

68 FLRA No. 5

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
CHARLES GEORGE VA MEDICAL CENTER
ASHEVILLE, NORTH CAROLINA
(Agency)

and

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

WA-RP-13-0062

ORDER DENYING
APPLICATION FOR REVIEW

October 23, 2014

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

I. Statement of the Case

The Union filed an application for review (application) of the attached decision of Federal Labor Relations Authority (FLRA) then-Acting Regional Director, Sandra LeBold (RD). The Union petitioned the RD to clarify the bargaining-unit status of four nurses occupying nursing coordinator (coordinator) positions at the VA Medical Center (Center) in Asheville, North Carolina. The RD concluded that the coordinators are supervisors under § 7103(a)(10) of the Federal Service Labor-Management Relations Statute (the Statute),¹ and clarified the bargaining unit to exclude the coordinator position at the Center. There are four questions before us.

The first question is whether the RD committed factual errors or failed to apply established law in finding that the coordinators are authorized to engage in supervisory functions under § 7103(a)(10). Because the Union fails to demonstrate that the RD erred in finding that the coordinators are authorized to direct and assign employees, and those duties are supervisory functions under § 7103(a)(10), the answer is no.

The second question is whether the RD committed factual errors in determining that the coordinators exercise independent judgment. Because the Union does not demonstrate that the RD made any factual errors, the answer is no.

The third question is whether the RD failed to apply established law in determining that the coordinators exercise independent judgment because the RD allegedly: (1) made broad generalizations in her analysis and failed to conduct a complete analysis; or (2) based her determination on factors the Authority has held to be irrelevant. Because the Union's general criticisms of the RD's decision lack a legal foundation, and because the Union's interpretation of Authority case law is erroneous, the answer is no.

The fourth question is whether the RD failed to apply established law when she applied the preponderance standard set forth in § 7103(a)(10) by: (1) not conducting an analysis with the level of specificity required by Authority precedent; or (2) erroneously considering the absence of Center management during coordinators' shifts and the coordinators' role in addressing "diversion" issues.² Because the Union has not shown that the RD must provide an analysis with the level of specificity that the Union argues is required, and has not otherwise demonstrated that the RD failed to apply established law, the answer is no.

II. Background and RD's Decision

This dispute involves the bargaining-unit status of four coordinators who work at the Center, a teaching hospital that operates twenty-four hours a day, seven days a week. As relevant here, the "[c]oordinators work six [twelve]-hour shifts and one [eight]-hour shift every two-week pay period."³ The coordinators work two of their twelve-hour shifts during weekends every pay period. Of the four coordinators, two work the 7:30 a.m. to 8:00 p.m. shift, and the other two work the 8:00 p.m. to 7:30 a.m. shift. By contrast, the Center's managers – including the Center director and the associate director, nursing managers, assistant nursing managers, and the chief nurse – work Monday through Friday, from 7:30 a.m. to 4:00 p.m. The Center's managers "do not work evenings, nights, weekends, or holidays (i.e., off hours)."⁴

The Union petitioned the RD to clarify the bargaining-unit status of four nurses occupying coordinator positions at the Center.

¹ 5 U.S.C. § 7103(a)(10).

² Application at 12.

³ RD's Decision at 2.

⁴ *Id.*

The RD found that the “[c]oordinators direct nurses to different units within the Center based upon the ebb and flow of the Center’s patient population.”⁵ The RD also found that the “[c]oordinators utilize their discretion and exercise independent judgment in determining whether to move staff from one unit to another by considering factors such as patient acuity and nurse[-]competency level.”⁶

The RD also found that the “[c]oordinators make the initial determination as to whether the Center should be . . . placed on diversion” – the practice of diverting new patients who would ordinarily be treated at the Center to other hospitals because the Center’s patient and staffing levels would not allow the Center to take in the new patients.⁷ When the coordinators decide to place the Center on diversion, they call the Center’s on-call administrator to discuss the matter.

The RD considered whether the coordinators should be excluded from the bargaining unit because they are supervisors under § 7103(a)(10). As the RD analyzed the case, “[n]urses are statutory supervisors when: (1) they have the authority to engage in any one of the supervisory functions listed in [§] 7103(a)(10); (2) their exercise of such authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment; and (3) they spend a preponderance of their employment time exercising that authority.”⁸

Relying on this framework, the RD first analyzed the record and determined that the “[c]oordinators are authorized to engage in supervisory functions by *directing* and *assigning* employees within the meaning of [§] 7103(a)(10).”⁹ In this regard, the RD found that the “[c]oordinators’ primary function is to monitor and adjust staff and patient levels between the Center’s units.”¹⁰ To accomplish this primary function, the RD found that the coordinators:

