70 FLRA No. 99

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE INFORMATION SYSTEMS AGENCY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO
(Union/Petitioner)

WA-RP-17-0007

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DECISION AND ORDER
ON REVIEW

April 13, 2018

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

Decision by Member Abbott for the Authority

I. Statement of the Case

The Petitioner filed a petition seeking to consolidate Agency bargaining units represented by the Petitioner and its constituent locals. In her attached decision and order, Federal Labor Relations Authority (FLRA) Regional Director Jessica Bartlett (RD) found that it was appropriate to consolidate eleven units into one larger unit, to be represented by the Petitioner. The Agency and the American Federation of Government Employees, Local 2 (Local 2) filed, with the Authority, applications for review of the RD's decision. On October 26, 2017, the Authority granted the applications but deferred action on the merits.

The main question before us is whether a clear and identifiable community of interest exists for the proposed consolidated unit. Because, based on the record before us, no such clear and identifiable community of interest exists, we reverse the RD's decision. And because the parties in this case entered into a stipulation of facts that does not create a sufficient record to support consolidation, we find it appropriate to dismiss the petition, rather than remanding for the RD to make further findings.

II. Background and RD's Decision

A. Background

In November 2016, the Petitioner filed a petition, in WA-RP-17-0007, to amend twenty bargaining-unit certifications in order to consolidate the units into a single unit. One month later, the Petitioner amended its petition to include two additional bargaining units.[1]

The Agency and the Petitioner stipulated to the following facts. The Agency is a component of the Department of Defense. The Agency's mission is to provide, operate, and assure command and control, information-sharing capabilities, and a globally accessible enterprise information infrastructure in direct support to joint warfighters, national-level leaders, and other mission and coalition partners across the full spectrum of operations.

The Agency is organized into four centers: (1) the Development and Business Center, (2) the Center for Operations, (3) the Resource Management Center, and (4) the Fifth Estate Center. The overall Agency Director is a U.S. Army Lieutenant General, and the leaders of all four centers report to him. In January 2017, the Agency implemented a new organizational system under the "line-of-business" model. Not all duties or functions are performed at each geographic location.

The Agency's headquarters implements Agency-wide human resources (HR) policy and internal guidelines with which all locations are obligated to comply. The Agency's headquarters also determines the Agency's mission and has discretion in distributing Agency work to be performed by each of the Centers and subcomponents, in furtherance of the Agency's mission; however, the Centers and subcomponents in different geographical areas generally maintain their own workloads and workflows. Center or subcomponent leadership has discretion in implementing supplemental guidance. Although local guidance cannot interfere with the headquarters-issued policy or guidelines, the local guidance may be more restrictive.

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[1] The Petitioner also filed a second petition, in WA-RP-17-0010, seeking to determine whether, following a reorganization, it is the successor labor organization for all employees it currently represents at the Agency's Defense Enterprise Computing Centers. The Authority takes official notice of this petition, which remains pending before the Washington Regional Office. *See* 5 C.F.R. § 2429.5 ("The Authority may . . . take official notice of such matters as would be proper."); *U.S. Dep't of the Air Force, Air Force Materiel Command, Eglin Air Force Base, Hurlburt Field, Fla.*, 66 FLRA 375, 378 (2011) (finding it appropriate to take official notice of other FLRA proceedings).

The Agency contains one Employee and Labor Relations Office that serves the Agency as a whole. The Agency employs HR Field Advisors who provide assistance with personnel and labor-relations matters, including contract negotiations, grievance resolution, and any other personnel-related issues. These HR Field Advisors are duty stationed at different Agency field sites throughout the country, and each support specific components. All HR Field Advisors report to the Chief of the Employee and Labor Relations Office, who in turn reports to the Chief of the Agency's Civilian Personnel Division, located at the Agency's headquarters.

The Agency and Local 2 filed position statements opposing the consolidation sought in the petition in WA-RP-17-0007, and specifically argued that no community of interest existed. In its statement, the Agency argued that employees in the proposed unit perform different and unrelated missions, and that they have a variety of different job classifications related to the specific missions at different locations. Further, subordinate commanders possess local command authority over personnel, labor matters, and conditions of employment, and these commanders receive personnel and labor-relations assistance from HR employees in the field rather than headquarters. The Agency argued that employees at different offices within the Agency have different and separate interests from those of other employees elsewhere, and are subject to different chains of command. The Agency also argued to the RD that conditions of employment under a new organizational system had not yet been implemented.

In its statement, Local 2 argued that employees support different missions and are subject to different chains of command, levels of supervision, and personnel and labor-relations policies. It argued that employees have different duties, job titles, work assignments, and conditions of employment. Local 2 argued that employees have distinct local concerns. It also argued that there was no history of cross-unit bargaining or interchange among employees.

B. RD's Decision

In her decision, the RD noted that § 7112(d) of the Federal Service Labor-Management Relations Statute (the Statute) allows consolidation of two or more bargaining units represented by the same exclusive representative if the Authority considers the larger unit to be appropriate.[2] Under § 7112(a) of the Statute a unit may be determined to be appropriate if it will: (1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency involved; and (3) promote efficiency of the operations of the agency involved.[3]

In examining the appropriate-unit factors, the RD determined that the employees shared a clear and identifiable community of interest, and that consolidation would promote effective dealings with, and efficiency of the operations of, the Agency.[4] In reaching this conclusion, the RD found that "[e]ach Agency location impacted by this petition, no matter where geographically located, is working in support of the same mission, and is part of the same chain of command, ultimately reporting to [the Agency Director] Lieutenant General."[5] She found that the Agency's HR office implements Agency-wide HR policy and guidelines, and that Agency headquarters distributes work to be performed at each location. The RD also noted that while the "work/duties" performed "may differ slightly from location to location, the completion of that work helps achieve an identical end goal."[6]

The Agency and Local 2[7] both filed applications for review of the RD's decision on August 28, 2017. The Petitioner filed an opposition to the Agency's application on September 12, 2017,[8] and to Local 2's application on October 2, 2017.[9] And, as noted above, on October 26, 2017, the Authority granted the applications but deferred action on the merits.

