68 FLRA No. 34

UNITED STATES
DEPARTMENT OF DEFENSE
ILLINOIS NATIONAL GUARD
SPRINGFIELD, ILLINOIS
(Agency)

and

LIUNA NATIONAL
GUARD DISTRICT COUNCIL
(Petitioner/Labor Organization)

and

ASSOCIATION OF
CIVILIAN TECHNICIANS
(Exclusive Representative/Labor Organization)

CH-RP-14-0011

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ORDER DENYING
APPLICATION FOR REVIEW

January 15, 2015

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

I. Statement of the Case

While the Association of Civilian Technicians (ACT) and the Agency were in the process of finalizing a renegotiated collective-bargaining agreement, the Laborers' International Union of North America, National Guard District Council (LIUNA) filed a petition seeking an election. In the attached decision of Federal Labor Relations Authority (FLRA) Regional Director Sandra LeBold (RD), the RD concluded that LIUNA's petition was timely filed and ordered an election. ACT then filed an application for review (application) of the RD's decision. In its application, ACT contends that the RD erred as a matter of law when she concluded that LIUNA's petition was timely filed and that the RD relied on several clear and prejudicial errors regarding substantial factual matters. Because ACT has not identified any case law that is inconsistent with the RD's decision or established that any of the RD's alleged factual errors concern substantial matters, we deny ACT's application.

II. Background and RD's Decision

The facts of this case are described in detail in the attached decision and are only briefly summarized here. ACT is the exclusive representative of the Agency's employees. ACT and the Agency had been parties to a collective-bargaining agreement, which had expired. At the time LIUNA filed the petition, ACT and the Agency were completing negotiations over a successor agreement. Specifically, ACT withdrew its remaining proposals on March 6, 2014,[1] and on March 11, the Agency sent the proposed agreement to the National Guard Bureau (Bureau) for its review; however, ACT and the Agency did not sign the agreement until March 13.

On March 12, after the Agency had forwarded the agreement to the Bureau, but before ACT and the Agency signed the agreement, LIUNA filed a petition seeking an election by which it hoped to replace ACT as the exclusive representative of the Agency's employees. ACT opposed the petition, claiming that it was filed during the agency-head-review period and therefore untimely.

The RD observed that, under § 2422.12(c) of the Authority's Regulations,[2] an election petition is untimely if filed during the thirty-day agency-head-review period provided for by § 7114(c) of the Federal Service Labor-Management Relations Statute (the Statute).[3] The RD found that the review period begins on the date an agreement is executed, which "is the date on which no further action is necessary to finalize the agreement."[4] The RD further found that Authority case law established that the date the parties sign an agreement is the date of execution, and therefore when the agency-head-review period begins.[5] She further noted that, under National Labor Relations Board (NLRB) precedent, a contract must be signed in order to bar an election.[6] The RD held that the only exception to the general rule that execution requires signing is where the parties intend further actions – such as ratification by the union's membership or approval by local management

[1] All dates are in 2014 unless otherwise noted.
[2] 5 C.F.R. § 2422.12(c) .
[3] 5 U.S.C. §§ 7101-7135.
[4] Decision at 3 (citing *Fort Bragg Ass'n of Teachers*, 44 FLRA 852, 857 (1992) (*Ft. Bragg*)).
[5] *Id.* (citing *Dep't of the Army III Corps & Fort Hood, Fort Hood, Tex.*, 51 FLRA 934, 937-38 (1996) (*Ft. Hood*); *Int'l Org. of Masters, Mates, & Pilots*, 36 FLRA 555, 560-61 (1990) (*Masters*)).
[6] *Id.* at 3-4 (citing *Waste Mgmt. of Md., Inc.*, 338 NLRB 1002, 1002 (2003); *De Paul Adult Care Cmty., Inc.*, 325 NLRB 681, 681 (1998); *Seton Med. Ctr.*, 317 NLRB 87, 87 (1995); *Appalachian Shale Prods. Co.*, 121 NLRB 1160 (1958)).

officials – to occur after the proposed agreement is signed.[7]

Accordingly, the RD found that the agreement was not executed until March 13. Additionally, the RD found that "there [wa]s no dispute that none of the steps [required to execute the agreement] set forth in the ground[-]rules [memorandum of understanding (MOU)] had been completed (party review of written agreement to [e]nsure meeting of the minds, membership ratification, and then execution)."[8] Finally, the RD found that "there [wa]s no dispute that the [Agency] (and ACT) had notice of LIUNA's petition on March 12th, and then took steps to sign the agreement on March 13th," and that "[g]iven the sequence of events, it [wa]s clear [that] the parties waited until *after* the . . . petition was filed to execute their contract."[9]

Based on her holding that "[t]here [wa]s no support for ACT's contention that an agreement may be considered 'executed' before a signing[,] at the moment negotiations concluded," the RD found that the agency-head-review bar began to run on March 13.[10] Accordingly, the RD found that LIUNA's March 12 petition was timely and directed an election to determine whether ACT or LIUNA would represent the Agency's employees, or whether the employees did not want any union to represent them.

