68 FLRA No. 121

UNITED STATES
DEPARTMENT OF DEFENSE
PENTAGON FORCE PROTECTION AGENCY
(Agency)

and

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

WA-RP-12-0005
(68 FLRA 266 (2015))
(68 FLRA 371 (2015))

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ORDER DENYING
APPLICATION FOR REVIEW

July 21, 2015

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

I. Statement of the Case

In the attached decision and order, as relevant here, Federal Labor Relations Authority (FLRA) Regional Director (RD) Barbara Kraft dismissed objections, filed by the Agency, that alleged that the RD erred by directing an election in 2013 (the election) and counting the votes from the election in 2015. There are five questions before us.

The first question is whether the RD failed to apply established law because: (1) she ordered the election to proceed while the Agency had an application for review of the RD's decision pending; and (2) the ballots do not represent the desires of current employees. The RD's decision to proceed with the election is consistent with the Federal Service Labor-Management Relations Statute (the Statute),[1] the Authority's Regulations, and applicable precedent. Further, the election results reflect the wishes of the employees who were eligible voters when the election was held. Therefore, the answer is no.

The second question is whether the RD committed a prejudicial procedural error when she resolved the Agency's objections to the conduct of the election without first conducting a hearing. Because the RD has the discretion not to hold a hearing where the investigatory record is sufficient to resolve any factual disputes, and the Agency does not identify any specific factual disputes that warranted a hearing, the answer is no.

The third question is whether the RD committed a prejudicial procedural error by conducting the election and impounding the ballots without a signed election agreement and while the Agency's application for review was pending. The RD followed the Statute, the Authority's Regulations, and precedent, which: (1) authorize the RD to determine how an election will be conducted when the parties cannot reach agreement; and (2) provide that an application for review does not stay an election. Therefore, the answer is no.

The fourth question is whether established law or policy warrants reconsideration – specifically, whether the Authority should postpone elections whenever an application for review is pending because of the time and expense involved in conducting an election and the possibility of ballots failing to reflect changes in employee views about representation. As the Statute and the Authority's existing law and practice adequately address the concerns that the Agency raises, the answer is no.

The fifth question is whether to grant the Agency's motion for a stay. Because we deny the Agency's application for review, we also deny, as moot, the Agency's motion for a stay.

II. Background and RD's Decisions

A. Background and the RD's First Decision

This case has a complex history,[2] which is described in detail in the Authority's decision in *U.S. DOD, Pentagon Force Protection Agency*.[3] As relevant here, the RD found that a particular group of Agency employees constituted an appropriate bargaining unit, and she directed an election (the RD's first decision). The Agency filed, with the Authority, an application for review of the RD's first decision and a motion to stay the RD's direction of an election (the Agency's first application). However, because the Authority lacked a quorum at the time of the Agency's

[1] 5 U.S.C. §§ 7101-7135.

[2] *U.S. DOD, Pentagon Force Prot. Agency*, 68 FLRA 371 (2015) (*Pentagon II*); *U.S. DOD, Pentagon Force Prot. Agency*, 68 FLRA 266 (2015).

[3] *Pentagon II*, 68 FLRA at 371.

first application, the Agency's motion to stay the election was not granted. Consequently, the RD ordered the election to be held. An election agreement between the parties stated that the RD would not count the ballots immediately after the election, but, instead, that she would impound the ballots until the Authority ruled on the Agency's first application. However, because the Agency disagreed with other terms of the election agreement concerning the notice of the election and the wording of the ballot, the Agency did not sign the agreement. Nevertheless, an election was held. Subsequently, that election was rerun because of an error in the wording on the ballots.

After the Authority regained a quorum, it did not undertake to grant review of the Agency's first application within sixty days of regaining a quorum – specifically, by January 11, 2014. Thus, the RD's first decision became "the action of the Authority" after January 11, 2014.[4] On January 30, 2015, the RD counted the ballots (the count) at the FLRA's Washington Regional Office (the Region). The tally was seventy-six to one in favor of representation by the Union.

After receiving the tally, the Agency filed, with the RD, timely objections to the conduct of the election. The Union filed an opposition to the Agency's objections. Following an investigation, the RD issued a decision and order dismissing the Agency's objections to the election (the RD's second decision).

B. The RD's Second Decision

In the RD's second decision, the RD stated that the Agency's objections alleged, as pertinent here, that: (1) the election was premature; (2) the ballots were improperly impounded; (3) eligible employees were improperly deprived of the opportunity to vote; and (4) the RD lacked the authority to count the ballots. The RD stated that the Region had "investigated the objections"[5] and that the Agency "[had] not demonstrate[d] that there [were] substantial and material facts in dispute that require[d] a hearing."[6]

As to the first objection, the RD rejected the Agency's arguments that the Region should not have conducted the election until: (1) the parties reached agreement on the terms of an election agreement; and (2) the Authority issued a decision on the Agency's first application.[7] Regarding the election agreement, the RD explained that § 2422.16(b) of the Authority's Regulations[8] "expressly authorized" her to decide the "procedural" details of the election when the parties were unable to reach agreement.[9] And with respect to the Agency's first application, the RD explained that, under § 2422.31(f) of the Authority's Regulations,[10] filing an application for review will not stay any action ordered by an RD unless the Authority specifically orders a stay. Because the Authority had not issued a stay, the RD concluded that she was correct to conduct the election, notwithstanding the fact that the Agency's first application was pending when she did so.

