

59 FLRA No. 157

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL CREDIT UNION ADMINISTRATION
(Activity)

and

NATIONAL TREASURY EMPLOYEES UNION
(Petitioner)

WA-RP-03-0057

ORDER DENYING APPLICATION FOR REVIEW

April 26, 2004

Before the Authority: Dale Cabaniss, Chairman, and
Carol Waller Pope and Tony Armendariz, Members^{1/}

I. Statement of the Case

This case is before the Authority on an application for review filed by the National Credit Union Administration (Activity) under § 2422.31(c) of the Authority's Regulations. NTEU (the Union) filed an opposition to the application.

The Activity seeks review of the Regional Director's (RD's) decision and order and direction of election to include incumbents of the credit union examiner (examiner) position in the bargaining unit.^{2/} As relevant here, the RD

^{1/} Chairman Cabaniss' separate opinion is set forth at the end of this decision.

^{2/} The credit union examiner position includes several sub-categories of examiners, including Problem Case Officers and
(continued...)

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rejected the Activity's argument that the examiners should be excluded from the bargaining unit on the basis that they are management officials as defined by § 7103(a)(11) of the Federal Service Labor-Management Relations Statute (the Statute).

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

II. Background

The Union filed a petition seeking an election in a nationwide unit of approximately 780 professional and nonprofessional employees. The parties disputed the eligibility of the examiners, who constitute approximately 485 incumbents of the proposed unit.^{3/}

The mission of the Activity is to administer the Federal Credit Union Act, and it is responsible for administering the National Credit Union Shared Insurance Fund. Under the Federal Credit Union Act, the Activity has the authority to supervise and regulate federally insured credit unions to ensure their safety and soundness, and to minimize risk to the Shared Insurance Fund.

Organizationally, the Activity consists of one central office and six regional offices. The regional offices are responsible for oversight of the credit unions in their geographic area. Each regional office has three senior staff members: a regional director, an associate regional director of programs, and an associate regional director of operations. Under the senior staff, each office has 8-10 supervisory examiners who report to the associate regional director of programs. Each supervisory examiner is the first-line supervisor of groups consisting of 8-10 examiners.

^{2/} (...continued)

Regional Training Specialists. We will refer to them throughout this decision collectively as examiners.

^{3/} The RD also determined the bargaining unit status of several other positions. As those determinations are not challenged in the application for review, we will not address them further.

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The examiners are the primary contact for the credit unions that they oversee.

The examiners' primary function is to conduct reviews (examinations) of credit union operations and issue an examination report with findings regarding their performance. As part of the examination process, the examiners are charged with ensuring that a credit union is in compliance with all applicable laws, rules, and regulations. Based on the results of the examination, credit unions are assigned a CAMEL (Capital, Assets, Management, Earnings and Liquidity) rating between 1 and 5. Credit unions with CAMEL ratings of 4 or 5 are considered to be in danger of failing, and are subject to more frequent examinations, whereas a credit union that is rated a 1 or 2 may operate with less supervision.

Several tools are utilized by the examiners to conduct their examinations, including a software package (AIRES) that provides a preliminary assessment of risk and a suggested CAMEL rating based on information provided by the examiner. The examiners also have access to an examination guide that includes Activity policy and guidance, which is utilized to varying degrees dependent upon their experience level.

Examiners have broad discretion to determine the CAMEL rating, and frequently change the rating generated by AIRES. In some regions, the examiners are instructed to inform the regional director or supervisory examiner when they are rating a credit union a 4 or 5. In other regions, the examiners are given discretion to apply a CAMEL rating independent of supervisory notification.

Upon completing the examination, a report is compiled by the examiner documenting his or her findings and any corrective action to be taken by the credit union. Shortly thereafter, the examiner holds a joint conference with the credit union's board. If the credit union is required to take corrective action based on the examiner's findings, the findings are recorded in a Document of Resolution (DOR). Following the joint conference, a final copy of the report is forwarded to the credit union board. The first page of the report explains that the findings may be appealed to the regional director.