ACT then filed this application, contending that the RD failed to apply established law and committed clear and prejudicial errors concerning substantial factual matters.

III. Analysis and Conclusion: The RD did not fail to apply established law or commit a clear and prejudicial error concerning a substantial factual matter.

Section 7111(f)(3) of the Statute provides that exclusive recognition shall not be accorded a labor organization "if there is then in effect a lawful written collective[-]bargaining agreement between the agency involved and an exclusive representative," except under certain circumstances not relevant here.[11] Section 2422.12(c) of the Authority's Regulations extends the contract bar to election petitions filed during the period of agency-head review under § 7114(c) of the Statute.[12] The agency-head-review period lasts from the date an agreement is executed until the earlier of thirty days or the date that the agency head approves or rejects the agreement.[13] The date of execution is the date on which no further action is necessary to finalize a complete agreement.[14]

ACT argues that the RD misapplied established law in rejecting its argument that the parties did not need to sign the agreement in order to execute it. In support of this claim, ACT argues that "under 5 U.S.C. § 7114(b)(5), an 'agreement' means 'a written document embodying the *agreed terms*.'"[15] Thus, it claims that once agreement is reached and that agreement is reduced to writing, "no further action is *necessary* to finalize a complete agreement."[16] But § 7114(b)(5) does not define the term "agreement"; it sets forth the obligations of parties when negotiations conclude. Specifically, § 7114(b)(5) provides:

> The duty of an agency and an exclusive representative to negotiate in good faith . . . shall include the obligation . . . if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.[17]

Thus, the text of § 7114(b)(5) does not support ACT's claim that the Statute merely requires the parties to reduce an agreement to writing.

Additionally, the only cases ACT identifies in which signing the agreement was found to be unnecessary are decisions where the parties did not reach agreement, but rather, the Federal Service Impasses Panel or an interest arbitrator imposed one.[18] ACT does not identify any Authority decision that even suggests that where agreement is reached through the normal bargaining process (i.e., without third-party impasse resolution), it is unnecessary to sign the agreement in order to execute it. And ACT certainly has not identified any decision in which the Authority has held that an agreement was executed *before* it was signed.

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[7] *Id.* at 4 (citing *Ft. Hood*, 51 FLRA at 938 n.7; *Ft. Bragg*, 44 FLRA at 857; *Dep't of HHS, Phila. Reg'l Office, Region III*, 12 FLRA 167, 169 (1983); *United Health Care Servs., Inc.*, 326 NLRB 1379, 1380 (1998); *B.C. Acquisitions, Inc.*, 307 NLRB 239, 239-40 (1992)).
[8] *Id.* at 4.
[9] *Id.*
[10] *Id.* at 5.
[11] 5 U.S.C. § 7111(f)(3).
[12] *Ft. Hood*, 51 FLRA at 938.
[13] 5 U.S.C. § 7114(c).
[14] *Ft. Bragg*, 44 FLRA at 857 (citing *POPA*, 41 FLRA 795, 803 (1991)).
[15] Application at 6.
[16] *Id.* (quoting *POPA*, 41 FLRA at 803) (internal quotation marks omitted).
[17] 5 U.S.C. § 7114(b)(5).
[18] *See* Application at 7-8 (citing *POPA*, 41 FLRA 795; *Masters*, 36 FLRA 555).

Indeed, the Authority "has recognized that the date of execution normally is the date [on which] the local parties sign the agreement."[19] And the Authority has also observed, albeit in different contexts, that it is "clear from the . . . language [of § 7114(b)(5)] that an imposition is placed upon a party to sign a document provided that an agreement is reached after negotiations thereon,"[20] and that:

> Execution of a written agreement is necessary to ensure that, in fact, there is a "meeting of the minds" on the terms of the agreement. Until such time as the parties have signed a written document embodying their understandings, there is no agreement to review under [§] 7114(c) or to otherwise implement.[21]

Moreover, the legislative history of the Statute supports the view that the agency-head-review period begins on "the date the agreement is signed by the negotiating parties."[22] Similarly, when the Authority adopted § 2422.12(c), it explained that it was changing the initially proposed language, which had conditioned the agency-head-review bar "on the presence of a 'signed and dated' agreement," because that language "did not take into account that an agreement can take effect through methods *other than execution*," i.e., third-party impasse resolution.[23] Finally, the ordinary meaning of the word "execute" is "[t]o make (a legal document) valid *by signing*; to bring (a legal document) into its final, legally enforceable form."[24] Thus, we hold that the RD did not misapply Authority precedent when she determined that the parties were required to sign the agreement in order to execute it.

