68 FLRA No. 104

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
ENGINEERING AND SUPPORT CENTER
HUNTSVILLE, ALABAMA
(Agency)

and

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

AT-RP-14-0029

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ORDER DENYING
APPLICATION FOR REVIEW
AND MOTION FOR STAY OF ELECTION

May 27, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

While a representation election was taking place, the Agency sent employees an email that incorrectly stated that if employees voted for representation, then the Petitioner (Union) would be employees' sole and exclusive representative in a variety of proceedings, including Merit Systems Protection Board (MSPB) appeals, Equal Employment Opportunity (EEO) complaints, workers' compensation, and disability claims. A majority of the voters rejected exclusive representation by the Union, and the Union filed objections to the Agency's conduct during the election and to the procedural conduct of the election. In the attached decision of Federal Labor Relations Authority (FLRA) Regional Director Richard Jones (the RD), the RD concluded that the Agency's email was objectionable and ordered a new election.

The Agency then filed an application for review (application) of the RD's decision. In its application, the Agency contends that the RD failed to apply established law. The Agency also asks that we issue a stay of the RD's order to hold a new election. Because the Agency has not identified any case law that is inconsistent with the RD's decision, we deny the application. In light of this decision, we deny, as moot, the Agency's motion for a stay of the RD's order.

II. Background and RD's Decision

Between December 16, 2014 and January 20, 2015, the FLRA's Atlanta Regional Office conducted an election to determine whether the Agency's nonprofessional employees wished to be represented by the Union. The election took place electronically, permitting employees to vote online or by telephone any time after the polls opened.

The same day that the polls opened, the Agency sent an email to all employees eligible to vote in the election. This email included an attached document, referred to as a "Union Election Fact Sheet."[1] This fact sheet stated, in relevant part, that if a majority of voters opted for representation, then "[the Union] would be the sole and exclusive representative for all employees in the bargaining unit in employee grievances, EEO complaints, MSPB appeals, security issues, workers' compensation, and disability cases."[2]

The Union objected to the Agency's email the following day. In an email sent that morning, the Union claimed that the Agency's email contained "several instances of misleading and erroneous information in what is obviously an attempt [by] management to influence voters to vote against the [U]nion."[3] The Agency responded to the Union two days later and asked the Union to identify the statements that it considered to be objectionable or misleading. The Union did not respond to the Agency's email. After the election ended and it was determined that a majority of the votes were against exclusive representation, the Union filed two objections to the election. Only the first objection, which relates to the December 16 email, is at issue here.

The RD observed that the Federal Service Labor-Management Relations Statute (the Statute)[4] requires agencies to remain neutral during the representation process.[5] The RD found that while "[§] 71l6(e) of the Statute permits management officials and supervisors to express personal views, encourage employees to vote, correct the record where false or misleading statements are made, or convey the [g]overnment's views on labor-management relations[,] . . . it does not permit erroneous legal statements which

[1] Application, Ex. 1 at 1-6.
[2] Decision at 2 (quoting Application, Ex. 1 at 6**)**.
[3] *Id.* (quoting Application, Ex. 2 at 1).
[4] 5 U.S.C. §§ 7101-7135.
[5] Decision at 2 (citing *Dep't of the Air Force, Air Force Plant Representative Office, Detachment 27, Fort Worth, Tex.*, 5 FLRA 492 (1981) (*Detachment 27*)).

can potentially taint an election."[6] Further, the RD "stressed that actual interference with freedom of choice is not a necessary factor in evaluating conduct during an election."[7] Rather, the RD found that "the standard for determining whether conduct is of an objectionable nature so as to require that an election be set aside is its potential for interfering with the free choice of the voters."[8]

The RD found that the Agency's statement that the Union would be employees' exclusive representative in non-grievance proceedings was "clearly an inaccurate statement of law,"[9] and the Agency does not dispute that the statement was inaccurate.[10] He further "f[ou]nd that this statement could potentially impact voter choice . . . as employees may be confused and concerned over their rights to a personal representative should the [Union] be certified as the exclusive representative."[11] Further, the RD declined to apply the Agency's proposed standard – "that only gross misrepresentations or substantial departures from the truth such that it is reasonable to infer has a significant effect on the election are objectionable."[12] Rather the RD found that that the Agency's statement created "the potential for interference [with employee free choice] . . . and . . . direct[ed] a new election as a result."[13]

