71 FLRA No. 10

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 1929
(Union)

0-AR-5187
(70 FLRA 501 (2018))

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ORDER DENYING
MOTION FOR RECONSIDERATION

February 14, 2019

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

I. Statement of the Case

In this case, we deny reconsideration to *U.S. DHS, U.S. CBP, El Paso, Texas* (*DHS*)[1] and reaffirm our seminal case emphasizing the difference between conditions of employment and working conditions.

Arbitrator Vicki Peterson Cohen issued an award finding that the Agency violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[2] by failing to bargain over a memorandum concerning immigration inspections conducted by border patrol agents (agents). The Agency filed exceptions to the award, arguing that the memo did not change a condition of employment. In *DHS*, the Authority reviewed those exceptions and addressed the plain-language distinction between "conditions of employment" and "working conditions," as those terms are used in § 7103(a)(14) of the Statute.[3] As relevant here, the Authority concluded that the Agency's issuance of the memo did not change a condition of employment, because it did not affect the nature of, or the type of duties, that the agents performed. Accordingly, the Authority in *DHS* set aside the award.

The Union now files a motion for reconsideration (motion) of *DHS* under § 2429.17 of the Authority's Regulations,[4] alleging that the Authority misapplied U.S. Supreme Court and Authority precedent. Because the Authority did not misapply precedent, the Union has failed to establish that extraordinary circumstances warrant reconsideration of *DHS*. Therefore, we deny the motion.

II. Background

The facts, summarized here, are set forth in greater detail in *DHS*. The agents involved in this case conduct inspections of vehicles and occupants traveling through a border-security checkpoint. The checkpoint has a primary and a secondary inspection area that are located adjacent to each other. On any given day, agents may be assigned to work one or both areas, but in either area the duties performed are essentially the same.

The Agency became aware that some of the agents "were failing very badly" at intercepting fraudulent and imposter vehicles and documents.[5] Around that same time, the Agency also received specific "intelligence indicating [that] people were using imposter and fraudulent documents in order to gain entry into the U.S. at checkpoints."[6] To address that situation, the Agency issued a memorandum detailing under what circumstances vehicles should be referred to the secondary inspection area (the memo).

The Arbitrator found that the memo constituted a change to the agents' conditions of employment because, after the Agency issued the memo, there were fewer primary-area inspections and the duties normally performed by agents assigned to the secondary inspection area increased. And the Arbitrator erroneously concluded that the Agency violated § 7116(a)(1) and (5) of the Statute by failing to give the Union notice and an opportunity to bargain before issuing the memo.

The Agency filed exceptions to the award. In *DHS*, the Authority took the opportunity to overturn its line of precedent that incorrectly held that there is no

[1] 70 FLRA 501 (2018) (Member DuBester dissenting).
[2] 5 U.S.C. § 7116(a)(1), (5).
[3] 5 U.S.C. § 7103(a)(14).
[4] 5 C.F.R. § 2429.17. The Agency requested leave to file, and did file, an opposition to the Union's motion. As it is the Authority's practice to grant these types of requests, we grant the Agency's request and consider its opposition. *See U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012).
[5] *DHS*, 70 FLRA at 501.
[6] *Id.*

substantive difference between the terms "conditions of employment" and "working conditions," as used in § 7103(a)(14).[7] While the Authority's previous interpretation of § 7103(a)(14) had been described as "reasonable,"[8] the Authority in *DHS* observed that it was not supported by the Statute's plain wording and, by conflating the relevant terms, it failed to provide the labor-management community with any meaningful guidance as to their statutory bargaining obligations.[9] The Authority also noted that the courts, including the U.S. Supreme Court in *Fort Stewart Schools v. FLRA* (*Fort Stewart*),[10] have acknowledged that the terms "conditions of employment" and "working conditions," as used in § 7103(a)(14), are *not* synonymous.

On the merits, the Authority found, as relevant here, that although the agents experienced an increase in their secondary inspection-area duties, there was *no change* to the "*nature of* or the *type of* duties" that the agents performed.[11] Relying on Authority precedent holding that variations in the volume of *normal* rotational duties do not constitute changes over which an agency must bargain, the Authority set aside the award.

III. Analysis and Conclusion: The Union has failed to establish that extraordinary circumstances exist to justify reconsideration of *DHS*.

While the Authority's Regulations permit a party to request reconsideration of an Authority decision,[12] the "party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action."[13] The Authority has identified a limited number of situations in which extraordinary circumstances have been found to exist.[14] These include situations where, as relevant here, the Authority erred in its remedial order, process, conclusion of law, or factual finding.[15]

The Union argues that *Fort Stewart* does not support the Authority's conclusion that the terms "conditions of employment" and "working conditions" have distinct meanings.[16] However, as the Agency notes,[17] that conclusion is based on the plain wording of § 7103(a)(14) – not *Fort Stewart*.[18] Section 7103(a)(14) defines the term "*conditions of employment*" as those "personnel policies, practices, and matters" which "*affect*[] *working conditions*."[19] Applying a basic canon of statutory interpretation,[20] the Authority in *DHS* found that those two *different* terms – one of which Congress used *to define* the other – cannot mean the same thing.[21] When referring to *Fort Stewart*, the Authority found it persuasive that the Court had previously recognized that "conditions of employment" and "working conditions" are susceptible to *distinct* interpretations.[22] Therefore, contrary to the Union's contention, that case *does* support the conclusion that "conditions of employment" and "working conditions" are *not* synonymous terms.