With regard to the Agency's second objection, the RD explained that, although no regulation specifically provides for impounding ballots while an application for review is pending, the Authority has previously found that impounding ballots is an appropriate action.[11] The RD also stated that the Agency "neither pointed to nor produced any evidence that impounding the ballots affected the conduct of the election."[12]

Regarding the Agency's third objection, the RD rejected the Agency's argument that employees who began work between the date of the election and the date of the count were improperly denied the opportunity to vote. In this connection, the RD explained that, under § 2422.29(b) of the Authority's Regulations,[13] the employees that were eligible to vote in the election were those employed during the payroll period immediately preceding the date of the direction of the election. Because the Region used that eligibility period, the RD found that no eligible employees were improperly denied the right to vote.

As to the Agency's fourth objection, the RD explained that, once the RD's first decision became the action of the Authority, and the Authority subsequently did not grant a stay of the count, § 2422.25(a) of the Authority's Regulations[14] authorized her to proceed with the count.

The RD concluded that the investigation "yielded no evidence of procedural irregularities or objectionable conduct that warrants setting aside the

[4] *Pentagon II*, 68 FLRA at 372 (internal quotation marks omitted).
[5] RD's Second Decision at 2.
[6] *Id.* at 2 n.2.
[7] *Id.* at 3.
[8] 5 C.F.R. § 2422.16(b).
[9] RD's Second Decision at 3.
[10] 5 C.F.R. § 2422.31(f).
[11] RD's Second Decision at 3-4 (citing *NLRB*, 62 FLRA 25 (2007) (*NLRB*), *overruled on other grounds by NLRB v. FLRA*, 613 F.3d 275 (D.C. Cir. 2010); *Dep't of the Army, U.S. Army Aviation Missile Command, Redstone Arsenal, Ala.*, 55 FLRA 640, 644 (1999) (*Redstone*)).
[12] *Id.* at 4.
[13] 5 C.F.R. § 2422.29(b).
[14] *Id.* § 2422.25(a).

election."[15] Consequently, the RD dismissed the Agency's objections in their entirety.

The Agency filed an application for review of the RD's second decision (the Agency's second application), as well as a "motion for a stay."[16] The Union filed an opposition to the Agency's second application and motion for stay.

III. Analysis and Conclusions

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

The Agency asserts that the RD failed to apply established law by: (1) conducting the election before the Authority issued a decision on the Agency's first application; and (2) interfering with the free choice of employees because the ballots cast in 2013 may not reflect the desires of "current eligible voters in 2015."[17] To support its argument regarding free choice, the Agency cites §§ 7102,[18] 7111(b)(2),[19] and 7116 of the Statute.[20] Further, the Agency argues that the length of time between the election and the count caused the ballots to become "stale," and that the RD erred by not analyzing the election results under the three-part test set forth in *U.S. National Park Service, Santa Monica Mountains Recreation Area, Agoura Hills, California* (*Agoura*).[21]

First, regarding the Agency's argument that the election should have been delayed, the Statute provides that the Authority's review of an RD's action "shall not, unless specifically ordered by the Authority, operate as a stay of action."[22] Consistent with this statutory wording, the Authority also has stated that an RD's direction of an election is *not* automatically stayed pending the Authority's decision on an application for review.[23] Here, the Authority did not grant a stay of the RD's direction of the election, and, consequently, the RD was correct to proceed with the election. The Agency offers no authority to the contrary, and, therefore, provides no basis for finding that the RD failed to apply established law.

Second, the Agency argues that its employees who began work between the date of the election and the date of the count were improperly denied the opportunity to vote through no fault of their own.[24] Under applicable Authority Regulations and precedent, as the RD found, eligible voters are those who are employed during the "latest payroll period" before the election.[25] And the Agency cites no authority that demonstrates that, as a matter of law, the RD erred in this regard. Accordingly, the Agency's argument does not establish that the RD failed to apply established law by conducting the election with eligible voters.

Additionally, the Agency cites §§ 7102, 7111(b)(2), and 7116 of the Statute to support its argument that the RD interfered with employees' free choice.[26] In relevant part, § 7102 provides that employees have the right to "form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal";[27] § 7111(b)(2) provides that elections shall be conducted by secret ballot;[28] and § 7116 provides that it is an unfair labor practice for agencies or unions to "interfere" with employees' exercise of their rights under the Statute.[29] Here, none of the RD's actions are inconsistent with those statutory provisions. Therefore, the Agency's reliance on those provisions provides no basis for finding that the RD failed to apply established law.