[2] 5 U.S.C. § 7112(d).

[3] *Id.* § 7112(a).

[4] As the Agency and Local 2 did not object to the RD's effectiveness and efficiency findings, we do not discuss them further.

[5] RD's Decision at 6.

[6] *Id.*

[7] Local 2 timely cured a deficiency in the filing of its application and we consider it. *See* Sept. 6 Order at 1-2; Local 2's Cure of Deficiencies (*see* Certificate of Service, certifying that application was served on designated representatives via certified mail on Sept. 12, 2017).

[8] The Petitioner argues that the Agency failed to present a number of its arguments to the RD. Sept. 12 Opp'n at 10-11, 14, 16, 18-19, 19 n.3. However, the Agency made these arguments in its position statement to the RD. *See supra* section II.A.; *see also* Agency's Position Statement at 4-7, 10-12. Additionally, the Agency requested that Local 2's position statement arguing against consolidation be included as part of the stipulation of facts signed by the Agency and the Petitioner. *See* June 8, 2017 email from Agency to the Washington Regional Office. As the Agency previously raised these arguments, we decline to dismiss them. *Commodity Futures Trading Comm'n, E. Reg'l Office, N.Y.C., N.Y.*, 70 FLRA 291, 293 (2017).

[9] The Petitioner's opposition to Local 2's application is untimely and does not allege extraordinary circumstances permitting waiver of an expired time limit. Accordingly, we do not consider the Petitioner's opposition to Local 2's application. 5 C.F.R. §§ 2422.31(d), 2429.21(b), 2429.22, 2429.24; *see also U.S. Dep't of VA, Wash., D.C.*, 67 FLRA 152, 153 (2013).

III. Preliminary Matters

A. The Petitioner's opposition to the Agency's application is timely.

The Agency filed a motion arguing that the Petitioner's opposition to its application is untimely because it was not filed within ten days of the Agency's service of its application on the Petitioner. The Agency argues that it served the Petitioner with its application on August 28, 2017, and so, the Petitioner's opposition, which was filed on September 12, 2017, is untimely.[10] The Agency served the Petitioner via commercial delivery service.[11]

Under the Authority's Regulations, a party may file with the Authority an opposition to an application for review within ten days after the party is served with the application.[12] However, the Authority's Regulations provide parties an additional five days to file a response to a document that has been served on the parties by "first-class mail or *commercial delivery*."[13] As the Agency served its application on the Petitioner via commercial delivery, the opposition is timely and we consider it.[14]

B. We deny the Petitioner's request to withdraw its petition.

After the Authority granted review and deferred action on the merits, the Petitioner filed (1) a request to withdraw its original, underlying petition, and (2) a notice stating it had withdrawn its petition. As nothing in the Authority's Regulations permits the Petitioner to withdraw its petition at this late stage of the proceeding, the Authority will exercise its discretion to decide whether to grant the Petitioner's request.[15]

As the Authority recently noted in *U.S. DOL* (*DOL*),[16] a charging party may not unilaterally withdraw its charge without FLRA approval in the unfair-labor-practice (ULP) context.[17] And, once the FLRA's General Counsel has issued a complaint in a ULP case, certain settlement agreements are "subject to approval by the Authority."[18] While the ULP process differs from the representation process, it demonstrates that once a proceeding has reached a certain stage, the FLRA has institutional interests in resolving the dispute.

The FLRA has spent considerable time and resources attempting to resolve the parties' dispute. The Petitioner filed its petition on November 15, 2016.[19] Since then, the FLRA's Washington Regional Office, including the RD, led an investigation, assessed evidence, conducted research, and issued a decision on the merits of the parties' dispute. More recently, the Authority processed the Agency's and Local 2's applications, reviewed the legal and factual issues presented on appeal, and notified the parties that the application raised legal issues that warranted further review. The Petitioner does not explain why now, after more than sixteen months, it seeks to withdraw its petition *after* the Agency and Local 2 brought this dispute to the Authority by filing applications for review *and* the Authority notified the parties that the applications warranted further review. Neither the Agency nor Local 2 has indicated any desire to withdraw their applications.[20]

The Authority has an obligation that extends beyond the parties in this case. Congress charged the Authority with "provid[ing] leadership in establishing policies and guidance" in matters that include "determin[ing] the appropriateness" of bargaining units.[21] As described more fully below, a bargaining unit must share a clear and identifiable community of interest under § 7112(a) of the Statute.[22] By issuing a decision that resolves the parties' dispute, the Authority clarifies for the labor-management community what does, or does not, constitute a clear and identifiable community of interest.

The dissent unnecessarily attempts to once again blur the line between adjudication and rulemaking. As

[10] Agency's Mot. at 1-2.
[11] Agency's Application at 8.
[12] 5 C.F.R. § 2422.31(d).
[13] *Id.* § 2429.22 (emphasis added).
[14] *Id.*
[15] *Cf.* 5 C.F.R. § 2423.10(a)(1) (in the unfair-labor-practice context, the regional director must approve a party's request to withdraw a charge); *id.* § 2423.25(b) (even when parties agree to settle an unfair-labor-practice dispute, the complaint is not withdrawn until the regional director approves the settlement).
[16] 70 FLRA 452, 453-54 (2018).
[17] 5 C.F.R. § 2423.10(a)(1) (stating that an RD, on behalf of the General Counsel, may "[a]pprove a request to withdraw a charge").
[18] *Id.* § 2423.25(a)(2).
[19] RD's Decision at 1.
[20] *Cf. AFGE, ICE, Nat'l Council 118*, 70 FLRA 441, 441 (2018) (granting union's request to withdraw negotiability petition where agency effectively agreed with union's request, contingent on the Authority vacating the underlying decisions at issue). Member Abbott notes, as he did in *DOL* and *U.S. Dep't of VA, Kan. City VA Med. Ctr., Kan. City, Kan.* (*VA*), that the dissent's suggestion—that the Union should be permitted to withdraw *this* petition and then refile a *new* petition in sixty (60) days—does not "facilitate or encourage the amicable settlement of disputes" and has no "semblance of effectiveness or efficiency." 70 FLRA at 457; 70 FLRA 465, 467 n.21 (2018). Besides whipsawing the Agency out of the opportunity to have its application reviewed on the merits, the Union's actions amount to nothing more than a "manipulation of Title V." *DOL*, 70 FLRA at 457; *VA*, 70 FLRA at 467 n.21.
[21] 5 U.S.C. § 7105(a).
[22] *Id.* § 7112(a).

