

64 FLRA No. 80

UNITED STATES
DEPARTMENT OF THE ARMY
DEFENSE LANGUAGE INSTITUTE
FOREIGN LANGUAGE CENTER AND
PRESIDIO OF MONTEREY
PRESIDIO OF MONTEREY, CALIFORNIA
(Activity/Petitioner)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1263, AFL-CIO
(Exclusive Representative)

and

FRATERNAL ORDER OF POLICE
MONTEREY COUNTY
FEDERAL LODGE NO. 32
(Labor Organization/Petitioner)

SF-RP-09-0010

ORDER DENYING
APPLICATION FOR REVIEW

February 16, 2010

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 filed by the Fraternal Order of Police, Monterey County, Federal Lodge No. 32 (FOP) under § 2422.31 of the Authority's Regulations.¹ The Activity² did not file an opposition to FOP's application for review. The American Federation of Government Employees, Local 1263, AFL-CIO (AFGE) filed an opposition to FOP's application.

As relevant here, FOP seeks review of the Regional Director's (RD's) Decision and Order (D&O) dismissing FOP's request to sever police department employees from a nonprofessional bargaining unit represented by AFGE.

For the reasons that follow, we deny the application for review.

II. Background and RD's D&O**A. Background**

AFGE is the exclusive representative of a professional and a nonprofessional bargaining unit at the Activity. Only the nonprofessional bargaining unit is at issue in this case. D&O at 2.

Events leading to this proceeding began in 2003. In that year, a reorganization split the Activity into two separate organizations: the Defense Language Institute Foreign Language Center (Language Center) and the Presidio of Monterey Garrison (Garrison). *Id.*

The Activity subsequently filed a petition claiming that the AFGE nonprofessional bargaining unit should be "divided" into separate units for the Language Center and the Garrison. *Id.* at 2-3. In a separate action, FOP filed a petition seeking to sever police department employees from the nonprofessional bargaining unit. *Id.* AFGE objected to both petitions. *Id.* at 4.

B. RD's Findings and Decision

The RD dismissed both petitions. In findings that are not challenged in this proceeding, the RD concluded that the existing unit continued to be appropriate notwithstanding the reorganization. The RD therefore dismissed the Activity's petition.³ *Id.* at 26.

Dismissing FOP's petition, the RD found no "unusual circumstances" "that would give rise to a question of representation . . . and justify severance[.]" *Id.* at 31-32. The RD rejected in this connection FOP's

1. Section 2422.31 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.

2. The Activity is the U.S. Department of the Army, Defense Language Institute Foreign Language Center and Presidio of Monterey, Presidio of Monterey, California.

3. The Activity did not file an application for review.

allegations “that AFGE provides inadequate representation to those in the police department.” *Id.* at 32 (relying upon, *inter alia*, *U.S. Dep’t of the Navy, Naval Air Station Jacksonville, Jacksonville, Fla.*, 61 FLRA 139 (2005)(*NAS, Jacksonville*)(denying FOP request to sever police officers from an AFGE nonprofessional bargaining unit)).

The RD found support in the record for his determination that AFGE had not failed in its representation of police department employees. The RD found that police officers were covered under the parties’ agreement and were able to file grievances and seek representation as necessary. *Id.* Also, contrary to FOP’s assertion, the RD determined that AFGE’s shop steward in the police department was a police officer who participated in negotiations concerning police department matters, and who actively represented employees on an informal basis. *Id.*

The RD acknowledged that not every issue involving the police department may have been resolved to the complete satisfaction of every particular employee. *Id.* However, the RD held that this was not the standard for determining adequate representation. *Id.* The RD also discounted FOP’s claim that it already represented the majority of employees in the police department, noting that membership strength “is not indicative of the quality or extent of AFGE’s representation.” *Id.* (quoting *U.S. Dep’t of the Air Force, Carswell AFB, Tex.*, 40 FLRA 221, 230-31 (1991)).

On this basis, the RD dismissed FOP’s severance petition. *Id.*

III. Positions of the Parties

A. FOP’s Application for Review

FOP makes two arguments in its application for review (Application). Citing 5 C.F.R. § 2422.31(c)(3)(i),⁴ FOP argues that the RD failed to apply established law. Application at 2, 6-7, 11-13. FOP claims that the RD erred by failing to consider whether “the unit proposed by FOP is appropriate on a functional basis.” *Id.* at 2. FOP derives its asserted legal requirement from the part of § 7112(a) of the Statute that states: “The Authority shall determine . . . whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under [the Statute], the appropriate unit should be established on an agency, plant, installa-

4. Although FOP cites 5 C.F.R. § 2431(c)(3)(i) and (iii), this appears to be a typographical error because FOP refers to the language of § 5 C.F.R. § 2422.31(c)(3)(i) and (iii). Application for Review at 2.

tion, functional, or other basis[.]” *Id.* FOP argues that its proposed unit is appropriate because police department employees share a community of interest and because such a unit would promote effective dealings with the Activity by providing better representation for department employees. *Id.* at 13.

