

67 FLRA No. 52

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
(Petitioner/Union)

and

UNITED STATES
SMALL BUSINESS ADMINISTRATION
DISASTER ASSISTANCE PROCESSING AND
DISBURSEMENT CENTER LEGAL CLOSING AND
QUALITY ASSURANCE AND TRAINING
FORT WORTH, TEXAS
(Agency)

DA-RP-13-0001

ORDER DENYING
APPLICATION FOR REVIEW

January 28, 2014

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

I. Statement of the Case

The Union filed a petition seeking an election among “core”¹ attorneys and paralegals of the U.S. Small Business Administration (SBA), Disaster Assistance Processing and Disbursement Center (PDC). The Union sought the election to determine whether those employees wish to be added to an existing SBA consolidated unit comprised of professional and non-professional SBA employees (SBA consolidated unit) represented by the Union.² As relevant here, Federal Labor Relations Authority Regional Director (RD) James E. Petrucci denied the petition, concluding that inclusion of the petitioned-for attorneys and paralegals would not create an appropriate unit as required under the Federal Service Labor-Management Relations Statute (the Statute). The Union filed an application for review (application) of the RD’s decision.

The main questions before us are whether the RD failed to apply established law in determining that a unit including the petitioned-for employees would not be appropriate or made clear and prejudicial errors

concerning substantial factual matters. As the Union does not demonstrate that the RD erred, the answer is no.

II. Background and RD’s Decision**A. Background**

The RD found the following:

The SBA is an independent agency of the federal government, created to aid, counsel, assist, and protect the interests of small businesses. The SBA’s mission is to assist small businesses by providing: government-backed guarantees for certain loans to small businesses, financial and federal contract procurement assistance and management assistance to small businesses, and specialized outreach and assistance to women, minorities, and armed forces veterans.

The SBA accomplishes this mission through a network of regional and district offices. The SBA Administrator heads the agency, and the Associate Administrator of the Office of Field Operations is the “locus of authority for the SBA [r]egional[-] and [d]istrict[-]office employees.”³ The SBA employs approximately 2,100 full-time, permanent employees in ten regions and sixty-eight district offices.

The Office of Disaster Assistance (ODA) is a “separate organization” within the SBA.⁴ The ODA’s mission is to offer low-interest, fixed-rate loans to individual disaster victims, enabling them to repair or replace property that is damaged or destroyed in a declared disaster. The ODA also offers these loans to small businesses and nonprofit entities to assist in their recovery from economic injury caused by such disasters.

The ODA accomplishes this mission through five permanent field offices of its own. Each has a unique functional responsibility within the ODA. For instance, one of the five field offices is the ODA’s Personnel and Administrative Services Center (Personnel Center). The Personnel Center “provides personnel and administrative services to the [ODA offices].”⁵ Another field office is the PDC – where the petitioned-for attorneys and paralegals are “responsible for the generation of loan documents and the closing and disbursement of loans.”⁶ “The employees of the ODA report to different supervisory hierarchies than the SBA field office employees[,] and the locus of authority [for ODA employees] lies with the Associate

³ *Id.* at 3.

⁴ *Id.* at 4.

⁵ *Id.* at 5.

⁶ *Id.* at 6.

¹ RD’s Decision at 7.

² *Id.* at 1, 7.

Administrator for the ODA.”⁷ Although the ODA operates independently of the SBA’s regional and district offices, with full responsibility for its own operations (including personnel matters), it is still subject to control by the SBA Administrator.

The ODA employs varying numbers of employees, depending on the number and severity of disasters that are declared by the President of the United States, state Governors, the Secretary of Agriculture, and the SBA Administrator. Declared disasters average around 300 per year and are of differing severity. The ODA workforce is composed of permanent, cadre, term-seasonal, term-intermittent, and excepted-service employees. “[C]ore” employees within the ODA’s PDC consist of cadre employees, term-seasonal employees, and excepted-service attorneys.⁸ Cadre employees are full-time-equivalent employees, on seasonal schedules, who sign employment agreements stating that: they may be released to non-pay status subject to the ODA’s needs; they may be required to work up to fourteen hours per day, seven days per week; and their geographic location may be changed according to the ODA’s needs. Term-seasonal employees have non-status appointments for a period of more than one year and may be extended up to a total of four years, depending on the ODA’s needs. Those employees also sign employment agreements stating that they: may be placed in a non-pay status; may be required to work up to fourteen hours per day, seven days per week; and must be available to report to work within forty-eight hours of notification to anywhere in the United States or its territories. Excepted-service attorneys are employees that are hired outside of the competitive process. They may be cadre or term-seasonal employees. The ODA hires those employees on a temporary basis through time-limited appointments. Those employees are placed on a full-time schedule, but may be released at any time before their appointment expires.

