

**71 FLRA No. 14**

INDEPENDENT UNION  
OF PENSION EMPLOYEES FOR  
DEMOCRACY AND JUSTICE  
(Respondent/Union)

and

PENSION BENEFIT GUARANTY CORPORATION  
(Charging Party/Agency)

WA-CO-13-0227  
WA-CO-15-0158  
(70 FLRA 820 (2018))

ORDER DENYING  
MOTION FOR RECONSIDERATION

March 7, 2019

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

**I. Statement of the Case**

This matter comes before the Authority on the Union's motion for reconsideration (motion) of the Authority's decision in *Independent Union of Pension Employees for Democracy & Justice (IUPEDJ I)*.<sup>1</sup> In *IUPEDJ I*, the Authority concluded that there were no genuine disputes over material factual matters and that Chief Administrative Law Judge Charles R. Center (Judge) properly decided this matter on a motion for summary judgment. Furthermore, the Authority modified the Judge's remedy to include an additional arbitrator.

In large part, the Union's motion presents arguments already considered and rejected by the Authority. The remainder of the Union's motion either mischaracterizes the Authority's decision or relies on dicta. Consequently, the Union fails to demonstrate extraordinary circumstances warranting reconsideration of *IUPEDJ I*, and we deny the Union's motion.

**II. Background and Judge's Order**

Because *IUPEDJ I* lays out the saga of this case in detail, we will only briefly summarize the history of this case.

**A. Background and Judge's Order**

The General Counsel (GC) issued two complaints alleging that the Union violated § 7116(b)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute)<sup>2</sup> when it refused to accept the terms of the parties' collective-bargaining agreement (CBA) for the selection of arbitrators, the payment of arbitrators, and the arbitration procedures and, thereby, failed to continue existing personnel policies, practices, and matters to the maximum extent possible.

The Judge found that there were no genuine issues of material fact and granted the GC's motion for summary judgment, finding that the Union had violated the Statute. Specifically, the Judge found that the Union had improperly contacted arbitrators and asked them to resign from the arbitration pool and attempted to dismantle the duly assembled arbitration panel.

The Agency filed exceptions,<sup>3</sup> and the Union filed cross-exceptions.

**B. IUPEDJ I**

As pertinent here, the Union raised several arguments in its cross-exceptions, including arguing that: (1) a finding on a motion for summary judgment was not appropriate because there were disputed material facts; (2) the Union could not be found to have violated the Statute for only attempting to commit an unfair labor practice (ULP); (3) section 7116 was not relevant or applicable; (4) the Union followed the arbitration procedures in the CBA to the maximum extent possible; (5) the Union's free speech rights protected its actions; (6) the Union's communications with the arbitrators did not contain threats, intimidation, or coercion; and (7) the Judge failed to recognize that many of the arbitrators resigned voluntarily from the arbitration pool.

As an initial matter, the Authority in *IUPEDJ I* analyzed the alleged genuine disputes over material facts and found nothing that prevented the Judge from finding based on the GC's motion for summary judgment. Furthermore, the Authority rejected the Union's remaining arguments and found that the Union had

<sup>2</sup> 5 U.S.C. § 7116(b)(1), (5).

<sup>3</sup> Because the Agency did not request reconsideration of our granting, in part, and denying, in part, its exception, we will not discuss it further.

<sup>1</sup> 70 FLRA 820 (2018) (Member DuBester concurring).

violated the Statute. The Authority denied the Union's cross-exceptions. The Union now requests that we reconsider our decision in *IUPEDJI* and issue a stay of that decision.

