64 FLRA No. 31

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOREST SERVICE
ALBUQUERQUE SERVICE CENTER
HUMAN CAPITAL MANAGEMENT
ALBUQUERQUE, NEW MEXICO
(Activity)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
INTERNATIONAL ASSOCIATION OF MACHINIST
AND AEROSPACE WORKERS
(Petitioner/Labor Organization)

DA-RP-09-0001

ORDER DENYING
APPLICATION FOR REVIEW

October 30, 2009

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This case is before the Authority on an application for review of the Regional Director's (RD) Decision and Order (RD Decision) directing an election. The application was filed by the United States Department of Agriculture, Forest Service, Albuquerque Service Center, Human Capital Management, Albuquerque, New Mexico (Activity) under § 2422.31 of the Authority's Regulations. [2] The Activity also filed a motion for a stay of the RD's Order directing an election. The National Federation of Federal Employees, IAMAW, AFL-CIO (the Union) filed an opposition to the application and opposes the stay motion.

The Activity seeks review of the RD's decision to include fifteen positions in the proposed bargaining unit, including fourteen Human Resource Specialist (HRS) positions and one Audit Liaison Specialist position. [3]

For the reasons that follow, we deny the Activity's application for review.

II. Background and RD's Decision

The Activity manages 191 million acres of public forests and grasslands that comprise the National Forest System. The forests are subdivided into ranger districts that manage the system on a day-to-day basis and coordinate activity with local interests.

In 2006, the Activity centralized its human resources (HR) functions at a single location, the Human Capital Management Service Center (HCM) in Albuquerque, New Mexico. The Activity relocated to the new HCM hundreds of positions from research stations and individual forests around the country as well as from Activity headquarters in Washington, D.C.

On November 4, 2008, the Union filed a petition for an election in a proposed unit covering the new HCM. On January 27, 2009, the RD issued a Notice of Hearing, scheduling a hearing for March 9, 2009. Authority Exhibit 4 and 5 at 2.

On March 4, 2009, the Activity filed a motion to delay the hearing. Authority Exhibit 7. The Activity argued that it did not have sufficient time to prepare for the hearing. The Activity asserted that the number of positions in dispute had been expanded at prehearing conferences and that the Activity had not obtained the final list of witnesses until a few days before the hearing date. *Id.* at 1-2.

On March 5, the RD denied the motion to delay the hearing. Authority Exhibit 8. The hearing was held as scheduled.

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1. The concurring opinion of Member Beck is set forth at the end of the decision.

2. Section 2422.31 of the Authority's Regulations provides in pertinent part:

> (c) *Review.* 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) The decision raises an issue for which there is an absence of precedent;
>
> (2) Established law or policy warrants reconsideration; or,
>
> (3) There is a genuine issue over whether the Regional Director has:
>
> (i) Failed to apply established law;
>
> (ii) Committed a prejudicial procedural error;
>
> (iii) Committed a clear and prejudicial error concerning a substantial factual matter.

3. The RD found that the proposed unit was an appropriate unit under § 7112(a) of the Federal Service Labor-Management Relations Statute (the Statute). The RD also determined the bargaining unit status of 20 other positions. Those determinations are not challenged in the application for review and, thus, are not before the Authority.

In the Decision, the RD rejected the Activity's claim that the fourteen HRS positions fall within § 7112(b)(3)'s exclusion for employees engaged in personnel work in other than a purely clerical capacity. [4] The RD applied the legal framework set forth in *Department of the Treasury, Internal Revenue Service, Washington, D.C.,* 36 FLRA 138, 144 (1990) (*IRS*).

Applying *IRS*, the RD found that the duties performed by the employees in the HRS positions did not require the consistent exercise of independent judgment or discretion "rising above the routine" and "which, when utilized might result in actions adverse to bargaining unit members, or otherwise might have a direct impact on the work environment of the unit." RD Decision at 33-34. The RD also found that the employees were "well trained subject matter experts and technicians working in an administrative capacity[,]" and that they "perform their duties in a routine manner, [and] in accordance with established policies and procedures." *Id*. at 34. The RD concluded that there was no basis for excluding the HRS positions from the proposed bargaining unit under § 7112(b)(3).

In addition, the RD rejected the Activity's claims that the one Audit Liaison Specialist position falls within the § 7112(b)(7) exclusion for employees involved in certain audit or investigation functions. [5] The RD applied the legal framework set forth in *AFGE, Local 3529*, 57 FLRA 633, 638 (2001) (*Local 3529*).

