

73 FLRA No. 180

MARYLAND AIR NATIONAL GUARD
(Agency)

and

INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS
(Labor Organization/Petitioner)

and

ASSOCIATION OF CIVILIAN TECHNICIANS
(Labor Organization/Intervenor)

WA-RP-24-0002

ORDER GRANTING APPLICATION FOR REVIEW
AND REMANDING TO THE REGIONAL DIRECTOR

July 15, 2024

Before the Authority: Susan Tsui Grundmann, Chairman,
and Colleen Duffy Kiko, Member

I. Statement of the Case

In the attached decision and order (decision), Federal Labor Relations Authority (FLRA) Regional Director Jessica S. Bartlett (the RD) found that: (1) certain fire-protection personnel (firefighters) fall within the express terms of a bargaining-unit certification held by the Association of Civilian Technicians (ACT); and (2) severing the firefighters from the bargaining unit that ACT represents (the ACT unit) would not be appropriate. Therefore, she dismissed the International Association of Fire Fighters' (IAFF's) petition for an election to determine whether the firefighters want IAFF to represent them in a separate bargaining unit.

IAFF filed an application for review of the decision (application), arguing, among other things, that the RD failed to apply established law in finding the firefighters fall within the express terms of the ACT unit's certification (the ACT certification). For the reasons discussed below, we agree. Therefore, we grant the application, vacate the RD's decision, and remand the case to the RD for further proceedings.

¹ Decision at 3 (quoting Certification of Representation issued in Case No. WA-RP-80132).

² *Id.* at 3 n.12.

³ *Id.*

II. Background and RD's Decision

In 1999, ACT was certified as the exclusive representative of "All Wage Grade (WG) and General Schedule (GS) Civilian Technicians employed by the Warfield Air National Guard Base, Baltimore, M[aryland]."¹ Before January 2023, firefighters at Warfield Air National Guard Base (Warfield) were employed by the State of Maryland. In January 2023, the firefighter positions at Warfield were converted to Title 5 federal-government positions with the U.S. Department of Defense, Air National Guard.

In October 2023, IAFF filed a petition with the FLRA seeking an election to determine whether the firefighters wanted IAFF to be their exclusive representative. The next month, ACT filed a petition to "amend the language of its existing certification" and change it from covering all WG and GS "[c]ivilian [t]echnicians" at Warfield to all WG and GS "employees" there.² However, ACT subsequently withdrew that petition because the FLRA "could not process the amendment while [IAFF's] petition was ongoing."³ According to the RD, ACT indicated that it intended to refile its petition once IAFF's petition was resolved.

Before the RD, IAFF argued the firefighters do not fall within the express terms of the ACT certification because they are not WG or GS "[c]ivilian [t]echnicians."⁴ In this regard, IAFF argued that civilian technicians are generally required to enlist in the National Guard as a condition of employment, while firefighters are not.

To resolve IAFF's arguments, the RD applied the doctrine set forth in *Department of the Army, Headquarters, Fort Dix, Fort Dix, N.J. (Fort Dix)*,⁵ and assessed whether the firefighters fall within the ACT certification's express terms. The RD found that, before 2017, National Guard units, including the Agency, filled positions under 32 U.S.C. § 709 (Title 32 employees). According to the RD, pre-2017, Title 32 employees were either: (1) dual-status technicians, who were required to maintain membership in a National Guard unit as a condition of their employment; or (2) non-dual-status technicians, who were not required to maintain such membership. The RD also found that, on December 23, 2016, the National Defense Authorization Act (NDAA) for fiscal year 2017 was enacted, requiring National Guard units – including the Agency – to convert all Title 32 non-dual-status technician positions to "Title 5 National Guard Employee" positions by April 1, 2018.⁶ "As a result," the RD determined, "there are now Agency employees that are not required to maintain membership

⁴ *Id.* at 7.

⁵ 53 FLRA 287, 294 (1997).

⁶ Decision at 7.

in the National Guard as a condition of employment[,] and a number of technicians have been converted to non-technician positions.”⁷ The RD found no evidence that those converted employees have not since been included in the ACT unit, and she concluded that “the term ‘technicians’” in the ACT unit description “is outdated and does not reflect the current composition of” the bargaining unit.⁸ Consequently, the RD found the ACT certification “includes all WG and GS employees at” Warfield, and that the firefighters fall within the express terms of that certification. In this regard, she determined that, when the firefighters converted to federal employees, “like all Title 5 GS employees employed by the Agency, they were members of” the ACT unit.⁹

The RD also determined that it would not be appropriate to sever the firefighters from the ACT unit. Therefore, she dismissed IAFF’s petition.

On June 4, 2024, IAFF filed this application.

