70 FLRA No. 97

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
KANSAS CITY VA MEDICAL CENTER
KANSAS CITY, MISSOURI
(Agency)

and

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

CH-RP-16-0024

DECISION AND ORDER ON REVIEW

April 13, 2018

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

Decision by Member Abbott for the Authority

I. Statement of the Case

On July 20, 2016, the Union petitioned Federal Labor Relations Authority (FLRA) Regional Director Sandra J. LeBold (RD) to clarify an existing bargaining unit at the Agency, and include seven Human Resources staffing assistants (staffing assistants). In the attached decision, the RD found that these employees are not excluded from the unit under § 7112(b)(3) of the Federal Service Labor-Management Relations Statute (Statute)[1] because they do not perform personnel work in other than a purely clerical capacity. The RD clarified the unit to include the staffing assistants on July 14, 2017.

On August 23, 2017, the Agency filed an application for review, and the Union filed an opposition on September 7, 2017. In an order dated October 23, 2017, the Authority granted review and deferred action on the merits.

The main question before us is whether the staffing assistants at issue are engaged in personnel work in other than a purely clerical capacity within the meaning of § 7112(b)(3). For the reasons set forth below, we find that current precedent concerning § 7112(b)(3) is inconsistent with the plain wording of the Statute. Therefore, we now reverse that precedent, and we find that the staffing assistants are engaged in personnel work in more than a purely clerical capacity. Accordingly, we overturn the RD's decision and exclude them from the unit.

II. Background and RD's Decision

The Union petitioned the RD to clarify an existing bargaining unit and include the staffing assistants. While the Agency opposed the petition, the Union argued that the § 7112(b)(3) exclusion did not apply because the staffing assistants' duties "do not involve the independent exercise of judgment or discretion."[2]

The RD found that the staffing assistants' main duties are: (1) advising one or more departments about staffing and recruitment; (2) developing and posting vacancy announcements; (3) qualifying applicants for employment; and (4) onboarding new hires. The RD found that, in advising departments about staffing and recruitment, the staffing assistants answer department chiefs' questions and conduct research prompted by those questions. She also found that they may advise their assigned departments about how to address staffing shortages, such as suggesting that departments advertise vacancy postings using social media or newspapers.

Additionally, the RD determined that, in developing and posting vacancy announcements, the staffing assistants collaborate with hiring departments, but they "do not make decisions about job qualifications, educational requirements, or any other substantive elements of the announcement."[3] The staffing assistants are trained by the Office of Personnel Management (OPM) to use the federal government's "online job posting and applicant review platform."[4] When developing vacancy announcements, staffing assistants "essentially distill and format information contained in the recruitment packet, and also pull information from OPM's Qualification Standards, the [Agency's] handbook 5005, and other regulatory guidance."[5] These vacancy announcements can vary in content, format, and wording depending on the staffing assistant drafting the announcement because some use templates and others "start each announcement from scratch."[6]

Further, the RD determined that, in qualifying applicants for employment, the staffing assistants "compare each applicant's qualifications . . . to OPM's requirements for the particular job series," but "are not

[1] 5 U.S.C. § 7112(b)(3).

[2] RD's Decision at 1.
[3] *Id.* at 7.
[4] *Id.* at 3.
[5] *Id.*
[6] *Id.*

permitted to compare one applicant to another."[7] The RD also found that "[s]taffing [a]ssistants may designate an applicant [as] unqualified" if the applicant does not meet the vacancy announcement's requirements, and "typically perform a second look" at unqualified applicants to make sure that the applicants did not make any errors in their online applications that resulted in their disqualification.[8]

The RD determined that, after reviewing applications for a vacancy announcement, the staffing assistants send applicant information to the hiring department identifying each applicant who is at least minimally qualified for the job. The staffing assistants must provide the applicants' resumes, but may also send other documents, such as cover letters. Once the department makes its selection, staffing assistants "examine the [department's] review materials to ensure that the applicant selection complies with applicable policies and procedures."[9]

Citing Authority case law, the RD found that for the § 7112(b)(3) exclusion to apply, an "employee must exercise independent judgment and discretion in the carrying out of personnel duties."[10] Applying this case law, the RD determined that "[w]hile the record reveals that [s]taffing [a]ssistants possess considerable expertise concerning [Agency] staffing and recruitment," they "are ultimately not involved in setting job qualifications, making hiring decisions, or otherwise exercising the type of independent judgment or discretion warranting exemption under [§] 7112(b)(3)."[11] Therefore, the RD clarified the bargaining unit to include the seven staffing assistants.[12]

III. Preliminary Matters

A. The Agency's application is not deficient under § 2422.31(b) of the Authority's Regulations.

While the Union argues[13] that the Agency's application is deficient under § 2422.31(b) of the Authority's Regulations,[14] we find that the content of the application satisfies the Regulations' requirements. Because the application states the grounds on which the Agency seeks review of the RD's decision and cites record evidence to support its arguments, we find the application sufficient to resolve on its merits.[15] Accordingly, we deny the Union's request to dismiss the application.

B. We deny the Union's request to withdraw its petition.

After the Authority granted review and deferred action on the merits, the Union filed (1) a request to withdraw its original, underlying petition, and (2) a notice stating it had withdrawn its petition. As nothing in the Authority's Regulations permits the Union to withdraw its petition at this late stage of the proceeding, the Authority will exercise its discretion to decide whether to grant the Union's request.[16]

As the Authority recently noted in *U.S. DOL* (*DOL*),[17] a charging party may not unilaterally withdraw its charge without FLRA approval in the unfair-labor-practice (ULP) context.[18] And, once the FLRA's General Counsel has issued a complaint in a ULP case, certain settlement agreements are "subject to approval by the Authority."[19] While the ULP process differs from the representation process, it demonstrates that once a proceeding has reached a certain stage, the FLRA has institutional interests in resolving the dispute.

