responsible for initiating contact with an arbitrator for purposes of scheduling a case."

NTEU argues that, "if the cases were important to AFGE's election prospects, AFGE itself could. . . pursue scheduling the cases instead of waiting for CBP." NTEU further submits that "delays in scheduling arbitration hearings are the norm in CBP's relationship with AFGE," citing *Cruz-Martinez v. Dep't of Homeland Sec.*, 410 F.3d 1366 (Fed. Cir. 2005). In that case, the court upheld the finding of an arbitrator that since the 1980's, a past practice existed whereby DHS (and formerly INS) closed out arbitration cases that had not been acted upon by AFGE for one year, and the arbitrator specifically referenced "past close-out letters averaging twenty-five to thirty per year." *Id.* at 1368.

Investigation

AFGE's Exhibit 24 is the declaration of a representative in San Diego, and in it, he states that since December 2005, he has filed four requests for arbitration which have not been heard. He also declares that in April 2006, he asked CBP representatives why he had not received a list of arbitrators for his cases and was told there was a new procedure of first come, first served, and there were more pending NTEU cases than AFGE cases, which would be heard first. None of the four arbitration requests were included with the exhibits.

The declarant provided an affidavit during the investigation. Subsequently, he supplied additional documents. Although he was asked to provide all four arbitration requests, only one was provided. It involves a suspension he received. On March 14, 2006, he requested expedited arbitration of his own case under Article 48, Section G of Agreement 2000. In April 2006, he inquired from CBP representatives about the status of his arbitration as well as the other three.[7]

The San Diego representative said that during the conversation, he told the CBP representative this looked bad, since NTEU had gone to arbitration several times in San Diego, and AFGE is still waiting to hear about arbitrations submitted in 2005. In

---

[7] Although it was not provided, he explained that he tried to expedite one of the other three arbitration requests in addition to his own. This concerned another employee who was denied annual leave.

response, the CBP representative stated they only have a small group of lawyers, and it was a first-come, first-serve basis, adding that NTEU has more pending cases. No documentary evidence was provided to substantiate the claim that CBP had processed several NTEU arbitrations, or that AFGE had arbitrations from 2005 still pending.

Around April 20, 2006, the declarant received a call from a CBP attorney, who said his arbitration could be expedited. He requested a list of arbitrators, and received one in mid May 2006. However, upon review of the list, he thought it was old. He did not attempt to initiate arbitration by contacting any of those listed, nor did he try to find out if anyone within AFGE had a newer list. Shortly after receiving the list, he left a message with the CBP attorney about it, but did not hear back from him. He also asked the Deputy Port Director in Calexico to look into it, but no action was taken.

FLAP Arbitrations–El Paso and National Grievances

Beginning with the national grievance, AFGE asserts that "the arbitrator has sought a date for arbitration since May 10, 2006," but CBP said it was unavailable for a hearing until "late October or November." AFGE submitted Exhibits 35 and 36 in support. As for the El Paso grievance, AFGE points to Exhibit 48, a declaration with accompanying documentation. Both grievances concern the Foreign Language Awards Program (FLAP), also described as the Foreign Language Proficiency Award, a bonus paid to CBP Officers for using a foreign language in connection with their duties.

NTEU Response

In addressing AFGE's national grievance, NTEU points to the evidence AFGE submitted, arguing that as the arbitrator was asking for hearing dates in May 2006, which is when the ballots went out, "even under the most favorable scheduling scenario for AFGE, the hearing would have been held a month after the ballot count, with a decision much later." NTEU added there is no evidence CBP's delay was intended to injure AFGE's election prospects or that the outcome of the election was affected. NTEU makes a similar argument in connection with the El Paso FLAP grievance.

NTEU also asserts that neither the El Paso nor the national grievance "present a fair basis for comparing CBP's actions with respect to NTEU and AFGE." NTEU's grievance was filed in October 2004 over failure to follow a FLAP agreement it had negotiated with Customs in 1996. In contrast, AFGE's grievance was filed over a year later, "on November 29, 2005, six days after NTEU settled its grievance. . . . [and t]hat fact alone explains why NTEU's grievance was resolved sooner." Moreover, NTEU claims the "settlement of its FLAP grievance appears to have been the catalyst for the AFGE grievance, which was filed immediately upon the heels of that settlement." NTEU provided attachments 19 and 20, its FLAP grievance and resulting settlement.

CBP Response

A CBP representative provided correspondence showing it considered the El Paso FLAP grievance to be subsumed by AFGE's previously filed national FLAP grievance. CBP so argued before the arbitrator of the El Paso grievance.

Investigation

AFGE's Exhibit 35 is an email exchange between an AFGE attorney and the arbitrator jointly selected by CBP and AFGE to hear the national FLAP grievance. The AFGE attorney contacted the arbitrator regarding proposed dates for the arbitration. The date the arbitrator was contacted was not provided, but the arbitrator responded on May 10, 2006, and proposed Friday, July 21, 2006 as the hearing date.

Another series of emails makes up Exhibit 36, beginning with one dated May 23, 2006 from the arbitrator of the national grievance, asking the parties to confirm that July 21 is acceptable. The CBP official said agency counsel would be in another hearing then, so on June 8, 2006, the arbitrator proposed August 18, 2006. At the time of the Tally of Ballots, the parties were scheduling the arbitration.

El Paso FLAP Grievance

Exhibit 48 includes a declaration from the AFGE Local President in El Paso, dated July 3, 2006; an unfair labor practice charge (Case No. DA-CA-06-0366); the El Paso FLAP grievance (filed November 29, 2005); and correspondence between a CBP attorney, an attorney handling the local FLAP grievance for AFGE, and the arbitrator assigned to the local grievance.

Background regarding time lines is relevant to understanding what took place with the El Paso grievance. The grievance procedure found in Article 47 of Agreement 2000 contains at least two separate processes. Section F describes "Grievances Filed by Employees," while section I deals with "Grievances Filed by the Union or the Service." These processes have different time lines, and different required stages leading to arbitration. Before arbitration, an employee grievance has three steps, one, two and three, but a Union or Service (INS) grievance only has two steps, A and B. The time when responses are due also differs. Without going into extensive detail regarding the time lines, it is apparent from the correspondence of both parties that the El Paso local considered its FLAP grievance to be covered by the section F procedure, while CBP believed it to be covered by section I.

The El Paso "step 1 grievance" was filed on November 29, 2005, and under section F, the AFGE local's expectation was that a response was due within five work days. As no response was provided within that time frame, AFGE Local 1210, through counsel, elevated this grievance to "step 2" by letter dated December 9, 2005.

On December 15, 2005, CBP responded to the grievance. CBP characterized its response as being pursuant to section I, as "Step A," stating its belief that this was the proper procedure for the grievance. According to the contract, a response to a Step A grievance is due within 15 workdays after receipt. CBP also submitted its "Step B" response on December 19, 2005. Similar to its initial response, CBP denied the relief requested but added that if the Union was "not satisfied with this decision, you may invoke arbitration."

Rather than going directly to arbitration, on January 3, 2006, Local 1210, through its counsel, submitted a "Step 3" grievance. CBP did not respond at the third step. The local invoked arbitration on February 1, 2006, and on March 16, the arbitrator was asked to provide dates for a hearing.[8] At that time, CBP raised the issue of whether the local grievance was properly before the arbitrator due to the earlier-filed national FLAP grievance. The national FLAP grievance was filed on September 19, 2005, and says it was filed on behalf of "any and all CBP employees from the legacy INS." AFGE invoked arbitration of the national grievance on November 17, 2005.

On April 28, 2006, recognizing that the issue of whether the national grievance would take precedence was unresolved, the arbitrator asked the parties to the El Paso grievance to submit dates for a hearing, which could include the arbitrability question. The arbitrator offered the week of June 12 as her first available date. On May 5, counsel for Local 1210 responded to the arbitrator, indicating he would contact CBP's counsel to obtain dates for a possible arbitration. However, on June 19, 2006, the arbitrator sent a letter to both parties asking "to clarify the status of this grievance," in particular, whether the parties still wanted dates for a hearing. At the time of the Tally of Ballots, the parties were having ongoing discussions with the arbitrator.

National Official Time Arbitration

In connection with this issue, AFGE asserted that CBP "stalled" the arbitration by failing "to provide AFGE with the name of the next arbitrator on the parties' arbitration roster or engage in the arbitration process." AFGE provided Exhibit 34 as support.

NTEU Response

In response to this objection, NTEU argued that AFGE failed to provide any evidence "showing how this grievance related to or affected the outcome of the election." In particular, NTEU claimed that a grievance over official time of one of AFGE's representatives would not impact "the rights or benefits of employees."

---

[8] On March 2, 2006, Local 1210 filed an unfair labor practice over CBP's failure to arbitrate its FLAP grievance, Case No. DA-CA-06-0366. The Union withdrew this ULP on June 26, 2006.

Investigation

Exhibit 34 is a declaration of an AFGE attorney who filed a national grievance because CBP refused to provide official time to one official in September 2005. The AFGE attorney provided a supplemental statement and supporting documentation. He explained that the grievance arose in September 2005 when a Buffalo employee was elected as Staff Assistant to the President of Council 117, a position that guarantees 100% official time under Agreement 2000. He did not know the amount of official time, if any, available to this employee before she was made Staff Assistant, but he was certain that she was not on 100% official time. In October 2005, AFGE invoked arbitration because CBP failed to respond to the grievance. He also acknowledged that some time after AFGE invoked arbitration, the employee was placed on 100% official time. Thus the only outstanding issue was back pay to make up for times she had used annual leave or personal time to perform work for the Union before being placed on 100% official time.

In December 2005, a CBP headquarters official did respond to the grievance, but stated the matter was being forwarded to Buffalo, New York, for response. The employee who had been denied official time worked in Buffalo. In January 2006, the AFGE attorney disputed CBP's actions and requested the name of an arbitrator. As CBP did not respond, in March 2006, AFGE requested an arbitrator from the Federal Mediation and Conciliation Service. In May 2006, the AFGE attorney sent another letter to CBP, inviting participation in the striking of arbitrators, but CBP did not respond.

The AFGE attorney explained how Agreement 2000 established several regional panels of arbitrators, as well as a national panel. "[I]n part because of the decentralized way in which arbitrations between the parties occur, Council 117 does not know who the next arbitrator scheduled to hear a particular grievance will be." He further explained that "the practice between the parties has been that CBP maintains the rosters and informs Council 117 (or its constituent locals) who the next arbitrator to hear a particular grievance will be." Finally, he explained that in May 2006, the matter was transferred to another AFGE attorney.

The other AFGE attorney was contacted, and she provided a statement and supporting documentation. She explained that the employee was seeking two months of back pay, as CBP placed her on 100% official time in November 2005. She also provided a letter dated June 13, 2006 from the FMCS, which shows that based upon a review of Agreement 2000, it concluded that it was "without authority to appoint an arbitrator" in this matter. Following that, and through the time of the Tally of Ballots, the attorney was pursuing the matter with CBP.

Champlain, New York Step Two Grievance

Finally, AFGE offered Exhibit 51 in support of its claim that its grievances were ignored. The evidence AFGE provided in concerns a grievance filed by a steward in Champlain. At that time, CBP had not responded to the second step of the grievance.

Investigation

Exhibit 51 includes a declaration and supporting documents. As relevant here, the declaration says the step two grievance "has gone unanswered to date." The declaration was signed on July 4, 2006. A copy of CBP's step one response to the grievance, dated May 19, 2006, was provided. CBP's step one response shows that the grievance was filed on April 28, 2006. The Union elevated the grievance to step two on June 1, 2006.

The declarant provided a supplemental affidavit and additional documentation. The investigation revealed that CBP did respond at step two on July 26, 2006, as well as step three.

Analysis and Conclusion

In connection with the arbitration requests in San Diego, AFGE has not been able to substantiate its claim regarding the number of arbitration requests it had pending, or its allegation that NTEU arbitration requests have been unfairly placed ahead of pending AFGE cases. The statements of the CBP representative in April 2006, as clarified, are that they have a small staff to handle arbitrations, including the "first come, first served" comment, and that NTEU has more pending cases. This does not show a violation of neutrality. *Ft. Myer.* Moreover, there is no evidence that a failure to arbitrate a single grievance over an employee's suspension could have affected the outcome of the election. *Ingleside.*

I do not find any unreasonable delay on CBP's part in connection with the processing of the FLAP grievances either. The investigation shows that both the El Paso FLAP grievance and the national FLAP grievance are being processed. Considering the El Paso FLAP grievance, following the invocation of arbitration in February 2006, an arbitrator was selected in March 2006. Then CBP raised its concern that the local grievance had been subsumed by the previously-filed national FLAP grievance. I find nothing improper in CBP's attempt to raise the arbitrability question under these circumstances. I note that the attorney handling the case for AFGE offered to contact CBP regarding a hearing in May, but hearing nothing, the arbitrator contacted the parties in June 2006. It cannot be concluded, as asserted, that CBP unduly delayed the processing of the FLAP grievances. AFGE has not met its burden of proof. *NGB Charlotte.*

Regarding the denial of official time in Buffalo, while restoration of two months of leave/personal time were certainly important to the employee affected, as of November 2005, she was placed on 100% official time. Although CBP has not explained the delay in proceeding to arbitration in this matter, AFGE has not shown how this affected the outcome of the election. *NGB Charlotte; Ingleside.* As far as the Champlain grievance, the investigation revealed that contrary to the claim made in the objection, this grievance is in fact being processed. No evidence has been provided suggesting this matter is being unnecessarily delayed. *NGB Charlotte.*

AFGE has not met its burden of showing that CBP's handling of any of these grievances, or all of them collectively, interfered with the free choice of the voters or improperly affected outcome of election. In reaching this conclusion, the evidence shows that NTEU grievances also took time to process. For example, the arbitration decision NTEU provided (attachment 17) shows that a grievance was filed in December 2004, and arbitration was invoked in February 2005, but the hearing was not until October 2005. The arbitrator's decision reflects that CBP "filed a Motion prior to the arbitration hearing" seeking "an order that the grievance was non-arbitrable." This is similar to what CBP did regarding AFGE's El Paso FLAP grievance. Accordingly, CBP did not breach its duty to remain neutral. *Ft. Myer; Ingleside.* I am therefore, dismissing all of these objections

9. CBP Refused to Implement AFGE Arbitration Awards

This objection is found within section 3.a. of the Election Protests. In support of the claim that CBP "refused to implement AFGE arbitration awards," AFGE points to one example from San Diego. AFGE asserts that the arbitrator's decision required CBP to "implement the entire local supplemental agreement, including but not limited to the . . . Heath Improvement Plan (HIP)." Moreover, after the Authority upheld the decision of the arbitrator, a CBP representative in San Diego said the Agency would not implement the arbitrator's decision because it showed favoritism to AFGE employees. AFGE contends that CBP's "refusal to implement the arbitrator's decision in favor of AFGE while at the same time implementing decisions favorable to NTEU is a disgraceful demonstration of favoritism." Exhibit 24, the declaration of an AFGE representative in San Diego, is the only exhibit in support of this objection.

