66 FLRA No. 65

UNITED STATES
DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
EGLIN AIR FORCE BASE
HURLBURT FIELD, FLORIDA
(Petitioner/Agency)

and

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

AT-RP-08-0029

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ORDER DENYING APPLICATION
FOR REVIEW

November 22, 2011

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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 case is before the Authority on an application for review (application) filed by the Agency under § 2422.31(c)(3)(i) of the Authority's Regulations.[1] The Union did not file an opposition to the Agency's application.

The Regional Director (RD) rejected the Agency's request to clarify a consolidated unit by excluding certain employees from that unit and thereby leaving them unrepresented. For the reasons that follow, we deny the application.

II. Background and RD's Decision

A. Background

The issue in this case is whether the RD erred in refusing to exclude certain professional and nonprofessional employees located at the Agency -- the U.S. Air Force installation at Hurlburt Field, Florida (Hurlburt) -- from a consolidated unit that has included them for many years. A complicated factual background is involved.

Over seventy years ago, Eglin Air Force Base, Florida (Eglin) was established, and in 1943, one of Eglin's auxiliary fields, located approximately thirty miles away, was named Hurlburt Field. RD's Decision at 2. Beginning as early as 1966, nonprofessional employees at Eglin and Hurlburt were included in a unit represented by the American Federation of Government Employees (AFGE). *Id.* That unit description defines its scope as including employees "serviced" by the Eglin personnel office. *Id.* at 4.

A second unit, for which the National Federation of Federal Employees (NFFE) was certified as the exclusive representative in 1979, includes professional employees at Eglin and Hurlburt. *Id.* at 2-3. Similar to the AFGE nonprofessional unit, the professional unit description defines its scope as including employees "subject to the personnel administration authority" of the Eglin Commander. *Id.*

In the early 1990s, reorganizations affected Eglin and Hurlburt. First, Hurlburt became a part of the Air Force Special Operations Command (Special Command). *Id.* at 3. Second, Eglin became part of the Air Force Materiel Command (Materiel Command), which was formed by combining two preexisting commands (not including the Special Command). *Id.* at 4.

In August 1999, the Union petitioned (in Case No. CH-RP-70058) to consolidate several units of professional and nonprofessional employees -- including the Eglin/Hurlburt nonprofessional unit -- in the Materiel Command. The Authority granted the Union's petition. *See U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 55 FLRA 359 (1999) (*Wright-Patterson*). The Authority concluded that employees in the consolidated unit shared a community of interest even though they worked for separate components having distinct missions. *Id.* at 362. According to the Authority, missions in such components need only "bear a relationship" to one another to warrant consolidation. *Id.* (citations and internal quotation marks omitted). The Authority did not discuss Eglin or Hurlburt in the decision.

One month after the Union filed the petition in Case No. CH-RP-70058, in September 1999, the RD of the Authority's Atlanta Regional Office granted a petition (in Case No. AT-RP-90045) that changed the exclusive representative of the professional Eglin/Hurlburt unit from NFFE to AFGE. RD's Decision at 4.

[1] This provision states that the Authority may grant an application for review where there is a "genuine issue" over whether an RD has "[f]ailed to apply established law." 5 C.F.R. § 2422.31(c)(3)(i).

In 2002, Hurlburt ceased to be an auxiliary of Eglin. *See id.* at 5. Two years later, in 2004, Hurlburt established its own civilian personnel office and Hurlburt employees -- both professional and nonprofessional -- began to be serviced by that office, not the Eglin office. *See id.*

The final bit of background occurred in 2006, when the Atlanta RD conducted an election (in Case No. AT-RP-06-0018) to determine whether employees in the *professional* Eglin/Hurlburt unit wished to be included in the consolidated unit of professional and nonprofessional employees -- including the Eglin/Hurlburt Field *nonprofessional* -- employees found appropriate in *Wright-Patterson*. Prior to the election, neither the Special Command nor the Materiel Command challenged the appropriateness of the proposed unit. As a majority of the professional Eglin/Hurlburt employees voted for inclusion in the consolidated unit, that unit was clarified to include them. RD's Decision at 6-7.

B. RD's Decision

In 2008, the Agency filed the petition now before us seeking to exclude professional and nonprofessional employees at Hurlburt from the consolidated unit on the grounds that: (1) the nonprofessional Hurlburt employees no longer fall within the express wording of the unit description because they are not serviced by the Eglin personnel office; and (2) inclusion of both nonprofessional and professional Hurlburt employees in the consolidated unit renders the unit inappropriate. *Id.* at 1-2, 6-7.

