**66 FLRA No. 161**

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
CAPTAIN JAMES A. LOVELL FEDERAL HEALTH CARE CENTER
NORTH CHICAGO, ILLINOIS
(Activity/Petitioner)

and

NATIONAL NURSES UNITED
AFL-CIO
(Exclusive Representative)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO
(Exclusive Representative)

CH-RP-10-0039

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ORDER DENYING APPLICATION FOR REVIEW

August 10, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

## I. Statement of the Case

This case is before the Authority on an application for review (application) filed by the American Federation of Government Employees (AFGE) under § 2422.31(c) of the Authority's Regulations.[1] Neither the Activity, Lovell Federal Health Care Center (Lovell FHCC), nor the National Nurses United (NNU) filed an opposition to the application.

AFGE seeks review of the Regional Director's (RD's) determination that the Lovell FHCC is the successor employer of a single unit of nurses made up of nurses from the United States Department of Veterans Affairs North Chicago Medical Center (VAMC) (represented by NNU) and from the United States Department of the Navy's Naval Health Clinic (Naval HC) (represented by AFGE).

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

## II. Background and RD's Decision

This case involves a merger of the United States Department of Veterans Affairs (VA) VAMC and the Department of Defense's (DoD's) Naval HC. The merger of these two medical facilities resulted in the creation of a new joint-use VA-DoD medical facility. RD's Decision at 1-2, 4. The merger was authorized by the National Defense Authorization Act for Fiscal Year 2010 (the Act). *Id.* at 4; *see* Title XVII of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat 2190 (October 28, 2009).[2]

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[1] Section 2422.31(c) 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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> . . . .
>
> (3) There is a genuine issue over whether the Regional Director has:
>
> (i) Failed to apply established law;
>
> . . . .
>
> (iii) Committed a clear and prejudicial error concerning a substantial factual matter.

5 C.F.R. § 2422.31(c).

[2] As relevant here, the Act provides as follows:

> (2) ELEMENTS.--In providing for the transfer of functions under subsection (a), the executive agreement under section 1701 shall provide for the following:
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> (A) The transfer of civilian employee positions of the Department of Defense identified in the executive agreement to the Department of Veterans Affairs, and of the incumbent civilian employees in such positions, and the transition of the employees so transferred to the pay, benefits, and personnel systems that apply to employees of the Department of Veterans Affairs (to the extent that different systems apply).
>
> . . . .
>
> (D) The extension of collective bargaining rights under title 5, United States Code, to employees so transferred in positions listed in subsection 7421(b) of title 38, United States Code, notwithstanding the provisions of section 7422 of title 38, United States Code, for a two-year period

As relevant here, the VAMC had three bargaining units before the merger. RD's Decision at 3. NNU was the exclusive representative of a unit of the VAMC's nurses. *Id.* AFGE was the exclusive representative of a unit of the VAMC's professional employees (excluding nurses) and a unit of the VAMC's non-professional employees. *Id.* The Naval HC had only one bargaining unit. AFGE represented that unit, which included nurses, as well as Lovell FHCC's other professional employees and its non-professional employees. *Id.* at 3-4.

The VA medical personnel at issue here are governed by the VA's personnel system under 38 U.S.C. § 7421 (Title 38). RD's Decision at 4. The Naval HC medical personnel are governed by Title 5, United States Code, including the Federal Service Labor-Management Relations Statute (the Statute). *Id.* According to the Act, however, all transferred medical employees affected by the merger, including the Naval HC medical personnel, are to be governed by the VA's Title 38 personnel system. *Id.* at 4-5; *see also* § 1703(b)(2)(A) of the Act. Recognizing that Title 38 allows for less comprehensive collective bargaining rights than Title 5, Congress included a provision in the Act extending Title 5 bargaining rights for transferred Naval HC employees for a two-year period, beginning on October 1, 2010.[3] *Id.*; *see also* § 1703(b)(2)(D) and (E) of the Act. After the merger, the Lovell FHCC filed a petition to clarify the bargaining unit status of the transferred Naval HC medical personnel, including the nurses. RD's Decision at 5.[4]

Addressing the Lovell FHCC's petition, the RD applied the Authority's successorship framework set forth in *Naval Facilities Engineering Service Center, Port Hueneme, California*, 50 FLRA 363 (1995) (*Port Hueneme*).[5] *Id.* at 7. The RD determined that: (1) the Lovell FHCC is the successor employer of the existing bargaining units of VAMC employees represented by NNU and AFGE; and (2) the VAMC AFGE units for professional and non-professional employees are appropriate units for the transferred Naval HC professional and non-professional employees, with the exception of the Naval HC nurses. RD's Decision at 9-10.

