

**63 FLRA No. 168**

UNITED STATES DEPARTMENT OF VETERANS  
AFFAIRS  
VETERANS AFFAIRS MEDICAL CENTER  
HAMPTON, VIRGINIA  
(Agency)  
and  
NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES  
SEIU  
(Petitioner/Union)  
WA-RP-08-0083

ORDER GRANTING  
APPLICATION FOR REVIEW

August 7, 2009

Before the Authority: Carol Waller Pope,  
Chairman and

Thomas M. Beck, Member

**I. Statement of the Case**

This case is before the Authority on an application for review filed by the Agency under § 2422.31 of the Authority's Regulations.<sup>1</sup> The Union filed an

1. Section 2422.31 of the Authority's Regulations provides, in pertinent part:

(c) *Review.* The Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds:

(1) The decision raises an issue for which there is an absence of precedent;

(2) Established law or policy warrants reconsideration; or,

(3) There is a genuine issue over whether the Regional Director has:

(i) Failed to apply established law;

(ii) Committed a prejudicial procedural error;

(iii) Committed a clear and prejudicial error concerning a substantial factual matter.

untimely opposition to the Agency's application for review.<sup>2</sup>

The Union filed a petition to clarify the bargaining unit status of a former Agency employee.<sup>3</sup> The Regional Director (RD) determined that the employee should be included in the bargaining unit because she was not a confidential employee as defined by § 7103(a)(13) of the Federal Service Labor-Management Relations Statute (the Statute).<sup>4</sup> In reaching this conclusion, the RD declined to consider the Agency's argument that the employee should be excluded because she primarily engaged in investigation and audit functions within the meaning of § 7112(b)(7) of the Statute.<sup>5</sup>

For the reasons that follow, we grant the Agency's application for review on the ground that the RD committed a prejudicial procedural error and remand the petition to the RD for processing.

**II. Background and RD's Decision****A. Background**

The Union filed a petition to clarify the bargaining unit status of an employee who had encumbered a GS-5, Compliance Business and Integrity Officer Intern (Intern) position. The Intern was supervised by a GS-13, Compliance Business and Integrity Officer (Supervisor).

The RD issued a Notice of Representation Hearing (Notice of Hearing), which set forth the parties' posi-

2. For the reasons set forth below, we do not consider the Union's opposition.

3. The RD found that clarification of the employee's bargaining unit status was necessary for the resolution of another case. *See* RD's Decision at 3 n.3. As neither party disputes this finding, we do not address it further.

4. § 7103(a)(13) of the Statute defines "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. § 7112(b)(7) of the Statute prevents a bargaining unit from being found appropriate if it contains "any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity."

tions including, as relevant here, the Agency's assertion that the Intern position should be excluded from the bargaining unit under § 7112(b)(2) of the Statute because she was a confidential employee within the meaning of § 7103(a)(13) of the Statute. *See* Authority Ex. 1(c) (Notice of Hearing) at 1. The Notice of Hearing further stated that "[t]he described issues are not intended to be all-inclusive, and the parties should be prepared to introduce evidence on any additional issues relevant to the proceedings." *Id.* At the hearing, the Agency once again argued that the Intern should be excluded from the bargaining unit due to her status as a confidential employee. *See* Tr. at 11. The Agency did not raise any other grounds for exclusion.

The Agency filed a post-hearing brief with the RD one day before the parties' briefs were due and one day before the Union filed its post-hearing brief. In its brief, the Agency argued for the first time that the Intern position should be excluded from the bargaining unit because she is primarily engaged in investigation and audit functions within the meaning of § 7112(b)(7) of the Statute. Although the Agency conceded that it had not previously raised this argument to the Hearing Officer, it argued that it was permitted to do so in its post-hearing brief because the Notice of Hearing stated that the issues set forth by the RD were "not intended to be all-inclusive" and that the parties should be prepared to introduce evidence on any relevant issues. Agency's Post-Hearing Brief at 2 n.2 (quoting Authority Ex. 1(c) at 1). Further, the Agency asserted that the record was sufficient to address whether the Intern's duties fell within the meaning of § 7112(b)(7) because the parties and the Hearing Officer explored the Intern's duties "in great detail[.]" *Id.*

