68 FLRA No. 41

FEDERAL DEPOSIT
INSURANCE CORPORATION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union/Petitioner)

WA-RP-12-0062
(67 FLRA 430 (2014))

_____

ORDER GRANTING
MOTION FOR RECONSIDERATION

January 28, 2015

_____

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

I. Statement of the Case

The Union petitioned Federal Labor Relations Authority Regional Director Barbara Kraft (RD) to clarify an existing bargaining unit to include, through "accretion," twenty-seven student interns who currently are expressly excluded from the certification of the bargaining unit that the Union represents.[1] In the attached decision, the RD dismissed the Union's petition without determining whether there had been meaningful changes in the interns' job circumstances that would warrant including them in the bargaining unit through accretion. The Union filed an application for review of the RD's decision, and the Authority, in *FDIC*,[2] found that the RD had failed to apply established law when she had declined to address the meaningful-changes issue. Accordingly, the Authority granted the Union's application for review and remanded the Union's petition to the RD to make further findings on that issue.

The main issue in this case is whether we should reconsider and vacate *FDIC* because the Authority issued that decision more than sixty days after regaining a quorum on November 12, 2013. We find that, when the Authority issued its decision in *FDIC* on May 30, 2014, the RD's decision had already become "the action of the Authority" within the meaning of § 7105(f) of the Federal Service Labor-Management Relations Statute (the Statute).[3] Therefore, the decision in *FDIC* is without legal effect, and we reconsider and vacate it.

II. Background

As mentioned previously, the Union petitioned the RD to clarify an existing bargaining unit to include, through "accretion," twenty-seven student interns who currently are expressly excluded from the bargaining unit's certification.[4] In the petition, the Union argued that accretion is proper because the interns' job circumstances have undergone "meaningful change[s]."[5] Without addressing this argument, the RD dismissed the petition.

On February 19, 2013, the Union filed a timely application for review of the RD's decision. At that time, the Authority lacked a quorum and, thus, could not issue decisions. On April 17, 2013 – within sixty days of the filing of the application, and while the Authority continued to lack a quorum – the Authority's Office of Case Intake and Publication (CIP) issued an interim order that "deferred until further notice" consideration of the application.[6] In this connection, the interim order stated that it "assure[d] the preservation of the parties' rights under the Statute to Authority review of the [RD's] decision" and that, "[i]n light of th[e] interim order, the [RD's] decision ha[d] not become the action of the Authority."[7]

Then, on November 12, 2013, the Authority regained its quorum. And on May 30, 2014 – more than sixty days after the Authority regained its quorum – the Authority issued the decision in *FDIC*. In that decision, the Authority found that the RD failed to apply well-established law regarding accretion, and remanded the petition to the RD for further findings.[8]

The Agency filed a motion for reconsideration of, and a motion to stay, the decision in *FDIC*. The Union filed an opposition to the Agency's motions.

III. Preliminary Matter

The Authority's Regulations do not provide for oppositions to motions for reconsideration.[9] And, while a party may request leave to file additional documents

[1] *FDIC*, 67 FLRA 430, 430 (2014) (Member Pizzella dissenting).
[2] *Id.*
[3] 5 U.S.C. § 7105(f).
[4] RD's Decision at 3.
[5] *Id.*
[6] Interim Order at 2.
[7] *Id.*
[8] 67 FLRA at 432.
[9] *SPORT Air Traffic Controllers Org.*, 68 FLRA 107, 107-08 (2014) (*SATCO*).

under § 2429.26 of the Authority's Regulations,[10] the Union did not request leave to do so here. Accordingly, we have not considered the Union's opposition.[11]

