74 FLRA No. 15

NATIONAL GUARD BUREAU
PEASE AIR NATIONAL GUARD BASE
NEWINGTON, NEW HAMPSHIRE
(Agency)

and

INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS
LOCAL F-317, AFL-CIO
(Petitioner/Labor Organization)

and

ASSOCIATION OF CIVILIAN TECHNICIANS
GRANITE STATE CHAPTER 19
(Incumbent/Labor Organization)

WA-RP-22-0055

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DECISION AND ORDER
ON REVIEW

October 28, 2024

_____

Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members (Member Kiko dissenting)

I. Statement of the Case

The Petitioner filed an application for review (application) of the attached decision and order (decision) of Federal Labor Relations Authority Regional Director Timothy J. Sullivan (RD). The RD dismissed the Petitioner's election petition that would sever a group of Agency employees from an established bargaining unit currently represented by the Incumbent.

In its application, the Petitioner argues the RD failed to apply established law and, alternatively, that established law warrants reconsideration. In an order dated March 2, 2023, the Authority granted review of the application and deferred action on the merits. For the following reasons, we find the Petitioner has not established that the RD erred as alleged, and we dismiss its petition.

II. Background and RD's Decision

The background and the RD's findings are set forth more fully in the attached decision and are discussed only briefly here.

The Incumbent is the certified, exclusive representative of all of the Agency's wage-grade and general-schedule employees. The petitioned-for employees (the employees) are fire-protection personnel who were previously employed by the State of New Hampshire as members of the New Hampshire Air National Guard. In late 2021, they were transitioned to federal-government positions with the Agency. As a result, they fell within the express terms of the existing bargaining unit's certification.

In January 2022, the employees expressed a desire to be represented by the International Association of Fire Fighters and shortly thereafter chartered the Petitioner for their representation. In July 2022, the Petitioner filed the election petition at issue here, which would sever the employees from the existing bargaining unit.

In his decision, the RD found the manner in which the employees joined the existing unit did not constitute unusual circumstances that warranted severance. Although the Petitioner claimed the Incumbent had failed to adequately represent the employees, the RD found that claim rested solely on the Incumbent's failure to proactively reach out to the employees to instruct them on how to exercise their rights under the collective-bargaining agreement that covers the unit (the CBA). The RD determined the Agency provided the employees a copy of the CBA as well as their Union representative's contact information, and that the Petitioner cited no evidence that any employees ever attempted to contact the Incumbent for assistance – let alone that the Incumbent ever failed to provide such assistance.

In addition, the RD acknowledged that the CBA was negotiated before the employees joined the unit and "d[id] not address any specific concerns unique to" them.[1] However, the RD found it was "unsurprising" that the Incumbent had not yet negotiated a new agreement tailored to the employees, given that the Petitioner filed the petition only months after the employees joined the Agency and that the CBA was set to expire less than one year after they joined, "at which point [the Incumbent] could negotiate on behalf of" them.[2] The RD also noted the Incumbent expressed its intent to negotiate a memorandum of understanding specific to the employees, and that the ground rules for the upcoming term negotiations expressly

[1] Decision at 12.

[2] *Id.*

stated that the parties would negotiate amendments concerning the employees.

Accordingly, the RD found the Incumbent effectively, adequately, and fairly represented the employees. He concluded severance was not warranted and, thus, he dismissed the petition.

On January 17, 2023, the Petitioner filed an application for review of the RD's decision. The Incumbent filed an opposition on January 27, 2023. As noted above, in an order dated March 2, 2023, the Authority granted review of the application and deferred action on the merits.

III. Preliminary Matter: Sections 2422.31(b) and 2429.5 of the Authority's Regulations bar one of the Petitioner's arguments.

In its application, the Petitioner argues the RD committed a clear and prejudicial procedural error by soliciting and accepting additional evidence from the Agency after the Agency had submitted a particular filing.[3] Under the Authority's Regulations, a party's application may not "raise any issue or rely on any facts not timely presented to the . . . [RD]"[4] or raise arguments "that could have been, but were not, presented in the proceedings before the [RD]."[5] The Petitioner could have presented the above argument to the RD, but the record does not reflect that it did so. Therefore, we find this argument barred and do not consider it.[6]

IV. Analysis and Conclusions

A. The RD did not fail to apply established law.

The Petitioner argues the RD failed to apply established law because he: (1) denied the employees an opportunity to exercise their right to self-determination in the unusual circumstances of their conversion from state employees to federal employees;[7] and (2) incorrectly applied Authority precedent to conclude the Incumbent adequately and effectively represented the employees.[8]

The Authority has long held that new employees are automatically included in an existing bargaining unit where their positions fall within the express terms of a bargaining-unit certificate and where their inclusion does not render the existing unit inappropriate (the automatic-inclusion principle).[9] The Authority also has long 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 unit fragmentation and, thereby, promoting effective dealings and efficiency of agency operations.[10] As relevant here, an incumbent union's failure to fairly or adequately represent unit employees may constitute unusual circumstances that warrant severance.[11]

It is undisputed that the employees in this case are new federal employees whose positions fall within the express terms of the certified bargaining unit represented by the Incumbent.[12] The Petitioner does not cite any Authority precedent that requires treating the transition from state to federal employment any differently than the Authority treats new hires for purposes of the automatic-inclusion principle; the Authority has not previously considered employees' *prior* employment status when applying that principle.[13] Further, the Petitioner did not argue to the RD, and does not argue to

[3] Application at 22.
[4] 5 C.F.R. § 2422.31(b).
[5] *Id.* § 2429.5.
[6] *E.g., U.S. Dep't of the Air Force, Air Force Life Cycle Mgmt. Ctr., Hanscom Air Force Base, Mass.*, 69 FLRA 483, 484 (2016).
[7] Application at 11.
[8] *Id.* at 16.
[9] *Dep't of the Army Headquarters, Fort Dix, Fort Dix, N.J.*, 53 FLRA 287, 294 (1997) (*Fort Dix*).
[10] *U.S. Dep't of the Navy, Naval Air Station Jacksonville, Jacksonville, Fla.*, 61 FLRA 139, 142-43 (2005) (*Naval Air Station*); *see also Libr. of Cong.*, 16 FLRA 429, 431 (1984); *Veterans Admin. Med. Ctr., Tucson, Ariz.*, 13 FLRA 727, 727 (1983) (finding that permitting severance where a petitioner shows dissatisfaction with the unit would lead to increased fragmentation and be inconsistent with the Statute's goal of facilitating unit consolidation); *Dep't of Transp., Wash., D.C.*, 5 FLRA 646, 652 (1981) (legislative history indicates that consolidating smaller units should be a goal of the Statute).
[11] *Fraternal Ord. of Police*, 66 FLRA 285, 287 (2011); *Naval Air Station*, 61 FLRA at 142-43.
[12] Decision at 7.
[13] *See, e.g.*, *SSA, Off. of Disability Adjudication & Rev., Falls Church, Va.*, 62 FLRA 513, 513-15 (2008) (applying principle equally to employees hired from two different bargaining units within the agency, non-unit agency employees, and new hires).

us, that including the employees in the existing unit renders the unit inappropriate.[14]

Although the Petitioner cites *Department of the Navy, Naval Station, Norfolk, Virginia* (*Navy*)[15] – a case not involving severance, as the Petitioner concedes[16] – that case involved dueling petitions: one to represent firefighters who were transferred by reorganization, and another to find they accreted into an existing unit.[17] The Authority found that either a separate unit of firefighters or including them in the existing unit would be appropriate, and directed an election giving them a chance to decide which unit they wanted to belong to.[18] Because *Navy* did not involve either an automatic-inclusion or a severance situation, it did not present the same concerns that the Authority's doctrines in those areas are based upon, as discussed further in Section IV.B. below. As such, the Petitioner's reliance on *Navy* is misplaced.

