**66 FLRA No. 97**

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
NORTHERN CALIFORNIA
HEALTH CARE SYSTEM
MARTINEZ, CALIFORNIA
(Activity)

and

DEBRA HASAN, AN INDIVIDUAL
(Petitioner)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO
(Petitioner/Exclusive Representative)

SF-RP-11-0010
SF-RP-11-0019

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DECISION AND ORDER
ON REVIEW

February 27, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

## I. Statement of the Case

This case is before the Authority on an application for review (application) of the Regional Director's (RD's) Decision and Order on Petitions Seeking Clarification of Unit. The application was filed by the Activity under § 2422.31 of the Authority's Regulations.[2] The American Federation of Government Employees, AFL-CIO (the Union-Petitioner) filed an opposition to the application.

The Activity seeks review of the RD's decision to include three positions in a nonprofessional consolidated unit of Department of Veterans Affairs employees. The RD's decision affects the bargaining unit status of two Recruitment Assistants,[3] two Benefits Assistants,[4] and three Pre-Employment Assistants.[5] In an Order, the Authority granted the application and deferred action on the merits.[6]

On review of the merits, and for the reasons that follow, we deny the Activity's application for review.

## II. Background and RD's Decision

The Activity is an integrated health care delivery system offering a comprehensive array of medical, surgical, rehabilitative, mental health, and extended care services to veterans in northern California. It covers seventeen counties, and serves over 377,700 veterans. It comprises a medical center in Sacramento, California, a rehabilitative and extended care facility in Martinez, and seven outpatient clinics.

In the decision, the RD rejected the Activity's claim that the three positions fall within the Federal Service Labor-Management Relations Statute's (the Statute's) § 7112(b)(2) exclusion for confidential employees[7] or the § 7112(b)(3) exclusion for employees engaged in personnel work in other than a purely clerical

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[1] Member Beck's dissenting opinion is set forth at the end of this decision.

[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] Human Resources (HR) Assistant (Recruitment/Placement).

[4] HR Assistant (Personnel, Employee Benefits).

[5] HR Assistant (Pre-Employment). The employees in each position perform essentially the same duties as the other employee(s) in the same position. *See* RD's Decision at 7, 8 n.1, 9 n.2.

[6] Following the Order's issuance, the Union-Petitioner submitted a request for leave under 5 C.F.R. § 2429.26 to submit additional argument. As the record before us is sufficient for us to reach a decision, we deny the request. *E.g., Allen Park Veterans Admin. Med. Ctr.*, 34 FLRA 1091, 1091 n.2 (1990).

[7] Section 7112(b)(2) excludes from a bargaining unit "a confidential employee." 5 U.S.C. § 7112(b)(2). Section 7103(a)(13) defines "a confidential employee" as "an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations." 5 U.S.C. § 7103(a)(13).

capacity.[8] To resolve the confidential employee issue, the RD applied the legal principles set forth in cases such as *United States Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona*, 37 FLRA 239, 244 (1990) (*Yuma*), and *United States Army Plant Representative Office, Mesa, Arizona*, 35 FLRA 181, 186 (1990) (*Army*).

Applying this case law, the RD found that the Recruitment Assistants, Benefits Assistants, and Pre-Employment Assistants "are not confidential employees who must be excluded from the bargaining unit pursuant to § 7112(b)(2) of the Statute." RD's Decision at 14, 15, 17. Although Recruitment Assistants work with individuals who "formulate[] or effectuate[] management policies in the field of labor-management relations," *id.* at 13, the RD found insufficient evidence that they act in a confidential capacity with respect to those individuals. *Id.* at 13-14. According to the RD, these employees, among other things, do not participate in meetings involving labor-management matters and are not privy to pre-decisional, confidential information concerning sensitive labor-management matters. *Id.* And the RD found no evidence that the Recruitment Assistants' supervisors use them as confidantes in labor-management matters. *Id.*

The RD similarly determined that the Benefits Assistants, who share a supervisor with the Recruitment Assistants, are not involved in the Activity's decision-making process with respect to contract negotiations, disciplinary actions, grievances, or unfair labor practices and that any personnel actions that they enter into the Activity's personnel system are post-decisional. *Id.* at 15. The RD also found no evidence that the Benefits Assistants' supervisor uses them as confidantes in labor-management matters.

As to the Pre-Employment Assistants, the RD found that their supervisors are not individuals who formulate or effectuate management policies in the field of labor-management relations. *Id.* at 16. The RD also found that these employees do not have any involvement in labor-management relations. *Id.* For example, they do not attend meetings involving labor-management matters and are not privy to pre-decisional information on management's decisions regarding grievances, contract negotiations, unfair labor practices, or disciplinary actions. *Id.* at 16, 17.