<u>NTEU Response</u>

Initially, NTEU points out that AFGE has only one example, limited to San Diego, to support the "broad claim that CBP refused to implement arbitration awards." NTEU further submits that, based on the declaration AFGE submitted, the HIP program was negotiated in 2002, "two years before CBP filed the. . . petition in this matter, indicating that CBP's motives for refusing to implement the program were unrelated to influencing the outcome of the. . . election."

As for the comment allegedly made by the CBP representative, NTEU contends that "[w]ithout endorsing CBP's behavior, it is significant that AFGE has proffered no evidence reflecting on how CBP's alleged refusal to implement the award affected the outcome of the election." In this regard, NTEU points out that the decision only affected legacy INS employees in San Diego, and AFGE has not presented evidence of the number of employees who were eligible and sought to participate in the HIP program. Further, even if the comment of the CBP representative "could be construed as favoring NTEU, there is no evidence that this comment was publicized," citing *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 48 FLRA 959 (1993).

Investigation

In the declaration provided, the San Diego representative indicated the HIP program existed since at least 1997, and it allowed Senior Immigration Inspectors of INS to exercise for up to three hours per week. The San Diego representative provided a supplemental affidavit and documentary evidence addressing this claim.

In December 2002, a local supplemental agreement was negotiated and delivered to management for signature. The agreement included, among other things, continuation of the HIP program. The entire local supplemental was provided. The HIP program is found under the Safety and Health Article, the first article, and section 1.5 states:

> All employees in the District that perform law enforcement or perform 6(c) qualified duties, shall be afforded the opportunity to participate in the Health Improvement Program, a minimum of 3 hours per week, as outlined in the National policy.

In approximately December 2003, another AFGE representative invoked arbitration of a grievance which alleged that provisions of the local supplemental pertaining to official time were not being honored. Part of CBP's defense to the grievance was that it had never agreed to the terms of the local supplemental.

On November 30, 2004, the arbitrator issued his decision in favor of the Union, and the award states, in total, that:

> For the reasons set forth above, the grievance is arbitrable and sustained on the merits. The Agency is, therefore, directed to allow Ms. Beltran 25% official time as requested by the Union in Mr. Moroney's January 16, 2004 letter to Ms. Fasano.

At no point in the arbitrator's decision was the HIP program mentioned. The San Diego representative nonetheless contends that the arbitration decision required CBP to implement the entire local supplemental agreement, which would include the HIP program.

CBP filed exceptions, but the Authority upheld the arbitrator's decision. *See U.S. Dep't of Homeland Sec., Customs and Border Prot., San Diego, Cal.*, 61 FLRA 136 (2005). A review of this decision reveals CBP argued before the Authority, as it had done before the arbitrator, that the entire local supplemental agreement was invalid because CBP had not signed it. *Id.* at 137. However, the Authority held "the Agency's failure to sign the agreement does not mean that the agreement was not 'executed,'" and the exception was denied. *Id.* at 138. The Authority decision does not mention the HIP program.

The San Diego representative explained that, due to heavy workload, no one had the time to take advantage of the HIP program, though CBP had taken no action to discontinue it. In late summer 2005, after the favorable Authority decision, the AFGE representative had a one-on-one conversation with the CBP labor relations specialist, who said that the Union got the official time as a result of the grievance. The AFGE representative countered that they actually secured the whole local supplemental agreement, including the HIP program. The CBP representative said the Union was trying to "go through the back door" to get the HIP program. The AFGE representative pointed out it was CBP that raised the issue that the entire agreement was invalid and lost. The labor relations representative said he would have to make "inroads" with upper management, but added that it would be unfair if the AFGE employees could lift weights when legacy Customs employees could not. The AFGE representative replied that the NTEU employees were allowed to wear shorts and receive FLAP pay. The labor relations representative said that was out of his control, and the AFGE representative responded that the HIP program was as well.

In January 2006, another one-on-one conversation took place regarding the HIP program. When the AFGE representative asked where they stood, he told him headquarters said it would be unfair to the other employees and show favoritism to AFGE to implement something in which NTEU employees could not participate. The AFGE representative strenuously objected, stating that CBP should allow its employees to benefit from the arbitration victory, as it had done when NTEU prevailed on issues such as allowing shorts, FLAP, or grooming standards. The labor relations specialist said he would get back to him.

In late January or early February 2006, the San Diego Port Director told the AFGE representative CBP had rescinded the HIP program. He went to the labor relations specialist for confirmation. During this conversation, he told him CBP's decision had a direct impact on the election because this was a "win" AFGE could point to, adding that NTEU constantly points to their victories as proof of their ability to represent employees. The labor relations specialist said CBP does not see it that way.

The AFGE representative did not publicize the HIP issue to employees. He explained that although AFGE had prevailed before the Authority, he did not want employees to have false expectations about something CBP continued to dispute. He also did not want to give NTEU "campaign fodder" allowing them to argue AFGE was

not effective. However, he added that legacy INS employee were aware they should have had the right to HIP based on the arbitration.

Analysis and Conclusion

The allegation here is refusal to implement an arbitration award, but there is no evidence of that. At the outset, I note AFGE has not alleged that Ms. Beltran did not receive her 25% official time as specifically ordered by the arbitrator's award. Contrary to AFGE's assertion, the arbitrator did not mention the HIP program in his award, nor did the Authority when upholding the award. AFGE has not met its burden of proof the award was not implemented. *NGB Charlotte*. The objection is dismissed.[9]

CBP Made Changes to Working Conditions During the Pendency of the Petition

10. CBP Made Unilateral Changes in Working Conditions

This objection appears at part 3.b. of the Election Protests. AFGE argues that the case of *U.S. Department of Justice v. FLRA*, 727 F.2d 481 (5th Cir. 1984), stands for the proposition that "it is incumbent on the employer to maintain the existing conditions of employment until the QCR is resolved, unless exigent circumstances" are present. AFGE alleges that during this period of "laboratory conditions," CBP made several changes. First, AFGE references the alleged adoption of NTEU standards, which have already been addressed in number six of this decision, including annual leave, compassionate transfers, and swaps. In addition, AFGE alleges that CBP: made revisions to the CBP Officer position and gave notice of a new CBP Officer (Admissibility) position, supported by Exhibits 37, 41 and 43; changed to the tours of duty at several ports of entry, supported by Exhibits 24, 40a,[10] and 50; and discontinued an alternative work schedule for legacy INS employees at the Los Angeles International Airport, supported by Exhibit 40b.

---

[9] Moreover, even if AFGE is correct about the HIP program, the evidence provided does not show that legacy INS employees in San Diego were dissuaded from voting for AFGE due to its inability to secure the HIP program as a result of the arbitration. The burden is on the objecting party to "provide the evidence necessary to support its allegations of improper conduct and to demonstrate that conduct may have improperly affected the results of the election." *Ingleside*, 46 FLRA at 1023 n.7. AFGE has not met its burden of establishing the HIP issue had the potential for interfering with the free choice of the voters. *Id.* As mentioned above, there are over 300 ports of entry in the United States. Even if every legacy INS employee in the San Diego area was swayed by this turn of events, which has not been shown, it would not have been sufficiently serious in nature to affect the results of the election. *Id.*

[10] AFGE's initial submission contained two exhibits marked 40. AFGE said this was an error and requested that the documents be identified as 40a and 40b.

CBP Response

CBP offered only a general response to the entire objection. CBP stated that "in 1995, the FLRA abandoned its '*status quo ante* absent overriding exigency' rule, and through changes in its regulations directed agencies to continue to deal with incumbent unions." (emphasis in original). CBP maintains that it has adhered to the standard found in section 2422.34(a) of the regulations and "continued to meet its statutory and contractual obligations with incumbent unions." CBP offered that "any resulting differences were a direct result of a particular labor organization's interest or skill in bargaining over changes affecting their constituents."

NTEU Response

NTEU mentioned the change in the Authority's Regulations, and also described the Authority's comments found in the Federal Register, both when those changes were initially proposed, and when the final regulations were issued. In sum, NTEU argues that "for unilateral changes in working conditions to be grounds for overturning an election, AFGE must establish that CBP unlawfully implemented changes in eligible voters' conditions of employment," and this conduct affected the free choice of voters and the outcome of the election.

Initial Analysis and Conclusion

It is not necessary to repeat the facts or analysis found in number six of this decision involving the alleged nationwide adoption of NTEU standards in the areas of annual leave, compassionate transfers, and swaps. I found insufficient evidence of nationwide adoption of those matters, and AFGE did not prove those isolated incidents interfered with the free choice of voters. The additional changes in working conditions alleged in this objection will be discussed below. At the outset, with respect to all alleged unilateral changes in working conditions, both those that have been discussed and those that have not, the Authority changed previous case law. This occurred when the Authority revised its Regulations at section 2422.34(a), Rights and obligations during the pendency of representation proceedings.

When initially proposing the revisions to the Regulations at 2422.34(a), the Authority stated that "subsection (a) would alter existing law by permitting changes after representational and collective bargaining responsibilities under the Statute are satisfied." Meaning of Terms as Used in This Subchapter; Representation Proceedings, 60 Fed. Reg. 39,878, 39,880 (August 4, 1995)(to be codified at 5 C.F.R. parts 2421 and 2422). As noted by the Authority in its comments on the final rules, "this subsection is, in some respects, a change from current law. This revision is intended to allow more flexibility during such periods through the exercise of bargaining and representational obligations." 60 Fed. Reg. 67,288, 67,291 (December 29, 1995). Therefore, cases cited by AFGE in its objections, such as *U.S. Department of Justice, INS*, 9 FLRA 253 (1982), which stood for the proposition that an agency was obligated

to maintain existing conditions of employment during the pendency of a question concerning representation, are no longer followed. *See e.g., Yorktown.* Accordingly, the only question that remains to be addressed is whether the specific changes discussed below interfered with the free choice of the voters

CBPO Position Changes

Here, AFGE alleged that in May 2006, CBP notified AFGE of revisions to the CBP Officer position description and creation of a new CBP Officer (Admissibility) position, to be implemented in June 2006. AFGE submitted a request to bargain, but alleged CBP's target date for implementation flouted the time frames for negotiation in Agreement 2000. AFGE thus argued that CBP's "plan of operation appeared to be a tacit rejection of recognition of the AFGE agreement during the pendency of the QCR."

NTEU Response

NTEU argues that based on AFGE's evidence, "[t]here is no evidence that the positions were filled before the completion of bargaining," nor is there evidence the matter was publicized or a matter of widespread concern to employees. "Most importantly, from a chronological perspective, AFGE's May 30 response, any bargaining that may have ensued, and any implementation of the change occurred weeks after the election ballots were mailed at the earliest." NTEU concludes that this change, if implemented at all, could not have affected the outcome of the election.

Investigation

Exhibit 37 is a declaration from the Executive Vice President of Council 117 located in Blaine, Washington. He provided a supplemental affidavit, as well as email correspondence he had with CBP over this issue.[11] As relevant here, on May 8, 2006, CBP announced a new position, the "CBP Admissibility Officer," through its TECS system and email, but AFGE was not notified in advance or provided an opportunity to bargain. On May 9, 2006, AFGE gave notice of its intent to file an unfair labor practice over the matter.

A letter from CBP to the President of Council 117, dated May 8, 2006, with the subject "Establishment of CBP Officer (Admissibility) and Basic CBPO Revisions" is Exhibit 41. The letter states, "we revised the position description of the basic CBP Officer to capture the various functions and correctly reflect the duties CBP Officers already perform." The letter also states that "[a]dditionally, this constitutes notice that CBP is establishing a new position, CBP Officer (Admissibility), designed to enhance CBP's ability to retain and develop specialization and expertise regarding admissibility

[11] The earliest message was on June 16, 2006, but most of the emails are from August, September and October 2006.

and immigration enforcement," and officers will be assigned to their "new duties beginning in late June 2006." Near the end, the letter adds, "[w]e have tentatively scheduled a briefing for this initiative on May 10, 2006. Please advise us of your availability for this date." Attached to the letter are position descriptions for the two discussed in the letter.

On May 10, the Executive V.P. received the May 8 letter by Federal Express. He said this was the first he heard about the briefing. He called to inquire about the briefing scheduled for that day, and learned it had already taken place and included NTEU representatives. However, the CBP representative asked him when he could come for a briefing.

Exhibit 43 is a response letter from the AFGE National President to CBP, dated May 25, 2006, though the exhibit includes a fax cover sheet indicating the letter was faxed to CBP on May 30, 2006. Generally this letter criticizes the "lack of any overtime compensation" as the new position has been designated as "FLSA exempt," and that additional duties, but no additional pay, have been proposed.

This letter also includes statements related to the objection. "It is a bedrock principle that during the pendency of a question concerning representation. . . . CBP is required to maintain the *status quo* absent evidence of an overriding exigency." The letter objected to "the threatened implementation. . . before bargaining can commence." Under time lines found in Agreement 2000, AFGE said it planned to submit a demand to bargain and a request for information, but even so, "were CBP to respond immediately. . . amended proposals would be due July 3, 2006." Thus, AFGE claimed that if CBP implemented the changes as scheduled, such action would be "an unfair labor practice [and. . .] also the grounds for an election protest."

When the Executive V.P. was trying to schedule the briefing, he said CBP refused to provide reasonable dates that would provide AFGE proper notice. For example, the Agency proposed a Monday briefing in Washington, D.C. on the preceding Friday. The AFGE briefing was postponed several times, including June 15 and 20, 2006, but it finally took place on August 23, 2006 at CBP headquarters. AFGE submitted proposals before the briefing. The investigation revealed that as of November 2006, the new position had not been filled, nor had anyone been required to attend training for the position.

Analysis and Conclusion

Even though AFGE was not able to participate in the briefing that took place in May 2006, AFGE was able to attend a briefing eventually. Additionally, no evidence was presented that the changes identified by AFGE were actually implemented. Accordingly, there has been no showing this issue interfered with the free choice of the voters or affected the outcome of the election. *Ingleside*. As AFGE has not met its burden of proving the allegations of improper conduct, I am dismissing this objection.

Changes to Tours of Duty

AFGE points to Exhibits 24, 40a, and 50 to support its argument that CBP unilaterally changed working conditions at various ports of entry. Exhibit 24 is the declaration of a San Diego AFGE official, and paragraphs 22-24 address changes to regular days off at the San Ysidro port of entry. Shift changes also occurred in Chicago, which are addressed by Exhibit 50.

NTEU Response

NTEU states that the change to days off applicable to eight legacy INS officers on the midnight shift at San Ysidro "appears to be a straightforward contact violation, which AFGE did not grieve and did not even raise with CBP until three months later in June" 2006, after the ballots had been mailed out. "In short, AFGE made no effort to cure the violation during the crucial period leading up to the balloting." Moreover, "given the absence of any evidence of publicity surrounding the change, only eight employees were affected."