we explained in *DOL*,[23] "[t]he three primary considerations in distinguishing adjudication from rulemaking are: (1) whether the government action applies to specific individuals or to unnamed and unspecified persons; (2) whether the promulgating agency considers general facts or adjudicates a particular set of disputed facts; and (3) whether the action determines policy issues or resolves specific disputes between particular parties."[24] Here, we decide *only* the dispute raised in the applications for review: whether a clear and identifiable community of interest exists. Our decision on that issue resolves the matter for the impacted employees, the Agency, Local 2, and the Petitioner – all of whom will benefit from knowing the bargaining-unit status of impacted employees.[25] As with any administrative determination by an adjudicatory body, our decision will provide precedential guidance to similarly situated parties.[26] That is adjudication, not rulemaking.

Consequently, we deny the Petitioner's request to withdraw.[27]

IV. Analysis and Conclusion: No clear and identifiable community of interest exists for the proposed consolidated unit.

The Agency and Local 2 both argue that the RD failed to apply established law and committed a clear and prejudicial error concerning a substantial factual matter when the RD found that a community of interest existed for the proposed consolidated unit. We agree.

The Agency argues that the RD's reliance on the finding that the employees share the same overall Agency mission and the same chain of command, by ultimately reporting to the Agency Director, was faulty because the logic was circular.[28] If that were the case, "there would be no argument to make by any [f]ederal agency against consolidation by any union, and every consolidation case would end in consolidation, without any need for" investigation or analysis.[29] The Agency contends that the RD did not sufficiently consider the geographic proximity of two-thirds of the bargaining-unit employees and their distance from the other employees in the proposed unit or the varied work hours, shifts, and local missions.

In its application, Local 2 similarly argues that there is no clear and identifiable community of interest across the proposed consolidated bargaining units because the employees it represents perform distinct missions, fall under different chains of command, are geographically distinct, and have unique conditions of employment and little interchange with other units, compared to the proposed consolidated unit.[30] Local 2 represents 1,362 bargaining-unit employees who are limited to Fort Meade and the national capital region, and so "[t]hey do not share, and have no reason to share, the concerns faced by workers overseas or in other areas of the country."[31] Local 2 contends that the mission performed by the employees it currently represents differs "significantly" from the missions performed by other bargaining units and, so, the RD failed to apply established law in finding a community of interest.[32]

Section 7112(d) of the Statute permits consolidation of two or more bargaining units represented by the same exclusive representative "if the Authority considers the larger unit to be appropriate."[33] Determinations are made on a case-by-case basis.[34]

The Authority has set out factors for assessing whether a clear identifiable community of interest exists, but has not specified the weight of individual factors or a particular number of factors necessary to establish an appropriate unit.[35]

The Authority examines such factors as geographic proximity, unique conditions of employment, distinct local concerns, degree of interchange between organizational components, and functional or operational separation.[36] In addition, the Authority considers factors such as whether the employees in the proposed unit are a part of the same organizational component of the agency; support the same mission; are subject to the same chain of command; have similar or related duties, job titles, and

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[23] 70 FLRA at 453.
[24] *Id.* (citing *Gallo v. U.S. Dist. Court for the Dist. of Ariz.*, 349 F.3d 1169, 1182 (9th Cir. 2003), *cert. denied*, 541 U.S. 1073 (2004)).
[25] *See Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) (noting that "adjudications . . . have an immediate effect on specific individuals (those involved in the dispute)").
[26] *See, e.g., Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999) (stating that "the nature of adjudication is that similarly situated non-parties may be affected by the policy or precedent applied, or even merely announced in dicta" (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969)).
[27] *See DOL*, 70 FLRA at 454.
[28] Agency's Application at 4-5.
[29] *Id.* at 4.
[30] Local 2's Application at 3-7.
[31] *Id.* at 2, 5-6.
[32] *Id.* at 4.
[33] *U.S. Dep't of the Air Force, Dover Air Force Base, Del.*, 66 FLRA 916, 919 (2012) (quoting 5 U.S.C. § 7112(d)).
[34] *Id.*
[35] *Id.*
[36] *U.S. Dep't of the Interior, Bureau of Ocean Energy Mgmt. & U.S. Dep't of the Interior, Bureau of Safety & Envtl. Enforcement, New Orleans, La.*, 67 FLRA 98, 99 (2012) (*Ocean*) (citing *U.S. Dep't of the Navy, Fleet & Indus. Supply Ctr., Norfolk, Va.*, 52 FLRA 950, 961 (1997) (*Navy*)).

work assignments; and are subject to the same general working conditions.[37] Historically, the Authority has also considered factors such as common supervision,[38] the distribution and proportion of employees to be represented,[39] the locus and scope of the personnel and labor-relations authority and functions,[40] areas of consideration with regard to merit promotion or reduction-in-force actions,[41] delegation to local management,[42] and integration of mission and function.[43]

We find that the RD did not make sufficient findings of fact to support the determination that employees in the proposed, consolidated unit share a clear and identifiable community of interest. Consequently, the RD failed to apply established law. Under the RD's generic community-of-interest findings,[44] it is difficult to determine what clear and identifiable community of interest exists within the proposed unit that would not be shared by any group of bargaining-unit employees at any federal agency, government wide. In particular, the RD reached no findings at all as to the geographic dispersal of the employees or as to any differences in their duties or supervision. That every employee in the proposed consolidated unit performs duties that supported the Agency's ultimate mission can be said of employees at every federal agency. Because the RD failed to make sufficient findings to support the community-of-interest determination, we reverse the RD.[45]

Further, as noted previously, the parties entered into a stipulation of facts. But those stipulated facts also do not provide a sufficient record to support a community-of-interest finding. Because the parties' agreed-upon facts do not support finding a community of interest, we find it inappropriate to remand to give the parties a second chance to create a sufficient record. Instead, we dismiss the petition.[46]

V. Order

We reverse the RD's decision and dismiss the petition.

