68 FLRA No. 99

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO
(Union/Petitioner)

WA-RP-14-0056

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ORDER DENYING
APPLICATION FOR REVIEW

May 19, 2015

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

I. Statement of the Case

In the attached decision and order (decision), as relevant here, Regional Director Barbara Kraft (the RD) of the Federal Labor Relations Authority (the FLRA) denied the Union's objections, which alleged that certain conduct by the Agency and a particular employee (the employee) improperly affected a representation election among the Agency's unrepresented non-professional employees. A majority of the votes cast in that election were against representation by the Union. Because the RD found that the Union had not proven that the election results should be set aside due to the allegedly objectionable conduct, she denied the Union's request to conduct a second election. There are three substantive questions before us.

The first question is whether the RD failed to apply established law when she determined that neither the release of voter-eligibility information (eligibility information) to the employee, nor the employee's subsequent use of that information, potentially interfered with the free choice of voters in the election. The RD's challenged findings – specifically, that the Union had the burden to prove that the election should be set aside, and that the Union failed to establish that the release or use of eligibility information in this case potentially interfered with the free choice of voters – are consistent with the Authority's Regulations and applicable precedent. Therefore, the answer to the first question is no.

The second question is whether the RD failed to investigate the release of eligibility information and thereby committed prejudicial procedural error or failed to apply established law. As the Union does not explain what further information the RD could have acquired through additional investigation that would have affected her analysis of the objections, the RD did not commit prejudicial procedural error. Further, the Union does not cite any established law to support its contention that the RD should have investigated whether the Agency was legally obligated to disclose the eligibility information in response to a Freedom of Information Act (FOIA) request. Thus, the answer to the second question is no.

The third question is whether the RD committed clear and prejudicial errors concerning substantial factual matters when she stated that: (1) the Agency had denied responsibility for releasing the eligibility information; or (2) certain emails that the employee sent before the election did not "characterize" the voting "eligibility" of the employees who received the emails.[1] Even assuming that these determinations were clearly erroneous, the Union does not show that the alleged errors were prejudicial. Therefore, the answer to the third question is also no.

II. Background and RD's Decision

The Union represents a bargaining unit of the Agency's employees (existing unit), and the Union petitioned the RD to conduct an election to determine whether the Agency's unrepresented non-professional employees wished to be added to the existing unit. After the Union filed its petition, the employee – whose position is within the existing unit – obtained the names and email addresses of the non-professional employees whom the Agency considered eligible to vote in the upcoming election (eligible voters). The employee subsequently emailed the eligible voters from his personal email account to urge them to vote against representation by the Union. Thereafter, the Union's vice president sent an email to eligible voters to challenge the employee's statements.

After the election concluded, the tally of ballots showed twenty-seven votes against, and twenty-three votes in favor of, representation by the Union. The Union filed objections to the election with the RD; the Agency filed an opposition; and the RD conducted an investigation.

[1] RD's Decision at 4.

Before the RD, as relevant here, the Union argued that the Agency's disclosure of eligibility information to the employee, and the employee's use of that information to email eligible voters, potentially interfered with the free choice of voters and violated decisional precedent concerning the publication of voter-eligibility information. In particular, the Union argued that the employee's email headers displayed all of the names of the emails' recipients and that the email messages characterized those recipients as the only individuals eligible to vote in the upcoming election. Further, the Union asserted that the Agency interfered with the conduct of the election by releasing the eligibility information so as to enable the employee to communicate with the eligible voters.

In her decision, the RD stated that she had "investigated the objections"[2] and that the Union, as the objecting party, bore the "burden of proving that the results of the election should be set aside."[3] Further, she explained that the "standard for determining whether conduct is of an objectionable nature so as to require that an election be set aside is [the conduct's] potential for interfering with the free choice of the voters."[4]

With regard to the objection that displaying the names of the email recipients potentially interfered with the election, the RD noted that the Union relied on a decision of the Assistant Secretary for Labor-Management Relations[5] under Executive Order 11,491,[6] which preceded the enactment[7] of the Federal Service Labor-Management Relations Statute (the Statute).[8] The RD explained that, in the decision that the Union cited – *Department of the U.S. Army, U.S. Army Aviation Systems Command, Saint Louis, Missouri* (*U.S. Army*)[9] – the Assistant Secretary set aside representation-election results after the employing agency issued a memo to all employees on election day that misidentified fifteen employees (using their job titles, series, and numbers) as ineligible to vote, even though the parties had not agreed to strike those employees' names from the list of eligible voters.

