64 FLRA No. 171

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION
AND REVIEW
BALTIMORE, MARYLAND
(Petitioner/Activity)

and

ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES
INTERNATIONAL FEDERATION
OF PROFESSIONAL AND TECHNICAL
ENGINEERS, AFL-CIO
(Exclusive Representative/Union)

WA-RP-09-0057

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ORDER DENYING
APPLICATION FOR REVIEW

June 22, 2010

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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 of the Regional Director's (RD's) Decision and Order (RD Decision) filed by the Association of Administrative Law Judges, IFPTE, AFL-CIO (Union) under § 2422.31 of the Authority's Regulations.[1] The Social Security Administration (SSA), Office of Disability Adjudication and Review (ODAR), Baltimore, Maryland (Activity) filed an opposition to the Union's application for review.

The Activity filed a petition seeking clarification of the bargaining unit status of Administrative Law Judges (ALJs) assigned to two of its National Hearing Centers -- one located in Falls Church, Virginia (NHC Falls Church) and the other in Albuquerque, New Mexico (NHC Albuquerque). The RD concluded that, because these ALJs are supervisors within the meaning of § 7103(a)(10) of the Federal Service Labor-Management Relations Statute (the Statute), they should be excluded from the unit.

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

II. Background and RD's Decision

A. Background

The Union has been the exclusive representative of a nationwide bargaining unit consisting of all full and part-time ALJs of the Activity's Office of Hearings and Appeals (OHA). To improve the appeals process, SSA eliminated OHA and established ODAR, whose mission and "organizational structure" is "basically the same as it was under OHA." RD Decision at 4.

ODAR administers SSA's nationwide Disability Adjudication and Review program. *Id.* ODAR is responsible for holding hearings and issuing decisions as part of the SSA's process for determining whether a person receives benefits. *Id.* ODAR consists of two primary components, the Office of Chief Administrative Law Judge and the Office of Appellate Operations. *Id.* at 5. The Office of Chief Administrative Law Judge includes a nationwide field organization that is staffed with ALJs, who conduct hearings and issue decisions on appeals. *Id.*

ODAR has 142 Hearing Offices, which operate under the Hearing Process Improvement system. *Id.* Pursuant to this system, ALJs are assigned to groups

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

with a pool of attorneys, who draft their decisions. *Id.* The ALJs have no authority over which attorney will draft a decision; rather, the attorneys are supervised and given assignments by a group supervisor. *Id.* Although there is no "dedicated judge-attorney" relationship, an ALJ may work closely with a particular attorney by submitting a request to the group supervisor. *Id.*

In 2007, to assist in alleviating a backlog of disability cases, SSA established National Hearing Centers (Hearing Centers), which are separate from the Hearing Offices. *Id.* Each Hearing Center is headed by a Chief ALJ. *Id.* at 6. At the time of the hearing, at NHC Falls Church, there were eleven ALJs, including the Acting Chief ALJ, and approximately fifteen attorneys. *Id.* At NHC Albuquerque, there were five ALJs, including the Chief ALJ, and eight attorneys; additionally, three attorneys were expected to join the staff "any day." *Id.* At the Hearing Centers, specific attorneys are assigned to a particular judge. *Id.*

As set forth above, the Activity filed the petition seeking clarification of the bargaining unit status of the ALJs assigned to NHC Falls Church and NHC Albuquerque. At the hearing, the Activity amended the petition to ask that the existing certification be amended to reflect the change from OHA to ODAR.

B. RD's Decision

Before the RD, the Activity argued that the Hearing Center ALJs are supervisors within the meaning of § 7103(a)(10) of the Statute because they supervise the attorneys assigned to them. The Union contended that the ALJs at issue were not supervisors because they perform the same duties as Hearing Office ALJs, who are not supervisors. The Union also argued that an arbitration award involving the same parties should be given preclusive effect.[2] RD Decision at 3.

