69 FLRA No. 79

UNITED STATES
DEPARTMENT OF THE AIR FORCE
AIR FORCE LIFE CYCLE MANAGEMENT CENTER
HANSCOM AIR FORCE BASE
MASSACHUSETTS
(Activity)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1384
(Union/Petitioner)

BN-RP-16-0009

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ORDER DENYING APPLICATION FOR REVIEW

September 6, 2016

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

I. Statement of the Case

The Union filed an application for review of the attached decision of Federal Labor Relations Authority (FLRA) Regional Director (RD) Philip T. Roberts. The Union petitioned the RD to clarify the bargaining-unit status of an employee who is on "extended active military leave"[1] because he is on active military service. The Activity eliminated the employee's position after he went on military leave, and reassigned him to a new position, purportedly in a different bargaining unit. The RD dismissed the petition, finding that any clarification determination must await the employee's return from active military service.

There are two substantive questions before us. The first question is whether the RD's decision warrants review because established law or policy warrants reconsideration, or because the RD failed to apply established law. The Union's arguments do not raise any issue as to whether established law or policy warrants reconsideration. As for whether the RD failed to apply established law, because the Union did not raise most of its arguments before the RD, the Authority's Regulations preclude the Union from making those arguments in this proceeding. As for the Union's remaining arguments, those arguments do not demonstrate that the RD failed to apply established law. Accordingly, the answer is no.

The second question is whether the RD's decision warrants review because the RD committed a clear and prejudicial error concerning a substantial factual matter. Because the Union does not demonstrate that the RD's decision is based on a clear and prejudicial factual error, the answer is no.

II. Background and RD's Decision

A. Background

Starting in 1991, the Union was the certified exclusive representative of a unit of professional employees in the Air Force Research Laboratory (research lab) located at Hanscom Air Force Base (Hanscom). Over the years, the certification has been amended to reflect and clarify changes in the name of the Activity. The RD found that the latest amendment occurred in 2015, "supersed[ing]" earlier amendments.[2] The 2015 amendment clarified the bargaining unit as including "[a]ll professional General Schedule[] employees employed by the Air Force Life Cycle Management Center [(Life-Cycle Center)] and duty-stationed at [Hanscom]."[3]

The employee in this case was in the bargaining unit and worked in the research lab as an electronics technician until he went on leave for active military service in 2008. Since his deployment, he has not received a paycheck from the Activity and, consequently, the RD found that he had not paid dues to the Union through deductions from his paycheck. In 2011, the Activity closed the research lab as part of a reorganization, effectively eliminating the employee's electronics-technician position.

In 2015, after the 2015 certification amendment, the Activity informed the employee that it had formally abolished his electronics-technician position and had reassigned him to a position in the Life-Cycle Center. Although the position is in the Life-Cycle Center, the Union asserts that the position is not in the Union's bargaining unit. Instead, the Union asserts, it is a position in a bargaining unit represented by another union.

The Union asked the RD to clarify the bargaining-unit status of the employee. The Union argued, in essence, that the employee's bargaining-unit status should not be changed while the employee is on

[1] RD's Decision at 1.

[2] *Id.* at 2 n.1; *see id.* at 1-2.

[3] *Id.* at 2.

military leave. The RD issued an order to show cause why the Union's petition should not be dismissed, to which the Union responded (Union's response to order to show cause).

B. RD's Decision

The RD dismissed the petition. First, the RD determined that the employee is not currently an employee of the Activity within the meaning of § 7103(a)(2) of the Federal Service Labor-Management Relations Statute (Statute).[4] In making this determination, the RD found that the employee is excluded from the definition of employee under § 7103(a)(2)(ii) of the Statute because he is on active military service.[5] Under § 7103(a)(2)(ii), the definition of employee "does not include . . . a member of the uniformed services."

Next, the RD determined that "no conclusion can be made about [the employee's] bargaining[-]unit status until he returns from active[-]duty service."[6] The RD observed that "[i]n order to decide whether to include or exclude a position from a bargaining unit, the Authority relies on testimony as to an employee's actual duties."[7] But, the RD also found, the employee "has no actual duties [in a civilian position at the Activity] at this time" "due to his deployment on active military [service]."[8] Therefore, the RD dismissed the Union's petition. The Union then filed an application for review of the RD's decision (application).

III. Analysis and Conclusions

A. The Union fails to demonstrate that the RD's decision warrants review because established law or policy warrants reconsideration, or because the RD failed to apply established law.

