

70 FLRA No. 77

UNITED STATES
DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION
SAN FRANCISCO, CALIFORNIA
(Agency)

and

ROSEMARY GREENLAW, AN INDIVIDUAL
(Petitioner)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO
(Labor Organization)

SF-RP-17-0015

ORDER DENYING
APPLICATION FOR REVIEW

January 2, 2018

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

The Petitioner has filed an application for review (application) of Federal Labor Relations Authority (FLRA) Regional Director (RD) John R. Panno's attached decision and order. The Petitioner had filed a petition asking the RD to clarify the bargaining-unit status of the position that she had held before the Agency terminated her. The RD dismissed the petition because he found that the position was vacant and there was no pending action requiring him to determine the position's unit status. There are four questions before us.

The first question is whether the RD's decision raises an issue for which there is an absence of precedent. Because there is relevant Authority precedent concerning the matter at issue here – whether the Authority will clarify the bargaining-unit status of a vacant position – the answer is no.

The second question is whether the Authority should reconsider established law or policy. Because the Petitioner provides no basis for doing so, the answer is no.

The third and fourth questions are whether the Petitioner has demonstrated that the RD committed a prejudicial procedural error and a clear and prejudicial error concerning a substantial factual matter. Because the Petitioner does not identify what prejudicial procedural or factual errors the RD allegedly made, the answer is no.

II. Background and RD's Decision

The Petitioner occupied an administrative-assistant position at the Agency until her termination. After her termination, she filed a petition with the FLRA's San Francisco Regional Office seeking to clarify whether, before her termination, her former position had been included in the bargaining unit that the Union represents. The RD ordered the Petitioner to show cause why the petition should not be dismissed on the grounds that, at the time he issued his order: (1) the Petitioner did not occupy the position, and (2) no party had identified any pending grievance or other appeal action that would require a determination of the Petitioner's former bargaining-unit status. In response, the Petitioner claimed that she had been denied her right to file a grievance because her former position had been erroneously excluded from the unit when she occupied the position.

In his decision, the RD, citing Authority precedent, explained that the Authority will not clarify the unit status of vacant positions except in limited circumstances, such as where it is necessary to resolve a grievance. The RD found that, at the time he issued his decision, no contractual grievance or other appeal action was filed or pending. The RD further found that although the Petitioner had filed an unfair-labor-practice charge that was still pending when he issued his decision, a determination of the Petitioner's former bargaining-unit status was not necessary to resolve that charge. Accordingly, the RD dismissed the petition.

In response, the Petitioner filed the application for review at issue here. One of the two Authority Members at the time – Acting Chairman Pizzella – recused himself from the case because he had been nominated to be the Deputy Secretary of Labor and this case involves the Department of Labor. Accordingly, the Authority's Office of Case Intake and Publication issued a notice

informing the parties that consideration of the case would be deferred until the Authority regained a quorum of Members who could decide the case. As the Authority now has such a quorum, we resolve the application.

III. Analysis and Conclusions

- A. The Petitioner has not demonstrated that there is an absence of precedent.

The Petitioner contends that review is warranted because there is an absence of “established preceden[t] as to the facts in this case.”¹ Under § 2422.31(c)(1) of the Authority’s Regulations, the Authority may grant an application for review when the application demonstrates that the decision raises an issue for which there is an absence of precedent.²

As the RD explained, the Authority has long held that it will not resolve the bargaining-unit status of vacant positions³ except in limited circumstances, such as where the clarification of the vacant position is necessary to resolve a grievance at arbitration.⁴ Because that precedent was directly applicable to the issue before the RD, the Petitioner has not established an absence of precedent. Therefore, we decline to grant review of the Petitioner’s application under § 2422.31(c)(1) of the Authority’s Regulations.⁵

- B. The Petitioner has not demonstrated that the Authority should reconsider established law or policy.

In the alternative, the Petitioner states that review is warranted on the ground that “any [applicable] law or policy warrants

reconsideration.”⁶ 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.⁷ Here, the Petitioner offers no arguments supporting a conclusion that the applicable precedent, discussed above, should be reconsidered. Therefore, the Petitioner has not demonstrated that review is warranted under § 2422.31(c)(2) of the Authority’s Regulations.⁸

- C. The Petitioner has not established that the RD committed a prejudicial procedural error or a clear and prejudicial error concerning a substantial factual matter.

Finally, the Petitioner claims that “a procedural error exists as to the application of the cited cases to these facts” because she “actively sought representation and relief under grievance remedies . . . before and after her termination.”⁹ Under § 2422.31(c)(3) of the Authority’s Regulations,¹⁰ the Authority may grant an application for review where the application demonstrates that there is a genuine issue over whether the RD has committed a prejudicial procedural error¹¹ or a clear and prejudicial error concerning a substantial factual matter.¹² We construe the Petitioner’s claim as raising these two grounds.¹³

¹ Application at 1.

² 5 C.F.R. § 2422.31(c)(1).

³ See *Dep’t of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Colo.*, 6 FLRA 52, 53 (1981); see also *U.S. Dep’t of HUD, Headquarters*, 41 FLRA 1226, 1235 n.4 (1991) (citing *U.S. Attorneys Office for the D.C.*, 37 FLRA 1077, 1082 (1990)); *EEOC, Phila. Dist. Office*, 21 FLRA 1144, 1145 (1986).

⁴ *U.S. Dep’t of VA*, 55 FLRA 781, 783-84 (1999); *Headquarters, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 34 FLRA 21, 25 (1989).