In addressing the Chicago issue, in addition to reiterating the Authority's regulatory change that specifically allows for changes in working conditions, NTEU asserts that while "CBP apparently implemented the change, on June 11, there is no indication that NTEU was treated more favorably than AFGE." NTEU also points out that as the timing of the change was "a month after the election ballots were mailed, makes it unlikely to have affected employees' votes in the election."

Chicago Investigation

Exhibit 50 is a declaration from the AFGE Local President in Chicago with attached documents. The Local President provided a supplemental affidavit as well. On May 18, 2006, at what she characterized as a "pre-decisional involvement" meeting with management and the local NTEU Chapter President, she was informed shift changes would take effect on June 11, 2006. During the meeting, the Assistant Port Director said this was not a negotiation, since "NIAP" allowed him to change the shifts.

The start time for the morning shift was changed, though start times were slightly different for the legacy INS employees as compared to the legacy Customs ones, since the legacy INS employees still had a 5/4-9 alternative work schedule and the legacy Customs employees did not. The alternative work schedule of the legacy INS employees was maintained. The Assistant Port Director also explained he was going to lower the number of officers working the midnight shift, change the time of the shift, and establish another shift. All of this was being done to "match the daily workload." Both the AFGE Local President and the NTEU Chapter President asked questions and tried to remind him of certain large flights that came in early from Japan and Korea.

The AFGE Local President requested information on May 25, 2006, and stated that "we are not in agreement with your proposed changes discussed on Thursday, May 18, 2006. Please do not implement these changes pursuant to Article 9A of the National Agreement. A demand to bargain dated June 7, 2006, states that "[w]hen CBP filed the Clarification of Unit petition, they locked in the provisions of Agreement 2000, pursuant to 5 C.F.R. 2422.34(a), as it was 'an existing collective bargaining agreement' at that time."

On June 2, 2006, CBP submitted a response to the information request made on May 25, 2006. The National Inspectional Assignment Policy (NIAP) was attached, as was a letter dated June 22, 2004, that CBP had sent to the President of Council 117, advising that "beginning on July 25, 2004, Immigration Inspectors will become CBP Officers and will become subject to the NIAP." CBP's response further explains that negotiations over NIAP provisions "could have been requested at the time of notice at the national levels of AFGE/NINSC and CBP." However, NIAP has been in place for the AFGE/NINSC bargaining unit since July 2004, and "[i]t allows CBP management to make changes in shifts and assignments without negotiation. . . [and] overrides the Article 9A provision of the National Agreement for issues covered by the NIAP." An email showing how the shifts would be changed was also attached. The changes were implemented on June 11, 2006 as originally announced.

San Diego Investigation

The San Diego representative who gave the declaration which is Exhibit 24 provided a supplemental affidavit. He explained that in return for agreeing in late 2004 or early 2005 to discontinue a local 5/4-9 alternate work schedule, management agreed to give employees two consecutive regularly scheduled days off that would remain the same, based on seniority. Although that agreement was reduced to writing, it was not provided. This schedule was to remain in place until all the CBPOs of San Ysidro could compete and bid for the next schedule.

In April 2006, management changed the days off of eight legacy INS officers on the midnight shift, but the legacy Customs officers working the same shift were not affected. There were twice as many legacy Customs employees. It is alleged this violated AFGE's local agreement and was done without providing advance notice to the union.

A week later, after learning what had happened, the AFGE representative spoke to the Port Director, who said he would look into it. Then because the AFGE representative was traveling, he was not able to discuss the issue until June 2006, at which time the Port Director explained that their days off had to be changed because of overtime shortages. When asked why he did not select legacy Customs employees, he said they were not proficient enough to work the shift. When he requested to negotiate new days off, he was told that the DFO said they would no longer honor the local agreement.

AFGE provided Exhibit 40a, an undated memo written by a CBP Officer to "Port Directors" regarding "Days Off." The memo relates that two years ago, when the officer had bid for his days off, he was approved for Monday and Tuesday, but they had been changed to Tuesday and Wednesday. He asked that his days off be changed back to Monday and Tuesday, and from the memo, it is clear that the issue raised therein only concerned him. The officer also described events which occurred as late as June 11, 2006. It appears that the officer is one of those located in San Ysidro and therefore, may have been one of those affected by the change in days off, but no contact information for the officer was provided.

Analysis and Conclusion

According to Exhibit 40a, the San Ysidro CBP Officer affected still gets two consecutive days off, but now Tuesdays and Wednesdays rather than Mondays and Tuesdays. As the agreement related to consecutive days off was not provided, its provisions cannot be definitively determined. Nonetheless, as shown by CBP's response to the Local President in Chicago, CBP views local schedule changes as being addressed by NIAP, which forecloses local bargaining.

The Authority has addressed the issue of the application of NIAP at CBP on several occasions. *See e.g. Dep't of Homeland Security, Border and Transp. Sec., Directorate, Bureau of Customs and Border Prot., Seattle, Wash.*, 61 FLRA 272 (2005)(*Customs VI*). In *Customs VI*, the Authority affirmed the dismissal of a complaint alleging a refusal to negotiate over the implementation of a midnight to 8 a.m. shift and implementation of numerous shift changes without affording the Union notice or an opportunity to bargain. *Id.* In so doing, the Authority noted that NIAP addresses "inspectional assignments, including tours of duty, scheduling and work hours," and a prior Authority decision concluded that the revised NIAP eliminated CBP's duty to engage in local bargaining. *Id.* at 276 (FLRA 2005)(internal quotations omitted).

Since July 25, 2004, AFGE employees have been under the same NIAP policy as NTEU employees. I conclude that, consistent with previous Authority decisions regarding NIAP, CBP was not required to engage in local bargaining over the schedule changes in both Chicago and San Diego. *Customs VI.* Additionally, in Chicago, it appears that employees represented by both NTEU and AFGE were affected, and thus it cannot be said that CBP violated its obligation to remain neutral. *Ft. Myer.* Moreover, AFGE failed to show how the schedule changes in San Diego or Chicago interfered with the free choice of the voters or affected the outcome of election. *Ingleside.* Accordingly, I am dismissing this objection.

Termination of AWS at LAX

The final issue raised by AFGE in connection with this objection is that CBP terminated an alternative work schedule in Los Angeles as of June 11, 2006, though "[n]o explanation of the exigent circumstances was articulated." AFGE provided

Exhibit 40b as supporting evidence. Exhibit 40b consists of an unfair labor practice, Case No. SF-CA-06-0426 and related documents. The ULP alleges that CBP's action was taken "to prejudice AFGE and to influence voters to favor NTEU in the current CBP election." The San Francisco Region dismissed Case No. SF-CA-06-0426 on October 10, 2006, and AFGE did not appeal the dismissal.

NTEU response

NTEU states that "[a]s unfortunate as this decision was for AFGE represented employees at LAX enjoying the benefits of [the] AWS schedule (AFGE does not identify the number of affected employees), CBP's implementation of it does not amount to objectionable conduct." NTEU posits that "[t]he fact that CBP did not terminate the AWS program until after the Panel ordered adoption of CBP's proposal demonstrates that CBP fulfilled its bargaining obligations." NTEU adds that there is no evidence this affected the outcome of the election.

Investigation

The investigation disclosed that termination of the AWS schedule at LAX was done pursuant to a decision of the Federal Services Impasses Panel, dated May 8, 2006. The Order of the Panel requires the "termination of the 4-10 CWS in Passport Operations at the Los Angeles International Airport."

A memorandum to CBP employees represented by AFGE, dated May 11, 2006, is part of Exhibit 40b. The memo was written by the Port Director, and she explained that over the past several months, the agency and AFGE local negotiated over the proposed termination of AWS, but reached an impasse and sought the assistance of FSIP on April 21, 2006. In her memo, the Port Director states:

> I am keenly aware that for some of you the changes in schedules may have an impact on your families and daily routines. Accordingly, in an effort to ensure that you have sufficient time to make necessary adjustments, the new schedule will be posted on May 11, 2006, but will not be effective until June 11, 2006.

Analysis and Conclusion

The evidence shows that, in accordance with 5 U.S.C. § 6131, CBP lawfully followed the procedure to terminate the AWS at LAX. Once FSIP made its decision, CBP was free to discontinue the AWS at any time, but provided one month advance notice. Thus, as CBP's actions were lawful, it cannot be said that CBP's conduct was of an objectionable nature and interfered with the free choice of the voters. *Ingleside.* AFGE has not met its burden of proof, and this objection is dismissed.

11. CBP Bargained with NTEU on Two Matters Affecting AFGE Employees in San Ysidro

This objection is found at part 1.b. of the Election Protests, under the heading "The Agency has bargained with NTEU, and not with AFGE, regarding matters affecting AFGE-represented employees." AFGE alleged that "on no less than two occasions, the Agency notified and bargained with NTEU on changes of working conditions without, at the same time, notifying and bargaining with AFGE." The two instances raised by AFGE are: a change in working conditions for Canine Officers which took place in April 2006; and selection of the "AT-CET team" in May 2006. Both of these changes impacted employees at the San Ysidro Port of Entry. AFGE asserted that "approximately 1,300 eligible voters work within the San Diego" district, which is "near the number of votes in the margin of victory."[12] Exhibit 24, the declaration from the San Diego AFGE representative, is the only evidence in support of this objection.

NTEU Response

At the outset, NTEU notes that it represents some of the Canine employees and members of AT-CET team at issue. Moreover, these are only isolated incidents at best, which were not widely publicized and affected a small number of employees. NTEU also asserts that AFGE has failed to present evidence CBP bargained with NTEU over matters affecting employees represented by AFGE. NTEU offered attachment 7, documents concerning both the AT-CET and Canine Officer issues.

Turning to the Canine Officer issue, NTEU alleges that the declaration AFGE offered does not specify the nature of the Canine Officer change in working conditions or how many legacy INS employees were affected as compared to NTEU employees. Plus, NTEU argues that AFGE has "misrepresented the facts in this matter," as evidence it provided shows that NTEU demanded to bargain, "but CBP refused, resulting in a grievance by NTEU being filed on May 9, 2006, coincidentally the date the ballots were mailed." NTEU argues this conclusively shows it was not favored by CBP at the time of the election.

With respect to the AT-CET issue, similar to the Canine issue, NTEU argues AFGE has not presented evidence of the total number of employees affected, particularly those represented by AFGE. In addition, any potential violations were cured when CBP re-selected the team following AFGE's complaint. Moreover, if the re-

---

[12] This is apparently a reference to an argument AFGE makes on page 2 of its Election Protests, that the margin of victory is not "almost 4,000 votes. Rather, the margin of victory is less than 2,000 votes, for had 1,972 employees voted for AFGE instead of NTEU, AFGE would have won the election," by one vote. AFGE's hypothesis is that "the nature and gravity of the Agency's misconduct is such that it is reasonable to infer that many more than 1,972 voters were swayed to vote for NTEU."

selection resulted in NTEU employees being removed from the AT-CET team, it would have undermined NTEU's support as much as the initial selection undermined AFGE.

Canine Officer Change Investigation

The declaration AFGE provided from its San Diego representative states that in early April 2006, CBP sent an email to the NTEU Chapter President, asking to discuss an unspecified change for CBP Canine Officers, but failed to send a similar request to the AFGE representative. The AFGE representative asserted that NTEU participated in negotiations concerning the change, which was implemented on April 17, 2006. Further, the declaration stated that on April 21, 2006, the AFGE representative received an email regarding the change, stating it was "per the NTEU agreement."

In addition, AFGE's declarant claimed he saw multiple fliers at the San Ysidro, Tecate and Otay Mesa ports of entry, which stated that NTEU bargained over the change and AFGE was not present. Finally, the AFGE representative said in May 2006, he met with the local Port Director and a labor relations specialist and was told that CBP was not required to notify AFGE of the proposed change, but had notified NTEU "out of courtesy." None of the documents mentioned in the declaration were included with AFGE's submission, nor were they provided when AFGE's witness was contacted to provide a supplemental affidavit during the investigation.

As part of attachment 7, NTEU provided an email dated April 7, 2006 with a subject line "Notification." This email came from a labor relations specialist, and although the email addresses of the recipients are not apparent, the body of the message begins by addressing both the AFGE and NTEU representatives. The message states that effective April 16, 2006, Canine Officers in Tecate will be reassigned to San Ysidro "in accordance with the provisions of the National Inspectional Assignment Policy (NIAP)." NTEU provided a demand to bargain from the Chapter President, dated April 26, 2006, which in part, protested the form of CBP's notice of the change. NTEU's attachment 7 included a letter from the NTEU Chapter President, dated July 14, 2006. In it, the Chapter President states that "[t]o date management has failed to negotiate this issue." He added that "[t]he K9 community consists of sixty handlers, seven of which are legacy INS."

During the investigation, the AFGE representative said there were approximately 15 legacy INS Canine Officers and about 30 NTEU Canine Officers. He denied ever seeing the April 7 email NTEU provided. He said he learned of the proposed change from a legacy INS employee, who heard it from another Canine Officer who was also an NTEU representative. At the next labor management relations meeting, which took place before the change was made, the AFGE official asked what CBP intended with respect to employees he represented. He was told that they did not know yet.

On April 20, 2006, the AFGE representative learned that the change affecting his Canine Officers had been implemented. He contacted the Deputy Port Director and asked why he had not been notified, and was told he would take care of it. Thereafter, he said he received a copy of the original email sent to NTEU. A meeting was arranged with the Port Director in May 2006, and the AFGE representative asked why NTEU had been notified but AFGE had not. He said the Port Director told him NTEU had been notified out of courtesy. When asked why AFGE had not received the same courtesy, the Port Director said they would try to do better in the future. The AFGE representative asked if he would post something or otherwise publicize the apology, instead of only making it in private. This did not happen, and he is unaware whether NTEU was able to reach an agreement regarding the Canine Officer change. The AFGE official further stated he never reached any agreement with CBP, nor did he file a grievance or unfair labor practice on the issue.

AT-CET Team Investigation

The AFGE representative's declaration states that in May 2006, CBP met with NTEU representatives "to vet the selection of the AT-CET team" at the San Ysidro port of entry, and legacy INS employees were among the potential candidates for the team. He adds that AFGE was not invited to the vetting process, and selections were announced in mid-May.

Afterwards, the AFGE representative met with the Deputy Port Director and registered a complaint about what had taken place. On May 25, 2006, the Port Director told him the AT-CET team would be re-selected. The AFGE representative asked management to issue a letter or email to employees along the lines that due to CBP's failure to include AFGE in the AT-CET team process, the team would be re-selected per AFGE's demand. CBP declined to send such a message.

The letter NTEU provided from the San Diego Chapter President states that in April 2006, he was notified of a panel that would score applicants for the AT-CET team. However, he said NTEU was present as an observer only and had no input into the selection process.

During the course of the investigation, the San Diego representative explained that on May 25, 2006, while he was involved in vetting selections for the port enforcement team, which involved both legacy INS and Customs employees, he was told the AT-CET team would be re-selected with AFGE involvement. He provided the memo from the San Ysidro Port Director, dated June 8, 2006, regarding the revised AT-CET team selections. Five employees were selected. This memo does not reflect that the re-selection resulted from an AFGE complaint. However, the AFGE representative said he publicized AFGE's efforts, placing a note on the AFGE bulletin board in the San Ysidro break room. He, and other AFGE advocates, also told employees what had taken place.

