

67 FLRA No. 28

UNITED STATES
DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
(Agency)

and

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS
(Union)

CH-RP-12-0012

ORDER DENYING
APPLICATION FOR REVIEW

December 18, 2013

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

As relevant here, Regional Director Peter Sutton, of the Federal Labor Relations Authority (the RD), found that eight of the Agency's firefighters should be excluded from the bargaining unit that the Union represents because five of them are supervisors under § 7103(a)(10) of the Federal Service Labor-Management Relations Statute (the Statute), and three of them are confidential employees under § 7103(a)(13) of the Statute.¹

The Union filed an application for review of the RD's findings. Because the Authority had two vacancies, the Chief of Case Intake and Publication issued an interim order on August 27, 2013, deferring consideration of the application for review until a quorum of Authority Members was present. The interim order preserved the parties' rights under the Statute to Authority consideration of the RD's decision.² As a quorum of the Authority is now present, there are two substantive questions before us.

The first question is whether the individual who conducted the hearing in this case (the Hearing Officer) committed prejudicial procedural error by excluding certain documentary evidence from the record, or by

denying the Union's request to call a particular witness. As the Union fails to establish that the Hearing Officer erred or exceeded her discretion to control and regulate the hearing, the answer to the first question is no.

The second question is whether the RD failed to apply established law in finding the disputed firefighters excluded from the unit. Because the RD's findings are consistent with the Statute and the Authority's case law concerning supervisory and confidential employees, the answer to the second question is also no.

II. Background and RD's Decision

The Union filed a petition seeking, as relevant here, to include in the bargaining unit eight firefighters – specifically, five station chiefs and a training chief from Wright-Patterson Air Force Base, and two station chiefs from Tinker Air Force Base. The Hearing Officer held a hearing on the Union's petition. At the hearing, the parties stipulated that one witness would provide “representative” testimony regarding the duties of all five Wright-Patterson station chiefs, and that “the decision reached . . . regarding the bargaining[-]unit eligibility” of the representative witness would also be “applied to determine the bargaining[-]unit eligibility” of the other Wright-Patterson station chiefs.³ The parties entered into an identical stipulation regarding another witness who would “represent[]” both Tinker station chiefs.⁴

During its cross-examinations of two Agency witnesses, the Union attempted to enter into evidence, and ask questions regarding, a position-classification guide (the classification guide) by the Office of Personnel Management (OPM). But after neither witness recognized the guide, the Hearing Officer determined that the Union had not laid the foundation necessary to admit the guide into evidence or ask questions about it.⁵ As such, she excluded the guide from the record.

Later in the proceedings, the Union requested permission to call a particular witness (the disputed witness). The Union's counsel explained, however, that he had not spoken with the disputed witness regarding the specific issues to be addressed in his testimony. Thus, counsel could not state with particularity what the disputed witness would say if permitted to testify, or what counsel expected to prove by that testimony (offer of proof). The Hearing Officer denied permission to call the witness, but explained that if counsel “want[ed] to make a further offer of proof” regarding the witness's expected testimony, she would allow him to do so.⁶ Counsel did

³ Tr. at 77.

⁴ *Id.*

⁵ *See id.* at 160-63, 240-41.

⁶ *Id.* at 298.

¹ 5 U.S.C. § 7103(a)(10), (13).

² *See id.* § 7105(f).

not proffer anything more for the record regarding the disputed witness.

Subsequently, the RD issued a decision clarifying the unit. First, he analyzed whether the firefighters are “supervisor[s],” as defined by § 7103(a)(10). (The text of § 7103(a)(10) and the legal standards for identifying a supervisor appear in part IV.B. below.)

Based on the testimony of the representative Wright-Patterson station chief, as well as the testimony of the Wright-Patterson fire chief (whose authority extends over all of Wright-Patterson’s fire stations), the RD found that Wright-Patterson’s five station chiefs “direct the daily operations of the fire station, set daily work priorities[,] and review employees’ work for quality and completion.”⁷ The RD also found that they routinely serve as “incident commander[s]” directing operational responses to emergency calls,⁸ and that when a lower-level employee serves as incident commander, the station chiefs provide oversight and direction through “contact with the employee by radio.”⁹ In addition, the RD determined that these five station chiefs: (1) change work assignments and priorities by, for example, assigning or reassigning tasks “based on an employee’s experience” or the need to “improve . . . performance”;¹⁰ (2) exercise “independent authority to discipline employees” by issuing reprimands;¹¹ (3) evaluate employees’ performance in ways directly linked to annual awards; (4) effectively recommend employees for promotions; and (5) grant on-the-spot and time-off awards, which are not subject to approval by a higher official. The RD concluded that the Wright-Patterson station chiefs “consistently exercise independent judgment in directing employees, assigning work, evaluating and rewarding employees, and disciplining employees.”¹² And the RD also credited testimony that these five firefighters spend at least “60% of their employment time exercising their supervisory authority” with a consistent level of independent judgment.¹³ Consequently, he found that they should be excluded from the unit as supervisors under § 7103(a)(10).

