64 FLRA No. 143

UNITED STATES
DEPARTMENT OF THE NAVY
COMMANDER, NAVY REGION MID-ATLANTIC
PROGRAM DIRECTOR,
FLEET AND FAMILY READINESS
NORFOLK, VIRGINIA
(Activity/Petitioner)

and

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
(Exclusive Representative/Petitioner)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 22, AFL-CIO
(Exclusive Representative)

WA-RP-09-0071
WA-RP-09-0078

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ORDER DENYING APPLICATION FOR REVIEW

May 14, 2010

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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 filed by the National Association of Independent Labor (NAIL) under § 2422.31 of the Authority's Regulations.[1] The Activity filed an opposition to the application for review.

As a result of a reorganization, 31 Nonappropriated Fund (NAF) employees were organizationally transferred from an Army activity in Virginia Beach, Virginia to a Navy activity in Norfolk, Virginia. Specifically, the NAF employees were transferred from the U.S. Army Garrison Command, Fort Story (Fort Story) to the Commander, Navy Region Mid-Atlantic, Program Director, Fleet and Family Readiness, in Norfolk, Virginia (the Activity).

NAIL and the Activity filed petitions to clarify the bargaining unit status of the affected employees. NAIL sought a ruling that the transferred employees constitute a separate appropriate unit for which the Activity is the successor employer. The Activity in its cross-petition sought a determination that the transferred employees had accreted into an existing unit at the Activity represented by the American Federation of Government Employees, Local 22 (AFGE).

The Regional Director (RD) found that the bargaining unit sought by NAIL was not appropriate and concluded that "a finding of successorship cannot be made." RD's Decision at 7. The RD then concluded that the 31 transferred employees accreted to the existing unit of NAF employees represented by AFGE and amended AFGE's certification to include the 31 accreted employees.[2]

For the reasons that follow, we deny the application for review.

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1. Section 2422.31 of the Authority's Regulations provides, 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:
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> (1) The decision raises an issue for which there is an absence of precedent;
> (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;
> (ii) Committed a prejudicial procedural error;
> (iii) Committed a clear and prejudicial error concerning a substantial factual matter.

2. The application for review in this case initially contained several procedural deficiencies. On March 11, 2010, the Authority's Case Intake and Publication Office issued an order directing NAIL to correct all deficiencies by March 25, 2010. Rather than amending the original application, the Union filed a new complete application on March 22, 2010. Because the second application was filed with the Authority within the 60-day time frame prescribed by the Authority's Regulations, the Authority accepted the second application as the formal filing and noted that the Union's original application would not be considered. 5 C.F.R. § 2422.31(a).

II. Background and RD's Decision

A. Background

The Activity is responsible for the operation of all the Morale, Welfare, and Recreation (MWR) programs in Navy installations and facilities along the eastern seaboard, except for the Washington, D.C. area. RD's Decision at 2. As part of the 2005 Department of Defense (DOD) Base Realignment and Closure (BRAC) process, DOD entities in close proximity to each other were ordered to consolidate base operating support functions as a way to save resources. *Id*. The Department of the Army agreed to organizationally transfer 31 NAF employees at Fort Story and their MWR functions to the Activity. *Id*. at 4. These transferred employees have been administratively and organizationally integrated into the Activity. *Id*.

NAIL is the exclusive representative of all NAF employees at Fort Story and consequently, the transferred employees at issue in this proceeding were part of NAIL's bargaining unit. *Id*. at 3. AFGE represents all NAF employees in the Activity, a unit of approximately 840 employees. *Id*. at 3.

NAIL filed a representation petition seeking to clarify the bargaining unit status of the NAF employees transferred to the Activity and seeking a determination that the Activity is the successor employer for these employees. The Activity filed a cross-petition to accrete the transferred employees into the bargaining unit represented by AFGE. *Id*. at 1-2.

B. RD's Decision

In considering NAIL's petition and the Activity's cross-petition, the RD applied the legal framework set forth in *United States Department of the Navy, Fleet and Industrial Supply Center, Norfolk, Virginia*, 52 FLRA 950, 958-59 (1997) (*FISC*). The Authority employs this framework to resolve competing claims of successorship and accretion in cases arising out of a reorganization where employees are transferred to a pre-existing or newly established organization. RD's Decision at 5. Applying *FISC*, the RD first considered whether the transferred employees constitute a separate appropriate unit. *Id*. at 6.