As an initial matter, the RD rejected the Agency's claim that the Authority's decisions in *United States Department of the Air Force, Randolph Air Force Base, San Antonio, Texas*, 64 FLRA 656 (2010) (Member Beck dissenting) (*Randolph AFB*), and *Department of the Army Headquarters, Fort Dix, Fort Dix, New Jersey*, 53 FLRA 287 (1997) (*Fort Dix*), required the exclusion of the nonprofessional Hurlburt employees from the consolidated unit because they had not been serviced by the Eglin personnel office since 2004. The RD stated that the Authority had applied the cited precedent "to automatically *include* employees in an existing unit, [but] . . . never . . . to *remove* employees from all representation." RD's Decision at 9. The RD noted that, while the disputed employees in *Randolph AFB* were automatically included in another unit, the Hurlburt nonprofessionals had "no [other] bargaining unit . . . that would . . . include" them. *Id.*

The RD then rejected the Agency's claim that the consolidated unit was inappropriate because it included nonprofessional and professional Hurlburt employees. The RD relied on Authority precedent holding that "absent changed circumstances, an agency may not alter previously certified appropriate units." *Id.* at 12 (citations omitted). The RD also relied on the fact that, in 2006, when the professional Eglin/Hurlburt employees voted for inclusion in the consolidated unit (which already included nonprofessional Eglin/Hurlburt employees), neither the Special Command nor the Materiel Command challenged the appropriateness of the unit. *Id.* at 5. As a result of the Commands' failure to object, the RD found that only events subsequent to 2006 could be considered in determining the continued appropriateness of the consolidated unit. According to the RD, the Agency's only post-2006 "proffered events" were the introduction of new technology and the creation of a training center. *Id.* at 13. The RD concluded that these events were insufficient to render the consolidated unit inappropriate. *Id.* And the RD noted that many employees in the consolidated unit were serviced by local personnel offices. *Id.* at 15.

Accordingly, the RD denied the Agency's petition. *Id.*

III. Agency's Application

The Agency asserts that the RD failed to apply established law. *See* Application at 3-4. With regard to the RD's determination that there was no basis to exclude nonprofessional Hurlburt employees from the consolidated unit based on the fact that they are no longer serviced by the Eglin personnel office, the Agency argues that the Authority should interpret *Randolph AFB* and *Fort Dix* to exclude employees from a unit even "where there is no current bargaining unit for them to go into." *Id.* at 46.

With regard to the RD's reliance on the 2006 certification, the Agency asserts that the certification was "not grounded in [Authority] law and must therefore be withdrawn as not pertaining to an appropriate unit." *Id.* at 44.

As for the RD's determination that changes since the 2006 certification did not render the consolidated unit inappropriate, the Agency argues that the RD "failed to note all the facts that . . . have occurred since 2006." *Id.* at 4. Further, the Agency asserts that the RD "failed to properly apply" the three appropriate-unit criteria set forth in § 7112(a) of the Federal Service Labor-Management Relations Statute (the Statute).[2] *Id.*

[2] Section 7112(a) of the Statute states, in pertinent part: "The Authority shall determine . . . any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved."

at 4. According to the Agency, as Hurlburt employees do not share a community of interest with other components of the consolidated unit, their inclusion in the unit renders it inappropriate.[3] *See id.* at 41, 43. The Agency notes that NFFE recently was certified by the Atlanta RD as the exclusive representative of two units of nonprofessional employees serviced by the Hurlburt Field personnel office and that AFGE did not seek to intervene in those elections.[4] *See id.* at 39.

IV. Analysis and Conclusions

Under 5 C.F.R. § 2422.31(c)(3)(i), the Authority may grant an application for review when the application demonstrates that the RD failed to apply established law.

In *Fort Dix*, the Authority stated, as relevant here, that "[n]ew employees are automatically *included* in an existing bargaining unit where their positions fall within the express terms of a bargaining certificate and where their *inclusion* does not render the bargaining unit inappropriate." 53 FLRA at 294 (emphasis added). In *Randolph AFB*, the Authority found that an RD failed to apply established law because he failed to apply the "automatic *inclusion* principle set forth in *Fort Dix*" to find that a new group of employees that came into existence after a reorganization was automatically *included* in a unit. 64 FLRA at 659 (emphasis added). Neither *Fort Dix* nor *Randolph AFB* involved petitions to *exclude* employees from a bargaining unit and render them *unrepresented*. *See Randolph AFB*, 64 FLRA at 658-59; *Fort Dix*, 53 FLRA at 294-96. The Agency does not explain how *Randolph AFB* or *Fort Dix* compels such exclusion, and does not cite any additional precedent that would support it. *See* Application at 33. Accordingly, the Agency has not demonstrated that the RD failed to apply established law by finding that *Randolph AFB* and *Fort Dix* did not support excluding the nonprofessional Hurlburt employees from the consolidated unit.[5]

We also reject the Agency's remaining claims.

