

67 FLRA No. 78

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
NATIONAL HEARING CENTER
CHICAGO, ILLINOIS
(Agency)

and

PAUL R. ARMSTRONG
(Petitioner/Individual)

CH-RP-13-0031

ORDER DENYING
APPLICATION FOR REVIEW

March 12, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Then-Acting Regional Director of the Federal Labor Relations Authority's San Francisco Regional Office (San Francisco RD), Jean M. Perata, determined that administrative law judges (ALJs) at the Agency's Chicago national-hearing center should be excluded from a bargaining unit of Agency ALJs because they are supervisors within the meaning of the Federal Service Labor-Management Relations Statute (the Statute). A Chicago ALJ (the petitioner) challenged the RD's determination by filing a petition to clarify his bargaining-unit status with the FLRA's Chicago Regional Office. Chicago Regional Director Peter A. Sutton (Chicago RD) dismissed the petition because the petitioner failed to demonstrate that meaningful changes had occurred in his position's duties and responsibilities since the San Francisco RD's decision.

The petitioner filed an application for review (application) of the Chicago RD's decision. The petitioner first contends that the Chicago RD committed a prejudicial procedural error by relying on the San Francisco RD's decision. For the reasons discussed below, we find that this claim is without merit.

The petitioner also claims that the San Francisco RD misapplied established law, which, according to the petitioner, permits the inclusion of supervisors in a

bargaining unit as long as their inclusion does not create a conflict of interest with the duties of other bargaining-unit employees. As discussed below, this claim is also without merit. To the extent the petitioner is contending that the Chicago RD misapplied established law, we find that this claim lacks merit as well.

Finally, the petitioner contends that the decision should be set aside because the Agency has issued a new position description, which establishes that he is not a supervisor. Because this argument was not presented to the RD, we find that the petitioner is precluded from raising this argument in his application.

Because the petitioner presents no other arguments, we deny the petitioner's application.

II. Background

A. The San Francisco RD's decision

In *SSA, Office of Disability Adjudication & Review, Baltimore, Maryland*,¹ the Authority concluded that ALJs at the Agency's national-hearing centers in Falls Church, Virginia and Albuquerque, New Mexico could not be included in a bargaining unit with other Agency ALJs because they are supervisors as defined by the Statute. The Agency subsequently filed a petition to clarify the bargaining-unit status of ALJs in its national-hearing centers in Baltimore, Maryland, St. Louis, Missouri, and Chicago, Illinois. The San Francisco RD concluded that these ALJs also should be excluded from the unit.

Twenty months after the Authority issued this decision, the petitioner filed with the Authority a motion to vacate the San Francisco RD's decision, which the Authority assumed, without deciding, was an application for review. The petitioner claimed that he never received notice of the Agency's petition and should, therefore, be granted an opportunity to challenge the exclusion of his position. Because the Authority's Regulations require a party to file an application for review of a Regional Director's (RD's) decision within sixty days, the Authority dismissed the petitioner's filing as untimely. The petitioner subsequently filed a motion for reconsideration, which the Authority denied.

B. The Chicago RD's decision

In addition to the above challenges, the petitioner filed a petition to clarify the bargaining-unit status of his position with the FLRA's Chicago Regional Office. Because the San Francisco RD had concluded that the petitioner's position should be excluded from the

¹ 64 FLRA 896 (2010).

unit, the Chicago RD issued an order directing the petitioner to show cause why his petition should not be dismissed. The Chicago RD explained that, under Authority precedent, to be included in the unit, the petitioner must demonstrate that “meaningful changes”² had occurred in his position’s “duties and responsibilities.”³

The Chicago RD concluded that the petitioner did not meet this burden. He noted that the petitioner stated that he “did not contradict” the evidence that the San Francisco RD had examined.⁴ Rather, the petitioner contended that he should be included in the bargaining unit because the Agency was not treating the national-hearing center ALJs “as management[.]”⁵ The Chicago RD determined, however, that this argument did not demonstrate meaningful changes in the petitioner’s duties and responsibilities, and he dismissed the petition.⁶

The petitioner then filed this application. The Agency did not file an opposition to the petitioner’s application.

III. Analysis and Conclusions

- A. The Chicago RD did not commit a prejudicial procedural error by enforcing the San Francisco RD’s decision against the petitioner.

The petitioner contends that the Chicago RD erred by dismissing his petition because the Chicago RD impermissibly enforced the San Francisco RD’s decision against him. The petitioner claims that the decision in that matter is invalid because he never received notice regarding the San Francisco RD’s investigation or decision.⁷ The petitioner notes that he presented this claim to the Authority, which “refused to [v]acate” the San Francisco RD’s decision.⁸ And he further notes that he has filed a motion for reconsideration of that decision with the Authority.⁹ According to the petitioner, enforcing an order without providing notice to a party violates “the party’s constitutional right to due process.”¹⁰ We construe the

² RD’s Decision at 3 (citation omitted).

³ *Id.*

⁴ *Id.*

⁵ *Id.* (citation omitted).

⁶ *Id.*

⁷ See Application at 2-3, 5.

⁸ *Id.* at 2.

⁹ *Id.*; see also *SSA, Office of Disability Adjudication & Review, Balt., Md.*, 67 FLRA 297 (March 12, 2014) (*SSA*) (denying motion for reconsideration).