[C]onduct rounds to determine the patient and staffing needs within the units, reassign nursing staff from one unit to another and determine the level of nurse to be moved from one unit to the other, grant and cancel overtime assignments, approve or disapprove leave, recall employees to return to the Center to work, change employee tours of duty, assign float pool nurses to

specific units, . . . review reports[,] and attend meetings concerning unit coverage requirements.¹¹

Second, the RD concluded that the exercise of the supervisory functions of directing and assigning employees “by the [c]oordinators *requires consistent exercise of independent judgment.*”¹² In this regard, the RD determined that “[w]hile there are critical, minimum staffing levels established for the Center’s units, [the c]oordinators maintain staffing above those levels and determine the appropriate numbers and types of employees based on the particular circumstances within each unit.”¹³ The RD noted that, “[i]n making these determinations, the [c]oordinators consider the needs and conditions of the patients, available staff skills and expertise, the type of unit at issue, and staffing requirements for upcoming shifts.”¹⁴

Third, addressing the preponderance issue, the RD concluded that “the [c]oordinators are not generally providing direct patient care, but rather spend a majority of their employment time acting in the capacity of a supervisor and performing supervisory functions.”¹⁵ The RD noted that the coordinators “spend a majority of their employment time working [during off hours], when there are no other supervisors or managers present in the Center.”¹⁶ And the RD further concluded that the “[c]oordinators function as supervisors, rather than rank-and-file employees during these [off hours], acting on behalf of the [c]hief [n]urse, the [a]ssociate [d]irector for [p]atient [c]are [s]ervices, and the Center [d]irector.”¹⁷ She also concluded that during off hours, “the [c]oordinators are responsible for the overall management and supervision of the Center,” including ensuring that the Center’s patient-care needs are met, and addressing diversion issues.¹⁸ The RD found that the coordinators “oversee[] the . . . work of approximately [fifty] nurses.”¹⁹

The Union filed an application for review of the RD’s decision. The Agency filed an opposition to the Union’s application.

III. Analysis and Conclusions

As discussed below, the Union has not established that the RD committed clear and prejudicial

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 3 (internal quotation marks omitted).

⁸ *Id.* (internal quotation marks omitted) (citations omitted).

⁹ *Id.* at 4 (emphases added).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (emphasis added).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2.

factual errors concerning substantial factual matters²⁰ or failed to apply established law²¹ in concluding that the coordinators are supervisors under § 7103(a)(10) of the Statute. Accordingly, we deny the Union's application for review.

- A. The Authority's framework for determining whether employees are supervisors under § 7103(a)(10) of the Statute.

The Authority's framework for determining whether employees are supervisors under § 7103(a)(10) of the Statute is well established. Section 7103(a)(10) defines a supervisor as follows:

"[S]upervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, *except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority*].²²

Thus, the Authority determines that nurses are supervisors under § 7103(a)(10) when: (1) they have the authority to engage in any of the supervisory functions listed in § 7103(a)(10); (2) their exercise of such authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment; and (3) they spend a preponderance of their employment time exercising that authority.²³

Applying this framework, the RD determined that the coordinators are supervisors under § 7103(a)(10), and excluded the positions from the bargaining unit.²⁴

- B. The RD did not commit factual errors or fail to apply established law in determining that the coordinators are authorized to engage in supervisory functions under § 7103(a)(10) of the Statute.

1. Factual Matters

The Union argues that the RD committed a factual error by finding – contrary to the coordinators' testimony – that coordinators are able to recall employees to return to the Center to work.²⁵ The Union relies on testimony by a coordinator stating that the coordinator did not "recall employees in the sense of recalling them from a layoff[.]"²⁶

The Union misinterprets the RD's finding, construing it to mean that the RD found that the coordinators are able to recall laid-off employees back to work. But nothing in the RD's decision supports this interpretation. Although a coordinator testified that coordinators are not able to recall *laid-off employees*,²⁷ there is also testimony, which the Union acknowledges,²⁸ that coordinators do recall *on-call employees*.²⁹ Thus, the Union provides no basis for finding that the RD erred factually in finding that the coordinators recall employees.

2. Established Law

The Union argues that the RD failed to apply established law because the RD did not find that the coordinators are authorized to engage in any supervisory functions that "fall within the list of indicia set forth in § 7103(a)(10) or other Authority case law."³⁰ The Union also argues that certain duties that the RD cited – including the coordinators' ability to recall employees – do not satisfy the supervisory indicia set forth in § 7103(a)(10).³¹

The Union's argument lacks merit on both counts. Under the Authority's framework, to be a supervisor, an employee need only have the authority to exercise any one of the supervisory functions listed in

²⁰ 5 C.F.R. § 2422.31(c)(3)(iii).