To determine the placement of the Naval HC nurses, the RD applied the three appropriate-unit criteria in § 7112(a) of the Statute – that an appropriate unit: (1) ensure a clear and identifiable community of interest

> beginning on the effective date of the executive agreement.
> (E) At the end of the two-year period beginning on the effective date of the executive agreement, for the following actions by the Secretary of Veterans Affairs with respect to the extension of collective bargaining rights under subparagraph (D):
> (i) Consideration of the impact of the extension of such rights.
> (ii) Consultation with exclusive employee representatives of the transferred employees about such impact.
> (iii) Determination, after consultation with the Secretary of Defense and the Secretary of the Navy, whether the extension of such rights should be terminated, modified, or kept in effect.
> (iv) Submittal to Congress of a notice regarding the determination made under clause (iii).

Section 1703(b)(2) of the Act.

[3] The Act also gave the VA's Secretary discretion to extend these bargaining rights beyond the two-year period. RD's Decision at 4; *see also* Section 1703(b)(2)(E) of the Act.

[4] Since the merger took place, the Lovell FHCC has maintained the existing collective bargaining agreements covering AFGE's VAMC units and the Naval HC unit, as well as NNU's VAMC unit. RD's Decision at 6.

[5] *Port Hueneme* provides that a gaining entity is a successor employer, and a union retains its status as the exclusive representative of employees who are 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 [§] 7112(a)(1) 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.

50 FLRA at 368 (footnote omitted).

among the employees in the unit;[6] (2) promote effective dealings;[7] and (3) promote the efficiency of agency operations.[8] *See id.* at 7 (citing *U.S. Dep't of the Navy, Fleet & Indus. Supply Ctr., Norfolk, Va.*, 52 FLRA 950, 958-59 (1997) (*FISC*)); 5 U.S.C. § 7112(a).

The RD first concluded that a separate unit consisting solely of the transferred Naval HC nurses would not be appropriate. RD's Decision at 12. Regarding the community-of-interest criterion, the RD found that the record did not establish that a separate unit of Naval HC nurses would share a clear and identifiable community of interest separate and distinct from the Lovell FHCC's other nurses in the NNU unit. *Id.* at 10. Specifically, the RD found that "[t]here is no functional, administrative or operational separation among the nurses." *Id.* According to the RD, the record demonstrated that the nurses are a fully integrated and unified work group; are part of the same organizational component of the Lovell FHCC; support the same mission; are subject to the same chain of command, general working conditions, and personnel and labor relations policies administered by the same personnel office; and have the same duties, job title, pay classification, hours, and work assignments. *Id.*

The RD considered AFGE's argument that the twenty Naval HC nurses retained Title 5 collective bargaining rights separate from the Lovell FHCC's other nurses in the NNU unit, and therefore shared a community of interest. *Id.* Rejecting the argument, the RD found that "[w]hile the [twenty] Naval HC nurses are not subject to the Title 38 bargaining limitations . . . for a two-year period, the record does not establish that this difference in bargaining rights, standing alone, outweighs the numerous community of interest factors shared by both groups" of nurses. *Id.* at 10-11 (citing *U.S. Dep't of the Air Force, Travis Air Force Base, Cal.*, 64 FLRA 1, 7 (2009) (*Air Force*)). The RD also found that "other than the difference in the scope of bargaining applicable to the two groups, there was no showing that the [twenty] Naval HC nurses have significant employment concerns or [personnel] issues that are unique or different from the nurses in the NNU unit." *Id.* at 10.