Citing § 2422.31(c)(2) of the Authority's Regulations,[9] the Union contends that the RD's decision warrants review because "established law or policy warrants reconsideration."[10] An assertion that established law or policy warrants reconsideration states a ground on which the Authority may grant an application for review under § 2422.31(c)(2).[11] However, for review to be granted on this ground, the application must identify an established law or policy, and contend that the Authority should reconsider that established law or policy.[12]

The Union's contention misinterprets this ground for review of an RD's decision. The Union does not identify any established law or policy that the Union contends the Authority should reconsider. Instead, the Union argues that the RD's decision "violates"[13] a particular law, the Uniformed Services Employment and Reemployment Rights Act (USERRA).[14] The Union also argues that the RD's decision violates "the Union's certification of representative."[15] And the Union argues that the RD's decision warrants review because the parties' collective-bargaining agreement requires that the employee remain in the Union's bargaining unit until the employee's return from military service.[16] Last, the Union argues that the employee should not currently be considered to be in the other union's bargaining unit, citing the Department of Labor's (DOL) definition of "employee" under the Fair Labor Standards Act (FLSA),[17] and, separately, argues that the Activity bypassed the Union when the Activity reassigned the employee, without negotiating with the Union, after the Activity closed the research lab.

Under the framework set forth above, the Union's arguments do not raise any issue as to whether established law or policy warrants reconsideration within the meaning of § 2422.31(c)(2). However, in situations such as this, the Authority has construed an application for review as asserting that the RD failed to apply established law under § 2422.31(c)(3)(i).[18] But, even if we were to construe the Union's arguments as contending that the RD failed to apply established law, the Union did not raise most of these arguments to the RD. That is, the Union did not argue before the RD that the RD should clarify the employee's bargaining-unit status based on the Union's or the employee's rights under USERRA, the Union's certification of representative, or the parties' collective-bargaining agreement. The Union merely asserted that it "believes" the employee should remain in the Union's bargaining unit until "the effective date of his new job" at the Activity.[19]

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[4] 5 U.S.C. § 7103(a)(2).
[5] *Id.* § 7103(a)(2)(ii).
[6] RD's Decision at 4.
[7] *Id.* (citations omitted).
[8] *Id.*
[9] 5 C.F.R. § 2422.31(c)(2).
[10] Application at 1.
[11] 5 C.F.R. § 2422.31(c)(2); *U.S. Dep't of the Air Force, Air Force Life Cycle Mgmt. Ctr., Hanscom AFB, Mass.*, 69 FLRA 483, 485 (2016) (*Hanscom*); *U.S. Dep't of Transp., FAA*, 63 FLRA 356, 360 (2009) (citation omitted).
[12] *Hanscom*, 69 FLRA at 485.
[13] Application at 4.
[14] 38 U.S.C. §§ 4301-4335.
[15] Application at 4.
[16] *Id.* at 3.
[17] *Id.* (citing 29 U.S.C. § 203).
[18] 5 C.F.R. § 2422.31(c)(2)(i). *See Hanscom*, 69 FLRA at 485; *SSA, Kissimmee Dist. Office, Kissimmee, Fla.*, 62 FLRA 18, 22 (2007); *U.S. Dep't of VA*, 60 FLRA 887, 888 (2005).
[19] Union's Response to Order to Show Cause at 5.

Under § 2422.31(b) of the Authority's Regulations, "[a]n application may not raise any issue or rely on any facts not timely presented to the . . . [RD]."[20] Similarly, § 2429.5 of the Authority's Regulations precludes a party from raising, to the Authority, "arguments . . . that could have been, but were not, presented in the proceedings before the [RD]."[21] Because the Union could have presented to the RD the reasons the Union now cites for clarifying that the employee remains in the Union's bargaining unit, but the Union did not do so, §§ 2422.31(b) and 2429.5 preclude it from doing so now.[22] Accordingly, we reject the Union's contention that the RD's decision warrants review because the RD failed to apply established law.

As for the Union's remaining arguments, the argument – that the employee should not currently be considered to be in the other union's bargaining unit, citing DOL's definition of "employee" under the FLSA – does not address the RD's decision not to resolve the employee's bargaining-unit status until the employee returns from active military service. And the Union's argument that it was bypassed does not raise the kind of unit-clarification issue that is resolved in a unit-clarification proceeding such as we have before us here. Consequently, neither argument demonstrates that the RD failed to apply established law when he dismissed the Union's petition.

