SEIU 32BJ Statement for the 8th Hearing of the Advisory Committee on Competitive Integrated Employment for Individuals with Disabilities

Introduction

Good afternoon. My name is Jessica Drangel Ochs. I am an Associate General Counsel of SEIU 32BJ, based in New York City. Thank you for the opportunity to address the Advisory Committee.

32BJ represents more than 155,000 members from New England to Florida, and is the largest union of property service workers in the United States. A large percentage of our members are janitors employed by private companies, many of whom receive government contracts for locations that include government buildings, colleges, universities, and stadiums.

32BJ supports and applauds the Advisory Committee’s important work of identifying ways to increase competitive integrated employment opportunities for individuals with intellectual or developmental disabilities. We believe that meeting the goals of integrated employment opportunities that are consistent with the Supreme Court’s 1999 Olmstead ruling and with the Americans with Disabilities Act, require assuring that workers with disabilities enjoy the same labor rights as all other workers. To permit otherwise is to relegate workers with disabilities to an inferior class status, which in our view is inconsistent with law.

SEIU 32BJ’s Interest: All Workers

I wish today to address the Advisory Committee's work with regard to AbilityOne. Many of the contracts set aside to provide opportunities for individuals with disabilities through AbilityOne’s Central Non-Profit Agencies (National Industries for the Blind and SourceAmerica) are for work performed that is similar if not identical to the work our members perform – that is, janitorial and cleaning services. As you know, such service work makes up the largest share of AbilityOne contracts, often performed in enclave or work crew models.

Our members have organized to build their power and transform low-wage, vulnerable jobs as contracted out janitors or security officers into family-supporting employment that provides good wages and benefits.

In the state of Connecticut, as we have previously briefed the Committee, we represent workers performing work on state contracts that have been developed to provide work opportunities for persons with disabilities. There workers with disabilities are employed side-by-side with workers without disabilities, enjoy the same labor rights, wages, and benefits, and participate fully in the life of the union as a way to achieve their collective and individual goals. Unlike the federal system, Connecticut’s system was designed to ensure all workers – disabled or not – have the same rights.
We are concerned that AbilityOne contracts are structured in a manner which often deprives individuals with disabilities of minimum wage and labor rights. We know from our experience in Connecticut that AbilityOne can be implemented consistent with the goals of the ADA in which all workers enjoy the benefit of full labor rights.

We believe that individuals hired through AbilityOne program should have the same rights and protections under federal law as do regular employees. To that end, we urge the Advisory Committee in its final report to recommend that AbilityOne and its Central Non-Profit Agencies (NIB and SourceAmerica) state as matters of policy that workers with disabilities employed on its contracts enjoy the full range of labor rights as all other employees.

**Importance of Labor Rights for all Workers**

Full labor rights would mean that individuals working on AbilityOne contracts are treated as regular employees and enjoy rights under the National Labor Relations Act. This means specifically the rights under Section 7: to form a union, and to engage in protected concerted activity for the purpose of collective bargaining or for other mutual aid or protection or to refrain from such activity.

Exercising rights under the NLRA enhances the rights of workers with disabilities under the law and is consistent with the goals of the Ability One program, Olmstead and the ADA.

The right to organize or join a union at one’s work site is a concept that is likely understood by this Committee. But the NLRA also protects workers’ right to engage in *protected concerted activity* to improve one’s working conditions. Examples of concerted activity protected under the NLRA include: talking with your coworkers about the lack of breaks, schedules, an abusive supervisor, inadequate training, or wages. It includes approaching a manager to raise workplace concerns, like using potentially toxic chemicals or poor ventilation, if done with a coworker or on behalf of coworkers, and not solely on behalf of the employee. We hope that this Committee succeeds in phasing out FLSA 14(c), but we can expect workers with disabilities will continue to be plagued by wage violations; enjoying the right to full wages does not ensure that a worker will receive them. Extending rights under the NLRA to workers with disabilities means that they have another tool available to enforce their workplace entitlements – like minimum wage.

