

70 FLRA No. 178

EXPORT-IMPORT
BANK OF THE UNITED STATES
(Agency/Petitioner)

and

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

WA-RP-18-0034

ORDER DENYING
APPLICATION FOR REVIEW

October 18, 2018

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, the Authority must address an issue that has not recently come before it. The Agency filed a petition under § 2422.1(b)(2) of the Authority's Regulations¹ alleging that it has a good faith doubt, based on objective considerations, that the currently recognized

labor organization represents a majority of the employees in the existing unit (good faith doubt).²

The Regional Director (RD) found that the Agency failed to demonstrate a good faith doubt and dismissed the Agency's petition. The Agency now files an application for review of that decision. Because the Agency has not demonstrated that there is a good faith doubt as to whether the Union represents a majority of its bargaining-unit employees, we deny the Agency's application.

II. Background and RD's Decision**A. Background**

On January 8, 2018, the Agency filed a petition alleging that there was good faith doubt as to whether the Union continued to represent a majority of approximately twenty nonprofessional bargaining-unit employees in the Washington, D.C. area. The parties operate under a collective-bargaining agreement (CBA) negotiated by a previous union in 1983. The Union has been the recognized labor organization for this unit since 1998, and in light of conflicting evidence, the RD determined that at least five of the twenty BUEs paid dues.

B. RD's Decision

In her decision and order, dated July 10, 2018, the RD found that there were no material issues of fact and that there was sufficient evidence to render a decision.

As to the merits of the Agency's petition, the RD found that the Agency had not demonstrated that

¹ 5 C.F.R. § 2422.1(b)(2) (“[T]he [Agency] may file a petition . . . [t]o clarify . . . [a]ny other matter relating to representation.”).

² Prior to 1995, the Authority's regulations explicitly stated that an agency could file a petition “seeking to clarify a matter relating to representation . . . where the activity or agency has a good faith doubt, based on objective considerations, that the currently recognized or certified labor organization represents a majority of the employees in the existing unit.” 5 C.F.R. § 2422.1(c) (1994). The Authority revised this regulation in 1995. Meaning of Terms as Used in This Subchapter; Representation Proceedings, Miscellaneous and General Requirements, 60 Fed. Reg. 67288-01 (Dec. 29, 1995). Although the new regulation removed the language concerning a good faith doubt, it retained for agencies the ability to file petitions “[t]o clarify . . . [a]ny other matter relating to representation.” 5 C.F.R. § 2422.1(b)(2). As the Authority revised its regulations “for the purpose of streamlining the regulations and making the rules more flexible in addressing the representational concerns of agencies, labor organizations, and individuals,” the revisions were not meant to limit agencies from filing good-faith-doubt petitions. 60 Fed. Reg. 67288-01, 67288. Consequently, although the regulation no longer contains the term “good faith doubt,” the Agency's petition is proper.

there was good faith doubt that the Union continued to represent the majority of the unit. Specifically, the RD considered the following Union activities as evidence weighing against any good faith doubt: (1) engaging in legislative lobbying; (2) holding meetings with membership; (3) dealing with the Agency in response to actions initiated against employees; (4) addressing working conditions affecting the bargaining unit; (5) engaging in representational activities and filing an unfair-labor-practice charge; and, (6) maintaining its representational duties despite periods where the Union lacked officers.

Referencing the above activities, the RD rejected the Agency's contention that the Union had been mostly dormant over a period of ten years. The RD also rejected the Agency's arguments that there was a good faith doubt because the Union lacked local officers and a sufficient number of dues-paying members. The RD dismissed the Agency's petition.

The Agency filed an application for review on August 24, 2018.³ The Union filed an opposition on September 6, 2018.⁴

³ Initially, the Agency failed to properly give notice to the RD of its application. The Agency promptly rectified the error, serving notice on both the RD and the Union in person by August 24, 2018. However, the Agency failed to inform the Union that it had cured the deficiency.

⁴ Based on the August 24, 2018 date of the Agency's cure of the deficiency, the Union's opposition was due September 4, 2018. However, as noted above, the Agency failed to serve the Union the updated statement of service indicating that it had properly served the RD. As such, the Union was unaware that the Agency had cured the deficiency. In such circumstances, we will consider the Union's opposition. See *AFGE, Local 3601*, 38 FLRA 177, 181 (1990) (granting a motion for reconsideration where a party's filing was dismissed as untimely even though that party was not informed of the cure of deficiencies by the other party). However, we reject the Union's request that we dismiss the Agency's application due to its failure to inform the Union of the cure of the deficiency. *SSA, Branch Office, E. Liverpool, Ohio*, 54 FLRA 142, 145 (1998) ("The Authority has declined to dismiss filings on the basis of minor deficiencies where the deficiencies did not impede the opposing party's ability to respond."); see also *U.S. Dep't of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 543 (2016) (same); *NAGE, Local R14-143*, 55 FLRA 317, 318 (1999) (same).

III. Analysis and Conclusion: The RD did not fail to apply established law.⁵

The Agency alleges that the RD failed to apply established law.⁶ We take this opportunity to address what is required for an agency to demonstrate that there is a good faith doubt as to whether a bargaining unit currently represents a majority of employees in the existing unit.

