REPORT OF REVIEW OF THE MEXICAN NAO SUBMISSION MEX 2006-1

I. Executive Summary

Under the terms of the North American Agreement on Labor Cooperation (NAALC), the governments of Mexico, the USA and Canada committed, among other objectives, to improve the work conditions and the level of living in their territories; to promote the maximum labor principles established; and to promote the enforcement and effective implementation of their corresponding labor legislation.

The NAALC contemplates the mechanism for public submissions so that every person could bring to the attention of the governments issues related with the effective application of the labor legislation which arise in the territory of any of the Parties. This report of review concerns Submission MEX 2006-1 received by the Mexican National Administration Office (NAO), as part of the International Affairs Unit of the Secretariat of Labor and Social Security.

The submission was presented on October 18, 2006 by Frente Auténtico del Trabajo (FAT), the *United Electrical Radio and Machine Workers of America* (UE), the Canadian Labor Congress, and Unión Nacional de Trabajadores (UNT), among 51 unions and non-governmental organizations (NGO) of the three countries.

The Mexican NAO admitted the submission for its review and requested consultations for cooperation to the American NAO, in keeping with section 21 of the NAALC. In April and August 2008 and May 2011, the petitioners submitted additional information in support of the initial submission.

The petitioners highlight the alleged violation of labor principles 1, 2, 6, 7, 8, 9 and 10 of the NAALC. They argue the prohibition that the workers of the public sector in North Carolina are faced with to negotiate labor collective agreements, under the *North Carolina General Statute* 95-98 (NC GS 95-98), which states that "any labor agreement of the public sector is contrary to the public policy of the state, illegal, illicit, void and without any effect." According to the petitioners, this generates bad working conditions in what regards to salaries and workdays; occupational lesions and disease are not prevented; the possibility of receiving compensations for said lesions is denied; and some public workers are submitted to a discriminatory treatment.

In this regards, the American government is forced - in keeping with the NAALC - to guarantee that its labor laws and regulations contemplate high labor standards (Section 2); foster the enforcement of its labor legislation and its effective application through the appropriate governmental measures (section 3); guarantee the workers' right to justice to state their rights (sections 4 and 5); guarantee the right to publication and knowledge of the labor legislation (sections 6 and 7).

The review of the Mexican NAO was carried out based on the arguments submitted by the petitioners and by the American NAO, in keeping with the NAALC and the regulation of the Mexican NAO about public submissions. The review does not pretend to create supra-national mechanisms, since as per the NAALC; the role of the NAO is not that judging or modifying the legislation of the other Parties. The purpose of the report of

review of the Mexican NAO, in keeping with the NAALC, is that of bringing to the attention of the American labor authorities the subjects in what respects to the alleged non-compliance of the labor legislation put forward by the submission.

To the sole purpose of complying with that stated in Section 5.8 of the NAALC, the Mexican NAO looked for information on the subjects which could be pending resolution, and left out of this report any *sub judice* matter.

As follows, the main accusations made by the petitioners on the alleged omissions of the American government as regards the labor principles of the NAALC are observed: As regards principle 1 of the NAALC, dealing with the freedom of association and protection of the right to organize, the petitioners indicate that the labor policy of North Carolina prohibits the workers to reach agreement in a collective manner and even if it is not illegal to integrate a union, as collective bargaining is prohibted, the main benefit to association is denied by the state. In contrast, it is referred that the federal employees do enjoy the freedom of association right without any restriction whatsoever.

The American NOA indicated that the employees at all government levels have the right to form and join a union, in keeping with the First Amendment of the United States Constitution which guarantees, *"... the right of people to gather for peaceful purposes."* Similarly, it added that the legislation of North Carolina is clear when it states that, *"every state employee reserves all those citizen rights and obligations provided by the United States Constitution and laws,"* and that even if the people of North Carolina through their representatives have decided that the state and municipal government cannot negotiate labor collective agreements, the public employees of North Carolina and their unions have a right to freedom of association and the right to participate collectively in state, municipal and federal democratic processes.

