64 FLRA No. 34

UNITED STATES
DEPARTMENT OF THE NAVY
AVIATION SUPPORT DETACHMENT
NORFOLK, VIRGINIA
(Agency)

and

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
(Petitioner/Labor Organization)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 53
(Incumbent Labor Organization)

WA-RP-07-0042

ORDER DENYING
APPLICATION FOR REVIEW

November 9, 2009

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 American Federation of Government Employees, Local 53 (AFGE) [1] under § 2422.31 of the Authority's Regulations. [2] The National Association of Independent Labor (NAIL) filed an opposition.

AFGE's application challenges the Regional Director's (RD's) Decision overruling its objections to an election. For the reasons that follow, we deny AFGE's application for review.

II. Background and RD's Decision

NAIL filed a petition seeking to determine whether the Agency's nonprofessional employees, who were already represented by AFGE, wished to be represented by NAIL. NAIL and AFGE received an equal number of votes in a mail ballot election. Following the tied election, the parties entered into a consent election agreement, and a manual election was held. Of the twenty-four eligible employees, eighteen voted: NAIL received fourteen votes and AFGE received four votes.

AFGE filed objections to the manual election with the RD. As there were material facts in dispute, the RD ordered a hearing. At the hearing, as an initial matter, the Hearing Officer denied AFGE's motion to sequester the witnesses. *See* Tr. at 21. In his decision, the RD stated that the party filing objections has the burden of proving its objections by a preponderance of the evidence. *See* RD's Decision at 10 (citing 5 C.F.R. § 2422.27(b)). [3] As relevant here, the RD overruled the following objections because AFGE had failed to meet its burden of proof. [4]

First Objection: The RD overruled AFGE's objection that the Agency's failure to respond to or comply with three information requests undermined AFGE in the eyes of potential voters. The RD overruled the Union's objection on the grounds that: (1) AFGE did not submit the first information request into evidence;

1. We note that the Authority's Office of Case Intake and Publication (CIP) issued AFGE a procedural deficiency order that AFGE timely cured in two separate mailings that the Authority received several days apart. However, in between receipt of the first and second mailings containing AFGE's cure, CIP, believing that AFGE had failed to completely cure the deficiency, issued AFGE an order to show cause why its application should not be dismissed for failure to comply with an Authority order. As CIP subsequently received both the second mailing completing AFGE's cure of the deficiency and AFGE's response to the order to show cause, there are no procedural deficiencies in the application for review.

2. 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;
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> (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.

3. 5 C.F.R. § 2422.27(b) provides, in relevant part, that "[a] party filing objections to the election bears the burden of proof by a preponderance of the evidence concerning those objections."

4. AFGE filed a total of thirteen objections, all of which were overruled by the RD. As AFGE does not challenge the RD's rulings with respect to its third, fourth, sixth, seventh, ninth, and tenth objections, we do not address them further. However, for the ease of the reader, we refer to the challenged objections by the numbering used in the RD's Decision.

(2) the Agency complied with the second information request; and (3) AFGE's own deadline for the Agency to provide the information requested in the third request was not until after the election. *See id.* at 11-12.

Second Objection: The RD overruled AFGE's objection that its status was undermined by the Agency's failure to provide AFGE with the information at issue in its first objection, while providing the same information to a member of the bargaining unit. In support of this objection, AFGE provided two emails, which the Hearing Officer refused to admit into evidence. *See* Tr. at 124-32 (rejecting admission of AFGE Ex. 5). The RD upheld this ruling because: (1) none of the individuals who sent or received the emails testified at the hearing; and (2) the emails did not provide probative evidence that a bargaining unit member received the information that AFGE allegedly requested but did not receive. RD's Decision at 12-13. The RD further found that, even if he had accepted the exhibit into evidence, AFGE failed to establish that it had a right to the information before the election.

Fifth Objection: The RD overruled AFGE's objection alleging that the Agency had unlawfully bypassed the Union by dealing directly with employees at two military quarters meetings [5] because the only testimony about a specific military quarters meeting merely established that "the subject of relocating employees was mentioned at a meeting that might have been held before or after the election." *Id.* at 15.

Eighth Objection: The RD overruled AFGE's objection that the Agency did not take steps to ensure that an employee, who was at home on extended administrative leave during the election, was notified of the election before it was conducted. The RD determined that the employee's vote would not have affected the outcome of the election because NAIL won the election by ten votes. *See id.* at 16 (citing *United States Nat'l Park Serv., Santa Monica Mountains Recreation Area, Agoura Hills, Cal.*, 50 FLRA 164, 169 (1995) (*Nat'l Park Serv.*)).

