67 FLRA No. 24

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF OCEAN ENERGY MANAGEMENT
AND
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF SAFETY
AND ENVRIONMENTAL ENFORCEMENT
NEW ORLEANS, LOUISIANA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
(Petitioner/Labor Organization)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3457
(Labor Organization)

DA-RP-11-0022

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ORDER GRANTING
APPLICATION FOR REVIEW
AND REMANDING TO THE REGIONAL DIRECTOR

December 31, 2012

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

I. Statement of the Case

The American Federation of Government Employees (the Union) filed a petition seeking to clarify the status of two existing bargaining units following a reorganization. Relying on the United States Court of Appeals for the District of Columbia Circuit's decision in *NLRB v. FLRA* (*NLRB*),[1] an Authority Regional Director (the RD) found that the reorganization rendered the existing units inappropriate, and he split those units into four separate units.

The main question before us is whether the RD failed to apply established law by splitting up the units. Because *NLRB* is inapposite, and the RD should have applied Authority precedent regarding whether existing units remain appropriate after a reorganization, the answer is yes. And because the RD did not make findings on several disputed factors regarding the appropriateness of the units, we remand to the RD for further findings.

II. Background and RD's Decision

As relevant here, the Union and one of its local unions each represented a unit of employees at the Minerals Management Service (the Service). The Union represented a unit of professional employees; its local union represented a unit of nonprofessional employees. The Secretary of the Interior (the Secretary) subsequently directed the reorganization of the Service – which was later renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement – and split the Service's mission into three separate missions across three separate bureaus. Unit employees' positions were redistributed between two of the three newly created bureaus – the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSSE). There is no claim that any unit employees were included in the third bureau, the Office of Natural Resources Revenue. The Union filed a petition with the Authority's Dallas Regional Office seeking to clarify the status of the two existing units following the reorganization.

The RD determined that the principles of successorship applied to BOEM and BSSE, and that the Union and its local union "shall continue to represent eligible professional and nonprofessional bargaining[-]unit employees" in those bureaus.[2] He then found that the appropriate-unit issues in the instant case are similar to the issues addressed in the court's decision in *NLRB*, which is discussed further below. Specifically, he found that the Secretary had issued an order directing the separation of missions, and that this was analogous to "the separation called for by the statutory provision" in *NLRB*.[3] He then found that BOEM and BSSE are "now independent bureaus performing different functions and operating under different missions."[4] And he determined that *NLRB* supported a conclusion that including BSSE and BOEM employees together in units would be inappropriate because it would require the negotiation of one contract covering the conditions of employment of "significantly different" bureaus.[5] Accordingly, he divided the two existing units into four separate units: (1) a professional BOEM unit; (2) a non-professional BOEM unit; (3) a professional BSSE unit; and (4) non-professional BSSE unit.

[1] 613 F.3d 275 (D.C. Cir. 2010).

[2] RD's Decision at 11.
[3] *Id.* at 12.
[4] *Id.*
[5] *Id.*

The Union and the Agency each filed an application for review of the RD's decision; the Agency filed an opposition to the Union's application. We discuss the parties' arguments below.

III. Preliminary Matter

The Agency moves to dismiss the Union's application as untimely because the application received by the Agency was postmarked December 4, 2012 – one day after its December 3 due date.[6] The Agency further contends that it was adversely affected by the lateness of the Union's service.[7] But the application filed with the Authority was postmarked December 3. And the Authority determines the date of filing by the postmark date of the application filed with the Authority.[8] In addition, the Agency filed its opposition before the deadline, and did not ask for an extension. Because the application was timely filed with the Authority, and the Agency has not demonstrated that it was prejudiced by the alleged lateness of the Union's service,[9] we deny the Agency's motion to dismiss the Union's application.

IV. Analysis and Conclusions

The Union argues that the RD failed to apply established law because he relied on *NLRB*, rather than assessing whether the reorganization made it inappropriate – under the criteria in § 7112(a) of the Federal Service Labor-Management Relations Statute (the Statute) – for employees of BOEM and BSSE to continue to be in units together.[10] The Agency argues that the RD properly relied on *NLRB* because the principles underlying this case are similar to those in *NLRB*.[11] The Authority will grant an application for review if the application demonstrates that the RD failed to apply established law.[12]

NLRB involved a petition to consolidate existing units of employees – some employed by the General Counsel (GC) of the National Labor Relations Board, and some employed by the Board's Members – into one unit.[13] The court interpreted a statute that provided that the GC "shall exercise general supervision" over all attorneys employed by the GC.[14] The court found that this wording made the GC "independent of the Board with respect to the 'conditions of employment' that are subject to collective bargaining under § 7102(2) of the Statute,"[15] and, thus, "specifically mandate[d] a separation of authority over agency employees."[16] As a result, the court found that it was inappropriate for the Authority to consolidate the existing units.[17]

Unlike *NLRB*, this case involves an order of the Secretary, rather than a statute. And, unlike the statute at issue in *NLRB*, there is nothing in the Secretary's order that, on its face, compels a conclusion that BOEM or BSSE have separate authority to determine the conditions of employment of their respective employees.[18] Accordingly, *NLRB* is inapposite, and we find that the RD erred by applying it.

