



AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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July 6, 2006

Mr. Robert P. Hunter,
Regional Director
Federal Labor Relations Authority
Washington Regional Office
1400 K Street, NW
Washington, DC 20424

**RE: Case No. WA-RP-04-0067
ELECTION PROTESTS**

Dear Mr. Hunter:

The American Federation of Government Employees (AFGE), by and through the undersigned counsel, hereby moves the Authority to set aside the above referenced election pursuant to 5 C.F.R. § 2422.26¹ and 5 C.F.R. § 2429.21(a). The U.S. Customs and Border Protection (Agency), Department of Homeland Security (DHS), engaged in pre-election conduct that warrants setting the election aside. As outlined below, the Agency did not exhibit neutrality, denied AFGE access to the bargaining unit, and unilaterally altered past practices that made AFGE appear powerless. Additionally, procedural errors in conducting the election occurred that warrant setting aside the election. Therefore, the Authority is urged to set aside the election and run it anew.

¹ The Tally of Ballots was received on or about June 28, 2006. 5 C.F.R. § 2422.26 states:

- (a) Filing objections to the election. Objections to the procedural conduct of the election or to conduct that may have improperly affected the results of the election may be filed by any party. Objections must be filed and received by the Regional Director within five days after the tally of ballots has been served. Any objections must be timely regardless of whether the challenged ballots are sufficient in number to affect the results of the election. The objections must be supported by clear and concise reasons. An original and two copies of the objections must be received by the Regional Director.
- (b) Supporting evidence. The objecting party must file with the Regional Director evidence, including signed statements, documents and other materials supporting the objections within ten days after the objections are filed.

The misconduct outlined below was not limited in scope to merely affect a handful of voters. Rather, the misconduct was national in scope and therefore improperly affected the outcome of the national election. Of the ballots counted, 3,426 votes were cast in favor of AFGE, and 7,369 votes were cast in favor of the National Treasury Employees Union (NTEU). Approximately 1,700 ballots received were challenged and not counted as these challenged ballots were deemed insufficient in number to affect the outcome of the election. However, the margin of the victory is not, as the Agency or NTEU will undoubtedly argue, almost 4,000 votes. Rather, the margin of victory is less than 2,000 voters, for had 1,972 employees voted for AFGE instead of NTEU, AFGE would have won the election. Why is this significant? Because the nature and gravity of the Agency's misconduct is such that it is reasonable to infer that many more than 1,972 voters were swayed to vote for NTEU.

1. Lack of Neutrality

The Agency has repeatedly exhibited a lack of neutrality between the AFGE and NTEU. During an election campaign, management has the duty to remain neutral. *Department of the Army and National Federation of Federal Employees*, 29 F.L.R.A. 1110 (1987); *Department of the Air Force, Air Force Plant Representative Office (AFPRO), Detachment 27, Ft. Worth, Texas*, 5 FLRA 492 (1981). The Authority has consistently noted that a cornerstone of the Federal Service Labor-Management Relations Statute is that employees should be free to choose or reject union representation without coercion and while agency management maintains a posture of neutrality. *Department of Justice, INS and AFGE, National Border Patrol Council and IBPO*, 9 F.L.R.A. 253 (1982). The Authority has previously set aside elections when the conduct was improper and could reasonably be expected to have affected the results of the election. *Marine Corps Logistics Base and AFGE Local 1482*, 9 F.L.R.A. 1046 (1982) ("The Authority concludes that the Respondent's conduct in this case interfered with the employees'

freedom of choice in the election and therefore requires that the election be set aside.”). In the instant case, the Agency’s lack of neutrality was widespread. Its lack of neutrality was manifested in a manner that effected employees locally, see Exhibit 39, and in a manner that effected employees nationwide, see Exhibits 6 and 23. Nevertheless, the widespread impact of the lack of neutrality was sufficient to impact the election in numbers greater than the margin of victory. It is undeniable that the Agency’s conduct resulted in employees’ drawing a coercive inference that it was in their best interest to vote for NTEU and not AFGE.

a. The Agency has posted NTEU contact information as the union to contact on the Agency’s intranet Web telephone directory.

In April 2006, a mere month before the election ballots were mailed, the Agency notified all of the approximately 25,000 employees eligible to vote in this election by e-mail of its implementation of a new employee phone directory found on the Agency’s intranet. All 25,000 employees eligible to vote in this election had computer access to view the telephone directory which exhibited such a lack of Agency neutrality that it, in and of itself, is sufficient to set aside this election. The “Web Tele,” or just “Tele,” could be accessed through the CBP’s intranet home page at <http://cbpnet>, or <http://jweb.cbp.dhs.gov/telesearch>. When logged onto the site, on the right side of the page is a link to “Web TELE Quick Reference Card.” Upon clicking the link, the first thing one sees is information for NTEU. Exhibit 6. The Quick Reference Card explains that the web locator “provides the ability to locate the Union Representatives at any listed CBP location.” *Id.* However, the union representatives listed by the Agency’s Web Tele are solely NTEU representatives. The NTEU chapters are listed with an upload of all of the chapters’ presidents whom one could contact if representation was needed. There is no corresponding information for AFGE in this system. Any employee viewing the Web Tele could not help but understand that NTEU was their only choice for representation.

For those employees who were unsure of how to use Web Tele, the Agency published a final "Web Tele User's Guide," for official use only, dated May 26, 2006. The User's Guide names NTEU at least 35 times while AFGE is not mentioned once in the entire document. Exhibit 23. NTEU is listed 7 times in the tables of contents alone; AFGE is not listed at all in any of the tables of contents. On page 43, CBP explains that "[t]he NTEU option allows...general users to view NTEU contact information and locate the Union Representatives at any listed CBP location." *Id.* No where on page 43 is AFGE named. On page 45, there is an entire diagram explaining how "[t]o view NTEU Information." *Id.* Again, there is no corollary diagram of explaining how to view AFGE information. In fact, in the list of "other info" includes merely NTEU, Management Chain, organization, and location. *Id.* There is no section in the entire Web Tele or Web Tele User's Guide for authorized users to update and general users to locate AFGE representatives. This complete lack of Agency recognition for AFGE's role in representation of the CBP bargaining unit is an outrageous and blatant lack of neutrality. Employees who view either the Web Tele or review the User's Guide cannot help but think that NTEU is their only representative. Thus, the Agency's conduct resulted in employees' drawing a coercive inference that it was in their best interest to vote for NTEU and not AFGE. Therefore, the election should be set aside due to this misconduct alone.

