

65 FLRA No. 56

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

and

NATIONAL NURSES UNITED, AFL-CIO
(Petitioner/Labor Organization)

and

UNITED AMERICAN NURSES, AFL-CIO
(Exclusive Representative)

and

JUDIANN CHARTIER
(Interested Party)

WA-RP-10-0039

ORDER DENYING
APPLICATIONS FOR REVIEW

November 23, 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 several applications for review filed by National Nurses United (NNU) bargaining unit members¹ under § 2422.31 of the Authority's Regulations.² The

1. The following individuals filed applications for review: (1) Alice Staggs; (2) Ruby Rose Hutchinson; (3) Donna King; (4) Linda Salvini; (5) Gina McLain; (6) Odell Anderson; (7) Rebecca Johnson; (8) Sandra McMeans; (9) Murrie Davis; and (10) Margaret Thompson.

2. 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;

Petitioner, NNU, and the United States Department of Veterans Affairs (VA) each filed an opposition³ to the applications for review.⁴ Judiann Chartier, to whom the Regional Director (RD) granted interested party status on behalf of her clients, did not file any response to the applications for review.

An election was held in which VA nurses voted to change their affiliation with their exclusive representative from United American Nurses (UAN) to NNU. NNU and UAN subsequently filed a petition requesting that the certification held by UAN for the VA nurses be amended to reflect the bargaining unit's change in affiliation with its exclusive representative from UAN to NNU. The RD granted the petition, finding that NNU met the requisite conditions for the change in affiliation.

For the reasons that follow, we deny the applications for review.

II. Background and RD's Decision

NNU and UAN filed a petition requesting that the certification held by UAN for a unit of nurses working at the VA known as the National VA Council (NVAC) be amended to reflect NVAC's change in affiliation with its exclusive representative from UAN to NNU. RD's Decision at 1. The VA

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- (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.

3. In addition to its original opposition addressing nine of the applications for review, NNU submitted an opposition specifically addressing Thompson's application for review and challenging her standing to file the application. As NNU's arguments in this opposition mirror those made in its original opposition submitted to the Authority, we do not address it further.

4. NNU also submitted two separate supplemental submissions replying to assertions made by the VA in its opposition. Section 2429.26 of the Authority's Regulations requires a party filing supplemental submissions to request permission to file such submissions. 5 C.F.R. § 2429.26. As NNU did not request permission to file either one of its supplemental submissions, we decline to consider them. *See, e.g., AFGE, Local 933*, 65 FLRA 9, 10 (2010) (union's supplemental submission not considered where union did not request permission to file submission).

stated that it agreed with the objective of the petition, “so long as there has been a proper following of the procedures for accomplishing a change in affiliation (i.e.,] *Montrose* procedures).” *Id.* at 2; *see VA Hosp., Montrose, N.Y.*, 4 A/SLMR 858 (1974) (*Montrose*) (setting forth procedures to be followed during a change in affiliation), reaffirmed in *Florida Nat’l Guard, St. Augustine, Fla.*, 25 FLRA 728 (1987). The RD subsequently conducted an investigation.

The RD found that NVAC is a consolidated unit of nurses for twenty-two separate VA facilities in twelve states. *Id.* at 3. The NVAC bargaining unit includes approximately 8,725 bargaining unit employees, 2,403 of whom are dues-paying members. *Id.* at 3-4. The RD further found that UAN and the VA had a master agreement in effect for NVAC (UAN-VA master agreement). *Id.* at 3.

The RD determined that, in 2009, a number of nursing associations affiliated with UAN, including NVAC, began discussing plans to form a national nurses union. *Id.* A secret-ballot vote was conducted in November 2009 among the sixty-three delegates representing various UAN units, including those from NVAC. *Id.* The majority of the delegates who participated in the election supported the formation of NNU. *Id.* After the formation of NNU, a second election was held among NVAC members in early 2010. *Id.* at 7. In that election, the voters overwhelmingly supported the transfer of UAN’s national bargaining rights to NNU. *Id.* at 8.