Regarding the claim that the three positions fall within § 7112(b)(3)'s exclusion for employees engaged in personnel work in other than a purely clerical capacity, the RD applied the legal principles set forth in cases such as *832nd Combat Support Group, Luke Air Force Base, Arizona*, 23 FLRA 768 (1986); *SSA*, 56 FLRA 1015, 1018 (2000) (*SSA*); *Headquarters, Fort Sam Houston, Texas*, 5 FLRA 339, 343 (1981); and *United States Department of the Navy, United States Naval Station, Panama*, 7 FLRA 489 (1981). The RD determined that the Recruitment Assistants' "work is more clerical in nature and does not require the exercise of independent judgment." RD's Decision at 14. For example, the RD found that these employees rely on Activity guidelines, rules, and regulations in performing their recruitment and placement duties, in reviewing vacancy announcements, and in verifying that applicants meet basic qualifications. *See id.* Similarly, the RD found, the Recruitment Assistants rely on rules and regulations in answering questions from both potential and actual applicants and in providing guidance to management officials on policies and procedures. *Id.*

The RD also found that the Benefits Assistants "do not perform personnel work in other than a clerical capacity." *Id.* at 16. Specifically, he determined that when advising employees about benefits, their work is mostly clerical. *Id.* at 15. Moreover, these employees do not exercise independent judgment and discretion because "[e]ligibility for benefits, changes to benefits and all other benefit-related information [are] strictly based on government-wide regulations." *Id.* The RD determined that, regarding processing personnel actions, their duties are also clerical in nature. *Id.* According to the RD, these employees merely provide a technical review of personnel actions to make certain that the information is accurate. *Id.* Moreover, the RD found, their duties "do not require the consistent exercise of independent judgment," *id.* at 16, because the employees use specific guidelines to review personnel actions and, in difficult cases, seek guidance from their supervisor. *Id.* at 15.

Finally, the RD found that the Pre-Employment Assistants' duties are mostly clerical in nature and do not require them consistently to exercise independent judgment. *Id.* at 17. According to the RD, "[v]erification of proper credentialing, licensure, education and other qualifications are governed by [Activity] regulation and guidance." *Id.* He noted that these employees confer with specialists if an issue arises that might affect an employee's suitability for employment and that service chiefs verify all new-employee information entered into the VA's credentialing system and make the decision to hire an employee. *Id.* Moreover, the RD found, regarding identification cards, the Pre-Employment Assistants simply ensure that all employees have proper identification as identified by the Activity and that, if an employee is unable to obtain an identification card, an HR specialist addresses the issue. *Id.*

[8] Section 7112(b)(3) excludes from a bargaining unit "an employee engaged in personnel work in other than a purely clerical capacity." 5 U.S.C. § 7112(b)(3).

Accordingly, in the decision, the RD concluded that the three positions should be included in the nonprofessional consolidated VA unit. *Id.* at 19.

## III. Positions of the Parties

The Activity contends that the RD failed to apply established law and committed clear and prejudicial errors concerning substantial factual matters. Regarding the RD's asserted legal errors, the Activity cites several Authority decisions. Application at 4-5. Regarding the RD's asserted factual errors, the Activity claims that the testimony of the employees' supervisors demonstrates that the RD committed clear factual errors when he found that the employees were neither confidential employees nor employees engaged in personnel work in other than a purely clerical capacity. *Id.* at 9, 11, 15, 19, 21, 25, 28-29. According to the Activity, the supervisors' testimony demonstrates that the employees' duties are confidential in nature and that the employees exercise discretion and independent judgment. *Id.*

The Union-Petitioner argues that the Activity's application is "mere disagreement with the [RD's] findings," and that the Activity "simply re-argues its case" in its application. Opp'n at 1, 6.

## IV. The Activity has not demonstrated that the RD either failed to apply established law or committed clear and prejudicial errors concerning substantial factual matters.

The Activity does not support either basis for its challenge to the RD's findings that the disputed positions should be included in the nonprofessional consolidated unit. The RD rejected the Activity's claim that the positions fall within the § 7112(b)(2) exclusion for confidential employees or the § 7112(b)(3) exclusion for employees engaged in personnel work in other than a purely clerical capacity.