[37] *Id.* at 99-100 (citing *Navy*, 52 FLRA at 960-61).
[38] *Dep't of HHS*, 13 FLRA 39, 41-42 (1983) (*HHS*).
[39] *Id.* at 42; *Dep't of Agric., Farmers Home Admin.*, 20 FLRA 216, 221 (1985) (*Farmers*); *U.S. Dep't of HUD*, 15 FLRA 497, 500 (1984) (*HUD*); *U.S. Army Training & Doctrine Command*, 11 FLRA 105, 109 (1983) (*Army*).
[40] *Farmers*, 20 FLRA at 221; *HHS*, 13 FLRA at 42.
[41] *Army*, 11 FLRA at 108.
[42] *Farmers*, 20 FLRA at 221; *HUD*, 15 FLRA at 500.
[43] *See HUD*, 15 FLRA at 500 (where "the record establishe[d] that, although there is a common mission shared by all employees of the [a]gency and similar functions are performed by employees throughout the field organization of HUD in pursuit of this mission, there is no integration of these functions between or among area offices or between area offices and regional offices," the Authority found no community of interest existed).
[44] *Cf. U.S. Dep't of the Interior, Ne. Park Serv., Ne. Region*, 69 FLRA 89, 90-91, 95-96, 99-115, 117 (2015) (regional director made very detailed factual findings on community-of-interest factors).
[45] *See, e.g., Ocean*, 67 FLRA at 99-100; *U.S. Dep't of the Interior, Nat'l Park Serv., Wash., D.C.*, 55 FLRA 311, 313, 315 (1999); *Farmers*, 20 FLRA at 221; *HUD*, 15 FLRA at 500; *HHS*, 13 FLRA at 42; *Army*, 11 FLRA at 108.
[46] As an alternative to dismissing the petition, the Agency requests a hearing. Agency's Application at 6. Because we dismiss the petition, we need not consider the Agency's alternative request.

Member DuBester, dissenting:

For the reasons expressed in my dissent in *U.S. DOL*,[1] the majority's issuance of their decision in this case violates the Authority's Regulations,[2] the Administrative Procedure Act (APA),[3] and fundamental administrative law principles. Accordingly, I dissent.

The Union has informed the Authority that it no longer seeks to consolidate Agency bargaining units, by moving to withdraw its petition. The Agency and Local 2 do not oppose the motion. Consistent with its Regulations, the Authority should grant the motion and dismiss the petition.

When the Authority performs its statutory responsibility to "determine the appropriateness of units for labor organization representation,"[4] it performs an adjudicative function. And, when it is engaged in adjudication, the Authority decides only matters placed before it by litigants. In accord with federal courts, the Authority has held that a dispute becomes moot when the parties no longer have a legally cognizable interest in the outcome.[5] And it is well-settled that "the Authority does not resolve disputes that have become moot."[6]

Section 2429.10 of the Authority's Rules and Regulations implements this principle by explicitly prohibiting the Authority from issuing advisory opinions.[7] To refuse to grant the Union's motion to withdraw its petition—and instead to address the petition's merits—is precluded by this Regulation. If there is no controversy before the Authority, then any decision in this matter is merely advisory.[8]

The majority attempts to justify its issuance of this advisory opinion by stating that the opinion "clarifies for the labor-management community what does, or does not, constitute a clear and identifiable community of interest."[9] This rationale confuses one Authority process, adjudication, with another, rulemaking. These are two distinct functions. Adjudication is reserved for resolving live disputes, whereas rulemaking is the only process by which the Authority, on its own, may announce prospective policies and guidance.[10]

When an agency fails to comply with its own regulations, its action is unlawful and exposes the agency to court review.[11] An agency's failure to follow its own regulations violates the APA's prohibition against agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in

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[1] 70 FLRA 452, 458-59 (2018) (Dissenting Opinion of Member DuBester).

[2] 5 C.F.R. § 2429.10.

[3] 5 U.S.C. § 706(2)(A).

[4] *Id.* § 7105(a)(2)(A).

[5] *SSA, Bos. Region (Region 1), Lowell Dist. Office, Lowell, Mass.*, 57 FLRA 264, 268 (2001); *accord United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

[6] *NTEU*, 67 FLRA 280, 281 (2014) (*NTEU*). The majority's decision is irreconcilable with its grant of a union's analogous dismissal request in *AFGE, ICE, Nat'l Council 118*, 70 FLRA 441, 441 (2018) (granting union's request to withdraw negotiability petition because the request mooted the case). In both instances, the matters became moot because the union moved to withdraw a petition seeking a ruling from the Authority. Contrary to the majority, Majority at 6, n.20, these matters became moot once those motions were filed, regardless of the Agency's, and here Local 2's, agreement.

[7] *NTEU*, 67 FLRA at 281 (citing 5 C.F.R. § 2429.10 ("The Authority and the General Counsel will not issue advisory opinions.")).

[8] *Cf. NFFE, Local 1998*, 48 FLRA 1074, 1075 (1993) (where union has withdrawn underlying grievance, arbitrator's award is moot and Authority decision on award's merits would be an advisory opinion). That the Agency and Local 2 have not withdrawn their applications for review, a significant consideration for the majority, Majority at 5, does not render the proceeding less moot. And, as noted, neither the Agency nor Local 2 oppose the Union's motion to withdraw its petition to consolidate, undoubtedly because retaining the status quo is precisely the result the Agency and Local 2 have sought throughout the proceeding.

