67 FLRA No. 65

NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION
GODDARD SPACE FLIGHT CENTER
WALLOPS ISLAND, VIRGINIA
(Agency)

and

RONALD H. WALSH
(Petitioner)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
(Exclusive Representative)

WA-RP-13-0052

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ORDER GRANTING IN PART AND DENYING
IN PART APPLICATION FOR REVIEW

February 18, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member DuBester concurring)

I. Statement of the Case

Regional Director (RD) Barbara Kraft, of the Federal Labor Relations Authority, found that the Petitioner submitted a valid "showing of interest"[1] – a collection of employee signatures – to support his petition to decertify the Exclusive Representative (decertification petition). However, the RD found that the petition was untimely, and she dismissed it. In doing so, she applied § 7111(f)(3) of the Federal Service Labor-Management Relations Statute (the Statute)[2] and § 2422.12(d) of the Authority's Regulations.[3] There are two questions before us.

The first question is whether the RD committed a prejudicial procedural error by extending the deadline for the Exclusive Representative to challenge the Petitioner's showing of interest. Because resolving this question would involve issuing an advisory opinion, and the Authority does not issue such opinions, we do not resolve this question.

The second question is whether the RD's decision raises an issue for which there is an absence of precedent. Because the Authority has never determined whether § 7111(f)(3) of the Statute and § 2422.12(d) of the Authority's Regulations apply to decertification petitions filed by individuals, we find that there is an absence of relevant precedent, and we grant review on this basis. As set forth below, we direct the parties to submit briefs addressing this question, and we invite other interested persons to address this question, as well.

II. Background and RD's Decision

The Petitioner filed a petition for an election to decertify the Exclusive Representative as the labor organization representing certain employees. The RD set a deadline for the Exclusive Representative to respond to the petition. Subsequently, the Exclusive Representative requested an extension of time to file its response, and the RD granted the request.

In its response, the Exclusive Representative alleged that the Petitioner submitted an invalid showing of interest. The RD rejected this allegation and found that showing of interest was valid.

In addition, the Exclusive Representative claimed that the petition was untimely. In this regard, the Exclusive Representative argued that there was a lawful, written collective-bargaining agreement between the Agency and the Exclusive Representative, and that the agreement acted as a bar to the petition because the Petitioner did not file the petition within the open period set forth in § 7111(f)(3) of the Statute. Section 7111(f)(3) of the Statute provides, in pertinent part:

> (f) Exclusive recognition shall not be accorded to a labor organization–
>
> . . . .
>
> (3) if there is then in effect a lawful written collective[-]bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless–
>
> . . . .

[1] RD's Decision at 8.
[2] 5 U.S.C. § 7111(f)(3).
[3] 5 C.F.R. § 2422.12(d).

> (B) the petition for exclusive recognition is filed not more than 105 days and not less than [sixty] days before the expiration date of the collective[-]bargaining agreement.[4]

Addressing these claims, the RD stated that § 7111(f)(3)(B) of the Statute "provides that a petition for an election must be filed not more than 105 days and not less than [sixty] days before the expiration of a collective[-]bargaining agreement."[5] The RD also stated, in this regard, that the Authority "has . . . applied [§] 7111(f)(3) to decertification petitions filed by individuals."[6] For support, she cited *Department of the Army, Corpus Christi Army Depot, Corpus Christi, Texas* (*Corpus Christi*),[7] *National Park Service, Harpers Ferry, West Virginia* (*Nat'l Park Service*),[8] and *Department of the Army, U.S. Army Concord District Recruiting Command, Concord, New Hampshire* (*Concord*).[9] In addition, she found that § 2422.12(d) of the Authority's Regulations "governs a determination as to whether th[e] petition is timely."[10] Section 2422.12(d) of the Authority's Regulations provides:

> *Contract bar where the contract is for three (3) years or less.* Where a collective[-]bargaining agreement is in effect covering the claimed unit and has a term of three (3) years or less from the date it became effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days before the expiration of the agreement.[11]

The RD found that there was a collective-bargaining agreement between the Agency and the Exclusive Representative, and that the agreement expired on October 23, 2013. Based on that expiration date, the RD found that the open period for filing the petition ran from July 10, 2013, the 105th day before the agreement expired, to August 26, 2013, the 60th day before the agreement expired. The RD stated that the Petitioner filed his petition on June 17, 2013 – outside this period – and, therefore, that the petition was untimely. Accordingly, she dismissed the petition.

The Petitioner filed an application for review of the RD's decision, and the Exclusive Representative filed an opposition to the Petitioner's application for review.