²¹ *Id.* § 2422.31(c)(3)(i).

²² 5 U.S.C. § 7103(a)(10) (emphasis added).

²³ *Id.*; see *U.S. Dep't of the Air Force, Offutt Air Force Base, Neb.*, 66 FLRA 616, 620 (2012) (*Offutt*) (citing *U.S. Dep't of the Army, Parks Reserve Training Ctr., Dublin, Cal.*, 61 FLRA 537, 543 (2006) (*Parks Reserve*)); *U.S. Dep't of VA, Med. Ctr., Hampton, Va.*, 65 FLRA 364, 367 (2010) (*Hampton*); *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 63 FLRA 22, 24 (2008).

²⁴ RD's Decision at 3-4.

²⁵ Application at 5.

²⁶ *Id.* (quoting Tr. at 175).

²⁷ Tr. at 172-73, 175 (emphasis added).

²⁸ Application at 5.

²⁹ Tr. at 156-57 (emphasis added).

³⁰ Application at 4.

³¹ *Id.*

§ 7103(a)(10).³² Here, the Union does not dispute that the RD found that the “[c]oordinators are authorized to engage in supervisory functions by *directing* and *assigning* employees within the meaning of [§] 7103(a)(10).”³³ The authorities to “direct” and to “assign” employees are supervisory functions listed under § 7103(a)(10).³⁴ Therefore, the Union has not demonstrated that the RD failed to apply established law by finding, on this basis, that the coordinators are authorized to engage in supervisory functions within the meaning of § 7103(a)(10).

Further, to the extent that the Union is arguing that the RD failed to apply established law because the RD cited certain duties performed by the coordinators that “have no relationship to the supervision of employees as required by § 7103(a)(10),”³⁵ this argument also lacks merit. Initially, the Union does not challenge the RD’s findings concerning a number of the duties that the coordinators perform in accomplishing the functions of directing and assigning employees. Specifically, the Union does not claim that the RD erred in finding that the coordinators: “reassign nursing staff from one unit to another and determine the level of nurse to be moved from one unit to the other, grant and cancel overtime assignments, . . . change employee[s]’ tours of duty, [and] assign float[-]pool nurses to specific units.”³⁶ And the Union does not argue that these duties do not have a direct relationship to the coordinators’ supervisory functions of directing and assigning employees under § 7103(a)(10). Therefore, the Union has not demonstrated that the RD failed to apply established law in this regard.

Also meritless is the Union’s specific claim that the RD erred by “characteriz[ing]” as supervisory functions duties such as “monitoring patient levels,” “determining patient needs,” and “recalling” employees.³⁷ The RD did not find that the duties the Union cites are supervisory functions under § 7103(a)(10). Thus, the Union has not demonstrated that the RD failed to apply established law in this regard as well.

C. The RD did not commit factual errors in determining that the coordinators’ supervisory functions require the consistent exercise of independent judgment.

The Union argues that the RD committed factual errors in her independent-judgment analysis, because the RD considered that the coordinators recall employees back to the Center to work³⁸ and are able to deny sick leave³⁹ in determining that the coordinators exercise independent judgment. Specifically, the Union argues that the coordinators are not able to recall employees or deny sick leave.⁴⁰ Further, the Union asserts that the coordinators’ duties of reviewing reports, attending meetings, and recalling on-call employees do not require the exercise of independent judgment.⁴¹

The Union’s arguments reflect a misunderstanding of the RD’s decision. The RD did not discuss the considerations the Union cites as part of her independent-judgment analysis. Instead, as discussed in section D, below, the RD expressly based her independent-judgment findings on the responsibility of coordinators to maintain staffing above critical, minimum staffing levels and to determine the appropriate numbers and types of employees for each unit based on the unit’s particular circumstances.⁴² Thus, the Union provides no basis for finding that the RD’s decision is deficient because she committed factual errors in this regard.

Moreover, and in any event, the Union’s specific claims are incorrect. As discussed previously, the record supports the RD’s finding that the coordinators are able to recall on-call employees.⁴³ Further, the Union does not cite anything in the record, or any other authority for the claim that a supervisor may not, in appropriate circumstances, deny a sick leave request.⁴⁴

Reviewing reports, attending meetings, and recalling on-call employees, contrary to the Union’s claim that these are irrelevant considerations, are all activities that the RD found to support the coordinators’ exercise of judgment in performing their supervisory functions.⁴⁵ The coordinators review staffing reports because they “show the variance between the number of

³² 5 U.S.C. § 7103(a)(10); *U.S. Dep’t of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 38 FLRA 764, 768 (1990) (the exercise of *any one* of the supervisory criteria set forth in § 7103(a)(10) with the requisite independent judgment is sufficient to exclude an individual from the bargaining unit as a supervisor).