[9] Majority at 6.

[10] *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Concurring Opinion of J. Scalia) ("[R]ulemaking [is] prospective, . . . adjudication [cannot] be purely prospective, since otherwise it would constitute rulemaking") (citing *NLRB v. Wyman–Gordon Co.*, 394 U.S. 759, 759 (1969), and *SEC v. Chenery Corp.*, 332 U.S. 194, 194 (1947)). The majority's claim, Majority at 5, that issuing a merits decision is not backdoor rulemaking is patently incorrect. The majority reasons that its decision "will benefit" the "employees, the Agency, Local 2" and the Union who will know "the bargaining-unit status of the of impacted employees." Majority at 6. This is simply wrong. What the majority appears reluctant to acknowledge, and that undercuts the majority's entire theory on this point, is that the Union no longer seeks to consolidate Agency units. Accordingly, the advisory opinion the majority issues will not have any effect on these employees' bargaining-unit status, or on the rights and responsibilities of any of the parties.

[11] *Frisby v. U.S. Dep't of HUD*, 755 F.2d 1052, 1055 (3d Cir. 1985) (validly promulgated agency regulations have the force of law).

accordance with law."[12] The Authority should follow its own Regulation and "not issue [an] advisory opinion[]."[13]

In addition to the illegality of the majority's action, it is difficult to imagine a clearer waste of government resources than the majority's decision to resolve, *sua sponte*, an issue that no longer requires a resolution.[14] The majority's exercise of jurisdiction here—tantamount to manufacturing a dispute where none exists—is in flagrant disregard of the Authority's statutory responsibilities.[15] The majority's actions here speak more to an interest in issuing overreaching proclamations than engaging in the reasoned adjudication of real disputes.

The majority does not dispute the central point: this case is moot.[16] Their decision is an unlawful advisory opinion. Accordingly, I dissent.

[12] 5 U.S.C. § 706(2)(A); *see also Aerial Banners, Inc. v. FAA*, 547 F.3d 1257, 1260 (11th Cir. 2008) (agency acts arbitrarily and capriciously by failing to follow its own regulations and procedures); *City of Sioux City v. Western Area Power Admin.*, 793 F.2d 181, 182 (8th Cir. 1986) (agency's failure to follow its own binding regulations is a reversible abuse of discretion); *United States v. Heffner*, 420 F.2d 809, 811-12 (4th Cir. 1969) (courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself); *Morton v. Ruiz*, 415 U.S. 199, 233-35 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.").

[13] 5 C.F.R. § 2429.10.

[14] If the majority is concerned about the belatedness of the Union's motion to withdraw, then an appropriate response is not to expend additional resources to resolve a matter that is moot. The Authority already has mechanisms in place to deal with belated requests to withdraw. *See* 5 C.F.R. § 2422.14(b) (imposing waiting periods for filing new representation petitions on parties who belatedly withdraw petitions).

[15] The majority's reliance on an analogy to unfair-labor-practice (ULP) proceedings, to support its claim that the Authority has "institutional interests" in resolving this case, Majority at 5, ignores fundamental distinctions among the Authority's various statutory responsibilities. The Authority enforces the ULP provisions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7116(a) & (b), and prosecutes those who violate them. The Authority has no analogous role in representation cases.

[16] The underlying dispute is moot. However, faced with the majority's improper actions regarding the RD's decision, I feel compelled to note that, if I were to reach the merits, I would uphold that decision. The RD found that it was appropriate to consolidate eleven units into one larger unit, to be represented by the Union. The RD's decision is consistent with long-standing Authority precedent, and the Authority's representation-case guidance on our website. *See, e.g.*, *U.S. Dep't of Commerce, U.S. Census Bureau*, 64 FLRA 399, 402 (2010); *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 55 FLRA 359, 362 (1999); *see also* the Authority's Representation Case Law Outline at 36.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE

U.S. DEPARTMENT OF DEFENSE
DEFENSE INFORMATION SYSTEMS AGENCY
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
(Union/Petitioner)

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WA-RP-17-0007

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DECISION AND ORDER

I. Statement of the Case

The American Federation of Government Employees, AFL-CIO (AFGE or the Union) filed the petition in WA-RP-17-0007 with the Federal Labor Relations Authority (Authority) on November 15, 2016, and amended the petition on December 12, 2016, under section 7111(b)(2) of the Federal Service Labor-Management Relations Statute (Statute). The petition sought to determine whether certain existing Defense Information Systems Agency (Agency) bargaining units represented by the Union may be consolidated into a single bargaining unit.[1]

Based upon the parties' stipulation of facts, I hereby find and conclude as follows:

II. Findings

On February 9, 1996, in Case Number AT-CU-50063, the Authority certified AFGE as the exclusive representative of the following unit:

Included: All nonprofessional employees of the Defense Information Systems Agency, Defense Megacenter (DMC) Warner Robins, GA.[2]

Excluded: All supervisors, management officials, professional employees, temporary employees holding temporary assignments not to exceed one year, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).[3]

On August 31, 2009, in Case Number BN-RP-09-0026, the Authority certified AFGE, Local 1156, as the exclusive representative of the following unit:

Included: All nonprofessional employees of the Defense Information Systems Agency (DISA), including Interns, assigned to Mechanicsburg, Pennsylvania.

Excluded: Management officials, supervisors, DISA employees assigned to the Systems Support Office (SSO) and the Defense Enterprise Computing Center (DECC) bargaining units, students assigned to the Student Temporary Employment Program (STEP) and the Student Career Experience Program (SCEP), and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (5), (6) and (7).[4]

On September 30, 1996, in Case Number WA-CU-60027, the Authority certified AFGE, Local 1156 as the exclusive representative of the following unit:

Included: All non-professional employees of the Defense Information Systems Agency, Joint Interoperability and Engineering Organization, Systems Support Office, Mechanicsburg, Pennsylvania.

