65 FLRA No. 65

NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.
(Respondent)

and

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION
(Charging Party)

WA-CA-09-0326

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DECISION AND ORDER

December 14, 2010

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

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent. The General Counsel filed an opposition to the Respondent's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to bargain with the Union in a consolidated bargaining unit that had previously been certified by the Authority. For the reasons set forth below, we dismiss the complaint.

II. Background and Judge's Decision

A. Background

Prior to the events in this case, the Union was the bargaining representative of two units of employees of the Agency working at its Washington, D.C., headquarters: one unit comprised professional employees working for the National Labor Relations Board (NLRB) Chairman and Members (the Board), and the other comprised professional employees working in the NLRB's Office of the General Counsel (GC). Judge's Decision at 3. The Regional Director (RD) of the Authority's San Francisco Regional Office granted the Union's petition to consolidate the two units. *Id.* After the Respondent filed an Application for Review, the Authority affirmed the RD's decision and found that the proposed consolidated unit was appropriate. *NLRB, Wash., D.C.*, 63 FLRA 47 (2008) (*NLRB II*). Accordingly, the RD certified the Union as the exclusive representative for the consolidated unit. Judge's Decision at 3

Subsequently, the Union requested to bargain with the Agency concerning conditions of employment in the consolidated unit. In response, the Agency advised the Union that it had "elected to test the certification of the unit consolidated by the FLRA[,]" and therefore would "refuse to bargain in the consolidated unit." *Id.* The Agency offered instead to bargain "in separate Board[-]side and GC[-]side units." *Id.* at 3-4.

B. Judge's Decision

Before the Judge, the General Counsel filed a motion for summary judgment, arguing that there was no genuine issue of material fact, and that the undisputed facts warranted a finding that the Respondent had committed a ULP. *Id.* at 2. The Respondent opposed this motion, arguing that the Authority's decision in the underlying representation case improperly forced its Board and GC to act in concert for collective bargaining in violation of §§ 3(d) and 4(a) of the National Labor Relations Act (the Act).[1] *Id.* at 2, 4. The Respondent did not offer any additional evidence or factual allegations beyond those in the underlying representation case. *Id.* at 2.

The Judge stated that the Respondent's "request to reverse the Authority's decision in the [underlying] representation case is properly one that must be made to the Authority itself, or, failing there, to the Court

1. Section 3(d) of the Act pertinently provides: "The [GC] shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices." 29 U.S.C. § 153(d). Section 4(a) pertinently provides:

> The Board shall appoint . . . such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts.

Id. § 154(a).

of Appeals." *Id.* at 5. The Judge found that he was bound to follow the Authority's holding that "a consolidated unit of Board-side and GC-side employees is appropriate." *Id.* (citing *NLRB II*, 63 FLRA at 51-52; *NLRB*, 62 FLRA 25, 31-34 (2007) (*NLRB I*)). Because the Judge found that "[t]he undisputed facts demonstrate that the Union made written requests to bargain with the Agency in the certified consolidated bargaining unit, and that the Agency refused to do so[,]" the Judge found that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute "by refusing to negotiate and by otherwise refusing to accord the Union its statutory status as exclusive bargaining representative of the employees in the consolidated bargaining unit." *Id.* Accordingly, the Judge recommended that the Authority grant the General Counsel's motion for summary judgment. *Id.*

III. Positions of the Parties

A. Respondent's Exceptions

The Respondent asks the Authority to "dismiss the complaint because the unit consolidation decision upon which it relies is fatally flawed." Exceptions at 1.[2] In this regard, the Respondent asserts that the consolidated unit is barred by the explicit separation of supervisory authority over attorneys in the prosecutorial and adjudicatory components of the Agency mandated by §§ 3(d) and 4(a) of the Act. *Id.* at 5-10. Thus, the Respondent urges the Authority to correct its "erroneous decision" in *NLRB II*, 63 FLRA 47, in which the Authority found the consolidated unit to be appropriate. Exceptions at 1.