The RD also addressed whether the Wright-Patterson training chief and the two Tinker station chiefs are “confidential employee[s],” within the

meaning of § 7103(a)(13) of the Statute, the pertinent wording of which appears in part IV.B. below.

The RD found that the Wright-Patterson training chief “serves in a confidential capacity” with respect to the Wright-Patterson fire chief, who is “significantly involved in labor-management relations,”¹⁴ including negotiating with the Union, signing labor-management agreements, and regularly communicating with the Union president. In addition, the RD found that the training chief is responsible for working with the Union to develop an annual training plan that complies with state mandates, agency guidance, and the parties’ negotiated agreements. The RD found further that the training chief and Union must agree to a training plan “before it is ever submitted to the [f]ire [c]hief for his approval.”¹⁵ As such, the RD determined that the Wright-Patterson training chief should be excluded as a confidential employee “based on his involvement in negotiations” over “some aspects of the training plan.”¹⁶

Regarding the two Tinker station chiefs, the RD found that they act in a confidential capacity with respect to the Tinker fire chief, who is significantly involved in contract negotiations, arbitrations, and grievances. In addition, the RD determined that the Tinker station chiefs meet with the fire chief “about four times a month,” and these meetings include discussions about “management’s position” on workplace matters “and/or negotiation[s] with the Union.”¹⁷ The RD also found that the station chiefs may draft or review standard operating procedures before they are shared with the Union. Because of these activities, the RD concluded that the Tinker station chiefs obtain advance information of management’s position regarding contract negotiations and other labor-relations matters, and therefore, they should be excluded from the unit as “confidential employees”¹⁸ under § 7103(a)(13).

In response to the RD’s decision and order, the Union filed the application for review at issue here, and the Agency filed an opposition to the Union’s application. As noted earlier, the Authority’s Chief of Case Intake and Publication issued an interim order on August 27, 2013, deferring consideration of the application for review.

⁷ RD’s Decision at 11 (citing *The Adjutant Gen. State of Vt., Vt. Air Nat’l Guard*, 5 FLRA 779, 785 (1981)).

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ *Id.* at 11 (citing *SSA*, 60 FLRA 590, 592 (2005) (*SSA*)).

¹¹ *Id.* (citing *The Adjutant Gen., Del. Nat’l Guard*, 9 FLRA 3, 11 (1982)).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 15.

¹⁵ *Id.*

¹⁶ *Id.* (citing *U.S. DOL, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1377 (1990) (*DOL, Arlington*)).

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 16.

III. Preliminary Matters

A. The Agency's opposition is untimely.

The Agency filed an opposition to the Union's application. Thereafter, the Authority issued an order to the Agency to show cause why the Authority should consider its opposition, which was untimely according to its postmark. The Agency did not respond to the order. Consequently, we do not consider its untimely opposition.¹⁹

B. Section 2429.5 of the Authority's Regulations bars the Union's challenges to the use of representative testimony.

At several points in its application for review, the Union challenges the RD's decision to determine the duties and unit eligibility of the station chiefs who did not testify at the hearing by relying on the testimony of the station chiefs who did testify. Section 2429.5 of the Authority's Regulations states, in pertinent part, that the "Authority will not consider any . . . factual assertions[or] arguments . . . that could have been, but were not, presented in the proceedings before the Regional Director[or] Hearing Officer."²⁰ The Authority has held that § 2429.5 prevents a party from advancing a position in its application for review that contradicts that party's earlier position before the RD or hearing officer.²¹ Because the Union stipulated before the Hearing Officer that the testifying station chiefs' duties were "representative" and that their bargaining-unit statuses would be "applied to determine the bargaining[-]unit eligibility" of the other station chiefs at the witnesses' respective locations,²² § 2429.5 precludes the Union from taking a contrary position in its application for review. Accordingly, we do not consider any of the Union's arguments challenging the RD's reliance on the station chiefs' testimony to determine the duties and bargaining-unit eligibility of the non-testifying station chiefs.

