UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

U.S. Department of Justice-Civil Rights Division - *Agency* *and* National Treasury Employees Union (NTEU) - *Union* *and* Jeffrey Morrison - *An Individual*	Case No. WA-RP-24-0077

MORRISON'S APPLICATION FOR REVIEW

Pursuant to 5 U.S.C. § 7105(f) and section 2422.3l(a) of the Federal Labor Relations Authority's ("Authority" or "FLRA") Regulations, Jeffrey Morrison applies for review of the Regional Director's Decision approving a bargaining unit of certain U.S. Department of Justice-Civil Rights Division ("CRT") personnel. The Regional Director erroneously accepted, without analysis, the union's and DOJ's assertions that the professional CRT employees are an appropriate unit under the Federal Service-Labor Management Statute ("Statute"). The Regional Director then directed an election to determine whether these employees want the National Treasury Employees Union ("NTEU") to be their exclusive representative. The vote count was held on January 9.

The Authority may grant review if established policy warrants reconsideration of a Regional Director's action or if there is a genuine issue over whether the Regional Director failed to apply established law or committed certain error. 5 U.S.C. § 7105(f); 5 C.F.R. § 2422.31. Here, the Regional Director failed to apply established FLRA precedent that precludes finding CRT professional to be an appropriate unit. *See Antitrust Division, Dep't of Justice*, 16 FLRA 297, 300–

301 (1984). The Regional Director's direction of election in this matter was thus in error. The Authority should grant review, stay the certification of the election results, reverse the Regional Director's decision, and dismiss the petition.

BACKGROUND

Jeffrey Morrison is employed by the U.S. Department of Justice. He currently works in the Civil Rights Division. In July and August, 2024, NTEU began a unionization drive within CRT. (Exs. B–C). On September 26, 2024, Union organizers stated in an email to CRT personnel that they had filed for an election with the Authority. (Ex. D). DOJ submitted a response to NTEU's petition including notifying the FLRA of two potential objections to the unit: 1) whether the proposed unit was not appropriate given that the FLRA has already held such a unit is not appropriate; and 2) whether certain job classifications should be excluded from the unit because of the nature of their duties. (Ex. A). These objections were maintained by the DOJ until at least November 7, 2024. *See* (Exs. E, F, G).

On Friday, November 8, 2024, employees received an email from the Union stating DOJ had dropped its opposition to the appropriateness of the unit "and has agreed to proceed with an election." (Ex. F).

On November 18, 2024, the Regional Director approved a stipulated election agreement for the unit. The unit deemed appropriate for an election by the Regional Director, was "All professional employees of the Department of Justice, Civil Rights Division," excluding "All nonprofessional employees, management officials, supervisors, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6), and (7)." (Ex. H). An appendix contains a voter list of all eligible voters within the bargaining unit. (Ex. H). In approving the agreement, the Regional Director did not discuss the appropriateness of the bargaining unit, cite any facts in the record, or cite to any

Authority case law. *See* (Ex. H). The Regional Director apparently just accepted NTEU's and CRT management's agreement that a unit consisting only of CRT professional employees is an appropriate unit. As set forth below, this was in error because this is not an appropriate unit under FLRA precedent.

ARGUMENT

I. This Application for Review is Properly Submitted.

A. Morrison has standing to file this Application for Review as an "interested party."

Morrison has standing to file an Application for Review as an "interested party" under Section 7105(f) of the Statute. 5 U.S.C. § 7105(f). Section 7105(f) provides that, if the Authority has delegated its authority under the Statute to a Regional Director in a representation case, "any interested person" may file an application for review of the Regional Director's action. 5 U.S.C. § 7105(f). Here, the Regional Director exercised the Authority's power to determine an appropriate bargaining unit and direct an election. Consequently, under Section 7105(f), any "interested person" may file an application for review of the Regional Director's action.

The Authority interprets "interested person" broadly, defining the term as "an individual 'having a legal interest that will be determined or affected' by a decision." *U.S. Dep't of the Navy, Human Resources Service Center, Northwest Silverdale, Washington*, 61 FLRA 408, 411 (2005) (hereafter, "*Navy*") (quoting *Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534, 1544 (9th Cir. 1993)). For example, the Authority has found an employee to be an "interested person" under Section 7105(f) where the Regional Director's action changed the employee's exclusive representative. *Id.*; *U.S. Dep't of Vet. Affairs*, 65 FLRA 259, 262 (2010) (same); *see also Eisinger v. FLRA*, 218 F.3d 1097, 1105 (9th Cir. 2000) (holding that the Statute's definition of "person" unambiguously included an individual employee).