The Union is the exclusive representative of a consolidated bargaining unit of professional and non-professional SBA employees. The unit consists primarily of the SBA’s regional- and district-office employees of its office of field operations. As relevant here, the Union filed a petition seeking an election among “core” attorneys and paralegals of the ODA’s PDC, to determine whether those employees wish to be added to the existing SBA consolidated bargaining unit.

B. RD’s Decision

The RD analyzed the three criteria the Authority considers when determining whether a unit is appropriate under the Statute – a clear and identifiable community of interest among employees in the unit, effective dealings with the agency, and the efficiency of agency operations – to determine whether adding ODA’s PDC attorneys and paralegals to the SBA consolidated unit would create an appropriate unit as required under the Statute.

In considering each of these criteria, the RD expressly considered the Union’s claims that the SBA and the ODA’s PDC employees support the same mission – helping small business owners. In particular, the RD considered the Union’s claim that the SBA and its ODA component have the same mission because the SBA’s strategic plan lists goals for the ODA among the overall SBA goals, and that such goals contemplate the use of non-disaster staff to support disaster recovery, if needed. The RD also recognized the Union’s assertions that SBA and ODA employees: (1) are subject to the same chain of command because the ultimate authority for all employees rests with the SBA Administrator; (2) have similar or related duties, job titles, and work assignments (noting that there are attorneys and paralegals employed with the SBA, as well as attorneys and paralegals employed with the ODA’s PDC); (3) are subject to the same general working conditions (noting that the SBA and its ODA use the same email system and their respective sections on the SBA website are overseen by the SBA chief information officer); and (4) are governed by the same, agency-wide personnel and labor-relations policies administered by the SBA office of human resources (noting that the SBA office of human resources delegated its authority to its ODA personnel office). The RD also considered the Union’s claims that the SBA performance-appraisal system includes a customer service element that is common to all SBA employees, and that the SBA and ODA’s PDC employees are covered by the same equal employment opportunity (EEO) policies. Finally, the RD considered the Union’s contention that ODA’s PDC cadre employees work regular, Monday-through-Friday forty-hour work weeks “absent significant disaster activity,” and that they are a stable and consistent workforce, even though they are not permanent employees.⁹ Specifically, the RD noted the Union’s claim that the ODA’s PDC had not placed cadre employees in a non-pay status for the past nineteen years.

Despite the above, the RD concluded that numerous factors indicate that the SBA and its ODA’s PDC employees do not share a community of interest. He first found that the SBA and its ODA share

⁷ *Id.* at 5.

⁸ *Id.* at 7.

⁹ *Id.* at 12.

the same mission in that the SBA guarantees bank loans to small businesses, whereas its ODA has the unique mission of lending funds directly to individuals and small businesses that are affected by disasters. He concluded that, while the SBA's strategic plan included a goal that non-disaster staff would be used to support disaster recovery, if necessary, the record did not establish that this has ever occurred.

The RD also found that all SBA employees are full-time permanent employees, but that there are no full-time permanent employees within the core ODA's PDC employees that the Union seeks to add to the existing bargaining unit. In a similar vein, the RD found that the SBA employees work a regular, forty-hour, Monday-through-Friday work schedule and rarely work overtime. But, while ODA's PDC employees work similar schedules when there are no immediate disasters, when disasters are declared, they are required to work seven days a week for up to fourteen hours per day to meet the ODA's needs. During those times, he found that they are required to work a vast amount of overtime, requiring the Associate Administrator for Disaster Assistance to issue a waiver of the bi-weekly premium pay limitation – an authority that applies only to ODA employees.

In addition, in considering the SBA its ODA as a whole (not just the existing bargaining unit and the organization containing the petitioned-for employees), the RD noted that while there are some job classifications common to the SBA and its ODA, there are many employees whose skills, training, and experience are such that their primary opportunities for transfer or promotion are only within the organization for which they work – either the SBA or its ODA. Further, he noted that SBA employees and ODA employees do not: work in geographic proximity to one another; share common facilities, such as cafeterias, parking spaces, work spaces, break areas, etc.; or interchange work assignments. He also noted that the SBA and its ODA do not exchange employees.