Further, under the test the Agency cites in *Agoura*, an objection alleging that eligible employees have been deprived of the opportunity to vote will be sustained, and an election set aside, if: (1) a party to the election caused the employees to miss the opportunity to vote; (2) the votes of the employees would be determinative; and (3) the employees were deprived of the opportunity to vote through no fault of their own.[30] In *Agoura*, the agency sent two eligible employees away on training assignments on the day of the election, thus depriving them of the opportunity to vote, and the election was decided by a two-vote margin.[31] Here, the Agency provides no argument, or evidence, that any

[15] RD's Second Decision at 6.
[16] Agency's Second Application at 12.
[17] *Id.* at 6-7.
[18] 5 U.S.C. § 7102.
[19] *Id.* § 7111(b)(2).
[20] *Id.* § 7116.
[21] Agency's Second Application at 7-8 (citing *Agoura*, 50 FLRA 164, 166 (1995)).
[22] 5 U.S.C. § 7105(f).
[23] 5 C.F.R. § 2422.31(f); *Redstone*, 55 FLRA at 643; *e.g.*, *Div. of Military & Naval Affairs (N.Y. Nat'l Guard), Latham, N.Y.*, 53 FLRA 111, 112 (1997) (*Latham*).
[24] Agency's Second Application at 8.
[25] 5 C.F.R. § 2422.29(b); *e.g.*, *U.S. Army Dist. Recruiting Command-Phila. Activity*, 12 FLRA 409, 411 (1983); *VA Med. Ctr., Tucson, Ariz.*, 4 FLRA 229, 230 (1980); *Dep't of the Air Force, 6th Missile Warning Squadron, Otis Air Force Base, Mass. Activity*, 3 FLRA 111, 115-16 (1980); *see also U.S. Army Corps of Eng'rs, Headquarters, S. Pac. Div., S.F., Cal.*, 39 FLRA 1445, 1449 (1991) (*Army*) (employees must be employed by the agency at the time an election is held in order to be eligible to vote).
[26] Agency's Second Application at 6.
[27] 5 U.S.C. § 7102.
[28] *Id.* § 7111(b)(2).
[29] *Id.* § 7116(a)(1), (b)(1).
[30] 50 FLRA at 169.
[31] *Id.* at 165, 169.

employee who was eligible *at the time of the election* was deprived of the opportunity to vote, as was the situation in *Agoura*. The Agency also does not allege, or provide any evidence, that its roster of employees changed during the period between the election and the count enough to potentially alter the outcome of the election – which, as stated previously, was a vote of seventy-six to one in favor of the Union.

For the foregoing reasons, we find that the Agency has not demonstrated that the RD failed to apply established law.

B. The RD did not commit prejudicial procedural errors.

1. The RD did not commit prejudicial procedural error by declining to hold a hearing.

The Agency argues that the RD resolved three disputed questions of fact without holding a hearing, in violation of § 2422.21(g) of the Authority's Regulations.[32] Specifically, the Agency challenges the RD's conclusions that: (1) the ballots were properly stored; (2) impounding the ballots did not affect the conduct of the election; and (3) eligible employees were not deprived of the opportunity to vote.[33] According to the Agency, the RD's failure to hold a hearing on these matters "prejudicially affected the rights of the [Agency] and of [its] employees."[34]

The regulation that the Agency cites, § 2422.21(g), no longer exists.[35] However, the Agency relies on that regulation to argue only that the Authority "require[s] an investigation where the objections . . . raise any 'relevant question of fact.'"[36] The Authority's current Regulation addressing investigations of objections is § 2422.30(a), which states that "[t]he [RD] will investigate the petition and any other matter as the [RD] deems necessary."[37] In this regard, it is well established that RDs have discretion to determine the scope of the investigation of objections, including whether or not to hold a hearing.[38] In exercising this discretion, the RD may determine that "there are sufficient facts not in dispute to form the basis for a decision, or that, even where some facts are in dispute, the record contains sufficient evidence on which to base a decision."[39] The Authority also has stated that, given the RD's discretion, the objecting party has a "heavy burden" to show that the exercise of that discretion in the conduct of the investigation resulted in prejudicial errors.[40] In particular, the Authority has stated that "successful challenges to the scope of an RD's investigation must show that further investigation could have provided evidence 'sufficient to warrant setting aside the RD's findings and conclusions.'"[41]

Here, the RD stated that she conducted an investigation[42] and that the Agency did not demonstrate that a hearing was required.[43] In particular, the RD found that the Agency's objections challenged only her legal conclusions concerning whether: (1) impounding the ballots was proper;[44] (2) eligible employees were denied the opportunity to vote;[45] and (3) she had the authority to tally the ballots.[46] Here, the Agency's arguments essentially reiterate those same objections. Moreover, the RD found that the Agency "[had] not demonstrate[d] that there [were] substantial and material facts in dispute."[47] And, similarly, here, the Agency does not explain what specific facts were in dispute, or why the record in this