¹⁹ See *U.S. Dep't of VA, VA Med. Ctr., Hampton, Va.*, 63 FLRA 593, 595 (2009) (declining to consider untimely opposition).

²⁰ 5 C.F.R. § 2429.5.

²¹ See *U.S. Dep't of the Army, N. Cent. Civilian Pers. Operation Ctr., Rock Island, Ill.*, 59 FLRA 296, 302 n.8 (2003) (citing § 2429.5).

²² Tr. at 77.

IV. Analysis and Conclusions

A. The Union has not established prejudicial procedural error.

According to the Union, the decision to exclude the classification guide from the record²³ was a "prejudicial [procedural] error."²⁴ As relevant here, § 2422.21(b) of the Authority's Regulations provides that "the Hearing Officer may take any action necessary to . . . conduct, . . . control, and regulate the hearing."²⁵ The Authority has held that § 2422.21(b) provides a hearing officer with discretion to determine which documents will be admitted into evidence.²⁶

When the Union requested to enter the classification guide into evidence during the testimony of witnesses who had never seen the guide before, the Hearing Officer determined that the Union had not laid the foundation necessary to do so. The Union does not cite any authority to show that excluding the classification guide from the record under such circumstances was a procedural error. In addition, the Authority has previously declined to find error in a decision not to consider OPM classification guidance when determining whether employees satisfied § 7103(a)'s definitional criteria because OPM's position-classification decisions do not determine bargaining-unit eligibility under the Statute.²⁷ Thus, we find no prejudicial procedural error in the decision to exclude the classification guide from the record.

The Union also asserts that "limiting the number of witnesses"²⁸ was a prejudicial procedural error, but it identifies only one individual who would have testified but for the Hearing Officer's denial of permission to do so – the disputed witness. The Authority has held that § 2422.21(b) provides a hearing officer with discretion to limit the number of witnesses,²⁹ as well as the scope of testimony.³⁰ In particular, the Authority has declined to find prejudicial procedural error where a hearing officer

²³ Application at 19, 30-32.

²⁴ *Id.* at 5 (citing 5 C.F.R. § 2422.32(c)(3)(ii)) (citation contains apparent typographical error, as grounds for application for review appear in § 2422.31(c), not .32(c)).

²⁵ 5 C.F.R. § 2422.21(b).

²⁶ See, e.g., *U.S. Dep't of the Navy, Naval Air Station, Jacksonville, Jacksonville, Fla.*, 61 FLRA 139, 143 (2005).

²⁷ See *U.S. DHS, Bureau of CBP*, 61 FLRA 485, 493 (2006) (no error in RD's refusal to consider or defer to OPM classification guidelines to determine whether agriculture specialists were "professional employees," within the meaning of § 7103(a)(15)).

²⁸ Application at 5.

²⁹ E.g., *U.S. SEC, Wash., D.C.*, 56 FLRA 312, 318 (2000) (*SEC*).

³⁰ *U.S. Dep't of the Air Force, Edwards Air Force Base, Cal.*, 62 FLRA 159, 163 (2007) (*Edwards AFB*).

did not permit a party's counsel to call certain witnesses but allowed counsel to summarize for the record the testimony expected from those witnesses.³¹ The situation here is similar: Although the Hearing Officer denied the Union permission to call the disputed witness, she did so only after counsel admitted that he could not provide a specific offer of proof.³² And despite the Hearing Officer's invitation to counsel to "make a further offer of proof,"³³ the record does not indicate that counsel did so. Under these circumstances, we find that the Union has not demonstrated that it was prejudicial procedural error to deny permission to call the disputed witness.

- B. The RD's decision is consistent with established law.

The Union argues that the RD "failed to apply established law"³⁴ because the decision is inconsistent with the Authority's precedent on supervisory and confidential employees in a variety of ways. We discuss the issues regarding supervisory and confidential employees separately below.