Applying *Local 3529*, the RD found that the duties of the Audit Liaison Specialist position did not include investigation or audit functions covered by § 7112(b)(7). RD Decision at 35. In fact, the RD found that the disputed employee did not perform audits at all. *Id.* Rather, the RD found the employee was responsible for coordinating, and responding to, internal or external requests for HR information in support of the Activity's yearly financial audits. *Id.* As found by the RD, such audits are not designed to determine whether or not the employees of the agency are discharging their duties honestly and with integrity. *Id.* The RD concluded that there was no basis for excluding the Audit Liaison Specialist position from the proposed bargaining unit under § 7112(b)(7).

In the Decision, the RD advised the parties that the RD would direct an election in the proposed unit, absent a timely application for review. RD Decision at 38.

III. Positions of the Parties

The Activity contends that the RD and the hearing officer committed prejudicial procedural errors. The Activity faults the RD for denying the Activity's motion to delay the hearing. Application at 9. The Activity argues that the RD's refusal to postpone the hearing denied it ample time to prepare because it had short advance notice of the final number of positions in dispute and the identity of the witnesses. *Id.* The Activity also argues that the RD's refusal to delay the hearing is contrary to § 2422.13 of the Authority's Regulations because the prehearing conferences served to expand, rather than narrow, the disputes between the parties. [6] *Id*.

The Activity claims that the hearing officer also committed a prejudicial procedural error by examining the witnesses at the hearing before the parties were permitted to examine them. *Id.* at 10-11. The Activity asserts that the petitioner usually proceeds first. *Id.* at 10.

As to the HRS positions, the Activity contends that the RD failed to apply established law and committed clear and prejudicial errors concerning substantial factual matters. In support, the Activity cites several Authority decisions. *Id.* at 36-38. The Activity also asserts that the RD ignored record evidence demonstrating that employees in the disputed positions exercise independent judgment. *Id.* at 13-16.

As to the Audit Liaison Specialist position, the Activity also contends that the RD failed to apply established law and committed clear and prejudicial errors concerning substantial factual matters. Regarding the RD's alleged failure to apply established law, the Activity argues that the RD failed to follow the Authority's decision in *United States Dep't of the Navy, Naval Audit Serv., Se. Region*, 46 FLRA 512, 518-19 (1992) (*Naval Audit*), where auditors were excluded from the bargaining unit. Application at 39. As to the RD's alleged factual errors, the Activity argues that the RD ignored

4. Section 7112(b)(3) excludes from an appropriate unit "an employee engaged in personnel work in other than a purely clerical capacity[.]"

5. Section 7112(b)(7) of the Statute provides that a bargaining unit is inappropriate if it includes:

> any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

6. 5 C.F.R.§ 2422.13(b) provides that "[a]fter a petition is filed, the Regional Director may require all affected parties to meet to narrow and resolve the issues raised in the petition."

testimony that demonstrates that the employee is primarily involved in investigation or audit functions covered by § 7112(b)(7). Application at 39-40.

The Union generally opposes the Activity's Application for Review.

IV. Analysis and Conclusions

A. The Activity has not demonstrated that the RD or the hearing officer committed prejudicial procedural errors

The Activity contends that the RD's refusal to postpone the hearing was an error because it was contrary to § 2422.13(b) of the Authority's Regulations. *Id.* at 9-10. Additionally, the Activity claims that the RD's asserted error was prejudicial because it deprived the Activity of sufficient time to prepare for the hearing. *Id.*

There is no merit to the Activity's contention that the RD committed a prejudicial procedural error by denying the Activity's motion to delay the hearing. In this regard, the Activity's reliance on 5 C.F.R. § 2422.13(b) is misplaced. Section 2422.13(b) does not set forth any conditions that must be met before a hearing is held. Rather, § 2422.13(b) relates only to prehearing activities. Section 2422.13(b) provides that "[a]fter a petition is filed, the Regional Director may require all affected parties to meet to narrow and resolve the issues raised in the petition." In fact, the RD conducted several telephone conferences with the parties. Authority Exhibit 8 at 1-2. However, because this regulation does not relate to the scheduling of hearings, any failure of the parties to "narrow and resolve issues" at the conferences did not require the RD to delay the hearing. Therefore, the Activity's claim that the RD acted contrary to § 2422.13(b) when he denied the Activity's motion to delay the hearing does not provide any basis for finding that the RD committed a prejudicial procedural error.

The Activity's contention that it was prejudiced by the RD's denial of its motion to delay the hearing is also without merit. The Activity asserts that the RD's denial deprived the Activity of sufficient time to prepare for the hearing because the Activity had short advance notice of the final number of positions in dispute and of the identity of the witnesses. Application at 9.

