

71 FLRA No. 115

ARKANSAS ARMY NATIONAL GUARD
LITTLE ROCK, ARKANSAS
(Agency)

and

ASSOCIATION OF CIVILIAN TECHNICIANS
(Petitioner/Labor Organization)

and

LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA
LOCAL 1776
(Incumbent/Labor Organization)

AT-RP-19-0025

ORDER DENYING
APPLICATION FOR REVIEW AND
MOTION FOR STAY OF ELECTION

March 2, 2020

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

I. Statement of the Case

In May 2019, the Association of Civilian Technicians (ACT) successfully petitioned for an election to be held to determine representation for a bargaining unit of employees currently represented by the Laborers' International Union of North America, Local 1776 (LIUNA). Following that election, LIUNA objected and Federal Labor Relations Authority Regional Director Rick Jones (the RD) ordered a re-run of the election. LIUNA subsequently requested that the RD order the Agency to provide a corrected employee list so that he could retroactively verify that ACT's showing of interest was adequate. The RD issued a Decision and Order and Direction of Election (order) denying LIUNA's request.

LIUNA filed an application for review (application) of the RD's order, along with a motion to stay the re-run election. For the reasons set forth below, we deny LIUNA's application. Because we deny LIUNA's application, we also deny, as moot, its motion for a stay.

II. Background and RD's Decision

On May 14, 2019, ACT filed a petition with the Atlanta Regional Office seeking to represent a bargaining unit of non-supervisory employees currently represented by LIUNA. The RD determined that ACT's petition provided a sufficient *prima facie* showing of interest. However, after the Agency provided an initial employee list, the RD determined that ACT's initial showing of interest did not include signatures from at least thirty percent of the eligible employees initially identified by the Agency. ACT then provided additional signatures and the RD determined that the showing of interest was adequate.

An election was held on September 4 and 5, 2019. On September 5, 2019, the ballots were counted and ACT received 101 votes, LIUNA received eighty-four votes, and five votes were cast for no union.

Six days later, LIUNA filed objections to the election, and, on December 5, 2019, the RD ordered a re-run election. Although the Agency subsequently provided the RD with an updated employee list,¹ LIUNA discovered that some employees were missing from the list. The Agency investigated and determined that some employees had been omitted due to a computer error.

The Agency provided a corrected employee list before a January 31, 2020 meeting, at which the parties discussed the employee list and an election agreement. At this meeting, the parties agreed to the corrected employee list and certain election procedures. However, LIUNA refused to sign the election agreement unless the RD retroactively verified that ACT's showing of interest was adequate.

On February 5, 2020, LIUNA filed a Request for Reconsideration of Adequacy with the RD, contending that the Agency should provide a new list of eligible employees for the pay period ending immediately before the petition was filed. LIUNA further argued that the RD should retroactively verify that ACT's showing of interest was adequate based on the new list, and alleged that the Agency had failed to comply with 5 C.F.R. § 2422.15.²

¹ The Agency also identified temporary employees and employees on military leave. The parties later agreed that these employees were eligible to vote.

² Section 2422.15(c) of the Authority's Regulations states that "[a]ll parties are required to cooperate in every aspect of the representation process. This obligation includes cooperating fully with the Regional Director, submitting all required and requested information, and participating in prehearing conferences and hearings." 5 C.F.R. § 2422.15(c).

On February 7, 2020, the RD issued the order that is before us. In the order, the RD rejected LIUNA's assertion that the Agency had failed to comply with § 2422.15 of our Regulations, and concluded that there was no reason to review the showing of interest. Accordingly, the RD ordered that the re-run election be held on March 3 and 4, 2020.

LIUNA filed an Application for Review of the Regional Director's Order (application) on February 15, 2020.³

III. Analysis and Conclusions

Under the Authority's Regulations, a RD's determination that a showing of interest is adequate is "final and binding," and is "not subject to collateral attack at a representation hearing or on appeal to the Authority."⁴ It is a well-established principle that the showing of interest serves an administrative purpose in helping to determine whether there is sufficient employee interest to warrant the expenditure of time, effort, and funds to conduct an election.⁵ Accordingly, a challenge to a showing of interest is authorized only under "limited circumstances."⁶

In its application, LIUNA argues that the RD erred by finding that the Agency had not violated § 2422.15 of our Regulations when it provided incomplete information regarding the eligible employees in the bargaining unit.⁷ As a result of this error, LIUNA contends that the adequacy of ACT's showing of interest is "suspect."⁸

