68 FLRA No. 23

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 7
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
SEYMOUR JOHNSON
AIR FORCE BASE, NORTH CAROLINA
(Agency)

0-NG-3180
(67 FLRA 654 (2014))

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ORDER DENYING
MOTION FOR RECONSIDERATION

December 17, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

In *NAIL, Local 7* (*NAIL*),[1] the Authority held, in relevant part, that the Agency had not established that a provision concerning sick-leave requests (the provision) is contrary to government-wide regulation or law. Accordingly, the Authority ordered the Agency to rescind its disapproval of the provision. The Agency has filed a motion for reconsideration of the Authority's decision in *NAIL*. There are two questions before us.

The first question is whether the Agency has established extraordinary circumstances that warrant reconsideration of *NAIL* because, according to the Agency, the Authority erroneously interpreted both 5 C.F.R. § 630.405(a) and Authority decisions interpreting § 630.405(a). Because the Agency's arguments attempt to relitigate the Authority's conclusions and do not show that the Authority erred, the answer is no.

The second question is whether an alleged change in the Authority's standard for determining whether a provision is an appropriate arrangement within the meaning of § 7106(b)(3) of the Federal Service Labor-Management Relations Statute (the Statute)[2] establishes extraordinary circumstances that warrant reconsideration of *NAIL*.[3] Regardless of what standard applies with respect to § 7106*(b)(3)*, the Agency had an obligation to assert that the provision affected a particular management right under § 7106*(a)* of the Statute in order to demonstrate the provision's inconsistency with § 7106. And as the Agency failed to identify an affected management right under § 7106(a), the answer to the second question is no.

II. Decision in *NAIL*

The provision states, in pertinent part: "Sick leave of more than three consecutive workdays should be supported by a medical certificate. When for justifiable reasons a medical certificate is unnecessary, the Employer may accept an employee's certificate showing incapacitation waiving medical documentation."[4] In *NAIL*, the Authority resolved the parties' dispute concerning the provision's meaning,[5] and ordered the Agency to rescind its disapproval of the provision.[6]

Concerning the provision's meaning, the Authority held, in relevant part, that the provision's first sentence would require the Agency to accept an employee's self-certification in support of a sick-leave request for three or fewer days unless the employee is on sick-leave restriction.[7] Regarding requests for more than three days of sick leave, the Authority held that, under the second sentence, the Agency would be permitted, *but not required*, to accept an employee's self-certification for a sick-leave request of more than three days.[8] In particular, based on the Union's clarification, the Authority interpreted the second sentence to mean that the Agency would retain the discretion to reject an employee's self-certification – and require medical certification – for sick-leave requests of more than three days, even when an employee asserted a "justifiable reason" for self-certification.[9]

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[1] 67 FLRA 654 (2014) (Member Pizzella dissenting, in part).

[2] 5 U.S.C. § 7106(b)(3).

[3] Agency's Motion at 7-8.

[4] *NAIL*, 67 FLRA at 655 (quoting Petition at 5).

[5] *Id.* at 655-56.

[6] *Id.* at 661.

[7] *Id.* at 656.

[8] *Id.*

[9] *Id.* at 656, 657 (internal quotation marks omitted); *see also id.* at 655 (noting that "the meaning that the Authority adopts in resolving a negotiability dispute applies in other proceedings – including arbitration – unless modified by the parties through subsequent agreement").

Next, the Authority evaluated the Agency's argument that the provision conflicts with § 630.405(a). That regulation provides that an agency "*may* . . . require a medical certificate . . . for an absence in excess of [three] workdays, or for a lesser period when the agency determines it is necessary."[10] But the regulation also states that an agency "*may* consider an employee's self-certification as to the reason for his or her absence as administratively acceptable evidence, regardless of the duration of the absence."[11] In this regard, the Authority noted that the U.S. Supreme Court has held that lawmakers' use of "the word 'may' . . . usually implies some degree of discretion."[12] Accordingly, the Authority found that the Agency has discretionary authority to accept something other than medical certification to support sick-leave requests without running afoul of the regulation.[13] And because of this discretionary authority, the Authority held that the Agency could exercise its discretion to agree, in the provision, to accept the self-certification of an employee who is not on sick-leave restriction to support a sick-leave request of three or fewer days.[14]