Unlike many election protest scenarios, the resolution of this controversy does not turn on credibility. *See Marine Corps Logistics Base and AFGE Local 1482, supra*, at 1058 ("it is obvious that resolution of the instant controversy turns on credibility."). It is indisputable that the Agency implemented a telephone directory system which names NTEU as the union representative, assists the eligible voters in easily finding an NTEU representative at any CBP location, and is completely devoid of reference to AFGE representation. It is reasonably foreseeable that the high visibility of the web directory and its incontestable lack of neutrality would have a national, favorable effect on the voters' attitude towards NTEU and a corresponding national, negative effect on the voters' attitude toward the AFGE.

b. The Agency has bargained with NTEU, and not with AFGE, regarding matters affecting AFGE-represented employees.

During the pendency of representation proceedings, parties are obligated to maintain existing recognitions and fulfill all bargaining responsibilities. 5 CFR § 2422.34(a). In violation of this regulation, on no less than two occasions, the Agency notified and bargained with NTEU on changes of working conditions without, at the same time, notifying and bargaining with AFGE. This was true notwithstanding the fact that AFGE was the recognized represented of employees, i.e., employees from legacy INS, effected by the impact and implementation of the changes of working conditions. In *Department of the Army and National Federation of Federal Employees*, 29 F.L.R.A. 1110 (1987), the Authority held that it was an unfair labor practice for the Agency to bargain with a challenging union during the pendency of a question concerning representation (QCR) and set aside the election. The Authority explained that for the agency to bargain and negotiate, or appear to bargain and negotiate, with the challenging union would, reasonably interpreted, show a preference for one of two competing labor organizations during the course of an election campaign. Such management conduct interfered with the bargaining unit employees' exercise of their rights to freely choose their exclusive representative and demonstrated impermissible interference with the conduct of a fair election.

As applied to the instant case, in April 2006, the Agency sent an e-mail to Harold Washington, the NTEU chapter president at San Ysidro Port of Entry (POE), asking to discuss the implementation of a change in working conditions for the CBPO (Canine) employees. Exhibit 24. The Agency did not send the AFGE local president at San Ysidro POE any such e-mail or contact him in any way with regard to the CBPO (Canine) change in working conditions notwithstanding the fact that AFGE is the exclusive representative of CBPO (Canine) employees who are legacy INS. *Id.* On or about April 17, 2006, the CBPO (Canine) employee's change of working condition was implemented and employees in the San Diego District Field Office (DFO) received an e-mail notifying them of the change "per the NTEU agreement." *Id.* In May 2006, AFGE

met with Port Director Jim Hynes, Deputy Port Director Bruce Ward, and CBP LMR Specialist Maria Buenrostro who all stated that the Agency was not required to notify AFGE of the proposed change of working conditions but had notified NTEU out of courtesy. *Id.* Informing NTEU “out of courtesy” is a patent illustration of bias.

Similarly, in May 2006, the Agency met with NTEU representatives to vet the selection of the AT-CET team at San Ysidro POE. *Id.* Although AFGE represented CBPOs were included amongst the candidates for the AT-CET team to be vetted, AFGE was neither informed nor invited to the vetting process. *Id.* Selections were made for the AT-CET team and announced in mid-May. Upon learning of the selection, the AFGE local president at San Ysidro met with Deputy Port Director Bruce Ward to inform him that once again, management has shown favoritism to NTEU and to remind him that AFGE remains the representative of legacy INS employees. *Id.* As a result, on or about May 25, 2006, Port Director Hynes informed AFGE that management was going to re-select the AT-CET team. *Id.* AFGE informed him that the damage to AFGE’s reputation had already occurred and would likely harm the outcome of the election. *Id.* AFGE therefore requested management to issue a letter or e-mail to the employees stating that due to CBP’s failure to include AFGE in the AT-CET team process, that the team would be re-selected per AFGE’s demand. *Id.* No such letter or e-mail was sent by management.

These examples are sufficient evidence to establish that the Agency negotiated with NTEU with regard to bargaining unit employees represented by AFGE, the challenging union, during the course of the QCR. Furthermore, AFGE bargaining unit employees learned of management’s negotiations with NTEU when the changes in working conditions were announced. The only reasonable conclusion, therefore, is that management’s actions showed a preference for NTEU and thus interfered with the principles of a fair election. Moreover, approximately 1,300 eligible voters work within the San Diego DFO. As such, the impact of management’s lack of neutrality on the number of eligible voters is nears the number of voters in the margin of victory.

Consistent with the holding in *Army and NFFE, supra*, the instant election should be set aside.

- c. The Agency has permitted NTEU electioneering on the Agency's e-mail system while denying AFGE e-mail access for electioneering and representational matters.**

On or about October 12, 2005, NTEU Chapter 137 sent an e-mail message over the Agency's e-mail system to "All South Florida CBP Employees (including Legacy INS and Agriculture)." See Exhibit 1. This message announced an upcoming visit by NTEU National President Coleen Kelly. *Id.* AFGE thereafter requested to send a similar e-mail regarding an upcoming visit of AFGE National President Gage. The Agency refused this request. *Id.* As a result, the AFGE filed an unfair labor practice. *Id.* (Case No. AT-CA-06-0032). The Acting Regional Director found that this lack of neutrality was not an unlawful labor practice as the Agency was not aware of NTEU's actions until apprised by the AFGE and upon notification, advised NTEU not to send e-mails via the Agency's internal e-mail system for internal union business. *Id.* Nevertheless, on or about December 15, 2005, NTEU Chapter 137 sent out an e-mail via the Agency's e-mail system regarding a general membership meeting. The first line of the e-mail read, "[t]he predominant issue discussed during this meeting was the upcoming election to determine which union will represent CBP personnel." Exhibit 2. Upon information and belief, approximately 2,600 eligible voters are stationed in southern Florida, which means that as many as 2,600 eligible voters may have been impacted by this misconduct. Certainly this number is larger than the margin of victory. That NTEU was able to send yet another electioneering e-mail on the Agency's system after the Agency was on notice shows a distinct lack of neutrality by the Agency.