Despite that abovementioned, the Committee on Freedom of Association of the ILO issued recommendations in March 2007 on a complaint raised by the *United Electrical Radio and Machine Workers of America* in 2005, where it is underlined that the right to freely negotiate work conditions with the employers constitutes an essential element of union freedom; and that the unions should have the right, through collective bargaining to improve the labor condition of those they represent, without the intervention of the authorities. It also requested that the American government fostered a legal framework which shall enable collective bargaining of the public employees of North Carolina and that the NCGS 95-98 statute were repealed. In this regards, the United States informed the ILO about the presentation of different initiatives before the General Assembly of North Carolina for the 2007-2010 sessions, which intended to repeal the NCGS 95-98 statute. On follow-up reports issued by the ILO in November 2008, March 2010 and November 2011, the Committee noted the presentation of the above-mentioned initiatives, but indicated that no legislation had been approved, and urged the United States to continue with the efforts to establish a legal framework for collective negotiation in North Carolina. 3

As per labor principle 2 of the NAALC, as regards collective bargaining, the petitioners point out that the American government does not protect the labor collective rights of state and municipal workers in any federal labor law or the National Constitution, and that it leaves to the states the regulation of collective contracts. Nevertheless, the Assembly of North Carolina has not passed any legislation which guarantees the collective rights of public workers, and the federal courts have refrained from hearing the demands where these workers state that the NCGS 95-98 statute violates the United States Constitution. They also state that the federal government workers have this basic right guaranteed through the Statute on Federal Service as regards the relations between the Workers and the Administration.

The petitioners report, that even if there are mechanisms to establish their rights in case of violations, these are costly and many times inefficient, and they do not substitute the collective bargaining process as a preventive protection measure of the minimum labor conditions. They consider that without the right to collective bargaining, diverse International rulings are violated.

The petitioners indicate that the case was submitted twice before the ILO, and that this concluded that North Carolina should repeal the NCGS 95-98 Statute, and establish a legal framework for collective bargaining which shall integrate the collective rights to its legislation and that it should focus on the jurisdictions where the public officers are deprived, totally or partially, from said rights, which as aforementioned stated should be exercisd in consultation with the public area unions.

The United States NAO confirmed that within the federal scope the United States Code grants and guarantees the right to collective bargaining that federal public employees have. Nevertheless, for public workers in North Carolina, the NCGS 95-98 statute is the law that applies, since the public sector is divided into three areas: federal, state and municipal, in keeping with the Constitution, which grants the federal government only certain capacities and the rest of the attributions are reserved to the states.[2]

The main law for collective bargaining in the country, the *National Labor Relations Act*, specifically excludes from its application state and municipal public employees, as per the federalism principles. Therefore, the federal government lacks the capacities to interfere with the authorities of the states to negotiate its own labor collective agreements and they have not achieved the majority in the General Assembly of North Carolina to modify the NCGS 95-98 Statute. Despite that aforementioned, the United States government indicated that it promotes collective bargaining practices at federal and state levels, respecting the autonomy of the states to develop laws and policies in the labor subject for its own workers, such as the promotion of collective bargaining practices through the *Federal Mediation and Conciliation Service*.

The United States NAO argued the existence of the corresponding legal precedents since there is no provision in the Constitution which forces to enter collective bargaining, and that North Carolina is free to decide, so the effectiveness of the NCGS 95-98 Statute remains. Other provisions have pointed out that the prohibition to collective hiring does not imply a prohibition for the workers to get involved in collective activities with unions to discuss their work matters, through the state legal process and they provided examples of these activities of the workers with the unions.

Additionally, in relation with the two complaints submitted before the Committee on Freedom of Association of the ILO, recommendations were issued in March 2007, where the Committee indicated that the right to freely negotiate work conditions with the employers constitutes an essential element of union freedom and that the unions should have the right, through collective bargaining to improve the work conditions of those they represent, without the intervention of the authorities. It also requested that the American government fostered a legal framework which shall enable collective bargaining of public employees in North Carolina and that the NCGS 95-98 statute shall be repealed. In this regards, the United States informed the ILO of the presentation of different initiatives before the General Assembly of North Carolina during the 2007-2010 sessions, which intended to repeal the NCGS 95-98 statute. On follow-up reports issued by the ILO in November 2008, March 2010 and November 2011, the Committee noted the presentation of the above-mentioned initiatives, but no legislation had been approved, and it urged the United States to continue with the efforts to establish a legal framework for collective negotiation in North Carolina.

At present, the ILO is reviewing another case, the 2741 one, which deals with the prohibition of state public workers to collectively negotiate, submitted on November 10, 2009 by the Transportation Workers Union of America and the Union of Transportation Workers of the New York City Metropolitan Area, AFL-CIO, Local 100 (Local 100).

As regards labor principle 6 of the NAALC, which deals with the matter of minimum work conditions, the petitioners point out that, since the NCGS 95-98 statutes prohibits a worker of the public sector to negotiate collectively, the state and municipal workers cannot obtain a decent wage and fair working hours. The petitioners exemplified situations in which the workers of the public sector of North Carolina face excessive and unsafe working hours, without the corresponding payment; and receive insufficient salaries and provisions. They argue they are forced to work long hours without rest and to work up to three weekends a month.

