

65 FLRA No. 74

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
HAMPTON, VIRGINIA
(Activity)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO
(Petitioner/Union)

WA-RP-09-0062

DECISION AND ORDER ON REVIEW

December 17, 2010

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I Statement of the Case

This case is before the Authority on an application for review (application) filed by the Department of Veterans Affairs (Agency) under § 2422.31(c) of the Authority's Regulations.¹ The Union filed an opposition to the Agency's application.

The Regional Director (RD) determined that the Nurse Officer of the Day, Evening/Night Nurse III position (NOD) should not be excluded from the consolidated bargaining unit represented by the

Union because the record did not indicate that NODs are supervisors within the meaning of § 7103(a)(10) of the Federal Service Labor-Management Relations Statute (the Statute).² For the reasons that follow, we deny the application.

II. Background and RD's Decision

This dispute involves four NODs who work at the Activity, a teaching hospital. RD's Decision at 1-2. The NODs work during "off-tours," a period of time that includes the evening shift, which starts at 3:30 p.m., and the night shift, which starts at midnight. *Id.* at 2. The NODs also work twelve hours every other weekend on a shift that also is considered an "off-tour." *Id.* at 2; Tr. at 11-12.

The RD found that NODs are responsible for ensuring that proper staffing is maintained. RD's Decision at 2. In this connection, NODs: assign tasks to employees; "float" employees from one unit to another; authorize overtime; temporarily change an employee's shift; grant unscheduled sick leave and up to two hours of emergency annual leave. *Id.* at 2, 4.

The RD also found that NODs are responsible for preparing a shift report. *Id.* at 3. The RD found that NODs prepare the shift report by reviewing information in earlier shift reports pertaining to inventory, patient care, and staff absences. *Id.* Then, the RD stated, NODs make "rounds" through the hospital, during which they gather information on patient needs, staffing, and supplies. *Id.* Next, NODs incorporate information from rounds, and from other nurses and previous shift reports, into the report. *Id.* at 4. Additionally, the RD determined that NODs respond to patient emergencies, disputes between employees, and requests for special

1. 5 C.F.R. § 2422.31 states, in pertinent part:

(c) *Review.* The Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds:

....

(2) Established law or policy warrants reconsideration; or,

(3) There is a genuine issue over whether the Regional Director has:

(i) Failed to apply established law;

....

(iii) Committed a clear and prejudicial error concerning a substantial factual matter.

2. 5 U.S.C. § 7103(a)(10) states:

"[S]upervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority[.]

equipment. *Id.* The RD found that NODs spend “very little time” on direct patient care. *Id.*

Analyzing these facts, the RD determined that NODs exercise supervisory authority only when they direct and assign employees. *Id.* at 6. In this regard, the RD found that NODs “assign and move employees among units, direct employees to perform specific job assignments, authorize overtime and adjust shift assignments[.]” and that NODs “approve sick and emergency annual leave.” *Id.* at 6-7. Further, the RD found that NODs exercise independent judgment because they consider different factors about patient information and staffing levels, use independent and clinical judgment to “decide the appropriate staffing level[.]” and then “direct[] and assign[] employees as necessary to achieve the desired staffing level.” *Id.* at 7. Because NODs make these considerations when directing and assigning employees, the RD determined that assigning and directing employees is “not a merely routine, clerical or perfunctory endeavor[.]” *Id.*

The RD then determined that “the record d[oes] not establish that the NODs spend a majority of their employment time on assigning and directing employees.” *Id.* at 7. In this connection, the RD determined that two of the duties that NODs spend a significant amount of time performing -- conducting rounds and preparing shift reports -- do not involve directing and assigning employees, and thus do not involve the exercise of supervisory authority. *See id.* In this connection, the RD found that one NOD witness (NOD #1) spends “60 to 80 minutes conducting a single set of rounds” and “60 minutes reviewing and verifying the information in the [shift report][.]” and further found that NOD #1 spends “more time conducting rounds and . . . preparing and making copies of the [shift report] than she spends on any one of her other functions.” *Id.* at 5. *See also id.* at 7. Moreover, the RD noted that the only duty that involved directing and assigning employees that NOD #1 specifically testified to was the “20 minutes” she spends each day “handling calls from employees and making calls to employees in connection with adjusting staffing[.]” *Id.* at 5. *Accord id.* at 7. With regard to the other NOD witness (NOD #2), the RD found that he spends only “two to three hours each shift” directing and assigning employees, specifically by “adjusting staffing levels by floating employees” and “calling employees to obtain replacements for absentees[.]” *Id.* at 5. *Accord id.* at 7.

