

**70 FLRA No. 51**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
VA ST. LOUIS HEALTHCARE SYSTEM  
ST. LOUIS, MISSOURI  
(Agency)

and

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

CH-RP-16-0022

ORDER DENYING  
APPLICATION FOR REVIEW

June 7, 2017

Before the Authority: Patrick Pizzella, Acting Chairman,  
and Ernest DuBester, Member

**I. Statement of the Case**

The Union petitioned Federal Labor Relations Authority Regional Director Sandra J. LeBold (RD) to clarify the bargaining-unit status of six Human Resources (HR) assistants. In the attached decision, the RD found that the employees were not excluded from the unit under § 7112(b)(3) of the Federal Service Labor-Management Relations Statute (Statute) for performing personnel work in other than a purely clerical capacity<sup>1</sup> or § 7103(a)(13) of the Statute as confidential employees.<sup>2</sup> She clarified the unit to include the six positions.

In its application for review, the Agency argues that the RD failed to apply established law when, in her decision, she ignored testimony that the disputed employees exercised independent judgment and sought “the best candidate for the job.”<sup>3</sup> Challenging the weight, importance, or significance ascribed by the RD to various factual matters in the record does not demonstrate that the RD failed to apply established law in this regard, and so, the Agency does not demonstrate that the RD erred in applying established law. Thus, the Agency’s application for review is denied.

**II. Background and RD’s Decision**

The Union filed a petition seeking to clarify the bargaining-unit status of six HR assistants. The Agency argued that the employees were excluded because they are engaged in personnel work within the meaning of § 7112(b)(3) of the Statute.

The RD found that the HR assistants perform or plan to perform recruitment duties through creating and posting job announcements through USA Staffing. They create job announcements by editing prior announcements and relying on information provided by the hiring department, handbooks, guides, and manuals. This includes “copy[ing] all the included information from boilerplate templates.”<sup>4</sup> When job announcements close, HR assistants are responsible for qualifying applicants by reviewing their application materials to see if they have described performing similar duties. If the HR assistants are unsure whether an applicant is qualified, they ask a specialist or their supervisor. The RD found that the HR assistants “do not interview applicants and do not determine which applicants are the best qualified.”<sup>5</sup>

In evaluating whether the HR assistants engage in personnel work within the meaning of § 7112(b)(3), the RD found that they “perform pre-employment duties (i.e.,] initiating background checks, scheduling physicals, ensuring new employees submit required forms), code personnel actions, assist with new employee orientation, process telework and [Education Debt Reduction Program] applications, and perform receptionist duties in a routine and clerical manner and in accordance with standardized rules and procedures.”<sup>6</sup> She further found that “the evidence did not establish that the HR assistants’ duties in posting job announcements, including assessments, and qualifying applicants required independent judgment or discretion . . . [as it] is defined and controlled by the applicable position description, qualification standards[,] and the requirements from various manuals.”<sup>7</sup> Citing Authority case law, the RD clarified the bargaining unit to include the HR assistants.

The Agency filed an application for review<sup>8</sup> and the Union filed an opposition.

<sup>1</sup> 5 U.S.C. § 7112(b)(3).

<sup>2</sup> *Id.* § 7103(a)(13).

<sup>3</sup> Application at 1.

<sup>4</sup> RD’s Decision at 2.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.*

<sup>8</sup> The Agency, in its application, does not challenge the RD’s finding that the HR assistants are not confidential employees, and so, we do not discuss it further.

**III. Preliminary Issue: The Agency's application is not deficient under § 2422.31(b) of the Authority's Regulations.**

In its opposition, the Union argues that the Agency's application is deficient and fails to meet the content requirements of § 2422.31(b) of the Authority's Regulations.<sup>9</sup> Section 2422.31(b) requires that "[a]n application for review must be sufficient for the Authority to rule on the application without looking at the record . . . [; it] must specify the matters and rulings to which exception(s) is taken, include a summary of evidence relating to any issue raised in the application, and make specific references to page citations in the transcript if a hearing was held."<sup>10</sup> The Union argues that the Agency's application is insufficient as it fails to cite to the record or summarize the evidence, and it "only contains two sentences from the [RD's decision] with which the Agency takes exception."<sup>11</sup> Further, the Union argues that the application is insufficient for the Authority to rule on without referring to the record.<sup>12</sup>

We find that the content of the application satisfies the Authority's regulatory requirements. Because the application states the ground on which the Agency seeks review of the RD's decision and cites evidence to support its argument, we find the application sufficient to resolve on the merits.<sup>13</sup> As a result, we deny the Union's request to dismiss the application.