With regard to the Agency's claim that the 2006 certification was "not grounded in [Authority] law," *id.* at 44, the Agency does not explain why it declined to challenge the appropriateness of the consolidated unit or the validity of the certification in 2006, *see* RD's Decision at 5-6, and does not explain why it should be permitted to do so now. In this connection, the Authority has indicated that a party may not collaterally attack a past certification. *Cf. Pension Benefit Guar. Corp.*, 65 FLRA 635, 637 (2011) (petitioner may not challenge the status of an incumbent exclusive representative on the basis that it did not constitute a labor organization as of the date on which it was certified). And, even if the Agency could challenge the 2006 certification now, the Agency cites no Authority precedent to support its claim that the 2006 certification is invalid. *See* Application at 44.

As the RD stated, the 2006 clarification/certification of the consolidated unit to include the Eglin/Hurlburt professionals necessarily included a finding that the unit was appropriate. *See* 5 U.S.C. § 7112(d).[6] *See also U.S. Dep't of Transp., FAA*, 63 FLRA 356, 359 (2009) (§ 7112(d) of the Statute "requires the application of the appropriate unit criteria of § 7112(a)" of the Statute). And, as noted, there was no contention to the contrary at that time. Thus, the RD correctly limited his analysis to the question of whether any events since the 2006 certification rendered the consolidated unit inappropriate.[7] *Cf. U.S. Dep't of*

[3] The Agency also claims that the RD "admitted there was no community of interest in this case." Application at 4. But, as the Agency does not cite any such admission, we reject that claim as a bare assertion.

[4] The Agency requests the Authority to take judicial notice of the two certifications (in Case Nos. AT-RP-11-0006 and AT-RP-11-0007) involving these employees. The Authority consistently has found it appropriate to take official notice of other FLRA proceedings. *U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Inst., Fairton, N.J.*, 62 FLRA 187, 189 (2007). Thus, we take official notice of those certifications. But, as the Agency does not explain how the certifications are relevant, we do not rely on them in our analysis and conclusions.

[5] Member Beck agrees with his colleagues that *Fort Dix* applies under these circumstances. As a result of several reorganizations, the employees at Hurlburt Field were first placed under an entirely new and separate Command and then later ceased to operate as an auxiliary activity of Eglin Air Force Base.

Member Beck does not agree, however, that *Randolph AFB* is dispositive here because, as he noted in his Dissent in that case, the only change that occurred there was a unilateral change in the personnel office that serviced the affected employees. 64 FLRA at 660. Accordingly, the application of *Fort Dix* was not warranted.

[6] Section 7112(d) of the Statute states, in pertinent part: "Two or more units which are in an agency . . . may . . . be consolidated . . . if the Authority considers the larger unit to be appropriate."

[7] Despite the Agency's denial that it seeks to "sever" the Hurlburt employees from the consolidated unit, RD's Decision at 2 n.2, granting its petition would have that effect. Even assuming that a severance petition properly could be filed by an agency, such petition must be supported by unusual circumstances. *See, e.g., Library of Cong.*, 16 FLRA 429, 431 (1984). No such circumstances are alleged here.

the Army, Army Materiel Command Headquarters, Joint Munitions Command, Rock Island, Ill., 63 FLRA 394, 403 (2009) ("In determining whether an existing unit remains appropriate after a reorganization, the Authority focuses on the changes caused by the reorganization . . . and assesses whether those changes are sufficient to render a recognized unit inappropriate . . . . If the scope and character of a unit is not significantly altered by a reorganization, then the unit remains appropriate.").

The RD found that the Agency offered only two "proffered events" that occurred after 2006 -- the introduction of new technology and the creation of a training center -- and that neither rendered the consolidated unit inappropriate. RD's Decision at 13. The Agency cites additional changes since 2006 that it considers to have been significant -- the establishment of an operations school, an operations center, a training squadron, a special operations squadron, an increase in tenant units, and additional engine repair capability -- but does not explain how these alleged changes constituted sufficient changed circumstances to render the consolidated unit inappropriate. *See* Application at 36-37. Similarly, the Agency claims that the RD "failed to note all the facts that warranted the filing of the petition in this case that have occurred since 2006," *id.* at 4, but does not demonstrate that consideration of the facts it alleges were overlooked leads to a conclusion that the consolidated unit is no longer appropriate. And, as for the Agency's assertion that the RD failed to properly apply the three appropriate-unit criteria, there are insufficient post-2006 changed circumstances to require a reexamination of the appropriateness of the consolidated unit.

Based on the foregoing, we find that the Agency has not shown that the RD failed to apply established law by denying the Agency's petition. Accordingly, we deny the Agency's application.

V. Order

The Agency's application for review is denied.