In both *Navy* and *Veterans Affairs*, individual employees petitioned for review of a Regional Director's decision to make changes to their bargaining units and their exclusive representative. In *Navy*, the individual challenged a unit clarification where his exclusive representative was changed without an election. 61 FLRA at 408–409. In *Veterans Affairs*, individual employees challenged a Regional Director's action to grant a petition changing their bargaining unit's exclusive representative's affiliation. 65 FLRA at 261. In both cases, the Authority found the employees had standing as an "interested person" because the Regional Director's decision directly affected them by changing *their* exclusive representative. *Veterans Affairs*, 65 FLRA at 262; *Navy*, 61 FLRA at 410.

Morrison is an "interested person" here because, like the employees in *Navy* and *Veterans Affairs*, his exclusive representation status has been changed by the Regional Director's decision to direct an election. In this instance, instead of being clarified into a unit or being subject to a unit affiliation change, the Regional Director's decision has transformed his employment from one of no bargaining unit with no exclusive representation to one subject to a representation election, with an exclusive representative to be certified imminently. He is subject to the wrongful imminent certification of the Union as exclusive bargaining representative, given that the unit, as directed by the Regional Director is not appropriate under the Statute. If NTEU is certified as exclusive bargaining representative, Morrison will be subject to an unwanted union based on the Regional Director's erroneous decision. As such he has "a legal interest that will be determined or affected" by the Regional Director's decision and subsequent action to hold an election, and has standing to bring this Application for Review. *Navy*, 61 FLRA at 410.

B. The facts and issues underlying this application are properly before the Authority.

The factual and legal issues raised in this Application are timely and properly before the Authority. This Application for Review is timely filed because Section 7105(f), and FLRA Regulations Section 2422.31 permit an application for review to be filed within 60 days of the date of agency action. The Regional Director approved the election agreement on November 18, 2024. (Ex. H). This Application is filed within 60 days of the Regional Director's action.

The legal and factual issues raised are similarly properly before the Authority, for at least two reasons. First, while typically "an application may not raise any issue or rely on any facts not timely presented to the Hearing Officer or Regional Director,"[1] the Authority has questioned whether these requirements can apply to an individual employee filing an application for review as an "interested person." *Navy*, 61 FLRA at 410. In *Navy*, the Authority held an application for review filed by an individual employee as an "interested person" under Section 2105(f) is not "deficient because the applicant failed to raise issues in proceedings before the [Regional Director]." *Id*. The Authority explained that holding an individual employee to such a standard would be inconsistent with the finding that an individual employee has standing to file an application for review, as the individual employee was not party to the case before the Region. *Id.* Even so, the Authority looked to whether the "essential issue" of the application was raised before the Regional Director.

Here, the "essential issue" of Morrison's Application is whether the unit in this matter is appropriate. This is an issue that must be decided in every representation proceeding under Section

[1] S*ee also* 5 C.F.R. § 2429.5 (precluding the Authority from considering issues not raised before the Hearing Officer or Regional Director).

7112 of the Statute. 5 U.S.C. § 7112. The Regional Director's decision in direction of election contains a specific description the Regional Director's finding that the unit in this case consists of "all professional employees of the Department of Justice, Civil Rights Division," who were on the payroll as of November 2, 2024. (Ex. H). The finding that such a unit exists in which an election can be conducted presupposes a finding that the unit was appropriate. Thus, the "essential issue" in this Application was before the Regional Director.

Second, even if Sections 2322.31(b) and 2429.5 apply, Morrison's Application satisfies the standard because all of these issues were presented to the Regional Director by DOJ management. *See* (Exs. A, G). DOJ submitted a response to NTEU's petition, including notifying the FLRA of the two issues now raised by this application: 1) whether the proposed unit was not appropriate given that the FLRA has already held such a unit is not appropriate; and 2) whether certain job classifications should be excluded because the employees engage in excluded job duties. (Ex. A). These are the two issues raised by this Application. Thus, even if DOJ management did not fully pursue these objections, the issues raised by this Application were before the Regional Director at some point in the proceedings.