**IV. Analysis and Conclusion: The RD did not fail to apply established law.**

In its application for review, the Agency contends that the RD "failed to apply established law by ignoring evidence demonstrating that the employees in the disputed positions exercise independent judgment."<sup>14</sup> Specifically, the Agency argues that the "disputed employees testified they seek 'the best candidate for the job' . . . [and] it was clear from testimony of witnesses that the decisions they made on the job applicant resumes do require an independent judgment."<sup>15</sup>

Under the Authority's Regulations, the Authority may grant an application for review only when

the application demonstrates that review is warranted, as relevant here, over whether there is a genuine issue over whether the RD has failed to apply established law or committed a clear and prejudicial error concerning a substantial factual matter.<sup>16</sup>

In her decision, the RD applied *USDA, National Finance Center, New Orleans, Louisiana (USDA)*,<sup>17</sup> and found that the HR assistants performed their work in a purely clerical capacity.<sup>18</sup> In *USDA*, the Authority explained that in order for an employee to be excluded from a bargaining unit under § 7112(b)(3), the character and extent of the employee's involvement in personnel work must be more than clerical in nature; the position's duties must not be performed in a routine manner; and the employee must exercise independent judgment and discretion.<sup>19</sup> Applying *USDA*, the RD found that the HR assistants did not exercise independent judgment and discretion and that their duties were clerical and performed in a routine manner.<sup>20</sup>

While the Agency argues that the RD failed to apply established law, the Agency does not cite any particular Authority decision, but instead challenges only the RD's application of § 7112(b)(3) to the facts of this case. For the reasons discussed above, we find that the RD's conclusions are consistent with Authority precedent.<sup>21</sup>

The Agency argues that the RD ignored certain evidence, including witness testimony. The Agency does not cite specific references to "the best candidate for the job" testimony.<sup>22</sup> Examining the record, that phrase does appear in testimony, in which the Agency representative asked one of the HR assistants:

Q. Do[es the Agency] want more qualified or do they want the best candidate?

A. I think it would be more along the lines of wanting the best candidate.

Q. Okay, so your role is to find the best candidate for the job?

A. Yes.<sup>23</sup>

<sup>9</sup> Opp'n at 3.

<sup>10</sup> 5 C.F.R. § 2422.31(b).

<sup>11</sup> Opp'n at 3.

<sup>12</sup> *Id.*

<sup>13</sup> See *U.S. Dep't of the Army, Parks Reserve Training Ctr., Dublin, Cal.*, 61 FLRA 537, 540 n.7 (2006); *U.S. Dep't of the Navy, Human Res. Serv. Ctr. Nw., Silverdale, Wash.*, 61 FLRA 408, 411 (2005); *SSA*, 60 FLRA 590, 591 n.4 (2005); see also 5 C.F.R. § 2422.31(b) (providing that the Authority may, in its discretion, examine the record in evaluating the application).

<sup>14</sup> Application at 1.

<sup>15</sup> *Id.*

<sup>16</sup> 5 C.F.R. § 2422.31(c).

<sup>17</sup> 68 FLRA 206, 208-09 (2015).

<sup>18</sup> RD's Decision at 6-8.

<sup>19</sup> 68 FLRA at 209; see also *USDA, Forest Serv., Albuquerque Serv. Ctr., Human Capital Mgmt., Albuquerque, N.M.*, 64 FLRA 239, 241-42 (2009) (Member Beck concurring); *AFGE, Local 3529*, 57 FLRA 633, 638-39 (2001).

<sup>20</sup> RD's Decision at 6-8.

<sup>21</sup> See *USDA*, 68 FLRA at 208-09.

<sup>22</sup> Application at 1.

<sup>23</sup> Hr'g Tr. at 379.

However, the Agency does not further explain how this testimony demonstrates that the HR assistants exercise independent judgment to exclude their positions from the unit under § 7112(b)(3) of the Statute.

