64 FLRA No. 30

BROADCASTING BOARD OF GOVERNORS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1812
(Petitioner/Labor Organization)

WA-RP-09-0023

ORDER DENYING
APPLICATION FOR REVIEW

October 30, 2009

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This case is before the Authority on an application for review (the application) filed by the Agency under § 2422.31 of the Authority's Regulations. [2] The Petitioner/Labor Organization (the Union) did not file an opposition to the Agency's application.

The Regional Director (RD) found that two employees are not confidential employees and, thus, that their positions are not excluded from the bargaining unit. For the reasons that follow, we deny the Agency's application.

II. Background and RD's Decision

The Union filed a petition to clarify the bargaining-unit status of two employees (Jackson and Davis-Roane) occupying the position of public affairs specialist, GS-12. [3] The Agency contended that they should be excluded as confidential employees, under § 7103(a)(13) of the Statute, because they have a confidential relationship with their supervisor (King), who is involved in the formulation and effectuation of management policies in the area of labor-management relations and has advance knowledge of Agency actions in this area.

The RD noted that § 7103(a)(13) of the Statute defines "confidential employee" as "an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations[.]" RD's Decision at 4. The RD also noted that the Authority has held that an employee is a confidential employee when there is evidence of a confidential working relationship between the employee and an agency representative and the agency representative is significantly involved in labor-management relations. *Id.*

The RD acknowledged that King receives a variety of information on workplace matters. However, he found that she is not significantly involved in labor-management relations because she does not: (1) develop, or advise management in developing, positions or proposals for bargaining with the Union; (2) represent management, or advise those representing management, in responding to grievances; or (3) represent management, or advise those representing management, at arbitration. *Id.* at 5 (citing *Dep't of Labor, Wash., D.C.*, 59 FLRA 853 (2004) (*DOL*)). The RD also acknowledged that King is privy to sensitive and confidential information, but found that she is not privy to information concerning labor-management relations before the information is conveyed to the Union. In this regard, the RD rejected the Agency's claim that King was part of discussions of labor-management relations matters. He noted that none of the specified items discussed in meetings that King had attended had been identified as matters being bargained with the Union and that none of the grievances discussed had been identified as grievances filed by the Union under the negotiated grievance procedure. *Id.*

Consequently, the RD found that, even if the employees have a confidential relationship with King, the relationship does not concern matters involving labor-management relations. *Id.* Accordingly, the RD concluded that Jackson and Davis-Roane are not confidential employees. *Id.*

III. Application for Review

The Agency contends that the RD committed clear and prejudicial errors concerning substantial factual matters. Although the Agency concedes that King does not participate in negotiations with the Union or in

1. Member Beck's dissenting opinion is set forth at the end of this decision.

2. Section 2422.31 of the Authority's Regulations provides, in pertinent part, that the Authority may grant an application for review when "[t]here is a genuine issue over whether the Regional Director has . . . [f]ailed to apply established law . . . [or] [c]ommitted a clear and prejudicial error concerning a substantial factual matter." 5 C.F.R. § 2422.31(c)(3)(i), (iii).

3. The parties agreed that the testimony of Jackson was representative of Davis-Roane.

responding to grievances or unfair labor practice charges, the Agency asserts that the RD disregarded unrefuted testimony that demonstrates involvement by King, Jackson, and Davis-Roane in labor-management relations matters and their advance knowledge of information pertaining to such matters. Application at 10. Specifically, the Agency notes the testimony of the involvement by King and Jackson in the Agency's review of one of its components. The Agency claims that Jackson was part of the discussions of possible personnel cuts in that component and researched the component's effectiveness to prepare a public statement. According to the Agency, this involvement "clearly demonstrates involvement in and advance knowledge of a personnel and potential labor relations issue since any changes would affect the conditions of bargaining unit employees with the service." *Id.* The Agency also notes testimony that Jackson and Davis-Roane attend staff meetings where "discussions involved pre-decisional information about employee complaints and grievances filed by the Union on behalf of their bargaining unit members." *Id.* at 11 (footnote omitted).

The Agency also contends that the RD failed to apply established law. The Agency claims that the RD failed to assess whether King and the employees "obtained advance information of management's positions in labor relations and personnel matters, were part of discussions relating to labor relations and personnel matters and attended meetings where such matters were discussed." *Id.* at 7. The Agency maintains that, if the RD had appropriately applied Authority precedent, then the RD would have concluded that Jackson and Davis-Roane are confidential. *Id.* at 8.

IV. Analysis and Conclusions

A. The application fails to demonstrate that there is a genuine issue over whether the RD committed a clear and prejudicial error concerning a substantial factual matter.

As discussed above, the RD concluded that King is not significantly involved in labor-management relations because she does not: (1) develop, or advise management in developing, positions or proposals for bargaining with the Union; (2) represent management, or advise those representing management, in responding to grievances; or (3) represent management, or advise those representing management, at arbitration. RD's Decision at 5. The RD likewise concluded that Jackson and Davis-Roane are not involved in labor-management relations matters. *Id.* The Agency contends that the RD erred by ignoring testimony clearly demonstrating their involvement in labor-management relations matters.

