66 FLRA No. 60

PENSION BENEFIT
GUARANTY CORPORATION
(Agency)

and

INDEPENDENT UNION
OF PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE
(Labor Organization/Petitioner)

and

UNION OF PENSION EMPLOYEES
(Labor Organization/Incumbent)

WA-RP-10-0070

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ORDER DENYING
APPLICATION FOR REVIEW

November 14, 2011

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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 case is before the Authority on an application for review (application) filed by the Incumbent under § 2422.31(c) of the Authority's Regulations.[1] The Petitioner filed an opposition to the Incumbent's application.

The Petitioner filed a petition seeking an election among employees in a bargaining unit exclusively represented by the Incumbent. After the Petitioner won the election, the Incumbent filed objections to the election with the Regional Director (RD). The Incumbent alleged, as relevant here, that the election should be set aside because of irregularities related to the Petitioner's e-mail campaigning. The RD dismissed the Incumbent's objections to the conduct of the election. For the following reasons, we deny the Incumbent's application for review.

II. Background and RD's Decision

A. Background

The Incumbent represents a unit of employees at the Agency. RD's Decision at 3. The Petitioner seeks to replace the Incumbent as the unit's representative. On May 10, 2011, the Authority's Regional Office conducted an election to determine whether the Agency's employees wished to be represented by the Incumbent, the Petitioner, or neither. *Id.*

The Petitioner won the election 194 to 138. *Id.* 4. On May 16, 2011, the Incumbent filed objections to the election. *Id.* On May 26, 2011, the Incumbent filed Amended Objections containing four additional objections and supporting documents for its original objections. *Id.* at 4-5. The RD dismissed the additional objections as untimely. *Id.* at 5. Following an investigation, the RD dismissed the remaining objections. *Id.* at 6.

Although the Incumbent filed fifteen objections to the conduct of the election with the RD, the application concerns only four of them. The four objections concerned the use of the Agency's e-mail system during the election campaign. *See id.* at 12. The Incumbent claimed to the RD that the Agency allowed the Petitioner to campaign in its e-mails, but did not allow the Incumbent to do the same. *Id.* And, the Incumbent claimed, the Petitioner's numerous e-mails contained false and slanderous statements. *Id.* The Incumbent complained that the Agency failed to stop the Petitioner's incorrect use of the Agency's e-mail system, even though

[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:
> (1) The decision raises an issue for which there is an absence of precedent;
> (2) Established law or policy warrants reconsideration; or,
> (3) There is a genuine issue over whether the Regional Director has:
> (i) Failed to apply established law;
> (ii) Committed a prejudicial procedural error;
> (iii) Committed a clear and prejudicial error concerning a substantial factual matter.

the Petitioner's e-mails violated an Agency directive[2] and the parties' collective bargaining agreement.[3] *Id.* The impact, the Incumbent argued, was that the Petitioner had an unfair advantage in shaping employees' perceptions, which improperly affected the election results. *Id.*

B. The RD's Decision

The RD concluded that the Petitioner's campaign statements were not a reason to set aside the election. *Id.* at 14. The RD found that the Petitioner sent approximately nineteen campaign-related e-mails during the campaign to groups of bargaining unit employees. *Id.* at 13. The RD also found that these e-mails contained both campaign material and slogans such as "Vote for [the Petitioner]," "Why vote for [the Petitioner]," "Time to Vote," and "Time to Unite." *Id.*

The RD found that the Incumbent responded by e-mail to the Petitioner's campaign e-mails. *Id.* at 13. The RD found that the Incumbent's campaign-related e-mails included an e-mail inviting employees to attend several meetings. The meetings' purposes were to discuss a new collective bargaining agreement that the Incumbent had just negotiated with the Agency and the Incumbent's plans for the bargaining unit if it were to win the election. *Id.* And, the RD found, the Incumbent also campaigned and distributed information in two of its monthly newsletters. *Id.*

The RD based her conclusion that the Petitioner's campaign statements were not a reason to set aside the election on § 7116(e)[4] of the Federal Service Labor-Management Relations Statute and Authority precedent on campaign statements. According to the RD, "where campaign communications are subject to evaluation by the electorate, [there is] no need to consider whether [the] other union had an opportunity to reply." *Id.* at 14 (citing *U.S. Dep't of the Army, Fifth Army, 122nd ARCOM, N. Little Rock, Ark.*, 36 FLRA 407, 413 (1990) (*Fifth Army*)). And, the RD noted, "[s]tatements that can be reasonably interpreted as 'campaign propaganda, easily recognizable as such by the reasonable employee' are not a basis for setting aside an election." *Id.* (citing *U.S. Dep't of the Army, Savanna Army Depot Activity, Savanna, Ill.*, 34 FLRA 218, 221 (1990) (*Savanna Army Depot*)). Finding that these requirements were satisfied, the RD rejected the Incumbent's argument that the election should be set aside because of the Petitioner's campaign statements. *Id.* at 15.

