

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE:

November 5, 2007

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

Respondent

AND

se No. WA-CA-07-0501

Ca

NATIONAL LABOR RELATIONS BOARD UNION

Charging Party

Pursuant to section 2423.27(c) of the Final Rules and Regulations, 5 C.F.R. § 2423.27(c), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed is a Motion for Summary Judgment and other supporting documents filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

Respondent

AND

Case No. WA-CA-07-0501

NATIONAL LABOR RELATIONS BOARD UNION

Charging Party

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 5, 2007**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

PAUL B. LANG
Administrative Law Judge

Dated: November 5, 2007
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

Respondent

AND

Case No. WA-CA-07-0501

NATIONAL LABOR RELATIONS BOARD UNION

Charging Party

Stefanie Arthur
For the General Counsel

Barry F. Smith
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

On August 15, 2007, the Regional Director of the San Francisco Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the National Labor Relations Board, Washington, D.C. (Respondent) committed an unfair labor practice in violation of §7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by refusing to bargain with the National Labor Relations Board Union (Union or Charging Party) over conditions of employment for employees of the Respondent who are members of a consolidated bargaining unit of which the Union was certified by the Authority as the bargaining representative. The Respondent filed a timely Answer in which it admitted that it had refused to bargain as alleged, but denied that it had

committed an unfair labor practice because the Authority had unlawfully certified the consolidated bargaining unit.

The General Counsel has filed a Motion for Summary Judgment with an accompanying affidavit and exhibits and a supporting brief. The Respondent has filed an opposition to the General Counsel's motion. The hearing date of October 9, 2007, was indefinitely postponed pending the disposition of the motion.

Legal Standard for Summary Judgment

Section 2423.27 of the Rules and Regulations of the Authority provides for the submission of summary judgment motions which must demonstrate that:

. . . there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Such motions shall be supported by documents, affidavits, applicable precedent, or other appropriate materials.

In considering motions for summary judgment, the Authority will apply the same criteria used by federal courts in accordance with Rule 56, Federal Rules of Civil Procedure, *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 222 (1995).

Having examined the General Counsel's motion according to applicable legal criteria I have determined that the summary judgment process is appropriate to this case.

Preliminary Issues

The Respondent's opposition to the General Counsel's motion was accompanied by a motion to incorporate by reference the full record of the Authority in Case No. WA-RP-06-0019 (certification case). That motion has not been opposed by the General Counsel.

The record which the Respondent seeks to have incorporated is of the case in which the Authority affirmed the decision of the Regional Director of the San Francisco Region in certifying the consolidated bargaining unit. The ultimate issue of the legal validity of the Authority's decision in the certification case is likely to be determined by the United States Court of Appeals which reviews the decision of the Authority in this case. Therefore, the

incorporation of the full record is appropriate and, pursuant to §2423.21 of the Rules and Regulations of the Authority, the Respondent's motion is granted.

Subsequent to the filing of its response to the General Counsel's motion the Respondent, by its counsel, delivered a letter to the Office of Administrative Law Judges requesting that the Authority take "administrative notice"^{1/} of the filing by the National Labor Relations Board Professional Association of a unit clarification petition with the Washington Regional Office of the Authority; the petition and forwarding letter are attached. The purpose of the petition is to seek consolidation of bargaining units of headquarters Board-side and General Counsel-side attorneys and other professionals performing "comparable legal work".^{2/} As grounds for its request, the Respondent states that:

Depending on the course of any further developments in this similar matter, the case may become germane to the instant proceeding in some manner, at which time we would set forth the particulars of our position in an appropriate filing. . . . For now, in the interest of complete disclosure and in order to preserve the record, we request that the Authority take administrative notice of this filing.

The General Counsel has filed an opposition to the Respondent's request on the grounds that the unit clarification petition has no relevance to the sole issue in the instant case of the Respondent's refusal to bargain. The General Counsel also maintains that the proffered petition is not an official record of the Authority and is not entitled to official notice.

While the concept of official notice is broad enough to encompass the unit clarification petition, §2429.5 of the Rules and Regulations of the Authority allows only for the acceptance of "such matters as would be proper". The Respondent's conjecture that the petition may eventually

^{1/} I will assume that the Respondent is referring to official notice as described in §2429.5 of the Rules and Regulations of the Authority.

^{2/} The terms "Board-side" and "General Counsel-side" describe the bargaining units, both at the Respondent's headquarters and in the field, which were consolidated in the certification case.

become germane to this case is insufficient to overcome the fact that it has no conceivable relevance to the only issue now before me, which is whether the undisputed material facts show that the Respondent has refused to bargain over the conditions of employment for a certified bargaining unit. While a unit clarification petition by a labor organization other than the Charging Party, and involving bargaining units other than the one at issue here, may be of some interest to the parties in this case, it cannot validly affect its outcome. Accordingly, it is not a material fact and is not entitled to consideration in a summary judgment proceeding, *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). The Respondent's request for official notice is denied.