The Union next argues that the Authority in *DHS* erred in its conclusions of law because none of the cases that the Authority cited stand for the proposition that variations to the volume of employees' normal duties do not constitute changes over which an agency must bargain.[23] This is simply untrue. The Authority cited *U.S. DHS, Border and Transportation Security Directorate, U.S. CBP, Border Patrol, Tucson Sector, Tucson, Arizona* (*CBP*).[24] In that case, the agency was responsible for patrolling the United States border with

[7] 5 U.S.C. § 7103(a)(14).
[8] *See U.S. DHS, CBP v. FLRA*, 647 F.3d 359, 365 (D.C. Cir. 2011); *see also NTEU*, 66 FLRA 577, 579-80 (2012) (finding that an increased workload did not constitute a bargainable change), *pet. for review denied sub nom. NTEU v. FLRA*, 745 F.3d 1219 (D.C. Cir. 2014).
[9] *See GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 80 (2014) (Dissenting Opinion of Member Pizzella) (the distinction between working conditions and conditions of employment "is significant in the federal workplace"); *U.S. Dep't of VA, Med. Ctr., Sheridan, Wyo.*, 59 FLRA 93, 95 (2003) (Concurring Opinion of Chairman Cabaniss) (noting the "longstanding" confusion on the distinction between working conditions and conditions of employment); *U.S. DOL, Occupational Safety & Health Admin., Region 1, Bos., Mass.*, 58 FLRA 213, 216 (2002) (Concurring Opinion of Chairman Cabaniss) (discussing the "confusion between changes to 'conditions of employment' and changes to 'working conditions'").
[10] 495 U.S. 641, 645-46 (1990) (citing *DOD Dependents Sch. v. FLRA*, 863 F.2d 988, 990 (D.C. Cir. 1988)).
[11] *DHS*, 70 FLRA at 503.
[12] 5 C.F.R. § 2429.17.
[13] *E.g., AFGE, Local 2238*, 70 FLRA 184, 184 (2017) (citation omitted).
[14] *E.g., NTEU*, 66 FLRA 1030, 1031 (2012).
[15] *Id.*
[16] Mot. at 4-5.
[17] Opp'n to Mot. at 4.
[18] *DHS*, 70 FLRA at 502-03.
[19] 5 U.S.C. § 7103(a)(14) (emphasis added).
[20] *DHS*, 70 FLRA at 503 (noting that Congress acts intentionally when it includes particular words in a statute (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also United States v. Williams*, 340 F.3d 1231, 1236 (11th Cir. 2003) ("[A] deliberate variation in terminology within the same sentence of a statute suggests that Congress did not interpret the two terms as being equivalent.").
[21] *DHS*, 70 FLRA at 503.
[22] *Id.*; *see also Fort Stewart*, 495 U.S. at 645 (acknowledging that the term "conditions of employment" is "susceptible [to multiple] meanings" whereas the term "working conditions" "more naturally refers, in isolation, only to the 'circumstances' or 'state of affairs' attendant to one's performance of a job" (citation omitted)).
[23] Mot. at 5-9.
[24] 60 FLRA 169 (2004); *see DHS*, 70 FLRA at 503 n.37.

Mexico and apprehending, and then processing, illegal aliens.[25] After the agency experienced a "sharp increase in illegal[-]alien activity,"[26] it began rerouting detained aliens to the Tucson Station for processing.[27] As a result, employees working at the Tucson Station saw a significant increase in their "processing" duties.[28]

The Authority found there that the workload increase was attributable to "operational demand[]" – *i.e.*, the large influx of illegal aliens – and not to the agency.[29] The Authority then stated that "[e]ven if" the increase *was* attributable to the agency,[30] there was no change in the *type* of processing duties that the employees performed, and mere variations in the volume of those "normal, rotational duties" *do not* constitute bargainable changes.[31]

Here, the increase in the agents' secondary inspection-area duties is ultimately attributable to the agents failing at their job and the intelligence indicating that people were seeking to illegally enter the United States.[32] And even if that increase was somehow attributable to a change effected by the Agency, there was no change in the *type* of inspection duties that the agents performed.[33] Thus, consistent with *CBP*,[34] the Authority in *DHS* correctly found that the variations in the volume of the agents' *normal* duties did not constitute bargainable changes.

Based on the above, we find that the Union has failed to establish that the Authority in *DHS* misapplied either Supreme Court or Authority precedent. Accordingly, no extraordinary circumstances warrant reconsideration of *DHS*, and we deny the Union's motion.

IV. Decision

We deny the Union's motion.

[25] *CBP*, 60 FLRA at 169.
[26] *Id.* at 171.
[27] *Id.* at 173.
[28] *Id.*
[29] *Id.* at 174.
[30] *Id.*
[31] *Id.* at 173.
[32] *DHS*, 70 FLRA at 501; *see also CBP*, 60 FLRA at 174 (finding that a workload increase was attributable to operational demands and not to the agency's response to that demand (citing *U.S. Dep't of VA, Med. Ctr., Sheridan, Wyo.*, 59 FLRA 93, 98-99 (2003))).
[33] *DHS*, 70 FLRA at 504 ("Both before and after the memorandum, the agents continued to perform vehicular inspections at either the primary or secondary inspection areas using the same techniques.").
[34] *CBP*, 60 FLRA at 174.

Member DuBester, dissenting:

Essentially for the reasons expressed in my dissent in the underlying case,[*] I believe that the Union's motion for reconsideration establishes extraordinary circumstances warranting reconsideration of *DHS*.

[*] *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 504-07 (2018).