The FLRA has spent considerable time and resources attempting to resolve the parties' dispute. The Union filed its petition on July 20, 2016, more than twenty months ago.[20] Since then, the FLRA's Chicago Regional Office, including the RD, led an investigation, assessed evidence, conducted research, and issued a decision on the merits of the parties' dispute. More recently, the Authority processed the Agency's application, reviewed the legal and factual issues presented on appeal, and notified the parties that the application raised legal issues that warranted further review. The Union does not explain why now, after

[7] *Id.* at 4.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 6 (citing *Dep't of the Treasury, IRS, Wash., D.C., & IRS, Cincinnati Dist., Cincinnati, Ohio*, 36 FLRA 138, 144 (1990) (*Cincinnati*)).
[11] *Id.* at 6-7.
[12] *Id.* at 7.
[13] Opp'n at 4.
[14] 5 C.F.R. § 2422.31(b) ("An application for review must be sufficient for the Authority to rule on the application without looking at the record . . . [; it] must specify the matters and rulings to which exception[] is taken, include a summary of evidence relating to any issue raised in the application, and make specific references to page citations in the transcript if a hearing was held.").
[15] *U.S. Dep't of VA, VA St. Louis Healthcare Sys., St. Louis, Mo.*, 70 FLRA 247, 248 (2017).
[16] *Cf.* 5 C.F.R. § 2423.10(a)(1) (in the unfair-labor-practice context, the regional director must approve a party's request to withdraw a charge); *id.* § 2423.25(b) (even when parties agree to settle an unfair-labor-practice dispute, the complaint is not withdrawn until the regional director approves the settlement).
[17] 70 FLRA 452, 453-54 (2018).
[18] 5 C.F.R. § 2423.10(a)(1) (stating that an RD, on behalf of the General Counsel, may "[a]pprove a request to withdraw a charge").
[19] *Id.* § 2423.25(a)(2).
[20] Pet. at 1.

nearly two years, it seeks to withdraw its petition *after* the Agency brought this dispute to the Authority by filing an application for review *and* the Authority notified the parties that the Agency's application warranted further review. The Agency has not indicated any desire to withdraw its application.[21]

The Authority has an obligation that extends beyond the parties in this case. Congress charged the Authority with "provid[ing] leadership in establishing policies and guidance" in matters that include "determin[ing] the appropriateness" of bargaining units.[22] As described more fully below, a bargaining unit cannot properly include an "employee engaged in personnel work in other than a purely clerical capacity" under § 7112(b)(3) of the Statute.[23] By issuing a decision that resolves the parties' dispute, the Authority clarifies for the labor-management community why the positions in dispute are, or are not, performing personnel work in other than a purely clerical capacity.

The dissent unnecessarily attempts to once again blur the line between adjudication and rulemaking. As we explained in *DOL*,[24] "[t]he three primary considerations in distinguishing adjudication from rulemaking are: (1) whether the government action applies to specific individuals or to unnamed and unspecified persons; (2) whether the promulgating agency considers general facts or adjudicates a particular set of disputed facts; and (3) whether the action determines policy issues or resolves specific disputes between particular parties."[25] Here, we decide *only* the dispute raised in the application for review: whether the staffing assistants in this case are engaged in personnel work in other than a purely clerical capacity. Our decision on that issue resolves the matter for those employees, the Agency, and the Union – all of whom will benefit from knowing the bargaining-unit status of the staffing-assistant position.[26] As with any administrative determination by an adjudicatory body, our decision will provide precedential guidance to similarly situated parties.[27] That is adjudication, not rulemaking.

Consequently, we deny the Union's request to withdraw.[28]

IV. Analysis and Conclusion: The staffing assistants are engaged in personnel work in other than a purely clerical capacity under § 7112(b)(3).

Section 7112(b)(3) excludes from a bargaining unit employees who are "engaged in personnel work in other than a purely clerical capacity."[29] In our view, many of the Authority's past interpretations of whether an employee was "engaged in personnel work in other than a purely clerical capacity" are inconsistent with the Statute's plain language. We take this opportunity to clarify what § 7112(b)(3) of the Statute means.

Beginning with Executive Orders 10,988 and 11,491 that predated the Statute, bargaining units could not include "an employee engaged in Federal personnel work in other than a purely clerical capacity."[30] While the Orders and subsequently the Statute do not define these terms, earlier decisions under Executive Order 11,491 of the Assistant Secretary of Labor for Labor-Management Relations (Assistant Secretary) are instructive. Employees were found to be engaged in federal personnel work in other than a purely clerical capacity when they "engaged in making determinations as to the [agency]'s manpower needs, screening job applicants and passing on their qualifications to fill job vacancies, and processing new hires and terminations";[31] provided advice and guidance on personnel matters;[32] assisted with hiring;[33] made recommendations that were

[21] *Cf. AFGE, ICE, Nat'l Council 118*, 70 FLRA 441, 441 (2018) (granting union's request to withdraw negotiability petition where agency effectively agreed with union's request, contingent on the Authority vacating the underlying decisions at issue). Member Abbott notes, as he did in *DOL*, that the dissent's suggestion—that the Union should be permitted to withdraw *this* petition and then refile a *new* petition in sixty (60) days—does not "facilitate or encourage the amicable settlement of disputes" and has no "semblance of effectiveness or efficiency." 70 FLRA at 457. Besides whipsawing the Agency out of the opportunity to have its application reviewed on the merits, the Union's actions amount to nothing more than a "manipulation of Title V." *Id.*

[22] 5 U.S.C. § 7105(a).

[23] *Id.* § 7112(b)(3).

[24] 70 FLRA at 453.

[25] *Id.* (citing *Gallo v. U.S. Dist. Court for the Dist. of Ariz.*, 349 F.3d 1169, 1182 (9th Cir. 2003), *cert. denied*, 541 U.S. 1073 (2004)).

[26] *See Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) (noting that "adjudications . . . have an immediate effect on specific individuals (those involved in the dispute)").