Only a handful of cases have addressed this issue.⁷ In such cases, the Authority historically has looked to objective criteria such as the status of a negotiated agreement,⁸ the filing—or lack thereof—of grievances⁹ and requests to negotiate over changes in conditions of employment,¹⁰ the number of dues-paying

⁵ The Agency also requests that we order an election based on the pending inclusion of an as-yet-undetermined number of additional employees into the bargaining unit. Application for Review (Application) at 8 n.2. However, the bargaining-unit status of any additional employees is still pending. *Id.* ("The parties . . . have yet to receive a decision with respect to these [additional] positions."). As such, we will not grant the Agency's application on these grounds as it would be premature. 5 C.F.R. § 2429.10 ("The Authority . . . will not issue advisory opinions."); cf. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 1001 (2011) (declining to address a party's arguments where to do so would be "premature"); *U.S. DOJ, Fed. BOP, U.S. States Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 330 (2003) (same).

⁶ Application at 3 (citing 5 C.F.R. § 2422.31(c)).

⁷ See *Morale, Welfare, & Recreation Directorate, Marine Corps Air Station, Cherry Point, N.C.*, 45 FLRA 281 (1992); *Overseas Private Inv. Corp.*, 36 FLRA 480, 483 n.2 (1990) (*OPIC*) (citing only five additional cases dealing with good faith doubt, one of which was dismissed on procedural grounds).

⁸ *U.S. Dep't of the Interior, Bureau of Indian Affairs, Navajo Area, Gallup, N. M.*, 33 FLRA 482 (1988) (*BIA I*) (finding the existence of a negotiated agreement indicated against good faith doubt), *recons. denied*, 34 FLRA 428 (1990) (*BIA II*); *NFFE, Local 1, Indep.*, 10 FLRA 502, 503 (1982) (*NFFE*) (finding lack of an agreement negotiated by the union indicated a good faith doubt).

⁹ *BIA II*, 34 FLRA at 449-50 (finding that the filing of several grievances indicated lack of good faith doubt); *Dep't of the Interior, Nat'l Park Serv., W. Regional Office, S. F., Cal.*, 15 FLRA 338, 341 (1984) (*Park Serv.*) (finding that the filing of zero grievances indicated a good faith doubt); *NFFE*, 10 FLRA at 503 (finding that the filing of zero grievances indicated a good faith doubt).

¹⁰ *OPIC*, 36 FLRA at 486 (finding that the lack of negotiations over changes in conditions of employment indicated a good faith doubt).

members,¹¹ and other activities performed by a union on behalf of its bargaining-unit employees.¹²

This inquiry is not, however, decided on one single indicator of good faith doubt. Instead, “the issue of whether an employer has questioned a union’s majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case”¹³ and “factors asserted to support a good faith doubt . . . must be viewed both in their context and in combination with each other.”¹⁴ In other words, the agency must demonstrate “that a reasonable doubt exists that a union continues to represent a majority of employees” or “that a majority of eligible employees voting in an election . . . would vote in favor of continuing the union as their exclusive representative.”¹⁵

If an agency demonstrates that there is a good faith doubt, the Authority will order a regional director to conduct an election.¹⁶ Such an order, however, impacts those employees’ right to self-determination. Consequently, it should not be easier for an agency to bring about an election by establishing doubt regarding the status of the exclusive representative than it is for employees to petition for an election on their own behalf. An employee petition requires a showing of 30% of the unit’s employees.¹⁷ Employee self-determination is an “essential tenet of our Statute.”¹⁸ Comparatively, the burden on an agency to demonstrate good faith doubt must be at least as high.¹⁹

The Agency alleges that there is a good faith doubt due to the following factors: (1) the Union has not negotiated a CBA with the Agency in over nineteen years; (2) the Union has not filed any grievances; (3) the Union has been inactive for over ten years; (4) the Union has lacked officers and currently lacks officers that are bargaining-unit employees; and (5) the Union has a “low level of Union membership and dues[-]paying members.”²⁰

As an initial matter, we find that the following factors do not indicate a good faith doubt in this case. First, rather than a “low level” of Union membership, the record indicates that at least five out of approximately twenty bargaining-unit employees are dues-paying members.²¹ This represents a membership rate of 25%, a much higher percentage than the 8% and 2.5% found in previous cases to indicate a good faith doubt.²² As such, we find that the number of dues-paying members, in this case, is not an indication of good faith doubt.²³

Second, as to the Agency’s argument that the Union lacked local officials, the record indicates that the Union has maintained its leadership with few exceptions and continued to fulfill its representational duties. The fact that occasionally Union officials were not employees in the bargaining unit does not itself support good faith doubt. As we recently held, “the Authority has long recognized, and still does today, the prerogative and necessity of federal unions to select their own officials.”²⁴ As such, the Agency’s reliance on the selection of Union officials from outside of the bargaining unit does not demonstrate a good faith doubt.