Resolving a second issue, the RD also concluded, based on the investigation, that there was "little or no evidence" that the Agency violated its obligation to remain neutral during the campaign, or that voters were impeded from exercising free choice. *Id.* The RD applied the principle that an agency's actions that violate the obligation to maintain neutrality and that have the potential to interfere with voter free choice require the election to be set aside. *Id.* (citing *U.S. Army Eng'r Activity, Capital Area, Fort Myer, Va.*, 34 FLRA 38, 43 (1989) (*Army Eng'r Activity*)).

[2] PBGC Directive IM-05-04 provides, in pertinent part:

> Messages to Large Groups. In addition to observing file size limits, staff members are required to obtain approval before sending electronic mail, announcements, files, or messages of a personal or unofficial nature to groups of recipients. The approval levels for the following groups of recipients are shown below:
> Group Approving Official (or designee)
> 20 or more users Department Director

Agency's Response to RD's Letter of May 17, 2011, Ex. 3 at 6.

[3] Article 2, Section 3.1 of the agreement provides, in pertinent part:

> The Local President will provide the Manager, Programs Division, HRD, with an advance copy of all electronic mail, normally one (1) workday in advance. Communications may not libel or slander any individuals, government agencies, or activities of the Federal Government, nor reflect on the integrity or motives of any individuals, government agencies or the activities of the Federal Government. Communications between Union officers and stewards or with an individual whom they are representing are not covered by this requirement.

Petitioner's Ex. 12.

[4] Section 7116(e) of the Statute provides:

> (e) The expression of any personal view, argument, opinion or the making of any statement which--
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> (1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,
>
> (2) corrects the record with respect to any false or misleading statement made by any person, or
>
> (3) informs employees of the Government's policy relating to labor-management relations and representation,
>
> shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

Specifically, the investigation disclosed that the Agency had made available to both unions an e-mail mailbox specifically established for communicating with the entire bargaining unit (BUE mailbox). *Id.* And, the RD found, the Agency's e-mail directive and review procedures were neutral on their face. *Id.* Finally, the RD found, there was no evidence that the Agency encouraged either union's noncompliance with its e-mail directive or review procedures. *Id.* The RD therefore dismissed the Incumbent's objections based on the way the Agency's e-mail system was used during the campaign.

III. Positions of the Parties

A. The Incumbent's Application

The Incumbent claims that the RD committed a procedural error by dismissing the Incumbent's Amended Objections as untimely. Application at 3. The Incumbent asserts that the RD gave the Incumbent "until May 26, 2011 to submit supporting evidence." *Id.*

The Incumbent also claims that there is an absence of precedent regarding the effect of e-mail communications on union elections and that established law or policy warrants reconsideration. *Id.* at 4, 9-10. The Incumbent argues that the RD relied on inapplicable case law focusing on "yesteryears campaign tactics." *Id.* at 9 (citing *Fifth Army*, 36 FLRA 407, and *Savanna Army Depot*, 34 FLRA 218). The Incumbent asserts that the cases are not applicable because they do not concern e-mail communications, but rather mass mailings to employees' homes and the distribution of flyers shortly before an election. *Id.*

In addition, the Incumbent claims that the RD committed clear and prejudicial errors concerning substantial factual matters in two respects. The Incumbent argues that the RD erred as to a factual matter when she dismissed the claim that the Agency failed to enforce its e-mail rules in a neutral manner. *Id.* at 10. And the Incumbent asserts that the RD similarly erred when she found that the campaign included a "volley of provocative and exaggerated claims and insults from both sides." *Id.*

Finally, the Incumbent argues that the RD ignored the recognized legal standard for setting elections aside. *Id.* at 11-12. The Incumbent cites Authority case law holding that objectionable management action that has "the potential to interfere with the free choice of the voters" requires that the election be set aside. *Id.* (citing, for example, *Pension Benefit Guar. Corp.*, 61 FLRA 447 (2006)). The Incumbent claims that the RD instead imposed a new standard, requiring the Incumbent to demonstrate that voters were "impeded and improperly coerced." *Id.* at 12.

