

69 FLRA No. 45

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

and

NATIONAL LABOR RELATIONS BOARD UNION
(Union/Petitioner)

and

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION
(Interested Party)

DE-RP-15-0007

ORDER DENYING
APPLICATION FOR REVIEW

April 14, 2016

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

I. Statement of the Case

In the attached decision, Regional Director (RD) Timothy J. Sullivan of the Federal Labor Relations Authority (FLRA) determined that professional employees assigned to the Freedom of Information Act (FOIA) Branch of the Agency's Office of the General Counsel (OGC), Division of Legal Counsel, fall within the express terms of an existing certification for a bargaining unit represented by the National Labor Relations Board Professional Association (the Association), and that including the employees in the Association's bargaining unit would not render that unit inappropriate. In addition, the RD found that the employees do not fall within the express terms of an existing certification for a unit of employees represented by the National Labor Relations Board Union (the Union).

The main question before us is whether the RD failed to apply established law when he concluded that the employees at issue fall within the express terms of the Association's unit certification. Because the Union has not demonstrated that, as a matter of law, the RD erred by finding that the employees fall within the express terms of that certification, the answer is no.

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

The Agency's General Counsel investigates and prosecutes unfair-labor-practice charges and processes representation cases. The OGC is headquartered in Washington, D.C., and has twenty-six field offices across the country.

In December 2010, the FLRA certified the Union and the Association as the exclusive representatives of separate bargaining units within the OGC. The Union's unit certification includes "all professional employees of the OGC in the [r]egional, [s]ubregional, and [r]esident [o]ffices."¹ The Association's unit certification includes "[a]ll attorneys and other professionals performing comparable legal work . . . in the [h]eadquarters [o]ffice."²

In August 2013, the Agency established the Division of Legal Counsel – a new OGC organization at headquarters. The Division of Legal Counsel includes the FOIA Branch, which oversees all of the Agency's FOIA responsibilities. As relevant here, three field employees transferred to the FOIA Branch, but remained physically located – at least part-time, when they are not teleworking – in their respective work locations in the field offices.

The Union petitioned the RD to clarify the bargaining-unit status of the FOIA Branch employees who remained physically located in the field offices.

B. RD's Decision

Before the RD, the Union argued that the employees fall within the express terms of its certification, while the Agency and the Association argued that the employees fall within the express terms of the Association's certification.

The parties stipulated to the facts, and the RD issued his decision. The RD noted that, under the Authority's decision in *Department of the Army, Headquarters, Fort Dix, Fort Dix, New Jersey (Fort Dix)*,³ "[n]ew employees are automatically included in an existing bargaining unit where their positions fall within the express terms of [an existing] bargaining[-unit] certificate and where their inclusion does not render the bargaining unit inappropriate."⁴ In addition, the RD stated that this holding applies "not only [to] new employees hired into previously existing positions, but

¹ RD's Decision at 2.

² *Id.*

³ 53 FLRA 287 (1997).

⁴ RD's Decision at 8 (quoting *Fort Dix*, 53 FLRA at 294).

also to employees in newly created positions that fall within the express terms of the existing certification.”⁵

Before the RD, the Union argued that the employees fall within the express terms of its certification because they work “in the [r]egional, [s]ubregional, or [r]esident offices.”⁶ But the RD found that the employees “have virtually no professional connection to the [s]ubregional offices, rarely discussing Agency work, and minimally using [s]ubregional supplies and equipment.”⁷ In addition, the RD found that the employees’ part-time presence in subregional offices was their only “tenuous” connection to the Union’s certification.⁸ Thus, the RD found that relying on the employees’ physical location “place[d] far too much emphasis on their part-time presence in [s]ubregional offices.”⁹

Further, the RD found that the employees’ “chain of command . . . [is] established and managed within the FOIA Branch at [h]eadquarters.”¹⁰ In addition, the RD found that the “vast majority of [the] employees’ conditions of employment are determined by the FOIA Branch.”¹¹ Citing the Authority’s decisions in *U.S. Department of the Navy, Naval Facilities, Engineering Command Southeast, Jacksonville, Florida (Navy)*,¹² and *SSA, Office of Disability Adjudication & Review, Dallas Region, Dallas, Texas (SSA Dallas)*,¹³ the RD found that the organizational structure of the division, as well as the employees’ work assignments, meant that they worked “in the [h]eadquarters office” – and that, as a result, they fell within the express terms of the Association’s existing certification.¹⁴

Because the RD found that the employees fall within the express terms of only the Association’s unit certification, the RD applied *Fort Dix* and found that the employees should be included in the Association’s unit unless their inclusion would render that unit inappropriate. Addressing the appropriate-unit issue, the RD found that including the employees in the Association’s unit would not render that unit inappropriate under the appropriate-unit criteria set forth in § 7112(a) of the Federal Service Labor-Management Relations Statute (the Statute).¹⁵ Further, the

RD declined to adopt the Union’s position that including the employees in its unit was appropriate because of the parties’ past practice and bargaining history. The RD explained that “the parties’ bargaining history is not determinative because only the FLRA can determine bargaining[-]unit eligibility.”¹⁶

Based on the foregoing, the RD dismissed the Union’s petition.

The Union filed an application for review of the RD’s decision. The Agency filed an opposition to the Union’s application.

III. Analysis and Conclusion: The RD did not fail to apply established law when he concluded that the employees fall within the Association’s certification.