If the credit union does not voluntarily comply with the recommended corrective action, additional informal action may be taken against the credit union at the regional level. This may include the negotiation of a Letter of Understanding (LUA) or the issuance of a Preliminary Warning Letter (PWL). An LUA, which may be negotiated with the credit union board by the examiner, is an agreement from the credit union to take certain actions and is signed by the examiner, the supervisory examiner, and the regional director. A PWL, which may be drafted by the examiner, is signed by the regional director and advises the credit union that the Activity may take further action against it to restrict operations or impose procedures. Any formal action against a credit union must be approved at the national level.

III. RD's Decision

Applying the criteria provided for in *Dep't of the Navy, Automatic Data Processing Selection Office*, 7 FLRA 172, 177 (1981) (*Navy ADP*), the RD determined that the employees at issue were not management officials as defined by § 7103(a)(11) of the Statute.^{4/} In *Navy ADP*, the Authority defined "management official" to include those individuals who: (1) create, establish or prescribe general principles, plans or courses of action for an agency; (2) decide upon or settle upon general principles, plans or courses of action for an agency; or (3) bring about or obtain a result as to the adoption of general principles, plans or courses of action for an agency.

Citing *United States Dep't of Justice, Executive Office of Immigration Review, Office of the Chief Immigration Judge*, 56 FLRA 616 (2000) (*EOIR*), the RD found that the incumbents effectuate rather than establish Activity policy. In this regard, the RD determined that

^{4/} § 7103(a)(11) provides that:

"management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency[.]

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[t]hese employees are technical experts in [Activity] policy and its application to the credit unions they supervise. They are expected to be able to use a degree of discretion in determining the scope of their examinations and to correct proposed CAMEL ratings that do not comport with the credit union's real posture, as revealed by the examination. The employees in these positions attempt to secure credit union compliance with [Activity] policies and their success in obtaining voluntary compliance is key to both protecting the resources of the Shared Insurance Fund and conserving [Activity] resources. However, everything these employees do is subject to review by the regional and national level and to appeals by the credit union of a DOR including the CAMEL rating assigned."

Decision at 22.

Further, the RD found that "[Activity] policy is to assign CAMEL ratings to credit unions and to have the examination staff base these ratings on specific criteria, including their experienced application of professional judgment. . . . [The examiners] do not establish any policy with respect to CAMEL ratings. Instead, they carry out the [Activity's] policies concerning CAMEL ratings." *Id.* at 23. "In determining the scope of the examination, drafting reports, conducting Joint Conferences, drafting DORs, letters of understanding, preliminary warning letters, and assigning a CAMEL rating, these employees implement and effectuate the policies of [the Activity] in support of its mission. They do not, however, establish [Activity] policy by carrying out that policy." *Id.*

Accordingly, the RD included these employees in the bargaining unit.^{5/}

^{5/} The RD also determined that the employees were not supervisors within the meaning of § 7103(a)(10) of the Statute. As this determination is not challenged in the

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IV. Positions of the Parties

A. The Activity's Application

The Activity asserts that the RD failed to apply established law, and that the RD committed a clear and prejudicial error concerning substantial factual matters.^{5/}

The Activity claims that the RD failed to apply established law in determining that the employees should be included in the bargaining unit. In this regard, the Activity argues that, by relying primarily upon Navy ADP, the RD failed to consider "two decades of decisions . . . [in which] the FLRA has developed criteria to determine whether an employee influences, decides or brings about an [Activity's] plans and courses of action[.]" Application at 4. The Activity also argues the RD erred by "essentially address[ing] only one criterion -- the degree of supervisory approval and review[.]" *Id.* at 5.

^{5/} (...continued)

Activity's application for review, we will not address it further.

^{6/} Under § 2422.31 of the Authority's Regulations, the Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds:

(1) The decision raises an issue for which there is an absence of precedent;

(2) Established law or policy warrants reconsideration; or,

(3) There is a genuine issue over whether the Regional Director has:

- (i) Failed to apply established law;
- (ii) Committed a prejudicial procedural error;
- (iii) Committed a clear and prejudicial error concerning a substantial factual matter.

