

65 FLRA No. 142

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 15
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL SCHOOL EXPLOSIVE
ORDNANCE DISPOSAL
EGLIN AIR FORCE BASE, FLORIDA
(Agency)

0-AR-4687
(65 FLRA 557 (2011))

ORDER DENYING
MOTION FOR RECONSIDERATION

March 31, 2011

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 the Authority's decision to deny the Union's exception in *National Association of Independent Labor, Local 15*, 65 FLRA 557 (2011) (*NAIL*). The Agency filed an opposition to the Union's motion for reconsideration.

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 conclude that the Union has failed to establish extraordinary circumstances warranting reconsideration. Accordingly, we deny the Union's motion for reconsideration.

II. Decision in *NAIL*

In the underlying proceedings in *NAIL*, the Arbitrator concluded, as relevant here, that the grievant was not entitled to a hazard pay differential for performing underwater duties because the hazard that he faced was not listed in Appendix A to 5 C.F.R. part 550, subpart I. *NAIL*, 65 FLRA at 557. In this regard, the Arbitrator noted that Appendix A allows an employee to receive a hazard pay differential for underwater duty, such as "diving, required in scientific and engineering pursuits, or search and rescue

operations, when: (a) at a depth of . . . [twenty feet] or more below the surface; or, (b) visibility is restricted; or, (c) in rapidly flowing or cold water; or, (d) vertical access to the surface is restricted[.]" *Id.* (quoting Appendix A to 5 C.F.R. part 550, subpart I) (internal quotations omitted). The Arbitrator rejected the Union's interpretation of the relevant portion of Appendix A and found that, to be entitled to a hazard pay differential, an employee must not only qualify under (a) or (b) or (c) or (d), but must also be engaged in scientific and engineering pursuits or search and rescue operations while diving. *Id.* Moreover, the Arbitrator found that "the [g]rievant's diving duties [were] not part of scientific and engineering pursuits or search and rescue operations." *Id.* (quoting Award at 5) (internal quotations omitted).

The Union filed an exception to the award. *Id.* In its exception, the Union argued that the award was contrary to 5 U.S.C. § 5545(d) because the clear intent of the statute is "to pay an employee when exposed to hardship or hazard without concern over the nature of the mission." *Id.* at 558 (quoting Exception at 5) (internal quotations omitted). Also, the Union contended that the award was contrary to the statute's implementing regulations. *Id.* Specifically, the Union argued that, based on the definition of hazardous duty in 5 C.F.R. § 550.902, the grievant's diving constituted a hazardous duty because it could result in serious injury or death. *Id.* According to the Union, the Arbitrator conceded that the grievant dived at depths greater than twenty feet; that he dived in cold or rapidly flowing waters; that, while diving, his visibility was restricted; and that, during training for hull inspections, his vertical access to the surface was restricted. *Id.* The Union contended that the Arbitrator's interpretation of the relevant language in Appendix A was irrational because the hazard at issue "is in the nature of the dive, not the mission the employee is on[,]" and "[t]he purpose of the [hazard pay] differential is to provide an increase in pay for the exposure to the hazard." *Id.* (quoting Exception at 7-8) (internal quotations omitted). Moreover, the Union argued that its interpretation of the implementing regulations was consistent with the statute. *Id.* Finally, the Union contended that, in accordance with 5 C.F.R. part 550, subpart I, the grievant participated in the dives only occasionally and that the hazard that the grievant faced while diving was not considered in the classification of his position. *Id.*

The Authority concluded that the award was not contrary to 5 U.S.C. § 5545(d) because that provision did not address or require the payment of a hazard differential for the underwater duty performed by the grievant. *Id.* at 559. Also, the Authority found that the Union failed to prove that the Arbitrator's interpretation of the implementing regulations conflicted with the plain wording of those regulations or was otherwise impermissible. *Id.* The Authority determined that, given the Arbitrator's underlying factual findings, which were undisputed, his legal conclusion that the grievant was precluded from obtaining a hazard pay differential because the underwater duty he performed was not listed in Appendix A to 5 C.F.R. part 550 was consistent with the applicable regulations. *Id.*

Moreover, the Authority found that, even assuming that the grievant participated in dives only occasionally and that the hazard that the grievant faced while diving was not considered in the classification of his position, the grievant would not be entitled to a hazard pay differential because the hazard faced by the grievant was not included in Appendix A. *Id.* The Authority, accordingly, denied the Union's exception. *Id.* at 560.