³³ RD’s Decision at 4 (emphases added).

³⁴ 5 U.S.C. § 7103(a)(10).

³⁵ Application at 4.

³⁶ RD’s Decision at 4.

³⁷ Application at 4.

³⁸ *Id.* at 7.

³⁹ *Id.* at 8.

⁴⁰ *Id.* at 7-8.

⁴¹ *Id.*

⁴² RD’s Decision at 4.

⁴³ Tr. at 156-57.

⁴⁴ See, e.g., *AFGE, Local 1156*, 42 FLRA 1157, 1161 (1991) (a leave restriction, as a precondition of an employer’s decision to discipline employees for suspected misuse or abuse of sick leave, allows an employer to deny a sick leave request).

⁴⁵ RD’s Decision at 4.

staff critically required for a particular unit and that unit's actual scheduled staffing level."⁴⁶ The coordinators attend meetings with other coordinators and managers "to evaluate patient flow and staffing requirements."⁴⁷ In fact, the Union concedes that coordinators use the data gathered from performing these duties "throughout the day when exercising supervisory responsibilities."⁴⁸ And the coordinators recall employees as part of their responsibility to "manage the staffing levels in the Center's units,"⁴⁹ including when coordinators are advised of, and must determine how to provide staffing support for, particular planned Center medical activities.⁵⁰

Thus, for the reasons discussed above, the Union provides no basis for finding that the RD committed factual errors in determining that the coordinators' supervisory functions require the consistent exercise of independent judgment.

- D. The RD did not fail to apply established law in determining that the coordinators' supervisory functions require the consistent exercise of independent judgment.

The Union argues that the RD committed several legal errors when she determined that the coordinators exercise independent judgment in performing their supervisory functions.⁵¹ The RD determined that "[w]hile there are critical, minimum staffing levels established for the Center's units, [the c]oordinators maintain staffing above those levels and determine the appropriate numbers and types of employees based on the particular circumstances within each unit."⁵² The RD further found that, "[i]n making these determinations, the [c]oordinators consider the needs and conditions of the patients, available staff skills and expertise, the type of unit at issue, and staffing requirements for upcoming shifts."⁵³ Finally, the RD noted that "[d]uring the Center's off hours, there is no one else within the Center that makes these determinations."⁵⁴

The Union makes two basic claims. First, the Union argues that the RD failed to apply established law by "making broad generalizations regarding the

[coordinators'] exercise of independent judgment"⁵⁵ and by "failing to . . . conduct a full analysis" because the RD did not "focus on the actual tasks performed."⁵⁶ However, the Union does not identify any recognized legal standard that the RD's discussion of the coordinators' exercise of independent judgment, set forth above, fails to meet. Thus, the Union has not demonstrated that the RD failed to apply established law in this regard.

Second, the Union argues that the RD's independent-judgment analysis is inconsistent with *U.S. Department of VA, Medical Center, Hampton, Virginia (Hampton)*.⁵⁷ The Union claims that under *Hampton*, the presence or absence of other individuals authorized to take the actions that an alleged supervisor can take is irrelevant in determining whether the alleged supervisor exercises independent judgment under § 7103(a)(10).⁵⁸ Therefore, the Union concludes, the RD failed to apply established law by considering the absence of Center managers during the coordinators' shifts as a "supporting justification[]" in determining that the coordinators exercise independent judgment.⁵⁹

The Union's reliance on *Hampton* is misplaced. *Hampton* does not deal with the "independent judgment" prong of § 7103(a)(10). Moreover, in *Hampton*, the Authority held only that a nurse being "the one and only nurse supervisor at the facility" during the nurse's employment time did not "necessitate[]" the conclusion that the nurse on duty was a supervisor under § 7103(a)(10).⁶⁰ But *Hampton* did *not* hold, as the Union claims, that the consideration is irrelevant in applying § 7103(a)(10). Accordingly, the RD did not fail to apply established law in considering that factor as part of her independent-judgment analysis. And the Union does not challenge the other considerations that the RD identified when she concluded that coordinators exercise independent judgment under § 7103(a)(10). We therefore reject the Union's claim that the RD failed to apply established law in her independent-judgment analysis.

- E. The RD did not fail to apply established law in determining that coordinators spend a preponderance of their time exercising supervisory authority.