¹¹ *Id.* at 482, 486 (finding that six dues-paying members out of seventy-five bargaining-unit employees indicated a good faith doubt); *BIA II*, 34 FLRA at 449 (finding that a substantial number of dues-paying members indicated a lack of good faith doubt); *Park Serv.*, 15 FLRA at 341 (finding that five dues-paying members out of 200 bargaining-unit employees indicated a good faith doubt).

¹² *OPIC*, 36 FLRA at 486 (finding that the union’s lack of recruiting indicated a good faith doubt); *BIA I*, 33 FLRA at 486 (finding that the union consulting with the agency over conditions of employment indicated a lack of good faith doubt).

¹³ *OPIC*, 36 FLRA at 484 (quoting *Celanese Corp.*, 95 NLRB 664, 673 (1951)).

¹⁴ *Id.*

¹⁵ *Id.* at 484-85.

¹⁶ *See, e.g., id.* at 488; *NFFE*, 10 FLRA at 504.

¹⁷ 5 U.S.C. § 7111(b)(1)(B).

¹⁸ *FDIC*, 67 FLRA 430, 433 (2014) (Dissenting Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)), *rev’d* 68 FLRA 260 (2015).

¹⁹ *Cf. U.S. Dep’t of VA, Neb./W. Iowa Health Care Sys, Omaha, Neb.*, 65 FLRA 713, 717 (2011) (citing *Def. Logistics Agency Def. Supply Ctr. Columbus, Columbus, Ohio, Columbus*, 53 FLRA 1114, 1125 (1998)) (The accretion doctrine is generally narrowly applied because it precludes employee self-determination.).

²⁰ Application at 10.

²¹ RD’s Decision at 9.

²² *OPIC*, 36 FLRA at 482, 486 (finding that six dues-paying members out of seventy-five bargaining-unit employees indicated a good faith doubt); *Park Serv.*, 15 FLRA at 341 (finding that five dues-paying members out of 200 bargaining-unit employees indicated a good faith doubt).

²³ Although the Agency suggests that the Union should have to show that a majority of unit employees pay dues, *see* Application at 1 (The Union “lack[s] of majority support through dues checkoff.”); *id.* at 6 (“[T]he Union can point to no objective evidence of employee support, other than five dues-paying members out of 20—far fewer than a majority.”), this has never been the Authority’s standard, and we decline to adopt that standard now. We also decline the Agency’s request to adopt “majoritarian principles.” Application at 11. The Agency’s requested development in case law would not only shift the burden onto unions to show that they have majority support, it would create a lesser burden on agencies than that required of employees to reach the same result sought here. This change would go against the principles of self-determination by employees stated above.

²⁴ *U.S. Dep’t of VA, St. Petersburg Reg’l Benefit Office*, 70 FLRA 586, 589 n.30 (2018) (Member DuBester dissenting on other grounds).

Finally, although the Union has neither negotiated a current agreement with the Agency nor filed any grievances, these two factors alone are not sufficient to demonstrate a good faith doubt, especially in light of the evidence indicating that the Union actively represents the interests of the bargaining unit and bargaining-unit employees and has not been dormant for over ten years.²⁵

The RD determined that, rather than being inactive for over ten years, the Union “has actively represented” the interests of its bargaining[-]unit employees²⁶ in negotiations over changes in policy; represented bargaining-unit employees in adverse actions, a hostile work environment complaint, and a work-safety issue; and represented bargaining-unit employees in legislative and lobbying efforts and recent representational matters. In addition, the RD stated that the Union “monitored day-to-day union operations and took action to respond to matters affecting the unit.”²⁷

Considering all of the factors raised by the Agency and considered by the RD, we find that the evidence does not indicate that there is good faith doubt that the Union represents a majority of the bargaining-unit employees. Consequently, the RD properly applied established law when she dismissed the Agency’s petition.

For the reasons above, we deny the Agency’s application for review.

IV. Order

We deny the Agency’s application for review.

²⁵ RD’s Decision at 7 (“[T]he record evidence is replete with examples of . . . representational actions on the part of [the Union] taken on behalf of the bargaining unit.”).

²⁶ *Id.* at 8.

²⁷ *Id.* at 7.

Member DuBester, concurring:

I agree that the Agency has not demonstrated that there is a good-faith doubt as to whether the Union represents a majority of the bargaining unit's employees. Accordingly, I also agree that the Agency's application for review should be denied.

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

EXPORT-IMPORT BANK OF THE UNITED STATES
(Agency/Petitioner)

and

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

WA-RP-18-0034

DECISION AND ORDER

I. Statement of the Case

The Export-Import Bank of the United States (Agency or EXIM) filed the petition in this proceeding on January 8, 2018, seeking to determine whether there was a good faith doubt as to the American Federation of Government Employees, AFL-CIO's (AFGE's or Union's) continued majority status with respect to the representation of the existing unit of Agency employees.