Contrary to the Activity's contention, any prejudice to the Activity is attributable to the Activity's actions in the case, not the RD's decision on the motion. As the RD noted in this connection, "it is clear that the parties have had ample opportunity to consider, discuss and resolve any disagreement over the unit status of employees following issuance of Notice of Hearing on January 27." Authority Exhibit 8 at 2. As the RD also stated, "the delay in developing and making available accurate employee lists for consideration between the requested date (November 24) and the received date (January 22) was a matter within the control of the Activity[.]" *Id.* In these circumstances, we reject the Activity's contention that the RD's denial of the motion to delay prejudiced the Activity.

The Activity's additional claim, that the hearing officer committed a prejudicial procedural error by examining the witnesses at the hearing before the parties were permitted to examine them, is not properly before the Authority. The Authority's Regulations provide that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the Regional Director[.]" 5 C.F.R. § 2429. 5. The record, including the Activity's post-hearing brief, discloses that the Activity did not raise its objections regarding the hearing officer's examination of the witnesses to the Regional Director. Accordingly, as the record fails to show that this contention was presented to the Regional Director, the contention is not properly before the Authority. *Cf. United States Dep't of the Army, North Central Civilian Personnel Operation Ctr., Rock Island, Ill.*, 59 FLRA 296, 302 n.8 (2002) (Member Cabaniss concurring) (applying § 2429. 5, the Authority found party's concession in brief to RD precluded party from raising issue in application).

Based on the foregoing, we conclude that review of the RD's decision is not warranted on the ground that the RD or the hearing officer committed prejudicial procedural errors.

B. The Activity has not demonstrated that the RD failed to apply established law and committed clear and prejudicial errors concerning substantial factual matters relating to the HRS positions

The Activity's challenge to the RD's finding that the disputed HRS positions should be included in the proposed bargaining unit is also unsupported. The RD rejected the Activity's claim that the HRS positions fall within the § 7112(b)(3) exclusion for employees engaged in personnel work in other than a purely clerical capacity.

The RD did not fail to apply established law when he resolved the unit status of the HRS positions. Looking to pertinent Authority precedent for guidance, the RD found that, even though the HRS employees perform duties as resource persons in personnel matters, they perform their duties in a routine manner in accor-

dance with established Activity guidelines. The RD also determined that the HRS employees are not required to exercise independent judgment or discretion in carrying out those duties. Finally, the RD determined that the HRS employees do not perform their duties in a manner that would create a conflict of interest between their job duties and their union affiliation.

The principles applied and the issues resolved by the RD in reaching these conclusions accurately reflect the principles and issues recognized as relevant by Authority precedent. *See Local 3529*, 57 FLRA at 639; *FDIC, San Francisco, Cal*, 49 FLRA 1598, 1602 (1994); *IRS*, 36 FLRA at 145. *Cf. United States Dep't of the Army Headquarters, 101st Airborne Div., Fort Campbell, Ky.*, 36 FLRA 598, 603-04 (1990) (analysts excluded under § 7112(b)(3) because they exercised independent judgment as to the appropriateness of the Activity's organizational structure, staffing, method of operation and capital investments). Moreover, the Activity does not dispute that the RD applied the correct principles; the Activity disputes only the results of that application. Therefore, we reject the Activity's contention that the RD failed to apply established law when he held that the HRS positions should be included in the proposed unit. [7]

The Authority decisions cited by the Activity are distinguishable. Application at 36-38. Some of the cited cases, unlike here, involved employees whose inclusion in bargaining units would create a conflict of interest between their job duties and their union affiliation. *See 832nd Combat Support Group, Luke AFB, Ariz.,* 23 FLRA 768, 771 (1986) (citing *SSA,* 17 FLRA 239, 240 (1985); *EPA, Region VII, Kansas City, Mo.*, 14 FLRA 25, 26 (1984); *Veterans Admin., Washington, D.C.*, 11 FLRA 176 , 177 (1983); and *Dep't of Health and Human Serv., Region X, Seattle, Wash.*, 9 FLRA 518 , 524-25 (1982)).

In addition, *Defense Mapping Agency, Hydrographic/Topographic Center, Providence Field Office*, 13 FLRA 407-08 (1983) is distinguishable because the employee at issue was "the resident expert on certain personnel matters[,]" "sat in on bargaining sessions dealing with performance appraisals[,] and shortly after ratification of the collective bargaining agreement conducted a training session for supervisors on the new performance appraisal system." The HRS employees do not perform any comparable duties.