Applying the effective-dealings criterion, the RD found that both the Naval HC nurses and the Lovell FHCC's other nurses in the NNU unit perform the same jobs under the same working conditions and chain of command, and are governed by the same personnel office. *Id.* at 11. The RD further found that dividing the Naval HC nurses from the other nurses in the NNU unit, and placing them in separate bargaining units represented by two unions, would require the Lovell FHCC to negotiate with two different unions and administer two separate collective bargaining agreements. *Id.* He concluded that this "fractured bargaining unit structure would not promote effective dealings." *Id.* (citing *U.S. Dep't of the Navy, Commander, Navy Region Mid-Atlantic, Program Dir., Fleet & Family Readiness, Norfolk, Va.*, 64 FLRA 782, 786 (2010); *FISC*, 52 FLRA at 958-59). In addition, the RD found that the unit would not promote the efficiency of agency operations. *Id.*

The RD also considered AFGE's argument that a separate bargaining unit consisting of all the transferred Naval HC professional employees, including the twenty Naval HC nurses, would be appropriate because those employees shared the same collective bargaining rights under Title 5. *Id.* at 12 n.3. Finding this unit inappropriate, the RD concluded that the Naval HC employees' retention of Title 5 bargaining rights is only one factor, "and the Authority does not make appropriate unit determinations on one factor alone." *Id.*; *see also* RD's Decision at 10 (citing *Air Force*, 64 FLRA at 7). He further concluded that "[t]he evidence here does not establish that the [twenty Naval HC] nurses have significant employment issues that are unique or different from the [Lovell FHCC's] other nurses" that would justify placing the Naval HC nurses "in a unit separate and apart from the other nurses (whether by themselves or with the other Naval HC professional employees)." RD's Decision at 12 n.3; *see also* RD's Decision at 10 (citing *U.S. Dep't of the Navy, Naval Facilities Eng'g Command Mid-Atlantic, Norfolk, Va.*, 65 FLRA 272, 278 (2010)).

Finally, the RD considered the appropriateness of a combined unit of Naval HC nurses and VAMC nurses represented by NNU. RD's Decision at 12. The RD found that the two groups shared a clear and identifiable community of interest. *Id.* The RD also

[6] In assessing the community-of-interest criterion, the Authority examines such factors as: geographic proximity, unique conditions of employment, distinct local concerns, degree of interchange between other organizational components, and functional or operational separation. *See U.S. Dep't of the Navy, Naval Facilities Eng'g Command, Se., Jacksonville, Fla.*, 62 FLRA 480, 487 (2008). In addition, the Authority considers factors such as whether the employees in the proposed unit are part of the same organizational component of the agency; support the same mission; are subject to the same chain of command; have similar or related duties, job titles and work assignments; are subject to the same general working conditions; and are governed by the same personnel office. *See id.* at 487-88.

[7] In assessing the effective-dealings criterion, the Authority examines such factors as: the past collective bargaining experience of the parties; the locus and scope of authority of the responsible personnel office administering personnel policies covering employees in the proposed unit; the limitations, if any, on the negotiation of matters of critical concern to employees in the proposed unit; and the level at which labor-relations policy is set in the agency. *FISC*, 52 FLRA at 958-59.

[8] Factors to be examined in assessing the efficiency of agency operations include the effect of the proposed unit on agency operations in terms of cost, productivity, and use of resources. FISC, 52 FLRA at 961-62.

found that this unit would promote effective dealings and efficiency of the Lovell FHCC's operations. *Id.* Specifically, he found that the unit was "co-extensive with the operational and organizational structure of the Lovell FHCC and exists at the level where personnel and labor relations policies are established and administered." *Id.* Also significant was that a single collective bargaining agreement would cover the entire unit of nurses. *Id.* Accordingly, the RD found that a single bargaining unit of VAMC-Naval HC nurses represented by NNU was appropriate. *Id.*

## III. AFGE's Application for Review

AFGE claims that the RD "committed factual and legal errors when he failed to examine the appropriateness of AFGE's proposed unit," specifically, a unit composed of all transferred Naval HC professional employees covered by extended Title 5 bargaining rights under the Act. Application at 4. AFGE argues that this proposed unit more closely maintains the status quo, and thus should have been considered first by the RD. *Id.* at 5 (citing *U.S. Dep't of the Army, Army Materiel Command Headquarters, Joint Munitions Command, Rock Island, Ill.*, 62 FLRA 313, 317 (2007) (*Rock Island*)). Further, AFGE contends, the RD committed a "substantial factual error" in examining the appropriateness of a separate unit of Naval HC nurses because AFGE made no argument that such a unit was appropriate and did not seek to represent such a unit. *Id.* at 5. AFGE argues that the RD also erred in examining the separate unit of Naval HC nurses because no representative was identified as an exclusive representative that would be certified to represent the unit. *Id.* (citing *Sheppard Air Force Base, Wichita Falls, Tex.*, 57 FLRA 148, 150 (2001) (*Sheppard AFB*)).

