

73 FLRA No. 133

TIDEWATER REGION MARKET
DEFENSE HEALTH AGENCY
U.S. DEPARTMENT OF DEFENSE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO
(Petitioner/Labor Organization)

and

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
(Petitioner/Labor Organization)

WA-RP-22-0035
WA-RP-22-0053

ORDER DENYING
APPLICATION FOR REVIEW

September 28, 2023

Before the Authority: Susan Tsui Grundmann,
Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

In the attached decision and order (decision), Federal Labor Relations Authority Regional Director Jessica S. Bartlett (the RD) found the Defense Health Agency (DHA), Tidewater Market (Tidewater Market) is the successor employer of professional and non-professional employees who organizationally transferred to Tidewater Market from various Department of Defense (DOD) facilities. She also found an election was not necessary to determine what labor organization would represent the transferred employees, because the American Federation of Government Employees (AFGE) represents a sufficient number of the employees. However, she directed an election to allow professional employees to decide whether they want to be included in a unit with non-professional employees.

The National Association of Independent Labor (NAIL) filed an application for review of the RD's decision (application). For the following reasons, we deny NAIL's application.

II. Background and RD's Decision

As discussed in greater detail in the attached RD's decision, previously, various military branches within DOD exercised authority over the military and dental treatment (treatment) facilities at issue here. In 2018, DOD gave DHA authority over all the treatment facilities, and organizationally transferred the treatment facilities' employees to DHA. In 2022, DHA "stood up" the Tidewater Market and organizationally realigned, under that Market, the treatment facilities and their employees.¹ The Tidewater Market consists of three "parent" treatment facilities, each with its own director.² All three directors of the parent treatment facilities report to a single director of the Tidewater Market.

Before the reorganization, the realigned employees were in six different bargaining units – two represented by AFGE, two by NAIL, and two by the National Association of Government Employees. AFGE and NAIL each filed representation petitions, asking the RD to determine whether the Tidewater Market is the transferred employees' successor employer and, if so, what labor organization(s) would serve as the employees' exclusive representative.³

In her decision, the RD set forth the Authority's established test for successorship,⁴ and first found that all six bargaining units were organizationally transferred to DHA when the Tidewater Market was created. Next, she resolved a dispute among the parties regarding what the unit structure should be. NAIL argued the Authority should maintain the status quo by keeping the bargaining units separated by parent facility, with NAIL representing the employees of one of those facilities. However, AFGE and DHA argued there should be either a single, mixed unit of professionals and nonprofessionals, or two units (one professional, one non-professional) of employees, recognized at the Tidewater Market level.

Citing Authority precedent, the RD stated that, "[w]hen there are competing petitions alleging different appropriate units, the Authority will first consider the appropriate[-]unit claim that will most fully preserve the status quo in terms of unit structure and the relationship of employees to their chosen exclusive representative."⁵ As

¹ RD's Decision at 2.

² *Id.* at 5.

³ *Id.* at 1.

⁴ *Id.* at 9 (citing *Naval Facilities Eng'g Serv. Ctr., Port Hueneme, Cal.*, 50 FLRA 363 (1995)).

⁵ *Id.* at 10 (citing *U.S. Dep't of the Navy, Commander Naval Base, Norfolk, Va.*, 56 FLRA 328, 332 (2000) (Chairman Wasserman concurring in part and dissenting in part) (COMNAVBASE)).

that principle applied to NAIL's proposed unit structure, she first resolved NAIL's petition.

The RD set forth the criteria for assessing whether a proposed bargaining unit is appropriate under § 7112(a) of the Federal Service Labor-Management Relations Statute,⁶ specifically, whether the proposed unit would: (1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency involved; and (3) promote efficiency of the operations of the agency involved.⁷ Again citing Authority precedent, the RD noted that, to assess whether NAIL's proposed separate unit remained appropriate, she also needed to determine: "whether the employees [in the proposed separate unit] share a community of interest that is 'different or unique' from the community of interest shared by" the other Tidewater Market employees;⁸ and whether maintaining separate units would "result in undue fragmentation or confusion in labor-management relations."⁹

The RD noted that,

NAIL's main argument in favor of finding a separate community of interest . . . relates to the geographic separation of the three Tidewater Market [treatment facilities] and the fact that there is traffic and the need to traverse bridges and/or tunnels in order to get from one [treatment] facility to another.¹⁰

The RD acknowledged that geographic proximity and distinct local concerns weighed in favor of separate units. She also found "a small amount of functional/operational separation based on [the] fact that [the facility where NAIL-represented employees work] is an Army-led facility where the other two [treatment facilities] within Tidewater Market are predominantly located on Air Force and Navy facilities."¹¹

Nonetheless, the RD found that, "on balance," those factors were "insufficient to support a finding that employees have a separate and distinct community of interest."¹² In this regard, she stated that, "due to the new structure of DHA that was created through the reorganization and the creation of . . . [the] Tidewater

Market," the "vast majority of community[-]of[-]interest factors at [the facility where NAIL-represented employees work] are shared with the other Tidewater Market employees."¹³ The RD acknowledged that "[o]ne unusual feature of DHA is that civilian employees, while employed by DHA, in some circumstances, are supervised by members of the various military branches."¹⁴ "However," she continued, "both the civilian employees and the military service members execute duties that fall under DHA's area of responsibility and fall under the command of the DHA Director and not any other military branch chain of command."¹⁵ She determined that, "[a]fter the reorganization, all DHA civilian employees now operate under the same policies, procedures, and guidance regardless of location," and "do not follow the regulations or instructions of any of the military services."¹⁶ She concluded that, although the individual treatment facilities were originally created as part of specific military branches, they "are now part of the Tidewater Market."¹⁷

In addition, the RD determined that, post-reorganization, the "[o]rganizational structure, mission, chain of command, [and human-resources] and [labor-relations] policies are all the same within the Tidewater Market no matter where employees work."¹⁸ She concluded NAIL's proposed unit lacked a community of interest that is different and unique from the remaining Tidewater Market employees.