In short, Morrison has standing to file this Application and has properly and timely presented the arguments before the Authority. The Authority should consider the merits of and grant his Application.

II. The Regional Director Erred by Finding the CRT Unit Appropriate.

A. The Regional Director erred by failing to conduct an independent investigation into the appropriateness of the unit.

To the extent the Regional Director uncritically relied on the consent of the parties in the election agreement to find the CRT unit appropriate, she committed error. The Authority is tasked with making that determination by Section 7112 of the Statute, which mandates that "[t]he

Authority shall determine the appropriateness of any unit." 5 U.S.C. § 7112; *see also* 5 U.S.C. § 7105(a)(2)(A). An agency agreeing with a union that a unit is appropriate does not mean that unit actually is appropriate. Agencies, like DOJ here, cannot usurp the Authority's role in deciding unit appropriateness and make itself the arbiter of whether a union-demanded unit is appropriate. The Statute reserves that power to the Authority.

The Authority recognized this in *U.S. Dep't of Justice Executive Office for Immigration Review*, 72 FLRA 733, 736 (2022): "[I]t is a fundamental principle of the Federal Service Labor-Management Relations Statute that parties cannot negotiate over the unit status of employees, which is a matter reserved exclusively to the Authority." *Id.* (recognizing that the unit status of employees is "a matter reserved exclusively to the Authority").

This is for good reason. The parties to election proceedings have self-interests that may diverge from the interests of impacted employees. The Authority's role, among others, is to protect employee interests, such as by making unit determinations that "ensure a clear and identifiable community of interest among employees in the unit . . ." 5 U.S.C. § 7112(a).

Here, CRT management and the Union signed an election agreement in which they agreed, between themselves, that an election should be conducted in the CRT-only unit. (Ex. B). The Regional Director approved the agreement, and thus the unit, without analysis. (Ex. B). As discussed below, this is not an appropriate unit under *Antitrust Division*, 16 FLRA at 302. The Regional Director's failure to independently determine if the petitioned-for unit was appropriate under Authority precedent is itself error that warrants granting the Application.

B. The Regional Director erred by finding a clear and identifiable community of interest among unit employees.

The Regional Director erroneously found the unit to be appropriate in this matter because there is no clear and identifiable community of interest among employees in the unit. As part of the

determination as to whether a bargaining unit is appropriate, the Statute commands that the Authority "shall determine any unit to be an appropriate unit *only* if the determination will ensure a clear and identifiable community of interest among employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved." 5 U.S.C. § 7112(a) (emphasis added). "[T]he fundamental premise of determining whether a community of interest exists among employees is to ensure that it is possible for employees to deal collectively with management as a single group." *U.S. Dep't of the Army, Army Materiel Command Headquarters, Joint Munitions Command, Rock Island, Ill.*, 62 FLRA 313, 314 (2007) (hereafter "*Rock Island*"). When assessing a community of interest, the Authority considers "factors [such as] geographic proximity, unique conditions of employment, distinct local concerns, degree of interchange between other organizational components, and functional or operational separation." *Id.* Additionally, the Authority considers "whether the employees in the proposed unit are a part of the same organizational component of the agency; support the same mission; are subject to the same chain of command; have similar or related duties, job titles, and work assignments; and are subject to the same general working conditions." *U.S. HHS*, 62 FLRA 84, 87 (2007). No one factor is dispositive and therefore the Authority makes decisions on a case-by-case basis based upon the totality of the circumstances. *See Rock Island*, 62 FLRA at 318.

1. A finding that a distinct community of interest exists is foreclosed by the Authority's decision in *Antitrust Division*.

The Regional Director's finding that a community of interest exists for a bargaining unit of all professional CRT employees is foreclosed by the Authority's decision in *Antitrust Division*. 16 FLRA at 302. In fact, in that case, the Authority *determined this very unit to not be an appropriate unit*. *Id.* The Regional Director's failure to comply with current, binding Authority precedent is in error and must be reversed.

In *Antitrust Division* the Authority considered a petition seeking election in a unit consisting of all CRT non-supervisory professional employees—the same unit proposed in this case. 16 FLRA at 297. The Authority engaged in a community of interest analysis and determined both the Antitrust Division and the CRT Division units were not appropriate under the Statute because these divisions did not have a separate and distinct community of interest from other DOJ trial attorneys. *Id.* at 302.

