

**66 FLRA No. 48**

FRATERNAL ORDER OF POLICE  
(Petitioner/Labor Organization)

and

NATIONAL FEDERATION  
OF FEDERAL EMPLOYEES  
LOCAL 2049  
(Exclusive Representative/Labor Organization)

and

UNITED STATES  
DEPARTMENT OF THE ARMY  
WHITE SANDS MISSILE RANGE  
WHITE SANDS MISSILE RANGE, NEW MEXICO  
(Activity)

DA-RP-11-0010

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ORDER DENYING APPLICATION FOR REVIEW

October 12, 2011

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Before the Authority: Carol Waller Pope, Chairman, and  
Thomas M. Beck and Ernest DuBester, Members

**I. Statement of the Case**

This case is before the Authority on an application for review (application) filed by the Fraternal Order of Police (FOP) under § 2422.31 of the Authority's Regulations.<sup>1</sup> Neither the Activity nor the National Federation of Federal Employees (NFFE) filed an opposition to FOP's application.

The Regional Director (RD) dismissed FOP's petition requesting that employees in two types of

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<sup>1</sup> Section 2422.31 of the Authority's Regulations provides, in pertinent part:

(c) *Review*. 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:

....

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

(i) Failed to apply established law;

....

(iii) Committed a clear and prejudicial error concerning a substantial factual matter.

5 C.F.R. § 2422.31(c).

positions be severed from a bargaining unit that is exclusively represented by NFFE (NFFE unit), and that an election be conducted in the severed unit. For the reasons that follow, we deny the application.

**II. Background and RD's Decision**

NFFE is the certified exclusive representative of a unit of employees that includes General Schedule (GS)-0083 Police Officers (officers) and GS-0085 Security Guards (guards) in the Activity's Directorate of Emergency Services. RD's Decision at 1. The unit also includes security guards who work for the Activity in a subdivision other than the Directorate of Emergency Services, but FOP does not seek to sever those security guards. *Id.* at 1 n.\*. Several years ago, an RD determined that employees in the NFFE unit shared a community of interest, and clarified and amended the NFFE unit to reflect the accretion of the officers into the unit. *Id.* at 2.

FOP filed the petition at issue here, which asks to sever the officers and guards from the NFFE unit and conduct an election for employees in the severed unit. *Id.* at 1-2. The RD issued an Order to Show Cause (order) directing FOP to explain why its petition should not be dismissed on the basis that FOP was "not asserting that the [NFFE] unit is inappropriate or that unusual circumstances warrant severance." *Id.* at 2.

In its response to the order, FOP asserted that NFFE was inadequately representing the officers and guards, *id.* at 3, and that employees in the NFFE unit did not share a "community of interest" because the duties of the officers and guards include "investigating, citing, arresting, [and] prosecuting . . . the remaining employees" in the unit, Petitioner Response to Order at 10. In support of its petition, FOP submitted affidavits concerning several incidents of allegedly inadequate representation of officers and guards. RD's Decision at 2-5. Specifically, FOP cited NFFE's alleged mishandling of: (1) the institution of twelve-hour shifts for officers and guards; (2) the discipline of a guard who fell asleep at his post; (3) the use of medical and physical agility tests to allegedly harass an employee; (4) shift restructuring that adversely affected an officer; (5) the non-promotion of an officer; (6) an officer's grievance concerning a supervisor's instruction to tear up a speeding ticket the officer had issued; (7) an officer's grievance alleging that the Activity did not use the proper equipment for packaging hazardous drugs; and (8) a shift seniority issue (collectively, the misrepresentation allegations). *Id.* at 4-5.

In its response, NFFE addressed each of the misrepresentation allegations with its explanation of its actions, *id.* at 3-5, and provided examples of NFFE's

representation of the concerns of officers and guards, *id.* at 6.