As an initial matter, the RD determined that, because eligibility determinations are based on an employee's actual duties at the time of a hearing, whether the Hearing Center ALJs have the same responsibilities and authorities as the Hearing Office ALJs "is not relevant or material" to this case. *Id.* at 2 n.2 (citing *U.S. Dep't of the Air Force, 82nd Training Wing, 361st Training Squadron, Aberdeen Proving Ground, Md.*, 57 FLRA 154 (2001) (*Dep't of the AF*)). In addition, the RD rejected the Union's contention that he was bound by the arbitration award. According to the RD, questions concerning the bargaining unit status of employees are reserved exclusively for final resolution by the Authority through the filing of a representation petition. Therefore, under the Statute, he had the exclusive authority to decide the issues being raised by the petition and was not bound by the award.

Turning to the merits, the RD found that the ALJs at issue are supervisors within the meaning of § 7103(a)(10) of the Statute.[3] RD Decision at 2. The RD stated that, under Authority precedent, "an employee will be found to be a supervisor if the employee consistently exercises independent judgment with regard to the supervisory indicia set forth" in § 7103(a)(10) of the Statute. *Id.* at 14 (citing *Nat'l Mediation Bd.*, 56 FLRA 1, 7-8 (2000) (*NMB*) (citing *Army & Air Force Exch. Service, Base Exch., Fort Carson, Fort Carson, Colo.*, 3 FLRA 596, 599 (1980)). These indicia include the authority "to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment." 5 U.S.C. § 7103(a)(10). To be found a supervisor, an "employee need exercise only one of the[se] responsibilities" with independent judgment. RD Decision at 7-8 (citing *NMB*, 56 FLRA at 8).

2. The arbitration award was issued in March 2009. In the award, the arbitrator found, among other things, that the Hearing Center ALJs were not supervisors. RD Decision at 4 and Union Ex. 11 at 37. Exceptions to that award are currently pending before the Authority in Case No. 0-AR-4524.

3. 5 U.S.C. § 7103(a)(10) provides:

> "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority[.]

The RD found that the evidence shows that the Hearing Center ALJs[4] "consistently exercise independent judgment in directing and assigning work, an indicator of supervisory status." RD Decision at 15-16. In this regard, the RD found, among other things, that an ALJ at NHC Falls Church "adjusts case assignments among his attorneys" to balance case load, and another ALJ "prioritizes his attorneys' work." *Id.* at 15. The RD further found that, although almost all of the ALJs at NHC Albuquerque have one assigned attorney, the ALJs at that office "have demonstrated independent judgment and discretion in reassigning attorney[s] between" them and prioritizing their attorneys' work. *Id.*

Additionally, the RD found that the Hearing Center ALJs exercise independent judgment when evaluating an attorney's performance. *Id.* at 16. The RD determined, in this regard, that the ALJs conduct an attorney's "initial [and] subsequent performance discussion[s], mid[-]year review[,] and prepare the final appraisal" without assistance or interference. *Id.* Moreover, in the final appraisal, the ALJs assign a rating of record and discuss in detail aspects of the attorney's performance. *Id.* The RD rejected the Union's assertion that the ALJ's performance review is "perfunctory, predicated on boilerplate language or without reference to case production." *Id.* The RD noted that, although one ALJ wrote the same productivity comment for both of the attorneys assigned to him, this did "not evidence perfunctory review" because the ALJ had determined that both attorneys needed to improve in this regard. *Id.* at 16 n.5. The RD further found that the performance evaluations are relied on in other personnel matters, such as an attorney's retention, promotion, and eligibility for awards. *Id.* at 16. In this regard, the RD noted that an attorney must receive a satisfactory rating on his/her first year evaluation to be retained for a second year, and that a successful rating is also "required for promotion[s] and eligibility for awards." *Id.*

The RD also determined that the evidence shows that the Hearing Center ALJs exercise "discretion and independent judgment" in recommending that attorneys receive performance awards, and that the ALJs grant, or effectively recommend, the attorneys for the awards. *Id.* According to the RD, this also demonstrates supervisory status. *Id.* (citing *Dep't of the Air Force, Hanscom Air Force Base, Bedford Mass.*, 14 FLRA 266, 268 (1984)).