Next, the RD found granting NAIL's petition "would unnecessarily fragment the unit(s)" and require DHA to negotiate several collective-bargaining agreements, leading to confusion in labor-management relations.¹⁹ She further found a Tidewater Market-level unit(s) would "have a rational relationship to the organizational structure of the Tidewater Market," as "DHA planned for Market[-]level bargaining by setting up its [human-resources] and [labor-relations] offices at the Agency level but with [human-resources/labor-relations] personnel working at the Market level, not the [treatment-facility] level."²⁰

Thus, the RD rejected NAIL's proposed unit structure and proceeded to address whether AFGE's and DHA's proposed unit(s) were appropriate. Relying on numerous factors – including that "Tidewater Market employees can be placed on [temporary duty assignments (TDYs)] at the various [treatment facilities], giving the

⁶ 5 U.S.C. § 7112(a).

⁷ RD's Decision at 10 (citing *U.S. Dep't of Com., U.S. Census Bureau*, 64 FLRA 399, 402 (2010)).

⁸ *Id.* (quoting *U.S. Dep't of the Navy, Naval Facilities Eng'g Command Mid-Atl., Norfolk, Va.*, 70 FLRA 263, 266 (2017)).

⁹ *Id.* (citing *U.S. Dep't of the Navy, Fleet & Indus. Supply Ctr., Norfolk, Va.*, 52 FLRA 950 (1997)).

¹⁰ *Id.* at 11.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 11.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

employees some degree of interchange” – the RD determined the employees in the Tidewater Market share a “strong” community of interest.²¹ She also found Tidewater Market-level unit(s) would promote effective dealings and efficiency of Agency operations, and she concluded such unit(s) would be appropriate.

Further, the RD found AFGE represented a “sufficiently predominant” number of the Tidewater Market employees – 81% of the professional employees and 71% of the non-professional employees.²² Therefore, she determined that an election was not necessary to determine which union would represent the employees, and that AFGE would represent them. However, finding the professional employees never voted on being included in a unit with non-professional employees, she directed an election to allow the professional employees to determine whether they wanted to be in such a unit.

NAIL filed the application on August 25, 2023. AFGE filed an opposition to the application on September 8, 2023.

III. Analysis and Conclusions

NAIL argues that the RD erred in various respects.²³ At the outset, we note that NAIL does not specify a particular ground for review set forth in § 2422.31(c) of the Authority’s Regulations.²⁴ However, even if we construe its arguments as claiming that, in various respects, the RD failed to apply established law and committed clear and prejudicial errors concerning substantial factual matters, we deny the application for the reasons below.²⁵

According to NAIL, the RD erred in stating that civilian employees do not follow any military service’s regulations or instructions.²⁶ In this regard, NAIL asserts that, “[i]f an employee wants to enter a military base, they

must conform to the rules, regulations, and policies established by the Commanding Officer of the base.”²⁷ NAIL contends different officers from different military branches supervise each parent treatment facility, and those military officers are required to follow their respective military branch’s requirements.²⁸ NAIL also contends that, under a Tidewater Market-level unit structure, implementing any new directives imposed by a single military department “would most likely create such an impossible task as to prevent [the directives] implementation.”²⁹ NAIL argues that the RD “provide[d] only a cursory review of th[is] issue, referring to it as ‘one unusual feature’” of DHA.³⁰

As an initial matter, the RD did not find that the employees are exempt from Commanding Officers’ rules, regulations, and policies regarding *presence on a base*. Rather, in context, it appears that the RD was discussing *human-resources* and *labor-relations* policies.³¹ In any event, NAIL does not cite any record evidence or legal authority to support its claims. Therefore, those claims do not demonstrate that the RD either made clear and prejudicial errors concerning substantial factual matters or failed to apply established law.³²

NAIL also contends the RD “ignore[d] that DHA does not have a plan for” a reduction in force (RIF), and asserts that having a Tidewater Market-wide competitive area for RIFs would violate RIF regulations because employees would be competing for positions that are more than fifty miles away.³³ In the background section of her decision, the RD stated DHA provided testimony “that the competitive area for any RIF may be done at the Market level,” but she also stated DHA “has not formally decided on the competitive area that would be used in the event of a RIF.”³⁴ Thus, contrary to NAIL’s contention, the RD did

²¹ *Id.* at 12.

²² *Id.* (citing *Def. Logistics Agency, Def. Supply Ctr. Columbus, Columbus, Ohio*, 53 FLRA 1114, 1134 (1998)).

²³ Application at 1-4.

²⁴ 5 C.F.R. § 2422.31(c)(1)-(3) (“The Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds: (1) [t]he decision raises an issue for which there is an absence of precedent; (2) [e]stablished law or policy warrants reconsideration; or, (3) [t]here is a genuine issue over whether the Regional Director has: (i) [f]ailed to apply established law; (ii) [c]ommitted a prejudicial procedural error; or (iii) [c]ommitted a clear and prejudicial error concerning a substantial factual matter.”).

²⁵ See, e.g., *Dep’t of Com., Nat’l Oceanic & Atmospheric Admin., Nat’l Marine Fisheries Serv., Se. Fisheries Sci. Ctr.*, 73 FLRA 238, 240 (2022) (finding that even if the Authority construed a party’s arguments in its application as raising recognized grounds for review, those arguments did not demonstrate that the Regional Director erred).

²⁶ Application at 4.

²⁷ *Id.*

²⁸ *Id.* at 3.