III. Analysis and Conclusions

IAFF argues the RD failed to apply established law by incorrectly finding the firefighters fall within the express terms of the ACT certification, because that certification covers only “civilian technicians” – and the firefighters “are categorically not civilian technicians.”¹⁰ According to IAFF, the RD improperly, “retroactively expand[ed] and change[d] the . . . certifi[ca]tion . . . in order to dismiss [IAFF’s] petition.”¹¹ IAFF asserts that, if ACT believed the NDAA changed the ACT unit’s composition effective December 23, 2016, then ACT should have filed a unit-clarification petition “to correct the alleged incongruity before the IAFF filed its representation petition nearly five years later.”¹² “That way,” IAFF argues, the FLRA “could have conducted an inquiry through the proper course to determine which,” if any, “non-technician WG or GS employees . . . are also part of” the ACT unit.¹³ IAFF notes that ACT did not do so and, instead, waited to file a petition – later withdrawn – that was “seemingly in direct response to the IAFF’s representation petition.”¹⁴ Further, IAFF contends the RD’s finding that the “technician” classification is outdated is “demonstrably inaccurate,” as that term is often used at Warfield as being distinct from firefighters.¹⁵

As the RD acknowledged, *Fort Dix* stands for the principle that new employees are automatically included in an existing bargaining unit where their positions fall within the *express* terms of a unit certification and where their inclusion does not render the unit inappropriate.¹⁶ In this regard, the express language of the certification is “a determinative factor.”¹⁷

The express terms of the ACT certification include all WG and GS “[c]ivilian [t]echnicians” employed by Warfield.¹⁸ There is no dispute that the firefighters are not civilian technicians. As such, they do not fall within the express terms of the ACT certification.

The RD found the ACT certification was “outdated” because some bargaining-unit technician positions at Warfield were converted to non-technician positions, and there was no evidence that the converted employees have not continued to be included in the ACT unit.¹⁹ Whatever the merits of that finding – an issue that is not currently before us – it does not change that there is no evidence the *firefighters* have *ever* been in the ACT unit.

For these reasons, we conclude that the RD erred, as a matter of law, by applying *Fort Dix* to automatically include the firefighters in the ACT unit. Therefore, we reverse the RD’s decision on this basis.

IAFF also argues that: (1) if the firefighters were part of the ACT unit, then the RD failed to apply established law by not severing the firefighters from ACT’s unit;²⁰ and (2) if established FLRA law or policy supports the RD’s decision, then the Authority should reconsider that law or policy.²¹ Because we reverse the RD for the reasons set forth above, we find it unnecessary to address these additional arguments.

IV. Order

We grant IAFF’s application for review, vacate the RD’s decision, and remand the case to the RD for further appropriate proceedings.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Application at 16.

¹¹ *Id.* at 17.

¹² *Id.* at 17-18.

¹³ *Id.* at 18.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Fort Dix*, 53 FLRA at 294.

¹⁷ *Div. of Mil. & Naval Affs., N.Y. Nat’l Guard, Latham, N.Y.*, 56 FLRA 139, 142 (2000) (citing *Fort Dix*, 53 FLRA at 294-95 (noting the newly created positions fell within the *express terms* of the certification before concluding the positions were within the existing bargaining unit)).

¹⁸ Decision at 3 (quoting Certification of Representation issued in Case No. WA-RP-80132).

¹⁹ *Id.* at 7.

²⁰ Application at 19-32.

²¹ *Id.* at 32-33.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE

MARYLAND AIR NATIONAL GUARD
(Agency)

and

INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS
(Labor Organization/Petitioner)

and

ASSOCIATION OF CIVILIAN TECHNICIANS
(Labor Organization/Intervenor)

WA-RP-24-0002

I. STATEMENT OF THE CASE

On October 11, 2023, the International Association of Fire Fighters, AFL-CIO (IAFF) or “Petitioner”), filed the petition in case WA-RP-24-0002 pursuant to section 7111 of the Federal Service Labor-Relations Statute (Statute), and section 2422.5 of the Authority’s Regulations.¹ The Petition requests that the Federal Labor Relations Authority (Authority) conduct a representation election for certain employees of the Maryland Air National Guard (Agency). However, because these employees are already included in a bargaining unit represented by the Association of Civilian Technicians (ACT) IAFF is ultimately seeking a determination that the petitioned-for employees should be severed from this bargaining unit.

Pursuant to section 7105(e)(1) of the Statute,² the Authority has delegated its powers in connection with the subject case to the undersigned Regional Director. In accordance with section 2422.30 of the Authority’s Regulations,³ I have completed my investigation and concluded a hearing on this matter is not necessary. Based on the record and for the reasons set forth below, I conclude that IAFF’s petition should be dismissed.

