65 FLRA No. 149

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
NEBRASKA/WESTERN IOWA
VA HEALTH CARE SYSTEM
OMAHA, NEBRASKA
(Agency/Petitioner)

and

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

DE-RP-10-0017
DE-RP-10-0018
DE-RP-10-0028

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ORDER GRANTING
APPLICATION FOR REVIEW

April 8, 2011

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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 filed by the Nebraska/Western Iowa VA Healthcare System (Agency or NWI), under § 2422.31 of the Authority's Regulations. [1] The petitions filed in this case were filed as a result of a reorganization that led to the formation of NWI. RD's Decision at 2-3.

The Union filed two petitions: one seeking a unit of all professional employees at NWI, and one seeking a unit of all non-professional employees at NWI. In its petitions, the Union contends that each of the bargaining units should be formed through the doctrine of successorship. The Agency filed a cross-petition seeking four units within NWI.

The Regional Director (RD) granted the Union's two petitions, finding that NWI was the successor employer of VA Medical Center employees located in Omaha, Lincoln, and Grand Island, Nebraska and Community-Based Outpatient Clinic (CBOC) employees at various locations in Nebraska and Iowa. The RD also dismissed the Agency's cross-petition.

For the reasons that follow, we grant the application for review on the grounds that there is a genuine issue over whether the RD failed to apply established law and whether the RD committed a clear and prejudicial error concerning a substantial factual matter under § 2422.31(c)(3)(i) and (iii), respectively. On review, we conclude that the RD erred in both of these respects. We therefore remand the matter to the RD to issue appropriate certifications.

II. Background and RD's Decision

NWI was created by a reorganization in 1999. In 2010, three petitions were filed to resolve representation issues resulting from the reorganization. The petitions dealt with the realignment in 1999 of VA Medical Center employees located in Omaha, Lincoln, and Grand Island into NWI. The petitions also addressed the bargaining unit status of employees located at the Bellevue, Holdrege, Norfolk, and North Platte, Nebraska, and Shenandoah, Iowa CBOCs. RD's Decision at 1-2.

The RD found that, for years, the Union has been the exclusive representative of units of both professional and non-professional VA employees. *Id.* at 8. The RD determined that, at the time of the hearing, the American Federation of Government Employees (AFGE), Local 2219 represented the professional and nonprofessional employees located at Lincoln; AFGE, Local 2270 represented professional nurses and nonprofessional employees located at Omaha; and AFGE, Local 2601 represented the professional and nonprofessional employees located at Grand Island and the non-

1. 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:
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> (1) The decision raises an issue for which there is an absence of precedent;
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> (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.

professional employees located at the Holdrege CBOC. *Id.* at 9-10.

The Union filed two petitions: one seeking a unit of all professional employees at NWI, and one seeking a unit of all non-professional employees at NWI. In its petitions, the Union contends that each of the bargaining units should be formed through the doctrine of successorship.[2] *Id.* at 2. The Agency filed a cross-petition seeking four more limited units within NWI.[3] *Id.*

As pertinent here, the RD determined that the petitions raised the following issues:

1. Whether NWI is an appropriate unit for purposes of exclusive recognition; and

2. Whether NWI is a successor employer for any employees represented by AFGE.

Id. at 12.

The RD made the following findings in response to the issues identified above. First, applying the statutory criteria for determining whether a unit is an appropriate unit for exclusive recognition, the RD found that the Union's requested units of professional and non-professional employees at NWI are appropriate for exclusive recognition under § 7112(a) of the Federal Service Labor-Management Relations Statute (the Statute). *Id.* at 12-17. Second, the RD determined that NWI is a successor employer, as set forth below. With respect to the latter point, the RD applied the Authority's three-pronged framework described in *Naval Facilities Engineering Service Center (NFESC), Port Hueneme, Cal.*, 50 FLRA 363 (1995) (*Port Hueneme*), to determine whether NWI constituted a successor employer.

As set forth in *Port Hueneme*, an entity is considered to be a successor employer, and the labor organization involved retains its status as exclusive representative of the transferred employees, where:

> (1) An entire recognized unit, or a portion thereof, is transferred and the transferred employees: (a) are in an appropriate bargaining unit . . . 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 . . .; and
>
> (3) It has not been demonstrated that an election is necessary to determine representation.

