62 FLRA No. 22

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

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UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CUSTOMS AND BORDER PROTECTION
(Petitioner/Activity)

and

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

and

NATIONAL TREASURY EMPLOYEES UNION
(Labor Organization)

WA-RP-04-0067

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ORDER DENYING APPLICATION FOR REVIEW

May 17, 2007

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Before the Authority: Dale Cabaniss, Chairman, and Wayne C. Beyer and Carol Waller Pope, Members

I. Statement of the Case

This case is before the Authority on an application for review (AFR) filed by the American Federation of Government Employees (AFGE) under § 2422.31 of the Authority's Regulations. The Department of Homeland Security (Agency) and the National Treasury Employees Union (NTEU) each filed an opposition to AFGE's application for review.

The Regional Director (RD) dismissed AFGE's objections to the conduct of an election. For the following reasons, we deny the application for review.

II. Background and RD's Decision

In March 2003, several Federal agencies were transferred to the Agency, pursuant to the Homeland Security Act of 2002. Pursuant to the Act, the United States Customs and Border Protection division was established, which is made up of employees from three former agencies: (1) the Immigration and Naturalization Service; (2) the United States Customs Service; and (3) the United States Department of Agriculture. Previously, the employees from these agencies were represented by different unions. In 2004, petitions were filed to determine, as relevant here, the exclusive representative of the employees. Among other things, the RD ordered an election between AFGE and NTEU (Unions).[1] The election was held in 2006. NTEU won the election 7,369 to 3,426, and AFGE filed timely objections to the conduct of the election. An investigation concerning AFGE's objections was held. The RD considered the results of the investigation, AFGE's supporting evidence, and responses from the Agency and NTEU. Finding no merit to AFGE's objections, the RD dismissed them.

As relevant here,[2] AFGE claimed that the Agency violated its obligation to remain neutral under § 7116(a)(3)[3] of the Federal Service Labor-Management Relations Statute (Statute) by including NTEU in a telephone directory and user's guide without also including AFGE. The RD found that the directory initially was available through a mainframe database system, but in April 2006, was moved to the Agency's intranet site. In addition, the RD found that: (1) the Agency did not notify either Union of the change or provide either with an opportunity to bargain; and (2) upon discovering that it was not included in the directory and user's guide, AFGE did not request to bargain or to be included in the directory. The RD concluded that the Agency's failure to include AFGE in the directory and user's guide did not violate its obligation to remain neutral. In this regard, the RD found that the Agency had "assumed" the collective bargaining agreement between NTEU and the United States Customs Service when it was established in 2003. RD Decision at 8. The RD found that Article 34 of that agreement requires the Agency to list NTEU in its telephone directory and that AFGE's collective bargaining agreement does not contain a similar provision.[4] According to the RD, "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

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[1] The National Association of Agriculture Employees (NAAE) filed a petition for a determination of the appropriateness and scope of the proposed units. The RD found that the Agency's proposed unit of professional and non-professional employees was appropriate and, on review, the Authority upheld that decision. *See United States Dep't of Homeland Sec., Bureau of Customs and Border Prot.*, 61 FLRA 485 (2006), *aff'd sub nom Nat'l Assoc. of Agric. Employees v. FLRA*, 473 F.3d 983 (9th Cir. 2007).

[2] Although AFGE filed 19 objections with the RD, the application for review concerns only 2 of them. Therefore, we will not address the RD's findings concerning the other objections, except as necessary to resolve AFGE's application for review.

[3] Section 7116(a)(3) of the Statute makes it an unfair labor practice for an agency "to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status[.]"

[4] Article 34, titled Access to Facilities and Services, states in relevant part: "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." RD Decision at 8.

not require that an agency equalize their positions[.]" *Id.* at 9 (*quoting United States Dep't of Defense, Dep't of the Army, United States Army Air Defense Ctr. and Fort Bliss, Fort Bliss, Tex.*, 29 FLRA 362, 366 (1987) (*Fort Bliss*)). Consequently, the RD concluded that the Agency did not violate its obligation to remain neutral by including NTEU, but not AFGE, in its directory and user's guide.

