

67 FLRA No. 113

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL AIR STATION
JOINT RESERVE BASE
NEW ORLEANS, LOUISIANA
(Agency)

and

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
(Union)

DA-RP-14-0004

ORDER DENYING
APPLICATION FOR REVIEW

May 30, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Agency claimed that its school-liaison officer (liaison) is a professional employee, and sought to exclude her from a bargaining unit of non-professional employees, despite the parties' prior agreement to include the liaison position in the unit. The Union filed a petition to clarify the liaison's bargaining-unit status. Federal Labor Relations Authority Regional Director (RD) James E. Petrucci found that the liaison is a professional employee within the meaning of § 7103(a)(15) of the Federal Service Labor-Management Relations Statute (the Statute),¹ and, thus, that she must be excluded from the non-professional bargaining unit under § 7112(b)(5) of the Statute.² There are two questions before us.

The first question is whether the RD failed to apply established law when he applied the Statute – rather than the parties' agreement – to determine the liaison's bargaining-unit status. Because the parties' agreement to include the liaison position is unenforceable to the extent it conflicts with § 7112(b) of the Statute, the answer is no.

The second question is whether the RD committed clear and prejudicial errors concerning substantial factual matters – or failed to apply established law – when he found that the liaison is a professional employee under § 7103(a)(15). Because the Union has not shown that the RD erred in his factual findings or legal conclusions, the answer is no.

II. Background and RD's Decision

In a pre-election agreement, the parties agreed to include the liaison position in a unit of non-professional employees. Generally, the liaison serves as a resource to military families with educational issues, and participates in partnerships between the military, schools, and communities. After an election was conducted, the Union was certified as the exclusive representative of the non-professional bargaining unit. Approximately a year and a half later, the Agency claimed that the liaison should be excluded from the unit because she is a professional employee, and the Union filed a petition seeking to clarify the liaison's bargaining-unit status. Although a bargaining unit may include both professional and non-professional employees, a combined unit is not "appropriate" under § 7112(b)(5) "unless a majority of the professional employees vote for inclusion in the unit."³ It is undisputed that the unit involved in this case is confined to non-professional employees; an election among professional employees to be included in the unit was never conducted.

Citing *Federal Trade Commission (FTC)*,⁴ the Union argued that – absent meaningful changes to the job duties, functions, or circumstances of the position at issue – the Authority will not clarify the bargaining-unit status of a position that the parties agreed, prior to an election, to include or exclude from a unit. Because it was undisputed that the liaison position had not changed since the parties' pre-election agreement, the Union asserted that the liaison should remain in the unit.

The RD rejected the Union's argument by citing *National Credit Union Administration (Credit Union)*,⁵ and determined that *FTC* does not apply where a "statutory exclusion" is involved.⁶ "Since this case involves a statutory exclusion," the RD stated, the parties' pre-election agreement "does not bind the parties or the Authority[,] and no meaningful changes [to the liaison's position] need be shown."⁷

Next, the RD addressed whether the liaison is a professional employee. Section 7103(a)(15) of the

¹ 5 U.S.C. § 7103(a)(15).

² *Id.* § 7112(b)(5).

³ *Id.* § 7112(b).

⁴ 35 FLRA 576 (1990).

⁵ 61 FLRA 349, 351 (2005).

⁶ RD's Decision at 7.

⁷ *Id.*

Statute defines an employee as a “professional” if that employee is engaged in performing work with four characteristics,⁸ and the RD addressed each in turn.

Regarding the first characteristic, as relevant here, § 7103(a)(15) provides that the work of a “professional employee” is work that requires “knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning.”⁹ The RD found that the liaison’s work “requires knowledge of an advanced type in a field of science or learning (e.g., education, child/youth development, or psychology).”¹⁰ In this regard, he found that the liaison is “not required to have a college or advanced degree,” but he noted that “neither the Statute nor Authority case law” requires such a degree in order for a position to be a professional.¹¹ Further, the RD noted that the liaison’s position description requires *either* “the successful completion of a four-year college or university degree . . . or a combination of education and experience” *equivalent* to a “four-year course of study.”¹²