B. General Counsel's Opposition

The General Counsel asserts that the Judge properly rejected the Respondent's attempts to challenge the underlying certification of the consolidated unit by refusing to bargain. Opp'n at 2. Because the Respondent does not dispute that it refused to bargain with the Union concerning the certified unit, the General Counsel asks the Authority to uphold the Judge's finding that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute. *Id.* at 2, 4.

2. The Respondent filed exceptions and a "brief in support of its exceptions" with the Authority. Because the supporting brief contains the Respondent's arguments in detail, we refer to this document as the Respondent's "Exceptions."

IV. Analysis and Conclusions

In *NLRB I*, the Authority found that a consolidated unit different from the one in this case – composed of nonprofessional employees of the Board and GC, as well as nonprofessional and professional employees of the GC's regional offices – was appropriate. *See* 62 FLRA at 31-36. The Authority also found that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute by refusing to negotiate with the Union as the exclusive representative of the employees in this consolidated unit in *NLRB, Wash., D.C.*, 63 FLRA 104, 107 (2009), *enforcement denied by NLRB v. FLRA*, 613 F.3d 275 (D.C. Cir. 2010) (*NLRB v. FLRA*).

On appeal, the United States Court of Appeals, District of Columbia Circuit (D.C. Circuit), denied enforcement of the ULP charges in *NLRB, Wash., D.C.*, because the court found that "subjecting the [GC]'s exercise of his supervisory authority to the consent of the Board," by requiring the GC and the Board to negotiate one contract with the consolidated unit, impermissibly interferes with the GC's independent authority. *NLRB v. FLRA*, 613 F.3d at 281. In this regard, the court held that, by providing that the GC "shall exercise general supervision" over all GC-side attorneys, § 3(d) of the Act "makes the [GC] independent of the Board with respect to the 'conditions of employment' that are subject to collective bargaining under § 7102(2) of the Statute." *Id.* at 280. Accordingly, the court held that "the Authority's unit determination conflicts with § 3(d) of the Act[,]" and that, consequently, the Authority "erred in holding the Board engaged in an unfair labor practice when it refused to bargain with the Union over the conditions of employment in that unit." *Id.* at 281, 282.

The consolidated unit at issue in this case comprises the GC and Board professional employees working at the NLRB's headquarters.[3] As relevant here, the Authority relied on *NLRB I* to find that the consolidated unit did not conflict with §§ 3(d) and 4(a) of the Act. *See NLRB II*, 63 FLRA at 51-52. The Authority has held that a respondent may not relitigate a certification in a ULP proceeding absent "new evidence or previously unavailable evidence or special circumstances[.]" *FDIC*, 40 FLRA 775, 782 (1991), *enf'd sub nom. FLRA v. FDIC*, No. 91-1207 (D.C. Cir. Sept. 1, 1992). We conclude that the decision in *NLRB v. FLRA* presents sufficient special

3. We leave it to the RD to take appropriate action regarding the unit involved in *NLRB II* consistent with this decision.

circumstances for the Authority to consider the Respondent's admitted refusal to bargain in the context of the D.C. Circuit's holding that the Respondent lawfully refused to bargain with another consolidated unit composed of Board and GC employees because requiring such coordinated collective bargaining conflicted with § 3(d) of the Act. *See* 613 F.3d at 282.

In light of the decision in *NLRB v. FLRA*, and for the reasons discussed therein, we find that the Respondent did not violate the Statute when it refused to bargain with the Union over the conditions of employment in the consolidated bargaining unit. *See id.* Accordingly, the complaint must be dismissed.

V. Order

The complaint is dismissed.

Office of Administrative Law Judges

NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.
Respondent

and

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION
Charging Party

Case No. WA-CA-09-0326

Stephanie Arthur, Esq.
For the General Counsel

Barry F. Smith, Esq.
For the Respondent

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

Statement of the Case

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On September 3, 2009, the Regional Director of the San Francisco Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by refusing to bargain with the Charging Party in a consolidated bargaining unit that had previously been certified. On September 28, 2009, the Respondent filed its Answer, in which it admitted refusing to bargain in the consolidated unit, but denied that it had committed an unfair labor practice or otherwise violated the Statute. In its Answer, the Respondent also asserted as an affirmative defense that the Authority's decision certifying the consolidated unit was legally erroneous.

