70 FLRA No. 108

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Petitioner/Labor Organization)

WA-RP-18-0011

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ORDER DENYING
APPLICATION FOR REVIEW

May 3, 2018

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

I. Statement of the Case

The Union petitioned Federal Labor Relations Authority (FLRA) Regional Director Jessica Bartlett (the RD) to clarify the bargaining-unit status of a particular position. The RD dismissed the petition because she found that the employee who encumbers the position is excluded from the unit based on the express terms of the bargaining-unit certification (the certification).

The Union filed an application for review (application) of the RD's decision. That application presents the questions of whether the Union has demonstrated that: (1) the RD failed to apply established law, or (2) the RD's decision raises an issue for which there is an absence of precedent. Because the RD's decision is consistent with relevant, established Authority precedent, the answer to both questions is no.

II. Background and RD's Decision

The Union is the certified exclusive representative of a bargaining unit of Agency employees. The certification states that the unit includes, in relevant part, "[a]ll professional employees of the [Agency] employed by *and located at* the [h]eadquarters [o]ffices, Washington, D.C., [m]etropolitan area."[1]

When the employee began working for the Agency, she reported to the Agency's headquarters in Washington, D.C. (D.C.), her official duty station was D.C., and she was in the unit. After the Agency began allowing the employee to telework full-time, she relocated to Buckley, Washington (Buckley). Although she continued to report *organizationally* to the Agency's headquarters in D.C., the Agency changed her official duty station from D.C. to Buckley. Then the Agency removed her from the unit.

On October 6, 2017, the Union filed a petition with the FLRA's Washington Regional Office to clarify whether the employee's position continues to be in the unit.

In her decision dated January 19, 2018, the RD stated that the express terms of the certification in this case require that employees be both "employed by *and located at*" the Agency's headquarters offices in D.C. in order to be included in the unit.[2] The RD found that, because the employee's official duty station is no longer D.C., she no longer falls "within the express terms" of the certification.[3] Accordingly, the RD dismissed the petition.

On March 20, 2018, the Union filed the application at issue here. On April 4, 2018, the Agency filed an opposition to the Union's application.

III. Analysis and Conclusions

A. The Union has not demonstrated that the RD failed to apply established law.

The Union states that the Authority should grant the application because the RD failed to apply established law.[4] Under § 2422.31(c)(3)(i) of the Authority's Regulations, the Authority may grant an application for review when there is a genuine issue over whether an RD has failed to apply established law.[5]

Here, the certification requires that, in order to be in the unit, an employee must both report to *and be "located at"* the Agency's D.C. headquarters.[6] The RD found that, because D.C. is no longer the employee's official duty station, she does not fall within the express terms of the certification.[7]

The Union argues that, under Authority precedent, unit certifications should be read broadly to

[1] RD's Decision at 1 (emphasis added).

[2] *Id.* at 2 (emphasis added).
[3] *Id.*
[4] Application at 6-8.
[5] 5 C.F.R. § 2422.31(c)(3)(i).
[6] RD's Decision at 1 (emphasis added).
[7] *Id.* at 2.

include employees, not to exclude them.[8] In this regard, the Union argues that the RD erred by considering only the employee's geographic location, rather than the "location of the position . . . , where the work is assigned . . . , and where the work goes" – all of which are D.C., the Union claims.[9] To support its argument, the Union posits several examples in which it argues that the RD's "narrow[]" interpretation could cause an employee to lose his or her unit status.[10]

However, none of the Union's examples involves the circumstances presented here: an employee whose *official duty station* is not in the D.C. metropolitan area. Further, the Union cites no authority for the proposition that the RD was required, as a matter of law, to interpret "located at" as meaning anything other than a geographic location.[11] In fact, Authority precedent supports the RD's determination that the employee's geographic location is a distinct requirement where, as here, the certification specifies that an employee must be located in a particular place in order to be included in a unit.[12]

Thus, the RD's decision is consistent with Authority precedent, and the Union has not demonstrated that the RD failed to apply established law.

B. The Union has not demonstrated that there is an absence of precedent.

The Union contends that "there is an absence of precedent" interpreting the term "located at" and addressing how telework affects an employee's location for unit-status purposes.[13] According to the Union, finding that the term "located at" precludes teleworkers from being in a unit could lead to various "absurd results."[14]

Under § 2422.31(c)(1) of the Authority's Regulations, the Authority may grant an application for review when the application demonstrates that the RD's decision raises an issue for which there is an absence of precedent.[15]

Here, for the reasons discussed above, we find that there is sufficient relevant Authority precedent supporting the RD's determination.[16] And, as for the Union's arguments regarding "absurd results" regarding teleworkers,[17] we emphasize that the employee does not merely *telework* from Buckley; Buckley is her *official duty station*. Therefore, the Union's various arguments regarding how the RD's decision would affect teleworking employees more broadly are misplaced: This case does not present the issue of how telework, standing alone, affects unit status. And our decision today should not be read as making any determinations on that issue; we will reserve any such determinations for future, appropriate cases.

