66 FLRA No. 89

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
(65 FLRA 713 (2011))

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ORDER GRANTING IN PART
AND DENYING IN PART
MOTION FOR RECONSIDERATION

January 31, 2012

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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 matter is before the Authority on the Union's motion for reconsideration (motion) of the Authority's decision to grant the Agency's application for review in *United States Department of Veterans Affairs, Nebraska/Western Iowa VA Health Care System, Omaha, Nebraska*, 65 FLRA 713 (2011) (*VA, Nebraska*). The Agency filed an opposition to the Union's motion.

Section 2429.17 of the Authority's Regulations permits a party that establishes extraordinary circumstances to request reconsideration of an Authority decision. For the reasons set forth below, we conclude that the Union establishes extraordinary circumstances warranting reconsideration of the Authority's factual finding concerning which employees are excluded from the successor employer's professional bargaining unit. However, we deny the motion in all other respects. We also deny the Union's stay requests.

II. Background and Authority's Order

The Nebraska/Western Iowa VA Healthcare System (NWI) was created by a reorganization in 1999. In 2010, the Union and the Agency filed petitions addressing representation issues resulting from the reorganization. The petitions address the 1999 realignment of VA Medical Center employees located in Omaha, Lincoln, and Grand Island, Nebraska into NWI. The petitions also address the bargaining-unit status of employees located at the Bellevue, Holdrege, Norfolk, and North Platte, Nebraska, and Shenandoah, Iowa Community-Based Outpatient Clinics (CBOCs). Regional Director's (RD's) Decision at 1-2.

For years, the Union has represented units of professional and non-professional VA employees. *VA, Nebraska*, 65 FLRA at 713. Different AFGE locals represent Omaha, Lincoln, and Grand Island VA Medical Center employees and Holdrege CBOC employees. The RD applied the successorship principles set forth in the Authority's decision in *Port Hueneme*.[1] Based on these principles, the RD determined that NWI is the successor employer, and the Union retains its status as the exclusive representative, of the employees from each of the previously recognized units that the RD found were transferred to NWI. *Id.* at 714.

Supporting this conclusion, the RD determined that post-transfer units of all NWI professional employees and all NWI non-professional employees are appropriate for representational purposes. *Id.* The RD included in these units not only previously represented professional and non-professional employees, but also certain Omaha VA Medical Center unrepresented professional employees transferred to NWI in the 1999 reorganization. The previously unrepresented Omaha professional employees were specifically excluded from the pre-transfer unit, and include professionals who are not nurses, Title 5 professionals, or physicians assistants. The RD also included unrepresented Bellevue, Holdrege, Norfolk, and Shenandoah CBOC employees. These CBOCs were established some years after NWI was created by the 1999 reorganization.

The Agency filed an application for review requesting two changes to the units the RD determined are appropriate. First, the Agency asked for the exclusion of the Omaha VA Medical Center professional

[1] *Naval Facilities Eng'g Serv. Ctr., Port Hueneme, Cal.*, 50 FLRA 363 (1995) (*Port Hueneme*). *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 section 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. *Id.* at 368.

employees who were specifically excluded from AFGE's predecessor unit. Application for Review at 13. Second, the Agency requested the exclusion, from both the professional and non-professional units, of Bellevue, Holdrege, Norfolk, and Shenandoah CBOC employees as these CBOCs were not in existence at the time of the 1999 reorganization. *Id.* at 11, 13-14.

The Authority granted the Agency's application for review. The Authority determined that the Omaha professional employees specifically excluded from AFGE's predecessor unit, and the employees of CBOCs not in existence before the reorganization, are not properly included in the new units. *VA, Nebraska*, 65 FLRA at 718-19.

Concerning the specifically excluded Omaha professional employees, the Authority held that "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.'" *Id.* at 718 (quoting *Naval Facilities Eng'g Serv. Ctr., Port Hueneme, Cal.*, 50 FLRA 363, 370 n.7 (1995) (*Port Hueneme*)). Referencing its accretion case law, the Authority determined that where employees are specifically excluded from a recognized bargaining unit that is transferred to a successor unit, such "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." *Id.* (quoting *Def. Logistics Agency, Def. Supply Ctr. Columbus, Columbus, Ohio*, 53 FLRA 1114, 1123 (1998) (*DLA, Columbus*) (internal citation omitted)). Accordingly, the Authority ordered the specifically excluded Omaha professional employees excluded from AFGE's successor professional unit in the certification issued by the RD. *Id.*