The Union argues that the RD misapplied the preponderance standard set forth in § 7103(a)(10) for two basic reasons. First, the Union claims that the RD did not

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* at 3.

⁴⁸ Application at 8.

⁴⁹ RD's Decision at 2-3.

⁵⁰ Tr. at 156-57.

⁵¹ Application at 6-9.

⁵² RD's Decision at 4.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Application at 6.

⁵⁶ *Id.* at 7.

⁵⁷ *Hampton*, 65 FLRA at 368.

⁵⁸ Application at 6-7.

⁵⁹ *Id.*

⁶⁰ *Hampton*, 65 FLRA at 368.

conduct her analysis with the level of specificity required by Authority precedent.⁶¹ Specifically, the Union claims that the RD erred by failing to conduct “a detailed and particularized analysis” of the coordinators’ supervisory functions.⁶² Further, in this regard, the Union claims that the RD erred by failing to conduct a “close and careful review of the actual duties being performed by the [coordinators], as supported by the facts in the record.”⁶³

Second, the Union argues that the RD committed legal errors by considering the absence of Center management during the coordinators’ shifts, and the coordinators’ role in addressing diversion issues, in determining that coordinators spend a majority of their employment time exercising supervisory authority.⁶⁴

For the following reasons, we find that the RD did not fail to correctly apply the preponderance standard set forth in § 7103(a)(10). Under the third part of the Authority’s framework – applicable only to nurses and firefighters – an employee is a supervisor under § 7103(a)(10) if the employee spends a preponderance of his or her employment time exercising supervisory authority.⁶⁵ The Authority has held that “preponderance” means the “majority” of the employee’s employment time.⁶⁶

Applying this framework, the RD found that “the [c]oordinators are not generally providing direct patient care, but rather spend *a majority of their employment time* acting in the capacity of a supervisor *and performing supervisory functions*.”⁶⁷ Analyzing how much time the coordinators spend performing supervisory functions, the RD found that the coordinators “spend a majority of their employment time working [during off hours], when there are no other supervisors or managers present in the Center.”⁶⁸ The RD further found that, during these off hours, “[c]oordinators function as supervisors” and act “*on behalf of*” the Center director, the associate director for patient care services, and the chief nurse.⁶⁹ The RD also found that during these off hours, coordinators are responsible for the “overall management and supervision of the Center, which includes [e]nsuring that patient care needs are being properly attended to by the staff and addressing diversion issues.”⁷⁰

The Union has not demonstrated that the RD failed to apply established law in applying § 7103(a)(10)’s preponderance standard. First, regarding the specificity with which the RD conducted her analysis, the Union claims that the RD erred by failing to conduct “a detailed and particularized analysis” of the coordinators’ supervisory functions as required by Authority precedent.⁷¹ The Union cites two Authority cases in support of this proposition.⁷² However, these cases are inapposite because they deal with the legal framework for evaluating exclusion claims regarding employees engaged in national security work under § 7112(b)(6) of the Statute, and the legal framework for evaluating the appropriateness of bargaining units under § 7112(a) of the Statute.⁷³ These cases do not address whether employees should be excluded from a bargaining unit because they are supervisors;⁷⁴ § 7103(a)(10)’s preponderance standard was not applied in either case.⁷⁵ Thus, contrary to the Union’s claims, these cases do not provide any guidance in applying § 7103(a)(10)’s preponderance standard. And here, unlike in the cited cases, the RD assessed the employees’ actual duties and found them to be supervisory under the Authority’s framework, as set forth above.

Further, the Union claims that the RD failed to follow Authority precedent requiring a “close and careful review of the actual duties being performed by the [coordinators], as supported by the facts and the record,” to satisfy § 7103(a)(10)’s preponderance standard.⁷⁶ In this regard, the Union argues that a “specific, detailed analysis of employee duties . . . is the hallmark and standard of Authority precedent.”⁷⁷

⁶¹ Application at 9-10, 14-15.

⁶² *Id.* at 9.

⁶³ *Id.* at 10.

⁶⁴ *Id.* at 10-13.

⁶⁵ 5 U.S.C. § 7103(a)(10).

⁶⁶ *Parks Reserve*, 61 FLRA at 541.

⁶⁷ RD’s Decision at 4 (emphases added).

⁶⁸ *Id.*

⁶⁹ *Id.* (emphasis added).

⁷⁰ *Id.*

⁷¹ Application at 10, 14.