II. PROCEDURAL HISTORY

On October 11, 2023, IAFF, filed the petition seeking an election to determine whether the fire protection employees (used interchangeably with

firefighters below) of the 175th Air National Guard, Martin State Airport, Maryland wished to be represented by the IAFF for purposes of collective bargaining.⁴

On October 25, 2023, the Washington Regional Office (Region) instructed the Agency to provide certain information relevant to IAFF’s Petition, including “a statement of your interest in the issues raised by the petition,” and “evidence of the [petitioner’s] incumbent exclusive representative status, such as a copy of the certification of representative and the most recent collective bargaining agreement(s) covering any of the employees affected by the issues raised in the petition.”⁵

On November 7, 2023, the Agency responded to the Region’s request for information related to IAFF’s petition.⁶ In its statement of interest, the Agency objected to IAFF’s petition. Because the petitioned-for employees had recently transitioned from being employed by the State of Maryland to being federal employees of the Maryland Air National Guard, the Agency argued that after the employees transitioned, they were automatically included in the bargaining unit represented by ACT and certified in Case No. WA-RP-80132.⁷ The Agency also stated that,

Although the language used to describe the included vs. excluded employees on our current certification of representative is adequate to include the petitioned-for employees, ACT has informed the agency of its intention to petition the FLRA to make a few minor amendments to that specific language that would reflect up to date appropriate terminology used for all Maryland Air National Guard employees. This change is only technical and will not affect the scope or appropriateness of the existing bargaining unit, nor will it affect employees’ conditions of employment in any way. The agency is not opposed to this anticipated amendment.⁸

The Agency further argued that approval of IAFF’s request for an election would result in fragmentation of the unit and have a negative effect on the efficiency of its operations.⁹

On November 15, 2023, the Association of Civilian Technicians (ACT) requested to intervene in Case No. WA-RP-24-0002.¹⁰ In its request, ACT argues that the fire protection employees at issue fall within the express

¹ 5 C.F.R. § 2422.5.

² 5 U.S.C. § 7105(e)(1).

³ 5 C.F.R. § 2422.30.

⁴ See Petition.

⁵ *Opening Letter* at 1-2.

⁶ *Agency Response (Agency Resp.)* at 1.

⁷ *Id.* at 2

⁸ *Id.*

⁹ *Id.*

¹⁰ See ACT’s Request to Intervene (*ACT Req.*)

terms of its existing certification.¹¹ ACT also indicated that it filed a representation petition to update the language of existing certification.¹² On November 16, 2023, the Region granted ACT's request to intervene in this matter.¹³

On January 18, 2024, the Region issued an Order to Show Cause instructing IAFF to demonstrate, in writing and with evidentiary support, why its petition should not be dismissed. Specifically, the Regional Director ordered IAFF to explain whether severance is warranted because the existing unit is no longer appropriate and/or because unusual circumstances exist which might warrant severance.¹⁴ The Regional instructed IAFF to submit its response by February 2, 2024.¹⁵ On January 24, 2024, IAFF filed a Request of Extension of Time to respond to the Order, and the Regional Director granted an extension until February 16, 2024. IAFF filed its Response to the Order to Show Cause on February 16, 2024.¹⁶

III. FACTUAL BACKGROUND

On March 2, 1999, ACT was certified in Case No. WA-RP-80132 as the exclusive representative of the following unit:

Included: All Wage Grade (WG) and General Schedule (GS) Civilian Technicians employed by the Warfield Air National Guard Base, Baltimore, MD.

Excluded: Professional employee, management officials, supervisors, and employees described in 5 U.S.C. § 7122(b)(1), (2), (3), (4), (6) and (7).¹⁷

ACT and the Agency are parties to a collective bargaining agreement (CBA) dated November 2008.¹⁸ In November 2022, ACT and the Agency agreed to negotiate a new CBA.¹⁹

The petitioned-for unit consists of fire protection personnel that work at the Agency. The Petition states that there are only nine employees in the proposed unit, and IAFF's showing of interest contained nine signatures. However, in the Agency's statement of interest, the Agency stated that there were 18 employees in the proposed unit.²⁰

Prior to January 2023, the petitioned-for employees were employed by the State of Maryland.²¹ The firefighters worked in the 175th Fire and Emergency Services Department (Department) on the Warfield Air National Guard Base. While employed by the State of Maryland, the employees formed IAFF, Local 5044 (Local 5044). However, the fire protection personnel were not represented for the purposes of collective bargaining by any labor organization.²²

In January 2023, the positions encumbered by these employees were converted to Title 5 federal government positions with the U.S. Department of Defense, Air National Guard.²³ Around the same time, the Agency then re-hired the same individuals to fill these newly-transitioned federal positions.²⁴ After the transition, firefighters continued to work at the Department.