Id. at 368.

With regard to the first prong, the RD determined that the employees in each of the previously recognized units at Omaha, Lincoln, and Grand Island, and the professional employees at Holdrege, were "transferred" to NWI. RD's Decision at 19. Next, the RD reiterated his prior determinations that two units of all professional and non-professional NWI employees are appropriate. *Id.* Last, the RD determined that the transferred employees constitute a majority of the employees of each unit.[4] *Id.* Thus, the RD found, the first prong of the successorship framework is met.

The RD also made findings with respect to the second and third prongs of *Port Hueneme's* successorship framework. Regarding the second prong, the RD found that the creation of NWI did not change the overall mission of the entities involved to maintain the health and well-being of veterans. *Id.* at 19-20. The RD further found that the transferred employees perform substantially the same duties and functions under substantially similar working conditions at NWI as they did prior to their transfer. *Id.* at 20. The RD also found that, in any event, under the existing Master Labor Agreement the parties' Partnership Council would address any

2. The petition in Case No. DE-RP-10-0017 seeks to clarify the bargaining unit status of approximately 775 professional NWI employees working in the VA Medical Centers and five CBOCs. The petition in Case No. DE-RP-10-0018 seeks to clarify the bargaining unit status of approximately 1,034 non-professional NWI employees working in the VA Medical Centers and the five CBOCs. RD's Decision at 2.

3. The Agency's cross-petition is designated Case No. DE-RP-10-0028. In its application for review, the Agency does not maintain that the units sought in its petition should be established.

4. Specifically, the RD found that the Union represented a total of 641 professional employees, and 1,018 non-professional employees in the NWI units he found appropriate, while only 134 professional employees and 16 non-professional employees remain unrepresented. RD's Decision at 19.

changes to employees' job duties. Therefore, the RD concluded, the second prong of the framework is met. With regard to the third prong, the RD found that an election is unnecessary since the Union represents a clear majority of the employees. Therefore, the RD determined, the third prong of the framework is also met. *Id.*

Consequently, the RD concluded that NWI is a successor employer. The RD thus determined that the unit certifications should be amended to reflect the Union's status as exclusive representative of one professional unit and one non-professional unit of all employees assigned to NWI including all CBOC employees. *Id*.

III. Positions of the Parties

A. Agency's Application for Review

The Agency agrees with the RD's conclusions, with two exceptions. First, the Agency argues for the continued exclusion of the non-nurse professional Omaha employees from the NWI professional unit. The Agency points out that these employees had been specifically excluded from the Omaha professional employee unit transferred to NWI in 1999. Application for Review at 13. Second, the Agency contends that all CBOC employees, both professional and non-professional, who are located at CBOCs that were not in existence in 1999, should be excluded from each of the respective NWI units that the RD found appropriate. *Id.* at 11, 13-14. [5]

In support, the Agency makes a number of claims. First, the Agency argues that the RD failed to apply established law by erroneously applying *Port Hueneme* to include in the NWI professional unit the Omaha non-nurse professional employees who were specifically excluded from the Omaha unit transferred to NWI. *Id.* at 6. According to the Agency, to find successorship under *Port Hueneme's* framework, the employees transferred as a result of a reorganization must be part of an appropriate bargaining unit prior to the transfer. Here, the Agency argues, the Omaha professional employees were not part of an appropriate bargaining unit prior to the unit's transfer, but rather, were specifically excluded from the unit. Thus, the Agency claims, the doctrine of successorship cannot be used to include them in the unit following that transfer. *Id.* at 8

The Agency further argues that doing so would be inconsistent with the purpose behind the successorship doctrine, which is intended to preserve and maintain a pre-existing bargaining relationship that would otherwise be disrupted by a reorganization. As applied here, the Agency contends, the successorship doctrine would not preserve the existing bargaining relationship. Rather, the Agency claims, the application of the successorship doctrine would change the bargaining relationship by including employees in the unit who, previously, were specifically excluded from the bargaining unit. *Id.* Therefore, the Agency argues, the RD failed to apply established law.

