

71 FLRA No. 94

UNITED STATES
DEPARTMENT OF EDUCATION

AND

UNITED STATES
DEPARTMENT OF AGRICULTURE
(Petitioners)

0-PS-43

DECISION ON
REQUEST FOR GENERAL STATEMENT
OF POLICY OR GUIDANCE

January 9, 2020

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

I. Statement of the Case

On September 3, 2019, the U.S. Departments of Education and Agriculture (Departments) requested the Authority to issue a policy statement on the following topic:

Do the “conditions of employment” over which federal employees may bargain under the Federal Service Labor-Management Relations Statute (Statute), include all “working conditions” in general, or does the phrase “conditions of employment” refer only to specific types of agency documents or information that constitute “personnel policies, practices, and matters . . . affecting working conditions,” as described in 5 U.S.C. § 7103(a)(14)?¹

II. Background

In their request, the Departments summarized the history and development of the Authority’s interpretation of § 7103(a)(14) to reassert a legal distinction between “conditions of employment” and “working conditions,” which was issued in the 2018

decision *U.S. DHS, U.S. CBP, El Paso, Texas (El Paso)*.² The Departments stressed the significance of the Authority’s interpretation because under the Statute, agencies and exclusive representatives are to engage in collective bargaining with respect to “conditions of employment.”³ The Departments then urged the Authority to issue guidance on the difference between changes to working conditions and conditions of employment, on what triggers a duty to bargain under the Statute, and on what specific types of agency documents or information generally constitute “personnel policies, practices, and matters.”⁴

III. Discussion

The Authority has carefully considered this request and has determined that the request does not satisfy the standards governing the issuance of general statements of policy and guidance set forth in § 2427.5 of the Authority’s Regulations.⁵ The guidance sought by the Departments can be more appropriately resolved by a case in controversy and there is little likelihood that the issuance of an Authority statement would prevent the proliferation of cases involving the same or similar question.⁶

Further, while the request summarized existing Authority precedent⁷ on the distinction between conditions of employment and working conditions, the request’s citation to *El Paso* did not acknowledge that that decision remains pending review before the U.S. Circuit Court of Appeals for the D.C. Circuit.⁸

IV. Decision

The request by the Departments for a general statement of policy or guidance is denied.

² 70 FLRA 501, 502-03 (2018) (Member DuBester dissenting).

³ See 5 U.S.C. § 7103(a)(12).

⁴ Request at 3 (citing § 7103(a)(14)).

⁵ 5 C.F.R. § 2427.5.

⁶ Member Abbott notes that since the issuance of *El Paso*, several matters have come before, and are pending decision from, the Authority that address the question posed by the Departments. It is through such controversies that the question is most appropriately addressed.

⁷ See *U.S. Dep’t of Commerce, Nat’l Inst. of Standards & Tech.*, 71 FLRA 199, 199 n.3 (2019) (Member DuBester dissenting) (noting that while the distinction was not raised by the parties, the policy at issue would have been determined to have been a condition of employment); *SSA, Office of Disability Adjudication & Review, Sacramento, Cal.*, 70 FLRA 759, 760 (2018) (Member DuBester dissenting) (remanding to judge to apply *El Paso*).

⁸ *El Paso*, 70 FLRA at 502-03, appeal docketed, *AFGE, Local 1929 v. FLRA*, No. 19-1069 (D.C. Cir. Mar. 19, 2019).

¹ Departments’ Request (Request) at 1.

Member DuBester, concurring:

I agree that the request does not satisfy the standards governing the issuance of general statements of policy or guidance. Because the questions posed by the request can more appropriately be addressed in the context of facts and circumstances presented by parties in an actual dispute, I concur in the Decision to deny the request.