5 C.F.R. § 2422.31(c).

Further, the Activity argues that the RD erred by relying upon *EIOR* "without applying the 'abundance of Authority case law'" cited therein. *Id.* at 6. Had the RD applied established Authority precedent, the Activity argues, he would have found that the incumbents were in fact management officials because the results of an examiner's report and CAMEL rating determine the future supervision of the credit union, effectively deciding Agency policy.

The Activity also claims that the RD should have considered the Authority's holding in *United States Army Communications Sys. Agency, Fort Monmouth, N.J.*, 4 FLRA 627 (1980) (*Ft. Monmouth*), asserting that it is "the case most comparable on its facts[,] " because "[t]he [Authority] held in that case that the principal auditor of an Army command group was a 'management official' because he functioned beyond the level of 'an expert or professional rendering resource information or recommendations.'" *Id.* at 6.

In addition, the Activity contends that the RD committed clear and prejudicial error concerning three substantial factual matters.

First, the Activity argues that the RD's decision minimizes the examiners' role in assigning CAMEL ratings. In this regard, the Activity argues that the examiners have more discretion and involvement in assigning CAMEL ratings than the RD's decision suggests and that such ratings "determine[] the course [and] amount [of] aggressiveness of future supervision that [the Activity] will devote to the credit union it oversees." *Id.* at 8.

Second, the Activity argues that, although an examiner's report is "theoretically" subject to review and appeal, "[t]his statement is inaccurate and misleading[]" because "the RD [d]ecision overlooked current actual practice confirming that Examiner decisions are seldom reviewed, rarely appealed[,] and almost never overturned." *Id.* at 9.

Finally, the Activity argues that the RD's statement that examiners' reports are reviewed or signed by a supervisor and the Regional Director is incorrect.

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B. The Union's Opposition

The Union contends that the Activity has failed to submit compelling reasons for granting review of the RD's decision under the Authority's Regulations.

First, the Union argues that the RD's decision is consistent with Authority precedent set forth in *Navy ADP*. In this regard, the Union contends that the RD relied upon well settled criteria for determining whether an employee is a management official and correctly found that examiners should be included in the bargaining unit because they implement, as opposed to establish, Activity policy.

Second, the Union contends that the RD did not commit clear and prejudicial error concerning substantial factual matters. The Union asserts that while the examiners "do use their professional judgment ably in their day to day work, that authority is circumscribed by group policies, regional instructions, national guidelines and an extensive overlay of law, rule and regulation" *Opposition at 12*. The Union also argues that "the credit union can appeal all aspects of the examiners report with the Regional Director and in some cases beyond that to the Central Office and the NCUA Board." *Id. at 13*.

The Union concedes that the RD erred in stating that an examiner's report is signed by the supervisor and the regional director, but contends that the reports are nevertheless subject to review, and the misstatement is "completely inconsequential." *Id. at 14*.

In sum, the Union asserts that the Activity's application for review constitutes mere disagreement with the RD's findings and should be denied.

V. Analysis and Conclusions

For the following reasons, we conclude that no compelling reasons exist for granting review of the Regional Director's Decision and Order.

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A. The RD did not Fail to Apply Established Law by Including the Positions in the Bargaining Unit

Section 7103(a)(11) of the Statute defines a management official as "an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency." As the Authority stated in Navy ADP, the definition of management official includes those individuals who: (1) create, establish or prescribe general principles, plans or courses of action for an Activity; (2) decide upon or settle upon general principles, plans or courses of action for an Activity; or (3) bring about plans or courses of action for an Activity. ADP, 7 FLRA at 177.

In this case, the RD found that the credit union examiners were not management officials because they did not perform duties which require or authorize them to formulate, determine, or influence the Activity's policies within the meaning of § 7103(a)(11) of the Statute. The RD found that the examiners act as technical experts in the Activity's policy and its application to the credit unions they supervise, and assign CAMEL ratings to credit unions based on established criteria, including their experienced application of professional judgement. As such, the RD found that the examiners carry out, as opposed to establish, the Activity's policies and that their duties do not extend to the point of creating, settling upon, or bringing about courses of action.