The Agency then filed this application, contending that the RD failed to apply established law. The Union filed an opposition to the Agency's application

III. Analysis and Conclusion: The RD did not fail to apply established law.

The Agency argues that the RD misapplied established law by not applying the "substantial departure from the truth" standard to evaluate the Agency's statement[14] and by not concluding that the Union "had sufficient time to correct the record."[15]

Agencies are required to remain neutral during the course of a representation election campaign,[16] and "management[] conduct which interferes with the employees' freedom of choice in [an] election requires that the election be set aside."[17] "[W]hile it is often difficult to assess how pervasive the impact of an agency's improper actions might be on voters, the standard for determining whether conduct is of an objectionable nature so as to require that an election be set aside is its potential for interfering with the free choice of the voters."[18]

The Authority will not set aside an election based on a union's campaign statement unless the statement involves "gross misrepresentations of a material fact"[19] or "a substantial departure from the truth . . . which may reasonably be expected to have had a significant impact on the election."[20] The rationale for tolerating some degree of misrepresentation in union campaign statements is that employees "are capable of recognizing campaign propaganda for what it is and discounting it."[21] Moreover, even substantial misrepresentations do not provide a basis for setting aside an election where the opposing party is able to respond to disputed statements before voting begins.[22]

The Agency argues that the RD failed to apply established law by not evaluating the December 16 email under the "substantial departure from the truth" standard.[23] But the Authority has applied that standard only to *unions'* pre-election statements[24] – not to

[6] *Id.*
[7] *Id.*
[8] *Id.* (quoting *Marine Corps Logistics Base, Barstow, Cal.*, 9 FLRA 1046, 1047 (1982) (*Barstow*)) (internal quotation marks omitted).
[9] *Id.* at 3; *see also* Application at 5.
[10] Application at 5.
[11] Decision at 3.
[12] *Id.* at 3 n.3 (citing *Hollywood Ceramics Co., Inc.*, 140 NLRB 221 (1962) *overruled by Midland Nat'l Life Ins. Co.*, 263 NLRB 127 (1982)).
[13] *Id.* at 3.
[14] Application at 3 (quoting *U.S. Dep't of the Army, Fifth Army, 122nd ARCOM, N. Little Rock, Ark.*, 36 FLRA 407, 409 (1990) (*Fifth Army*)).
[15] *Id.* at 6.
[16] *Detachment 27*, 5 FLRA at 496-98.
[17] *Barstow*, 9 FLRA at 1047 (citing *Detachment 27*, 5 FLRA 492).
[18] *Id.* (citing *U.S. DOJ, U.S. INS*, 9 FLRA 293 (1984) *enforcement of consolidated unfair-labor-practice decision denied, pet. for review of order directing new election dismissed for lack of jurisdiction*, 727 F.2d 481 (5th Cir. 1984).
[19] *Naval Air Rework Facility, Naval Air Station, Jacksonville, Fla.*, 6 A/SLMR 93, 94 (1976) (*Jacksonville*).
[20] *Health Care Fin. Admin.*, 13 FLRA 743, 744 (1983) (*HCFA*).
[21] *Shopping Kart Food Mkt.*, 228 NLRB 1311, 1313 (1977); *accord Pension Benefit Guar. Corp.*, 66 FLRA 349, 352 (2011) (citing *Fifth Army*, 36 FLRA at 413; *U.S. Dep't of the Army, Savanna Army Depot Activity, Savanna, Ill.*, 34 FLRA 218, 221 (1990)) ("Authority precedent holds that campaign communications subject to employee evaluation, and easily interpreted as campaign propaganda, are not a basis for setting aside an election.").
[22] *Dep't of Army, McAlester Army Ammunition Plant, Red River Munitions Ctr., Texarkana, Tex.*, 61 FLRA 323, 324 (2005) (Chairman Cabaniss dissenting) (citing *U.S. DOD, Stateside Dependents Schs., Fort Benning Schs., Fort Benning, Ga.*, 48 FLRA 471, 474 (1993) (*Fort Benning*); *Army & Air Force Exch. Serv., Fort Drum Exch. (Fort Drum, N.Y.)*, 33 FLRA 245, 248 (1988)).
[23] Application at 3.
[24] *E.g.*, *Fort Benning*, 48 FLRA at 474; *Fifth Army*, 36 FLRA at 409, 413; *HCFA*, 13 FLRA at 744; *Dep't of the Navy*,

