65 FLRA No. 52

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
SEAGOVILLE, TEXAS
(Activity)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 1030
(Petitioner/Labor Organization)

DA-RP-10-0013

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ORDER DENYING
APPLICATION FOR REVIEW

November 12, 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 (application) filed by the United States Department of Justice (the Agency) under § 2422.31 of the Authority's Regulations.[1] The Petitioner/Labor Organization (the Union) did not file an opposition to the Agency's application.

As relevant here, the Regional Director (RD) determined that § 7112(b)(7) of the Federal Service Labor-Management Relations Statute (the Statute) does not bar the inclusion of a Special Investigative Support (SIS) Technician in the bargaining unit represented by the Union.[2] For the reasons that follow, we deny the Agency's application.

II. Background and RD's Decision

The Agency is a correctional institution. RD's Decision at 3. The Union filed a petition seeking to clarify the bargaining-unit status of the SIS Technician position. *Id.* at 1. In determining whether the disputed position should be excluded from the unit under § 7112(b)(7) of the Statute, the RD noted that the Authority equates "primarily engaged," within the meaning of that statutory section, with "preponderance." *Id.* at 5. He then found that the SIS Technician in dispute spends between thirty-five and forty percent of his time conducting staff investigations and, as a result, "the record evidence does not demonstrate that a preponderance of [the SIS Technician's] duties involved the investigation of staff." *Id.* The RD also noted the Agency's assertion that inmate investigations always have the potential to become staff investigations, but determined that "Authority precedent demonstrates that the 'potential for uncovering employee fraud, misuse of funds, or malfeasance' has been considered only in cases involving audits or investigations of agency programs or employees." *Id.* (citing *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, McCreary, Pine Knot, Ky.*, 63 FLRA 153, 155 (2009) (*McCreary*); *Small Bus. Admin.*, 34 FLRA 392, 401-02 (1990) (*SBA*); *U.S. Dep't of Labor, Office of Inspector Gen., Reg. I, Boston, Mass.*, 7 FLRA 834, 835-36 (1982) (*DOL*)). For these reasons, the RD concluded that the SIS Technician is not "primarily engaged in" staff investigations within the meaning of § 7112(b)(7), and he clarified the existing bargaining unit to include the disputed position. *Id.*

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:
> . . . .
> (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.

5 C.F.R. § 2422.31(c)(3)(i), (iii).

2. Section 7112(b)(7) of the Statute provides that a bargaining unit is inappropriate if it includes "any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity." 5 U.S.C. § 7112(b)(7).

III. Agency's Application

The Agency requests review on the grounds that, in determining that the SIS Technician was not excluded under § 7112(b)(7) of the Statute, the RD: (1) committed a clear and prejudicial error concerning a substantial factual matter; and/or (2) failed to apply established Authority precedent. Application at 3.

With respect to the first ground, the Agency argues that the RD erred in finding that a preponderance of the SIS Technician's duties do not involve staff investigations because, according to the Agency, hearing testimony demonstrates that "approximately [fifty percent] of [the SIS's] current duties . . . pertain solely to conducting staff investigations[.]" *Id.* at 5. In this connection, the Agency asserts that the RD's reliance on *McCreary* is misplaced because the evidence in that decision indicated that only ten to twenty percent of the duties of the SIS Technicians at issue there involved staff investigations -- a much lower percentage than demonstrated in the instant case. *Id.* at 8-9.

With respect to the second ground, the Agency contends that, even assuming that the RD correctly found that up to forty-five percent of the SIS's duties consist of staff investigations, "the subject position should still be excluded . . . because it satisfies the 'preponderance' standard." *Id.* at 9. Further, the Agency maintains that the percentage of time spent by the SIS Technician investigating staff members is even greater than fifty percent because he also conducts inmate interviews, which "always have the potential to result in staff investigations." *Id.* at 8-9. In this connection, the Agency claims that the Authority has held that § 7112(b)(7) applies where employees perform internal investigations with "the potential for uncovering employee fraud, misuse of funds, or malfeasance[.]" *Id.* at 4 (citing *U.S. DOJ, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 55 FLRA 1243, 1248 (2000) (*USP Marion*); *SBA*, 34 FLRA at 402)). The Agency also claims that the RD misread *McCreary* "as establishing a *per se* rule that, henceforth, all [] SIS Technicians are automatically included in the bargaining unit unless they are engaged solely in staff investigations[,]" and that *McCreary* is distinguishable from the instant case because: (1) *McCreary* was based on "a limited and incomplete factual record" that "consisted solely of affidavits"; and (2) unlike here, "the SIS technician [in *McCreary*] did *not* assert that he received information about possible misconduct in the course of his inmate investigations." *Id.* at 7-8 (internal quotations omitted).

IV. Analysis and Conclusions

A. The RD did not commit a clear and prejudicial error concerning a substantial factual matter.

The Authority may grant an application for review 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). As set forth above, the Agency contends that the RD failed to properly consider hearing testimony indicating that approximately fifty percent of the SIS Technician's duties involve staff investigations. Application at 5.