The RD noted initially that, although the Agency here "denie[d] any role in publicizing the [eligibility] list or making it available" to the employee, it was "undisputed" that the employee obtained the eligibility information and emailed eligible voters to encourage them to vote against representation by the Union.[10] Still, the RD found the circumstances of this case distinguishable from those in *U.S. Army*. Specifically, she found that the Union in this case presented no evidence that the employee's emails led to voter confusion or potentially interfered with voters' decision making. As an example to the contrary, the RD found that one employee, who was not among the emails' recipients – and who was, thus, not identified in the email as an eligible voter – nonetheless showed up to vote on election day. (The parties' election observers agreed, however, that this employee was not an eligible voter.) In addition, the RD observed that the disputed emails did not "characterize voters' eligibility; instead, [they] encouraged [the recipients] to vote against the Union."[11] Because she found that the Union had not supplied evidence to establish potential interference with the free choice of voters, the RD denied this objection.

With regard to the objection that the Agency's conduct potentially interfered with the election by enabling the employee to communicate assertedly "'anti-union' views" to eligible voters,[12] the RD determined that the Agency informed the employee that he could not use his Agency email account or his on-duty time to communicate with eligible voters.[13] In addition, and consistent with her rationale for denying the objection that relied on *U.S. Army*, the RD found that the Union had failed to create "a record that show[ed] the potential impact [that] the [Agency's] alleged conduct had on the election."[14] As such, the RD found that the "evidence as a whole" did not reflect that the Agency's conduct potentially interfered with the free choice of the voters, and she denied this objection as well.[15]

Because she denied the Union's objections, the RD also denied the Union's requests to set aside the election results and conduct a new election. The Union filed an application for review of the RD's decision, and the Agency filed an opposition to the Union's application.

[2] *Id.* at 2.
[3] *Id.* (citing *FDIC, Wash., D.C.*, 38 FLRA 952, 963 (1990) (*FDIC*)).
[4] *Id.* at 4 (quoting *U.S. Army Eng'r Activity, Capital Area, Fort Myer, Va.*, 34 FLRA 38, 42 (1989) (*Fort Myer*)) (internal quotation mark omitted).
[5] *Id.* (citing *Dep't of the U.S. Army, U.S. Army Aviation Sys. Command, St. Louis, Mo.*, A/SLMR No. 315 (1973), 3 A/SLMR 559).
[6] 5 U.S.C. § 7101 note (Exec. Order No. 11,491, as amended).
[7] *U.S. Dep't of Commerce, Patent & Trademark Office*, 53 FLRA 858, 875 n.14 (1997) (describing Executive Order 11,491 as "the immediate predecessor to" the Federal Service Labor-Management Relations Statute).
[8] 5 U.S.C. §§ 7101-7315.
[9] 3 A/SLMR 559.
[10] RD's Decision at 4.
[11] *Id.*
[12] *Id.* at 5.
[13] *Id.*
[14] *Id.* (quoting *U.S. DOD, Nat'l Guard Bureau, N.C. Air Nat'l Guard, Charlotte, N.C.*, 48 FLRA 1140, 1147 (1993)) (internal quotation mark omitted).
[15] *Id.*

III. Preliminary Matter: Sections 2422.31(b) and 2429.5 of the Authority's Regulations do not bar the Union's arguments concerning voter confusion.

In its opposition, the Agency contends that the Union's objections before the RD did not assert that any pre-election conduct confused voters regarding their eligibility.[16] Thus, to the extent that the application asserts that the election should be set aside due to voter confusion, the Agency argues that the Authority should not consider such assertions.[17] Section 2422.31(b) of the Authority's Regulations precludes "[a]n application [for review from] rais[ing] any issue or rely[ing] on any facts not timely presented to" the RD,[18] and § 2429.5 of the Regulations likewise prevents a party from raising any "evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented in the proceedings before" the RD.[19]

Where the Union refers to voter confusion in its application, the Union does so to explain its view that *U.S. Army* relieves it of any burden to prove that the release of eligibility information led to voter confusion.[20] In the arguments that the Union presented to the RD, the Union contended that "[p]ublication of the [eligibility information] . . . interfered with the free choice of voters."[21] Further, the Union asserted that "[t]here is no requirement in the case law" for an objecting party to show that "publicizing" eligibility information "affected the behavior of potential voters" in order to establish that an election should be re-run.[22] As the Union presented these arguments to the RD, we deny the Agency's request to bar them under §§ 2422.31(b) and 2429.5.