AFGE also claimed that the Agency violated its statutory obligation to remain neutral by refusing to facilitate a direct mailing for both Unions. AFGE argued, in this regard, that as NTEU represented more than two-thirds of the electorate, it was unable to reach most of the voters. The RD found that, before the election, AFGE proposed to allow both Unions, at their own expense, to submit campaign materials in sealed envelopes to the Agency, which the Agency would then address and mail to the employees' home addresses. The Agency denied AFGE's request because, among other things, NTEU opposed AFGE's proposal and threatened to file an unfair labor practice charge, based on § 7116(a)(3) of the Statute, on the ground that facilitating AFGE's mailing was not a "routine service" within the meaning of that section of the Statute. *Id.* at 52. The RD characterized AFGE's proposal as a "procedure[] to govern campaign activities" during the pendency of a question concerning representation (QCR), and concluded that the Agency was not obligated to bargain over AFGE's proposal. *Id.* (*quoting United States Dep't of Defense, Nat'l Guard Bureau, N.C. Air Nat'l Guard, Charlotte, N.C.*, 48 FLRA 1140 (1993) (*NGB Charlotte*)).

In addition, the RD found no evidence that the Agency's refusal to facilitate the proposed direct mailing affected the voters' free choice or the outcome of the election. In this regard, the RD found that the Agency provided several other avenues by which AFGE had access to employees. For example, he found that AFGE was allowed to host several "lunch and learn" meetings at various of the Agency's locations across the country; hold meetings on the Agency's premises; leave literature at the Agency's facilities; and use the Agency's email system to announce its meetings. RD Decision at 65-77. He also found that, even though AFGE was not allowed to hold a meeting or post literature in one location, that action would not have affected the outcome of the election because there were no more than 100 employees located at that facility. Therefore, the RD concluded that the Agency did not violate its statutory obligation to remain neutral by not facilitating AFGE's proposed direct mailing.

Based on the foregoing, the RD dismissed AFGE's objections.

## III. Positions of the Parties

### A. AFGE

AFGE claims the RD failed to apply established law in finding that the Agency did not violate is obligation to remain neutral by listing only NTEU in its directory and user's guide. According to AFGE, it was "reasonably foreseeable" that the Agency's failure to list both unions in the directory and guide would have a "favorable effect on the voters' attitude towards NTEU and a corresponding national, negative effect on the

voters' attitude toward the AFGE." AFR at 10. Therefore, AFGE claims the RD should have concluded that the Agency violated its obligation to remain neutral.

AFGE also disputes the RD's conclusion that Article 34 of the Agency's agreement with NTEU required the Agency to list NTEU in its directory and user's guide. Specifically, AFGE asserts, contrary to the RD, that *Fort Bliss* is inapplicable because: (1) the union claiming a right to the service and facility in that case was a union with "equivalent status" rather than an incumbent union; and (2) the directory and user's guide are "arguably neither a service nor a facility[.] " *Id.* at 7. As to the latter, AFGE claims there is an absence of precedent as to whether the Agency's directory and user's guide constitute a "service" or "facility" under the Statute. *Id.* Even assuming *Fort Bliss* is applicable, AFGE claims that Article 34 requires the Agency to list NTEU only in the directory and not also in the user's guide. *See id.* at 9. AFGE also asserts that the Agency failed to give notice and an opportunity to bargain over the implementation of the directory and user's guide and that there is an absence of precedent to determine whether the Agency acted properly in doing so.

AFGE also disputes the RD's conclusion that the Agency did not violate its obligation to remain neutral by refusing to facilitate the direct mailing. Specifically, AFGE asserts that the Agency gave NTEU "an unwarranted and unlawful advantage" by allowing it to veto AFGE's proposed direct mailing. *Id.* at 15. AFGE claims that the Agency hindered its ability "to reach the entire voting population[,]" which resulted in many employees being "completely unaware" of its views. *Id.* at 13. Citing the National Labor Relations Board (NLRB) decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240-41 (1966), AFGE also claims the RD failed to apply established law requiring fair and meaningful elections. *See id.* at 12. In this regard, AFGE asserts that the Agency's facilitation of the mailing "would have ensured a fair, free and honest election" consistent with this precedent, and would not have violated § 7116(a)(3) of the Statute. *Id.* at 13.