In addition, as discussed above, the RD made extensive factual findings underlying his conclusion that the Incumbent has not inadequately represented the employees.[19] The Petitioner does not argue the RD "[c]ommitted . . . clear and prejudicial error[s] concerning . . . substantial factual matter[s]."[20] The Petitioner's claims of inadequate representation center on the Incumbent's alleged failure to proactively create a relationship with the employees or provide them guidance on how to exercise their rights under the CBA.[21] The RD found that this alone – without additional evidence of the Incumbent preventing employees from participating in Union affairs, declining to assist with pending grievances, or refusing to allow members to join Union leadership – was insufficient to find there was inadequate representation.[22] The Petitioner cites no precedent that conflicts with the RD's finding. Although the Petitioner cites[23] *Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*,[24] the RD correctly found that decision distinguishable because there, unlike here, the parties had "a longstanding relationship [that] deteriorated rapidly, during which the incumbent[ ]union took affirmative steps against the petitioner[ ]union and against its members."[25]

In sum, the Petitioner does not cite any Authority precedent, or any other law, with which the RD's decision conflicts. Thus, the Petitioner has not established that the RD failed to apply established law.

B. The Petitioner has not demonstrated that established law or policy warrants reconsideration.

The Petitioner asserts that, if the Authority finds the RD properly applied established law, then the Authority should reconsider its automatic-inclusion precedent.[26] According to the Petitioner, converting state employees into federal employees and "forcing them to join a new bargaining unit, over their decision to affiliate with a different union, is untenable and inconsistent with" the Federal Service Labor-Management Relations Statute's (Statute's) policies protecting employees' right to choose their representative.[27] The Petitioner further claims that "an incumbent labor union should not be permitted to neglect" these newly added employees "for nearly an entire year, while the employees need union representation and are unaware of even who their union representative is or how to contact them."[28]

The automatic-inclusion principle provides for stability in bargaining units,[29] consistent with one of the Statute's policies: to "promote stability in labor-management relationships."[30] The Authority has interpreted that principle broadly and has rejected requests to interpret it narrowly.[31] As for the Authority's severance precedent, while employees' right to self-determination is undoubtedly an important goal of the Statute,[32] so too is

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[14] Decision at 7. We note that, in its application, the Petitioner states that the employees "share little, if any, community of interest" with the other employees in the unit. Application at 12. However, the Petitioner does not expressly argue that the unit is inappropriate or address the Authority's standards for assessing unit appropriateness. *See, e.g.*, *Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Marine Fisheries Serv., Se. Fisheries Sci. Ctr.*, 73 FLRA 238, 240 (2022) (discussing appropriate-unit criteria).
[15] 14 FLRA 702 (1984).
[16] Application at 14.
[17] *Navy*, 14 FLRA at 702-03.
[18] *Id.* at 704-05.
[19] Decision at 10-13.
[20] 5 C.F.R. § 2422.31(c)(iii).
[21] Decision at 11.
[22] *Id.* at 13.
[23] Application at 14.
[24] 70 FLRA 995 (2018) (*Portsmouth*) (Member DuBester dissenting).
[25] Decision at 9; *see also Portsmouth*, 70 FLRA at 998-99 ("[T]he ongoing incidents were not a 'temporary problem.' The record is replete with examples of bargaining-unit [employees] being ignored and forgotten. The incidents were numerous and well-cataloged . . . .").
[26] Application at 21-22.
[27] *Id.*
[28] *Id.* at 22.
[29] *U.S. DOD, Def. Commissary Agency*, 59 FLRA 990, 992 (2004) (*DCA*).
[30] *Naval Facilities Eng'g Serv. Ctr., Port Hueneme, Cal.*, 50 FLRA 363, 367 (1995) (citing *NTEU v. FLRA*, 810 F.2d 295, 300 (D.C. Cir. 1987)).
[31] *DCA*, 59 FLRA at 991-92 (rejecting agency's request to reconsider *Fort Dix's* presumption that new categories of employees falling within express terms of a unit certification are included in the unit).
[32] *Portsmouth*, 70 FLRA at 998.

preventing the fragmentation of an established, appropriate bargaining unit that promotes effective dealings, protects employees, and respects an agency's organizational and labor-relations structure.[33]

In short, the Authority's well-established precedent in these areas is grounded in significant statutory policies. We agree with the dissent that the Incumbent should have done a better job of connecting with and reaching out to the firefighters during their transition from state to federal employment. It is imperative that employees know whom to contact for assistance and how to enforce their rights under the Statute and the CBA that applies to them. However, the facts of this case do not rise to the level of ineffective representation under Authority precedent, and we do not believe that it warrants abandoning the automatic-inclusion principle. For these reasons, the Petitioner has not demonstrated that established law or policy warrants reconsideration.[34]

V. Order

We dismiss the Petitioner's petition.

[33] *Naval Air Station*, 61 FLRA at 142-43.

[34] *See, e.g.*, *U.S. DOD, Pentagon Force Prot. Agency*, 68 FLRA 761, 766-67 (2015) (rejecting claim that established law or policy warranted reconsideration).

Member Kiko, dissenting:

I disagree with the majority's decision to hold federal-sector unions to such a low bar for adequate representation. In *Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire* (*Portsmouth*), the Authority recognized that, "when employees are treated unfairly, ineffectively, or differently, unusual circumstances warranting severance exist."[1] By failing to contact the petitioned-for employees (the firefighters) during their crucial transition to federal employment—let alone represent them or their distinct interests in any way—the Incumbent treated these employees "unfairly" and "ineffectively."[2] Thus, I would find the Regional Director (the RD) failed to properly apply *Portsmouth* when he denied the election petition requesting severance.[3]

From the outset, this case involves an unusual scenario in which state-employed firefighters transitioned to federal-government employment.[4] As a result, in November 2021, the firefighters fell under the coverage of the Federal Labor-Management Relations Statute (the Statute)[5] for the first time; were automatically included into a larger bargaining unit of National Guard staff with an existing collective-bargaining agreement (the CBA); and had their previous union replaced automatically by the Incumbent.[6] But despite this period of substantial change, the firefighters heard nothing from their new union: the Incumbent did not hold a single meeting with the firefighters until September 2022—approximately eleven months after the transition.[7] None of the Incumbent's representatives contacted the firefighters to introduce themselves, to orient them to their new CBA, or to explain how they could enforce their rights under the CBA or the Statute.[8] In fact, the record reflects that the only time any of the firefighters even received their Incumbent representative's contact information was when the Agency included it on one slide during a larger orientation presentation.[9] Moreover, it was *the Agency*, rather than the Incumbent, who provided certain firefighters with copies of their new CBA.[10]

As the record reflects, the Incumbent's omissions were consequential. When the Agency "unilaterally issued at least [seventeen] Standard Operating Guidelines" (guidelines) for the employees,[11] some of the firefighters objected, arguing to their managers and human-resources officials that the guidelines were "poorly designed and . . . improperly issued."[12] These guidelines covered a wide range of the firefighters' conditions of employment, including staffing and uniform requirements, overtime rules, and the circumstances in which firefighters may be directed to enter active-shooter situations before law enforcement had given the "all clear."[13]

However, lacking a relationship with the Incumbent, the firefighters did not formally challenge the changes.[14] One firefighter claimed that he "did not know how to file a grievance or otherwise challenge these unilateral changes to the [firehouse's] work rules through the [Incumbent], nor did [he] have any contact information for anyone at the [Incumbent] to even raise the issue."[15] Even more troublingly, when the Agency called that firefighter into a meeting for failure to comply with one of the new guidelines, and he was "worried that [he] would

[1] 70 FLRA 995, 999 (2018) (Member DuBester dissenting).

[2] *Id.*

[3] Because I would grant the application for review on the grounds that the RD failed to properly apply established law, I find it unnecessary to address the Petitioner's remaining arguments. *See* Application for Rev. (Application) at 21 (arguing Authority's established severance precedent warrants reconsideration); *id.* at 22 (arguing RD committed clear and prejudicial procedural error); *see also U.S. Dep't of VA, Kan. City VA Med. Ctr., Kan. City, Mo.*, 70 FLRA 465, 469 n.62 (2018) (Member DuBester dissenting) (finding "it unnecessary to address the [a]gency's remaining arguments" after overturning regional director's decision).