1. The decision is consistent with the Authority's precedent on supervisors, under § 7103(a)(10).

Section 7103(a)(10) of the Statute defines "supervisor[s]" as those individuals

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 . . . , the term "supervisor" includes only those individuals who devote a preponderance of their

employment time to exercising such authority.³⁵

Firefighters are supervisors when: (1) they have the authority to engage in any of the supervisory functions listed in § 7103(a)(10); (2) their exercise of such authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment; and (3) they spend a preponderance of their employment time exercising that authority.³⁶ The RD found that the Wright-Patterson station chiefs satisfy all three of these criteria, and the Union argues this finding is contrary to law for several reasons.

First, the Union contends that the RD erred by relying on Authority decisions concerning supervisors who were not firefighters. In that regard, the Union correctly observes that only firefighters and nurses must devote a preponderance of their employment time to exercising the supervisory authorities listed in § 7103(a)(10) to be supervisors. But other than the preponderance requirement, the remainder of the Statute's definition of "supervisor" applies to both firefighters and non-firefighters. As the RD relied on decisions involving firefighters and nurses when applying the preponderance requirement, and only relied on decisions involving employees in other occupations when applying § 7103(a)(10)'s remaining criteria, there is no basis to find that the RD's reliance on particular decisions was inconsistent with established law.

Second, the Union argues that several of the duties that the RD attributes to the Wright-Patterson station chiefs are "work[-]leader" responsibilities rather than supervisory responsibilities, and if the RD had recognized that distinction, then he would have found that the station chiefs are not supervisors.³⁷ But even if the RD had attached a "work[-]leader" label to the station chiefs' duties, there is no basis for finding that he would have reached a different conclusion on their supervisory status.³⁸ In this regard, an "employee is classified based on the actual duties he or she performs, not on how he or

³¹ SEC, 56 FLRA at 318.

³² Tr. at 298; see *Fort Campbell Dependents Sch., Fort Campbell, Ky.*, 47 FLRA 1386, 1389 (1993) (quoting *FDIC*, 40 FLRA 775, 783 (1991)) ("An offer of proof must consist of 'specific evidence of specific events from or about specific people,' and conclusory allegations are insufficient.")

³³ Tr. at 298.

³⁴ Application at 5 (citing 5 C.F.R. § 2422.32(c)(3)(i)) (citation contains apparent typographical error, as grounds for application for review appear in § 2422.31(c), not .32(c)).

³⁵ 5 U.S.C. § 7103(a)(10).

³⁶ E.g., *U.S. Dep't of the Air Force, Offutt Air Force Base, Neb.*, 66 FLRA 616, 620 (2012) (*Offutt*).

³⁷ E.g., Application at 9, 19.

³⁸ See, e.g., *U.S. Dep't of Energy, W. Area Power Admin., Lakewood, Colo.*, 60 FLRA 6, 8-9 (2004) ("team leaders" excluded from unit as supervisors); *U.S. Dep't of the Army, Army Aviation Sys. Command*, 36 FLRA 587, 592-94 (1990) (whether "team leaders" are supervisors depends on applying § 7103(a)(10) criteria to facts of each case); *U.S. Army, Office of the Project Manager, Patriot Air Def. Missile Sys., DARCOM Redstone Arsenal, Ala.*, 11 FLRA 166, 167-68 (1983) ("[t]eam [l]eaders" and "[g]roup [l]eaders" excluded from unit as supervisors (internal quotation marks omitted)).

she is labeled.”³⁹ Thus, the RD’s decision not to characterize certain duties as work-leader functions does not establish a failure to apply established law.

Third, the Union contends that the Wright-Patterson station chiefs are not supervisors because they “do not devote a preponderance of their employment time [to] exercising” supervisory authorities.⁴⁰ However, the RD credited testimony to the contrary,⁴¹ and the Authority has held that a party’s challenge to the weight an RD affords to certain evidence is insufficient to demonstrate an error in the RD’s unit-determination analysis.⁴² Thus, this contention provides no basis for finding the RD’s decision deficient.

Fourth, the Union challenges the RD’s finding that certain duties of the Wright-Patterson station chiefs are supervisory even though they are “subject to revision and review by at least two higher levels of authority.”⁴³ The text of § 7103(a)(10) itself contemplates that supervisory authority may be exercised subject to review because among the supervisory indicia listed there is the “authority . . . to *effectively recommend*” that others exercise supervisory authority.⁴⁴ And in fact, the Union concedes that the station chiefs have “authority effectively to recommend” promotions, discipline, and awards.⁴⁵ Moreover, an “employee need exercise only one of the responsibilities set forth in § 7103(a)(10) in conjunction with independent judgment in order to be found a supervisor,”⁴⁶ and the RD’s determination that the Wright-Patterson station chiefs are supervisors relied on several supervisory authorities exercised without higher-level approval, such as issuing reprimands and granting on-the-spot awards. For these reasons, the

Union’s challenge does not establish a deficiency in the RD’s decision.