The petitioners argue that they have no right to access of the due process, since some workers in state hospitals can only submit complaints before the North Carolina Department of Health and Human Services on some specific subjects, and that the minimum conditions to work are not in place.

As regards the labor legislation applied to this principle, the United States NAO indicated that there is a federal legislation which regulates the payment of salaries and prohibits inequitable or below-the-standard payment as stated by the *Equal Pay Act*. Besides that, Title 29 of the *US Code*, Chapter 8, § 201-§ 219, refers to fair labor standards (*Fair Labor Standards Act)* and states the minimum salary and the payment for long hours.

The North Carolina Statute, NCGS § 95-25, requires that state and municipal public employers in said state place visible notices at work centers with information on the corresponding legislation dealing with the federal minimum salary and the payment of long hours, as well as information in what respects to the resources they have at the workers disposition. The procedures that the workers can start against the violations to the *Equal Pay Act* shall be presented before the state *Equal Opportunity Commission* and the *Wage and Hour Division* when dealing with violations to the *Fair Labor Standards Act*. The petitioners did not mention they have started these procedures.

As regards labor principle 7 of the NAALC, elimination of employment discrimination, the petitioners pointed out that there is racial and sexual discrimination in the public sector in North Carolina, due to the inequality existing as regards hiring, promotion, firing and salaries of the racial minorities and women. Similarly, they indicate that there is favoritism as regards best-paid work positions which are taken by white workers; while the positions with a lower salary are left to Afro-American workers, they argue that the complaints which have been submitted in the matter of discrimination are not resolved in a satisfactory manner.

According to that informed by the United States NOA, the *Equal Protection Clause*, the Nineteenth amendment to the Constitution, prohibits that the government at all levels provide a differentiated treatment to people, based on race or sex, so no distinction is legally justified.

Similarly, the *Civil Rights Act* contemplates equality of treatment to all people and prohibits discrimination and Title 42 of the *US Code* and the *Workforce Investment Act* prohibits labor discrimination. The *Employment Litigation Section,* of the *Civil Rights Division* of the Department of Justice of the United States, applies the dispositions of the *Workforce Investment Act,* which prohibits state and municipal government employers to discriminate at employment.

Additionally, the United States NAO indicates that the Constitution of North Carolina, in its section I, § 19, states that no person can be denied equality of protection which law offers, nor will this person be subject to discrimination by the state for reasons of race, color, religion or nationality. Similarly, the statutes of this state contemplate provisions to prohibit discrimination, for example, that all the state departments and agencies should provide equality of opportunities to employment and compensation, as well as prohibit that said authorities take retaliation measures against a worker for raising a complaint based on a discrimination issue. The United States NAO explained that the workers count with federal and state procedures in place against discrimination.

As regards labor principle 8 of the NAALC, dealing with the matter of a similar salary to men and women, the petitioners did not provide specific information, despite the fact they mentioned this as one of the alleged violated principles. Nevertheless, they argued that the prohibition to negotiate collectively limits the rights of the public workers to get fair work conditions.

The United States NAO indicated that, as regards the payment to workers, the federal legislation requires that the employers pay similar salaries to men and women who develop a same job, which requires a similar capacity, effort and responsibility and which is performed in similar work conditions.

As for labor principles 9 and 10 of the NAALC, prevention of occupational lesions and disease and compensation in said cases, the petitioners share the experience of the workers of mental health hospital centers of the state government of North Carolina whose health and safety conditions are poor and they allege that this makes evident the need to count with an organization which shall represent them in order to improve said conditions. They argue that the workers work long hours and without a rest in environments with hostile and aggressive patients who have caused lesions too them. They also refer being exposed to toxic substances without the appropriate protection and of irregularities in the inspections practiced.

Besides that, they state that the workers do not have access to appropriate processes to make their complaints as regards the violations to health and safety matters at the work place, that access to these processes is very limited and that the resolutions of the complaints raised have been mostly settled against the worker. They consider that the workers do not receive the necessary information to request compensations when they suffer an accident or get ill, in keeping with the *North Carolina Workers' Compensation Act* and the *Family and Medical Leave Act.*

The United States NAO provided information in relation with the fact that its government through the *Occupational Safety and Health Act* ensures to every worker health and safety labor work conditions and urges the states to develop plans which shall ensure safe work places, which shall be approved by the United States Department of Labor. In the case of North Carolina, its plan to implement health and safety standards was approved. It also mentioned that the NCGS 95-143 statute states that state and municipal public employers in North Carolina shall place public notices at the work place which describe the occupational health and safety laws and the defense and actions which shall be executed towards their enforcement before the Department of Labor of North Carolina. Employers are also obliged to keep records and reports on the causes of occupational disease and accidents.