IV. Analysis and Conclusions

A. The RD's denial of the objection concerning *U.S. Army* did not fail to apply established law.

The Union asserts that: (1) except for disclosures to the FLRA or the parties' designated representatives, *U.S. Army* absolutely prohibits the disclosure of eligibility information before a representation election, and (2) the RD failed to apply that established law.[23] In addition, the Union contends that: (1) any eligibility-information disclosure that does not comply with the Union's understanding of *U.S. Army* necessarily requires re-running an election; and (2) the only burden of proof for an objection under *U.S. Army* is to show that the eligibility information was disclosed.[24] Further, the Union notes that the FLRA Office of the General Counsel's Representation Proceedings Case Handling Manual (manual) quotes *U.S. Army* regarding the perils of disclosing potentially inaccurate eligibility information,[25] and the Union submits a copy of a decision and order – *Department of VA, Carl Vinson VA Medical Center, Dublin, Georgia* (*VA Dublin*)[26] – in which an FLRA regional director cited *U.S. Army* as a basis for re-running a representation election.[27]

Under § 7135(b) of the Statute, as relevant here, "decisions issued under" the executive orders that preceded the Statute – such as the Assistant Secretary's decision in *U.S. Army* – "shall remain in full force and effect . . . unless superseded . . . by regulations or decisions issued pursuant to" the Statute.[28] The Authority has stated that § 7135(b) "does not bar . . . reevaluating precedent under the executive order," provided that any reevaluation treats the executive-order precedent "with the same deference as" the Authority's own prior decisions and, at a "minimum, acknowledge[s] the precedent and provide[s] a reason for departure."[29]

Initially, we note the difference in circumstances between *U.S. Army* and this case. In *U.S. Army*, the election results showed a narrow twenty-two vote difference between the two labor organizations on the ballot,[30] and the agency had informed at least fifteen employees on election day that they were ineligible to vote, even though the parties had not stricken those employees' names from the voter-eligibility list.[31] By contrast, in this case, the Union does not allege that any potential voters were misinformed of their eligibility status, or that the eligibility information revealed in the employee's emails was incomplete or inaccurate.

In any event, we find it unnecessary to determine whether the Union has accurately described the holding in *U.S. Army* as imposing a per se nondisclosure rule. To the extent that *U.S. Army* may have required

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[16] Opp'n at 9 (citing 5 C.F.R. §§ 2422.31(b), 2429.5).
[17] *Id.*
[18] 5 C.F.R. § 2422.31(b).
[19] *Id.* § 2429.5.
[20] *E.g.*, Application for Review (Application) at 9.
[21] Union's Evidence in Support of the Objections to the Conduct of the Election at 1.
[22] *Id.* at 2 n.2.
[23] Application at 9, 12 (citing 5 C.F.R. § 2422.31(c)(3)(i)).
[24] *See id.* at 12-16.
[25] *Id.* at 9-11.
[26] *Id.*, Attach., Ex. 8, Decision & Order on Objections to Election, AT-RP-01-0019 (Sept. 17, 2001).
[27] *See* Application at 11-12 (discussing *VA Dublin*).
[28] 5 U.S.C. § 7135(b).
[29] *NASA, Goddard Space Flight Ctr., Wallops Island, Va.*, 67 FLRA 670, 674 (2014) (quoting *NTEU v. FLRA*, 774 F.2d 1181, 1192 (D.C. Cir. 1985)) (internal quotation marks omitted).
[30] 3 A/SLMR at 561.
[31] *Id.* at 563.

setting aside an election without proof that any eligibility-information disclosures confused voters or potentially affected the election's results, the Authority's Regulations and decisional precedent have "superseded" that holding, within the meaning of § 7135(b).[32] In particular, §§ 2422.26(b) and 2422.27(b) of the Regulations require, respectively, that an "objecting party must file evidence . . . supporting the objections"[33] and (except as to challenged ballots) "bear[] the burden of proof on objections by a preponderance of the evidence."[34] The RD adhered to these regulations when she stated that the Union, "as the objecting party, bears the burden of proving that the results of the election should be set aside,"[35] and she ultimately found that the Union had not satisfied that burden.[36]

Moreover, as the RD correctly recognized, the Authority has stated in numerous "decisions issued pursuant to" the Statute[37] that the "standard for determining whether conduct is of an objectionable nature so as to require that an election be set aside is [the conduct's] potential for interfering with the free choice of the voters."[38] This standard does not indicate that any particular conduct is per se objectionable so as to require an election to be set aside. Thus, to the extent that *U.S. Army* imposed a per se nondisclosure rule, the Authority's regulations and decisions have "superseded" that rule.[39] Nevertheless, we reaffirm that disclosing eligibility information *could* potentially interfere with the free choice of voters in certain circumstances, and, thus, we certainly do not encourage parties to disclose eligibility information without the involvement of the FLRA employees conducting or supervising an election. As stated earlier, however, an objecting party has the burden to prove that allegedly objectionable conduct had the potential for interfering with the free choice of voters, and the Union does not show that the RD erred in finding that the Union failed to prove potential interference in this case.