[27] *See, e.g.*, *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999) (stating that "the nature of adjudication is that similarly situated non-parties may be affected by the policy or precedent applied, or even merely announced in dicta" (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969)).

[28] *See DOL*, 70 FLRA at 454.

[29] 5 U.S.C. § 7112(b)(3).

[30] Exec. Order No. 11,491.

[31] *Army & Air Force Exch. Serv., Alaskan Exch. Sys., S. Dist. & Headquarters, Elmendorf Air Force Base & Fort Richardson, Anchorage, Alaska*, 2 A/SLMR 498, 501 n.8 (1972).

[32] *Dep't of Transp., FAA, Airway Facilities Sector, Fort Worth, Tex.*, 2 A/SLMR 613, 615 (1972) (*Fort Worth*).

[33] *Dep't of Health, Educ., & Welfare, U.S. Office of Educ., Headquarters*, 7 A/SLMR 190, 191-92 (1977) (*Education*).

followed;[34] had access to confidential personnel information;[35] actively participated in the development of policy and programs;[36] were "privy to essentially the same personnel[-]related information [as] [p]ersonnel [s]pecialists";[37] prepared vacancy announcements;[38] and prepared and processed personnel actions, such as promotions, reassignments, pay increases, and transfers.[39]

In decisions of the Assistant Secretary, clerical work typically refers to filing, stenography, and typing.[40] Further, the dictionary defines "clerical" as "(of a job or person) concerned with or relating to work in an office, esp[ecially] routine documentation and administrative tasks."[41] The word "purely" is defined as "entirely; exclusively."[42]

The Authority's earlier decisions, like *Department of HHS, Region X, Seattle, Washington*,[43] found that an employee who set up an initial qualifying test for job applicants at the agency and who helped screen applicants was performing personnel work in other than a purely clerical capacity.[44] In *Veterans Administration, Washington, D.C. & Veterans Administration Medical Center, Salisbury, North Carolina*,[45] the Authority found that a personnel assistant should be excluded from the bargaining unit as she served as the agency's resource on workers' compensation and retirement and death benefit programs.[46] In *U.S. Department of the Army, Headquarters, 101st Airborne Division, Fort Campbell, Kentucky*,[47] the Authority found that employees who analyzed an agency's workload and made staffing recommendations were excluded from the unit.[48] However, in more recent decisions, the Authority has not excluded employees performing personnel work.[49] In determining whether a position was excluded, the Authority also required that the employee's duties not be performed in a routine manner and that the employee exercise independent judgment and discretion.[50]

We believe that the Statute's plain wording, and the understanding reflected in the earlier decisions of the Assistant Secretary, indicate that (1) employees engaged in personnel work were meant to be excluded from bargaining units unless their work was "purely clerical," and (2) "purely clerical" would mean that the employee was exclusively focused on administrative tasks like filing and typing. For this reason, personnel work that involves evaluating, advising, recommending, and making assessments is not purely clerical. So, any analysis of the § 7112(b)(3) exclusion must comport with the Statute's plain language, and we now reconsider and reverse prior Authority decisions[51] that overly relied on analyzing whether duties were performed in a routine manner or whether employees exercised independent judgment and discretion.[52]

Applying § 7112(b)(3) as written, we find that the staffing assistants, at issue here, are excluded from the bargaining unit because the duties they perform are not purely clerical.

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[34] *U.S. Naval Weapons Station, Seal Beach, Cal., Dep't of the Navy*, 7 A/SLMR 331, 332 (1977) (*Seal Beach*); *Education*, 7 A/SLMR at 191-92.
[35] *U.S. PTO*, 7 A/SLMR 512, 516 (1977) (*PTO*); *Seal Beach*, 7 A/SLMR at 332; *Education*, 7 A/SLMR at 192; *Fort Worth*, 2 A/SLMR at 616.
[36] *Seal Beach*, 7 A/SLMR at 332.
[37] *PTO*, 7 A/SLMR at 516.
[38] *IRS, Office of the Reg'l Comm'r, Se. Region*, 5 A/SLMR 625, 629 (1975).
[39] *IRS, Office of the Reg'l Comm'r, Se. Region*, 7 A/SLMR 606, 608 (1977); *Pa. Nat'l Guard, Dep't of Military Affairs*, 4 A/SLMR 240, 242 (1974); *Fort Worth*, 2 A/SLMR at 615.
[40] *See U.S. Soldiers' Home, Wash., D.C.*, 1 A/SLMR 100, 101 (1971) (typing); *U.S. Army Special Servs., Central Post Fund, Fort Benning, Ga.*, 1 A/SLMR 200, 202 (1971) (stenography and typing); *Dep't of the Army, Picatinny Arsenal, Dover, N.J.*, 1 A/SLMR 219, 221 (1971) (stenography and typing); *Va. Nat'l Guard, Headquarters, 4th Battalion, 11th Artillery*, 1 A/SLMR 332, 335 (1971) (typing and filing); *Commander Serv. Force, U.S. Atl. Fleet*, 1 A/SLMR 367, 368 (1971) (filing, typing, and stenography); *Dep't of the Army, U.S. Army Engineers Dist., Phila., Pa.*, 1 A/SLMR 424, 426 (1971) (filing, typing, and stenography); *FAA, Dep't of Transp.*, 1 A/SLMR 594, 600 (1971) (typing and filing); *U.S. Army Infantry Ctr., Non-Appropriated Fund Activity, Fort Benning, Ga.*, 2 A/SLMR 417, 419 n.2 (1972) (stenography and typing).
[41] *Clerical*, *New Oxford American Dictionary* (3ed. 2010).
[42] *Purely*, *id.*
[43] 9 FLRA 518, 524 (1982).
[44] *Id.* at 524-25.
[45] 11 FLRA 176, 177 (1983).
[46] *Id.*
[47] 36 FLRA 598, 602-05 (1990).
[48] *Id.*
[49] *E.g., U.S. Dep't of State, Bureau of Consular Affairs, Passport Servs.*, 68 FLRA 657, 661-62 (2015) (*Passport*) (Member Pizzella concurring in part and dissenting in part); *USDA, Nat'l Fin. Ctr., New Orleans, La.*, 68 FLRA 206, 208-09 (2015) (*Fin. Ctr.*); *U.S. Dep't of VA, N. Cal. Health Care Sys., Martinez, Cal.*, 66 FLRA 522, 524-25 (2012) (*Martinez*) (Member Beck dissenting); *USDA, Forest Serv., Albuquerque Serv. Ctr., Human Capital Mgmt., Albuquerque, N.M.*, 64 FLRA 239, 241-42 (2009) (*Forest Serv.*) (Member Beck concurring); *FDIC, S.F., Cal.*, 49 FLRA 1598, 1601-02 (1994) (*FDIC*); *Cincinnati*, 36 FLRA at 145.
[50] *E.g., Passport*, 68 FLRA at 662 (citing *U.S. Dep't of the Navy, Navy Undersea Warfare Ctr., Keyport, Wash.*, 68 FLRA 416, 436 (2015)).
[51] *E.g., id.* at 661-62; *Fin. Ctr.*, 68 FLRA at 208-09; *Martinez*, 66 FLRA at 524-25; *Forest Serv.*, 64 FLRA at 241-42; *U.S. DOJ, INS, Wash., D.C.*, 59 FLRA 304, 306 (2003); *FDIC*, 49 FLRA at 1601-02; *Cincinnati*, 36 FLRA at 145.
[52] We note that the revised analysis applied in this case is consistent with Member Beck's dissent in *Martinez*, 66 FLRA at 525-27.

