70 FLRA No. 187

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12, AFL-CIO
(Union/Petitioner)

WA-RP-16-0027
(70 FLRA 452 (2018))

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ORDER DENYING MOTION FOR RECONSIDERATION

November 21, 2018

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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 motion for reconsideration, the Union fails to establish that extraordinary circumstances exist to justify reconsideration of *U.S. DOL* (*DOL*).[1]

Upon a clarification petition (the petition) filed by the Union, Federal Labor Relations Authority (FLRA) Regional Director Jessica Bartlett (the RD) issued a decision finding, as relevant here, that two employees are not "confidential employee[s]" under § 7103(a)(13) of the Federal Service Labor-Management Relations Statute (the Statute).[2] Accordingly, the RD concluded that the employees should be included in the bargaining unit that the Union represents. The Agency filed an application for review with the Authority challenging the RD's decision. After the Authority informed the parties that the Agency's application raised issues that warranted further consideration, the Union filed two submissions with the Authority seeking to withdraw the petition.

In *DOL*, the Authority held that it would not permit the Union to withdraw the petition. Accordingly, the Authority addressed the merits of the parties' dispute and, ultimately, concluded that the two employees should be excluded from the bargaining unit as confidential employees.

The Union has now filed a motion for reconsideration (motion) of *DOL* under § 2429.17 of the Authority's Regulations.[3] Because the Union has not established extraordinary circumstances that warrant reconsideration of *DOL*, we deny its motion.

II. Background

The facts, summarized here, are set forth in greater detail in *DOL*. The Union petitioned the RD to clarify, as relevant here, the bargaining-unit status of two employees (the employees). The RD issued a decision concluding that the employees should be included in the bargaining unit (the unit). The Agency filed an application for review (application) with the Authority, alleging that the RD failed to apply established law.

In an order to the parties, the Authority granted review of the RD's decision, but deferred action on the merits of the case. In the order, the Authority stated that the Agency's application raised issues warranting further consideration. Shortly after receiving that order, the Union submitted to the Authority a "request to withdraw" the petition and, then, a "[n]otice of [w]ithdrawal."[4]

In *DOL*, the Authority asserted that nothing in the Authority's Regulations permitted the Union to unilaterally withdraw the petition at that stage of the proceeding. As such, the Authority exercised its discretion to determine whether to approve the Union's request to withdraw. The Authority denied the Union's request, noting that (1) it was unusual that the Union sought to withdraw the petition, without explanation, given that it had spent nearly two years alleging that the employees should be included in the unit; (2) after spending considerable time and resources attempting to resolve the bargaining-unit status of the employees, the FLRA had institutional interests in the dispute; and (3) the Agency – not the Union – brought the dispute before the Authority.

On the merits, the Authority concluded that the RD failed to apply established law and that the employees are confidential employees under § 7103(a)(13) of the Statute. Accordingly, the Authority directed the RD to clarify the unit to exclude the employees.

Subsequently, on April 27, 2018, the Union filed this motion for reconsideration of *DOL*. In response, the

[1] 70 FLRA 452 (2018) (Member DuBester dissenting).
[2] 5 U.S.C. § 7103(a)(13).
[3] 5 C.F.R. § 2429.17.
[4] *DOL*, 70 FLRA at 453 (alteration in originals) (citation omitted).

Agency requested leave to file an opposition to the motion. As "it is the Authority's practice to grant requests to file oppositions to motions for reconsideration,"[5] the Authority granted that request. On July 26, 2018, the Agency filed an opposition to the motion.

III. Analysis and Conclusions

The Authority's Regulations permit a party to request reconsideration of an Authority decision.[6] However, a "party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action."[7] The Authority has identified only a limited number of situations in which extraordinary circumstances have been found to exist.[8] These include situations where: (1) an intervening court decision or change in the law affected dispositive issues; (2) evidence, information, or issues crucial to the decision had not been presented to the Authority; (3) the Authority erred in its remedial order, process, conclusion of law, or factual finding; and (4) the moving party has not been given an opportunity to address an issue raised sua sponte by the Authority in its decision.[9]

In its motion, the Union challenges the denial of its request to withdraw the petition.[10] In particular, it alleges that the Authority erred in its factual findings and conclusions of law, and raised issues sua sponte.[11]

A. The Union has not established that the bargaining-unit status of the employees is a moot issue.

The Union argues that once it sought to withdraw the petition, the bargaining-unit status of the employees became a moot issue.[12] The Union maintains that because that matter is moot, the Authority's decision in *DOL* violates § 2429.10 of the Authority's Regulations[13] – which states that the Authority "will not issue advisory opinions."[14]

It is well established that a dispute becomes moot when the parties no longer have a "legally cognizable interest" in the outcome.[15] The burden of demonstrating mootness is a "heavy one."[16] As relevant here, a party urging mootness meets that burden by establishing that it is "absolutely clear"[17] that "there is no reasonable expectation" that the same controversy will recur.[18] And when a dispute is moot, a decision on the merits of that dispute would constitute an advisory opinion in violation of § 2429.10.[19]