Concerning the second characteristic, § 7103(a)(15) provides that the work of a “professional employee” requires “the consistent exercise of discretion and judgment in its performance,”¹³ and the RD found that the liaison’s duties meet that requirement.¹⁴ Specifically, the RD found that the liaison acts as a “primary advisor” and “subject[-]matter expert” on “youth education, transitions, deployment issues, and K-12 educational matters.”¹⁵ The RD also found that the liaison: represents her superiors “to school boards, school faculty, parents, and the local community”; “builds relationships with community leaders and organizations”; and “works independently in dealing with multiple school districts and schools, as well as the educational requirements/restrictions of different localities.”¹⁶ And the RD found that the liaison “develops solutions, in partnership with local schools, to overcome educational barriers for students and . . . collaborates with local schools, school boards, public and private organizations, and installation organizations to facilitate transitions in education for military students.”¹⁷ Further, the RD found that the

liaison: “receives and processes complaints”; “develops action[] plans for accomplishment of community/school[-]support goals”; and “develops the timelines for projects . . . and then ensures that the planned events take place.”¹⁸ In addition, the RD found that the liaison “provides direct support and assistance to military families on educational issues.”¹⁹

The RD determined that, in conducting these duties, the liaison “exercises broad discretion,” “receives little supervision,” and “sets her own schedule.”²⁰ “[A]lthough [the liaison] communicates frequently with her direct supervisor,” the RD found that the supervisor “does not direct [the liaison’s] daily work duties.”²¹ “Rather,” according to the RD, the liaison “is given a great deal of freedom to plan her work, relying on her experience as the subject[-]matter expert in educational issues.”²²

The third and fourth characteristics of the work of a “professional employee,” as defined by § 7103(a)(15), are that the work “is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work),” and “is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time.”²³ The RD also found that the liaison’s duties have these characteristics.²⁴

The RD concluded that the liaison is a professional employee under § 7103(a)(15).²⁵ Therefore, he found that she should be excluded from the unit under § 7112(b)(5).²⁶

The Union filed an application for review of the RD’s decision, and the Agency filed an opposition to the Union’s application.

III. Analysis and Conclusions

- A. The RD did not fail to apply established law by applying the Statute – rather than the parties’ agreement – to determine the liaison’s bargaining-unit status.

The Union argues that the RD failed to apply established law – specifically, *FTC* – when he declined to

⁸ 5 U.S.C. § 7103(a)(15).

⁹ *Id.*

¹⁰ RD’s Decision at 8.

¹¹ *Id.* (citing *U.S. Attorneys Office for the Dist. of Columbia*, 37 FLRA 1077 (1990) (*Attorneys Office*)).

¹² *Id.* (emphasis added).

¹³ 5 U.S.C. § 7103(a)(15).

¹⁴ RD’s Decision at 8.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 9.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 8.

²¹ *Id.*

²² *Id.*

²³ 5 U.S.C. § 7103(a)(15).

²⁴ RD’s Decision at 8.

²⁵ *Id.* at 9.

²⁶ *Id.* at 10.

consider whether there were meaningful changes to the liaison's job duties, functions, or circumstances before excluding the liaison from the unit as a professional employee.²⁷ In other words, the Union argues that the RD should have "held [the parties] to their earlier agreement" rather than resolving the liaison's bargaining-unit status under the Statute.²⁸ The Authority will grant an application for review if the application demonstrates that the RD failed to apply established law.²⁹

In *FTC*, the parties had a pre-election agreement to *exclude* certain positions, several of which were also statutorily excluded, from a bargaining unit.³⁰ After the election, when the Union sought to include some of those previously excluded positions in the unit, the Authority held that it would not clarify the bargaining-unit status of those positions absent "meaningful changes . . . in the job duties or functions and/or job circumstances" of the positions.³¹ However, *FTC* did *not* involve a situation where the parties had agreed to *include* a position in a unit and later asked the Authority to resolve whether the Statute prohibited the continued inclusion of that position. Those situations are governed by a different line of Authority precedent, including the Authority's decision in *Credit Union*. In that decision, the Authority explained that, regardless of an agreement between parties to include a position in a unit, meaningful changes to the position need not be shown in order for the Authority to resolve whether the *Statute* requires that the position be excluded from the unit.³² This is because, as a general matter, where the Statute requires the exclusion of a position from a bargaining unit, a prior agreement between the parties to include that position is not enforceable.³³ In particular, § 7112 of the Statute provides that a bargaining unit is not "appropriate" if it includes certain types of employees.³⁴ For example, under § 7112(b)(2), a bargaining unit cannot properly include a "confidential employee."³⁵ So, in *Credit Union*, where the parties had agreed to include in the unit a position that the regional director found to be a confidential employee under § 7103(a)(13) of the Statute,

the Authority found that § 7112(b)(2) required that the position be excluded from the unit.³⁶