²⁹ *Id.*

³⁰ *Id.*

³¹ See RD’s Decision at 6 (stating that, “[a]fter the reorganization, all DHA civilian employees now operate under the same policies, procedures, and guidance regardless of location,” and “do not follow the regulations or instructions of any of the military services”); 11 (concluding the “[*human-resources*] and [*labor-relations*] policies are all the same within the Tidewater Market no matter where employees work[.]” (emphasis added)).

³² See, e.g., *Dep’t of the Army, Fort Carson Fire & Emergency Servs., Fort Carson, Colo.*, 73 FLRA 1, 3 (2022) (*Fort Carson*) (finding a party cited no evidence to support argument and therefore failed to provide a basis for the Authority to conclude the RD committed a clear and prejudicial factual error); *U.S. Dep’t of the Navy, Fleet Readiness Ctr. Sw., San Diego, Cal.*, 63 FLRA 245, 252 (2009) (*Fleet Readiness*) (finding a party did not support claim that RD failed to apply established law).

³³ Application at 3-4 (citing 5 C.F.R. §§ 351.203, 351.402).

³⁴ RD’s Decision at 7.

not “ignore[]” that DHA did not have a plan for a RIF.³⁵ In any event, in conducting her appropriate-unit assessments, the RD did not expressly rely on RIF competitive areas. Even if she implicitly did so, NAIL does not cite any record evidence that demonstrates the RD made an erroneous factual finding. In addition, nothing in the RD’s decision would require DHA to structure competitive areas in any particular way, let alone in a way that would conflict with RIF regulations. Further, even if the unit employees would ultimately be in different RIF competitive areas, that factor, standing alone, would not necessarily demonstrate that the RD erred in her appropriate-unit determinations.³⁶ For these reasons, we find NAIL’s contentions do not demonstrate the RD made clear and prejudicial errors concerning substantial factual matters or failed to apply established law.

Further, NAIL notes the RD’s statement that civilian employees perform TDY assignments throughout the Tidewater Market, and asks, “Does that mean the employee will be entitled to/covered by the [F]ederal [T]ravel [R]egulation[] at 41 C.F.R. Parts 300-304?”³⁷ To the extent NAIL is disputing the RD’s factual finding, or arguing that it conflicts with the Federal Travel Regulation, NAIL provides no supporting arguments or evidence that the RD erred in either regard. Therefore, we reject NAIL’s arguments as unsupported.³⁸

Finally, according to NAIL, separate units at the different treatment facilities remain appropriate,³⁹ and if the RD “actually considered the appropriate[-]unit claim which would most fully preserve the status quo in terms of unit structure and the relationship to their chosen exclusive representative, there was no reason to proceed beyond” assessing NAIL’s proposed unit structure.⁴⁰ NAIL asserts that maintaining separate units would “allow the employees to have a voice in choosing their representative,” and that “[t]his should be the primary concern, not what may be the most convenient unit for DHA or AFGE.”⁴¹ In this regard, NAIL asserts “the rationale for a single unit is difficult to find in the [RD’s] decision[,] [o]ther than the fact that it is easier on DHA.”⁴² NAIL also asserts that “there is no rational basis for creating a single market” of the individual facilities, given the differences in the areas.⁴³

As stated previously, in resolving the competing petitions, the RD first assessed NAIL’s proposed unit structure, as that would most fully preserve the status quo in terms of unit structure and the relationship of employees to their chosen exclusive representative.⁴⁴ However, applying Authority precedent to her factual findings, she concluded that, post-reorganization, that unit structure is no longer appropriate.⁴⁵ In reaching that conclusion, she relied on numerous factors – not merely what would be “most convenient” or “easier” for either DHA or AFGE.⁴⁶ NAIL’s arguments do not address any of the findings underlying the RD’s conclusion or explain why they are clearly erroneous. Nor do NAIL’s arguments cite any legal authority demonstrating the RD erred as a matter of law. Therefore, we reject NAIL’s unsupported arguments.⁴⁷

For the above reasons, NAIL does not demonstrate that the RD failed to apply established law or committed clear and prejudicial errors concerning substantial factual matters. Accordingly, we deny the application.

IV. Order

We deny NAIL’s application for review.

³⁵ Application at 3.

³⁶ *U.S. SEC, Wash., D.C.*, 56 FLRA 312, 316 (2000) (“[W]hile separate RIF competitive areas may be a factor in assessing community of interest, there is no precedent supporting the [a]gency’s argument that this issue should be considered dispositive.”).

³⁷ Application at 4.

³⁸ See, e.g., *Fort Carson*, 73 FLRA at 3; *Fleet Readiness*, 63 FLRA at 252.

³⁹ Application at 2.

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 4.

⁴⁴ RD’s Decision at 10 (citing *COMNAVBASE*, 56 FLRA at 332).

⁴⁵ *Id.* at 11.

⁴⁶ Application at 3.

⁴⁷ See, e.g., *Fort Carson*, 73 FLRA at 3; *Fleet Readiness*, 63 FLRA at 252.

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

TIDEWATER REGION MARKET
DEFENSE HEALTH AGENCY
U.S. DEPARTMENT OF DEFENSE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO
(Petitioner/Labor Organization)

and

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
(Petitioner/Labor Organization)

WA-RP-22-0035 and WA-RP-22-0053

DECISION AND DIRECTION OF ELECTION

I. Statement of the Case

The National Association of Independent Labor (NAIL) and the American Federation of Government Employees, AFL-CIO (AFGE) filed representation petitions with the Federal Labor Relations Authority (Authority) on June 30, and July 6, 2022, under Section 7111(b) of the Federal Service Labor-Management Relations Statute (the Statute) to determine if the Defense Health Agency, Tidewater Market (Tidewater Market) is the successor employer of employees who transferred to Tidewater Market from various Department of Defense (DoD) Military Treatment Facilities (MTFs) and Dental Treatment Facilities (DTFs), and, as a result, what labor organization(s) would serve as exclusive representative(s) of the transferred employees.