[32] Agency's Second Application at 9-10 (citing 5 C.F.R. § 2422.21(g)).
[33] *Id.* at 10.
[34] *Id.*
[35] *See* Meaning of Terms as Used in this Subchapter; Representation Proceedings; Miscellaneous & General Requirements, 60 Fed. Reg. 67,288-01, 67,295 (Dec. 29, 1995) (codified at 5 C.F.R. § 2422.21).
[36] Agency's Second Application at 9 (quoting 5 C.F.R. § 2422.21(g)).
[37] 5 C.F.R. § 2422.30(a).
[38] *Fort Campbell Dependents Sch., Fort Campbell, Ky.*, 47 FLRA 1386, 1389 (1993) (citing *FDIC, Wash., D.C.*, 38 FLRA 952, 963-64 (1990)); *see also Dep't of the Interior, Bureau of Indian Affairs*, 56 FLRA 169, 171 (2000) (*BIA*) (finding that RD has discretion about how to conduct an investigation into objections); *USDA, Forest Serv., Apache-Sitgreaves Nat'l Forest, Springerville, Ariz.*, 47 FLRA 945, 952 (1993) ("The RD may determine, on the basis of the investigation or by stipulation of the parties, that there are sufficient facts not in dispute to form the basis for a decision or that, even where some facts are in dispute, the record contains sufficient evidence on which to base a decision.").
[39] *U.S. Dep't of the Air Force, Travis Air Force Base, Cal.*, 64 FLRA 1, 5 (2009) (*Travis*) (quoting *U.S. Dep't of the Navy, Fleet & Indus. Supply Ctr., Norfolk, Va.*, 62 FLRA 497, 501 (2008)) (internal quotation marks omitted).
[40] *BIA*, 56 FLRA at 171 (citing *DOD, Dep't of the Navy, Naval Air Rework Facility (NAS), Norfolk, Va.*, 12 FLRA 164, 165 (1983)).
[41] *NASA, Goddard Space Flight Ctr., Wallops Flight Facility, Wallops Island, Va.*, 68 FLRA 622, 626 (2015) (quoting *BIA*, 56 FLRA at 171); *see also Travis*, 64 FLRA at 6 (party alleging RD erred by failing to conduct hearing must show how the record resulting from the RD's investigation was insufficient for the RD to resolve the petition).
[42] RD's Second Decision at 2.
[43] *Id.* at 2 n.2.
[44] *Id.* at 3.
[45] *Id.* at 4.
[46] *Id.* at 4-5.
[47] *Id.* at 2 n.2.

case was insufficient for the RD to resolve the Agency's objections without a hearing. Consequently, the Agency's arguments do not establish that a factual dispute existed to require a hearing.[48]

Based on the foregoing, we find that the Agency has not demonstrated that the RD committed prejudicial procedural error by declining to hold a hearing as part of her investigation of the Agency's objections.

2. The RD did not commit prejudicial procedural error by conducting the election without a signed election agreement and while the Agency's first application was pending.

The Agency contends that the RD committed prejudicial procedural error by "allowing voting and impounding ballots without a signed election agreement" while the Agency's first application was pending.[49] According to the Agency, neither the Statute nor the Authority's Regulations contain a "right to a speedy election," and the Agency argues that it was forced, in error, to expend "time, money, and resources to host an election" while its first application was pending.[50]

Under § 2422.16(b) of the Authority's Regulations, "[i]f the parties are unable to agree on . . . [the] method of election[,] . . . [then] the [RD] will decide" the appropriate election procedures.[51] The Authority has explained that § 2422.16(b) gives an RD the discretion to establish the procedures for an election where parties are not able to agree to those procedures on their own.[52]

Here, the RD found that the Agency was "not willing to agree to certain procedural matters," specifically "the language of the election notice and wording on the ballot," and, therefore, she decided the procedural details.[53] The Union argues that the Agency's arguments regarding impounding the ballots are "disingenuous"[54] because the Agency "consented to the impoundment of the ballots" and failed to contest the impoundment before it filed its objections.[55] However, even assuming that the Agency's challenge to impoundment is properly before us, that challenge is without merit. Under § 2422.16(b), the RD had the discretion to determine the conduct of the election if the parties could not agree to all the procedural terms – including whether to impound the ballots – and the Agency provides no basis for finding that the RD committed prejudicial procedural error by doing so.

As to the RD's decision to proceed with the election while the Agency's first application was pending before the Authority, that decision is consistent with the Authority's Regulations[56] as well as established precedent in both the federal[57] and private sectors.[58] As discussed above, the Statute and the Authority's Regulations,[59] as well as Authority precedent,[60] provide that an RD's direction of an election is not automatically stayed pending the Authority's decision on an application for review. Further, the Authority has explained that promptly conducting an election is necessary to "ensure that the vote reflects the wishes of the bargaining unit at a time sufficiently proximate to the filing of the petition to preserve the rights of the employees under [§] 7102 [of the Statute]."[61] In this connection, the Authority has held that there is a "public interest[]" in "allowing employees to vote for the representative of their choice, without undue delay or the possible influence of extraneous factors caused by the passage of time."[62]

[48] *E.g.*, *Fed. Mediation & Conciliation Serv.*, 52 FLRA 1509, 1517 (1997) (finding that an evidentiary hearing is not required where the agency failed to dispute material issues of fact).
[49] Agency's Second Application at 9.
[50] *Id.*
[51] 5 C.F.R. § 2422.16(b).
[52] *E.g.*, *Army & Air Force Exch. Serv., Dallas, Tex.*, 55 FLRA 1239, 1241 (2000).
[53] RD's Second Decision at 3.
[54] Opp'n at 13.
[55] *Id.* at 14.
[56] 5 C.F.R. § 2422.31(f).
[57] *E.g.*, *NLRB*, 62 FLRA at 25; *Redstone*, 55 FLRA at 643-45; *Latham*, 53 FLRA at 112.
[58] *E.g.*, *Sub-Acute Rehab. Ctr. at Kearny, LLC*, 361 NLRB No. 118 at 2 (2014) (*Kearny*) (explaining that an election should proceed while any appeals are pending); *Aimbridge Emp. Serv. Corp.*, 355 NLRB 597 (2010) (*Aimbridge*) (same).
[59] 5 U.S.C. § 7105(f); 5 C.F.R. § 2422.31(f).
[60] *Redstone*, 55 FLRA at 643; *see also NLRB*, 62 FLRA at 25; *Latham*, 53 FLRA at 112.
[61] *Redstone*, 55 FLRA at 644 (quoting *Latham*, 53 FLRA at 123 n.14 (1997)) (internal quotation marks omitted).
[62] *U.S. DHS, Transp. Sec. Admin.*, 65 FLRA 242, 248 (2010) (quoting *Redstone*, 55 FLRA at 645 (1999)) (internal quotation marks omitted); *accord Nat'l Ass'n of Agric. Emps.*, 61 FLRA 545, 548 (2006) (denying request for stay of election).