The RD stated that “[t]he Authority has long held that absent any unusual circumstances, such as a significant reorganization or a failure to adequately represent employees, when an established bargaining unit continues to be appropriate, a petition seeking to sever some employees from that unit ‘will be dismissed in the interest of reducing the potential for unit fragmentation and, thereby, promoting effective dealings and efficiency of agency operations.’” *Id.* (quoting *U.S. Dep’t of the Navy, Naval Air Station Jacksonville, Jacksonville, Fla.*, 61 FLRA 139, 142 (2005) (*Jacksonville*)). Applying this precedent, the RD found that FOP “provided no evidence to support a finding of a loss of a community of interest among any employees in NFFE[’s] . . . existing unit,” and that, therefore, the unit “remain[ed] appropriate.” *Id.*

With regard to FOP’s allegations of inadequate representation, the RD found that “the evidence d[id] not show a failure of NFFE . . . in its representation of . . . officers and . . . guards.” *Id.* at 7. In this connection, the RD found that: (1) “[t]he contract contains police officer/security[-]guard[-]specific provisions”; (2) officers serve in leadership positions in the NFFE unit as vice president and steward; and (3) “the record reflects significant actions taken by NFFE . . . in representing employees, both as a whole and on other individual matters.” *Id.* Further, the RD stated that although “[n]ot every issue raised by FOP may have been resolved to the complete satisfaction of every particular employee,” that does not establish inadequate representation by NFFE. *Id.* To the contrary, the RD found that “[c]learly, NFFE . . . has not overlooked the . . . officers and . . . guards and has demonstrated adequate representation under all the circumstances.” *Id.* Accordingly, the RD found that severance was not warranted and dismissed FOP’s petition. *Id.*

### III. FOP’s Application

FOP argues that, pursuant to § 7112(b)(7) of the Statute,<sup>2</sup> officers and guards “do not have a community of interest with the remaining employees due to . . .

<sup>2</sup> Section § 7112(b)(7) of the Statute pertinently provides:

A unit shall not be determined to be appropriate . . . if it includes . . . any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

5 U.S.C. § 7112(b)(7).

[their] job [duties] of investigating, citing, arresting, [and] prosecuting . . . the remaining [unit] employees.” Application at 8-9. In this regard, FOP argues that it compromises the Activity’s mission effectiveness and the officers’ and guards’ safety to require them “to attend union meetings and participate in union business with the[] same individuals that [they] . . . investigate[], arrest[], and cite[].” *Id.* at 7-8.

In addition, FOP argues that the RD committed clear and prejudicial errors concerning substantial factual matters by failing “to respond to some of the issues addressed by FOP warranting a severance.” *Id.* at 1. In this regard, FOP argues that NFFE’s “failure to represent the employee[s] of the bargaining unit . . . should be considered by the [A]uthority in evaluating whether severance is warranted.” *Id.* at 6 (citing *Dep’t of the Army, Headquarters, Fort Carson*, 34 FLRA 30 (1989) (*Ft. Carson*); *Dep’t of the Navy, Naval Air Station, Point Mugu, Cal.*, 26 FLRA 620 (1987) (*Navy*)).<sup>3</sup> FOP asserts that the misrepresentation allegations demonstrate that unusual circumstances warrant severance.<sup>4</sup> *See id.* at 2-6. In addition, FOP contends that NFFE did not provide sufficient evidence to support its arguments about the adequacy of its representation.<sup>5</sup> *Id.* at 3-6.

### IV. Analysis and Conclusions

- A. The RD did not err by finding that the NFFE unit retained its community of interest.

FOP argues that, pursuant to § 7112(b)(7) of the Statute, officers and guards “do not have a community of interest with the remaining employees due to . . . [their] job [duties] of investigating, citing, arresting, [and] prosecuting . . . the remaining [unit] employees.” *Id.* at 8-9. We construe this as an argument that the RD failed to apply established law. *See* 5 C.F.R. § 2422.31(c)(3)(i). *See, e.g., U.S. Dep’t of the Air Force, Tyndall Air Force Base, Tyndall AFB, Fla.*, 65 FLRA 610, 614 (2011) (*Tyndall AFB*) (construing a party’s argument).