Concerning the CBOC employees, the Authority found that, with the exception of the North Platte CBOC which the parties agreed was created before the reorganization, the CBOCs' establishment within NWI generally occurred eight to ten years after the 1999 reorganization. *Id.* at 717 (citing RD's Decision at 5-6). In the Authority's view, this was "too remote from events giving rise to the successorship issues in this case" to apply successorship principles. *Id.* at 719. Therefore, the Authority concluded, the unrepresented CBOC employees were not part of the gaining organization at a time relevant for purposes of applying successorship law. *Id.* Accordingly, the Authority ordered these CBOC employees excluded from the NWI professional and non-professional units in the certifications issued by the RD. *Id.*

III. Positions of the Parties

A. Union's Motion for Reconsideration

The Union challenges the Authority's decision in *VA, Nebraska* on three bases. First, the Union claims that the Authority erroneously described the Omaha professional employees specifically excluded from AFGE's predecessor unit as "non-nurse professionals." Motion for Reconsideration (Motion) at 3. The Union argues that this erroneously broad description prevents approximately 160 previously represented Omaha "non-nurse professionals," such as Title 5 professionals and physicians assistants, from being represented in the new unit. *Id.* at 2-3. The Union contends that it is undisputed that the only professional employees located in Omaha specifically excluded from the predecessor unit are eighty-one physicians. *Id.* at 2. So, the Union concludes, the Authority should modify its factual finding.

Second, the Union claims that the Authority erroneously relied on *DLA, Columbus*. *Id.* at 6. Citing *United States Department of the Navy, Human Resources Service Center, Northwest Silverdale, Washington*, 61 FLRA 408, 412 (2005) (*Navy*), the Union argues that *DLA, Columbus* does not apply to successorship or accretion situations. Motion at 6. Therefore, the Union contends, because successorship applies in this case, *DLA, Columbus* is inapposite. *Id.* So, the Union argues, rather than rely on *DLA, Columbus*, the Authority should uphold the RD's determination that NWI is the successor employer, and AFGE the successor representative, of the previously unrepresented professional employees transferred to NWI from Omaha. *Id.*

And the Union challenges the Authority's reliance on *DLA, Columbus's* "meaningful changes" principle. The Union claims that the Authority erred when it determined the previously unrepresented Omaha employees' placement in the post-transfer unit based on whether there were "meaningful changes" in their duties, functions, or job circumstances. *Id.* at 5-6; *see DLA, Columbus*, 53 FLRA at 1123-24. This requirement, the Union argues, is inconsistent with the Authority's undisputed finding that successorship applies in this case. Specifically, in the Union's view, the "meaningful changes" principle contradicts *Port Hueneme's* second requirement that a gaining entity is a successor, and a union retains its exclusive representative status, only where employees transferred from a previously recognized unit perform substantially the same duties and functions under substantially similar working conditions in the gaining entity. Motion at 6; *see Port Hueneme*, 50 FLRA at 368. Thus, the Union argues, the Authority should not have applied *DLA, Columbus* to determine the specifically excluded Omaha employees' placement in the successor unit. Motion at 6-7. The Union asserts

there is no basis for excluding the Omaha physicians from the successor professional unit "while other physicians located at Grand Island and Lincoln [are] included in the unit." *Id.* at 7.

Third, the Union asks that the Authority clarify its Order regarding employees working at the North Platte CBOC. The Union acknowledges that the status of the North Platte CBOC employees was undisputed in *VA, Nebraska* and that the Authority's decision would include the transferred North Platte employees in the successor unit since that CBOC existed at the time of the reorganization. *Id.* at 10. However, the Union claims, these employees' status remains unclear because the Authority's Order does not explicitly discuss it. *Id.*

In addition, the Union requests that the Authority stay the Order in *VA, Nebraska* until: (1) the Authority resolves the arguments set forth in the motion for reconsideration, and (2) the RD processes petitions the Union filed seeking accretion of Bellevue CBOC employees into the professional and nonprofessional bargaining units it represents. *Id.* at 9-10, 11-12.

B. Agency's Opposition

The Agency makes three arguments opposing the Union's motion. First, the Agency argues that there are no factual inaccuracies in the Authority's Order in *VA, Nebraska* and, even if there were, they do not constitute extraordinary circumstances warranting reconsideration. According to the Agency, the Order does not require the exclusion of any Omaha professional employees represented in AFGE's predecessor unit. Opp'n at 3. Therefore, the Agency argues, no extraordinary circumstances exist requiring reconsideration of the Authority's factual findings. *Id.* at 2.