A hearing was held in this matter before a Hearing Officer of the Authority. I have reviewed the rulings made by the Hearing Officer and find that they are free from prejudicial error. Accordingly, the Hearing Officer's rulings are affirmed. The Agency, AFGE, and NAIL all filed timely briefs and were considered. While the National Association of Government Employees (NAGE) participated in all pre-hearing proceedings and

was represented at the hearing, NAGE disclaimed interest in all of the employees impacted by the reorganization after the hearing. I have considered the entire record, pursuant to section 2422 of the Authority's Rules and Regulations.

For the reasons discussed below, I find that DHA's Tidewater Market is the successor employer of the impacted employees that transferred to the Tidewater Market and that AFGE has a sufficient number of the transferred employees, both professional and nonprofessional, such that no election is necessary to determine the exclusive representative.

However, because the reorganization impacted professional employees and some of those employees have not had the opportunity to vote for inclusion in a potential mixed bargaining unit, an election is necessary for that group of employees to determine whether they wish to be included in a separate professional bargaining unit or a mixed bargaining unit with the nonprofessional employees. After the election, AFGE will be certified as the exclusive representative of the transferred bargaining unit employees, with either separate professional and nonprofessional bargaining units or in one single mixed bargaining unit.

I also conclude that employees of the James A. Lovell Federal Healthcare Center, North Chicago, Illinois, are not employees of DHA and, therefore, are not appropriately included in the successorship analysis, and will not be included in any of the potential AFGE's bargaining units.

II. Findings

Background

In 2018, the Department of Defense (DoD) granted the Defense Health Agency (DHA) authority, direction, and control over all Military Treatment Facilities (MTF) and Dental Treatment Facilities (DTF) within the DoD (A. Ex. 1; Tr. 29)¹. Specifically, DoD transferred these entities from control of the various branches of DoD (Army, Air Force, Navy) directly to DHA. (Tr. 29). As a result of the reorganization, all civilian employees of these various MTF/DTFs would also be transferred over to DHA. (Tr. 29). DHA would be the provider of all healthcare delivery. (Tr. 31).

Affected Bargaining Units

¹ Authority Exhibits will be referenced as A Ex., AFGE's Exhibits will be referenced as AFGE Ex., NAIL's exhibits will be referenced as NAIL Ex., and the Transcript will be referenced as Tr.

On or about July 17, 2022, DHA stood up its Tidewater Market, realigning MTF/DTFs and employees from the U.S Navy, Air Force, and Army. (Tr. 36-37; A Ex. 19). The Tidewater Market is made up of MTF/DTFs² from around the Tidewater, Virginia region which consists of multiple cities and communities including Norfolk, Portsmouth, Virginia Beach, Newport News, Hampton, Williamsburg, Jamestown and other surrounding communities. (Tr. 65, 165). At the time that the Tidewater Market was created, it contained six bargaining units represented by three different labor organizations: (1) AFGE³; (2) NAIL; and (3) NAGE⁴.

AFGE, AFL-CIO represents two bargaining units relevant to the petitions. (Jt. Ex. 2 and 3). On June 13, 1995, in Case No. WA-AC-50028, the Authority certified AFGE, Local 22, AFL-CIO as the exclusive representative of the following unit (Jt. Ex. 3):

Included: All professional and nonprofessional employees of the Naval Hospital, Portsmouth, Virginia.

Excluded: All employees of Food Management Service and all employees excluded under 5 U.S.C. 7112(b).

The second bargaining unit represented by AFGE, was certified on September 21, 2007, in Case No. CH-RP-07-0027, and AFGE, Local 2017, AFL-CIO was certified as the exclusive representative of the following unit: (Jt. Ex. 2):

Included: All professional and nonprofessional employees of the U.S. Naval Health Clinic, Great Lakes, Illinois.

Excluded: Management officials, supervisors, and employees described in 5 U.S.C. §7112(b)(2), (3), (4), (6) and (7).

The National Association of Independent Labor (NAIL) also represents two bargaining units impacted by the reorganization of DHA. (Jt. Ex. 1). On February 27, 2007, in Case No. WA-RP-06-0076, NAIL was certified as the exclusive representative of the following unit: (Jt. Ex. 1).

Included: All professional employees employed by the U.S. Army Medical Activities (MEDDAC), Fort Eustis, Virginia.

Excluded: All management officials, supervisors, nonprofessional employees, temporary employees, and employees described in 5 U.S.C. §7112(b)(2), (3), (4), (6) and (7).

On February 27, 2007, in Case No. WA-RP-06-0078, NAIL was certified as the exclusive representative of the following unit: (Jt. Ex. 1).

Included: All employees of the U.S. Army Transportation Center and Fort Eustis, Fort Eustis (USATCFE), the U.S. Army Medical Department Activities, Fort Eustis, Virginia (MEDDAC); the U.S. Army Dental Activity, Fort Eustis, Virginia (DENTAC); the U.S. Army Veterinary Command, southern Virginia Service Support District, Fort Eustis, Virginia and the U.S. Army Aviation Logistics School, Fort Eustis, Virginia (USAALS), including those employees assigned to these activities who are located at other locations.

Excluded: All employees represented by other exclusive representatives, management officials, supervisors, professional employees, temporary employees, and employees described in 5 U.S.C. §7112(b)(2), (3), (4), (6) and (7).

The National Association of Government Employees (NAGE) represents two bargaining units

² For brevity's sake, the rest of the Decision and Order will use "MTF" to describe both MTF and DTFs.

³ AFGE's two units are represented by AFGE, Local 22 and AFGE, Local 2017.