The RD also found that the Hearing Center ALJs "use independent judgment in hiring attorney[s]." RD Decision at 16. Based on the evidence, the RD determined that the ALJs "exercise meaningful authority through their joint participation in the hiring process." *Id.* at 17. According to the RD, the ALJs' input during the process was not "merely a recommendation"; instead, their collective decisions "constituted a directive that certain applicants be offered positions." *Id.* The RD, accordingly, found that the Hearing Center ALJs in both offices "hire attorney[s], consistently exercising independent judgment in these joint hiring decisions." *Id.*

Finally, the RD found that the evidence establishes that the Hearing Center ALJs have authority to discipline attorneys and have consistently exercised independent judgment in doing so. *Id.* The RD noted, in this regard, that witnesses testified that ALJs have provided both written and oral counseling to attorneys. *Id.*

Therefore, the RD determined that the "record conclusively" establishes that the Hearing Center ALJs possess and exercise "supervisory" authorities. *Id.* Specifically, he found that the ALJs "consistently exercise independent judgment with regard to the supervisory indicia of hiring, directing, assigning work, promoting, rewarding, disciplining, and transferring attorneys. *Id.* Furthermore, he found that the ALJs exercise "secondary indicia of supervisory authority": they receive supervisory training; grant annual, sick, compensatory and administrative leave, leave without pay, credit time, and overtime; and decide how much weekly overtime an attorney is entitled to earn. *Id.* at 17-18. Accordingly, based on the evidence, the RD concluded that the Hearing Center ALJs are supervisors within the meaning of § 7103(a)(10) of the Statute and that "[t]he exercise of secondary indicia demonstrating supervisory status further supports this conclusion." *Id.* at 18.

The RD rejected the Union's contention that finding the ALJs to be supervisors would conflict with the Administrative Procedure Act (APA). According to the RD, the Union presented no evidence that finding the ALJs to be supervisors "would potentially erode their judicial independence,

4. The RD noted that the record "demonstrates that the Chief ALJs [at] the [Hearing Centers] have the same authorities over and responsibilities for attorney[s] as the ALJs" have at the Centers. RD Decision at 13. Accordingly, he stated that the same legal analysis would apply to both. *Id.* The RD also noted that the parties stipulated that the position of Chief ALJ at the Hearing Centers is excluded from the unit. *Id.*

or subject them to *de facto* [A]gency control." *Id.* The RD noted that, contrary to this contention, the Chief ALJs do not review either the attorneys' performance evaluations or how the Hearing Center ALJs assign and direct their attorneys during case processing. *Id*.

Addressing the Activity's request that the certification be amended to reflect the change from OHA to ODAR, the RD determined that, because the change from OHA to ODAR was organizational, the Authority's successorship doctrine applied. *Id*. Applying this doctrine, the RD held that ODAR is the successor employer to the employees of OHA and that, therefore, the Union continues to be the exclusive representative of the ALJ bargaining unit. *Id*. at 18-19.

Based on the above, the RD held that: (1) the positions of ALJ and Chief ALJ of NHC Falls Church and NHC Albuquerque are excluded from the unit; and (2) the certification should be amended to change the name of the Activity from OHA to ODAR. *Id*. at 19.

III. Positions of the Parties

A. Union's Application for Review

The Union asserts that the RD "failed to apply established law" when he determined that treating the Hearing Center ALJs as supervisors does not violate the APA. Application for Review at 5. Citing 5 U.S.C. § 4301, the Union claims that "adding supervisory duties to the role of an ALJ" violates "the [APA's] protection of an ALJ's decisional independence."[5] *Id.* According to the Union, an ALJ's primary functions are to conduct hearings and make determinations regarding an individual's disability. *Id*. The Union contends that, because attorneys help the ALJs in their pre-hearing preparations and in writing decisions, the relationship between an ALJ and an attorney is connected to these primary functions. *Id*. The Union asserts that, if an ALJ is considered the supervisor of an attorney, then the ALJ "cannot be monitored with respect to how [the ALJ] interacts with the [a]ttorney . . . without running afoul of the APA's prohibition against interference with an ALJ's judicial function." *Id.* at 6. This situation, according to the Union, also would create an "unjust" situation for the attorneys being supervised because it would permit ALJs to act autonomously "with no consequences or control over their supervisory authority." *Id.* at 6-7. The Union notes that this point was addressed in the March 2009 arbitration award that, according to the Union, should be given preclusive effect. *Id*.