In addition, the Union's arguments regarding the manual and *VA Dublin* do not show that the RD should have applied a different standard to evaluate the objections. As the Union acknowledges, the manual is "not precedent or binding on the Authority, nor [is] it intended to be all inclusive."[40] As such, the manual's quoting of *U.S. Army* does not indicate that the RD erred in enforcing the standards set by the Authority's Regulations and post–*U.S. Army* case law. As for *VA Dublin*, the regional director in that case found that an employee told certain individuals that "their names were not on the eligibility list[]," and on election day, none of the workers in the same department as those individuals voted.[41] The regional director found that this conduct, as well as the employee's informing other individuals of their eligibility status, "had the effect of interfering with the proper conduct of the election and may have improperly affected the results of the election."[42] Although the regional director also found that the union "may have improperly affected the results of the election" by providing the eligibility information to the employee, who further disseminated that information, the regional director did not set aside the election in *VA Dublin* based on the mere disclosure of eligibility information alone.[43] Here, the Union does not contend that it presented the RD with evidence of potential interference with the free choice of voters – including evidence that the disclosure of information confused eligible voters about whether they could vote or discouraged anyone from attempting to vote – so *VA Dublin* likewise does not support finding that the RD failed to apply established law.

B. The RD did not commit prejudicial procedural error or fail to apply established law in investigating the release of eligibility information.

The Union contends that the RD "committed . . . prejudicial procedural error"[44] and failed to apply established law by not investigating precisely how the employee obtained the eligibility information – including whether the Agency lawfully disclosed that information in response to a FOIA request.[45] The RD's decision shows that she did investigate the Union's objections,[46]

[32] 5 U.S.C. § 7135(b).
[33] 5 C.F.R. § 2422.26(b).
[34] *Id.* § 2422.27(b).
[35] RD's Decision at 2 (citing *FDIC*, 38 FLRA at 963).
[36] *Id.* at 5, 6.
[37] 5 U.S.C. § 7135(b).
[38] RD's Decision at 4 (quoting *Fort Myer*, 34 FLRA at 42) (internal quotation mark omitted); *accord, e.g., Pension Benefit Guar. Corp.*, 66 FLRA 349, 354 (2011) (reciting identical standard); *U.S. DHS, U.S. CBP*, 62 FLRA 78, 81, 82 (2007) (same); *U.S. DOD, Stateside Dependents Sch., Fort Benning Sch., Fort Benning, Ga.*, 48 FLRA 471, 474 (1993) (same); *FDIC*, 38 FLRA at 959, 963 (same); *Marine Corps Logistics Base, Barstow, Cal.*, 9 FLRA 1046, 1047 (1982) (same).
[39] 5 U.S.C. § 7135(b); *cf. U.S. Army, Air Def. Artillery Ctr. & Fort Bliss, Fort Bliss, Tex.*, 54 FLRA 1484, 1488 (1998) (rejecting "per se connection" between finding that agency committed unfair labor practice by unlawfully assisting union and finding that union's showing of interest in support of petition for election was invalid due to taint of unlawful assistance).
[40] Application at 9-10; *accord* FLRA, Office of the General Counsel, Representation Proceedings, Case Handling Manual, at i (foreword Aug. 2000).
[41] *VA Dublin* at 5.
[42] *Id.* at 6.
[43] *Id.* at 7.
[44] Application at 16.
[45] *Id.* at 16-18.
[46] RD's Decision at 2 ("The [r]egion has investigated the objections pursuant to [§] 2422.27(a) of the [FLRA's]

and under § 2422.30(a) of the Authority's Regulations, the RD had the discretion to investigate particular matters as she "deem[ed] necessary."[47] As relevant here, the Authority has stated that successful challenges to the scope of an RD's investigation must show that further investigation could have provided evidence "sufficient to warrant setting aside the RD's findings and conclusions."[48]

The RD's statement that it was "undisputed" that the employee had access to the eligibility information shows that, in denying the Union's objections, she considered the employee's use of the eligibility information in contacting eligible voters.[49] And the Union does not explain why the RD's findings and conclusions would have been different if she had investigated further to determine the precise method through which the employee acquired the eligibility information. For example, the Union does not explain why the RD would have found that the Union's evidence was sufficient to warrant setting aside the election if she had concluded that the Agency released the eligibility information under FOIA, as opposed to another method. Thus, the RD's investigation did not reflect prejudicial procedural error.

