64 FLRA No. 103

NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION
GODDARD SPACE FLIGHT CENTER
WALLOPS ISLAND FACILITY
WALLOPS ISLAND, VIRGINIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 2755
(Labor Organization/Petitioner)

WA-RP-08-0037

ORDER DENYING
APPLICATION FOR REVIEW

March 19, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This case is before the Authority on an application for review filed by the American Federation of Government Employees (AFGE) under § 2422.31 of the Authority's Regulations. [1] The National Aeronautics and Space Administration (NASA) filed an opposition.

AFGE's application challenges the Regional Director's (RD's) Decision finding that the professional administrative positions at issue are excluded from the bargaining unit represented by AFGE. For the reasons that follow, we deny AFGE's application for review.

II. Background and RD's Decision

In 1971, AFGE filed a petition for an election to determine whether nonprofessional employees at the Goddard Space Flight Center, Wallops Island Facility, Wallops Island, Virginia (Facility) wished to be represented. RD's Decision at 2. The Assistant Secretary of Labor for Labor-Management Relations, who was authorized to supervise representation elections at that time, approved the parties' consent agreement establishing the terms of the election. [2] *Id.* The Facility and AFGE agreed, among other things, that employees in professional administrative (PA) positions would not vote. *Id.* After the election, AFGE was certified as the exclusive representative of the following unit:

> Included: All non-supervisory Wage Grade, Class Act employees of NASA Wallops Station, Wallops Island, Virginia[.]
>
> Excluded: Management officials, supervisors, guards, professionals, employees engaged in Federal personnel work in other than a purely clerical capacity, and employees covered by other exclusive recognition[.]

Id. at 2-3.

An add-on election was conducted in 1998 to determine whether scientists, engineers, and mathematicians, all of whom were professional employees, wished to be included in the bargaining unit. As a result of the election, the description of the unit was changed to:

> Included: All professional scientists, engineers and mathematicians[,] non-supervisory wage grade and class act employees of NASA Goddard Space Flight Center, Wallops Island Facility, Wallops Island, Virginia.

1. Section 2422.31 of the Authority's Regulations provides, in pertinent part:

> (c) *Review.* The Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds:
>
> (1) The decision raises an issue for which there is an absence of precedent;
>
> (2) Established law or policy warrants reconsideration; or,
>
> (3) There is a genuine issue over whether the Regional Director has:
>
> (i) Failed to apply established law;
>
> (ii) Committed a prejudicial procedural error;
>
> (iii) Committed a clear and prejudicial error concerning a substantial factual matter.

2. While the 1971 representation election occurred under Executive Order 11491, the procedure followed by the Assistant Secretary at that time is "essentially the same procedure" that Regional Directors follow under the Statute. RD's Decision at 4.

Excluded: All supervisors, management officials, guards, and employees described in 5 U.S.C. § 7112(b)(2)(3)(4)(6) and (7).

Id. [3]

Subsequently, AFGE sought to clarify the bargaining unit status of certain PA positions. *Id.* at 2. Following a hearing and post-hearing briefing by the parties, the RD concluded that the PA positions at issue were excluded from the current unit. *Id.* at 5. The RD stated that, under existing Authority precedent, the Authority will not clarify the bargaining unit status of positions that the parties' agreed, prior to an election, would be excluded from the bargaining unit, absent meaningful changes to the job duties, functions or circumstances of employees who were excluded from the unit. *Id.* at 4 (citing *Fed. Trade Comm'n,* 35 FLRA 576 (1990) (*FTC*)). The RD found that, since 1971, the evidence did not show that meaningful changes had occurred to the duties, functions, or circumstances of the PA positions at issue. *Id*. Indeed, the RD found that "the [p]arties expressly eschewed the opportunity to introduce evidence concerning the duties of the positions in 1971 and subsequently." *Id.* at 4.

The RD also found that AFGE's reliance on *Department of the Army, Headquarters, Fort Dix, Fort Dix, New Jersey,* 53 FLRA 287 (1997) (*Fort Dix*) was misplaced. *Id.* at 5. The RD noted that *Fort Dix* applies "where new categories of employees who are covered by the existing unit are hired[.]" *Id.* (citing *Fort Dix,* 53 FLRA at 295). According to the RD, the evidence failed to show that one or more new categories of PA employees have been hired since the 1971 election. *Id.* at 4-5.

III. Positions of the Parties

A. AFGE's Application for Review

AFGE alleges that the RD committed a factual error by "mischaracterizing" the PA employees at issue. Application for Review (Application) at 3. AFGE contends that it sought clarification of two different groups of PA positions: those positions that existed in 1971 and those that did not. However, according to AFGE, the RD mistakenly treated the PA positions as a single group. [4] *Id.* at 2-3.