The RD found that the HR assistants “do not determine which applicants are the best qualified”<sup>24</sup> and that they do not “exercise[e] independent judgment or discretion.”<sup>25</sup> This is supported in the record by testimony in which the same HR assistant quoted above testified that when posting positions he “transcribes . . . [job announcements w]ord for word” from material provided by the hiring department and that he only alters the announcement if there is a spelling mistake.<sup>26</sup> He also testified that his announcements were reviewed by his supervisor and the hiring department before being posted.<sup>27</sup> Further, he testified that if he has questions about whether a candidate was qualified, he would ask his supervisor.<sup>28</sup>

Although the Agency disagrees with the RD’s conclusions, challenging the weight, importance, or significance ascribed by the RD to various factual matters in the record does not demonstrate that the RD failed to apply established law in this regard.<sup>29</sup> Therefore, the Agency does not demonstrate, based on the facts the RD found, that the RD made any errors in her application of established law.<sup>30</sup>

## V. Order

We deny the Agency’s application for review.

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<sup>24</sup> RD’s Decision at 3.

<sup>25</sup> *Id.* at 7.

<sup>26</sup> Hr’g Tr. at 340.

<sup>27</sup> *Id.* at 332.

<sup>28</sup> *Id.* at 348.

<sup>29</sup> *U.S. Dep’t of the Army, U.S. Army Corps of Engineers Logistics Activity Ctr., Millington, Tenn.*, 69 FLRA 436, 439 (2016) (citing *U.S. Dep’t of the Interior, Nat’l Park Serv., Ne. Region*, 69 FLRA 89, 97 (2015)).

<sup>30</sup> *Id.*

FEDERAL LABOR RELATIONS AUTHORITY  
CHICAGO REGION

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U.S. DEPARTMENT OF VETERANS AFFAIRS VA  
ST. LOUIS HEALTHCARE SYSTEM  
ST. LOUIS, MISSOURI  
- Agency -

and

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

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Case No. CH-RP-16-0022

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DECISION AND ORDER  
CLARIFYING UNIT

### I. Statement of the Case

The Union's petition seeks to clarify the bargaining unit status of the Agency's Human Resources (HR) Assistant GS-203-6 position encumbered by Arielle Black and GS-203-7 positions encumbered by Dana White, Richard Barron, Brenda Nauert, Jerri North, and Charlene Johnson.<sup>1</sup>

The Agency contends that the HR Assistants are excluded from the Union's existing bargaining unit because they are engaged in personnel work within the meaning of section 7112(b)(3) of the Statute and because they are confidential employees within the meaning of section 7103(a)(13) and 7112(b)(2) of the Statute. The Union disagrees and contends that duties do not exclude them from the Union's bargaining unit.

The Region held a hearing on this matter and the Agency and Union filed briefs, all of which I have fully considered. For the reasons discussed below, I find that the record did not establish that HR Assistants White, Black, Barron, Nauert, North, and Johnson are engaged in personnel work within the meaning of section 7112(b)(3) of the Statute. I further find that they are not confidential employees under the Statute. Accordingly, I will clarify the Union's nationwide

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<sup>1</sup> The Union's petition originally sought to clarify the unit status all HR Assistants at the Agency. During the Region's processing of the petition, the parties resolved the status of all positions in dispute save the six employees identified above.

non-professional bargaining unit to include their positions.

### II. Findings

The Union represents nationwide, consolidated bargaining units of VA professional and non-professional employees. The VA's Veteran Health Administration has regions called Veterans Integrated Service Networks (VISN) and the Agency is under VISN 15. The Agency's HR Service is located in its Jefferson Barracks Division in St. Louis, Missouri and includes six teams: Employee Relations/Benefits, Credentialing & Privileging, HR Operations, Title 38 Hybrid Recruitment/Placement, Title 5 Recruitment/Placement, and Title 38 Recruitment/Placement. In addition to the three recruitment/placement teams, the HR Operations team also performs recruitment functions. The employees at issue here are all non-professional employees assigned to the Agency's HR Service, in one of the three recruitment/placement teams or in the HR operations team, as GS-203-6 or 7s, under the Position Description no. 08055-A.

All six employees at issue either perform or plan to perform the recruitment duties of creating job announcements and qualifying applicants.<sup>2</sup> They all testified consistently about the process and tools used. The HR Assistants create and post job announcements on the electronic platform USA Staffing. They must have a USA Staffing license in order to have access to USA Staffing. The VA has an internal licensing program. The licensing program can take several months to complete, but it depends on the employees' individual pace and the timing of course offerings. There is no indication that the Agency's licensing program has any prerequisites of specific personnel knowledge or skills.