III. Analysis and Conclusions

A. We do not resolve the Petitioner's claim that the RD committed a prejudicial procedural error.

The Petitioner agrees that the RD correctly determined that his showing of interest was valid.[12] Nevertheless, the Petitioner argues that the RD committed a prejudicial procedural error by giving the Exclusive Representative an extension of time to challenge the validity of the Petitioner's showing of interest.[13]

Under § 2429.10 of the Authority's Regulations, the Authority will not issue advisory opinions.[14] The determination that the Petitioner seeks – that the RD committed a prejudicial procedural error by granting the Exclusive Representative's extension request – would not change the RD's determination that the Petitioner's showing of interest was valid. As a result, addressing this argument would involve issuing an advisory opinion. Accordingly, and consistent with § 2429.10, we do not resolve this argument.[15]

B. The RD's decision raises an issue for which there is an absence of precedent.

The Petitioner quotes the Authority's statement in *90th Regional Support Command, Little Rock, Arkansas* (*Support Command*),[16] that "[t]he [A]uthority has never specifically held that the [open] period described in [§] 7111(f)(3) of the Statute applies to decertification petitions filed by . . . individual[s]."[17] In addition, the Petitioner alleges that the RD did not cite any post-*Support Command* precedent that indicates that these "open issues" have been resolved.[18] The Petitioner is thus making a claim, under § 2422.31 of the

[4] 5 U.S.C. § 7111(f)(3).
[5] RD's Decision at 9.
[6] *Id.* at 11.
[7] 16 FLRA 281 (1984).
[8] 15 FLRA 786 (1984).
[9] 14 FLRA 73 (1984).
[10] RD's Decision at 10.
[11] 5 C.F.R. § 2422.12(d).
[12] Application at 1.
[13] *See id.* at 2; Opp'n, Attach. 1 at 1-2.
[14] 5 C.F.R. § 2429.10.
[15] *Cf. U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 354 (2005) (declining to issue advisory opinion where the matter was "fully resolved" and "no cognizable legal interest remained in the dispute"); *AFSCME, Local 1418*, 53 FLRA 1191, 1194 (1998) (declining to issue advisory opinion where doing so "would serve no purpose").
[16] 56 FLRA 1041 (2000) (Chairman Wasserman concurring), *order granting application for review vacated and application dismissed as moot*, 57 FLRA 31 (2001).
[17] Application at 6 (quoting *Support Command*, 56 FLRA at 1041 n.1).
[18] *Id.* at 7.

Authority's Regulations, that the RD's decision raises an issue for which there is an absence of precedent.[19]

In *Support Command*, the activity alleged that there was an absence of precedent as to whether § 7111(f)(3) of the Statute and § 2422.12(d) of the Authority's Regulations apply to decertification petitions.[20] The Authority stated that the application demonstrated that the underlying decision raised an issue for which there was an absence of precedent, or that established law or policy warranted reconsideration.[21] In this regard, the Authority stated that it had "never specifically held that the [open] period described in [§] 7111(f)(3) of the Statute applies to decertification petitions filed by . . . individual[s]."[22] Accordingly, the Authority granted the application for review on the question of whether the open period specified in § 7111(f)(3) of the Statute and § 2422.12(d) of the Authority's Regulations applies to such petitions.[23] The Authority requested that the parties file briefs on the question and, in doing so, discuss "the statutory construction, legislative history, applicable precedent, and appropriate policy considerations."[24] Additionally, because the question was "likely to be of concern to the federal[-]sector[-]labor-management[-]relations community in general," the Authority stated that it would publish a Federal Register notice inviting interested persons to address the question.[25] But subsequent events rendered the dispute in *Support Command* moot, and the Authority vacated the order granting the application for review, and dismissed the application, without resolving the question.[26] And, post-*Support Command*, the Authority has not resolved the question.

In this case, the RD stated that the Authority "applied [§] 7111(f)(3) [of the Statute] to decertification petitions" in three pre-*Support Command* decisions: *Corpus Christi*, *Nat'l Park Service*, and *Concord*.[27] In those decisions, the Authority presumed – but did not expressly find – that § 7111(f)(3) applied to such petitions.[28] And it was unnecessary for the Authority to resolve that question because, in all three decisions, the Authority found that there were no collective-bargaining agreements that could constitute bars in the first place. Specifically, in *Corpus Christi*, the Authority found that an expired collective-bargaining agreement and correspondence purporting to extend that agreement could not act as bars to the petition.[29] In *Nat'l Park Service*, the Authority found that a collective-bargaining agreement that the agency head had disapproved could not act as a bar to the petition.[30] And, in *Concord*, the Authority found that a collective-bargaining agreement lacking a clear and unambiguous effective date could not act as a bar to the petition.[31] These decisions are therefore consistent with *Support Command's* finding that the Authority has "never specifically held that the [open] period described in [§] 7111(f)(3) of the Statute applies to decertification petitions filed by . . . individual[s]."[32]