In concluding that the record did not establish that NODs spend a majority of their time directing

and assigning employees, the RD acknowledged that the Agency relied on testimony allegedly demonstrating that NOD #1 spends “90%” of her time performing supervisory duties, and that NOD #2 spends “100%” of his time performing supervisory duties. *Id.* at 5. However, the RD found this generalized testimony was outweighed by the more specific testimony discussed above. *See id.*

With the exception of directing and assigning employees, the RD found that NODs do not exercise supervisory authority. Specifically, the RD found that NODs do not adjust employee grievances or hire, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, although the RD noted that NODs document employee misconduct and submit the documentation to supervisors, and may reassign employees who threaten patient care. *Id.* at 4. Further, the RD found that although NODs are generally the senior registered nurses on duty at the hospital during off-tours, charge nurses, rather than NODs, directly oversee the work performance of other nurses during off-tours. *Id.* at 2. In this regard, the RD found that NODs “generally are not assessing whether an employee is performing his or her job properly” when making rounds, *id.* at 3, and are not responsible for overseeing the performance of the hospital’s staff. *Id.* at 4-5. Rather, the RD stated, “how an employee performs an assigned task is a matter for a [c]harge [n]urse[.]” *id.* at 3 who “directly oversee[s] the work performed by the [r]egistered [n]urses and other employees in the unit.” *Id.* at 3, 2.

III. Positions of the Parties

A. Agency’s Application

The Agency alleges that the RD committed clear and prejudicial errors concerning substantial factual matters. Application at 8. Specifically, the Agency asserts that the RD was “prejudicially selective” in considering testimony because he “did not appropriately consider the incumbents’ testimony[.]” *id.* at 10, that NODs spend “‘the majority,’ or ‘90 percent,’ or ‘100 percent,’” of their time engaged in “supervisory duties[.]” *Id.* at 11. Further, the Agency claims that because NODs spend little time performing hands-on patient care, the RD should have inferred that NODs spend “the vast majority” of their time “making rounds, ensuring staffing, and making other supervisory decisions that are eventually reflected in their report.” *Id.* at 14.

The Agency also alleges that the RD failed to apply established law. In this regard, the Agency

contends that, because NODs exercise supervisory authority during a preponderance of their employment time, they are supervisory employees under *Veterans Administration Medical Center, Fayetteville, North Carolina*, 8 FLRA 651, 660 (1982) (*Fayetteville*). See Application at 13-14. The Agency also claims the RD failed to apply *Fayetteville* by failing to find that NODs exercise supervisory authority when they conduct rounds and prepare shift reports. *Id.* at 14-15. Finally, the Agency asserts that NODs are supervisors because NODs “act as *the one-and-only nurse supervisor at the facility*” during off-tours, and argues that including NODs in the unit would result in an “extremely odd situation” that would be “prejudicial to the A[ctivity] due to the obvious conflict of interest[,]” because it would leave “up to 100 bargaining unit employees on duty without a single supervisor present.”³ *Id.* at 12.

B. Union’s Opposition

The Union contends that the RD did not fail to apply established law and did not commit factual errors. Opp’n at 1. In this regard, the Union argues that there was “no evidence that the NODs exercised any supervisory authority when doing rounds[,]” during which time NODs “collect[] information” for the shift report. *Id.* at 2-3. Further, the Union contends, the Agency “does not explain how” preparing the shift report “involves the exercise of any of the supervisory indicia under § 7103(a)(10).” *Id.* at 2. With regard to the Agency’s argument that the RD’s Decision results in no supervisory nurses being present at the hospital during off-tours, Application at 12, the Union argues that the Authority previously has rejected a similar claim, Opp’n at 3 & n.3, and that unit employees are accountable to non-bargaining unit member nurse managers twenty-four hours per day, even when the nurse managers are not present at the hospital. *Id.* at 3.