Relying upon established precedent set forth in Navy ADP and EOIR, the RD found that the examiners were not management officials because the record established that their duties "effectuate" rather than establish agency policy, that "everything [they] do is subject to review by the regional and national level and to appeals by the credit union of a DOR including the CAMEL rating assigned[,]" and that the ratings they assign to credit unions are based on "specific criteria, including their experienced application of professional judgment." Decision at 22, 23.

The Activity claims that the RD "ignor[ed] the post-Navy ADP body of cases," Application at 6, and that "[h]ad those precedents been applied in the RD Decision here, . . .

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that [the Activity's] Examiners would qualify as 'management officials' exempt from bargaining unit eligibility." *Id.*

In this regard, the Activity cites several cases which explain the general standard the Authority uses to determine whether an employee is a "management official." Contrary to the Activity's argument, however, long-standing Authority precedent provides support for the RD's decision. See *United States Coast Guard, Wash., D.C.*, 7 FLRA 743 (1982) (employee whose recommended changes in research plans were subject to higher-level guidance found to be "valuable expert or professional," as opposed to management official); *Def. Communications Agency, Def. Commercial Communications Office, Scott Air Force Base, Ill.*, 8 FLRA 273 (1982) (employees whose actions assist in implementing policies do not actively participate in ultimate determination so as to rise to the level of management official); *Dep't of Def., Dep't of the Army, Headquarters, United States Army Armament, Materiel Readiness Command, Rock Island Arsenal, Ill.*, 8 FLRA 758 (1982) (employees whose recommendations were subject to review by supervisory channels found not to be management officials); *Headquarters, Space Div., Air Force Sys. Command, Dep't of the Air Force, Dep't of Def.*, 9 FLRA 885 (1982) (professionals whose actions assisted agency policy found not to be management officials); *United States Dep't of the Interior, Bureau of Mines, Twin Cities Research Ctr., Twin Cities, Minn.*, 9 FLRA 109 (1982) (employees functioning within pre-established guidelines found not to be management officials).

The Activity also claims that the facts in *Ft. Monmouth*, 4 FLRA 627, are similar to this case, and support a finding that the examiners are management officials. We disagree. In support of its position, the Activity points to one of the excluded positions, a " . . . principal auditor of an Army command group [who] was [found to be] a 'management official' because he functioned beyond the level of 'an expert or professional rendering resource information or recommendations.'" Application at 6, citing *Ft. Monmouth*, 4 FLRA at 631. However, the Authority found that the auditor in that case took "an active role in influencing and in determining the internal review objectives of the Activity . . . extend[ing] beyond that of an expert or professional

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rendering resource information or recommendations to the point of active participation in the ultimate determination as to what the policy in fact will be." *Id.* at 631.

In this case, the RD determined that the examiners do not take an active role in influencing and in determining Agency policy extending beyond that of an expert or professional to the point of active participation in the ultimate determination as to what the policy in fact will be. The RD's determination is supported by the record. Thus, the Activity has failed to show that the RD failed to apply established law in this regard.

Further, the Activity asserts that the RD's decision warrants review because the RD erred by "essentially address[ing] only one criterion -- the degree of supervisory approval and review[.]" Application at 5. We reject this argument, because the RD did not rely solely upon the level of review to which an examiner's report is subjected. See Decision at 22-23. The RD's determination that the examiners are not management officials was appropriately based on all of his findings concerning their duties and responsibilities.

Our review of the case law reflects that the Authority has reserved the term "management official" for a discrete category of employees whose responsibilities extend beyond that of a professional or technical expert, and/or employees who are authorized to draft or author agency rules, regulations or directives. See, e.g., *United States Dep't of Energy, Headquarters, Wash., D.C.*, 40 FLRA 264 (1991); *United States Dep't of Labor, Mine Safety and Health Admin., Wash., D.C.*, 37 FLRA 1151 (1990); *Adjutant General of New Hampshire, State Military Reservation, Concord, N.H., 157th Air Refueling Group, New Hampshire Nat'l Guard*, 13 FLRA 88 (1983).

