

65 FLRA No. 136

PENSION BENEFIT
GUARANTY CORPORATION
(Agency)

and

INDEPENDENT UNION
OF PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE
(Petitioner/Labor Organization)

and

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS, AFL-CIO
UNION OF PENSION EMPLOYEES
(Incumbent Union)

WA-RP-10-0070

ORDER DENYING
APPLICATION FOR REVIEW

March 25, 2011

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

I. Statement of the Case

This case is before the Authority on an application for review (application) filed by the Petitioner under § 2422.31(c) of the Authority's Regulations.¹ The Incumbent Union (UPE) filed an opposition to the application.²

1. 5 C.F.R. § 2422.31 states, 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;

....

The Regional Director (RD) determined that UPE is the incumbent exclusive representative of the bargaining unit at issue in the petition for an election and thus, under § 2422.8(d) of the Authority's Regulations, had a right to participate in the election.³ For the reasons that follow, we deny the application.

II. Background and RD's Decision

On March 4, 2009, an RD of the Authority certified UPE as the exclusive representative of the bargaining unit at issue here. RD's Decision at 5 (citing Certification of Representative in Case No. WA-RP-09-0013). In the proceeding at issue here, the Petitioner filed a petition under § 7111(b) of the Federal Service Labor-Management Relations Statute (the Statute), requesting an election to determine whether employees of the Agency still wished to be represented by UPE or wished, instead, to be represented by the Petitioner. *Id.* at 1. Subsequently, the Petitioner filed a motion asserting that UPE is not automatically entitled to participate in this proceeding as the incumbent exclusive representative because it is not a "labor organization" within the meaning of § 7103(a)(4) of the Statute.⁴ *Id.* at 2.

As relevant here, the RD found that, to meet the definition of "labor organization" under § 7103(a)(4), the organization must be composed of employees who participate and pay dues. *Id.* at 8. In this connection, the RD determined that it was not disputed that, in June 2010, UPE adopted a constitution that included a dues structure, and that dues withholding became effective August 15, 2010. *Id.* at 7. She also found it undisputed that, since that time, the Agency has been withholding dues payments of bargaining unit employees and transmitting the dues to UPE. *Id.* at 7-8. In addition,

(iii) Committed a clear and prejudicial error concerning a substantial factual matter.

2. In its opposition, UPE states that, on February 3, 2011, it filed a petition to amend its certification to remove the reference to IFPTE. *Opp'n* at 2 n.2. As there is no allegation that this matter affects the application, we do not address it further. In addition, both the Petitioner and UPE filed supplemental submissions. As neither the Petitioner nor UPE requested permission to do so, we have not considered the submissions. *E.g., U.S. Dep't of Def., Dep't of Def. Dependents Sch., Europe*, 65 FLRA 580, 581 (2011).

3. The pertinent wording of § 2422.8(d) is set forth below.

4. Section 7103(a)(4) provides, in pertinent part, that "labor organization" means "an organization . . . in which employees participate and pay dues[.]"

the RD stated that the Authority has found that a newly formed organization may be a labor organization even before it has collected dues. *Id.* at 9 (citing *U.S. Dep't of Veterans Affairs, Wash., D.C. and U.S. Dep't of Veterans Affairs, Westside Med. Ctr., Chi., Ill.*, 35 FLRA 172, 178 (1990) (*Veterans Affairs*)). Accordingly, the RD concluded that employees participate in, and pay dues to, UPE and that, consequently, UPE is a labor organization within the meaning of § 7103(a)(4). *Id.* at 9-10.

Further, the RD stated that, under § 2422.8(d) of the Authority's Regulations, an incumbent exclusive representative is a party if any of the employees represented by the exclusive representative are affected by issues raised in a representation petition, and she found that employees represented by UPE are affected by the petition in this case. *Id.* at 10. As UPE is the incumbent exclusive representative, and in view of her conclusion that UPE is a labor organization under the Statute, the RD determined that UPE had a right under § 2422.8(d) to participate in the election. *Id.* at 10-11.

III. Positions of the Parties

A. Petitioner

The Petitioner contends that review is warranted because the RD failed to apply established law. Application at 2-3. Specifically, the Petitioner asserts that § 7103(a)(4) and the holding in *Veterans Affairs* require that UPE must actually have collected dues money no later than the date of its certification to qualify as a labor organization and that there is no exception for a "newly formed" organization. *Id.* at 21-22, 29. Consequently, the Petitioner asserts that the RD failed to properly apply § 7103(a)(4) in concluding that UPE qualified as a labor organization. *Id.* at 3.