Other NTEU e-mails containing representation information were also distributed on the Agency's e-mail while AFGE was denied such, without any corrective action taken to restore neutrality in the eyes of the voting bargaining unit employees. On or about October 19, 2005, NTEU's electronic newsletter was distributed throughout the Agency at the Dallas Fort Worth facility's e-mail system. Exhibit 3. On or about April 27, 2006,

the NTEU sent an e-mail on the Agency's e-mail system regarding the Foreign Language Awards Program, grooming standards, seniority, and union dues. Exhibit 7. It is unmistakable that this e-mail was NTEU electioneering, as it stated, "when you vote - ask yourself these questions." *Id.* After learning about this e-mail, AFGE requested to be given an equivalent e-mail. On or about May 22, 2006, Agency representative Michael Wenzler rejected this request. On or about May 28, 2006, NTEU again used the Agency's e-mail server to conduct a survey on election preferences at San Diego DFO's Port of Entries. Exhibit 8. In fact, one AFGE member reported receiving anywhere from 4-10 e-mails per day on the Agency's e-mail service for NTEU electioneering purposes while the AFGE steward at the same location was not permitted the same e-mail access. Exhibit 4. Upon information and belief, approximately 1,800 eligible voters are stationed in Dallas Fort Worth and San Diego DFO together, which means that as many as 1,800 eligible voters may have been impacted by this misconduct. Certainly this number greatly impacted the outcome of the election.

While NTEU has been e-mailing electioneering and representational information on the Agency's server, AFGE has been denied the right to send representational information, even though it is permitted in the AFGE and INS Master Labor Agreement (Agreement). On or about February 16, 2006, AFGE requested to send a broadcast e-mail to bargaining unit employees stationed at the Agency's headquarters building about non-internal, non-election issues, as permitted by the Agreement. Exhibit 5. AFGE's request quoted the Agreement and then stated in relevant part:

I would like to use the e-mail system to communicate with CBP employees at HQ on other than internal business, including to notify them of a meeting at the Reagan Building on some future date to discuss matters referenced in the article [of the AFGE and INS Agreement quoted] above. Please let me know if CBP will allow such use, or will not allow such use.

Exhibit 5. On or about February 22, 2006, the Agency's representative Michael Service responded by characterizing, without cause, that any information would be electioneering and thus prohibited the e-mail:

Unfortunately, your option is unacceptable. First, as we have discussed, the reason you are requesting the use of the CBP E-mail system is, for discussions with CBP employees regarding the upcoming election. This would be considered

as internal union business and not in compliance with the contract article you address. Two, you are not the exclusive representative of the employees who work at CBP and we do not have an easy ability to discern who each employee is specifically represented by.

Id. The Agency's response underscored its lack of neutrality as it blatantly ignored AFGE's right to representation of CBP employees. *Id.* ("you are not the exclusive representative of the employees who work at CBP").

d. The Agency has specialized codes for NTEU union activity in the COSS system.

The Agency has demonstrated a lack of neutrality in its human resources time management database, called the Customs Overtime Scheduling System (COSS). The COSS database records employees' time and attendance, and overtime. It does so through a variety of codes, for example, leave without pay is coded, "LWOP." Exhibit 9. As relevant herein, NTEU stewards and elected officers have specialized codes for official time used for NTEU activities. Specifically, the Agency has designated the following code for NTEU: "UNFPF Union – NTEU Bargaining Unit Activities." *Id.* In contrast, there are no specialized codes for AFGE official time. *Id.* Instead, AFGE official time is coded as "DUNI" which stands for "union – bargaining unit" business. *Id.* The COSS system is another example in which the CBP highlighted NTEU's representative status by naming it as the union representative while at the same time, in contrast, the CBP wiped away any direct reference to AFGE. This underhanded coding system sent a direct message to employees² to vote for NTEU and is another reason why the election should be set aside.

² Upon information and belief, all CBPOs have access to COSS. Therefore, any employee voting in the instant election had the ability to view COSS, and its lack of mention of AFGE, and be reasonably influenced by the lack of Agency neutrality.

e. The Agency has adopted NTEU standards and implemented them Agency-wide.

The Agency has unilaterally adopted standards for personnel actions that stem from the NTEU negotiated agreement. In addition to displaying an utmost lack of neutrality, the Agency's actions are violative of 5 CFR § 2422.34(a) in that the Agency failed to recognize and adhere to the terms and conditions of the existing collective bargaining agreement with AFGE. This conduct would reasonably send a message to the employees that the Agency is favoring the NTEU. This tacit endorsement of NTEU negotiated standards is a barefaced display by the Agency of its lack of neutrality.

Early in the pendency of the QCR, the Agency changed the established past practice of legacy INS and the AFGE and INS contract with regard to annual leave. In its stead, management adopted the NTEU and Customs Agreement with regard to carry over of leave, criteria for approval of annual leave for competing requests, the deadline for requesting annual leave of five days or less, and the date of the annual leave schedule. Exhibits 24-25. Although the Agency did not expressly name NTEU in its October 20, 2004, memorandum adopting NTEU's negotiated annual leave standard, any AFGE represented employee would recognize that the "Article 13" quoted was not that of AFGE's negotiated agreement.³ Exhibit 25.