⁷² *Id.* at 9 (citing *U.S. DOD, Pentagon Force Prot. Agency, Wash., D.C.*, 62 FLRA 164, 172 (2007) (*Pentagon*) (holding that the RD failed to apply established law by considering together the testimony of representative witnesses of different categories of police officers and not examining the distinct duties of the various categories of police officers employed in different locations in reaching § 7112(b)(6) determinations); *Dep’t of the Navy, Naval Computer & Telecomms. Area, Master Station-Atl. Base Level Commc’ns Dep’t Reg’l Operations Div., Norfolk, Va., Base Commc’ns Office-Mechanicsburg*, 56 FLRA 228, 230 (2000) (*Navy*) (holding that the RD failed to apply established law because the RD did not separately evaluate and make explicit findings with respect to each of statutory criteria under § 7112(a) to determine the appropriateness of a bargaining unit)).

⁷³ *Pentagon*, 62 FLRA at 172; *Navy*, 56 FLRA at 230.

⁷⁴ *Pentagon*, 62 FLRA at 172; *Navy*, 56 FLRA at 230.

⁷⁵ *Pentagon*, 62 FLRA at 172; *Navy*, 56 FLRA at 230; 5 U.S.C. § 7103(a)(10).

⁷⁶ Application at 10-12.

⁷⁷ *Id.* at 14 (citing *Offutt*, 66 FLRA at 617-18; *Hampton*, 65 FLRA at 366-67; *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Seagoville, Tex.*, 65 FLRA 239, 240 (2010); *Parks Reserve*, 61 FLRA 537).

The Authority decisions on which the Union relies do not support the Union's claim that the RD erred in making her preponderance determination. Even if the level of detail with which the RD conducted her analysis in this case differs from the level of detail in the cited cases, the Authority in those cases did not make any rulings setting a standard concerning the level of specificity required for the application of § 7103(a)(10)'s preponderance requirement. Thus, because the Authority precedent that the Union relies on does not support the Union's claims, the Union has not established that the RD failed to apply established law in this regard.

Second, challenging the substantive considerations on which the RD relied, the Union claims that the RD failed to apply established law because her analysis of the preponderance requirement "largely focuses on the alleged lack of other supervisors or managers at the [Center]" during the coordinators' shifts,⁷⁸ and on the coordinators' role in addressing diversion issues.⁷⁹ Contrary to the Union's claim, the RD did not determine that the coordinators exercise supervisory authority for a majority of their employment time "based on the mere fact that no other supervisors are present at [the] facility."⁸⁰ Rather, in determining that the coordinators exercise the supervisory authority to direct and assign employees for a majority of their employment time, the RD emphasized that, for a majority of the coordinators' employment time, they are solely responsible for the "overall management and supervision of the Center."⁸¹ Thus, the Union has not demonstrated that the RD failed to apply established law in this regard.

The RD also did not commit legal error by considering the coordinators' role in addressing diversion issues. The Union argues that addressing diversion "is not a supervisory responsibility under 5 U.S.C. § 7103(a)(10) because it involves . . . hospital patients and does not involve the [c]oordinators exercising . . . supervisory indicia with regard to facility employees."⁸² The Union also claims that addressing diversion is not a supervisory responsibility because "the [c]oordinators must call the [a]dministrator on [c]all . . . to ask if the facility can be put on diversion."⁸³ Further, the Union argues that the RD erred by citing diversion issues in her "preponderance" analysis because it is "an occasional duty, not a daily responsibility."⁸⁴

To the extent that the Union is arguing that addressing diversion issues does not involve exercising

the supervisory authority to direct and assign employees under § 7103(a)(10), this argument lacks merit. Analyzing whether the coordinators spend a majority of their employment time acting in the capacity of a supervisor and exercising supervisory authority, the RD found that addressing diversion issues is part of the "overall management and supervision of the Center,"⁸⁵ including "overseeing . . . the work of approximately [fifty] nurses."⁸⁶ The Union does not challenge these findings.

Moreover, the Union relies on an incomplete understanding of the duty of addressing diversion issues. The Union characterizes the duty to address diversion issues as an "occasional duty"⁸⁷ to "monitor[] the number of beds available at the facility, and if there is a lack of new beds, the [c]oordinators must call the [a]dministrator on [c]all."⁸⁸ However, the coordinators testified that in addressing diversion issues – which includes working throughout the shift to prevent placing the Center on diversion status – they are "always looking at the numbers"⁸⁹ concerning staffing and patient levels and are required to move patients from one unit to another and to assign and move staff to accommodate patients' needs.⁹⁰ The coordinators also testified that the Center's on-call administrator is contacted only after the coordinators take these steps to prevent placing the Center on diversion status, as the last step in this process.⁹¹ Consequently, addressing diversion issues involves exercising supervisory authority to direct and assign employees, and the Union has not demonstrated that the RD failed to apply established law in this regard.