In addition, the Authority found that interpreting § 630.405(a) as "permissive and discretionary"[15] would be consistent with the Authority's decisions in *AFGE, AFL-CIO, Local 2052* (*Local 2052*)[16] and *U.S. Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia* (*Navy*).[17] In this regard, the Authority held in *Local 2052* that a proposal that prohibited an agency from requiring anything other than self-certification to support an employee's sick-leave request did not conflict with the discretion conferred on agencies by the regulation.[18] Similarly, in *Navy*, the Authority found that an arbitrator's enforcement of a contract provision that required an agency to accept self-certification in certain circumstances did not conflict with the regulation.[19] Accordingly, the Authority held that both decisions supported a conclusion that the Agency's discretion to require a medical certificate may be the subject of collective bargaining.[20]

Thus, based on the regulation's wording and Authority precedent, the Authority held in *NAIL* that § 630.405(a) authorizes the Agency to accept self-certification to support sick leave of any duration, and does not compel the Agency to require medical certification in any circumstance.[21] As a result, the Authority found the provision consistent with the discretion conferred on the Agency by § 630.405(a),[22] and held that the Agency had not established that the provision conflicts with § 630.405(a).[23]

Further, the Authority addressed the Agency's argument that the provision is "[n]ot [a]n [a]ppropriate [a]rrangement"[24] because it is "outside the duty to bargain under §[]7106(b)(3) of the Statute."[25] Specifically, the Authority stated that in order for an agency to demonstrate that a proposal or provision is contrary to § 7106, the agency must allege and demonstrate that the proposal or provision affects a management right; if it does not do that, then it is unnecessary to resolve any claims regarding whether the proposal or provision falls within an exception set forth in § 7106(b).[26]

Because the Agency did not assert that the provision affects the exercise of any management rights under § 7106(a), cite any rights under § 7106(a), or explain why the provision is otherwise contrary to law under § 7106, the Authority concluded that the Agency had not met its regulatory burden to demonstrate that the provision is contrary to law.[27] Further, the Authority rejected the dissent's position that the allegedly "unsteady, contextual framework"[28] used to resolve claims regarding § 7106(b)(3) relieved the Agency of its obligation to properly raise and support its arguments. In this regard, the Authority stated that "[t]here can be no (principled) application of § 7106(b)(3) *at all* in the

[10] 5 C.F.R. § 630.405(a) (emphasis added).
[11] *Id.* (emphasis added).
[12] *NAIL*, 67 FLRA at 657 (quoting *United States v. Rodgers*, 461 U.S. 677, 706 (1983)) (internal quotation marks omitted); *see also id.* (citing *Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981); *Contreras v. United States*, 64 Fed. Cl. 583, 593 (Fed. Cl. 2005)).
[13] *See id.*
[14] *See id.*
[15] *Id.*
[16] 30 FLRA 837 (1987).
[17] 55 FLRA 1103 (1999).
[18] 30 FLRA at 840-41 (proposal stating that "[w]hen an employee calls in on sick leave, the supervisor shall not ask or order an employee to make a medical diagnosis of his/her condition" was consistent with 5 C.F.R. § 630.403).
[19] 55 FLRA at 1103-05.
[20] *NAIL*, 67 FLRA at 657 (citing *Navy*, 55 FLRA at 1105; *Local 2052*, 30 FLRA at 841).
[21] *Id.*
[22] *Id.* (citing *Navy*, 55 FLRA at 1105; *Local 2052*, 30 FLRA at 840-41).
[23] *Id.* at 658.
[24] *Id.* (quoting Agency's Statement of Position at 12) (internal quotation marks omitted).
[25] *Id.* (quoting Agency's Statement of Position at 13) (internal quotation marks omitted).
[26] *Id.* (citing *AFGE, Local 3928*, 66 FLRA 175, 179 n.5 (2011) (Member Beck dissenting in part) (*Local 3928*); *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 128 n.7 (2011) (Member Beck dissenting in part) (*Local 1998*)).
[27] *Id.* at 658-59 (discussing 5 C.F.R. §§ 2424.24(a), 2424.32(b), (c)(1), (2)).
[28] *Id.* at 659 (quoting *id.* at 663 (Dissenting Opinion of Member Pizzella)) (internal quotation marks omitted).

absence of a claim under § 7106(a)."[29] And the Authority stated that permitting the Agency to rely on the Authority to "discern (guess?) which of the nineteen management rights in § 7106(a) the Agency may have intended to raise . . . [would] make[] the neutral adjudicator an agency advocate [and] . . . turn[] on its head any notion of fair and orderly decision making."[30]

Consequently, the Authority held that the Agency had not shown that the provision is contrary to law or regulation, and directed the Agency to rescind its disapproval of the provision. In response, the Agency filed its motion for reconsideration in this case.