The Union argues that the RD failed to apply established law under *Fort Dix* when he concluded that the employees fall within the express terms of the Association’s certification.¹⁷ Under § 2422.31(c)(3)(i) of the Authority’s Regulations, the Authority may grant an application for review when an application demonstrates that the RD has failed to apply established law.¹⁸

The Union argues that the RD failed to apply established law in three respects. First, the Union contends that the RD ignored the plain wording of the Union’s certification because the term “in” has a “plainly geographical meaning” that operates to “automatically” include the employees in its certification.¹⁹ Regarding the Union’s certification, the RD found that the employees’ “part-time presence in [s]ubregional offices” was their only “tenuous” connection to the Union’s certification.²⁰ But concerning the Association’s certification, the RD found that: (1) the employees operate within the organizational structure of the FOIA Branch; (2) the employees’ “chain of command . . . [is] established and managed within” that branch at headquarters;²¹ and (3) the “vast majority of [the] employees’ conditions of employment are determined by the FOIA Branch.”²² As a result, the RD concluded that the employees fall within the express terms of the Association’s certification because they work “in the [h]eadquarters office,” where the majority of the FOIA Branch is located.²³ Based on the foregoing, contrary to

⁵ *Id.* (citing *SSA, Office of Disability Adjudication & Review, Falls Church, Va.*, 62 FLRA 513, 514-15 (2008) (*SSA*)).

⁶ *Id.* at 9.

⁷ *Id.* at 10.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² 68 FLRA 244 (2015).

¹³ 66 FLRA 1 (2011).

¹⁴ RD’s Decision at 10 (quoting the Association’s certification) (RD’s emphasis).

¹⁵ 5 U.S.C. § 7112(a).

¹⁶ RD’s Decision at 12 (citing *SSA Dallas*, 66 FLRA at 2; *AFGE, Local 3529*, 57 FLRA 633, 636 (2001)).

¹⁷ Application at 6.

¹⁸ 5 C.F.R. § 2422.31(c)(3)(i); see *SSA Dallas*, 66 FLRA at 2.

¹⁹ Application at 6 (emphasis omitted).

²⁰ RD’s Decision at 10.

²¹ *Id.*

²² *Id.*

²³ *Id.* (quoting the Association’s certification) (RD’s emphasis).

the Union's claim, we find that the RD did not ignore the plain wording of the Union's certification.

In addition, the Union provides no basis for finding that, as a matter of law, the term "in" refers to geographical location rather than organizational structure.²⁴ The Union relies on *SSA, Office of Disability Adjudication & Review, Falls Church, Virginia, (SSA)*²⁵ for the proposition that wording concerning geographical location "trigger[s] the application of the *Fort Dix* presumption."²⁶ But the Union's reliance on that decision is misplaced. *SSA* merely reaffirmed that when employees in newly created positions fall within the express terms of an existing certification, the automatic-inclusion principle of *Fort Dix* – not the successorship doctrine – applies.²⁷ The Authority did not find that, as a matter of law, the term "in" denotes geographical location. Thus, the Union has not established that the RD failed to apply established law in this respect.

Second, the Union argues that the RD failed to apply established law because the two Authority decisions that the RD cited – *SSA Dallas* and *Navy* – do not support his findings.²⁸ Regarding *SSA Dallas*, the Union argues that because the Authority held in that decision that the "geographical relocation of . . . employees led to an application of . . . *Fort Dix*," the RD should have applied *Fort Dix* to automatically include the employees in the Union's unit.²⁹ *SSA Dallas* involved employees who were "physically located" at an agency's district office, but "organizationally located" within, and supervised by, an agency's regional office.³⁰ In *SSA Dallas*, the Authority upheld the regional director's determination that the employees fell within the express terms of the regional-office unit's certification because they were "assigned to" the regional office,³¹ "despite the fact that [the employees] were treated as being in the [district-office] unit."³² In other words, the Authority found that the employees were included in the bargaining unit based on their placement within the agency's organizational structure, not the employees' geographical location. The RD's decision in this case is consistent with that finding. Thus, the Union provides no basis for finding that the RD erred in relying on *SSA Dallas*.

Similarly, in *Navy*, the Authority upheld a regional director's determination that the term "assigned to" referred to an "organizational assignment rather than a geographic one."³³ The Union contends that the RD's reliance on *Navy* is misplaced because the operative term in this case – "in" – is different from the term "assigned to."³⁴ In this regard, the Union argues that the term "in" refers to "location . . . not . . . [a] chain of command or reporting."³⁵ Although the certification in *Navy* involved different wording, the Union provides no basis for finding that the RD erred, as a matter of law, by finding that the term "in," as used in the Association's unit certification, refers to the employees' placement within the Agency's organizational structure.³⁶ Accordingly, the Union has not demonstrated that the RD erred in relying on *Navy*.

Third, the Union argues that the parties' collective-bargaining history demonstrates that the employees should be included in the Union's unit because historically the Union has represented employees working *in* the field offices, while the Association has represented employees working *in* the Agency's headquarters.³⁷ However, as the RD correctly explained,³⁸ the parties' bargaining history is not determinative because only the FLRA can determine bargaining-unit eligibility.³⁹ Accordingly, the Union's argument provides no basis for finding that the RD failed to apply established law.

For the foregoing reasons, we find that the Union has not demonstrated that the RD failed to apply established law under *Fort Dix*.