Specifically, the Authority found that, given the DOJ's structure, a community of interest among DOJ litigation personnel exists at a hierarchy level higher that an individual division—the office, board, or division ("OBD") level. *Id.* DOJ litigation personnel operate within a specific OBD. *Id.* at 298. DOJ designed positions within each OBD to be as functionally interchangeable with positions at other OBDs. *Id.* With the exception of those in the U.S. Attorneys Offices, the personnel share the same pay scale. *Id*. Thus, the Authority concluded:

> [I]t has not been shown that Civil Rights Division attorneys share a community of interest separate and distinct from other attorneys in the various OBDs [offices, board, and divisions] of the Agency. Their mission requires regular contacts between the Civil Rights attorneys and other attorneys within the OBDs; interchange and transfer occur regularly, and DOJ has sought to make its litigation attorneys, including those in the Civil Rights Division, as functionally interchangeable as possible. Personnel policy regarding the attorneys within the Civil Rights Division, as for other litigation attorneys within the OBDs, is determined by OAPM and OAPM reviews all related personnel actions.

Id. at 302.

The Authority rejected a CRT-only unit as inappropriate, because it "could lead to diverse personnel policies and undue fragmentation among the attorneys within the legal offices and divisions which would not promote effective dealings with, and efficiency of operations of, the Agency. . . DOJ's efficiency of operations, and effective dealings, would not be promoted by granting the unit sought." *Id.* at 300–301. Upon finding the unit inappropriate, the Authority dismissed the CRT petition.

The personnel policies in CRT and the hierarchy of the DOJ OBDs, have not materially changed since the Authority's decision in *Antitrust Division*. (Ex. A). DOJ trial attorneys in an OBD are functionally interchangeable between divisions of the DOJ. Each of the trial attorneys is required to maintain an active Bar membership, all trial attorneys are excepted from the competitive service as Schedule A federal employees, and with the exception of Assistant U.S. Attorneys, have the same pay scale, benefits, and workplace terms. The attorneys receive centralized training at a common facility. Recruitment and personnel functions applicable to CRT and other DOJ OBD trial attorneys are also centralized at the departmental level. (Ex. A).

Trial attorneys in an OBD can transfer between divisions, including short-term details of attorneys to other divisions. *See* (Ex. A). DOJ policies on personnel details permit details both inside and outside an employee's Division. (Ex. A). Details to outside agencies occur regularly. (Ex. A). For example, Morrison himself recently returned to his ordinary duty station with CRT from a detail with the Equal Employment Opportunity Commission, while at the same time, a Civil Division attorney was serving a detail in his Section at CRT. (Ex. A).

The Authority's holding in *Antitrust Division* is controlling here. The Regional Director was bound by that decision and erred in finding an appropriate unit here.

2. Personnel within CRT cannot constitute an appropriate unit because of the interchange of attorneys between excluded and included job classifications.

The unit, as approved by the Regional Director includes all professional employees in CRT, and excludes "employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6), and (7)." (Ex. H). The Regional Director's approved election agreement included a redacted voter list, with excluded and included job classifications. (Ex. H). The job classifications provided do not differentiate employees within the sections or offices of CRT. *See* (Ex. H). Thus, it is unclear whether the Regional Director's approved unit includes employees from the Complaint Adjudication Office

("CAO"). To the extent any personnel from that office are included in the unit, the Regional Director erred. Moreover, even if the Regional Director properly excluded all of these employees, the remainder of the CRT professional employees would not constitute an appropriate unit because of the interchange between sections and offices of CRT, including the CAO, shared duties, job titles, and working conditions.

CAO employees must be excluded from the unit pursuant to Section 7112(b)(3). Section 7112(b)(3) excludes from a bargaining unit employees who are "engaged in personnel work in other than a purely clerical capacity." *VA Kansas City*, 70 FLRA 465, 467 (2018). The Authority has interpreted Section 7112(b)(3)'s personnel exemption such that employees are properly excluded from a bargaining unit when employees perform personnel work, whether that personnel work affects the bargaining unit or not. *U.S. Dep't of Army, N. Cent. Civilian Personnel, Operation Ctr., Rock Island*, 59 FLRA 296, 302 (2003). "Employees found to have been engaged in personnel work have been involved in work directly relating to the personnel operations of the employee's agency which would create a conflict of interest between the employee's job and union representation if the employee were included in the bargaining unit." *832nd Combat Support Group*, 23 FLRA 768, 771 (1986).