In determining whether the NAIL unit constitutes a separate appropriate unit, the RD considered whether the unit would: (1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the Activity; and (3) promote the efficiency of the Activity's operations. *See id.* (citing *U.S. Dep't of the Army, Military Traffic Mgmt. Command, Alexandria, Va*., 60 FLRA 391, 393-94 (2004) (*Military Traffic Mgmt. Command*); *U.S. Dep't of the Air Force, Lackland Air Force Base, San Antonio, Tex.*, 59 FLRA 739, 741 (2004)). The RD further noted that all three criteria must be satisfied in order for a proposed unit to be appropriate. RD's Decision at 6 (citing *FISC*, 52 FLRA at 961).

In assessing the community of interest criterion, the RD found that the record did not demonstrate that the transferred employees shared a clear and identifiable community of interest separate and distinct from the NAF employees of the Activity represented by AFGE. RD's Decision at 7. The RD found that the transferred employees did not have an employment relationship or work situation different from that of the NAF employees in the AFGE bargaining unit. *Id*. Moreover, the RD found that the transferred employees and the employees in the AFGE bargaining unit were all part of the same organizational component, supported the same mission, and were subject to the same chain of command. *Id*. The RD also found that the transferred employees have similar or related duties, job titles, and work assignments, and are subject to the same general working conditions as the employees in the AFGE bargaining unit. Finally, the RD found that the transferred employees and the employees in the AFGE bargaining unit are governed by the same personnel and labor relations policies that are centrally established and administered by the same human resources office. *Id.*

The RD concluded that all of the above factors indicated that the transferred employees do not share an identifiable community of interest separate and distinct from the employees in the Activity's pre-existing bargaining unit represented by AFGE. *Id.* (citing, among others, *U S. Dep't of the Navy, Fleet Readiness Ctr. S.W., San Diego, Cal.*, 63 FLRA 245, 250 (2009) (*Fleet Readiness*) and *FISC*, 52 FLRA at 964-65).

With respect to the second appropriate unit criterion, the RD found that a stand-alone unit limited to 31 employees would not promote effective dealings. RD's Decision at 7. The RD found that all personnel and labor relations matters including the negotiation of collective bargaining agreements related to NAF were administered centrally from the Activity's NAF human resources office. *Id*. Under

such circumstances, the RD found that having to negotiate and administer a separate collective bargaining agreement for the transferred employees, who share a community of interest with the NAF employees in the AFGE bargaining unit, would not promote effective dealings. *Id*.

Finally, with regard to the third appropriate unit criterion, the RD found that the unit proposed by NAIL would not promote the efficiency of the Activity's operations. *Id*. The RD found that the establishment of a small stand-alone unit of employees would result in an unwarranted fragmentation of the Activity's integrated organizational and operational structure. *Id*. (citing *FISC*, 52 FLRA at 966-67).

Accordingly, the RD found that the bargaining unit sought by NAIL was not appropriate and concluded that "a finding of successorship cannot be made." RD's Decision at 7. The RD then concluded that the 31 transferred employees accreted to the existing unit of NAF employees represented by AFGE, and he amended AFGE's certification to include the 31 accreted employees. *Id*. at 8.

III. Positions of the Parties

A. Application for Review

NAIL asserts that "established law or policy warrants reconsideration." Application for Review at 1. NAIL argues that the RD's decision that the transferred employees were accreted to the existing unit represented by AFGE circumvents the transferred employees' right to select their own representative. *Id*. at 3. NAIL asserts that in resolving competing claims of successorship and accretion in cases arising out of a reorganization where employees are transferred to a pre-existing or newly established organization, the Authority should first consider §§ 7101 and 7102 of the Statute, which permit employees to choose their representative. *Id*. at 2, 3-5.