As required by Authority case law when determining whether to approve an affiliation change in these circumstances, the RD investigated whether appropriate due process procedures were followed in conducting the election. In order to amend a certificate of exclusive recognition to reflect a change in affiliation, the RD noted that the procedures set forth in *Montrose* must be followed. *Id.* (citing *Montrose*, 4 A/SLMR 858; *Fla. Nat’l Guard, St. Augustine, Fla.*, 25 FLRA 728). The RD found that, at a minimum, the Authority requires that: (1) a proposed change in affiliation should be the subject of a special meeting of the members of the incumbent labor organization, called for this purpose only, with adequate advance notice provided to the entire membership; (2) the meeting should be held at a time and place convenient to all members; (3) adequate time for discussion of the proposed change should be provided, with all members given an opportunity to raise questions within the bounds of normal parliamentary procedure; and (4) a vote by the members of the incumbent labor organization on the

question should be taken by secret ballot, with the ballot clearly stating the change proposed and the choices inherent therein. RD’s Decision at 8 (citing *Montrose*, 4 A/SLMR at 860).

The RD determined that the foregoing procedural *Montrose* requirements were satisfied. Specifically, the RD found that NVAC members all received several mailings that described the proposed change in affiliation and that special meetings were held to discuss the change at almost every VA facility. RD’s Decision at 9. The RD also found that NVAC members received adequate notice of each of the meetings and that the meetings provided them with the opportunity to have their questions about the affiliation change answered in person. *Id.* In addition, the RD found that the ballot question was clearly written, and voters understood that the election was being held to decide whether the VA nurses should change their affiliation with their exclusive representative from UAN to NNU. *Id.* at 10.

As required under *Montrose*, the RD also investigated whether the proposed change in affiliation would “affect the continuity of unit employees’ representation . . . [or] leave open any question concerning such representation.” *Id.* at 9. The RD found that substantial information was provided to members over the course of several months which clearly stated that NNU would maintain existing NVAC officers, abide by all agreements entered into by UAN, and maintain the current dues amount. *Id.* at 10. The RD found that there had been no change to the NVAC officers, local officials, and business representatives. *Id.* The RD further found that, regardless of affiliation, the VA continued to work with the same representatives, including NVAC President Alice Staggs, and agreed that it could work with NNU. *Id.* Further, the RD found that NNU had stated that it was willing to adhere to the UAN-VA master agreement. Accordingly, because the procedures used to conduct the election for the change in affiliation met the required standards and there was the requisite continuity of representation, the RD granted the petition. *Id.*

III. Positions of the Parties

A. Applications for Review

The individuals filing applications for review (Applicants) make largely identical claims. The Applicants assert that NNU has not conducted itself as it said it would before the RD granted the petition

changing the bargaining unit employees' exclusive representative affiliation from UAN to NNU. Specifically, the Applicants claim that, since the RD's decision to grant the petition, NNU has changed the structure of NVAC. *See, e.g., King Application at 1.* In this regard, the Applicants point to NNU's removal of NVAC President Alice Staggs, NVAC Manhattan Local President Cathy Benjamin-Bovell⁵, and business representative Hector Ramos, even though a document included in the ballot package stipulated that NVAC's leadership would remain the same until elections could be held. *See, e.g., Staggs Application at 2; Johnson Application at 2.* The Applicants argue that they did not agree to these changes. *See, e.g., McMeans Application at 1-2.* At least one Applicant claims that NNU has acted in "bad faith" and "violat[ed] . . . continuity of representation" by effecting these changes. McLain Application at 1. And another Applicant claims that NNU's conduct does not comply with an October 28, 2009 internal memorandum and a document distributed prior to the election, entitled, "Q & A Regarding Legal and Governance Issues Raised by UAN NVAC," which sets forth questions and answers about the transferring of bargaining rights from UAN to NNU. Hutchinson Application at 2.