Analysis and Conclusion

AFGE has not presented evidence that CBP bargained with NTEU over the Canine Officer change. At best, the evidence establishes NTEU received a "courtesy" copy of the proposed change. Although AFGE claims that NTEU widely publicized the fact that NTEU "bargained" with CBP on this issue, it has not produced any evidence to that effect either. Therefore, AFGE has not met its burden of proving this issue affected the free choice of the voters. *NGB Charlotte*; *Ingleside.* The objection is dismissed.

Turning to the AT-CET roster, the evidence shows that when AFGE protested its lack of involvement, CBP quickly re-ran the process, and both AFGE and NTEU participated. Accordingly, CBP did not violate its obligation of neutrality in this instance. *Ft. Myer.* Moreover, as further evidence of CBP's neutrality in this regard, the investigation revealed that AFGE was involved in the vetting of at least one other team that included both AFGE and NTEU represented employees. AFGE has not met its burden of showing that the AT-CET issue interfered with the free choice of the voters, and this objection is dismissed. *Ingleside.*

Objections that CBP Withheld Information from AFGE That Would Have Been Beneficial to its Campaign Efforts

12. CBP Refused AFGE's Request for a Pre-election Mailing by Both Unions

This objection is found in the Election Protests under the heading, Lack of Access, at 2.a, and there are documentary exhibits provided in support: 18, 19, 20, 21, 22.[13] AFGE said it "had an uphill climb in that it only represented approximately less than one third of the eligible voting population. . . Regardless of this disadvantage, AFGE entered the QCR expecting what the law guarantees–equivalent status and equivalent access."

AFGE argues that by its actions, CBP gave NTEU "veto power" over the request for "a neutral mailing" to the entire bargaining unit. AFGE said its proposal should not be considered "an election conduct agreement." Instead, a "better characterization for the requested mailing is a method of repairing pre-election conduct."

---

[13] In this context, and in support of this specific objection, AFGE also mentions difficulties resulting from heightened security requirements present at many of the locations. The exhibits AFGE provided to support these related objections are that AFGE "officers and staff members. . . [were] escorted directly into a conference or break room," and that CBP denied or limited site visits by union representatives. These objections will be addressed in this decision under number 17.

NTEU Response

NTEU argues that AFGE has not established objectionable conduct by CBP's refusal to "send a mailing of AFGE election propaganda to employees at their home address." Additionally, AFGE's objection failed to mention that:

> CBP provided an initial list of eligible and ineligible employees to all unions in December 2004, sixteen months before the mailing of ballots. The unions had an extraordinarily long period to use the eligibility list to contact employees at the job site and solicit voluntary provision of home addresses and emails in order to communicate further with employees. NTEU aggressively sought such information. AFGE could have done so as well.

Moreover, NTEU asserts that there were a "large number of campaign events and dissemination of campaign materials by both unions at most of the 315 Ports of Entry around the country." NTEU argues that one additional mailing of materials to employees at home would not have been sufficient to "affect the outcome of the election."

CBP Response

CBP says it was not responsible for conducting AFGE's campaign as the pre-election mailing would have required. CBP argues that AFGE's request was "clearly outside the scope of customary and routine services. . . . [, and] unilateral agreement to provide this benefit to only one of the competing labor organizations would clearly constitute a violation of 5 U.S.C. § 7116(a)(3)," and possibly other laws or regulations. CBP adds that while parties to "an election are free to negotiate a pre-election agreement. . . no party may be compelled to. . . agree." Moreover, CBP argues that:

> AFGE's claim that it was unaware fo the location of Agency employees is entirely baseless. . . . the locations of CBP facilities are a matter of public record. In addition, evidence demonstrates that not only was AFGE aware of the location of Agency employees, it actively engaged in campaigning activities at most, if not all of CBP's major ports of entry without incident.

To the extent AFGE argues it is entitled to equivalent status, CBP says that concept is inapplicable here. "AFGE is an incumbent union currently representing employees within the CBP bargaining unit. . . NTEU is also of identical incumbent status. As such, 'equivalent status' cannot be conveyed to either union."

Investigation

Exhibit 18 is a letter from AFGE's General Counsel to CBP dated April 12, 2006. This letter stated that "due to what is in many locations a high security and therefore low access situation for the unions, AFGE requests that your agency facilitate a pre-election mailing to the entire bargaining unit." In its letter, AFGE acknowledged that "agency facilities, due to understandable security concerns, are not easily accessed by union organizers," and a variety of difficulties were listed. To address these problems, AFGE proposed to submit campaign materials in sealed envelopes to CBP, which would then be responsible for placing the names and addresses on those envelopes. AFGE added that "[t]he union which participates in the mailing takes full responsibility for the costs of the mailing."

CBP responded to AFGE's request on April 18, 2006, which is Exhibit 19. As part of its response, CBP went through each of the difficulties listed by AFGE. CBP began by stating that:

> During the pendency of the representation proceeding, including the upcoming election, all parties continue to be obligated to maintain existing recognitions, adhere to the applicable terms of and conditions of existing collective bargaining agreements, and fulfill all other representational and bargaining responsibilities under the . . . Statute. With this in mind, I note that all of the examples of access challenges cited in your letter meet these requirements.

After either explaining why it could not comply with a particular request, or how alternative arrangements had been made, CBP stated it was "not free to independently or unilaterally enter in to such an agreement with only one of the participating unions. With this in mind, before entertaining your proposal, it is important to know whether AFGE has obtained NTEU's concurrence."

AFGE replied on April 25, 2006 (Exhibit 20), reiterating its request to submit "pre-stuffed envelopes" for mailing to the entire bargaining unit. AFGE argued that as both it and NTEU would be allowed to participate in the mailing, "it is disingenuous to suggest that the agency would be independently or unilaterally entering into an agreement with only one of the candidate unions." The letter also made it clear AFGE had not secured NTEU's agreement with its proposal. "[A]s the election draws near, AFGE cannot continue to wait on NTEU's concurrence." Moreover, AFGE argued that "[a]s two-thirds of the bargaining unit was previously represented exclusively by NTEU, NTEU currently maintains greater access to the bargaining unit than AFGE. Thus, awaiting NTEU's concurrence on the proposed mailing smacks of agency collusion with NTEU."

Exhibit 20 also includes a letter from CBP to me, dated May 4, 2006, requesting advice regarding AFGE's pre-election mailing proposal. First, CBP explained it had "established a centralized national election management team. . . responsible for all matters related to the upcoming election." However, despite the best efforts of the team to address all matters related to the election, they found themselves in need of advice. The letter states:

> Although CBP is willing to consider AFGE's proposal, NTEU has expressed its opposition, adding that it will likely initiate Unfair Labor Practice or election challenge proceedings should CBP unilaterally or independently enter into such an arrangement with AFGE. In contrast, AFGE persists that CBP is responsible for counter-balancing their perception that NTEU possesses a competitive advantage as a result of the greater number of employees NTEU currently represents within the new bargaining unit. Specifically, AFGE maintains that regardless of NTEU's objection, CBP must grant AFGE's proposal and has also threatened to initiate ULP or election challenge proceedings should CBP refuse.

This exhibit also includes a letter CBP sent to AFGE's National President on May 4, 2006, indicating its belief that the pre-election mailing is "not considered a 'routine service,'" and as a result, CBP viewed the proposal as a request for "an election conduct agreement." CBP's letter said that "[g]iven AFGE and NTEU's diametrically opposing positions on the proposal," the likelihood of reaching an agreement "appears improbable." The letter added that "absent conflicting operational requirements, CBP has been extremely accommodating in its approval of AFGE and NTEU requests for access to employees for campaigning purposes. As a demonstration of our efforts in this area, I note that as of the date of this letter, I am unaware of any unresolved instance where either union has claimed it was denied access to employees."

Exhibit 22 is the response provided by this office on May 5 to CBP's May 4, 2006 request for advice. This response generally addressed the requirements of section 7116(a)(3) of the Statute and the inability to "offer what would be essentially an advisory opinion about possible violations of the Statute."

Analysis and Conclusion

In *NGB Charlotte*, the Authority held that management is "not obligated to bargain with the Union over procedures to govern campaign activities due to the pendency of a QCR. Rather, it was the Activity's obligation to remain neutral. . . in order to ensure the employees' freedom of choice." 48 FLRA at 1143. I do not find that CBP was required to assent to AFGE's pre-election mailing proposal, and AFGE has failed to meet its burden of proving that CBP's refusal affected the free choice of the voters or the outcome of the election. *Ingleside*. Accordingly, the objection is dismissed.

13. CBP Refused to Provide Names and Locations of Those Represented By AFGE

Under the general heading of Lack of Access in the Election Protests, and before any of the specific subheadings, AFGE charged that CBP "refused to provide information as to the names and corresponding locations of employees represented by AFGE" as well as new hires. AFGE provided Exhibits 10-12 to support this objection.

NTEU Response

NTEU did not respond to this objection as such, but in connection with the objection over the pre-election mailing, noted that "CBP did provide the same lists of eligible and ineligible employees to all unions. The lists did not contain home addresses." As both unions had the same list "for over a year, it provided an adequate and equal basis for communication with employees at the job site and elsewhere."

Investigation

The investigation revealed that an AFGE Local President in Minnesota submitted a data request on December 22, 2005 (Exhibit 10). The request is for "the entire bargaining unit list for CBPO's in the Minneapolis District to include the northern border ports." The reason given was, "We at AFGE Local have a particularized need for this information, as we need to know where the employees work that we represent and who is covered in the unit."

CBP responded to the data request on December 29, 2005. In its response, CBP denied that any particularized need had been stated, and even if it had, "AFGE has no ability under the [S]tatute to gain access to agency information regarding employees for which it is not currently the exclusive representative." CBP added that "the Port of Minneapolis does not have any northern border components."

On March 22, 2006, CBP sent a letter to the President of Council 117 regarding the data request made by the Eastern Regional V.P. (Exhibit 12). The underlying data request was not provided, but CBP's letter indicates that on January 26, 2006, "a modified request for a complete list of [the] U.S. Customs and Border Protection bargaining unit employees they represent" was submitted by AFGE.[14] According to CBP's letter, the shift in its primary mission "towards anti-terrorism has created a critical countervailing interest in providing any information to outside organizations from which end-strength at any particular port or duty station could be disclosed or derived."

---

[14] This request, as modified, was the issue of Case No. WA-CA-06-0354 (Exhibit 11), which was dismissed. No appeal was filed.

CBP's letter also states that on February 9, 2006, it provided AFGE with a national listing of its bargaining unit employees "that contains organizational office, employee name, pay plan, series, grade, and position title." Specific duty stations of employees were excluded. CBP said that Article 8, Section D.(1) of Agreement 2000, which required the provision of a list of names of employees with duty stations, "excessively interferes with management's ability to determine its internal security practices," and on that basis, CBP would no longer recognize that portion of the expired collective bargaining agreement. CBP closed by saying that it "stands willing to bargain. . . over this change."

During the investigation, CBP addressed certain questions that arose. Both the AFGE and NTEU collective bargaining agreements require the provision of lists of employees, with accompanying duty stations. For example, as referenced above, AFGE's agreement, at Article 8, Section D.(1), states that:

> Upon request, but no more than annually, the Service will furnish to the Union, at the Regional level, for its internal use only, a list which will contain the names, grades, position title, and posts of duty of all employees in the local bargaining unit.

Similarly, NTEU's agreement with the former U.S. Customs Service, at Article 34, Section 9.B., requires the employer to furnish a list containing the names, post of duty, and other information for all employees in the bargaining unit. Unlike AFGE's contract, the employer is required to supply these lists automatically on a quarterly basis.

CBP was asked if it continued to automatically provide such lists under the NTEU contract. CBP stated it "has only refused to provide composite lists of employees with their specific duty locations. . . [because the] release of such information to outside organizations could create risks to national security." In this regard, I note AFGE's Exhibit 19, CBP's April 18, 2006 response to the pre-election mailing request, shows a consistent response from CBP:

> CBP is unable to release to non-government organizations information containing or that could be utilized to derive the Agency's deployment strategies or end-strength among specific operational locations. As an example, CBP has been unable to grant requests for comprehensive listings of employees by duty locations to the labor organizations competing in the upcoming elections.

CBP stated that "since its creation in March of 2003, CBP has never provided AFGE or NTEU a composite list of employees by duty station. . . . Our inability to provide . . . [such] information has never been raised by NTEU."

Analysis and Conclusion

The investigation shows CBP treated AFGE and NTEU similarly by refusing to provide either with a list of employees that included duty stations. Thus, CBP did not violate its obligation to maintain neutrality. *Ft. Myer.* Moreover, CBP did give AFGE a significant amount of information regarding its bargaining unit employees, including the names, position title, series and grade, and organizational office. Although AFGE has another objection, to be discussed later in this decision, regarding denial of access to employees at certain locations, it is undisputed that AFGE had access at all other work sites. Accordingly, AFGE has not presented evidence that the failure to provide a list of employees with their corresponding duty locations interfered with the free choice of the voters or affected the outcome of the election. *Ingleside.* As AFGE has not met its burden of proof, the objection is dismissed.

Objections that CBP Interfered with AFGE's Attempts to Meet with Employees

14. CBP Stymied AFGE's Efforts to Contact Bargaining Unit to Provide Representational and Election Material

This objection is also found under the general heading of Lack of Access in the Election Protests, before any of the specific subheadings, and Exhibit 47 was provided in support. This exhibit consists of three documents related to AFGE's request to hold lunch and learn sessions at the Los Angeles International Airport (LAX).

NTEU Response

NTEU offers that the Port Director "was confused about whether electioneering could take place on employees' paid breaks, but CBP did not specifically prohibit use of the break rooms for meetings with employees." NTEU adds there is no evidence AFGE used the rooms and was ordered to stop. CBP did not address this objection.

Investigation

The first document AFGE provided is a letter from the Chief Steward of the Local to the LAX Port Director. This letter requests use of various lunchrooms for events between September 12-19, 2005, and states the sessions will take place "during employee breaks or nutrition periods."

The next document is an email from the Port Director, dated September 12, 2005. According to this email, the Port Director was attempting to obtain guidance regarding a possible legal prohibition on allowing employees to participate in lunch and learns "during paid nutritional breaks." The Port Director expressed concern because "employees are on paid status."

The final document is from the AFGE Local to the Port Director. It is dated December 20, 2005, and accuses CBP of using "stall tactics" to prevent it from having lunch and learns. According to the letter, the Union made "three requests since its September letter," and as a result of the continuing denial, requested permission to have lunch and learns on January 17 and 18, 2006. The letter also pointed out that NTEU held lunch and learns on November 30 and December 1, 2005.