<sup>3</sup> FOP also cites “*Veterans Affairs*, 35 FLRA at 80.” Application at 6. However the decision located at that volume and page number neither involves the Department of Veterans Affairs nor concerns representation issues, and we cannot determine which Authority decision FOP is attempting to cite.

<sup>4</sup> FOP’s specific arguments concerning the misrepresentation allegations are discussed individually, to the extent necessary, below.

<sup>5</sup> In addition, FOP argues that the severance of the Activity’s firefighters from an existing bargaining unit demonstrates that severance is appropriate in this case. Application at 8. Because FOP does not cite a recognized ground for review or an Authority decision in support of this argument, and it is unclear what ground FOP is attempting to raise, we do not address this argument further.

Under § 2429.5 of the Authority's Regulations, "[t]he Authority will not consider any . . . arguments . . . that could have been, but were not, presented in the proceedings before the [RD]." 5 C.F.R. § 2429.5. See also 5 C.F.R. § 2422.31(b) (an application for review of an RD's decision "may not raise any issue . . . not timely presented to the . . . [RD]"). Although FOP argued before the RD that the investigation and law enforcement duties of officers and guards undermined these employees' community of interest with the rest of the unit, there is no indication in the record that FOP cited § 7112(b)(7) of the Statute in support of this argument. See Petitioner Response to Order at 10. Because FOP could have raised § 7112(b)(7) to the RD, but did not do so, this argument is barred by § 2429.5, and we do not consider it.<sup>6</sup>

To the extent that FOP argues that the conflict of interest created by the duties of officers and guards destroyed the NFFE unit's community of interest independent of any argument based upon § 7112(b)(7), FOP has not demonstrated that the RD erred in finding that the unit "remain[ed] appropriate." RD's Decision at 6. In this regard, the Authority has previously found that a unit containing both police officers and non-police employees was appropriate, especially where, as here, the petitioner has provided no evidence or specific examples of the alleged conflicts of interest. See, e.g., *Jacksonville*, 61 FLRA at 140, 142-43. Accordingly, FOP has failed to establish that the RD failed to apply established law in this regard.

- B. The RD did not err in finding that FOP did not establish unusual circumstances justifying severance.

As noted previously, the Authority may grant an application for review if the party filing the application demonstrates that the RD failed to apply established law or committed a clear and prejudicial error concerning a substantial factual matter. 5 C.F.R. §§ 2422.31(c)(3)(i) & (iii). FOP argues that the RD committed clear and prejudicial errors concerning substantial factual matters by failing to respond to FOP's allegations of inadequate representation. See Application at 1-7. Although FOP does not expressly argue that the RD failed to apply established law, FOP cites Authority decisions to support its argument that NFFE's "failure to represent the employee[s] of the bargaining unit . . . should be considered by the [A]uthority in evaluating whether severance is warranted." *Id.* at 6 (citing *Ft. Carson*, 34 FLRA 30; *Navy*, 26 FLRA 620). Accordingly, we

construe FOP's argument as contending that the RD failed to apply established law in this regard. See, e.g., *Tyndall AFB*, 65 FLRA at 614.

As the RD acknowledged, the Authority has held that, absent unusual circumstances, where an established bargaining unit continues to be appropriate, a petition seeking to sever employees from that unit will be dismissed in the interest of reducing the potential for unit fragmentation and, thereby, promoting effective dealings and efficiency of agency operations. *Jacksonville*, 61 FLRA at 142 (citing *Library of Cong.*, 16 FLRA 429, 431 (1984)). However, the failure of an incumbent exclusive representative to fairly represent the employees at issue may give rise to a question of representation concerning the petitioned-for unit and justify severance of those employees from an existing unit that continues to remain appropriate. *Id.* In evaluating whether employees have been adequately represented, the Authority has considered such factors as employees' opportunities to participate in union affairs, *U.S. Dep't of the Air Force, Carswell Air Force Base, Tex.*, 40 FLRA 221, 231-32 (1991) (*Carswell*), the existence of collective bargaining agreement provisions addressing the specific concerns of the employees at issue, see *Library of Cong.*, 16 FLRA at 432, and the union's formal and informal efforts to resolve issues of concern to the employees at issue, *Jacksonville*, 61 FLRA at 143.

