70 FLRA No. 166

UNITED STATES
DEPARTMENT OF THE NAVY
NAVY REGION MID-ATLANTIC
NORFOLK, VIRGINIA
(Agency)

and

INTERNATIONAL BROTHERHOOD
OF POLICE OFFICERS
LOCAL 800
(Union)

0-AR-5291
(70 FLRA 512 (2018))

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ORDER DENYING
MOTION FOR RECONSIDERATION

September 25, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

Decision by Member Abbott for the Authority

I. Statement of the Case

Earlier this year the Authority set aside the award in *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia* (*Navy*).[1] In that decision, the Authority reviewed and corrected its interpretation of § 7116(d)[2] to hue closer to the plain terms of the Statute so that parties could no longer avoid the Statute's choice-of-forum provision through artful pleadings.

The Union now files a motion for reconsideration of *Navy* under § 2429.17 of the Authority's Regulations.[3]

The question before us is whether the Union has established extraordinary circumstances that warrant reconsideration of *Navy*. Because the Union's motion for reconsideration largely repeats the same arguments which the Authority considered and rejected in *Navy*, the Union fails to establish extraordinary circumstances warranting reconsideration. Consequently, we deny the Union's motion.

II. Background and the Authority's Decision in *Navy*

The circumstances of this dispute are fully detailed in *Navy*.[4] Accordingly, this order discusses only those aspects of the case that are pertinent to the reconsideration motion.

In 2011, the Agency notified the Union that it would implement the Commander, Navy Installations Command Ashore Protection Program Instruction 5530.14 (instruction) which, as relevant here, required its security officers to complete an agility test. In 2013, 2014, and 2015, the Union filed several ULP charges alleging that the Agency violated 5 U.S.C. § 7116(a)(1), (5), and (8) of the Statute by implementing the instruction without bargaining. Ultimately, each charge was either dismissed or withdrawn after the Federal Labor Relations Authority Washington Regional Director found that the Union had waived its rights to bargain because it failed to present a single negotiable proposal.

In 2016, the Agency notified two security officers at one facility of their requirement to perform the agility test. The Union grieved that the Agency violated the parties' agreement when it failed to provide the Union with an opportunity to bargain. The grievance went to arbitration. The Arbitrator found that while § 7116(d) would bar the current grievance, he would nonetheless consider the merits because the Agency did not raise this argument as an affirmative defense. The Arbitrator found that the instruction provided "distinct bargaining language" specific to the implementation of the agility test, and ordered the Agency to provide notice and an opportunity to bargain prior to any further implementation of the agility test.

In *Navy*, the Authority re-evaluated its interpretation of § 7116(d) and found that the grievance was barred because the earlier-filed ULP charges and grievance advanced the same basic issues. The Authority determined that its previous interpretations and applications of § 7116(d) had become an exercise in technical hair-splitting and artful pleading.[5] Considering the plain language and intent of the policy behind § 7116(d), the Authority found that the earlier-filed ULP charges barred the later-filed grievance because they presented the same issues.[6] Accordingly, the Authority set aside the award.

[1] 70 FLRA 512 (2018) (Member DuBester dissenting).
[2] 5 U.S.C. § 7116(d).
[3] 5 C.F.R. § 2429.17.
[4] 70 FLRA at 516.
[5] *Id.* at 515 (citing *U.S. DOD, Def. Commissary Agency*, 69 FLRA 379, 385 (2016) (Dissenting Opinion of Member Pizzella)).
[6] *Id.* at 516.

On May 23, 2018, the Union filed its motion for reconsideration of the Authority's decision in *Navy*.[7]

III. Analysis and Conclusions

Section 2429.17 of the Authority's Regulations permits a party to move for reconsideration of an Authority order if it can establish extraordinary circumstances.[8] The Authority has repeatedly recognized that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[9]

The Union argues that *Navy* is contrary to § 7116(d), Authority precedent, and Congressional intent because the arguments raised in the grievance—as described in *Navy*[10]—present a different legal theory than the earlier-filed ULP charges. Therefore, the Union alleges, its grievance is not barred by its earlier-filed ULP charge because the grievance sets forth different legal arguments than the earlier-filed ULP.[11]