Excluded: All management officials, supervisors, professional employees, and employees described in 5 U.S.C.

[1] AFGE Locals subject to the petition were afforded the opportunity to submit a statement of interest. AFGE, Local 2 submitted a statement of interest. No other AFGE Locals impacted by the petition submitted a statement of interest.

[2] The Agency no longer has locations referred to as Defense Megacenters. However, the Agency continues to recognize employees covered by bargaining unit descriptions that reference Defense Megacenters.

[3] Stips. Page 1, ¶ 5.

[4] Stips. Page 2, ¶ 6.

§7112(b)(2), (3), (4), (6), and (7) and employees whose normal duty station is not located at Mechanicsburg, Pennsylvania.[5]

On December 15, 1995, in Case Number BN-CU-50056, the Authority certified AFGE, Local 1156 as the exclusive representative of the following unit:

Included: All nonprofessional employees of the Defense Information Systems Agency, Defense Megacenter (DMC) Mechanicsburg, Pennsylvania.

Excluded: All supervisors, management officials, professional employees, and employees described in 5 U.S.C. §7112(b)(2), (3), (4), (6), and (7).[6]

On December 23, 1998, in Case Number CH-RP-90007, the Authority certified AFGE, Local 1138 as the exclusive representative of the following unit:

Included: All General Schedule (GS) employees of the Defense Information Systems Agency (DISA) located at Wright-Patterson Air Force Base, Ohio.

Excluded: Professional employees, management officials, supervisors and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).[7]

On February 2, 2017, in Case Number DE-RP-17-0001, the Authority certified AFGE as the exclusive representative of the following unit:

Included: All nonprofessional employees of the Defense Information Systems Agency, Ogden, Utah and all nonprofessional employees of the Defense Information Systems Agency, Global Service Desk who are physically located in Ogden, Utah.

Excluded: All supervisors, management officials, professional employees, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).[8]

On February 14, 1996, in Case Number DE-CU-50065, the Authority certified AFGE, Local 2040 as the exclusive representative of the following unit:

Included: All nonprofessional employees of the Defense Information Systems Agency, Defense Megacenter (DMC) Denver, Colorado.

Excluded: All supervisors, management officials, professional employees and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).[9]

On April 30, 2013, in Case Number DE-RP-13-0001, the Authority certified AFGE, Local 1662 as the exclusive representative of the following unit:

Included: All professional and non-professional General Schedule and Wage Grade employees of the Defense Information Systems Agency, Joint Interoperability Test Command located at Ft Huachuca, AZ.

Excluded: Management officials, supervisors, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6), and (7).[10]

On May 21, 2012, in Case Number WA-RP-12-0013, the Authority certified

[5] Stips. Page 2, ¶ 7.
[6] Stips. Page 2, ¶ 8.
[7] Stips. Page 2, ¶ 9.
[8] Stips. Pages 2-3, ¶ 10.
[9] Stips. Page 3, ¶ 11.
[10] Stips. Page 3, ¶ 12.

AFGE, Local 2 as the exclusive representative of the following unit:

Included: All nonprofessional general schedule full-time and part-time employees of the Defense Information Systems Agency, located at Ft. Meade, Maryland and in the National Capital Region, Washington, DC.

Excluded: All professional employees, management officials, supervisors, temporary employees, employees of the White House communications Agency and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).[11]

On October 13, 2016, in Case Number DA-RP-16-0009, the Authority certified AFGE, Local 916, as the exclusive representative of the following unit:

Included: All nonprofessional employees of the Defense Information Systems Agency, Defense Enterprise Computing Center, Oklahoma City, Oklahoma and all nonprofessional employees of the Defense Information Systems Agency, Global Service Desk who are physically located in Oklahoma City, Oklahoma.

Excluded: All supervisors, management officials, professional employees, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6), and (7).[12]

On February 8, 1996, in Case Number CH-CU-50052, the Authority certified AFGE as the exclusive representative of the following unit:

Included: All nonprofessional employees of the Defense Information Systems Agency, Defense Megacenter (DMC) Columbus, Ohio.

Excluded: All supervisors, management officials, professional employees, temporary employees and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6), and (7).[13]

Army Lieutenant General Alan R. Lynn is the Agency Director.[14] The parties agree that the Agency's mission, created by Agency headquarters (Agency HQ) in Fort Meade, Maryland, is to provide, operate, and assure command and control, information-sharing capabilities, and a globally accessible enterprise information infrastructure in direct support to joint warfighters, national-level leaders, and other mission and coalition partners across the full spectrum of Agency operations.[15] These services are delivered through the information technology infrastructure that the Agency provides and operates at each of its locations.[16]

The Agency has operations in 18 States, in addition to Washington, DC, eight countries, and Guam and is organized into four centers: (1) the Development and Business Center, (2) the Resource Management Center, (3) the Fifth Estate Center, and (4) the Center for Operations.[17] The leadership at each center reports to Lieutenant General Lynn.[18] All four centers have a unique sub-mission, and each sub-mission supports the Agency's overall mission.[19] Agency HQ has discretion in distributing work to each of the centers discussed above.[20] Not all duties are performed at each location, but each location, no matter where geographically located, supports the Agency's overall mission.[21]

Agency HQ contains a Human Resources Office (HRO) that implements Agency-wide human resources policies and internal guidelines that all Agency locations must comply with.[22] Each center has discretion in implementing local guidance to supplement the headquarters-issued policy and internal guidelines.[23] Local guidance cannot interfere with the

