66 FLRA No. 185

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF CHIEF COUNSEL
WASHINGTON, D.C.
(Agency)

0-NG-3130
(66 FLRA 809 (2012))

_____

ORDER DENYING
MOTION FOR RECONSIDERATION

September 25, 2012

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on the Agency's motion for reconsideration (motion) of the Authority's decision in *NTEU*, 66 FLRA 809 (2012) (*NTEU*) (Member Beck dissenting). The Union did not file an opposition to the Agency's motion.

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority final decision or order. For the reasons that follow, we find that the Agency has not established extraordinary circumstances warranting reconsideration of *NTEU*. Accordingly, we deny the Agency's motion.

II. Background

In *National Treasury Employees Union*, 65 FLRA 509 (2011) (*Treasury*), the Authority modified the standard for determining, in the negotiability context, whether an agreed-upon contract provision constitutes an appropriate arrangement within the meaning of § 7106(b)(3) of the Federal Service Labor-Management Relations Statute (the Statute). *Treasury*, 65 FLRA at 509. The Authority stated that it would "make that determination by applying an abrogation (waiver) — not an excessive-interference — standard." *Id.* The Agency appealed *Treasury* to the United States Court of Appeals for the District of Columbia Circuit, which dismissed the appeal for lack of jurisdiction. *U.S. Dep't of the Treasury, Bureau of the Pub. Debt, Wash., D.C. v. FLRA*, 670 F.3d 1315, 1321 (D.C. Cir. 2012).

In *NTEU* — the decision at issue in the motion in this case — the Agency noted that a provision that had been disapproved on agency-head review was "similar to a provision found negotiable" in *Treasury*. Statement of Position (SOP) at 3. But the Agency argued that *Treasury* was "improperly decided" because the Authority should have applied the excessive-interference standard, rather than adopting the abrogation standard.[*] *Id.* at 3-4. In support of its view that the provision "'excessively interferes' with management's right to discipline," the Agency "incorporate[d] by reference arguments set forth in the briefs filed by the Department of Justice [(DOJ briefs)] in support of the [Agency's] appeal" of *Treasury*. *Id.* at 4; *see also* Reply at 2. In its response, the Union requested that the Authority "continue to apply the 'abrogation' test introduced in" *Treasury*. Response at 2.

The Authority acknowledged that the Agency had requested, for the reasons asserted in the DOJ briefs, that the Authority return to the excessive-interference standard that existed prior to *Treasury*. *NTEU*, 66 FLRA at 811; *see also id.* at 812 n.8. But the Authority stated that it had "explained the reasons for adopting an abrogation standard" in *Treasury*, 65 FLRA at 511-15, and that, for the same reasons, it would decline to return to the excessive-interference standard that existed prior to *Treasury*. *NTEU*, 66 FLRA at 812 n.8. The Authority found that the relevant provision did not abrogate management's right to discipline and, thus, was not inconsistent with law, rule, or regulation. *See id.* at 812-13. Therefore, the Authority ordered the Agency to rescind its disapproval of the provision. *See id.* at 813.

III. Motion for Reconsideration

The Agency argues that the Authority has "not adequately justified its departure" from pre-*Treasury* precedent, and that the "new analytical framework" set forth in *Treasury* is "not consistent with the plain language nor the intent and purpose of the Statute." Motion at 3. The Agency requests that the Authority "reconsider its decision in the case at hand . . . and return to its pre-[*Treasury*] precedent applying the excessive interference analysis to [provisions] disapproved during agency[-]head review." *Id.* at 17. To support its motion,

[*] The underlying matter involved an additional provision that was disapproved on agency-head review. *See NTEU*, 66 FLRA at 810, 813-15. The Agency does not seek reconsideration with regard to that provision. *See* Motion at 1.

the Agency asserts that the Authority "did not address any of the arguments set forth in the [DOJ briefs] incorporated by reference in the" Agency's SOP, *id.* at 3, and makes numerous legal arguments that challenge the Authority's decision in *NTEU* not to return to the excessive-interference standard that existed prior to *Treasury*, *see* Motion at 9-18.

IV. Analysis and Conclusions

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority decision. *E.g.*, *Nat'l Ass'n of Indep. Labor, Local 15*, 65 FLRA 666, 667 (2011). A party seeking reconsideration under § 2429.17 bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action. *Id.* The Authority has identified a limited number of situations in which extraordinary circumstances were found to exist. *E.g.*, *U.S. Dep't of the Navy, Marine Corps Depot Maint. Command, Barstow, Cal.*, 66 FLRA 708, 709 (2012). 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. *Id.* The Authority has held that attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances. *E.g.*, *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 634, 636 (2012) (*CBP*).

The Agency argues that the Authority did not address any of the arguments set forth in the DOJ briefs and incorporated by reference in the Agency's SOP, Motion at 3, and makes numerous legal arguments that challenge the Authority's decision in *NTEU* not to return to the excessive-interference standard that existed prior to *Treasury*, *see* Motion at 9-18. In *NTEU*, the Authority acknowledged that the Agency had requested, for the reasons asserted in the DOJ briefs, that the Authority return to the excessive-interference standard that existed prior to *Treasury*. *See NTEU*, 66 FLRA at 811, 812 n.8. But the Authority concluded that it would not return to the excessive-interference standard, for the reasons set forth in *Treasury*. *See NTEU*, 66 FLRA at 812 n.8 (citing *Treasury*, 65 FLRA at 511-15). All of the arguments in the Agency's motion attempt to relitigate that conclusion. *See* Motion 9-18. As such, those arguments do not establish extraordinary circumstances warranting reconsideration of *NTEU*. *See, e.g.*, *CBP*, 66 FLRA at 636. Accordingly, we deny the Agency's motion.

V. Order

The Agency's motion is denied.