B. The Petitioner's Opposition

The Petitioner contends that there is no absence of precedent regarding the effect of e-mails on union elections. Opp'n at 77. The Petitioner argues that there is ample Authority precedent for evaluating communications during election campaigns, as well as on the means that parties can use to provide campaign information to voters. *Id.* at 77-78. As a consequence, the Petitioner claims, the Authority has no difficulty applying existing law to resolve questions concerning e-mail rights and content. *Id.* at 78.

The Petitioner also contends that the RD did not commit clear and prejudicial errors concerning substantial factual matters. In the Petitioner's opinion, the RD correctly found that the Agency maintained its neutrality. *Id.* at 2. The Petitioner argues that the premise of the Incumbent's argument is that the Agency had an e-mail policy that prevented the Petitioner from sending campaign e-mails to bargaining unit employees. *Id.* at 2. The Petitioner claims that there was no such restriction. *Id.* More specifically, the Petitioner argues that neither the Agency's policy, its e-mail directive, nor the parties' agreement prohibit or restrict the e-mails that either the Incumbent or the Petitioner sent. *Id.* at 34-36, 41-43. Moreover, the Petitioner asserts, the Agency maintained in a court proceeding that occurred a short time before the election campaign that e-mail messages in the workplace that concern union matters are protected union activity and do not violate any Agency policies or directives. *Id.* at 3 (citing *Perry v. Gotbaum*, 766 F. Supp. 2d 151, 168 (D.D.C. 2011)).

In addition, the Petitioner asserts that the Incumbent has failed to demonstrate that any of the Petitioner's e-mails contained libelous, slanderous, or false statements. *Id.* at 36-38.

The Petitioner also claims that the RD properly applied established law. The Petitioner argues, among other things, that under § 7116(e) of the Statute, only statements containing threats or coercion may be considered as grounds for setting aside an election. *Id.* at 74 n.54.

IV. Analysis and Conclusions

A. The Incumbent has not established that the RD committed a procedural error by dismissing the Incumbent's Amended Objections as untimely.

Under 5 C.F.R. § 2422.31(c)(3)(ii), the Authority may grant an application for review when the application demonstrates that there is a genuine issue over whether the RD has committed a prejudicial procedural error. The Incumbent claims that the RD committed a procedural error by dismissing the Incumbent's Amended Objections as untimely. Application at 3. The Incumbent asserts that the RD stated in a letter dated May 17, 2011, that the Incumbent had ten days from the date the objections were filed, "until May 26, 2011 to submit supporting evidence." *Id.* The Incumbent's Amended Objections contained four additional objections and supporting evidence for the timely filed objections. RD's Decision at 5.

Under 5 C.F.R. § 2422.26(a), objections to an election must be filed and received by the RD within five days after the tally of ballots has been served. 5 C.F.R. § 2422.26(a).[5] The four additional objections included in the Incumbent's Amended Objections were untimely filed. The tally of ballots in this election was served on May 10, 2011. Any objections to the election must have been filed and received by the RD no later than May 16, 2011. The Incumbent's four additional objections were received by the RD on May 26, 2011. Therefore, the RD properly dismissed them as untimely. *See* 5 C.F.R. § 2422.26(a); *U.S. Dep't of Army, U.S. Army Garrison, Fort McClellan, Ala.*, 57 FLRA 108, 109 (2001).

That the RD's letter gave the Incumbent "until May 26, 2011 to submit supporting evidence" does not, as argued by the Incumbent, render the Incumbent's four additional objections timely. The RD set a May 26 deadline to submit *evidence* to support the timely filed objections, not additional objections. The RD considered the evidence submitted with the Amended Objections in reaching her conclusions on the timely filed objections. RD's Decision at 5.

And the Incumbent does not challenge the RD's conclusion that the evidence supporting the four additional objections does not fall within the exception for evidence that is newly discovered and previously unavailable. *Id.* (citing *U.S. Dep't of the Navy, Naval Station, Ingleside, Tex.*, 46 FLRA 1011, 1021 (1992)). The RD found that the evidence supporting the four additional objections did not satisfy either requirement. RD's Decision at 5.

Consequently, the Incumbent fails to establish grounds for review under 5 C.F.R. § 2422.31(c)(3)(ii).

B. The RD's decision does not raise an issue for which there is an absence of precedent.

Under 5 C.F.R. § 2422.31(c)(1), the Authority may grant an application for review when the application demonstrates that the RD's decision raises an issue for which there is an absence of precedent. The Incumbent claims that there is an absence of precedent regarding the effect of e-mail communications on union elections. Application at 4, 9-10. On this basis, the Incumbent challenges the RD's conclusion that the Petitioner's campaign e-mails are not a reason to set aside the election.