Eleventh Objection: The RD overruled AFGE's objection challenging the Authority agent's denial of its request that it be allowed to have two election observers. The RD noted that the consent election agreement between the parties provided that the Agency, AFGE, and NAIL would each have an equal number of election observers, but did not specify the number of observers that each party would have. AFGE objected to not being allowed to have two observers at the election, arguing that a second observer could have overseen the hallway outside the election room and prevented Employee B, who supported NAIL, from campaigning in the hallway during the election. The RD held that Authority agents have wide discretion in determining the number of observers each party may have at an election, as long as each party has an equal number of observers. *See id.* at 18 (citation omitted). The RD overruled the objection on the ground that AFGE had not indicated a basis, and none was apparent, for finding that the Authority agent who conducted the election abused his discretion by denying AFGE's request. *See id.*

Twelfth Objection: The RD overruled AFGE's objection alleging that the Agency failed to take action to prevent Employee B from campaigning on behalf of NAIL while she was on duty the day before and the day of the election because the evidence did not demonstrate that the Agency allowed Employee B to act in that manner. *See id.* The RD noted that agencies are required to remain neutral during an election between two competing unions and rejected AFGE's contention that the Agency failed to remain neutral by allowing Employee B to encourage potential voters to vote for NAIL. The RD found that: (1) the evidence, including the testimony of the AFGE election observer, did not show that any Agency manager, supervisor, or agent knew that Employee B had spoken with any eligible voters the day before or the day of the election while she was on duty; and (2) although AFGE's President called the Agency twice on the morning of the election to complain that Employee B was campaigning on behalf of NAIL, AFGE failed to provide any evidence that Employee B actually had been campaigning or that the Agency was aware that she actually had been acting in that manner. *See id.* Absent knowledge that Employee B actually had been campaigning while on duty, the RD determined that the Agency could not be found to have allowed her to do so.

Thirteenth Objection: The RD overruled AFGE's objection alleging that Employee B's conduct in the hallway outside the election room during the election compromised voters' free choice. The RD determined that, as there was no evidence that Employee B was either a representative or an agent of NAIL, and as there was no evidence that the Agency knew about Employee B's activities on the day of the election after she cast her vote, Employee B's activities had to be evaluated as

5. "Quarters meetings" are meetings that the Agency holds every Tuesday morning to distribute awards and disseminate information about future events. They are primarily for military personnel, but civilian employees are encouraged to attend. RD's Decision at 5.

those of an employee who was not an agent of NAIL, AFGE, or the Agency. *See id.* at 19 (citation omitted). The RD thus considered whether Employee B's conduct "substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Id.* Based on the record, the RD found that Employee B's "conduct was neither coercive nor disruptive so as to substantially impair the voters' free choice." *Id.* In addition, the RD found that, as the evidence shows only that Employee B spoke to two voters, and NAIL defeated AFGE by ten votes, Employee B's conduct could not have affected the outcome of the election. *See id.*

III. Positions of the Parties

A. AFGE's Application for Review

AFGE claims that the RD erred in denying its request to sequester the hearing witnesses. In this respect, AFGE asserts that the hearing was not fair and proper because employees feared saying anything negative about the manager who was in the hearing room and lacked protection from reprisal by managers and coworkers. *See* Application for Review (Application) at 1, 3.

With respect to its eleventh objection, concerning the denial of its request for two election observers, AFGE asserts that, in order to ensure that the election was conducted properly, there should have been an "appropriate number" of observers. *Id.* at 2. AFGE further asserts that allowing each party to have the same number of observers is the same as not having any observers at all because improper conduct did not take place in the voting room where the observers were seated, but in the areas outside the voting room. *See id.* at 3.

With respect to its first and second objections concerning the Agency's alleged failure to comply with AFGE's information requests, AFGE argues that the Agency's actions "favor[ed]" NAIL and "affected AFGE['s] ability to deal with [the Agency]" because the Agency did not provide the requested information to AFGE, but provided it to a bargaining unit member. *Id.* at 2. In a related claim addressing its fifth objection, AFGE asserts that the Agency favored NAIL by bypassing AFGE when it provided to a bargaining unit employee the information that AFGE had requested but had not received. AFGE essentially asserts that this adversely affected bargaining unit employees' perception of which union could better represent them, as evidenced by the number of votes AFGE received. *See id.* at 3.

As to AFGE's twelfth objection, concerning the Agency's actions with respect to Employee B, AFGE argues that the Agency was aware that Employee B lied about whether she was on leave and when she requested leave for the morning of the election. *See id.* at 1-2. AFGE further asserts that the Agency allowed Employee B to continue her improper actions even after the Agency had been made aware that Employee B was campaigning. *See id.* at 3. In addition, AFGE argues that, even if Employee B were on leave, the Agency did not maintain neutrality in the election because it allowed Employee B to campaign for NAIL to employees who were not on leave.