agencies'. Moreover, because the "substantial departure from the truth" standard applies to campaign propaganda – which agencies are prohibited from distributing[25] – applying that standard to agency statements is not a natural and obvious extension of existing precedent. Simply put, the RD did not fail to apply established law concerning the evaluation of an agency's false or misleading (but non-coercive) statements made during an election campaign because there is no established law holding that the "substantial departure from the truth" standard applies to agency misstatements. And we note that the Agency does not seek review of the RD's decision on the grounds that there is an absence of Authority precedent or that established law warrants reconsideration, in this regard.[26]

Similarly, the Authority has never determined whether or how the opportunity to correct the record applies to misstatements by management. Thus, the Agency's argument that RD erred in failing to conclude that the Union had sufficient time to correct the record before the polls opened (even though the Agency distributed the email after the polls had opened) does not establish that the RD failed to apply established law. We also note that the Agency does not argue that review is warranted on the grounds that there is an absence of precedent or that established law warrants reconsideration, on this issue.

Accordingly, we hold that the RD did not misapply Authority precedent when he ordered a new election based on his determination that the Agency's email had the potential to interfere with employee free choice. We therefore deny the Agency's application. Consequently, the Agency's motion for a stay of the RD's order directing a new election is moot, and we deny it.[27]

IV. Order

We deny the Agency's application for review and motion for a stay.

Naval Air Rework Facility, Norfolk, Va., 12 FLRA 15, 15 (1983) (citations omitted); *accord Jacksonville*, 6 A/SLMR at 94.

[25] *See Detachment 27*, 5 FLRA at 496-98.

[26] *See* 5 C.F.R. § 2422.31(c) (setting forth grounds upon which the Authority will review an RD's decision).

[27] *See, e.g.*, *FDIC*, 68 FLRA 260, 262 (2015) (citing *U.S. DHS, U.S. CBP*, 66 FLRA 1042, 1045 n.2 (2012)).

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FEDERAL LABOR RELATIONS AUTHORITY
ATLANTA REGIONAL OFFICE

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DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
ENGINEERING AND SUPPORT CENTER
HUNTSVILLE, ALABAMA
(Agency)

And

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

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AT-RP-14-0029

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DECISION AND ORDER
DIRECTING ELECTION[1]

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I. Introduction

On July 8, 2014, the Petitioner filed the petition in this matter seeking an election for a unit of non-professional employees at the Agency. An election was held in this case *via* electronic voting from December 16, 2014 to January 20, 2015. The count was conducted on January 21, 2015, where it was determined that a majority of employees had voted No in the election. Thereafter, the Petitioner filed timely objections to the election. One objection is that the Agency failed to remain neutral during the election and "sent emails giving false information about the union in an attempt to influence employees to vote against the union." The second objection is that the FLRA Agent assigned to process this petition allegedly did not return telephone calls from several employee/voters who called requesting a ballot.[2] There was insufficient evidence to support this second objection, and I am dismissing this objection on that basis.

Both parties have submitted evidence and their positions in this matter which I have carefully reviewed and considered.

The first objection involves an email the Agency sent to all employees eligible to vote on December 16, 2014, the first day the polls were open. This email stated, in part, that should a majority of employees vote for representation, then "AFGE would be the sole and exclusive representative for all employees in the bargaining unit in employee grievances, EEO complaints, MSPB appeals, security issues, workers' compensation, and disability cases." On December 17, 2014, the Union objected to the email claiming that it contained "several instances of misleading and erroneous information in what is obviously an attempt to management to influence voters to vote against the union in this election." On December 19, 2014, the Agency responded by asking the Petitioner to identify what statements it considered to be objectionable or misleading. The Petitioner did not respond.

II. Positions of the Parties

The Agency concedes that the statement at issue is "technically inaccurate" but contends that it is not a "substantive misinterpretation of fact which impacted employees' ability to vote intelligently on the issues" or a "blatant misrepresentation" which warrants overturning the election. The Agency further contends that the Petitioner had the opportunity to correct the record but failed to identify the objectionable comments as requested. Finally, the Agency maintains that the Petitioner has not established that any eligible voter was actually influenced by the statements at issue.