Here, the RD concluded that *FTC* did not apply – and that *Credit Union* did apply – because the Union sought to enforce an agreement to *include* a position in the unit even if doing so might conflict with the mandatory exclusions of § 7112.³⁷ The Union argues that *Credit Union* is inapplicable here because confidential employees like those excluded in *Credit Union* cannot belong to *any* bargaining unit under § 7112(b)(2), whereas professional employees can be in units.³⁸ But § 7112(b)(5) provides that professional employees cannot be included in a non-professional unit like the one here "unless a majority of the professional employees vote for inclusion in the unit."³⁹ And the Union fails to explain why the Authority's holding in *Credit Union* – that § 7112(b) exclusions govern over pre-election agreements to include positions – does not encompass the RD's application of § 7112(b)(5) here. Moreover, the Authority has held that the parties' history of categorizing employees as professionals or non-professionals does not bind the Authority "insofar as unit determination[s] under the Statute [are] concerned."⁴⁰ Thus, where, as here, there has been no election to determine whether professional employees wish to be included in a non-professional unit, the parties' pre-election agreement provides no basis for including a professional employee in the unit. However, we note that nothing in this decision precludes an election to include professionals in this non-professional unit in the event that an election petition is properly filed.

In sum, the parties' pre-election agreement does not provide a basis for the Authority to keep the liaison in the unit without determining whether she is excluded under § 7112(b)(5). Therefore, the Union has not shown that the RD failed to apply established law when he clarified the liaison's bargaining-unit status under the Statute, rather than enforcing the parties' agreement.

B. The RD did not err in finding that the liaison is a professional under § 7103(a)(15) of the Statute.

The Union argues that the RD committed clear and prejudicial errors concerning substantial factual matters when he found that the duties of the liaison require "advanced knowledge" and "the consistent exercise of discretion and judgment."⁴¹ The Union also argues that, as a result of these alleged errors, the

²⁷ Application at 2.

²⁸ *Id.*

²⁹ 5 C.F.R. § 2422.31(c)(3)(i).

³⁰ 35 FLRA at 577.

³¹ *Id.* at 584.

³² 61 FLRA at 351.

³³ *E.g., U.S. Dep't of the Army, U.S. Army Law Enforcement Command Pac., Fort Shafter, Haw.*, 53 FLRA 1602, 1603 (1998) (Member Wasserman concurring) (regional director correctly excluded positions from unit as supervisors despite prior agreement between the parties to include those positions).

³⁴ 5 U.S.C. § 7112(b).

³⁵ *Id.* § 7112(b)(2).

³⁶ 61 FLRA at 351.

³⁷ *See* RD's Decision at 7.

³⁸ Application at 2.

³⁹ 5 U.S.C. § 7112(b)(5).

⁴⁰ *U.S. DHS, Bureau of CBP*, 61 FLRA 485, 493 (2006) (*CBP*).

⁴¹ RD's Decision at 8; *see also* Application at 2-4.

RD failed to apply established law when he found that the liaison is a professional under § 7103(a)(15) of the Statute.⁴² Additionally, the Union argues that the RD should have relied upon the Authority's decision in *U.S. Attorneys Office for the District of Columbia (Attorneys Office)*⁴³ to find that the liaison is not a professional employee.⁴⁴ As relevant here, the Authority will grant an application for review if the application demonstrates that the RD committed a clear and prejudicial error concerning a substantial factual matter,⁴⁵ or (as stated previously) failed to apply established law.⁴⁶

As discussed above, under § 7103(a)(15), one of the characteristics of the work of a "professional employee" is that it requires "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning."⁴⁷ In this regard, the RD found that the liaison position "requires knowledge of an advanced type in a field of science or learning (e.g., education, child/youth development, or psychology)."⁴⁸ The Union argues that the RD erred in making these findings because the liaison's position description "does not . . . use the term 'advanced.'"⁴⁹ However, bargaining-unit-eligibility determinations are based on the evidence of employees' actual duties, not written position descriptions.⁵⁰ Therefore, the Union's argument does not establish that the RD erred.

