64 FLRA No. 26

DEPARTMENT OF DEFENSE
UNITED STATES
ARMY AERONAUTICAL SERVICES AGENCY
FORT BELVOIR, VIRGINIA
(Agency)

and

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

WA-RP-08-0091

ORDER GRANTING IN PART AND
DENYING IN PART
APPLICATION FOR REVIEW, AND
REMANDING TO REGIONAL DIRECTOR

October 22, 2009

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This case is before the Authority on an application for review (the application) filed by the Labor Organization/Petitioner (the Union) under § 2422.31 of the Authority's Regulations. [1] The Agency filed an opposition to the Union's application.

The Union seeks review of two related decisions of the Regional Director (RD): (1) Decision and Order Clarifying Eligibility to Vote in Representation Election (Challenges Decision); and (2) Decision and Order Dismissing Objections to Election (Objections Decision). [2] In the Challenges Decision, the RD found that employee Schwinn is not properly included in the petitioned-for unit because he is engaged in security work that directly affects national security under § 7112(b)(6) of the Federal Service Labor-Management Relations Statute (the Statute). [3] *Id.* at 8. In the Objections Decision, the RD declined to address the status of employee Owens. [4] Application at 2, 10.

For the reasons set forth below, we deny the Union's application with regard to Owens, grant the application with regard to Schwinn, and remand the issue of Schwinn's status to the RD for appropriate action.

II. Background and RD's Decisions

A. Procedural Background

The Union filed a petition seeking a representation election. The Agency challenged the inclusion of six employees in the proposed unit, and a hearing was held to determine the status of those six employees. At the conclusion of the hearing, the Hearing Officer stated that the Authority would clarify positions after the election, if such clarification were necessary. Hearing Transcript (Tr.) at 100. Subsequently, the Union withdrew its objections to the Agency's proposed exclusion of two of the six employees, leaving in dispute the status of four employees: William McCormick (McCormick), Sydney Tutein (Tutein), Owens, and Schwinn. The parties stipulated that if any of these four employees voted in the election, their votes would be challenged.

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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: . . .
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> (3) There is a genuine issue over whether the Regional Director has:
>
> (i) Failed to apply established law [or] . . .
>
> (iii) Committed a clear and prejudicial error concerning a substantial factual matter.

2. In the application, the Union states that it seeks review of "the Decision and Order," without specifying which decision and order. Application at 1. However, the Union's contention that the RD erroneously failed to consider the bargaining unit eligibility of employee Barney C. Owens (Owens) contests a determination that the RD made in the Objections Decision, and the Union's contention that employee William Charles Schwinn (Schwinn) is properly included in the unit contests a determination that the RD made in the Challenges Decision. Accordingly, we construe the Union's statement as seeking review of both Decisions and Orders.

3. The pertinent wording of § 7112(b)(6) is set forth below.

4. Although the RD does not mention Owens by name, the record makes clear that the RD declined to consider Owens' status when the RD ruled in the Objections Decision that the scope of post-hearing briefs was properly limited to the two ballots determinative of the election. *See* Objections Decision at 2, 4.

Later, a representation election was held pursuant to a consent election agreement approved by the RD. On the day of the election, the Agency conceded that McCormick was eligible to be in the unit and to vote; the Agency did not challenge McCormick's ballot. [5] A total of eight ballots were cast: four unchallenged ballots in favor of representation, two unchallenged ballots against representation, and two challenged ballots — one cast by Schwinn and one cast by Tutein. It is undisputed that Owens did not vote in the election. [6]