Finally, the Union argues that "[h]aving [d]emonstrated that the [RD] [c]ommitted [r]eversible [e]rror in [h]is [a]pplication of the *Fort Dix* [p]resumption," the evidence demonstrates that including the employees in the Union's unit would not create an inappropriate unit under § 7112(a)(1) of the Statute.⁴⁰ The Union's argument is based on the premise that the RD erred in his application of *Fort Dix*, which we have rejected. Because the RD properly applied *Fort Dix*, and the Union does not challenge the RD's application of the appropriate-unit criteria in connection with the Association's unit, the Union has provided no basis for

²⁴ Application at 6-7.

²⁵ 62 FLRA 513.

²⁶ Application at 6.

²⁷ 62 FLRA at 515.

²⁸ Application at 6.

²⁹ *Id.* at 7 (emphasis omitted).

³⁰ 66 FLRA at 1.

³¹ *Id.*

³² *Id.* at 2.

³³ 68 FLRA at 246.

³⁴ Application at 7.

³⁵ *Id.*

³⁶ RD's Decision at 10 (quoting the Association's certification) (emphasis omitted).

³⁷ Application at 7, 9.

³⁸ RD's Decision at 12.

³⁹ See e.g., *Navy*, 68 FLRA at 246 (citations omitted).

⁴⁰ Application at 8.

finding that the RD erred in concluding that the employees are appropriately included in that unit.⁴¹

IV. Order

We deny the Union's application for review.

⁴¹ See, e.g., *Navy*, 68 FLRA at 246-47; *SSA Dallas*, 66 FLRA at 2.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS
AUTHORITY
DENVER REGION

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

and

NATIONAL LABOR RELATIONS BOARD UNION
(Union/Petitioner)

And

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION
(Interested Party)

DE-RP-15-0007

DECISION AND ORDER
DISMISSING PETITION

I. Statement of the Case

The National Labor Relations Board Union (NLRBU) filed a petition on March 3, 2015, to clarify its bargaining unit of professional and non-professional employees of the National Labor Relations Board (NLRB or Agency), Office of the General Counsel (OGC). The petition seeks to clarify the bargaining unit status of employees who have been assigned to the newly created OGC Division of Legal Counsel, Freedom of Information Act (FOIA) Branch, but remain physically located in the NLRB field offices.

The NLRBU contends that it should be the exclusive representative of these employees based on the language of its certification, and because it has traditionally represented field professionals. The Agency and the NLRB Professional Association (NLRBPA) contend that because these employees now work for the Headquarters FOIA Branch, and no longer perform the work of field employees, the NLRBPA should be their exclusive representative.

Section 7105(e)(1) of the Statute provides that the Authority may delegate to any Regional Director certain authorities, and in Section 2422.30(c) of the

Authority’s Rules and Regulations, the Authority gave me the authority to conduct investigations and hearings in representation matters and issue Decisions and Orders. The Region conducted an investigation and all parties provided information and their respective positions. None of the facts relied upon in this Decision are in dispute. Accordingly, no hearing is necessary. Based upon my investigation and a Stipulation of Facts, and pursuant to Section 2422.30 of the Authority’s Rules and Regulations, I hereby find and conclude as follows:

II. Findings

A. The Affected Bargaining Units

The NLRBU currently represents a unit of professional and nonprofessional employees of the OGC, NLRB [Case No. WA-RP-06-0019 (December 13, 2010)]. The unit is described as follows:

Included: All nonprofessional employees of the Office of the General Counsel (OGC) of the National Labor Relations Board; and all professional employees of the OGC in the Regional, Subregional, and Resident Offices.

Excluded: All employees of the National Labor Relations Board; all other professional employees, management officials, supervisors, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6), and (7).

The NLRBU also represents a unit of nonprofessional employees of the NLRB. [Case No. WA-RP-06-0019 (December 13, 2010)] This unit is described as follows:

Included: All nonprofessional employees of the National Labor Relations Board.

Excluded: All professional employees, all employees of the Office of the General Counsel, management officials, supervisors, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

The NLRB Professional Association (NLRBPA) currently represents two units of professional employees of the NLRB. [Case No. WA-RP-08-0002 (December 20, 2010)] The first unit is 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.

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

The second unit [Case No. WA-RP-08-0002 (December 20, 2010)] is 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 General Counsel of the National Labor Relations Board.

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

B. The Structure and Operation of the NLRB

The NLRB is an independent federal agency which safeguards employees' rights to organize and to determine whether to have unions as their bargaining representatives. The NLRB is statutorily bifurcated into two sides. The Board side adjudicates unfair labor practice (ULP) cases under the National Labor Relations Act (NLRA), hears exceptions to the decisions of administrative law judges (ALJs), and adjudicates representation cases (REP). Headquarters Board-side offices report to the Board, or to individual Board members.

The General Counsel (GC) side exercises the GC's independent prosecutorial authority under the NLRA – investigating and prosecuting ULP charges and, under delegation from the Board, processing REP cases. The OGC field offices report to the General Counsel through the OGC Division of Operations Management. The OGC supervises the field offices in the processing of all cases. Headquarters OGC Divisions report directly to the General Counsel.

All NLRB Regions are headed by a Regional Director, who answers directly to the Division of Operations-Management at Headquarters. The professional staff in the Regions consists of Field Attorneys and non-attorney Field Examiners. Subregional Offices, such as Kansas City (Overland Park), Winston-Salem, and San Juan, Puerto Rico, are structured similarly, but are smaller. They report to one Regional Office. Each Subregion is headed by an Officer-in-Charge, who reports directly to the Regional Director of the Region to which the Subregion is subordinate. Certain smaller offices, designated as Resident Offices, are headed by Resident Officers, who report to a Regional office.