3. The Agency also asserts that the Authority should review the RD’s Decision because “established policy warrants reconsideration[.]” Application at 2. However, the Agency provides no support for this claim. Accordingly, we reject this claim as a bare assertion. See *U.S. Dep’t of the Navy, Fleet Readiness Ctr. Sw., San Diego, Cal.*, 63 FLRA 245, 252 (2009).

IV. Analysis and Conclusions

A. The RD did not commit clear and prejudicial errors concerning substantial factual matters.

As noted previously, the Authority may grant review of an application if it is demonstrated that the RD committed a clear and prejudicial error concerning a substantial factual matter. 5 C.F.R. § 2422.31(c)(3)(iii). It is well settled that disagreement over the weight that an RD has accorded certain evidence is not sufficient to find that an RD committed a clear and prejudicial error concerning a substantial factual matter. *SSA, Office of Disability Adjudication & Review, Balt., Md.*, 64 FLRA 896, 902 (2010) (*SSA*).

The Agency contends that the RD did not sufficiently consider testimony that NODs spend “the majority,’ ‘90 percent,’ or ‘100 percent,’” of their day allegedly exercising “supervisory duties[.]” Application at 11. In this connection, NOD #2 claimed, generally, that “100 percent” of his work was “in supervision[.]” Tr. at 150. However, the RD decided to credit NOD #2’s more specific testimony that he spends only “two to three hours each shift” directing and assigning employees, and thus, only two to three hours each shift exercising supervisory authority. RD’s Decision at 5. *Accord id.* at 7; Tr. at 153. In effect, the Agency challenges the weight that the RD accorded certain evidence, which, as stated above, is not sufficient to demonstrate that he committed a clear and prejudicial error concerning a substantial factual matter. *SSA*, 64 FLRA at 902.

With regard to NOD #1, the RD found that NOD #1 spends “more time conducting rounds and more time preparing and making copies of the [shift report] than she spends on any one of her other functions[,]” which necessarily include the duties that the RD found to be supervisory.⁴ RD’s Decision at 5. The RD based this finding on specific testimony that NOD #1 spends “60 to 80 minutes conducting a single set of rounds” and “60 minutes reviewing and verifying the information in the [shift report,]” and more time performing those non-supervisory activities than she spends performing activities in

4. As stated previously, the RD found that conducting rounds and preparing the shift report are not supervisory duties. As discussed further below, we find that the RD did not err as a matter of law in concluding that the NODs do not exercise supervisory duties when they conduct rounds and “think[] about” exercising supervisory authority while conducting rounds and preparing shift reports. Application at 15.

which she exercises supervisory authority. *Id.* *Accord id.* at 7; Tr. at 97, 113. Indeed, the RD noted that the one specific activity the witness testified to in which she directs and assigns employees is “handling calls from employees and making calls to employees in connection with adjusting staffing[,]” which takes her only “20 minutes each day[.]” RD’s Decision at 5. *Accord* Tr. at 94.

The testimony that the Agency cites with regard to NOD #1 is a general, brief, unexplained response to a vague, multi-part question. Specifically, the Agency relies on the following exchange:

[Agency Attorney]: . . . I asked you about a number of categories of duties that you do. I asked you about granting leave, directing employees between units. We talked about resolving conflicts between employees, basically, all kinds of duties that relate to the nurses in your -- at the medical center. Do you have an estimate for what percentage of your time is spent on those duties?

[NOD #1]: Probably 95 percent of the time. Let’s say 90 percent because you spend time -- because we have reports that we do as well, that we have to do every day. So I’d say 90 percent.

Tr. at 85. Although NOD #1 testified that she spends “90 percent” of her time performing “a number of categories of duties” and “all kinds of duties that relate to the nurses[.]” *id.*, those general phrases do not necessarily equate to supervisory duties. Moreover, as with NOD #2, it was not a clear and prejudicial error for the RD to rely on NOD #1’s more specific testimony discussed above rather than this more general testimony.

The Agency also relies on the testimony of the Activity’s associate director of patient care services, an indirect supervisor of the NODs:

[Agency Attorney]: . . . Now, I talked with you about a number of duties that [NODs] do. We talked about directing employees, assigning employees, having some involvement in discipline, and granting leave. Those duties that we talked about, do you have an opinion on what percentage of their time is spent on those supervisory duties?