After the employees transitioned, they met with an Agency Human Resources (HR) Officer for onboarding and orientation.²⁵ The HR Officer did not inform employees that they were represented by ACT.²⁶ Shortly after the orientation, firefighter Daniel Blake, met with the Jason Hearne, Chief of the 175th Wing Fire Department. During this conversation, Hearne told Blake that fire personnel were not represented by any labor organization.²⁷ The fire protection personnel decided that they wished to be represented by IAFF. The employees then formed IAFF, Local F-319 and elected Blake president.²⁸

In April or May 2023, an employee told Blake that ACT Chesapeake Air Chapter 125 (Chapter 125) represented employees at the Agency and gave him the

¹¹ *Act Req* at 1-2.

¹² ACT filed representation petition WA-RP-24-0005 on November 3, 2023 to amend the language of its existing certification from "All Wage Grade (WG) and General Schedule (GS) Civilian Technicians employed by the Warfield Air National Guard Base, Baltimore, MD" to "All Wage Grade (WG) and General Schedule (GS) employees employed by the Warfield Air National Guard Base, Baltimore, MD." ACT withdrew this petition on November 30, 2023 because the Region could not process the amendment while this petition was ongoing. ACT indicated that plans to refile the petition to amend the language of the certification once the issue in the instant petition is resolved. IAFF was not a party to WA-RP-24-0005.

¹³ See Letter Acknowledging Intervention.

¹⁴ *Order to Show Cause* at 1-2.

¹⁵ *Id.* at 2.

¹⁶ *IAFF Response to Order to Show Cause (IAFF Resp)* at 1.

¹⁷ *Certification in Case No. WA-RP-80132* Ex. 1. The Martin State Airport is located on Warfield Air National Guard Base. See Ex. 5.

¹⁸ *Agency Resp* at 2'

¹⁹ *Id.*

²⁰ *Id.* at 1-2.

²¹ *IAFF Resp* at 3.

²² *Id.* at 2.

²³ *Id.* at 3- 4.

²⁴ *Id.*

²⁵ *Id.* at 4.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

contact information of Chapter 125's President, Eric Hollman.²⁹ On May 5, 2023, Blake emailed Hollman to ask about the bargaining unit status of fire protection personnel and to state their desire to be represented by IAFF. Hollman responded that same day and asked Blake to submit a list of questions.³⁰ Blake responded on May 7, 2023 asking whether the fire protection personnel fell under ACT's bargaining unit and, if so, whether ACT would release the employees from ACT's unit.³¹ On May 16, 2023, Blake sent a follow-up email to Hollman.³² Hollman responded on May 24, 2023 and said he did not have answers yet, that ACT was changing its leadership, and requested questions from the fire protection personnel.³³ Blake responded and said that his only question was whether the fire protection personnel were automatically placed in the ACT bargaining unit. Hollman responded and said that the employees were included in ACT's bargaining unit.³⁴

On May 26, 2023, Blake emailed Hollman to ask if ACT would write a letter releasing fire protection personnel from ACT's bargaining unit. On May 30, 2023, Hollman responded and said that it shouldn't be a problem, but he needed to check with an ACT representative.³⁵ On May 31, 2023, Yvonne Wyatt³⁶ responded to Blake's May 24, 2023 email and said that no one was automatically a member of ACT and that they would have to fill out an SF-1187.³⁷ The next day, Hollman emailed Blake and said, "I apologize. I shouldn't have assumed you were part of our union."

On June 22, 2023, William Michael, new President of Chapter 125 sent an email to all bargaining unit employees, including the firefighters, at the Agency.³⁸ Michael announced that ACT had a new Executive Board. He also attached a copy of the current CBA, said that the CBA was being renegotiated soon, and solicited suggestions for the new CBA.³⁹

On December 13, 2023, Blake contacted Michael and asked ACT to meet with the fire protection personnel.⁴⁰ On December 15, 2023, Michael and Amanda Bates, Vice President of Chapter 125, met with Blake and Nathan Cibrian, Vice President of IAFF, Local F-319.⁴¹ During the meeting Michael told Blake and

Cibrian that ACT was preparing to negotiate a new CBA and that the fire department personnel should provide input as soon as possible.⁴² Blake explained that the current terms of the CBA did not apply to the fire protection personnel.⁴³ Blake explained that the firefighters wished to be represented by IAFF and requested that ACT release the firefighters from its bargaining unit.⁴⁴ According to Blake, Michael said if it was up to him, Chapter 125 would release the firefighters from the unit.⁴⁵

Shortly after the meeting with ACT, Hearne told Blake that ACT recently held a meeting to discuss workplace issues and the CBA.⁴⁶ According to Blake, ACT did not invite the firefighters to this meeting or any of its subsequent monthly meetings.⁴⁷