For the above reasons, we conclude that the Union has not demonstrated that, in the circumstances of this case, the RD's decision raises an issue for which there is an absence of precedent.

IV. Order

We deny the Union's application for review.

[8] Application at 6-7 (citing *NFFE, FD-1, IAMAW, AFL-CIO*, 67 FLRA 643 (2014) (Member Pizzella dissenting)).
[9] *Id.* at 7.
[10] *Id.* at 5 (arguing that an employee could lose bargaining-unit status when that employee: (1) uses leave, (2) goes on work-related travel, or (3) leaves the Agency's physical office in D.C. at the end of the workday).
[11] *E.g., U.S. Dep't of the Air Force, Air Force Life Cycle Mgmt. Ctr., Hanscom Air Force Base, Mass.*, 69 FLRA 483, 486 (2016) (*Hanscom*) (noting that the union "cite[d] no authority for the proposition that the term 'duty-stationed at' denote[d], as a matter of law, an organizational assignment, rather than a geographic one").
[12] *See id.* ("duty-stationed" in a certification required an employee's physical presence at that location, not just that the employee reported to management at the location); *SSA*, 68 FLRA 710, 711-12 (2015) (*SSA*) (finding that a certification required a position to both report to and be physically located at the agency's headquarters in D.C. to satisfy the express wording of the certification).
[13] Application at 3.
[14] *Id.* at 5.
[15] 5 C.F.R. § 2422.31(c)(1).
[16] *See Hanscom*, 69 FLRA at 486; *SSA*, 68 FLRA at 711-12.
[17] Application at 5.

Member Abbott, dissenting:

I agree with my colleagues that the plain language of the certification appears, at first blush, as if it could be interpreted to exclude the employee from the bargaining unit. But I do not agree that *Department of the Army Headquarters, Fort Dix, Fort Dix, New Jersey* (*Fort Dix*)[1] should, or ever was intended to, be applied to the unique facts of this case. In either event, *Fort Dix* does not resolve the unique questions raised by NTEU's application for review.

Therefore, I agree with NTEU that the automatic inclusion principle set forth in *Fort Dix* does not apply, and is not properly applied, to these circumstances.

As Member Pizzella explained in *NFFE FD-1, IAMAW, AFL-CIO* (*NFFE FD-1*), *Fort Dix* held quite simply that "new employees (hired into *previously existing positions*) automatically become part of an existing bargaining unit when they fall within the existing certification for that bargaining unit."[2] While this case does not share the offensive characteristics of forced accretion or involuntary absorption that were addressed in *NFFE FD-1*, I agree with the premise set forth by Member Pizzella that there is no rationale to expand *Fort Dix* further (and would in a future case reexamine that expansion) than it has been already − to "employees *placed operationally* or geographically *under another organization* as the result of a reorganization and employees hired into *newly created positions.*"[3] Even applying *Fort Dix* in its current iteration, the employee here is not a new employee, was not placed operationally or geographically under another organization as the result of a reorganization, and was not hired into a newly created position.

Therefore, I would conclude that the Regional Director (RD) failed to apply established law by applying *Fort Dix* to these circumstances.

I also agree with NTEU that there is an absence of precedent on which to determine whether the employee should continue to be included, or should be excluded, from the bargaining unit. I would grant the Union's application for review to determine how "full-time teleworking outside the metropolitan area impact[s] an employee's status in an established bargaining unit."[4]

This much is clear. It is now a common occurrence for employees to work remotely under a variety of telework arrangements – some based on agency policies, some based on provisions which have been collectively bargained, and others based on some combination of both. What is not so clear is how far (or in this case, how close) a bargaining-unit description – i.e. "and located at" – should be applied to employees who telework full-time.[5] Here, the employee elected, and was permitted, to telework full-time from her home in Washington state even though she continues to report "organizationally" to the Washington, D.C. headquarters of the Environmental Protection Agency.[6]

The question that is left begging is one that is faced regularly by agencies and unions in any metropolitan area which houses agency headquarters, regional, or area offices. For example, at any agency, whose headquarters is located in Washington, DC, would the exclusion apply to an employee who opts to telework exclusively from Richmond, Virginia (110 miles)? Winchester, Virginia (75 miles)? Baltimore, Maryland (50 miles)? Manassas, Virginia (35 miles)? Gaithersburg, Maryland (30 miles)? In other words, is it reasonable to resolve the "and located at" question solely on the basis of a mileage determination?[7]

Applying a geographic formula and *Fort Dix* to resolve the unique questions posed by this case provides no clarity or guidance to the federal labor-management relations community. It can only lead to more disputes and litigation, a result that runs counter to the Federal Service Labor-Management Relations Statute's mandate that calls upon the Authority to "facilitate[] and encourage[] the amicable *settlements* of disputes."[8] It is noteworthy that many bargaining-unit certifications came into existence prior to the widespread application of telework policies and those certifications could not have anticipated or taken into consideration such scenarios.[9]

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[1] 53 FLRA 287 (1997).