The Union also contends that the RD should have investigated whether the Agency could have invoked a statutory exemption from any FOIA-disclosure obligations in order to avoid releasing the eligibility information.[50] But the Union does not cite any authority requiring the RD to conduct such an investigation in order to determine whether the disclosure or use of the eligibility information potentially interfered with the free choice of voters. Therefore, this contention does not establish that the RD failed to apply established law in conducting her investigation.

C. Even assuming that the RD clearly erred regarding substantial factual matters, the Union has not shown those errors to be prejudicial.

The Union argues that the RD committed two clear and prejudicial errors concerning substantial factual matters. First, although the RD stated that the Agency "denie[d] any role in publicizing the [eligibility] list or making it available" to the employee,[51] the Union notes that the Agency expressly acknowledged in its opposition to the Union's objections that the employee "obtained" the eligibility information from the Agency in response to a FOIA request.[52] Second, although the RD stated that the employee's emails did not "characterize" the voting eligibility of the emails' recipients,[53] the Union notes that at least two of the emails expressly stated that the recipients "[we]re eligible to vote" in the upcoming election.[54]

We assume, without deciding, that these are clearly erroneous determinations of substantial factual matters. But the Union provides no basis for finding that, had the RD not made these determinations, she would have found that the Union met its burden to prove potential interference with the free choice of voters. In particular, for the reasons discussed in part IV.B. above, the Union has not demonstrated that a finding that the Agency admitted that it disclosed information under FOIA would have changed the RD's decision to deny the objections. And as explained in part IV.A. above, the Union has not shown that the RD would have set aside the election if she had found that the employee characterized the email recipients' voting eligibility, *absent proof* that the emails potentially confused voters or discouraged employees from voting. As such, the Union has not established that the alleged factual errors were prejudicial. Accordingly, the Union has not demonstrated that we should grant the application on this ground.

V. Order

We deny the Union's application for review.

Regulations."), 6 (noting results of "investigation of [the Union's] objections[,] including the Union's supporting evidence and documentation").

[47] 5 C.F.R. § 2422.30(a).

[48] *Dep't of the Interior, Bureau of Indian Affairs*, 56 FLRA 169, 171 (2000) (citing *U.S. Small Bus. Admin., Dist. Office, Casper, Wyo.*, 49 FLRA 1051, 1060 (1994)).

[49] RD's Decision at 4.

[50] Application at 17-18 (citing 5 U.S.C. § 552(b)(5), (6) (FOIA exemptions)).

[51] RD's Decision at 4.

[52] Application at 19 (quoting *id.*, Attach., Ex. 1, Agency's Opp'n to Objections at 2).

[53] RD's Decision at 4.

[54] Application at 6.

BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE

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

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
(Union/Petitioner)

WA-RP-14-0056

DECISION AND ORDER
ON OBJECTIONS TO THE ELECTION

I. Statement of the Case

On July 11, 2014, the American Federation of Government Employees, AFL-CIO (AFGE) filed the petition in this proceeding, seeking an election among all unrepresented non-professional employees at the NASA Goddard Space Flight Center, Wallops Flight Facility, Wallops Island, Virginia (NASA). On November 21, 2014, the parties entered into an election agreement providing for a secret ballot election to be conducted among the sixty-three eligible voters on December 10, 2014, from 12:00 p.m. to 3:00 p.m.[1]

The election took place as scheduled. The non-professional employees were polled on whether they wished to be represented by AFGE in AFGE's existing unit of professional and non-professional employees at NASA.[2] A majority of the non-professional employees voted against representation by AFGE.[3] After the ballots were tallied, the Region hand-delivered a copy of the Tally of Ballots to the election observers.[4]

On December 16, 2014, in accordance with section 2422.26(a) of the Authority's Regulations, AFGE timely filed objections to the procedural conduct of the election and to conduct that may have improperly affected the election results. AFGE contends in its objections that the publication of the voter list on at least two occasions interfered with the free choice of the voters and, thus, the conduct of the election; that NASA failed to remain neutral when it allowed anti-union campaigning to occur on its email system while prohibiting use of the system by AFGE officials and threatening to take action against those officials for using the system; and that the Region committed procedural errors by improperly resolving a challenged ballot, by failing to note the challenged ballot on the tally and by failing to serve the tally on AFGE.