Accordingly, the Union has not demonstrated that the RD failed to apply established law in determining that coordinators spend a preponderance of their time exercising supervisory authority.

IV. Order

We deny the Union's application for review.

⁷⁸ Application at 11.

⁷⁹ *Id.* at 12.

⁸⁰ *Id.* at 10.

⁸¹ RD's Decision at 4.

⁸² Application at 12.

⁸³ *Id.*

⁸⁴ *Id.* at 13-14, 14 n.5.

⁸⁵ RD's Decision at 4.

⁸⁶ *Id.* at 2.

⁸⁷ Application at 14 n.5.

⁸⁸ *Id.* at 12.

⁸⁹ Tr. at 135.

⁹⁰ *Id.* at 27-28, 48-49, 135.

⁹¹ *Id.* at 135-36.

BEFORE THE
UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
CHICAGO REGION

U.S. DEPARTMENT OF VETERANS AFFAIRS
CHARLES GEORGE VA MEDICAL CENTER
ASHEVILLE, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO
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WA-RP-13-0062

DECISION AND ORDER

I. Statement of the Case

This case concerns the bargaining unit status of the Nursing Coordinators at the Agency's Asheville VA Medical Center (Center). There are four employees in this position.¹ The Agency contends that the employees are supervisors as defined by section 7103(a)(10) of the Statute.² The Union submits that while the Nursing Coordinators exercise some supervisory powers they do not do so for a preponderance of their time, and thus are not statutory supervisors.

¹ The parties agreed that the testimony of Nursing Coordinator Sharon Morgan was representative of the duties and responsibilities performed by both her and Nursing Coordinator Donna Lindsey and that the testimony of Nursing Coordinator Pamela Howell was representative of the duties and responsibilities performed by both her and Nursing Coordinator Angela Davenport.

² Section 7103(a)(10) defines a supervisor as "an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority.

A Hearing Officer of the Authority held a hearing in this case, and parties filed briefs.³ Because the record demonstrates that the Nursing Coordinators spend a majority of their employment time performing supervisory duties, I find that they are supervisors under section 7103(a)(10) of the Statute. Accordingly, I will clarify the Union's professional employee bargaining unit to exclude the Nursing Coordinator position at the Center.

II. Findings

The Union represents a nationwide consolidated unit of the VA's professional employees, which includes the Center's nurses.

The Center is a teaching hospital providing veterans with a full range of medical services. The Center operates twenty-four hours a day, seven days a week and includes three medical/surgical units, two intensive care units, an acute psychiatric unit, a 24-hour emergency room, and a domiciliary substance abuse rehabilitation program.

The Nursing Coordinators (Coordinators) work in the Patient Care Services (PCS) department under the supervision of Linda Bugg, Chief Nurse of Acute Care and Operations. Bugg directly reports to David Przezzelski, Associate Director of PCS, who in turn reports to the Center's Director.

Coordinators work six 12-hour shifts and one 8-hour shift every two-week pay period. Of the four positions in dispute, Pamela Howell and Angela Davenport generally work day shift (7:30AM to 8PM) and Sharon Morgan and Donna Lindsey generally work night shift (8PM to 7:30AM). Because the Coordinators work every other weekend, two of the six 12-hour shifts during a pay period are worked on weekends. Center managers and executive leadership work Monday through Friday, 7:30AM to 4PM. This includes all Nursing Managers and Assistant Nursing Managers who oversee the Center's units, as well as Chief Nurse Bugg and Associate Director Przezzelski. These individuals do not work evenings, nights, weekends, or holidays (i.e., off hours). During these periods, which constitute a majority of the Coordinator's employment time, the Coordinator on duty acts on behalf of Bugg, Przezzelski, and the Center Director and is the only individual overseeing the overall patient care functions of the Center, including the work of approximately 50 nurses. Coordinators are generally not involved in providing direct patient care.

³ The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

Coordinators direct nurses to different units within the Center based upon the ebb and flow of the Center's patient population. In performing this task, Coordinators utilize staffing reports which show the variance between the number of staff critically required for a particular unit and that unit's actual scheduled staffing level. However, the Coordinators utilize their discretion and exercise independent judgment in determining whether to move staff from one unit to another by considering factors such as patient acuity and nurse competency level. In addition to moving nurses from one unit to another, Coordinators manage the staffing levels in the Center's units by changing employee tours of duty, approving and canceling overtime, recalling employees to work, and making assignments from the nursing float pool. Coordinators also participate in meetings with other Coordinators, higher level Center management, and nurse managers to evaluate patient flow and staffing requirements.

