INTERNATIONAL LABOUR OFFICE

Governing Body

GB.297/10
297th Session

Geneva, November 2006

TENTH ITEM ON THE AGENDA

Report of the Committee on Freedom of Association

343rd Report of the Committee on Freedom of Association

Contents

CASE NO. 2292

REPORT IN WHICH THE COMMITTEE REQUESTS
TO BE KEPT INFORMED OF DEVELOPMENTS

Complaint against the Government of the United States presented by
— the American Federation of Government Employees (AFGE), AFL-CIO supported by
— Public Services International (PSI)

Allegations: The complainants allege a successive use of executive orders, as well as the recent passage of legislation and preparation of draft laws which exempt a variety of federal employees from the basic rights of freedom of association and collective bargaining

705. The complaint is contained in a communication from the American Federation of Government Employees (AFGE), AFL-CIO, dated 14 August 2003. Public Services International (PSI) associated itself with the complaint in a communication dated 20 August 2003. By a communication dated 1 May 2006, the complainants withdrew a number of elements contained in their original complaint.

706. The Government sent its reply in communications dated 23 December 2004 and 4 August 2006.

707. The United States has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), nor the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

708. The American Federation of Government Employees, American Federation of Labor, Congress of Industrial Organizations (AFGE, AFL-CIO, hereinafter AFGE), is North America's largest federal employee union, representing 600,000 workers in the federal government and the Government of the District of Columbia. AFGE alleges serious violations of the right to bargain collectively by the Government of the United States, and in particular by the current administration.

709. American federal law provides working persons in the United States the right to join, or refuse to join, a labour union. The United States Supreme Court upheld this right in 1937 when it stated that labour unions are essential for curbing the abuses of workers by their employers. Almost 25 years later, President Kennedy signed an executive order in January 1962, granting federal employees these same rights. Both Presidents Nixon and Carter also signed executive orders or civil service laws that strengthened these rights.

710. Although collective bargaining has been available to federal employees since 1962, Congress did not enact the Federal Service Labor-Management Relations Statute (FSLMRS), as part of the Civil Service Reform Act, until 1978. This was the first comprehensive legislation governing labour relations between federal civil employees and their managers. The FSLMRS itself manifests some of the principles of the ILO

association and collective bargaining with respect to federal employees whose work is critical to national security. US law provides, consistent with ILO principles, for limited instances in which employees may be excluded from the statutory right to bargain collectively when their duties affect national security. Significantly, these employees still have the right to join labour organizations of their choice and they enjoy a range of other rights and benefits that serve to safeguard their interests. Furthermore, the new personnel systems being developed at DHS and DoD are also consistent with the basic principles of freedom of association and collective bargaining in that the authorizing legislation contains strict requirements to provide for employee rights to freedom of association and collective bargaining. Through the collaborative mechanism set forth in the legislation, employees and their representatives are provided meaningful opportunities to participate actively in the design, development, and implementation of those systems.

784. In a communication dated 4 August 2006, the Government indicates that, as the recent partial withdrawal made by the complainant in this case does not provide any further substantive information regarding the TSA than what was included in the original complaint, its position has not changed. The Government further indicates its readiness to respond to additional AFGE allegations or to specific questions raised by the Committee.

C. The Committee's conclusions

785. *The Committee notes that the allegations in this case concern the violation of the collective bargaining rights of a variety of federal employees through the expanded use over several decades of executive orders exempting certain employees from the Federal Service Labor-Management Relations Statute (FSLMRS). In particular, following the complainant's request for a partial withdrawal, the complainant alleges that federal airport screeners have been denied their collective bargaining rights.*

786. *Setting out the historical context, the complainant first refers to the adoption in 1978 of the FSLMRS, the basic legislation governing labour relations between federal civil employees and their managers. The FSLMRS was based on the conclusion that "labor organizations and collective bargaining in the civil service are in the public interest" (5 USCA. §7101(a)). In setting out the definition of "employee" and "agency" covered by the Statute, §7103(a) already excludes certain employees and agencies. Furthermore, §7103(b)(1) authorizes the President to issue orders excluding otherwise covered agencies or subdivisions thereof if the President determines that: (a) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative or national security work; and (b) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.*