With respect to its thirteenth objection, AFGE asserts that the RD erred in finding that Employee B's actions did not affect the outcome of the election because, in the first election, AFGE and NAIL received an equal number of votes. *See id.* at 2. AFGE also reiterates its claim that Employee B lied about whether or not she was on leave the morning of the election. In addition, AFGE argues that Employee B was an agent of NAIL because she received a copy of AFGE's objections to the election. Further, AFGE disputes the RD's finding regarding how many employees Employee B spoke to, asserting that "there was no clear number of employees[.]" *Id.*

Finally, with respect to its eighth objection, AFGE asserts that the employee who had been on administrative leave the day of the election was denied her right to vote because she was not notified that an election would be held. [6] *See id.* (citing *Nat'l Park Serv.*, 50 FLRA at 169).

B. NAIL's Opposition

NAIL asserts that AFGE's application for review fails to establish that review of the RD's Decision is warranted under any of the grounds set forth in § 2422.31(c) of the Authority's Regulations. Further, NAIL asserts that the application for review does not provide specific references to the hearing transcript, as required under § 2422.31(b) of the Authority's Regulations. According to NAIL, the application for review constitutes nothing more than disagreement with the RD's findings of fact and conclusions, and consists of a

6. AFGE also argues that the RD's Decision is contrary to regulation. Application at 2 ("The regulation is clear where campaigning is prohibited on Election Day, bare [sic] not to be in the agreement to apply."). However, as AFGE has failed to identify to which regulation it refers, we deny this claim as a bare assertion. *See United States Dep't of the Navy, Fleet Readiness Ctr. Sw., San Diego, Cal.*, 63 FLRA 245, 252 (2009).

series of unsupported accusations and false claims. NAIL urges the Authority to deny review of the RD's Decision.

IV. Analysis and Conclusions

A. The RD did not commit prejudicial procedural errors.

We construe AFGE's challenge to the RD's denials of its motion to sequester the hearing witnesses and its request to have two election observers (eleventh objection) as claims that the RD committed prejudicial procedural errors.

As to sequestration, the granting of a motion to sequester is not a matter of right, but rather, is a matter within the broad discretion of the Hearing Officer. *See Bureau of Indian Affairs, Wind River Agency, Fort Washakie, Wyo.*, 29 FLRA 935, 938-39 (1987) (*Indian Affairs*); *see also* 5 C.F.R. § 2422.21(b) ("[T]he Hearing Officer may take any action necessary to schedule, conduct, continue, control, and regulate the hearing, including ruling on motions when appropriate."). Although AFGE asserts that witnesses feared reprisal by managers and co-workers who were in the hearing room, apart from this bare assertion, AFGE has failed to provide any specific evidence in support of this claim and does not explain how sequestration would have resolved the reprisal issue. Thus, AFGE has failed to demonstrate how the Hearing Officer's failure to sequester the hearing witnesses interfered with the presentation at the hearing of all relevant facts. Accordingly, we conclude that AFGE has not demonstrated that the denial of its motion to sequester the hearing witnesses has resulted in prejudicial procedural error within the meaning of 5 C.F.R. § 2422.31(c)(3)(ii). *See Indian Affairs*, 29 FLRA at 938-39.

As to the number of election observers, the election in this case was conducted pursuant to a consent election agreement to which AFGE was a party. *See* Authority Ex. 1(c) at 1. Under that agreement, each party was entitled to "an equal number of authorized observers." *Id.* AFGE has not claimed that the procedures followed by the Authority agent at the election were inconsistent with that agreement. *See Dep't of the Interior, Bureau of Indian Affairs*, 56 FLRA 169, 172 (2000) (no prejudicial procedural error where incumbent union was party to consent election agreement and did not claim that the election procedures were inconsistent with that agreement). Although AFGE contends that additional observers were necessary "due to the voting area[,]" Application at 2, AFGE neither cites any evidence to support this claim, nor explains how the Authority agent abused his discretion in denying the request for additional observers. Consequently, we find that AFGE has not demonstrated that it was prejudiced by the Authority agent's denial of its request at the election for two election observers, and, as such, does not establish that review of the RD's Decision is warranted.

B. The RD did not commit clear and prejudicial errors concerning substantial factual matters.

We construe AFGE's claims with respect to its first, second, fifth, twelfth, and thirteenth objections as claims that the RD committed clear and prejudicial errors concerning substantial factual matters.

AFGE's first, second, and fifth objections concern three information requests that AFGE allegedly submitted to the Agency and with which the Agency allegedly failed to comply. As set forth above, the RD overruled AFGE's first objection because: (1) AFGE did not submit the first information request into evidence; (2) the Agency complied with the second information request; and (3) AFGE's own deadline for the Agency to provide the information requested in the third request was not until after the election. *See* RD's Decision at 11. Apart from AFGE's bare assertion that the Agency failed to comply with its information requests, AFGE has failed to cite to any evidence or provide any argument or assertion to support its claims that the RD erred in making these findings. Accordingly, we find that there is no basis for concluding that the RD committed a clear and prejudicial factual error with respect to the first objection.