Second, the Agency contends that the Authority properly relied on *DLA, Columbus*. *Id.* at 3. The Agency claims that the Union misstates *Navy*'s holding. In the Agency's view, although *Navy* relied on *DLA, Columbus* in a situation where neither successorship nor accretion applied, *DLA, Columbus* is still good law as to how to determine the unit status of employees affected by a reorganization who are specifically excluded from the bargaining unit that is reorganized. *Id.*

Third, the Agency contends that there is no need to clarify North Platte CBOC employees' unit status. The Agency cites the Authority's holding that employees of CBOCs that were established after formation of NWI are not included in the successor unit. As the North Platte CBOC was formed before NWI was created, the Agency concludes, it is clear that those employees are included in the successor unit. *Id.*

In addition, the Agency opposes the Union's request to stay the Order until the Union's accretion petitions are processed. *Id.*

IV. Analysis and Conclusions

Under § 2429.17 of the Authority's Regulations, a party seeking reconsideration of an Authority final decision or order must establish extraordinary circumstances. In *United States Department of the Air Force, 375th Combat Support Group, Scott Air Force Base, Illinois*, 50 FLRA 84, 86-87 (1995), the Authority identified a limited number of situations previously found to constitute extraordinary circumstances. These include situations where: (1) an intervening court decision or change in the law affected dispositive issues; (2) evidence, information, or issues crucial to the decision were not presented to the Authority; and (3) the Authority erred in its remedial order, process, conclusion of law, or factual finding. Extraordinary circumstances may also be present when the moving party lacks an opportunity to address an issue raised sua sponte by the Authority. *See U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv., Silver Spring, Md. v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993).

For the reasons set forth below, we grant the Union's motion to reconsider the Authority's factual finding concerning which employees are excluded from the successor employer's professional bargaining unit, but deny the motion in all other respects.

A. The Union has established extraordinary circumstances for clarifying which professional employees located at the Omaha VA Medical Center are excluded from the successor employer's professional bargaining unit.

The Union's request that the Authority clarify which Omaha professional employees are excluded from the successor employer's professional bargaining unit has merit. The Union claims that describing the Omaha professional employees at issue as "non-nurse professionals" erroneously excludes 160 previously represented professionals from the successor unit. Motion at 3.

Clarity regarding issues that relate to employees' future representational rights is essential. For this reason, we grant the Union's request for reconsideration and clarify which Omaha professional employees are excluded from the post-transfer NWI professional bargaining unit. In referring to the employees at issue as non-nurse professionals in *VA, Nebraska*, the Authority intended to limit the Omaha professional employees excluded from AFGE's successor unit only to those

specifically excluded from its predecessor unit. *VA, Nebraska*, 65 FLRA at 718. The Authority did not intend to change the composition or broaden the category of Omaha professional employees excluded from the unit. Therefore, to the extent that *VA, Nebraska* is unclear about which Omaha employees are excluded from AFGE's successor bargaining unit, we grant the Union's motion and clarify that the only Omaha professional employees excluded from the successor unit are those specifically excluded from AFGE's predecessor unit; specifically, professional employees who are not nurses, Title 5 professional employees, or physicians assistants. *See* RD's Decision at 9.

B. The Union has not established extraordinary circumstances for reconsidering the Authority's reliance on *DLA, Columbus* in *VA, Nebraska.*

The Union's argument that the Authority erroneously relied on *DLA, Columbus* rather than *Port Hueneme* lacks merit. As claimed by the Union and as set forth in *Navy*, *DLA, Columbus* is applicable precedent for resolving unit-placement issues where neither accretion nor successorship is established. *See Navy*, 61 FLRA at 412.

However, *DLA, Columbus* addresses other unit placement issues. As the Authority explained in *VA, Nebraska*, *DLA, Columbus* sets forth requirements that may apply when determining whether employees other than those transferred from a recognized bargaining unit should be included in a successor unit after a reorganization. *See VA, Nebraska*, 65 FLRA at 718. In particular, where employees specifically excluded from a predecessor bargaining unit are involved, those employees may only be included in a successor unit without an election based on "meaningful changes" in the employees' duties, functions, or job circumstances. *DLA, Columbus*, 53 FLRA at 1123-24. As the Authority indicated in *DLA, Columbus*, such an assessment is essential to determine whether the original distinctions between employees that led to the employees' specific exclusion from the unit have been eliminated, "thus warrant[ing] their inclusion into the unit." *Id.* at 1123.[2]

More fundamentally, and contrary to the Union's argument, *DLA, Columbus's* "meaningful changes" requirement is not at odds with the successorship doctrine's requirement that there be no substantial changes to employees' duties or working conditions for their inclusion in a successor unit. *See Port Hueneme*, 50 FLRA at 368, 372-73. As *Port Hueneme* makes clear in applying basic successorship principles, the Authority applies the requirement of "substantial continuity . . . in the employees' duties, functions, and working conditions," *id.* at 373, specifically to "further[] the principle [of] preserving a labor organization's status as exclusive representative" of employees transferred from a previously recognized bargaining unit. *Id.* at 373; *see id*. at 368.