As far as the legislation on compensation for occupational lesions and disease is concerned, the United States NAO did not provide an answer to the specific questions of the Mexican NAO, contained on the consultations for cooperation.

Recommendations

1. In view of the arguments submitted by the petitioners and the United States government through the NAO, and based on the Regulations of the Mexican National Administration Office (NAO) on the submissions to which section 16 (3) of the North American Agreement on Labor Cooperation (NAALC) makes reference to, this report of review is brought to the attention of the United States Department of Labor (DOL) so that, in keeping with its internal procedures, the DOL determines the action to take, in keeping with the legislation and internal practices, to attend the arguments of the petitioners in what regards to whether the rights of the public employees of North Carolina have been violated for not guaranteeing their full exercise; not counting with the governmental measures for the effective application of the labor legislation; not having appropriate access to the procedures for the application of the legislation, or the corresponding process guarantees; as well as not knowing the laws, regulations and procedures that the workers might have to state their rights, as regards:

- Freedom of association and protection of the right to organize;
- The right to collective bargaining;
- Minimum work conditions;
- Elimination of discrimination at employment;
- Equal salary for men and women;
- Prevention of occupational lesions and disease; and
- Compensation in case of occupational lesions or disease.

2. The Mexican NOA places particular emphasis on the right to association and the collective bargaining right. As mentioned by the petitioners, even if, there is freedom of

association for the public workers of North Carolina, the prohibition to bargain collectively limits the exercise of said freedom. In this regards, there are recommendations and follow-up reports of the Committee on Freedom of Association of the International Labor Organization in the sense that North Carolina shall repeal the NCGS 95-98 statute and enable public workers of said state to negotiate collectively, as well as to proclaim a legal framework which shall foster this situation. Nevertheless, these reports recognize the efforts of the United States to proclaim legislation in the Legislative Assembly of North Carolina which contemplates collective bargaining of public workers.

On this particular, the Mexican NAO reiterates its respect for the NAALC and the general commitment established in section 2, which reads: the right of the Parties *"to establish, internally, their own labor regulations and to adopt or modify, in consequence, its labor laws and regulations,"* is recognized and it refrains from requesting or recommending to the United States government to repeal the NCGS 95-98 statute.

Despite that aforementioned, the Mexican NAO indicates its interest to learn the actions which the United States government carries out to promote the right of collective bargaining of the public workers of North Carolina, as well as it requests being updated on the initiatives submitted in past sessions of the Legislative Assembly and as regards the eventual submission of new initiatives of law on this subject in the Senate or in the same Legislative Assembly of North Carolina to repeal the NCGS 95-98 Statute.

3. As regards the subjects of minimum work conditions and the elimination of discrimination at employment, the United States NAO was informed of the resources in the legislation of the United States which enable the workers to state their rights faced with the alleged violations to them. Of the information provided by the petitioners it is not clear if the workers started said procedures.

In this regards, the Mexican NAO brings to the attention of the United States government the convenience of broadcasting in a more widely manner, through the mechanisms it might find fit, the minimum labor rights and conditions the public workers of said state should count with, as well as the legal resources at their reach.

4. As far as the health and safety issues which the petitioners mention is concerned, the Mexican NAO recommends that the subject be kept under review through cooperation consultations, in keeping with that stated in section 21 of the NAALC, since from the information that the United States government provided it is not clear what actions the government of said country has carried out, in special the North Carolina government, to guarantee the protection of health and safety of the public employees of that state.

In this regards, the NAO understands that the process to obtain information escapes the federal jurisdiction since it corresponds to the states and is not a simple one. Despite that aforementioned, the NAALC states the obligation of the parties to comply with their commitments, without considering it an obstacle the autonomy of the states.

1 The labor principles of Appendix 1 of the NAALC are: 1) are: 1) freedom of association and protection of the right to organize; 2) right to collective bargaining ; 3) right to strike; 4) prohibition of forced labor; 5) restrictions to minors work; 6) minimum labor conditions; 7) elimination of discrimination at employment; 8) equal salary for men and women; 9) prevention of occupational lesions and disease; 10) compensation in cases of occupational lesions or disease; and 11) protection of migration workers.

2 Constitution of the United States, Amendment X (powers not delegated to the United States by the Constitution, not prohibited to the States, are reserved as it corresponds to the states or the people).