On December 20, 2014, AFGE timely submitted evidence in support of the objections pursuant to section 2422.26(b) of the Authority's Regulations. On January 8, 2015, NASA submitted an opposition to AFGE's objections.[5]

The Region has investigated the objections pursuant to section 2422.27(a) of the Regulations.[6] AFGE, as the objecting party, bears the burden of proving that the results of the election should be set aside. *FDIC*, 38 FLRA 952, 963 (1990). For the reasons that follow, I find that AFGE has not established grounds to set aside the December 10, 2014 election.

II. Findings

On November 24, 2014, sixteen days before the election, AFGE Local 1923 Vice President Ben Robbins emailed eligible voters, advising them of the upcoming election and stating that a vote in favor of AFGE would result in their inclusion in the existing bargaining unit.

On November 25, 2014, Labor Relations Specialist Edward Bohl emailed Mr. Robbins, stating that Robbins' email violated Article 31, Section 31.03 of the collective bargaining agreement (CBA). That section provides: "Correspondence between Management and the Union and among Union representatives which is of mutual interest to Management and the Union may be transmitted through the internal mail system of

[1] The Election Agreement stated that each party would designate an equal number of observers. AFGE and NASA each designated two election observers. In addition, an addendum to the Election Agreement, signed by NASA, identified by name the eligible and ineligible voters. AFGE declined to sign the addendum.

[2] AFGE's existing unit was certified in Case No. WA-RP-08-0040.

[3] The Tally was 27 to 23 against inclusion in the existing unit of professional and non-professional employees represented by AFGE. The Tally showed no void or challenged ballots. The challenged ballot of one employee was not shown on the Tally because his name appeared on the ineligible list and the parties' observers agreed he was ineligible. His ballot was not counted. See note 7 and accompanying text below.

[4] The Election Agreement indicated that the Tally of Ballots was to be served by hand-delivery on each of the parties.

[5] On December 23, 2014, I granted NASA's request for an extension of time to submit its opposition to AFGE's objections.

[6] AFGE did not show or claim that there are substantial and material facts in dispute that require a hearing.

Management." "Bargaining unit employees may use the internal mail system to transmit correspondence to Union representatives." Mr. Bohl told Mr. Robbins that AFGE was not permitted to use Agency email to communicate with eligible employees because the employees were not in the bargaining unit; that Mr. Robbins' email was persuasive and coercive and that it amounted to organizing while on duty time; and that because management's position in the election was neutral, Robbins' email did not serve the "mutual interest" of management. He further stated that organizing is to be conducted on non-duty time, and since the email was sent during duty time, Mr. Robbins needed to annotate his time card to indicate that he was in a non-duty status when he, Robbins, drafted the November 24 email. Finally, Mr. Bohl told Mr. Robbins that AFGE must cease and desist from sending future emails to non-bargaining unit employees.

Mr. Robbins responded on November 25, and stated that Article 31, Section 31.03 did not prohibit his use of email. He noted that Agency policy and past practice permitted such use during breaks, and "on a non-interfering basis." Mr. Robbins further noted that section 7116(e) of the Statute allows a union to publicize an election and encourage employees to vote.

On December 3, 2014, Ron Walsh, an employee in AFGE's existing unit, sent an email from his personal email account to eligible employees, urging them to vote against inclusion in the bargaining unit. Later that day, AFGE's Deputy General Counsel emailed Mr. Bohl, asking him how he planned to respond to Mr. Walsh's message and whether he "would be sending Mr. Walsh a threatening email like the one you sent to AFGE last week when the Local [Vice] President sent an email to the potential voters."

On December 9, 2014, Mr. Walsh sent the employees a reminder email from his personal email account, urging them to vote "no" in the upcoming election.

On December 10, 2014, Mr. Robbins responded to Mr. Walsh's email and also urged employees to vote. Mr. Robbins' message stated:

> It has come to my attention that you have likely received correspondence from Mr. Ronald Walsh that indicate[s] you should not vote in the upcoming election. While section 7116(e)(1) of the Federal Labor-Management Relations Statute (Statute) permits the publicizing of a representational election and encourages employees to exercise their right to vote in such an election [link to section 7116 of the Statute on the FLRA's website], I am aware [that] several of you feel Mr. Walsh's correspondence went beyond that or had the opposite effect; and that several of you feel intimated into not voting. In order to alleviate the above concern, please rest assured that today's election will be conducted by secret ballot and pursuant to the Federal Labor Relations Authority (FLRA) regulations…., and that no one will know how an employee voted.

