Labor & Employment Issues
In Focus
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For Clients and Friends
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COMPLETE PREEMPTION PREVAILS TO DEFEAT NYS AND NYC DISCRIMINATION CLAIMS

On June 28, 2019, a unanimous panel of the U.S. Court of Appeals for the Second Circuit reaffirmed the principles of Section 301 of the Labor Management Relations Act ("LMRA") that require complete preemption of state law claims substantially dependent on analysis of a collective bargaining agreement ("CBA"). *Whitehurst v. United Healthcare Workers East*, 2d Cir. No. 18-02451. In so doing, the Appeals Court clarified the scope of its earlier decision in *Figueroa v. Foster*, 864 F. 3d 222 (2d Cir. 2017), which had rejected complete preemption of claims encompassing the union's duty of fair representation.

In September 2014, Staten Island University Hospital (the "Hospital") moved Helen Whitehurst to a new position, arguably making her a probationary employee under the Union CBA. Whitehurst did not complete probation, falling asleep while on duty due to sleep apnea, and was discharged. The Union declined to take her grievance to arbitration, concluding on review that "there is virtually no likelihood of succeeding in arbitration." Whitehurst then sued the Hospital and Union in state court alleging violations of the State and City Human Rights Law prohibitions on disability discrimination. Defendants removed the case to federal district court as arising under LMRA §301 and the district court dismissed the complaint for failure to file within the LMRA's short six month limitations period. Whitehurst appealed.

In rejecting Whitehurst's appeal, Judges Sack, Hall and Droney reiterated the longstanding core principle that LMRA Section 301 completely preempts state or local claims "substantially dependent" upon or "inextricably intertwined" with analysis of CBA terms where those claims "require construing" the CBA. The Court found Whitehurst's Human Rights Law claims against the Hospital and Union inextricably bound to the CBA and so preempted. Whitehurst's claims required determinations whether she was a probationary employee terminable at will or not, requiring just cause for discharge and/or return to her prior position under the terms of the CBA. In that regard, explained the Court, no breach of the Union's duty of fair representation could arise if the Union reasonably believed the CBA treated Whitehurst as an at-will probationary employee. The Court distinguished its earlier decision in *Figueroa* which held that a union's duty of fair representation under the National Labor Relations Act ("NLRA") did not preempt the authority of the New York State Human Rights Commission to enforce the State Human Rights Law. The Union's NLRA duty did not involve a CBA or complete preemption, reasoned the Court, but Whitehurst's action required construction of the CBA by the Union, Employer and the Court, and so triggered LMRA §301 complete preemption. Regardless of the Union's awareness of Whitehurst's disability, stressed the Court, "the Union was entitled to refuse to arbitrate on her behalf if it reasonably concluded that arbitration would be futile under the terms of the CBA."

Whitehurst is welcome news to unions and employers that are parties to a CBA for a number of reasons. First, *Whitehurst* places *Figueroa* in traditional context as opposed to wholesale deference to local law. Second, the Court reaffirmed a union's right to reasonably

decline a member's request to arbitrate. Finally, given the National Labor Relations Board's stricter scrutiny of unions in NLRA charges, *Whitehurst* reasserts a powerful defense strategy which may become ever more important should the Board double down in this area.

COURT OF APPEALS REBUFFS FEDERAL EMPLOYEE UNIONS' LAWSUIT CHALLENGING TRUMP EXECUTIVE ORDERS

On July 16, 2019, the District of Columbia Circuit Court of Appeals reversed a federal district court injunction against executive orders issued by the Trump Administration relating to the rights of federal employees to engage in collective bargaining. In doing so, the Court of Appeals applied the brakes to the plaintiff-unions' effort to fast-track the challenges to those orders and sent the unions back to the Federal Labor Relations Authority ("FLRA") for administrative processing before seeking court review. *American Federation of Government Employees, AFL-CIO v. Trump* (No. 18-5289) (D.C. Cir. 7/16/19) ("*AFGE")*.

