

67 FLRA No. 37

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, D.C.
(Agency)

and

DELAWARE AND SOUTHERN NEW JERSEY
HEALTHCARE SYSTEM
VETERANS AFFAIRS MEDICAL CENTER
WILMINGTON, DELAWARE
(Activity/Wilmington)

and

VETERANS READJUSTMENT
COUNSELING SERVICE
REGION 1B
TOWSON, MARYLAND
(Activity/VRCS)

and

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

WA-RP-12-0050

ORDER DENYING
APPLICATION FOR REVIEW

December 19, 2013

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

I. Statement of the Case

Regional Director (RD) Philip T. Roberts, of the Federal Labor Relations Authority, held that seven employees who had been mistakenly included on a list of employees deemed eligible to vote in an election were not members of the bargaining unit. In its application for review, the Union contends that the RD, in reaching this conclusion, failed to apply established law and improperly “removed” the seven employees from the bargaining unit.¹ For the reasons discussed below, we

find the Union’s arguments unpersuasive and, accordingly, deny the Union’s application for review.

II. Background and RD’s Decision**A. Background**

The Activity/Wilmington and the Activity/VRCS are two separate components of the U.S. Department of Veterans Affairs (Agency). The Activity/Wilmington is part of the Agency’s Patient Care Services. It performs a broad range of health services for veterans, including providing several community-based-outpatient clinics in New Jersey and Delaware.

The Activity/VRCS is part of the Agency’s Readjustment Counseling Service, which provides readjustment counseling and outreach services to veterans and their family members. As part of its mission, the Activity/VRCS operates veterans centers (vet centers) across the country. The Activity/Wilmington does not “direct[] or oversee[]” the vet centers or have any “authority, control, or responsibility over the [centers’] budget, expenditures[,] or staffing and human resource actions, such as disciplinary actions, performance rating[s], position qualifications or awards.”²

In 2010, the Activity/Wilmington, the Union, and a second union agreed to an election regarding the issue of representation for “[a]ll professional employees” of the Activity/Wilmington.³ The Activity/Wilmington generated a list of 185 employees as eligible to vote in the election; a majority of these employees voted to be represented by the Union. Because the Union already represented a bargaining unit of Agency professional employees, a certification for inclusion in existing unit was issued placing the professional employees of the Activity/Wilmington into the existing unit.

Shortly after the election and the certification, the Activity/Wilmington discovered that it had erroneously included seven vet-center employees on the voter-eligibility list and had mistakenly designated them as members of the bargaining unit. The Activity/Wilmington subsequently changed its records to show that these employees were not part of the unit.

In response, the Union filed a petition under § 7111(b)(2) of the Federal Service Labor-Management Relations Statute (the Statute) to clarify the unit description to include the disputed vet-center employees. The Union contended that these employees were a part of the unit because they were eligible voters and had cast ballots in the election.

¹ Application for Review (Application) at 7.

² RD’s Decision at 3.

³ *Id.* at 4.

B. RD's Decision

The RD denied the Union's petition. He found that: (1) the Activity/Wilmington exercises no control over the vet centers; (2) the vet centers fall under a different chain of command within the Agency than the Activity/Wilmington; and (3) the vet-center employees do not work for the Activity/Wilmington. Based on these facts, the RD determined that vet-center employees were not part of the bargaining unit certified through the election.

The RD considered and rejected the Union's contention that the Authority's decision in *United States Department of the Air Force, Air Force Materiel Command, Eglin Air Force Base, Hurlburt Field, Florida (Eglin)*⁴ mandated that the vet-center employees be included in the unit. The RD noted that, in *Eglin*, the Authority rejected an activity's attempt to remove employees from a bargaining unit because they no longer fell within the unit description. The RD found that *Eglin* was inapplicable because the evidence in this case indicated that vet-center employees "were never meant to be in the unit, were never certified as part of the unit and the only reason these positions [were] in dispute [was] because of an error made in the compilation of the voter eligibility list."⁵ Because the vet-center employees were never included in the unit, the RD found it unnecessary to address the Union's claim that "a unit that included these employees would continue to be" appropriate.⁶

The Union subsequently filed this application for review, contending that the RD failed to apply established law when he denied the Union's petition. The Agency filed an opposition to the Union's application for review.

III. Preliminary Issue: We will not consider the Agency's opposition.

After receiving the Agency's opposition, the Authority's Office of Case Intake and Publication (CIP) issued an order directing the Agency to show cause why the Authority should consider the opposition because it appeared to be untimely.⁷ CIP stated that the Agency's failure to comply with the order could result in the Authority not considering the opposition.⁸ The Agency did not respond to this order. Where a party does not respond to a show-cause order, the Authority has held that it will not consider the deficient filing that prompted

the order.⁹ Given the Agency's failure to respond to the order to show cause, we decline to consider its opposition to the Union's application for review.¹⁰

IV. Analysis and Conclusion: The RD did not fail to apply established law.

The Union argues that the RD failed to apply established law "when he removed employees from [the] unit and left them unrepresented after they were eligible voters in an election and were included in the bargaining unit for two years."¹¹ The Union raises several arguments in support of this proposition, all of which are premised on its assertion that the parties mutually agreed to include certain vet-center employees on the voter eligibility list and in the unit description.¹² This assertion is contrary to the RD's factual determinations that the parties never agreed to include these employees in the unit description, on the voter list, or in the unit itself.¹³ Further, the Union does not allege that the RD committed any clear and prejudicial errors in his factual findings. To the extent the Union is raising such a claim, however, it is merely a challenge to the weight the RD attributed to the evidence that he reviewed. Such a challenge does not provide a basis for demonstrating that the RD erred.¹⁴

Turning to the Union's legal arguments, we find none persuasive.