The testimony that the Agency alleges demonstrates involvement in "personnel and potential labor relations issue[s]," Application at 10 (citing Tr. at 38-39), may demonstrate involvement in general personnel issues, but fails to demonstrate involvement by King or Jackson in any matter that the Authority has recognized as a labor-management relations matter. The cited testimony also does not specify any involvement by Jackson or King in the formulation or effectuation of management policies, even if the matter were connected to labor-management relations. In this regard, the Agency fails to specify any involvement by King and identifies Jackson's involvement solely as conducting research to prepare a statement about the possible personnel cuts in a particular Agency component when the Agency's review of that component was completed. *Id.* As Jackson testified, her involvement in labor-management relations matters is to present the Agency's positions on such issues to the media and external entities only after the positions are formulated. Tr. at 53. In *United States Dep't of Hous. and Urban Dev. Headquarters*, 41 FLRA 1226, 1234 (1991), the Authority found that employees' occasional involvement in the issuance of press releases pertaining to labor-management relations matters did not demonstrate that they were confidential employees. Accordingly, such testimony fails to demonstrate a genuine issue over whether the RD committed a clear and prejudicial error concerning a substantial factual matter when he concluded that King and the employees are not significantly involved in labor-management relations.

The Agency additionally argues that the RD disregarded testimony that King, Jackson, and Davis-Roane have advance knowledge of information pertaining to labor-management relations matters. Application at 10-11 (citing Tr. at 43-44). The definition of "confidential employee" under the Statute includes employees who, in the normal performance of their duties, may obtain advance information regarding management's position with regard to contract negotiations, the disposition of grievances, and other labor-management relations matters. *United States Dep't of Labor, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1383 (1990) (*Office of the Solicitor*). In this regard, the Authority found that management should not be faced with having bargaining-unit members in positions where they could divulge information pertaining to labor-management relations to the union in advance. *Id.* The Agency argues that Jackson's testimony that she had advance knowledge of information pertaining to possible personnel cuts in one of the Agency's components establishes that she and Davis-Roane are confidential employees. Although advance knowledge of information pertaining to possible personnel cuts relates generally to a person-

nel issue, the Agency does not provide any evidence that the advance knowledge of such information had any connection to a labor-management relations matter. Accordingly, such testimony fails to demonstrate a genuine issue over whether the RD committed a clear and prejudicial error concerning a substantial factual matter in this regard.

The Agency also alleges that the RD disregarded Jackson's testimony of advance notice of "employee complaints and grievances" in concluding that the employees are not confidential employees. Application at 11 (citing Tr. at 46-47). In this regard, the hearing officer asked Jackson whether the "grievances" about which she had testified were grievances filed under the negotiated grievance procedure or whether her reference to "grievances" referred to more general employee dissatisfaction. Tr. at 54. Jackson answered: "A lot of times it's employee dissatisfaction." *Id.* The Union's attorney then asked: "Have you ever reviewed . . . management's grievance response to the union before it was submitted?" *Id.* at 55. Jackson answered: "I don't think I have." *Id.* This testimony fails to establish any advance knowledge of management's position in connection with grievances under the negotiated grievance procedure and, thus, fails to demonstrate a genuine issue over whether the RD committed a clear and prejudicial error concerning a substantial factual matter in this regard.

Finally, the Agency alleges that Jackson's testimony concerning the Agency's telecommuting policy confirms that she has advance notice of negotiations with the Union. Application at 11 (citing Tr. at 50). In this connection, when asked by the hearing officer what King "tell[s Jackson] about any labor proposal or negotiations[,]" Jackson replied that King "may say something to the effect where, well, the Agency is—received an inquiry from the union that this telecommuting is not working and, you know, management is going to do what they can to work things out. And someone suggested A, B, and C and then that's about it." Tr. at 50-51. This testimony does not establish that the disputed employees have any advance knowledge of management's proposals or positions in contract negotiations with the Union and fails to demonstrate a genuine issue over whether the RD committed a clear and prejudicial error concerning a substantial factual matter in this regard. *Cf. Office of the Solicitor*, 37 FLRA at 1383 (employees were confidential employees where they had advance information concerning management's positions with regard to contract negotiations, disposition of grievances, and other labor-management relations matters that would not normally be known to the union). In addition, Jackson's testimony that she has no contact with the Agency's labor-relations specialists and employee-relations specialists, Tr. at 53, further supports the RD's conclusion that the employees are not privy to information concerning labor-management relations matters before the information is conveyed to the Union.