[4] Decision at 4-5.

[5] 5 U.S.C. §§ 7101-7135.

[6] Decision at 10 ("[T]he newly-created positions in [the firehouse] were automatically folded into an existing bargaining unit because they fell within the express terms of that unit's certification.").

[7] *Id.* at 5-6.

[8] *Id.*

[9] *Id.* at 5 ("[T]he [h]uman [r]esource [o]fficers show[ed] a slide which said that [they] were represented by the [Incumbent] and identifying who [their] [U]nion representative was." (internal quotation marks omitted)); *but see* Application at 4 ("Certain . . . [f]ire [f]ighters do not recall seeing this slide or receiving any information about the [Incumbent] at this meeting.").

[10] Decision at 5 (noting a firefighter claimed that, before receiving a copy of the agreement from an Agency official in January or February 2022, that firefighter "was not aware that [the Incumbent] purportedly represented [the firefighters] or that [they] were covered by any CBA").

[11] *Id.* at 6.

[12] *Id.*

[13] *See* Application at 5; *see also* Application, Ex. 2, Guidelines at 73 (replacing policy where, "[h]istorically, [fire departments] have been unable (due to policy) to enter violent incident scenes until [law enforcement] resources have given the 'all clear'"); Decision at 6 (noting that the Agency unilaterally issued "new guidelines for employees' facial hair"); Application at 5 (arguing that the Agency "expressly prohibit[ed] a specific kind of facial hair that the Deputy Chief personally deemed 'unprofessional'").

[14] Decision at 6 (noting that firefighters disagreed with the guidelines but did not file any grievances).

[15] *Id.* (internal quotation marks omitted).

be terminated," he noted that he "did not know who [he] should reach out to" for assistance.[16]

Under these circumstances, it is hardly surprising that the firefighters contacted the Petitioner—a firefighters' union they trusted to understand and represent their distinct interests—for representation.[17] This mirrors *Portsmouth* where, "[i]n direct response to the[ir i]ncumbent[u]nion's failure to adequately and fairly represent [them]," the employees sought to withdraw from their larger unit and to select a new exclusive representative.[18] In *Portsmouth*, the Authority held the incumbent union's inadequate representation and the employees' interest in new representation based on that inadequacy created unusual circumstances warranting severance.[19] In reaching this conclusion, the Authority found the regional director's denial of the employees' request for severance "failed to adequately account for [the employees'] interests and concerns" and, instead, improperly focused exclusively on "preventing unit fragmentation."[20]

In my view, the RD made the same mistake here. In *Portsmouth*, the Authority held that employees' expressions of their "interests, concerns, and self-determination . . . [should be afforded] *equal importance* when determining whether severance is warranted."[21] Here, however, the RD barely considered the firefighters' concerns in his decision. As the majority notes,[22] the RD found the conditions of this case distinguishable from *Portsmouth*'s "unique" context because there, unlike here, the parties had "a longstanding relationship [that] deteriorated rapidly, during which the incumbent[ ]union took affirmative steps against the petitioner[ ]union and against its members."[23] Although the RD explained how the facts in *Portsmouth* differed from the inadequate-representation claims here, the RD ignored *Portsmouth*'s central principle: the Authority instructed regional directors to focus "equal" attention on employees' right to join, and refrain from joining, a union when evaluating severance requests.[24]

Here, the firefighters clearly expressed their interest in the Petitioner as their exclusive representative early in this transition process.[25] But, as the RD correctly noted, *Portsmouth* "did not turn solely on whether the 'wishes of affected employees' were considered—it also hinged substantially on the incumbent[ ]union's failure to adequately represent the petitioned-for employees."[26] Thus, the question is whether the Incumbent's sustained inaction constitutes inadequate representation of the firefighters.

When the Authority has considered whether a union's representation of employees has been so inadequate as to warrant severance, the Authority has evaluated the following factors: (1) whether the employees at issue had opportunities to participate in union affairs,[27] (2) whether the collective-bargaining agreement contained provisions addressing the specific concerns of the employees at issue,[28] and (3) whether the union engaged in formal or informal efforts to resolve concerns of the employees at issue.[29]

Applying those considerations here, the Incumbent clearly failed to adequately represent the firefighters. For example, rather than offering the firefighters opportunities to participate in union affairs, the Incumbent neglected to communicate with the firefighters in any way during this period of substantial change. Assuming the Incumbent held meetings during the eleven months after the transition, it did not invite the firefighters

[16] *Id.* (internal quotation mark omitted).

[17] *Id.* (noting that firefighter told Incumbent they wanted to be represented by a "[f]ire [f]ighter union"); *see also* Application at 3-4 (noting that the firefighters "decided that they wanted to be represented by a labor union affiliated with the [Petitioner] since the [Petitioner] is comprised of more than 326,000 [f]ire [f]ighters and other first responders, and thus would be better equipped and positioned to represent their unique interests and workplace concerns as fire protection employees than a union that represents no fire fighters").

[18] *Portsmouth*, 70 FLRA at 999.

[19] *Id.*

[20] *Id.*

[21] *Id.* (emphasis added).

[22] Majority at 5.

[23] Decision at 9.

[24] *Portsmouth*, 70 FLRA at 999 (citing 5 U.S.C. § 7102).

[25] Decision at 5 ("In or around January 2022, the [firefighters] began discussing a desire to be represented by [the Petitioner]."); *see also* Application at 4 n.2 (claiming the firefighters "began discussing unionizing with the [Petitioner] in 2019, well before they were made federal employees [at the end of 2021] or informed of their supposed representation by the [Incumbent]").

[26] Decision at 9 (quoting *Portsmouth*, 70 FLRA at 999).

[27] *U.S. Dep't of the Air Force, Carswell Air Force Base, Tex.*, 40 FLRA 221, 231-32 (1991) (*Air Force*) (considering argument of inadequate representation claiming employees were denied reasonable opportunity to participate in union affairs).

[28] *Libr. of Cong.*, 16 FLRA 429, 432 (1984) (finding adequate representation, in part, where the employees were "covered by a modification to the 'master' collective[-]bargaining agreement pertaining specifically to them").

[29] *U.S. Dep't of the Navy, Naval Air Station Jacksonville, Jacksonville, Fla.*, 61 FLRA 139, 141, 143 (2005) (finding "no evidence that the [i]ncumbent ha[d] failed, or refused to represent" employees where union engaged in formal national-level representation of unit, as well as a "pattern of informal resolutions" of individual issues (internal quotation mark omitted)).

to any of them[30]—effectively preventing their involvement in union affairs.[31]

Regarding the CBA, the Agency[32]—and months later—the Incumbent,[33] recognized that the existing CBA did not address the firefighters' specific concerns and distinct conditions of employment. For example, the CBA provides that all unit employees are entitled to a daily lunch break and may leave early if they are not provided with a lunch break; firefighters are not entitled to this benefit and the CBA contains no comparable rule for their work schedule.[34] Despite the firefighters' different needs, the Incumbent did not even acknowledge that a new agreement would be necessary for the firefighters until a month and a half after the petition—*eleven months after the transition*—when the Incumbent held its first meeting with some firefighters to discuss, among other things, the CBA's procedure for filing grievances.[35] After this meeting, the Incumbent notified the Agency that it wanted to negotiate a supplemental agreement specific to the firefighters during upcoming CBA negotiations.[36] However, there is no indication in the record that the Incumbent ever invited the firefighters to participate in these negotiations or even solicited input from the firefighters regarding their specific concerns.

As for whether the Incumbent engaged in formal or informal efforts to resolve concerns of the firefighters, the record contains no evidence that it did.[37] The firefighters weathered the unilateral changes to their conditions of employment—including changes to staffing rules, overtime procedures, and the firefighters' involvement in active-shooter incidents[38]—without a formal grievance or a request to bargain over the changes.[39] Additionally, there is no evidence in the record that the Incumbent represented any employees during this period in any disciplinary matters.