The RD also found that there are several areas in which ODA employees are treated differently than SBA employees. For instance, he found that while the same performance-review system is used for all employees, performance appraisal records for ODA term-seasonal employees are not entered into the electronic system, but are kept in paper files. He also noted that SBA employees' Official Personnel Files (OPFs) are kept at the USDA National Business Center, while ODA employees' OPFs are kept at the ODA Personnel Center.

Furthermore, the RD found that the ODA is a separate and independent component of the

SBA – unconnected with the SBA's regional and district offices and the SBA office of field operations. He also found that the ODA sets general personnel and workplace policies applicable to ODA's PDC attorneys and paralegals, while the SBA office of field operations sets policies applicable to SBA employees.

Accordingly, the RD concluded that certain community-of-interest factors concerning common mission, common general working conditions, geographic proximity, common organizational structure and chain of command, and common personnel and labor-relations policies are not present. He therefore found that the ODA's PDC attorneys and paralegals do not share a community of interest with the SBA employees in the consolidated unit.

The RD next concluded that numerous factors indicate that adding the ODA's PDC attorneys and paralegals to the consolidated unit would not promote effective dealings and the efficiency of agency operations. Specifically, the RD found that the SBA and the ODA are “funded separately and have different organizational structures and chains of command.”¹⁰ He also found that the SBA and its ODA do not interchange work assignments or employees, and noted again that the SBA and its ODA have separate personnel offices, each managing its own personnel and labor-relations matters. In particular, he found that employment decisions, such as hiring, firing, promotions, transfers, and grievance handling “are made separately by the SBA and the [ODA's PDC] for their respective employees.”¹¹

The RD also determined that the way in which the SBA and its ODA carry out their work is very different. In this respect, he noted that the SBA carries out its guaranteed-loan program through district offices that report to regional offices, which report to the Associate Administrator for Field Operations. In contrast, the ODA carries out its disaster loan-making program using five component offices that report directly to the Associate Administrator for Disaster Assistance, who then reports to the SBA Administrator. Moreover, the RD found that employees of the SBA regional and district offices all do similar work in differing geographical locations, while employees of the five components of the ODA carry out differing functions depending on their component office, and they carry out those functions for the entire United States and its territories. The RD also noted that the SBA process is somewhat predictable, but that the mission and work of the ODA is unpredictable and depends upon the number and severity of disasters that occur.

¹⁰ *Id.* at 17.

¹¹ *Id.* at 18.

Finding that adding the ODA's PDC attorneys and paralegals to the SBA consolidated unit "would not result in a unit [that] is rationally related to the structure of the SBA and ODA," the RD concluded that creating such a unit would unnecessarily "hamper[]" Agency operations.¹² Consequently, the RD found that the proposed unit would not promote effective dealings and the efficiency of Agency operations. The RD thus concluded that the Union's proposed unit did not meet the Statute's appropriate-unit criteria, and he denied the Union's petition.

The Union filed an application, and the Agency filed an opposition to the Union's application.

III. Analysis and Conclusion: The RD neither committed clear and prejudicial errors concerning substantial factual matters nor failed to apply established law.

Under § 7112(a) of the Statute, a unit is appropriate if it: (1) ensures a clear and identifiable community of interest among the employees in the unit; (2) promotes effective dealings with the agency involved; and (3) promotes the efficiency of operations of the agency involved.¹³ A proposed unit must meet all three criteria to be appropriate.¹⁴

The Union alleges that the RD committed factual and legal errors relating to each of the three appropriate-unit criteria.¹⁵ As to the community-of-interest criterion, the Union asserts that the RD made incorrect factual findings and "failed to consider and weigh" certain evidence, and that these errors were prejudicial.¹⁶ The Union also asserts that the RD failed to apply established law.¹⁷

In considering whether employees share a clear and identifiable community of interest, the Authority examines such factors as geographic proximity, unique conditions of employment, distinct local concerns, degree of interchange between other organizational components, and functional or operational separation.¹⁸ In addition, the Authority considers factors such as whether the employees in the proposed unit are a part of the same organizational component of the agency; support the same mission; are subject to the same chain of command; have similar or related duties, job titles, and work

assignments; and are subject to the same general working conditions.¹⁹ No single community-of-interest factor is dispositive.²⁰ Additionally, the Authority has not specified the weight to be accorded the various factors.²¹ Consistent with these principles, the Authority has made determinations regarding the factors on a case-by-case basis after examining the totality of the circumstances.²²