First, relying on the Authority's decision in *Eglin*, the Union argues that employees may not be collaterally removed from a bargaining unit once that unit is certified.¹⁵ The Union's argument is misplaced, however, as no vet-center employees were removed from the unit. As explained above, the RD determined that the disputed vet-center employees had *never been certified as part of the unit*.¹⁶ Because they were never part of the unit, they could not be collaterally removed from the unit.

The Union suggests that, once "the majority of a voting group votes for a choice in an election and a certification is issued as to that voting group, they become certified as part of a bargaining unit."¹⁷ The

⁴ 66 FLRA 375 (2011).

⁵ RD's Decision at 6.

⁶ *Id.*

⁷ See Order to Show Cause at 1-2.

⁸ *Id.* at 2.

⁹ See, e.g., *U.S. Dep't of VA, Jefferson Barracks Nat'l Cemetery, St. Louis, Mo.*, 61 FLRA 861, 861 n.1 (2006) (citing *U.S. Dep't of VA*, 60 FLRA 479, 479 n.1 (2004)).

¹⁰ See, e.g., *AFGE, Local 1547*, 64 FLRA 642, 642 (2010).

¹¹ Application at 7.

¹² See, e.g., *id.* at 7 (stating it is "undisputed" that vet-center employees were eligible voters), 8 (claiming unit certification included these employees), 9 (asserting that evidence shows that vet-center employees were considered eligible voters).

¹³ See RD's Decision at 5-6.

¹⁴ E.g., *U.S. Dep't of VA, N. Cal. Health Care Sys., Martinez, Cal.*, 66 FLRA 522, 525 (2012).

¹⁵ See Application at 8-9, 11.

¹⁶ RD's Decision at 5-6.

¹⁷ Application at 8.

Union cites no authority for this proposition. Nor does the Union explain how the RD failed to apply established law by not applying this theory to the facts of this case. Accordingly, this argument is unavailing.

Relatedly, the Union asserts that, once parties agree to a unit composition, employees may be removed from that unit only if they: (1) have experienced meaningful changes or changed circumstances or (2) fall under a statutory exclusion.¹⁸ According to the Union, because neither of these conditions is present here, the RD erred in removing the employees from the unit. The Union's argument is again misplaced. As noted previously, the RD determined that the parties never agreed to include vet-center employees in the bargaining unit. The cases and statutory provisions relied upon by the Union¹⁹ – all of which involve the removal of employees from a bargaining unit – are thus inapplicable, and the Union's argument is without merit.

Citing *Defense Logistics Agency, Fort Belvoir, Virginia*,²⁰ the Union asserts that, under the reasoning of this case, the only question the RD should have examined was whether there was “any reason that the disputed vet[-]center employees would not be appropriately included in [the Union's] consolidated unit.”²¹ The Union, in essence, contends that, because the disputed vet-center employees participated in the election, such employees should be considered members of the bargaining unit unless their inclusion would make the unit inappropriate. Contrary to the Union's assertion, employees do not become members of a bargaining unit simply because they were erroneously included on a voter eligibility list and mistakenly voted in an election. As the RD found, the parties never agreed to include the disputed employees in the unit description, on the voter list, or in the unit itself.²² Accordingly, the RD did not err in declining to address whether a unit that included these employees would be appropriate.

The Union also claims that the RD inappropriately created a new legal requirement for elections by examining whether the Agency “inten[ded]” to enter into the election agreement with the vet-center employees or whether it made a mistake.²³ But the RD did not establish a new legal standard. Rather, he made a *factual* determination that the disputed vet-center employees were never included in the agreed-upon unit

description.²⁴ The Union fails to cite any authority that prohibited the RD from making such a determination.

Finally, the Union contends that the RD's decision is at odds with the plain language of the Statute. According to the Union, the RD's decision contradicts § 7111(b) of the Statute – which states that the Authority will conduct “*an* election”²⁵ regarding the question of representation – because the decision requires the disputed vet-center employees “to vote multiple times in multiple elections to be included in a bargaining unit.”²⁶ Contrary to the Union's assertion, however, *no* election has occurred concerning representation for vet-center employees. Rather, as the RD found, the only election that took place concerned the issue of representation for employees of the Activity/Wilmington. It is undisputed that the vet-center employees are not employees of the Activity/Wilmington, but, rather, work for the Activity/VRCS. Accordingly, this argument also is without merit.

The Union's arguments do not establish that the RD failed to apply established law. Accordingly, we deny the Union's application for review.

V. Order

We deny the Union's application for review.

¹⁸ See *id.* at 6, 9.

¹⁹ See *id.* at 6 (citing 5 U.S.C. § 7112(b); *NASA, Goddard Space Flight Ctr., Wallops Island Facility, Wallops Island, Va.*, 64 FLRA 580 (2010); *Nat'l Credit Union Admin.*, 61 FLRA 349 (2005)).

²⁰ 60 FLRA 701 (2005).

²¹ Application at 10.

²² See RD's Decision at 6.

²³ Application at 10-11.

²⁴ See RD's Decision at 6.

²⁵ 5 U.S.C. § 7111(b) (emphasis added).

²⁶ Application at 11-12.