Fifth, the Union objects to the RD’s treatment of “incident[-]commander” duties as supervisory.⁴⁷ According to the Union, “serving as an incident commander is a functional[,] occupationally specific matter not related at all to supervisory duties.”⁴⁸ But the Union’s objection does not undermine the RD’s finding that “incident commander[s] . . . direct” employees,⁴⁹ which is a supervisory function.⁵⁰ And although the Union also argues that non-supervisors may serve as incident commanders, the RD found that when a lowerlevel employee does so, the station chief continues to exercise his authority through “contact with th[at] employee by radio.”⁵¹ Thus, the Union’s objection does not demonstrate that the RD failed to apply established law.

2. The decision is consistent with the Authority’s precedent on confidential employees, under § 7103(a)(13).

Section 7103(a)(13) of the Statute defines “confidential employee[s]” as those who act “in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.”⁵² The Authority has held that an individual is a confidential employee when: (1) there is evidence of a confidential working relationship between the employee and an agency representative; and (2) that agency representative is significantly involved in labor-management relations.⁵³ Moreover, an employee who “actually formulates or effectuates” management’s labor-relations policies would also be “confidential.”⁵⁴

To determine whether a particular agency representative is “significantly involved” in formulating or effectuating management’s labor-relations policies, the Authority considers, among other things, whether the representative “develop[s], or advise[s] management in developing, positions or proposals for bargaining with the

³⁹ *Offutt*, 66 FLRA at 623 (citing *VA Med. Ctr., Prescott, Ariz.*, 29 FLRA 1313, 1315 (1987)).

⁴⁰ Application at 6 (emphasis omitted).

⁴¹ RD’s Decision at 4, 11; *accord* Tr. at 91 (Wright-Patterson fire chief’s testimony that more than 60% of station chiefs’ employment time spent performing supervisory duties), 137 (representative Wright-Patterson station chief’s testimony agreeing with estimate of approximately 60% supervisory duties).

⁴² *Offutt*, 66 FLRA at 619.

⁴³ Application at 6-7 (emphasis omitted); *see also id.* at 8.

⁴⁴ 5 U.S.C. § 7103(a)(10) (emphasis added); *see U.S. Dep’t of the Interior, Bureau of Indian Affairs, Navajo Area Office, Gallup, N.M.*, 45 FLRA 646, 650-56 (1992).

⁴⁵ Application at 6-7 (“With respect to promotions, discipline[,] and awards, the *evidence does establish* that [the station chiefs] *have the authority effectively to recommend* such actions[,] which are subject to revision and review by at least two higher levels of authority.” (Original emphasis omitted.) (New emphases added.)).

⁴⁶ *Nat’l Mediation Bd.*, 56 FLRA 1, 7-8 (2000) (citing *Army & Air Force Exch. Serv., Base Exch. Fort Carson, Fort Carson, Colo.*, 3 FLRA 596, 599 (1980)).

⁴⁷ Application at 8, 17-18.

⁴⁸ *Id.* at 17; *see also id.* at 8, 18.

⁴⁹ RD’s Decision at 11; *see also id.* at 3.

⁵⁰ *See U.S. Dep’t of the Army, Parks Reserve Training Ctr., Dublin, Cal.*, 61 FLRA 537, 538-39 (2006) (*Parks Reserve*) (recognizing incident-commander duties as supervisory indicia).

⁵¹ RD’s Decision at 3; *accord* Tr. at 134 (“Even if I don’t respond on the call, I still supervise them over the radio.”)

⁵² 5 U.S.C. § 7103(a)(13).

⁵³ *NASA, Glenn Research Ctr., Cleveland, Ohio*, 57 FLRA 571, 573 (2001) (*NASA*).

⁵⁴ *DOL, Arlington*, 37 FLRA at 1377.