The Incumbent does not claim that there is any absence of Authority precedent regarding the effect of campaign communications on union elections. For example, long-standing Authority precedent holds that campaign communications subject to employee evaluation, and easily interpreted as campaign propaganda, are not a basis for setting aside an election, even in circumstances where the other union has not had an opportunity to respond. *See Fifth Army*, 36 FLRA at 413; *Savanna Army Depot*, 34 FLRA at 221. Authority precedent also deals with issues where campaign communications with the entire electorate are involved. *See, e.g., U.S. Dep't of Homeland Sec., Customs & Border Prot.*, 62 FLRA 78 (2007) (mass mailings to voters).

[5] 5 C.F.R. § 2422.26 provides:

> (a) *Filing objections to the election.* Objections to the procedural conduct of the election or to conduct that may have improperly affected the results of the election may be filed by any party. Objections must be filed and received by the Regional Director within five (5) days after the tally of ballots has been served. Any objections must be timely regardless of whether the challenged ballots are sufficient in number to affect the results of the election. The objections must be supported by clear and concise reasons. An original and two (2) copies of the objections must be received by the Regional Director.
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> (b) *Supporting evidence.* The objecting party must file with the Regional Director evidence, including signed statements, documents and other materials supporting the objections within ten (10) days after the objections are filed.

The Incumbent's claim that the RD applied case law pertaining to "yesteryears campaign tactics" does not establish that there is an absence of precedent. Application at 9. Although e-mail communications differ technologically from other forms of communication, the Incumbent has failed to explain why this difference gives e-mail communications a different legal character. The Incumbent's failure to cite any legal authority in support of its contention that e-mail communications are legally distinct from other forms of campaign communications reinforces this conclusion.

As the Incumbent has failed to show that the precedent applied by the RD is not applicable to the circumstances of this case, the Incumbent fails to establish grounds for review under 5 C.F.R. § 2422.31(c)(1).[6]

C. The Incumbent has not established that the RD committed clear and prejudicial errors concerning substantial factual matters.

Under 5 C.F.R. § 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 has committed a clear and prejudicial error concerning a substantial factual matter. The Incumbent claims that the RD committed two clear and prejudicial errors concerning substantial factual matters. The Incumbent alleges that the first error occurred when the RD dismissed the claim that the Agency failed to enforce its e-mail rules in a neutral manner. The Incumbent alleges that the second error occurred when the RD found that the campaign included provocative and exaggerated claims and insults from both sides.

1. The Incumbent has not established that the RD committed a clear and prejudicial factual error when she dismissed the claim that the Agency failed to enforce its e-mail rules in a neutral manner.

The RD relied on three factual findings when she dismissed the Incumbent's claim that the Agency failed to enforce its e-mail rules in a neutral manner. The RD found that the BUE mailbox that the Agency established specifically for union communications with the bargaining unit was available to both unions. RD's Decision at 15. And, the RD found, the Agency's e-mail directive and review procedures were neutral on their face. *Id.* Finally, the RD found, there was no evidence that the Agency encouraged either union's noncompliance with its e-mail directive or review procedures. *Id.*

The Incumbent does not challenge any of the RD's factual findings. Rather, the Incumbent argues that the RD made a clear factual error by failing to find that the Agency enforced its e-mail policy in a manner that favored the Petitioner. Specifically, the Incumbent claims that the Agency was made aware of the Petitioner's allegedly improper e-mails but did nothing about them.

The Incumbent fails to demonstrate that the RD made a clear factual error. First, the record evidence the Incumbent cites to show that the Agency was notified that the Petitioner was the sender of the disputed e-mails is ambiguous. The most direct evidence that the Incumbent cites is an e-mail message the Incumbent sent to the Agency attributing the allegedly improper e-mails not to the Petitioner, but to "a small group of [Agency] employees that are spamming bargaining unit employees[.]" Incumbent's Ex. B 2. Other evidence the Incumbent cites is in declarations by "an active . . . member" of the Incumbent and the Incumbent's president. Application at 6; *see* Incumbent's Exs. J and M. The former attributes the allegedly improper e-mails to the Petitioner "and its supporters." Incumbent's Ex. J. The latter attributes the allegedly improper e-mails only to the Petitioner. *See* Incumbent's Ex. M. This ambiguity concerning the sender of the e-mails of which the Agency was made aware undercuts the Incumbent's claim that the RD committed a clear factual error.