⁴ Typos and inconsistent language in the description of AFGE, NAIL, and/or NAGE's certifications are the result of the way the certifications were drafted.

impacted by the reorganization of DHA and the creation of the Tidewater Market. (Jt. Ex. 3). On September 27, 2012, in Case Nos. WA-RP-11-0003, WA-RP-11-0004, and WA-RP-11-0005, NAGE's bargaining units were amended as follows: (Jt. Ex. 3).

Unit 1

Included: All professional general schedule employees serviced by the CPO, 633rd Air Base Wing, Joint Base Langley-Eustis, VA.

Excluded: All nonprofessional general schedule employees and wage grade employees serviced by the COP, 633rd Air Base Wing, Joint Base Langley-Eustis, VA, Commissary employees, firefighters, managerial officials, employees engaged in personnel work in other than a purely clerical capacity, confidential employees and guard and supervisors as defined in the Order, and temporary employees with appointments of 90 days or less with no prospect of continuous employment.

Unit 2

Included: All nonprofessional GS and WG employees serviced by the CPO, 633rd Air Base Wing, Joint Base Langley-Eustis, VA.

Excluded: All professional GS employees, employees engaged in personnel work in other than a purely clerical capacity, confidential employees, non-appropriated and employees, supervisors, and those temporary employees whose appointment is for 90 days or less.

Creation of DHA and of the Tidewater Market

The National Defense Authorization Act ("NDAA") for fiscal year 2017 called for the creation of a Military Health System, through the creation of a single agency within DoD, specifically the Defense Health Agency. (A Ex. 3). DHA is headed by a Director, Lieutenant General Ronald Place. (Tr. 46). Under the direction of Lt. General Place are numerous "intermediate level organizations", including "Direct Reporting Markets" (DRMs). (Tr. 46-47). DRMs are generally composed of a group of MTF/DTFs in a general geographic area and headed by a Market Director. (A. Ex. 8). One of the DRMs that was established was the Tidewater Market, on or about July 17, 2022. (A. Ex. 19). The Tidewater Market is one of nineteen DRMs and the second largest DRM within DHA. (A. Ex. 8; Tr. 145). The Tidewater Market is headed by Rear Admiral Matthew Case, who is stationed out of Portsmouth, Virginia. (Tr. 143).

DHA is tasked with selecting a Director for each individual MTF, including all the MTFs in the Tidewater Market. (Tr. 42). The MTF Director then exercises authority, direction, and control over the individual MTF operations, and all personnel assigned, allocated, or detailed to, and who perform duties and functions associated with the MTF, including both clinical medical services and business operations. (Tr. 42-43; A. Ex. 6).

The Tidewater Market is made up of three "parent" MTFs: (1) Naval Medical Center, Portsmouth; (2) Army Health Clinic, McDonald-Eustis; and (3) the 633rd Medical Group⁵. (Tr. 94-95). All of these MTFs, and their associated sub-facilities, are located in the general Tidewater, Virginia geographic area. (Tr. 65). Each MTF is also led by an individual, also titled "Director". (Tr. 50). Individual MTF Directors then report to Tidewater Market Director, Rear Admiral Case. (Tr. 50).

The Army Health Clinic is located in Fort Eustis, Virginia. (Tr. 94). The 633rd Medical Unit is located on Langley Air Force Base located in Hampton, Virginia. (Tr. 158, 174). Fort Eustis and Langley Air Force Base are part of one entity, titled Joint Base Langley-Eustis. (Tr. 13 and 14). The third MTF, the Naval Medical Center is located in Portsmouth, Virginia.

The Tidewater region is partially located on a peninsula. (Tr. 256). In order to travel around the various cities and military bases, individuals must cross several bridges and/or tunnels. (Tr. 258). Due to the size, geography, and population of the area, and Virginia Beach's status as a tourist destination, traffic and travel

⁵ The 633rd is a U.S. Air Force MTF. (Tr. 158).

times within the Tidewater Region can be significant. (Tr. 254-259; 304).

One unusual feature of DHA is that civilian employees, while employed by DHA, in some circumstances, are supervised by members of the various military branches. (Tr. 151). However, both the civilian employees and the military service members execute duties that fall under DHA's area of responsibility and fall under the command of the DHA Director and not any other military branch chain of command. (Tr. 151).

In addition to civilian employees who work directly for individual MTFs, the Tidewater Market also includes civilian employees who work directly for the Market and report directly to the Tidewater Market Director. (Tr. 175-76). Although these Tidewater Market employees work directly for the Director, they are physically located throughout the Market. (Tr. 175-176).

In addition to the three Tidewater area MTF organizations, a fourth organization is also part of the Tidewater Market. The James A. Lovell (Lovell) Federal Healthcare Center (FHCC) located in Chicago, Illinois. (Tr. 163). Lovell is not a DHA MTF but a separate federal entity that combined facilities previously under the Department of Veterans Affairs (VA) and the Department of the Navy's Bureau of Medicine (BUMED). (Tr. 163). Lovell was included in the Tidewater Market because Rear Admiral Case also serves as Commander of the Navy Medical Forces Atlantic (NMFL) and Lovell falls under the oversight command authority of NMFL. (Tr. 144, 164). Lovell employees are not DHA employees, but employees of the VA. (Tr. 165). The Tidewater Market only provides financial management to Lovell and is not involved in the delivery of any healthcare at the FHCC. (Tr. 163-164). Lovell employees are not currently members of any bargaining unit. (Tr. 165, 168).

Although the transfer from various entities within DoD to DHA was announced in 2018, the scale of the reorganization required years for completion. (Tr. 38). A temporary organization, called the "Transitional Intermediate Management Organization" (TIMO) was created to help ease the transition without further burdening DHA Headquarters. (Tr. 38-39).