In another demonstration of favoritism, on or about June 2, 2006, an AFGE elected official received a phone call from a Labor and Employee Relations (LER) Specialist at Laredo, TX, regarding a representation issue. Exhibit 28. The LER Specialist informed AFGE that the standard the Agency applied to determine whether a (non-legacy Customs) CBPO was entitled to a compassionate transfer was that negotiated by the NTEU and U.S. Customs. *Id.* She continued to say that absent a nationwide CBP policy, the Agency had adopted the NTEU negotiated standard. When asked why CBP adopted NTEU's standard to apply in this case, the LER Specialist stated that upon merging, "that was CBP's standard since AFGE was not a U.S. Customs representative." *Id.* By

³ Article 13 of the AFGE and INS negotiated agreement pertains to "Outside Employment." Negotiated standards regarding annual leave is found in Article 35.

adopting the bargained standards from one union over another it expressed a preference for NTEU. Such an expression of preference is the very violation of the principal of neutrality.

f. The Agency permitted NTEU access and orientation of newly hired CBPOs without extending the same to AFGE.

When the Agency was first created, NTEU was permitted, and the only union permitted, to present an orientation to the newly hired once at the training academy. During this orientation, NTEU represented itself as the exclusive representative of those new hires. From October 2003 through June 2004, approximately 2,000 employees were hired, trained, and orientated to believe that NTEU was the sole union representative. Once the election petition was filed and it was clear that NTEU and AFGE had equivalent status, NTEU should no longer have been solely permitted to present at the training academy, present at facility orientations, or both. Nevertheless, NTEU was permitted to present orientations at the academy while AFGE was not afforded the right to make a similar presentation. Exhibit 24. Attendees at the training academy were given NTEU benefits information. *Id.* NTEU was also permitted to distribute informational material at the dining facility.

Moreover, NTEU was permitted by management to present orientations at ports of entry within San Diego DFO; Bridge of the Americas, El Paso, TX; Blaine POE; and Seattle POE; AFGE was not so permitted. Exhibits 24, 37, and 42. In response to AFGE's request to be permitted, like NTEU, to give a presentation at orientation, the Agency based its denial on its "understanding that the Agency has not hired any new employees since October 2003 that would be covered by the NINSC contract." Exhibit 42. At Blaine POE and Seattle POE, management allotted NTEU representatives 30 minutes during the paid orientation. Exhibit 37. In other words, new hires were on salary when learning about the benefits of NTEU membership. At said orientations, management would allow NTEU representatives to discuss union membership, benefits, and bargaining power with the new hires. Exhibit 24. Even worse, NTEU would engage

in electioneering and explain why they believed NTEU was superior to AFGE. *Id.*

It is reasonably foreseeable that permitting one union to make a one-sided presentation to all newly hired CBPOs and permitting the same union to distribute take-home material describing the benefits of joining to all newly hired CBPOs, would positively influence the vote in favor of that union while at the same time, would negatively influence the vote against the opponent union. This is exactly what happened here over the entire course of the Agency's existence, including but not limited to the entire pendency of the QCR. The NTEU's presentation reached more eligible voters than the margin of victory, and thus unquestionably effected the outcome of the election.

2. Lack of Access

The Agency has stymied AFGE's efforts to contact AFGE's legacy bargaining unit employees as well as the rest of the bargaining unit in order to provide representational information, election material, or both. The concept of fair, free and honest elections means more than just an honest ballot. *U.S. v. International Broth. of Teamsters*, 2000 WL 1682963 (S.D.N.Y. 2000). Fair elections demand that individuals who are voting are given a meaningful choice of candidates. *Id.* This meaningful choice includes the right to receive proper and complete information about the candidates so that the election process is democratic and informed. *Id.* The Agency has engaged in numerous activities that have denied AFGE access to the voters and thus denied AFGE the ability to give those voting meaningful information. The Agency has, amongst other similar conduct, denied AFGE access to new hires, Exhibit 24; refused to provide information as to the names and corresponding locations of employees represented by AFGE voting in the upcoming election, or both, Exhibit 10-12; denied access to meeting with employees represented by AFGE, Exhibit 13-14 ("[Agency] told me that unless the visit was for union representation, he would deny the request."), 15 ("Detroit Field Office management will allow each union requesting access to its facilities, to meet on a one-time only basis at a determined facility and/or station, or airport."); made last minute

changes to the room location for already publicized meetings, Exhibits 17, 26-27; and demanded escorts for AFGE representatives while allows NTEU unescorted access, Exhibit 16 - 17.

- a. **The Agency refused AFGE's request for both unions to have a right to a pre-election bargaining unit mailing and gave NTEU the veto power over the right to access the entire electorate.**

In April 2006, AFGE requested that the Agency facilitate a pre-election mailing, at no cost to the Agency, to the *entire* bargaining unit for both unions. Exhibit 18. This request was based on multiple access concerns. First, the numerous number of employee locations, i.e. well over 300 locations across the country, in Canada, and overseas, made it difficult if not impossible to reach all voters. Second, due to September 11, 2001, there was heightened security at many of the locations. AFGE representatives were unable to reach voters in certain locations as entrance was barred by locked doors and armed guards. Further, even when AFGE officers and staff members arrived at facilities to speak with potential voters, AFGE was escorted directly into a conference or break room to wait until interested voters found us, see Exhibits 16-17, 30 ("We were escorted by management, until such time as we set up in the designated areas."). Third, Agency flatly denied or limited visits by union representatives, see Exhibits 13-17, 29-30. Fourth, inability to mail directly to the entire bargaining unit as in the federal sector the employer is prohibited from providing the union candidates with the addresses of the eligible voters due to the Privacy Act, see *U.S. Dept. of Defense v. Federal Labor Relations*, 510 U.S. 487 (1994), and AFGE's own database with mailing addresses amounted to less than one-fourth of the bargaining unit. The Agency itself recognized that the election was precedential in nature due to "its size and complexity." Exhibit 21. It thus belies reason that the Agency would discount AFGE's concerns regarding the unions' abilities to ensure that accurate information reached the entire electorate.