These are the same arguments that the Authority considered and rejected in *Navy* with a detailed, well-reasoned explanation.[12] In *Navy*, we explained that the Authority's previous application of § 7116(d) had strayed from Congress' original intent and therefore, a return to the plain language of the Statute was warranted.[13] Our decision considered the plain language of the Statute and then found that § 7116(d) barred the grievance because both the earlier-filed ULP charges and the grievance presented the same issues: the Agency's announcement and implementation of an Agency's instruction requiring an agility test for its security officers.[14] Hence, we are unpersuaded that the Union's arguments here present extraordinary circumstances warranting our reconsideration of *Navy*.[15]

The Union's remaining arguments—that the Authority's decision in *Navy* is contrary to public policy,[16] contrary to the doctrine of stare decisis,[17] is arbitrary and capricious,[18] and an abuse of discretion[19]—also do not establish extraordinary circumstances warranting reconsideration of our decision.

Our decision to overturn Authority precedent is well-reasoned and, therefore, consistent with the U.S. Court of Appeals for the D.C. Circuit's holding that the Authority may depart from precedent when it provides a "reasoned analysis indicating that prior policies or standards are being deliberately changed, not casually ignored."[20] More recently, the U.S. Supreme Court issued a decision in *Janus v. AFSCME, Council 31*, in which that Court also reiterated the "importance of following precedent unless there are strong reasons for not doing so."[21] The Court found very strong reasons to overturn its own forty-year precedent because fundamental free speech was at stake and the precedent at issue has "led to practical problems and abuse."[22] Similarly here, we departed from past precedent because the choice-of-forum provision provided in § 7116(d) had been drained of all of its utility.[23] Therefore, we find that the Union fails to demonstrate that extraordinary circumstances exist to support granting reconsideration of *Navy*,[24] and we deny the Union's motion.

IV. Order

We deny the Union's motion for reconsideration.

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[7] On June 6, 2018, the Agency requested leave to file, and did file, an opposition to the reconsideration motion. We grant the Agency's request and have considered its arguments. *See* 5 C.F.R. § 2429.26(a) (the Authority "may in [its] discretion grant leave to file" documents other than those specifically listed in the Authority's regulations).

[8] 5 C.F.R. § 2429.17; *see AFGE, Local 2419*, 70 FLRA 319 (2017).

[9] *AFGE, Local 2238*, 70 FLRA 184, 184-85 (2017) (attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances).

[10] 70 FLRA at 516 ("The Union now argues that the issue here differs from those in the earlier-filed ULP charges because the grievance alleges that the Agency committed a contractual violation.").

[11] Mot. for Recons. at 11-12.

[12] 70 FLRA at 516-17 (The Authority found that § 7116(d) bars the grievance when the legal theories advanced in the ULP charge and grievance are *substantially similar*. And, given the derivative nature of the contractual bargaining obligation from the statutory bargaining obligation, the Authority found that § 7116(d) bars the grievance.).

[13] 70 FLRA at 514.

[14] *Id.*

[15] *Sports Air Traffic Controllers Org.*, 70 FLRA 345, 346 (2017) (citing *Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010) (Member DuBester concurring)).

[16] Mot. for Recons. at 17-18.

[17] *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

[18] *Id.* at 15-16.

[19] *Id.*

[20] *NFFE, FD-1, IAMAW, Local 951 & NFFE, FD-1, IAMAW, Local 2152 v. FLRA*, 412 F.3d 119, 121 (D.C. Cir. 2005) (quoting *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

[21] 138 S. Ct. 2448, 2460 (2018).

[22] *Id.*

[23] *Navy*, 70 FLRA at 515.

[24] *See NAIL, Local 5*, 66 FLRA 704, 705 (2012).

Member DuBester, dissenting:

For reasons set forth in my dissent in the underlying case, *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia*,[1] it remains my opinion that the majority errs by deciding to set aside well-established, judicially-approved Authority precedent concerning the interpretation and application of § 7116(d) of the Statute.[2] Further, it is my opinion that the Union's arguments seeking reconsideration of the Authority's decision, including its argument that the Authority's decision is arbitrary and capricious, raise extraordinary circumstances. I would therefore grant the Union's request for reconsideration.

[1] 70 FLRA 512, 518 (2018) (Dissenting Opinion of Member DuBester).
[2] 5 U.S.C. § 7116(d).