

63 FLRA No. 118

UNITED STATES DEPARTMENT
OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency/Petitioner)

and

AMERICAN FEDERATION OF STATE,
COUNTY, AND
MUNICIPAL EMPLOYEES
COUNCIL 26, AFL-CIO
(Union/Petitioner)

WA-RP-08-0080

WA-RP-08-0084

ORDER DENYING APPLICATION
FOR REVIEW

May 22, 2009

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This case is before the Authority on an application for review filed by the Union under § 2422.31 of the Authority's Regulations.¹ The Agency did not file an opposition.

As relevant to the Union's application for review, the Regional Director (RD) granted the Agency's petition for consolidation. The RD also excluded four employees from the consolidated unit on the basis of § 7112(b)(3) of the Federal Service Labor-Management

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:

- (1) The decision raises an issue for which there is an absence of precedent;
- (2) Established law or policy warrants reconsideration; or
- (3) There is a genuine issue over whether the Regional Director has:
 - (i) Failed to apply established law;
 - (ii) Committed a prejudicial procedural error; or
 - (iii) Committed a clear and prejudicial error concerning a substantial factual matter.

Relations Statute (Statute).² For the reasons that follow, we deny the application for review.

II. Background and RD's decision

The Union filed the petition in Case No. WA-RP-08-0080 requesting clarification of its largest bargaining unit at the Agency's headquarters (referred to as bargaining unit status (BUS) code 0054) and a determination on the unit eligibility of certain positions. The Agency filed the petition in Case No. WA-RP-08-0084 requesting consolidation of all four of the Union's bargaining units³ pursuant to § 7112(d) of the Statute.⁴ The parties agreed that two of the units should be consolidated and clarified, and, in accordance with the parties' agreement and stipulation of facts, the RD ordered the two units consolidated and clarified.⁵ Decision at 3-8. However, the Union opposed the Agency's request to consolidate the three units into a single unit.

As a threshold matter, the RD acknowledged that both the Statute and the Authority's Regulations

2. Section 7112(b)(3) excludes from appropriate units employees "engaged in personnel work in other than a purely clerical capacity[.]" The RD also excluded additional employees for various reasons, which exclusions are not disputed in the Union's application for review and, therefore, are not addressed further.

3. The four units were coded BUS 0054, 0059, 0069, and 0155. BUS 0054 included all professional and nonprofessional headquarters employees of the Agency in Office of the Administrator; Office of Communications; Office of the Assistant Administrator for International Aviation; Office of the Assistant Administrator for Regions and Center Operations; Office of the Assistant Administrator for Aviation Policy, Planning, and Environment; and Air Traffic Organization. BUS 0059 included all professional and nonprofessional headquarters employees of the Office of Chief Counsel. BUS 0069 included all professional and nonprofessional headquarters employees of the Office of the Associate Administrator for Commercial Space Transportation. BUS 0155 included all professional and nonprofessional employees of the Office of the Associate Administrator for Airports; Office of the Associate Administrator for Aviation Safety; and Office of Civil Rights. Decision. App. B.

4. Section 7112(d) provides, in pertinent part:

Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate.

5. The RD also updated the description of BUS 0054 in accordance with the parties' agreement. Decision, App. C. In so doing, the RD added the headquarters employees of the Office of the Assistant Administrator for Aviation Policy, Planning and Environment (AEP) after finding that AEP is a successor employer for the Office of the Assistant Administrator for International Aviation (API) for the employees transferred to AEP and that the unit remained appropriate. Decision at 5-8. This aspect of the decision is not in dispute.

expressly provide that agencies have standing to file consolidation petitions. *Id.* at 25 (citing § 2422.2(c)). He also noted that such petitions will be granted when the proposed consolidated unit is appropriate and a single union represents all of the units proposed to be consolidated. *Id.* (citing *United States Dep't of the Navy, Commander, Navy Region Southeast, Jacksonville, Fla.*, 62 FLRA 11 (2007)). Accordingly, the RD addressed whether a consolidated single unit is appropriate.