As the proposed mailing would have been available to both unions, it would not have been a violation of Section 7116(a)(3). Affording equal treatment to two unions of

equivalent status seeking access to the bargaining unit in an election context does not equate to sponsorship, control, or assistance. *Social Security Administration and NTEU and AFGE*, 52 F.L.R.A. 1159 (1997). Thus, providing both unions a chance to reach each member of the bargaining unit eligible to vote in the instant election while protecting the voter's privacy interests, would have been a step towards ensuring a fair, free, and honest election. Instead, the Agency gave NTEU veto power over the proposed mailing. Exhibit 19 ("before entertaining your proposal, it is important to know whether AFGE has obtained NTEU's concurrence for this arrangement."), and 21 ("NTEU has expressed its opposition"). In effect, the Agency deferred a management decision to NTEU, a union that represented two-thirds of the employees eligible to vote and appeared to have access to all POEs. This is a transparent example of Agency's lack of neutrality.

As articulated in *Excelsior Underwear Inc.*, 156 NLRB 1236, 1240-1241 (1966), elections for union representation must be conducted in a manner free

from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed.

As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party might be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious--that the access of all employees to such communications can be insured only if all parties have the names and addresses of all the voters. In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the

voters will be exposed to the arguments for, as well as against, union representation.

As discussed above, unlike in the private sector, receipt of home mailing addresses is limited by the Privacy Act. Nevertheless, like the private sector, guaranteeing a democratic election remains important. In the instant case, AFGE did not have the opportunity to adequately inform all eligible to vote about the pros and cons of the voting choices.

Entering into the QCR, AFGE already had an uphill climb in that it only represented approximately less than one third of the eligible voting population whereas NTEU represented approximately two thirds. Regardless of this disadvantage, AFGE entered the QCR expecting what the law guarantees – equivalent status and equivalent access. However, AFGE’s access was less than equivalent. As discussed above, AFGE was curtailed in its ability to reach the voting population via government e-mail, although NTEU repeatedly electioneered via the Agency’s e-mail system. *See supra* Section 1(c)(The Agency has permitted NTEU electioneering on the Agency’s e-mail system, while denying AFGE e-mail access for electioneering and representational matters.). AFGE was also curtailed in its ability to introduce itself and its strengths to the newly hired voting population. *See supra* Section 1(f)(The Agency permitted NTEU access and orientation of newly hired CBPOs without extending the same to AFGE.). AFGE advised the Agency of numerous obstacles it faced via e-mail, for example Exhibit 3, and in the letter requesting the Agency facilitate the mailing, Exhibit 18. One of the obstacles that the Agency created and which supported AFGE’s requested mailing was the Agency’s refusal to provide the names and corresponding locations of employees represented by AFGE, voting in the upcoming election, or both, Exhibit 10-12. In toto, AFGE was unable to reach the entire voting population. As a result, the electorate was unable to learn of arguments in favor of one union’s representation over another, and more employees than the margin of victory was completely unaware of AFGE’s point of view. Agency’s facilitation of a mailing, therefore, would have ensured a fair, free and honest election.

The Agency perceived AFGE's request that the Agency facilitate a mailing for both unions as an "election conduct agreement." Exhibit 21. Based on this mischaracterization, the Agency provided NTEU, the union which already had greater access to the eligible voters, the right to veto the request of a neutral mailing. This veto power gave NTEU an unwarranted and unlawful advantage. A better characterization for the requested mailing is a method of repairing pre-election conduct that impeded the electorate from having a free and reasoned choice and impeded a fair election.

b. The Agency required AFGE representatives to be escorted by Agency officials while permitting NTEU representatives unfettered access.

The Agency restricted AFGE access within its headquarters' building by requiring a management escort at all times. Exhibit 16-17. In contrast, the Agency permitted at least one NTEU representative unfettered access. Exhibit 16. Upon information and belief, approximately 1,000 eligible voters are stationed in the headquarters building, which means that as many as 1,000 eligible voters may have been impacted by this misconduct. On July 19, 2005, three AFGE elected officials – all of whom are DHS employees – were present at headquarters for a labor-management briefing. *Id.* These three AFGE officials were escorted from the entrance to headquarters to the meeting room. Present also at the briefing was an NTEU attorney representative, who was not a government employee. *Id.* During the briefing, the NTEU attorney left the briefing and walked down the hallway unescorted. *Id.* During the length of the briefing, he did not return. When it was pointed out to a management official that the NTEU attorney was permitted to walk unescorted, the management official responded, "oh, I am sure he will just find his own way out." Notwithstanding the fact that the NTEU attorney was permitted to walk unescorted, the three AFGE representatives were escorted out of the building when the briefing came to conclusion. In addition to the lack of Agency neutrality, this contrast could have reasonably led an employee to perceive AFGE as an interloper.⁴

⁴ The Authority has long recognized that Unions are not interlopers but rather are in the public interest. See *Social Security Administration and AFGE*, 24 F.L.R.A. 543 (1986).

The local president of AFGE Local 1924 is an employee of the Department of Homeland Security and the exclusive representative of legacy INS employees who work at the headquarters building. Nevertheless, since Spring 2003, he has been repeatedly told and reminded by management officials that he must be escorted when meeting with his bargaining unit employees at headquarters. Exhibit 16. On several occasions, Michael Service informed him that CBP management did not deem it appropriate for the AFGE to have the freedom to walk about the facility unescorted, "soliciting grievances" from employees. *Id.* On each such occasion, the local AFGE president has responded that it is his duty, as the exclusive representative, to represent its employees in grievances, which requires access to the employees and the ability to discuss working conditions with them. *Id.* On or about February 28, 2006, the local AFGE president received an e-mail from Michael Service which stated in relevant part,

as we have discussed non-CBP personnel are not allowed in work areas unless escorted by a labor relations official. A union does not have an unfettered right to the solicitation of employees during an employees regularly scheduled duty hours.

With the imposition of this escort policy, the Agency limited access not only for the purposes of electioneering but also for the purposes of proper union representation. Impeding AFGE's ability to properly represent its own bargaining unit within headquarters could not but damage AFGE's reputation as an able representative.

c. The Agency denied site visits for the purposes of electioneering.