The Union also contends that the RD failed to apply established law by not considering whether the Hearing Center ALJs perform the same duties as Hearing Office ALJs. *Id.* at 2, 7-9. The Union asserts that, under § 7112(a) of the Statute, one criterion for determining the appropriateness of a unit is whether employees share a community of interest. *Id*. at 7-8. According to the Union, by failing to consider the duties of Hearing Office ALJs, the RD misapplied this provision of the Statute. *Id.* at 8.

The Union next contends that, in finding that the Hearing Center ALJs are supervisors, the RD committed clear and prejudicial errors concerning substantial factual matters. *Id*. at 2. As an initial matter, the Union contends that, because the parties agreed that Hearing Center Chief ALJs are supervisors, evidence pertaining to their duties cannot be used to establish the supervisory status of line Hearing Center ALJs. *Id.* at 9-10. Further, according to the Union, although Chief ALJs and line Hearing Center ALJs have similar responsibilities, they differ regarding one critical function: Chief ALJs supervise and manage operations at the Hearing Centers and Hearing Offices, whereas line ALJs in the Hearing Centers and Hearing Offices do not. *Id*. at 9. Because of this "unmistakable distinction," the Union contends that the RD erred in finding that the Chief ALJs "had the *same* authorities over and responsibilities" for attorneys as Hearing Center ALJs. *Id.* at 10.

The Union contends that the RD's finding that the Hearing Center ALJs are supervisors "based on their ability to assign and direct work is incorrect." *Id.* The Union asserts that, although evidence was presented that the Chief ALJs assigned attorneys to particular ALJs, no evidence was presented that line ALJs had "authority to permanently assign [attorneys] to other ALJs." *Id.* at 11. In addition, the Union contends that the RD ignored evidence that Hearing Office ALJs also assign and direct work to attorneys and "that assignment of work is an integral part of *every* ALJ's responsibilities." *Id.* at 10-12

5. Section 4301 defines terms contained in Chapter 43, which provides for performance appraisals in Executive Agencies. In pertinent part, 5 U.S.C. § 4301 provides:

> (2) "employee" means an individual employed in or under an agency, but does not include -
> . . . .
> (D) an administrative law judge appointed under section 3105 of this title[.]

(citing Tr. at 423-24, 466-67, 504). The Union further claims that the testimony and evidence did not indicate that the Hearing Center ALJs exercised independent judgment in assigning cases to attorneys. Application for Review at 11.

The Union also disputes the RD's finding that the Hearing Center ALJs exercise independent judgment when evaluating an attorney's performance. *Id.* at 12. According to the Union, the RD reached this conclusion despite the fact that evaluation forms submitted as evidence contained nearly identical, boilerplate language. *Id.* The Union further asserts that the evidence shows that the evaluation forms had no "significant impact" on the employment status of attorneys, including their retention after their first year of employment. *Id.* at 13 & Tr. at 151-52 (referring to testimony of an ALJ, who testified that he did not complete a first-year appraisal until six months after attorney's first year). Moreover, the Union contends that all ALJs review the work of attorneys and that the ability to review the performance of another employee is not "by itself dispositive of supervisory authority." *Id.* at 12 & 13 (citing *U.S. Dep't of the Interior, Bureau of Indian Affairs, Navajo Area Office, Gallup, N.M.*, 45 FLRA 646 (1992) (*Dep't of the Interior*)).

The Union also challenges the RD's finding that a successful rating is required for promotions and awards. *Id.* at 14 (referring to Tr. at 302). The Union contends that: (1) "[p]romotions and pay raises are automatic or arise by seniority" and are not based on evaluations; (2) awards are considered only when funds become available and are not directly related to any performance review; and (3) all employees have the ability to nominate anyone for an award. *Id.* at 14 & 15 (citing Tr. at 521-22, 579-80).[6]

The Union disputes the RD's finding that the Hearing Center ALJs "exercised supervisory authority by participating in a joint hiring process and that [their] collective decision constituted a 'directive that certain applicants be offered positions.'" Application for Review at 16 (quoting RD Decision at 17). The Union contends that the evidence shows that these ALJs did not have the authority to hire and that "even a [s]enior [a]ttorney could participate in the hiring process." Application for Review at 17 (citing Tr. at 569).[7] The Union also claims that certain testimony concerning the hiring authority of Hearing Center ALJs "is not relevant" because the testimony only demonstrates that Chief ALJs have the authority to hire. *Id.* at 18.