In addition, the Agency argues that to include previously excluded employees in a post-transfer unit expansion, an additional test must be met. *Id.* at 9. Specifically, the Agency argues that there must be "'meaningful changes' in the employees' duties, functions, or job circumstances that eliminate the original distinctions between employees and thus warrant their inclusion into the unit." *Id.* (citing *Def. Logistics Agency Def. Supply Ctr. Columbus, Columbus, Ohio*, 53 FLRA 1114, 1124 (1998) (*DLA, Columbus*)).

Second, the Agency claims that, if *Port Hueneme* does not address the question raised by the Omaha professional employees who had been specifically excluded from the Union's bargaining unit, then the RD's decision raises an issue for which there is an absence of precedent. *Id.* at 10.

Third, the Agency contends that the RD failed to apply established law by determining that NWI is a successor employer for unrepresented CBOC employees who were not employed at NWI at the time of the reorganization. *Id.* at 10-12. According to the Agency, the successorship doctrine was meant to be applied at the time of the reorganization and resulting transfer of employees from the losing organization to the gaining organization. *Id.* at 11. Applying this principle, the Agency makes three main arguments. The Agency argues that, as the CBOC employees were hired directly into NWI

5. Thus, the Agency agrees to the formation of a single NWI professional unit and a single NWI non-professional unit, excluding only Omaha's non-nurse professional employees and employees of the CBOCs formed after 1999; that is, the Bellevue, Holdrege, and Norfolk, Nebraska, and Shenandoah, Iowa CBOCs. The record does not include the number of non-nurse professional employees who were specifically excluded from the Omaha professional unit. However, because their exclusion from the NWI professional unit, as the Agency seeks, would only reduce the number of unrepresented professionals in that unit, their exclusion would not alter the RD's conclusion that the represented employees are a "clear majority." RD's Decision at 20. *See also* n.4, *supra*.

several years after the 1999 reorganization that gave rise to this case, those employees could not have been transferred as part of that reorganization. *Id.* Further, the Agency asserts, as the CBOC employees were hired directly into NWI, they were not transferred at all. *Id.* Finally, the Agency argues, successorship principles allowing for the inclusion of formerly unrepresented employees in an appropriate successor unit do not apply because the disputed CBOC employees did not exist at the time of the transfer. *Id.*

Fourth, the Agency claims that, if Authority successorship precedent does not address the question raised by the unrepresented CBOC employees, then the RD's decision raises an issue for which there is an absence of precedent. *Id.* at 12.

Fifth, the Agency claims that the RD made a prejudicial factual error in finding that the Holdrege CBOC professional employees were transferred to NWI. *See* RD's Decision at 19; Application for Review at 12-13. The Agency claims that, contrary to the RD's factual findings, it was the North Platte employees, not the Holdrege professional employees, who were transferred to NWI as a result of the reorganization. According to the Agency, the North Platte CBOC was created in 1995, prior to the reorganization. Therefore, the Agency asserts, North Platte employees were capable of being "transferred" to NWI in the 1999 reorganization. *Id.* The Agency argues that the Holdrege CBOC only came into existence between 2007 and 2009 and therefore, could not have been transferred to NWI as part of the 1999 reorganization.[6]

Sixth, the Agency argues that the RD failed to apply established law by misapplying the third prong of the *Port Hueneme* test for successorship. *Id.* at 13. In this regard, the Agency claims that the RD erroneously determined that an election was not required because the unit employees who had been transferred to NWI constituted a majority of all transferred employees. *Id.* In the Agency's view, contrary to the RD's findings, an election is required as to the Omaha professional employees and the unrepresented CBOC employees. The Agency argues that the third prong of the test has not been met with regard to these employees because none of them were ever part of an appropriate bargaining unit, and because, aside from the CBOC employees located at the North Platte CBOC created in 1995, none of these employees were ever "transferred" to NWI. *Id.*

B. Union's Opposition

The Union contends that the RD correctly applied *Port Hueneme's* successorship framework. The Union agrees with the RD's appropriate unit findings. Specifically, the Union claims that the RD properly determined that excluding the Omaha non-nurse professional employees from the unit would promote unit fragmentation. Opp'n at 5. The Union argues that the RD properly applied Authority precedent in finding that one unit of NWI non-professional employees and one unit of NWI professional employees is appropriate. *Id.* at 1, 6.