Findings of Fact

The General Counsel relies on an affidavit by Eric Brooks, President of the Union, with accompanying exhibits, and on the Complaint and Answer in the instant case. The Respondent has not disputed any of the factual findings proposed by the General Counsel, but bases its opposition to the motion on a legal challenge to the decisions of the Regional Director and the Authority in the certification case. Accordingly, I have adopted the following findings of fact which have been set forth in the Brooks affidavit or are derived from the Complaint and Answer:

1. Respondent is an agency as defined in §7103(a)(3) of the Statute (Complaint and Answer, ¶2).

2. The Union is a labor organization within the meaning of §7103(a)(4) of the Statute (Complaint and Answer, ¶3).

3. On December 19, 2005, the Union filed a petition with the Regional Director of the Washington Region of the Authority seeking consolidation of the four separate bargaining units of the Respondent which were represented by the Union. The petition, docketed as Case No. WA-RP-06-0019, was transferred to the San Francisco Region of the Authority on January 27, 2006 (Brooks affidavit, ¶4).

4. On September 6, 2006, the Regional Director of the San Francisco Region issued a Decision and Order Granting the Petition for Consolidation and Directing an Election Among Professional Employees (Brooks affidavit, ¶4).

5. The Respondent submitted a timely Application for

Review and Motion for Stay of the Regional Director's Decision and Order. The Authority granted the application and denied the Motion for Stay. On March 14, 2007, the Authority issued a Decision and Order on Review in which it affirmed the finding of the Regional Director that the proposed consolidated bargaining unit was appropriate under the Statute. The Decision and Order on Review are set forth in *National Labor Relations Board and National Labor Relations Board Union*, 62 FLRA 25 (2007) (Brooks affidavit, ¶5).

6. During April and May of 2007 the San Francisco Region of the Authority conducted an election among the Respondent's professional employees to determine whether they wished to be included in a consolidated unit with nonprofessional employees (Brooks affidavit, ¶6).

7. On May 31, 2007, the San Francisco Region of the Authority issued a Tally of Ballots showing that a majority of professional employees voted for inclusion in a bargaining unit with nonprofessional employees (Brooks affidavit, ¶7).

8. On June 8, 2007, the Union was certified as the exclusive representative of a nationwide consolidated unit of the Respondent's employees described as follows:

Included: All nonprofessional employees of the National Labor Relations Board and Office of the General Counsel^{3/}; and all professional employees of the General Counsel in the Regional, Subregional and Resident Offices.

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

(Complaint and Answer, ¶9)

9. Since June 25, 2007, and continuing to date, the Respondent has refused to recognize and bargain with the Union as the exclusive representative of the bargaining unit which was certified on June 8, 2007 (Complaint and Answer, ¶12).

^{3/} In spite of the redundant terminology, all of the employees in the bargaining unit are employed by the Respondent. As used in the unit certification "National Labor Relations Board" refers to employees of the Respondent who are on the staffs of Board members.

10. On June 25, 2007, John E. Higgins, Jr., the Respondent's Deputy General Counsel, sent a memorandum to Brooks stating that the Respondent would not bargain with the Union for the consolidated unit. Higgins further stated that it was the intention of the Respondent to test the certification of the consolidated unit by refusing to bargain (Brooks affidavit, ¶10 with exhibit).

11. In a memorandum dated June 25, 2007, to "All Agency Employees" Ronald Meisburg, the Respondent's General Counsel, stated:

After much deliberation, I have decided to test certification of this combined Board-General Counsel unit because it raises profound issues regarding the structure and operation of the Agency, and the independence of the General Counsel's office. At my direction, the NLRBU has been advised that I am refusing to bargain over conditions of employment in the new bargaining unit.

(Brooks affidavit, ¶11 with exhibit)

Discussion and Analysis

In its Motion to Incorporate by Reference the Respondent has tacitly acknowledged that its refusal to bargain, which led to the issuance of the Complaint and Notice of Hearing as well as the Motion for Summary Judgment, was designed to have the merits of the certification of the consolidated unit again reviewed by the Authority and, most likely, by at least one appellate court. That acknowledgment is corroborated by the memoranda of June 25, 2007, from Higgins and Meisburg and by the fact that, in its opposition to the motion by the General Counsel, the Respondent has only presented arguments which were, or could have been, presented to the Regional Director and the Authority in the certification case.