The Union contends that the RD erred in finding that Hearing Center ALJs have the authority to discipline attorneys. *Id.* The Union contends that this finding was based on an e-mail from an ALJ to an attorney, and oral and written counseling conducted by a Chief ALJ with another attorney. *Id.* at 18-19. The Union asserts that the e-mail is "nothing more than . . . written feedback" and that the oral and written counseling "only demonstrates" that the Chief ALJ has authority to discipline attorneys. *Id.* at 18-19.

The Union also asserts that the RD erred in relying on training received by Hearing Center ALJs, performance meetings held at the NHC Albuquerque, and the ALJs' approval of leave as secondary indicia of supervisory status. *Id.* at 19-21.

Finally, the Union contends that the applications for review should be granted because "established precedent regarding deference to an arbitration award during a [u]nit [clarification [p]etition warrants reconsideration." *Id.* at 3 (citing 5 C.F.R. § 2422.31(c)(2)). The Union asserts that the RD erred by not considering the arbitration award. Application for Review at 3 & 21-23. According to the Union, the RD's decision should be reviewed pursuant to 5 C.F.R. § 2422.31(c)(2) because Authority precedent requires "deference" to an arbitrator's factual findings. *Id.* at 21-22. The Union asserts that such precedent "must be considered" to avoid an unjust situation. *Id.* at 23.

B. Activity's Opposition

The Activity contends that, contrary to the Union's assertion, the RD's finding that the ALJs at NHC Falls Church and NHC Albuquerque are supervisors is not contrary to the APA. Opp'n at 5-8. The Activity contends that, because the RD applied established law, the Union's application for review on this ground should be denied. *Id.* at 8. The Activity also claims that the RD correctly determined that the duties performed by Hearing Office ALJs are "irrelevant" because unit determinations are decided solely on the duties performed by the employees at

6. While the Union cites to the hearing transcript at page 579-80, nothing on these pages concerns awards.

7. The Union incorrectly cites to the hearing transcript at page 569 for the testimony supporting its assertion; the testimony is found at page 566.

issue. *Id.* at 8-9. The Activity further contends that the Union's community of interest claim is "flawed" because it ignores the "statutory mandate that excludes supervisors from bargaining units." *Id.* at 9. In addition, the Activity contends that the RD did not commit clear or prejudicial error concerning a substantial factual matter. *Id.* at 10.

The Activity maintains that the RD "appropriately relied on evidence" from both line ALJs and Chief ALJs to resolve the supervisory status of the Hearing Center ALJs. *Id.* at 10. According to the Activity, although the Chief ALJs have additional managerial duties, the Chief ALJs have the same authorities and responsibilities for attorneys as the line ALJs. *Id.* at 11. The Activity further contends that the RD did not err in concluding that the Hearing Center ALJs exercise independent judgment in directing and assigning work; conducting performance appraisals; promoting, rewarding, hiring and disciplining attorneys; approving leave and overtime; and attending management training. *Id.* at 13-24. Further, the Activity contends that the testimony supports the RD's finding that the Hearing Center ALJs performed evaluations for their attorneys, and that the evidence also shows that these evaluations were used in evaluating whether the attorney would be eligible for awards, retention, and promotions. *Id*. at 16-19 (citing Tr. at 94-100; 208-212; 295-298; 409-410).

The Activity further claims that the RD correctly determined that the Hearing Center ALJs have hiring authority. Opp'n at 19-21. The Activity asserts that, contrary to the Union's claim that only Chief ALJs have control over the hiring process, all ten ALJs at NHC Falls Church "collectively made . . . hiring decisions" and that NHC Albuquerque uses a similar hiring process. *Id.* at 20-21. The Activity also maintains that the RD correctly determined that all of the ALJs have the authority to impose discipline and to address performance issues. *Id*. at 21-22.