Additionally, the Authority's practice is consistent with that found in the private sector. The Authority has noted that "the structure, role, and functions of the Authority were closely patterned after those of the [National Labor Relations Board (the Board)]," and, therefore, relevant Board precedent is due "serious consideration."[63] In this regard, it is the Board's practice in representation cases that regional directors process and issue appropriate certifications "notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review."[64] The Board's regulations expressly state that once a regional director directs an election, the regional director should schedule the election "for the earliest date practicable," and that the election notice should advise the parties that any eligibility questions will be resolved after the election.[65]

Thus, we find that relevant precedent supports the RD's conclusion that it was proper to conduct the election before the Authority issued a decision on the Agency's first application. Relevant precedent supports the RD's action, and the Agency provides no basis for finding that the action was an error – let alone a prejudicial procedural one.

C. The Agency has not demonstrated that established law or policy warrants reconsideration.

Under § 2422.31(c)(2) of the Authority's Regulations, the Authority may grant an application for review if the application demonstrates that established law or policy warrants reconsideration.[66] Essentially, the Agency argues that the Authority should automatically stay any direction of election when a party files an application for review of an RD's decision and order.[67] The Agency argues that "premature elections harm employees'[] and the public['s] interests," because a delayed tally prevents employees who were not present when the election occurred, or those who "may have changed their minds," from having "a say in the outcome" of the election.[68] The Agency also cites several problems that it alleges stem from the Authority's current policy of proceeding with elections while an application is pending before the Authority, such as the cost and time involved in preparing for elections and the possibility of "stale" ballots that "may, or may not, reflect the will of current employees."[69]

As discussed in Section III.B.2. above, there are policies that support the Authority's longstanding practice of promptly carrying out representation elections, rather than postponing such elections while an application for review is pending before the Authority. Moreover, in this case, the RD's certification of the election results does not foreclose employees' ability to choose a different exclusive representative – or no representative at all – in the future. In this regard, the Statute provides for employees who are exclusively represented by a union to change or decertify that representative.[70] Specifically, under § 7111 of the Statute, employees can file a new petition for representation twelve months after an election, provided there is no contract bar.[71] Also, a petition "may be filed at any time when unusual circumstances exist that substantially affect the unit or majority representation."[72] As the Statute and the Authority's Regulations already provide sufficient means for employees to exercise their representation rights, there is no need to change longstanding Authority practice (and act inconsistently with private-sector practice) to create another one.

[63] *NASA, Goddard Space Flight Ctr., Wallops Island, Va.*, 67 FLRA 670, 674 (2014) (*Wallops*) (quoting *Library of Cong. v. FLRA*, 699 F.2d 1280, 1287 (D.C. Cir. 1983)) (internal quotation marks omitted); *see also U.S. Dep't of the Interior, Bureau of Indian Affairs, Navajo Area Office, Gallup, N.M.*, 45 FLRA 646, 652 (1992) (citing *Army*, 39 FLRA at 1450).

[64] *Kearny*, 361 NLRB No. 118 at 2 (citing *Champlin Shores Assisted Living*, 361 NLRB No. 92, slip op. at 1-2 (2014)); *see* 29 C.F.R. § 102.182 ("During any period when the Board lacks a quorum, . . . all representation cases should continue to be processed and the appropriate certification should be issued by the [r]egional [d]irector notwithstanding the pendency of a request for review . . . ."); *see also* Representation – Case Procedures, 79 Fed. Reg. 74,308-01 to -10 (Dec. 15, 2014) (quoting *N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946)) (modifying Board practice to discontinue the automatic impounding of ballots in order to better comply with the mandate from the U.S. Supreme Court that the Board "adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently[,] and speedily").

[65] 29 C.F.R. § 102.67(b).

[66] 5 C.F.R. § 2422.31(c)(2).

[67] Agency's Second Application at 10.

[68] *Id.*

[69] *Id.* at 11.

[70] *Wallops*, 67 FLRA at 678.

[71] 5 U.S.C. § 7111.

[72] *Wallops*, 67 FLRA at 677-78 (quoting 5 C.F.R. § 2422.12(f)) (internal quotation marks omitted).

For the foregoing reasons, we find that the Agency has not demonstrated that established law or policy warrants reconsideration.