Rather than finding that these factors reflect poorly on *the Incumbent*, the RD suggested that they could indicate the firefighters "were willfully blind to the representation available to them."[40] Despite acknowledging the Incumbent "could have done more to reach out to these employees,"[41] the RD denied the petition for severance because he found the Petitioner's "only evidence" of inadequate representation was that the Incumbent "did not proactively reach out and establish a relationship with [the firefighters]."[42] However, as I believe the facts of this case make abundantly clear, such a relationship is a necessary prerequisite for adequate representation. In circumstances like this one—where an entire group of employees are new to federal-sector employment—they cannot truly receive the benefits of union representation if they do not know what their contractual and statutory rights are or whom at their union they can contact to enforce those rights.

Moreover, the RD's suggestion that the employees could have been "willfully blind to the representation available to them" improperly placed the onus on the individual employees to ensure that the Incumbent was providing adequate representation.[43] I am concerned that the majority's decision, finding that the Incumbent had no duty "to proactively create a relationship with the employees or provide them guidance on how to exercise their rights under the [collective-bargaining agreement],"[44] tacitly condones ineffective representation that harms employees and undermines federal labor-management relations.

While the facts here differ from the bitter struggle in *Portsmouth*, this case involves another form of inadequate representation: sustained neglect for new bargaining-unit employees during a significant change. As the Incumbent took no affirmative, representational

[30] *See* Application at 7 (noting that Incumbent representative's "September 14, 2022[,] meeting with Lieutenant Maffee represents the first communication that the [Incumbent] had with any . . . [of the f]ire[f]ighter[s] since they became federal employees and part of the [Incumbent's] bargaining unit in November 2021"); Incumbent's Reply to Petitioner's Resp. to Show-Cause Ord. at 6 n.9 (quoting Incumbent representative's statement that, "[o]n or about [September 7,] 2022[, he] contacted the fire [department] . . . to set up a meet and greet with the employees in regard to the union and the benefits of being members of the union").

[31] *Cf. Air Force*, 40 FLRA at 231-32 (finding incumbent union provided firefighters reasonable opportunity to participate in union affairs where firefighters were notified of, and some attended, larger union meetings; the union held two meetings particularly for the firefighters; and the firefighters participated in negotiations over a firefighter-specific provision to their collective-bargaining agreement).

[32] Decision at 5-6 (noting an Agency official stated "'obviously' there would need to be some changes to the [agreement] to address working conditions for fire protection personnel").

[33] *Id.* at 6 (noting representative informed the firefighters that the Incumbent "intended to negotiate a [m]emorandum of [u]nderstanding . . . with the Agency to establish different conditions of employment for [the firefighters]").

[34] *Id.* at 5; *see also* Application, Attach. 2, Maffee Aff. at 6.

[35] Decision at 6.

[36] *Id.*

[37] *Cf. U.S. Dep't of VA, Wash., D.C.*, 35 FLRA 172, 180 (1990) (finding adequate representation where union "ha[d] filed grievances and unfair[-]labor[-]practice charges on behalf of unit employees, and . . . represent[ed] unit employees in dealings with the [a]gency concerning working conditions on both the local and national levels").

[38] *See, e.g.*, Application, Ex. 2, Guidelines at 14, 21, 73.

[39] Decision at 6.

[40] *Id.* at 13.

[41] *Id.* at 12.

[42] *Id.* at 13.

[43] *Id.*

[44] Majority at 5.

actions on behalf of the firefighters for almost a year, I am hard pressed to see *any* evidence to contradict the Petitioner's claim that the Incumbent inadequately represented the employees. Accordingly, consistent with the Authority's decision in *Portsmouth*, I would find the Petitioner has established unusual circumstances that warrant severing the firefighters from the larger unit.[45]

For these reasons, I dissent.

[45] *See Portsmouth*, 70 FLRA at 999 (finding regional director should have granted severance where incumbent union failed to adequately represent bargaining-unit employees).

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
DENVER REGION

NATIONAL GUARD BUREAU
PEASE AIR NATIONAL GUARD BASE,
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GRANITE STATE CHAPTER 19
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WA-RP-22-0055

DECISION AND ORDER

I. STATEMENT OF THE CASE

This case is before the undersigned Regional Director of the Federal Labor Relations Authority based on a petition filed by the International Association of Fire Fighters, Local F-317, AFL-CIO ("IAFF" or "Petitioner"), pursuant to § 7111 of the Federal Service Labor-Relations Statute (the Statute),[1] and § 2422.5 of the Authority's Regulations.[2] The Petition requests that the FLRA conduct a representation election for certain employees of the Air National Guard, Pease Air National Guard Base, Newington, New Hampshire (Agency). However, because these employees are already included in a bargaining unit represented by the Association of Civilian Technicians, Granite State Chapter 19 ("ACT" or "Incumbent"), IAFF is ultimately seeking a determination that the petitioned-for employees should be severed from this bargaining unit.

Pursuant to § 7105(e)(1) of the Statute,[3] the Authority has delegated its powers in connection with the subject case to the undersigned Regional Director. In accordance with § 2422.30 of the Authority's Regulations,[4] I have completed my investigation and concluded a hearing on this matter is not necessary. Based on the record and for the reasons set forth below, I conclude that IAFF's petition should be dismissed.

II. PROCEDURAL HISTORY AND CREATION OF THE RECORD

IAFF filed this petition on July 28, 2022 seeking an election for "fire protection personnel that have been recently transitioned to Title 5 Employees within the OPM GS-0081 Job Classification Series located at [Pease] Air National Guard Base, New Hampshire."[5] The petition indicated that the ACT is an affected party.[6]

On August 17, 2022, the Regional Director of the FLRA's Denver Regional Office (the Denver Region) instructed the Agency to provide certain information relevant to IAFF's Petition, including "a statement of your interest in the issues raised by the petition," and "evidence of the [petitioner's] incumbent exclusive representative status, such as a copy of the certification of representative and the most recent collective bargaining agreement(s) covering any of the employees affected by the issues raised in the petition."

Meanwhile, the Agency contacted ACT about this petition, and a representative for ACT then contacted the Denver Region via email on August 18, 2022 to express its interest in participating in these proceedings.[7] The Denver Region thereafter included ACT in all communications concerning this matter.

On August 31, 2022, in response to the Denver Region's August 17th request, the Agency provided the following information: a Statement of Interest; an alphabetized list of all employees who would be included in the proposed unit; an alphabetized list of all employees who would be excluded from the proposed unit; and the collective bargaining agreement (CBA) between ACT and the Agency, dated October 2, 2019. In its Statement of Interest, the Agency asserted that the employees who are impacted by this petition are already included in a bargaining unit represented by ACT.[8] Accordingly, the Agency argued that the proposed unit sought by Petitioner is inappropriate because the affected employees are already represented, and because "working with one union on workplace matters concerning all employees, rather than having another union representing a very small

[1] 5 U.S.C. § 7111.
[2] 5 C.F.R. § 2422.5.
[3] 5 U.S.C. § 7105(e)(1).
[4] 5 C.F.R. § 2422.30.
[5] Petition at 2.
[6] *Id*. at 5.
[7] Email from Travis Perry to Adam Johnson, Aug. 18, 2022.
[8] Agency Statement of Interest at 1.

number of employees, is in the best interest of both the employees and the efficiency of the service."[9]

ACT also submitted a Statement of Interest on September 14, 2022 asserting its opposition to IAFF's Petition, and arguing that the Petition should be dismissed because "severance is unwarranted."[10]

Pursuant to § 2422.13(b) of the Authority's Regulations, the Denver Region scheduled a post-petition conference between all three parties on September 19, 2022 to discuss, narrow, and potentially resolve the issues raised in the petition. The parties could not reach a resolution, and both the Agency and ACT reiterated their opposition to IAFF's request to sever the petitioned-for employees from the already-existing bargaining unit.