The Petitioner contends that the December 16 email, as a whole, is objectionable, and not just the portion cited above. The Petitioner explains that is one reason why it did not identify any specific language in response to the Agency's December 19 inquiry. The Petitioner also contends that it did not respond to that inquiry because the Agency waited two days to reply to Petitioner's concerns as expressed in its December 17 email. Thus, by the time the Agency responded, December 19, employees had already had three days to vote and many already likely had voted with the Agency's erroneous information on their minds.

[1] On April 8, 2015, I issued a Direction of Election in this matter. This Decision and Order replaces that document.

[2] On February 4, 2015, the Petitioner subsequently submitted additional objections to this office. However, I find that those objections were untimely filed pursuant to section 2422.26 of the Authority's Rules and Regulations so I am dismissing those objections.

III. Analysis:

In the federal sector, agencies are required to remain neutral during the representation process. *See Dep't of the Air Force, Air Force Plant Representative Office, Detachment 27, Ft. Worth, Tex.*, 5 FLRA 492 (1981). During this process, however, section 7116(e) of the Statute permits management officials and supervisors to express personal views, encourage employees to vote, correct the record where false or misleading statements are made, or convey the Government's views on labor-management relations. But it does not permit erroneous legal statements which can potentially taint an election. It should be stressed that actual interference with freedom of choice is not a necessary factor in evaluating conduct during an election. Rather, as noted in *Marine Corps Logistics Base, Barstow, Cal.*, 9 FLRA 1046 (1982), "while it is often difficult to assess how pervasive the impact of an agency's improper actions might be on voters, the standard for determining whether conduct is of an objectionable nature so as to require that an election be set aside is its potential for interfering with the free choice of the voters." 9 FLRA at 1047.

The message cited above is clearly an inaccurate statement of law. While a union may act as an employee's representative in any of the listed processes, it would only serve as the exclusive representative in the negotiated grievance process. In the other situations, employees have the right to personal representatives of their own choosing, which could be a union, a private attorney, or someone else. I find that this statement could potentially impact voter choice in this matter as employees may be confused and concerned over their rights to a personal representative should the Petitioner be certified as the exclusive representative. Although there is no indication that the Agency intentionally misinformed employees of the Petitioner's potential role in these procedures or that the Agency sought to influence the election,[3] this is not a factor in my decision. Rather, I am only considering whether the objectionable message could potentially interfere with voter choice. I find that the potential for interference exists with respect to the previous election and I am directing a new election as a result.

IV. Order

Pursuant to section 2422.16(d) of the Regulations, I am issuing a Direction of Election as part of this decision without prejudice to the right of a party to file a challenge to the eligibility of any person participating in the election and/or objections to the election. The Election Agreement setting forth the details of the new election is attached and is a part of this Direction of Election. If either party chooses to sign this agreement, that party must sign on the appropriate spaces provided on the Agreement and on the Appendix outlining the procedures and return the entire document to the undersigned. A copy of the document must be served on the parties to this proceeding as set forth on the service sheet. Absent such agreement, I am directing the election to take place pursuant to the terms of the attached election agreement. Therefore, absent a stay, the election will take place on June 2, 2015, as set forth in the attached agreement.

V. Application of Review

Under section 7105(f) of the Statute and section 2422.31(a) of the Authority's Regulations, a party may file an application for review with the Authority within sixty days of this Decision. The application for review must be filed with the Authority by **June 8, 2015**, and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, NW, Washington, DC 20424–0001. The parties are encouraged to file an application for review electronically through the Authority's website, www.flra.gov.[4]

Dated: April 9, 2015

Regional Director, Atlanta Region

Attachment:
Election Sheet
Service Sheet

[3] The Agency, citing private sector precedent, *Hollywood Ceramics Co., Inc.*, 140 NLRB 221 (1962), argues that only gross misrepresentations or substantial departures from the truth such that it is reasonable to infer has a significant effect on the election are objectionable. However, it should be noted that in the private sector, the employer is not required to remain strictly neutral.

[4] To file an application for review electronically, go to the Authority's website at **www.flra.gov**, select **eFile** under the **Filing a Case** tab and follow the instructions.