ACT makes a number of additional arguments. It claims that the evidence showed that the parties intended to execute the agreement on March 11, and believed that it was, in fact, executed on that date,[25] and that the RD erred in concluding that the parties "waited" until after LIUNA filed the petition to sign the agreement.[26] It alleges that the RD erred in relying on NLRB precedent[27] and offers policy arguments in favor of its proposed interpretation of "execute."[28] It claims that the RD's finding that the MOA required additional steps prior to execution is factually incorrect[29] and inconsistent with Authority precedent,[30] and that the RD erred in finding that the Agency never sent a March 22 "auxiliary agreement" to the Department of Defense (DOD).[31] Finally, it makes a number of arguments concerning the significance of the Agency sending the agreement to the Bureau, rather than the DOD, to begin the agency-head-review process, all of which challenge arguments made by LIUNA but not adopted by the RD.[32]

We find it unnecessary to address these claims. None of ACT's remaining legal arguments address whether the RD misapplied established Authority precedent when she concluded that the parties were required to sign the agreement in order to execute it. And, because the only material question of fact – Did LIUNA file its petition before the parties signed the agreement? – is undisputed, any factual errors that the RD may have made cannot go to substantial factual matters.

Accordingly, we hold that the RD did not rely on a clear error of material fact or misapply Authority precedent when she determined that LIUNA's petition was timely filed.

IV. Order

We deny ACT's application for review.

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[19] *Ft. Bragg*, 44 FLRA at 857.
[20] *IRS, Phila. Dist. Office*, 22 FLRA 245, 255 (1984) (ALJ decision adopted by Authority) *overruled on other grounds sub nom. NTEU v. FLRA*, 793 F.2d 371 (D.C. Cir. 1986) (emphasis omitted).
[21] *Masters*, 36 FLRA at 560-61.
[22] S. Rep. No. 95-969 at 109 (1978), *reprinted in* H. Subcomm. on Postal Pers. & Modernization, H. Comm. on Post Office & Civil Serv., 96th Cong., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 769 (1979) (explaining agency-head-review provision of Senate bill).
[23] Representation Proceedings, 60 Fed. Reg. 67,288, 67,289 (Dec. 29, 1995) (emphasis added).
[24] *Black's Law Dictionary* 649 (9th ed. 2009) (emphasis added).
[25] Application at 4-6.
[26] *Id.* at 10.
[27] *Id.* at 7 n.9.
[28] *Id.* at 9.
[29] *Id.* at 9-10 & 10 n.13.
[30] *Id.* at 9-10 (citing *Ft. Hood*, 51 FLRA at 942).
[31] *Id.* at 5 n.5.
[32] *Id.* at 10-14.

BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
CHICAGO REGION

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ILLINOIS NATIONAL GUARD
SPRINGFIELD, ILLINOIS
(Agency)

And

LIUNA NATIONAL GUARD DISTRICT COUNCIL
(Petitioner/Labor Organization)

And

ASSOCIATION OF CIVILIAN TECHNICIANS
(Exclusive Representative/Labor Organization)

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CH-RP-14-0011

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DECISION AND ORDER

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I. Statement of the Case

On March 12, 2014, the Laborers' International Union of North America (LIUNA) filed a petition seeking an election among the employees of the Illinois Army National Guard (Illinois Guard). The Association of Civilian Technicians (ACT), the current exclusive representative of the Illinois Guard's employees, opposes the petition and contends that LIUNA's petition is untimely because it was filed during a period of agency head review of the new ACT/Guard collective bargaining agreement. The Illinois Guard is neutral on the issue of whether LIUNA's petition is timely filed.

The Region held a hearing on this matter and LIUNA and ACT filed briefs, which I have fully considered. Based on the entire record of this matter, I find that LIUNA's petition is timely filed. Accordingly, I will direct an election to determine whether the Illinois Guard's employees wish to be represented by LIUNA, ACT, or no union.