Additionally, AFGE argues that if the Authority finds that the RD properly examined the appropriateness of the separate unit of Naval HC nurses, then the Authority must also find that the RD failed to follow established law in applying the effective-dealings criterion as to that unit. Application at 9-12.

Finally, AFGE argues, the RD failed to examine its claim that placing a portion of the Title 5 employees in the NNU unit would be inconsistent with the Act's clear congressional intent that those employees continue to exercise Title 5 bargaining rights, because the NNU contract requires all articles to be interpreted consistent with Title 38's limited bargaining rights. AFGE contends that this affects the appropriateness of any such unit and argues that there is an absence of precedent on this issue. *Id.* at 6.

## IV. Analysis and Conclusions

### A. The RD did not fail to apply established law and did not commit clear and prejudicial errors concerning a substantial factual matter.

#### 1. The RD did not err by failing to examine the appropriateness of AFGE's proposed unit of all transferred Naval HC professional employees (including nurses) and by failing to examine the appropriateness of that unit first.

AFGE asserts that the RD "committed factual and legal errors when he failed to examine the appropriateness of AFGE's proposed unit," specifically, a unit composed of all transferred Naval HC professional employees covered by the extended Title 5 collective bargaining rights, pursuant to the Act. Application at 4. AFGE also asserts this proposed unit more closely maintains the status quo, and thus should have been considered first. *Id.* at 5 (citing *Rock Island*, 62 FLRA at 317).

AFGE's claim is based on a misunderstanding of the RD's decision. The RD's decision clearly reflects that the RD considered the appropriateness of AFGE's proposed unit of all transferred Naval HC professional employees and rejected it. RD's Decision at 12 n.3. In note 3, the RD explicitly recognized that "[i]n its post-hearing brief, AFGE submits that a unit consisting of the [twenty] Naval HC nurses along with the other Naval HC Title 5 medical professional employees who transferred to the Lovell FHCC . . . would constitute a separate appropriate unit." *Id.* Finding this proposed unit inappropriate, the RD concluded that the Naval HC employees' "retention of [Title 5] bargaining rights is [but] one factor," in the Authority's criterion for determining whether a unit is appropriate under the statute, "and the Authority does not make appropriate unit determinations on one factor alone." *Id.*; *see also id.* at 10 (citing *Air Force*, 64 FLRA at 7). The RD also concluded that "[t]he evidence here does not establish that the [twenty Naval HC] nurses have significant employment issues that are unique or different from the [Lovell FHCC's] other nurses" that would justify placing the Naval HC nurses in a "unit separate and apart from the other nurses (whether by themselves or with the other Naval HC professional employees)." RD's Decision at 12 n.3.

Therefore, AFGE's assertion that the RD failed to consider its proposed unit of all transferred Naval HC professional employees is erroneous. Moreover, AFGE

has not challenged the RD's findings in considering and rejecting the proposed unit. Consequently, we find that AFGE's claim that the RD erroneously failed to examine the appropriateness of its proposed unit of Naval HC professional employees, and AFGE's related claim that the proposed unit should have been considered first, fails to provide a basis for modifying the RD's decision.

2. The RD did not err by examining the appropriateness of a separate unit composed solely of the transferred Naval HC nurses.

AFGE next argues that the RD committed a clear and prejudicial error concerning a substantial factual matter, and failed to apply established law, by examining the appropriateness of a separate unit composed solely of the transferred Naval HC nurses. Application at 5. AFGE contends that it made no argument before the RD that such a unit was appropriate, nor did it seek to represent such a unit. *Id.* AFGE further contends that no representative was identified that could serve as the exclusive representative for that unit. *Id.*

As noted previously, under § 2422.31(c)(3)(iii), the Authority may grant an application for review when the application demonstrates that there is a genuine issue over whether the RD committed a clear and prejudicial error concerning a substantial factual matter. We find no such clear and prejudicial error here. In this regard, AFGE challenges the RD's consideration of a unit that it did not seek. However, the RD found that unit *inappropriate*. As such, AFGE fails to demonstrate that it sustained any prejudice as a result of the RD's examination of that unit's appropriateness. AFGE therefore fails to show that the RD committed a clear and prejudicial factual error within the meaning of § 2422.31(c)(3)(iii). For the same reason, we reject AFGE's argument that the RD failed to apply established law by considering the unit, as the argument asserts no more than harmless error.