We note the dissent's conclusion that King, Jackson, and Davis-Roane receive "advance notice" of "labor relations matters." In our view, this conflates matters with potential implications for an agency's labor relations policies with labor-management relations matters themselves, conflicting with § 7103(a)(13)'s requirement of a nexus with "labor-management relations." As the Authority's decision in *Office of the Solicitor* reflects, § 7103(a)(13)'s reference to "labor-management relations" matters is narrowly limited to matters commonly understood to be within the meaning of that phrase, such as contract negotiations and the disposition of grievances. *See Office of the Solicitor*, 37 FLRA at 1383; *cf. NLRB v. Hendricks County Rural Elec. Membership Corp.* 454 U.S. 170 (1981) (declining to expand the confidential employee exclusion under the NLRA to encompass confidential business information that did not meet the NLRB's labor-nexus test). The dissent would expand § 7103(a)(13)'s "confidential employee" exclusion, which would inappropriately "deprive many employees of the right to bargain collectively." *Office of the Solicitor*, 37 FLRA at 1379 (citing analogous precedent under the NLRA).

Accordingly, we conclude that the Agency has not demonstrated that there is a genuine issue over whether the RD committed a clear and prejudicial error concerning a substantial factual matter.

B. The application fails to demonstrate that there is a genuine issue over whether the RD failed to apply established law.

As set forth above, under Authority precedent, an employee is a confidential employee when: (1) there is evidence of a confidential working relationship between an employee and an agency representative; and (2) the agency representative is significantly involved in labor-management relations. *DOL*, 59 FLRA at 855. In addition, as also set forth above, employees who may obtain advance information of management's position regarding labor-management relations matters are confidential employees under the Statute. *Id.*

The Agency contends that the RD failed to apply established law when he failed to assess whether King and the employees: (1) have advance information of

management's position with regard to contract negotiations, disposition of grievances, or other labor-management relations matters; and (2) are part of discussions relating to labor-management relations matters. Application at 9-10 (citing *DOL*). The Agency misconstrues the RD's decision. In this regard, as discussed previously, the RD specifically acknowledged and rejected the Agency's claim that Jackson and Davis-Roane are confidential employees because King has advanced knowledge of management's actions in the area of labor-management relations. RD's Decision at 4-5. The RD determined that, although King is privy to sensitive and confidential information, she is not privy to information concerning labor-management relations before the information is conveyed to the Union. *Id.* at 5. These findings demonstrate that the RD applied established Authority precedent and assessed whether the employees are confidential employees. *See DOL*, 59 FLRA at 855.

Accordingly, we conclude that the Agency has not demonstrated that there is a genuine issue over whether the RD failed to apply established law.

V. Order

The Agency's application for review is denied.

Member Beck, dissenting:

I do not agree with the Majority that the Agency's Application for Review should be denied.

My colleagues and the RD have misapplied our holding in *Office of the Solicitor.* There, the Authority determined that an employee who obtains "advance information" regarding "contract negotiations, the disposition of grievances, and *other labor relations matters*" is considered to be a "confidential" employee. 37 FLRA 1371, 1383 (1990) (emphasis added). Here, it is undisputed that King, the supervisor of the employees at issue, attended BBG Board staff meetings (RD's Decision at 2, 5); at those meetings, she received information regarding potential cuts in the Russian Language Service and "workplace conditions such as telecommuting and parking" (RD's Decision at 3); and she, as well as the two employees, received e-mail correspondence regarding discussions at the staff meetings that include budget, personnel, modifications of the organization, and a variety of other matters that affect the conditions of employment of Agency employees. RD's Decision at 2. As a result, the employees who work for King receive advance information about labor relations matters.

The Majority and the RD appear to believe that, unless the Union actually filed a grievance or complaint over the matters discussed at the staff meetings, those matters cannot be "labor relations matters." The RD concluded in his Decision that "none of the items discussed in the [staff meetings] have been identified as something being bargained with the Local." RD's Decision at 5. Similarly, the Majority concludes that the Agency failed to "provide any evidence that the advance knowledge of such information had any connection to a labor-management relations matter." Majority Decision at 4.

Unlike the Majority and the RD, I cannot conclude that "labor relations matters" arise only when an actual grievance or complaint has been filed or the Union has requested negotiations. By their very nature, the subjects that were discussed at staff meetings and communicated to Board members involve "labor relations matters." The Authority has concluded in many other instances that the Agency has a responsibility to provide pre-implementation notice and to negotiate about matters such as parking (*AFGE Local 1458*, 63 FLRA 469 (2009); elimination of positions (*Fed Employees Metal Trade Council of Charleston*, 44 FLRA 683, 706 (1992), citing *AFGE Local 2635*, 30 FLRA 41 (1987)(reasonable effort to reassign employees whose positions were eliminated negotiable as an appropriate arrangement)); and budget (*Ass'n. of Civilian Technicians, Puerto Rican Army Chapter*, 58 FLRA 318 (2003)).

I therefore conclude that the undisputed evidence indicates that the employees in question receive "advance notice" of "labor relations matters," that the RD erred concerning a factual matter, and that the RD failed to apply established law.