The Region conducted an investigation in this case pursuant to section 2422.30 of the Authority's Regulations. Following the Union's submission of its Statement of Interest and Position on Petition on February 13, 2018, both parties were afforded the opportunity to provide additional evidence for the Region's consideration in this investigation. Accordingly, on March 16, the Agency and the Union each submitted supplemental responses and supporting evidence. In addition, the Region took affidavits from two AFGE representatives and, on May 14 and May 29, the Union provided additional documentary evidence. All responses, affidavits, and evidence submitted for the investigation were considered in rendering this decision and have been shared with both parties. There has been no further response or rebuttal from the parties as to this evidence.

Because the record demonstrates that AFGE actively represents the bargaining unit, and has continued to do so throughout its history as the exclusive representative, I find that the Agency has failed to demonstrate the objective considerations sufficient to establish a good faith doubt as to AFGE's continued

majority status. Accordingly, I dismiss the Agency's petition.

II. Findings

The current bargaining unit, comprised of nonprofessional employees in the Washington, DC area, was initially certified on June 24, 1981, in Case No. 3-RO-40, with the National Federation of Federal Employees, Local 1935 (NFFE, Local 1935) as the certified exclusive representative of the unit. (GC Ex. 1)

Subsequently, pursuant to a Montrose petition filed by AFGE in Case No. WA-RP-70096, the certification was amended to change the designation from NFFE, Local 1935 to AFGE. (GC Ex. 1; GC Ex. 2). The Region issued the Amendment of Certification in Case No. WA-RP-70096 on October 1, 1998. (GC Ex. 1). AFGE holds the certification for this bargaining unit at the national level, and the unit falls under AFGE District 14. (GC Ex. 2). However, AFGE initially delegated representation of this unit to AFGE, Local 1935 (Local 1935). (GC Ex. 2). AFGE provided representation at a March 1998 hearing addressing the Montrose petition. (GC Ex. 2; GC Ex. 3). The hearing also addressed a decertification cross-petition, Case No. WA-RP-8009, in which the Agency asserted a good faith doubt as to NFFE's status as exclusive representative. (GC Ex. 2; GC Ex. 3). Although the Region was unable to locate a copy of a Decision and Order or a Withdrawal Letter issued in WA-RP-8009, there is no dispute that, following this hearing, the unit's certification remained in effect and the unit changed affiliation to AFGE.

The collective bargaining agreement (CBA) for this unit, originally bargained over and signed by representatives of NFFE, Local 1935 and the Agency, went into effect in 1983 for an initial period of three years. (GC Ex. 4). Thereafter, the CBA was renewed automatically every three years in the absence of written notice by either party of a desire to renegotiate the agreement. (GC Ex. 4). In 1998, EXIM and AFGE agreed that the existing contract would remain in effect following the change in affiliation. (GC Ex. 2). Although the language of the CBA does not appear to have been updated to reflect the change in designation from NFFE, Local 1935 to AFGE, the cover page attached to the Agency's copy of the CBA states that it is an agreement between EXIM and AFGE, Local 1935. (GC Ex. 4). To date, the parties continue to recognize this CBA as the governing contract for this unit. (GC Ex. 2; GC Ex. 5; GC Ex. 6; GC Ex. 7).

With the exception of several memoranda and side letter amendments to the CBA, all of which date

back approximately 19 years or more, there is no evidence that either the Agency or AFGE requested to negotiate a new CBA or to renegotiate additional provisions of the existing CBA. (GC Ex. 4; GC Ex. 6; GC Ex. 7). The most recent evidence of such negotiations appears to be a 1999 memorandum addressed to AFGE, Local 1935 regarding changes to the contract's Merit Promotion Policy. (GC Ex. 4; GC Ex. 7).

In 1998, Local 1935's leadership included a President, Vice-President, Secretary, and Treasurer. (GC Ex. 2). Shortly after the change in affiliation, representatives from AFGE National and AFGE District 14 provided representation to two of the Local 1935 officers in adverse actions initiated by the Agency, namely a proposed termination and a proposed reduction-in-force. (GC Ex. 2; GC Ex. 3).

In 2010, after the last of the remaining Local 1935 leadership left office, AFGE placed Local 1935 in trusteeship, naming a National Representative from AFGE District 14 as the trustee for the unit. (GC Ex. 2). Later, around 2014, Local 1935 came out of trusteeship and new Local 1935 officers were elected into office. (GC Ex. 2). That same year, Peter Winch, Special Assistant to the National Vice President for AFGE District 14, was assigned as Local 1935's District 14 Representative. (GC Ex. 2). Following the election, Agency employee LaVensus Jones held the positions of Local 1935 President and Treasurer, and Agency employee Andrea Richardson held the positions of Local 1935 Vice President and Secretary. (GC Ex. 2).

In April 2015, Jones stepped down from Local 1935 leadership after accepting a new position within the Agency as a Management and Program Analyst. (GC Ex. 2; GC Ex. 6; GC Ex. 7; GC Ex. 8). Jones allegedly relinquished her role as a Union official at the instruction of Management. (GC Ex. 2). The Agency asserted that Jones' new position was a non-bargaining unit position and changed her bargaining unit code to 7777, the code assigned to those positions eligible for inclusion in a bargaining unit, but not represented. (GC Ex. 2; GC Ex. 8). However, Jones did not stop paying dues to the Union, and she continues to have dues withheld from her paychecks to date. (GC Ex. 2).