According to AFGE, the RD erred in relying on *NGB Charlotte* because that decision addressed "whether an agency must bargain with a union pursuant to statutory bargaining obligations[,]" which AFGE claims is not an issue here. AFR at 13. Rather, AFGE claims it was not requesting to bargain but, instead, was requesting "customary and routine facilities and services pursuant to § 7116(a)(3)." *Id* at 14. AFGE claims there is an absence of precedent as to whether its "proposal" for a direct mailing is "customary and routine" under § 7116(a)(3) of the Statute. *Id.* AFGE states that the Authority's decision in *Overseas Ed. Assoc., Inc.*, 22 FLRA 351 (1986), "stands for the premise that use of the internal mail system is customary and routine." Id. at 15.

Finally, AFGE asserts that there is an absence of precedent addressing "how unions involved in an election campaign can obtain fair access to the employees in an admittedly high security agency like" the Agency. *Id.* at 13.

B. NTEU

NTEU asserts that AFGE has not met its "burden of proof regarding all matters raised in its objections." NTEU's Opposition at 5. In this regard, NTEU asserts that "improper conduct not affecting the election result is not grounds for setting an election aside." *Id.* at 6 (*citing Fed. Deposit Ins. Corp., Wash., DC*, 38 FLRA 952, 964 (1990) (*FDIC*)). According to NTEU, objectionable conduct must "have a material effect on voter free choice and the outcome of the election" in order to warrant setting aside the election. *Id.*

NTEU claims the RD correctly applied *Fort Bliss* to conclude that the Agency's reliance on Article 34 of its agreement with NTEU was proper. NTEU also claims that the RD correctly applied *NGB, Charlotte* in finding that the Agency did not violate its obligation to remain neutral by denying AFGE's request for a direct mailing. According to NTEU, the Agency provided the same list of eligible and ineligible employees to both Unions before the election and, therefore, AFGE could have reached the employees at work to request their home addresses. In any event, "[g]iven the large number of campaigning events and wide dissemination of campaign materials by both unions[,]" NTEU disputes that "a single mailing of materials to employees at home would have affected . . . the outcome of the election." *Id.* at 10.

C. Agency

As a procedural matter, the Agency asserts that the Authority should not consider AFGE's claim that it failed to give AFGE notice and an opportunity to bargain before launching the directory and user's guide because that claim was not raised below. *See* Agency's Opposition at 5-6, n.10 (*citing* 5 C.F.R. § 2422.31(b)).

On the merits, the Agency disputes AFGE's claim that it violated its obligation to remain neutral. With respect to the directory and user's guide, the Agency asserts that it did not give NTEU "preferential treatment." *Id.* at 3. Rather, the Agency asserts that it was contractually obligated to list NTEU in the directory and user's guide and the RD, therefore, correctly applied *Fort Bliss*. In response to AFGE's alternative claim that the user's guide is not mentioned in Article 34, the Agency asserts that the user's guide is "part and parcel with the . . . directory." *Id.* at 6. The Agency also asserts that it gave both Unions "equal access to unit employees and services for the purpose of the campaign[,]" such as meeting space for campaigning activities, access to employee break rooms/lunch areas, easels/boards, and e-mail. *Id.* at 4 and n.6. In this connection, the Agency claims that listing in its directory and user's guide is not a "service or facility" that it was required to provide to AFGE under § 7116(a)(3) of the Statute, especially since AFGE did not request to be listed. *Id.* at 4-5. In any event, the Agency asserts that AFGE has not demonstrated that its failure to be listed in the directory and user's guide "had an impact on the outcome of the election." *Id.* at 6.