A number of support functions are initiated in the field or headquarters divisions, but are ultimately centralized at NLRB Headquarters in Washington, D.C. This includes a servicing payroll office, that contracts with a payroll provider for the entire Agency. A Human Resources office serves the entire Agency. For field employees, personnel actions are prepared in the Region and Subregion offices, and forwarded to the Office of Human Resources for processing. The Division of Operations Management develops performance standards for field professionals. Performance appraisals for field employees are written and issued by the supervisors in their chains of command, including their immediate supervisors and the Regional Directors. All employees' OPFs are maintained in the central Human Resources office and are made available electronically to employees. Generally, a

disciplinary action against a field employee would be proposed by a Manager in a Region or Subregion office and decided by the Associate General Counsel in the Division of Operations Management.

C. Management of FOIA Requests at the NLRB

Like all Government agencies, the NLRB is required to respond to requests made under the FOIA. Prior to August 11, 2013, FOIA requests were generally answered by the office that maintained the records sought. When requests involved agency case-processing documents, the Regions and other field offices typically answered the requests. The Branch Chief of the Legal Research and Policy Planning Branch (LRPPB) FOIA unit in the Office of the General Counsel's Division of Advice, coordinated the FOIA requests for documents maintained by the GC. The Regional Directors assigned FOIA tasks within their Regions and the Offices in their purview. FOIA matters were typically handled by one person but in some offices were assigned using a rotational system. These employees coordinated with the LRPPB in the event the Region had questions concerning a FOIA request involving documents maintained in the Region. The Office of the Solicitor handled FOIA requests for documents maintained on the Board side.

On August 11, 2013, the NLRB established a new Headquarters GC side organization - the Division of Legal Counsel, which is headed by an Associate General Counsel and a Deputy Associate General Counsel. The Division consists of three Branches, as well as the Lead Technology Counsel, which conducts litigation and provides advice and assistance involving e-litigation matters. The three Branches are: (1) Ethics, Employment and Administrative Law Branch; (2) Contempt, Compliance and Special Litigation Branch; and (3) FOIA Branch, which responds to, among other things, all FOIA requests received by the Agency at its Headquarters facility as well as its 26 field offices.

The FOIA Branch is headed by the Branch Chief, or FOIA Officer. The Branch is divided into two sections, one headed by a Supervisory Attorney-Advisor and the other by the Deputy Assistant General Counsel. Staff professionals in these sections report to their respective supervisors. The FOIA Branch conducts all aspects of the agency's FOIA function - logging in FOIA requests, gathering documents, making determinations as to what can be released under the FOIA exemptions, assessing charges to requesters, and handling administrative appeals on

decisions. Documents are gathered primarily through the agency's electronic NxGen filing system.¹

FOIA employees' timesheets are submitted to and approved by the FOIA Branch supervisors and Branch Chief, and then submitted to the Payroll Office. FOIA personnel actions are prepared in the FOIA Branch and submitted to the Office of Human Resources for processing. Performance standards for FOIA Branch professionals are issued by the FOIA Branch Chief and immediate supervisor. Appraisals for FOIA Branch employees are written and issued by the supervisors in their chain of command, including the Branch Chief and the head of the Division of Legal Counsel. Any disciplinary action taken against a FOIA Branch employee, whether they were working in Headquarters or in the field, would be proposed by the Assistant General Counsel and/or Deputy Assistant General Counsel. They would prepare a written document that would be forwarded to the Associate General Counsel.

D. FOIA Branch Employees Who Work in the Regions

With the creation of the FOIA Branch, and its assumption of all FOIA responsibilities, additional staff were needed. Headquarters employees, including many who had performed FOIA work in the LRPPB, transferred to the FOIA Branch. Three field employees who had managed some FOIA cases, also took positions as FOIA Attorneys or FOIA Specialists. These are Rosetta Lane, from Winston-Salem, North Carolina; Susan Stokenberry from Overland Park, Kansas; and Teresita Sanabria, from San Juan, Puerto Rico.

1. Rosetta Lane

Lane has been an attorney with the NLRB since 1988 in the Winston-Salem Office (the Subregion 11 Office in Region 10, under the Atlanta, Georgia Office). The management structure in the Winston-Salem Office consists of an Officer in Charge, a Deputy Regional Attorney, a Supervisory Attorney, and an Office Manager.

Before transferring to the FOIA Branch, as a Field Attorney, Lane's primary responsibilities included the full range of ULP and REP duties. Her supervisory structure existed within the Subregion. Lane submitted time sheets and leave requests to her Subregional supervisor.

¹ Field Attorneys' and Field Examiners' case files are now maintained on NxGen, where they can be read, reviewed, and approved by supervisors and managers.

Before the creation of the FOIA Branch, each Region received and processed FOIA requests for information maintained in paper files, or in archives, by that Region. Lane was involved in answering FOIA requests for several years, although her primary duties remained the processing of ULP and REP cases. Some of the FOIA requests were routine. A support staffer in the Region compiled the responsive documents and drafted a letter to the requester. Lane reviewed it, made modifications if necessary, and forwarded the package to her supervisor for approval. Once approved, the package was sent from the Subregion to the requester. For non-routine requests, Lane retrieved the documents, reviewed them, redacted them in order to comply with FOIA exemptions, and drafted a response to the requester. Her supervisor reviewed the materials and the package was sent from the Subregion to the requester.