As to community of interest, the RD acknowledged that the Authority examines such factors as whether employees in the proposed unit: are part of the same organizational component of the agency; are subject to the same chain of command; have similar or related duties, job titles, and work assignments; are subject to the same general working conditions; and are governed by the same personnel and labor relations policies that are administered by the same personnel office. *Id.* at 25-26 (citing *United States Dep't of the Navy, Fleet and Industrial Supply Ctr., Norfolk, Va.*, 52 FLRA 950, 961 (1997) (*FISC*)). Applying these factors, the RD noted that the Union represents employees in most of the headquarters components of the Agency. He found that they all are part of the same chain of command and that overall working conditions are set at a higher level. *Id.* at 26. He further found that nearly all of the employees represented by the Union are located in the Agency's main headquarters building where they work in a similar office setting with a variety of common benefits. In addition, the RD stated that the affected headquarters components share a related mission and each component plays a role in achieving Agency goals. The RD rejected the Union's assertion that the Office of Chief Counsel (BUS 0059) attorneys do not share a community of interest with the employees of the other units. *Id.* at 28. In the RD's view, the Authority had rejected a similar argument in *National Labor Relations Board, Washington, D.C.*, 63 FLRA 47 (2008) (*NLRB, Washington*). *Id.* at 28. Based on these findings, the RD concluded that the employees in all three of the Union's units share a community of interest. *Id.*

The RD also concluded that the consolidated unit would promote effective dealings. In particular, the RD found that operating policies and procedures, including labor and employee relations policies, are established at headquarters level and apply to all employees. *Id.* at 28. As to bargaining history, the RD noted that the parties' existing collective bargaining agreement applied to all of the units. *Id.* at 28-29. He rejected as misplaced the Union's argument that there was no evidence that the separate units were not effective because, according to

the RD, the Statute does not require that a consolidated unit will improve the collective bargaining relationship. *Id.* at 28.

The RD stated that an assessment of the efficiency of agency operations considers "[c]ost, productivity, and use of resources[.]" *Id.* at 29. Applying these factors, the RD found a consolidated unit would be more efficient because the Agency would save resources by bargaining only once with the consolidated unit. In addition, he noted that there was no evidence that a consolidated unit would decrease productivity. Accordingly, he concluded that the consolidated unit would promote efficiency of agency operations. *Id.*

As he had concluded that a single consolidated unit satisfied all of the unit criteria of § 7112(a), the RD ordered the Union's bargaining units consolidated. *Id.*

Next, the RD addressed the Agency's claims that certain positions must be excluded from the consolidated unit. As relevant to the Union's application for review, the Agency argued that employees Cook, Green, Gill, and Tarbell should be excluded under § 7112(b)(3) of the Statute.

As to employees Cook and Green, the Agency argued that they "work on business cases, where the analysis of staffing levels, or processes that would change employees' duties are considered." *Id.* at 38. In particular, the Agency asserted that they work on "staffing models[.]" *Id.* The RD found that employees Cook and Green work on business case analyses and evaluate the results of implementing new technology. The RD noted examples "where the analysis consider[ed] impacts of new technologies on staffing, both the number of staff, as well as the impact on the duties of employees, particularly air traffic controllers." *Id.* at 39. The RD found that "the record contains abundant evidence that these employees are involved in work that affects the staffing of the Agency and the manner in which employees perform their duties." *Id.* at 40. Accordingly, he concluded that, similar to the analysts excluded in *United States Department of the Army Headquarters, 101st Airborne Division., Fort Campbell, Kentucky.*, 36 FLRA 598 (1990) (*Ft. Campbell*), they must be excluded because "the primary function of these employees is 'to recommend to management the most efficient and effective method of performing its mission . . . and their decisions, consciously or unconsciously, may be influenced by their desire to advance the interests of the bargaining unit employees rather than the best interests of management.'" *Id.* (quoting *Ft. Campbell*, 36 FLRA at 604).