The HR Assistants create job announcements by editing prior announcements. They enter information that a department (service) gives them, including the job series and grade, duties, and specific qualifications the service wants. They also use the VA Handbook 5005 and OPM General Schedule Qualification Standards, which details the required education, experience, qualifications, and Knowledge, Skills and Abilities (KSAs or competencies) for each category of position. Other guides they use include a salary table, the Vet Guide to determine veteran preference, and an OPM medical certification form (OF-178) to determine physical requirements. When creating job

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<sup>2</sup> At the time of the hearing, White, Nauert, and Black had not actually started performing the job announcement or qualifying applicant duties.

announcements the HR Assistants copy all the included information from boilerplate templates, documents the service sends, or their various manuals and guides. They send the job announcement to the service for approval before posting, and make changes if requested by the service.

After the job announcements close, the HR Assistants qualify the applicants. This is an initial review to ensure the applicants meet the minimum requirements for the job, such as “the ability to plan and organize work, set priorities in order to meet deadlines.” The HR Assistant compares the competencies in the job announcement with the applicants’ resumes. For each competency they search the resume to see if the applicant described performing duties or having skills similar to the competency. If they are not clear on whether someone meets a competency they ask a specialist or their supervisor.

The HR Assistants send a list of qualified applicants to the service, which then determines which applicants are the most qualified and ultimately selects which applicants to hire. The HR Assistants do not interview applicants and do not determine which applicants are the best qualified. Once a service selects an applicant, the HR Assistants will make the job offer.

#### **a. Dana White**

White is a GS-7 who does various tasks for onboarding new hires. She schedules physical exams for applicants who receive tentative job offers, and follows up to make sure the applicants attend the exams. White initiates the background checks by sending the applicants’ forms, verifying they filled out all the documents, and then releasing those forms to OPM for the background investigation. She also attends new employee orientation to help new employees fill out and submit tax and health insurance paperwork. White answers applicants’ questions, mostly about their benefits or uniform allowances. If an applicant asks her a question for which she does not know the answer, she asks a HR Specialist or her supervisor.

At the time of the hearing, White had a license for USA Staffing, but did not have access to it for almost four months. White had not posted any jobs on USA Staffing, qualified applicants, or made job offers. She knows once she receives access to USA staffing, she will start qualifying Nursing Assistants, who are GS-3s to GS-5s.

White has not been involved in processing any grievances, disciplining employees, or negotiating contracts with the Union.

#### **b. Brenda Nauert**

Nauert is a GS-7 who works on the HR operations team. She inputs codes into a program called HRsmart for certain personnel actions, such as resignations, promotions, address changes, and education updates. She also makes corrections to employees’ personnel records in this system. She speaks with employees about the VA’s payroll system and the Electronic Official Personnel Folder (EOPF) system. She explains to employees how to update their address or education. In carrying out her duties, Nauert relies on various resources, such as the OPM website, manuals, and consultation with HR specialists.

She also assists the Agency’s compensation panels, which sets physicians’ pay. The compensation panel has to agree to confidentiality and Nauert provides a confidentiality statement at the beginning of the panel’s work. Nauert also answers the panel’s technical questions. For example, if they ask the median pay for a type of physician she will give them that data. She takes notes for the panel, records them, and places them in a restricted electronic file. Once the panel makes a preliminary decision on compensation levels, higher-level final approval is sought. Nauert does not review the panel’s preliminary decision and is not involved in the higher-level review. Once final approval is received, Nauert codes the action into HRsmart.

Nauert assists with employees’ requests to participate in telework and the Agency’s student debt reduction program. She reviews telework request forms to make sure they are filled out correctly and codes approved requests into HRsmart. She explains the eligibility requirements for the Education Debt Reduction Program (EDRP) to employees. The Agency also has a list of positions that are eligible and not eligible for EDRP, and she lets people know if they are not eligible based on that list. Nauert helps employees put together their packets and verify they included all the necessary information. Another Agency department and the VISN decide whether to approve applications for the program.

At the time of the hearing, Nauert was taking classes to obtain her USA Staffing license. She estimated she would receive her license around January 2017, and would start doing recruitment duties immediately after. Management told her she would do announcements and qualifications for tenant facilities, such as Canteen Services. Canteen Services includes bargaining unit employees.