Specifically, the Union claims that the RD incorrectly found that the SBA and its ODA do not share the same mission.²³ According to the Union, this finding is not supported by the evidence because the SBA strategic plan lists disaster assistance as a part of the Agency's overall strategic goals.²⁴ The Union alleges that the RD similarly erred in finding differences in the nature of employee appointments within the SBA consolidated unit and its ODA's PDC.²⁵ The Union claims that this finding is not supported by the record, and that the RD failed to recognize that the ODA's PDC cadre employees have not been placed in a non-pay status for nineteen years.²⁶ The Union claims that this fact demonstrates that even though ODA's PDC employees do not have permanent appointments, they do have long-term, uninterrupted appointments.²⁷

Next, the Union claims that the RD erred in finding a distinction between the work schedules of the SBA employees and the petitioned-for ODA's PDC employees.²⁸ The Union argues that the RD failed to recognize that even though the ODA's PDC employees are required to work up to seven days per week, up to fourteen hours per day during times of disaster – this only occurs on intermittent occasions when disasters are declared (like the disaster declarations related to hurricanes Katrina and Sandy).²⁹ The Union points out that the ODA's PDC employees otherwise work the same forty-hour week, Monday through Friday schedule, as the SBA employees.³⁰

The Union argues that the RD erred because he found that the ODA is separate from the SBA, even though both organizations ultimately report to the SBA Administrator.³¹ In addition, the Union claims that

¹² *Id.* at 18-19.

¹³ *U.S. Dep't of the Navy, Fleet & Indus. Supply Ctr., Norfolk, Va.*, 52 FLRA 950, 959 (1997) (*FISC*).

¹⁴ *E.g., U.S. Dep't of Commerce, U.S. Census Bureau*, 64 FLRA 399, 402 (2010).

¹⁵ Application at 3-9.

¹⁶ *Id.* at 3-9, 15

¹⁷ *Id.*

¹⁸ *FISC*, 52 FLRA at 961.

¹⁹ *See id.* at 960-61.

²⁰ *U.S. Dep't of the Air Force, Travis Air Force Base, Cal.*, 64 FLRA 1, 7 (2009) (*Travis*).

²¹ *Id.*

²² *Id.*

²³ Application at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 3-4.

²⁷ *Id.* at 4.

²⁸ *Id.* at 6.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 4 n.4.

the RD erred because he considered the job titles and duties of employees other than those in the SBA consolidated unit and the petitioned-for ODA's PDC component, and because he failed to recognize that both the SBA and its ODA's PDC employ attorneys and paralegals, all of whom perform some type of work regarding disaster loans.³² The Union also claims that the RD failed to consider that the SBA has a field office in Dallas, Texas – in close geographic proximity to the petitioned-for employees who are located in Fort Worth, Texas.³³ The Union further claims that the RD improperly considered that term-seasonal employees' performance appraisals are kept in paper form, instead of on the SBA's electronic system.³⁴

Moreover, the Union claims that the RD made incorrect factual findings and determinations in concluding that the SBA district and field operations offices are separate and independent from the ODA because: (1) SBA employees service the disaster loans made and disbursed by the ODA; (2) the SBA's standard operating procedures for employment apply equally to ODA employees; (3) personnel policies for all employees issue from SBA headquarters; (4) the SBA EEO office processes complaints from all employees; (5) the SBA administers the Agency's administrative-grievance procedure; (6) SBA and ODA employees are subject to the same performance-appraisal system, which is dictated by SBA headquarters; and (7) while the ODA Associate Administrator issues policies for ODA employees, his authority is based only upon a delegation of authority from the SBA Administrator.³⁵

As noted above, the Union asserts that each of these claims demonstrates that the RD committed prejudicial factual errors, failed to properly consider and weigh the evidence, and misapplied Authority precedent.³⁶ However, while the Union's claims dispute a number of the RD's findings and evaluations, they do not demonstrate that the RD committed clear and prejudicial errors concerning substantial factual matters or failed to apply established law. In fact, the Union's claims do not demonstrate that the RD committed any of the claimed factual errors. To the contrary, the record establishes that the RD acknowledged and considered each of the factual matters highlighted by the Union, but found that these facts, when considered with the totality of the facts concerning the SBA consolidated unit and its ODA's PDC, weighed against finding that a community of interest existed between the two entities.³⁷ Thus, the

Union's application provides no basis for granting review of the RD's decision.³⁸

The Union also asserts that the RD's community-of-interest analysis is flawed because the RD failed to follow established law by misstating or misapplying Authority precedent.³⁹ Specifically, the Union claims that the RD misstated Authority precedent with regard to the geographic-proximity factor.⁴⁰ But the Union fails to cite to any contrary precedent.⁴¹ Accordingly, the Union does not show that the RD erred.