Subsequently, Counsel for the General Counsel filed a Motion for Summary Judgment, arguing that there was no genuine issue of material fact, and that the undisputed facts warranted a finding that Respondent had committed an unfair labor practice.

Respondent opposed the General Counsel's Motion for Summary Judgment and requested that the Authority set aside its earlier decision approving a consolidated unit. It further moved to incorporate by reference the full record of the underlying representation case, WA-RP-08-0002, into the instant case record, but it did not offer any additional evidence or factual allegations beyond that which was introduced in the representation case. Counsel for the General Counsel has not opposed the Respondent's Motion to Incorporate by Reference.

Based on these pleadings, the Chief Administrative Law Judge issued an Order on October 13, 2009, postponing the hearing indefinitely.

DISCUSSION OF MOTION FOR SUMMARY JUDGMENT

The Authority has held that motions for summary judgment, filed under section 2423.27 of its Regulations, 5 C.F.R. § 2423.27, serve the same purpose, and are governed by the same principles as motions filed in United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 222 (1995); *Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky*, 33 FLRA 3, 4-5 (1988). If the pleadings, and additional evidence submitted in support thereof, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, the motion for summary judgment should be granted. I*d.*

Along with its brief in support of its motion, the General Counsel has offered an affidavit and exhibits to corroborate the factual allegations of the Complaint. The Respondent's supporting brief does not dispute any of the General Counsel's factual allegations, nor does it offer any factual assertions of its own; rather, it disputes the legal arguments on which the Authority's decision in WA-RP-08-0002 was based, and it includes excerpts from the transcript of the representation hearing to support its own legal arguments. Further, as noted above, the Respondent moves to incorporate by reference the record in Case No. WA-RP-08-0002. Although (as I will discuss further below) the Respondent is not entitled to relitigate in this ULP proceeding issues that were or could have been raised in the underlying representation proceeding, the representation case record would be relevant if either party seeks review of the Authority's determination in this case in the United States Court of Appeals. Therefore, Respondent's motion to incorporate is granted.

After fully reviewing the pleadings and the documents in support of and in opposition to the motion for summary judgment, I agree with the General Counsel that there is no genuine issue of material fact in this case. Accordingly, it is appropriate to decide the case on the motion for summary judgment. Based on the entire record, I will summarize the material facts that are not in dispute, and based thereon, I make the following conclusions of law and recommendations.

Findings of Fact

The National Labor Relations Board, Washington, D.C. (Respondent or Agency) is an agency within the meaning of section 7103(a)(3) of the Statute. The National Labor Relations Board Professional Association (Charging Party or Union) is a labor organization within the meaning of section 7103(a)(4) of the Statute.

Prior to the events in this case, the Union was the bargaining representative of two units of employees of the Agency working at its Washington, D.C., headquarters: one unit was composed of professional employees working for the NLRB Chairman and Members, and the other was composed of professional employees working in the Office of the General Counsel. Affidavit of Leslie Rossen at 1, G.C. Exhibit 3 of Motion for Summary Judgment. On October 16, 2007, the Union filed a petition with the Authority seeking to consolidate these two units into one. The petition was docketed as Case No. WA-RP-08-0002. Rossen Affidavit at 1-2.

After holding a hearing, the Regional Director of the Authority's San Francisco Region issued a Decision and Order Granting the Petition for Consolidation. After the Respondent filed an Application for Review, the Authority issued a Decision and Order on Review, in which it affirmed the Regional Director's conclusion that the proposed consolidated unit was appropriate. *National Labor Relations Board, Washington, D.C.*, 63 FLRA 47 (2008). Accordingly, on December 18, 2008, the San Francisco Regional Director certified the Union as the exclusive representative for the consolidated unit, described as follows:

Included:	All attorneys and other professionals performing comparable legal work, including permanent part-time employees, and law student employees (Student Assistants), in the Headquarters Office of the National Labor Relations Board and the Office of the General Counsel.
Excluded:	Law students holding summer appointments and those on work-study programs; nonprofessional employees; management officials; supervisors; and employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6) and (7).