On September 29, 2022 the Regional Director issued on *Order to Show Cause* instructing IAFF to demonstrate, in writing and with evidentiary support, why its petition should not be dismissed.[11] Specifically, the Regional Director ordered IAFF to explain whether severance is warranted because the existing unit is no longer appropriate and/or because unusual circumstances exist which might warrant severance.[12] The Regional Director instructed IAFF to submit its response by October 12, 2022, and specified that the Agency and ACT may submit replies within ten calendar days of IAFF's response.[13] On October 4, 2022 IAFF filed a *Request of Extension of Time* to respond to the Order, and the Regional Director granted an extension until October 24, 2022.[14]

IAFF filed its *Response to the Order to Show Cause* on October 24, 2022 along with the following attachments: a signed affidavit from Daniel J. Maffee, Lieutenant/Lead Fire Fighter with the Pease Fire Protection and Emergency Services Department (Pease FES), dated October 22, 2022; a signed affidavit from Jesse C. Kelley, Assistant Chief of Training/Fire Protection Specialist with Pease FES, dated October 21, 2022; the collective bargaining agreement (CBA) between ACT and the Agency, dated September 16, 2019; and numerous Standard Operating Guidelines (SOGs) issued in June and July 2022 by the Acting Chief of Pease FES.

Both the Agency and ACT filed a *Reply to IAFF's Response* on November 1 and November 2, 2022, respectively. The Agency did not include any evidence alongside its Reply. ACT included the following attachments: a declaration of John Bober, President of ACT Granite State Chapter 19, dated November 2, 2022; a list of bargaining-unit employees (BUEs) represented by ACT Granite State Chapter 19; an email from Bober to an Agency Labor Relations Official requesting to negotiate a new CBA, dated September 16, 2022; an undated MOU setting forth ground rules for upcoming CBA negotiations between ACT and the Agency; ACT's comments on OPM Policy Regarding the Firefighter Trading Time Authority, dated August 22, 2022; emails between ACT and the Agency concerning matters impacting firefighters, dated from September 19 through October 31, 2022; and an email from Bober to Daniel Maffee asking him to reach out with any questions concerning ACT's CBA, dated November 1, 2022.

III. FACTUAL BACKGROUND

On May 17, 2001, the ACT was certified in Case No. BN--RP--00054 as the exclusive representative of the following unit:

Included: All Wage Grade and General Schedule employees employed by the New Hampshire Army or Air National Guard statewide.

Excluded: Professional employees; management officials, supervisors; and employees described in 5 U.S.C. § 7122(b)(2), (3), (4), (6) and (7).[15]

ACT and the Agency are parties to a CBA which became effective on October 2, 2019.[16] The agreement expired in September 2022, and ACT and the Agency have agreed to negotiate a new CBA.[17]

[9] *Id.*
[10] ACT Statement of Interest at 1-2.
[11] Order to Show Cause at 2-3.
[12] *Id.* at 2 (citing *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 70 FLRA 995, 1004 (2018) (*Portsmouth Naval Shipyard*) (dissenting opinion of Member DuBester); *U.S. Dep't of the Army, Defense Language Inst., Foreign Language Ctr. & Presidio of Monterey, Monterey, Cal.*, 64 FLRA 497, 498-99 (2010) (*DLA Monterey*); *U.S. Dep't of the Navy, Naval Air Station Jacksonville, Jacksonville, Fla.*, 61 FLRA 139 142 (2005) (*NAS Jacksonville*); *Library of Congress*, 16 FLRA 429, 431 (1984); *U.S. Dep't of Veterans Affairs, Washington, D.C.*, 35 FLRA 172, 180 (1990) (*VA D.C.*)).
[13] *Id.* at 3.
[14] IAFF Request for Extension of Time, Oct. 4, 2022; Order Granting Extension, Oct. 4, 2022.
[15] *See* Certification of Consolidation of Unit, Case No. BN-RP-00054, May 17, 2001.
[16] Collective Bargaining Agreement Between Adjutant General of N.H. and Association of Civilian Technicians, Oct. 2, 2019 (CBA).
[17] *See* Email from John Bober to Adam Adair, Sept. 16, 2022..

The petitioned-for unit consists of fire protection personnel, many (but not all) of whom are firefighters, who work at Pease FES. The Petition states that there are only 13 employees in the proposed unit, and IAFF's showing of interest contained 13 signatures. However, ACT suggested in an email to all parties on September 2, 2022 that the true number is 25,[18] and IAFF provided evidence suggesting that there are 21 employees in the proposed unit.[19] The Denver Region raised this issue at the post-petition conference on September 19, 2022, and the parties agreed that the true number may be closer to 25 because IAFF neglected to include non-firefighter employees in its tally of the proposed unit. However, IAFF's showing of interest is sufficient for a proposed unit of up to 42 employees.[20]

The petitioned-for employees were previously employed by the State of New Hampshire as members of the New Hampshire Air National Guard. While employed with the New Hampshire Air National Guard, they were represented by State Employees' Association/Service Employees International Union, Local 1984, Chapter 38 (SEA/SEIU).[21] In late 2021, the positions encumbered by these employees were converted to Title 5 federal government positions with the U.S. Department of Defense, Air National Guard.[22] The Agency then re-hired the same individuals to fill these newly-transitioned federal positions starting on or around November 21, 2021.[23] As a result of becoming federal positions, these employees were longer be represented by SEA/SEIU.

Later in the week of November 21, 2021, these employees met with members of the Agency's Human Resources department to arrange their pay and benefits.[24] Daniel Maffee recalled that "the Human Resource Officers show[ed] a slide which said that we were represented by the ACT and identifying who [their] union representative was."[25] The Agency later confirmed that this orientation presentation included a PowerPoint slide which identified John Bober, President of ACT Granite State Chapter 19, as the Union representative for these employees, and also included Bober's contact information.[26]

Maffee also recalled that "[i]n or about January or February 2022, Fire Chief Hutchinson emailed [him] a copy of a [CBA] between the ACT and the Adjutant General of New Hampshire …. He also said that the ACT represents Pease Fire Fighters, and that [they] were covered by that CBA."[27] Similarly, Jesse Kelley recalled that "[i]n December or January 2022, Fire Chief Hutchinson emailed [him] a copy of a [CBA] between the ACT and the Adjutant General of New Hampshire … He also said that the ACT represents Pease Fire Fighters, and that [they] were covered by that CBA. Prior to this, [Maffee] was not aware that ACT purportedly represented Pease fire protection personnel or that [they] were covered by any CBA."[28]

In or around January 2022, the Pease FES BUEs began discussing a desire to be represented by IAFF.[29] According to Kelley's affidavit, "IAFF Local F-317 was then chartered in January 2022 to represent fire protection personnel on Pease ANG Base."[30] However, upon learning of this, an Agency Labor Relations Officer Adam Adair and the Pease FES Fire Chief called a meeting with three firefighters—including Maffee and Thomas Gleason, Jr., the Treasurer and Secretary of IAFF Local F-317—to inform them that they were not permitted to form a new labor organization because they belonged to the bargaining unit represented by ACT.[31] During this meeting, Maffee "explained that the conditions of employment set forth in the ACT CBA are not in effect at Pease FES, are not observed at PES, or otherwise do not apply to Pease FES personnel," and raised some specific examples of portions in the CBA—such as a guaranteed lunch break for all BUEs—that do not apply to BUEs within the Pease FES.[32] Maffee recalled that Adair replied: "'obviously' there would need to be some changes to the CBA to address working conditions for fire protection personnel."[33]

In June and July 2022, the Acting Fire Chief unilaterally issued at least 17 Standard Operating Guidelines (SOGs) for Pease FES.[34] Some of the Pease FES BUEs, including Kelley, objected to the issuance of these SOGs as poorly designed and/or improperly issued.[35] However, Kelley asserts that he "did not know how to file a grievance or otherwise challenge these unilateral changes to the Pease FES work rules through the ACT, nor