NAIL also claims that, in determining the appropriateness of the unit, the RD failed to apply established law. NAIL cites §§ 7101, 7102 and 7112(a)[3] of the Statute. According to NAIL, the transferred employees constitute a separate appropriate unit for which the Activity is a successor employer. NAIL claims that the transferred employees have no interaction with other NAF employees at the Activity, nor has there ever been an interchange of employees between the organizations. *Id*. at 5-6. NAIL also asserts that decisions concerning conditions of employment have been historically made at the local level, and that the transferred employees have better benefits under NAIL's collective bargaining agreement than under AFGE's agreement. *Id*. at 6. NAIL asserts that the competitive area for merit promotions and RIFs would be impossible to determine, and finally, that the proposed unit is geographically isolated from the gaining organization. *Id*.

With respect to effective dealings, NAIL asserts that it does not promote effective dealings to have the office responsible for administering personnel and labor relations policies located in Norfolk, Virginia while the employees are physically located at Fort Story in Virginia Beach. *Id*. at 8. NAIL also claims that NAF employees under the NAIL agreement enjoy more benefits than NAF employees under AFGE's contract. *Id*.

Finally, regarding the efficiency of operations, NAIL claims that the record does not support the Activity's claim that it is more efficient to have the transferred employees accrete to AFGE. *Id*. NAIL asserts that the record does not support the conclusion that the accretion of the NAIL employees to AFGE would be cost effective or would lead to more efficient operations. *Id*. In sum, NAIL asserts that the transferred employees are an appropriate unit, and that the RD erred when he concluded otherwise. *Id*.

B. Opposition

The Activity asserts that NAIL is basically arguing, without support, that the RD misapplied accretion principles in rendering his decision. Opp'n at 2.

The Activity asserts that, although under § 7101 of the Statute employees have the right to choose their labor organizations, under established accretion principles an election is not always necessary when a group of employees is added to an existing bargaining unit based on a change in agency operations or organization. *Id*. at 2-3.

Regarding the community of interest criterion, the Activity argues that the transferred employees do not work side-by-side with other NAF employees who remain at Fort Story. *Id*. at 3. The Activity

3. NAIL refers to § 7112(c) in its application; however, its arguments are based on the application of the criteria for appropriate unit determination set forth in § 7112(a) of the Statute.

further argues that the transferred employees are being trained under Navy rules, regulations, and local policy. *Id.* Finally, the Activity asserts that the transferred employees interact with other Navy MWR employees at various sites under the Activity's control, and through training and job exchanges. *Id.* at 3-4.

On the subject of effective dealings, the Activity asserts that having all employees covered by the same collective bargaining agreement will facilitate effective dealings. *Id.* at 4. The Activity first notes that the transferred employees are no longer under the same organizational structure as the other employees at Fort Story. The Activity asserts that the transferred employees are now under the same chain of command as the other employees represented by AFGE. *Id*.

Finally, the Activity argues that a finding of successorship would not promote efficiency because negotiating and administering two separate contracts would be costly for the Activity. *Id.* at 4-5. The Activity claims that the establishment of a separate unit for a few transferred employees who share the same community of interest as the employees represented by AFGE would result in an artificial, unwarranted fragmentation. *Id*. at 5.

IV. Analysis and Conclusions

A. Established law on accretion does not warrant reconsideration.

NAIL argues that "established law or policy warrants reconsideration." Application for Review at 1. An assertion that "established law or policy warrants reconsideration" is an established ground for challenging an RD's Decision and Order. 5 C.F.R. § 2422.31(c)(2); *U.S. Dep't of Agric., Office of the Chief Info. Officer, Info. Tech. Servs.*, 61 FLRA 879, 883 (2006).

In support, NAIL asserts that in cases arising out of a reorganization where employees are transferred to a pre-existing or newly established organization, the Authority should first consider §§ 7101 and 7102 of the Statute, which permit employees to choose their representative. NAIL claims that the RD's decision that the transferred employees were accreted to the existing units represented by AFGE circumvents the transferred employees' right to select their own representative. Application for Review at 3.