Once, management assigned Nauert a special project of participating in a fact-finding investigation for

the VISN. The fact-finding could have led to disciplinary action, but she does not know the result. She transcribed testimony for about four to six weeks and gathered documents a couple months after the interviews. She did not attend any meetings where management discussed the fact-finding or discussed whether or not they planned on disciplining anyone.

Nauert has not been involved in negotiations with the Union, responding to Union grievances, or disciplining employees.

### **c. Arielle Black**

Black is a GS-6 who works on the HR operations team. She spends most of her day coding personnel actions into HRsmart. She also initiates background checks and schedules new employee physical exams. Black takes phone calls from current, past, and potential employees and employers who want employment verification. If she cannot answer their questions she asks a HR Specialist for the answer.

She also organized a job fair for Medical Support Assistant positions. Black assembled a team that included a supervisor, a couple HR Specialists, and a few HR assistants. She put together folders for applicants with forms, such as those for physicals and fingerprinting. Black provided the services with the location, date, and time for the job fair. She did not talk to the services about what kind of positions they wanted to fill.

At the time of the hearing Black had a USA Staffing license for about 10 months, but had not yet made any job announcements or qualified any applicants. Her supervisor has told her she will do these duties in the future, but he did not tell her when.

Black has not been involved in disciplining employees or grievances.

### **d. Charlene Johnson**

Johnson is a GS-7 whose duties include posting job announcements and qualifying applicants. She prepares certificates of the qualified applicants, which she sends to the service for its selection. Certain positions Johnson handles can be filled non-competitively without a job announcement, such as those hired under the Veterans Recruitment Act. Sometimes a service already knows applicants who can fill non-competitive positions and sometimes a service asks her if the Agency has any qualified non-competitive applicants. If there are no qualified veteran applicants for positions like housekeeping

aides, Johnson talks with the service about opening the announcement to all U.S. citizens.

She works on Title 5 positions. For these positions, if more than eight applicants are on a promotion certificate, the service does a Best Qualified Panel. She attends these panels to observe, and to answer questions about the process. She does not advise the panel on which candidates are the most qualified. The Union is invited to sit on the panel and the panel's subject matter expert is often a bargaining unit employee.

Johnson makes job offers and initiates physicals and background checks. She does these onboarding duties for both the positions she announced and those HR Specialists announced. She attends New Employee Orientation to get documents signed and answer questions. Johnson also participates in job fairs where she greets applicants and gives them documents.

Johnson does not advise on whether to discipline employees, she does not respond to union grievances, and she is not involved in EEOC or MSPB complaints. Johnson has provided the Union with documents about announcements when directed to by the Employee Relations supervisor.

### **e. Richard Barron**

Barron is a GS-7 who supports two HR Specialists. He creates job announcements for Title 5 employees and qualifies applicants. He also creates assessments or questionnaires in USA Staffing as part of application process. He pulls the questions from the USA Staffing Library based on the position. Sometimes Barron has conversations with a service about whether the service wants to limit the number of applicants and how long the service wants the announcement open.

Barron schedules physicals and initiates background checks. Barron creates packets of documents employees need to fill out at New Employees Orientation. He attends the orientation to explain the documents and where the employees need to sign. Barron enters the new employees' personnel information from the documents they provide into HRsmart. He also answers phones and in-person questions.

Barron has never been involved in a selection audit, discipline, grievance, or EEO proceeding. He has provided documents from a selection to the Union for an audit, but he did not participate in the audit.

## f. Jerri North

North is a GS-7 who performs recruitment duties such as posting job announcements and qualifying applicants. After a service selects an applicant, he makes a job offer (for the announcements he posted). For his announcements and those created by the two HR Specialists he supports, North enters the information about the job offer in the database. He initiates background checks. He calls the selectee to give them information about the job, such as the salary, and New Employee Orientation. North also attends the New Employee Orientations to go over paperwork and verify their personal information is correct. He processes the employees' paperwork, such as health benefit and tax forms. He occasionally relieves the receptionists and performs those duties.

He has never written a response to a grievance, been involved in an EEO or MSPB proceeding, advised management on disciplining an employee, or negotiated with the Union.

## III. Positions of the Parties

The Agency contends that the HR Assistants should be excluded pursuant to section 7112(b)(3) of the Statute because they exercise independent discretion and judgment in carrying out their various personnel work duties. The Agency also asserts that the employees qualify as a confidential employee because they discuss with management the kind of job applicants they want, request permission from the Union to change the scope of certain announcements, sit in on Union audits of selections, and could possibly testify as an agency witness if someone grieved or filed an EEO complaint over a service's selection.