AFGE notes that it is seeking review of the RD's decision *only* with respect to the PA positions created after 1971. *Id.* at 2. AFGE contends that the RD erred by failing to apply *Fort Dix* when he analyzed whether these positions were included in the existing unit. Application at 2-4. According to AFGE, *Fort Dix* provides that "new positions are automatically included in the existing bargaining unit when their positions fall within the express terms of a bargaining unit certification[.]" *Id.* at 4. AFGE maintains that, because the positions created after 1971 are new and fall within the plain language of the current certification, the positions satisfy this test. *Id.*

AFGE also contends that the RD erred in applying *United States Department of Veterans Affairs, Veterans Affairs Medical Center, Allen Park, Michigan*, 43 FLRA 264 (1991) (*VA Allen Park*) because, unlike the situation in that case, the employees here are specifically included in the plain language of the most recent unit certification. *Id.* at 5.

B. NASA's Opposition

NASA contends that the RD did not improperly apply established law in reaching his decision. Opposition at 4. According to NASA, the RD correctly applied *FTC*, rather than *Fort Dix*, to the facts of this case. *Id.* at 4-5. NASA contends that, under *FTC*, AFGE was required to show that the duties or functions of the PA positions had undergone meaningful changes after the unit was certified in 1971. *Id.* at 5. NASA maintains that, because AFGE failed to present evidence of the categories of PA positions and the duties performed by the PA employees in 1971 or subsequently, the employees at issue cannot be included in the unit. *Id.*

Moreover, NASA contends that AFGE has not alleged that the RD committed a clear and prejudicial error concerning a substantial factual matter. *Id.* NASA further notes that AFGE had the opportunity to support its position by presenting additional evidence regarding the duties and positions of the PA employees, but declined to do so. *Id.* at 5-6.

3. The certification also was amended in 1996 to show that a different AFGE local was the exclusive representative of the bargaining unit and to include references to the Federal Service Labor-Management Relations Statute. RD's Decision at 3.

4. AFGE further maintains that the RD mistakenly found as fact that AFGE believed, until shortly before filing the petition in this case, that all of the PA positions were not included in the bargaining unit. *See* Application at 3.

IV. Discussion and Analysis

The RD did not fail to apply established law.

Under 5 C.F.R. § 2422.31(c)(3)(i), the Authority may grant an application for review when an application demonstrates that the RD failed to apply established law. Prior to the election in 1971, the Agency and the Union agreed that employees in the PA positions would not vote in the 1971 election; as a result, the PA positions were excluded from the bargaining unit. Under *FTC*, the Authority will not clarify the bargaining unit status of positions that the parties agreed, prior to an election, would be excluded from the bargaining unit, absent meaningful changes to the job duties, functions or circumstances of employees who were excluded from the unit. *See FTC*, 35 FLRA at 583-84. The RD found that "[t]he evidence does not show that meaningful changes have occurred to the duties, functions or circumstances of the PA employees since the representation election in 1971." RD's Decision at 4.

AFGE does not challenge this finding. Nor does it challenge the RD's holding with respect to positions created prior to 1971. Rather AFGE contends that PA positions created after 1971 should be analyzed under *Fort Dix*, not *FTC*. Application at 2-4. We disagree.

In his decision, the RD held that *Fort Dix* applies "where new categories of employees who are covered by the existing unit are hired[.]" RD's Decision at 5. The RD found, in this regard, that the evidence failed to show which positions existed in 1971 and which were created after that time. *Id.* ("the evidence does not show what PA positions existed in 1971."); ("[t]he evidence . . . does not show . . . that one or more new categories of PA employees were hired . . . since the 1971 representation election"). Aside from making a bare assertion that certain PA positions were created after 1971, AFGE fails to dispute this finding. [5] *See U.S. Dep't of the Navy, Fleet Readiness Ctr. Sw., San Diego, Cal.*, 63 FLRA 245, 252 (2009) (rejecting as bare assertion union's unsubstantiated argument). Moreover, AFGE specifically declined the opportunity expressly provided by the RD to introduce additional evidence, including the duties of the PA positions in 1971 and subsequently. RD's Decision at 4. As a result, because *Fort Dix* could arguably apply only if new positions had been created after the initial election in 1971 and because the Union does not challenge the RD's finding that the evidence failed to show that such positions had been created, the Union has not established that review of the RD's decision is warranted.

Accordingly, we find that the RD did not fail to apply established law. [6]

V. Order

AFGE's application for review is denied.

5. AFGE also alleges that the RD committed a factual error by "mischaracterizing" the PA positions as a single group. Application at 3. AFGE fails to note, however, that the RD did this because he found that the evidence failed to show which positions existed in 1971 and which ones were created after that time.

6. Further, we reject AFGE's argument that the RD erred in applying *VA Allen Park* because the RD's Decision does not reference or cite to *VA Allen Park.*