However, the Authority previously has rejected the argument that "employees must always be given an opportunity to vote on which exclusive representative will represent them." *U.S. Dep't of the Navy, Human Resources Serv. Ctr. Nw., Silverdale, Wash.*, 61 FLRA 408, 412 (2005). For example, under basic accretion principles, employees who are accreted into an existing unit are included in the unit without having the opportunity to vote. *See, e.g., FISC*, 52 FLRA at 963. Similarly, the Authority has held that new employees are automatically included in an existing unit where their positions fall within the express terms of a unit certification and their inclusion would not render the unit inappropriate. *See, e.g., Dep't of the Army, Headquarters, Fort Dix, Fort Dix, N.J.*, 53 FLRA 287, 294 (1997).

The Authority's existing accretion principles adequately account for the individual rights cited by NAIL. In this connection, the Authority has held that "[b]ecause accretion precludes employee self-determination, the accretion doctrine is narrowly applied." *U.S. Dep't of Veterans Affairs, Gulf Coast Veterans Health Care Sys., Biloxi, Miss.*, 64 FLRA 452, 455 (2010) (citation omitted). NAIL does not explain with any specificity why this established law is incorrect. In these circumstances, there is no need to reconsider established Authority precedent regarding accretion in order to acknowledge the individual statutory rights cited by NAIL. Consequently, NAIL's application for review as to this matter is denied.

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

NAIL claims that the Activity is a successor employer and that the RD failed to apply established law when he concluded that the transferred employees were not a separate appropriate unit.

1. Established Law

In *FISC*, 52 FLRA 950, the Authority adopted the following framework for resolving cases arising from a reorganization where employees are transferred to a pre-existing or newly established organization (the "gaining organization") and both successorship and accretion principles are claimed to apply:

> (1) Initially, the Authority will determine whether, under [§] 7112(a) of the Statute, the transferred employees are included in, and constitute a majority of, a separate appropriate unit in the gaining organization. The outcome of this inquiry will govern

> whether successorship or accretion principles should next be applied.
>
> (2) If it is determined that the transferred employees are included in and constitute a majority of a separate appropriate unit in the gaining organization, [then] the Authority will apply the remainder of the successorship factors set forth in [*Naval Facilities Eng'g Serv. Ctr., Port Hueneme, Cal.*, 50 FLRA 363 (1995) (*Port Hueneme*)] to the unit determined to be appropriate. The outcome of the *Port Hueneme* analysis will determine whether the gaining organization is a successor for purposes of collective bargaining with the labor organization that represented the transferred employees at their previous employer.
>
> (3) If it is determined that the transferred employees are not included in or do not constitute a majority of a separate appropriate unit in the gaining organization, [then the Authority] will apply accretion principles. The outcome of this analysis will determine whether the transferred employees have accreted to a pre-existing unit in the gaining organization.

Def. Logistics Agency, Def. Supply Ctr. Columbus, Columbus, Ohio, 53 FLRA 1114, 1121 (1998) (citing *Dep't of the Navy, Naval Supply Ctr., Puget Sound, Bremerton*, 53 FLRA 173, 178-79 (1997); *FISC*, 52 FLRA at 958-59).

The first step in the above framework "corresponds to the first factor set forth in *Port Hueneme*, which requires, *inter alia*, that 'the post-transfer unit must be appropriate[.]'" *FISC*, 52 FLRA at 959 (quoting *Port Hueneme*, 50 FLRA at 368). As discussed previously, a unit may be deemed to be appropriate under § 7112(a) of the Statute only if it will: (1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency involved; and (3) promote efficiency of the operations of the agency involved. *FISC* at 959-62. A proposed unit must meet all three criteria in order to be found appropriate. *Military Traffic Mgmt. Command*, 60 FLRA at 394. Determinations as to each of these criteria are made on a case-by-case basis. *Id.* The Authority has set out factors for assessing each criterion, but has not specified the weight of individual factors or a particular number of factors necessary to establish an appropriate unit. *Id.*

2. The RD applied established law.

With regard to the first appropriate unit criterion -- whether employees share a clear and identifiable community of interest -- the Authority examines factors such as geographic proximity, unique conditions of employment, distinct local concerns, degree of interchange between other organizational components, and functional or operational separation. *See FISC*, 52 FLRA at 960-961 (citations omitted). In addition, the Authority considers factors such as whether the employees in the proposed unit are a part of the same organizational component of the agency; support the same mission; are subject to the same chain of command; have similar or related duties, job titles, and work assignments; are subject to the same general working conditions; and are governed by the same personnel office. *See id.*