The RD did not fail to apply established law when he resolved the unit status of the disputed positions. Looking for guidance to pertinent Authority precedent on confidential employees under § 7112(b)(2), the RD found that the employees in one of the disputed positions do not work with individuals who formulate or effectuate management policies in the field of labor-management relations. Also consistent with Authority precedent, the RD found that none of the employees in the disputed positions have pre-decisional, confidential involvement in labor-management matters.

The RD's determinations are likewise consistent with precedent on employees involved in personnel work in other than a purely clerical capacity under § 7112(b)(3). The RD found that the disputed employees' work is essentially clerical in nature, and does not require the exercise of independent judgment. The RD also determined that the employees perform their duties in accordance with and reliance on established government-wide and Activity rules, regulations, and guidelines.

The principles applied and the issues resolved by the RD in reaching these conclusions accurately reflect the principles and issues recognized as relevant by Authority precedent. Regarding "confidential employees," the Authority has held that an employee is not "confidential" unless (1) there is evidence of a confidential working relationship between an employee and the employee's supervisor, and (2) the supervisor is significantly involved in labor-management relations. *See, e.g.*, *Yuma*, 37 FLRA at 244; *Army*, 35 FLRA at 186 (same). The Authority has also held that labor-management relations matters are limited to matters such as contract negotiations and the disposition of grievances. *See, e.g.*, *Broad. Bd. of Governors*, 64 FLRA 235, 236-37 (2009). Regarding employees involved in personnel work in other than a purely clerical capacity, the Authority has held that the character and extent of the employee's involvement in personnel work must be more than clerical in nature, and the position's duties must not be performed in a routine manner; the employee must exercise independent judgment and discretion. *See, e.g.*, *SSA*, 56 FLRA at 1018; *accord U.S. Dep't of Agric., Forest Serv., Albuquerque Serv. Ctr., Human Capital Mgmt., Albuquerque, N.M.*, 64 FLRA 239, 242 (2009) (*Dep't of Agric.*).

The Activity does not argue that the RD failed to apply the correct principles. In fact, the Activity relies on much of the same precedent as did the RD when the Activity sets forth its view of the applicable law. The Activity only challenges the RD's conclusions based on his application of that case law. We therefore reject the Activity's contention that the RD failed to apply established law.[9]

We also reject as unsupported the Activity's contention that the RD committed clear and prejudicial factual errors regarding the disputed positions. The RD made extensive factual findings supporting his determinations concerning the disputed employees and their supervisors. RD's Decision at 7-11, 13-17.

[9] We disagree with the dissent, as stated in our previous decision in *Dep't of Agric.*, 64 FLRA at 242 n.7, that there is a need to reconsider Authority precedent interpreting § 7112(b)(3). The Activity did not claim in its application that "[e]stablished law or policy warrants reconsideration." 5 C.F.R. § 2422.31(c)(2). We also continue to believe that the Authority's precedent, which is thirty years old and noncontroversial, reasonably interprets the Statute's wording.

The Activity does not directly challenge any of the RD's factual findings as unsupported by the record. Instead, rearguing the case it presented to the RD, the Activity cites assertedly contrary evidence to substantiate its claim that the RD erred. The Activity's disagreement with the weight the RD ascribed to certain evidence does not provide a basis for finding that the RD committed clear errors in making factual findings. *E.g., U.S. Dep't of Def., Pentagon Force Protective Agency, Wash., D.C.*, 62 FLRA 164, 170 (2007) (disagreement over evidentiary weight not sufficient to find that RD committed a clear and prejudicial error concerning a substantial factual matter); *Nat'l Credit Union Admin.*, 59 FLRA 858, 862 (2004) (same).

Moreover, the record supports the RD's factual findings. Regarding the "confidential employee" issue, the RD found that none of the disputed employees act in a confidential capacity to their supervisors. RD's Decision at 13-14, 15, 16, 17. Supporting this finding, the record discloses, for example, that the Recruitment Assistants do not attend management meetings at which labor-management issues are discussed and are not privy to management's formulation of its decisions regarding matters such as grievances and disciplinary actions. Tr. at 146, 153, 386, 387. And the record provides comparable support for the RD's findings on this question concerning the Benefits Assistants, *id*. at 109-10, and the Pre-Employment Assistants, *id*. at 89-90, 93-94, 273-74.

Similarly, the record supports the RD's findings that none of the disputed employees perform personnel work in other than a clerical capacity. RD's Decision at 14, 15-16, 17. The record discloses, for example, that the Recruitment Assistants perform their duties following and in compliance with VA guidelines, rules, and regulations, rather than by exercising discretion and independent judgment. Tr. at 147, 148, 380, 381, 389. And the record provides comparable support for the RD's findings on this question concerning the Benefits Assistants, *id*. at 98, 99, 100, 111, 112, 117, and the Pre-Employment Assistants, *id*. at 33, 61, 268, 280, 283, 285, 287.