After the election, the RD issued an order for post-hearing briefs concerning the bargaining-unit eligibility of Schwinn and Tutein. Motion Denial at 1. The RD stated that "[i]n order to most efficiently process the petition, this decision will address only the bargaining unit status of the determinative challenged ballot voters, Schwinn and Tutein." [7] Challenges Decision at 1. Thereafter, the Union filed an Objection to the Conduct of Election, in which it disagreed with: (1) the RD's decision to limit the briefs to Schwinn and Tutein when the hearing had been held regarding four employees; and (2) the RD's statement that "should [the Union] prevail in the election it will be required to submit a clarification of unit petition to clarify the status of" Owens. Motion Denial at 2. The Union filed a Motion to Postpone Post-Hearing Briefs Due Date indefinitely, which the RD denied because the Union "failed to demonstrate how the [order for post-hearing briefs limited to Schwinn and Tutein] constitutes an inefficient use of time and resources when it was undertaken to directly resolve the underlying [Union] petition for election." *Id.*

Subsequently, the RD issued both the Objections Decision and Challenges Decision, which are discussed below.

B. RD's Decisions

The RD found that Schwinn, an Aeronautical Information Specialist, "has not read, seen or heard classified information" while performing his regular duties, although Schwinn "possessed a secret security clearance at the time of the hearing." Challenges Decision 3. The RD further found that Schwinn participated in three Department of Defense working groups — the Digital Working Group, the Digital Aeronautical Transformation Working Group, and the Vertical Obstruction Working Group — and that each group meets separately every six months. *Id.* at 4. In this regard, the RD noted that Schwinn attended a Digital Working Group meeting that "included a briefing on classified information with regard to National Geospatial Intelligence[,]" and that this classified information concerned "intelligence capabilities." *Id.* The RD also found that on "two other occasions, Schwinn attended working group meetings during which the meeting rooms were cleared of group members who lacked security clearances so that classified matters could be discussed." *Id.*

Based on the foregoing, the RD determined that "Schwinn accessed classified information on numerous occasions while attending the semi-annual working group meetings[,]" and that, consequently, Schwinn's work "involves regular access to classified information that addresses intelligence capabilities within the context of supporting the various branches of the military." *Id.* at 7. The RD concluded that Schwinn is engaged in security work that directly affects national security and, therefore, that his position is excluded from the unit under § 7112(b)(6) of the Statute.

In the Objections Decision, the RD denied the Union's objections regarding the RD's failure to direct the parties to brief the unit eligibility of Owens. In this connection the RD determined that he was not required to issue a Decision and Order prior to the election, stating:

> After the hearing in this case, the undersigned approved a consent election agreement and today is issuing a Decision and Order resolving the dispute over the bargaining unit eligibility of the two voters in the election whose eligibility can determine whether a majority of the valid votes cast at the election were for representation by [the Union]. The Authority Regulations do not expressly require that a Decision and Order concerning bargaining unit eligibility of disputed potential voters be issued before an election is held. Even if they do, [the Union] effectively waived its right to a Decision and Order before the

5. In the objections, the Union claimed, among other things, that the election observer improperly permitted the Agency to concede the eligibility of McCormick. *See* Order Denying Motion to Postpone Post-Hearing Briefs Due Date (Motion Denial) at 1-2. The RD denied the Union's objection in this regard. Objections Decision at 4. As the Union does not contend that the RD erred in this regard, we do not consider the matter further.

6. In this regard, the Agency asserts that Owens did not vote in the election, Opp'n at 3, and the Union does not state anything to the contrary.

7. The Agency does not challenge the RD's determination that Tutein is properly included in the unit. Opp'n at 3 n.3. As such, we do not consider Tutein further.

> election was held by entering into a consent election agreement.[[8]]

Objections Decision at 3.

The RD stated that "[s]ince the petition in this case was for an election, limiting the eligibility determination to [the] two [determinative, challenged] voters is all that is necessary to satisfy the purpose of the petition." *Id.* at 4. Accordingly, he declined to consider Owens' eligibility.

III. Positions of the Parties

A. Union's Application

The Union contends that the RD failed to apply established law and committed a clear and prejudicial error concerning substantial factual matters regarding Schwinn and Owens. *See* Application at 1-2, 10.