II. Factual Background

In February 2009, the Illinois Guard and ACT completed negotiation of a collective bargaining agreement ("CBA"). (Tr. 13.) That agreement was in effect for three years and automatically renewed for an additional year before the parties timely invoked the renegotiation section. (Tr. 37, 47.) In preparation for renegotiation of the CBA, the parties signed ground rules expressly providing for review, ratification, and execution of the resulting agreement. By early March 2014, negotiations toward the new CBA were coming to a close. (Tr. 28.) On March 6, 2014, the Union's representative, Kevin Johnson, sent an email to agency representative Lieutenant Colonel Sheila Perry finalizing the last remaining terms:

> [W]e would like to withdraw our proposal and leave the wording as it stands on the current contract' areas, 13-2 and 29-6. We are also happy that you have agreed with us on the 4 year contract length. This should conclude the negotiations process. Please have LTC Hough[1] contact us so we can complete the next step.

(Ex. ACT 1; *see also* Tr. 28, 44-45.)

A few days later, on March 11, 2014, Lt. Col. Perry, forwarded that email to Robert Tetrault of the National Guard Bureau (Bureau), stating: "Sir[,] We have completed our negotiations with ACT 120 and attach it for your review ." (Ex. ACT 1.) The attached document had not yet been signed by the parties. Lt. Col. Perry and the other agency representatives believed the March 11th email initiated agency head review. *(Id.;* Tr. 19; Ex. ACT 3). They were under the impression that the agreement would first be reviewed by the Bureau and would then advance to the Department of Defense Civilian Personnel Advisory Service ("DCPAS") for review.

On March 13, 2014, representatives of the Illinois Guard and ACT exchanged, by email, a signature page for the new collective bargaining agreement. It was signed on March 13, 2014. The

[1] LCT Hough was a member of the Illinois Guard's negotiating team.

signature page states: 'The Parties hereby agree to the above on 12 March 2014."(Ex. LIUNA 2; Tr. 13-14, 27, 32-33, 36.) Once signed, the Illinois Guard did not forward that signature page to the National Guard Bureau, and the Bureau never requested it. (Tr. 34.)

On March 22, 2014, the Illinois Guard and ACT entered into an auxiliary agreement, which outlined a procedure for the parties to follow if some or all of their new CBA was rejected in agency head review. (Ex. LIUNA 6.) The auxiliary agreement stated that the collective bargaining agreement was "on 11 March 2013 . . . submitted for agency head review by email from LTC Sheila N. Perry to Robert W. Tetrault." *(Id.;* Tr. 37.) That auxiliary agreement was not sent to either the National Guard Bureau or DCPAS. (Tr. 40.)

On March 27, 2014, a representative of the Illinois Guard sent an email to DCPAS stating: "Our agency submitted' this contract to National Guard Bureau on 11 March 2014 to begin Agency Head Review" and "[w]e ... are now forwarding to you to complete the review process." (Ex. ACT 3.) That email attached the same unsigned version of the agreement attached to the March 11 email. The signature page, signed on March 13, was never sent to DCPAS. (Tr. 38).

Between the time the agency believed it was initiating agency head review (March 11th) and the time the parties actually signed their collective bargaining agreement (March 13th), LIUNA filed its petition for an election. The Region reviewed that petition and concluded that LIUNA had met its "showing of interest" obligation by obtaining signatures from at least 30 per cent of unit employees. That finding would normally result in an election between LIUNA and ACT, but ACT opposed the election on the grounds that LIUNA's petition was unlawfully filed during the period of agency head review.

III. Analysis

Agency head review is a function of Section 7114(c) of the Federal Service Labor-Management Relations Statute (Statute), which provides that any agreement between an agency and an exclusive representative may be elevated to the agency's head, who has 30 days from "the date the agreement is executed" to either approve or disapprove the agreement. Section 2422.12(c) of the Statute bars election petitions filed during the 30-day agency head review period under Section 7114(c). The date of execution that triggers the 30-day agency head review period is the date on which no further action is necessary to finalize the agreement. *Fort Bragg Ass'n of Teachers*, 44 FLRA 852, 857 (1992)(Fort Bragg).

Under the Authority's regulations, an election petition will also be considered untimely where a collective bargaining agreement is in place covering the unit (known as a contract bar). In contract bar situations, the date the agreement is signed by the parties is the date that triggers the agency head review period. *See Dep't of the Army III Corps and Fort Hood*, 51 FLRA 934, 937-38 (1996). As explained by the Authority in *Panama Canal*, 36 FLRA 555 (1990), "[e]xecution of a written agreement is necessary to ensure that, in fact, there is a 'meeting of the minds' on the terms of the agreement. Until such time as the parties have signed a written document embodying their understanding, there is no agreement to review under section 7114(c) ...." 36 FLRA at 560-61.

