65 FLRA No. 21

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
USP ADMINISTRATIVE MAXIMUM (ADX)
FLORENCE, COLORADO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1302
COUNCIL OF PRISON LOCALS
(Union)

0-AR-4612
(64 FLRA 1168 (2010))

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ORDER DENYING
MOTION FOR RECONSIDERATION

September 22, 2010

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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 Agency's motion for reconsideration of an Authority order dismissing the Agency's exception in *United States Department of Justice, Federal Bureau of Prisons, USP Administrative Maximum (ADX), Florence, Colorado*, 64 FLRA 1168 (2010) (*DOJ*). The Union has not filed an opposition to the Agency'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 deny the Agency's motion for reconsideration.

II. Decision in *DOJ*

In the underlying proceedings in *DOJ*, the Arbitrator concluded, as relevant here, that the Agency violated the Fair Labor Standards Act (FLSA) and the parties' agreement by failing to compensate Correctional Officers (Officers) for time spent performing certain pre- and post-shift activities. *DOJ*, 64 FLRA at 1168. The Arbitrator granted the Officers backpay in the amount of ten minutes per shift and liquidated damages. *Id.* The Arbitrator ordered the parties to meet and determine which Officers were entitled to compensation and the amount of compensation owed. *Id.*

The Agency filed an exception arguing that the Arbitrator's award of backpay was contrary to law, specifically, 5 C.F.R. § 551.412(a)(1).[1] *DOJ*, 64 FLRA at 1169. The Agency contended that, under § 551.412(a)(1), overtime compensation for prepatory activities is recoverable only if that time totals "*more than ten minutes*[.]" *Id.* (quoting Agency's Exception at 5) (emphasis in original). Because the Arbitrator awarded *only* ten minutes of overtime compensation, the Agency asserted that, even if the Officers' activities were recoverable, the award was inconsistent with § 551.412(a)(1). *Id.* at 1169. The Agency, accordingly, asked the Authority to set aside the award of backpay and liquidated damages. It presented no other arguments.

The Authority concluded that the Agency's exception was barred by § 2429.5 of the Authority's Regulations.[2] *Id.* at 1170. The Authority found that the Agency had ample notice throughout the arbitration process that the Union had requested, as a remedy, *only* ten minutes of overtime compensation in its grievance. *Id.* (citing Award at 15, 28; Exception at 1-2; Exception, Attach. B). Because the Agency had notice of the specific relief requested by the Union, the Authority stated that the Agency was required to present its argument concerning § 551.412(a)(1) to the Arbitrator. The Authority determined that the record did not establish that the Agency presented this argument to the Arbitrator; consequently, the Authority concluded that it could

1. 5 C.F.R. § 551.412, "Preparatory or concluding activities," provides, in pertinent part:

> If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per workday, the agency shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

2. Section 2429.5 of the Authority's Regulations states, in relevant part, that "[t]he Authority will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the . . . arbitrator."

not consider this argument. *Id.* at 1170. The Authority, accordingly, dismissed the exception. *Id.*

III. Motion for Reconsideration

The Agency does not dispute that it neglected to present its argument concerning § 551.412(a)(1) to the Arbitrator. Instead, the Agency argues that extraordinary circumstances are established for reconsideration for two reasons.

First, the Agency contends that, by "allowing an award that is contrary to law to become binding[,]" the Authority erred in its conclusion of law. Motion for Reconsideration (Motion) at 5. The Agency contends that the Arbitrator's award is clearly prohibited by § 551.412(a)(1); as such, it asserts that, under principles of *de novo* review, the Authority cannot permit the award to become "final and binding." *Id.*

Second, according to the Agency, the Authority's decision to dismiss the Agency's exception allows "an improper monetary award against the United States Government to stand" even though principles of sovereign immunity require an express statutory waiver before the United States can be held liable for monetary damages. *Id.* (citations omitted). The Agency asserts that the Authority's dismissal of its exception contradicts Authority precedent that states issues of sovereign immunity may be raised at any time and that monetary awards "without proper statutory authority to waive sovereign immunity must be set aside." *Id.* at 6 (citations omitted). The Agency, accordingly, asks the Authority to grant its motion and set aside the Arbitrator's award of backpay and liquidated damages. *Id.* at 5, 5 n.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, 86-87 (1995).

The Agency first argues that reconsideration of *DOJ* is warranted because a "basic tenet behind *de novo* review is that the Authority cannot allow an award that is contrary to law to become final and binding." Motion at 5; *see also id.* at 6. The Authority has rejected this argument as a basis for permitting reconsideration of an underlying decision. *See, e.g., U.S. Dep't of the Treasury, IRS*, 57 FLRA 592, 593-94 (2001) (rejecting argument that Authority was required to conduct *de novo* review of award and set it aside as inconsistent with Office of Personnel Management (OPM) regulation even though agency failed to raise regulation below). Accordingly, we reject this argument.