III. Analysis and Conclusions

The Authority's Regulations permit a party to request reconsideration of an Authority decision.[31] But "a party seeking reconsideration 'bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.'"[32] One recognized ground for granting reconsideration is that the Authority erred in its conclusions of law.[33] However, attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.[34] And an argument based on a misinterpretation of the Authority's decision does not establish extraordinary circumstances warranting reconsideration of that decision.[35]

A. The Agency does not demonstrate extraordinary circumstances warranting reconsideration of the Authority's interpretation of 5 C.F.R. § 630.405(a) or related Authority precedent.

The Agency argues that *NAIL* warrants reconsideration because the Authority erroneously interpreted both 5 C.F.R. § 630.405(a)[36] and the Authority's decisions in *Local 2052* and *Navy*.[37] First, the Agency argues that *NAIL* erroneously "narrowed the scope of the regulation"[38] because the provision would require the Agency to accept self-certification for sick leave requests of more than three days where an employee presented a "justifiable reason."[39] But in *NAIL*, as discussed above, the Authority specifically stated that the Agency would retain the discretion to reject an employee's self-certification – and require medical certification – for sick leave requests of more than three days, even when an employee asserted a "justifiable reason" for self-certification.[40] Thus, because the Agency's argument misinterprets *NAIL*, it provides no basis for reconsidering that decision.[41]

In addition, the Agency accuses the Authority of "stepp[ing] in the shoes of the Office of Personnel Management (OPM)," and argues that "[t]here can be no doubt that OPM did not intend to give employees who were not on sick[-]leave restriction a 'free pass' in all circumstances where the absence did not exceed three days."[42] Rather than "stepp[ing] in the shoes" of OPM,[43] we note that the Authority in *NAIL* relied on the regulation's express wording that an agency "*may* consider an employee's self-certification as to the reason for his or her absence as administratively acceptable evidence, *regardless of the duration of the absence*."[44] And the Agency has cited no authority for its position that OPM would interpret its regulation differently. Because the Agency's argument attempts to relitigate the Authority's conclusion in *NAIL* that the regulation grants the Agency discretionary authority to contractually agree to accept self-certification in certain circumstances, this argument does not establish extraordinary circumstances necessary to warrant reconsideration.[45]

Next, the Agency argues that the Authority "[m]isconstrued" the Authority's decisions in *Local 2052* and *Navy* because the provision in *NAIL* involved an employee's "initial[]" sick-leave request, and *Local 2052* and *Navy* "addressed circumstances where employees had

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[29] *Id.*
[30] *Id.*
[31] 5 C.F.R. § 2429.17.
[32] *AFGE, Council 215*, 67 FLRA 164, 165 (2014) (quoting *NAIL, Local 15*, 65 FLRA 666, 667 (2011)).
[33] *Id.* (citing *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012)).
[34] *See U.S. Dep't of HHS, Food & Drug Admin.*, 60 FLRA 789, 791 (2005) (*FDA*); *Ass'n of Civilian Technicians, Tony Kempenich Memorial, Chapter 21*, 56 FLRA 947, 948-49 (2000) (*ACT I*); *U.S. Dep't of the Interior, Bureau of Indian Affairs, Navajo Area Office*, 54 FLRA 9, 12-13 (1998) (*Interior*).
[35] *E.g. Ass'n of Civilian Technicians, Wichita Air Capitol Chapter*, 60 FLRA 835, 836 (2005) (*ACT II*) (then-Member Pope dissenting in part); *cf. SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 555 (2012) (exception to arbitration award based on misunderstanding of the award provides no basis for finding award deficient).
[36] Agency's Motion at 3-4.
[37] *Id.* at 4-5.
[38] *Id.* at 3.
[39] *Id.* (quoting the provision) (internal quotation marks omitted).
[40] 67 FLRA at 656, 657.
[41] *E.g. ACT II*, 60 FLRA at 836.
[42] Agency's Motion at 3-4.
[43] *Id.* at 3.
[44] 67 FLRA at 656 (quoting 5 C.F.R. § 630.405(a)) (emphasis added); *see id.* at 657 (citing *Rodgers*, 461 U.S. at 706 ("the word 'may' . . . usually implies some degree of discretion); *Haig*, 453 U.S. at 294 n.26 ("'may' expressly recognizes substantial discretion"); *Contreras*, 64 Fed. Cl. at 593 ("strong presumption that 'may' is permissive and discretionary, and not mandatory")).
[45] *See FDA*, 60 FLRA at 791; *ACT I*, 56 FLRA at 948-49; *Interior*, 54 FLRA at 12-13.