Although the staffing assistants do perform some clerical duties, several of the duties that they perform are not clerical. Staffing assistants are "responsible for answering whatever questions the [department] chiefs might have about staffing."[53] They "respond to these inquiries by conducting research, reviewing personnel documents, and contacting employees' supervisors when necessary."[54] They also provide advice on responding to staffing shortages, including recommending advertising vacancies using social media and newspapers.[55] Furthermore, staffing assistants are responsible for qualifying job applicants.[56] They "ensure that the applicant selection complies with applicable policies and procedures."[57] In her decision, the RD highlighted one example of a staffing assistant who, based on a note, was concerned that a selection had violated merit system principles.[58] The staffing assistant intervened and "made certain recommendations to mitigate the risk of a violation."[59] Staffing assistants also decide whether or not to forward applicants' cover letters or other application materials to the hiring departments.[60] Further, "[t]here are no governing [Agency] guidelines about where a [department] may post vacancy announcements," so staffing assistants cannot rely on them, and instead need to use their own judgment.[61]

Accordingly, the staffing assistants are engaged in personnel work in other than a purely clerical capacity within the meaning of § 7112(b)(3) and, as a result, we find that they are excluded from the bargaining unit.[62]

V. Order

We direct the RD to clarify the bargaining unit to exclude the staffing assistants.

[53] RD's Decision at 2; *see also* Application, Attach. 5 (Aff. of Mannie Escriche) at 2; Application, Attach. 8 (Aff. of Zaleia Thomas) at 4.
[54] RD's Decision at 2; *see also* Application, Attach. 5 at 2.
[55] RD's Decision at 2; *see also* Application, Attach. 6 (Aff. of Cameron Lee) at 3.
[56] RD's Decision at 4; *see also* Application, Attach. 4 (Aff. of Gretchen Bedard) at 2-3; Application, Attach. 5 at 4-5; Application, Attach. 6 at 4; Application, Attach. 7 (Aff. of Amanda Richmond) at 3.
[57] RD's Decision at 4; *see also* Application, Attach. 3 (Aff. of Karla Kavanaugh) at 3.
[58] RD's Decision at 4; *see also* Application, Attach. 7 at 4.
[59] RD's Decision at 4; *see also* Application, Attach. 7 at 4.
[60] RD's Decision at 4; *see also* Application, Attach. 6 at 4; Application, Attach. 8 at 4.
[61] RD's Decision at 2-3; *see also* Application, Attach. 6 at 3.
[62] Because we find that the staffing assistants are excluded on this basis, we find it unnecessary to address the Agency's remaining arguments. *See* Application at 10-15 (arguing that the RD failed to apply established law and committed clear and prejudicial error concerning substantial factual matters, and renewing its objection to the RD's collection of evidence using affidavits, rather than holding a hearing).

Member DuBester, dissenting:

For the reasons expressed in my dissent in *U.S. DOL*[1], the majority's issuance of their decision in this case violates the Authority's regulations,[2] the Administrative Procedure Act (APA),[3] and fundamental administrative law principles. Accordingly, I dissent.

The Union has informed the Authority that it no longer has an interest in representing the disputed employees, by moving to withdraw its petition to include those employees in its bargaining unit. The Agency does not oppose the motion.[4] Consistent with its regulations, the Authority should grant the motion and dismiss the petition.

When the Authority performs its statutory responsibility to "determine the appropriateness of units for labor organization representation,"[5] it performs an adjudicative function. And, when it is engaged in adjudication, the Authority decides only matters placed before it by litigants. In accord with federal courts, the Authority has held that a dispute becomes moot when the parties no longer have a legally cognizable interest in the outcome.[6] And it is well-settled that "the Authority does not resolve disputes that have become moot."[7]

Section 2429.10 of the Authority's Rules and Regulations implements this principle by explicitly prohibiting the Authority from issuing advisory opinions.[8] To refuse to grant the Union's motion to withdraw its petition—and instead to address the petition's merits—is precluded by this regulation. If there is no controversy before the Authority, then any decision in this matter is merely advisory.[9]

The majority attempts to justify its issuance of this advisory opinion by stating that the opinion "clarifies for the labor-management community" whether or not the disputed positions perform "work in other than a purely clerical capacity."[10] This rationale confuses one Authority process, adjudication, with another, rulemaking. These are two distinct functions. Adjudication is reserved for resolving live disputes, whereas rulemaking is the only process by which the Authority, on its own, may announce prospective policies and guidance.[11]

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[1] 70 FLRA 452, 458-59 (2018) (Dissenting Opinion of Member DuBester).