#### B. RD's Decision

As a preliminary matter, the RD stated that he would not consider the Agency's argument that the Intern position should be excluded from the bargaining unit because she primarily engaged in investigation and audit functions. Although the RD acknowledged that the Notice of Hearing stated that the issues listed therein were not intended to be all inclusive and that the parties should be prepared to present evidence on all relevant issues, he noted that the Agency had argued, in both its pre-hearing statements and at the hearing, only that the Intern position should be excluded from the bargaining unit on the basis that she was a confidential employee. RD's Decision at 1 n.1. Further, the RD stated that the Union presented evidence at the hearing concerning the

Intern's duties in direct response to the Agency's assertion that the Intern was a confidential employee. *Id.* at 2 n.1. Based on the foregoing, the RD determined that it would be "inappropriate" for him to consider any other argument other than whether or not the Intern was a confidential employee. *Id.*

Addressing the merits of the Union's petition, the RD concluded that the Intern was not a confidential employee within the meaning of § 7103(a)(13) of the Statute.<sup>6</sup> As such, the RD concluded that the Intern position should be included in the bargaining unit.

### III. Agency's Application for Review

The Agency requests review of the RD's decision on the grounds that he committed a prejudicial procedural error and failed to apply established law. In regard to its argument that the RD committed prejudicial procedural error, the Agency asserts that the RD erred by not considering its argument that the Intern primarily engaged in investigation and audit functions within the meaning of § 7112(b)(7) of the Statute. The Agency claims that the RD did not "cite any statute, Authority [R]egulation, or case law" in support of his decision, and that allowing the RD's decision to stand would require it to file another petition to clarify the Intern's bargaining unit status on the basis that she primarily engaged in investigation and audit functions within the meaning of § 7112(b)(7) of the Statute. Application for Review (Application) at 7. Moreover, the Agency asserts that the RD had a sufficient record to determine the § 7112(b)(7) issue. Further, the Agency notes that the Notice of Hearing states that the issues set forth in the Notice were "not intended to be all inclusive" and that "the parties should be prepared to introduce evidence on any issues relevant to the proceedings." *Id.* at 7 n.6 (quoting Authority Ex. 1(c) at 1).

In regard to its argument that the RD failed to apply established law, the Agency asserts that the record establishes that the Intern is primarily engaged in investigation and audit functions within the meaning of § 7112(b)(7) of the Statute, and, as such, the RD should have excluded her position from the bargaining unit. *See id.* at 5.

### IV. Preliminary Issue

The Agency served its application for review on the Union by certified mail on June 22, 2009. Accord-

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6. As the Agency does not challenge the RD's findings in this respect, we do not address them further.

ingly, the Union's opposition had to be postmarked with the Authority's address, or hand-delivered to the Authority, no later than July 7, 2009. 5 C.F.R. §§ 2422.31(d), 2429.21(b), and 2429.24(a) and (e). The Union mailed its opposition on July 1 to the Authority's Washington Regional Office (WRO). The WRO received the opposition on July 7, and hand-delivered the opposition to the Authority's Office of Case Intake and Publication (CIP) on July 9. On July 9, the Union filed a submission with CIP, which included an affidavit from a law clerk employed by the Union's counsel, requesting that the Authority consider its opposition, despite the fact it was filed in the wrong office, because an Authority employee provided the Union with inaccurate filing information. In her affidavit, the law clerk stated that she called the telephone number for CIP that is listed on the Authority's web site in order to learn where to file the opposition because Union counsel found the filing instructions in § 2422.31(d) of the Authority's Regulations "vague." Union Supplemental Submission, Affidavit. The law clerk further stated that the CIP employee who answered the phone informed her that the Union only had to file its opposition with the WRO and send copies to the RD and the Agency. *Id.*

The Authority issued an Order directing the Union to show cause why its opposition should not be dismissed as untimely. The Order stated that the opposition was considered filed on July 9, when CIP received the opposition from the WRO by hand-delivery, and therefore appeared to be untimely. *See* Order to Show Cause at 2 (citing *United States Dep't of the Navy, Naval Computer & Telecomms. Command, Headquarters, Wash., D.C.*, 42 FLRA 1265, 1266 (1991)). In response to the Order, the Union did not contend that the opposition was timely. However, the Union incorporated the above argument and affidavit and again argued that its error should be excused because it received inaccurate filing information. Further, the Union asserted that nothing prevented the WRO from informing the Union of its mistake or delivering the opposition to CIP earlier.

The Authority may waive any expired time limit, with exceptions not relevant here, in "extraordinary circumstances." 5 C.F.R. § 2429.23(b). For the reasons that follow, we find that the Union has not established extraordinary circumstances warranting waiver of the expired time limit.