In light of Jones's departure from Local 1935 leadership in 2015, the Union took measures to facilitate an orderly transition for the unit's representation. (GC Ex. 2). Richardson agreed to assume the role of Acting Local 1935 President. (GC Ex. 2). In addition to holding on-site meetings with Local 1935 membership, Winch also met with Jones and Richardson separately on the matter. (GC Ex. 2). Because the Union believed that

Jones should remain in the bargaining unit despite her new position, Winch communicated with EXIM Labor Relations staff on several occasions in an attempt to address the Union's concerns. (GC Ex. 2; GC Ex. 8). The Union also made efforts to clarify the bargaining unit status of all EXIM employees. (GC Ex. 2; GC Ex. 8). However, according to Winch, his specific requests for a list of all EXIM employees coded as 7777 went unanswered. (GC Ex. 2).

The investigation revealed various other examples of instances where representatives from AFGE National and AFGE District 14 worked with Local 1935 on representational matters affecting the bargaining unit. (GC Ex. 2). In one such example, AFGE District 14 provided Local 1935 leadership with information and support in response to the potential lapse in appropriations and pending government shutdown during the fall of 2015. (GC Ex. 2). Winch maintains that he sent Richardson guidance and instructions prepared by AFGE National detailing how to bargain over such an event at the local level. (GC Ex. 2). Local 1935 leadership then met with Agency management regarding the Agency's contingency plans in anticipation of the shutdown. (GC Ex. 2; GC Ex. 9). According to a September 28, 2015, email Richardson sent updating AFGE representatives on the matter, Richardson met with EXIM's Human Resources Director about Agency preparations. (GC Ex. 9). The email also mentioned Richardson's plans to communicate with the Agency's Ethics Officer about bargaining unit employees lobbying lawmakers as members of AFGE. (GC Ex. 9).

Other representational activities on the part of AFGE in recent years include actions taken by AFGE's Legislative and Political Department on behalf of the bargaining unit. (GC Ex. 2). As evidenced by a September 20, 2015, email from Appollos Baker, a Legislative and Political Organizer in AFGE's Legislative and Political Department, AFGE communicated with Local 1935 leadership regarding updates on relevant legislative efforts. (GC Ex. 2; GC Ex. 10). This particular email was in relation to the Agency's budget and reauthorization which, at that time, was pending before Congress. (GC Ex. 2; GC Ex. 10). According to Winch, he requested that Baker's Department take action on the matter on behalf of the bargaining unit. (GC Ex. 2).

Similarly, AFGE's Legislative and Political Department represented the interests of Local 1923 when, in 2017, it took steps to oppose a nominee for President of EXIM. (GC Ex. 5). According to the Union, members of the Legislative Department reached out to staff in Rep. Bonnie Watson Coleman's office to voice the Union's concerns about the impact that confirmation would have on EXIM and its bargaining unit employees.

(GC Ex. 5). As part of its response for this investigation, the Union proffered a letter, dated April 19, 2017, addressed to the Senate Majority and Minority Leaders and signed by several Members of Congress, including Rep. Watson Coleman, opposing the nomination. (GC Ex. 11). The Union submits that the efforts by AFGE's Legislative Department, acting on behalf of the EXIM bargaining unit employees, contributed to the production of this letter. (GC Ex. 5).

In 2015 and 2016, AFGE District 14 and AFGE National Representative Nathaniel Nelson provided representation to Richardson in several matters, including a hostile work environment complaint and a workplace safety investigation. (GC Ex. 2). With respect to the workplace safety investigation, then Acting Vice President and Acting Human Capital Officer for the Agency, Shauna McDowell, copied AFGE District 14 on a June 24, 2016, notification to Richardson of the investigation. (GC Ex. 2; GC Ex. 12). Around this time, Richardson was no longer able to continue serving in her capacity as Acting Local 1935 President due, in part, to health issues. (GC Ex. 2).

In response to the vacancy of Local 1935's leadership at the local level, AFGE District 14 made the decision to intervene in accordance with AFGE National Policy. (GC Ex. 2). On June 30, 2017, AFGE National Vice President of District 14 Eric Bunn, Sr. notified the Agency that he would be functioning as Acting Local President of Local 1935 and delegating representational responsibilities to Winch and another official within AFGE District 14. (GC Ex. 2; GC Ex. 13).

Also in 2017, Winch identified an issue with Local 1935's dues withholding and took steps to resolve the matter for the unit. (GC Ex. 2). After realizing that, for several pay periods, the Union had not received the checks or the reports for dues collected from Local 1935 membership, Winch investigated the matter and learned that EXIM had recently changed payroll service providers. (GC Ex. 2). Winch alerted the new provider to the situation and provided the Union's bank account information and contact information. (GC Ex. 2). Through these actions, Winch corrected the issue and ensured that, going forward, money withheld for dues was properly deposited in the Union's bank account and that both he and AFGE National received a copy of Local 1935's dues reconciliation report each pay period. (GC Ex. 2; GC Ex. 14).