FOP’s second argument is that the RD committed a clear and prejudicial error concerning a substantial factual matter (citing 5 C.F.R. § 2422.31(c)(3)(iii)⁵). Application at 2, 3-6, 7-11. FOP claims that the RD erred by ignoring evidence that AFGE excluded police department employees from the collective bargaining process and from other union representational services. *Id.* at 2. FOP points to evidence assertedly ignored by the RD that AFGE did not include police department employees in negotiations for a new agreement, that AFGE did not afford legal representation to police department employees, and that AFGE refused to take police department employees’ issues to arbitration. *Id.* at 9-10.

B. AFGE’s Opposition

AFGE argues that FOP’s application should be denied because it does not establish grounds for review. Opposition at 1. Regarding FOP’s objection that the RD failed to apply established law, AFGE urges that there was “no reason for the [RD] to consider the appropriateness of FOP’s proposed unit since FOP failed to show that there was any legal basis to sever the police employees from [the existing] unit.” *Id.* at 2-3. Regarding FOP’s factual error assertion, AFGE answers that FOP’s position is not supported by the record. *Id.* at 3.

IV. Analysis and Conclusions

A. The RD did not fail 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. FOP claims that the RD erred by failing to consider whether the unit proposed by FOP is appropriate on a functional basis. For the following reasons, FOP’s claim lacks merit.

1. Established law.

The legal framework for analyzing severance claims is well established. Where an existing unit continues to be appropriate and there are no unusual circumstances to justify severance of the petitioned-for employees, the severance petition will be dismissed.

5. See note 4.

See *NAS, Jacksonville*, 61 FLRA at 142 (citing *Library of Congress*, 16 FLRA 429, 431(1984)). If the Authority determines that severance is justified, e.g., where unusual circumstances exist, the Authority will then consider whether the petitioned-for unit is appropriate. See *U.S. Dep't of the Treasury, Bureau of Engraving and Printing*, 49 FLRA 100, 108 (1994).

2. The RD did not fail to apply established law by failing to consider whether the unit proposed by FOP was appropriate.

FOP's claim that the RD was legally required to consider whether FOP's proposed unit was appropriate is inconsistent with the Authority's established law on severance. As discussed previously, in a severance case, the Authority will only consider whether a petitioned-for unit is appropriate if it has already been determined that severance is justified. In this case, however, that condition is absent because the RD concluded that AFGE's existing nonprofessional bargaining unit continues to be appropriate. D&O at 26. That holding is not challenged in this proceeding.

Moreover, the RD determined that there were no unusual circumstances to justify severance of the petitioned-for employees. As discussed in § V.B., below, the RD's determination on this point, that "the evidence does not show a failure of AFGE in its representation of police department employees" (D&O at 32), is supported by the record and does not constitute a clear and prejudicial error concerning a substantial factual matter. Accordingly, because the conditions that would compel consideration of the appropriateness of FOP's proposed unit are not present in this case, the RD's failure to consider that issue was not erroneous. Therefore, we reject FOP's failure to apply established law claim.

Based on the above, we find that FOP has not demonstrated that the RD failed to apply established law within the meaning of 5 C.F.R. § 2422.31(c)(3)(i).

- B. The RD did not commit a clear and prejudicial error concerning a substantial factual matter.

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. FOP claims that the RD erred by ignoring evidence that AFGE excluded police department employees from the collective bargaining process and from other union representational services.

FOP's claim is not supported by the record. There is no evidence in the record that demonstrates a clear error by the RD in determining that AFGE adequately represented police department employees. In fact, the record includes ample evidence of adequate representation. For example, the record indicates that, since 1990, AFGE has maintained a shop steward in the police department who is a police officer and who actively represented employees on an informal basis. D&O at 32; Transcript at 398, 402-13. There is also record evidence that the shop steward was consulted regarding the submission of proposals concerning matters affecting police officers, such as pay and RIFs, and was asked to submit proposals for negotiations. Transcript at 402-13, 422-24, 427. Additionally, as the record reflects, the shop steward knew of the availability of legal representation through AFGE, but that most of the time he was successful in settling matters informally. D&O at 32; Transcript at 402-413, 427. Moreover, the record shows that police department employees were able to file grievances and seek representation as necessary and that they were covered under the parties' agreement. *Id.*; Transcript at 402-413, 422-24, and 427. Finally, nothing in the record supports FOP's claim that police department employees were treated differently than other nonprofessional unit employees.

Consequently, as the record does not demonstrate that police department employees have not been adequately represented, we find that FOP has not demonstrated that the RD committed a clear and prejudicial error concerning a substantial factual matter within the meaning of 5 C.F.R. § 2422.31(c)(3)(iii).

V. Order

FOP's application for review is denied.