already submitted initial medical certifications."[46] But – as in *NAIL* – both *Local 2052* and *Navy* concerned the negotiability or enforceability of contract proposals or provisions that require an agency to exercise its regulatory discretion to accept self-certification in certain circumstances.[47] And, in *Local 2052*, the Authority expressly held that requiring an employee to provide anything more than self-certification was "discretionary with the [a]gency even for absences of more than [three] days or where sick leave abuse is suspected."[48] Thus, the Agency's argument provides no basis for finding that the Authority erred in *NAIL* by relying on *Local 2052* and *Navy*.

For the foregoing reasons, the Agency's arguments concerning the Authority's interpretation of § 630.405(a) and related Authority precedent do not demonstrate extraordinary circumstances warranting reconsideration.

B. The Agency does not establish extraordinary circumstances warranting reconsideration of the Authority's holding that the Agency failed to establish that the provision is contrary to § 7106 of the Statute.

In *NTEU*,[49] the Authority held that it would find an agreed-upon contract provision to be an "appropriate" arrangement under § 7106(b)(3) of the Statute unless the provision "abrogates, or waives, a management right."[50] Subsequently, in *U.S. Department of the Treasury, IRS, Office of Chief Counsel, Washington, D.C.* (*IRS*),[51] the U.S. Court of Appeals for the District of Columbia Circuit held that the Authority "acted arbitrarily and capriciously" by applying the "abrogation" standard for agreed-upon provisions, while applying the "excessive[-]interference" standard to determine whether bargaining proposals are "appropriate" arrangements under § 7106(b)(3).[52]

The Agency argues that *IRS* triggered a "shift" in the applicable standard for determining whether a provision is an appropriate arrangement under § 7106(b)(3), and that this establishes extraordinary circumstances warranting reconsideration of *NAIL*.[53] However, the Agency does not explain how its "uncertainty" concerning which standard the Authority might apply with respect to § 7106*(b)(3)* of the Statute "effectively hamstrung [the Agency] in making an argument that [the provision] affected a management right" under § 7106*(a)*.[54] In this regard, we note that under both the "abrogation" and the "excessive[-]interference" standards,[55] a party arguing that a proposal or provision is not an appropriate arrangement under § 7106(b)(3) must first *identify* a § 7106(a) right and establish that the proposal or provision *affects* that right.[56] As the Authority stated in *NAIL*, if the party does not meet this initial burden concerning § 7106(a), then it is unnecessary for the Authority to resolve any claims regarding whether the proposal or provision falls within an exception to § 7106(a) set forth in § 7106(b).[57] In *NAIL*, the Agency did not assert that the provision affects the exercise of any management rights under § 7106(a), cite any rights under § 7106(a), or explain why the provision is otherwise contrary to law under § 7106.[58] In fact, even in this motion for reconsideration, the Agency *still* does not identify any § 7106(a) right that the provision allegedly affects.