B. The Union fails to demonstrate that the RD's decision warrants review because the RD committed a clear and prejudicial error concerning a substantial factual matter.

The Authority may grant an application for review of an RD's decision if the application demonstrates that the RD "[c]ommitted a clear and prejudicial error concerning a substantial factual matter."[23] The Union contends that the RD committed a clear and prejudicial error concerning a substantial factual matter by finding that the 2015 amendment to the Union's bargaining-unit certification "superseded" an earlier certification describing the bargaining unit as including employees of the research lab at Hanscom.[24] The Union asserts that the earlier certification remains a valid certification.[25]

Although there is no evidence in the record that the earlier certification has been revoked, it is undisputed that the Activity closed the Hanscom research lab. And even if the RD committed a factual error as the Union argues, the Union fails to establish that such an error was the basis for the RD's decision that the employee's bargaining-unit status could not be clarified until the employee's return from military service. The RD's decision is not based on the identity of the bargaining unit. Rather, it is based on facts concerning the employee's active military service – that he is not currently an Activity employee and does not have any current duties with the Activity. Consequently, the Union has not demonstrated that the RD committed a clear factual error prejudicial to the Union.[26] Accordingly, we find that the Union fails to establish that the RD's decision warrants review on this ground.

IV. Order

We deny the Union's application for review.

[20] 5 C.F.R. § 2422.31(b).
[21] *Id.* § 2429.5.
[22] *E.g.*, *Hanscom*, 69 FLRA at 484; *U.S. Dep't of the Navy, Navy Undersea Warfare Ctr., Keyport, Wash.*, 68 FLRA 416, 418 (2015).
[23] 5 C.F.R. § 2422.31(c)(3)(iii).
[24] Application at 4.
[25] *Id.*
[26] *See U.S. Dep't of the Air Force, Edwards Air Force Base, Cal.*, 62 FLRA 159, 163 (2007).

FEDERAL LABOR RELATIONS AUTHORITY
BOSTON REGION

DEPARTMENT OF THE AIR FORCE
AIR FORCE LIFE CYCLE MANAGEMENT CENTER
HANSCOM AIR FORCE BASE
MASSACHUSETTS
(Activity)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1384
(Union/Petitioner)

BN-RP-16-0009

DECISION AND ORDER

I. Statement of the Case

On February 1, 2016, the National Federation of Federal Employees, Local 1384 (Petitioner) filed a petition with the Boston Regional Office of the Federal Labor Relations Authority (FLRA) seeking a determination as to whether, given an alleged change in an employee's position, an agency can reassign the employee and change that employee's bargaining unit status, while that employee is on extended active military leave. Because the evidence fails to support the petition that Murrin should remain in the NFFE bargaining unit while on active duty, I am dismissing this petition.

II. Findings

A. History

The FLRA Boston Region's investigation revealed that the National Federation of Federal Employees, Local 975, was certified on November 29, 1971, in Case No. 31-3338 EO, as the exclusive representative of a unit of employees of the Department of the Air Force, Electronics System Division, L.G. Hanscom Field, Bedford, Massachusetts. The unit was described as follows:

INCLUDED: All non-supervisory professional General Schedule employees serviced by the Central Civilian Personnel Office, L.G. Hanscom Field, Bedford Mass.

EXCLUDED: All non-professional employees, supervisory and managerial personnel, guards, firefighters, employees engaged in Federal personnel work other than in a purely clerical capacity, and all General Schedule employees of the Air Force Cambridge Research Laboratories.

On April 3, 1991, the above-referenced certification was amended in FLRA Case No. 1-AC-10002 to reflect the designation of the National Federation of Federal Employees, Local 1384 as the certified exclusive representative of the bargaining unit.

On March 15, 2012, in FLRA Case No. BN-RP-12-0023, the certification was further amended to reflect and clarify the change in name of the activity. The unit was described as follows:

INCLUDED: All professional General Schedule employees employed by the Electronic Systems Center (ESC) and the 66 Air Base Group (ABG) duty-stationed at Hanscom Air Force Base, Massachusetts.

EXCLUDED: All non-professional employees, management officials, supervisors, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6), and (7).