D. The Agency's motion for a stay is moot.

The Agency argues that the Authority should grant a stay "to prevent further harm while a decision is pending,"[73] but does not specify what action of the RD should be stayed. In any event, where the Authority denies an application for review on the merits, it also denies any stay request as moot.[74]

IV. Order

We deny the Agency's application for review and motion for a stay.

[73] Agency's Second Application at 12.

[74] *E.g.*, *U.S. Dep't of the Army, Army Corps of Eng'rs, Eng'g & Support Ctr., Hunstville, Ala.*, 68 FLRA 649, 651 (2015) (denying a motion for a stay as moot where the application for review was denied on the merits) (citations omitted); *Pentagon II*, 68 FLRA at 373 (citing *U.S. Dep't of VA, Neb./W. Iowa VA Health Care Sys., Omaha, Neb.*, 66 FLRA 462, 466 n.4 (2012)) (noting that the denial of reconsideration in this case renders the stay request moot).

BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE

DEPARTMENT OF DEFENSE, PENTAGON FORCE PROTECTION AGENCY
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
(Union/Petitioner)

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WA-RP-12-0005

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DECISION AND ORDER
ON OBJECTIONS TO THE ELECTION

I. Introduction

On October 31, 2011, the American Federation of Government Employees, AFL-CIO (Union) filed the petition in this proceeding, seeking an election among all unrepresented law enforcement and security officers employed by the Pentagon Force Protection Agency (Agency) at the Agency's Raven Rock Mountain Complex (Raven Rock).

On March 29 and April 2, 2012, the Washington Region conducted a hearing at Raven Rock to consider the Agency's challenges to the officers' eligibility for inclusion in a bargaining unit. On November 8, 2012, I issued a Decision and Order finding, first, that law enforcement and security officers working for the Agency at Raven Rock were eligible, and second, ordering an election. On January 7, 2013, the Agency filed an Application for Review and a Motion for Stay with the Authority.

On February 7, 2013, I issued a Direction of Election, noting that the parties had agreed to all the terms of an election agreement except for two: the Agency disagreed with the language in paragraph 3 of the Election Agreement pertaining to the Notice of Election, arguing that the Notice should inform the voters that the Agency contested the appropriateness of the unit and the employees may be found not to be an appropriate unit; and the Agency believed the wording on the ballot should have included, in addition to "yes" and "no," a box designated "no union."[1] The parties did agree that the ballots would not be counted after the election and instead that the Region would impound them until such time as the Authority ruled on the Agency's Application for Review.

On February 21, 2013, the Authority's Case Intake and Publication Office issued an Order stating that, without a quorum, the Authority could not review the Agency's Motion for a Stay. The Order referred the Agency's January 7, 2013 Motion to the Region for further action. On February 22, 2013, I denied the Agency's Motion for a Stay and ordered the election to proceed. A manual ballot election was conducted at the Raven Rock site among the eligible employees on February 26, 2013. However, upon discovering that the ballot used contained erroneous wording that may have confused the voters, I directed that the election be rerun. Section 2422.29(a)(4) of the Authority's Regulations. The rerun election was held April 16-17, 2013, and the ballots were impounded.

On January 28, 2015, the Authority issued a Notice stating that it had not undertaken review of the Agency's Application for Review within sixty days of regaining a quorum as required under Section 7105(f) of the Statute, and that the Decision and Order, finding that the employees were eligible to be in a bargaining unit and directing an election, had become the action of the Authority on January 11, 2014, 60 days after the Authority had regained a quorum. *Pentagon Force Protection Agency*, 68 FLRA 266 (2015)(*PFPA*).

On January 28, 2015, the Region notified the parties that the Region would tally the ballots at 10:00 am on January 30, 2015 at the Region's office. On January 29, 2015, the Agency filed with the Authority a Motion to Stay the tally of ballots. Upon receiving a copy of the Motion, the Region informed the Agency that the tally would proceed at 10:00 a.m. the following day, January 30, 2015. The Agency representative requested that the count be rescheduled in light of its Motion and so that unidentified Department of Defense (DoD) officials could also attend and observe the count. The Region informed the Agency that the tally would proceed at 10:00 am at the Region's office on January 30.

On January 30 at 10:00 am the Region conducted the tally of the ballots. The Union's representative was present at the tally. The Agency's

[1] The Notice of Election is an official document prepared by the Region and contains the information set forth in section 2422.33(b) of the Authority's Regulations. When an election involves a single labor organization, the ballot provides "Yes" or "No" choices. Representation Case Handling Manual, section 28.18.2.

representative did not attend. The Regional Office Agent removed the ballot box containing the impounded ballots from a locked cabinet where the Region had stored the materials since the April 2013 election. The Agent then opened the ballot box and tallied the ballots. The tally was 76 to 1 in favor of representation. There were no void or challenged ballots.

The tally of ballots was then served on the parties' representatives. Thereafter, the Agency timely filed objections to the conduct of the election contending that: (1) the election was premature; (2) the ballots were improperly impounded; (3) eligible employees were improperly deprived of the opportunity to vote; (4) the Regional Director lacked the authority to count and tabulate the ballots; and (5) the Regional Director's scheduling of the tally of the ballots on January 30 deprived the Agency of the right to have observers present. The Union filed an opposition to the Agency's objections.