Based on the foregoing, we find that the RD's decision raises an issue for which there is an absence of precedent, and we grant review on this basis. Consistent with *Support Command*,[33] and § 2422.31(g) of the Authority's Regulations – which pertinently provides that the Authority "may, in its discretion, give the parties an opportunity to file briefs" in these circumstances[34] – we direct the parties to file briefs addressing the following question:

> **Do § 7111(f)(3) of the Statute and § 2422.12(d) of the Authority's Regulations apply to decertification petitions filed by individuals?**
>
> **In answering that question, the parties should address any pertinent considerations of: (1) statutory construction; (2) legislative history; (3) applicable precedent; and (4) policy.**

Additionally, the Authority believes that this issue is likely to be of concern to agencies, labor organizations, and other interested persons. Accordingly, the Authority will publish a Federal Register notice inviting interested persons to address whether § 7111(f)(3) of the Statute and § 2422.12(d) of the Authority's Regulations apply to decertification petitions filed by individuals. Interested persons may obtain copies of the notice from the Authority's Office of Case Intake and Publication, or on the Authority's web site, www.flra.gov, once the notice has been published.

The Authority will consider briefs – from both parties and other interested persons – that the Authority

[19] 5 C.F.R. § 2422.31.
[20] 56 FLRA at 1041.
[21] *Id.*
[22] *Id.* at 1041 n.1.
[23] *Id.* at 1041.
[24] *Id.*
[25] *Id.* at 1041 n.4.
[26] *90th Reg'l Support Command, Little Rock, Ark.*, 57 FLRA 31, 31-32 (2001).
[27] RD's Decision at 11-12.
[28] *Corpus Christi*, 16 FLRA at 282-83 & n.1; *Nat'l Park Service*, 15 FLRA at 789; *Concord*, 14 FLRA at 73.
[29] 16 FLRA at 282-83.
[30] 15 FLRA at 788-89.
[31] 14 FLRA at 75.
[32] 56 FLRA at 1041 n.1.
[33] *Id.* at 1041.
[34] 5 C.F.R. § 2422.31(g).

receives on or before **March 31, 2014**. The Authority will not grant extensions of time. The parties should submit briefs to:

Gina K. Grippando
Chief, Case Intake and Publication
Federal Labor Relations Authority
1400 K Street NW., Docket Room, Suite 200
Washington, DC 20424-0001

Finally, the Petitioner argues that the RD committed clear and prejudicial errors concerning substantial factual matters by: (1) "failing to determine that AFGE Local 1923 cannot be regarded as having exclusive representation . . . based on the fact that the [collective-bargaining agreement] is with AFGE[,] Local 2755 and not with Local 1923";[35] (2) "improperly claiming that the [agreement] renews year to year";[36] and (3) "not recognizing that the [agreement] lacks a clear and unambiguous effective date."[37] Depending on how the Authority resolves the question of whether § 7111(f)(3) of the Statute and § 2422.12(d) of the Authority's Regulations apply to decertification petitions filed by individuals, it may be unnecessary to resolve the Petitioner's additional arguments. Accordingly, it is premature at this time to address them.[38]

IV. Order

We grant the application for review in part, deny it in part, and direct the parties to address the question discussed in section III.B above.

Member DuBester, concurring:

Essentially, I agree with the concurring opinion of Chairman Wasserman in *90th Regional Support Command, Little Rock, Arkansas*.[*] Thus, I am inclined to uphold the Regional Director here on the timeliness issue and deny review. Nevertheless, I join my colleagues in granting the application for the purpose of getting input from the parties and other interested members of the federal labor relations community per the order.

[35] Application at 5.
[36] *Id.*
[37] *Id.* at 6.
[38] *Cf. U.S. Dep't of the Interior, Bureau of Ocean Energy Mgmt. & U.S. Dep't of the Interior, Bureau of Safety & Envtl. Enforcement, New Orleans, La.*, 67 FLRA 98, 100 (2012) (declining to address certain issues raised by application where Authority's remand to RD could render those issues moot).

[*] 56 FLRA 1041 (2000) (Chairman Wasserman concurring), *order granting application for review vacated and application dismissed as moot*, 57 FLRA 31 (2001).