The President of the AFGE Local was contacted as part of the investigation. She said after certain AFGE national officials spoke to CBP's headquarters personnel, the Port Director began to allow AFGE to have lunch and learns. These commenced in February 2006 and ended in June 2006. There were eight altogether, and at a variety of locations, including the Tom Bradley International Terminal of LAX, the cargo building, the sea port office, and the Federal building. The AFGE National President attended the event at the Federal building, and other high-ranking AFGE officials attended some of the others.

Analysis and Conclusion

The objection is that CBP stymied AFGE's efforts to meet with bargaining unit employees, but the evidence shows AFGE held eight lunch and learn events in Los Angeles during the campaign period. Accordingly, AFGE has not met its burden of proving the initial denial interfered with the free choice of voters or affected the outcome of the election. *Ingleside*. The objection is dismissed.

15. CBP Denied an Annual Leave Request in El Paso, Texas

This objection also fits within the general heading of Lack of Access in the Election Protests, and before any of the specific subheadings, under the category of stymying AFGE's efforts to meet with bargaining unit employees, but Exhibit 49 supports this incident. AFGE alleges that an individual was improperly denied one day of annual leave to assist with a lunch and learn event.

NTEU Response

For its part, NTEU reiterated that "[t]he same representative's request for annual leave to campaign on the preceding day was approved. . . . [, and] there is no evidence that AFGE was otherwise prevented from campaigning at the El Paso facility."

CBP Response

CBP did not comment specifically on this incident, but generally stated that AFGE "actively engaged in campaigning activities at most, if not all of CBP's major ports of entry without incident."

Investigation

Exhibit 49 begins with a declaration from the AFGE Local President in El Paso, Texas, and an attached unfair labor practice charge, Case No. DA-CA-06-0493, which was dismissed on October 12, 2006. AFGE's appeal of that decision was denied.

AFGE held a series of lunch and learn events, including those from May 8-12 and June 5-9, 2006 at the seven bridges that make up the El Paso Port of Entry. Council 117 or AFGE national representatives attended each of these events.

The AFGE activist who is the subject of this objection has a food trailer with a grill, and past experience had shown the Local that when he grills, turnout is higher. However, he did not take leave for the entire period of the lunch and learns, and cold cuts were served when he was not available. His regular days off were Tuesday, May 9 and Wednesday, May 10, 2006, and he was granted annual leave for Thursday, May 11, 2006. The issue raised in this objection is that he was denied eight hours of leave on Friday, May 12, 2006. His original intention was to leave the lunch and learn at 3:00 p.m. on Friday to attend his daughter's graduation ceremony. After his eight hour leave request was denied, he was allowed to leave an hour early on May 12 to attend the graduation.

When questioned by the AFGE Local President, the Chief who had denied the eight hour leave request, also denied he was refusing to authorize leave for any improper reasons. He maintained the request was denied because the individual had been granted leave the previous day.

Analysis and Conclusion

There is no evidence the denial of annual leave to assist with one lunch and learn event affected the outcome of the election, particularly when it is clear this lunch and learn, and others, were held in El Paso. Accordingly, AFGE has not met its burden of proving that one denial of annual leave interfered with the free choice of the voters. *Ingleside.*

16. CBP Allowed NTEU to Make Presentations at FLETC and Some Ports of Entry

This objection is found at part 1.f. of the Election Protests. Initially, AFGE alleged that "[f]rom October 2003 through June 2004, approximately 2,000 employees were hired, trained, and orientated to believe that NTEU was the sole union representative." AFGE further alleged that "[o]nce the election petition was filed and it was clear that NTEU and AFGE had equivalent status, NTEU should no longer have been solely permitted to present at the training academy. . . [or] facility orientations." AFGE offered Exhibits 24, 37, and 42 in support of its claim that NTEU presented orientations at the academy as well as ports of entry in San Diego, El Paso, and Blaine and Seattle, Washington, while AFGE was not permitted.

NTEU Response

NTEU argued that "[v]irtually all of the events referred to in this objection occurred prior to the filing of the petition in May 2004, and to that extent, the objection should be dismissed as referring to pre-petition conduct." NTEU added that after CBP was formed, it attempted to adhere to the collective bargaining agreements of all the unions. NTEU provided attachment 5, specifically Article 4, Section 6 of its contract with the U.S. Customs service, which addresses NTEU's ability to make a presentation during an orientation session or at the Federal Law Enforcement Training Center (FLETC).

After July 2004, when CBP established the "merged" CBP Officer position, both converting existing legacy INS and Customs inspectors to CBP Officers, and making all new hires from that point on CBP Officers, no union was permitted to provide a presentation to those new hires, either at FLETC or at ports of entry. However, NTEU asserted that unions were able to make presentations to other newly-hired employees who were clearly traceable to the legacy agencies. NTEU claimed "this practice was carried out in an even handed manner by CBP." NTEU provided attachment 15, a CBP memo describing the transition to the CBP Officer position.

CBP Response

CBP stated that as both NTEU and AFGE are incumbent unions, it was "obligated to adhere to requirements and provisions contained in their respective collective bargaining agreements or demonstrated by past practices. By default, adherence to this standard will inevitably result in differences in the benefits provided to each union." As relevant to this objection, CBP stated that between October 2003 and July 2004, it "hired a significant number of Customs Officers who, in accordance with the Homeland Security Act of 2002, were represented by NTEU." CBP says it conformed to the NTEU contract by allowing NTEU representatives to speak to and provide information to those employees during their orientation sessions. CBP argues that "it would have been improper" to provide AFGE with a similar opportunity, since those employees were not legacy INS employees represented by AFGE. CBP added that once it was no longer possible to make "a clear determination as to which union represented a particular position (e.g. when CBP began hiring for the new CBP Officer occupation in July of 2004, . . . NTEU was no longer provided the opportunity to meet with these employees."

Investigation

Exhibit 24, the declaration from the AFGE representative in San Diego, confirms that as of July 2004, all new CBP Officers "were classified as 'Quad 7,'" meaning that they were considered bargaining unit eligible but not represented by either union. These new CBP Officers were eligible to vote in the election in this case, which is the reason AFGE wanted access to them for campaign purposes.

FLETC Training Academy

The San Diego representative asserts that NTEU had access to new hires during their "first phase" of training at FLETC. He said most of the instructors during the first phase are legacy Customs employees, and some of them wear a brass pin on their uniform. He provided one of the pins, which is slightly more than two inches in length, and one half inch tall. The pin is stamped "NTEU OFFICIAL." The AFGE representative asserts that new hires start out believing NTEU is the only union.

AFGE's Exhibit 37, a declaration of the Executive Vice President of Council 117, located in Blaine, Washington, also addresses the FLETC issue, as does his supplemental affidavit. He explained that two AFGE stewards at Seattle International Airport told him everything he knew about NTEU's activities. The AFGE stewards informed him that employees returning from classes at FLETC were given lectures by NTEU organizers and received "marketing material," and NTEU had an informational stand in the dining facility. The Executive V.P. never talked directly to employees who spent 12 weeks being trained at FLETC, nor did he get their names, or copies of any of the materials NTEU was allegedly providing. No specific information regarding the dates when NTEU presentations occurred was provided.

The Executive V.P. said he began hearing reports from his stewards about NTEU's activities at FLETC in approximately January 2006 and immediately contacted AFGE headquarters officials, including the lead organizer for AFGE's election campaign. He did not know, what, if anything, AFGE did regarding the FLETC situation once he made them aware of it.

During the investigation, CBP acknowledged that NTEU requested several site visits during lunch at FLETC. However, CBP added that an AFGE representative also requested and was granted space to meet with employees at the CBP Academy at FLETC on April 17 and 18, 2006. Further, the CBP Academy made a conference room in the compound available for AFGE's use. CBP stated it was "unaware of any denial of an AFGE request for access at FLETC."

AFGE was asked to confirm CBP's assertions, and offered that as "the voter eligibility cut-off date was February 3, 2006[,] . . . any access in April 2006 would not have had any real effect on this election." AFGE stated that "[n]evertheless, AFGE was granted. . . permission to distribute materials to students at FLETC. . . .[,but] it is our understanding that only 75 CBP officers eligible to vote in the election were present at FLETC."

Ports of Entry

Beginning in September or October 2004, the San Diego AFGE representative began hearing reports that NTEU was making a presentation to new hires in Calexico, the San Diego Air and Sea ports, and at the San Ysidro port of entry. He said

approximately 20 or 25 employees hired after July 2004 received a presentation from NTEU, but the practice stopped in approximately February or March 2005. The names of those new hires who received an NTEU presentation were not provided.

The Executive V.P. in Blaine also said CBP gave new CBP Officers in Blaine 30 minutes of "paid time" to meet with the NTEU Chapter President, where he discussed the benefits of joining NTEU, and a similar situation occurred in the Seattle Airport and Seaport (Exhibit 37). No specific information was given, such as the dates when such presentations occurred, or the employees who heard them. The Executive V.P. could not provide this information when contacted during the investigation, but he suggested that perhaps the AFGE Local President would have it. That individual was contacted and provided an affidavit, but he did not have any specific information either. He also never raised the issue with CBP management. Article 8, Section D of Agreement 2000 does allow AFGE to make a presentation to new employees, so long as it does not exceed 25 minutes.

Exhibit 42 consists of a declaration from the AFGE Local President in El Paso, Texas and attached documents, including a grievance and CBP's response. He also provided an affidavit during the investigation. The grievance was filed on March 14, 2005, under article 8 of Agreement 2000, and asks that new employees be made available for an AFGE presentation at their assigned port of entry. CBP's response to the grievance, dated April 1, 2005, states that "the Agency has not hired any new employees since October 2003 that would be covered by the NINSC contract." The Port Director's response also offered that if AFGE believed any particular employee should be covered by Agreement 2000, he would "look into if further."

The Local President did not elevate his grievance after CBP's initial response in April 2005.[15] He had no first hand knowledge of presentations by NTEU during orientation at the ports of entry, and he did not have any of the documents NTEU allegedly distributed at those sessions. He added that an AFGE steward at the Fabens port of entry told him he saw an NTEU representative conduct a "meet and greet" for new CBP officers hired after July 2004. He provided the names of five CBP officers who received a presentation from NTEU either at FLETC or the Fabens port of entry.

---

[15] A grievance filed by the AFGE representative in Champlain, New York on April 28, 2006, shows that he too filed a grievance over the alleged violation of Article 8(D)(2) of Agreement 2000. The Assistant Port Director's response, dated May 19, 2006, indicates that while "AFGE has not raised this matter nor has AFGE requested an audience of employees for this purpose. . . you are assured that management will honor any future requests for an opportunity to meet with new bargaining unit employees entering on duty at the Champlain" port of entry.

Analysis and Conclusion

To the extent AFGE complains about anything which occurred before the petition was filed on May 17, 2004, such matters are not properly before me. *See U.S. Dep't of Justice, INS*, 9 FLRA 253, 258 (1982)(holding that objections raising conduct occurring prior to the filing of a representation petition "cannot be said to have interfered with the election."). Moreover, AFGE concedes that CBP allowed it to send representatives to FLETC to make presentations, and provided a conference room when requested in April 2006. AFGE has not demonstrated that it made any prior requests to go to FLETC that were denied by CBP. Thus, it has not been shown that CBP violated its obligation of neutrality or engaged in conduct that could have affected the outcome of the election. *Ft. Myer; Ingleside.* Likewise, AFGE has not met its burden of identifying employees in the State of Washington who received a presentation from NTEU. *NGB Charlotte.*

CBP treated those officers hired after July 2004 as unrepresented by either NTEU or AFGE. Both Unions acquiesced to this practice. In El Paso, assuming the five CBP officers were hired after July 2004 and should not have received a presentation from NTEU, there is insufficient evidence the free choice of the voters or the outcome of the election was affected. *Ingleside.* It bears repeating that the margin of victory in this case was nearly 4,000 votes. As only a very small number of the eligible voters may have been directly affected, the results of a nationwide election could not be impacted, particularly where, as here, the margin of victory is substantial. *FDIC, Wash., D.C.,* 38 FLRA 952, 964 (1990). A similar result is reached regarding the 20 or 25 employees in the San Diego area who received a presentation by NTEU in 2005. *Id.* Accordingly, the objection related to NTEU presentations at FLETC and certain ports of entry is dismissed.

17. CBP Limited or Denied Site Visits Requested By AFGE Representatives While Granting NTEU Site Visits; in Some Instances, Required AFGE Representatives to Be Escorted; and this CBP Surveillance of AFGE Representatives Hindered Them From Learning of Potential Grievances

These objections appear in the Election Protests, both under the general heading Lack of Access, as well as section 2.c., the section specifically designated as addressing denial of site visits. The alleged denials or limited opportunities to meet took place at more than one location, and each will be addressed in turn. The requirement that certain AFGE representatives be escorted appears at section 2.b., but it is related. AFGE alleged that once it was finally able to get representatives to a site, they had to be escorted, making it difficult for employees to speak freely to the Union. This occurred at some of the same places where site visits were limited, specifically Calexico and Washington, D.C. Accordingly, such matters will be considered together. Both NTEU and CBP responded generally to these objections, and specifically addressed a few of the locations raised by AFGE. The general responses will be considered first.

NTEU Response

NTEU affirms that requests for space "were subject to scheduling and availability." NTEU argues AFGE has failed to meet its burden of proving "employees were prevented from obtaining access to one of the campaigning unions and that any such denial of access materially affected the outcome of the election." NTEU claims "CBP clearly announced . . . that the unions would be treated equally in terms of access, and they were." As support, NTEU provided attachments 1 - 3, all documents written by CBP.

Attachment 1 is a letter regarding the election written to AFGE, NAAE, and NTEU on January 25, 2006, by CBP's Director of Labor Relations. This letter affirmed "CBP's commitment to continue to work closely with the FLRA and all participating labor organizations to ensure that an impartial and efficient election is conducted." The letter went on to say that CBP would "adhere to applicable provisions" of the expired collective bargaining agreements in terms of arranging for meetings with bargaining unit employees, and identified CBP's national point of contact for all matters related to the election. A chart identifying all of CBP's Labor and Employee Relations Representatives in the field, including their area of responsibility and phone number, was attached to the letter.

Attachment 2 is a CBP interoffice memorandum to all managers and supervisors from CBP's Director of Labor Relations, which is also dated January 25, 2006. The subject of the memo is "Pre-Election Guidance," and attached to the memo are a statement of "Key Pre-Election Principles," as well as "Pre-Election Questions and Answers." The chart identifying all field LER Specialists was also attached to the memo, which is the same one the unions received. The memo states:

> The attached guidance emphasizes three common themes. Throughout the election process, managers, supervisors and other CBP representatives must:
>
> > *(1) Be neutral and maintain the appearance of neutrality;*
> > *(2) Ensure permissible campaigning activities are not disruptive to the accomplishment of organizational missions and functions; and*
> > *(3) Seek guidance and advice from servicing Labor and Employee Relations (LER) Specialists regarding any union inquiries or activities related to the election.*

(emphasis in original). Many of the issues CBP identified in the question and answer portion are some of the very same issues that have been raised by AFGE in its objections.