LIUNA acknowledges that an RD's adequacy determination is not subject to challenge "[u]nder normal circumstances."⁹ However, it claims that the Authority should order the RD to revisit the adequacy determination in this case based on the Agency's "admission" that it did not provide complete information to the RD,¹⁰ and because failing to review the RD's determination could allow agencies to disregard their obligation to provide accurate employee lists "as a way to manipulate an election petition's adequacy."¹¹

In rejecting LIUNA's claims below, the RD found that the Agency "repeatedly provided lists of employees, attended several meetings, and otherwise cooperated throughout the election process."¹² The RD further found that "[t]here is no evidence that the Agency, intentionally or maliciously, omitted employees from the lists."¹³ And he found that, "[o]nce LIUNA identified concerns about missing employees, the Agency investigated, discovered the database error, and provided a corrected list."¹⁴

Upon review of LIUNA's application, we find no grounds upon which to disregard our Regulations and established precedent, which provide that RD determinations regarding the adequacy of a showing of interest are not subject to collateral review on appeal to the Authority. Accordingly, we deny the application.

IV. Order

We deny LIUNA's application and motion for a stay.¹⁵

³ On February 24, 2020, ACT filed an opposition to the application. The Office of Case Intake and Publication ordered ACT to cure a procedural deficiency underlying its opposition, and the deadline for complying has not yet passed. Because considering the opposition would not change our disposition of the case, we do not find it necessary to delay our decision.

⁴ 5 C.F.R. § 2422.9(b).

⁵ *U.S. Dep't of Transp., U.S. Coast Guard Fin. Ctr., Chesapeake, Va.*, 34 FLRA 946, 949 (1990) (further finding that "[t]he question of union support is conclusively decided by the actual secret ballot election") (citing *NLRB v. Metro-Truck Body, Inc.*, 613 F.2d 746, 750 (9th Cir. 1979)).

⁶ *See, e.g., id.* ("If a Regional Director dismisses a petition or denies intervention, an application for review of the determination regarding the adequacy of the showing of interest may be filed with the Authority.")

⁷ Application at 1 (contending that the "Agency has admitted to violating [§] 2422.15 based on [its] voluntary admission that it did not furnish complete information in response to the [Regional Director]'s initial request for a payroll list").

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ *Id.* at 2 (further arguing that "there is no [Authority] precedent for this situation").

¹² Order at 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Where the Authority denies an application for review on the merits, it also denies any stay request as moot. *U.S. DOD, Pentagon Force Prot. Agency*, 68 FLRA 761, 767 (2015) (citing *U.S. Dep't of the Army, Army Corps of Eng'rs, Eng'g & Support Ctr., Huntsville, Ala.*, 68 FLRA 649, 651 (2015); *U.S. DOD, Pentagon Force Prot. Agency*, 68 FLRA 371, 373 (2015)).

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS
AUTHORITY
ATLANTA REGION**

**ARKANSAS ARMY NATIONAL GUARD
LITTLE ROCK, ARKANSAS
(Agency)**

And

**ASSOCIATION OF CIVILIAN TECHNICIANS
(Petitioner/Labor Organization)**

And

**LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 1776
(Incumbent/Labor Organization)**

AT-RP-19-0025

**DECISION AND ORDER AND DIRECTION OF
ELECTION**

I. Statement of the Case

On May 14, 2019, the Association of Civilian Technicians (ACT) filed the petition in this matter seeking to represent employees of the Arkansas Army National Guard (Agency) and currently represented by Laborers' International Union of North America, Local 1776 (LIUNA). On January 31, 2020, the parties participated in a conference call and agreed to all procedural details of this re-run election. On February 5, 2020, LIUNA filed a Request for Reconsideration of Adequacy (Request for Reconsideration) contending that the Regional Director should verify that the showing of interest submitted by ACT is still adequate following the Agency's revision of the eligibility list. For the reasons discussed below, I am denying LIUNA's request for reconsideration of the adequacy of the showing of interest and directing the re-run election.

II. Findings

On May 17, 2019, the Region determined that ACT satisfied its obligation to provide a sufficient *prima facie* showing of interest. On May 31, 2019, the Agency provided the initial employee list identifying 443 eligible employees. ACT's initial showing of

interest did not include signatures from at least 30% of the 443 eligible employees identified by the Agency. Therefore, ACT provided additional signatures evidencing a showing of interest. The Region determined that, based on this supplemental list, the showing of interest was adequate.

The parties met on several occasions and revised the initial eligibility list. An election was held on September 4 and 5, 2019. The ballots were counted on September 5, 2019. ACT received 101 votes, LIUNA received 84 votes, and 5 votes were cast for no union. On September 11, 2019, LIUNA timely filed objections to the election. On December 5, 2019, the Regional Director ordered the election to be re-run.