The Union also argues that the RD erred because the liaison's position description "does not require a degree."⁵¹ However, the RD did not find that the liaison is required to hold a degree. Rather, the RD found that the liaison's position description requires *either* "the successful completion of a four-year college or university degree . . . or a combination of education and experience" *equivalent* to a "four-year course of study."⁵² More importantly, the RD correctly noted that "neither the Statute nor Authority case law" specifically requires a degree in order for a position to be professional.⁵³ In this regard, the Authority has held that "a college degree is not necessarily required for an employee to be considered

a professional."⁵⁴ Thus, that the liaison is not required to hold a college degree does not establish that the RD erred in his findings concerning the "advanced knowledge" required to perform the liaison's duties.⁵⁵

The Union also argues that the RD erred when he found that the duties of the liaison require the "consistent exercise of discretion and judgment."⁵⁶ As set forth above, § 7103(a)(15) pertinently provides that the work of a "professional employee" requires "the consistent exercise of discretion and judgment in its performance."⁵⁷ In challenging the RD's findings concerning this statutory requirement, the Union makes three assertions. In support of these assertions, the Union cites a signed document that the liaison provided to the RD in which she describes her duties (liaison's statement).⁵⁸

First, the Union asserts that the liaison's work is "routine in nature."⁵⁹ But the variety and complexity of the liaison's duties – as described in both the RD's decision and the liaison's statement – contradict this assertion. For example, the RD found that the liaison: acts as a "primary advisor" and "subject[-]matter expert" on "youth education, transitions, deployment issues, and K-12 educational matters"; represents her superiors "to school boards, school faculty, parents, and the local community"; "builds relationships with community leaders and organizations"; and "works independently in dealing with multiple school districts and schools, as well as the educational requirements/restrictions of different localities."⁶⁰ And the RD found that the liaison "develops solutions, in partnership with local schools, to overcome educational barriers for students and . . . collaborates with local schools, school boards, public and private organizations, and installation organizations to facilitate transitions in education for military students."⁶¹ The Union does not specifically dispute any of these findings. And, similarly, the liaison's statement describes the "wide spectrum of services" she provides, including: "serv[ing] as subject[-]matter expert[] . . . on K-12 issues"; "helping to connect command, school[,] and community resources"; "leverag[ing] [resources] to support . . . families"; and "navigating families [through] the administrative systems

⁴² Application at 2-4.

⁴³ 37 FLRA at 1082.

⁴⁴ Application at 3-4.

⁴⁵ 5 C.F.R. § 2422.31(c)(3)(iii).

⁴⁶ *Id.* § 2422.31(c)(3)(i).

⁴⁷ 5 U.S.C. § 7103(a)(15).

⁴⁸ RD's Decision at 8.

⁴⁹ Application at 2 (quoting RD's Decision at 8).

⁵⁰ *E.g., U.S. Dep't of the Air Force, Air Force Materiel Command*, 67 FLRA 117, 123 (2013) (citing *U.S. Dep't of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Ariz.*, 37 FLRA 239, 245 (1990)).

⁵¹ Application at 2.

⁵² RD's Decision at 8 (emphasis added).

⁵³ *Id.* (citing *Attorneys Office*, 37 FLRA 1077).

⁵⁴ *CBP*, 61 FLRA at 493; *see also Attorneys Office*, 37 FLRA at 1082 ("a college degree is not always required for an employee to be considered professional").

⁵⁵ RD's Decision at 8.

⁵⁶ Application at 3.

⁵⁷ 5 U.S.C. § 7103(a)(15).

⁵⁸ Application at 3 (citing Application, Attach. 7, School Liaison Officer Statement (Liaison's Statement)).

⁵⁹ *Id.*

⁶⁰ RD's Decision at 8.

⁶¹ *Id.* at 9.

within the local education agencies.”⁶² Therefore, undisputed evidence indicates that the liaison’s duties are varied and complex, and, thus, the Union has not shown that the RD erred by failing to find that the liaison’s duties are “routine in nature.”⁶³

Second, the Union asserts that the liaison does not “mak[e] decisions for or pertaining to schools/military families”⁶⁴ However, the RD did not find that the liaison *makes decisions for* schools or military families. Rather, the RD found that the liaison “provides direct support and assistance to military families on educational issues.”⁶⁵ And the liaison’s statement – cited by the Union in support of its argument – confirms the RD’s findings. For example, the liaison states that she “assist[s] families with school transfers and help[s] ‘level the playing field’ for military children and youth”; “[a]ssist[s] with school choice”; “navigat[es] families [through] the administrative systems within the local education agencies”; and “leverage[s] installation and school resources to provide graduating military students with access to post-secondary information and opportunities.”⁶⁶ Thus, undisputed record evidence supports the RD’s finding that the liaison “provides direct support and assistance to military families on educational issues.”⁶⁷