[2] 67 FLRA 643, 646 (2014) (Dissenting Opinion of Member Pizzella).

[3] *Id.* (citing *U.S. Dep't of the Air Force, Randolph Air Force Base, San Antonio, Tex.*, 64 FLRA 656, 660 (2010) (Dissenting Opinion of Member Beck)).

[4] Application at 3.

[5] RD's Decision at 1.

[6] Majority at 2.

[7] RD's Decision at 1; Application at 3-6.

[8] 5 U.S.C. § 7101(a)(1)(C) (emphasis added).

[9] Another unique characteristic of this case (which was not raised by the parties but seems unavoidably relevant to its determination) is that, on the one hand, the employee's election to telework a continent away from the EPA's headquarters is permitted by the parties' collective-bargaining agreement (CBA) and arguably takes her out of the plain language of the certification's description. But, on the other hand, that election likely takes her out of any eligibility to telework remotely full-time, which is a permission that is granted solely by the terms of the CBA (the Telework Enhancement Act of 2010 notwithstanding).

The impact of today's decision will have implications that reach far beyond the one employee in this case.

For these reasons, I would grant NTEU's application for review as presenting an issue for which there is an absence of precedent. I also would have published an invitation-to-brief notice in the Federal Register (prior to any decision) in order to afford the broader federal labor-management relations community the opportunity to provide their insights on these matters.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGION

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
(Agency)

and

NATIONAL TREASURY EMPLOYEES UNION
(Petitioner/Labor Organization)

WA-RP-18-0011

DECISION AND ORDER

I. Statement of the Case

The National Treasury Employees Union (NTEU) filed the petition in this proceeding on October 6, 2017. The Petition sought to clarify the position of Attorney-Advisor currently encumbered by Jessica Barkas to be included in NTEU's existing unit of professional employees at the Environmental Protection Agency (EPA). As set forth below, the evidence revealed that Barkas reports directly to the EPA's Headquarters Office in Washington, DC, but works remotely from her residence in Buckley, Washington.

The Region investigated this case. The parties submitted evidence which has been fully considered. Based upon that investigation, I hereby find and conclude as follows.

II. Findings

NTEU is the certified exclusive representative of professional employees at EPA. The unit was certified on April 20, 1998 (Case No. WA-RP-80038). The unit includes the following employees:

> All professional employees of the United States Environmental Protection Agency employed by and located at the Headquarters Offices, Washington, D.C., Metropolitan area; excluding all non-professionals employees; management officials; supervisors; confidential employees; employees engaged in personnel work in other than a purely clerical capacity; employees engaged in administering the Statute; employees engaged in intelligence or other security work directly-affecting national security; employees primarily engaged in investigation or audit functions related to internal security or integrity of the Agency; consultants; experts appointed un 5 CFR 213.301; Commission Corps Officers; employees on an IPA assignment; intermittent employees; and temporary employees of 90 days or less.

When Barkas began working at the EPA, she was employed by and reported to the Headquarters Offices in Washington, DC. Barkas was also duty stationed in Washington, DC. In August 2017, Barkas relocated to Washington State and began teleworking fulltime. Barkas is still employed by and reports to the EPA Headquarters Offices in Washington, DC. Barkas' duty stationed is listed as her town of residence, Buckley, Washington. On August 6, 2017, the EPA removed Barkas from the bargaining unit represented by NTEU.

III. Analysis and Conclusions

As stated above, the petition seeks to clarify whether Barkas may be included in NTEU's existing unit of professional employees at the EPA. The Authority holds that "[n]ew employees are automatically included in an existing bargaining unit where their positions fall within the express terms of a bargaining certificate and where their inclusion does not render the bargaining unit inappropriate." *Dep't of the Army Headquarters, Fort Dix, Fort Dix, N.J.* 53 FLRA 287, 294 (1997) *(Fort Dix). Fort Dix* is interpreted broadly to include not only to newly-hired employees, but also existing and relocated employees "to ensure effective employee representation consistent with the terms of an existing unit certification." *NFFE, Employees FD-1, JAMA W,* 67 FLRA 643, 644-45 (2014).

NTEU is certified to represent employees who are both employed by and located at the EPA's Headquarters Offices, Washington, DC. Because Barkas is no longer duty-stationed at the Headquarters Offices in Washington, DC, I find the position encumbered by Barkas does not fall within the express terms of NTEU's bargaining certificate. As there is no other basis argued for including NTEU's existing unit of professional employees at the EPA, further proceedings on the petition are not warranted.

IV. Order

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 the date of this Decision.** The application for review must be filed with the Authority by **March 20, 2018**, 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.[1]

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Jessica S. Bartlett
Regional Director, Washington Region
Federal Labor Relations Authority

Dated: January 19, 2018

[1] 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.