That same day, December 10, Mr. Walsh sent another message using his personal email account, urging employees to vote "no."

The Region conducted the election that day, December 10, 2014. A majority of eligible employees voted against representation by AFGE. One voter voted a challenged ballot: however, just prior to the ballot count, the parties' observers and the Regional Office agent conducting the election resolved the challenge. As a result, the ballot is not reflected in the Tally.[7] The Region's agent served the Tally on the observers by hand delivery on December 10.

On December 11, 2014, AFGE's Deputy General Counsel, who was AFGE's designated representative and who was not present during the election, requested that the Region provide her with a copy of the Tally of Ballots. On December 12, 2014, the Region served her with the Tally.

III. Analysis and Conclusions

A. Objection that publication of the voter list on at least two occasions interfered with the free choice of the voters and, thus, the conduct of the election.

AFGE alleges that on December 3 and December 10, 2014, Mr. Walsh sent two emails that showed as recipients the names of the 63 employees who appeared on the Agency's eligibility list, that this amounted to publication of the voter list, and that such publication interfered with the election. In support of its argument, AFGE cite the *Department of the Army, U.S. Army Aviation Systems Command, St. Louis*, 3 A/SLMR 559 (1973). NASA, for its part, denies any role in publicizing the list or making it available to Mr. Walsh. It points out that that he may have obtained the list from an AFGE campaign email or as a result of a November 2014 FOIA request. In any event, it is undisputed that Mr. Walsh had access to the names and

[7] The Regional Office agent inadvertently gave the voter, who was on the list of ineligible voters prepared by the Agency, a challenged ballot. The observers agreed the voter was ineligible.

email addresses of eligible voters and that he sent messages to them encouraging them to vote "no."

I have determined that *Department of the Army, U.S. Army Aviation Systems Command, St. Louis*, is distinguishable from the instant case. There, the agency issued a memo to all employees on the day of the election, identifying them by job title, series and job number and noting they were management officials and thus ineligible to vote. *Id.* One employee on the ineligible list was actually an eligible voter, and research in response to his inquiry showed that at least 14 other eligible employees were listed as ineligible in management's memo. *Id.* The Assistant Secretary for Labor-Management Relations held that publication of the voter list by the agency created confusion in the minds of prospective voters and had the effect of interfering with the conduct of the election. As a result, the Assistant Secretary set aside the election.

Here, in contrast, the employer did not publicize the voter eligibility list, or tell employees they were ineligible, and there is no evidence that any of the email correspondence addressed to them, including Mr. Walsh's, confused voters. Nor did his messages characterize voters' eligibility; instead, he encouraged them to vote against the Union. There is no evidence that his messages interfered with their decision-making. AFGE provided evidence that an employee whom observers agreed was ineligible, and who had seen the list of eligible employees in Walsh's emails, was himself not dissuaded from voting: he ended up voting the challenged ballot discussed above. There is no evidence that "publication" of the voter list in Walsh's messages interfered with voters' free choice, and I am dismissing this objection for that reason.

B. Objection that NASA failed to remain neutral when it allowed anti-union campaigning on its email system, but prohibited the use of the system by AFGE officials and threated action against those officials for use of the email system.

"The standard for determining whether conduct is of an objectionable nature so as to require that an election be set aside is its potential for interfering with the free choice of the voters." *U.S. Army Eng'r Activity, Capital Area, Fort Myer, Va.*, 34 FLRA 38, 42 (1989). In determining whether conduct requires setting aside an election, the Authority has stated that management must remain neutral, and that conduct that deviates from this required neutrality and has the potential to interfere with voters' free choice requires setting aside the election. *Id.*

AFGE argues that the Region should set aside the election because NASA failed to enforce its email rules in a neutral manner. For example, AFGE argues that NASA incorrectly interpreted the CBA to bar Robbins' use of email, and that NASA should not have ordered Mr. Robbins to adjust his time card: the Union points out that employees at the Agency work flexible schedules and there is no evidence as to whether Mr. Robbins was even working, or on official time, when he sent the email. Finally, AFGE argues that NASA interfered with Mr. Robbins' ability to express his personal views about the election and his ability to encourage employees to vote. In this regard, AFGE notes that NASA did not take any action against Mr. Walsh when he used the Agency's email to communicate his "anti-union" views.

The Region's investigation disclosed that Mr. Bohl contacted Mr. Walsh on December 5, and told him not to use his government email to contact voters while he was on duty time. NASA contends that Bohl's November 25, 2014 email to Mr. Robbins was based on the belief that Robbins was engaging in union organizing during duty time: based on that belief, NASA directed Robbins to annotate his time card. Bohl apparently told Robbins that AFGE had to remain "neutral" during the period leading up to the election.