In 1978, Congress enacted the Federal Service Labor-Management Relations Statute ("Statute") which governs relations between the executive branch and its employees. Generally, it grants federal employees the right to organize and bargain collectively, and it requires that the federal government and unions bargain in good faith over certain matters. The Statute also created the FLRA, a three member Board appointed by the President and confirmed by the Senate. The FLRA determines unfair labor practice and negotiability disputes involving whether an agency has violated its duty to bargain in good faith, whether certain subjects must be bargained, and whether an agency has otherwise violated the Statute. Court review is available in the federal courts of appeals from FLRA determinations.

In May, 2018, President Trump issued the three executive orders under the Statute. The first executive order sought to remove barriers for implementing discipline, providing that supervisors should not be required to use progressive discipline. In addition, the order directed agencies to negotiate collective bargaining agreements that exclude from the grievance procedure matters such as the termination of employees for misconduct or poor performance, assignment of rating, and incentive pay awards. The second order set time limits on negotiations and also limited the subjects upon which agencies were permitted to negotiate. The third order limited the extent to which federal employees could engage in union business during working hours (called "official time") ; disallowed employees from using government offices and other property, including email, for union business conducted during official time; and rejected reimbursement of employees for any costs incurred during official time.

The executive orders were promptly challenged by the plaintiffs in *AFGE* (2018-cv-1261) (D.C. D.C.). The unions argued that the President had no authority to issue executive orders in federal labor relations and that the orders violated the U.S. Constitution and the Statute's requirements. On August 25, 2018, U.S. District Court Judge Ketanji Brown Jackson invalidated the majority of three executive orders. The Judge first held that the Court had jurisdiction and rejected the government's argument that jurisdiction belonged to the FLRA exclusively with review by the Courts of Appeals. On the merits, the Court held that the nine provisions of the orders violated the federal government's duty to bargain with the unions by removing certain subjects from the bargaining table and by preventing agencies from bargaining in good faith. The district court issued an injunction against implementation of those provisions.

On July 16, 2019, a three-judge panel of the Court of Appeals reversed the district court stating that the unions "must pursue their claims through the scheme established by the Statute, which provides for administrative review by the FLRA followed by judicial review in the courts of appeals." Relying on U.S. Supreme Court precedent, the Court of Appeals analyzed whether Congress had precluded district court jurisdiction by establishing an alternative scheme for administrative or judicial review through a two-part test. The Court of Appeals noted its agreement with the district court that the first part of the test was met because it was apparent from the Statute's scope and complexity that Congress intended the statutory scheme to be exclusive "with respect to claims within its scope." The Court of Appeals, however, disagreed with the district court's view of the second part of the test – whether the unions' claims are "of the type" Congress intended for review within the statutory scheme.

The district court had concluded that the claims of the unions fell outside the Statute because the unions could not obtain meaningful review of their claims which sought pre-implementation review in the context of a nationwide challenge. The Court of Appeals rejected that conclusion because there are "administrative options" under the Statute even if they were not the preferred options of the unions for challenging the orders. Further, the Court of Appeals noted that the fact that the unions had to challenge the order on a local-by-local basis rather than a nationwide basis did not mean that the unions could resort to the courts. Rather, it simply meant that a nationwide challenge was not allowed as it would circumvent the administrative scheme.

As the Court of Appeals found, the unions could file unfair labor practice charges challenging the agency's adherence to the executive orders as bad-faith bargaining, and then the FLRA could then determine whether the agency had done so and may continue to do so during bargaining. If an agency refuses to bargain over various subjects based on the executive orders, the Court noted, the unions could charge in a negotiability or unfair labor practice dispute that the agency had refused to bargain over mandatory subjects of bargaining in violation of the Statute.