On January 3, 2024, Michael requested to meet with Blake.⁴⁸ On January 11, 2024, Blake met with Michael and two ACT officers. Michael asked if the fire protection personnel had suggestions for the new CBA, but also said that proposed changes were also being reviewed by ACT attorneys.⁴⁹ After the meeting, Blake "understood that the ACT CBA is being renegotiated without any input from the firefighters and, as a result, the new ACT CBA still will not contain any provisions applicable to firefighters' hours, staffing, pay, schedules, work rules, overtime policies, safety issues, promotions or qualifications, trainings, job requirements, or other conditions of employment."⁵⁰

Blake says that no fire protection personnel has filed a grievance and that they did not know how to file a grievance until June 2023 when they received a copy of the CBA.⁵¹ Further, the conditions of employment set forth in the CBA are not in effect at the fire department.⁵² Whenever there have been workplace issues or disputes, Blake has addressed them with the Agency in his role as President of IAFF, Local F-319.⁵³

IV. ANALYSIS

A. The Fire Protection Personnel are included in the bargaining unit.

The Authority holds that "[n]ew employees are

²⁹ *Id.* at 4-5.

³⁰ *Id.* at 4-5

³¹ *Id.* at 5.

³² *Id.* at 6.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 7.

³⁶ It is unclear whether White was an Agency or ACT representative.

³⁷ *Id.* at 7, 44.

³⁸ *Id.* at 8.

³⁹ *Id.*

⁴⁰ *Id.* at 9.

⁴¹ *Id.*

⁴² *Id.* at 10.

⁴³ *Id.*

⁴⁴ *Id.* at 10-11.

⁴⁵ *Id.* at 11.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 48.

⁴⁹ *Id.* at 49.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 49-50.

⁵³ *Id.* at 13.

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.”⁵⁴ *Fort Dix* is interpreted broadly to include not only to newly hired employees, but also to employees in newly created positions that fall within the express terms of the existing certification.⁵⁵

In this case, IAFF argues that the firefighters do not fall within the express terms of ACT’s certification because the fire protection personnel are not “Wage Grade (WG) and General Schedule (GS) Civilian Technicians” employed by the Warfield Air National Guard Base, Baltimore, MD. To support its position, IAFF argues that technicians are generally required to enlist in the National Guard as a condition of employment, while firefighters are not required to enlist in the military as a condition of employment. IAFF also says that because ACT filed a “clarification petition” on November 3, 2023, it conceded that the firefighters are not included in the express terms of its certification.⁵⁶

Prior to 2017, National Guard units, including the Agency, filled positions pursuant to 32 U.S.C. Section 709 (“Title 32”). Title 32 employees were designated as Dual Status Technicians or Non-Dual Status Technicians. Dual-Status Technicians are required to maintain membership in a National Guard unit as a condition of their employment, and can be separated from employment if they are removed from the National Guard.⁵⁷ Non-Dual Status Technicians were not required to be members of the National Guard.⁵⁸

On December 23, 2016, the National Defense Authorization Act (“NDAA”) for Fiscal Year 2017 was enacted.⁵⁹ In part, the 2017 NDAA required that National Guard units, including the Agency, convert all Title 32 Non-Dual Status Technician positions to Title 5 National Guard Employee positions by October 1, 2017.⁶⁰ Additionally, the 2017 NDAA required a percentage of Title 32 dual status technicians be converted to Title 5 National Guard Employees by April 1, 2018.⁶¹ As a result, there are now Agency employees that are not required to

maintain membership in the National Guard as a condition of employment and a number of technicians have been converted to non-technician positions. There is no evidence to suggest that the converted employees have not been included in ACT’s existing bargaining unit and bound by the terms of its CBA.⁶² Accordingly, I find that the term “technicians” in the current bargaining-unit description is outdated and does not reflect the current composition of the bargaining unit.

Having found that the term “technicians” is outdated, the certification includes all wage grade and general schedule (GS) employees at the Warfield Air National Guard Base. Accordingly, I also find that the fire protection personnel fall within the express terms of ACT’s certification. When the fire protection personnel converted to federal employees, like all Title 5 GS employees employed by the Agency, they were members of the bargaining unit represented by ACT.

IAFF does not dispute that the current unit remains appropriate after the fire protection personnel were transferred, nor did it submit any evidence to show otherwise. Absent any argument or evidence to the contrary—and in light of prior decisions where the Authority found appropriate units comprised of both firefighters and non-firefighters⁶³—there are no grounds to conclude that the existing unit is no longer appropriate.

B. Severance is not appropriate

The issue of severance arises when a petitioner files an election petition seeking to sever or carve out employees from an established bargaining unit.⁶⁴ Any such petition must be accompanied with a 30-percent showing of interest of employees in the petitioned-for unit, not 30 percent of the existing bargaining unit.⁶⁵ Here, IAFF has provided a 50-percent showing of interest for the petitioned-for unit.