[Indirect Supervisor Witness]: That’s the majority of our duties. Outside of that small

window where they provide -- they may be called upon to provide direct care, the majority of our responsibility is directing staff, ensuring the patient care delivery. You know, sometimes on the off[-]tour . . . they have to be responsible for calling in the nurses. So the majority of our role is spent making sure that patient care needs are met and coordinate the resources during the time where resources aren’t readily available to make that happen.

Id. at 33-34.

Contrary to the Agency’s claim, this testimony does not clearly demonstrate that NODs spend a majority of their time exercising supervisory authority. In this regard, the question generally refers back to “a number of duties” that the Agency attorney had asked the witness about, including one -- discipline -- that the RD found the NODs do not engage in. *Id.* at 33. In addition, the witness’ response that the activities of “making sure that patient care needs are met” and coordinating resources “to make that happen[.]” do not necessarily encompass supervisory duties and, in the case of patient care needs, could reasonably be interpreted as including making rounds and preparing the shift report, both of which the RD found were non-supervisory duties. *Id.* at 34. Finally, the Agency provides no support for its assertions that NODs exercise supervisory authority whenever they are not performing direct patient care. *See* Application at 14.

For the foregoing reasons, the Agency has not established that the RD committed clear and prejudicial errors concerning substantial factual matters.

B. The RD did not fail to apply established law.

As noted previously, under 5 C.F.R. § 2422.31(c)(3)(i), the Authority may grant an application for review when an application demonstrates that the RD failed to apply established law. When determining whether a nurse is a supervisor under § 7103(a)(10), the Authority determines, as relevant here, whether the employee spends a preponderance of his or her employment time exercising supervisory authority that requires the consistent exercise of independent judgment. *U.S. Dep’t of the Army, Parks Reserve Training Ctr., Dublin, Cal.*, 61 FLRA 537, 543 (2006) (Chairman Cabaniss dissenting in part) (*Parks Reserve*)).

Here, the Agency asserts that the record indicates that NODs spend a majority of their time acting as supervisors and that under *Fayetteville*, an employee who is “primarily a supervisor . . . during a majority of their employment time” is a supervisor. Application at 13-14 & n.6. As we have previously rejected the argument that the NODs spend a majority of their time exercising supervisory authority, we find that the RD’s decision is not inconsistent with *Fayetteville*, 8 FLRA at 660, in this regard.

The Agency further claims that the RD failed to apply *Fayetteville* because he failed to find that NODs exercise supervisory authority when they: (1) conduct rounds; and (2) “think[] about” exercising supervisory authority when conducting rounds and preparing shift reports. Application at 14-15. The nurses in *Fayetteville* exercised supervisory authority when they conducted rounds because they “evaluat[ed] the work of . . . subordinates in carrying out their assigned duties” and “act[ed] as . . . role model[s] in teaching or demonstrating proper procedures and techniques to . . . subordinates.” *Fayetteville*, 8 FLRA at 662.

The record in this case does not show that NODs engage in similar activities, or any supervisory duties, when they conduct rounds. See RD’s Decision at 3-4. Moreover, the RD specifically found, and the Agency does not dispute, that “NODs generally are not assessing whether an employee is performing his or her job properly” when making rounds. RD’s Decision at 3. With regard to the Agency’s assertion that *Fayetteville* indicates that “‘thinking about’ supervisory responsibilities” is the “same as exercising supervisory responsibilities[,]” the Agency does not cite any evidence indicating whether, or to what extent, NODs think about supervisory duties when conducting rounds or preparing shift reports. Application at 15. Thus, we find that the Agency has not demonstrated that the RD’s decision is contrary to the Authority’s decision in *Fayetteville*.

Finally, the Agency cites no law, rule, or regulation to support its claim that the RD’s Decision is deficient because it would allegedly result in NODs being “*the* one-and-only nurse supervisor at the facility” during off-tours, *id.* at 12, and does not explain why the Activity is required to have supervisory staff on duty at all times, or why this necessitates a finding that the NODs are supervisors. Similarly, the Agency does not demonstrate that the alleged result of the RD’s Decision -- that it would lead to an “obvious conflict of interest[,]” *id.* -- indicates that the RD failed to apply established law.

For the foregoing reasons, the Agency has not demonstrated that the RD failed to apply established law.

V. Order

The Agency’s application is denied.