The Union asserts that the HR Assistants are not subject to exclusion under section 7112(b)(3) because their personnel work duties are performed in a clerical and administrative capacity and in accordance with established policies and procedures. The Union submits that inclusion of the employees in the Union's bargaining unit would not create a conflict of interest as none of the employees make decisions on personnel matters or can take actions that affect the status of the bargaining unit. The Union further contends that the employees do not have a confidential relationship with management.

## IV. Analysis and Conclusions

### A. Personnel Work Exclusion

Under section 7112(b)(3) of the Statute, a bargaining unit may not include an employee who is

“engaged in personnel work in other than a purely clerical capacity.” Staffing levels, types of employees, and the organizational structure of an agency's individual components all relate to an agency's personnel work. See *Dep't of the Army, HQ, 101st Airborne Div., Ft. Campbell, Ky.*, 36 FLRA 598, 602 (1990); *OPM*, 5 FLRA 238, 246 (1981). For an employee to be excluded under the Section, the record must show that the character and extent of the employee's involvement in personnel work is more than clerical in nature and that the employee does not perform the duties in a routine manner. *DOJ, INS, Wash., D.C.*, 59 FLRA 304, 306 (2003). Further, the employee must exercise independent judgment and discretion in carrying out the personnel duties. *Id* Individuals whose personnel duties only require processing completed personnel actions or screening personnel actions for technical sufficiency are not excluded. *Dep't of the Navy, U.S. Naval Station, Pan.*, 7 FLRA 489, 493 (1981).

The record did not establish that any of the HR Assistants engage in personnel work within the meaning of section 7112(b)(3) of the Statute. They perform pre-employment duties (i.e. initiating background checks, scheduling physicals, ensuring new employees submit required forms), code personnel actions, assist with new employee orientation, process telework and EDRP applications, and perform receptionist duties in a routine and clerical manner and in accordance with standardized rules and procedures. These duties do not require independent judgment or discretion.

The HR Assistants who attend compensation panels and best qualified panels also perform these duties in a routine manner in accordance with standardized rules and procedures. Their role is to give standard information to the panels, ensure forms are filled out and tallied, and file documents. They do not advise the panels on how to make their decision or suggest what the panels' decisions should be. Thus, they are not exercising independent judgment or discretion in performing these duties.

Black organized a job fair, but did so following the instructions someone gave her and performed related administrative tasks, such as giving services fliers and putting together folders. She did not determine which positions would be filled at the fair, which services would participate, or which applicants the service should hire. None of the HR Assistants who participated in job fairs made those kinds of determinations. Rather, they greeted applicants and passed out folders. Thus, the HR Assistants' duties, including Black's, related to job fairs were performed in a routine manner and without exercising independent judgement or discretion.

Finally, the evidence did not establish that the HR Assistants' duties in posting job announcements, including assessments, and qualifying applicants required independent judgment or discretion. The preparation of announcements and screening of applications is defined and controlled by the applicable position description, qualification standards and the requirements from various manuals.<sup>3</sup>

Based on the foregoing, I find the HR Assistants White, Nauert, Black, Johnson, Barron, and North are not excluded from the Union's bargaining unit under section 7112(b)(3) of the Statute. *USDA, Nat'l Fin. Center, New Orleans, La.*, 68 FLRA 206 (2015); *Albuquerque Service Center*, 64 FLRA 239; *U.S. DOD, Def Contract Audit Agency Central Region, Irving, Tex.*, 57 FLRA 633, 638-639 (2001); *FDIC, SF, Cal.*, 49 FLRA 1598 (1994); *VA Medical Center Prescott*, 29 FLRA 1313 (1987); *HQ, Fort Sam Houston*, 5 FLRA 339, 342-345 (1981); *U.S. DOJ, U.S. Penitentiary, Marion, Ill.*, 55 FLRA 1243, 1247 (2000).

