

**67 FLRA No. 54**

UNITED STATES  
DEPARTMENT OF AGRICULTURE  
RURAL HOUSING SERVICE  
CENTRALIZED SERVICING CENTER  
(Activity)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 3354  
(Union/Petitioner)

DE-RP-12-0024

ORDER DENYING  
APPLICATION FOR REVIEW

January 31, 2014

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

**I. Statement of the Case**

The Union filed a petition to clarify the bargaining-unit status of the Activity's workflow coordinators (coordinators). As relevant here, Federal Labor Relations Authority Regional Director (RD) Matthew Jarvinen found that some of the coordinators are not supervisors – and, therefore, are not excluded from the bargaining unit – even though they evaluate employees' work.

The primary question before us is whether the RD failed to apply established law by finding that those coordinators are not supervisors. Because the Activity did not establish before the RD that the coordinators effectively recommend the exercise of supervisory authority when they evaluate employees' work, the answer is no.

**II. Background and RD's Decision**

The Union filed a petition seeking to clarify the bargaining-unit status of coordinators who the Activity claimed were supervisors of the Activity's employees (processors). Section 7112(b)(1) of the Federal Service Labor-Management Relations Statute (the Statute)

excludes any "supervisor" from a bargaining unit.<sup>1</sup> Section 7103(a)(10) of the Statute defines a "supervisor," in pertinent part, as:

an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment . . . .<sup>2</sup>

The RD found that many of the coordinators perform quality reviews of processors' work, and that these reviews involve randomly selecting examples of processors' work and using a checklist to determine whether the processors have complied with Activity procedures. The RD found that, as a result of the quality reviews, coordinators prepare forms documenting each processor's errors, and that management uses these forms when they review the processors' performance.

As relevant here, the Activity alleged before the RD that these coordinators are supervisors because they evaluate processors' performance when they perform these quality reviews. To analyze the Activity's argument, the RD discussed the Authority's determination in *U.S. Department of the Interior, Bureau of Indian Affairs, Navajo Area Office, Gallup, New Mexico (Navajo)*<sup>3</sup> that an employee who evaluated other employees' performance was a supervisor. Specifically, the RD emphasized that the supervisor in *Navajo* not only evaluated employees' performance, but also effectively recommended the retention or termination of those employees – thereby effectively recommending actions set forth in § 7103(a)(10). Applying this precedent, the RD addressed whether two of the Activity's coordinators – the coordinator for the "Field Assistance Desk" (field coordinator),<sup>4</sup> and the coordinator for the "Multi-Family Housing Section" (multi-family coordinator)<sup>5</sup> – are supervisors.

The RD found that the field coordinator "perform[s] quality reviews of . . . [p]rocessors' work, but she doesn't sit in with her supervisor during the [p]rocessors' performance[-]appraisal meetings."<sup>6</sup> Additionally, the RD found that the evidence did not

<sup>1</sup> 5 U.S.C. § 7112(b)(1).

<sup>2</sup> *Id.* § 7103(a)(10).

<sup>3</sup> 45 FLRA 646 (1992).

<sup>4</sup> RD's Decision at 7.

<sup>5</sup> *Id.* at 16.

<sup>6</sup> *Id.* at 21.

establish that the field coordinator “effectively recommends employee appraisal ratings, or that her supervisor’s rating of employees are directly tied to the exercise of any supervisory criteria listed in [§] 7103(a)(10).”<sup>7</sup> The RD concluded that the field coordinator is not a supervisor and, thus, is included in the bargaining unit.

Regarding the multi-family coordinator, the RD found that management uses the results of the coordinator’s quality reviews in the processors’ monthly reviews. But the RD found that the multi-family coordinator “rarely participates in these monthly reviews, and . . . never participates in the [p]rocessors’ annual performance[-]appraisal meetings.”<sup>8</sup> Further, citing *Navajo*, the RD found that “[e]ven if [the multi-family coordinator] effectively recommend[s] the evaluations issued to [p]rocessors in her unit, there is no evidence of any direct link between [her] role in evaluating [p]rocessor performance and the exercise of any supervisory criteria listed in [§] 7103(a)(10).”<sup>9</sup> The RD concluded that the multi-family coordinator is not a supervisor and, thus, is included in the unit.<sup>10</sup>

The RD found that all of the Activity’s other coordinators – including the coordinator for the “Appeals, Audits and Unauthorized Assistance Section” (audit coordinator)<sup>11</sup> – are supervisors, and, thus, are excluded from the bargaining unit.<sup>12</sup>

In finding that the audit coordinator is a supervisor, the RD rejected the Activity’s argument that the audit coordinator’s quality-review duties establish her supervisory status, but, instead, found that the audit coordinator is a supervisor based on her training duties. Regarding the audit coordinator’s quality-review duties, the RD found that management’s reliance upon the audit coordinator’s quality reviews established that the coordinator’s reviews “effectively recommend the [p]rocessors’ performance ratings.”<sup>13</sup> However, citing *Navajo*, the RD found that these duties did not provide a basis for finding that the audit coordinator is a supervisor because there was no evidence of “a direct link between [the audit coordinator’s] role in evaluating [p]rocessor performance and the exercise of any supervisory criteria listed in [§] 7103(a)(10).”<sup>14</sup>

The Activity filed an application for review of the RD’s decision, and the Union filed an opposition to

the Activity’s application. Because the Authority had two vacancies, the Authority’s Chief of Case Intake and Publication issued an interim order on September 27, 2013, deferring consideration of the application until a quorum of Authority Members was present.