[18] Email from Travis Perry to Adam Johnson, Sept. 2, 2022.
[19] Jesse C. Kelley Aff. at 1-2 ("There are approximately twenty-one nonsupervisory fire protection employees….").
[20] Moreover, because the Denver Region is dismissing IAFF's Petition, it is not necessary to determine the exact size of the proposed unit.
[21] *See* Kelley Aff. at 3; Daniel J. Maffee Aff. at 3.
[22] *See* IAFF Resp. to Show Cause Order (IAFF Resp.) at 5 (citing Kelley Aff. at 3; Maffee Aff. at 4); Agency Reply at 1.
[23] Agency Reply at 1; Maffee Aff. at 5; Kelley Aff. at 4.
[24] Maffee Aff. at 5; Kelley Aff. at 4.
[25] Maffee Aff. at 5.
[26] *See* Email from Adam Adair to Adam Johnson, November 8, 2022.
[27] *Id.*
[28] Kelley Aff. at 5.
[29] *See* Kelley Aff. at 5; Agency Reply at 1.
[30] Kelley Aff. at 5; *see also* Maffee Aff. at 4-5.
[31] Maffee Aff. at 6.
[32] *Id.*
[33] *Id.*
[34] Kelley Aff. at 6; Pease FES Standard Operating Guidelines, June 1-July 1, 2022 (SOGs).
[35] Kelley Aff. at 6.

did [he] have any contact information for anyone at the ACT to even raise the issue."[36]

One SOG titled Duty Uniform Requirements set forth new guidelines for employees' facial hair.[37] Kelley chose not to comply with these requirements[38] and in September 2022—several weeks after IAFF filed this Petition on July 28th—the Acting Fire Chief called him into a meeting to discuss his facial hair, at which point Kelley "became worried that [he] would be terminated for violating" the SOG.[39] Kelley states that did not contact ACT about this meeting because he "did not know who [his] ACT representative was or how to contact them," and instead emailed Adam Adair to raise concerns about these unilaterally-implemented SOGs.[40] Later that day, Adair called Kelley to ask if Kelley had reached out to ACT for assistance, to which Kelley replied that he had not because he "did not know who [he] should reach out to."[41]

On or around September 14, 2022, Bober visited the Pease FES Station to speak with Maffee about ACT, including the grievance procedure set forth in the CBA.[42] Bober informed them that ACT intended to negotiate a Memorandum of Understanding (MOU) with the Agency to establish different conditions of employment for Pease FES personnel.[43] Maffee informed Bober that they "were not interested in being represented by the ACT, or any non-Fire Fighter union, and that [they] wanted to be represented by IAFF Local F-317."[44]

On September 16, 2022 Bober emailed Adam Adair to notify the Agency that ACT desired to negotiate a new agreement, as the current CBA was set to expire on October 2, 2022.[45]

IV. ANALYSIS

The issue of severance arises when a petitioner files an election petition seeking to sever or carve out employees from an established bargaining unit.[46] Any such petition must be accompanied with a 30-percent showing of interest of employees in the petitioned-for unit, not 30 percent of the existing bargaining unit.[47]

The legal framework for analyzing severance claims is well established,[48] and the Authority has long held that severance is only granted in rare circumstances.[49] Where an existing bargaining unit continues to be appropriate under § 7112(a) of the Statute and there are no unusual circumstances to justify severing the petitioned-for employees from that unit, the petition will be dismissed.[50] The Authority first explained its rationale for this rule in *Library of Congress*, holding that: "where . . . an established bargaining unit continues to be appropriate and no unusual circumstances are presented, a petition seeking to remove certain employees from the overall unit and to separately represent them must be dismissed, in the interest of reducing the potential for unit fragmentation and . . . promoting effective dealings and efficiency of agency operations."[51]

Here, IAFF does not argue that the existing bargaining unit was rendered inappropriate by the inclusion of the petitioned-for employees. Although IAFF argues at length that these employees would be *better*-represented by IAFF,[52] it does not dispute that the current unit remains appropriate, nor did it submit any evidence to show otherwise. Absent any argument or evidence to the contrary—and in light of prior decisions where the Authority found appropriate units comprised of both firefighters and non-firefighters[53]—there are no grounds to conclude that the existing unit is no longer appropriate.

The next question is whether any "unusual circumstances" exist which justify severance. The Authority has previously found that unusual circumstances exist where the character and degree of a reorganization resulted in the loss of a community of interest between some employees and the remainder of the unit;[54] where the incumbent union expressly disclaims any further interest in continuing to represent the petitioned-for

[36] *Id*. at 6-7.
[37] *Id*. at 6; SOGs at 27.
[38] Kelley Aff. at 7.
[39] *Id*.
[40] *Id*.
[41] *Id*. at 7-8.
[42] *Id*. at 8; Maffee Aff. at 7.
[43] Maffee Aff. at 7.
[44] *Id*.
[45] Email from John Bober to Adam Adair, Sept. 16, 2022.
[46] *Office of Hearings & Appeals, Social Security Admin.*, 16 FLRA 1175, 1176 (1984).
[47] *Id*.
[48] *See DLA Monterey*, 64 FLRA at 498 (*NAS Jacksonville*, 61 FLRA at 142).
[49] *Portsmouth Naval Shipyard*, 70 FLRA at 1004 (dissenting opinion of Member DuBester).
[50] *DLA Monterey*, 64 FLRA at 498-99 (citing *NAS Jacksonville*, 61 FLRA at 142; *Library of Congress*, 16 FLRA 429, 431 (1984)).
[51] 16 FLRA at 431.
[52] *See, e.g.,* IAFF Resp. at 17.
[53] *See U.S. Dep't of the Air Force, Carswell Air Force Base, Tex.*, 40 FLRA 221, 223, 229 (1991) (*Carswell AFB*) (finding that firefighters shared a community of interest with other agency employees even though "some working conditions of the firefighters are distinctive in relation to the rest of the civilian workforce"); *Dep't of the Navy, Naval Station, Norfolk, Va.*, 14 FLRA 702, 704 (1984) (finding that firefighters "may appropriately be included in [a] comprehensive, Activity-wide unit").
[54] *See U.S. Dep't of Labor.*, 23 FLRA 464, 471 (1986) (*DOL*).

employees;[55] and where the incumbent union has failed to adequately represent employees.[56]

Here, IAFF argues that unusual circumstances exist for two reasons: (1) absent severance, the petitioned-for employees will be denied their right to self-determination under the Statute; and (2) ACT has failed to represent these employees effectively, adequately, or fairly.[57]

A. The manner in which the petitioned-for employees joined the already-existing unit does not give rise to unusual circumstances.

IAFF's first argument is that severance must be granted in order to preserve the Pease FES employees' right to self-determination. IAFF asserts that "the extraordinary manner" in which they were added to the existing bargaining unit "effectively denied [them] any [] right to self-determination under the Statute as to whether they want to be represented by a particular labor organization," including the guarantee under § 7102 that "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right."[58]

IAFF does not cite to any precedent in which the Authority found "unusual circumstances" in a scenario like this one. To the contrary, the Authority has confronted this very situation—i.e., where a group of new employees were automatically included in an existing bargaining unit because their positions fell within the description of that unit—and concluded that such an outcome was proper.[59] In fact, the Authority has considered and denied a severance petition filed on behalf of firefighters who (much like the ones seen in this case) "were not employed [by the agency] when the Activity-wide bargaining unit was recognized."[60] The Authority also rejected a similar argument to the one seen here: that "the firefighters should be 'allowed the opportunity to determine for themselves, . . . their collective bargaining representative.'"[61]

IAFF nonetheless argues that severance is appropriate under the Authority's more recent decision *Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.* (*Portsmouth Naval Shipyard*).[62] In that case, the Authority granted the petitioner-union's request for severance in part because "'employee interests, concerns, and self-determination' are important considerations when determining whether severance is warranted."[63] IAFF argues that this decision's emphasis on "the interests, concerns, or wishes of affected employees" warrants granting severance here.[64] Specifically, IAFF notes that the Pease FES employees "were required to accept as their bargaining representative and denied any opportunity to vote on whether they wanted to be represented that by that organization, or another union, or any representative at all, for that matter,"[65] and asserts that failing to sever them "is an unjust result which undercuts a central purpose of the Statute."[66]