While the reorganization of DHA and creation of DRMs such as the Tidewater Market had a tremendous impact on organizational structures of the various entities, the civilian employees who now work for the Tidewater Market maintain the same job titles, perform the same duties, and continue to work in the same physical locations as they did prior to the transfer. (Tr. 50). After the reorganization, all DHA civilian employees now operate under the same policies, procedures, and guidance regardless of location. (Tr. 30). DHA civilian employees

do not follow the regulations or instructions of any of the military services. (Tr. 73).

The missions of the various MTF's were split off from the military service associated with that MTF and given directly to DHA. (Tr. 25). The mission of DHA is to deliver healthcare through the various MTFs and related facilities. (Tr. 58, 152).

DHA's Center of Excellence, an organization within the U.S. Army's Civilian Human Resources Agency (CHRA), provides all human resources (HR) services to all the Tidewater Market civilian employees. (Tr. 108-110). This includes recruitment, placement, classification, and workforce development services. (Tr. 110-111). Although handled centrally for all DHA, HR services are specifically aligned to DHA's new structure such that they are provided on the specific Market level. (Tr. 113). CHRA also provides all labor relations (LR) services for DHA, also aligned with specific Markets. (Tr. 110). CHRA has specific employees assigned to provide LR and HR support to the Tidewater Market, and CHRA has current plans to provide future on-site support. (Tr. 116, 153).

The Defense Finance and Accounting Service (DFAS) continues to provide all payroll services to all Tidewater Market employees, as it did prior to the transfer. (Tr. 153). DHA has its own Equal Opportunity and Diversity Management (EODM) office, which handles equal employment opportunity (EEO) issues. (Tr. 62).

It is possible for civilian employees within the Tidewater Market to be placed on temporary duty assignments ("TDY") within the Market other than at their normal work location. (Tr. 88). Such assignments are infrequent, but do occur, for example, if there is a shortfall in a facilities ability to provide healthcare services. (Tr. 88). Employees could also be sent on a TDY to perform a mission or otherwise support other operations performed by any of the military services. (Tr. 82). Even when placed on a TDY to military service, employees will remain DHA employees and DHA will continue to handle any issues arising out of an employee's detail. (Tr. 84).

There have not been any reductions-in-force (RIF) conducted within the Tidewater Market, and the Agency has not formally decided on the competitive area that would be used in the event of a RIF. (Tr. 104, 219, 221, 232). However, the Agency testified that the competitive area for any RIF may be done at the Market level. (Tr. 100, 215, 232, 238).

Number of Impacted Employees⁶

Labor Organization	Professional	Non-Professional	Total
AFGE, Local 22 (mixed)	568	803	1371
AFGE, Local 2017 ⁷	0	0	0
NAIL (Unit I)	84	5	89
NAIL (Unit II)	4	233	237
NAGE (Professional)	39	0	39
NAGE (Nonprofessional)	3	88	91
7777 (not represented/eligible)	0	3	3
Grand Total	698	1132	1830

III. Parties' Positions**A. DHA's Position**

DHA maintains that the record establishes that DHA is the successor employer for Employees who transferred into DHA from the various military entities and now work for DHA's Tidewater Market⁸. Further, DHA maintains that a consolidated unit of professional and nonprofessional employees within the Tidewater Market is an appropriate unit. Finally, DHA asserts that the level of recognition for the bargaining unit is most appropriately set at the Tidewater Market level.

B. NAIL's Position

NAIL's position is that DHA is the successor employer of the transferred employees. However, NAIL argues that the appropriate unit is not at the Tidewater Market level but rather at the parent level of the three MTFs that comprise the Tidewater Market.

NAIL asserts that when there are competing petitions, each alleging different appropriate units, that the Authority should maintain the Status Quo. Here, NAIL asserts that the separate units at each of the MTFs remain appropriate units after the reorganization⁹.

Further, NAIL asserts that DHA has not demonstrated how the Tidewater Market was created or proved that it would constitute an appropriate unit. Instead, NAIL claims that individuals within DHA simply merged MTFs that were relatively close geographically into a single market. NAIL acknowledges DHA as the successor employer but argues that the differences between the three parent MTFs are significant enough that the Authority should maintain the Status Quo and define the bargaining units at the MTF level, instead of the

Market level. This would have the effect of leaving each labor organization as the exclusive representative of the DHA employees at a single MTF.

C. AFGE's Position

AFGE's position is that DHA is the successor employer of the employees who were transferred into the Tidewater Market from the three MTFs. Like DHA's position, AFGE asserts the appropriate bargaining unit level should be set at the Tidewater Market level.

AFGE disputes NAIL's position that separate units at the MTF level would be appropriate, maintaining that separate units at the MTF level would not have a distinct community of interest apart from the other Tidewater Market entities, and therefore, are not separate appropriate units.

IV. Analysis and ConclusionsLovell FHCC

Because the employees of the Lovell FHCC are not DHA employees and there are no other factors connecting it with the rest of the Tidewater Market, other than Rear Admiral Case serving in leadership roles with both organizations and DHA providing financial services to FHCC, I have determined that it should not be included in the below successorship analysis and the employees who work for FHCC will be excluded from any unit(s) certified as a result of these petitions.

Successorship Test

Successorship involves a determination of the status of a bargaining relationship between an agency which acquires employees who were in a previously existing bargaining unit, and a labor organization that exclusively represented those employees prior to their transfer. In *U.S. Navy, Naval Facilities Eng'g Serv., Port Hueneme, Cali.*, 50 FLRA 363 (1995) (*Port Hueneme*), the Authority created the framework for determining whether an employing entity is the successor to a previous one such that a secret ballot election is not necessary to determine representation rights of the employees who were transferred to the successor. A gaining entity is a successor, and a union retains its status as the exclusive

⁶ There are on-going disputes over the status of professionals/nonprofessionals in both NAIL units and the NAGE nonprofessional unit. This Decision and Order will not determine the professional/nonprofessional status of these positions. For the purposes of determining percentage of employees, the Region will use the current designation pro/non-pro provided by DHA.