Attachment 3 is a memorandum dated December 23, 2005 for CBP's directors in the field, which was written by the Assistant Commissioner of the Office of Field

Operations. This memo has an attachment of its own, a "Weekly Muster" disseminated to all employees during musters held the week of December 25, 2005. CBP included a statement that "every eligible employee within the bargaining unit will have the opportunity to vote," representatives from each union will be campaigning, and "employees may meet with union representatives." The muster closed with a statement reminding employees that "no outside activity should distract from or take precedence over CBP's border protection responsibilities."

In terms of CBP's escort policy, NTEU confirmed its understanding that:

> [n]on-CBP personnel were required to be escorted, while in CBP controlled space and non-CBP employee union officials were subject to the same escort policy as everyone else. In some cases there were legitimate issues of scheduling or availability of space. There may have been isolated acts not in accordance with these broad policies (see Attachments 12 and 13), but they involved both unions to a similar extent.

Attachments 12 and 13 are relevant to specific locations only. They, along with any other matters specific to a location AFGE identified, will be discussed below.

CBP Response

CBP asserts that not only did it "continue to meet its statutory and contractual obligations throughout the QCR processes, it took extraordinary steps. . . In addition to repeated issuance of detailed direction and guidance. . . CBP established a clear line of communication." CBP said it provided "AFGE and NTEU equal access to unit employees and services" for campaign purposes. CBP noted that when issues arose because an outside facility owner, such as the General Services Administration, "created access challenges, CBP took additional steps to help facilitate union representative access." CBP also established "a dedicated team to address election related issues," particularly those related to access. CBP said "[b]oth AFGE and NTEU took full advantage of this process, and CBP is unaware of any access challenge brought to its attention. . . that was not resolved."

AFGE's Exhibit 19, a letter from CBP to AFGE's General Counsel dated April 18, 2006, responding to the request for a pre-election mailing, addresses the issue of site visit access. CBP stated:

> As of the date of this letter, I am unaware of any unresolved instance where AFGE claims it was denied access to employees. Furthermore, I note that AFGE's requests for visits and tours of CBP's ports of entry continue to be granted without incident.

The specific instances where site visits were limited, denied, and/or an escort was required, are described below.

Brownsville, Texas

Exhibit 29 was offered to support the claim site visits were denied or limited at the Brownsville port of entry, specifically at Veterans Bridge. This claim is found under section 2.a. of AFGE's Election Protests. The exhibit is an affidavit of the Council 117 Central Region Vice President regarding a campaign visit to Veterans Bridge on February 13, 2006.

Investigation

The affiant provided a supplemental statement. He assisted with an AFGE campaign effort which lasted the entire week of February 13, 2006, and the AFGE National President was with the team the entire week. The Central Region V.P. said the Local presidents coordinated the campaign visit to their ports, but they did not know which bridge the National President intended to visit, so requests for him to tour were not made until the day of the visit.

On February 13, while at the Veterans Bridge site, an AFGE national organizer asked if the AFGE National President could tour the operations and visit with officers. The Chief Inspector said she did not have a problem with it, but would have to check with the Port Director in Brownsville. The Port Director called back and denied the request, stating it would interfere with operations. It was later reported that NTEU's National President had visited the same port, and the Port Director had allowed the NTEU Chapter President to escort her around the port of entry. AFGE did not submit the names of those employees who saw the NTEU National President tour the port of entry in Brownsville as part of its evidence.

When the AFGE National President learned he could not walk around Veterans Bridge, he decided to go to Gateway, another site that is part of Brownsville, to attend a lunch and learn, spending at least three hours there. The Central Region V.P. explained Gateway is a larger port than Veterans Bridge. The lunch and learn at Veterans Bridge was held as scheduled, from 8:30 a.m. to 3:30 p.m. At least two AFGE national organizers remained at the Veterans Bridge event. The Central Region V.P. requested that AFGE make another visit to Brownsville, including Veterans Bridge, but he said Council 117 officials refused, because CBP had "burned President Gage."

CBP was asked to explain the difference in treatment of AFGE's National President as compared to NTEU's. CBP said NTEU held lunch and learns in Brownsville in February and May 2006, but "[t]o the best knowledge of local management, Colleen Kelley was not in attendance."

CBP also provided a request AFGE sent to the Brownsville Port Director, dated February 13, 2006. In this request, AFGE asked for permission to hold a lunch and learn for several purposes, including "the upcoming NTEU/AFGE election." The request included a list of AFGE officials who would be in attendance, and the AFGE

National President is the first person listed. Other officials on the list included two AFGE national organizers and several local officials. CBP identified an LER specialist in Brownsville who stated that AFGE's "request was accepted and the 'lunch and learn' took place later that month." CBP did not assert that the AFGE National President did in fact attend the event.

Analysis and Conclusion

The evidence shows the AFGE National President attended lunch and learn events in the Brownsville area. The request to tour the Veterans Bridge site was made at the last minute, and he ended up going to a bigger port instead. Assuming the NTEU National President was able to tour Veterans Bridge, it has not been shown whether this too was a last minute request. AFGE bears the burden of making a record that CBP violated its obligation to remain maintain neutral. *NGB Charlotte; Ft. Myer.* AFGE decided whether the National President would choose to make an appearance at Veterans Bridge during the campaign. Given that he did attend other lunch and learns in the area, there has been no showing the isolated incident at Veterans Bridge intefered with the free choice of the voters requiring that the election be set aside. *Ingleside.* The objection is dismissed.

Calexico, California

The incident at Calexico is referenced in section 2.a., as well as section 3.a. of the Election Protests. Regardless, the issue is the same, CBP escorted AFGE representatives, and AFGE argues that this amounted to surveillance, which hindered their ability to talk to employees and learn issues deserving of grievances. Exhibit 30, a declaration from the AFGE Local Vice President in Calexico, was provided.

Investigation

The exhibit relates a campaign event on March 23, 2006, and that the Local V.P. was present to accompany AFGE dignitaries who would be visiting the Port. The Local V.P. provided a supplemental affidavit. He explained that a lunch and learn was held on March 23, 2006 from noon to 3:00 p.m. at lunch rooms at the East and West ports in Calexico. Three officials from AFGE national headquarters attended these events. Before going to the lunchrooms, they toured the port area. They were escorted by management until such time as they set up in the designated areas.

The entourage started at the West port, visiting the pedestrian area, the vehicle secondary area, and the vehicle lane, before going to the lunch room. An Assistant Area Port Director escorted them until they arrived at the lunch room area, when he left. While walking through the pedestrian area, an employee asked the Local V.P. who was accompanying him, and he introduced the AFGE national officials. The Assistant Area Port Director allowed the employee to continue his conversation with the national officials. However, he pulled the Local V.P. aside and told him he had to observe the

ground rules, showing him a piece of paper with the words "do's and don'ts." The Assistant Area Port Director read from a part that said bargaining unit members could not talk to them unless they were on their breaks and in designated areas. The Local V.P. stated they were out of earshot during this discussion, and the conversation between the employee and the AFGE officials concluded without interruption. The CBP supervisor did not say anything else about to whom the union officials could talk, or when, but the Local V.P. recalled that while they were being escorted, the supervisor did seem to "maintain a good eye for observation."

No management officials were present when the AFGE officials were in the lunch room, except for a five minute visit from the Port Director. She went in to ask why someone was using a cell phone on the balcony. After the Local V.P. introduced the AFGE dignitaries, she said she had forgotten they were going to be there that day and walked out. When the AFGE officials finished at Calexico West, they were able to leave unescorted, taking the elevator to the parking lot and driving to Calexico East, where the Assistant Area Port Director was waiting to escort them to the lunch room.

Once again, they were able to observe the flow of traffic and tour the pedestrian area before going to the lunch room. At no time during this visit did the Assistant Area Port Director raise the issue of with whom, or where, discussions with employees should take place. After the event was over, they were again able to leave unescorted.

Analysis and Conclusion

What has been alleged is that employees were inhibited from speaking to AFGE because its officials were escorted. However, there has been no showing employees were not able to speak to the union representatives in private at the lunch and learn events, where CBP management was not present. *NGB Charlotte*. The supervisor's comments to the Local V.P. essentially reiterated the rule that campaign discussions with employees should take place in non-work areas at non-work times. *See Fort Campbell Dependents Sch., Fort Campbell, Ky.*, 46 FLRA 219, 226 (1992). As the conversation between the supervisor and the Local V.P. was not heard by any employees, it could not have interfered with the free choice of the voters or affected the outcome of the election. *FDIC, Wash., D.C.*, 38 FLRA 952, 963-4 (1990); *Ingleside*. The objection is dismissed.

Detroit

AFGE alleges that management of the Detroit Field Office said it would "allow each union requesting access to its facilities, to meet on a one-time only basis at a determined facility and/or station or airport." Exhibit 15 was provided to support this claim, and it consists of two documents, one of which is the email where a CBP LER Specialist made the "one-time only" comment.

Investigation

On March 20, 2006 the AFGE Local President in Detroit requested to have meetings during the week of March 27, 2006 at six different locations (Exhibit 15). The email response to the request, dated March 21, 2006, from the CBP LER Specialist provides:

> At this time, I would like to express CBP's commitment to continue to work closely with the FLRA and all participating labor organizations to ensure that an impartial and efficient election is conducted. CBP recognizes and appreciates the need for labor organizations to meet with bargaining unit employees. However, CBP representatives must "ensure permissible campaigning activities are not burdensome or disruptive to the accomplishment of organizational missions and functions." Therefore, be advised that CBP - Detroit Field Office management will allow each union requesting access to its facilities, to meet on a one-time only basis at a determined facility and/or station, or airport. Please take this notification under advisement and govern yourself accordingly.
>
> I will provide you with a reply to the attached request after consultation with port management.

NTEU provided attachment 13E, an email from an NTEU adherent who witnessed the AFGE National President walking around the Port of Detroit on April 28, 2006 unescorted. He was accompanied by an AFGE representative who was providing campaign literature to employees. This email relates that the NTEU adherent complained, and "management put a stop to AFGE walking the floor and approaching employees during work hours."

The AFGE Local President in Detroit was contacted, and he stated that he threatened to file an unfair labor practice after receiving the March 21 message. He also confirmed that the local labor relations representative relented and allowed all the lunch and learns requested in the March 20, 2006 memo. However, he did have to change the time of some of the events. Moreover, the Local President confirmed that even more lunch and learns were held at those same locations during the entire week of April 24, 2006. Consistent with the information NTEU provided, the AFGE National President attended those. AFGE's additional lunch and learns were held January 18, and February 9-10, 2006.

Analysis and Conclusion

The investigation revealed AFGE's claims as to alleged restrictions on lunch and learns in Detroit were not accurate, as several lunch and learns took place. Accordingly, AFGE has not demonstrated CBP interfered with the free choice of the voters in Detroit. *Ingleside*. The objection is dismissed.

Vancouver, British Columbia, Canada

This instance appears under 2.c. of the Election Protests, and Exhibits 13 and 14 are offered in support. The issue is disapproval of a visit by the Council 117 President at an event on December 6, 2005. Permission for this visit was requested on Sunday, December 4, 2005. Around the same time, the NTEU National President visited the Vancouver site.

NTEU Response

NTEU contends "AFGE's exhibits 13 and 14 typify the weakness of AFGE's evidence." NTEU argues it is not reasonable to compare AFGE's request for a site visit made two days before the scheduled trip with NTEU's request for a similar site visit by its National President "submitted *over a month* in advance." (emphasis in original).

Investigation

The two declarants offered by AFGE provided supplemental affidavits. The AFGE Local President in Blaine, Washington, a CBP Officer, said he accompanied the Council 117 President on his five-day tour in December 2005. They visited locations in the Pacific Northwest, including the ports of entry at the Peace Arch, Pacific Highway, Lynden, Sumas, as well as the Seattle International Airport. His request to CBP for approval of the visits did not include Vancouver, as it is a foreign port. About three weeks before the planned visit to Vancouver, he left messages with the Port Director to find out what would be required. He knew there would be different procedures since it is an international facility. In his messages, he did not tell the Port Director the date of the proposed visit. However, since the Port Director never returned his calls, he asked the AFGE Local Steward in Vancouver to make a formal request on his behalf. This was the first time anything was put in writing.

On Sunday, December 4, 2005, the Local Steward in Vancouver submitted the request to the Area Port Director of the Vancouver Pre-flight Inspection station, which states:

> AFGE District 117 President, Mr. Showalter is requesting a tour of the PFI facilities on December 06, 2005.
>
> I am requesting the use of one half of the break room and a private room with phone for Mr. Showalter to meet with employees.

On Monday, December 5, 2005, around 9:00 or 10:00 a.m., the Area Port Director asked the Local Steward, "who is this Showalter guy?" The Local Steward explained his status and said the purpose of his visit was to conduct an informal lunch and provide Union updates. The Port Director asked if he had a country clearance, and the Local Steward said he did not, but asked how such arrangements would be made.

The Port Director told him to go through the Vancouver Consulate General's office. He added that he did not have enough supervisors on duty and was too busy to show Showalter the port, and unless he was going to be representing an individual, he could not come.

Although Article 8, Section H. of Agreement 2000 expressly permits "National representatives of the Union and Council officers" to visit at all locations so long as permission is requested in advance, the local steward did not raise that point with the Port Director. The Local Steward did not try to get a country pass because he had heard the Consulate General's office is slow, but he did tell the Local President and another AFGE official what had happened.

After hearing about the country pass, the Local President called the U.S. State Department, and was told that country clearance had to be authorized by someone in Washington, D.C. He stated that he stopped trying because he did not think he could obtain the clearance in time.

On January 17, 2006, a CBP representative responded to an AFGE inquiry about the Vancouver visit. That inquiry was not included, but the declaration (Exhibit 13) reproduces a portion of the CBP email, which states that:

> In general, a two-day notice is not sufficient to schedule and obtain the necessary clearances (including the requisite country clearance) to conduct such a tour. As a result, the Port Director was unfortunately unable to accommodate AFGE's request.

The entire email was not provided, but the Local Steward said in the past, two days advance notice was sufficient to schedule a meeting space and tour of the port. His sole example was in June 2005 when the Local President needed to visit an employee about a grievance. The Local Steward showed him around, and employees were able to talk to the Local President during their break times. The Local President confirmed he had been to Vancouver previously, both as a CBP employee and to represent another employee on a grievance. He said he was never required to have a country pass.

The Local Steward estimated there are about 60 employees at Vancouver, and about 2/3 of them are legacy INS employees. He said the Council 117 President never tried to make a return visit, but about a month or two after the visit by the NTEU National President, someone from AFGE headquarters came out for a lunch and learn. Although he was not directly involved, the Local Steward did not think a country pass was required in that instance. The Local President confirmed an AFGE lunch and learn was held in Vancouver a few months later, though he did not attend.