However, as already mentioned above, the Authority has previously rejected a severance petition based on employees' "right of self determination guaranteed in 5 U.S.C. § 7102."[67] That case notwithstanding, the facts in *Portsmouth Naval Shipyard* are distinguishable from those seen here. That decision did not turn solely on whether the "wishes of affected employees" were considered—it also hinged substantially on the incumbent-union's failure to adequately represent the petitioned-for employees. Specifically, the Authority observed that "[t]he record is replete with examples of [BUEs] being ignored and forgotten," and then described at length several examples of the petitioned-for employees' inability to obtain adequate representation or participate in union affairs.[68] The Authority concluded by finding: "when employees are treated unfairly, ineffectively, or differently, unusual circumstances warranting severance exist."[69] In other words, the Authority arrived at its decision largely because the incumbent-union had failed to adequately represent the petitioning employees, which—as explained in detail below—is not the case here. Absent a finding that ACT inadequately represented the petitioned-for employees, the

[55] *See Dep't of the Treasury, Bureau of Engraving & Printing*, 49 FLRA 100, 107-08 (1994) (*BEP*).
[56] *VA D.C.*, 35 FLRA at 180.
[57] IAFF Resp. at 11-17.
[58] *Id*. at 12 (quoting 5 U.S.C. § 7102).
[59] *See Division of Military & Naval Affairs, N.Y. Nat'l Guard, Latham, N.Y.*, 56 FLRA 139, 142 (2000) (*Nat'l Guard Latham*) ("New employees are automatically included in an existing bargaining unit where their positions fall within the express terms of a bargaining certificate and where their inclusion does not render the bargaining unit inappropriate.") (citing *Department of the Army, Headquarters, Fort Dix, Fort Dix, New Jersey*, 53 FLRA 287, 294 (1997) (*Fort Dix*); *Carswell AFB*, 40 FLRA at 229-30).
[60] *Carswell AFB*, 40 FLRA at 225.
[61] *Id*. at 224.
[62] 70 FLRA at 995-96.
[63] IAFF Resp. at 12 (quoting *Portsmouth Naval Shipyard*, 70 FLRA at 999).
[64] *Id*. (quoting *Portsmouth Naval Shipyard*, 70 FLRA at 998-00).
[65] *Id*. at 13 (citing *Portsmouth Naval Shipyard*, 70 FLRA at 999).
[66] *Id*.
[67] *Carswell AFB*, 40 FLRA at 224.
[68] *Portsmouth Naval Shipyard*, 70 FLRA at 998.
[69] *Id*. at 999.

holding in *Naval Portsmouth Shipyard* is inapposite to this case.

Moreover, the history between the parties in *Portsmouth* was unique. The petitioner-union was one of eight local trade unions which made up the incumbent-union.[70] In 2015 the incumbent-union elected a new president who removed the petitioner-union's representatives from union leadership, divided the petitioner-union's members amongst the other local unions, ordered the petitioner-union to vacate its offices, and advised management to communicate only with the incumbent-union.[71] The incumbent-union also removed the petitioner-union's stewards from their positions, turned away a dues-paying member of the petitioner-union from a meeting which concerned conditions of employment, and failed to inform some of the petitioned-for employees that it had elected not to advance their pending grievances.[72] Unlike in the instant case, the parties in *Portsmouth* had a longstanding relationship which deteriorated rapidly, during which the incumbent-union took affirmative steps against the petitioner-union and against its members.

Here, conversely, the parties do not have a contentious past that devolved in a way which hindered BUEs' ability to obtain representation. Rather, the newly-created positions in Pease FES were automatically folded into an existing bargaining unit because they fell within the express terms of that unit's certification. As already explained above, the Authority has confronted this very scenario and concluded that the inclusion of such employees is appropriate.[73] Although IAFF contends that Pease FES joined the already-existing unit in an "extraordinary manner," the aforementioned cases show that there is nothing extraordinary about "automatically includ[ing new employees] in an existing bargaining unit where their positions fall within the express terms of a bargaining certificate and where their inclusion does not render the bargaining unit inappropriate."[74] They also show that the Authority has previously considered and rejected IAFF's very argument that, absent severance, "the Pease fire protection personnel are effectively denied any [] right to self-determination under the Statute . . . ."[75]

Accordingly, the allegedly "extraordinary manner" in which the petitioned-for employees joined the existing unit does not give rise to unusual circumstances which requires severance.

B. <u>ACT has not failed to represent the petitioned-for employees effectively, adequately, or fairly.</u>

IAFF's second argument is that ACT has failed to represent the Pease FES BUEs effectively, adequately, or fairly.[76] The Authority has previously found severance to be appropriate where the incumbent union has failed to adequately represent employees.[77] For an incumbent union's representation to be considered inadequate, the incumbent must have essentially abandoned or otherwise treated the petitioned-for employees "unfairly, ineffectively, or differently."[78]

Here, IAFF claims "there can be no legitimate dispute that the ACT has completely failed to represent the Pease Fire Fighters effectively or adequately, or that the Pease Fire Fighters have received different and substandard representation from the ACT compared with the other Title 5 employees on Pease ANG Base."[79] IAFF asserts that ACT has failed to reach out to these employees, and argues that "adequate representation requires, at the very least, some communication with the employees such that the employees know who their union representative is and how to exercise their rights under the collective bargaining agreement."[80]

IAFF also asserts that due to this failure to communicate, "the Pease Fire Fighters have been unable to raise serious workplace issues with their bargaining representative and have been effectively precluded from challenging violative and likely unlawful conduct by the Employer through their union."[81] IAFF specifically points to employees' concerns with the SOGs issued in June and July 2022: "despite the fire protection employees' objections to these unilateral changes, without any communication from the ACT, they had no idea how to contact their union representative to submit a grievance, file an unfair labor practice charge, or otherwise ask the ACT to intercede on their behalf and challenge the Employer's unilateral changes."[82] According to IAFF,

[70] *Id*. at 996.
[71] *Id*. at 998.
[72] *Id*. at 998-999.
[73] *See Nat'l Guard Latham*, 56 FLRA at 142 (citing *Fort Dix*, 53 FLRA at 294; *Carswell AFB*, 40 FLRA at 229-30).
[74] *Id*.
[75] IAFF Resp. at 12; *compare Carswell AFB*, 40 FLRA at 224 (rejecting petitioner-union's claim that "the right of self determination guaranteed in 5 U.S.C. § 7102" should outweigh "the concern over 'fragmentation' of existing bargaining units").
[76] IAFF Resp. at 13-17.
[77] *See VA D.C.*, 35 FLRA at 180.
[78] *Portsmouth Naval Shipyard*, 70 FLRA at 999 (citing *NAS Jacksonville*, 61 FLRA at 142-43; *BEP*, 49 FLRA at 107-08; *Carswell AFB*, 40 FLRA at 231-32).
[79] IAFF Resp. at 14.
[80] *Id*.
[81] *Id*.
[82] *Id*. (citing Kelley Aff. at 7-8).

"the vast majority of Pease Fire Fighters have no idea who their union representative is or how to contact them."[83]

IAFF again relies on *Portsmouth Naval Shipyard* to support this position.[84] However, the record in that case was replete with examples of inadequate representation, and the Authority took note of "numerous" such incidents before granting severance.[85] Specifically, the Authority observed that the incumbent-union removed the petitioner-union's stewards from union leadership, divided the petitioner-union's members amongst the seven other local unions, ordered the petitioner-union to vacate its offices, advised management to communicate only with the incumbent-union, turned away a dues-paying member of the petitioner-union from a meeting which concerned conditions of employment for the petitioned-for employees, and failed to inform some of the petitioned-for employees that it had elected not to advance their pending grievances.[86] Put differently, the incumbent-union in that case took several steps to weaken or harm the petitioner-union, impeded BUEs from participating in union affairs, and degraded the quality of representation BUEs received on important matters such as pending grievances.