In contrast, *DLA, Columbus's* "meaningful changes" requirement applies to the narrower issue of the unit placement of employees specifically excluded from a previously recognized unit. *See DLA, Columbus*, 53 FLRA at 1123-24. Because of its application to the narrower issue of employees' unit placement, rather than a labor organization's "ret[ention of] its status as the exclusive representative of employees who are transferred to the successor," *Port Hueneme*, 50 FLRA at 368, *DLA, Columbus's* "meaningful changes" requirement is not inconsistent with *Port Hueneme*.[3]

Accordingly, we find that the Union has not established extraordinary circumstances for reconsidering the Authority's reliance on *DLA, Columbus*.

C. The Union has not established extraordinary circumstances for clarifying that North Platte CBOC employees are included in the successor employer's bargaining units.

The parties did not raise the North Platte CBOC employees' bargaining unit status before the Authority in *VA, Nebraska*. Thus, the Authority did not address their

[2] The Union overlooks this point when it argues that there is no reason for excluding the Omaha physicians from the successor professional unit "while other physicians located at Grand Island and Lincoln are included in the unit." Motion at 7. It is true that "[u]nder the successorship doctrine, . . . employees other than the employees transferred from a recognized unit may become part of the successor unit." *VA, Nebraska*, 65 FLRA at 718 (citing *Port Hueneme*, 50 FLRA at 370 n.7). But the Omaha physicians are distinguishable from other unrepresented employees; they were specifically excluded from the predecessor bargaining unit. *DLA, Columbus'* "meaningful changes" principle functions, simply, to determine whether the original distinctions between employees that led to these employees' specific exclusion from the unit have been eliminated. *See DLA, Columbus*, 53 FLRA at 1123-24.

[3] We reject the Union's claim that reliance on *DLA, Columbus's* "meaningful changes" principle is "a radical departure from precedent." Motion at 4-5; *see also* Motion at 2 n.1, 5 n.4, 8. The requirement that employees specifically excluded from a bargaining unit undergo "meaningful changes" in their duties and functions before they may be placed in the unit or its successor is firmly rooted in the Authority's case law. *E.g., U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Allen Park, Mich.*, 43 FLRA 264, 266 (1991); *U.S. Dep't of the Air Force, Langley Air Force Base, Va.*, 40 FLRA 111, 113, 117 (1991). Moreover, like the cases the Union seeks to distinguish, Motion at 2 n.1, the Omaha professional employees were indisputably excluded from the Union's predecessor unit. Finally, none of the cases on which the Union relies in its motion, *id.* at 8, involves situations where a group of employees was specifically excluded from a recognized bargaining unit.

placement. And the RD's determination as to these employees is not affected by the Authority's Order. The Authority determined that employees working at CBOCs that were formed after the reorganization took place are not included in the successor bargaining units because those employees began their duties with NWI at a time too remote from the events giving rise to the successorship issues in this case. *VA, Nebraska*, 65 FLRA at 719. As the Agency acknowledges, because the North Platte CBOC came into existence before the reorganization occurred, the Authority's Order does not affect those employees' inclusion in the post-transfer units pursuant to successorship law. Accordingly, we find that the Union has not established extraordinary circumstances for further clarifying North Platte CBOC employees' bargaining unit status.[4]

V. Order

The Union's motion is granted with respect to our factual finding concerning which employees are excluded from the successor employer's professional bargaining unit. The remainder of the Union's motion and its stay requests are denied. The case is remanded to the RD to issue appropriate certifications.

[4] We also deny both of the Union's requests for a stay of the Order. We deny the Union's stay request, until "the Authority considers the issues and arguments raised in [its] motion," as moot, as the Authority's order on reconsideration resolves the issues presented in the Union's motion. Motion at 9-10. We also deny the Union's second stay request, until the RD "processes AFGE's accretion petitions . . . in relation to the Bellevue CBOC." *Id.* at 11-12. The Union does not demonstrate why staying the Authority's Order would affect the processing of its accretion petitions or the RD's decision on them.