With regard to Schwinn, the Union disputes the RD's determination that Schwinn is engaged in "security work" under § 7112(b)(6) of the Statute because, according to the Union, Schwinn's work does not involve regular access to classified information, as required under *United States Dep't of Justice*, 52 FLRA 1093, 1103 (1997) (*DOJ*). In this connection, the Union contends that the RD erroneously determined that Schwinn has regular access to classified information and "accessed classified information on numerous occasions while attending the semi-annual working group meetings." Application at 9 (quoting Challenges Decision at 7). The Union asserts that, although the record indicates that Schwinn attended working group meetings in which some of the attendees had access to classified information in "sidebar" meetings, the record does not indicate that Schwinn was one of the attendees who had such access. Specifically, according to the Union, "Schwinn did not state that he was one of the individuals, and, in fact, he was not one of those individuals[]" who had such access. *Id.* at 7. The Union claims that there is no evidence that Schwinn "ever has access to classified material on a regular basis[,]" and, therefore, he should be included in the unit. *Id.* at 9.

Additionally, the Union contends that the RD should have considered whether Owens is properly included in the unit, that "the inclusion of Owens must be remanded to the RD for further determination, and that the ballots in the election must be set aside and a new election held." *Id.* at 10.

B. Agency's Opposition

The Agency contends that the RD did not fail to apply established law, and did not commit a clear and prejudicial error concerning a substantial factual matter, with regard to Schwinn and Owens. *See* Opp'n at 4-5.

The Agency argues that the record supports the RD's conclusion that Schwinn is engaged in security work because his duties involve the regular use of, or access to, classified information. *Id.* at 4. In this regard, the Agency contends that Schwinn testified that he "regularly has access to classified information as a member of the . . . working groups that deal with . . . classified information 'as to intelligence capabilities[.]'" *Id.* (quoting Tr. at 76). Further, the Agency asserts that "[a]t times, the working groups receive classified briefings, and at other times, 'sidebar type' discussions touching on classified matters occur at the working group meetings." *Id.* (quoting Tr. at 78). The Agency also asserts that Schwinn indicated that "one of the locations where the working groups sometimes visit or meet is a location where 'you cannot enter [the] facility . . . without a secret clearance to begin with.'" *Id.* at 4-5 (quoting Tr. at 79).

With regard to Owens, the Agency argues that the Union "cites no Authority case law . . . supporting" its position that the RD should have considered Owens' status, and that the Union "has not shown how the RD's procedural decision not to determine a matter that was not necessary to satisfy the purpose of the petition had the potential to interfere with the free choice of the voters at the election." *Id.* at 5.

IV. Analysis and Conclusions

A. A remand is necessary to determine whether the RD failed to apply established law, or committed a clear and prejudicial error concerning a substantial factual matter, by finding that Schwinn is excluded from the unit under § 7112(b)(6) of the Statute.

Section 7112(b)(6) of the Statute excludes from bargaining units "any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security[.]" In order to determine whether an employee is excluded under § 7112(b)(6), the Authority considers whether the employee is: "(1) engaged in security work that (2) directly affects (3) national security." *United States Dep't of Defense, Pentagon Force Prot. Agency, Wash., D.C.*, 62 FLRA 164, 171 (2007). As relevant here, an

8. The record indicates that, in the consent election agreement, the parties stipulated that a ballot cast by Schwinn, Tutein, McCormick, or Owens would be challenged. *See* Objections Decision at 3; Application at 3.

employee will be found to be "engaged in security work" within the meaning of § 7112(b)(6) if the employee's duties include "the regular use of, or access to, classified information." *DOJ*, 52 FLRA at 1103.