The Agency greatly impeded or outright denied site visits to AFGE representatives. AFGE representatives tried for months to arrange for meetings with CBPOs at the Ronald Reagan Building and National Place. Beginning in February 2006, AFGE representatives engaged in back and forth conversations and e-mail correspondence with Michael Service. Exhibits 5, 17, and 31-32. As Mr. Service was for months unable to locate a room for the meeting, the meeting date was repeatedly delayed. *Id.* Furthermore, the Agency impeded AFGE efforts to notify the employees of the meeting. *Id.*

With regard to the meeting at the Ronald Reagan Building, at first Mr. Service

offered to “post an invitation . . . and place it on an easel in the CBP entrance space at the front and back entrances.” Exhibit 5. However, Mr. Service, then refused to post the invitation via government e-mail, refused to permit AFGE representatives to distribute the invitations via desk drops, and recanted his offer to place a “poster [on an easel] to be placed in the front and/or rear CBP space.” Exhibit 17. Instead, Mr. Service suggested that AFGE place the invitation on bulletin boards in the break-rooms. *Id.* While this may seem reasonable, one must remember that it was the same Mr. Service who forbade AFGE representatives from reaching those break-rooms unescorted. Exhibits 16-17; *see supra* Section 2(b) (The Agency required AFGE representatives to be escorted by Agency officials while permitting NTEU representatives unfettered access.). Ultimately, May 11, 2006, and a room was identified for the meeting, and announcements printed.

On May 11, 2006, AFGE representatives arrived at the Ronald Reagan Building at approximately 7:00 a.m. They had arranged through the building’s management company for a table in order to display AFGE materials, including but not limited to the meeting announcement. Exhibit 26. The management company set up and placed the table in a space by the elevator bank. Approximately one hour into the leafleting, Mr. Service approached the representatives and instructed them that (1) they could not be in that space, and (2) they could not have a table display of information. At Mr. Service’s direction, the AFGE representatives packed up the material from the table and moved to another location within the building. The AFGE representatives continued to distribute the meeting information. At approximately 8:40 a.m., Michael Service came back and instructed the AFGE representatives that they must leave the building. When the AFGE representatives returned to set up the meeting, Mr. Service informed them that he had to change the room location for the meeting from room B1.5-10 to room B1.5-25. Without the benefit of e-mail or a desk drop, there was no effective mechanism by which to announce to the CBP employees who worked at the Ronald Reagan Building that the room had changed other than to post a sign on the door of the first room with the new room information. Exhibit 27. The make-shift room change leaflet looked sloppy and unprofessional, thus tarnishing AFGE’s image. *Id.* One AFGE representative observed that the first room, B1.5-10, was empty between the meeting hours of 11:30 a.m. – 1:30

p.m. There was no apparent reason that AFGE could not have used the room but for Mr. Service's continued run around with regard to the AFGE meeting. Consequently, turn out was limited. The next day, Mr. Wenzler called Peter Winch, AFGE National Organizer, and told him that a mistake had occurred and that AFGE should have been allowed to remain in the original space and to have use of the table set up by the building's management company.

With regard to the meeting at the National Place building, Mr. Service instructed AFGE representatives that (1) it must be escorted to the meeting room, Exhibit 31; (2) cannot distribute fliers anywhere inside the work area, *id.*; (3) cannot distribute any materials in the common space including the lobby, Exhibit 32; and (4) cannot e-mail any notice of meeting to the employees' e-mail addresses, *id.* Faced with these Agency restrictions, AFGE had absolutely no method by which to contact the employees stationed at National Place to inform them of a meeting. These Agency restrictions, therefore, were tantamount to a tacit denial of any meaningful meeting with the electorate stationed at National Place.

The Agency also denied site visits to AFGE representatives while permitting NTEU representatives to visit at the same sites. For example, on or about December 4, 2005, AFGE representatives requested a site visit at the Vancouver POE, British Columbia, Canada, for December 6, 2005. Exhibit 13-14. The day before the scheduled meeting, Agency official Mr. Estell approached AFGE representative Gary Tober and stated that unless the visit was for union representation, he would deny the request. Exhibit 13. Furthermore, Mr. Estell stated that he did not have time to show Mr. Showalter, AFGE Council 117 President, the port and that the staff was too busy. *Id.* Lastly, Mr. Estell would require Mr. Showalter to obtain a "country pass" issued by the US Consulate before being allowed on the premises. *Id.* On or about January 17, 2006, Michael Wenzler, stated via e-mail that the reason for the denial was due to insufficient notice. *Id.* While at first blush Mr. Wenzler's explanation may seem reasonable, it doesn't actually stand to reason. Mr. Estell expressly stated that the reason for the denial was due to the content of the visit, not the timing. This example is made all the more disturbing

when viewed in the context of Agency's lack of neutrality. Per an NTEU representative, Mr. Estell did not require NTEU to obtain a "country pass." Exhibit 14.

Upon information and belief, approximately 1,200 eligible voters are stationed in the Ronald Reagan Building, National Place and Vancouver POE, which means that as many as 1,200 eligible voters may have been impacted by the misconduct exemplified above. However, these are just a few examples amongst many. Therefore, the impact nationwide easily effected the outcome of the election. The combination of the site visit denial and the lack of neutrality greatly hindered AFGE's ability to convey its message and show its strengths. It is a reasonable inference, therefore, that this hindrance directly resulted in a reduced vote in the election.

3. Interference with Representation

The Agency repeatedly failed to recognize AFGE as an exclusive representative, unilaterally altered past practices, and failed to adhere to the terms and conditions of the existing collective bargaining agreement with AFGE. 5 CFR § 2422.34(a). The Agency ignored AFGE grievances and delayed arbitrations, while at the same time the Agency and NTEU were settling national and well publicized grievances. The Agency unilaterally changed conditions of employment without articulating exigent circumstances. Additionally, the Agency stalled at giving contractually required notice of changes in working conditions in the rare instances in which it did give such notice. This interference with representation harmed AFGE's ability in this election period two-fold, first, it made AFGE's appear ineffective in its representation, and second, it made NTEU look even more effective in its representation in comparison.

a. Failure to Adhere to the Contractual Grievance and Arbitration Provisions.