Further, the Union agrees with the RD's finding that an election is not required in this case. The Union argues that the RD's determination in this regard was proper because a majority of the employees who were transferred to NWI were previously part of the Union's bargaining units. *Id.* at 1, 3, 5. The Union claims that, in finding this to be the case, the RD correctly treated the employees who are now employed by NWI, but who were not part of its bargaining unit at the time of the hearing, as "unrepresented." *Id.* at 4. The Union asserts that under Authority case law, an election is not necessary if the number of represented employees exceeds the number of unrepresented employees. *Id.* at 3. Thus, the Union argues, the previously excluded Omaha non-nurse professional employees transferred to NWI are properly included by the RD in the unit because the Union represents a majority of the transferred professional NWI employees. *Id.* at 4-5. The Union contends that to exclude these employees would promote unit fragmentation. *Id.* at 5.

Similarly, the Union argues that new hires, such as those employees located at the CBOCs formed by NWI after the reorganization in 1999, were also correctly determined by the RD to be included in the two appropriate NWI bargaining units. *Id.* at 5. The Union contends, in this connection, that Authority precedent requires that the RD consider the facts and circumstances at the time of the hearing, and at the time of the hearing, there were CBOC employees employed at NWI who shared a community of interest with the other NWI employees. *Id.* The Union further argues that the RD correctly included the CBOC employees in the unit because the reorganization took place over a period of time. *Id.*

6. The Agency notes that the non-professional employees at the Holdrege CBOC are now represented as the result of a recent election and does not oppose their inclusion in the non-professional unit. Application for Review at 3, 13. The Agency asks that the Authority take official notice of that certification, as set forth in Case No. DE-RP-09-0023.

The Union also claims that excluding the CBOC employees at issue would not effectuate the purposes of the Statute because the representational status of a portion of NWI employees would be left unresolved. *Id.* at 5-6. The Union asserts: "Given the integration and inter-reliance of NWI functions and employees it would promote fragmentation to separate *some* CBOC employees . . . from the remainder of NWI." *Id.* at 6.

In sum, the Union argues that the RD properly found that NWI is the successor employer to the Omaha, Lincoln, and Grand Island VA Medical Centers and the Bellevue, Holdrege, Norfolk, North Platte, and Shenandoah CBOCs. *Id.* at 1.

IV. Analysis and Conclusions

The Agency claims that the RD failed to apply established successorship law. The Authority's current successorship doctrine is based on the Authority's decision in *Port Hueneme*, 50 FLRA 363. In *Port Hueneme*, the Authority recognized that successorship promotes stability in labor-management relations, one of the Statute's fundamental purposes. *Id.* at 367. Accordingly, the Authority broadened the applicability of successorship to ensure that it was "flexible enough to apply . . . to the types of organizational changes being undertaken in Government at the present time." *Id.*

Previously, the Authority had restricted the doctrine's application to units of employees remaining "substantially intact" after transfer to a gaining entity. Furthermore, the appropriateness of "the unit" had to be "unimpaired in the gaining [entity]." *Dep't of Energy, W. Area Power Admin.*, 3 FLRA 77, 79 (1980). The Authority's decision in *Port Hueneme* modified these criteria by applying successorship not just to units remaining substantially intact after the transfer, but also to units in which only a portion of the unit has been transferred. *See Port Hueneme*, 50 FLRA at 370. Moreover, the Authority held that "successorship is possible . . . and a post-transfer unit may be found appropriate even if [the unit] has been expanded to include employees in addition to those transferred." *Id.*

In this case, the Agency agrees with the RD's application of the successorship doctrine in every respect save two: applying the doctrine to (1) include in the post-transfer professional unit Omaha non-nurse professional employees specifically excluded from the pre-transfer unit, and (2) include in the post-transfer units employees at CBOCs formed after 1999. Application for Review at 13-14. In other words, the Agency agrees to the formation, pursuant to the law of successorship, of a single NWI professional unit and a single NWI non-professional unit, with the exclusions noted. *Id.*