Finally, the remaining cited cases are distinguishable because the employees were not excluded on § 7112(b)(3) grounds. *See IRS*, 36 FLRA at 145-46: *United States Dep't of Housing and Urban Dev.*, 34 FLRA 207, 214 (1990); *Headquarters Fort Sam Houston, Fort Sam Houston, Tex,* 5 FLRA 339 (1981).

There is also no merit to the Activity's contention that the RD committed clear and prejudicial errors concerning substantial factual matters regarding the HRS positions. The RD made extensive factual findings supporting his determination that the HRS employees exercise their duties in a routine manner, that they do not exercise independent judgment, and that they do not perform their duties in such a manner as to create a conflict of interest. RD Decision at 7-30, 33-35.

The Activity does not directly challenge any of the RD's factual findings as unsupported by the record. Rather, the Activity cites assertedly contrary evidence to substantiate its claim that the RD erred. The evidence cited by the Activity does not directly controvert the RD's findings. The Activity's disagreement with the weight the RD ascribed to certain evidence does not provide a basis for finding that the RD committed clear errors in making factual findings. *E.g., United States Dep't of Defense, Pentagon Force Protection Agency, Washington, D.C.*, 62 FLRA 164, 170 (2007) (disagreement over evidentiary weight not sufficient to find that RD committed a clear and prejudicial error concerning a substantial factual matter); *Nat'l Credit Union Admin.*, 59 FLRA 858, 862 (2004) (same).

Moreover, the RD's factual findings are supported by the record. The RD found, for example, that the HRS employees' performance "does not require the consistent exercise of independent judgment or discretion rising above the routine[.]" RD Decision at 33. Supporting this finding, the record discloses, for example, that employees perform their duties in accordance with standardized guidelines such as manuals and handbooks that extensively explain policies and procedures. Tr. at 147, 180, 354, 477, 534-35.

Similarly, the record supports the RD's finding that the HRS positions do not perform their duties in such a manner as to create a conflict of interest. RD Decision at 33-34. For example, the record includes testimony that the employees do not perform staffing level studies

7. We disagree with the concurrence that there is a need to reconsider Authority precedent interpreting § 7112(b)(3). The Activity did not claim in its application that "[e]stablished law or policy warrants reconsideration[.]" 5 C.F.R. § 2422.31(c)(2). In our view, moreover, the Authority's precedent in this area reasonably interprets the Statute's language; that precedent is almost 30 years old and has been noncontroversial.

and are not involved in performance actions. Tr. at 362, 424, 470-71.

Based on the foregoing, we conclude that review of the RD's Decision is not warranted on the ground that the RD failed to apply established law or committed clear and prejudicial errors concerning substantial factual matters relating to the HRS positions.

C. The Activity has not demonstrated that the RD failed to apply established law and committed clear and prejudicial errors concerning substantial factual matters relating to the Audit Liaison Specialist position

The Activity's contention that the RD erroneously included the disputed Audit Liaison Specialist position in the proposed unit is also unfounded. The RD rejected the Activity's claim that the Audit Liaison Specialist position falls within the § 7112(b)(7) exclusion for certain employees "primarily engaged in . . . audit functions . . . undertaken to ensure that the duties [certain referenced individuals perform] are discharged honestly and with integrity."

The Activity's argument that the RD failed to apply established law is not supported by the Authority precedent the Activity cites. The Activity contends that the RD failed to apply established law because the RD's Decision is assertedly inconsistent with the Authority's decision in *Naval Audit,* 46 FLRA 512. As pertinent here, in *Naval Audit,* the Authority agreed with the RD that the disputed employees should be excluded from the proposed unit because the individuals were "primarily engaged in financial and program audits[.]" *Id.* at 518-19.

In contrast to *Naval Audit*, and as the RD found, the disputed Audit Liaison Specialist position does not perform audits. RD Decision at 35. Rather, the employee is responsible for coordinating, and responding to internal or external requests for HR information in support of the Activity's yearly financial audits conducted by external auditors. *Id.* In further contrast to *Naval Audit,* the financial audits to which the Audit Liaison Specialist's duties relate are not designed to determine whether or not the employees of the agency are discharging their duties honestly and with integrity. *Id.* Hence, *Naval Audit* is distinguishable and the Activity's reliance on *Naval Audit* does not demonstrate that the RD failed to apply established law in finding that Audit Liaison Specialist position was not covered by § 7112(b)(7).