On December 13, 2019, the Agency provided an updated list of employees. The Agency identified several temporary employees and indicated that they were ineligible. The Agency also indicated that several other employees were on military leave. The parties subsequently agreed that the temporary employees and the employees on military leave were eligible to vote in the election. However, LIUNA discovered that some employees were missing from the employee lists. The Agency investigated the matter and discovered that, due to an error in its computer system, some employees were not included in the employee lists. The Agency provided a corrected employee list to the parties before the January 31, 2020 meeting.

On January 31, 2020, the parties met to discuss the eligibility list and the election agreement. The parties agreed to the corrected employee list and to the election procedures. The Agency and ACT signed the draft election agreement. However, LIUNA refused to sign the draft election agreement unless the Agency provided a new list of eligible employees for the pay period ending before the petition was filed and the Region verified retroactively that the showing of interest was adequate. It further argues that the Agency failed to cooperate with the investigation by: (1) not providing an accurate list due to the database error; and (2) intentionally omitting temporary employees and other employees that were absent from their position.

III. Analysis and Conclusions

A petition seeking an election for a unit that is already represented by an exclusive representative must state that 30 percent of the employees in the appropriate unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit. 5 U.S.C. § 7111(b)(1)(B). ACT satisfied this statutory obligation when it alleged, in the petition, that 30% of the employees in the unit wish to have an election.

However, the Authority also requires, under 5 C.F.R. §§ 2422.1(a)(3) and 2422.3(c)(2), that the petition include a showing of interest from at least 30% of the employees in the unit. This requirement serves an “administrative purpose in helping to avoid unnecessary expenditure of time and funds where there is no reasonable assurance that a genuine representation question exists and prevents the parties from abusing the Authority’s processes.” *North Carolina Army National Guard, Raleigh, N.C.*, 34 FLRA 377, 383 (1990). According to 5 C.F.R. § 2422.9(b), the Regional Director’s determination that the showing of interest is adequate is final and binding. A party may not challenge the decision in a hearing or on appeal to the Authority. Notably, “the question of union support is conclusively decided by the actual secret ballot election.” *Dep’t of Transp., Coast Guard Fin. Ctr., Chesapeake, Va.*, 34 FLRA, 946, 949 (1990) (*Dep’t of Transp.*) citing *NLRB v. Metro-Truck Body, Inc.*, 613 F.2d 746, 750 (9th Cir. 1979).

LIUNA asserts that the Agency failed to comply with 5 C.F.R. § 2422.15. Section 2422.15 requires all parties to furnish information and otherwise cooperate with the representation proceedings. The Agency has repeatedly provided lists of employees, attended several meetings, and otherwise cooperated throughout the election process. There is no evidence that the Agency, intentionally or maliciously, omitted employees from the lists. The original employee list and subsequent lists consistently included temporary employees and employees absent from their position because they were on military leave.¹ Once LIUNA identified concerns about missing employees, the Agency investigated, discovered the database error, and provided a corrected list.

LIUNA correctly states that the number of employees on the current eligibility list (500) is much higher than the number of employees estimated by ACT when it filed the petition (410). However, the Regional Director determined that the showing of interest was adequate based on the 443 eligible employees initially identified by the Agency. Furthermore, 82 of the employees on the most recent eligibility list were hired after ACT filed the petition. ACT was only required to provide evidence that at least 30% of the employees eligible at the time the petition was filed were interested in an election. *Dep’t of Transp.*, 34 FLRA at 950. Therefore, the fact that the Agency has hired more employees does not call into question the adequacy of the showing of interest.

¹ The Agency did omit, initially, two individuals, the state Adjutant General and Inspector General, that are unquestionably excluded from the bargaining unit.

Therefore, in the circumstances of this case, there is no reason to review the showing of interest.

IV. Order

The parties have agreed to the appropriate unit, all of the procedures in the election, and that the collective bargaining agreement does not bar the election. The attached election agreement that included those procedures was sent to the parties on January 31, 2020, and is incorporated into this order.

Pursuant to section 2422.16(d) of the Regulations, I am hereby issuing this Direction of Election without prejudice to the right of a party to file a challenge to the eligibility of any person participating in the election and/or objections to the election.

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 and Order. The application for review must be filed with the Authority by April 7, 2020, 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.²

Richard S. Jones
Regional Director, Atlanta Region
Federal Labor Relations Authority

Dated: February 7, 2020

² 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.