[2] 5 C.F.R. § 2429.10.

[3] 5 U.S.C. § 706(2)(A).

[4] The Union filed a petition to clarify the bargaining unit status of certain Agency positions, contending that these positions should be included in the unit it represents. The Agency did not file a cross-petition. It merely alleged that these positions should be excluded from the unit. Accordingly, the Union's motion to withdraw its petition removed any cognizable interest the Agency had in this matter.

[5] 5 U.S.C. § 7105(a)(2)(A).

[6] *SSA, Boston Region (Region 1), Lowell Dist. Office, Lowell, Mass.*, 57 FLRA 264, 268 (2001)*; accord United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

[7] *NTEU*, 67 FLRA 280, 281 (2014) (*NTEU*). It is also a fundamental labor-law principle that there is no issue concerning representation when a union does not seek to represent the employees. *Morale, Welfare & Recreation Directorate, Marine Corps Air Station, Cherry Point, N.C.*, 48 FLRA 686, 701 (1993) ("It is axiomatic, in a single union situation, that no [question concerning representation] can be presented where the union does not seek to represent employees in an appropriate unit."); *Fed. Trade Comm'n*, 35 FLRA 576, 583 (1990) ("A [unit clarification petition] is the proper procedure to clarify, *consistent with the parties' intent*, inclusions or exclusions from a unit.") (emphasis added).

The majority's decision is irreconcilable with its grant of a union's analogous dismissal request in *AFGE, ICE, Nat'l Council 118*, 70 FLRA 441, 441 (2018) (granting union's request to withdraw negotiability petition because the request mooted the case). In both instances, the matters became moot because the union moved to withdraw a petition seeking a ruling from the Authority. Contrary to the majority (Majority at 3, n.11), these matters became moot once those motions were filed, regardless of the agency's agreement.

[8] *NTEU*, 67 FLRA at 281 (citing 5 C.F.R. § 2429.10 ("The Authority and the General Counsel will not issue advisory opinions.")).

[9] *Cf. NFFE, Local 1998*, 48 FLRA 1074, 1075 (1993) (where union has withdrawn underlying grievance, arbitrator's award is moot and Authority decision on award's merits would be an advisory opinion). That the Agency has not withdrawn its application for review, a significant consideration for the majority (Majority at 4), does not render the proceeding less moot. And, as noted, the Agency does not oppose the Union's motion to withdraw its representation petition, undoubtedly because this leaves the disputed employees unrepresented, precisely the result the Agency has sought throughout the proceeding.

[10] Majority at 5.

[11] *See, e.g.*, *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 221 (1988) (Concurring Opinion of J. Scalia) ("[R]ulemaking [is] prospective, . . . adjudication [cannot] be purely prospective, since otherwise it would constitute rulemaking.") (citing *NLRB v. Wyman–Gordon Co*., 394 U.S. 759, 759 (1969), and *SEC v. Chenery Corp*., 332 U.S. 194, 194 (1947)). The majority's claim, Majority at 5, that issuing a merits decision is not backdoor rulemaking is patently incorrect. The majority reasons that its decision "benefits" the "employees, Agency, and the Union" who will know "the bargaining-unit status of the staffing-assistant position." Majority at 5. This is simply wrong. What the majority appears reluctant to acknowledge, and that undercuts the majority's entire theory on this point, is that the Union no longer seeks to include any disputed employees in its bargaining unit. Accordingly, the advisory opinion the majority issues will not have any effect on these employees' bargaining-unit status, or on the rights and responsibilities of any of the parties.

When an agency fails to comply with its own regulations, its action is unlawful and exposes the agency to court review.[12] An agency's failure to follow its own regulations violates the APA's prohibition against agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[13] The Authority should follow its own regulation and "not issue [an] advisory opinion[]."[14]

In addition to the illegality of the majority's action, it is difficult to imagine a clearer waste of government resources than the majority's decision to resolve, *sua sponte*, an issue that no longer requires a resolution.[15] The majority's exercise of jurisdiction here—tantamount to manufacturing a dispute where none exists—is in flagrant disregard of the Authority's statutory responsibilities.[16] The majority's actions here speak more to an interest in issuing overreaching proclamations than engaging in the reasoned adjudication of real disputes.

The majority does not dispute the central point: this case is moot.[17] Their decision is an unlawful advisory opinion. Accordingly, I dissent.

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[12] *Frisby v. U.S. Dep't of HUD*, 755 F.2d 1052, 1055 (3d Cir. 1985) (validly promulgated agency regulations have the force of law).

[13] 5 U.S.C. § 706(2)(A); *see also Aerial Banners, Inc. v. FAA*, 547 F.3d 1257, 1260 (11th Cir. 2008) (agency acts arbitrarily and capriciously by failing to follow its own regulations and procedures); *City of Sioux City v. Western Area Power Admin.*, 793 F.2d 181, 182 (8th Cir. 1986) (agency's failure to follow its own binding regulations is a reversible abuse of discretion); *United States v. Heffner*, 420 F.2d 809, 811-12 (4th Cir. 1969) (courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself); *Morton v. Ruiz*, 415 U.S. 199, 233-35 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.").

[14] 5 C.F.R. § 2429.10.

[15] If the majority is concerned about the belatedness of the Union's motion to withdraw, then an appropriate response is not to expend additional resources to resolve a matter that is moot. The Authority already has mechanisms in place to deal with belated requests to withdraw. *See* 5 C.F.R. § 2422.14(b) (imposing waiting periods for filing new representation petitions on parties who belatedly withdraw petitions).