The legal framework for analyzing severance claims is well established,⁶⁶ and the Authority has long held that severance is only granted in rare circumstances.⁶⁷ Further, the petitioner seeking severance bears the burden

⁵⁴ *Dep’t of the Army Headquarters, Fort Dix, Fort Dix, N.J.* 53 FLRA 287, 294 (1997) (*Fort Dix*).

⁵⁵ *SSA, Office of Disability Adjudication & Review, Falls Church, Va.*, 62 FLRA 513, 514-15 (2008).

⁵⁶ Here, IAFF misstates the purpose of the petition filed by ACT which was to amend its existing certification.

⁵⁷ 32 U.S.C. Sec 709(b)

⁵⁸ 32 U.S.C. Sec 709(c)

⁵⁹ Public Law 114-328, Sections 932 and 1084

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Agency Resp.* at 2.

⁶³ See *U.S. Dep’t of the Air Force, Carswell Air Force Base, Tex.*, 40 FLRA 221, 223, 229 (1991) (*Carswell AFB*) (finding that

firefighters shared a community of interest with other agency employees even though “some working conditions of the firefighters are distinctive in relation to the rest of the civilian workforce”); *Dep’t of the Navy, Naval Station, Norfolk, Va.*, 14 FLRA 702, 704 (1984) (finding that firefighters “may appropriately be included in [a] comprehensive, Activity-wide unit”).

⁶⁴ *Office of Hearings & Appeals, Social Security Admin.*, 16 FLRA 1175, 1176 (1984).

⁶⁵ *Id.*

⁶⁶ See *DLA Monterey*, 64 FLRA at 498 (*NAS Jacksonville*, 61 FLRA at 142).

⁶⁷ *Portsmouth Naval Shipyard*, 70 FLRA at 1004 (dissenting opinion of Member DuBester).

of presenting evidence that supports such a finding.⁶⁸ Where an existing bargaining unit continues to be appropriate under § 7112(a) of the Statute and there are no unusual circumstances to justify severing the petitioned-for employees from that unit, the petition will be dismissed.⁶⁹ The Authority first explained its rationale for this rule in *Library of Congress*, holding that: “where . . . an established bargaining unit continues to be appropriate and no unusual circumstances are presented, a petition seeking to remove certain employees from the overall unit and to separately represent them must be dismissed, in the interest of reducing the potential for unit fragmentation and . . . promoting effective dealings and efficiency of agency operations.”⁷⁰ As discussed above, I find that the current unit remains appropriate after the inclusion of the fire protection personnel.

The next question is whether any “unusual circumstances” exist which justify severance. The Authority has previously found that unusual circumstances exist where the character and degree of a reorganization resulted in the loss of a community of interest between some employees and the remainder of the unit;⁷¹ where the incumbent union expressly disclaims any further interest in continuing to represent the petitioned-for employees;⁷² and where the incumbent union has failed to adequately represent employees.⁷³

Here, IAFF argues that unusual circumstances exist for two reasons: (1) absent severance, the petitioned-for employees will be denied their right to self-determination under the Statute; and (2) ACT has failed to represent these employees effectively, adequately, or fairly.

- i. The manner in which the petitioned-for employees joined the already-existing unit does not give rise to unusual circumstances.

IAFF’s first argument is that severance must be granted in order to preserve the employees’ right to self-determination. IAFF asserts that “the extraordinary manner” in which the fire protection personnel were

reclassified as GS federal employees effectively denied them to the right to self-determination in accordance § 7102 of the Statute.

IAFF does not cite to any precedent in which the Authority found “unusual circumstances” in a scenario like this one. To the contrary, federal employees are routinely transferred or reorganized into existing bargaining units and the Authority has well-developed case law to address these circumstances.⁷⁴ In fact, the Authority has confronted this very situation—i.e., where a group of new employees were automatically included in an existing bargaining unit because their positions fell within the description of that unit—and concluded that such an outcome was proper.⁷⁵ In fact, the Authority has considered and denied a severance petition filed on behalf of firefighters who (much like the ones seen in this case) “were not employed [by the agency] when the Activity-wide bargaining unit was recognized.”⁷⁶ The Authority also rejected a similar argument to the one seen here: that “the firefighters should be ‘allowed the opportunity to determine for themselves, . . . their collective bargaining representative.’”⁷⁷

Accordingly, the manner in which the petitioned-for employees joined the existing unit does not give rise to unusual circumstances which requires severance.

- ii. ACT has not failed to represent the petitioned-for employees effectively, adequately, or fairly.

IAFF’s second argument is that ACT has failed to represent the firefighters effectively, adequately, or fairly.⁷⁸ The Authority has previously found severance to be appropriate where the incumbent union has failed to adequately represent employees.⁷⁹ For an incumbent union’s representation to be considered inadequate, the incumbent must have essentially abandoned or otherwise treated the petitioned-for employees “unfairly, ineffectively, or differently.”⁸⁰

⁶⁸ *U.S. Dep’t of the Army, White Sands Missile Range, N.M.*, 66 FLRA 285, 287 (2011) (White Sands).