The Petitioner also contends that review is warranted because the RD committed clear and prejudicial errors concerning substantial factual matters. Specifically, the Petitioner asserts that the RD erred in her application of *Veterans Affairs* because UPE did not have a dues structure and did not intend (or had only a speculative intent) to collect dues at relevant times, "including in November 2008 when it filed its representational petition with the [Authority], in February 2009 when the [Authority] conducted an election, and in March 2009 when UPE was certified." *Id.* at 35-38, 42-43. In addition, the Petitioner claims that the reference to a "newly-formed organization" in *Veterans Affairs*, 35 FLRA at 177, does not excuse the delay in actual dues

collection. Application at 42. The Petitioner further alleges that the constitution adopted in June 2010 and its dues structure "are not valid or legitimate[.]" and that the Department of Labor is investigating issues related to this constitution. *Id.* at 37 & 38 n.22.

The Petitioner also contends that the RD committed clear and prejudicial errors as to substantial factual matters concerning the representation petition filed in November 2008 and UPE's affiliation with IFPTE. The Petitioner alleges that IFPTE, and not UPE, filed the petition and that the petition contained false information on UPE's affiliation with IFPTE. *Id.* at 30-34.

In addition, the Petitioner argues that review is warranted because there is an absence of precedent regarding whether a group can constitute a "labor organization" by simply having a dues structure and a speculative intent to collect dues, and regarding whether there is an exception for a newly formed organization. *Id.* at 21-22.

B. UPE

UPE contends that the application should be denied because the RD correctly applied established law to undisputed facts and correctly concluded that UPE is a "labor organization" within the meaning of § 7103(a)(4). *Opp'n* at 2. In this regard, UPE argues that the RD correctly found that, under § 7103(a)(4) and *Veterans Affairs*, UPE is a labor organization because it is undisputed that, in August 2010, the Agency began withholding dues and transmitting them to UPE. *Id.* at 6. For these reasons, UPE also contends that the RD's decision does not raise an issue for which there is an absence of precedent. *Id.* at 10-11. UPE further contends that the Petitioner fails to demonstrate that the RD committed any errors concerning any substantial factual matters because the RD identified and properly relied on undisputed facts in concluding that UPE is a labor organization. *Id.* at 15-18.

IV. Analysis and Conclusions⁵

As relevant here, § 2422.8(d) provides: "An incumbent exclusive representative . . . will be considered a party in any representation proceeding raising issues that affect employees the incumbent represents[.]" In turn, § 7103(a)(16)(A) of the

5. Although the Petitioner cites § 2422.31(c)(2) in its application, it does not allege that any established law or policy warrants reconsideration. Accordingly, we do not consider that issue further.

Statute pertinently defines “exclusive representative” as a “labor organization . . . which is certified as the exclusive representative[.]” There is no dispute that UPE is certified as the exclusive representative of the bargaining unit employees at issue in this proceeding, or that this proceeding affects these employees. There also is no dispute that, at the time of the RD’s decision, UPE met the definition of labor organization. Consequently, there can be no dispute that, at the time of the RD’s decision at issue here, UPE also met the definition of exclusive representative and constituted “[a]n incumbent exclusive representative” within the meaning of § 2422.8(d). Thus, under § 2422.8(d), UPE is entitled to be considered a party in this proceeding and to participate in any election.

The Petitioner argues that UPE did not meet the definition of labor organization by the time it was certified in 2009 and failed to meet the definition until it was “too late[.]” Application at 37. However, nothing in the wording of § 2422.8(d) or Authority precedent indicates that, in the context of an election petition where the unit employees are currently represented, the Petitioner may challenge the status of an incumbent exclusive representative on the basis that it did not constitute a labor organization as of the date on which it was certified by the Authority. *Cf. Def. Logistics Agency*, 5 FLRA 126, 127 (1981) (Authority adopted judge’s conclusion that the certification of exclusive representative could not be collaterally attacked). In addition, § 7103(a)(4) and the Authority’s decision in *Veterans Affairs* do not require that newly formed organizations must actually have collected dues money no later than the date of certification, or within any specific period of time thereafter, in order to qualify as a labor organization. Thus, the Petitioner’s arguments provide no basis for finding that the RD erred in concluding that UPE is a labor organization and has a right under § 2422.8(d) to participate in any election. Accordingly, we deny the application.⁶

6. In connection with the Petitioner’s claim that UPE is being investigated by the Department of Labor, the Authority has repeatedly acknowledged that the Assistant Secretary of Labor has exclusive jurisdiction over the type of claims raised by the Petitioner when they “do not fall under the purview of the [Statute].” *N.M. Army & Air Nat’l Guard*, 56 FLRA 145, 149 (2000) (then-Member Segal and then-Member Cabaniss concurring and Chairman Wasserman dissenting as to other matters). Here, the Petitioner makes no argument that the alleged matters are within the purview of the Statute. To the extent that the Petitioner is challenging UPE’s certification on grounds other than UPE’s failure to meet the definition of “labor organization[.]” the Petitioner may not raise any issue in its

V. Order

The Petitioner’s application for review is denied.

application that it did not raise to the RD. It is not clear that the Petitioner raised any challenge to the validity of the Authority’s certification to the RD apart from whether UPE met the definition of labor organization.