[16] The majority's reliance on an analogy to unfair-labor-practice (ULP) proceedings, to support its claim that the Authority has "institutional interests" in resolving this case, Majority at 4, ignores fundamental distinctions among the Authority's various statutory responsibilities. The Authority enforces the ULP provisions of the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7116(a) & (b), and prosecutes those who violate them. The Authority has no analogous role in representation cases.

[17] The underlying dispute is moot. However, faced with the majority's improper actions regarding the RD's decision, I feel compelled to note that, if I were to reach the merits, I would uphold that decision. The RD found that the employees at issue are not excluded from the unit under § 7112(b)(3) of the Statute because they do not perform personnel work in other than a purely clerical capacity. The RD's decision is consistent with long-standing Authority precedent concerning the § 7112(b)(3) exclusion. *See U.S. Dep't of VA, VA St. Louis Healthcare Sys., St. Louis, Mo.*, 70 FLRA 247, 248 (2017); *U.S. DOJ, INS, Wash., D.C.*, 59 FLRA 304, 306 (2003); *U.S. Dep't of the Army, Headquarters, 101st Airborne Div., Fort Campbell, Ky.*, 36 FLRA 598, 603 (1990).

FEDERAL LABOR RELATIONS AUTHORITY
CHICAGO REGIONAL OFFICE

U.S. DEPARTMENT OF VETERANS AFFAIRS
KANSAS CITY VA MEDICAL CENTER
KANSAS CITY, MISSOURI
-Agency –

and

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

Case No. CH-RP-16-0024

DECISION AND ORDER CLARIFYING UNIT

I. Statement of the Case

The Union's petition in this matter seeks to clarify the bargaining unit status of seven Human Resources Staffing Assistants at the Kansas City VA Medical Center (Agency or Medical Center). The Staffing Assistants are all principally involved in developing and posting job announcements, qualifying job applicants, and otherwise working with the Medical Center's various "service lines" to ensure staffing needs are met.

The Agency considers the Staffing Assistants excluded from the Union's existing bargaining unit, because they are "engaged in personnel work" within the meaning section 7112(b)(3) of the Statute. The Union seeks to include the Staffing Assistants in the bargaining unit, arguing their duties do not involve the independent exercise of judgement or discretion, and therefore the Statute's personnel work exemption does not apply.

The Region conducted an investigation of this matter and the record was shared with the parties.[1] Both the Agency and Union submitted briefs, which I have fully considered. For the reasons discussed below, I find that the Staffing Assistants are not engaged in personnel work within the meaning of section 7112(b)(3) of the Statute. Accordingly, I will clarify the Union's bargaining unit to include these positions.

II. Findings

The Agency's Human Resources (HR) Department consists of 33 full-time employees, categorized in the following positions: supervisors; senior/lead specialists; specialists; and assistants. They work in three divisions: PIV/Security; Staffing and Recruitment; and Labor Relations and Benefits. The Staffing Assistants at issue are assigned to the Staffing and Recruitment division. The incumbents are: (1) Manuel Escriche; (2) Zakeia Thomas; (3) Cameron Lee; (4) Gretchen Bedard; (5) Connie Folsom; (6) Amanda Richmond; and (7) Brett Menzel. These employees are all non-professional, General Schedule employees (Grades 5-7).

VA medical centers are organized into regions, called Veterans Integrated Service Networks (VISN). The Agency is under VISN 15. The Agency's HR Department has a somewhat distinct delivery model within VISN 15, in that Staffing Assistants work independently with their service lines, and are not supervised by HR Specialists.

The Staffing Assistants testified consistently that their major duties are as follows: (a) advise their service lines about staffing and recruitment, (b) develop and post vacancy announcements, (c) qualify applicants who are seeking employment, and (d) onboard new hires.

(a) Advise Service Lines

Each Staffing Assistant is assigned to one or more "service lines" at the Medical Center. There are 24 service lines in all, together employing about 2,000 full-time staff members. Staffing Assistants generally meet, in person or telephonically, with their service chiefs on a weekly basis. Staffing Assistants prepare an agenda for those meetings and attend as the sole HR representative. The meetings generally last from an hour to an hour and a half and cover such topics as recruitment for vacant positions, onboarding of new hires, step increases, career ladder promotions, grade increases of certain positions, and any other HR-related issues.

Staffing Assistants are responsible for answering whatever questions the service chiefs might have about staffing their service lines. *(E.g.,* Does the service line need to publically announce a vacancy or can it be filled

[1] While the Agency requested that the Region hold a hearing in this matter, the Region's investigation established sufficient facts not in dispute to form the basis for a decision in this matter. Accordingly, a hearing was not required. *United States Dep't of the Navy, Fleet & Indus. Supply Ctr., Norfolk, Va.,62* FLRA 497, 501 (2008).

internally? Is a particular employee eligible for a step increase or promotion?) Staffing Assistants respond to those inquiries by conducting research, reviewing personnel documents, and contacting employees' supervisors when necessary.

Staffing Assistants may also advise their service lines about how to address staffing shortages. For example, one Staffing Assistant testified that he served the Police Officer service line, which had experienced a lot of tum-over. He coordinated implementation of a special pay table and also recommended posting vacancy announcements in the *Kansas City Star* and on Facebook. There are no governing VA guidelines about where a service line may post vacancy announcements. In this instance, the Staffing Assistant worked with his service line to secure special permission from the Associate Director concerning the announcement.

(b) Draft Job Announcements

Staffing Assistants are very involved in creating and posting job vacancy announcements on behalf of their service lines. They receive special training and certification from the Office of Personnel Management (OPM) to use USA Staffing, an online job posting and applicant review platform.

The process of creating a new vacancy announcement begins with the service line's creation of a recruitment packet. This includes, among other documents, a Position Description (also known as a "Functional Statement") for the open position. Staffing Assistants sometimes provide their service lines with feedback about the draft Position Descriptions. For example, a Staffing Assistant testified that her service line sent her a draft Position Description requiring knowledge of "how to use office equipment." The Staffing Assistant submitted comments back to the service line, suggesting that the service line clarify the term "office equipment."

