

**70 FLRA No. 93**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
IMMIGRATION AND CUSTOMS ENFORCEMENT  
NATIONAL COUNCIL 118  
(Union)

and

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
U.S. IMMIGRATION AND  
CUSTOMS ENFORCEMENT  
(Agency)

0-NG-3248  
(68 FLRA 910 (2015))  
(69 FLRA 248 (2016))

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ORDER

April 6, 2018

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

**I. Statement of the Case**

This case is before the Authority on remand from the U.S. Court of Appeals for the District of Columbia in *U.S. DHS, ICE v. FLRA* (D.C. Cir. December 19, 2017) (*DHS, ICE*).<sup>1</sup> After the Agency appealed the Authority's decisions in *AFGE, ICE, National Council 118, (AFGE I)*<sup>2</sup> and *AFGE, ICE, National Council 118, (AFGE II)*<sup>3</sup>—in which the Authority found negotiable a proposal concerning administratively uncontrollable overtime—the Authority filed a motion for voluntary remand, which the Agency did not oppose.

In *DHS, ICE*, the court granted the Authority's motion so that the Authority could consider its decision in light of the passage and enactment of the Administrative Leave Act of 2016.<sup>4</sup>

Following an Authority order concerning supplemental briefing on the issue, the Union requested to withdraw its petition because it no longer sought to

negotiate over the proposal at issue in this case. In response, the Agency opposed any action by the Authority granting the Union's withdrawal request that was not accompanied by Authority action to also vacate the underlying Authority decisions, stating that one appropriate option in this case would be to "[v]acate" those decisions "and allow the petition to be withdrawn"<sup>5</sup>—effectively agreeing with the Union's withdrawal request, on that condition.

In these circumstances, namely, where one party has appealed a negotiability petition to court, the matter has been returned to us without judicial pronouncement, and where *both parties* effectively agree to a withdrawal of the underlying petition, we find it appropriate to grant the Agency's request to vacate<sup>6</sup> the Authority decisions in *AFGE I* and *AFGE II* and grant the Union's request to withdraw its underlying petition.<sup>7</sup>

**II. Order**

We hereby grant the Agency's request to vacate *AFGE I* and *AFGE II* and the Union's request to withdraw its negotiability petition.

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<sup>1</sup> The court's decision is unpublished.

<sup>2</sup> 68 FLRA 910 (2015).

<sup>3</sup> 69 FLRA 248 (2016) (Member Pizzella concurring).

<sup>4</sup> 5 U.S.C. § 6329a.

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<sup>5</sup> Agency's Request for Vacatur or Opportunity to Respond to Union's Notice of Withdrawal at 3 (arguing that upon the Union's withdrawal, the Agency has lost its ability to appeal this petition further).

<sup>6</sup> *United States v. Munsingwear*, 340 U.S. 36, 39-41 (1950) ("The established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. . . . [This procedure] is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences."); *cf. AFGE, Nat'l Border Patrol Council Local 2544*, 49 FLRA 545, 548-49 (1994) (finding exception to *Munsingwear* rule appropriate and denying agency's motion for vacatur).

<sup>7</sup> *Cf. NLRB Union, NLRB Prof'l Ass'n*, 62 FLRA 397, 397 n.1 (2008) (allowing union to withdraw proposals in a negotiability appeal in situation where case had not yet been fully processed by the Authority and had not proceeded to litigation); *NFFE, Local 1214*, 40 FLRA 1181, 1181 n.1 (1991) (same).