Coordinators conduct regular rounds of the entire Center. During rounds the Coordinators observe how busy each unit is and whether the unit is organized, clean and functioning properly. Coordinators check time and attendance records while on rounds to confirm that staffing is consistent with those records. They observe whether employees are following work rules such as the prohibition of drinks at their work stations and the use of personal identification cards for computer access. Coordinators counsel employees over these and other matters. Coordinators also interact with patients and their families when the patients have complaints about their care or other concerns.

Coordinators make the initial determination as to whether the Center should be temporarily placed on "diversion." This happens when patient load and staffing are such that the Center is unable to accept any new patients, at which time ambulance services are directed to take VA patients to another area hospital for treatment. Once a Coordinator decides that the Center should be placed on diversion, a phone call is placed to the Center's on-call administrator. The administrator is a member of the Center's Executive Leadership Team (ELT), which consists of the Center's Director, Associate Director, Associate Director for Patient Services, and Chief of Staff. ELT members serve in a weekly rotation as the on-call administrator for significant issues that come up during off hours. In the case of a diversion, the on-call administrator discusses the matter with the Coordinator and routinely accepts the Coordinator's determination that diversion is necessary. Then when the Coordinator decides that the Center is able to begin accepting new patients so that diversion is no longer necessary, the Coordinator directs that diversion be cancelled. The Coordinator takes that action without any consultation with the on-call administrator.

III. Analysis and Conclusions

Nurses are statutory supervisors when: (1) they have the authority to engage in any one of the supervisory functions listed in section 7103(a)(10); (2) their exercise of such authority "is not merely routine or clerical in nature but requires the consistent exercise of independent judgment"; and (3) they spend a preponderance of their employment time exercising that authority. *U.S. Dep't of Veterans Affairs, Medical Center, Hampton, VA*, 65 FLRA 364, 367 (2010). The Authority has held that "preponderance" means a "majority" of the employee's employment time. *U.S. Dep't of the Air Force, Offutt Air Force Base, Neb.*, 66 FLRA 616, 620 (2012).

The record demonstrates that Coordinators are authorized to engage in supervisory functions by directing and assigning employees within the meaning of section 7103(a)(10). The Coordinators' primary function is to monitor and adjust staff and patient levels between the Center's units. To accomplish this, the Coordinators conduct rounds to determine the patient and staffing needs within the units, reassign nursing staff from one unit to another and determine the level of nurse to be moved from one unit to the other, grant and cancel overtime assignments, approve or disapprove leave, recall employees to return to the Center to work, change employee tours of duty, assign float pool nurses to specific units, and review reports and attend meetings concerning unit coverage requirements.

The record further demonstrates that the exercise of the above supervisory functions by the Coordinators requires consistent exercise of independent judgment. While there are critical, minimum staffing levels established for the Center's units, Coordinators maintain staffing above those levels and determine the appropriate numbers and types of employees based on the particular circumstances within each unit. In making these determinations, the Coordinators consider the needs and conditions of the patients, available staff skills and expertise, the type of unit at issue, and staffing requirements for upcoming shifts. During the Center's off hours, there is no one else within the Center that makes these determinations.

Finally, the record establishes that the Coordinators are not generally providing direct patient care, but rather spend a majority of their employment time acting in the capacity of a supervisor and performing supervisory functions. Both the day-shift Coordinators and the night-shift Coordinators spend a majority of their employment time working evenings, nights, weekends, and holidays, when there are no other supervisors or

managers present in the Center.⁴ The Coordinators function as supervisors, rather than rank-and-file employees during these periods, acting on behalf of the Chief Nurse, the Associate Director for Patient Care Services, and the Center Director. During these off hours, the Coordinators are responsible for the overall management and supervision of the Center, which includes insuring that patient care needs are being properly attended to by the staff and addressing diversion issues.

Accordingly, I find that the Coordinators are supervisors within the meaning of section 7103(a)(10) of the Statute. *See Veterans Administration Medical Center, Fayetteville, NC*, 8 FLRA 651 (1982); *Veterans Administration Hospital, Tucson, Ariz.*, 4 FLRA 122 (1980).

IV. Order

I order that the Union's professional bargaining unit of VA employees be clarified to exclude the Nursing Coordinator position at the Center, which is encumbered by Sharon Morgan, Pam Howell, Angela Davenport, and Donna Lindsey.

V. Right to Seek 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 **August 25, 2014**, 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.⁵

Sandra LeBold, Acting Regional Director
Federal Labor Relations Authority
Chicago Regional Office
224 S. Michigan Avenue, Suite 445
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Dated: June 25, 2014

⁴ There is a housekeeping supervisor present during part of this time, and there is an Administrator on Duty who does not supervise any employees.

⁵ 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.