In about August 2014, Lane placed her name on a list for transfer into the Division of Legal Counsel, FOIA Branch, at NLRB Headquarters in Washington, D.C. She was selected for the position, and was informed that she would be able to work remotely from Winston-Salem. Since March 9, 2015, as an attorney with the FOIA Branch, she processes FOIA requests full-time. Her supervisor is Diana Bridge, Deputy Assistant General Counsel in the FOIA Branch, who works under Dierdre MacNeill, the head of the FOIA Branch. Lane submits time sheets to a FOIA staff person in Washington, and makes leave requests to Bridge. Although Lane has not had a performance appraisal since she transferred to the FOIA Branch, she understands that her rating official will be Bridge, and the reviewing official will be MacNeil. Bridge provided her performance plan.

Since her transfer to the FOIA Branch, Lane's work assignments have come from Bridge, who sends an email, including a FOIA ID number, for each request. Lane gains access to the request through the Agency's FOIA tracking system (FTS). She reviews the request, notes due dates, creates an electronic file containing a draft response letter and folders with documents, and retrieves documents for the response from NxGen. Lane sends this file to Bridge for review. Lane and Bridge discuss the request and, if any questions arise, Lane makes necessary changes and sends the package back to Bridge for a final review. Once approved, the package is forwarded to support staff in the FOIA Branch, and then to the requester.

Lane does the same FOIA work whether at home or in the Subregional office. She currently operates under the NLRBPA contract, which allows for three telework days per pay period. When in the office, Lane communicates on a social level with employees in the Subregion, but rarely discusses their work, and does

not discuss FOIA matters with them. She is on the FOIA e-mail list, and also continues to receive e-mail from the Subregion. She has access to the Subregion's office supplies and uses the office printer. She does not have fixed hours for work, breaks, or lunch periods. Since she transferred to the FOIA Branch, there have been no issues related to work space in the Subregion over which the Union has negotiated.

2. Susan Stokenbury

Stokenbury started working at the NLRB in 1999. Before transferring to the FOIA Branch, she was a Field Examiner in NLRB Subregion 17, Overland Park, Kansas. Subregion 17 is part of Region 14, in St. Louis, and is managed by an Officer in Charge who answers to the Regional Director in St. Louis. Under the Officer in Charge is the Deputy Regional Attorney, and a Supervisory General Attorney who, prior to Ms. Stokenbury's transfer, was her first-line supervisor. When Stokenbury was a Field Examiner, she did both ULP and REP case work, all of which was reviewed by the Supervisory General Attorney, the Deputy Regional Attorney, and the Officer in Charge. Complex cases were sent to the Regional Director for review, who made the final decision when in the Overland Park office for monthly visits. Stokenbury submitted leave requests to her first-line supervisor, and her leave was approved by the Managers in her office. Annually, the Subregion 17 Managers met to evaluate her performance, and her first-line supervisor presented her with an appraisal.

Previously, the Subregion answered FOIA requests that were filed directly with the Subregion or were transferred from Headquarters if they involved documents in the Subregion. Stokenbury did not deal with FOIA requests until 2012, when she was selected to take a detail in Washington, D.C. to answer FOIA requests. She remained on the detail for four months, and learned then that the Agency intended to centralize FOIA operations. Stokenbury returned to the Subregion and continued with her Field Examiner duties. When the FOIA Branch was in place, she applied to transfer, but asked to remain in Overland Park. She was selected for the position.

Now, as a FOIA Specialist, Stokenbury no longer does any work for the Subregion. She receives work assignments electronically from her supervisor, Bridge. These requests may come from anywhere in the country. After clarifying any questions about these FOIA requests, she searches for the documents primarily in NxGen. Occasionally, she must obtain documents or seek assistance from Headquarters offices, or from Regional Offices. Otherwise, her work-related communications are with FOIA Branch employees.

Stokenbury compiles documents responsive to a FOIA request. She then drafts a cover letter and notifies Bridge that the response is ready. Bridge reviews the response electronically and forwards it to MacNeil for final review. If questions arise, Stokenbury speaks with Bridge or other employees in the FOIA Branch. She does not discuss FOIA work with Subregion 17 staff.

Stokenbury submits leave requests electronically to Bridge, who forwards them to MacNeil for final approval. Stokenbury has received one performance appraisal since her transfer to the FOIA Branch. She submitted a summary of her work during the prior year to Bridge, who met with MacNeil and Marjorie Lieber, the Associate General Counsel, Division of Legal Counsel, who signed the appraisal.

As a Field Examiner in Subregion 17, Stokenbury was in the bargaining unit represented by the NLRBU. She teleworked to the extent permitted under the negotiated agreement. Currently, Stokenbury operates under the NLRBPA contract, and teleworks three days each week. Otherwise, she uses the same office she had when she worked for the Region as a Field Examiner. She uses Subregion 17 supplies and equipment, and occasionally uses the Subregion 17 break room. She has a copier in her office. If she were to have problems with it, she would contact Ms. Bridge. If she had any problems with her physical office space, she would contact the building manager. If an emergency arose in the building, she has been assured that Regional management would notify her about it. She is on a FOIA e-mail list and communicates by e-mail daily with the FOIA office. She does not believe she remains on the Subregion's e-mail list. Her conversations with Overland Park employees are primarily social; however, she does not attend office parties, office training, retirement lunches, etc.

3. Teresita Sanabria

Sanabria was hired by the NLRB in 2011 as an Office Automation Assistant. She was promoted to the position of Case Processing Assistant a year later for Region 12, Subregion 24 (Puerto Rico). She worked with the attorneys in the Subregion to help them prepare for trial. She was supervised by Lydia Quinones, the Subregion's Office Manager. Sanabria also responded to FOIA requests. She received FOIA assignments from the Subregion 24 Director, Deputy Regional Director, and FOIA Coordinator. She had an office in the Subregion, and teleworked occasionally.