At the same time that the Agency and NTEU were settling national and well publicized grievances, the Agency interfered with AFGE's ability to interact with its bargaining unit, ignored grievances, and delayed arbitrations. NTEU's arbitrations and

settlement agreements were well publicized within the workforce. Evidence of the possible influence of improper conduct is one element of proof necessary to sustain an election protest. *Federal Deposit Insurance Corporation and NTEU*, 38 FLRA 952 (1990). The NTEU utilized the Agency's e-mail system to announce its "major win in fight against grooming standards." Exhibit 3. The NTEU utilized the Agency's e-mail system in February 2006, to announce an arbitration decision "ordering CBP to rerun its employee awards process for 2005." Exhibit 38. The Agency's Office of Field Operations announced on May 4, 2006, via the Agency's e-mail system that "[t]he NTEU and CBP are pleased to announce that they have successfully reached an agreement which allows CBP Officers who attended basic training at the FLETC to receive compensation for their participation in Saturday training sessions." Exhibit 33 (emphasis added). This announcement came right on the heels of the mailing of election ballots. Plainly, this announcement was forefront in the minds of the CBPOs -- particularly those gaining from the settlement -- when receiving the ballots. The reach of the government e-mail announcing the grooming standard award, the employee award rerun, and the Saturday training award meant that a large percentage of eligible voters were directly affected by the pre-election announcements.

In contrast, the Agency has gone to lengths to interfere with AFGE's representational duties in grievances and arbitrations in violation of statute and case law. The AFGE negotiated grievance procedure -- which includes arbitration -- continued in full force and effect at all times relevant to the pendency of the QCR. Even though the Agency argued during the pendency of the QCR that the AFGE negotiated agreement was expired, it is well settled that even following the expiration of a collective bargaining agreement, mandatory subjects of bargaining, such as a grievance procedure, continue by operation of law, to the maximum extent possible, in the absence of either an express agreement to the contrary or the modifications of those conditions of employment in a manner consistent with the Statute. *United States Border Patrol Livermore Sector, Dublin, Cal.*, 58 FLRA 231 (2002); *Department of Army, 90th Regional Support Command and AFGE Local 1017*, FLRA ALJ Dec. Rep. No. 144 (1999); see also *FAA, Northwest Mountain Region, Seattle, Washington and Federal Aviation Administration, Washington, D.C.*, 14

FLRA 644 (1984); *Department of Transportation, Federal Aviation Administration, San Diego, California*, 15 FLRA 407 (1984). The Agency's repeated interference with AFGE's representational duties weakened AFGE's stature and effected the outcome of the election.

The Agency surveillance of AFGE representatives hindered AFGE from learning about issues that were deserving of grievances. Exhibits 16, 30, 31. In fact, one Agency official expressly stated that he did not want AFGE "soliciting grievances" from employees. Exhibit 16. Moreover, the Agency delayed AFGE grievances and arbitrations. For example, in the San Diego DFO, AFGE has invoked at least four arbitrations since December 2005. Exhibit 24. To date, none have been heard. *Id.* In April 2006, the Local President from AFGE Local 2850 questioned John McCabe about why he had not yet received an arbitrator's list as requested, or any other information pertinent to the arbitration process as required by the collective bargaining agreement. *Id.* The Agency responded that there was a new procedure of "first come, first serve." *Id.* Mr. McCabe explained that NTEU cases would be heard before AFGE cases because there were more pending NTEU cases than AFGE cases. *Id.* The AFGE collective bargaining agreement does not contain a "first come, first serve provision" nor was it a past practice. The Agency's failure to process these arbitrations is an unfair labor practice which impacted the outcome of this election as it made AFGE appear powerless in the eyes of the electorate.

There are other examples of the Agency's efforts to meddle with AFGE's representational endeavors. AFGE filed a national grievance against the Agency in September 2005 which went unacknowledged by the Agency. Exhibit 34. Additionally, the Agency stalled arbitrations. In a grievance challenging the denial of official time, AFGE invoked arbitration on or about January 2006, and contacted the Agency by letter in March and May. *Id.* To date, the Agency has failed to provide AFGE with the name of the next arbitrator on the parties' arbitration roster or to engage in the arbitration process consistent with the collective bargaining agreement. *Id.* Similarly, in a grievance challenging the denial of the Foreign Language Award Program pay, the arbitrator has

sought a date for arbitration since May 10, 2006. Exhibit 35. The Agency has stated that it will only be available for hearing “in late October or November.” Exhibit 36. The Agency explains that “due to unexpected attorney attrition...this case cannot be reassigned at this time. *Id.*”

The Agency refused to implement AFGE arbitration awards. In Spring 2005, an arbitration decision was issued requiring the Agency to implement the entire local supplemental agreement, including but not limited to the continuity of the Health Improvement Plan (HIP) program. Exhibit 24. The HIP program provides CBPO (Enforcement) the opportunity to participate in physical activities, i.e. exercise, for up to three hours per week for the purpose of maintaining a physical well being necessary to perform their strenuous duties. After the Agency filed exceptions, the Authority upheld the arbitrator’s decision. In January 2006, John McCabe, the Chief Labor Management Relations Specialist for the San Diego DFO, informed AFGE that the Agency would not implement the arbitrator’s decision because it showed favoritism to AFGE employees. *Id.* The Agency’s refusal to implement the arbitrator’s decision in favor of AFGE while at the same time implementing decisions favorable to NTEU is a disgraceful demonstration of favoritism. It is reasonably foreseeable that this demonstration of favoritism – with its wide spread publicity of NTEU representational “wins” – not only was an unfair labor practice but also impacted the outcome of the election. Therefore, this election should be set aside.

b. Unilateral Changes in Working Conditions

The time period before an election has often been referred to as the “laboratory conditions.” *Department of Justice, Immigration and Naturalization Service*, 9 FLRA 253 (1982), rev’d as to other matters sub nom. *U.S. Department of Justice v. FLRA*, 727 F.2d 481 (5th Cir.1984). During this time period, it is incumbent on the employer to maintain the existing conditions of employment until the QCR is resolved, unless exigent circumstances are existent and articulated. *Id.* The Authority requires management to

maintain past practices not covered by the collective bargaining agreement, see *Defense Distribution Region West and AFGE Local 1546*, 55 FLRA 93 (1993)(Respondent violated section 7116(a)(1) and (5) of the Statute by changing past practices impacting on conditions of employment, specifically the use of headsets for radios, that were not necessary to change during the pendency of a QCR.). The Authority has found that an agency's unilateral change in working conditions during an election period is reason enough to set aside an election. *Department of Justice, INS and AFGE, National Border Patrol Council and IBPO*, 9 F.L.R.A. 253 (1982).