The Agency relies on the testimony of the SIS Technician stating that approximately fifty percent of his duties pertain to staff investigations. *Id.* However, the SIS Technician's testimony was unclear. In this regard, the SIS Technician initially testified that seventy percent of his time involves investigatory work. Tr. at 144. He then reported spending half of his time conducting staff investigations, and the other half handling inmate investigations. *Id.* at 203, 205-06. It is unclear whether the SIS Technician meant that he evenly splits his *total* time, rather than the seventy percent pertaining to investigatory work, between staff and inmate investigations. The SIS Technician also later testified that approximately five percent of his time involves non-investigatory tasks, with the remainder of his time evenly split between staff and inmate investigations. *Id.* at 254-55. By contrast, both of the SIS Technician's former and current supervisors testified that one-third of the SIS Technician's duties involve staff investigations. *Id.* at 60, 115. In light of the SIS Technician's ambiguous statements, and the clear testimony of both his former and current supervisors, the Agency provides no basis for finding that the RD erred by declining to rely solely on one among the several unclear statements made by the SIS Technician, and, instead, reaching a conclusion consistent with the testimony of the supervisors. Accordingly, we find that the Agency has not established that the RD committed a clear and prejudicial error concerning a substantial factual matter.

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

The Authority may grant an application for review if it is demonstrated that the RD failed to apply established law. 5 C.F.R. § 2422.3l(c)(3)(i). In determining whether a specified investigative or audit position is properly excluded from a bargaining unit, the Authority considers whether: (1) the incumbents

are "primarily engaged in investigation or audit functions"; (2) these functions "relat[e] to the work of individuals employed by an agency whose duties directly affect the internal security of the agency"; and (3) these functions are "undertaken to ensure that the duties are discharged honestly and with integrity." 5 U.S.C. § 7112(b)(7).

The Activity argues that, even assuming that the RD correctly found that up to forty-five percent of the SIS's duties consist of staff investigations, the "position should still be excluded . . . because it satisfies the 'preponderance' standard." Application at 9. In *McCreary*, the Authority held that where the RD found that "only ten to twenty percent of SIS Technicians' time involves investigations of staff members[,]" his conclusion that SIS Technicians' duties did not meet the "primarily engaged requirement" of § 7112(b)(7) "comport[ed] squarely with the 'preponderance' interpretation of 'primarily engaged' adopted in *AFGE, Local 3529*[, 57 FLRA 633, 637-38 (2001).]" 63 FLRA at 156. Although the Authority has not defined what percentage of an employee's duties constitutes a "preponderance" in this context, the Authority has interpreted "preponderance" to mean "a majority" in the context of interpreting the term as it appears in § 7103(a)(10) of the Statute.[3] *See U.S. Dep't of the Army, Parks Reserve Training Ctr., Dublin, Cal.*, 61 FLRA 537, 541 (2006) (citing *Veterans Admin. Med. Ctr., Fayetteville, N.C.*, 8 FLRA 651, 660 (1982)). There is no basis on which to define "preponderance" differently in the context of § 7112(b)(7) than it is defined in the context of § 7103(a)(10). The RD found that, at most, forty-five percent of the SIS Technician's duties involved staff investigations, and we have found no factual error. Consistent with the definition of "preponderance" as "a majority," *see id.*, we find that forty-five percent does not constitute a preponderance, and conclude that the RD did not fail to apply established law in this regard.

The Agency also argues that the preponderance standard is met in this case because the percentage of time spent by the SIS Technician investigating staff members is even greater than fifty percent, given that he conducts inmate interviews that "always have the potential to result in staff investigations." Application at 8. In this regard, the Agency argues that the Authority has held that § 7112(b)(7) "applies where individuals 'perform internal investigations of employee wrongdoing and fraud[]' with the potential for uncovering 'employee fraud, misuse of funds, or malfeasance[.]'" *Id*. at 4 (citing *SBA*, 34 FLRA at 399-402). However, in response to an identical argument, the Authority stated in *McCreary* that "Authority precedent demonstrates that the 'potential for uncovering employee fraud, misuse of funds, or malfeasance' has been considered only in cases involving audits or investigations of agency programs or employees." 63 FLRA at 155 (citing *SBA*, 34 FLRA at 401-02 ("potential" considered where auditors performed audits of agency "programs, contracts, operations and program participants"); *DOL*, 7 FLRA at 835 ("potential" considered where auditors conducted audits of agency "programs and the employees who run these programs")). The Authority also held in M*cCreary* that "the potential for discovering staff misconduct ar[ose] in the context of inmate investigations, not employee investigations, as the precedent requires." *McCreary*, 63 FLRA at 155. Further, with respect to the Agency's arguments that *McCreary* is distinguishable from the instant case, neither the differences in record evidence between the cases nor the testimony in this case indicating that the potential for discovering staff misconduct always arises during inmate investigations provides a basis for finding that the RD erred as a matter of law. Accordingly, insofar as the RD failed to consider the potential for uncovering staff misconduct during the course of inmate investigations, we find that the Agency has not demonstrated that the RD failed to apply established law.

V. Order

The Agency's application for review is denied.

3. Section 7103(a)(10) of the Statute states, in pertinent part: "[T]he term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority[.]" 5 U.S.C. § 7103(a)(10).