Finally, the Court rejected the unions' concerns about whether the FLRA could address all of their claims, including that the President acted outside his authority or violated the U.S. Constitution. The Court concluded that the government has taken the position that the FLRA would have the authority to resolve all of the unions' claims including those asserting that the executive orders are invalid. Further, however, the Court noted that, in any event, upon judicial review the circuit courts of appeals have the authority under the Statute to consider all types of challenges to agency actions, even constitutional challenges.

The unions have said they will continue to fight the orders and were considering an appeal to the U.S. Supreme Court. Some of the unions had filed unfair labor practice charges, but there is a backlog at the FLRA because the position of General Counsel of the FLRA, the only agency official empowered to issue unfair labor practice complaints, has been vacant since January, 2017. The Trump Administration's appointee, Catherine Bird, a U.S. Health and Human Services Administration ("HHS") attorney, has faced strong opposition from labor unions for her actions in labor negotiations at HHS.

NATIONAL MEDIATION BOARD SEEKS TO STREAMLINE PROCEDURE FOR DECERTIFICATION UNDER RAILWAY LABOR ACT

On July 26, 2019, the National Mediation Board ("NMB"), the three-member body that administers the Railway Labor Act ("RLA") and mediates disputes in the railroad and airline industries, published a Final Rule in the Federal Register amending its regulations to provide for a direct procedure for the decertification of a bargaining representative. The Final Rule is the culmination of a six-month-long rulemaking process that began with the NMB's January 31, 2019 Notice of Proposed Rulemaking, which first announced the planned amendments. In attempting to justify the proposed changes, the NMB then claimed that the intent of the amendments is to provide a "straight-forward process" for decertification and to eliminate an "unjustifiable hurdle for employees." The NMB also claimed that the rule seeks to "put decertification on an equal footing with certification." The Final Rule will become effective on August 26, 2019.

Following the publication of the Final Rule, on July 30, 2019, the NMB also issued Notice 46 NMB No. 18 ("Notice"), announcing its intention to revise various sections of the NMB's Representation Manual to conform them to the new decertification process provided for in the Final Rule. The NMB will accept comments from the public about the proposed revisions to the Representation Manual for 30 days following the date of the Notice. Since the Final Rule has been published, however, and these proposed changes are to align the guidance in the Representation Manual to the new decertification procedure, it is unlikely that any changes made in response to public comments will be substantive.

Under the NMB's current practice, rather than petitioning for decertification, employees must apply to be represented by someone other than their current bargaining representative—a "straw man"—who will disclaim interest in the craft if selected. Unlike the National Labor Relations Act, the RLA has no statutory provision related to the decertification of bargaining representatives. Despite the lack of an explicit statutory provision, the right of employees to decertify their bargaining representative is well-settled. Employees who want to decertify their representative must identify a straw man who will be listed on authorization cards and, ultimately, an election ballot. If an application is supported by a showing of interest of 50% of the employees of the craft seeking to be represented by the straw man, an election is held in which employees can choose: (i) their current representative; (ii) the straw man; (iii) no representative; or (iv) a write-in option. To achieve decertification, the majority of employees must either vote for no representative or for the straw man, who then would subsequently disclaim interest in the class. The votes for no representative and for a straw man are not aggregated.

Pursuant to the NMB's Final Rule, the so-called "straw man" requirement to trigger a decertification election has been eliminated. Additionally, the Final Rule extends the two-year bar that applies to certification elections to decertification elections. In explaining the rationale for the rule, the NMB Republican majority asserted that the current decertification process is "unnecessarily complex and convoluted" and is "an unjustifiable hurdle for employees who no longer wish to be represented." In order to fulfill its statutory purpose of "freedom of association among employees," the NMB, recognizing that there is no statutory basis for the straw man requirement, reasoned that it should be eliminated.

It remains to be seen what effect this streamlined decertification process will have on labor unions in the railroad and airline industries. Employees in these industries are some of the most unionized in the country, and perhaps, it is no coincidence that the anti-labor and anti-worker majority of the NMB has set its sights on chipping away at the bargaining power of labor unions in these sectors.

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