The Applicants also explain that NNU has effected several other changes outside of the above-mentioned removals. For example, NNU has asked that NVAC presidents change their titles and that NVAC refer to its other officers as "stewards." Salvini Application at 4, 6. NNU has also eliminated the office of Vice President, allegedly in violation of the UAN-VA master agreement to which it is bound. Johnson Application at 3. In addition, NNU informed NVAC that NVAC's by-laws would need to be replaced by "guidelines," even though, prior to the RD's decision, NNU had stated that NVAC's by-laws would remain in place. *See, e.g., Salvini Application at 4.* Also, most of the Applicants mention that NNU has taken control of the local treasuries and is holding that money in escrow for the local organizations. *Id.*

Several of the Applicants note NNU's claim that at least some of these changes were made in response to an ongoing Department of Labor (DOL) investigation. *See, e.g., Salvini Application at 4; Johnson Application at 1-2.* Several Applicants explain in this regard that NNU claims that DOL suspects that local NVAC units are in violation of

reporting requirements, and that the changes NNU has undertaken are necessary to show DOL that the individual NVAC units are not "individual unions." Thompson Application at 1; Davis Application at 1. Several of the Applicants also note that, despite NVAC's request that NNU provide documentary evidence of DOL's investigation requiring these changes, NNU refused to provide any such documentation. Davis Application at 2. Accordingly, the Applicants ask that the Authority "reverse" the RD's decision to grant the petition to change NVAC's affiliation with its exclusive representative from UAN to NNU. *See, e.g., McLain Application at 1; Hutchinson Application at 1; Anderson Application at 1.*

B. NNU's Opposition

NNU makes three claims in its opposition. First, NNU contends that none of the Applicants are parties to this case under the Authority's Regulations and that they therefore lack standing to file applications for review. NNU Opp'n at 2, 5-7. NNU argues that each Applicant filed the application for review on her own individual behalf. In NNU's view, the Applicants do not qualify as "parties" under the Authority's Regulations because none of them are petitioners, charged parties, respondents, or intervenors in the proceeding.⁶ *Id.* at 7. According to NNU, as only a "party" may file an application for review with the Authority,⁷ and as none of the Applicants meet the Authority's definition of a "party" under the Authority's Regulations, the Applicants do not have standing to file their applications for review. *Id.* at 7-8.

6. *See* 5 C.F.R. § 2421.11, defining a "party," as relevant here, as:

- (a) Any labor organization, employing agency or activity or individual filing a charge, petition, or request;
- (b) Any labor organization or agency or activity
 - (1) Named as
 - (i) A charged party in a charge,
 - (ii) A respondent in a complaint, or
 - (iii) An employing agency or activity or an incumbent labor organization in a petition;
 - (2) Whose intervention in a proceeding has been permitted or directed by the Authority[.]

5. Some of the Applicants explain that Ms. Benjamin-Bovell was returned to her position shortly after being removed. *See, e.g., Salvini Application at 6.*

7. *See* 5 C.F.R. § 2422.30(d), *Appeal of Regional Director Decision and Order*, which provides that "[a] party may file with the Authority an application for review of a Regional Director Decision and Order."

Second, NNU argues that the applications should be denied because the Applicants have failed to satisfy the criteria necessary for review set forth in 5 C.F.R. § 2422.31.⁸ *Id.* at 2. Rather, NNU argues, the Applicants are “complain[ing] about an extraneous, internal union event that occurred subsequent to the [RD’s] Decision.” *Id.* According to NNU, “[t]he only argument advanced in support of the applications for review is based on the removal of Staggs as NVAC president following her extended and indefinite leave of absence from the VA.” *Id.* at 9. NNU argues that “the Authority’s practice in representation cases requires an assessment of the record based on the circumstances existing at the time of the hearing.” *Id.* (emphasis omitted) (quoting *U.S. Dep’t of the Army, U.S. Dep’t of Def., Fort Detrick, Md.*, 62 FLRA 407, 409 (2008); and citing *N.M. Army & Air Nat’l Guard*, 56 FLRA 145, 149 (2000)). NNU further alleges that the Authority’s inquiry must focus on whether a question concerning representation existed at the time of the RD’s investigation into the matter. *Id.* Staggs was removed after the RD’s investigation and decision to grant the petition. Therefore, NNU claims that the issues raised by the applications do not raise a question of representation. *Id.* at 9-10.