NTEU Visit to Vancouver

A declaration supplied by AFGE (Exhibit 13) also reproduces an email exchange between the Port Director and an NTEU representative concerning a planned visit by the NTEU National President in Vancouver on January 23, 2006. The request says she would like to visit, and "hope[s] CBP would provide a VIP walk through of the facility and then the opportunity to meet with employees in the break room prior to the start of their shifts." The original email was not provided, and thus the date of the NTEU request is not known. However, the response from the Port Director is dated December 21, 2005. In the response, the Port Director said he would be able to provide her with a tour and make the break room available as requested. The NTEU National President made the visit as planned, and she was given meeting space and a tour of the port.

The AFGE Local President said on March 29, 2006, at an AFGE meeting, he had a discussion with the NTEU Chapter President about the NTEU National President's visit to Vancouver. When asked if she was required to have a country pass to enter the facility, he said she was not, because as a United States citizen, all you need is a passport; you do not need a country pass to travel to Canada or go to the Vancouver, PFI facility. When told that the Port Director said the AFGE Council 117 President would have to have a country pass, according to the declaration, "[h]e just laughed and said we were not required to have a country pass." (Exhibit 14).

CBP was asked to explain what is required to access a United States Government facility in a foreign country. CBP replied that:

> Country clearance is an indispensable part of official travel, especially in the current threat environment. Requesting country clearance should be among the first steps in planning international travel. It grants an employee permission to enter a country and . . . most importantly protection as an official of the U.S. Government and not afforded to U.S. citizens who travel as tourists. Employees who travel without proper country clearance face considerable personal risk.
>
> To ensure appropriate time to review and process country clearance requests, requests should be submitted at least 15 business days prior to international travel. Any country clearance request received by the Embassy/Consulate with less than 10 business days notice may be denied.
>
> In addition to the Country Clearance requirement, other local protocols are necessary to accommodate visitors. These protocols are targeted around operational concerns, e.g., if a visit is being requested on a certain date and the Port of Entry is scheduled to process a high volume of passengers at that time, obviously that request cannot be granted and alternative arrangements would need to be made.

In addressing AFGE's request, CBP stated, "[a] two day turnaround was not sufficient time for local management. AFGE never sent an additional request." In contrast, NTEU's request was made in early December 2005, and the visit was conducted on January 23, 2006, allowing time to accommodate the visit.

Analysis and Conclusion

AFGE alleged CBP denied its site visit while permitting NTEU's, thus violating the obligation to remain neutral. However, I do not find Vancouver examples to be comparable. AFGE's own evidence shows that NTEU's visit to Vancouver was authorized over a month in advance, while AFGE's request was on short notice. Moreover, CBP allowed AFGE to have a subsequent event in Vancouver, and it was AFGE's decision not to send the Council President. Accordingly, I am not persuaded that CBP breached its duty to remain neutral. *Ft. Myer.* As to the denial of the December 2005 visit itself, I find this occurred because the request was made with little advance notice. Finally, there are only 60 or so bargaining unit employees at Vancouver, and the margin of victory was far greater. Accordingly, the denial of the December 2005 AFGE visit cannot be said to have interfered with the free choice of the voters or affected the outcome of the election. *Ingleside.* The objection is dismissed.

Washington D.C. Area

Exhibits in support of these objections appear generally at section 2.c. AFGE claims that CBP "greatly impeded or outright denied site visits. . . [, and] AFGE representatives tried for months to arrange for meetings with CBPOs at the Ronald Reagan Building and National Place." Moreover, AFGE highlights Exhibit 17, an email from a CBP labor relations representative that contains a statement AFGE finds troublesome, "A union does not have an unfettered right to the solicitation of employees during an employees [sic] regularly scheduled duty hours." AFGE argues that by application of the escort policy, "the Agency limited access not only for the purposes of electioneering, but also for the purposes of proper union representation." The exhibits, resulting investigation and conclusions for each location will be discussed in turn.

Ronald Reagan Building

For this objection, AFGE offers Exhibits 5, 16, 17, 26 and 27. Exhibits 16 and 17 also appear in part 2.b. of the Election Protests as a separate item, but the conduct is the same and will only be discussed once. Difficulties raised by AFGE in connection with the Ronald Reagan meeting include: delays in scheduling the meeting; an allegation CBP impeded efforts to notify employees of the location, retracting an offer to provide an easel in the entrance areas, refusal to allow desk drops or emails; and a last minute change to the room location for the meeting scheduled for May 11, 2006.

NTEU Response

As relevant here, NTEU states it was "subject to similar treatment, and forced to reschedule activities and acquire GSA approval to electioneer in certain space." On the escort issue, NTEU admits that on one occasion, its negotiator left a bargaining session "in disgust without waiting to be escorted from the building." However, AFGE's evidence does not show that his visit had anything to do with the election, nor does it show that he spoke to any CBP employees on his way out. Moreover, "AFGE's broad claim that this demonstrates CBP conferring 'unfettered access' rights to NTEU representatives is patently ludicrous and should color their overall claim."

NTEU provided attachment 12, which includes an affidavit of an NTEU organizer. She said she had to obtain approval from GSA for a campaign table in the public lobby of the Ronald Reagan Building after CBP labor relations officials "demanded we leave." After obtaining the necessary approval, they were allowed to return, but on subsequent days, CBP officials asked them to "produce the GSA paperwork." Moreover, "[n]ear the end of the campaign period, on some of the requested days our request was disapproved because AFGE had already reserved the space."

CBP Response

CBP explained that when AFGE and NTEU "desired to leaflet employees by placing representatives at tables in the entrance of CBP's headquarters office," it ensured both unions were provided a contact person at GSA to obtain the proper permits. However, CBP stated that "AFGE initially failed to properly obtain such permits, and as a result, CBP was required to ask AFGE to cease its activity until the permission from the appropriate authority was granted."

Investigation

The President of AFGE Local 1924 is an employee of the U.S. Citizenship and Immigration Service (CIS), a separate activity within DHS whose employees were not part of this election. His declaration is Exhibit 16, and he was contacted regarding an affidavit.[16] He explained that the Ronald Reagan building was the former headquarters

[16] An affidavit was sent to the employee, but it was not returned by the agreed-upon deadline. After phone calls regarding the delay were not returned, both he and the AFGE attorney who submitted the objections were notified by email that if the affidavit was not returned by the new deadline, or if the affiant failed to contact the investigating agent by that time, the Region would "assume the facts as described are correct, and the statement will be submitted to the Regional Director as evidence to be considered." There was no response. The email to the affiant was sent to his personal account, and I have confirmation the emails were delivered and/or read by both AFGE officials. The Authority has allowed unsigned witness statements to be considered

of the U.S. Customs Service and is now CBP's headquarters. Some legacy INS employees were moved there, including employees of various administrative offices, such as procurement. Although he was uncertain of the actual number of employees, he estimated the legacy INS presence at around 200 employees, but as many as 400 others were either legacy Customs or contractors. The AFGE Local does not have an office in the building.

Notification to Employees of AFGE Events at Headquarters

Exhibit 5 is an email exchange from February 2006.[17] As relevant to this objection, the main point is that CBP refused to comply with an AFGE request that CBP send an email on its behalf to "communicate with CBP employees at HQ on other than internal business, including to notify them of a meeting at the Reagan building on some future date." CBP refused, stating in part, that AFGE is not the exclusive representative of all of the headquarters employees, and there is not "an easy ability to discern who each employee is specifically represented by." CBP also refused to allow desk drops based on the lack of applicable contract provisions. Since AFGE did not have a bulletin board at the Ronald Reagan building, CBP "determined that it would allow [AFGE] to post in the CBP entrance space," on easels at the front and rear entrances.

Exhibit 17 is an email exchange between the same AFGE national organizer and CBP labor relations representative found in Exhibit 5, this time from late February - March 2006. From this exhibit, it appears AFGE was attempting to arrange a meeting only for employees it represented, and on that basis, asked CBP to send an email message notifying its employees of the meeting. AFGE's request to use email on this occasion is supported by an earlier statement of the CBP labor relations representative found in his email on February 28, 2006, "[i]f it is determined that we can identify [AFGE] Local 1924 represented employees, CBP will send your email, if approved." However, by an email dated March 15, 2006, CBP said it would not send union emails on its own, though it did offer that AFGE local representatives could "send, on their own, emails to their constituents that are not considered internal union business."

As part of Exhibit 17, the other issue where the CBP official appeared to reverse his stance was the option of placing a poster on an easel at the front and rear entrances. The official explained that "[s]ince this is a Local 1924 meeting and not an AFGE election meeting, the use of the lobbies to post is not acceptable as we do not allow any headquarters representatives to do so." However, he continued, "Local 1924

---

during the investigation of objections. *Dep't of the Interior, Bureau of Indian Affairs*, 56 FLRA 169, 171 (2000).

[17] Exhibit 5 has already be discussed in context of another objection found in this decision under item number two, CBP's refusal to allow AFGE to use its email system to campaign.

has been allowed in the past to post their notices of meetings on the physical bulletin boards, located in a break room and copy room on each floor where bargaining unit employees work." In order to comply with the escort policy, "a representative from CBP Labor Relations will escort the party placing the posting." As the meeting was set for March 23, 2006, he offered that the documents could be posted on March 20, 2006. It is not clear whether the meeting set for March 23, 2006 took place. However a meeting did take place on May 11, 2006.

May 11 Meeting at CBP Headquarters

The AFGE Local President said that building management imposed restrictions on leafleting by the competing unions. However, leafleting was allowed if permission was granted in advance and both unions were not in the lobby at the same time.

The morning of May 11, 2006, AFGE officials passed out leaflets advising employees of a lunch and learn later that day. The AFGE Local President conceded they may not have obtained permission to leaflet that day, and when a CBP representative told them they would have to leave the area if they did not have permission, they went to another area. However, they did not have permission to be there either, and were again asked to leave.

When they returned to set up the meeting, they found that the location had been changed. The Local President placed approximately 10 fliers with arrows on the wall pointing to the room where the lunch and learn was moved. One flyer was on the door of the original meeting location, and the Local President also stood by the elevator to direct employees to the new location. He said this location was approximately 100 feet farther away, about 5 or 6 doors down, though it was down a winding hallway and not in a line of sight of the original location, which was closer to the elevator.

Exhibits 26 and 27 are the flyers concerning the meeting held on May 11, 2006. The top of the flyers asks, "WHO WILL REPRESENT YOU?!" Exhibit 27 is the same flyer as Exhibit 26, though it shows a handwritten change to the room location, from room B1.5-10 to B1.5-25. In large letters written on the back the words "UNION B1.5-25" appear. In its objections, AFGE argued that "[t]he make-shift room change leaflet looked sloppy and unprofessional, thus tarnishing AFGE's image."

Other AFGE Events Held at CBP Headquarters

The Local President said four or five lunch and learn events were held at the Ronald Reagan building, and other than the event on May 11, the rooms were not changed. He also noted that attendance at each of these events was about 10 to 15 people, which was about how many attended the May 11 event as well.

Escort Issue

As far as the escort issue, the Local President said when they had their lunch and learn events, he placed food on a cart and was escorted directly to the room where the event was held. To publicize the events, in addition to leafleting, he placed a poster on an easel in the lobby near the elevator. He added that AFGE did not have a bulletin board in the Ronald Reagan building, nor did he grieve that issue. However, he stated that on a couple of occasions, on the day before the lunch and learn, a CBP labor relations representative escorted him to seven bulletin boards in the break rooms, one per floor, and he placed flyers on those boards.

He generally objected to being escorted since he is employed by another division of DHS, as opposed to an outside entity. He said he is not escorted when he visits ICE (Immigration and Customs Enforcement) facilities, another activity within DHS that was not part of this election. However, he acknowledged that employees of AFGE, such as national organizers, are employed by an outside entity and are properly escorted. He said the escort policy CBP applied to him, coupled with the lack of an office at the Ronald Reagan building, and the lack of stewards in the location, made it difficult to communicate with employees on grievable issues.

Exhibit 16, the declaration from the AFGE Local President, generally addresses CBP's escort policy, rather than the meeting which took place on May 11, 2006. Although the Local President was told by CBP that the escort policy is applicable to him as well as NTEU staff and others who are not CBP employees, he describes an incident of disparate treatment. The incident took place on July 19, 2005, a briefing he attended along with an NTEU attorney on the subject of moving any CBP employees residing in Canada back to the United States. The Local President said he was escorted to the briefing, which took place in the Ronald Reagan Building, and at some point, the NTEU representative became "thoroughly disgusted with the briefing and left abruptly," unescorted. The Local President said he found it odd that NTEU was allowed to walk through the building unescorted, but a CBP official responded, "oh, I am sure he will just find his own way out."

In approximately May 2006, the Local President appointed a couple of CBP Officers in the Ronald Reagan building as stewards. Before that time, AFGE had no stewards in the building, though NTEU had stewards and an office. The AFGE Local President said he asked for an office, but was told he already had one at CIS. He also asked for an "access card," but was told it was not appropriate since he is not a CBP employee, and the Union should not be "wandering around soliciting grievances." After the tally of ballots in June 2006, the stewards escorted the Local President rather than a labor relations person. This has not been challenged. He did not attempt to have the stewards escort him before that time.

Analysis and Conclusion

The investigation revealed that despite scheduling difficulties, AFGE had several lunch and learns at the Ronald Reagan building, and points to only one where the room was changed. This did not seem to affect attendance, as it was similar to other events. Thus, AFGE has not shown that the outcome of the election was affected. *NGB Charlotte; Ingleside.* With respect to the issue of notifying employees of the meetings, including leafleting, certain areas were controlled by GSA, and NTEU was subject to similar restrictions as AFGE. As CBP allowed several AFGE events at its headquarters, and took steps to ensure that both Unions complied with GSA's leafleting requirements, it cannot be said that CBP violated its obligation of neutrality. *Ft. Myer.*

As far as application of the escort policy to the Local President, he was not an employee of CBP, though he was an employee of DHS. Despite the impediment of the escort policy, the investigation showed CBP took the Local President to break rooms to allow the posting of notices of AFGE events. AFGE's evidence concerning one incident where the NTEU representative abruptly left a briefing is insufficient to establish that CBP's escort policy did not apply to NTEU employees. *NGB Charlotte.* The evidence also shows that CBP enforced an escort policy for all non-CBP employees, and thus did not violate its obligation of neutrality. *Ft. Myer.* Finally, the statements concerning solicitation of grievances during work time made by a CBP representative to various AFGE officials, found in certain emails to AFGE employees, as well as a comment made to the Local President, who, as a CIS employee was not an eligible voter, were devoid of threat and could not have affected the free choice of voters. *Ingleside.* This objection is dismissed.

National Place

For this objection, AFGE identified Exhibits 31 and 32. These are emails between the President of AFGE Local 1924 and the same CBP labor relations representative who corresponded by email on the Ronald Reagan meeting. AFGE asserts the restrictions CBP placed on it "were tantamount to a tacit denial of any meaningful meeting with the electorate stationed at National Place."

Investigation

The statement of the AFGE Local President addresses this issue. He explained there are approximately 50 to 100 bargaining unit employees on two floors of private office space at National Place. There is no CBP-controlled lobby, just private office suites behind secure doors.