The record evidence cited by the Incumbent does not support a finding of clear error by the RD for a second reason. The record evidence the Incumbent cites does not demonstrate that the allegedly improper e-mails violated the Agency's e-mail directive. The Agency's e-mail directive "requires department head approval if an email is sent to 20 or more users." Incumbent's Ex. B 2; *see supra* note 2 (setting forth the relevant portion of the Agency's e-mail directive). The Incumbent told the Agency that the "small group of [Agency] employees . . . [was] . . . sending their messages in [sic] groups of 19 or fewer employees." Incumbent's Ex. B 2; *see* Incumbent's Exs. J and M. These actions do not violate the directive's provisions. *See also* Incumbent's Ex. M (reporting an Agency manager's comment that the

[6] The Incumbent also asserts that the Authority should review the RD's Decision because "established law or policy warrants reconsideration." Application at 4. However, the Incumbent provides no support for this claim. Accordingly, we reject this claim as a bare assertion. *See U.S. Dep't of the Navy, Fleet Readiness Ctr. Sw., San Diego, Cal.*, 63 FLRA 245, 252 (2009).

Agency was looking into the issue of e-mails sent to small groups of employees and "that a new Directive was being worked on"). Accordingly, the Incumbent's assertion that the RD clearly erred is not supported for this reason as well.

The Incumbent's claim that the RD committed a clear and prejudicial factual error fails to establish grounds for review for a third reason. As indicated, the Incumbent claims that the RD erred by failing to find that the Agency enforced its e-mail policy in a manner that favored the Petitioner. Under the Authority's case law, management actions will only provide a basis for setting aside an election when those actions have the potential to interfere with voter free choice. *E.g.*, *Army Eng'r Activity*, 34 FLRA at 43. In section IV.B, above, we uphold the RD's finding that the content of the Petitioner's campaign e-mails does not provide a basis for setting aside the election. Also, the Incumbent does not argue that bargaining unit voters were aware of the Agency's alleged lack of neutrality in the enforcement of its e-mail rules. Consequently, even if the RD erred in failing to find that the Agency applied its e-mail policy with a lack of neutrality, that error was not prejudicial to the Incumbent because there is no showing that either voter knowledge of the alleged lack of neutrality, or its effects on campaign e-mail communications, tended to interfere with voter free choice.

2. The Incumbent has not established that the RD committed a clear and prejudicial factual error when she dismissed the claim that campaign communications included provocative and exaggerated claims and insults from both sides.

The Incumbent's argument that the RD made a prejudicial factual error when she dismissed the Incumbent's claim concerning the nature of the unions' campaign communications also fails to establish grounds for review under the Authority's regulations. As discussed in section IV.B, above, the content of campaign communications is generally not a ground for overturning an election. The Incumbent does not assert that this precedent is inapplicable to the campaign communications to which the RD was referring. Consequently, even if the RD erred, the error was not prejudicial to the Incumbent because the campaign communications would not provide a basis for overturning the election.

As the Incumbent has failed to meet its burden of establishing that the RD committed clear and prejudicial errors concerning substantial factual matters, the Petitioner fails to establish grounds for review under 5 C.F.R. § 2422.31(c)(3)(iii).

D. The Incumbent has not established that the RD failed to apply established law.

Under 5 C.F.R. § 2422.31(c)(3)(i), the Authority may grant an application for review when the application demonstrates that the RD failed to apply established law. The Incumbent contends that the RD ignored the recognized legal standard for setting elections aside. The Incumbent claims that the RD erroneously required proof that voters were "impeded and improperly coerced." Application at 12. The Incumbent argues that the proper standard is whether the disputed conduct "had the potential to interfere with the free choice of voters." *Id.*

The Incumbent has not demonstrated that the RD failed to apply established law. The standard for determining whether conduct is of an objectionable nature so as to require that an election be set aside is its potential for interfering with voters' free choice. *E.g.*, *Army Eng'r Activity*, 34 FLRA at 42. Referencing this case law, the RD found that there was no proof that "voters were impeded from exercising free choice," and "no evidence that voters were improperly coerced." RD's Decision at 15. The RD's determination was also based on the finding that there was "little or no evidence that [the Agency] failed to maintain neutrality during the campaign." *Id.*

Read in context, the RD's decision is consistent with Authority precedent, especially given that the RD was resolving an issue about Agency neutrality, and found that the Agency remained neutral. Accordingly, the Incumbent's contention fails to establish grounds for review under 5 C.F.R. § 2422.31(c)(3)(i).

V. Order

The Incumbent's application for review is denied.