Shortly after AFGE's decision to intervene with Local 1935, AFGE District 14 began coordinating an internal AFGE merger of Local 1935 with AFGE Local 2211, the designated representative of a bargaining unit at the U.S. International Trade Commission. (GC Ex. 2). AFGE Local 2211 officers agreed to assist in

the representation of EXIM bargaining unit employees, and members of Local 2211 voted for the merger on August 2, 2017, by unanimous vote. (GC Ex. 2). Later, in November 2017, Winch held a meeting at EXIM to conduct Local 1935's vote on the matter and, as a result of the vote, Local 1935 merged with Local 2211. (GC Ex. 2). Two Local 2211 officials, President Pathenia Proctor and Treasurer Diane Whitfield, also attended the meeting. (GC Ex. 2). Winch introduced the Local 2211 officers and explained that they would be available to handle representational issues and step one grievances on behalf of EXIM employees going forward. (GC Ex. 2).

According to Winch, he also met with Larry Williams, Senior Labor Management and Employee Relations Advisor, following the November 2017 vote. (GC Ex. 2). Winch states that he introduced Williams to Proctor and Whitfield and explained their role as the Union's upcoming new officers. (GC Ex. 2). After the filing of the subject petition, in a February 7, 2018, letter to the Agency, AFGE gave written notice that Local 1935 members had been transferred into Local 2211 and that, effective immediately, Local 2211 was the delegated authority to represent the EXIM bargaining unit at the local level. (GC Ex. 7; GC Ex. 15). The letter asked that the Agency direct any correspondence to Proctor. (GC Ex. 15). Although Williams references Local 2211 and the February 7 letter in his sworn statement provided by the Agency for this investigation, he makes no mention of meeting the Local 2211 officers in November 2017. (GC Ex. 7). Williams also asserts that there have been no elected officers or stewards during his tenure at EXIM, which began in July 2016. (GC Ex. 7). Regardless of the disputed testimony as to this introductory meeting with Agency Labor Relations, the evidence demonstrates that, as of February 2018, and potentially as early as November 2017, EXIM bargaining unit employees were represented at the local level by Local 2211 officers. The evidence also shows that, prior to the merger with Local 2211, representatives from AFGE National and AFGE District 14 fulfilled certain representational responsibilities on behalf of the bargaining unit.

Concurrent with the merger of Local 1935 and Local 2211, the Union also engaged in organizing efforts to expand its representation to employees in the Agency's regional offices. (GC Ex. 16). These efforts resulted in the Union's submission of an election petition and corresponding showing of interest to the FLRA's Washington Regional Office on August 3, 2017. (GC Ex. 16). In the petition, Case No. WA-RP-17-0052, the Union sought an add-on election to determine whether certain employees in the Agency's regional offices wished to be included in the existing bargaining unit. (GC Ex. 16). The parties asserted opposing positions

as to whether certain regional employees should be considered professional within the meaning of Section 7103(a)(15) of the Federal Service Labor-Management Relations Statute (Statute) and therefore ineligible for inclusion in the existing nonprofessional unit. On September 20, 2017, AFGE filed a second representation petition, Case No. WA-RP-17-0059, to clarify the bargaining unit status of approximately 210 Agency employees in the DC metropolitan area and to include these employees in the existing bargaining unit. (GC Ex. 17). Hearings were held for both petitions on December 12, 2017, and January 29, 2018, respectively. AFGE Legal Rights Attorney Denise Duarte Alves provided representation at both hearings and submitted post-hearing briefs. Throughout the processing of the petitions, both the Agency and AFGE cooperated with the Region by exchanging documents and information and participating in conference calls. Prior to the hearing in WA-RP-17-0059, Alves met with representatives for the Agency and the parties resolved 33 of the 39 positions at issue in that case.

The Agency asserts that there are currently five dues-paying members out of approximately 20 bargaining unit employees in the unit. (GC Ex. 7; GC Ex. 18). AFGE, however, contends that there are eight dues-paying members. (GC Ex. 5; GC Ex. 19). According to a Union Dues Reconciliation Report, dated January 11, 2018, dues were withheld from eight individuals for the pay period ending January 6, 2018. (GC Ex. 14).

With respect to official time, the parties' CBA provides that requests for Union official time be approved by management on an as-needed basis. (GC Ex. 4). The investigation did not reveal any evidence of Local officers having requested official time for conducting Union business in accordance with the procedures in the CBA. (GC Ex. 2). Similarly, with respect to grievances, there is no evidence of the Union having filed or processed grievances pursuant to the parties' negotiated grievance procedure in recent years. (GC Ex. 2; GC Ex. 6; GC Ex. 7). AFGE National did, however, file an Unfair Labor Practice Charge (ULP) against the Agency, Case No. SF-CA-18-0053, on October 23, 2017. (GC Ex. 20). The facts of the ULP allegation involved actions by the Agency affecting non-bargaining unit employees located in EXIM's regional offices. Although the ULP charge was ultimately withdrawn, AFGE participated in the investigation by communicating with the FLRA agent, by providing witness affidavits, and by gathering and submitting documentary evidence.