### III. Analysis and Conclusions

The Activity argues that the RD failed to apply established law, and asks the Authority to reconsider the RD’s determinations as to the status of the audit, field, and multi-family coordinators.<sup>15</sup> The Authority will grant an application for review if the application demonstrates that the RD failed to apply established law.<sup>16</sup>

Regarding the audit coordinator, the Activity agrees that the RD appropriately excluded the position from the unit based on her training duties. Nevertheless, the Activity challenges the RD’s determination that the audit coordinator’s quality-review duties do not establish that she exercises supervisory authority.<sup>17</sup> Under § 2429.10 of the Authority’s Regulations, the Authority will not issue advisory opinions.<sup>18</sup> The determination that the Activity seeks – that the audit coordinator exercises supervisory authority for reasons *in addition* to those found by the RD – would not change the unit status of the audit coordinator. As a result, addressing the Activity’s argument would involve issuing an advisory opinion. Consistent with § 2429.10, we decline to do so.<sup>19</sup>

Regarding the field and multi-family coordinators, the Activity argues that the RD misinterpreted *Navajo* to require the Activity to show a “direct link” between appraising performance and the exercise of § 7103(a)(10) supervisory authority in order to establish that the coordinators are supervisors.<sup>20</sup> According to the Activity, the Authority should *presume* a “direct link” between the coordinators’ quality-review duties and management’s exercise of § 7103(a)(10) supervisory authority because federal statute and regulations – as well as the Activity’s own regulations – require that performance evaluations form the basis of the

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 24.

<sup>9</sup> *Id.* (citing 45 FLRA at 657).

<sup>10</sup> *Id.* at 24, 25.

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.* at 18-25.

<sup>13</sup> *Id.* at 20.

<sup>14</sup> *Id.* (citing 45 FLRA at 657).

<sup>15</sup> Application at 9.

<sup>16</sup> 5 C.F.R. § 2422.31(c)(3)(i).

<sup>17</sup> Application at 1-2.

<sup>18</sup> 5 C.F.R. § 2429.10.

<sup>19</sup> *Cf. U.S. Dep’t of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 354 (2005) (declining to issue advisory opinion where the matter was “fully resolved” and “no cognizable legal interest remained in the dispute”); *AFSCME, Local 1418*, 53 FLRA 1191, 1194 (1998) (declining to issue advisory opinion where doing so “would serve no purpose”).

<sup>20</sup> Application at 13-20.

Activity's decisions to reward, promote, reassign, retain, and discipline employees.<sup>21</sup>

*Navajo* involved a specialist who evaluated contract employees by rating their performance, conducting performance-appraisal meetings with those employees, and making recommendations concerning their continued employment.<sup>22</sup> In determining that the specialist was a supervisor, the Authority stated that "where an individual exercises independent judgment in evaluating employee performance, and where that evaluation is relied on by upper-level management in taking an action listed among the indicia of supervisory authority specified in [§] 7103(a)(10), thereby constituting the effective recommendation of that action," there is a sufficient basis to conclude that the individual is a supervisor.<sup>23</sup> Because management in *Navajo* relied heavily on the specialist's evaluations in deciding whether to renew the evaluated employees' contracts, the Authority held that the specialist effectively recommended the retention of those employees.<sup>24</sup> Thus, the Authority found that the specialist was a supervisor.<sup>25</sup>

In this case, the RD did not find – and the record does not establish – that any managers relied on coordinators' quality reviews in exercising supervisory authority.<sup>26</sup> And, unlike the specialist in *Navajo*, the coordinators here do not draft performance appraisals or conduct performance-review meetings.<sup>27</sup> Rather, the coordinators use a checklist to determine whether processors have complied with Activity procedures, and then prepare forms for management tabulating the number of errors committed by each processor.<sup>28</sup> And the Activity does not claim that, by conducting quality reviews, the coordinators effectively recommend performance ratings in *all* of processors' performance elements. Instead, undisputed record evidence shows that management uses the field coordinator's quality reviews in connection with only two out of six performance elements,<sup>29</sup> and that the multi-family coordinator's quality-review statistics affect only two out of four performance elements.<sup>30</sup> Thus, the record does not

establish that the coordinators' quality-review duties – which involve producing statistics for managers to use in determining the ratings in some, but not all, of processors' performance elements – constitute appraising performance, let alone amount to effectively recommending the exercise of § 7103(a)(10) supervisory authority.