IV. Analysis and Conclusions

The Agency argues that extraordinary circumstances warrant reconsidering the decision in *FDIC*.[12] Specifically, the Agency contends[13] that the decision is contrary to § 7105(f) of the Statute, the pertinent wording of which is set forth below. The Agency argues that, "[o]nce [sixty] days with a quorum passed, [§] 7105(f) . . . required that the [RD's] decision [become] the decision of the Authority," and the Authority "committed legal error [in *FDIC*] by disregarding [§] 7105(f) and granting review of the [Union's] application."[14] According to the Agency, CIP's interim order "merely 'deferred' processing"[15] – and did not "grant"[16] – the Union's application, and did not "purport[] to toll the [sixty]-day time limit in [§] 7105(f) indefinitely and without regard to when the Authority regain[ed] a quorum."[17] The Agency contends that, "[t]o find otherwise would mean that the Authority deemed the lack of a quorum to grant an indefinite amount of time to grant applications for review once a quorum [was] reached – something clearly contrary to [§] 7105(f)."[18] Moreover, the Agency contends that, in a previous situation when the Authority lacked a quorum, the Authority granted review in cases within sixty days after regaining a quorum, and the Authority in *FDIC* "fail[ed] to explain its departure from this precedent."[19]

To resolve the Agency's arguments, we begin with the plain wording of § 7105(f) of the Statute.[20] Section 7105(f) provides, in pertinent part:

> If the Authority delegates any authority to any regional director . . . to take any action pursuant to [§ 7105(e) of the Statute], the Authority may, upon application by any interested person filed within [sixty] days after the date of the action, review such action . . . . The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within [sixty] days after the later of—
>
> (1) the date of the action; or
>
> (2) the date of the filing of any application under this subsection for review of the action;
>
> the action shall become the action of the Authority at the end of such [sixty]-day period.[21]

Under § 7105(f), the Authority must "undertake to grant review" of a regional director's decision within sixty days of a properly filed application for review.[22] If the Authority does not do so, then the regional director's decision becomes "the action of the Authority."[23]

In some cases, consistent with § 2422.31(f) and (g) of the Authority's Regulations,[24] the Authority grants review of a regional director's decision, but defers ruling on the issues in the application for review until a later time.[25] In those circumstances, nothing in the Statute requires the Authority to rule on the issues in the application within any particular time period.[26]

When the Authority decided *FDIC*, it did so based on an assumption that, by issuing the interim order, CIP had, on the Authority's behalf, "undertake[n] to grant review"[27] of the RD's decision. If that assumption was correct, then – given the absence of any statutory deadline for the Authority to rule on the issues in the Union's application – § 7105(f) did not preclude the Authority from issuing *FDIC* when it did.

---

[10] 5 C.F.R. § 2429.26.
[11] *See, e.g.*, *SATCO*, 68 FLRA at 107-08.
[12] Mot. for Recons. & Request for Stay (Mot.) at 1.
[13] *Id.*
[14] *Id.* at 3.
[15] *Id.*
[16] *Id.* at 4.
[17] *Id.* at 3.
[18] *Id.*
[19] *Id.* at 4.
[20] *See, e.g.*, *NASA, Goddard Space Flight Ctr., Wallops Island, Va.*, 67 FLRA 670, 672 (2014).
[21] 5 U.S.C. § 7105(f).
[22] *Id.*
[23] *Id.*
[24] 5 C.F.R. § 2422.31(f) ("The Authority *may* rule on the issue(s) in an application for review in its order granting the application for review.") (emphasis added); *id.* § 2422.31(g) ("If the Authority does *not* rule on the issue(s) in the application for review in its order granting review, the Authority *may, in its discretion*, give the parties an opportunity to file briefs.") (emphasis added).
[25] *See, e.g.*, *U.S. Dep't of VA, N. Cal. Health Care Sys., Martinez, Cal.*, 66 FLRA 522, 522 (2012) (noting Authority's prior order granting application and deferring ruling on the issues in the application); *U.S. Dep't of the Treasury, IRS*, 65 FLRA 687, 687 (2011) (same).
[26] *See* 5 U.S.C. § 7105(f) (setting forth no deadline for the Authority to "affirm, modify, or reverse" the regional director's action).
[27] *Id.*

But the Agency argues that this assumption was not correct.[28] And, for two reasons, we agree. First, the scope of CIP's delegation does not expressly encompass the authority to undertake to grant review of an application for review on the Authority's behalf.[29] Second, in the interim order, CIP did not purport to do so. Rather, CIP stated, in pertinent part, that it was "*providing notice* that consideration of the application for review is deferred until further notice," and that, "[i]n light of this interim order, the [RD's] decision has not become the action of the Authority."[30] Based on the scope of CIP's delegation and the wording of CIP's interim order, we find that the interim order did not "undertake to grant review"[31] of the Union's application.

