

64 FLRA No. 154

OVERSEAS PRIVATE
INVESTMENT CORPORATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1534
(Union)

0-AR-4303
(64 FLRA 466 (2010))

ORDER GRANTING
MOTION FOR RECONSIDERATION

May 28, 2010

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

I. Statement of the Case

This matter is before the Authority on the Union's motion for reconsideration of an Authority decision dismissing the Agency's exceptions without prejudice in *Overseas Private Investment Corp.*, 64 FLRA 466 (2010) (*OPIC*). The Agency did not file an opposition to the Union's motion.

Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority final decision or order. For the reasons that follow, we grant the Union's motion for reconsideration, but affirm our decision in *OPIC* dismissing the Agency's exceptions without prejudice.

II. Decision in *OPIC*

In the underlying proceedings in *OPIC*, the Arbitrator sustained the Union's grievance, but stated that his award was conditional upon a determination, by the Authority, that the grievant is a member of the bargaining unit. *See OPIC*, 64 FLRA at 466. The Agency filed exceptions challenging the merits of the award. The Authority's Office of Case Intake and Publication issued an order (Order) directing the

Agency to show cause why its exceptions should not be dismissed as interlocutory. *See id.* The Order stated that, because the Arbitrator's award was conditional, it appeared to be interlocutory. *See id.* The Order further gave the Union leave to file a response (Response) to the Agency's response to the Order. *See Order at 3.*

The Authority concluded that the Arbitrator's award was not interlocutory because it fully resolved all of the issues before the Arbitrator. *See OPIC*, 64 FLRA at 467. However, the Authority also found that the Agency's exceptions were not properly before the Authority because a decision on them would constitute an impermissible advisory opinion. *See id.* Noting that the Agency continued to assert that the grievant was not a member of the bargaining unit, the Authority stated that a decision on the merits of the exceptions could become moot if subsequent proceedings determined that the grievant was not within the unit. The Authority, accordingly, dismissed the Agency's exceptions without prejudice. *See id.* at 467-68. In reaching this conclusion, the Authority considered the Agency's response to the Order; however, it did not consider the Union's Response to the Agency's Response. *See id.* at 467 n.2.

III. Motion for Reconsideration

The Union requests that the Authority "reopen" its decision in *OPIC*, or alternatively, reconsider its decision because the Authority did not consider the Union's Response to the Agency's response to the Order. Motion for Reconsideration at 2, 1 n.1. The Union contends that, because the Authority gave the Union permission to file its Response, the Authority should have considered the document. *See id.* at 1-2.

IV. Analysis and Conclusion

Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority order. The Authority has repeatedly recognized that a party seeking reconsideration under § 2429.17 bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action. *See, e.g., U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000). The Authority has identified a limited number of situations in which extraordinary circumstances have been found to exist. These include situations: (1) where an intervening court decision or change in the law affected dispositive issues; (2) where evidence, information, or issues crucial to the

decision had not been presented to the Authority; (3) where the Authority erred in its remedial order, process, conclusion of law, or factual finding; and (4) where the moving party has not been given an opportunity to address an issue raised *sua sponte* by the Authority in the decision. *See U.S. Dep't of the Air Force, 375th Combat Support Group, Scott Air Force Base, Ill.*, 50 FLRA 84, 85-87 (1995).

The Union correctly asserts that the Authority gave it leave to file its Response and that the Authority did not consider this submission. The Union, therefore, has established that the Authority erred in its process and that, as a result, extraordinary circumstances exist to warrant reconsideration of *OPIC*. *See NTEU*, 64 FLRA 395, 396 (2010) (Member Beck dissenting as to other matters) (Authority granted motion for reconsideration because Authority failed to address several issues). Accordingly, we address the arguments raised in the Union's Response. *See id.*

The Union asserts that the Authority should resolve the merits of the Agency's exceptions because: (1) the Arbitrator's award is not interlocutory, *see Response at 2*; (2) the Agency should not have been permitted to challenge the grievant's bargaining unit status because it has yet to initiate proceedings to challenge her status, *see id.* at 2-3; and (3) because the parties agreed to allow the Arbitrator to decide the merits of its grievance, the Authority should likewise agree to resolve the merits of the Agency's exceptions. *See id.* at 3. None of these arguments provide a basis for concluding that *OPIC* was incorrectly decided.

First, the Union argues that the Arbitrator's award was not interlocutory because the Arbitrator fully resolved all issues before him. As stated above, in agreement with the Union, we determined that the award was not interlocutory. *See OPIC*, 64 FLRA at 467.

Second, the Union argues that the Agency's challenge to the grievant's bargaining unit status should be considered "abandoned/waived/forfeited" due to the Agency's delay in challenging her status. *Response at 3*. As we stated in *OPIC*, either party may initiate proceedings concerning the grievant's bargaining unit status at any time. *See OPIC*, 64 FLRA at 468 n.4. Thus, although the Agency has failed to file a unit-clarification petition, the Union is not, and has not been, precluded from filing its own petition to resolve this issue. *See id.* Accordingly, the Union's assertion that the Authority should

consider the Agency's challenge waived is unavailing.

Third, the Union contends that, because the parties agreed to allow the Arbitrator to resolve the merits of its grievance, the Authority should likewise consider the merits of the Agency's exceptions. *See Response at 3*. The Authority explicitly considered and rejected this argument, which had been raised by the Agency, in *OPIC*. *See OPIC*, 64 FLRA at 467.

Based on the foregoing, we find that, even with the consideration of the Union's arguments in its Response, *OPIC* was correctly decided.

V. Order

The Union's motion for reconsideration is granted. The decision in *OPIC* is affirmed.