With respect to the direct mailing, the Agency asserts that AFGE has not shown that its actions had a negative impact on the election or that the RD erred in finding that

the Agency did not violate its obligation to remain neutral. In this regard, the Agency asserts that it had no "burden to provide a full-proof [sic] method of communication with the electorate for either union in this election." *Id.* at 10. The Agency also claims that the NLRB's decision in *Excelsior Underwear, Inc.*, which AFGE cites, is neither binding nor applicable. Rather, the Agency asserts that the RD properly relied on *NGB, Charlotte*, which the Agency claims "clearly supports the proposition that" it had discretion whether to agree to AFGE's proposal. *Id.* at 11. In agreement with the RD, the Agency asserts that AFGE's proposal for a direct mailing concerns "an election conduct issue." *Id.*

## IV. Preliminary Issue

Section 2422.31(b) of the Authority's Regulations provides that "[a]n application may not raise any issue or rely on any facts not timely presented to the Hearing Officer or Regional Director." As relevant here, AFGE claims that there is an absence of precedent as to whether the Agency violated its obligation to remain neutral by implementing the directory and user's guide without fulfilling its bargaining obligations under the Statute. According to the Agency, AFGE did not raise this argument below. A review of the record supports the Agency's claim that AFGE did not raise this argument below. In this connection, the record shows that AFGE claimed that the Agency's implementation of the directory and user's guide was in violation of its obligation to remain neutral, not an obligation to provide notice and an opportunity to bargain. *See* RD Decision at 6; AFGE's Election Protests at 3-4 and 23-25. As AFGE's argument was not raised below, it cannot be raised for the first time in the application for review. *See United States Dep't of Homeland Sec., Border and Transp. Sec. Directorate, Transp. Sec. Admin.*, 59 FLRA 423, 430 (2003) (Member Pope dissenting as to other matters). Accordingly, we will not consider AFGE's claim in this regard.

## V. Analysis and Conclusions

### A. The RD Did Not Fail To Apply Established Law

The Authority may grant an application for review only when the application demonstrates that review is warranted because: (1) the decision raises an issue for which there is an absence of precedent; (2) established law or policy warrants reconsideration; or (3) there is a genuine issue over whether the RD has failed to apply established law, committed a prejudicial procedural error, or committed a clear and prejudicial error concerning a substantial factual matter. 5 C.F.R. § 2422.31(c). AFGE claims that review is warranted because the RD failed to apply established law in concluding that the Agency did not violate its obligation to remain neutral.

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. *See United States Dep't of Defense, Stateside Dependents Schools, Fort Benning Schools, Fort Benning, Ga.*, 48 FLRA 471, 474 (1993) (*Fort Benning*). Application of this standard involves an assessment of whether, by its conduct, the

employer has violated its statutory obligation to remain neutral. *See, e.g., United States Dep't of Agric., Forest Serv., Apache-Sitgreaves Nat'l Forest, Springerville, Ariz.*, 47 FLRA 945, 953 (1993) (noting RD's obligation to resolve whether activity's conduct violated its obligation "to maintain its neutrality"); *see also United States Army Eng'r Activity, Capital Area, Fort Myer, Va.*, 34 FLRA 38, 43 (1989) (holding that management actions during an election that violate obligation to maintain neutrality and that have the potential to interfere with the free choice of voters require the election to be set aside). In making this assessment, the Authority has considered, as relevant factors, whether there is evidence that employees were prevented from gaining access to a campaigning union and whether a union received preferential treatment because it was allowed to use facilities that the rival union was not allowed to use. *See United States Dep't of the Navy, Naval Station, Ingleside, Tex.*, 46 FLRA 1011, 1023 (1992) (*Dep't of the Navy*).

1. The Directory and User's Guide

Under *Fort Bliss*, an agency is required to provide a union that has "equivalent status" the same "services and facilities" that it provides an incumbent union, consistent with § 7116(a)(3) of the Statute. 29 FLRA at 365. However, when an agency is required by a collective bargaining agreement to provide a union with a particular service or facility, the Statute does not require that agency to "equalize" the unions' positions. *Id.* at 366. Consistent with this precedent, the RD found, and AFGE does not dispute, that Article 34 of the Agency's agreement with NTEU requires the Agency to list NTEU in its directory, and the Agency's agreement with AFGE does not contain a similar provision. Based on the foregoing, we agree with the RD's application of *Fort Bliss*, and conclude that the Agency was not obligated to list AFGE in its directory and user's guide as it was contractually required to list NTEU.