In August 2015, Sanabria applied for the position of FOIA Specialist. She was selected and is now an employee of the NLRB FOIA Branch. She works full-time answering FOIA requests, and no longer has

any duties in the Subregion. Sanabria receives work assignments via e-mail from Bridge. She then accesses the electronic FTS to view the request. She uses the NxGen system to retrieve the requested documents, redact as necessary, and write a letter to the requester describing the response and costs. She compiles everything in the FTS and sends Bridge an e-mail, informing her that the package is available in FTS for her review. Once Bridge has reviewed the package, she returns it to Sanabria to finalize. Sanabria then forwards it to someone in the FOIA Branch who releases it to the requester.

Sanabria now works three days a week at home and two days in the office she has always occupied. Her leave requests are approved by Bridge. Sanabria sends her time and attendance sheets to the secretary in the FOIA branch. Bridge will be responsible for her performance appraisals. Sanabria uses very few office supplies because all of her work is completed electronically. Once, when she needed a ream of paper for training materials, she obtained one from the Region, and replaced it from the FOIA Branch supplies when she returned from a trip to NLRB Headquarters in Washington. She uses the laptop computer that she had when she worked for the Subregion. Sanabria does not discuss work-related matters with Quinones or other Subregion employees. If Sanabria has questions about work, she contacts Bridge or other colleagues in the FOIA Branch. She has some social interaction with Subregion 24 employees. The Subregion 24 office is in a shopping mall, so most facilities, such as the parking lot and cafeteria, are open to the public. Once, during a tropical storm, Bridge contacted Sanabria to tell her to stay home for the week. Sanabria did not have any contact with the Subregion concerning her absence during the storm.

E. Labor Relations at the NLRB

Labor relations authority in the NLRBU is exercised by a national Executive Board, and officers in locals around the country. The grievance procedure consists of two steps in a local office, and a third step at the Headquarters level. An earlier step may be skipped if the authority for resolution resides at a higher level in the Agency. The NLRBPA has nationwide officers, as well as GC-side and Board-side grievance chairs; there is a three-step grievance procedure, originating in the office where the grievant works.

When the Agency was reorganized in August 2013, the labor relations function was transferred from the Division of Operations Management to the newly-created Division of Legal Counsel. The primary Agency officer for labor relations is the Associate General Counsel (AGC) for Labor and

Employee Relations, in the Division of Legal Counsel, who deals with labor matters on a daily basis, with appropriate consultation with Management at Headquarters or in the Field. All negotiations with both the NLRBU and the NLRBPA are coordinated and handled by the AGC. Although much of the AGC's work includes advice and services to the Division of Operations Management, the AGC is no longer supervised by that Division. As appropriate, the AGC consults with the Office of Human resources and other affected offices.

III. Analysis and Conclusions

A. The NLRBU and NLRBPA Certifications

The Authority has long held 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. *Dep’t of the Army Headquarters, Fort Dix, Fort Dix, N.J.*, 53 FLRA 287, 294 (1997) (*Fort Dix*). The Authority interprets *Ft Dix* broadly, to encompass not only new employees hired into previously existing positions, but also to employees in newly created positions that fall within the express terms of the existing certification. *See Soc. Sec. Admin., Office of Disability Adjudication & Review, Falls Church, Va.*, 62 FLRA 513, 514-15 (2008).

The relevant NLRBU certification includes “all professional employees of the OGC in the Regional, Subregional, and Resident Offices.” Until 2013, the employees at issue in this case were assigned work peculiar to the Regions and operated within the Regional chains of command. With the creation of the FOIA Branch and their acceptance of positions in the FOIA Branch, they now have identical job assignments as FOIA Branch employees located at Headquarters. They operate within the organizational structure of the FOIA Branch at Headquarters, including performance standards, leave approval, disciplinary standards, etc. Nonetheless, they remain (at least part of the time, when they are not teleworking) *in* the Regional, Subregional, or Resident offices. Thus, the NLRBU argues, the remotely located FOIA Specialists and Attorneys fit within the express terms of the NLRBU certification. According to the NLRBU, the employees’ physical locations are determinative of their placement in the NLRBU unit.²

² The NLRBU also argues that because it represents NxGen Analysts, who are supervised from Headquarters but work in the Regions, the FOIA Attorneys and Specialists, who are supervised from Headquarters and work in the Regions, should also be included in the NLRBU unit. However, the present petition seeks clarification with respect to the FOIA

The relevant certification for the NLRBPA, includes “[a]ll attorneys and other professionals performing comparable legal work . . . in the Headquarters Office of the General Counsel of the National Labor Relations Board.” The NLRBPA argues that the remotely located FOIA employees share a significant majority of working conditions with their colleagues in the FOIA Branch at Headquarters. The NLRBPA contends that the language “*in* the Headquarters Office” refers not to the employees’ physical locations, but to the organizational structure of which they are all a part. *See Soc. Sec. Admin., Office of Disability Adjudication and Review, Dallas Region, Dallas, Tex.*, 66 FLRA 1, 1-2 (2011) (*SSA Dallas*) (regional office employees, although geographically located at the district office, fell within the express terms of NTEU’s certification for regional office employees).