Similarly, the National Labor Relations Board (NLRB) in applying the National Labor Relations Act (Act) (from which the Statute's contract bar rule is derived) requires a contract to be duly signed by the parties in order to constitute a bar to an election petition.[2] *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958); *see also Fort Hood*, 51 FLRA at 940-41 (also discussing execution of contracts when a rival election petition is filed); *Seton Med. Ctr.*, 317 NLRB 87, 87 (1995); *Waste Mgmt. of Maryland, Inc.*, 338 NLRB 1002, 1002 (2003); *De Paul Adult Care Cmty.*, Inc., 325 NLRB 681, 681 (1998). In addition, the Authority has recognized that a union can condition the execution of a contract on ratification by its members provided the employer is on notice of the ratification requirement, and there is no waiver of the right by the union. *Fort Hood*, 51 FLRA at 938 n. 7; *B.C. Acquisitions Inc.*, 307 NLRB 239, 239-40 (1992) (no contract bar where agreement required ratification, and it is unclear whether union had ratified current or prior version of agreement); *see also United Health Care Servs., Inc.*, 326 NLRB 1379, 1380 (1998).

[2] The Authority will take into account decisions of the NLRB when considering a statutory provision which is comparable to a provision under the Act. *Nat'l Aeronautics and Space Admin., Goddard Space Flight Ctr., Wallops Island, Va.*, 67 FLRA 670, 674 (2014).

Finally, the Authority has recognized that, while the date the parties sign the agreement is usually the date of execution, the parties may intend further actions to occur, and execution for 7114(c) purposes does not occur until those subsequent actions are completed. *Fort Bragg*, 44 FLRA at 857 (signatures of local negotiators did not constitute "execution," where it was clear from the agreement's face that subsequent ratification by union and acceptance by school board were also required); *Dep't of Health and Human Servs.*, 12 FLRA 167, 169 (1983) (document that was signed, but still subject to final approval, could not serve as a bar to election petition).

Here, ACT argues that the successor contract was executed on March 11 and that is the date the agency head review period began. While acknowledging that the contract was not signed until March 13 (the day after LIUNA's petition was filed), ACT contends that as of March 11 no further action by the parties was necessary to finalize the agreement.

There is no dispute that prior to March 12 (when LIUNA filed the petition), the parties had not signed the agreement. In fact, there is no dispute that none of the steps set forth in the ground rules had been completed (party review of written agreement to insure meeting of the minds, membership ratification, and then execution). Finally, there is no dispute that the Illinois Guard (and ACT) had notice of LIUNA's petition on March 12th, and then took steps to sign the agreement on March 13th. Given the sequence of events, it is clear the parties waited until *after* the LIUNA petition was filed to execute their contract.

Thus, in deciding whether the parties' collective bargaining agreement was "executed" on March 11th, when the parties *finalized the terms* of the agreement, or two days later, on March 13th, when the parties *signed* the agreement, I find that agency head review began at the signing of the agreement (March 13th). As explained above, as a general rule, the *signing* of an agreement triggers agency head review. The only narrow exception to that rule is when it is clear, from the parties' agreement, that certain actions after signing would be necessary to finalize an agreement. There is no support for ACT's contention that an agreement may be considered "executed" before a signing at the moment negotiations concluded. LIUNA's March 12th petition is therefore timely.

IV. Direction of Election and Order

The Region will conduct a secret ballot election among the employees in the following appropriate unit:

INCLUDED: All employees of the Illinois Army National Guard.

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

The eligible employees will vote on whether they wish to be represented for the purpose of collective bargaining by the Laborers' International Union of North America (LIUNA), the Association of Civilian Technicians (ACT), or neither.

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or on furlough. Ineligible to vote are those employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. The date, time, method and place of election will be specified in the Notice of Election that the Regional Office will issue subsequent to this Decision.

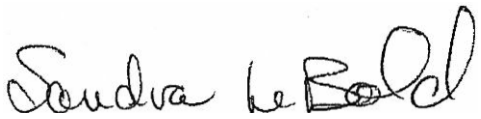
V. Right to File an Application for Review

Under Section 2422.31 of the Authority's Regulations, a party may file an application for review of this Decision with the Federal Labor Relations Authority. Pursuant to section 7105(f) of the Statute, the application for review must be filed with the Authority "within 60 days after the date of the action."

The contest of, and grounds for, an application for review are set forth in Section 2422.31(b) and (c) of the Authority's Regulations. The filing and service

requirements for an application for review are addressed in Part 2429 of the Authority's Regulations.

The application for review must be addressed to the Chief Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, N\V, Washington, DC 20424-000l. The application for review may be filed electronically through the Authority's website, www.flra.gov.[3]



Sandra LeBold, Regional Director
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Dated: September 25, 2014

[3] 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 detailed instructions.