Furthermore, we reject AFGE's claim that *Fort Bliss* is inapplicable because: (1) the rival union in that case was a union with "equivalent status" unlike AFGE, which is an incumbent union; and (2) the "directory is arguably neither a service nor a facility[.] "[5] AFR at 7. In this connection, *Fort Bliss* held only that, if an agency grants a union's request for customary and routine services and facilities in a representation proceeding, then the agency must, upon request, provide such services and facilities to another union having equivalent status, provided that the services and facilities were not granted pursuant to a collective bargaining agreement. Nothing in *Fort Bliss* implies that incumbent unions should be given contract rights for which they have not negotiated. Moreover, 5 C.F.R. § 2422.34(a) requires agencies, during the pendency of a representation proceeding, to adhere to the "terms and conditions of existing collective bargaining agreements[.]" *See, e.g., Defense Logistics Agency, Defense Supply Ctr. Columbus, Columbus, Ohio*, 53 FLRA 5, 12 (1997) (denying request for a stay and requiring parties to "comply with their obligations under § 2422.34(a) . . . to adhere, during the pendency of this proceeding, to the terms of the collective bargaining agreement"). That provision requires agencies to adhere to all terms and conditions of

[5] We note that Article 34 of the Agency's agreement with NTEU is titled "Access to Facilities and Services," which suggests, contrary to AFGE's claim, that the parties considered the Agency's directory to be a type of facility or service. RD Decision at 8.

existing agreements, not just those relating to an exclusive representative's use of agency services and facilities. Thus, even assuming the directory is not a "service" or "facility" within the meaning of the Statute, as AFGE alleges, that fact would not undermine the RD's conclusion that the Agency was required to list NTEU, but not AFGE, in the directory.

Finally, according to AFGE, even if *Fort Bliss* applies, it does not support the RD's conclusion because Article 34 does not address the user's guide. AFGE is correct that Article 34 does not expressly mention the Agency's user's guide. However, the record supports the Agency's claim that the user's guide provides instructions on using the directory and, therefore, is "part and parcel" of the directory. Agency's Opposition at 6. In this regard, the record demonstrates that the user's guide is a set of instructions on using the Agency's directory and, therefore, that it is not independent of the Agency's directory. *See* AFGE's Exhibits 6 and 23 at 43. As such, the fact that the user's guide is not expressly referenced in Article 34 does not demonstrate that it is not included in that provision.

2. The Proposed Direct Mailing

As previously explained, 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. *See Fort Benning*, 48 FLRA at 474. Applying this standard, the RD found that AFGE did not demonstrate that the Agency's refusal to facilitate the direct mailing affected the voters' free choice or the outcome of the election. In reaching this conclusion, the RD explained that, under *NGB, Charlotte*, agencies are not required to bargain "over procedures to govern campaign activities due to the pendency of a QCR." RD Decision at 52.

For the following reasons, we find that AFGE has failed to show that the Agency's refusal to facilitate the direct mailing affected the voters' free choice, which affected the outcome of the election. First, AFGE provides no support for its claim that the Agency's actions prevented it from reaching the entire electorate and, as a result, that more employees than the margin of victory were unaware of its views. To the contrary, NTEU asserts, without dispute, that the Agency provided both unions a list of eligible and ineligible employees over a year in advance of the election, which AFGE could have used to directly contact the employees at their offices to request their home addresses. Second, the RD found, and AFGE does not dispute, that the Agency provided several other avenues by which AFGE had access to employees. Specifically, AFGE was allowed to host several "lunch and learn" meetings at various of the Agency's locations across the country; hold meetings on the Agency's premises; leave literature at the Agency's facilities; and use the Agency's email system to announce its meetings. *See* RD Decision at 65-77. Even though AFGE was not allowed to hold a meeting or post literature in one location, the RD found that there were not more than 100 employees located at that facility, which would not have affected the outcome of the election, given that NTEU's margin of victory was nearly 4,000 votes. AFGE does not contest these findings in its application for review and, thus, provides no basis to conclude that the

Agency's actions interfered with employees' free choice, which affected the outcome of the election. *See, e.g., FDIC*, 38 FLRA at 963 (objecting party has the burden to show the potential impact the alleged conduct had on the election).