In *United States Dep’t of the Navy, Naval Facilities Eng’g Command Southeast, Jacksonville, Fla.*, 68 FLRA No. 39 (2015) (*NAVFAC*), the Authority upheld the Regional Director’s finding in a case concerning employees physically located in one location, but with organizational ties to another. There, the IAMAW was certified to represent all non-professional employees “assigned to” the Public Works Department in Pensacola, Florida. The RD determined that despite the newly hired technicians’ physical presence in Pensacola, they were not included in the IAMAW unit’s certification. These technicians, along with other technicians who were located in Jacksonville, Florida, were supervised by a manager in Jacksonville. The RD declined to adopt IAMAW’s interpretation of “assigned to” as meaning “geographically located at.” Thus, he determined that these technicians fell within the express terms of an AFGE bargaining unit encompassing all non-professional employees of the Naval Facilities Engineering Command – Southeast.

The present case raises similar issues. Before August 2013, Lane, Sanabria, and Stokenbury had been employees of the OGC, working within the organizational structures of their Subregions and Regions. All of their conditions of employment (work assignments, leave, performance appraisals, etc.) were administered through their Subregions and Regions. Now, as employees of the FOIA Branch, they remain within the OGC, but their chain of command and all of their conditions of employment, with the exception of those specific to their physical locations, are established and managed within the FOIA Branch at Headquarters. I find that, like *SSA Dallas* and *NAVFAC*, the work

employees. The question of whether the FOIA employees belong in the NLRBU unit or the NLRBPA unit has been thoroughly investigated. It is unnecessary to consider NxGen Analysts in order to decide the question presented here.

assignments of Lane, Sanabria, and Stokenbury, and the organizational structure within which they operate, place them within the express terms of the NLRBPA certification. Their physical locations notwithstanding, they work “in the Headquarters office” of the NLRB, where the majority of the FOIA Branch, including their chain of command, is located.

The NLRBU argues that the plain language of the NLRBU certification places these FOIA employees in the NLRBU unit because they remain physically “in the Regional, Subregional, or Resident offices.” I find, however, that this single connection to the NLRBU certification is, at best, tenuous. It places far too much emphasis on their part-time presence in Subregional offices while ignoring the fact that the vast majority of these employees’ conditions of employment are determined by the FOIA Branch. Regarding their physical locations, the employees spend some time in the Subregional offices. However, they have virtually no professional connection to the Subregional offices, rarely discussing Agency work, and minimally using Subregional supplies and equipment.

Accordingly, I find that the FOIA Branch employees at issue here fall within the express terms of NLRBPA’s certification and should be included in that unit unless the addition of these employees would render the unit inappropriate.

B. Including Lane, Sanabria, and Stokenbury in the NLRBPA Unit Does not Render that Unit Inappropriate

Under 5 U.S.C. 7112 (a), in determining whether a unit is appropriate, the Authority examines whether the unit would: (1) ensure a clear and identifiable community of interest among employees in the unit; (2) promote effective dealings with the agency; and (3) promote efficiency of operations of the agency. *United States Dep’t of the Navy, Fleet & Indus. Supply Ctr., Norfolk, Va.*, 52 FLRA 950, 959-62 (1997) (*FISC*). These criteria are applied on a case-by-case basis. *United States Dep’t of the Army, Military Traffic Mgmt. Command, Alexandria, Va.*, 60 FLRA 390, 394 (2004). Some factors may weigh against finding a unit appropriate, but that does not mean that the unit is not appropriate, if other factors support the finding of an appropriate unit. *United States Dep’t of Commerce, U.S. Census Bureau*, 64 FLRA 399, 402-03 (2010). The Statute does not require that the unit be the most or the only appropriate unit. The proposed unit meets the requirements if it is an appropriate unit. *See U.S. Dep’t of the Air Force, Lackland Air Force Base, San Antonio, Tex.*, 59 FLRA 739, 741-42 (2004); *Def. Logistics Agency, Def. Supply Ctr. Columbus, Columbus, Ohio*, 53 FLRA 1114, 1127 n.7

(1998) (*DLA*); *American Fed’n of Gov’t Employees, Local 2004*, 47 FLRA 969, 973 (1993); *Dep’t of the Navy, Naval Station, Norfolk, Va.*, 14 FLRA 702, 704-05 (1984) (more than one unit structure is appropriate).

1. A community of interest exists between the FOIA Branch employees who work remotely and the FOIA Branch employees at Headquarters.

A community of interest involves a commonality or sharing of interests between employees in a unit. This ensures that employees can deal collectively with management as a single group. *See U.S. Dep’t of the Air Force, Travis Air Force Base, Cal.*, 64 FLRA 1, 6 (2009) (Member Beck, Dissenting) (citing *U.S. Dep’t of the Navy, Fleet & Indus. Supply Ctr., Norfolk, Va.*, 52 FLRA 950, 960 (1997) (*FISC*)). Factors to be considered include whether the employees: are part of the same organizational component of the agency; support the same mission; are subject to the same chain of command; have similar or related duties, job titles, and work assignments; are subject to the same general working conditions; and are governed by the same personnel and labor relations policies that are administered by the same personnel office. *FISC*, 52 FLRA at 960.