### III. Analysis and Conclusions

The Authority's Regulations permit a party to request reconsideration of an Authority decision,<sup>4</sup> but "a party seeking reconsideration 'bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.'"<sup>5</sup>

The Authority has found that extraordinary circumstances exist, and as a result has granted reconsideration, in a limited number of situations. As relevant here, these have included where a moving party has established that the Authority had erred in its conclusion of law, or factual finding.<sup>6</sup> The Authority has held that attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.<sup>7</sup>

The majority of the Union's motion reiterates arguments already considered, and rejected, by the Authority. Specifically the Union argues that the Authority should have accepted as true all of the Union's evidence;<sup>8</sup> that an attempted ULP is not a ULP;<sup>9</sup> that § 7116(b)(1) and (5) are not relevant or applicable;<sup>10</sup> that the Union followed the arbitration procedures in the CBA to the maximum extent possible;<sup>11</sup> that the Union's speech rights protected its actions;<sup>12</sup> that the Union's statements were bargaining proposals;<sup>13</sup> that the Union's communications to arbitrators did not contain threats, intimidation, coercion, pressure, or harassment;<sup>14</sup> that the arbitrators resigned voluntarily;<sup>15</sup> and that the Union was denied a fair hearing.<sup>16</sup>

However, the Union made<sup>17</sup>—and the Authority considered and rejected<sup>18</sup>—all of these arguments previously.<sup>19</sup> Consequently, the Union is merely relitigating arguments and does not demonstrate extraordinary circumstances warranting reconsideration of *IUPEDJI*.<sup>20</sup>

Next, the Union presents two arguments that mischaracterize *IUPEDJI*. First, the Union argues that the Authority ordered the remedy concerning Arbitrator Conway even though "the [Judge] did not order such remedies and the [GC] did not challenge the [Judge]'s recommended decision and did not seek such remedies concerning [Arbitrator] Conway."<sup>21</sup> Although the GC did not request such a remedy, the Agency in its

<sup>17</sup> Union's Cross-Exceptions at 102 (arguing that the Judge "failed to accept as true all evidence raised by the [Union]"); *id.* at 104 (arguing that the Judge "was wrong as a matter of law by finding that it was a[ ULP] to 'attempt' a[ ULP]"); *id.* at 105 (arguing that § 7116(b)(1) and (5) "are not relevant and are not applicable to the violations alleged"); *id.* at 109 (arguing that the Union followed the arbitration procedures to the "MAXIMUM EXTENT POSSIBLE"); *id.* at 115 (arguing that § 7116(e) and the First Amendment protected the Union's speech); *id.* at 81 (arguing that the Union's communications were bargaining proposals); *id.* at 123 (arguing that the Judge erred in finding that the Union "threatened, intimidated, pressured, coerced[,] and harassed arbitrators"); *id.* at 128 (arguing that the Union "did not force any arbitrator to do anything"); *id.* at 96 (arguing that there were material facts in dispute and that the Judge "failed to hold a hearing to determine these facts").

<sup>18</sup> *IUPEDJI*, 70 FLRA at 822-25 (discussing and applying the standards for evaluating alleged genuine disputes over material facts); *id.* at 825 (rejecting the Union's argument that "it did not commit a ULP because the Judge only found that the Union attempted to commit a ULP"); *id.* (rejecting the Union's argument against "the very applicability of § 7116(b)(1) and (5)"); *id.* at 825 n.54 (rejecting the Union's argument that it complied with the arbitration procedures); *id.* at 826 n.70 (rejecting the Union's argument that the Statute and the First Amendment protected the Union's actions); *id.* at 825 (finding the Union did not present believable evidence to demonstrate that any of its statements were bargaining proposals); *id.* at 826 (rejecting the Union's argument that its communications were not coercive); *id.* at 823 (rejecting the Union's argument that "the arbitrators who resigned from the pool did so 'voluntarily of their own free will'"); *id.* at 825 (finding that there were no genuine disputes as to material facts preventing the Judge from ruling on a motion for summary judgment").

<sup>19</sup> The Union alleges that the Authority did not address its arguments concerning the Union's right to speech under §§ 7102, 7114(a)(1), and 7121(a)(1). Mot. at 14. However, the only portion of the Statute that protects the Union's speech from being considered a ULP is § 7116(e), which the decision explicitly addressed. *IUPEDJI*, 70 FLRA at 826.

<sup>20</sup> *NTEU*, 66 FLRA at 1031.

<sup>21</sup> Mot. at 2.

<sup>4</sup> 5 C.F.R. § 2429.17.

<sup>5</sup> *AFGE, Council 215*, 67 FLRA 164, 165 (2014) (quoting *NAIL, Local 15*, 65 FLRA 666, 667 (2011)).