Third, NNU argues that, even if the Authority considers the applications for review, it must deny them because none of the applications sets forth a basis to grant review. According to NNU, the RD correctly found that the *Montrose* requirements were met and the change in affiliation has not affected bargaining unit members’ continuity of representation. *Id.* at 10. NNU alleges that there is no Authority precedent providing that continuity of representation must last indefinitely. *Id.* at 10. Furthermore, NNU claims that it has maintained continuity of representation. *Id.* at 9. NNU explains that, with the exception of Alice Staggs, whose position was filled by NVAC’s former vice-president, “all of the national positions representing [VA nurses] continue to be filled by the previous NVAC officers.” *Id.* at 6. According to NNU, Staggs’ removal has not undermined the continuity of representation for VA nurses. *Id.* at 10-11. NNU also notes that it continues to adhere to the UAN-VA master agreement and the VA continues to deal with NNU in all representational matters. Therefore, as substantial continuity of representation still exists, NNU requests that the Authority deny the applications for review. *Id.*

C. VA’s Opposition

The VA claims that the change in affiliation from UAN to NNU has had no effect on its relationship with the local bargaining units. VA Opp’n at 6. The VA further contends that the change in affiliation will not interfere with its mission, statutory labor obligations, or ability to adhere to the UAN-VA master agreement. *Id.* However, the VA is concerned that material facts may be in dispute regarding whether there is continuity of representation. Therefore, the VA asks that the Authority remand this matter to the Authority’s San Francisco Regional Office for additional factual investigation and review. *Id.* at 7.

IV. Analysis and Conclusions

A. The Applicants have standing to seek review of the RD’s decision.

For the following reasons, we find that the Applicants have standing to seek review of the RD’s decision.

NNU argues that the Applicants lack standing to seek review of the RD’s decision because they do not qualify as “parties” under § 2422.31(a) of the Authority’s Regulations. However, the Authority rejected this argument in *United States Department of the Navy, Human Resources Service Center Northwest, Silverdale, Washington*, 61 FLRA 408 (2005) (*Navy*).

In *Navy*, an agency employee filed an application seeking review of an RD’s decision that clarified several bargaining units following an agency reorganization. The union challenged the applicant’s standing to file the petition, arguing that he was not a party under the Authority’s Regulations. *See Navy*, 61 FLRA at 409. The Authority found that the applicant had standing to file the application for review under § 7105(f) of the Federal Service Labor-Management Relations Statute (the Statute) as an “interested person.” *See Navy*, 61 FLRA at 410-11.

Section 7105(f) of the Statute provides that “the Authority may, upon application by any interested person filed within 60 days after the date of the action,” review actions of the RD in representation matters. Since the applicant in *Navy* was an agency employee, and since that employee’s exclusive representative was changed as a result of the decision, the Authority found that he was an interested person under the Statute and that he therefore had standing to file the application for

8. *See supra* at n.2.

review. *Id.* Similarly, here, as the Applicants are employees whose exclusive representative was changed as a result of the RD's decision, we find that the Applicants are interested persons under the Statute and that they therefore have standing to file applications for review.

- B. The applications for review do not demonstrate that review is warranted on one of the required grounds set forth in § 2422.31.

Under § 2422.31(c) of the Authority's Regulations, 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; or (iii) committed a clear and prejudicial error concerning a substantial factual matter.

The Applicants do not assert that review is warranted on any of the grounds set forth in § 2422.31(c) of the Authority's Regulations. Moreover, the record does not show that the Applicants intend to make any such claim. Instead, the Applicants ask the Authority to reverse the RD's decision based on events that took place after the RD completed the investigation and subsequently granted the petition. *See, e.g.,* Staggs Application at 1. The Applicants do not challenge the RD's decision to grant the petition and concede that they agreed to the change in affiliation based on the information that was presented to the RD and on which the RD made his decision to grant the petition. *See* Salvini Application at 7. Therefore, as the Applicants fail to challenge the RD's decision to grant the petition, and absent any other claim that comports with the requirements for review set forth in § 2422.31(c) of the Authority's Regulations, we find that review of the RD's decision is not warranted under the Authority's Regulations and deny the applications for

review.⁹ *See U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Fayetteville, N.C.*, 65 FLRA 191 (2010) (application denied for failing to assert any grounds for review set forth in § 2422.31(c), including any challenge to RD's determinations).

V. Order

The applications for review are denied.

9. As we deny the applications for review for failing to assert grounds for review pursuant to § 2422.31(c) of the Authority's Regulations, we find that it is unnecessary to address NNU's claim that it has maintained continuity of representation. For the same reason, we also find that it is unnecessary to address the VA's request that the Authority remand this matter to the Authority's San Francisco Regional Office for additional factual investigation and review.