[11] Stips. Page 3, ¶ 13.
[12] Stips. Page 3, ¶ 14.
[13] Stips. Pages 3-4, ¶ 15.
[14] Stips. Page 4, ¶ 18.
[15] Stips. Pages 4-5, ¶ 17, 25.
[16] Stips. Page 4, ¶ 17.
[17] Stips. Page 4, ¶ 18.
[18] Stips. Page 4, ¶ 18.
[19] Stips. Page 4, ¶ 19.
[20] Stips. Page 5, ¶ 25.
[21] Stips. Page 4, ¶ 19.
[22] Stips. Page 5, ¶ 25, 28.
[23] Stips. Page 5, ¶ 26.

headquarters-issued policy and/or guidelines.[24] The HRO contains the Agency's only Employee and Labor Relations Office (ELRO), which services the entire Agency.[25] To effectuate its labor relations program, the Agency employs Human Resources Field Advisors.[26] The Human Resources Field Advisors provide assistance with personnel and labor relations matters, including contract negotiations, grievance resolution, and any other personnel-related issues.[27] Each of the Human Resources Field Advisors is stationed at different Agency locations throughout the country, and each supports a specific command center or other Agency component.[28] All Human Resources Field Advisors report to the Chief of the ELRO, who is stationed at Agency HQ.[29] The Chief of the ELRO reports to the Chief of the Civilian Personnel Division, who is also located at Agency HQ.[30]

The Agency and certain AFGE Local units have existing Collective Bargaining Agreements (CBAs).[31] Agency HQ and AFGE, Local 2 executed a CBA in 1989.[32] The Agency and its Fort Huachuca, Arizona location executed a CBA with AFGE, Local 1662 on April 14, 2000.[33] One of the Agency's Mechanicsburg, Pennsylvania units executed a CBA with AFGE, Local 1156 in March or April 2011.[34] While separate agencies, the Defense Logistics Agency executed a CBA on November 12, 1990, that covers employees of the Agency's Columbus, Ohio location, and the Air Force Logistics Command executed a CBA on October 22, 1986, that covers employees of the Agency's Ogden, Utah and Oklahoma City, Oklahoma locations.[35] These individuals, however, are Agency employees.[36] Other than the CBAs referenced herein, the relevant Agency employees are covered by no other CBAs.[37]

In addition to AFGE, the following labor organizations represent Agency employees at the corresponding locations but are not included in this petition: National Association of Government Employees, Local R7-23, Scott Air Force Base, Illinois; National Federation of Federal Employees, Local 405, Saint Louis, Missouri and Local 1442, Chambersburg, Pennsylvania; the International Federation of Professional and Technical Engineers, Local 121, Aiea, Hawaii; and the Service Employees International Union, Local 556, Aiea, Hawaii.[38]

III. Analysis and Conclusions

A. Consolidation

Section 7112(d) of the Statute allows consolidation of two or more bargaining units represented by the same exclusive representative "if the Authority considers the larger unit to be appropriate." *U.S. Dep't of the Air Force, Air Force Materiel Command Wright-Patterson Air Force Base, Ohio*, 55 FLRA 359, 361 (1999)(*Air Force Materiel Command)*. The reference in Section 7112(d) of an "appropriate" unit incorporates the appropriate unit elements established in Section 7112(a) of the Statute. *Id.* A unit may be determined to be appropriate if it will: "(1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency involved; and (3) promote efficiency of the operations of the agency involved." *U.S. Dep't of Commerce U.S. Census Bureau*, 64 FLRA 399, 402 (2010)(*Department of Commerce)*(citing *U.S. Dep't of the Navy Fleet and Industrial Supply Center, Norfolk, Virginia*, 52 FLRA 950, 959 (1997))(*Department of the Navy).*

Clear and Identifiable Community of Interest

When determining whether employees share a clear and identifiable community of interest, the Authority will examine a host of factors. *Department of Commerce*, 64 FLRA at 402 (citing *Department of the Navy*, 52 FLRA at 961). Among the factors are: geographic proximity; unique conditions of employment; whether the employees are a part of the same organizational component of the Agency; whether the employees support the same mission; whether the employees have similar or related job duties, titles, and assignments; and whether the employees are governed by the same personnel office. *Id.*

Here, the employees involved share a clear and identifiable community of interest. Each Agency location impacted by this petition, no matter where geographically located, is working in support of the same mission, and is a part of the same chain of command, ultimately reporting to Lieutenant General Lynn. To support the mission, one centralized location, Agency HQ, distributes the work to be performed by each location. While the work/duties performed may differ slightly from location to location, the completion of that work helps achieve an identical end goal. See *Department of Commerce*, 64 FLRA at 402 (noting that employees can perform

[24] Stips. Page 5, ¶ 26.
[25] Stips. Page 5, ¶ 28.
[26] Stips. Page 5, ¶ 27.
[27] Stips. Page 5, ¶ 27.
[28] Stips. Page 5, ¶ 27.
[29] Stips. Page 5, ¶ 27.
[30] Stips. Page 5, ¶ 27.
[31] Stips. Pages 5-6, ¶ 29-33.
[32] Stips. Page 5, ¶ 29.
[33] Stips. Page 5, ¶ 30.
[34] Stips. Page 5, ¶ 31.
[35] Stips. Pages 5-6, ¶ 32, 33.
[36] Stips. Pages 2-4, ¶ 10, 14, 15.
[37] Stips. Page 6, ¶ 34.
[38] Stips. Page 6, ¶ 35.

separate duties and still share a clear and identifiable community of interest).

Additionally, the employees at issue are collectively serviced by both the Agency's HRO and ELRO. The HRO implements Agency-wide human resources policy and internal guidelines that each location must comply with. While different locations have different Human Resources Field Advisors who provide assistance with labor relations matters, each of those Human Resources Field Advisors is a part of the ELRO and report back to the ELRO Chief.

Because the subject employees have in common a number of the determinative factors, I find that the employees share a clear and identifiable community of interest.