Resolving the Agency's application for review raises complex issues in the application of successorship law. These issues arise from the case's special circumstances, including the composition and number of predecessor units, as well as the extended period during which events pertinent to the Union's petitions occurred. With regard to the predecessor units, the professional unit certifications at Lincoln and Grand Island differ from Omaha's professional unit certification in one significant respect. Whereas the Lincoln and Grand Island professional units include all professionals at those locations; the Omaha professional unit specifically excludes most categories of professionals, essentially including only professional nurses. *See* RD's Decision at 9-10. In addition, with regard to the CBOCs, their establishment within NWI occurred for the most part at least eight, and as much as ten years after the reorganization that realigned the VA Medical Centers at Omaha, Lincoln, and Grand Island to create NWI. *Id.* at 5-6.

The RD's decision does not address these complex issues. The RD's application of the successorship doctrine is discussed below.

A. The RD failed to apply established law by determining that NWI is the successor employer of the Omaha non-nurse professional employees who were specifically excluded from the Omaha professional unit.

Successorship results in the continuation of a union's status as exclusive representative of an appropriate bargaining unit without a new, secret ballot election. *Port Hueneme* at 370-71. Thus, successorship depends on the union involved being the choice of the majority of employees in the claimed successor unit. *Id.* (citing *Def. Supply Agency, Def. Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Md.*, 3 FLRC 789, 802 (1975)). Typically, the Authority has narrowly applied doctrines providing for the inclusion of employees in a bargaining unit without a self-determination election. *See, e.g., DLA, Columbus*, 53 FLRA at 1125 (the accretion doctrine is generally narrowly applied because it precludes employee self determination).

This case presents a situation to which both successorship principles and the principle of employees' right to self-determination apply. Under the successorship doctrine, where employees transferred from a recognized bargaining unit constitute a majority of the claimed successor's unit, employees other than the employees transferred from a recognized unit may become part of the successor unit as long as the unit remains appropriate with their inclusion. *See, e.g.*, *Port Hueneme*, 50 FLRA at 370 n.7. In this regard, successorship situations will often involve previously unrepresented employees. Such unrepresented employees may include current employees of the successor employer when successorship conditions arise.

Here, not only were the unrepresented non-nurse professional Omaha employees not included in the recognized unit that was transferred, they had been specifically excluded from that unit's certification. RD's Decision at 9. The record is silent as to the reason why the non-nurse professional Omaha employees were specifically excluded from Omaha's professional unit. Nevertheless, reflecting the importance the Authority has placed on the right of self-determination, Authority case law addresses that special circumstance. In particular, specifically excluded employees may only be added to a unit without an election "where there have been 'meaningful changes' in the employees' duties, functions, or job circumstances that eliminate the original distinctions between employees[.]" *DLA, Columbus*, 53 FLRA 1123-24 (internal citation omitted); *see also U.S. Dep't of the Air Force, Langley Air Force Base, Va.*, 40 FLRA 111, 113, 117 (1991). This case law is pertinent in a successorship context because, under *Port Hueneme*, where successorship analysis must resolve the status of employees other than those transferred from a recognized bargaining unit, it must do so "consistent with established accretion principles." *Port Hueneme*, 50 FLRA at 370 n.7.

Consequently, although a straightforward application of successorship principles would resolve the status of a predecessor's unrepresented employees transferred to a successor, the same cannot be said as to the unrepresented non-nurse professional Omaha employees in this case.[7] Because Authority self-determination case law addresses their special situation, and because the RD did not resolve their situation consistent with that case law, we find that the RD failed to apply established law by determining that NWI is the successor employer of the non-nurse professional Omaha employees.[8] For the reasons discussed above, successorship law cannot be applied to include the unrepresented non-nurse professional Omaha employees in the NWI professional bargaining unit, and they must be excluded from the NWI professional unit in the certification issued by the RD.

B. The RD failed to apply established law by applying the successorship doctrine to include in the NWI bargaining units unrepresented CBOC employees hired by NWI several years after the reorganization creating NWI took place.