For these reasons, we conclude that the Activity has not demonstrated that the RD failed to apply established law or committed clear and prejudicial errors concerning substantial factual matters.

## V. Order

The application for review is denied.

**Member Beck, Dissenting**:

I disagree with my colleagues that the Assistants should be included in the bargaining unit. In my view, these individuals are engaged in personnel work in other than a purely clerical capacity within the meaning of § 7112(b)(3) of the Statute.

For the reasons that I articulated in *United States Department of Agriculture, Forest Service, Albuquerque Service Center, Human Capital Management, Albuquerque, New Mexico*, 64 FLRA 239, 243 (2009) (*Dep't of Agric.*) (Concurring Opinion of Member Beck), I do not believe that our current precedent concerning § 7112(b)(3) is consistent with the plain language of the Statute. I also do not believe that the Authority has interpreted the exclusion for "personnel work" as broadly as was intended by Congress. As a result, reconsideration of our precedent is warranted.

Section 7112(b)(3) excludes from a bargaining unit employees who are "engaged in personnel work in other than a *purely clerical* capacity." 5 U.S.C. § 7112(b)(3) (emphasis added). The term "clerical" is defined as "of or relating to a clerk," and the term "clerk" is defined as "one employed to keep records or accounts or to perform general office work." Webster's Seventh New Collegiate Dictionary 155 (1971) (*Webster's*). Moreover, the word "purely" is defined as "merely, solely." *Id.* at 693. Based on these definitions, duties such as typing, processing paperwork, and filing are purely clerical. In contrast, duties such as evaluating, advising, and recommending; assessing and classifying; and performing research and reviews clearly are not. Yet, our precedent has erroneously found that employees performing these latter duties may not be excluded from a bargaining unit. *See, e.g., Dep't of Agric.*, 64 FLRA at 243; *Fed. Deposit Ins. Corp., S.F., Cal.*, 49 FLRA 1598, 1602 (1994) (*FDIC*).

Indeed, in some instances in which the "personnel work" exclusion was invoked by an agency, the Authority has failed even to examine whether the duties performed were "purely clerical" in nature. In such cases, the Authority simply concluded that employees were not excluded from the bargaining unit because the duties they performed were routine and did not require the exercise of independent judgment and discretion. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 55 FLRA 1243, 1247 (2000) (finding that employees did not exercise independent judgment and discretion without discussing whether employees' duties, namely developing the training plan and counseling employees regarding training requirements, constituted purely clerical duties); *Dep't of the Treasury, Internal Revenue Serv., Wash., D.C. & Internal Revenue Serv.,*

*Cincinnati Dist., Cincinnati, Ohio*, 36 FLRA 138, 144-45 (1990) (*IRS*) (upholding the RD's determination that the employees performed their duties in a routine manner and were not required to exercise independent judgment and discretion in carrying out their duties without discussing whether their duties were purely clerical).

The Authority also has created too high a standard for determining whether the duties the employees perform are routine. The word "routine" is defined as the "habitual or mechanical performance of an established procedure." *Webster's* at 750. Our precedent has concluded that duties are routine whenever employees, in performing such duties, rely on guidelines or regulations. *See, e.g.*, *Dep't of Agric.*, 64 FLRA at 241-42 (finding that duties were routine when employees performed those duties in accordance with established guidelines); *IRS*, 36 FLRA at 145 (determining that duties were routine when employees performed those duties in accordance with regulations and established guidelines). But such analysis fails to consider the extent of the employee's reliance on those guidelines and regulations. Merely following by rote a pre-established checklist should be considered a routine duty; however, interpreting and analyzing various guidelines and regulations should not be considered routine.

Similarly, the Authority has created too high a standard for determining whether employees exercise independent judgment and discretion. Under 5 C.F.R. § 551.206, employees exercise independent judgment and discretion simply by comparing and evaluating "possible courses of conduct, and acting or making a decision [or recommendation] after the various possibilities have been considered." *See also Webster's* at 459 (defining the term "judgment" simply as "the process of forming an opinion or evaluation by discerning and comparing"); *id.* at 238 (defining the word "discretion" as "individual choice or judgment"). Yet our precedent implicitly requires that an employee must exercise *substantial* independent judgment and discretion in order for that employee to be exempt from a bargaining unit. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 63 FLRA 356, 360-61 (2009) (finding that employees exercised independent judgment when they made recommendations to management and their recommendations had a significant effect on personnel decisions); *FDIC*, 49 FLRA at 1601-02 (concluding that, even though an employee served as a resource person for time and attendance matters and other administrative subjects and assisted the labor staff, he was not exempt because he was not required to exercise independent judgment or discretion to any *significant* degree in carrying out those duties).