In addition, the Union claims that the RD construed too narrowly the community-of-interest factor pertaining to common working conditions, and cites *U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio (Wright-Patterson)*,⁴² *Department of the Navy, U.S. Marine Corps (Marine Corps)*,⁴³ and *Veterans Administration, Washington, D.C. (VA)* in support.⁴⁴ The Union argues that consideration of this factor cannot "destroy a community of interest among employees in a nationwide unit."⁴⁵ The Union also relies upon the three cited decisions to support its claim that the RD was not required to consider whether the SBA and its ODA's PDC were subject to an identical chain of command.⁴⁶ But, even assuming that the Union's interpretations of the cited Authority decisions are accurate, none of the cited decisions precludes the RD from considering these factors, and the Authority leaves it to the RD to determine the appropriate weight to give to each factor.⁴⁷ Moreover, the decisions the Union cites are consistent with the Authority's long-standing precedent that community-of-interest determinations are made on a case-by-case basis, considering the totality of the circumstances.⁴⁸ That is exactly what the RD did here. He considered the working-conditions factor and the chain-of-command factor in conjunction with other factors and the totality of the circumstances in this case. Thus, contrary to the Union's claims, the RD did not find that any one of these factors, standing alone, "destroyed

³² *Id.* at 4-5.

³³ *Id.* at 5.

³⁴ *Id.* at 7.

³⁵ *Id.* at 7-8.

³⁶ *Id.*

³⁷ RD's Decision at 2, 4-5, 7-12, 16-17.

³⁸ See, e.g., *U.S. Dep't of the Navy, Naval Station Ingleside, Tex.*, 46 FLRA 1011, 1025 (1992) (*Navy*) (citing *U.S. DOL, Office of Admin. Law Judges, Pittsburgh, Pa.*, 40 FLRA 1021, 1024 (1991)).

³⁹ Application at 3.

⁴⁰ *Id.* at 5.

⁴¹ *Id.*

⁴² 55 FLRA 359 (1999).

⁴³ 8 FLRA 15 (1982).

⁴⁴ 1 FLRA 458 (1979); Application at 6.

⁴⁵ Application at 6.

⁴⁶ *Id.* at 8.

⁴⁷ *Travis*, 64 FLRA at 7.

⁴⁸ *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base*, 47 FLRA 602, 610 (1993); see also *Wright-Patterson*, 55 FLRA at 362; *Marine Corps*, 8 FLRA at 21-22; *VA*, 1 FLRA at 463.

the community of interest” between the SBA consolidated unit and the ODA’s PDC. For these reasons, the Union’s application in this regard provides no basis for granting review of the RD’s decision.

We also are not persuaded by the Union’s claim that the RD’s community-of-interest determination is erroneous because the RD “failed to weigh and consider evidence that supported the inclusion of the petitioned-for employees in the consolidated unit.”⁴⁹ In fact, an examination of the record shows that the RD fully considered the evidence that the Union highlighted in its application as weighing in favor of finding a community of interest.⁵⁰ However, in considering this evidence in conjunction with the remaining evidence in this case – as he is required to do – the RD found that the totality of the circumstances presented here weigh against finding a community of interest between the SBA consolidated unit and the ODA’s PDC attorneys and paralegals. The Union’s application does not demonstrate that the RD erred.⁵¹

In sum, the RD’s findings and his conclusion that the proposed unit is not appropriate under § 7112(a)(1) of the Statute as to the community-of-interest criterion are supported by the record in this case. And the Union’s application provides no basis for granting review of the RD’s Decision.⁵²

Because we conclude that the RD did not err in his community-of-interest analysis, and because all three criteria for determining whether a unit is appropriate under § 7112(a) must be met, the Authority denies the Union’s application.⁵³ In doing so, we do not address – or adopt – the RD’s conclusions regarding effective dealings or the efficiency of agency operations.⁵⁴

IV. Order

We deny the Union’s application.

⁴⁹ Application at 8.

⁵⁰ *Id.* at 7-8.

⁵¹ See *Navy*, 46 FLRA at 1025.

⁵² See *Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 46 FLRA 502, 510 (1992).

⁵³ See, e.g., *DOI, Nat’l Park Serv., Lake Mead Nat’l Recreation Area, Boulder City, Nev.*, 57 FLRA 582, 585-86 (2001); *Dep’t of the Navy, Naval Computer & Telecomms. Area, Master Station-Atl. Base Level Commc’ns Dep’t, Reg’l Operations Div., Norfolk, Va., Base Commc’ns Office, Mechanicsburg*, 57 FLRA 230, 236 (2001).

⁵⁴ *Id.*