The Activity further contends that the RD correctly determined that the Hearing Center ALJs exercise certain secondary indicia of supervisory status. *Id*. at 24. The Activity notes that, contrary to the Union's contention, the RD did not rely solely on the secondary indicia to establish that the ALJs were supervisors; rather, the RD relied on these findings as further evidence to support his conclusion that the ALJs were supervisors. *Id*. Moreover, the Activity asserts that the "indisputable evidence" supports the RD's findings that the ALJs attended supervisory training, granted leave, and approved overtime. *Id*.

Lastly, the Activity contends that, because the Authority has exclusive jurisdiction to decide clarification of unit petitions, the RD correctly ignored the arbitrator's findings in the arbitration award. *Id*. at 25-26 (citing *U.S. Small Bus. Admin.*, 32 FLRA 847, 853 (1988)) (*SBA*), *recons. granted*, 36 FLRA 155 (1990)). The Activity asserts that, contrary to the Union's contention, it did not file the instant petition for a "'second bite' of the apple," but rather, "for a ruling by the only body empowered to render a . . . determination on the bargaining unit status" of the Hearing Center ALJs. Opp'n at 26.

IV. Analysis and Conclusions

A. The RD did not fail to apply establish 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 Union contends that the RD failed to apply the APA when he concluded that the ALJs at NHC Falls Church and NHC Albuquerque are supervisors within the meaning of § 7103(a)(10) of the Statute. For the following reasons, we find that the Union's claim lacks merit.

The Union first claims that adding supervisory duties to the role of an ALJ violates the APA's protection of an ALJ's decisional independence. Application for Review at 5. Citing 5 U.S.C. § 4301, the Union contends that the APA guarantees the decisional independence of ALJs. *Id.* Nothing in § 4301, however, precludes an ALJ from performing administrative supervisory duties. Section 4301 simply defines terms used in Chapter 43 of Title 5 of the United States Code, which provides for the establishment of performance appraisal systems in executive agencies. As the RD found, nothing in the record supports the Union's argument that treating Hearing Center ALJs as supervisors within the meaning of § 7103(a)(10) "would . . . erode their judicial independence." RD Decision at 18.

Additionally, relying on the arbitration award, the Union argues that the RD's finding would create a "dangerous situation" for attorneys because Hearing Center ALJs could act without any control over their supervisory authority. Application for Review at 6. This claim provides no basis for finding that the RD's decision violates the APA. As an initial matter, as the Activity correctly notes, because the Union stipulated that the Chief ALJs are supervisors, this contention is illogical. Moreover, the Union has provided no evidence that shows that the RD's finding that the disputed ALJs are

supervisors within the meaning of § 7103(a)(10) of the Statute interferes with their decisional independence under the APA. Further, as discussed *infra*, arbitrators have no authority to resolve questions concerning the unit status of employees under the Statute; accordingly, the RD is not bound by the arbitration award and did not err by choosing not to defer to it. *See U.S. Dep't of Veterans Affairs, Allen Park Veterans Admin. Med. Ctr., Allen Park, Mich.*, 40 FLRA 160, 172-73 (1991).

Relying on § 7112(a) of the Statute, the Union further contends that the RD misapplied law because he failed to consider whether Hearing Center ALJs have the same responsibilities and authorities as Hearing Office ALJs. This contention also provides no basis for finding that the RD failed to apply established law. Under Authority precedent, bargaining unit eligibility determinations are based on testimony regarding an employee's actual duties at the time of the hearing. *See, e.g., Dep't of the AF*, 57 FLRA at 157. Further, while § 7112(a) sets forth the criteria regarding whether a proposed unit is appropriate, including whether employees share a clear and identifiable community of interest, § 7112(b) provides that a unit shall not include any supervisor. *See* 5 U.S.C. § 7112(b) ("[A] unit shall not be determined to be appropriate . . . if it includes . . . any supervisor[.]").

In this case, the issue before the RD was whether the Hearing Center ALJs are supervisors within the meaning of § 7103(a)(10) and, therefore, excluded from the unit pursuant to § 7112(b). *See* RD Decision at 13. Because the issue before the RD concerned the eligibility status of the Hearing Center ALJs, -- not the Hearing Office ALJs -- and the RD's conclusion that these employees are supervisors is based on testimony and other evidence as to their actual duties at the time of the hearing, the Union has not demonstrated that the RD misapplied law.