Effective Dealings and Efficiency of Agency Operations

In determining whether consolidation would promote effective dealings and efficiency of Agency operations, the Authority examines a number of factors, none of which is by itself dispositive. *Air Force Materiel Command*, 55 FLRA at 364 (citing *Army and Air Force Exchange Service, Dallas, Texas*, 5 FLRA 657, 661-662 (1981)). The factors include: whether personnel and labor relations discretion is centralized and broad operating polices exist at a national level; whether consolidation will reduce unit fragmentation, thereby "promoting a more effective, comprehensive bargaining unit structure to effectuate the purposes of the Statute." *Id.* The Authority further examines whether the unit would "adequately reflect the agency's organizational structure or would require creating a new agency structure." *Air Force Materiel Command*, 55 FLRA at 364 (citing *Dep't of Defense, National Guard Bureau*, 13 FLRA 232, 237 (1983)).

Here, consolidating the employees would promote effective dealings with the Agency and efficiency of the Agency's operations. As noted above, the Agency's Human Resources Office, located at Agency HQ, issues Agency-wide human resources policy and internal guidelines that all Agency employees are subject to. Additionally, the HRO and ELRO service all of the impacted employees from Agency HQ. Thus, both the policy-making function and labor-management function that the at-issue employees are subject to are at a central location, clearly making for efficient operations.

Moreover, consolidating the 11 units into one larger unit will reduce unit fragmentation, centralizing Agency-Union interaction as to those 11 units, thereby "promoting a more effective, comprehensive bargaining unit structure." See *Air Force Materiel Command*, 55 FLRA at 364. As to the Agency's operating structure, there is no indication in the Stipulation of Facts, or otherwise, that a consolidation would require creating a new Agency structure. Indeed, Agency operations will continue as usual, consolidation or not.

Finally, while there are other AFGE units that are not included in this petition, the Authority has consistently held that a consolidation petition does not need to include all possible bargaining units. *Id.* As to the non-AFGE bargaining units and their employees, a consolidation will have no bearing on the labor-management relationship between those units and the Agency. Accordingly, I find that consolidating the 11 units would promote effective dealings and efficiency of the Agency's operations.

Because combining the 11 units would make an appropriate unit, I find that the certifications issued in Case Numbers AT-CU-50063; BN-RP-09-0026; WA-CU-60027; BN-CU-50056; CH-RP-90007; DE-RP-17-0001; DE-CU-50065; DE-RP-13-0001; WA-RP-12-0013; DA-RP-16-0009; CH-CU-50052 may be consolidated as follows:

Included:	All nonprofessional employees of the Defense Information Systems Agency, Defense Megacenter (DMC) Warner Robins, GA.
Excluded:	All supervisors, management officials, professional employees, temporary employees holding temporary assignments not to exceed one year, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).
Included:	All nonprofessional employees of the Defense Information Systems Agency (DISA), including Interns, assigned to Mechanicsburg, Pennsylvania.
Excluded:	Management officials, supervisors, DISA employees assigned to the Systems Support Office (SSO) and the Defense Enterprise Computing Center (DECC) bargaining units, students assigned to the Student Temporary Employment Program (STEP)

and the Student Career Experience Program (SCEP), and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (5), (6) and (7).

Included: All non-professional employees of the Defense Information Systems Agency, Joint Interoperability and Engineering Organization, Systems Support Office, Mechanicsburg, Pennsylvania.

Excluded: All management officials, supervisors, professional employees, and employees described in 5 U.S.C. §7112(b)(2), (3), (4), (6), and (7) and employees whose normal duty station is not located at Mechanicsburg, Pennsylvania.

Included: All nonprofessional employees of the Defense Information Systems Agency, Defense Megacenter (DMC) Mechanicsburg, Pennsylvania.

Excluded: All supervisors, management officials, professional employees, and employees described in 5 U.S.C. §7112(b)(2), (3), (4), (6), and (7).

Included: All General Schedule (GS) employees of the Defense Information Systems Agency (DISA) located at Wright-Patterson Air Force Base, Ohio.

Excluded: Professional employees, management officials, supervisors and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

Included: All nonprofessional employees of the Defense Information Systems Agency, Ogden, Utah and all nonprofessional employees of the Defense Information Systems Agency, Global Service Desk who are physically located in Ogden, Utah.

Excluded: All supervisors, management officials, professional employees, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

Included: All nonprofessional employees of the Defense Information Systems Agency, Defense Megacenter (DMC) Denver, Colorado.

Excluded: All supervisors, management officials, professional employees and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

Included: All professional and non-professional General Schedule and Wage Grade employees of the Defense Information Systems Agency, Joint Interoperability Test Command located at Ft Huachuca, AZ.

Excluded: Management officials, supervisors, and employees described in 5 U.S.C.7112(b)(2), (3), (4), (6), and (7).

Included: All nonprofessional general schedule full-time and part-time employees of the Defense Information Systems Agency, located at Ft. Meade, Maryland and in the National Capital Region, Washington, DC.

Excluded: All professional employees, management officials, supervisors, temporary employees, employees of the White House communications Agency and employees described in 5 U.S.C.

7112(b)(2), (3), (4), (6) and (7).

Included: All nonprofessional employees of the Defense Information Systems Agency, Defense Enterprise Computing Center, Oklahoma City, Oklahoma and all nonprofessional employees of the Defense Information Systems Agency, Global Service Desk who are physically located in Oklahoma City, Oklahoma.

Excluded: All supervisors, management officials, professional employees, andemployees described in 5 U.S.C. 7112(b)(2), (3), (4), (6), and (7).

Included: All nonprofessional employees of the Defense Information Systems Agency, Defense Megacenter (DMC) Columbus, Ohio.

Excluded: All supervisors, management officials, professional employees, temporary employees and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6), and (7).

IV. Order

IT IS HEREBY ORDERED that the certifications granted to AFGE; AFGE, Local 1156; AFGE, Local 1138; AFGE, Local 2040; AFGE, Local 1662; AFGE, Local 2; and AFGE, Local 916, identified above, be consolidated into a single unit represented by AFGE.

V. Right to Seek 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 August 28, 2017, 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.

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

Dated: June 29, 2017