Here, conversely, ACT is not accused of harming IAFF, preventing its employees from exercising their right to engage in protected activity, or failing to adequately address any BUE-related issues such as pending grievances. IAFF cannot point to a single instance in which a BUE requested representation but ACT refused to provide it. IAFF's claim of inadequate representation rests solely on the fact that ACT did not proactively reach out to instruct employees on "how to exercise their rights under the collective bargaining agreement."[87] This on its own, without any of the other factors seen in *Naval Portsmouth Shipyard*, is not sufficient to find that ACT's representation is so inadequate as to warrant severance.

Moreover, IAFF's arguments are in tension with its own supporting evidence. IAFF largely ignores the statements from Daniel Maffee and Jesse Kelley that the Agency informed the Pease FES BUEs who their Union representative was and how to contact him,[88] and that the Agency provided them with copies of the CBA in early 2022.[89] It is difficult to conclude that the petitioned-for employees were "effectively precluded from challenging violative and likely unlawful conduct by the Employer through their union"[90] when IAFF's witnesses acknowledge that they received ACT's contact information and copies of the CBA shortly after they joined the Agency.

IAFF also does not detail what efforts, if any, these employees made to contact ACT or consult the CBA for guidance. IAFF essentially argues that it was impossible to obtain representation from ACT, yet provides no evidence that anyone ever actually tried to obtain it. Just because ACT could have done more to reach out to these employees does not mean that they were "effectively precluded" from obtaining representation.

Finally, IAFF argues that severance is warranted because "the Pease Fire Fighters are treated differently than the other employees in ACT's bargaining unit."[91] IAFF notes that "the Agency's Labor Relations Specialist even acknowledged to Local F-317 officers, the conditions of employment in the ACT CBA are not in effect at Pease FES, are not observed at Pease FES, or otherwise do not apply to Pease FES personnel."[92] In other words, IAFF argues that ACT's representation is inadequate due to the fact that the existing CBA was written before Pease FES joined the Agency and is therefore not tailored to address those employees' concerns.

In assessing whether an incumbent-union's representation is adequate, the Authority has previously considered whether any existing negotiated agreements address the specific concerns of the petitioned-for employees.[93] Here, IAFF is correct that the CBA, which was executed two years before Pease FES joined the Agency, does not address any specific concerns unique to Pease FES. However, IAFF filed this Petition only several months after the petitioned-for employees joined the Agency. Given this timeframe, it is unsurprising that ACT has not yet negotiated any new language on Pease FES's behalf.

This is especially the case when considering that the 2019 CBA was set to expire less than one year after Pease FES joined the Agency, at which point ACT could negotiate on behalf of its new constituents. Indeed, the ground rules for upcoming CBA negotiations expressly state that the parties will negotiate "amendments addressing the conditions of employment of fire protection employees."[94] IAFF acknowledges as much in its Response, stating that ACT intends to negotiate a separate MOU "to establish different conditions of employment for

[83] *Id*. (citing Kelley Aff. at 4-5, 6-8; Maffee Aff. at 4-5; *Portsmouth Naval Shipyard*, 70 FLRA at 1000).
[84] *Id*. (emphasis in original) (quoting *Portsmouth Naval Shipyard*, 70 FLRA at 999).
[85] *Naval Portsmouth Shipyard*, 70 FLRA at 999.
[86] *Id*. at 998-999.
[87] IAFF Resp. at 15.
[88] *See* Maffee Aff. at 5.
[89] *Id*. at 5; Kelley Aff. at 5.
[90] IAFF Resp. at 15.
[91] *Id*. at 17 (quoting *Portsmouth Naval Shipyard*, 70 FLRA at 999).
[92] *Id*. (citing Kelly Aff. at ¶ 14; Maffee Aff. at ¶¶ 15, 17).
[93] *Library of Congress*, 16 FLRA at 432.
[94] *See* Memorandum of Understanding Between Adjutant General of New Hampshire and ACT.

Pease fire protection personnel than those conditions of employment enjoyed by the other Title 5 employees on the Pease ANG Base."[95]

IAFF seems to contend that this is evidence of "disparate treatment" which "constitutes unusual circumstances supporting severance."[96] However, the opposite is true—it is evidence that ACT is seeking to ensure that the petitioned-for employees are adequately represented at the bargaining table.[97] For example, the Authority once rejected a claim of inadequate representation in part because the incumbent-union had negotiated "a modification to the 'master' collective bargaining agreement pertaining specifically to" the petitioned-for employees.[98] Much like in that case, ACT's efforts to negotiate an MOU specifically on behalf of Pease FES is evidence that ACT is attempting to "specifically deal with their unique problems and give [them] the best possible representation."[99]

Given the above analysis, this case does not present any of the "rare circumstances"[100] seen in the few cases where severance was warranted. This conclusion is bolstered by the fact that IAFF filed its petition only eight months after Pease FES joined the existing unit. This would be a remarkably short period of time in which to conclude that an incumbent-union inadequately represented a petitioner-union,[101] and it would require substantial proof that ACT is somehow guilty of treating these employees uniquely poorly. IAFF's only evidence of such treatment is that ACT did not proactively reach out and establish a relationship with them. This alone—without any accompanying examples of ACT preventing BUEs from participating in Union affairs,[102] declining to aid BUEs or communicate with them about pending grievances,[103] or refusing to allow any members of Pease FES to join Union leadership[104]—is insufficient to find that ACT has inadequately represented the petitioned-for employees. In fact, it would not be unreasonable to conclude that after the petitioned-for employees discussed a desire to be represented by its' own representative, bargaining unit employees were willfully blind to the representation available to them as members of the existing ACT bargaining unit.

Accordingly, because the existing bargaining unit continues to be appropriate and no unusual circumstances exist, I am dismissing this Petition.

Having found no basis for severance, I need not reach the question of whether the bargaining unit sought by the Petitioner would be an appropriate one.[105]

V. ORDER

IT IS ORDERED that the petition in this case be dismissed.

VI. RIGHT TO SEEK REVIEW

Under section 7105(f) of the Statute and section 2422.31 (a) of the Authority's regulations, a party may file an application for review with the Authority **within sixty days** of this decision. The application for review must be filed with the Authority, and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, NW, Washington D.C. 20424-0001. The parties are encouraged to file an application for review electronically through the Authority's website: www.flra.gov.

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Timothy Sullivan
Regional Director
Denver Regional Office
Federal Labor Relations Authority
1244 Speer Blvd., Suite 446
Denver, CO 80204

Dated: November 16, 2022

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[95] IAFF Resp. at 17.
[96] *Id.* (citing *Portsmouth Naval Shipyard*, 70 FLRA at 999; *NAS Jacksonville*, 61 FLRA at 142-43).
[97] *See, e.g., Library of Congress*, 16 FLRA at 432.
[98] *Id.*
[99] *Id.*
[100] *Naval Portsmouth Shipyard*, 70 FLRA at 1003 (dissenting opinion of Member DuBester)
[101] *See id.* ("Where the question is whether an incumbent union's representation has been inadequate, the Authority has held that . . . [an incumbent] must have essentially abandoned" the petitioned-for employees) (quotations omitted) (citing *NAS Jacksonville*, 61 FLRA at 143)); *see also NAS Jacksonville*, 61 FLRA at 143 (assessing whether "the petitioned-for employees have been 'abandoned'" by the incumbent union).
[102] *Portsmouth Naval Shipyard*, 70 FLRA at 998 ("A dues-paying member of Petitioner-Union was turned away from a meeting that he tried to attend—a meeting at which conditions of employment significant to plastic fabricators and shipwrights were discussed.").
[103] *Id.* ("Shipwrights did not hear from their 'new' representatives about the status of their pending grievances and when the Incumbent-Union decided not to advance those grievances to Step 3, the shipwrights were not informed until several months later.").
[104] *Id.* at 997 ("The Petitioner-Union's members who were elected Incumbent-Union officers served out their terms, but the Petitioner-Union's stewards were immediately removed.").
[105] *See DLA Monterey*, 64 FLRA at 499 (finding the regional director did not fail to consider whether the proposed unit was appropriate because the regional director determined that there were no unusual circumstances justifying severance of the petitioned-for employees).