[u]nion,”⁵⁵ or represents management in negotiations with the union.⁵⁶ And to assess whether an employee has a “confidential working relationship” with an agency representative significantly involved in labor-management relations, the Authority considers, as relevant here, whether the employee: (1) obtains advance information of management’s position with regard to contract negotiations, the disposition of grievances, and other labor-relations matters; (2) attends meetings where labor-management matters are discussed; or (3) has access to, prepares, or types labor-relations materials, such as bargaining proposals and grievance responses.⁵⁷

Applying the foregoing standards, the RD found that the Wright-Patterson training chief negotiates aspects of the training plan with the Union before it is submitted to the Wright-Patterson fire chief, and that the fire chief is significantly involved in labor-management relations. Thus, the RD found that the Wright-Patterson training chief has a confidential working relationship with an agency representative who is significantly involved in labor-management relations. With regard to the Tinker station chiefs, the RD found that they obtain advance knowledge of management’s positions on labor-relations matters when they attend regular management meetings, indicating that they have a confidential working relationship with the Tinker fire chief, who is significantly involved in labor-management relations. Accordingly, the RD found that these three firefighters should be excluded from the Union’s bargaining unit as confidential employees, under § 7103(a)(13).

The Union contends that the Wright-Patterson training chief is not a confidential employee because he “has never been involved in negotiations,”⁵⁸ although he “coordinates,”⁵⁹ “consult[s],” and exchanges information with the Union “on changes to the [training] schedule or programming.”⁶⁰ Notwithstanding this attempt to characterize the training chief’s interactions with the Union as something other than “negotiations,” the Union does not contest the RD’s factual finding that the training chief and Union must “agree to a [training] plan”⁶¹ “before it is ever submitted to the [f]ire [c]hief for his approval.”⁶² That finding supports the RD’s conclusion that the training chief negotiates aspects of the training

plan.⁶³ Moreover, the Authority has previously found that a training manager was a confidential employee based, in part, on her interactions “with the Union in a collaborative process to draft an operating instruction . . . regarding training.”⁶⁴ This precedent provides additional support for the RD’s determination.

The Union also argues that the Wright-Patterson training chief is not a confidential employee because he is not “‘significantly involved’ in matters of labor relations.”⁶⁵ Section 7103(a)(13) requires that a confidential employee have a working relationship with an *agency representative* “significantly involved in labor-management relations,”⁶⁶ but does not require that the alleged confidential employee also be significantly involved in labor-management relations. The Union does not challenge the RD’s determination that the Wright-Patterson fire chief is significantly involved in labor-management relations, which supports the RD’s conclusion that the training chief has a confidential working relationship with an agency representative (the fire chief) who is significantly involved in labor-management relations. Thus, the Union’s argument does not demonstrate that the RD failed to apply established law in this regard.

With regard to the Tinker station chiefs, the Union challenges their exclusion as confidential employees because “mere attendance at meetings with managers does not illustrate that the station chiefs are significantly involved in matters regarding labor relations.”⁶⁷ But as stated above, an employee need not be significantly involved in labor-management relations to be a confidential employee under § 7103(a)(13). To the extent that the Union is arguing that the Tinker station chiefs do not spend enough time working in a confidential capacity to be excluded under § 7103(a)(13),⁶⁸ the Authority has held that the frequency and amount of time that an employee spends performing in such a capacity “may be relevant,” but is “not controlling.”⁶⁹ We note, in this regard, that § 7103(a)(13)’s definition of “confidential employee”⁷⁰ –

⁵⁵ *Broad. Bd. of Governors*, 64 FLRA 235, 236 (2009).

⁵⁶ *Dep’t of HHS, Region X, Seattle, Wash.*, 9 FLRA 518, 522 (1982).

⁵⁷ *U.S. DOL, Wash., D.C.*, 59 FLRA 853, 855 (2004) (citations omitted).

⁵⁸ Application at 8 (citing Tr. at 198); *accord id.* at 22-23 (citing Tr. at 193-95, 198).

⁵⁹ *Id.* at 7.

⁶⁰ *Id.* at 20.

⁶¹ RD’s Decision at 4 (emphasis added).

⁶² *Id.* at 15; *see SSA*, 60 FLRA at 592 (RD’s findings on employee’s duties are factual matters).

⁶³ *See GSA, Nat’l Archives & Records Serv., Wash., D.C.*, 8 FLRA 333, 335 (1982) (employee who negotiated with union on management’s behalf excluded from unit as confidential employee).

⁶⁴ *Edwards AFB*, 62 FLRA at 159; *see also U.S. Dep’t of Transp., FAA, Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 319 (1997) (collective bargaining may occur in a variety of ways, including the use of collaborative methods).