Accordingly, we deny these claims by AFGE that the RD committed clear and prejudicial errors concerning a substantial factual matter and failed to apply established law.

B. The RD did not fail to apply established law in his effective-dealings analysis with respect to a separate unit of Naval HC Nurses.

AFGE argues that if the Authority finds the RD properly examined the appropriateness of a separate unit composed solely of the transferred Naval HC nurses, then the Authority should also find the RD failed to apply established law in his effective-dealings analysis regarding that unit. Specifically, AFGE argues that the RD erred by adopting the Lovell FHCC's "bare assertion" that dividing the Lovell FHCC's nurses into two separate bargaining units would create a fractured bargaining structure and would not promote effective dealings. Application at 9-12; *see* RD's Decision at 11.

In determining whether a unit is appropriate under the Statute, the Authority considers whether the unit would: (1) ensure a clear and identifiable community of interest among employees in the unit; (2) promote effective dealings with the activity; and (3) promote efficiency of the operations of the activity. 5 U.S.C. § 7112(a); *see also FISC*, 52 FLRA at 959. A unit must meet all three criteria in order to be found appropriate. *See FISC*, 52 FLRA at 961 n.6.

As stated above, the RD analyzed each of the three appropriate-unit criteria in examining the appropriateness of the separate unit of Naval HC nurses and found the unit inappropriate. RD's Decision at 11. In fact, the RD found the unit inappropriate under each of the three separate criteria. *Id.* AFGE contends only that the RD erred in his analysis of the effective-dealings criterion. Application at 9. AFGE does not challenge the RD's findings that this particular unit is likewise not appropriate under the remaining two criteria. *Id.* at 9. As set forth above, a unit must meet all three appropriate-unit criteria in order to be found appropriate. *FISC*, 52 FLRA at 961 n.6. As AFGE has not challenged the RD's findings that the unit is not appropriate based on his analysis of the other two criteria, we find it unnecessary to resolve AFGE's argument with respect to the RD's effective-dealings analysis alone.

For the foregoing reasons, we find that AFGE has not demonstrated that the RD failed to apply established law in his effective-dealings analysis with respect to a separate unit of Naval HC Nurses.

C. The RD's decision does not raise an issue for which there is an absence of precedent, and the RD did not fail to apply established law in determining that a combined unit of Naval HC and VAMC nurses would be appropriate.

AFGE asserts that there is an absence of precedent addressing the appropriateness of including employees in a bargaining unit if doing so would be inconsistent with Congress' intent concerning the unit employees' collective bargaining rights. Application at 6-7. Specifically, AFGE asserts that including the Naval HC nurses in the NNU unit would preclude them from exercising their Title 5 bargaining rights, contrary to the Act. *Id.* We reject AFGE's assertions because they are without merit.

Authority precedent holds that a unit is not inappropriate merely because the unit includes employees with different congressionally-mandated bargaining rights. *See, e.g., Div. of Military & Naval Affairs, N.Y. Nat'l Guard, Latham, N.Y.*, 56 FLRA 139, 144 (2000) (bargaining unit containing both Title 32 and Title 5 employees found appropriate). Further, AFGE's claim that the Naval HC nurses' inclusion in the combined NNU unit would preclude them from exercising those rights is a bare assertion. The RD found that the record did not establish that NNU would be unable to represent the twenty Naval HC nurses, despite their distinctive Title 5 bargaining rights. RD's Decision at 11. Although AFGE disagrees with the RD's conclusion in this regard, AFGE does not identify any legal basis to support its claim that different bargaining rights cannot coexist in a single unit. Application 6-8. We therefore find that AFGE does not demonstrate that the RD's decision raises an issue for which there is an absence of precedent, or that the RD failed to apply established law in determining that a combined unit of Naval HC and VAMC nurses would be appropriate.

## V. Order

The application for review is denied.