Third, the Union asserts that “[a]ny issues/problems that are brought to . . . the [liaison] by schools or families are given to . . . her immediate supervisor.”⁶⁸ However, even if correct, this assertion does not establish that the RD erred in finding that the liaison consistently exercises discretion and judgment. In this regard, undisputed findings by the RD, in addition to the liaison’s undisputed description of her duties in her statement, establish that the liaison performs duties beyond resolving the “issues/problems” of “schools or families.”⁶⁹ For example, as discussed above, the RD and the liaison both describe the liaison as a “subject[-]matter expert” who builds connections between schools, communities, military command, and military families.⁷⁰ Further, the RD found – and the Union does not dispute – that the liaison: represents her superiors “to school boards, school faculty, parents, and the local community”; “collaborates with local schools, school boards, public and private organizations, and installation organizations to facilitate transitions in education for military students”; “develops action[] plans for

accomplishment of community/school support goals”; and “develops the timelines for projects . . . and then ensures that the planned events take place.”⁷¹ Moreover, even if the liaison brings “issues/problems” to her immediate supervisor,⁷² that does not refute the RD’s finding that the liaison “receives little supervision” and “sets her own schedule.”⁷³ Similarly, the RD’s conclusion that the liaison consistently exercises discretion and judgment is supported by his undisputed findings that the liaison’s supervisor “does not direct [the liaison’s] daily work duties,” but, rather, gives the liaison “a great deal of freedom to plan her work, relying on her experience as the subject[-]matter expert in educational issues.”⁷⁴

Based on the foregoing, the Union’s three assertions do not establish that the RD erred in finding that the liaison’s duties “require the consistent exercise of discretion and judgment.”⁷⁵

Finally, we address the Union’s argument that the RD’s decision was inconsistent with *Attorneys Office*. Specifically, the Union argues that because the liaison – like the non-professional “[v]ictim/[w]itness [a]dvocate” in *Attorneys Office*⁷⁶ – is not required to have a degree or provide “psychological or clinical counseling,” the RD failed to apply established law when he found that the liaison is a professional employee.⁷⁷ However, *Attorneys Office* is distinguishable because, in this case, the RD found that the liaison has many duties requiring “advanced knowledge” and the “consistent exercise of discretion and judgment” – as discussed extensively in the analysis above – that were not performed by the employee in *Attorneys Office*.⁷⁸

⁷¹ RD’s Decision at 9.

⁷² Application at 3.

⁷³ RD’s Decision at 8.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 37 FLRA at 1082.

⁷⁷ Application at 3-4.

⁷⁸ RD’s Decision at 8; *see, e.g., id.* at 8-9 (liaison: acts as a “primary advisor” and “subject[-]matter expert” on “youth education, transitions, deployment issues, and K-12 educational matters”; represents her superiors “to school boards, school faculty, parents, and the local community”; “builds relationships with community leaders and organizations”; “works independently in dealing with multiple school districts and schools, as well as the educational requirements/restrictions of different localities”; “develops solutions, in partnership with local schools, to overcome educational barriers for students and . . . collaborates with local schools, school boards, public and private organizations, and installation organizations to facilitate transitions in education for military students”; “develops action[] plans for accomplishment of community/school support goals”; and “develops the timelines for projects . . . and then ensures that the planned events take place”).

⁶² Liaison’s Statement at 1.

⁶³ Application at 3.

⁶⁴ *Id.*

⁶⁵ RD’s Decision at 9.

⁶⁶ Liaison’s Statement at 1.

⁶⁷ RD’s Decision at 9.

⁶⁸ Application at 3.

⁶⁹ *Id.*

⁷⁰ RD’s Decision at 8; *see* Liaison’s Statement at 1.

Accordingly, the Union's argument does not establish that the RD failed to apply established law.

Based on the foregoing, the Union has not shown that the RD committed a clear and prejudicial error concerning a substantial factual matter, or failed to apply established law, when he concluded that the liaison is a professional under § 7103(a)(15) of the Statute.

IV. Order

We deny the Union's application for review.