The disputed employees here do not fall within this category. As such, we find that the Activity has not established grounds warranting review of the RD's decision under § 2422.31(c)(3)(i) of the Authority's Regulations and deny this portion of the application.

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B. The RD did not Commit a Clear and Prejudicial Error Concerning Substantial Factual Matters

The Activity also alleges that review of the RD's decision is warranted under § 2422.31(c)(3)(iii) of the Authority's Regulations because the RD committed factual errors related to the examiners' duties. According to the Activity, the RD minimized the examiners' role in assigning CAMEL ratings. The Activity also claims that the RD's finding that the examination reports are subject to appeal "is inaccurate and misleading[.]" Application at 9, and that the examiners' reports are not, in fact, signed by the supervisor or regional director as asserted by the RD. We reject these allegations.

The RD specifically addressed the examiners' role in regard to the assignment of CAMEL ratings and concluded that the degree of discretion granted to the examiners by the Activity did not provide them with duties that result in the establishment or formulation of policy necessary to find them to be management officials. The record reflects that examinations are conducted based on training, manuals, and letters provided by the agency as well as governing laws, rules and regulations in addition to the examiners' professional experience. See JE 1; Transcript (Tr.) at 73, 457. Although examiners are given a fair amount of discretion based on their professional judgment, the CAMEL rating assigned by the examiner is based on various factors already established by the Agency. *Id.* at 55-58. Thus, the Activity has not shown that the RD committed any factual error in this regard. The record supports the RD's conclusion that the examiners are expected to rely upon an already established framework in assigning CAMEL ratings, and are not responsible for the development of that policy.

The Activity also alleges that the RD's finding that the examiners' reports are subject to review and appeal is "inaccurate and misleading." Application at 9. However, the Agency does not dispute the RD's factual finding that the examinations are subject to appeal. Instead, the Activity asserts that, although the examinations are "technically" subject to appeal, it disagrees with the evidentiary weight that the RD ascribed to that fact. In our view, the Activity has not shown that the RD committed a clear and prejudicial error concerning a substantial factual matter.

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Finally, the Activity submits that the RD was incorrect in stating that the examiners' reports are reviewed or signed by the supervisor and the regional director before being forwarded to the credit union board. The Union concedes that the finished examination report is not signed. However, the record supports the RD's finding that the examiners' report is subject to higher-level review. In particular, there was testimony at the hearing that although the report is not signed by the supervisor or regional director, it is forwarded to the supervisor and regional director upon completion. Tr. at 319. In these circumstances, the Activity has failed to establish that the RD's misstatement as to signing is significant. As such, the Activity has not established grounds warranting review of the RD's decision in this regard.

As such, we find that the Activity has not established grounds warranting review of the RD's decision under § 2422.31(c)(iii) of the Authority's Regulations and deny this portion of the application.

VI. Order

We deny the application for review.

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Dissenting opinion of Chairman Cabaniss:

I write separately to note that I would remand this case back to the Regional Director (RD) for a reexamination of whether the incumbents of the credit union examiner position should be excluded from the bargaining unit as management officials.

The Application for Review presents a strong argument for reexamining the adjudication of these positions, in contrast to the four paragraphs in the RD's decision that explain the determination made. While the majority opinion does a much better job of addressing the issues than the RD's decision, it does not overcome my belief that the Application for Review establishes that 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. Both criteria are found at § 2422.31(c)(3) of the Authority's Regulations, and I note that all a party must do is raise enough doubt to establish the issue of whether such errors took place.

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL CREDIT UNION ADMINISTRATION
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(Petitioner)

WA-RP-03-0057

STATEMENT OF SERVICE

I hereby certify that copies of the Order of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following parties:


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DATED: April 26, 2004
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