The Region has investigated the objections pursuant to section 2422.27(a) of the Regulations.[2] The Agency, under Section 2422.27(b) of the Regulations bears the burden of proof on its objections by a preponderance of the evidence. For the reasons that follow, I have determined that the Agency has not established valid grounds to set aside the election and I am therefore dismissing its objections.

II. Analysis and Conclusions

A. Objection that the election was premature.

The Agency maintains that the Region should have waited to conduct the election until the Authority issued a decision on its application for review filed on January 7, 2013. The Agency also contends that the Region should have waited until after the parties reached agreement on the terms of an election agreement before conducting the election.

Section 2422.31(f) of the Regulations states that "[n]either filing nor granting an application for review will stay any action ordered by the Regional Director unless specifically ordered by the Authority". In contrast to the Agency's argument that delaying the election was necessary to ensure "maximum participation by eligible voters who would be affected by union certification," the Authority has exercised its power to stay elections sparingly precisely *because* such delays undermine the purposes of the Statute, including promptly affording the opportunity to vote to employees who have expressed an interest in representation. *U.S. Dep't of Homeland Security, Transportation Security Administration*, 65 FLRA 242, 248 (2010). Indeed, it has found that this approach is necessary to "ensure that the vote reflects the wishes of the bargaining unit at a time sufficiently proximate to the filing of the petition to preserve the rights of the employees under section 7102." *Dep't of the Army, U.S. Army Aviation Missile Command, Redstone Arsenal, Alabama*, 55 FLRA 640, 644 (1999) (*Redstone Arsenal*). In the absence of any order by the Authority staying the election, the Region did not err by proceeding forward with the election. *Dep't of Defense, Army National Guard, Camp Keyes, Augusta, Me.*, 34 FLRA 59, 60 (1989). Accordingly, the Agency's claim that the Region should have delayed the election until the Authority ruled on its application for review lacks merit.

Additionally, section 2422.16(b) of the Regulations grants the Regional Director the authority to direct an election if the parties are unable to agree on procedural matters such as eligibility period, method of election, dates, hours, or location of the election. Here, the parties were afforded the opportunity to enter into a consent election agreement under section 2422.16(a) of the Regulations. As the Agency was not willing to agree to certain procedural matters (e.g., the language of the election notice and wording on the ballot), I was expressly authorized by section 2422.16(b) of the Regulations to decide these details. As the Agency has not demonstrated that the Region erred by issuing a Direction of Election, I am therefore dismissing this objection.

B. Objection that the ballots were improperly impounded.

The Agency contends that neither the Statute nor Authority regulations provides for impounding of ballots while an application for review is pending. Instead, the Agency asserts that section 2422.25(a) requires ballots to be counted "when the election is concluded."

There is no merit to this objection. In *Dep't of the Army, U.S. Army Aviation Missile Command, Redstone Arsenal, Alabama*, 55 FLRA at 644, the Authority denied a request for a stay but found it would be appropriate to impound the ballots in the event the election occurred prior to the issuance of a final adjudication on the matter. Thus, contrary to the Agency's argument, the Authority has acknowledged that impoundment of the ballots is appropriate when an application for review is pending before the Authority. *NLRB*, 62 FLRA 25 (2007). Moreover, this objection marks the first time the Agency has objected to impoundment. Although it objected when the Region declined to modify the "Notice of Election" language and

[2] The Agency did not demonstrate that there are substantial and material facts in dispute that require a hearing.

the "Yes" and "No" wording of the ballot, the Agency did not object when the Region informed the parties that it would impound the ballots pending an Authority determination on the Agency's application for review. Additionally, while the Agency asserts in its objection that impounding ballots raises "a host of issues" regarding the eligibility of voters and the safekeeping of votes, it has neither pointed to nor produced any evidence that impounding the ballots affected the conduct of the election.

Accordingly, this objection lacks merit and is dismissed.

C. Objection that eligible employees were improperly deprived of the opportunity to vote.

The Agency contends that employees who began work at Raven Rock between the date of the rerun election and the date of the tally were improperly denied the opportunity to vote. The Agency also reiterates its argument that the election was premature.

It is well-settled that for an employee to be eligible to vote in a representation election the employee has to be employed as of the eligibility date and the date of the election. *U.S. Army Corps of Engineers, Hdqtrs., South Pacific Division , San Francisco, Cali*., 39 FLRA 1445, 1449 (1991); *Dep't of the Air Force, 6th Mission Warning Squadron, Otis Air Force Base, Mass.*, 4 FLRA 112, 115-116 (1980) ("Eligible to vote are those in the unit who were employed during the payroll period immediately preceding [April 28, 1980]… Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date."); *see also Portsmouth Naval Shipyard*, A/SLMR No. 2 (1970); *Roy N. Lotspeich Publ*., 204 NLRB 517, 517-18 (1973). Under section 2422.29(b) of the Regulations, employees eligible to vote in a rerun election are those employed during the payroll period immediately preceding the date of the approval of the election agreement or the Direction of Election. In the Direction of Election issued for the April 2013 rerun election, the Region used the payroll period immediately preceding the date of the Direction of Election. Accordingly, the Agency's contention that the Region erred by using the eligibility period established by section 2422.29(b) of the Regulations is without merit, and I am therefore dismissing this objection.