As stated previously, in *NAIL*, the Authority rejected the position that any alleged uncertainty as to the framework used to resolve claims regarding § 7106(b)(3) relieved the Agency of its obligation to properly raise and support its arguments because "there can be no (principled) application of § 7106(b)(3) *at all* in the absence of a claim under § 7106(a)."[59] As the Agency's argument attempts to relitigate this conclusion, the argument does not establish extraordinary circumstances necessary to warrant reconsideration.[60]

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[46] Agency's Motion at 4-5.
[47] *Navy*, 55 FLRA at 1105; *Local 2052*, 30 FLRA at 840-41.
[48] 30 FLRA at 841.
[49] 65 FLRA 509 (2011) (Member Beck dissenting in part).
[50] *Id.* at 515.
[51] 739 F.3d 13 (D.C. Cir. 2014).
[52] *Id.* at 21 (internal quotation marks omitted).
[53] Agency's Motion at 7-8 (internal quotation marks omitted).
[54] *Id.* at 7.
[55] *Id.* at 8 (internal quotation marks omitted).
[56] *See, e.g.*, *Local 3928*, 66 FLRA at 179 n.5 (as agency failed to demonstrate that proposal affected the specified management rights, Authority applying excessive-interference standard found it unnecessary to address agency arguments that the proposal was not a procedure or an appropriate arrangement); *NTEU*, 65 FLRA at 510, 515 (where Agency "contend[ed] that the provisions affect management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B)," Authority applying abrogation standard evaluated provisions' effect on management's exercise of only those § 7106 rights); *Local 1998*, 66 FLRA at 128 n.7 (as an agency argument did "not cite a management right under § 7106 that the proposal would affect[,] . . . that argument provide[d] no basis for finding [a proposal] outside the duty to bargain," and as the agency did not demonstrate that the proposal affected a cited management right, the Authority – applying the excessive-interference standard – found it unnecessary to address the union's claim that the proposal was a procedure and an appropriate arrangement).
[57] 67 FLRA at 658 (citing *Local 3928*, 66 FLRA at 179 n.5; *Local 1998*, 66 FLRA at 128 n.7).
[58] *Id.* at 659.
[59] *Id.*
[60] *See FDA*, 60 FLRA at 791; *ACT I*, 56 FLRA at 948-49; *Interior*, 54 FLRA at 12-13.

IV. Order

We deny the Agency's motion for reconsideration.

Member Pizzella, dissenting:

I do not agree with the majority that the Authority that we should not grant the Agency's request for reconsideration of our decision in *NAIL, Local 7*.[1]

As my colleagues note, one basis for granting reconsideration is when the Authority has erred in its conclusions of law.[2] As such, the Agency's request affords the majority one more opportunity to reconsider its determinations which, in my assessment, are clearly contrary-to-law.

As I noted in my dissenting opinion, the majority erred in concluding that the subject proposal is not contrary to 5 C.F.R. § 630.405(a).[3] In its request for reconsideration, the Agency argues that the majority's reliance on *U.S. Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia* (*Navy*)[4] and *AFGE, AFL-CIO, Local 2052*[5] do not support their conclusion that the proposal does not conflict with 5 C.F.R. § 630.405(a), and is therefore, inconsistent with Authority precedent. In that respect, the Agency's argument is not just an "attempt[] to relitigate" the Authority's conclusions and warrants reconsideration.[6]

In similar fashion, the Agency also argues that the Authority erred by not considering its conclusions in view of the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *U.S. Department of the Treasury, IRS, Office of Chief Counsel, Washington, D.C.*,[7] a deficiency that I noted in my dissent[8] and reaffirm today. By failing to acknowledge and consider the court's decision, my colleagues minimize the Agency's argument that, by shifting back and forth between the excessive interference and abrogation standards, the Authority has adversely impacted the parties' ability to frame exceptions concerning proposals that may interfere with 5 U.S.C. § 7106(a) rights.[9]

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[1] 67 FLRA 654 (2014) (Member Pizzella dissenting in part).
[2] Majority at 2 (citing 5 C.F.R. § 630.405(a)).
[3] 67 FLRA at 662 (Dissenting Opinion of Member Pizzella).
[4] 55 FLRA 1103 (1999).
[5] 30 FLRA 837 (1987).
[6] Majority at 4 (citations omitted).
[7] Agency's Motion for Reconsideration at 6.
[8] 67 FLRA at 664 (Dissenting Opinion of Member Pizzella).
[9] *Id*.

Furthermore, because the majority reasserts that the Agency failed to "identify" the management right that is affected by the proposal, I reaffirm that I would conclude that the Agency sufficiently identified "management's right to discipline" as the "right in question."[10]

Thank you.

[10] *Id*. at 663.