Applying § 7112(b)(3) as written and intended by Congress, I would find that the Assistants in this case should be excluded from the bargaining unit because the duties that they perform are not *purely clerical*.

Although the Recruitment Assistants do perform some clerical duties, several of the duties that they perform are not clerical. Specifically, Recruitment Assistants "advise managers and administrative employees on appropriate staffing methods for recruitment actions"; verify the basic qualifications of applicants applying for positions above the GS-5 level; determine what qualification standards are necessary and incorporate those standards into announcements for GS-5 positions and below; decide which KSAs to include in those announcements; rate applicants who apply for those positions; and develop a certificate of eligibles from those applicants. *See* RD's Decision at 7; *see also* Tr. at 365-66 (testifying to the duties that Recruitment Assistants perform with respect to GS-5 positions and below). Similarly, Benefits Assistants perform several duties that are not clerical, including informing employees of their eligibility for various benefits; "advis[ing] employees [regarding] what constitutes a qualifying life event and . . . what changes they can make outside of open season"; and examining "court orders[,] such as divorce decrees[,] to make sure that requested or continued benefits are legally appropriate." RD's Decision at 8. Finally, Pre-Employment Assistants also perform both clerical and non-clerical duties. The non-clerical duties that they perform include interpreting and applying regulations and licensing board criteria to decide whether prospective and current employees have the proper licensure and certifications; preparing a fact sheet with their findings; and making recommendations to their supervisors regarding whether regulations and licensing board criteria have been met. *See id.* at 10; Application at 7-8, 13-14.

In addition, all of the Assistants exercise independent judgment and discretion. Recruitment Assistants determine what advice to give to supervisors regarding the hiring process, decide how to answer applicants' questions regarding their qualifications for vacant positions, and elect what qualification standards and KSAs to use for vacant GS-5 positions and below and determine how to rate and rank applicants for those positions. *See* RD's Decision at 7; Application at 22; Tr. at 365-66. Benefits Assistants analyze whether employees are eligible for benefits, determine what changes employees "can make outside of open season," and interpret court documents to determine whether "requested or continued benefits are legally appropriate." RD's Decision at 8; *see also* Application at 18. Additionally, Pre-Employment Assistants decide whether candidates and employees have the proper licenses and certifications, draft a fact sheet with their findings, and present recommendations to their supervisors regarding whether regulations and licensing board criteria have been met. *See* RD's Decision at 9-10; Application at 8,

14. Moreover, while Assistants may discuss difficult issues with their supervisors, their supervisors' involvement does not diminish the independent judgment and discretion that these employees exercise. *See, e.g.*, RD's Decision at 7, 8, 10; *see also* 5 C.F.R. § 551.206(c) (indicating that, with regard to the Fair Labor Standards Act's administrative exemption, "an employee can exercise discretion and independent judgment even if the employee's decisions or recommendations are reviewed at a higher level").

Furthermore, the Assistants' duties are not routine. Although the Assistants refer to regulations and guidelines in performing their duties, they do not use these regulations and guidelines in a completely mechanical manner. In answering applicants' questions, Recruitment Assistants "utilize various federal and [Activity] guidelines, rules[,] and regulations and may have to research those sources in order to provide answers" to applicants. RD's Decision at 7. Benefits Assistants research and apply government-wide regulations to determine whether employees have a legal entitlement to benefits. Application at 18; Tr. at 100, 350-51. Additionally, Pre-Employment Assistants evaluate whether employees have the appropriate certifications and licensure in accordance with applicable regulations and licensing board criteria. *See* RD's Decision at 9-10.

Accordingly, I would find that the Assistants are engaged in personnel work in other than a purely clerical capacity within the meaning of § 7112(b)(3) of the Statute and that, as a result, the Assistants are excluded from membership in the bargaining unit.[*]

[*] Because I would find the Assistants are excluded on this basis, I would find it unnecessary to address the Agency's remaining arguments, namely whether the Assistants are excluded from the bargaining unit under § 7112(b)(2) and whether there is a conflict of interest between their union affiliation and job duties. *See Soc. Sec. Admin.*, 17 FLRA 239, 240 (1985) (finding it unnecessary to address whether program analysts were confidential employees or management officials after finding that they were excluded from the bargaining unit under § 7112(b)(3) of the Statute).