¹⁰ Application at 2 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)); see also *id.* at 2-3 (citing *Leedom v. Kyne*, 358 U.S. 184 (1958); *Eisinger v. FLRA*, 218 F.3d 1097 (9th Cir. 2000); *U.S. Dep’t of the Navy, Human*

petitioner’s claim as an argument that the Chicago RD committed a prejudicial procedural error.¹¹

The petitioner’s argument does not provide a basis for granting his application. Pursuant to § 2422.31(a) of the Authority’s Regulations, an application for review of an RD’s decision must be filed within sixty days.¹² An RD’s decision becomes final if an application for review is not filed within the sixty-day time period.¹³

The San Francisco RD’s decision excluding the ALJs from the bargaining unit became final sixty days after it was issued because no party filed an application for review. Although the petitioner attempted to challenge that decision through an application for review filed twenty months after the San Francisco RD issued her decision, the Authority dismissed the petitioner’s application because it was untimely.¹⁴ And, in *SSA, Office of Disability Adjudication & Review, Baltimore, Maryland*, the Authority denied the petitioner’s motion requesting reconsideration of that dismissal.¹⁵ The Chicago RD, therefore, did not err by enforcing the San Francisco RD’s decision, which was final and binding, against the petitioner.

Accordingly, we find that the petitioner has not demonstrated that the Chicago RD committed a prejudicial procedural error.

- B. Neither the San Francisco RD nor the Chicago RD failed to apply established law.

The petitioner argues that the San Francisco RD’s decision “was based upon an erroneous interpretation of the Statute.”¹⁶ According to the petitioner, the San Francisco RD “misapplied the law”¹⁷ because “cases construing” § 7120(e) of the Statute¹⁸

Res. Serv. Ctr., Nw. Silverdale, Wash., 61 FLRA 408 (2005) (*Navy*)).

¹¹ See *Navy*, 61 FLRA at 412.

¹² See 5 C.F.R. § 2422.31(a).

¹³ See *id.* § 2422.31(e)(1).

¹⁴ See *SSA*, 67 FLRA at 297 (March 12, 2014).

¹⁵ *Id.*

¹⁶ Application at 1; see also *id.* at 3.

¹⁷ *Id.* at 4.

¹⁸ 5 U.S.C. § 7120(e) states, in relevant part:

[The Statute] does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by . . . a supervisor . . . if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

hold that supervisors may be in a bargaining unit as long as their inclusion does not create a conflict of interest with the duties of other bargaining-unit employees.¹⁹ Because the petitioner is challenging the San Francisco RD's application of precedent, we construe his claim as an argument that the San Francisco RD failed to apply established law.²⁰

As noted above, the San Francisco RD's decision excluding the ALJs from the bargaining unit is final and binding. The petitioner may not now challenge the legal sufficiency of the San Francisco RD's decision through his application for review of a *different* decision. Thus, we find that the petitioner is precluded, through this application, from challenging whether the San Francisco RD properly applied established law.

Moreover, to the extent that the petitioner is asserting that the Chicago RD misapplied established law, this contention also provides no basis for granting his application. The only law that the Chicago RD applied was Authority precedent concerning meaningful changes.²¹ But the petitioner does not contend that the RD misapplied this precedent. Nor does he explain how his argument concerning § 7120(e) addresses this precedent. Accordingly, we find that the petitioner has failed to establish that the Chicago RD misapplied established law.

- C. The petitioner's argument concerning a new position description is not properly before the Authority.

The petitioner argues that the Chicago RD's decision should be set aside because the Agency issued a new position description for his position that is identical to those of Agency ALJs that are in the bargaining unit.²² The record does not indicate that the petitioner presented this argument to the Chicago RD. Section 2429.5 of the Authority's Regulations precludes the Authority's consideration of "evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented in the proceedings before the [RD]."²³ Section 2422.31(b) similarly states that "[a]n application may not raise any issue or rely on any facts not timely presented to the . . . [RD]."²⁴

It is unclear whether the Agency created the position description before or after the Chicago RD issued his decision. Assuming the position description existed before the Chicago RD issued his decision, the petitioner had an opportunity to present his argument to the RD. Because the petitioner could have raised his argument at that time, but failed to do so, he may not raise it now.²⁵

Moreover, even if the position description was not created until after the Chicago RD issued his decision, the petitioner is still precluded from relying on it in his application. In this regard, the Authority held that, under a previous, but identical, version of § 2422.31(b), parties were prohibited from raising facts that arise after an RD issues his or her decision because "the Authority may consider only the facts that were before the RD."²⁶ Thus, even if the position description was not created until after the Chicago RD issued his decision, because the position description was not presented to the RD, the petitioner may not rely on it now.²⁷

Accordingly, we find that the petitioner is precluded from raising this argument in his application.

IV. Order

We deny the petitioner's application for review.

¹⁹ See Application at 3 (citing *AFGE v. FLRA*, 834 F.2d 174 (D.C. Cir. 1987); *SSA, Office of Hearings & Appeals*, 59 FLRA 716 (2004)).

²⁰ See, e.g., *SSA, Kissimmee Dist. Office, Kissimmee, FL*, 62 FLRA 18, 22 (2007) (citation omitted).

²¹ See RD's Decision at 3 (citations omitted).

²² See Application at 1; see also *id.* at 5.

²³ 5 C.F.R. § 2429.5.

²⁴ *Id.* § 2422.31(b).

²⁵ See *U.S. Dep't of the Air Force, Offutt Air Force Base, Neb.*, 66 FLRA 616, 622 n.7 (2012) (*Offutt*).

²⁶ *U.S. Geological Survey, Water Resources Div., Se. Region, Caribbean Dist.*, 46 FLRA 832, 842 (1992) (*USGS*) (citations omitted).

²⁷ See *Offutt*, 66 FLRA at 622 n.7; *USGS*, 46 FLRA at 842.