As to employees Gill and Tarbell, the Agency argued that they should be excluded because they are part of an office whose purpose “is to evaluate how employees do work and determine if it should be done in another way.” *Id.* at 43-44. The RD found that Gill and Tarbell serve as process reengineering officers and evaluate an organization’s processes and determine how they could be streamlined. *Id.* at 44. He further found that management relies on their judgment to determine how to resolve operational problems. *Id.* at 46. He noted specific examples of organization evaluations that resulted in recommendations to make the organizations more effective and efficient. He concluded that employees who use their judgment to determine what is occurring and how to make operations more effective and efficient are excluded under § 7112(b)(3). *Id.* He noted that, in *Ft. Campbell*, the Authority excluded analysts whose primary function was to recommend to management the most efficient and effective method of performing its mission because of the significant effect on personnel decisions and the conflict of interest it creates. The RD found that Gill and Tarbell clearly perform a similar function and a similar conflict of interest was apparent. He explained that “[t]he entire purpose of their review is to determine ways to make organizations more efficient” and noted that “fairly radical changes to the work of employees have resulted from their efforts.” *Id.* For these reasons, the RD excluded Gill and Tarbell in accordance with § 7112(b)(3).

III. Application for Review

As to the ordered consolidation, the Union contends that review is warranted under § 2422.31(c)(3)(i) because the consolidation does not comply with established law. Alternatively, the Union contends that, if the RD correctly applied the law, then the Authority should reconsider the consolidation decision under § 2422.31(c)(2). As to the ordered exclusions, the Union contends that review is warranted under § 2422.31(c)(3)(i) because the exclusions are contrary to established law.

With regard to the RD’s decision to consolidate, the Union argues that the RD “wrongly concluded that a consolidated . . . unit would better reflect or enhance community of interest, that consolidation would better promote effective dealings, and that consolidation would increase the efficiency of . . . operations. Application at 15. The Union maintains that “there is no evidence that one unit is ‘more appropriate’ than three, and there is no evidence that the three existing units are inappropriate.” *Id.* at 26.

Addressing each of the unit criteria, the Union argues, as to community of interest, that there is no evidence that consolidation of the Office of Chief Counsel unit with the other two units establishes a “better community of interest[.]” *Id.* at 10. The Union asserts that, because the office functions as “the Agency’s law firm[.]” the community of interest “within their current unit . . . would be undermined significantly.” *Id.* at 9-10. The Union also argues as to the Office of Chief Counsel that the RD “ignored . . . precedent concerning community of interest.” *Id.*⁶ As to effective dealings, the Union asserts that there is no evidence that three units presented obstacles to effective dealings. *Id.* at 12. As to efficiency of Agency operations, the Union asserts that the RD failed to consider whether, in view of the varied positions and specialties of employees, a single unit could effectively deal with management on behalf of all employees. *Id.* at 15.

As to the RD’s exclusions from the unit of the positions encumbered by Cook, Green, Gill, and Tarbell, the Union contends that review is warranted because the RD failed properly to apply *Ft. Campbell*. *Id.* at 16. The Union asserts that Cook and Green may not properly be excluded under *Ft. Campbell* because they do not perform duties that directly involve the Agency’s personnel operations and decision-making. *Id.* at 19. In support of this assertion, the Union cites testimony of their supervisor that “staffing” is not involved in their work. *Id.* (citing Tr. at 1998). As to Cook, the Union further argues that there is no evidence that her duties involve recommendations to management on staffing requirements and forecasts like the analysts excluded in *Ft. Campbell*. *Id.* at 21. As to Green, the Union argues that, although he conducts studies of agency systems, he does not make, or advise management on, personnel decisions, and that his studies have no direct impact on personnel policy or actions. *Id.* at 23.