The Agency argues that the RD failed to apply established law when he resolved the bargaining unit status of unrepresented CBOC employees. The Agency points out that these employees are located at CBOCs that were formed years after the reorganization that created NWI. According to the Agency, as the CBOCs did not exist at the time of the reorganization, successorship principles should not be applied to their unrepresented employees. Application for Review at 11-12.

As discussed above, the successorship doctrine in *Port Hueneme* is applied to determine the representation rights of employees who are transferred as a result of a reorganization. In addition, successorship principles can operate to determine the representation rights of unrepresented employees employed by the gaining organization. *See, e.g.*, *Port Hueneme*, 50 FLRA at 370 n.7, 374 n.11.[9] In this regard, such unrepresented employees

7. Thus, although we agree with the Union that avoiding unit fragmentation is a significant consideration in successorship law, *see* Opp'n at 5, 6, in the circumstances of this case such a consideration does not prevail over considerations relating to employee self-determination.

8. Given the conclusion that the RD failed to apply established law by including the non-nurse professional Omaha employees in the NWI professional bargaining unit, we find that there is no need to address the Agency's argument that there is an absence of precedent with regard to his decision concerning these employees.

9. We note that in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) (*Fall River*), the Supreme Court found that a successorship existed despite a seven-month "hiatus" between the demise of a predecessor employer and the "start-up" of the successor. *Id.* at 45. Applying the National Labor Relations Board's "substantial and representative complement" rule, the Court recognized that a successor employer might have a "start-up period" postponing "the moment when the determination as to the

can become part of an appropriate successor unit when the employees transferred from a recognized bargaining unit constitute a majority of the employees in the post-transfer bargaining unit. *Id.* at 374-75.

Here, the RD erred by failing to find that the unrepresented CBOC employees were not part of the gaining organization at a time relevant for purposes of applying successorship law. Instead, the RD only considered whether it would be appropriate to include the unrepresented CBOC employees in the Union's proposed post-successorship unit under § 7112(a) of the Statute. As the unrepresented CBOC employees began their duties with NWI at a time too remote from events giving rise to the successorship issues in this case, successorship principles may not be applied to include them in the NWI bargaining units established pursuant to the reorganization in 1999.[10] Accordingly, we find that RD failed to apply established law by determining that the unrepresented CBOC employees should be included in the NWI bargaining units.[11] Consequently, these employees must be excluded from the NWI professional and non-professional units in the certifications issued by the RD.

V. Order

The application for review is granted and the case is remanded to the RD to issue appropriate certifications.

composition of the successor's work force is to be made." *Id.* at 47. The "start-up" period in *Fall River* was approximately four months. Therefore, almost one year elapsed before successorship determinations were made. The Authority referred approvingly to *Fall River's* holding regarding the "substantial and representative complement" rule in *Port Hueneme*, 50 FLRA at 371 n.9. However, no basis is argued to extend this principle to situations, as here, where eight to ten years elapsed before the establishment of the CBOCs and the hiring of their employees whose inclusion in the NWI units the parties dispute.

10. The record reflects that the same is true for the represented non-professional employees at the Holdrege CBOC, which was formed in 2008-09. RD's Decision at 6. Accordingly, to the extent that the RD found that any Holdrege employees were transferred to NWI for successorship purposes, *see* Application for Review at 12-13, we find that the RD committed a clear and prejudicial error concerning a substantial factual matter. Represented non-professional Holdrege employees voted in an election to be represented by the Union, and remain represented under the terms of the existing certification that applies to them, of which we take official notice.

11. Given the conclusion that the RD failed to apply established law in determining to include the unrepresented CBOC employees in the NWI bargaining units, we find that there is no need to address the Agency's argument that there is an absence of precedent with regard to the RD's decision concerning these employees. In addition, given the above determinations that the RD failed to apply established law with regard to the previously excluded non-nurse professional Omaha employees and the unrepresented CBOC employees, we find it unnecessary to separately address the Agency's argument that the RD failed to apply established law by misapplying the third prong of the *Port Hueneme* framework.