Without full labor rights under the NLRA, a worker can be disciplined or fired for talking to union organizers or coworkers about problems on the job or for advocating for changes in working conditions–like better wheelchair access or accommodations–without any remedy. Employees who enjoy the protections of the NLRA would have the right to reinstatement and back pay if their employer retaliated against them for engaging in such activity. But a worker with a disability employed by an AbilityOne contractor may not enjoy such protection. If two or more of them approach their employer to complain about underpayment, or to question a
supervisor’s behavior, or to complain about a training provider, they would do so at their peril, while a co-worker without a disability would be protected.

Such a bifurcated workplace where workers doing the same work enjoy different rights and protections is contrary to the mandates of competitive integrated employment. To deny individuals working with disabilities the right of workplace collective action is degrading and dehumanizing.

Moreover, we believe it enhances integration to assure that individuals employed on AbilityOne contracts have the right to talk with their coworkers about their work without fear of retaliation; these may be coworkers who are deemed disabled, or coworkers who are classified as non-disabled. It should make no difference.

Finally, disabled workers who are represented by a union at the workplace will benefit from the protections and benefits a union brings through collective bargaining and will have the opportunity to participate in the union and collective bargaining process, which would likely have a rehabilitative benefit for workers with disabilities as they prepare to enter the labor market.

Thus, rights under the NLRA offer a measure of self-protection for workers with disabilities and a base from which they can engage support from the Wage and Hour Division, Protection and Advocacy organizations or other advocates and allies. They are an exercise in self-determination for workers with disabilities, increasing their control over their own circumstances of work.

**The National Labor Relations Board’s Brevard Decision**

Unfortunately as this Advisory Committee knows, the current position of the National Labor Relations Board as expressed in the case *Brevard Achievement Center*, 342 NLRB 982 (2004), is not consistent with the broad principles embraced by this Advisory Committee, the goals of integrated employment or the view of 32BJ. Notwithstanding the NLRA’s broad statutory definition of employee, the Board currently applies a test to individuals with disabilities working on AbilityOne contracts to determine if they are protected by the Act: Workers who have a relationship with their employer that is “primarily rehabilitative” rather than one that is “typically industrial” (guided primarily by business considerations) are not covered under the Act. Therefore, under current Board law, individuals working on AbilityOne contracts may or may not have the protection of the Act, depending upon the specific facts surrounding their employment.

Unions, including 32BJ, and advocates are endeavoring to find a means to ask the Board to overturn Brevard. It is unclear when that will happen. What is clear is that findings and initiatives from this Advisory Committee that express the importance of granting individuals
with disabilities full labor rights in the workplace will make a difference now and hopefully support those on the Board who seek to change the law in the future.

**The Committee Should Recommend that Workers with Disabilities Enjoy Full Labor Rights**

In its March 18, 2016 Declaration in Support of Minimum Wage for All People Who Are Blind or Have Significant Disabilities, the AbilityOne Commission itself acknowledged that the activity in which people with disabilities are engaged is indeed employment. It announced that it was “engaging its Central Nonprofit Agencies and AbilityOne participating nonprofit agencies to develop effective strategies for all members of the Ability One network to achieve the goal of minimum wage, while striving to reach payment of the full prevailing wage to all Ability One employees.” Moreover, the Commission committed itself to a lofty goal of offering “quality employment and equitable wages, including competitive integrated employment opportunities.”

It would be disingenuous to assert these principles while AbilityOne contracts with companies who deny the labor rights of their employees’ with disabilities on the grounds that they are not employees under the NLRA or their activity does not constitute employment. If AbilityOne wants to position itself “as a model of best practices and an innovator of pioneering strategies,” it should finally recognize that these workers enjoy the same ‘practices’ and ‘strategies’ that have been available to other American workers since 1935.

While we are working to overturn the Brevard decision at the NLRB, this Committee should take an important step by recommending AbilityOne declare that workers with disabilities should be entitled to the same labor rights as all other workers, including rights under the NLRA to take concerted action.

AbilityOne should:

- Post this declaration on its website;
- Instruct NIB and SourceAmerica to notify all of its nonprofit agencies of its position on NLRA coverage.
- Inform NIB and SourceAmerica that nonprofit agencies should not be allowed to participate in the AbilityOne program until they afford their employees the full legal rights and protections that all other employees enjoy.

Thank you for your attention.