In addition to reviewing the application packet, Staffing Assistants often discuss the position with service chiefs to better understand the major needs of the job. Staffing Assistants testified consistently that the process of crafting vacancy announcements is completed in collaboration with the service line.

Upon receipt of the final recruitment packet, Staffing Assistants draft the vacancy announcement in USA Staffing. Some use templates; others prefer to start each announcement from scratch. Staffing Assistants testified that they essentially distill and format information contained in the recruitment packet, and also pull information from OPM's Qualification Standards, the VA's Handbook 5005, and other regulatory guidance. Vacancy announcements, even for the same position, can vary depending on the particular Staffing Assistant who takes the lead in drafting it. Some announcements include a section entitled "you must provide a complete application package," listing the required components of a complete application. Other announcements do not. Also, the formatting and verbiage can vary from one Staffing Assistant's announcement to another. Some announcements use acronyms; others avoid them. Some format with bullet points and bold font; others do not. Some are more concise than others.

After Staffing Assistants create a vacancy announcement, it goes to the service line for final review and approval before it is posted online at USAjobs.

(c) Qualify Job Applicants

Another major duty of Staffing Assistants is "qualifying" job applicants. The qualification process ensures that each applicant meets minimum qualification requirements before receiving consideration from the service line. In qualifying applicants, Staffing Assistants essentially compare each applicant's qualifications (as reflected in their resume and other application materials) to OPM's requirements for the particular job series. They are not permitted to compare one applicant to another.

Staffing Assistants may designate an applicant unqualified when his or her application does not reflect the level of specialized/specific experience required by the announcement; when the applicant does not provide proper documentation to show they are an active employee when the announcement is for internal applicants; when the application packet fails to establish that they meet the educational requirements; etc.

Staffing Assistants also typically perform a second look at applicants who are "rated out" by USA Staffing, to ensure that the applicant did not erroneously rate themselves out. Staffing Assistants then release a "certificate" to the service line, which includes abbreviated application materials for each minimally qualified applicant. Staffing Assistants do not forward the entire application packet; instead, they select certain applicant materials. They are required to send resumes, but may have discretion over whether to include things like cover letters.

In generating the certificate, the Staffing Assistants code the applicants as qualified and flag preferred hires based on veteran status, citizenship, or seniority. Also, they will highlight any other category that the selecting official might designate *(e.g.*, internal hires).

After the service line receives the certificate of qualified applicants, service line managers interview candidates and contact references. The service line then makes its selection and informs the Staffing Assistant of its decision. It also returns its review materials to the Staffing Assistant (interview notes, reference check forms, ranking sheets).

The Staffing Assistant will then examine the service line's review materials to ensure that the applicant selection complies with applicable policies and procedures. For example, a Staffing Assistant testified that she saw a note indicating that an applicant was not hired because of his appearance. Concerned that the selection could violate merit system principles, the Staffing Assistant intervened with the service line and made certain recommendations to mitigate the risk of a violation.

(d) On-board New Hires

After the service line makes a hiring decision, the Staffing Assistant extends a tentative job offer to the applicant. If the applicant wants to move forward, the Staffing Assistant will send a welcome letter, and whatever materials are necessary for the applicant's physical and/or background check. For new hires who are veterans, Staffing Assistants must also certify their veteran status, which involves understanding length of service determinations and separation from the military procedures. Credentialing and background checks are completed by outside entities.

When extending a tentative offer, Staffing Assistants invite new hires to complete a Declaration for Federal Employment. That form asks the new hire to disclose certain issues that might disqualify them from federal service (prior criminal record, financial conflict of interest, etc.). Staffing Assistants then review that form, and refer the applicant to PIC/Security for further review if they observe a potential disqualifier. Certain issues will automatically result in further review by PIV/Security: incomplete responses, criminal offenses, and quitting a job without notice. The Staffing Assistant reviews other responses that might be potentially disqualifying. For example, disclosing a familial relationship with another VA employee.

Staffing Assistants work on setting the pay of new hires. They consider GS schedules and locations, as well as special pay charts. They may also apply special rules regarding transfers (allowing the VA to adjust grade levels to match an applicant's current level of pay). Staffing Assistants negotiate start dates with new hires.

III. Legal Standard

Under section 7112(b)(3) of the Statute, a bargaining unit may not include an employee who is "engaged in personnel work in other than a purely clerical capacity." Staffing levels, types of employees, and the organizational structure of an agency's individual components all relate to an agency's personnel work. *See Dep't of the Army, HQ, 101st Airborne Div., Ft. Campbell, Ky.*, 36 FLRA 598, 602 (1990); *OPM*, 5 FLRA 238, 246 (1981). For an employee to be excluded under the Section, the record must show that the character and extent of the employee's involvement in personnel work is more than clerical in nature and that the employee does not perform the duties in a routine manner. *DOJ, INS, Wash., D.C.*, 59 FLRA 304, 306 (2003). Further, the employee must exercise independent judgment and discretion in carrying out the personnel duties. *Id.* Individuals whose personnel duties only require processing completed personnel actions or screening personnel actions for technical sufficiency are not excluded. *Dep't of the Navy, U S. Naval Station, Pan.*, 7 FLRA 489, 493 (1981).

IV. Positions of the Parties

The Agency contends that the Staffing Assistants should be excluded pursuant to section 7112(b)(3) of the Statute because they exercise independent discretion and judgment in carrying out their various personnel work duties. The Agency notes that, unlike other VA Medical Centers, its Staffing Assistants work independently with their assigned service lines and receive minimal direction or formal quality review within HR. Staffing Assistants act as an arm of management, the Agency argues, advising their respective service lines, evaluating vacancies, and making recommendations to meet the service line's HR-related needs. Although much of their work is governed by rules, regulations, and policies that apply to all federal hiring; those guidelines are often open to interpretation, requiring Staffing Assistants to exercise judgement in their application.