The Respondent admitted that it continues to refuse to bargain over the conditions of employment for the consolidated unit that was certified by the Authority in Case No. WA-RP-06-0019. In accordance with §2422.31 of the Rules and Regulations of the Authority, the merits of the unit certification, which is the only basis of the Respondent's defense, may only be reviewed by the Authority in a representation proceeding. In the language of §2422.33 of the Rules and Regulations of the Authority:

Remedial relief that was or could have been obtained as a result of a motion, objection, or challenge filed or raised under this subpart [Objections to the conduct of the hearing], may not be the basis for similar relief if filed or raised as an unfair labor practice under part 2423 of this chapter [Unfair Labor Practice Proceedings]

The clear import of that language is that I may not consider the merits of the certification of the consolidated unit, but only the fact that the Respondent has refused to bargain with regard to the conditions of employment of its employees in that unit.

The Respondent's belief that it is under no legal obligation to bargain with regard to the consolidated unit is no doubt sincere and the result of careful analysis. However, that fact does not detract from the willful nature of its refusal, *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 56 FLRA 9, 13 (2000). Accordingly, on the basis of the undisputed facts appearing in the record, the General Counsel has supported her burden of proof and is entitled to judgment as a matter of law.

For the reasons set forth above, I have concluded that the Respondent committed an unfair labor practice in violation of §7116(a)(1), (5) and (8) of the Statute by refusing to bargain with the Union over conditions of employment for the consolidated unit. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that:

1. The General Counsel's Motion for Summary Judgment be, and hereby is, granted.

2. The National Labor Relations Board (Respondent) shall cease and desist from:

(a) Refusing to bargain with the National Labor Relations Board Union (Union) as the exclusive representative of the consolidated bargaining unit certified on June 8, 2007.

(b) Otherwise refusing to accord the Union its statutory status as the exclusive representative of the consolidated bargaining unit certified on June 8, 2007.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

3. The Respondent shall take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Recognize the Union as the exclusive representative for the following consolidated bargaining unit which was certified on June 8, 2007, and accord the Union its statutory status as the exclusive bargaining representative of the employees in the unit:

All nonprofessional employees of the National Labor Relations Board and Office of the General Counsel and all professional employees of the Office of the General Counsel in the Regional, Subregional and Resident Offices, excluding all other professional employees, management officials, supervisors and employees described in §7112(b)(2), (3), (4), (6) and (7) of the Statute.

(b) Upon request, negotiate in good faith with the Union over conditions of employment of its employees in the consolidated unit certified on June 8, 2007.

(c) Accord the Union and the employees in the consolidated bargaining unit certified on June 8, 2007, all rights and entitlements provided in the Statute.

(d) Post at all of its facilities where employees in the consolidated bargaining unit certified on June 8, 2007, are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the General Counsel of the Respondent, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.41(e) of the

Authority=s Rules and Regulations, notify the Regional
Director, San Francisco Region, Federal Labor Relations
Authority, in

writing, within 30 days from the date of this Order, as to

what steps have been taken to comply.

Issued, Washington, DC, November 5, 2007.

PAUL B. LANG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the National Labor Relations Board, Washington, D.C., violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain with the National Labor Relations Board Union (Union) as the exclusive representative of the consolidated bargaining unit certified on June 8, 2007.

WE WILL NOT otherwise refuse to accord the Union its statutory status as the exclusive representative of the consolidated bargaining unit certified on June 8, 2007.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of rights assured them by the Statute.

WE WILL recognize the Union as the exclusive representative for the following consolidated bargaining unit which was certified on June 8, 2007, and accord the Union its statutory status as the exclusive bargaining representative of the employees in the unit:

All nonprofessional employees of the National Labor Relations Board and Office of the General Counsel and all professional employees of the Office of the General Counsel in the Regional, Subregional and Resident Offices, excluding all other professional employees, management officials, supervisors and employees described in §7112(b)(2), (3), (4), (6) and (7) of the Statute.

WE WILL, upon request, negotiate in good faith with the Union over conditions of employment of its employees in the consolidated unit certified on June 8, 2007.

WE WILL accord the Union and the employees in the consolidated

bargaining unit certified on June 8, 2007, all rights and entitlements provided in the Statute.

(Activity)

Date: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: 415-356-5000

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CA-07-0501, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Greg A. Weddle, Esq.
Federal Labor Relations Authority
55 West Monroe Street, Suite 1150
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7000 2570 0001 8450 3733

Barry F. Smith
Special Counsel to the General Counsel
National Labor Relations Board
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REGULAR MAIL:

Eric Brooks, President
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, NY 10278-0104

DATED: November 5, 2007

Washington, DC