A review of the factors enumerated in *FISC* reveals that a strong community of interest exists between the FOIA Branch employees located in the Regions and those working in Headquarters. They support the same mission, answering FOIA requests filed with the NLRB. All FOIA Branch employees are within the same chain of command. Although the FOIA Branch is divided into two teams, their work is assigned along Regional lines rather than by subject matter. Both teams are overseen by MacNeil. All of the employees in the FOIA Branch, whether located in the field or in Headquarters, answer individualized requests as well as requests filed on a regular basis by the same requesters. The only significant difference in workload is that attorneys handle FOIA appeals, while specialists generally do not. The FOIA Branch employees are subject to the same personnel and labor relations policies as other employees throughout the Agency. The only difference between FOIA Branch employees at Headquarters and those in the Subregions is their physical locations. However, the fact that Lane, Sanabria, and Stokenbury do not share office space with the rest of the FOIA Branch does not, by itself, undermine the community of interest that otherwise exists within the FOIA Branch.

2. The inclusion of the remotely-located FOIA Branch employees in the NLRBPA unit promotes effective dealings with the Agency.

The requirement that the bargaining unit promote effective dealings concerns the relationship between management and the exclusive representative. In evaluating this factor, the Authority considers whether the inclusion of other units would result in the efficient use of resources; the parties' past collective bargaining experience; the locus and scope of the authority of the personnel office administering policies covering employees in the proposed unit; the limitations, if any, on the negotiation of matters of critical concern to employees in the proposed unit; and the level at which labor policy is set in the agency. *United States Dep't of the Air Force, 82nd Training Wing, 361st Training Squadron, Aberdeen Proving Ground, Md.*, 57 FLRA 154, 156 (2001) (*Aberdeen*).

The evidence reveals that the NLRBPA has a long history of bargaining with the Agency over matters concerning the professional employees it represents, on both the Board and General Counsel sides. There is no indication that the inclusion of FOIA Branch employees physically located outside Headquarters, but in all other respects connected with Headquarters through the FOIA Branch, would interfere with that collective bargaining relationship. Given the community of interest that exists among all FOIA Branch employees, the location of all FOIA Branch employees within a single bargaining unit would undoubtedly result in efficient use of the Agency's resources and would facilitate the negotiation of matters of concern to all of the FOIA Branch employees. Because labor, personnel, and other policies are established at the Headquarters level, all employees are affected similarly by these Agency actions, and having remotely-located FOIA Branch employees in the NLRBPA unit would not interfere with effective dealings when these matters are being addressed. The NLRBU argues that, if the FOIA Branch employees in the Subregional offices were included in the NLRBPA unit, they would lose their voice whenever matters related to office space were negotiated. As discussed above, physical location is one of many conditions of employment, and the evidence demonstrates that these employees now have far more in common with their FOIA Branch counterparts than with the Subregions. Moreover, they spend only part of their time in the Subregional offices, making any issues related to physical space even less significant.

3. The inclusion of the remotely-located FOIA Branch employees in the existing NLRBPA unit promotes efficiency of Agency operations.

In determining whether inclusion of certain employees in an existing bargaining unit would promote the efficiency of the agency's operations, the Authority examines the degree to which the unit structure bears a rational relationship to the operational and organizational structure of the agency. *Aberdeen*, 57 FLRA, at 156-57.

There are several reasons that the inclusion of the remotely-located FOIA employees bears a rational relationship to the operational and organizational structure of the NLRB. The FOIA Branch operates as a strong, single unit, with all employees performing the same type of work. There is no distinction within the organization between Headquarters employees and those in the field. All are subject to the same personnel and labor policies, and their performance, leave, discipline, and work assignments are managed uniformly within the same chain of command. Under these circumstances, I find that including the field-located FOIA Branch employees in the NLRBPA unit promotes efficiency of Agency operations.

Accordingly, I find that including the FOIA Branch employees located in the field in the NLRBPA unit would not render the unit inappropriate. The NLRBU argues that including the employees in its unit would be appropriate because of the parties' past practice and bargaining history. However, the parties' bargaining history is not determinative because only the FLRA can determine bargaining unit eligibility. *See, SSA Dallas*, 66 FLRA 2 (employees were included in the regional-office unit "despite the fact that they were treated as being" in the district-office unit); *See, also, American Fed'n of Gov't Employees, Local 3529 and United States Dep't of Defense, Defense Contract Audit Agency, Central Region, Irving, Texas*, 57 FLRA 633, 636 (2001) (Authority not bound by a Memorandum of Agreement between the parties regarding the eligibility of the employees);

IV. Order

The FOIA Branch employees located in Overland Park, Kansas; Winston-Salem, North Carolina; and San Juan, Puerto Rico fall within the express terms of the NLRBPA existing certification, and inclusion of these employees within the NLRBPA bargaining unit would not render the unit inappropriate under section 7112(a) of the Statute. Under these circumstances, the FOIA Branch employees located in Overland Park, Kansas;

Winston-Salem, North Carolina; and San Juan, Puerto Rico were automatically included in the NLRBPA unit upon their employment with the FOIA Branch. *Ft. Dix*, 53 FLRA at 295. Accordingly, further proceedings on the petition are not warranted and it is dismissed. *Nat'l Oceanic and Atmospheric Admin, Nat'l Marine Fisheries Serv., Northeast Region*, 24 FLRA 922, 927 (1986)

V. Right to Seek Review

Under section 7105(f) of the Statute and section 2422.31(a) of the Authority's Regulations, a party may file an application for review with the Authority **within sixty days** of this Decision. The application for review must be addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, NW, Washington, DC 20424-0001. The parties are encouraged to file an application for review electronically through the Authority's website, www.flra.gov. To file an application for review electronically go to the Authority's website, select **eFile** under the **Filing a Case** tab and follow the instructions.

Timothy J. Sullivan
Regional Director
Denver Region
Federal Labor Relations Authority

Dated: January 14, 2016