As to its second objection, the RD rejected the emails submitted by AFGE (AFGE Ex. 5) in support of its claim that the Agency provided the requested information to a bargaining unit employee. *See id.* at 12. As relevant here, the RD found that the emails did not provide reliable probative evidence that a bargaining unit member received the information that AFGE had requested. *See id.* As AFGE neither challenges the RD's rejection of its exhibit nor cites to any evidence to support its assertion that a bargaining unit employee received the requested information, we find that there is no basis for concluding that the RD committed a clear and prejudicial factual error with respect to the second objection.

The RD overruled AFGE's fifth objection because the testimony about a specific military quarters meeting established only that "the subject of relocating employees was mentioned at a meeting that might have been held before or after the election." RD's Decision at 15. As AFGE has failed to either dispute the RD's finding in

this regard or cite to any evidence of a bypass, we find that there is no basis for concluding that the RD committed a clear and prejudicial factual error with respect to the fifth objection.

As relevant here, the RD overruled AFGE's twelfth objection on the basis that, although AFGE's President called the Agency twice on the morning of the election to complain that Employee B was campaigning on behalf of NAIL, AFGE failed to provide any evidence that Employee B actually had been campaigning or that the Agency was aware that she actually had been acting in that manner. *See id.* at 18. AFGE essentially challenges the RD's finding that the Agency was not aware of Employee B's actions by claiming that Employee B lied about whether she was on leave, and when she requested leave for, the morning of the election. *See* Application at 1-2. In this regard, AFGE asserts that the Agency knew that Employee B was not on leave. *See id.* at 2-3. AFGE further asserts that the Agency knew that the employees to whom Employee B spoke were not on leave, but nonetheless allowed Employee B to continue to campaign. *See id.* at 3. However, apart from these unsupported assertions, AFGE offers no citations to the record to support its claim that the Agency was aware of Employee B's actions. Moreover, AFGE does not challenge the RD's factual findings that: (1) after each call from AFGE's President to the Agency, the Agency sent a supervisor to the area outside the voting room "to handle the matter"; (2) the supervisor spoke with Employee B after each call; (3) each time Employee B denied that she had been campaigning on behalf of NAIL; and (4) the supervisor instructed Employee B to refrain from encouraging employees to vote for NAIL while she or they were on duty. RD's Decision at 9. Accordingly, we find that there is no basis for concluding that the RD committed a clear and prejudicial factual error with respect to the twelfth objection.

The RD overruled AFGE's thirteenth objection, finding that AFGE had failed to establish that Employee B's conduct affected the outcome of the election. *See* RD's Decision at 19. AFGE asserts that the RD erred in making this finding because AFGE and NAIL received an equal number of votes in the first election. *See* Application at 2. The results of the *first* election are irrelevant, however, for deciding whether AFGE's objections to the *second* election should be sustained. Accordingly, we find that this claim does not establish that the RD committed a clear and prejudicial factual error concerning a substantial factual matter.

AFGE also argues that the RD erred in finding that Employee B was not an agent of NAIL because she received a copy of AFGE's objections to the election. Apart from its unsupported claim that Employee B received a copy of AFGE's objections to the election, AFGE offers no support for its claim that Employee B was an agent of NAIL and no argument or assertion as to how this claim, if true, would establish that the election should be set aside. Accordingly, we find that this claim does not establish that the RD committed a clear and prejudicial factual concerning a substantial factual matter.

Finally, AFGE disputes the RD's finding regarding how many employees Employee B spoke to, asserting that "there was no clear number of employees[.]" *Id.* AFGE provides no evidence to support this claim. Accordingly, we find that there is no basis for concluding that the RD committed a clear and prejudicial factual error with respect to the thirteenth objection.

C. The RD did not fail to apply established law.

AFGE asserts that the RD erred in denying its objection concerning an employee who was on extended administrative leave the day of the election and did not have an opportunity to vote. In this regard, AFGE essentially asserts that the RD's determination is inconsistent with *Nat'l Park Serv.* *See* Application at 2 (citing 50 FLRA at 169). We construe this assertion as a claim that the RD failed to apply established law.

As relevant here, *Nat'l Park Serv.* provides that an objection alleging that an eligible employee was deprived of the opportunity to vote will be sustained and the election set aside if the vote of the employee would be "determinative." 50 FLRA at 169. As found by the RD, even if the employee on administrative leave had been allowed to vote, her vote would not have been determinative because NAIL won the election by ten votes. *See* RD's Decision at 16. As AFGE does not dispute either that NAIL won the election by ten votes, or that the employee's vote would not have affected the outcome of the election, we find that the RD did not fail to apply established law.

V. Order

AFGE's application for review is denied.