Exhibit A of Rossen Affidavit.

On March 5, 6, and 13, 2009, the Union requested to bargain with the Agency "in the certified bargaining unit" concerning quality step increases and a proposed revision to the Agency's information technology policy. Rossen Affidavit at 2-3; Exhibits B and C of Rossen Affidavit. On March 16, 2009, Lee Clark, the Agency's Chief of the Labor Relations Section, advised the Union that the Agency "has elected to test the certification of the unit consolidated by the FLRA", and that the Agency therefore would "refuse to bargain in the consolidated unit." Exhibit D of Rossen Affidavit. Clark offered instead to bargain "in separate Board side and GC side units." *Id.* Since that date, the Agency has not bargained with the Union regarding working conditions in the consolidated unit. Rossen Affidavit at 3.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

The General Counsel notes first that the Respondent has admitted it is refusing to bargain with the Union in the consolidated unit that was recently certified by the Authority. The G.C. submits not only that the facts of this case are not in dispute, but that the unlawfulness of the Respondent's actions is also undisputed. The Respondent is knowingly defying the decision and order of the Authority in order to test the legal soundness of that decision in court; therefore, the G.C. argues that Respondent has clearly violated section 7116(a)(1), (5) and (8) of the Statute.

According to the General Counsel, the Respondent has defended its actions by attacking the Authority's decision in the representation case, reasserting the same arguments against a consolidated unit of Board-side and GC-side employees that it made in the representation case. The General Counsel cites *Federal Deposit Insurance Corporation*, 40 FLRA 775 (1991), *enf'd sub nom. FLRA v. Federal Deposit Insurance Corporation*, No. 91-1207 (D.C. Cir. Sept. 1, 1992)(*FDIC*), which applied similar principles from NLRB case law governing private sector labor relations. *See, e.g., Fred's Inc.,* 343 NLRB 138 (2004); *Texas Industries, Inc.*, 199 NLRB 671, 672 (1972). In both the private sector and in cases involving federal employees and agencies, a respondent in an unfair labor practice proceeding is not entitled to relitigate issues that were or could have been litigated in the underlying representation proceeding, absent newly discovered or previously unavailable evidence or special circumstances. *FDIC*, 40 FLRA at 782. Since the Respondent here has not offered any such evidence or demonstrated special circumstances, the General Counsel submits that it has violated section 7116(a)(1), (5) and (8) of the Statute, and urges that it be ordered to recognize and bargain with the Union on matters affecting the consolidated bargaining unit.

The Respondent argues that the Authority's decision in the underlying representation case improperly forces its Board and General Counsel to act in concert for collective bargaining, something that is contrary to sections 3(d) and 4(a) of the National Labor Relations Act, as amended, and that compromises the "complete separation" of the Agency's General Counsel and Board. The Authority has failed to give deference to the Respondent's longstanding interpretation of its own organic statute, and it has misinterpreted the Respondent's history of cooperative bargaining in the separate Board-side and GC-side units. While cooperative bargaining maintained the separation of the two entities within the Agency, Respondent insists that consolidation of the two units cannot similarly guarantee their independence. As a result, the Authority's representation decision creates a conflict between the National Labor Relations Act and the Statute, contrary to established rules of statutory construction. *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974). Respondent urges that the

Authority reverse its previous decision and set aside the certification of the consolidated unit.

Analysis

Although the Respondent presents a lengthy and impassioned legal argument, it is asking me to do something that is not within my authority. Its request to reverse the Authority's decision in the representation case is properly one that must be made to the Authority itself, or, failing there, to the Court of Appeals. For my part, I must follow the Authority's decisions in this and similar cases, and the Authority has been quite consistent in holding that a consolidated unit of Board-side and GC-side employees is appropriate. *National Labor Relations Board, Washington, D.C.*, 63 FLRA 47, 51-52 (2008); *see also National Labor Relations Board*, 62 FLRA 25, 31-34 (2007)(representation case involving the consolidation of four other bargaining units of Respondent's employees, represented by a different union); *National Labor Relations Board, Washington, D.C.*, 63 FLRA 104, 107 (2009), *appeal docketed*, No. 09-1119 (D.C. Cir. 2009).