#### B. Confidential Employee Exclusion

Section 7103(a)(13) of the Statute defines a confidential employee as an employee "who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations." An employee is confidential when: (1) the employee has a confidential working relationship with an agency representative; and (2) the agency's representative is significantly involved in labor-management relations. *NASA, Glenn Research Ctr., Cleveland, Ohio*, 57 FLRA 571, 573 (2001). In addition, employees who, in the normal performance of their job duties, may obtain advance information on management's position concerning negotiations, the disposition of grievances, and other labor-management relations matters are confidential employees under the Statute. *Broadcasting Board of Governors*, 64 FLRA 235, 236 (2009); *US. DOL, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1377-83 (1990).

When assessing whether an individual serves in a confidential capacity, the Authority considers whether the individual: (1) obtains advance information of management's position regarding contract negotiations, the disposition of grievances, and other labor relations matters; (2) attends meetings where labor-management matters are discussed; (3) because of physical proximity to their supervisor, overhears discussions of labor management matters; and

(4) prepares or types materials related to labor-management relations, such as bargaining proposals and grievance responses. *U.S. DOL, Wash., D.C.*, 59 FLRA 853, 855 (2004) (*DOL*).

There is no evidence that any of the HR Assistants maintain a confidential working relationship with Agency officials significantly involved in labor-management relations. Nor do the HR Assistants obtain advance information on management's positions regarding contract negotiations, grievances, or other labor-management relations matters. Only Black testified that she had ever contacted the Union to request permission to not post an announcement. But complying with the contractual obligation to obtain the Union's permission to change the scope of an announcement is not negotiating and knowing management's "position" on how it would like to announce a job does not constitute advance information on labor relations matters.

The HR Assistants also do not attend any meetings where management discusses labor-relations matters. Some attended compensation and best qualified panels, but these are not internal management discussions on labor-relations matters. The Union has a contractual right to have a representative present during best qualified panels and bargaining unit employees sit on those panels. None of the HR Assistants attended Union audits of selections, but even if they did these are also not confidential management discussions on labor-relations matters. Nauert attended VISN level fact-finding interviews, but there is no evidence that this in anyway involved bargaining unit employees. And she did not attend any of management's discussions about what the outcome of the fact-finding should be or management's position on possible discipline. Therefore, none of the HR Assistants attended meetings where management discussed labor-management matters.

Further, there is no evidence an HR Assistant would represent management at an arbitration or EEO or MSPB hearing. Testimony on whether HR Assistants might testify as a witness at a hearing was speculative at best. In any event, testifying as a witness about how they performed their job does not require a confidential relationship with management.

Finally, there is no evidence that they overheard discussions of labor management matters or prepared management responses to grievances, ULP charges, or disciplinary actions. Some of HR Assistants collected information which labor relations or their supervisors had already decided to provide to the Union. There is no evidence that they decide or participate in management discussion on what

<sup>3</sup> While White, Nauert and Black haven't yet performed any of these duties, even if they did the duties would not warrant their exclusion from the Union's bargaining unit.



information to provide to the Union or otherwise act in a confidential capacity regarding management's response to information requests. *See, FDIC, San Francisco, Cal.*, 49 FLRA 1598 (1994)

Based on the foregoing, I find that HR Assistants White, Nauert, Black, Johnson, Barron, and North are not confidential employees within the meaning of section 7103(a)(13) of the Statute. *BBG*, 64 FLRA at 230; *Sheppard AFB*, 61 FLRA 443; *U.S. Dep't of VA*, 60 FLRA 887, 889 (2005); *DOL*, 59 FLRA 853, 855.

## **V. Order**

The Union's consolidated bargaining unit of VA non-professional employees is clarified to include the GS-203-6 Human Resources Assistant position encumbered by Arielle Black and the GS-203-7 Human Resources Assistant position encumbered by Dana White, Richard Barron, Brenda Nauert, Jerri North, and Charlene Johnson.

## **VI. Right to File an Application for Review**

Under section 2422.31(a) of the Authority's Regulations, a party may obtain review of this action by filing an application for review with the Authority. Pursuant 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 60 day time limit contained in section 7105(f) may not be waived or extended.

The contents of, and grounds for, an application for review are set forth in section 2422.31(b) and (c) of the Authority's Regulations. ([www.flra.gov/regulations](http://www.flra.gov/regulations)). The filing and service requirements for an application for review are addressed in Part 2429 of the Authority's Regulations ([www.flra.gov/regulations](http://www.flra.gov/regulations)).

The application for review must be filed on or before April 24, 2017 and must be filed with Gina K. Grippando, Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Suite 201, 1400 K Street, NW, Washington, DC 20424-0001.

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Dated: February 23, 2017