III. Analysis and Conclusions

The representation process before a Regional Director is a non-adversarial investigatory proceeding in which all parties are afforded the opportunity to present evidence and arguments. *E.g.*, *Walter Reed Army Med. Ctr.*, 52 FLRA 852, 855 n.3 (1997). Pursuant to the Authority's Regulations, the determination of how to investigate a petition is within the Regional Director's discretion. *See* 5 C.F.R. § 2422.30(a). In this respect, the Authority's Regulations require a hearing only where "a material issue of fact exists[.]" *Id.* § 2422.30(b); *United States Dep't of the Army, United States Army Aviation Ctr., Fort Rucker, Ala.*, 60 FLRA 771, 773 (2005) (Absent a question involving an issue of material fact, a Regional Director is not required to hold a hearing). Thus, Regional Directors have broad discretion to determine initially whether a formal hearing is necessary, and I have elected to exercise that discretion here. Based on my review of the evidence disclosed during the investigation of this matter, I conclude that there are no material issues of fact and that there is sufficient evidence to render a decision.

According to Authority precedent, in order to prevail in a representation petition raising good faith doubt as to majority status, the Agency must demonstrate objective considerations sufficient to support a conclusion that a reasonable doubt exists that the union continues to represent a majority of employees in the existing unit. *Overseas Private Inv. Corp.*, 36 FLRA 480, 484 (1990) (*OPIC*). These objective considerations are based on the totality of the circumstances in a particular case and can include: the collective bargaining agreement, failure of the union to request negotiations with respect to proposed changes in conditions of employment, long periods of dormancy by the union, lack of union officers or stewards, and lack of members or very low membership. *See Dep't of the Interior, Nat'l Park Serv., W. Reg'l Office, S.F. Cal.*, 15 FLRA 338, 341 (1984) (*Interior*); *see also OPIC*, 36 FLRA 480, 484-87 (1990). The factors asserted to support a good faith doubt as to majority status must be reviewed in their context and in combination with each other where determining whether such doubt is warranted. *OPIC*, 36 FLRA 480, 484 (1990).

Here, as the basis for filing its petition, the Agency asserts that AFGE has been mostly dormant over the years on issues of bargaining, grievance processing, and officer/steward positions. The Agency also cites to the number of dues-paying members and the parties' current collective bargaining agreement as additional factors that support a finding of good faith doubt here. However, as noted above, the Authority considers the totality of the circumstances when determining whether a reasonable doubt exists. As applied here, based on the

evidence of AFGE's continued activity in representational matters with this unit throughout the years, it is clear that the Agency's petition is not supported by adequate objective evidence to establish a reasonable basis for doubting AFGE's majority status.

When listing the factors supporting a good faith doubt, the Agency specifically raises issue with the fact that AFGE's history of representation has not included grievance processing or bargaining. Indeed, there is no evidence of AFGE filing contractual grievances or initiating negotiations pursuant the parties' collective bargaining agreement. However, these inactions by the Union, standing alone, do not support a good faith doubt as there are numerous ways in which an exclusive representative may fulfill its representational responsibilities. *See* 5 U.S.C. §7103(a)(4) and 7114. Here, the record evidence is replete with examples of other representational actions on the part of AFGE District 14 and AFGE National taken on behalf of the bargaining unit. Specifically, the investigation revealed that AFGE has engaged in legislative lobbying efforts on the unit's behalf, held meetings with membership, dealt with the Agency in response to actions initiated against employees, and assisted local officers in addressing working conditions affecting the bargaining unit. The evidence also shows that AFGE monitored day-to-day union operations and took action to respond to matters affecting the unit. For instance, representatives from AFGE receive and review the unit's dues reconciliation report each pay period. In this respect, Winch, in his capacity as the AFGE District 14 representative for the bargaining unit, corrected administrative issues with the unit's dues withholding. Not only did Winch detect that the Union was missing funds, he investigated the matter and took the steps necessary to ensure that the Union received the money it was owed and that dues withholding functioned properly going forward. Also, there is evidence of communications between AFGE and the Agency on various representational matters over the years, such as Winch's correspondence with EXIM Labor Relations staff on the subject of bargaining unit status clarification.

In addition, it is evident that in the past year alone, AFGE has taken action on behalf of the bargaining unit in a variety of representational matters. For example, the investigation revealed that, in 2017, AFGE orchestrated the internal merger of the unit with another AFGE local. During this process, AFGE District 14 conducted two separate secret ballot elections regarding the merger, including one at EXIM for unit members. As a result of this merger, AFGE secured AFGE 2211 officers to provide representation to the unit at the local level. Also, it is undisputed that AFGE, acting in its role as exclusive representative of the bargaining unit, has engaged in several representational activities directly

involving the FLRA in 2017. These activities include the filing of two representation petitions and an unfair labor practice charge. As opposed to having been dormant, the evidence shows that AFGE actively carried out an organizational campaign to expand the existing bargaining unit by gathering the requisite showing of interest from employees in EXIM's regional offices and filing the corresponding representation petition. And, in addition to representing the unit during the subsequent representation hearings, AFGE directly engaged with the FLRA and the Agency when it participated in conference calls and exchanged documents and information during the processing of the petitions. Further, AFGE met with representatives for the Agency to clarify and resolve matters in dispute prior to hearing. Ultimately, despite the lack of grievance processing and negotiations, it is apparent that AFGE has not been dormant over the years, as alleged by the Agency. Instead, the evidence clearly demonstrates that AFGE has actively represented bargaining unit employees' interests in numerous actions throughout its time serving as exclusive representative. Accordingly, I find that the representational history of the unit does not support the Agency's assertion of good faith doubt as to AFGE's continued support as exclusive representative here.