My discretion is even further constrained by the principles set forth in *FDIC, supra*, 40 FLRA at 782, which in turn follows the NLRB's own precedent regarding challenges to a union's certification in an unfair labor practice proceeding. *Texas Industries, Inc., supra*, 199 NLRB at 672. As the Authority stated most recently, "a respondent in a ULP proceeding is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding absent newly discovered or previously unavailable evidence or special circumstances." 63 FLRA at 107.

The Respondent has not offered any evidence other than that which was presented at the representation hearing, and it has not presented any special circumstances warranting a reconsideration of the Authority's earlier decision.

The undisputed facts demonstrate that the Union made written requests to bargain with the Agency in the certified consolidated bargaining unit, and that the Agency refused to do so. Paragraph 11 of Complaint, G.C. Exhibit 1 to Motion for Summary Judgment; Paragraph 11 of Answer, G.C. Exhibit 2; Exhibit D of Rossen Affidavit, G.C. Exhibit 3. Accordingly, the Respondent has violated section 7116(a)(1), (5) and (8) of the Statute by refusing to negotiate and by otherwise refusing to accord the Union its statutory status as exclusive bargaining representative of the employees in the consolidated bargaining unit.

I therefore recommend that the Authority grant the General Counsel's Motion for Summary Judgment and issue the following:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the National Labor Relations Board, Washington, D.C. (the Respondent):

1. Cease and desist from:

(a) Refusing to bargain with the National Labor Relations Board Professional Association (the Union), as the exclusive representative of the consolidated bargaining unit certified on December 18, 2008.

(b) Otherwise refusing to accord the Union its statutory status as the exclusive representative of the consolidated bargaining unit certified on December 18, 2008.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Recognize the Union as the exclusive representative for the following consolidated unit which was certified on December 18, 2008, and accord the Union its statutory status as the exclusive representative of the employees in the unit:

> Included: All attorneys and other professionals performing comparable legal work, including permanent part-time employees, and law student employees (Student Assistants), in the Headquarters Office of the National Labor Relations Board and the Office of the General Counsel.

Excluded: Law students holding summer appointments and those on work-study programs; nonprofessional employees; management officials; supervisors; and employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6) and (7).

(b) Upon request, negotiate in good faith with the Union over conditions of employment of its employees in the consolidated unit certified on December 18, 2008.

(c) Accord the Union and the employees in the consolidated bargaining unit certified on December 18, 2008, all rights and entitlements provided in the Statute.

(d) Post at its Headquarters offices where employees in the consolidated bargaining unit certified on December 18, 2008, are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Respondent's General Counsel and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, November 18, 2009.

_____
RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the National Labor Relations Board, Washington, D.C., violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain with the National Labor Relations Board Professional Association (the Union) as the exclusive representative of the consolidated bargaining unit certified on December 18, 2008.

WE WILL NOT otherwise refuse to accord the Union its statutory status as the exclusive representative of the consolidated bargaining unit certified on December 18, 2008.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL recognize the Union as the exclusive representative for the following consolidated bargaining unit which was certified on December 18, 2008, and accord the Union its statutory status as the exclusive bargaining representative of the employees in this unit:

Included: All attorneys and other professionals performing comparable legal work, including permanent part-time employees, and law student employees (Student Assistants) in the Headquarters Office of the National Labor Relations Board and the Office of the General Counsel.

Excluded: Law students holding summer appointments and those on work-study programs; nonprofessional employees; management officials; supervisors; and employees described in § 7112(b)(2), (3), (4), (6) and (7) of the Statute.

WE WILL, upon request, negotiate in good faith with the Union over conditions of employment of

employees in the consolidated unit certified on December 18, 2008.

WE WILL accord the Union and the employees in the consolidated unit certified on December 18, 2008, all rights and entitlements provided in the Statute.

_____
National Labor Relations Board

Dated:_____ By:_____
(Title) (Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, San Francisco Region, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose phone number is: (415) 356-5000.