Because the Authority did not undertake to grant review of the RD's decision within sixty days of regaining a quorum – specifically, by January 11, 2014 – § 7105(f) of the Statute supports the Agency's claim that the RD's decision became "the action of the Authority"[32] after that date. We find that, as a result, *FDIC* is without legal effect.

We acknowledge that, in *Naval Air Station Fallon, Fallon, Nevada* (*Naval Air Station*),[33] the Authority stated that – in "the unique circumstances of [that] case" – it could sua sponte review a regional director's decision that had become the action of the Authority when the Authority had not undertaken to grant an application for review of the regional director's decision within sixty days.[34] Given the unique circumstances of this case, including the amount of time that has elapsed since the RD's decision became the action of the Authority, we find that it would not be appropriate to take the same approach as in *Naval Air Station*.[35]

For the foregoing reasons, we find that, after January 11, 2014, the RD's decision and order became the "action of the Authority" under § 7105(f) of the Statute.[36] Thus, *FDIC* is without legal effect, and we grant the Agency's motion for reconsideration of – and vacate – that decision. Consequently, the Agency's motion for a stay of *FDIC* is moot, and we deny it.[37]

V. Order

We grant the Agency's motion for reconsideration of, and we vacate, *FDIC*.[38]

[28] Mot. at 4 ("neither the [i]nterim [o]rder, nor the delegation to which it refers, could grant the instant application for review").
[29] *See* Delegation of Authority at 1 (Jan. 18, 2000) (giving CIP authority to, among other things, "[g]rant or deny requests for extensions of time and requests for waivers of expired time limits," but not addressing applications for review).
[30] Interim Order at 2 (emphasis added).
[31] 5 U.S.C. § 7105(f).
[32] *Id.*
[33] 51 FLRA 1254 (1996).
[34] *Id.* at 1257.
[35] *Cf. Citizens Against the Pellissippi Parkway v. Mineta*, 375 F.3d 412, 418 (6th Cir. 2004) ("[T]his court qualified its recognition of an agency's inherent authority to reconsider by referring to reconsiderations that occur 'within a reasonable time.'" (quoting *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993))); *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002) ("Reconsideration must . . . occur within a reasonable time after the first decision."); *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995) ("In recognition of the fallibility of earthly lawgivers, every court, and every administrative agency that exercises adjudicative authority, has been understood to have (at least until the matter is regularized in rules . . .) the inherent power to reconsider its decisions *within a reasonable time*." (emphasis added) (citations omitted)); *Prieto v. United States*, 655 F. Supp. 1187, 1191 (D.D.C. 1987) (noting that an administrative agency's exercise of its power to reconsider "must be timely").
[36] 5 U.S.C. § 7105(f).
[37] *See, e.g.*, *U.S. DHS, U.S. CBP*, 66 FLRA 1042, 1045 n.2 (2012).
[38] 67 FLRA 430.

BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE

FEDERAL DEPOSIT
INSURANCE CORPORATION
(Agency)

AND
NATIONAL TREASURY
EMPLOYEES UNION
(Labor Organization/Petitioner)

Case No. WA-RP-12-0062

DECISION AND ORDER
DISMISSING AMENDED PETITION

I. Statement of the Case

On August 21, 2012, the National Treasury Employees Union (NTEU) filed a Petition under the Federal Service Labor-Management Relations Statute[1] (Statute). The Petition sought to clarify NTEU's bargaining unit to include twenty-seven "Grade 4 Financial Institution Specialists" at the Federal Deposit Insurance Corporation (FDIC).