With respect to the Agency's assertion that AFGE has been dormant for many years on officer and steward positions as a factor supporting a good faith doubt, the evidence concerning the unit's local union leadership does not give rise to a question concerning whether AFGE continues to enjoy majority status. Rather, the evidence shows that AFGE has taken measures to maintain its representational relationship with the unit, despite occasional periods where the unit lacked officers at the local level. The investigation revealed that Local 1935 had a full slate of officers after AFGE's certification in 1998. While there appears to have been a decline in leadership at the local level in 2010, there is no evidence that this halted the Local 1935's operations. Instead, AFGE, acting pursuant its authority as exclusive representative, responded accordingly by appointing a National Representative from AFGE District 14 as trustee. This action demonstrates that AFGE continued to fulfill its representational role notwithstanding the vacant local positions. Moreover, there is no dispute that Union leadership at the local level at EXIM was restored following the election of new officers in 2014. And, when AFGE released Local 1935 from its trusteeship, AFGE continued to oversee the unit by assigning another AFGE District 14 representative to assist in the representation of the local. The parties agree that, around 2016 the Local 1935 officer positions were, once again, vacant. However, the evidence shows that representatives from AFGE National and AFGE District 14 continued to represent the unit and that the Agency was aware of this

continued representation. Specifically, in response to the lack of local leadership, AFGE made the decision to intervene on the unit's behalf and, in June 2017, notified the Agency that representational responsibilities had been delegated to AFGE District 14. Furthermore, after formally intervening with Local 1935, AFGE District 14 identified a solution to the unit's issue sustaining local leadership and began the process of merging Local 1935 with the AFGE Local 2211. The evidence clearly indicates that, as a result of this merger, the unit is now represented by Local 2211 officials.

Although the Agency contends that the Union currently has no local officers in place to represent the existing unit in dealings with the Agency, this assertion is not supported by the evidence. Rather, the evidence shows that, following the vote to merge with Local 2211 in November 2017, members of the unit at EXIM had the opportunity to meet the officers from AFGE Local 2211 who would be serving as the unit's representatives going forward. Likewise, the Agency was put on notice of the merger and of these new union representatives in February 2018, if not earlier. Accordingly, because it is clear that AFGE maintained its representational role and designated representatives when vacancies in local officer positions arose, I find that the unit's history of local officers does not contribute to a finding of objective good faith doubt here.

Another objective consideration raised by the Agency is the Union's level of membership. However, the evidence with respect to the percentage of dues-paying members does not support the Agency's position. Regardless of the parties' dispute as to the exact number, it is clear that there are at least five dues-paying members in the bargaining unit. Given that the bargaining unit as a whole currently consists of approximately 20 employees, the current level of Union membership, standing at approximately 25%, would not tend to contribute to establishing doubt as to AFGE's majority status here. *Cf. OPIC*, 36 FLRA 480 (1990) (low level of membership contributed to good faith doubt of majority status where two out of 75 bargaining unit employees were on dues withholding); *Interior*, 15 FLRA 338 (1984) (the fact that only five of approximately 200 employees were on dues withholding supported a good faith doubt that the Union continued to represent a majority of the unit). Accordingly, I find that the percentage of dues-paying members here demonstrates the unit's continued support for AFGE.

I also reject the Agency's contention that the current collective bargaining agreement is a factor supporting a good faith doubt here. It is evident that the parties have a collective bargaining agreement that governs the unit. And, even though the contract was originally negotiated in 1983 by the previous exclusive

representative, the evidence suggests that the parties have mutually and continuously agreed to abide by this CBA over the years. Accordingly, I find that the current collective bargaining agreement does not contribute to doubt as to AFGE's majority status.

Based on the totality of the circumstances, I find that the evidence failed to establish objective considerations necessary to support a good faith doubt that AFGE continues to represent a majority of the employees in the existing bargaining unit.

IV. Order

In view of the above findings and conclusions, it is ordered that the Agency's petition be dismissed.

V. Right to File and Application for Review

Under Section 7105(f) of the Statute and Section 2422.31(a) of the Authority's Regulations, a party may file an application for review with the Authority within sixty (60) days of this Decision. The application for review must be filed with the Authority by September 10, 2018, and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, NW, Washington, DC 20424-0001. The parties are encouraged to file an application for review electronically through the Authority's website, www.flra.gov.

Jessica S. Bartlett
Regional Director, Washington Region
Federal Labor Relations Authority

Dated: July 10, 2018