D. Objection that the Regional Director lacked the authority to tally the ballots.

The Agency maintains that I lacked the authority to tally the ballots because the Authority had not specifically authorized me to do so. In support of this objection, the Agency cites the Election Agreement, which provides that the count will occur "if authorized" by the Authority. The Agency contends that the Authority never authorized the Region to tally the votes.

The provision of the Election Agreement relied upon by the Agency states in full that "[a]fter the election, the votes will [be] impounded, pending action by the Federal Labor Relations Authority under 5 U.S.C. §7105(f). If authorized by the Federal Labor Relations Authority, votes will be counted and tabulated by the Regional Director, or Authority agent(s)." In its Notice in *PFPA*, 68 FLRA 266 (2015), the Authority cited section 7105(f) of the Statute, which provides that if the Authority does not undertake to grant review within 60 days after the later of the date of a regional director's action or the date of filing an application for review, the regional director's action becomes the action of the Authority. Relying on that provision, the Notice informed the parties and the public that the Decision and Order -- finding the employees to be eligible to be included in a bargaining unit -- became the action of the Authority. *Id.* at 266.

As noted, the Authority did not stay any action ordered by the Regional Director, including the tally of ballots, and section 2422.25(a) of the Regulations specifically authorizes the Regional Director to tally the ballots upon the conclusion of the election. Accordingly, following issuance of *PFPA*, it was appropriate to proceed with the tally of the ballots cast in the April 2013 election. The Agency's claim that the Region lacked authority to tally the ballots after *PFPA* was issued lacks merit and is dismissed.

E. Objection that the Regional Director deprived the Agency of the right to have observers present at the tally of ballots.

The Agency contends that by proceeding with the January 30, 2015 tally the Region deprived it of the right to have observers present at the count. It points out that the Election Agreement provided for an equal number of observers, and that the Region's decision to proceed with the tally notwithstanding the Agency's Motion to Stay, filed with the Authority, violated its right to have an observer attend the tally. The Agency further argues that it should have been given 15 days to provide a list of observers according to section 2422.23(h) of the Regulations. The Agency cites *Dep't of Health and Human Serv.*, 36 FLRA 824 (1990) (*HHS*) to argue that

the decision to tally the votes in this case is analogous to the agent's decision in that case to count a ballot found after the tally, without providing the parties with notice or the opportunity to have observers present at the count.

It is important to note that nothing prevented the Agency from sending an observer to the tally, which was conducted at the Regional Office in Washington, DC on January 30, 2015. On January 28, the Region notified the Agency of the issuance of the Authority's Notice that same day and informed the parties that the Region would proceed to tally the ballots on January 30. On January 29, the Region informed the Agency again that the Region would tally the ballots the next day at 10:00 a.m. Both the Regional Office and the Agency representative's office are in the Washington, DC area. The Agency argued that the pendency of its Motion to Stay, filed on January 29 with the Authority, justified delaying the tally, and that certain unidentified Department of Defense officials wanted to attend but were unable to attend on January 30.

The parties had a right to an equal number of observers to attend the tally, and were provided equal and adequate opportunity to have an observer present. Although the Agency's representative indicated that the Agency wanted other unnamed Department of Defense officials to attend the tally, the representative never indicated that he was unavailable to attend or that the Agency was unable to send another observer to the tally. In the end, the decision not to send an observer to the tally of ballots was the Agency's choice.

The Agency's reliance on section 2422.23(h) of the Regulations to support this objection is misplaced. That provision describes the process for selecting observers prior to the election who will observe the election; such selections are subject to the Regional Director's approval. The provision does not describe a process for selecting those who will observe the counting of ballots.

The Agency's reliance on *HHS* is similarly misplaced. In that case, the parties had been present at the tally, but a few days later the agent found an additional mail ballot, opened it, counted it and issued a revised tally without notifying the parties and without providing them the opportunity to have their observer present before the mail ballot was opened, counted and added to the tally. The Authority concluded that the agent's action in opening and counting the additional mail ballot without notice to the parties and without affording the parties the opportunity to have their observers present was prejudicial error and required a rerun election. *Id.* at 830-832. Here, the Agency was provided notice of the tally and afforded the opportunity to have its observer present.

Accordingly, the Agency's objection lacks merit and is dismissed. *See Best Products*, 269 NLRB 578 (1984), enfd. 765 F.2d 903 (9th Cir 1985); *Manhattan Adhesives*, 123 NLRB 1096 (1959).

III. Order

The Region has thoroughly investigated and considered the Agency's objections, including its brief in support of the objections. The investigation has yielded no evidence of procedural irregularities or objectionable conduct that warrants setting aside the election. Accordingly, I am dismissing the objections in their entirety.

IV. Right to Seek Review

Under section 7105(f) of the Statute and section 2422.31(a) of the Authority's Regulations, a party may file an application for review with the Authority within sixty days of this Decision. The application for review must be filed with the Authority by **May 25, 2015**, and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, NW, Washington, DC 20424–0001. The parties are encouraged to file an application for review electronically through the Authority's website, www.flra.gov.[3]

Barbara Kraft
Regional Director, Washington Region
Federal Labor Relations Authority

Dated: March 23, 2015

[3] To file an application for review electronically, go to the Authority's website at **www.flra.gov**, select **eFile** under the **Filing a Case** tab and follow the instructions.