⁶⁵ Application at 23 (quoting 5 U.S.C. § 7103(a)(13)).

⁶⁶ *NASA*, 57 FLRA at 573.

⁶⁷ Application at 27-28.

⁶⁸ *See, e.g., id.* at 29 (quoting *U.S. Dep’t of VA*, 60 FLRA 887, 887-88 (2005)).

⁶⁹ *See DOL, Arlington*, 37 FLRA at 1382.

⁷⁰ 5 U.S.C. § 7103(a)(13).

unlike § 7103(a)(10)'s definition of supervisor – does not contain a requirement that a confidential employee perform confidential work for a “preponderance” of his work time.⁷¹ Therefore, these arguments do not support a finding that the RD failed to apply established law.

The Union also questions why the RD discussed the Tinker fire chief's involvement in labor-management relations, inasmuch as the fire chief's “inclusion or exclusion” from the bargaining unit was not at issue.⁷² The RD addressed that issue because the standards for applying § 7103(a)(13) required a determination of whether the station chiefs have a confidential working relationship with an agency representative who is significantly involved in labor-management relations. Thus, the RD's decision to address the fire chief's duties was appropriate.

Finally, at several points in its application, often relying on prior Authority decisions for support,⁷³ the Union challenges the exclusion of the eight firefighters at issue here with the argument that, in other instances, firefighters with identical job titles or seemingly identical position descriptions were included in bargaining units. However, bargaining-unit-eligibility determinations are not based on evidence such as written position descriptions, because such evidence might not reflect the employee's actual duties.⁷⁴ In addition, the RDs and the Authority resolve unit-eligibility questions on a case-by-case basis by applying the statutory criteria to the record developed in each case,⁷⁵ and the Union has not demonstrated that the RD failed to apply the pertinent statutory eligibility criteria to the particular employees at issue here. For example, the RD found that the Wright-Patterson station chiefs spend a preponderance of their employment time exercising supervisory authority, which distinguishes this case from several of the

Authority decisions that the Union cites.⁷⁶ And the RD also found that the Wright-Patterson station chiefs' supervisory duties require them to consistently exercise independent judgment, which distinguishes this case from the remaining Authority decisions that the Union cites.⁷⁷ Consequently, the Union has not demonstrated that the RD failed to apply established law.

V. Order

We deny the Union's application for review.

⁷¹ Compare *id.* § 7103(a)(10) (supervisor), with *id.* § 7103(a)(13) (confidential employee).

⁷² Application at 26.

⁷³ E.g., *id.* at 10 (citing *Dep't of the Army, U.S. Army Armor Ctr., Fort Knox, Ky.*, 4 FLRA 116, 119-20 (1980) (*Fort Knox*); *Dep't of the Navy, Naval Educ. & Training Ctr., Newport, R.I.*, 3 FLRA 324, 326 (1980) (*Newport*)); *id.* at 11 (citing *Phila. Naval Shipyard*, 4 FLRA 484, 485-86 (1980) (*Naval Shipyard*)); *id.* at 12 (citing *Fire Dep't Directorate of Eng'g & Hous., U.S. Army Infantry Ctr., Fort Benning, Ga.*, 14 FLRA 263 (1984) (*Fort Benning*); *U.S. Dep't of the Navy, Marine Corps Base, Camp Pendleton, Cal.*, 8 FLRA 276 (1982) (*Pendleton*); *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 6 FLRA 67, 68 (1981) (*Portsmouth*)); *id.* at 13-14 (citing *Parks Reserve*, 61 FLRA at 537); *id.* at 16-17 (quoting *Offutt*, 66 FLRA at 620); *id.* at 19-20 (quoting *Offutt*, 66 FLRA at 622-23).

⁷⁴ *U.S. Dep't of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Ariz.*, 37 FLRA 239, 245 (1990).

⁷⁵ *SSA, Balt., Md.*, 59 FLRA 137, 145 (2003).

⁷⁶ Compare RD's Decision at 11, with *Offutt*, 66 FLRA at 620-22, *Parks Reserve*, 61 FLRA at 542, *Pendleton*, 8 FLRA at 277, *Portsmouth*, 6 FLRA at 68, *Naval Shipyard*, 4 FLRA at 487, and *Newport*, 3 FLRA at 327.

⁷⁷ Compare RD's Decision at 10-11, with *Fort Benning*, 14 FLRA at 264, and *Fort Knox*, 4 FLRA at 119, 120.