⁶⁹ *DLA Monterey*, 64 FLRA at 498-99 (citing *NAS Jacksonville*, 61 FLRA at 142; *Library of Congress*, 16 FLRA 429, 431 (1984)).

⁷⁰ 16 FLRA at 431.

⁷¹ *See U.S. Dep’t of Labor.*, 23 FLRA 464, 471 (1986) (*DOL*).

⁷² *See Dep’t of the Treasury, Bureau of Engraving & Printing*, 49 FLRA 100, 107-08 (1994) (*BEP*).

⁷³ *VA D.C.*, 35 FLRA at 180.

⁷⁴ *In U.S. Navy, Naval Facilities Eng’g Serv., Port Hueneme, Cali.*, 50 FLRA 363 (1995) (*Port Hueneme*); *BLM, Sacramento, Cal. & BLM, Ukiah Dist. Office*, 53 FLRA 1417, 1422 (1998); *Fort Dix*, 53 FLRA 287, 294 (1997)

⁷⁵ *See Division of Military & Naval Affairs, N.Y. Nat’l Guard, Latham, N.Y.*, 56 FLRA 139, 142 (2000) (*Nat’l Guard Latham*) (“New 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.”) (citing *Fort Dix*, 53 FLRA 287, 294 (1997); *Carswell AFB*, 40 FLRA at 229-30).

⁷⁶ *Carswell AFB*, 40 FLRA at 225.

⁷⁷ *Id.* at 224.

⁷⁸ *IAFF Resp.* at 24.

⁷⁹ *See VA D.C.*, 35 FLRA at 180.

⁸⁰ *Portsmouth Naval Shipyard*, 70 FLRA at 999 (citing *NAS Jacksonville*, 61 FLRA at 142-43; *BEP*, 49 FLRA at 107-08; *Carswell AFB*, 40 FLRA at 231-32).

Here, IAFF claims “there can be no legitimate dispute that the ACT has completely failed to represent the Warfield Fire Fighters effectively or adequately, or that the Warfield Fire Fighters have received different and substandard representation from the ACT compared with the other employees in the ACT’s bargaining unit.”⁸¹ IAFF asserts that since January 2023, “the ACT has failed to undertake any representational activities whatsoever on behalf of the firefighters.” To support this argument IAFF contends that ACT made no attempts to contact the firefighters; failed provide copies of its CBA, constitution, and bylaws; did not identify any of its officers; failed to explain how to file a grievance; and did not provide information about voting in its election. IAFF also argues that ACT has failed to reach out to these employees, and argues that “adequate representation requires, at the very least, some communication with the employees such that the employees know who their union representative is and how to exercise their rights under the collective bargaining agreement.”⁸²

There is no evidence to suggest that the Agency notified ACT or that ACT otherwise knew that the firefighters had been converted to federal employees. In fact, the evidence suggests that ACT was confused about the representational status of the firefighters. While ACT did not affirmatively reach out to firefighters and was slow in responding to Blake’s inquiries, it did not simply ignore the firefighters. In June 2023, ACT sent out an email to Agency employees with the CBA and a copy of the CBA. Further Blake spoke multiple times to both the former and current Union President about the representation status of firefighters.⁸³ While ACT could have proactively communicated with the firefighters shortly after they became bargaining unit members, the lack of initial communication does not establish that the firefighters were precluded from obtaining adequate representation.

Moreover, IAFF essentially argues that it was impossible to obtain representation from ACT, yet provides no evidence that anyone ever actually tried to obtain it. IAFF failed to provide evidence that details the efforts firefighters made to contact ACT for representation or consult the CBA for guidance.

Finally, IAFF argues that severance is warranted because ACT “treats the Warfield firefighters differently, and measurable worse than other employees in ACT’s bargaining unit.”⁸⁴ IAFF notes that firefighters have not been invited to Union meetings and were denied the right to vote in ACT elections. Again, there is insufficient evidence to support these assertions. It is unclear who

(whether all bargaining unit members, only dues-paying members, officers, or some combination thereof) is invited to ACT’s meetings. Further, there is no evidence that a firefighter attempted to attend or even inquired about the meetings.⁸⁵ Similarly, there is no evidence that establishes when ACT’s internal election occurred or who were the eligible voters; the results of the election were shared with the bargaining unit in June 2023.