NAIL argues that the transferred employees share an identifiable community of interest that is separate and distinct from the other NAF employees represented by AFGE. However, considering the relevant factors, the RD found that the transferred employees were administratively and organizationally integrated into the Activity. RD's Decision at 4, 7. In this regard, the RD found that the transferred employees do not have an employment relationship or work situation materially different from the NAF employees represented by AFGE. *Id.* at 7. The RD further found that the transferred employees and the employees represented by AFGE are all part of the same organizational component. The RD found that the two groups support the same mission, are subject to the same chain of command, have similar or related duties, job titles, and work assignments, and are subject to the same general working conditions. The RD also found that the two groups are governed by the same personnel and labor relations policies that are centrally established and administered by the same human resources office. *Id.* The RD concluded that the work situation or employment relationship of the transferred employees and the employees represented by AFGE is essentially the same. *Id.*

NAIL's assertions do not dispute the above findings, and do not demonstrate that the RD inappropriately applied the community of interest criterion. In this regard, NAIL has not established that the transferred employees have duties that are different from the employees represented by AFGE, report to a different chain of command, support a different mission, or are subject to working conditions, organizational components, or job titles that are different from those of the employees

represented by AFGE. *See FISC*, 52 FLRA at 960-61. Based on the foregoing, NAIL has not demonstrated that the RD failed to apply established law in finding that the transferred employees do not share a clear and identifiable community of interest separate and distinct from other AFGE employees.[4]

The RD also applied established law when he considered the effective dealings criterion. To apply this criterion, the Authority examines factors such as the past collective bargaining experience of the parties; the locus and scope of authority of the responsible personnel office administering personnel policies covering employees in the proposed unit; the limitations, if any, on the negotiation of matters of critical concern to the employees in the proposed unit; and the level at which labor relations is set by the agency. *Id*. at 961.

The RD found that NAIL's continued representation of the transferred employees would not promote effective dealings with the Activity because supervisors at Fort Story no longer have the authority to establish policies, procedures, or working conditions or to negotiate over such matters. Rather, all personnel and labor relations matters, including the negotiation of collective bargaining agreements, are administered centrally from the Activity's human resources office. The RD found that effective dealings are not promoted by a unit that would require the Activity's human resources office to negotiate and administer a separate collective bargaining agreement for the 31 NAF employees who share a community of interest with the 840 employees in the AFGE bargaining unit. In this regard, we note that NAIL's claim regarding employee benefits under its contract, in contrast to AFGE's contract, has no relevance when determining effective dealings between the Union and the Activity. *Id*. Thus, the RD's findings support his conclusion that allowing NAIL to represent a separate unit of 31 employees would not promote effective dealings with the Activity.

Finally, the RD applied established law when he considered the efficiency of agency operations criterion. This criterion concerns the benefits to be derived from a unit structure bearing a rational relationship to the operations and organizational structure of the agency. *Id*. The record here does not establish that the unit proposed by NAIL would promote the efficiency of the Activity's operations. As found by the RD, the Activity has a centralized operational and organizational structure. Therefore, the establishment of a small unit of 31 employees would result in an artificial, unwarranted fragmentation of the Activity's organizational and operational structure, thereby interfering with the efficiency of the Activity's operations.

The foregoing demonstrates that the RD correctly applied established law in determining that the transferred employees do not constitute a separate appropriate unit under § 7112 of the Statute. Accordingly, as NAIL has not established that the RD failed to apply established law, we deny NAIL's application for review as to this matter as well. *See U.S. Dep't of the Navy, Fleet Readiness Ctr., Sw., San Diego, Cal.*, 63 FLRA 245, 252 (2009).

V. Order

The application for review is denied.

4. As set forth in *Military Traffic Mgmt. Command*, 60 FLRA at 394, all three criteria under § 7112(a) must be satisfied in order to establish that a unit remains appropriate after a transfer. Here, as the first criterion is not met, it is unnecessary to consider whether the proposed unit would promote effective dealings with the Activity or promote the efficiency of the Activity's operations. For purposes of this decision, however, we nonetheless analyze the other factors, as set forth below.