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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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June 27, 2019

The Honorable Colleen Duffy Kiko
Chairman
Federal Labor Relations Authority
1400 K Street, N.W.
Washington, D.C. 20424

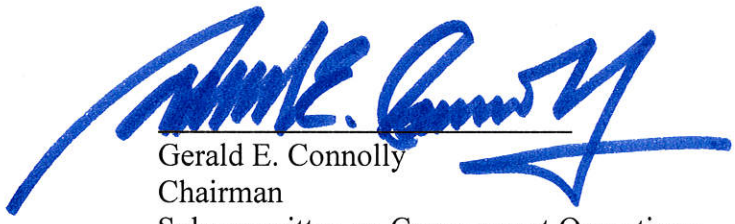
Dear Chairman Kiko:

Enclosed are post-hearing questions that have been directed to you and submitted to the official record for the hearing that was held on Tuesday, June 4, 2019, "Examining Federal Labor-Management Relations."

In order to ensure a complete hearing record, please return your written response to the Committee by Thursday, July 11, 2019, including each question in full as well as the name of the Member. Your response should be addressed to the Committee office at 2157 Rayburn House Office Building, Washington, D.C. 20515. Please also send an electronic version of your response by email to Joshua Zucker, Assistant Clerk, at Joshua.Zucker@mail.house.gov.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Elisa LaNier, Chief Clerk, at (202) 225-5051.

Sincerely,



Gerald E. Connolly
Chairman
Subcommittee on Government Operations

Enclosure

cc: The Honorable Mark Meadows, Ranking Member

Questions for Colleen Duffy Kiko
Chairman
Federal Labor Relations Authority
June 4, 2019, Hearing: "Examining Federal Labor-Management Relations"

Questions from Rep. Gerald Connolly

In January 2018, the three-member Authority voted two-to-one to close the Boston and Dallas regional offices of the Office of General Counsel, which investigates violations of federal service labor law, among other important things.

In a letter to Congress dated May 21, 2018, you wrote: "the number of agency agents available to perform investigative work will actually increase" after the consolidation.

In the hearing, I asked you to explain your assurance to Congress that the closure of regional offices in Boston and Dallas would increase or at least have no net impact on the capacity of the Office of General Counsel.

Mr. Connolly. Well, the argument was made that it would increase -- it would have almost no net impact on staffing, and as a matter of fact, it did have an impact on staffing.

Ms. Kiko. We hoped it wouldn't, yes. We hoped all 16 of them would come with the agency.

But according to your own staffing figures that you provided the Subcommittee, and contrary to your representations in that May letter, total staffing in the Office of General Counsel has fallen by 21%, from 66 to 52 professionals.

Of those, nine former employees of the Boston and Dallas offices chose not to accept offers of relocation and have departed the agency. In addition, another five employees working in other regional offices or in the main office have also departed the agency.

1. Have you received a request of any kind from senior managers in the Office of General Counsel to hire replacements for the people who have left the agency since you became Chair? If so, what was your response?

Questions for Colleen Duffy Kiko
Chairman
Federal Labor Relations Authority
June 4, 2019, Hearing: "Examining Federal Labor-Management Relations"

Questions from Rep. Jamie Raskin

In the hearing, I had the following exchange with you, Chairman Kiko:

Mr. Raskin. I understand there's a regulation providing that the Authority and General Counsel will not issue advisory opinions, and yet last year the Authority issued two advisory opinions and, therefore, violated its own rule to do so. The case numbers were 70 FLRA 452 and 70 FLRA 465. Why did you make a decision to issue advisory opinions?

Ms. Kiko. Well, I don't agree that they were advisory opinions. I do believe that the dissent in those decisions characterized them as advisory positions, but I do not agree with that.

Mr. Raskin. Well, in each case one of the parties had withdrawn its petition for review, making the matter moot. And then when you proceeded to render an opinion. It was by definition, "advisory." Now isn't that right?

Ms. Kiko. I believe that our decisions speak for themselves and I don't really believe it's appropriate for me to engage in an analysis of why I reached the decision I did.
Mr. Raskin. But in other words, you think it would be acceptable practice to render a decision in a moot case?

Ms. Kiko. I did not issue a decision in a moot case.

You maintained that your decisions in 70 FLRA 452 and 70 FLRA 465 did not violate your agency's own regulation against issuing advisory opinions because the cases were not moot.

But even your own decisions acknowledged that the union filed appropriate motions to withdraw their petitions for review. In 70 FLRA 465, for instance, you stated, "After the Authority granted review and deferred action on the merits, the Union filed (a) a request to withdraw its original, underlying petition, and (2) a notice stating it had withdrawn its petition."

In response, you used "discretion" not to approve the union's request. In both decisions, you use the same language, citing 5 C.F.R. § 2423.10(a)(1)), "As nothing in the Authority's Regulations permits the Union to withdraw its petition at this late stage of the proceeding, the Authority will exercise its discretion to decide whether to grant the Union's request."