There is no dispute that, in determining whether Schwinn engaged in security work, the RD applied the proper test by considering whether Schwinn's duties include "the regular use of, or access to, classified information." Challenges Decision at 6 (citing *Soc. Sec. Admin., Balt., Md.*, 59 FLRA 137, 144 (2003) (Chairman Cabaniss concurring and then-Member Pope dissenting in part) & *DOJ*, 52 FLRA at 1103). However, for the reasons that follow, the record is unclear as to the extent of Schwinn's access to classified information, and as a result, we are unable to determine whether the RD failed to apply established law or committed a clear and prejudicial error concerning a substantial factual matter with respect to Schwinn.

With regard to access to classified information, Schwinn first testified: "The only time that I've seen or had been in classified briefings or potential for classified information is on the working groups as it relates to National Geospatial Intelligence[.]" Tr. at 74. Then Schwinn testified that "some of the working groups I'm on there's potential and there've actually been *at least one* that I recall within the last calendar year of a classified briefing that I sat in on." *Id.* at 76 (emphasis added). Additionally, Schwinn testified that "there have been discussions during some of these working groups that information as to intelligence capabilities [has] been discussed and that information is classified as well." *Id.* The Agency's attorney then asked Schwinn on cross-examination to clarify his statements. In replying, Schwinn implied, but did not state, that he attended two sidebar meetings where classified information was presented:

> Q. BY [AGENCY COUNSEL]: I just wanted to make sure. I'm confused because they seem to be two different things. Did I misunderstand your testimony that, in addition to the briefing, that you — there have been some discussions at the working group that touched —
>
> A. Yeah, there —
>
> Q. — on classified matters?
>
> A. That is correct. And — yes, there was one or two, sidebar type meetings amongst individuals that attended it.
>
> Q. Okay
>
> A. Along with that one particular case that was a classified briefing.
>
> Q. Okay. So, it's not true that there's only one occasion where you —
>
> A. No, it's —
>
> Q. No.
>
> A. It's been a couple of times that it — that you discuss certain information within that realm, but no, it's not on a — it's not all the time and that's all that I can recall.

Id. at 78-79.

Schwinn's responses to the Hearing Officer's questions also make it unclear to what extent Schwinn had access to classified information. Specifically, with regard to Schwinn's participation in the three working groups, the following exchange occurred:

> HEARING OFFICER . . . : To your knowledge, does everyone who attends the meetings of these workgroups have at least a secret security clearance?
>
> THE WITNESS: Not everyone that attends, but whenever the time comes that they will discuss information that is classified, they will clear out the room for all those people that do not have the appropriate clearance that I'm — that is — that I'm aware of.
>
> HEARING OFFICER . . . : All right. Now, how many of these meetings have you attended, total?
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> THE WITNESS: The Digital Working Group, at least 3 in the 18 months I've been here. Same with the Digital Aeronautical Transformation Working Group, and the VOWG, 3 times, again, every 6 months. And then a few of the other working groups, not that they all deal with classified information, I've attended —
>
> HEARING OFFICER . . . : Let's stick with the ones — those three groups, how often do they clear out people who don't have classified security clearances?
>
> THE WITNESS: There's only been twice that I recall.

Id. at 80-81. When asked, "and your workgroups, have you been told that you will be performing work that would include the use or access to classified informa-

tion?", Schwinn answered, "Other than those instances, no." *Id.* at 83.

Although the record suggests that Schwinn had a security clearance, *see id.* at 32, 79-80, and further suggests that this would have enabled him to attend the sidebar meetings referenced above, *see id.* at 78-81, the record does not indicate that Schwinn had a security clearance at the time of the sidebar meetings, or that Schwinn's security clearance permitted him to attend the sidebar meetings. Moreover, Schwinn's testimony does not clarify the matter further. In this regard, Schwinn testified:

> [A]ny of the workgroups, I suppose, could potentially have that [classified] information, but the workgroups that I attend, they're every six months. And there are several different workgroups that I attend on about an — about every six month basis. That's not to say there's going to be information that's going to be classified at that time. I just know that when I accepted the position, part of the requirement was I had to have the secret clearance to be able to attend these meetings.