<sup>6</sup> *NTEU*, 66 FLRA 1030, 1031 (2012) (*NTEU*) (citation omitted).

<sup>7</sup> *Id.*

<sup>8</sup> Mot. for Recons. (Mot.) at 8.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *Id.* at 10.

<sup>11</sup> *Id.* at 12.

<sup>12</sup> *Id.* at 14.

<sup>13</sup> *Id.* at 22.

<sup>14</sup> *Id.* at 23.

<sup>15</sup> *Id.* at 26.

<sup>16</sup> *Id.* at 2-3.

exception, which the Authority granted, did request that specific relief.<sup>22</sup>

Second, the Union argues that the Authority's decision "falsely accuses the Union of not doing arbitrations for employees."<sup>23</sup> However, the decision makes no such claims. Rather, the Authority found in *IUPEDJ I* that the Union "'interfere[d] with, [and] restrain[ed] . . . employee[s] in the exercise by the employee[s] of [a] right' under the Statute."<sup>24</sup> Specifically, by rejecting the arbitration procedures in the CBA, the Union denied the employees that it represents access to those procedures.

Because these arguments mischaracterize the decision, they do not present extraordinary circumstances warranting review.<sup>25</sup>

Finally, the Union alleges that the Authority "blames the Union for the proceedings that transpired"<sup>26</sup> and is "retaliat[ing]" against the Union.<sup>27</sup> The Union bases this argument entirely on the first, introductory sentence of the decision.<sup>28</sup> However, this introductory sentence is dicta<sup>29</sup> and had no effect on the decision. As such, this argument does not present extraordinary circumstances warranting reconsideration.<sup>30</sup>

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<sup>22</sup> Agency's Exceptions at 24 ("The Agency requests that the Authority order the remedy requested in its summary judgment motion: that the Union send each arbitrator on the panel a copy of the decision in this case, the signed notice, and a request that any arbitrators who resigned due to the Union's unlawful conduct rejoin the [p]anel."). The Union also argues that a judicial-settlement agreement concerning Arbitrator Conway's participation in the arbitration pool conflicts with the Authority's remedy here. Mot. at 28. But the Union fails to cite specific wording from that agreement to show how it conflicts with the remedy. Further, the Union does not demonstrate that the agreement prohibits the Union from *inviting* Arbitrator Conway to rejoin the pool.

<sup>23</sup> Mot. at 3.

<sup>24</sup> *IUPEDJ I*, 70 FLRA at 825.

<sup>25</sup> *Cf. id.* at 826.

<sup>26</sup> Mot. at 5.

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.* at 5 ("In this case we must address, *yet once again*, the Respondent Union's . . . long-standing attempts to evade certain provisions in a binding [CBA]." (quoting *IUPEDJ I*, 70 FLRA at 820)).

<sup>29</sup> *AFGE, Council of Prison Locals #33, Local Union Number 922*, 69 FLRA 480, 480 n.2; *Black's Law Dictionary* 549 (10th ed. 2014) (defining judicial dictum as "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision"); *id.* at 1240 (defining *obiter dictum* as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential").

<sup>30</sup> *AFGE, Council of Marine Corps Locals, Council 240*, 51 FLRA 49, 51 (1995) (finding that an argument based on

For the foregoing reasons, we deny the Union's motion for reconsideration. Because our denial of the merits of the Union's motion for reconsideration renders the Union's motion to stay moot,<sup>31</sup> we also deny the Union's motion for a stay.

#### IV. Order

We deny the Union's motion for reconsideration and its motion to stay.

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dicta fails to establish extraordinary circumstances warranting reconsideration of an Authority decision).

<sup>31</sup> *See, e.g., U.S. DHS, U.S. CBP*, 68 FLRA 807, 809 n.29 (2015) (citing *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 60 (2014)).

**Member DuBester, concurring:**

I agree that the Union fails to demonstrate extraordinary circumstances warranting reconsideration of *IUPEDJI*.<sup>1</sup>

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<sup>1</sup> 70 FLRA 820 (2018) (Member DuBester concurring).