787. *The complainant alleges that the systematic use of the authority granted under §7103(b)(1) has resulted in the exclusion by executive fiat of hundreds of thousands of federal employees from the rights of the FSLMRS and thus from the rights stemming from ILO Conventions on freedom of association and collective bargaining. According to the complainant, presidential orders issued under this section going as far back as President Carter's term in office have inappropriately denied federal government employees who are not directly engaged in the administration of the State the right to union representation and collective bargaining. Moreover, the complainant contends that a court judgement concerning the use of this section by President Reagan has established that such presidential actions are entitled to a presumption of regularity and are thereby essentially not reviewable by American courts. For this reason, the complainant considers that this matter can only be properly addressed at the international level.*

788. *The complainant adds that the current administration has continued this tendency of infringing upon collective bargaining rights and has even carried out a more*

encompassing prohibition of these rights under the guise of government structural adjustment and in the name of national security where US courts generally do not have jurisdiction to challenge.

789. *The Government, for its part, admits to recent restrictions of the collective bargaining rights of various groups of federal employees, but insists that these restrictions must be considered within the context of the permissive provisions in US law that allow such restrictions for employees 'whose duties affect national security. The Government maintains that all of the measures called into question in the complaint were a direct response to the new and greater threats to citizens and residents of the United States since the terrorist attacks of 11 September 2001 and were aimed at ensuring that agencies responsible for national security can react immediately and effectively. Moreover, the Government contends that these measures were narrowly drawn so as to strike a balance between the security of the State and the rights of public sector employees. Finally, the Government argues that exclusions from the FSLMRS provisions for employees involved in national security work are necessary because the cumbersome procedures involved with collective bargaining on significant agency decisions, such as agency reorganizations, equipment and technology changes, work relocations, etc., are incompatible with national security work.*

790. *As regards more specifically the §7103(b)(1) permissible exclusions, the Government further evokes what it describes as a substantial multi-layer review process for the presentation, filing and publishing of executive orders excluding certain federal employees from the FSLMRS. According to the Government, such orders are not unilaterally invoked by the President, but rather originate with agency initiatives that are reviewed by the Director of the Office of Management and Budget (OMB) and the Attorney-General. While judicial precedence has established a "rebuttable presumption of regularity" for the President's actions in this respect, such orders may be appealed under a limited judicial review procedure, thus providing, according to the Government, an additional safeguard against the misuse of this authority.*

791. *While noting that both the complainant and the Government refer to the justification of these restrictions in security terms and, in particular, the specific reference to this effect in the exclusionary provision of the FSLMRS, the Committee recalls that, when examining the question of collective bargaining rights for civil servants, it has always used a standard similar to that developed in Convention No. 98 concerning public servants engaged in the administration of the State. The Committee will therefore base its considerations on whether the federal employees concerned may be properly considered as public servants engaged in the administration of the State, which in the Committee's view is a broader criterion encompassing the more narrowly defined concept of national security work.*

792. *The Committee notes in this respect that the only allegation remaining in this case concerns the issuance by the Transportation Security Administration (TSA) Administrator of an order, by virtue of the authority vested in him by the Aviation and Transportation Security Act (ATSA), denying 56,000 federal airport screeners the right to engage in collective bargaining or be represented by any organization for collective bargaining purposes. While the complainant attempted an appeal to the Federal Labor Relations Authority (FLRA) arguing that the ATSA did not grant the Administrator any such authority, the FLRA, referring to the sole and exclusive jurisdiction of the agency to determine conditions of employment of security screening personnel and the authority under 5 USCA §7101 et seq., dismissed the petition on the ground that it lacked jurisdiction.*

793. *The Government indicates that the rationale, operation and effect behind the law permitting the exclusion of federal airport screeners from the protection of the FSLMRS*

are analogous to those underlying the application of the executive orders pursuant to §7103(b)(1). According to the Government, the Administrator of TSA was granted broad authority by the ATSA of 2001 to determine conditions of work of federal employees carrying out security screening at US airports and, drawing its exclusions carefully and narrowly, the TSA Administrator determined, in January 2003, that airport security screeners would henceforth not be entitled to engage in collective bargaining. There would, however, be no prejudice to the right of those federal employees to exercise their right to form, join or participate in a union.