Accordingly, we find that the Union has not established that the RD failed to apply established law.

B. The RD did not commit 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 Union claims that the RD committed factual errors related to the duties of the Hearing Center ALJs.

According to the Union, the RD erred as an initial matter in finding that the Chief ALJs have the same authority and responsibility as the Hearing Center ALJs. *See* Application for Review at 10. The Union's claim is meritless. Witnesses testified at the hearing that no distinction existed between the line ALJs and the Chief ALJs regarding their supervisory authorities and responsibilities for attorneys. *See, e.g.*, Tr. at 38 (Hearing Center ALJ testified that in his capacity as a former Chief ALJ and now as a line ALJ there is no difference regarding his interaction with or responsibilities for managing attorneys) & 268 (ALJ testified that as former line ALJ and now as Chief ALJ supervision of attorneys is the same). The RD's finding was based on this evidence and his examination of the record. *See* RD Decision at 13. Moreover, as the Activity correctly notes, that the Chief ALJs may perform additional managerial functions "in no way signals" that the Hearing Center line ALJs are not supervisors. Opp'n at 11. The record thus supports the RD's finding. As such, the Union has not shown that the RD committed any factual error in this regard.

The Union further contends that the RD erred in finding that the Hearing Center ALJs exercise independent judgment in the assignment of work to attorneys. Contrary to the Union's contention, record evidence supports the RD's finding. *See, e.g.*, Tr. at 53-61 (former Chief Judge, now a line ALJ testified regarding the assignment of work to attorneys); Tr. at 403 (ALJ testified concerning his assignment of work to an attorney). Further, the Union claims that the RD erred in relying on the testimony and evidence presented by the Activity and ignoring evidence presented by the Union regarding this issue. Evaluating the weight afforded to evidence, however, is within the discretion of the RD. *See, e.g.*, *Nat'l Credit Union Admin.*, 59 FLRA 858, 862 (2004) (disagreement over evidentiary weight not sufficient to find that RD committed a clear and prejudicial error concerning a substantial factual matter). Therefore, we reject the Union's claim that the RD committed clear and prejudicial factual error based on the weight he afforded various testimony and evidence. Additionally, as noted above, because bargaining unit eligibility determinations are based on testimony as to the disputed employees' actual duties at the time of the hearing, the Union's claim that the RD ignored evidence regarding the duties of Hearing Office ALJs provides no basis for finding that the RD erred in this regard.

The Union disputes the RD's finding that the Hearing Center ALJs exercise independent judgment when evaluating attorneys' performance. Contrary to the Union's contention, the record supports the RD's finding. *See* RD Decision at 16; *see also* Tr. at 92-100, 295-98 (ALJs testified concerning the performance plan and their evaluation of employees' performance). Further, the Union's claim that the evidence does not support the RD's finding because evaluation forms for two attorneys contained nearly identical, boilerplate language provides no basis for finding that the RD erred. *See* Application for Review at 16 (citing Agency Ex. 26 and Union Ex. 1). The RD specifically found that the use of the same comment did not evidence perfunctory review because the ALJ completing those evaluations "felt that both attorney[s] needed to improve productivity." RD Decision at 16 n.5; *see also* Tr. at 230 (ALJ explained why he used the same language in both documents).

The Union also argues that the record does not support the RD's finding that the evaluation forms affected the attorneys' employment status because an ALJ testified that he completed an attorney's performance appraisal after the end of the attorney's first year and the attorney was not terminated. Application for Review at 14 (citing Tr. at 151-52). However, this ALJ also testified that if the attorney had not received a successful rating, he could have been terminated. *See* Tr. at 95. The record also contains other evidence that support the RD's finding. *See, e.g.*, *id*. at 298-99 (witness testified that evaluations are used for re-employment decisions, (*e.g.*, if attorney sought permanent position with the Agency, and for renewal of employment).