The Union notes that Gill’s and Tarbell’s duties involve “process reengineering” and argues that the duties have “no direct relationship to staffing or other personnel work.” *Id.* at 25. The Union asserts that, although Gill analyzes “workflows[.]” and has input into space issues, she does not establish the content or responsibilities of positions or determine or allocate space for employees. *Id.* As to Tarbell, the Union notes that her office makes recommendations on processes with respect to staffing, but “[n]either she nor her office analyzes or determines how many people should be on

6. The Union does not specify the precedent to which it refers.

staff.” *Id.* The Union claims that these employees perform work that is comparable to the work performed by the analysts included in the bargaining unit in *Ft. Campbell*. *Id.*

IV. Analysis and Conclusions

A. The application for review fails to demonstrate that there is a genuine issue over whether the RD failed to apply established law in ordering the units consolidated.

Section 7112(d) permits consolidation of two or more bargaining units represented by the same exclusive representative when the larger unit is appropriate. *E.g.*, *NLRB, Washington*, 63 FLRA at 50. As the RD acknowledged, and the Union does not dispute, the Statute and the Authority’s Regulations expressly provide that both unions and agencies have standing to file consolidation petitions. Decision at 25. Section 7112(d) was intended by Congress “to better facilitate the consolidation of small units” into more comprehensive ones. *NLRB, Washington*, 63 at 50-51 (quoting 124 Cong. Rec. H9634 (daily ed. Sept 13, 1978) (statement of Representative Udall)). In this regard, consolidation serves a statutory interest in reducing unit fragmentation and in promoting an effective, comprehensive bargaining unit structure. *Id.* at 51. The reference in § 7112(d) to “appropriate” requires the application of the appropriate unit criteria of § 7112(a). *Id.* The Authority has “consistently held that § 7112(d) requires consolidation whenever a consolidated unit is appropriate[.]” *Nat’l Labor Relations Bd.*, 62 FLRA 25, 36 (2007) (*NLRB*). Moreover, there is no comparison of the consolidated unit with the unconsolidated units when determining whether the consolidated unit is appropriate. *Id.*

The Union argues that review is warranted because “there is no evidence that one unit is ‘more appropriate’ than three, and there is no evidence that the three existing units are inappropriate.” Application at 26. The Union’s argument misconstrues the Statute and fails to demonstrate that the RD failed to apply established law. As noted, a proposed consolidated unit is not compared with unconsolidated units. *NLRB*, 62 FLRA at 36. In other words, a proposed consolidated unit need not be “more appropriate” than the unconsolidated units. Application at 26. The Union similarly misconstrues the RD’s decision in arguing that the RD wrongly concluded that the consolidated unit would enhance community of interest, better promote effective dealings, and increase the efficiency of agency operations. The RD made no such comparative conclusions; the RD stated that “it [wa]s not necessary to determine the relative merits of either unit configuration[.]” Decision at

26. Consequently, the Union’s argument fails to demonstrate a genuine issue over whether the RD failed to apply established law.

The Union also argues that, as to the attorneys in the Office of Chief Counsel, the RD “ignored . . . precedent concerning community of interest.” Application at 9. We construe this argument as a claim that, in concluding that employees in the consolidated unit share a community of interest, the RD failed to apply established law.

The purpose of the criterion that employees share a clear and identifiable community of interest is to ensure that it is possible for them to deal with management as a single group. *FISC*, 52 FLRA at 960. In assessing this criterion, the Authority examines whether employees in the proposed unit: are part of the same organizational component of the agency; are subject to the same chain of command; have similar or related duties, job titles, and work assignments; are subject to the same general working conditions; and are governed by the same personnel and labor relations policies that are administered by the same personnel office. *Id.* at 960-61. In assessing whether the employees of the proposed consolidated unit share a community of interest, the RD acknowledged Authority precedent and examined the factors identified in *FISC*. Decision at 26-28. The Union does not specifically contest the RD’s assessment of these factors. Instead, the Union reiterates its argument to the RD that the attorneys of the Office of Chief Counsel cannot be consolidated with the other bargaining units because they serve as “the Agency’s law firm.” Application at 10.