To support its argument, IAFF points out that the terms of the CBA do not apply to the firefighters and that ACT’s requests for firefighters’ input “were not serious.” In other words, IAFF argues that ACT’s representation is inadequate due to the fact that the existing CBA was written before the firefighters were converted and is therefore not tailored to address those employees’ concerns. In assessing whether an incumbent-union’s representation is adequate, the Authority has previously considered whether any existing negotiated agreements address the specific concerns of the petitioned-for employees.⁸⁶ Here, the CBA, which was executed years before the firefighters joined the Agency, does not address any specific concerns unique to fire protection personnel. However, ACT and the Agency will soon be negotiating a new CBA. ACT officers solicited input from firefighters at least three times; however, there is no evidence that the fire protection personnel submitted proposals or suggestions to ACT. Nor is there any evidence that ACT has refused or will refuse to address the conditions of employment unique to firefighters. Instead, the firefighters assumed that that because Michael stated that proposals were already with ACT’s attorneys that the request was “performative” and “it was too late for fire fighters to meaningfully participate in formulating proposals.”

IAFF argues that the firefighters are effectively precluded from filing grievances because they did not receive a copy of the CBA until June 2023 and the CBA does not apply to them. Again, there is no evidence to suggest that any firefighters have contacted ACT regarding a grievance or other workplace dispute.

IAFF further argues ACT has effectively disclaimed interest in representing the firefighters. To support this argument, the IAFF relies on a separate petition filed and withdrawn by ACT as well as statements made by Chapter 125 officers to Blake.⁸⁷ To be effective, a disclaimer must be made in good faith, be clear and unequivocal, and leave no doubt that a matter relating to the incumbent’s representation does not exist with respect to the bargaining unit.⁸⁸ Throughout the pendency of this petition, ACT has consistently argued that the firefighters

⁸¹ *IAFF Resp.* at 24.

⁸² *Id.* at 24-25.

⁸³ *Id.* at 5-11.

⁸⁴ *Id.* at 28.

⁸⁵ *Portsmouth Naval Shipyard*, 70 FLRA at 999.

⁸⁶ *Library of Congress*, 16 FLRA at 432.

⁸⁷ *Id.* at 28.

⁸⁸ *Department of Defense, Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 14 FLRA 76 (1984).

are part of its existing unit.⁸⁹ Accordingly, ACT has not clearly and unequivocally disclaimed interest in representing the firefighters.

Given the above analysis, this case does not present any of the rare circumstances⁹⁰ seen in the cases where the Authority found that severance was warranted. This conclusion is bolstered by the fact that IAFF filed its petition only ten months after the firefighters converted to positions within the existing unit. This would be a remarkably short period of time in which to conclude that an incumbent-union inadequately represented a petitioner-union,⁹¹ and it would require substantial proof that ACT treated the firefighters in a disparate manner. IAFF's only evidence of such treatment is that ACT did not proactively reach out and establish a relationship with them. This alone—without any accompanying examples of ACT preventing BUEs from participating in Union affairs,⁹² declining to aid BUEs or communicate with them about pending grievances,⁹³ or refusing to allow any members of the fire department to join Union leadership⁹⁴—is insufficient to find that ACT has inadequately represented the petitioned-for employees. In fact, the evidence establishes that bargaining unit employees were resistant to the representation available to them as members of the existing ACT bargaining unit.

Accordingly, because the existing bargaining unit continues to be appropriate and no unusual circumstances exist, I am dismissing this Petition.

V. ORDER

IT IS ORDERED that the petition in this case be dismissed.

VI. RIGHT TO FILE AN APPLICATION FOR 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 (60) days of this Decision. The application for review must be filed with the Authority by June 3, 2024 and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority,

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.

Jessica S. Bartlett
Regional Director

Dated: April 5, 2024

⁸⁹ *ACT Req.* 1-2.

⁹⁰ *Portsmouth Naval Shipyard*, 70 FLRA at 1003 (dissenting opinion of Member DuBester)

⁹¹ *See id.* (“Where the question is whether an incumbent union’s representation has been inadequate, the Authority has held that . . . [an incumbent] must have essentially abandoned” the petitioned-for employees) (quotations omitted) (citing *NAS Jacksonville*, 61 FLRA at 143)); *see also NAS Jacksonville*, 61 FLRA at 143 (assessing whether “the petitioned-for employees have been ‘abandoned’” by the incumbent union).

⁹² *Portsmouth Naval Shipyard*, 70 FLRA at 998 (“A dues-paying member of Petitioner-Union was turned away from a meeting

that he tried to attend—a meeting at which conditions of employment significant to plastic fabricators and shipwrights were discussed.”).

⁹³ *Id.* (“Shipwrights did not hear from their ‘new’ representatives about the status of their pending grievances and when the Incumbent-Union decided not to advance those grievances to Step 3, the shipwrights were not informed until several months later.”).

⁹⁴ *Id.* at 997 (“The Petitioner-Union’s members who were elected Incumbent-Union officers served out their terms, but the Petitioner-Union’s stewards were immediately removed.”).