

Interviewing inmates doesn't count toward investigatory status

CASE FILE: Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Seagoville, Texas and AFGE, Council of Prison Locals, Local 1030, 1103 RR 67985 (FLRA 11/12/10).

Ruling: The FLRA denied the agency's application for a review of a regional director's ruling that the special investigative support technician position should be included in the existing bargaining unit.

What it means: The agency argued that the amount of time the relevant employee spent investigating staff was greater than 50 percent, given that he conducted inmate investigations that had the "potential" to lead to staff interviews. The FLRA explained that according to precedent, the potential for uncovering employee misconduct is only considered in cases involving audits or investigations of agency staff or programs, not inmate investigations.

Summary: The union filed a petition seeking to clarify the bargaining-unit status of the special investigative support technician position. In determining whether the position should be excluded from the unit as an investigatory worker under 5 USC 7112 (b)(7), the RD found that the technician spent between 35 and 40 percent of his time conducting staff investigations. Thus, the evidence didn't demonstrate that a preponderance of the technician's duties involved the investigation of staff. The RD concluded that the technician is not "primarily engaged in" staff investigations within the meaning of Section 7112(b)(7), and he clarified the existing bargaining unit to include the disputed position.

The agency sought review of the decision, alleging that the RD committed a clear and prejudicial error concerning a substantial factual matter. According to the agency, the RD failed to properly consider hearing testimony demonstrating that approximately 50 percent of the technician's duties pertained solely to conducting staff investigations. The FLRA disagreed, explaining that it was unclear whether the technician witness was referring to time spent in staff investigations, or time spent in inmate investigations. By contrast, both of the technician's supervisors testified that he spent about one-third of his time on staff investigations. In light of the ambiguous testimony, the FLRA concluded that the RD didn't commit a clear and prejudicial error about the technician's duties.

The agency also contended that the RD failed to apply established FLRA precedent. Even assuming that the RD correctly found that up to 45 percent of the technician's duties consisted of staff investigations, the position should still be excluded because it satisfied the "preponderance standard," the agency argued. The FLRA explained that although it hasn't defined what percentage of an employee's duties constitute a preponderance, it has interpreted the term to mean a majority. As 45 percent of the technician's time is not a majority of his time, it is also not a preponderance of his time. Thus, the FLRA didn't fail to apply established law in not finding the preponderance standard met.

The agency argued that the preponderance standard was met because the amount of time investigating staff was greater than 50 percent, given that he conducted inmate investigations that had the "potential" to lead to staff interviews. The FLRA explained that according to precedent, the potential for uncovering employee misconduct is only considered in cases involving audits or investigations of agency staff or programs, not inmate investigations.