The Agency next argues that reconsideration is warranted because the remedy conflicts with § 551.412(a)(1) and is, therefore, not based on a valid waiver of sovereign immunity. The Agency further contends that Authority precedent states that: (1) agencies may raise issues of sovereign immunity at any time; and (2) monetary awards that are not based on proper waivers of sovereign immunity must be set aside. Motion at 6 (citing *U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 328-29 (2009) (*FAA*); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 151 (2005) (*IRS I*) (then-Member Pope concurring) *aff'd sub nom. Dep't of the Treasury, IRS v. FLRA*, 521 F.3d 1148 (9th Cir. 2008) (*IRS II*)).

The question of sovereign immunity concerns whether Congress has validly waived the United States' immunity to monetary liability. *See, e.g., Dep't of the Army v. FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995) (citations omitted). The Agency does not dispute that the Arbitrator based his award, in part, on the FLSA. The Agency also does not dispute that, "[b]y authorizing suits against the United States, the [FLSA's amendment] waives the government's sovereign immunity[]" or that "[g]overnment employees were given the right to sue for violations of the FLSA[.]" *IRS II*, 521 F.3d at 1154 (citations omitted). Finally, the Agency does not dispute that the FLSA permits compensation for pre- and post-shift activities and that it does not prohibit payments for *de minimis* work.

Based on the foregoing, and contrary to the Agency's claim, the award *is* based on a valid Congressional waiver of sovereign immunity. Because the award is based on a valid waiver of sovereign immunity, i.e., the FLSA, any alleged conflict the remedy has with § 551.412(a)(1) provides no basis for concluding that the award is based on an invalid waiver of sovereign immunity. *See IRS I*, 61 FLRA at 151 (finding that remedy's alleged conflict with an OPM regulation provided no basis for concluding that sovereign immunity had not been validly waived where award was based on waiver under Portal-to-Portal Act); *see also IRS II*, 521 F.3d at 1156 (in affirming Authority's determination that award was based on valid waiver of sovereign immunity, court stated that alleged inconsistency with regulation did not address whether Portal-to-Portal Act was part of sovereign immunity found under FLSA).

The Agency's reliance on *IRS I* is misplaced. As explained above, in *IRS I*, the Authority rejected the agency's assertion that the waiver of sovereign immunity at issue was invalid because the arbitrator's remedy conflicted with an OPM regulation. *See IRS I*, 61 FLRA at 151; *see also IRS II*, 521 F.3d at 1156.

The Agency's reliance on *FAA* is likewise misplaced. *FAA* involves the Back Pay Act (BPA) -- not the FLSA -- which is a limited waiver of sovereign immunity. The BPA permits recovery of backpay if, among other things, it constitutes "pay, allowances, or differentials" within the meaning of the BPA. *FAA*, 64 FLRA at 329 (quoting *U.S. Dep't of HHS, Gallup Indian Med. Ctr., Navajo Area Indian Health Serv.*, 60 FLRA 202, 212 (2004) (Chairman Cabaniss dissenting in part; then-Member Pope dissenting in part)). Federal courts and the Authority have acknowledged that the foregoing requirement concerns whether sovereign immunity has been validly waived under the BPA. *See, e.g., SSA, Balt., Md.*, 201 F.3d 465, 471 (D.C. Cir. 2000) (stating that liquidated damages did not constitute "'pay, allowances, or differentials within the meaning of the statutory waiver of sovereign immunity" under the BPA); *U.S. DOL*, 61 FLRA 64, 66 (2005) (Chairman Cabaniss concurring) (citation omitted) (acknowledging that "pay, allowances, and differentials" under BPA concerned sovereign immunity); *U.S. Dep't of Transp., FAA*, 52 FLRA 46, 50 (1996) (citations omitted) (same); *cf. U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189-90 (2009) (finding that issue of whether remedy satisfied casual connection requirement of BPA was properly barred by § 2429.5 -- and would therefore not be considered on review -- even though it was part of agency's sovereign immunity argument). Thus, *FAA*, in accordance with related precedent, establishes only that sovereign immunity *under the BPA* has not been waived if certain requirements *under the BPA* have not been satisfied. *See FAA*, 64 FLRA at 329. Because this case does not involve the BPA, *FAA* is inapplicable.

Based on the foregoing, we deny the Agency's motion for reconsideration.

V. Order

The Agency's motion for reconsideration is denied.