For example, in posting job announcements, Staffing Assistants may craft announcements for the same vacant position somewhat differently. And, in qualifying applicants, Staffing Assistants may differ in their analysis of an applicant's supporting documents, which might result in divergent determinations about whether an applicant is qualified. The fact that the work of Staffing Assistants can vary within reason is a strong indicator, the Agency argues, that the work is not "merely clerical" as the Statutory exclusion requires.

The Union asserts that Staffing Assistants are not subject to exclusion under section 7112(b)(3) because

their personnel work duties are performed in a clerical and administrative capacity. With respect to posting vacancy announcements, the Union argues that Staffing Assistants essentially populate preexisting templates with information from the service line's functional statements and qualification standards provided by OPM and the VA. Draft announcements are then reviewed and approved by the service line before being posted. With respect to qualifying applicants, the Union emphasizes that hiring decisions are made by management officials. Determinations concerning minimal qualifications are controlled by preexisting qualifications standards, from which Staffing Assistants may not deviate. Any involvement in onboarding new hires, the Union argues, is entirely clerical in nature, primarily involving the transmission of a series of standardized forms.

V. Analysis and Conclusions

While the record reveals that Staffing Assistants possess considerable expertise concerning VA staffing and recruitment, it does not establish that they engage in personnel work within the meaning of section 7112(b)(3) of the Statute. Awareness of various personnel regulations and guidelines-as well as acting as an advisor to others about those regulations and guidelines-are not duties which establish that an employee is engaged in personnel work in other than a purely clerical capacity. *Headquarters, Ft. Sam Houston, Texas,* 5 FLRA 336, 341 (1981); *United States Dep't of Agriculture, US. Forest Service,* 64 FLRA 239 (2009) (personnel list exclusion did not apply to "well trained subject matter experts and technicians working in an administrative capacity").

Instead, for the exclusion to apply, the employee must exercise independent judgement and discretion in the carrying out of personnel duties. *Dep't of the Treasury, Internal Revenue Service, Washington, D.C.,* 36 FLRA 138, 144 (1990). The Agency contends that Staffing Assistants exercise independent judgement and discretion in a few ways. First, in drafting job announcements, the Agency points out that Staffing Assistants decide how to format and phrase the technical content they pull from qualification standards and the service line. Second, the Agency contends that, in qualifying applicants, Staffing Assistants have to analyze application materials, and interpret qualification standards, to determine if minimum qualifications are met. Finally, the Agency contends that the Staffing Assistants exercise independent judgment and discretion in reviewing Declarations for Federal Employment.

With respect to vacancy announcements, although Staffing Assistants have some leeway in their presentation, the record is clear that Staffing Assistants do not make decisions about job qualifications, educational requirements, or any other substantive elements of the announcement. With respect to qualifying applicants, Staffing Assistants compare applications to minimum requirements; but they do not set those requirements or otherwise influence the service lines' hiring decisions. The Agency urges that Staffing Assistants exercise judgement and discretion in comparing application materials to minimum qualifications, but failed to provide any examples of how that analysis is more than administrative in nature. Finally, with respect to reviewing Declarations for Federal Employment, determinations about whether responses should disqualify an applicant lie with the Security Officer, not with the Staffing Assistant. The Staffing Assistant is trained to refer that form to Security, and the record reveals that they do so in a clerical and routine manner.

In sum, Staffing Assistants are ultimately not involved in setting job qualifications, making hiring decisions, or otherwise exercising the type of independent judgement or discretion warranting exemption under section 7112(b)(3). Based on the foregoing, I find the Staffing Assistants Manuel Escriche, Zakeia Thomas, Cameron Lee, Gretchen Bedard, Connie Folsom, Amanda Richmond, and Brett Menzel are not excluded from the Union's bargaining unit under section 7112(b)(3) of the Statute. *US. Dep 't of VA, St. Louis Healthcare System, St. Louis, MO,* 70 FLRA 247 (2017); *USDA, Nat'l Fin. Center, New Orleans, La.,* 68 FLRA 206 (2015); *Albuquerque Service Center,* 64 FLRA 239 (2009); *U S. DOD, Def Contract Audit Agency Central Region, Irving, Tex.,* 57 FLRA 633, 638-639 (2001); *FDIC, S.F , Cal.,* 49 FLRA 1598 (1994); *VA Medical Center Prescott,* 29 FLRA 1313 (1987); *HQ, Fort Sam Houston,* 5 FLRA 339, 342-345 (1981); *US. DOJ, U S. Penitentiary, Marion, Ill.,* 55 FLRA 1243, 1247 (2000).

VI. Order

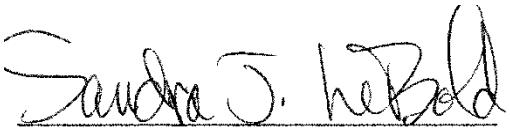
The Union's consolidated bargaining unit of VA non-professional employees is clarified to include the GS-203-5 Staffing Assistant position encumbered by Brett Menzel and Gretchen Bedard; the GS-203-6 Staffing Assistant position encumbered by Amanda Richmond and Zakeia Thomas; and the GS-203-7 Staffing Assistant position encumbered by Manuel Escriche, Cameron Lee, and Connie Folsom.

VII. Right to File an Application for Review

Under section 2422.3l(a) of the Authority's Regulations, a party may obtain review of this action by filing an application for review with the Authority. Pursuant section 7105(f) of the Statute, the application for review must be filed with the Authority "within 60 days after the date of the action." The 60 day time limit contained in section 7105(f) may not be waived or extended.

The contents of, and grounds for, an application for review are set forth in section 2422.3l(b) and (c) of the Authority's Regulations. (www.flra.gov/regulations). The filing and service requirements for an application for review are addressed in Part 2429 of the Authority's Regulations (www.flra.gov/regulations).

The application for review must be filed on or before **September 12, 2017,** and must be filed with Gina K. Grippando, Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Suite 201, 1400 K Street, NW, Washington, D.C. 20424-0001.



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Dated: July 14, 2017