First, § 2422.31(d) of the Authority's Regulations is not vague. To the contrary, the Regulation clearly states that "[a] party may file *with the Authority* an opposition[.]" 5 C.F.R. § 2422.31(d) (emphasis added). This language clearly establishes that any party desiring

to file an opposition must do so "with *the Authority*[,] rather than any regional office. *Id.* (emphasis added). Second, the Authority has consistently held that a party's filing error may not be excused, even if an Authority agent provides a party with inaccurate filing information. A party is responsible for having knowledge of the filing requirements set forth under the Statute and the Authority's Regulations. *See, e.g., Dep't of Veterans Affairs, John J. Pershing Med. Ctr., Poplar Bluff, Mo.*, 45 FLRA 791, 792 (1992) (*DVA*) (Authority did not accept untimely application for review even though it was established that RD provided party with the wrong filing deadline); *United States Dep't of Def., Def. Logistic Agency, Def. Depot Memphis, Memphis, Tenn.*, 44 FLRA 1602, 1603 (1992) (union's exceptions were dismissed as untimely filed even though Authority employee provided union with incorrect filing date). Therefore, even if an Authority agent provided the Union with inaccurate filing information, the Union's error may not be excused. *See DVA*, 45 FLRA at 792. Third, the Union has cited no authority which establishes that Authority agents are responsible for correcting a party's filing error. Thus, it is not relevant whether the WRO could have hand-delivered the opposition to CIP earlier. Accordingly, we will not consider the Union's untimely opposition.

## V. Analysis and Conclusions

Under 5 C.F.R. § 2422.31(c)(3)(ii), the Authority may grant an application for review if it is demonstrated that the RD committed a prejudicial procedural error. The Authority has not directly addressed whether an RD may decline to address an argument solely because a party raises it for the first time in its post-hearing brief. *See, e.g., AFGE, Local 3529*, 57 FLRA 633, 636-37 (2001) (even assuming RD committed procedural error by failing to address an argument because it was first raised in post-hearing brief, error was not prejudicial since argument was incorrect as a matter of law). However, the Authority has held that in light of an "explicit request that the RD evaluate the statutory exclusion of particular employees and the routine practice of [RDs and the Authority] doing so, the RD's refusal to do so constitutes harmful procedural error." *Nat'l Mediation Board*, 54 FLRA 1474, 1482 (1998) (Member Wasserman concurring as to other matters) (*NMB*) (RD committed prejudicial procedural error by failing to address whether employees should be excluded from bargaining unit solely because this issue was first raised in a response to an Order to Show Cause). In *NBM*, the Authority explained that an RD must examine whether any statutory exclusions preclude an employee from

being included within a bargaining unit once a party makes an “explicit request” for such an evaluation. *Id.*

Based on the above precedent, the RD committed a prejudicial procedural error by refusing to consider the Agency’s argument concerning § 7112(b)(7) of the Statute solely because the Agency raised this argument for the first time in its post-hearing brief. In this regard, although *NMB* does not address the precise situation before us, it does establish that an argument concerning statutory exclusions of employees from a bargaining unit need not be included in a party’s initial filing(s) with an RD in order to be considered properly before an RD. Here, it is undisputed that the Agency raised its argument regarding § 7112(b)(7) of the Statute in its post-hearing brief to the RD. The fact that the Agency did not raise the statutory exclusion argument until then does not alter the fact that the Agency made an “explicit request” for the RD to consider the argument. *NMB*, 54 FLRA at 1482. Thus, the RD was required to consider the Agency’s assertion that the Intern position was excluded from the Union due to § 7112(b)(7) of the Statute. *See id.*

Based on the foregoing, we find that the RD committed a prejudicial procedural error by declining to address the Agency’s argument that the Intern primarily engaged in investigation and audit functions within the meaning of § 7112(b)(7) of the Statute and remand the petition to the RD with instructions to resolve this issue. *See id.* Further, as the parties filed simultaneous post-hearing briefs, the Union was not aware that the Agency had decided to raise this issue until after both parties had filed their post-hearing briefs. As such, the RD should issue another decision and order only *after* he provides the Union with an opportunity to respond to the Agency’s assertion regarding § 7112(b)(7) and otherwise determines that the record is sufficient. *See United States Army Air Def., Artillery Ctr. & Fort Bliss, Fort Bliss, Tex.*, 55 FLRA 940, 944 n.9 (1999) (Member Wasserman dissenting)

## **VI. Order**

We grant the application for review on the ground that the RD committed a prejudicial procedural error and remand the petition to the RD for action consistent with this decision.