On August 30, 2012, I issued an opening letter requesting that the Agency submit certain information and a statement of its interest in the issues raised by the Petition. FDIC responded on September 14, 2012, stating that it does not employ any Grade 4 Financial Institution Specialists. FDIC went on to explain that it does employ "Grade 4 Student Trainees", but that Union's current certification expressly excludes Trainees.

On September 25, 2012, NTEU amended the Petition to include "all new student intern Financial Institution Specialists" at FDIC. The Region issued an amended opening letter on September 27, 2012. On October 9, 2012, NTEU submitted a letter contending that the petitioned-for employees should be included in its existing unit without an election based on the theory of accretion. The Agency submitted its response to the amended Petition on October 11, 2012. As explained below, I find merit to the Agency's objections to the Petition. Specifically, I agree that, because the parties expressly excluded student interns from the definition of those employees who are included in NTEU's unit, the Region should not include them without an election.

I am issuing this Decision and Order pursuant to §§ 2422.30(d) and 2422.31 of the Rules and Regulations of the FLRA.

After carefully considering the record in this case, including the parties' submissions, I hereby find and conclude as follows:

II. Facts

On April 2, 2002, in Case No. WA-RP-01-0100, the Federal Labor Relations Authority clarified the National Treasury Employees Union bargaining unit as follows:

Included:	All professional and nonprofessional employees employed by the Federal Deposit Insurance Corporation (FDIC) nationwide.
Excluded:	All management officials; supervisors; student interns, student trainees, summer interns, and employees described in 5 U.S.C. § 7112(b)(2),(3),(4), (6) and (7).

The investigation of the Petition revealed that the current Unit Certification explicitly excludes student interns, student trainees, and summer interns from the bargaining unit.

In its Petition, NTEU did not request an election to determine whether student interns wish to be represented for the purpose of collective bargaining by NTEU, nor did it include a showing of interest demonstrating that not less than 30% of the student interns wanted to be represented by NTEU. Such a showing would be required in order to proceed to an election.[2]

III. NTEU's Position

NTEU contends that student interns should be included in its bargaining unit under the theory of accretion. NTEU maintains that accretion is appropriate because a meaningful change has occurred in the student interns' job circumstances; specifically, according to NTEU, student interns now have an expectation of continued employment, where previously they did not. NTEU maintains that current FDIC policy, or at least the policy in effect during the period preceding the filing of

[1] 5 U.S.C. §§ 7101–7135.

[2] See 5 U.S.C. § 7111(b)(1)(A); 5 C.F.R. 2422.3(c)

the Petition in August 2012, is to hire student interns as Financial Institution Specialists upon their completion of the Student Career Experience Program, or SCEP. The Union appears to be saying that all interns complete the SCEP, and that the Agency hires all interns upon completion of the SCEP requirements. In other words, an intern becomes a career employee automatically upon completion of the SCEP.

IV. FDIC's Position

FDIC maintains that it does not employ any "Student Intern Financial Institution Specialists" but instead employs temporary student interns under the SCEP who, upon completion of the program, may be hired as full-time Financial Institution Specialists. FDIC disputes that student interns have an expectation of continued employment. FDIC maintains that it cannot and does not guarantee permanent employment to interns, including interns who have completed the SCEP. FDIC notes that, as soon as an intern is hired as a Financial Institution Specialist, he or she is included in the NTEU bargaining unit.

FDIC insists that the Petition is deficient because student interns, student trainees and summer interns are expressly excluded from the current NTEU bargaining unit. Therefore, FDIC argues, the proper procedure to include them in the bargaining unit would be to file a petition supported by a showing of interest and seeking an election.[3]

V. Applicable Law

Accretion is the process the Authority uses to add a group of employees to an existing bargaining unit without an election. Accretion normally occurs as a result of a reorganization or realignment of an agency's operations.[4] The FLRA applies the accretion doctrine sparingly. As a general rule, accretion is not allowed where the petitioner seeks to include, in an existing unit, employees whom the parties had previously agreed to exclude because their inclusion would render the bargaining unit inappropriate under section 7112(b). The exception to this general rule is where there has been meaningful change in the excluded employees' employment status, such that the Statutory exclusions in section 7112(b) no longer apply. If the evidence shows the employees' working conditions have changed, and that but for the Statutory exclusion, they would have been included in the unit, the Authority may clarify the unit to include them. On the other hand, where, the parties have agreed to excluded a group of employees for reasons other than the section 7112(b) appropriate unit criteria, and a union later seeks to include them in the unit, an election is required.[5]