Moreover, the record supports the RD's finding that a successful rating was required for promotions and awards. *See, e.g.*, *id*. at 110-11, 411 (Hearing Center ALJs testified attorneys would not have been promoted if had not received a successful rating); RD Decision at 10-11 & 16. *See also* Tr. at 351-52; 107-109; (a witnesses testified that an ALJ supervising an attorney recommends the attorney for an award; another witness testified concerning the recommendation of attorneys for awards as reflected in Agency Exs. 18 & 19); Agency Exs. 18 & 19 (e-mails indicating that attorneys need ALJs' recommendations for awards and showing ALJs' disapproval of award for one attorney and justification of award for another). Further, although the Union cites the transcript as support for its position that an ALJ's recommendation was not required for awards, nothing on the cited pages (Tr. at 579-80) concerns awards. *See* Application for Review at 15.

Additionally, *Dep't of the Interior* provides no support for the Union's claim that the ability to review the performance of an employee is not dispositive of supervisory authority under § 7103(a)(10). As the RD correctly stated, "[a]lthough evaluation of performance is not listed among the supervisory indicia, an employee may nevertheless be a supervisor if that employee exercises independent judgment in evaluating employee performance, and upper management relies upon that evaluation when deciding to hire, promote, reward or discipline an employee." RD Decision at 14 (citing *Dep't of the Interior*, 45 FLRA at 651). In this case, as noted above, the evidence supports the RD's determination that the evaluations are relied on by upper level-management "in other personnel matters," including retention, promotion and eligibility for awards. RD Decision at 16. Accordingly, the Union has not demonstrated that the RD committed a clear and prejudicial error in finding that the Hearing Center ALJs exercise independent judgment when evaluating attorneys.

The Union also contends that the RD erred in finding that Hearing Center ALJs exercise independent judgment in hiring and in disciplining attorneys and that the ALJs have the authority to approve leave and attend supervisory training. On review of the record, the Union has not provided any information that demonstrates the RD's findings concerning the ALJs' authority to hire and discipline attorneys is clearly erroneous. *See id.* at 6-7, 11-12. *See also, e.g.*, Tr. at 277, 280, 401-02 (witnesses testified that ALJs participate in the hiring process) 104, 312 & 412 (witnesses testified that ALJs have the authority to discipline attorneys). The Union also has not provided any information that demonstrates the RD's findings that ALJs have the authority to approve leave and attend supervisory training is clearly erroneous. *See* RD Decision at 12-13 & 17-18.

Accordingly, we find that the Union has not established that the RD committed a clear and prejudicial error concerning a substantial factual matter.

C. The application for review fails to demonstrate that established law or policy warrants reconsideration.

The Union contends that the application for review should be granted because established

precedent regarding deference to an arbitration award during a unit clarification petition warrants reconsideration under 5 C.F.R. § 2422.31(c)(2)). Application for Review at 3. This contention also provides no basis for granting review of the RD's Decision.

The Authority has previously addressed the authority of arbitrators to resolve questions concerning the bargaining unit status of an employee. In *SBA*, 32 FLRA at 852, the Authority held that an arbitrator is not empowered to determine a grievant's bargaining unit status, even if the unit question is raised as a collateral issue to a grievance otherwise properly brought under the collective bargaining agreement. The Authority noted that § 7105(a)(2)(A) of the Statute provides that the Authority shall "determine the appropriateness of units for labor organization representation." *Id.* at 853. Moreover, § 7112(a)(1) directs that the "Authority shall determine the appropriateness of any unit." *Id. See also U.S. Dep't of the Treasury, IRS, L.A. Dist.*, 34 FLRA 1161, 1164-65 (1990) (award set aside and parties ordered to place grievance in abeyance pending the outcome of a clarification of unit petition, if union decided to pursue the question; factual disputes as to whether employees are included in a bargaining unit are resolved by filing a clarification of unit petition).

In view of this precedent, and the clear statutory mandate in §§ 7105 and 7112 of the Statute, we find that the Union has not demonstrated that reconsideration of Authority precedent is warranted. Consequently, as the RD correctly stated, the Authority has exclusive jurisdiction to make unit determinations. *See Veterans Affairs*, 56 FLRA at 969 (citing *SBA*, 32 FLRA at 854). Accordingly, the RD properly concluded that the arbitration award was not binding on him, and he did not err by not deferring to the factual findings contained therein.

Accordingly, we deny the Union's contention that established law or policy warrants reconsideration of Authority precedent.

V. Order

The Union's application for review is denied.