Similarly, the Activity's claim, that the RD's Decision regarding the HRS positions is inconsistent with *United States Small Business Admin.,* 34 FLRA 392 (1990) (*SBA)*, is also incorrect. *SBA* does not, as the Activity asserts, exclude non-auditor support staff from unit coverage based on § 7112(b)(7). *See id.* at 402-03.

Finally, there is no merit to the Activity's contention that the RD committed clear and prejudicial errors concerning substantial factual matters in reaching his decision concerning the Audit Liaison Specialist position. Similar to its objections relating to the RD's HRS position determination, the Activity does not challenge as unsupported the RD's finding that the Audit Liaison Specialist employee does not perform audits. Instead, the Activity cites other record evidence that describes the functions performed by the Audit Liaison Specialist. As discussed previously, the Activity's disagreement with the RD's assessment of the evidence does not demonstrate that the RD committed a clear factual error.

Moreover, the record supports the RD's factual determinations regarding the Audit Liaison Specialist position. In this regard, the employee testified at the hearing that she compiles information requested by contractors who perform audits of the Activity's employee compensation system. Tr. at 312, 291-94. She also testified that no employee has been disciplined by the Activity as a result of the audits performed by the contractors. Tr. at 314.

Based on the foregoing, we conclude that review of the RD's decision is not warranted on the ground that the RD failed to apply established law or committed clear and prejudicial errors concerning substantial factual matters relating to the Audit Liaison Specialist position.

V. Order

The application for review is denied. [8]

8. Because the RD's order directing an election was contingent on the resolution of any timely application for review, there is no need to rule on the Activity's motion for a stay of the RD's election order.

Concurring Opinion of Member Beck:

I join with my colleagues' conclusion that the Activity's application for review should be denied insofar as it argues that the RD committed prejudicial procedural errors and prejudicial errors concerning disputed factual matters. I also agree with my colleagues that the RD did not fail to apply established law in finding that the Audit Liaison position does not warrant exclusion under § 7112(b)(7) of our Statute. Further, I agree with the Majority that the RD applied established precedent in determining whether the duties of the HRS employees required the consistent exercise of independent judgment or discretion rising above the routine; however, I question whether, in this respect, our precedent is true to Congress' intention as expressed in our Statute.

Section 7112(b)(3) excludes from a bargaining unit employees who are "engaged in personnel work in *other than a purely clerical capacity*" (emphasis added). In determining whether this exclusion applies, the pertinent precedent focuses on whether the duties performed by an employee are routine and on the degree of discretion exercised by the employee. [*] However, I do not believe that the standard established by our precedent extends the exclusion as far as Congress intended.

It is clear to me that § 7112(b)(3) intends to permit the inclusion in the bargaining unit of secretaries, administrative assistants, and clerks who merely support — but do not perform — the HR function. There is a significant gap between those positions, which typically are engaged in purely clerical duties, and positions that engage in substantive decision-making about labor and employee relations. This case falls into that gap.

The disputed HRS positions engage in personnel management duties that are patently more than "purely clerical":

- Evaluating duty statements and classifying new positions (RD's Decision at 6);
- Conducting position reviews (RD's Decision at 7);
- Advising managers on vacancy recruitments and interviews (RD's Decision at 8);
- Processing information required for firefighters to obtain waivers to work capacity tests (RD's Decision at 10);
- Conducting the research that allows managers to respond to inquiries from Congressional representatives and other agencies (RD's Decision at 12);
- Handling matters related to danger pay and overtime (RD's Decision at 13);
- Developing functional requirements for the E-forms program and determining whether a problem may be resolved in-house or by a contractor (RD's Decision at 13); and
- Recommending changes to performance management policies and procedures (RD's Decision at 21).

These employees are not just moving papers or maintaining files; they are evaluating, advising, and recommending. Yet, under our precedent, such duties may be deemed purely clerical because the standard turns on whether discretion or independent judgment is exercised and whether the duties are routine. Even if these duties are considered routine and do not necessarily require the exercise of substantial discretion and independent judgment, the standard fails to consider that such duties would not in any other context be considered *purely* clerical. The existing standard ignores the significance of the word "purely."

Accordingly, I cannot conclude that our precedent applies the scope of the exemption as was intended by the plain language of § 7112(b)(3). I would treat this case as an opportunity to review and reconsider our precedent.

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*. These cases include *AFGE, Local 3529*, 57 FLRA 633 (2001); *FDIC San Francisco, Cal*, 49 FLRA 1598 (1994); *Dep't of the Treasury, Internal Revenue Serv., Wash., D.C., IRS*, 36 FLRA 138 (1990).