UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

U.S. Department of Justice-Environment and Natural Resources Division - *Agency* *and* National Treasury Employees Union (NTEU) - *Union* *and* Jeffrey Morrison - *An Individual*	Case No. WA-RP-24-0075

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 and Order approving a bargaining unit of U.S. Department of Justice-Environment and Natural Resources Division ("ENRD") personnel. The Regional Director erroneously accepted, without analysis, the union's and agency's assertions that all attorneys in ENRD 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 10.

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 ENRD

attorneys 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 the summer of 2024, NTEU began a unionization drive within both CRT and ENRD. (Ex. A). Based upon public statements, the FLRA, ENRD management, and the Union discussed the appropriateness of who should be included in an appropriate unit. (Ex. C).

On November 18, 2025, the Regional Director approved a stipulated election agreement that deemed the following unit appropriate for an election: "All attorneys of the Department of Justice, Environment and Natural Resources 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. B). In the decision, 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. B). The Regional Director apparently just accepted NTEU's and ENRD management's agreement that a unit consisting only of ENRD attorneys 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 to 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 they were directly affected by the Regional Director's action to change their exclusive representative. *Veterans Affairs*, 65 FLRA at 262; *Navy*, 61 FLRA at 411.

Morrison is an "interested person" here because he is in an attorney in the Civil Rights Division ("CRT"), which is an Office, Board, or Division ("OBD") of the DOJ, like the ENRD. As described in detail, *infra*, the Authority has held the only appropriate unit of DOJ attorneys within OBDs is all attorneys across all OBDs because those attorneys "functionally interchangeable" between different OBDs. *Antitrust Division*, 16 FLRA at 300–301. Since ENRD and CRT are OBDs, Morrison is part of the only unit that could be appropriate here—a unit encompassing all OBDs, that includes both ENRD *and* CRT attorneys, as well as other DOJ attorneys.

The Regional Director's erroneous decision to accept a unit that includes only ENRD attorneys, but that excludes CRT attorneys like Morrison and other DOJ attorneys working in other OBDs, will impact Morrison and those other attorneys. At this time, CRT attorneys are functionally interchangeable with ENRD attorneys, and can transfer and retain the same conditions of employment in either division. This will end if the ENRD is deemed a unionized bargaining unit separate from CRT and the other OBDs. What should be one unit across all OBDs under *Antitrust Division* will be fragmented into one small unionized division (ENRD) and nonunion divisions. To transfer to the ENRD division in the future, Morrison and other CRT attorneys would have to accept the representation of a union they never voted on and abide by its contract. Moreover, the terms of employment negotiated in the ENRD would likely spillover to CRT and the other OBDs because, again, they are sister divisions at the OBD level and currently share terms and conditions of employment.

In short, Morrison has "'a legal interest that will be determined or affected'"[1] by the Regional Director's decision here because he and other DOJ attorneys in other OBDs *must* be included in

[1] *Navy*, 61 FLRA at 411.

any bargaining unit that includes ENRD attorneys, but are being wrongfully excluded from that unit. Morrison thus has standing as an interested person to file this application for review.

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

The factual and legal issues raised in this Application for Review 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. B). 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. While typically "an application may not raise any issue or rely on any facts not timely presented to the Hearing Officer or Regional Director,"[2] 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.

[2] S*ee also* 5 C.F.R. § 2429.5 (precluding the Authority from considering issues not raised before the Hearing Officer or 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 7112 of the Statute. 5 U.S.C. § 7112. According to public reporting, NTEU and DOJ officials discussed who they wanted to include in a unit. (Ex. C). The Regional Director approved the election agreement, accepting the parties' agreement as to the composition of the unit—"[a]ll attorneys of the Department of Justice, Environment and Natural Resources Division," who were on the payroll as of November 2, 2024. (Ex. B). Thus, the "essential issue" in this Application was before the Regional Director.

For these reasons, 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 ENRD Unit Appropriate.

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.

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 ENRD 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, the parties signed an election agreement in which they agreed, between themselves, that an election should be conducted in the ENRD-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's decision is foreclosed by the Authority's decision in *Antitrust Division*.

The Regional Director defied established precedent by directing an election in an ENRD-only unit because the Authority held in *Antitrust Division* that there is no clear and identifiable community of interest among individual divisions of DOJ attorneys employed in an OBD. 16 FLRA at 302. In *Antitrust Division* the Authority considered two petitions seeking election in units consisting of all CRT non-supervisory professional employees and one of all Antitrust Division non-supervisory professional employees. *Id.* at 297. The Authority determined both the Antitrust Division and the individual divisions did *not* constitute an appropriate unit under the Statute because these divisions do 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 engaged in a similar analysis and conclusion with respect to the proposed unit in the Antitrust Division. *Id.*

The Authority rejected a CRT-only unit and an Antitrust Division-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 units inappropriate, the Authority dismissed both the CRT and Antitrust Division petitions.

The personnel policies in CRT and ENRD, 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. With the exception of Assistant U.S. Attorneys, the trial 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 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 and the Regional Director's acceptance of an ENRD-only unit cannot be reconciled with it.

CONCLUSION

The Regional Director erred in approving an ENRD-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

Robyn Johnson
Supervisory Human Resources Specialist
U.S. Department of Justice-Environment and Natural Resources Division
Robyn.Johnson@usdoj.gov
950 Pennsylvania Avenue NW
Washington, D.C. 20530-0001

/S/ EAMON MCCARTHY EARLS
EAMON MCCARTHY EARLS