As an initial matter, several of FOP's arguments dispute statements in NFFE's submission to the RD that do not appear anywhere in the RD's decision.<sup>7</sup> See Application at 4, 5. Because there is no evidence in the record that the RD relied upon these allegedly false statements in reaching his decision, these arguments do not establish that the RD committed a clear and prejudicial error concerning a substantial factual matter.

Further, although FOP argues that NFFE should have pursued the officer's grievance concerning a speeding ticket even though there was no discipline at issue, this argument does not identify any specific factual findings of the RD that were erroneous. See *id.* at 4-5, 7. Similarly, although FOP argues that NFFE's proffered examples of its representation of the interests of officers and guards were not supported by sufficient evidence, FOP does not specifically dispute the veracity of any of NFFE's claims. See *id.* at 5-6. Accordingly,

<sup>6</sup> We note, in any event, that if the officers and guards met the criteria in § 7112(b)(7) of the Statute, then this would provide a basis for excluding them from *any* unit, not for directing an election for them in a severed unit. See 5 U.S.C. § 7112(b)(7).

<sup>7</sup> For example, FOP disputes: (1) in regard to the employee who alleged that the Activity was using medical and physical agility tests to harass him, NFFE's statement that this employee "complained about seniority and Vietnam War preference," Application at 4; and (2) several of NFFE's alleged findings concerning the equipment used by the Activity for packaging hazardous drugs, *id.* at 5. However, these statements made by NFFE in its submission to the RD do not appear in the RD's decision.

these arguments do not establish that the RD committed a clear and prejudicial error concerning a substantial factual matter.

As for the remainder of FOP's arguments, FOP challenges the accuracy of statements made by the RD in the "Position of the Parties" section of his decision. RD's Decision at 3. Although the RD summarized factual allegations made by FOP and NFFE in this section, it is not clear that he specifically relied on any of these allegations in reaching his conclusion. *See id.* at 3-5.

Even assuming that the RD erroneously relied upon the disputed allegations, this error would not be sufficient to demonstrate that the RD committed a clear and prejudicial error concerning a substantial factual matter because the record does not support FOP's assertion that officers and guards were inadequately represented. With regard to NFFE's representation activities, as stated previously, the RD found that: (1) "[t]he contract contains police officer/security[-]guard[-]specific provisions"; (2) police officers serve in leadership positions in the NFFE unit as vice president and steward; and (3) "the record reflects significant actions taken by NFFE . . . in representing employees, both as a whole and on other individual matters." *Id.* at 7. FOP's arguments do not establish that the RD erred in any of these findings and, as noted by the RD, although "[n]ot every issue raised by FOP may have been resolved to the complete satisfaction of every particular employee," this does not establish inadequate representation by NFFE. *Id.*

In addition, the RD found that "[c]learly, NFFE . . . has not overlooked the police officers and security guards and has demonstrated adequate representation under all the circumstances." *Id.* This finding is consistent with Authority decisions holding that evidence of employee opportunities to participate in union affairs, the existence of collective bargaining agreement provisions addressing the specific concerns of the employees at issue, and formal and informal union efforts to resolve issues of concern to the employees at issue support a conclusion that an incumbent union continues to provide adequate representation. *See, e.g., Jacksonville*, 61 FLRA at 143; *Carswell*, 40 FLRA at 231-32; *Library of Cong.*, 16 FLRA at 432. Further, the decisions cited by FOP, in which the Authority *denied* applications for review that argued that incumbent unions failed to adequately represent certain employees, do not provide a basis for finding that the RD erred in concluding that NFFE adequately represented the employees at issue here. *See Ft. Carson*, 34 FLRA at 35; *Navy*, 26 FLRA at 622-23.

For the foregoing reasons, FOP has not established that the RD failed to apply established law or committed a clear and prejudicial error concerning a substantial factual matter by concluding that FOP did not establish unusual circumstances justifying severance.

## V. Order

The application for review is denied.