In the instant situation, during the laboratory conditions, changes were made unilaterally by the Agency that have a nationwide effect and which made AFGE appear powerless and ineffective. Therefore, the Authority should set aside this election. As discussed above, the Agency adopted NTEU negotiated standards for the entire workforce, thus unilaterally changing the working conditions of AFGE represented CBPOs. *See supra*, Section 1(e)(The Agency has adopted NTEU standards and implemented them Agency wide.). On or about May 8, 2006, the Agency notified AFGE of revisions to the CBPO position description and notice of a new position, the CBPO (Admissibility) position. Exhibit 41. AFGE objected to the implementation of an admissibility officer position and revisions to the generalist CBPO position description before the bargaining can commence per the AFGE Agreement. Exhibit 43. The notice stated that the Agency planned to implement this position by late June 2006. According to Article 9 of the AFGE Agreement, the AFGE had 22 workdays to request information, demand to bargain and submit proposals. As applied to the notice, that was June 12, 2006. AFGE notified the Agency of its plan to submit a demand to bargain with the requisite proposals, and a request for information. Even were Agency to respond immediately to AFGE's request for information, the amended proposals would be due July 3, 2006. It was obvious, therefore, that were implementation to actually occur by late June, this would be prior to the commencement of bargaining. The Agency's plan of operation appeared to be a tacit rejection of recognition of the AFGE Agreement during the pendency of the QCR.

The Agency has also unilaterally changed working conditions at various ports of entry. For example, on or about March 31, 2005, Annette Bywaters, a management official in Florida, notified AFGE Local 1458 by e-mail of proposed changes to tours and days off for the bargaining unit employees at Port Everglades (PEV). The specific changes to the schedule included but were not limited to the implementation of a 7-day workweek at PEV. Across the country, in April 2006, San Ysidro POE management changed the days off of 8 legacy INS officers on the midnight shift in violation of the local agreement without notification to the union. Exhibit 24. In June 2006, Deputy Port Director Bruce Ward informed AFGE that per Adele Faisano, District Field Officer, San Ysidro POE management was not going to honor the previous local Agreement. *Id.* Similarly, on or about May 11, 2006, Ana Hinojosa, Area Port Director for the Los Angeles International Airport, distributed a memorandum to AFGE bargaining unit employees represented by AFGE Local 505 announcing that their alternative work schedule would be terminated as of June 11, 2006. Exhibit 40. No explanation of the exigent circumstances was articulated in the memorandum. *Id.* These examples are indicative of problems experienced Agency-wide wherein management did not maintain the status quo during the pendency of the pre-election period. In aggregate, management's degradation of AFGE's role as representative and AFGE's collective bargaining agreement impacted deleteriously on the outcome of the election. Therefore, to remedy the unfair labor practices committed by the Agency, the Authority should set aside this election.

4. Procedural Errors

The large number of challenged ballots is a procedural error that warrants setting aside the election. The AFGE challenged the exclusion of almost 5,000 employees, almost 20% of the entire population of eligible voters. This is more than the Authority's practice to allow only 15% of the entire population of voters' eligibility to remain in dispute. Of the approximately 5,000 employees, approximately 900 employees were in the Air and Marine Operations. At the election count, Agency representatives mentioned to an AFGE observer that they had changed their position on Air and Marine Operations'

employees and are now considering restoring these employees into the bargaining unit. This unit is closely affiliated with AFGE's represented unit of the Border Patrol, and as such would likely have voted for AFGE. Of the remaining challenged employees, approximately 950 employees were excluded by the Agency for "national security reasons," although they had in the past been represented by the AFGE when they were part of the Coast Guard and INS. Had these voters believed themselves to be part of the bargaining unit, they likely would have voted for AFGE.

The Agency also failed to follow regulations in the manner in which the notice was posted. This procedural error is sufficient cause to set aside the election. Regulation requires an activity to post a notice of election

in places where notices to employees are customarily posted and/or distributed in a manner by which notices are normally distributed. The notice of election will contain the details and procedures of the election, including the appropriate unit, the eligibility period, the date(s), hour(s) and location(s) of the election, a sample ballot, and the effect of the vote.

5 CFR § 2422.23(b). In the instant case, the Agency sent an electronic election notice with a hyperlink to the Agency's intranet web site. Exhibit 44. The e-mail itself did not include the appropriate unit, eligibility period, the dates of the election, or a sample ballot. AFGE objected to this method of notice, as the notice was not provided to voters. *Id.* Rather, voters were invited to link to it. In fact, voters contacted AFGE to remark that they were unable to open the hyperlink. Exhibit 45. This procedural error and violation of election regulation impacted on voters nationwide. As a result, the Authority should set aside the election.

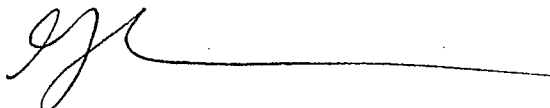
CONCLUSION

The Agency's lack of neutrality as exemplified by its announcement and implementation of a web-based directly which was completely devoid of AFGE recognition is sufficient in and of itself to set aside the instant election. This, coupled with the numerous other infractions enumerated herein can only result in the set aside of this election as the norms of a fair and democratic election was not realized in this case.

Respectfully Submitted,



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Certificate of Service

I certify by my signature below that the foregoing Election Objections and the exhibits in support thereof were sent postage prepaid via first class mail this 6th day of July, 2006, to:

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