66 FLRA No. 1

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
DALLAS REGION
DALLAS, TEXAS
(Activity)

and

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Labor Organization/Incumbent)

DA-RP-11-0005

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ORDER DENYING APPLICATION
FOR REVIEW

August 5, 2011

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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 American Federation of Government Employees, AFL-CIO (AFGE) under § 2422.31 of the Authority's Regulations.[1] As of the date of this decision, neither the Activity nor the National Treasury Employees Union (NTEU) has filed an opposition to AFGE's application.

The Regional Director (RD) determined that a group of Activity employees previously treated as AFGE bargaining unit members fall within the express terms of NTEU's existing unit certification and, therefore, are included in the NTEU bargaining unit. For the reasons that follow, we deny the application.

II. Background and RD's Decision

AFGE is the certified exclusive representative of all graded and nonprofessional employees permanently assigned to the Social Security Administration district office (the district office) and branch offices in Dallas, Texas. RD's Decision at 1-2. The employees at issue here were physically located at the district office and treated as AFGE bargaining unit members, despite the fact that they were organizationally located within, and supervised by, the Region VI[2] Office of Disability Adjudication and Review regional office (the regional office). *Id.* at 3-4. The employees were subsequently physically relocated to the same location as other regional office employees. *Id.* at 4. As relevant here, NTEU is the certified exclusive representative of a unit that includes all nonprofessional employees assigned to the regional office. *Id.* at 2-3.

AFGE filed a petition seeking to clarify the bargaining unit status of the relocated employees. *Id.* at 1. The RD found that "[s]ince only the Authority may determine bargaining unit eligibility issues, historical treatment of the disputed employees . . . is not controlling." *Id.* at 4. He also found that "[i]t is well established that '[n]ew employees are automatically included in an existing bargaining unit where their positions fall within the express terms of a bargaining certificat[ion] and where their inclusion does not render the bargaining unit inappropriate.'" *Id.* (quoting *Dep't of the Army Headquarters, Fort Dix, N.J.*, 53 FLRA 287, 294 (1997) (*Fort Dix*)). In addition, the RD noted that "[t]he Authority has interpreted *Fort Dix* broadly to apply not only to new employees hired into previously existing positions, but also to employees in newly created positions that fall within the express terms of the existing certification." *Id.* (citing *SSA, Office of Disability Adjudication & Review, Falls Church, Va.*, 62 FLRA 513, 514-15 (2008) (*Falls Church*)). Applying *Fort Dix*, the RD found that the relocated employees "fall within the express terms" of NTEU's certification, and "do not fall within the express terms" of AFGE's certification. *Id.* at 5. Accordingly, he determined that the employees

[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.

[2] We note that Region VI is the Activity. *See* Application, Attach. at 1.

are included in the bargaining unit represented by NTEU. *Id.*

III. AFGE's Application

AFGE argues that the RD committed a clear and prejudicial error concerning a substantial factual matter by finding that "the disputed employees are considered 'new employees' hired into previously existing positions or into newly created positions." Application at 1, 5. In this connection, AFGE asserts that the employees were "not the subject [of a] reorganization or [in] newly created positions[,]" and "should be viewed as employees who have always worked in the same positions, for the same organization, under the same first level of supervision." *Id.* at 5-6.

AFGE also argues that the RD failed to apply established law. *Id.* at 1, 6-7. Specifically, AFGE claims that the RD erred by not "apply[ing] the full principles of the *Fort Dix* doctrine, specifically[,] the principle that requires the RD's consideration [of] an 'appropriate unit' [under] [§] 7112(a)" of the Statute.[3] *Id.* at 6. In this regard, AFGE contends that its petitioned-for unit is appropriate. *Id.* at 6-7.

IV. Analysis and Conclusions

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

As noted previously, the Authority may grant an application for review if the party filing the application demonstrates 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, AFGE argues that the RD erred in finding that "the disputed employees are considered 'new employees' hired into previously existing positions or into newly created positions." Application at 5.

The RD found, and AFGE does not dispute, that the employees' positions fall within the express terms of NTEU's certification. RD's Decision at 5. Thus, under *Fort Dix*, the employees were automatically included in the NTEU bargaining unit upon their initial occupation of these positions, unless their inclusion would have rendered the certified unit inappropriate for exclusive recognition. *See* 53 FLRA at 294. It is undisputed that the employees occupied these positions prior to the relocation. As such, the employees were included in the NTEU bargaining unit prior to the relocation, despite the fact that they were treated as being in the AFGE bargaining unit. In addition, AFGE does not argue that including the employees in NTEU's bargaining unit would render that unit inappropriate. Therefore, even assuming that the RD erroneously characterized them as "new employees," this alleged error was not prejudicial because an application of *Fort Dix* supports including them in the NTEU unit. Application at 5. Accordingly, we find that AFGE 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.

As noted previously, the Authority may grant an application for review if the party filing the application demonstrates that the RD failed to apply established law. 5 C.F.R. § 2422.3l(c)(3)(i). AFGE contends that the RD failed to apply *Fort Dix* insofar as he did not assess whether AFGE is an appropriate unit under § 7112(a) of the Statute. Application at 6.

Under *Fort Dix*, "[n]ew employees are automatically included in an existing bargaining unit where their positions fall within the express terms of a bargaining certificat[ion] and where their inclusion does not render the bargaining unit inappropriate." 53 FLRA at 294. As previously stated, the RD found that the relocated employees fall within the express terms of NTEU's certification. RD's Decision at 5. Thus, under *Fort Dix*, the RD needed to consider only whether the inclusion of those employees would render NTEU's bargaining unit inappropriate -- not whether the petitioned-for AFGE unit was appropriate under § 7112(a) of the Statute. In this regard, as stated previously, AFGE does not contend that inclusion of the relocated employees in the NTEU unit would render that unit inappropriate. As *Fort Dix* did not require the RD to assess whether the petitioned-for AFGE unit would be appropriate, we find that AFGE has not demonstrated that the RD failed to apply established law.

V. Order

The application is denied.

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[3] Section 7112(a) of the Statute provides, in pertinent part:

> The Authority shall determine the appropriateness of any unit. The Authority . . . shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

5 U.S.C. § 7112.