794. *In the case of this particular exclusion, the Committee is concerned about two issues: (1) the use of an ever-enlarged definition of work connected to national security to exclude employees that are further and further away from the type of employee considered to be "engaged in the administration of the State"; and (2) the apparent lack of, or at least severely limited jurisdiction, to review possible excesses of authority in excluding federal employees from the FSLMRS. As regards the determination of public servants engaged in the administration of the State, the Committee recalls, as was cited in the Government's reply, that a distinction must be drawn between, on the one hand, public servants who by their functions are directly engaged in the administration of the State (that is, civil servants employed in government ministries and other comparable bodies), as well as officials acting as supporting elements in these activities and, on the other hand, persons employed by the Government, by public undertakings or by autonomous public institutions [see* ***Digest,*** *op. cit., para. 794]. When previously examining a complaint against the Government of the United States in respect of the violation of the collective bargaining rights of federal employees, the Committee had concluded that all public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service [see* ***Digest of decisions and principles of the Freedom of Association Committee,*** *1994, 4th edition, para. 893 (see also Case No. 1557; 284th Report, para. 806 and 291st Report, para. 285(a))].*

795. *In light of these abovementioned principles, the Committee queries whether the 56,000 federal airport screeners in question here may actually be considered as public servants engaged in the administration of the State. While recognizing that there is clearly a security element involved in their work, as indeed exists for security screeners of private enterprises, the Committee is concerned that the extension of the notion of national security concerns for persons who are clearly not making national policy that may affect security, but only exercising specific tasks within clearly defined parameters, may impede unduly upon the rights of these federal employees. The fact that the link of exclusions to national security concerns so clearly set out in §7103(b)(1) (referred to by the FLRA and stated by the Government to be analogous to the rationale used by the TSA) on the basis of a dual requirement – this section refers not only to the primary function of the work, but also to a determination that the FSLMRS could not otherwise be applied to those employees in a manner consistent with national security requirements – has been considered unreviewable by the FLRA has added to the Committee's concern in this regard.*

796. *In these circumstances, the Committee recalls its previous conclusion in Case No. 1557 that priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service. In particular, the Committee wishes to emphasize that one of the main objectives of workers in exercising their right to organize is to bargain collectively their terms and conditions of employment. It requests the Government to carefully review, in consultation with the workers' organizations concerned, the matters covered within the overall terms and conditions of employment of federal airport screeners which are not*

directly related to national security issues and to engage in collective bargaining on these matters with the screeners' freely chosen representative. It requests the Government to keep it informed of the measures taken in this regard. The Committee further trusts that all necessary measures will be taken to ensure that the organizational rights of these employees are effectively guaranteed in practice and that they may be represented in respect of their individual grievances by the organizations freely chosen by them.

797. *The Committee reminds the Government that the technical assistance of the Office is available in respect of the matters raised in this case.*

The Committee's recommendations

798. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(a) Recalling that priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service, the Committee requests the Government to carefully review, in consultation with the workers' organizations concerned, the matters covered within the overall terms and conditions of employment of federal airport screeners which are not directly related to national security issues and to engage in collective bargaining on these matters with the screeners' freely chosen representative. It requests the Government to keep it informed of the measures taken in this regard. The Committee further trusts that all necessary measures will be taken to ensure that the organizational rights of these employees are effectively guaranteed in practice and that they may be represented in respect of their individual grievances by the organizations freely chosen by them.

(b) The Committee reminds the Government that the technical assistance of the Office is available in respect of the matters raised in this case.

CASE NO. 2341

INTERIM REPORT

Complaint against the Government of Guatemala presented by
— the Workers' Trade Union of Guatemala (UNSITRAGUA) and
— the International Confederation of Trade Unions (ICFTU)

Allegations: Interference by the Labour Inspectorate in the internal affairs of the Trade Union of Portuaria Quetzal, illegal banning of seven member of the Executive Committee from carrying out their trade union duties, restructuring (voluntary retirement plan) of the enterprise for anti-union purposes and without consultation, and practices contrary to the right to bargain collectively; dismissal of union