III. Positions of the Parties

A. Motion for Reconsideration

In requesting that the Authority reconsider its decision in *NAIL*, the Union asserts that the decision is based on an erroneous conclusion of law. *See* Request at 1. In support of this assertion, the Union repeats the arguments it initially set forth in its exception to the award. *See id.* at 5-9; *NAIL*, 65 FLRA at 558.

The Union claims that the award is contrary to 5 U.S.C. § 5545(d) because legislative history indicates that the purpose of 5 U.S.C. 5545(d) is "to pay an employee when exposed to hardship or hazard without concern over the nature of the mission." Request at 6; *see also id.* at 1, 5, 8. Also, the Union asserts that the award is contrary to the statute's implementing regulations. *See id.* at 5-8. The Union claims that, under the definition of hazardous duty in 5 C.F.R. § 550.902, the grievant's diving constitutes a hazardous duty because it could result in serious injury or death. *Id.* at 7-8. The Union notes that, in the award, the Arbitrator conceded that the grievant dived at depths greater than twenty feet; that he dived in cold or rapidly flowing waters; that, while diving, his visibility was restricted; and that, during training for hull inspections, his vertical access to the surface was restricted. *Id.* at 8. The Union asserts that its interpretation of the implementing regulations is consistent with the statute and that the Arbitrator's interpretation of the relevant language in Appendix A is irrational because the hazard at issue "is in the nature of the dive, not the mission the employee is on" and "[t]he purpose of the [hazard pay] differential is to provide an increase in pay for the exposure to the hazard." *Id.* Finally, the Union claims that, in accordance with the regulations, the grievant dived only occasionally and that the hazard that he faced while diving was not considered in the classification of his position. *Id.* at 8-9.

B. Agency's Opposition

The Agency argues that the Union has failed to establish that extraordinary circumstances exist to warrant reconsideration of the Authority's decision in *NAIL*. Opp'n at 1-2. According to the Agency, the Union merely disagrees with the conclusion reached by the Authority. *Id.* at 2. Moreover, the Agency contends that the arguments that the Union makes in its motion for reconsideration are identical to those that it made in its exception. *Id.*

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 decision. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Atwater, Cal.*, 65 FLRA 256, 257 (2010). The Authority has recognized repeatedly that 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 have been found to exist. *Id.* These include situations where: (1) an intervening court decision or change in the law affected dispositive issues; (2) evidence, information, or issues crucial to the decision had not been presented to the Authority; (3) the Authority erred in its remedial order, process, conclusion of law, or factual finding; and (4) the moving party has not been given an opportunity to address an issue raised *sua sponte* by the Authority in the decision. *See e.g., U.S. Dep't of the Air Force, 375th Combat Support Grp., Scott Air Force Base, Ill.*, 50 FLRA 84, 84 (1995).

In its motion for reconsideration, the Union presents the same arguments that it raised in its exception before the Authority. Request at 5-9; *NAIL*, 65 FLRA at 558. The Authority considered each of these arguments in *NAIL* and found that they must be denied for the reasons set forth in *NAIL*. *See NAIL*, 65 FLRA 559-60. The Union provides no additional argument to warrant a finding that the decision is based on an erroneous conclusion of law; rather, the Union is attempting merely to relitigate issues already presented and resolved. *See Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010). Consequently, the Union's arguments do not establish that reconsideration is warranted. *See e.g., U.S. Gen. Servs. Admin.*, 63 FLRA 254, 254-55 (2009); *U.S. Dep't of the Interior, Bureau of Indian Affairs, Navajo Area Office*, 54 FLRA 9, 13 (1998) (finding that the motion for reconsideration did not establish the extraordinary circumstances necessary to warrant reconsideration of the decision because the arguments that the union advanced in its motion were the same as those previously considered by the Authority in its decision); *U.S. Dep't of Health & Human Servs., Office of the Assistant Sec'y for Mgmt. & Budget, Office of Grant & Contract Fin. Mgmt., Div. of Audit Resolution*, 51 FLRA 982, 984-85 (1996) (denying the motion for reconsideration because, with one exception, the agency presented the same arguments raised in its exceptions before the Authority).

Accordingly, we deny the Union's motion for reconsideration.

V. Decision

The Union's motion for reconsideration is denied.