Considering the evidence as a whole, I have concluded that that the conduct AFGE describes in this objection does not warrant setting aside the election. NASA appears to have advised Robbins, incorrectly, that management neutrality required it to bar his use of email to correspond with eligible voters. And it may have incorrectly applied contract language governing use of email for Union-Management correspondence to Robbins' outreach to eligible voters. Bohl's statement to Robbins that AFGE had to remain neutral is also inexplicable. There is, however, no evidence that voters were aware of or influenced by management's statements to Robbins or its conduct with respect to him, including requiring him to annotate his time card. *See, PBGC*, 66 FLRA 349 (2011). In fact, even after Bohl's November 25, 2014 email to Robbins, the latter continued to email eligible voters to encourage them to vote.

As for Mr. Walsh, although NASA did not advise him to remain neutral, the investigation confirmed that NASA told him not to use his government email and to communicate with employees only during non-duty time. Walsh used his personal email to send messages but, like Robbins, he sent them to employees, some of whom were working, at their work addresses. Looking at the evidence as a whole, however, I cannot conclude that NASA favored Walsh, or that its conduct with respect to him interfered with voters' decision-making.

There is no evidence that employees were aware of any slight to AFGE, perceived or otherwise.

As the Authority has previously stated, "the burden is on the objecting party to make a record that shows the potential impact the alleged conduct had on the election." *Dep't of Defense, Nat'l Guard Bureau, North Carolina Air Nat'l Guard, Charlotte, N.C.,* 48 FLRA 1140, 1147 (1993). Here, there is no evidence of impact, real or potential. I am dismissing this objection for that reason.

C. Objection that the FLRA agent overseeing the election committed procedural errors by improperly resolving a challenged ballot, failing to note the challenged ballot on the tally, and failing to serve the tally on the Union.

This objection alleges that at least one voter cast a challenged ballot that was improperly resolved without the consent of AFGE's representative; that the Tally of Ballots does not reflect the challenged ballot; and that the Region failed to serve the Tally on AFGE's representative until two days after the election. AFGE also alleges that because it did not sign the eligibility list, it did not agree to the contents of the list.

As explained above, the investigation confirmed that the Regional Office agent, with the observers' agreement, had given a challenged ballot to a voter whose name appeared on NASA's list of employees ineligible to vote. The employee voted the challenged ballot, at which point the agent and the observers realized his name was on the ineligible list and agreed that he was in fact ineligible. Because it was agreed he was ineligible, the Region did not record his ballot as a challenged ballot on the Tally.

The Authority decides challenged ballots when they could affect the results of an election. *See, e.g., VAMC, Fayetteville, N.C.,* 8 FLRA 651, 656 (1982) (ALJ Decision). Here, the resolution of the one ballot the parties initially treated as a challenged ballot would not have affected the election results. Although the Regional Office agent may have erred by giving the ineligible voter a challenged ballot, the error was harmless. AFGE's observer agreed that the person was ineligible. The vote was not counted. There is no evidence the error affected the conduct or outcome of the election. Accordingly, I have concluded that to the extent this objection argues that the election results are invalid because a challenged ballot was cast and not shown on the Tally, it is not grounds for setting aside the election.

Finally, as to the objection that the Regional Office agent did not serve the Tally on AFGE's Deputy General Counsel, its designated representative, I note that the agent served AFGE's observer on the day of the election, that its designated representative was not present that day, that the representative requested the Tally on December 11, and that the Region provided it to her on December 12. Although the election agreement required the Region to serve the Tally on the parties – and thus on their designated representatives – by hand delivery, and although the Region served AFGE's observer, not its representative, the investigation unearthed no evidence that this error, which the agent corrected within 2 days, compromised the integrity of the election results or otherwise interfered with the election process.

IV. Order

The Region's investigation of AFGE's objections including the Union's supporting evidence and documentation yielded no evidence of interference with voter rights. Nor is there evidence of procedural irregularities that warrant setting aside the election. Accordingly, I am dismissing the objections.

V. Right to Seek 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 days of this Decision. The application for review must be filed with the Authority by **March 30, 2015**, and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 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.[8]

Barbara Kraft
Regional Director, Washington Region
Federal Labor Relations Authority

Dated: January 28, 2015

[8] To file an application for review electronically, go to the Authority's website at **www.flra.gov**, select **eFile** under the **Filing a Case** tab and follow the instructions.