With regard to whether combined units of BOEM and BSSE employees remain appropriate after the reorganization, the Authority determines whether existing units remain appropriate after a reorganization by focusing on the changes caused by the reorganization, and whether those changes are sufficient to render the existing units inappropriate.[19] Section 7112(a) of the Statute requires the Authority to consider three criteria in determining the appropriateness of a unit.[20] Specifically, the Authority examines whether the unit: (1) ensures a clear and identifiable community of interest among the employees in the unit; (2) promotes effective dealings with the agency; and (3) promotes efficiency of the operation of the agency.[21] A proposed unit must meet all three § 7112(a) criteria in order to be found appropriate.[22] The Authority has set forth factors for assessing each criterion, but has not specified the weight of individual factors or a particular number of factors necessary to establish an appropriate unit.[23]

In considering whether employees share a clear and identifiable community of interest, 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.[24] In addition, the Authority considers factors such as whether the employees in the proposed unit are a part of the same

[6] Agency's Opp'n at 1-2.
[7] *Id.* at 2.
[8] 5 C.F.R. §2429.21(b).
[9] *See NAGE, Local R1-109*, 61 FLRA 593, 595 (2006) (denying motion to dismiss where union was not harmed by delay in service).
[10] Union's Application at 5-6.
[11] Agency's Opp'n at 3-4.
[12] 5 C.F.R § 2422.31(c)(3)(i).
[13] 613 F.3d at 278-79.
[14] *Id.* at 278 (quoting 29 U.S.C. § 153(d) (internal quotation marks omitted).
[15] *Id.* at 280.
[16] *Id.* at 278.
[17] *Id.* at 282.
[18] *See* Agency's Ex. 5.
[19] *U.S. Dep't of the Navy, Commander, Naval Base, Norfolk, Va.*, 56 FLRA 328, 332 (2000).
[20] 5 U.S.C. § 7112(a).
[21] *Id.*
[22] *U.S. Dep't of the Army, Military Traffic Mgmt. Command, Alexandria, Va.*, 60 FLRA 390, 394 (2004).
[23] *Id.*
[24] *U.S. Dep't of the Navy, Fleet & Indus. Supply Ctr., Norfolk, Va.*, 52 FLRA 950, 961 (1997).

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; and are subject to the same general working conditions.[25]

In assessing the effective-dealings requirement, 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.[26]

The third appropriate-unit criterion – the efficiency of agency operations – pertains to the benefits to be derived from a unit structure that bears some rational relationship to the operational and organizational structure of the agency.[27] In assessing efficiency of agency operations, the Authority examines the effect of the proposed unit on agency operations in terms of cost, productivity, or use of resources.[28]

The RD did not assess these myriad factors and how the reorganization affected them.[29] The Union argues that combined units of BOEM and BSSE employees continue to be appropriate based on several of these factors.[30] For example, the Union argues that BOEM and BSSE employees were serviced by the same human-resources office before and after the reorganization.[31] The Union also argues that the Union and the Agency negotiated new agreements after the reorganization.[32] And the Union claims that dividing the existing units would increase costs.[33] But the Agency disputes these claims.[34]

The Authority will remand a petition if it cannot make the determinations necessary to resolve the petition.[35] Because the RD did not make findings on several disputed factors concerning the appropriateness of the existing units, the Authority cannot make the determinations necessary to resolve the petition. Accordingly, we remand the petition to the RD for further findings regarding whether and how the reorganization affected the appropriateness of units that include both BOEM and BSSE employees.

The Agency's application for review does not challenge the RD's basic analysis, but alleges that he incorrectly described several organizations in the unit certifications that he issued.[36] The RD's decision does not contain any discussion of the issues raised by the Agency's application. In any event, the RD's further findings regarding the appropriateness of the units may change the certifications that he issues on remand, which could render the Agency's application moot. As the Authority will not consider moot applications,[37] we find it premature at this time to address the Agency's arguments, and we give the RD the opportunity to address them on remand, if necessary.

V. Order

We grant the Union's application for review and remand the petition to the RD.

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[25] *Id.* at 960-61.
[26] *Id.* at 961.
[27] *Id.*
[28] *Id.* at 961-62.
[29] RD's Decision at 12.
[30] Union's Application at 6-10.
[31] *Id.* at 8.
[32] *Id.* at 4, 10.
[33] *Id.* at 10.
[34] Agency's Opp'n at 4-6.
[35] *U.S. Dep't of the Army, Army Materiel Command, Headquarters, Joint Munitions Command, Rock Island, Ill.*, 62 FLRA 313, 317 (2007); *see also U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys., Biloxi, Miss.*, 64 FLRA 452, 456 (2010) (remanding where RD did not examine each of the appropriate-unit criteria, and the record did not provide a sufficient basis for determining whether proposed units were appropriate); *U.S. Dep't of the Army, U.S. Army Reserve Command, Fort McPherson, Ga.*, 57 FLRA 95, 97 (2001) (remanding where, among other things, RD "did not discuss" certain relevant evidence "or address how it should be weighed relative to the record evidence that she did discuss"); *Dep't of the Navy, Naval Computer & Telecomms. Area, Master Station - Atl., Base Level Commc'ns Dep't, Reg'l Operations Div., Norfolk, Va., Base Commc'ns Office - Mechanicsburg*, 56 FLRA 228, 230 (2000) (remanding where RD "did not separately evaluate and make explicit findings with respect to each of" the appropriate-unit criteria).
[36] Agency's Application at 1-7.
[37] *See U.S. Dep't of the Air Force, Joint Base, Langley - Eustis, Va.*, 66 FLRA 752, 752 n.2 (2012).