⁷ Jt. Ex. 3 showed one nonprofessional employee in the unit, but testimony at the hearing said no DHA employees are currently in this unit.

⁸ DHA argues that DHA, and not DHA-Tidewater Market is the successor employer.

⁹ In its post-hearing brief, NAIL argues there "three units" remain appropriate. However, there are five bargaining units in total. Two bargaining units each for NAGE and NAIL and one mixed unit for AFGE.

representative of the employees who were transferred to the successor, when:

- (1) an entire recognized unit or a portion thereof, is transferred and the transferred employees: (a) are in an appropriate bargaining unit, under section 7112(a) of the Statute, after the transfer, and (b) constitute a majority of the employees in such unit;
- (2) the gaining entity has substantially the same organizational mission as the losing entity, with the transferred employees performing substantially the same duties and functions under substantially similar working conditions in the gaining entity; and
- (3) it has not been demonstrated that an election is necessary to determine representation. *Id.*

Based on the record as a whole, I find that the Defense Health Agency, Tidewater Market is the successor employer of both professional and nonprofessional bargaining unit employees who were transferred into the Tidewater Market from various the various military services under the *Port Hueneme* framework.

Here, in applying the first part of *Port Hueneme*, it is clear that the entirety of six bargaining units, represented by three different labor organizations, were transferred to DHA when the Tidewater Market was created.

However, while the Agency and AFGE argue that the appropriate unit(s) would either be a single unit (mixed) or, alternatively, two units (a professional and a nonprofessional) at the Tidewater Market level, NAIL requests that the Authority preserve the status quo and maintain recognition of the bargaining units at the MTF level. When there are competing petitions alleging different appropriate units, the Authority will first consider the appropriate unit claim that will most fully preserve the status quo in terms of unit structure and the relationship of employees to their chosen exclusive representative. *Commander I*, 56 FLRA 328, 332 (2000). This rule stems from the Authority's reluctance to disturb long-standing bargaining units when bargaining in those units has been successful. *DLA*, 53 FLRA at 1124. If the Authority finds that a bargaining unit continues to be appropriate, that appropriate unit claim will be chosen, since it most fully preserves the status quo in terms of unit structure and the relationship of employees to their union. *U.S. Dep't of the*

Navy, Commander, Naval Base, Norfolk, Va., 56 FLRA 328 (2000).

Appropriate Unit

In determining whether a unit is appropriate under § 7112(a) of the Statute, the Authority considers whether the unit would: "(1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency involved; and (3) promote efficiency of the operations of the agency involved." *U.S. Dep't of Commerce, U.S. Census Bureau*, 64 FLRA 399, 402 (2010) (*Commerce*). Determinations as to each of these three criteria are made on a case-by-case basis. *Id.* The Authority has set out factors for assessing each criterion but has not specified the weight of individual factors or a particular number of factors necessary to establish an appropriate unit. *AFGE, Local 2004*, 47 FLRA 969, 972 (1993). Additionally, an appropriate unit need not be the most appropriate unit or the only appropriate unit in order to nonetheless be an appropriate unit. *U.S. Dep't of the Air Force, Lackland Air Force Base, San Antonio, Tex.*, 59 FLRA 739, 741 (2004) (*Lackland AFB*).

NAIL Proposed Unit

In a circumstance where the Authority is trying to decide between employees remaining in their existing bargaining unit, and, therefore, retain their incumbent exclusive representative, or be part of a new, different bargaining unit, the relevant community-of-interest question is whether the employees at issue share a community of interest that is "different or unique" from the community of interest shared by the gaining organization's employees. *U.S. Dep't of the Navy, Naval Facilities Engineering Command, Mid-Atlantic, Norfolk, VA.*, 70 FLRA 263, 266 (2017). Additionally, for a petitioned for separate unit to be found to be appropriate, the unit should not result in undue fragmentation or confusion in labor-management relations. *U.S. Dep't of the Navy, Fleet & Indus. Supply Ctr., Norfolk, VA.*, 52 FLRA 950 (1997) (*FISC*).

First, in examining community of interest, the Authority considers factors like 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 the same or related job 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. *FISC*, 52 FLRA 960 (1997). Additional factors the Authority considers are geographic proximity, unique conditions of employment, distinct local concerns, degree of interchange between other organizational components, and functional or operational separation. *Id.* at 961.

NAIL proposes a unit where it would represent bargaining unit employees who are employed by the organizations associated with Fort Eustis, specifically the Army Health Clinic MTF. This group of employees does have several factors that weigh in favor of a community of interest, particularly, geographic proximity and distinct local concerns, both based on the fact that the employees are located at Fort Eustis-McDonald. Additionally, there is a small amount of functional/operational separation based on that fact that Fort Eustis-McDonald is an Army-led facility where the other two MTFs within Tidewater Market are predominately located on Air Force and Navy facilities.

However, the vast majority of the community of interest factors at Fort Eustis are shared with the other Tidewater Market employees. This is due to the new structure of DHA that was created through the reorganization and the creation of Markets like Tidewater Market. Organizational structure, mission, chain of command, HR and LR policies are all the same within the Tidewater Market no matter where employees work. Additionally, despite being created as an MTF of a specific military branch, as a result of the reorganization, all of the MTFs, including the Army Health Clinic, are now part of the Tidewater Market.

NAIL's main argument in favor of finding a separate community of interest for the Fort Eustis employees relates to the geographic separation of the three Tidewater Market MTFs and the fact that there is traffic and the need to traverse bridges and/or tunnels in order to get from one MTF facility to another. But, on balance, I conclude this is insufficient to support a finding that employees have a separate and distinct community of interest.