The RD rejected the Union’s argument, relying on *NLRB, Washington*, where the Authority rejected the agency’s claim that a consolidated unit properly could not include both attorneys who work for the General Counsel of the agency and attorneys who worked for the Chairman and Members of the agency. 63 FLRA at 51-52. The Authority concluded that there was no impediment under the Statute to such a consolidated unit. *Id.* The Union here similarly fails to demonstrate that established law or Authority precedent impedes a consolidated bargaining unit that includes the attorneys of the Office of Chief Counsel. Consequently, the Union fails to demonstrate that the RD failed to apply established law in concluding that the employees of the proposed consolidated unit share a community of interest.

The Union further argues that the RD “failed to consider . . . whether a single bargaining unit *could* efficiently deal with management[.]” Application at 15. We construe this argument as a claim that, in concluding

that the consolidated unit would promote efficiency of agency operations, the RD failed to apply established law.

In assessing efficiency of agency operations, the Authority examines the effect of the proposed unit on agency operations in terms of cost, productivity, and use of resources. *FISC*, 52 FLRA at 961-62. The RD specifically acknowledged established law in evaluating this criterion. Decision at 29. Moreover, contrary to the Union's claim, the RD's decision shows that he considered established law in concluding that the proposed consolidated unit would promote efficiency of agency operations. *Id.* Furthermore, the record and the RD's findings support the RD's conclusion. Consequently, the Union fails to demonstrate that review is warranted because there is a genuine issue over whether the RD failed to apply established law in concluding that the proposed consolidated unit would promote efficiency of agency operations.

B. The application for review fails to demonstrate that review is warranted because established law or policy warrants reconsideration within the meaning of § 2422.31(c)(2).

An assertion that established law or policy warrants reconsideration states a ground on which the Authority may grant an application for review under § 2422.31(c)(2). *E.g.*, *United States Dep't of Agric., Office of the Chief Info. Officer; Info. Tech. Servs.*, 61 FLRA 879, 883 (2006) (*CIO*). For review to be granted, the application must identify an established law or policy and contend that reconsideration of the established law or policy is warranted. *Id.* In this case, the Union contends that "the Authority should reconsider the consolidation decision under [§] 2422.31(c)(2)[.]" Application at 5. However, the Union does not identify any established law or policy that should be reconsidered. Instead, the Union contends only that the RD's "consolidation decision" should be reconsidered. *Id.* Consequently, the Union fails to demonstrate that review is warranted under § 2422.31(c)(2). *See CIO*, 61 FLRA at 883.

C. The application for review fails demonstrate that there is a genuine issue over whether the RD failed to apply established law in ordering the disputed positions excluded under § 7112(b)(3) of the Statute.

In *Ft. Campbell*, the Authority found that certain management analysts performed personnel work in other than a clerical capacity, within the meaning of § 7112(b)(3) of the Statute. 36 FLRA at 604-05. The Authority concluded that these analysts were properly

excluded from a unit because they performed several functions "that involve personnel work or have a significant effect on personnel decisions." *Id.* at 603 (emphasis added). The Authority described the functions as the study or analysis of "the appropriateness of the [agency's] organizational structure, staffing, method of operations and capital investments." *Id.* at 604. The Authority explained that such functions affect personnel decisions and warrant the exclusion of employees because management relies on the judgment and ability of the analysts to determine the most efficient and effective method of performing the mission of the agency, which can have a direct impact on the elimination of jobs, the creation of positions, and the overall work environment of the bargaining unit. *Id.* The Authority further concluded that these analysts were required to be excluded because the nature of this job would create a conflict of interest were they to be included in a bargaining unit. *Id.*

In concluding that the primary function of Cook and Green is similar to the analysts excluded in *Ft. Campbell*, the RD noted that their analyses considered the impact of new technology on staffing, both the number of staff and the duties of employees, particularly air traffic controllers. Decision at 39. Consequently, he found that these employees are involved in work that affects the staffing of the Agency and the manner in which employees perform their duties. *Id.* at 40.