But the regulation you cited, Section 2423.10(a)(1), concerns unfair labor practice proceedings. The cases in these two FLRA decisions that I asked you about were representation cases, not

unfair labor practice charges.
It appears that you have made a serious error in applying your own regulations.

With respect to unfair labor practices, the statute authorizes the Office of General Counsel exclusive authority to "investigate alleged unfair labor practices under this chapter, [and] file and prosecute complaints under this chapter." [5 U.S.C. §7104(f)(2)(A) and (B)]. The regulation you cite, Section 2423.10 (a)(1), concerns actions that the Regional Director may take with regard to an unfair labor practice charge.

With respect to representation matters, the statute authorizes the three-member Authority to "determine the appropriateness of units for labor organization representation" [5 U.S.C. §7105(a)(2)(A)] and "the Authority shall determine the appropriateness of any unit" [5 U.S.C. §7112(a)]. By longstanding practice, the Authority delegates this authority to the Office of General Counsel. In representation cases, the Office of General Counsel acts pursuant to a different regulation than the one you cited, Section 2422.

In your decision, you acknowledged the difference between unfair labor practice charges and representation cases. You stated, "While the ULP process differs from the representation process, it demonstrates that once a proceeding has reached a certain state, the FLRA has institutional interests in resolving the dispute." [70 FLRA 465]

But your characterization of "reached a certain state" obscures the critical difference between unfair labor practices and representation cases. In the case of unfair labor practice charges, the Office of General Counsel becomes a party to the matter when it issues a complaint. That "state" is never reached in representation cases, which is a critical distinction you overlooked. You appear to make the argument that once "considerable time and resources" have been spent by the FLRA, you have an "institutional interest," but I can find no basis in law or regulation for this argument.

1. What is your legal basis for applying Section 2423.10 (a)(1) to a representation case, when that regulation clearly applies to unfair labor practice cases, not representation cases, and when there is another regulation, Section 2422, which does apply to representation cases?

Section 2423.10(a)(1) explicitly empowers the Regional Director, an officer of the Office of General Counsel, which is charged by the statute with investigating and disposing of unfair labor practice charges -- and not the three-member Authority -- to exercise discretion to approve a request to withdraw an unfair labor practice charge.

Yet your decisions in both cases stated, "We deny the Union's request to withdraw its petition." (Emphasis added.) Nothing in the record cited in these decisions indicates that the Regional Director denied the union's requests to withdraw.

2. What explicit authority does the three-member Authority have for denying the union's request to withdraw a petition, when the regulation you cited solely and exclusively authorizes the Regional Director, not the Authority, to do so?

Questions for Colleen Duffy Kiko
Chairman
Federal Labor Relations Authority
June 4, 2019, Hearing: "Examining Federal Labor-Management Relations

Questions from Rep. Eleanor Holmes Norton

In the hearing, I asked you to explain your basis for reversing longstanding precedent concerning the meaning of "conditions of employment" in a couple recent decisions, including 70 FLRA 102. The effect of your decisions was to limit the scope of collective bargaining.

I quoted from an Authority case which preceded your decision. It stated, in relevant part, "a purported distinction between 'conditions of employment' and 'working conditions' to narrow the parties' bargaining obligations directly conflicts with the Congressional intent." [68 FLRA 10].

I also quoted from a 2011 D.C. Circuit opinion, which held that "Both the courts and the Authority have accorded [working conditions] a broad interpretation that encapsulates a wide range of subjects that is effectively synonymous with conditions of employment." [DHS, CBP v. FLRA, 647 F.3d 359,365]

You told me that you:

> "believe the first thing we look at in determining any case before us is the statutory language…When I look at precedent, I look at it and use it if it is consistent with the plain language of the statute. If it is not consistent with the plain language of the statute, then I would look to the precedent as to changing the precedent because I would feel that it is not consistent with the language of the statute."

You explained that you reversed precedent in 70 FLRA 102 based upon the following:

> "I believe that the way the wording of the statute says when it says conditions of employment mean any personnel policies and practices affecting working conditions. I don't believe that Congress would have used the same word in working conditions to mean conditions of employment unless they -- I believe they didn't -- they used two words for a reason."

But you omitted from your explanation some important statutory language. Immediately following your reference to "affecting working conditions," the statute reads:

> "except that such term does not include policies, practices, and matters (A) relating to political activities prohibited under sub-chapter III of chapter 73 of this title; (B) relating

to the classification of any position; or (C) to the extent such matters are specifically provided for by Federal statute.

That omission is very consequential for a plain language reading of the law.
When you read the entire provision along with the exception clause, the meaning of "conditions of employment" clearly overlaps and is synonymous with "working conditions," except for the three specific exclusions that the statute lays out.

I think you have the burden to explain your plain language interpretation of the law, and the reversal of longstanding precedent you believe it justified, in light of your apparent omission of critical statutory language from your interpretation of the law.

1. What is your basis for interpreting "conditions of employment" to mean less than "working conditions" and the three specific exclusions in the plain language of the statute?