In order to be "engaged in federal personnel work" an employee must have "provided advice and guidance on personnel matters," "made recommendations that were followed," "had access to confidential personnel information," "actively participated in the development of policy and programs," or "prepared and processed personnel actions." *VA Kansas City*, 70 FLRA at 467 (internal citations omitted); *see also U.S. Dep't of Agriculture*, 72 FLRA 261, 261 (2021).

Professional employees in the CAO deal almost exclusively with personnel matters. The CAO is responsible for issuing final DOJ decisions in administrative EEO complaints filed by DOJ

employees who believe they have been subject to employment discrimination. When assigned a case, CAO attorneys are responsible for reviewing the employee's and management's positions on the complaint and drafting a proposed final decision. The CAO has authority to order reinstatement or workplace changes, and issue back pay awards to employees. (Ex. A). CAO personnel provide advice and guidance on personnel matters, handle sensitive information, develop policy, and make recommendations. *See* (Ex. A).

Thus, CAO's entire purpose is to review and process personnel actions for the DOJ as a whole. It is entirely engaged in personnel matters and its employees should be excluded pursuant to Section 7112(b)(3), and to the extent the Regional Director included these employees she erred. *See VA Kansas City*, 70 FLRA at 467.

Moreover, even if these employees are properly excluded from the unit, the remaining CRT professional employees cannot constitute an appropriate unit with a community of interest separate and distinct from that of the excluded CAO personnel. In looking at whether a community of interest exists, the Authority considers a multitude of factors, which include whether the employees are in the same organizational component, support the same mission, are subject to the same chain of command, have similar job titles or work assignments, are subject to the same general working conditions, and the degree of interchange between components. *Rock Island*, 62 FLRA at 314. Applying these factors here compels a conclusion that any unit of CRT professional employees must include CAO employees, who are prohibited from unionizing.

Here, CAO employees are in the same division of the agency—CRT, they are located in the same office, have the same or similar job title, and are subject to the same working conditions as the other CRT professional employees. Moreover, the degree of interchange among sections or offices within CRT is significant. CRT attorneys transfer in and out of CAO to other CRT sections.

This happens so regularly, there is a designated "open season" for such transfers. These factors militate in favor of a finding that CAO personnel share a community of interest with CRT employees such that any unit excluding these employees would not be appropriate.

Thus, there cannot be an appropriate unit of CRT professional employees without CAO professional employees, and given that they cannot be included in any bargaining unit under Section 7112(b)(3), there can be no finding of an appropriate unit for CRT employees, excluding CAO employees. The Regional Director erred in finding an appropriate unit here.

CONCLUSION

The Regional Director erred in approving a CRT-only bargaining unit. The Authority should grant review, stay the certification of the election results, reverse the Regional Director's decision, and dismiss the petition.

Dated: January 16, 2025

/s/ Eamon McCarthy Earls
Eamon McCarthy Earls
Alyssa Hazelwood
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Ste. 600
Springfield, VA 22160-2110
(703) 770-3359
eme@nrtw.org
akh@nrtw.org
Counsel for Jeffrey Morrison

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2025, I electronically filed the foregoing with Federal Labor Relations Authority using its e-filing system. I further certify that the foregoing document was served on the following via e-mail and Federal Express.

Jessica Bartlett
Regional Director
Washington, D.C. Region
Federal Labor Relations Authority
jbartlett@flra.gov
1400 K Street, NW, 3rd Floor
Washington, D.C. 20424-0001

Joni Ketter
Director of Organizing
National Treasury Employees Union (NTEU)
joni.ketter@nteu.org
800 K Street, NW, Suite 1000
Washington, D.C. 20001

Diana Embrey
Chief Counsel
U.S. Department of Justice-Civil Rights Division
diana.embrey@usdoj.gov
950 Pennsylvania Avenue NW
Washington, D.C. 20530-0001

/s/EAMON MCCARTHY EARLS
EAMON MCCARTHY EARLS