On April 23, 2015, in FLRA Case Nos. BN-RP-14-0015 and BN-RP-15-0005, the certification was further amended to reflect and clarify the change in name of the activity after a reorganization.[27] The unit was described as follows:

[27] In Petitioner's response to the Order to Show Cause, Petitioner claims that the proper bargaining unit was certified in CH-RP-10-0037 as including all professional and nonprofessional employees of the Air Force Research Laboratory, duty-stationed at Hanscom Air Force Base, Massachusetts, excluding management officials, supervisors, AFRL Wage Grade employees, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7). Given that the AFRL was subject to a BRAC in 2011, and superseded by BN-RP-14-0015 & BN-RP-15-0005, the unit described in the Petitioner's response no longer applies.

INCLUDED:	All professional General Scheduled employees employed by the Air Force Life Cycle Management Center (AFLCMC) and duty-stationed at Hanscom Air Force Base, Massachusetts.
EXCLUDED:	All non-professional supervisors, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6), and (7).

B. James Murrin

James J. Murrin was a bargaining unit employee in the above-referenced bargaining unit. Murrin occupied the position of Electronics Technician, GS-0856-12, which was in the Air Force Research Laboratory (AFRL) located at Hanscom Air Force Base, Massachusetts.

In 2008, Murrin went on active duty for the United States Army. Murrin has been deployed overseas since 2008. Currently, Murrin is stationed in Germany, and may return to his civilian position at Hanscom Air Force Base at some unknown point in the future.

Around September 15, 2011, the Air Force Research Laboratory located at Hanscom Air Force Base, Massachusetts was abolished during a Base Realignment and Closure (BRAC). Employees affected by the BRAC were offered qualified position at Hanscom Air Force Base, Massachusetts. Employees also had the option of moving to other Air Force Research Laboratories at other Air Force Bases throughout the United States.

As a result of the BRAC, the Air Force Research Laboratory at Hanscom Air Force Base, Massachusetts is no longer operational, and therefore Murrin's Electronics Technician position at the Air Force Research Laboratory at Hanscom Air Force Base, Massachusetts, has been abolished. Pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA), returning military servicemen are to be reemployed in the job that they would have attained had they not been absent for military service.[28] Since Murrin was on active duty and his position was subject to the BRAC, his position was not initially abolished at the time of the AFRL closure. This action prevented he completion of the BRAC because Murrin's position was left active.

In 2014, the Agency found a comparable position at Hanscom Air Force Base, Massachusetts in which it could place Murrin so that it could close out the BRAC. By reassigning Murrin into a comparable vacant position, the Agency was able to close out the BRAC and provide Murrin with a comparable position on paper in an effort to comply with USERRA.

On May 19, 2015, Murrin was given a Notice of Placement Memorandum that noted the Agency's records indicate that he occupied a position that was eliminated during the BRAC in 2011. The Notice of Placement stated that the Agency found a position that Murrin could be reassigned to at Hanscom AFB, and thus he was being notified of his placement into an Acquisition Program Manager, GS-1101-12 position. The Notice of Placement further noted that because there were no GS-0856-12 positions at Hanscom AFB, he was being placed into a vacant position for which he was fully qualified.

On August 9, 2015, the Agency executed the personnel action referenced above. Murrin was officially reassigned to the Acquisition Program Manager position in the Air Force Life Cycle Management Center at Hanscom AFB.

The Acquisition Program Manager, GS-1101-12 position in the AFLCMC at Hanscom AFB is a position that is not in the NFFE Local 1384 bargaining unit. The Acquisition Program Manager position is a position in the NAGE Local R1-8 bargaining unit at Hanscom, AFB. By reassigning Murrin to his new position, Murrin was effectively removed from the NFFE Local 1384 bargaining unit.

At all times relevant to the reassignment, Murrin has been stationed overseas and has been on LWOP-US for active military duty. As such, Murrin has not received a paycheck from the Agency since 2008 when he was placed on active military duty. Since Murrin has not received a paycheck from the Agency, he also has not had dues withdrawn from his paycheck for NFFE Local 1384 since leaving for active duty. No evidence was presented to challenge that conclusion.

Since Murrin has been on active duty since 2008, he has not begun performance of his duties as an Acquisition Program Manager, GS-1101-12. He may perform the duties of an Acquisition Program Manager if or when he returns to Hanscom Air Force Base.

III. Analysis and Conclusions

The evidence clearly indicates that Murrin has been on active duty military leave since approximately 2008. Although he was employed as an Electronics Technician at the Air Force Research Laboratory in Hanscom Air Force Base – a position that was in the bargaining unit represented by NFFE Local 1384 – the

[28] Uniformed Services Employment and Reemployment Rights Act. 38 U.S.C. §§ 4301 – 4335.