We also reject AFGE's claim that review is warranted because the RD's decision is improperly based on his finding, in reliance on *NGB Charlotte*, that the Agency was not required to bargain over procedures to govern campaign activities due to the pendency of the QCR. In this regard, AFGE claims it was not requesting to bargain -- as was the union in *NGB Charlotte* -- but was requesting customary and routine services and facilities under § 7116(a)(3) of the Statute. However, whether AFGE was requesting bargaining or customary and routine services and facilities, it must show that the Agency's denial of its request was improper and that it affected the voters' free choice, which affected the outcome of the election. AFGE has not made these showings and, therefore, provides no basis for granting its application for review. *See, e.g., United States Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 48 FLRA 959, 965 (1993) (finding no basis to grant application for review where improper conduct not shown to have improperly influenced election's results).

Finally, we conclude that AFGE's reliance on the NLRB's decision in *Excelsior Underwear, Inc.* does not demonstrate that the RD failed to apply established law. In that case, the Board held that RDs must provide employers with "an election eligibility list, containing the names and addresses of all the eligible voters" to ensure fairness in elections. *Excelsior Underwear, Inc.*, 156 NLRB at 1239-40. As an initial matter, we note that NLRB decisions are not controlling in the Federal sector. *See Dep't of the Navy, Pearl Harbor Naval Shipyard Restaurant System, Pearl Harbor, Haw.*, 28 FLRA 172, 176 n.* (1987). Even if they were, *Excelsior Underwear, Inc.* would not apply here. In this regard, AFGE did not ask for, and would not have been entitled to, employees' home addresses because the United States Supreme Court has held that the Privacy Act precludes Federal agencies from disclosing employees' home addresses to unions. *See United States Dep't of Defense v. FLRA*, 510 U.S. 487, 502 (1994). Rather, at issue in this case was AFGE's proposal that the Agency facilitate a direct mailing on its behalf. Nothing in *Excelsior Underwear, Inc.* requires employers to facilitate direct mailings on behalf of unions.

For all of the foregoing reasons, we conclude that the RD did not fail to apply established law, and we deny AFGE's application for review on this ground.

B. The RD's Decision Does Not Raise an Issue for Which There Is an Absence of Precedent

As relevant here, AFGE claims there is an absence of precedent as to whether: (1) the directory is a service or facility within the meaning of the Statute; (2) facilitating a direct mailing is customary and routine within the meaning of the Statute; (3) NTEU could veto its proposal for a direct mailing; and (4) the Agency's heightened security entitled AFGE to the direct mailing. However, as previously demonstrated, the RD properly applied the Authority's decisions in *Fort Bliss* and *NGB, Charlotte* in

concluding that the Agency did not violate its obligation to remain neutral. As such, AFGE has not demonstrated that there is an absence of precedent for the RD's decision that would warrant granting its application for review. *E.g., United States Dep't of the Interior, Bureau of Land Mgmt., Phoenix, Ariz.*, 56 FLRA 202, 206 (2000) (rejecting claim that review was warranted because factual circumstances raised a novel issue that Authority had not previously addressed, and finding that RD properly applied existing precedent). Consequently, we also deny AFGE's application for review with respect to this claim.

## VI. Order

The application for review is denied.

**FEDERAL LABOR RELATIONS AUTHORITY**
**WASHINGTON, D.C.**

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**(Labor Organization)**

**WA-RP-04-0067**

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**STATEMENT OF SERVICE**

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I hereby certify that copies of the Decision of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Julie A. Murphy
Agency Representative
Office of Chief Counsel
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, NW,
Room 4.4B
Washington, DC 20229

Mark D. Roth
Union Representative
American Federation of Government
Employees
80 F Street, NW.
Washington, DC 20001

Jefferson D. Friday
Union Representative
National Treasury Employees Union
1750 H Street, NW.
Washington, DC 20006

Personal Delivery
Robert P. Hunter
Regional Director
Federal Labor Relations Authority
1400 K Street, NW, Second Floor
Washington, DC 20424-0001

FAX ONLY
Marta Brito Perez
Office of the Chief Human Capital Officer
U.S. Department of Homeland Security
Washington, DC 20005
Fax No. 202-357-8295

DATED: May 17, 2007
WASHINGTON, DC

for Deborah Johnson
Labor Relations Specialist