The Activity cites a statute and various regulations that require performance appraisals to form the basis of Activity decisions to reward, promote, retain, and discipline employees. According to the Activity, these authorities establish the requisite "connection" between performance appraisals and these types of decisions as a matter of law.<sup>31</sup> However, these authorities do not provide a basis for eliminating the Authority's requirement that a party seeking to exclude an employee from a bargaining unit establish, through record evidence, the link between that employee's performance-appraisal duties and the actual exercise of supervisory authority. And, although the Activity argues that *Navajo* limited this requirement to employees who evaluate the performance of contract employees,<sup>32</sup> the Authority has applied this requirement in subsequent decisions concerning federal-government employees.<sup>33</sup>

Alternatively, the Activity asks the Authority to overrule *Navajo* as "[i]rrational and unworkable,"<sup>34</sup> and argues that because evaluating employee performance is included within the management rights to "direct employees" and "assign work" under § 7106 of the Statute, employees who evaluate performance must be supervisors under §§ 7112(b)(1) and 7103(a)(10).<sup>35</sup> However, the Authority's consistent application of *Navajo*'s central holding undermines the Activity's argument that *Navajo* is "unworkable."<sup>36</sup> And the Activity's citation to § 7106 provides no basis for eliminating the requirement that excluding an employee

<sup>21</sup> *Id.* at 14-20 (citing 5 U.S.C. § 4302(a); 5 C.F.R. §§ 432.104, 432.105, 531.404; Agency Ex. 74, USDA Departmental Regulation 4040-430 at 1-25; Agency Ex. 75, Rural Dev. Instruction 2060-A at 1-13).

<sup>22</sup> 45 FLRA at 655.

<sup>23</sup> *Id.* at 651 (emphasis added).

<sup>24</sup> *Id.* at 656-57.

<sup>25</sup> *Id.* at 656-58.

<sup>26</sup> See RD's Decision at 21, 24.

<sup>27</sup> See *id.* at 8, 17, 21, 24.

<sup>28</sup> *Id.* at 8, 17.

<sup>29</sup> Tr. at 92-93, 102; Agency Ex. 2, Field Processor Performance Work Plan at 1-31.

<sup>30</sup> See Tr. at 626-28, 659-60; Agency Ex. 30, Multi-Family Processor Performance Work Plan at 1-11.

<sup>31</sup> Application at 17-19.

<sup>32</sup> *Id.* at 13-15.

<sup>33</sup> *SSA, Office of Disability Adjudication & Review, Balt., Md.*, 64 FLRA 896, 896-97, 903 (2010) (*SSA*) (judges excluded as supervisors where their evaluations were relied upon by upper-level management in retention, promotion, and award-eligibility decisions); *U.S. DOL, Wash., D.C.*, 59 FLRA 853, 856-57 (2004) (*DOL*) (Chairman Cabaniss dissenting in part) (budget officer who appraised employees' performance not a supervisor where "the record [*did*] not establish" that his recommendations were "accepted or relied on by upper-level management").

<sup>34</sup> Application at 20.

<sup>35</sup> See *id.* at 9-11 (citing *Nat'l Weather Serv. Employees Org.*, 63 FLRA 450, 452 (2009); *NTEU*, 47 FLRA 705 (1993) (Member Armendariz concurring in part, dissenting in part); *AFGE, AFL-CIO, Local 1760*, 28 FLRA 160, 169 (1987); *AFGE, Local 1760, AFL-CIO*, 15 FLRA 909 (1984)).

<sup>36</sup> *Id.* at 20.

from a bargaining unit be based on evidence that the employee *actually* exercises supervisory authority.

Although, as discussed above, the Activity asks the Authority to presume a “direct link” between performance appraisals and management’s exercise of supervisory authority,<sup>37</sup> the Activity does not assert – and the RD did not find – that the Activity established this link as a factual matter. Therefore, the RD’s decision is consistent with *Navajo*, and subsequent Authority decisions, requiring a demonstrated link between performance-appraisal duties and the exercise of § 7103(a)(10) supervisory authority in order to demonstrate that an employee is a supervisor.<sup>38</sup>

In addition, we note that even if the Activity had shown that coordinators’ quality-review duties effectively recommend the exercise of supervisory authority, the record evidence – including the evidence cited by the Activity in its application<sup>39</sup> – does not clearly establish that these coordinators exercise *independent judgment* when they conduct quality reviews. In this regard, the RD made no finding whether coordinators exercise independent judgment when performing these duties. And the coordinators acknowledged before the RD that identifying errors for quality reviews is often “cut and dry.”<sup>40</sup> Therefore, there is no basis for finding that these duties involve the “consistent exercise of independent judgment” necessary to demonstrate that the coordinators are supervisors under § 7103(a)(10).<sup>41</sup>

For the foregoing reasons, we conclude that the Activity has not established that the RD failed to apply established law.

#### **IV. Order**

We deny the Activity’s application for review.

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<sup>37</sup> *Id.* at 19.

<sup>38</sup> SSA, 64 FLRA at 903; DOL, 59 FLRA at 856-57; *Navajo*, 45 FLRA at 651-58.

<sup>39</sup> Application at 22-23, 26.

<sup>40</sup> Tr. at 671; *see id.* at 81.

<sup>41</sup> 5 U.S.C. § 7103(a)(10).