AFRL was closed pursuant to a BRAC in 2011. To close out the BRAC, Murrin had to be offered a comparable position either within Hanscom or in another AFRL at another base in the United States. However, because Murrin was on active duty military leave, the Agency was unable to offer him a comparable position at the time. In order to comply with the provisions of USERRA, the Agency left Murrin's position alone until it could find a suitable position in which to place him.

In 2014, the Agency determined that Murrin qualified for the vacant positon of Acquisition Program Manager, which removed him from the NFFE Local 1384 bargaining unit and placed him in the NAGE Local R1-8 bargaining unit. Petitioner asserts that the Agency is not allowed to change Murrin's bargaining unit status until he returns from active duty. Petitioner asserts that Murrin has paid dues the entire time he has been deployed, but failed to provide evidence of that, while the Agency provided Roster Sheets indicating that Murrin was not paying dues.

Since Murrin was on active duty military leave, he has not been receiving a paycheck from Hanscom AFB since his 2008 deployment. Thus, Murrin has not had dues withdrawn from his paycheck to pay NFFE Local 1384. Since Murrin is still deployed on active duty, he has yet to assume his duties as an Acquisition Program Manager.

Section 7103(a)(2) defines an employee for the purposes of the Statute as an individual in an agency, but specifically excludes from that definition a member of the uniformed services.[29] Since Murrin is on active duty in the uniformed services since 2008, the evidence supports the conclusion that Murrin currently is not an employee of Hanscom AFB.

In order to decide whether to include or exclude a position from the bargaining unit, the Authority relies on testimony as to an employee's actual duties.[30] Although evidence such as a position description for a position, may be useful in making unit determinations, it is not controlling. Future duties may be considered only where it is established that there are definite and imminent changes planned by the agency.[31] Here, the employee has no actual duties due to his deployment on active military duty. Murrin has not performed any civilian duties since 2008. Furthermore, future duties that he may or may not undertake are purely speculative at this point. Murrin may not return from active duty for a number of reasons, and even if he does return, he may elect not to take the Acquisition Program Manager position. Thus, the evidence supports the conclusion that Murrin has no actual duties at this time, and so there can be no conclusion made as to which bargaining unit Murrin should be appropriately placed.

Where an employee has recently been placed in a position, duties are considered to have been actually assigned where: (1) it has been demonstrated that, apart from a position description, an employee has been informed that he or she will be performing the duties; (2) the nature of the job clearly requires those duties; and (3) the employee is not performing those duties at the time of the hearing solely because of lack of experience on the job. The Authority does not consider duties to have been actually assigned where (1) the assignment of duties is speculative, because the nature of the job may change or the nature of the job does not require such duties; or (2) although duties may be included in a written position description, it is not clear that duties actually will be assigned to the employee or that the employee has been informed that he or she will perform those duties. *Id*. Murrin is still deployed on active military duty, and although on paper he has been reassigned to the Acquisition Program Manager position, he has not actually been assigned any duties of that position. Thus, the evidence supports the conclusion that Murrin is not assigned any duties at this point, and therefore has no actual duties.

Therefore, based on the evidence presented, the evidence fails to support the petition that Murrin should remain in the NFFE bargaining unit, and accordingly, further proceedings are not warranted.

IV. Order

IT IS ORDERED that the petition in this case be dismissed.

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 filed with the Authority by **July 12, 2016,** and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, N.W., Washington, DC 20424-0001. The parties are encouraged to file an

[29] *Dep't of the Air Force, Hanscom, AFB, Bedford, Ma.,* 14 FLRA 266, 268 (1984).
[30] *See Dep't of Veterans Affairs, Wash., D.C.,* 60 FLRA 749, 751 n.3 (2005); and *Dep't of HUD, Wash., D.C.,* 35 FLRA 1249, 1256-57 (1990).
[31] *United States Dep't of Agric., Food Safety and Inspection Serv.*, 61 FLRA 397, 400-01 (2005).

application for review electronically through the Authority's website, www.flra.gov.[32]

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Philip T. Roberts, Regional Director
Boston Region
Federal Labor Relations Authority
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Dated: May, 13 2016

[32] To file an application for review electronically, go to the Authority's website at **www.flra.gov**, select **eFile** under the **Filing a Case** tab and follow the instructions.