On May 12, 2006, the Local President requested a meeting room at National Place. CBP's response on May 15, 2006, indicated a conference room was scheduled, but the Local President would have to be escorted. The message further stated, "this is not a CBP building, and as a result you may be restricted from posting or distributing

flyers anywhere outside of CBP space. Also, you can not distribute flyers anywhere inside the work area." (Exhibit 31).

An email dated May 17, 2006, informed the Local President the landlord's policy at National Place "is that no one can distribute any materials in their common space. This would include the lobby area." As a result, he would be escorted directly to the conference room and "cannot distribute any materials other than in the conference room." (Exhibit 32). The Local President responded that "given the restrictions on our access to the facility and the prohibition on distributing literature. . . . we have the dismal prospect of sitting in the meeting room hoping that somehow, the employees might sense our presence."

The Local President also requested to postpone the scheduled meeting until May 24, and asked CBP to send an email to employees who work in the building informing them of the meeting. CBP refused, stating that "CBP in the Washington, D.C. commuting area does not afford the use of email for non-CBP supported events. . . you were advised that CBP considers such requests as internal union business and not in compliance with your expired contract." As another reason why the request was inappropriate, he added that "AFGE is not the exclusive representative of all of the employees within CBP." Based on CBP's response, the Local President chose not to have any events at National Place, instead focusing on those in the Ronald Reagan building.

Analysis and Conclusion

The investigation shows that the Local President requested space for a lunch and learn on May 18, 2006, and CBP secured space. However, the CBP representative told him there was no place to leaflet, put up a poster, or otherwise inform employees of the event. In *NGB Charlotte*, the Authority stated that an agency may not "unduly limit the Union's access to unit employees." 48 FLRA at 1144. Although some of the restrictions were because the landlord controlled this private office space, CBP did not provide any method for AFGE to inform employees of the meeting and was unduly restrictive. Even so, there were not more than 100 bargaining unit employees located at National Place, and as NTEU's margin of victory in this election was nearly 4,000 votes, it has not been shown that CBP's actions with respect to National Place could have affected the outcome of the election. *Ingleside*. As such, there is no basis to set aside an election involving approximately 25,000 voters. Therefore, the objection is dismissed.

Objections Related to the Election Procedures

18. The Notice of Election Was Inadequately Posted by CBP

This objection is found in the Election Protests at section 4. Procedural Errors, and Exhibits 44-45 support an objection regarding "the manner in which the notice was posted." AFGE claims CBP failed to met the requirements of section 2422.23(b) of the Regulations with an electronic notice it sent to all voters.

NTEU Response

NTEU provided several reasons why this objection should be discounted, among them, since this was a completely mail-ballot election, "all these voters received the same notice in the mail at home," and "AFGE agreed to the electronic notice and signed a consent agreement to that effect." NTEU also noted AFGE did not establish that employees were unable to access the notice from CBP computers.

CBP Response

CBP responded to this objection and defended its actions, stating that the electronic notices were:

> [S]ent to employees through the exact method by which employees routinely receive information through CBP's electronic mail system. This methodology is designed to maximize the likelihood of receipt by employees as well as preservation of the document's integrity.

CBP also asserted it "fulfilled its notice obligation in a manner that met or exceeded the requirements of the parties' Election Agreement, as well as the intent of statutory and regulatory requirements."

Investigation

On May 4, 2006, CBP sent an email to the representatives of the parties to the election outlining the form the electronic notice would take. CBP explained:

> Our standard process for the mass distribution of documents is to include a hyperlink in the text of the message to the **specific CBP intranet site** on which the document is posted. This avoids the potential of clogging the mail system with 42,000+ large attachments.

(Exhibit 44)(emphasis added).

AFGE objected to the "hyperlink" aspect, stating that "[n]otice must be provided to the voters, not available to them if they choose to link to it." On May 4, 2006, CBP's representative responded to AFGE's complaint about the email message and use of a link. Among other things, CBP said the process described "is the exact method by which employees routinely receive information through CBP's electronic mail system."

On May 5, AFGE's representative renewed his objection, stating that "[p]erhaps in the alternative, you could post [a] physical notice, as you have done previously." On May 9, CBP submitted confirmation to this office that paper Notices had indeed been posted at all Ports of Entry and Headquarters in addition to the electronic notice.

AFGE provided a copy of the email sent to all potential voters, which has the following subject line: "Notice of Mail Ballot Election." The body of the message asks the reader to "[p]lease click on the following link to view a Notice of Mail Ballot Election from the Federal Labor Relations Authority." (Exhibit 45). In general, AFGE's complaint is that the email itself should have contained the information found in the Notice of Election, rather than requiring voters to follow a link to read it, because by so doing, "the notice was not provided to voters."

The Election Agreement I approved in this case addresses CBP's obligations regarding the Notice of Election. The first page of the agreement states:

> The Activity or Agency shall post the Notice of Election in places where notices to employees are customarily posted and/or in a manner by which notices are normally distributed.

In addition, Appendix A of the Agreement goes into further detail regarding the notices, both electronic and printed versions:

> The Notice of Mail Ballot Election will be sent to eligible employees electronically by the Agency and, in addition, printed notices will also be posted at a total of approximately 350 ports of entry and Headquarters.

Trouble with the Link

Exhibit 45 shows AFGE complained that some voters were not able to open the hyperlink. In support of this aspect of the objection, one complaint regarding trouble with the link was identified, but this was in the form of an email sent from an outside (AOL) account. The investigation showed that a CBP employee in New York informed AFGE that the link was not accessible. On May 11, 2006, CBP verified that there was indeed a problem viewing the link at that location, and "[i]n order to remedy this situation, the affected employees were provided a paper copy of the information posted on the web site." Six employees were located in the office in New York where this occurred. The CBP representative concluded by stating that:

I have been reassured that this is an isolated incident, and that we are unaware of any other cases where employees are unable to access the document. Again, this is the routine method by which employees receive information. However, should any further cases be brought to my attention, we will ensure the employees are provided the information.

Analysis and Conclusion

Clearly there was ample opportunity for voters to be informed of the election procedures, as the Notice was posted at all ports of entry and Headquarters, and the voters received the notice as part of the mail ballot package, in addition to the electronic notice. Despite AFGE's claim to the contrary, there is no guarantee that a potential voter will take the time to read all the information contained in any notice, be it an electronic notice, whether it is part of the message itself or contained in an attachment or link, or notices posted in the workplace or mailed to their homes.

Nothing in the Election Agreement specified the precise format the electronic notice should take, other than it should comport with the manner in which notices are normally distributed. AFGE has not established that CBP did not distribute the notice consistent with its usual practice. *NGB Charlotte*. I find that CBP met its obligations under the terms of the Election Agreement, as well as section 2422.23(b) of the Regulations in this regard. CBP's conduct in this regard was not objectionable, and the objection is dismissed. *Ingleside*.

As far as the issue of difficulties with the link, the investigation shows this occurred at only one site affecting six employees, and CBP took curative measures quickly. AFGE did not offer any employees to testify they could not read the link or see a copy of the notice one way or another. AFGE has not met its burden of proving its assertion that employees were not able to see the notice. *NGB Charlotte*. This objection is dismissed.

19. AFGE Challenged CBP's Exclusion of Almost 5,000 Voters

This objection is found at section 4. of the Election Protests, and no exhibits were provided in support. AFGE alleges that it "challenged the exclusion of almost 5,000 employees, almost 20% of the entire population of eligible voters."

NTEU Response

NTEU stated that "[t]here are a number of reasons why this objection lacks merit," including the fact that the issue of eligibility was raised by NTEU at the hearing in this matter, ruled on in the Decision and Order, and no one appealed that ruling. Still, NTEU agreed with AFGE that CBP had excluded too many potentially eligible voters, but only up to a point. Of those claimed to be eligible by AFGE, NTEU also believed

903 of the nonprofessionals, and 20 of the professionals, were improperly excluded by CBP. Otherwise, NTEU believed CBP had accurately listed those who were bargaining unit eligible.

CBP Response

In addition to echoing NTEU's position that the issue of the number of positions in dispute was addressed in the previous Decision and Order in this case, CBP pointed out that when the issue was initially raised, "AFGE went on record as raising bargaining unit eligibility challenges on only one hundred and forty-nine positions. . . Once the election was underway, AFGE multiplied its number of eligibility challenges by more than thirty-three times." Moreover, as part of the election agreement, CBP contends that AFGE waived any right to a hearing on eligibility unless outcome-determinative of the election. CBP describes AFGE's objection as "a last-ditch effort to delay the certification of a properly elected bargaining unit representative. . . [and] urges the FLRA not to legitimize such dilatory tactics."

Investigation

The Election Agreement approved in this case required the parties to submit separate listings of professional and nonprofessional employees whose eligibility to vote was in dispute, no later than April 7, 2006. At the start of the election, there were 4,808 individuals (4,701 nonprofessionals and 107 professionals) whom AFGE believed were eligible to vote, but had been excluded by CBP.

An Addendum to the Election Agreement was signed by representatives of all parties, including AFGE, and approved on April 24, 2006. The following provision is contained therein:

> The parties agree that the eligibility of the employees listed on the challenge list is in dispute. . . The parties agree that the employees will be given an opportunity to vote by mail ballot that is subject to challenge, if their ballot is returned.

Consistent with the Addendum, all 4,808 of those whose status was in dispute were provided ballots, bringing the total number of ballots that were initially mailed out in this election to approximately 24,600.

An additional 375 ballots were sent to employees who requested them of this office during the voting period. This occurred in cases where, for example, an employee stated s/he had never received a ballot and requested one. As a result, a total of 5,183 potential challenged ballots were mailed. Yet, of those that were returned, only 1,734 remained unresolved by the end of the ballot count. As reflected in the Tally of Ballots, the unresolved challenged ballots were thus insufficient to affect the outcome of the election, since NTEU's margin of victory over AFGE was 3,943 votes.

Analysis and Conclusion

Here, all parties to the election, including AFGE, reached agreement on those eligible to vote and those whose eligibility to vote was in dispute. Those in dispute numbered 4,808. Apparently not all 4,808 voted and/or some of those whose eligibility was disputed were resolved. The unresolved challenged ballots numbered 1,734 and were not determinative of the outcome.[18] Accordingly, proper procedures for handling eligibility disputes were followed, and a correct Tally of Ballots was issued, showing the election result was not contingent upon resolving the outstanding challenged ballots. AFGE's objection has no basis. *See DOD Dependents Schools*, 6 FLRA 297, 310 (1981)(noting that "the election process allows a challenge to any ballot cast. Challenges that are "not determinative of the election results. . . remain unopened and uncounted." *VA Med. Ctr., Fayetteville, N.C.*, 8 FLRA 651, 653 (1982)(challenged ballots that are not determinative of the outcome of the election "remain unopened and uncounted."). AFGE has not met its burden of proving the allegation that the number of unresolved challenged ballots improperly affected the outcome of the election. *Ingleside*. Accordingly, I am dismissing this objection.

CONCLUSION

Following a consideration of all the issues identified by AFGE, I do not find them to be meritorious. It has not been shown that any of the matters raised, whether considered separately or cumulatively, are sufficient to set the election aside. In sum, all objections have are dismissed, and the certification to NTEU should be issued without any further delay.

---

[18] Section 2422.24(b) of the Regulations provide:

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 Region are unable to resolve the challenged ballot(s) prior to the tally of ballots, the unresolved challenged ballot(s) will be impounded and preserved until a determination can be made, **if necessary**, by the Regional Director.

(emphasis added).

Section 2422.27(a) provides:

Investigation. The Regional Director will investigate objections and/or determinative challenged ballots that are sufficient in number to affect the results of the election.

Accordingly, the parties are advised that, pursuant to section 2422.31 of the Authority's Rules and Regulations, absent a timely-filed application for review of this Decision and Order, or if one is filed and denied, or if the Authority does not grant review of my action within sixty (60) days after the filing of an application for review, the action of the undersigned dismissing AFGE's objections to this election will become final. At that time, a Certification of Representative naming NTEU as the exclusive representative will be issued in this case. The unit will be described as follows:

Included: All professional and nonprofessional employees of U.S. Customs and Border Protection, Department of Homeland Security.

Excluded: All nonprofessional employees in the Office of Border Patrol who are assigned to Border Patrol Sectors; employees of the Office of Chief Counsel; management officials; supervisors; and employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6) and (7).

Pursuant to section 2422.31 of the Authority's Rules and Regulations, a party may file an application for review of this Decision and Order within sixty (60) days of the date of this Decision and Order. This sixty (60) day time limit may not be extended or waived. Copies of the application for review must be served on the undersigned and on all other parties. A statement of such service must be filed with the application for review.

The application for review must be a self-contained document enabling the Authority to rule on the basis of its contents without the necessity of recourse to the record. The Authority will grant review only upon one or more of the grounds set forth in section 2422.31(c) of the Rules and Regulations.

Any application filed must contain a summary of all evidence or rulings relating to the issues raised together with page citations from the transcript, if applicable, and supporting arguments. An application may not raise any issue or allege any facts not timely presented to the Regional Director.

The application for review must be filed with the Federal Labor Relations Authority, 1400 K Street NW, Docket Room, Second Floor, Washington, D.C. 20424, by close of business, March 19, 2007. Pursuant to section 2422.31(3)(f) of the Regulations, neither filing nor granting an application for review shall stay any action ordered by the Regional Director unless specifically ordered by the Authority.

Pursuant to section 2429.21(b) of the Rules and Regulations, the date of filing shall be deemed by the date of mailing indicated by the postmark date. If no postmark date is evident on the mailing, it shall be presumed to have been mailed five days prior to receipt. If the filing of the application for review is by personal or commercial delivery, it shall be considered filed on the date it is received by the Federal Labor Relations Authority.

Dated: January 17, 2007

Robert P. Hunter by TFB

Robert P. Hunter, Regional Director
Federal Labor Relations Authority
Washington Regional Office

Attachment: Certificate of Service

CERTIFICATE OF SERVICE

I certify that I have served the parties listed below a copy of the **Decision and Order Dismissing Objections To the Conduct of the Election** in Case No. WA-RP-04-0067 as follows:

Certified Mail:

Jefferson Friday
National Counsel
National Treasury Employees Union
1750 H Street, NW
Washington, DC 20006

7003 0500 0002 6948 7292

Gony Frieder Goldberg
Assistant General Counsel
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

7003 0500 0002 6948 7308

Michael Wenzler, Director
Office of Labor and Employee Relations
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, NW
Washington, DC 20229

7003 0500 0002 6948 7315

Hand Delivery:

Director, Case Control and Legal Publications Office
Federal Labor Relations Authority
1400 K Street, NW, Suite 201
Washington, DC 20424-0001

Colleen Duffy Kiko, General Counsel
Federal Labor Relations Authority
Office of the General Counsel
1400 K Street NW, Second Floor
Washington, DC 20424-0001

Dated this 17th day of January 2007, at the Washington Regional Office, 1400 K Street N.W., Second Floor, Washington, D.C. 20424-0001

Catherine Turner