⁵ 5 C.F.R. § 2422.31(c)(1); see also *Commodity Futures Trading Comm’n, E. Reg’l Office, N.Y., N.Y.*, 70 FLRA 291, 294 (2017); *U.S. Dep’t of the Navy, Naval Facilities, Eng’g Command Se., Jacksonville, Fla.*, 68 FLRA 244, 246 (2015); *U.S. Dep’t of the Air Force, Edwards Air Force Base, Cal.*, 62 FLRA 159, 163 (2007).

⁶ Application at 1.

⁷ 5 C.F.R. § 2422.31(c)(2).

⁸ See *USDA, Office of the Chief Info. Officer, Info. Tech. Servs.*, 61 FLRA 879, 883 (2006) (denying review where party claimed that an established policy warranted reconsideration but did not argue that any established policy should be reconsidered by the Authority); *U.S. Dep’t of the Navy, Naval Air Station, Jacksonville, Jacksonville, Fla.*, 61 FLRA 139, 142 (2005).

⁹ Application at 1.

¹⁰ 5 C.F.R. § 2422.31(c)(3).

¹¹ *Id.* § 2422.31(c)(3)(ii).

¹² *Id.* § 2422.31(c)(3)(iii).

¹³ See *U.S. Dep’t of the Army, U.S. Army Aviation Ctr., Fort Rucker, Ala.*, 60 FLRA 771, 772 (2005) (construing party’s assertions as claims that the RD committed a prejudicial procedural error and a clear and prejudicial error concerning a substantial factual matter); see also *SSA, Office of Disability Adjudication & Review, Nat’l Hearing Ctr., Chi., Ill.*, 67 FLRA 299, 300-01 (2014) (citation omitted); *U.S. Dep’t of the Navy, Commander, Navy Region Mid-Atl., Pub. Safety Program Manager*, 64 FLRA 563, 564 (2010); *U.S. DOD, Pentagon Force Prot. Agency, Wash., D.C.*, 62 FLRA 164, 170 (2007); *U.S. Air Force, 82nd Training Wing, Sheppard Air Force Base, Wichita Falls, Tex.*, 61 FLRA 443, 445 (2006).

The Petitioner does not identify what prejudicial procedural or factual errors the RD allegedly made. Consequently, we conclude that the Petitioner has not demonstrated that review of the RD's decision is warranted under § 2422.31(c)(3) of the Authority's Regulations.¹⁴

In sum, the Petitioner has not demonstrated that review of the RD's decision is warranted under § 2422.31(c) of the Authority's Regulations, and we deny her application for review.

IV. Order

We deny the Petitioner's application for review.

¹⁴ *USDA, Forest Serv., Albuquerque Serv. Ctr., Human Capital Mgmt., Albuquerque, N.M.*, 64 FLRA 239, 242-43 (2009).

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS
AUTHORITY
SAN FRANCISCO REGION

DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION
SAN FRANCISCO, CALIFORNIA
(Agency)

and

ROSEMARY GREENLAW, AN INDIVIDUAL
(Petitioner)

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AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2391, AFL-CIO
(Labor Organization)

SF-RP-17-0015

DECISION AND ORDER

I. Statement of the Case

The petition in this case was filed with the San Francisco Region on April 21, 2017 by Rosemary Greenlaw. The petition seeks clarification of the Administrative Assistant (Office Automation) position formerly occupied by her. Petitioner seeks a determination as to whether the position was included in the bargaining unit during the period of her employment with Department of Labor, Occupational Safety and Health Administration, San Francisco, California (Agency); and, therefore included in the unit represented by the American Federation of Government Employees, Local 2391 AFL-CIO (Union).

On May 18, 2017, the San Francisco Region issued an Order to Show Cause asking the Petitioner to show why this petition should not be dismissed on grounds that she is not employed in the position at issue. Petitioner submitted a response on May 30, 2017. The Region gave Petitioner an extension to submit additional information. Petitioner submitted additional documents on June 5, 2017.

II. Findings

Petitioner was employed as an Administrative Assistant (Office Automation) at the Agency for approximately seven months. During that time, her position was excluded from the bargaining unit. Effective October 28, 2016, the Agency terminated Petitioner's employment. No contractual grievance was filed or is pending. The Petitioner filed an unfair labor practice with the San Francisco Region on April 21, 2017 alleging that she was terminated for her protected activity.

III. Analysis and Conclusions

The Authority has long held that vacant positions are not clarified, except in very limited circumstances, such as when an individual's right to process a grievance requires a determination of his or her bargaining unit status, or where the clarification of a vacant position is necessary to the resolution of a grievance. *U.S. Dep't of Veterans Affairs*, 55 FLRA 781, 783-784 (1999). *See also, Dep't of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Col.*, 6 FLRA 52, 53 (1981); *Hqtrs., XVII Airborne Corps and Ft. Bragg, Ft. Bragg, N.C.*, 34 FLRA 21, 25 (1989). Here, the position in question is vacant. Petitioner argues that she was not allowed to file a grievance because she was erroneously excluded from the bargaining unit. Ultimately, no party has identified any pending grievance or other appeal action which would require a determination of the Petitioner's bargaining unit status prior to her termination. The Petitioner does have an unfair labor practice charge pending before the San Francisco Region. However, the determination of her bargaining unit status is not necessary for the resolution of this charge.

IV. Order

Based on the foregoing, the petition is dismissed.

V. 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 **August 14, 2017**, 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.¹⁵

John R. Pannozzo, Regional Director
San Francisco Region
Federal Labor Relations Authority
Dated: June 15, 2017

¹⁵ 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.