Id. at 79-80.

Although the record indicates that Schwinn attended one classified briefing, and suggests that he *may have* attended two sidebar meetings of working groups in which classified information was presented, the record does not indicate that he attended those sidebar meetings. Given the ambiguity of the record, we are unable to assess the RD's conclusion that "Schwinn accessed classified information on *numerous occasions* while attending the semi-annual working group meetings." Challenges Decision at 7 (emphasis added). That is, the record does not enable us to determine whether Schwinn's duties include "the regular use of, or access to, classified information," under *DOJ*, 52 FLRA 1103. Therefore, with regard to Schwinn, we are unable to determine whether the RD failed to apply established law or committed a clear and prejudicial error concerning a substantial factual matter.

Under § 2422.21(a) of the Authority's Rules and Regulations, the hearing officer is responsible for ensuring that the record is properly developed. Section 2422.21(a) states, in pertinent part: "The Hearing Officer will receive evidence and inquire fully into the relevant and material facts concerning the matters that are the subject of the hearing[.]" Similarly, § 2422.18(a) of the Authority's Rules and Regulations states: "Representation hearings are considered investigatory and not adversarial. The purpose of the hearing is to develop a full and complete record of relevant and material facts."

Consistent with these regulations, the Authority has emphasized the need for development of a full and complete record in order to decide disputed factual issues in representation cases. *See United States Dep't of Energy, Fed. Energy Regulatory Comm'n*, 22 FLRA 3, 5 (1986) (remand required where regional director failed to rule on supervisory status of six individuals). Where an RD's decision does not contain sufficient evidence to allow the Authority to make findings necessary to determine the outcome of a case, the Authority has remanded such cases to the RD to reopen the record and obtain the necessary evidence. *See, e.g., United States Dep't of Hous. and Urban Dev.*, 34 FLRA 207, 212 (1990). Here, as the record does not permit a determination regarding Schwinn's status, we grant the application as to Schwinn and remand this aspect of the case to the RD to take whatever actions are necessary to make the necessary findings and determination.

B. The application fails to demonstrate that the RD erred by not considering whether Owens is properly included in the petitioned-for unit.

The Union alleges that the "evidence gathered through the hearing supports a finding that . . . Owens [is] included in the bargaining unit[,]" and contends that "the inclusion of Owens must be remanded to the RD for further determination[.]" Application at 2, 10.

As noted above, the record indicates that Owens did not vote in the election. *See* note 6, *supra*. As such, the RD's decision with respect to Owens did not affect the outcome of the election. The Union cites no Authority precedent, rule, or regulation that the RD allegedly failed to apply.[9] In addition, the Union does not explain how the RD committed a clear and prejudicial error concerning a substantial factual matter. Further, the Union's request that the "ballots in the election . . . be set aside and a new election held" is unsupported. Application at 10. As the Union makes only bare assertions, we find that the Union has neither demonstrated that the RD erred by declining to consider Owens' unit

9. In this connection, we note that the Union does not address § 2422.27 of the Authority's Regulations, which states, in pertinent part, that the "Regional Director will investigate objections and/or *determinative challenged ballots* that are sufficient in number to affect the results of the election." (Emphasis added).

status nor provided any basis for setting aside the election and directing a new one. [10] *Cf. United States Dep't of the Navy, Fleet Readiness Ctr. Sw., San Diego, Cal.*, 63 FLRA 245, 252 (2009) (rejecting as bare assertion union's unsubstantiated argument in accretion case that separate unit would result in increased productivity and economic savings). Accordingly, we deny the application with respect to Owens.

V. Order

We deny the Union's application with regard to Owens, grant the application with regard to Schwinn, and remand the issue of Schwinn's status to the RD, for appropriate action consistent with this Order.

10. We note that nothing in this Order would preclude the Union from filing a petition for unit clarification with regard to Owens, should it wish to do so.