VI. Analysis

In this case, accretion of the student interns to the NTEU bargaining unit is not appropriate. This is because the FDIC and NTEU previously agreed to exclude them from NTEU's unit. As a result of the parties' agreement, student interns have never had the opportunity to vote for or against the NTEU as their exclusive bargaining unit representative.

I find without merit NTEU's argument that the interns should be accreted to its unit because there has been a meaningful change in their conditions of employment. As noted above, had NTEU and FDIC originally agreed that the interns were excluded under section 7112(b), the Authority might consider accreting positions now, if there were evidence of a meaningful change in their duties such that the Statutory exclusions no longer apply. That is not what the parties agreed, however. Instead they agreed to exclude a group of employees who could have been included consistent with section 7112(b). As a result of their agreement, this group – the student interns – did not have an opportunity to vote for or against union representation. The fact that some or all of the student interns may, as NTEU now asserts, have an expectation of continued employment does not change their status as student interns. The parties' original agreement and NTEU's certification expressly exclude student interns.

It may be appropriate to include student interns in the current NTEU bargaining unit at FDIC. However, whether they become part of the unit must be decided through an election, following the filing of a petition supported by a showing of interest, and upon the Region's determination that a unit including student interns meets the criteria for an appropriate unit set forth in Section 7112(a) of the Statute.

VII. Order

In accordance with section 7105(e) of the Federal Service Labor-Management Relations Statute, and for the above reasons, I am dismissing NTEU's Petition.

VIII. Right to File an Application for Review

Pursuant to section 2422.31 of the Authority's Rules and Regulations, a party may file an **application for review of this Decision and Order** within sixty (60)

[3] See *U.S. Dep't of the Air Force, Langley Air Force Base, Virginia*, 40 FLRA 111, 117 (1991).

[4] See *Dep't of the Navy, Naval Hospital, Submarine Base Bangor Clinic, Bremerton, Washington*, 5 FLRA 125 (1984).

[5] See *FTC II*, 35 FLRA 576, 583 (1990).

days of the date of this Decision and Order. This sixty (60) day time limit may not be extended or waived. Copies of the application for review must be served on the undersigned and on all other parties. A statement of such service must be filed with the application for review.

The application for review must be a self-contained document enabling the Authority to rule on the basis of its contents without the necessity of recourse to the record. The Authority will grant review only upon one or more of the grounds set forth in section 2422.31(c) of the Rules and Regulations. Any application filed must contain a summary of all evidence or rulings relating to the issues raised together with page citations from the transcript, if applicable, and supporting arguments. An application may not raise any issue or allege any facts not timely presented to the Regional Director.

The application for review must be filed with the Chief, Case Intake & Publications, Federal Labor Relations Authority, Docket Room, 1400 K Street, N.W., Suite 201, Washington, D.C. 20424 **by February 19, 2013**. Pursuant to section 2422.31(3)(f) of the Regulations, neither filing nor granting an application for review shall stay any action ordered by the Regional Director unless specifically ordered by the Authority. **A party may also file an application for review using the Authority's electronic case filing system. Consult the Authority's website, http://www.flra.gov/eFiling.**

Pursuant to section 2429.21(b) of the Rules and Regulations, the date of filing is the date of mailing indicated by the postmark date. If no postmark date is evident on the mailing, it shall be presumed to have been mailed five days prior to receipt. If a party files an application for review by personal or commercial delivery, it shall be considered filed on the date the Federal Labor Relations Authority receives it. **If a party files an application for review using the electronic case filing system, the Authority considers the application filed on the date the Authority receives it.**

Dated this 21th day of December, 2012.

_____

Barbara Kraft, Regional Director
Washington Regional Office
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001