Further, basing the bargaining units by separate MTF would unnecessarily fragment the unit(s) proposed by AFGE and DHA and could create labor-management relations confusion. Such a division would require the Tidewater Market to negotiate with three different labor organizations and bargain at least three separate collective-bargaining-agreements just for the Tidewater Market. This does not even take into consideration additional other bargaining units located within other DHA Markets and/or DHA-Headquarters. DHA planned for Market level bargaining by setting up its HR and LR offices at the Agency level but with HR/LR personnel working at the Market level, not the MTF level, and thus, Market Level units have a rational relationship to the organizational structure of the Tidewater Market.

Examining the entirety of the record, I have determined that the unit proposed by NAIL is not appropriate in that it lacks a community of interest different or unique from that of the remaining Tidewater Market employees and would result in unnecessary

fragmentation of collective-bargaining units, and confusion in labor-management relations.

Tidewater Market Level Bargaining Unit(s)

The bargaining unit(s) proposed by DHA and AFGE are both appropriate and satisfy all of the remaining requirements set forth by *Port Hueneme*. As addressed above, the evidence clearly established that the Tidewater Market employees have a strong community of interest. All of the employees are part of one organizational component of DHA, namely the Tidewater Market. The employees of this market support the same mission, have the same chain of command, and are subject to the same HR and LR policies. Employees in the Tidewater Market have the same or related job duties, titles, and assignments that each work towards accomplishing DHA's mission. Tidewater Market employees also have a geographic proximity, namely the Tidewater Region of Virginia. Tidewater Market employees can be placed on TDY's at the various MTFs, giving the employees some degree of interchange.

The Tidewater Market bargaining unit also satisfies the other two criteria of an appropriate unit: promoting effective dealings and efficiency of operations. The proposed bargaining unit would mirror the Agency's organizational structure as well as be in sync with the Agency's labor relations and human resources offices. This should allow DHA-Tidewater to negotiate a single collective-bargaining-agreement that would allow for similarly situated employees across the Tidewater Region to operate under similar conditions of employment.

Remaining Port Hueneme Criteria

A Tidewater Market bargaining unit(s) would also satisfy part two of the *Port Hueneme* analysis as the Tidewater Market has substantially the same mission as the three MTFs that were combined to create it. Additionally, the transferred employees perform the same or similar job duties and responsibilities both pre and post-reorganization. Finally, employees work under substantially the same working conditions now that they did prior to the Tidewater Market's creation.

For the final *Port Hueneme* criteria, the Authority has recognized that when more than one labor organization has represented employees in a new unit, one group may be "sufficiently predominant" to render an election unnecessary. See *Defense Logistics Agency, Defense Supply Ctr. Columbus, Columbus, Ohio*, 53 FLRA 1114, 1134 (1998). The Authority found that a union that represents more than 70% of the employees in the newly combined unit formerly represented by two or more unions is sufficiently predominant to render an election unnecessary. *Dep't of the Army, U.S. Army Aviation Missile Cmd. Redstone Arenal*, 56 FLRA 126, 131 (2000)

(*Redstone*). In this case, AFGE represents 75% of the total transferred employees, 81% of the professional employees, and 71% of the nonprofessional employees. Because AFGE is sufficiently predominant in both groups, no election is necessary to determine the exclusive representative of bargaining unit employees.

Accordingly, I find that DHA-Tidewater Market is the successor employer to the majority of bargaining unit employees who previously worked at the various MTFs. Further, because AFGE has over 70% of the transferred bargaining unit employees, it will be the exclusive representative of the relevant bargaining unit employees.

However, because the transferred employees consist of both professional and nonprofessional employees, and the professional employees at issue have not previously voted to be included in a Tidewater Market-wide mixed unit, an election is necessary to determine whether or not the professional employees in the Tidewater Market choose to be included in a mixed unit with the nonprofessionals. In the alternative, the professionals may vote to have their own standalone unit made up of only professional employees. *U.S. Dep't of the Air Force, Wright-Patterson AFB, Ohio*, 1 FLRA 217, 218-19 (1979).

If the professional employees vote for inclusion in a mixed unit, the Region will issue a certification certifying the American Federation of Government Employees, AFL-CIO as the exclusive representative of the following mixed unit:

Included: All professional and nonprofessional employees of the Tidewater Market, Defense Health Agency, Department of Defense.

Excluded: All employees of James A. Lovell Federal Healthcare Center; management officials; supervisors; and employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6), and (7).

If the professional employees vote not to be included in a mixed unit, the Region will issue two certifications, each certifying the American Federation of Government Employees, AFL-CIO as the exclusive representative of the following units:

Professional Unit

Included: All professional employees of the Tidewater Market, Defense Health Agency, Department of Defense.

Excluded: All nonprofessional employees; employees of James A. Lovell Federal Healthcare Center; management officials; supervisors; and employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6), and (7).

Nonprofessional Unit

Included: All nonprofessional employees of the Tidewater Market, Defense Health Agency, Department of Defense.

Excluded: All professional employees; employees of James A. Lovell Federal Healthcare Center; management officials; supervisors; and employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6), and (7).

V. Order

Having found that DHA Tidewater Market is a successor employer to certain bargaining unit employees who previously worked at various Military Treatment Facilities within the U.S. Military, pursuant to the authority vested in the undersigned, it is hereby ordered that an election be conducted to determine whether the professional employees of the Tidewater Market wish to be included in a unit with the nonprofessional employees of the Tidewater Market. After the election is conducted, certification(s) of representative, as described above, will be issued to reflect that AFGE is the exclusive representative of both the professional and nonprofessional bargaining unit employees in either a single mixed unit or separate professional and nonprofessional units.

VI. 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 (60) days of this Decision. The application for review must be filed with the Authority by **August 28**,

2023, and 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.¹⁰

Jessica S. Bartlett
Regional Director
Washington Region
Federal Labor Relations Authority

Dated: June 29, 2023

¹⁰ 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.