The record supports the RD's findings, which support the RD's conclusion. In particular, the testimony of Cook, Green, and their supervisor shows that, as in *Ft. Campbell*, management relies on the work of Cook and Green to determine the most efficient and effective staffing and manner of performing work, and that their analysis and evaluation have a direct impact on the work environment. *Id.* As an example, the RD acknowledged the supervisor's testimony that one study, involving both Cook and Green, evaluated the number of controllers needed and found that, as of 2014, "over a thousand" controller positions will not be needed. *Id.* at 39 (quoting Tr. at 1990).

The Union asserts that *Ft. Campbell* requires the performance of duties "that directly involve the Agency's internal personnel operations and decision-making." Application at 19. However, contrary to the Union's assertion, *Ft. Campbell* expressly extends beyond internal personnel operations to work that can directly impact staffing and the overall work environment. *See Federal Deposit Insurance Corp., S.F.*, 49 FLRA 1598, 1602 (1994); *Ft. Campbell*, 36 FLRA at 604. In addition, in view of the testimony of the supervisor of Cook and Green as to their projects that affected

staffing and the manner of performing work, the Union's reliance on the supervisor's testimony that their study of navigation and weather systems did not involve staffing fails to demonstrate that the RD misapplied *Ft. Campbell*.

In concluding that Gill and Tarbell perform a function similar to the analysts excluded in *Ft. Campbell*, the RD found that Gill and Tarbell evaluate organizational processes and noted examples of their evaluations that resulted in recommendations to make organizations more effective and efficient. Decision at 44. In excluding Gill and Tarbell, the RD also noted that, at the hearing, the Union acknowledged "that Tarbell and Gill worked on teams that make recommendations which may affect staffing of bargaining unit positions." *Id.* Consequently, he found that the entire purpose of their work is to determine ways to make organizations more efficient and noted that "fairly radical changes to work of employees have resulted from their efforts." *Id.*

The record supports the RD's findings, which support the RD's conclusion. As is the case with respect to Cook and Green, the testimony of Gill, Tarbell, and their supervisor shows that, similar to the excluded analysts in *Ft. Campbell*, Gill and Tarbell "us[e] their judgment to determine . . . how to make the operations more effective and efficient" and make recommendations to management. *Ft. Campbell*, 36 FLRA at 604. As one example of the "fairly radical changes to work of employees" that resulted from their efforts, the RD acknowledged testimony of Gill about a study that resulted in the replacement of a nine-region structure with three service areas, which affected "1,100 people" who had to relocate or transfer to other positions. Decision at 45.

The Union argues that Gill and Tarbell perform work that is almost identical to the work of the analysts included in the bargaining unit in *Ft. Campbell*, which the Authority described as primarily involving studies of budgetary and other computerized systems that do not directly involve individual personnel actions. 36 FLRA at 605. However, unlike the analysts included in *Ft. Campbell*, the record as to Gill and Tarbell shows that, similar to the excluded analysts in *Ft. Campbell*, Gill and Tarbell "us[e] their judgment to determine what is occurring and how to make the operations more effective and efficient" and make recommendations to management. *Ft. Campbell*, 36 FLRA at 604. Consequently, the Union fails to demonstrate that Gill and Tarbell are like the analysts included in the unit in *Ft. Campbell*.

In sum, the Union fails to demonstrate that the RD failed to apply established law in ordering the disputed positions excluded under § 7112(b)(3) of the Statute.

V. Order

As the Union has failed to demonstrate that review is warranted on any of the asserted grounds, we deny the application for review.