Here, the timing of the Union's withdrawal request militates against a finding of mootness. As noted above, the Union sought to withdraw the petition *only after* the Authority informed the parties that the Agency's application raised issues that warranted consideration of the RD's decision.[20] The Union did not provide any reason it was suddenly insistent on withdrawing the petition, after nearly two years of seeking to clarify the status of the employees.[21] Even now, in its motion, the Union fails to provide a definitive rationale. As the Authority referenced in *DOL*, we will not permit parties to utilize considerable FLRA resources and, then, in order to evade an Authority decision, withdraw before final resolution.[22] Allowing such conduct would be inconsistent with the fundamental principles of

[5] *E.g.*, *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012) (citation omitted).
[6] 5 C.F.R. § 2429.17.
[7] *E.g.*, *AFGE, Local 2238*, 70 FLRA 184, 184 (2017) (*Local 2238*).
[8] *E.g.*, *NTEU*, 66 FLRA 1030, 1031 (2012).
[9] *Id.*
[10] Mot. at 3.
[11] *Id.* at 11-12.
[12] *Id.* at 14-16.
[13] *Id.* at 12-17.
[14] 5 C.F.R. § 2429.10.
[15] *SSA, Boston Region (Region I), Lowell Dist. Office, Lowell, Mass.*, 57 FLRA 264, 268 (2001) (*SSA*); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (*Pap's*) ("A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome" (quoting *L.A. County v. Davis*, 440 U.S. 625, 631 (1979) (*Davis*)).
[16] *SSA*, 57 FLRA at 268; *Davis*, 440 U.S. at 631 (quoting *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (*Grant*)).
[17] *See, e.g.*, *Friends of Earth, Inc. v. Laidlaw Envtl. Serv.'s (TOC), Inc.*, 528 U.S. 167, 190 (2000) (*Friends*).
[18] *SSA*, 57 FLRA at 268 (citation omitted); *see Davis*, 440 U.S. at 631.
[19] *See Pap's*, 529 U.S. at 287 (any opinion as to the legality of a moot issue would be advisory); *NTEU, Chapter 207*, 58 FLRA 409, 410 (2003) (where a proposal becomes moot, issuance of a ruling on the merits of that proposal would constitute an advisory opinion).
[20] *DOL*, 70 FLRA at 452-03.
[21] *Id.* at 453.
[22] *Id.*

mootness[23] and "the requirement [for] an effective and efficient Government."[24]

It is also noteworthy that the bargaining-unit status of the employees is not rendered moot simply because the Union does not, *at this time*, desire to represent them. The Union is still the certified, exclusive representative of a bargaining unit of Agency employees, and it fails to provide any assurance that it will not, at a later time, seek to include the employees in that unit.[25] Moreover, without an Authority determination on the bargaining-unit status of the employees, nothing in the Statute or the Authority's regulations would preclude the Union from attempting to do so. Thus, the very conduct that triggered this dispute could reasonably be expected to recur.[26]

In addition, under § 2422.2(c) of the Authority's Regulations, both unions *and agencies* have the right to file petitions that seek to clarify the bargaining-unit status of employees.[27] Therefore, regardless of the Union's sudden disinterest in resolving the status of the employees, the Agency has a legally cognizable interest in that matter under the Authority's regulations. The Agency effectively expressed that interest by filing the application challenging the RD's decision and, again, by filing an opposition.[28]

Given that both parties have, at some point, expressed an interest in resolving the bargaining-unit status of the employees, it is not "absolutely clear" that this dispute would not recur.[29] Therefore, and for the reasons provided above, the issue of the bargaining-unit status of the employees is not moot. And because that issue is not moot, *DOL* does not violate § 2429.10's prohibition on issuing advisory opinions.

B. The Union has not established that the Authority's decision in *DOL* was arbitrary, capricious, or an abuse of discretion.

The Union argues that the Authority acted arbitrarily and capriciously by denying the Union's request to withdraw because, in prior cases, the Authority has granted similar requests.[30] Specifically, the Union cites *U.S. EPA* (*EPA*)[31] and *AFGE, ICE, National Council* (*ICE*).[32] However, as demonstrated below, both of those cases are distinguishable.

In *EPA*, the Authority – in an unpublished order – granted the union's request to withdraw its *election* petition.[33] Unlike the clarification petition at issue here, an election petition can be filed only by a union.[34] Thus, when the union in *EPA* sought to withdraw its petition, the agency had no legally cognizable interest in an Authority determination concerning whether an election would take place.[35] In addition, after that petition was withdrawn, the union was barred by regulation from filing a similar petition for six months[36] – making it absolutely clear that the issue raised by the petition would not recur for a set amount time. Therefore, unlike here, the facts in *EPA* established that the issue raised by the petition had been mooted.

Similarly, in *ICE*, although the Authority granted the union's request to withdraw, it limited that holding to "circumstances . . . where one party has appealed a negotiability petition to court, the matter has been returned to [the Authority] without judicial pronouncement, and where *both parties* effectively agree to a withdrawal of the underlying petition."[37] *ICE* does not apply here, where the dispute concerns a

[23] *See City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (a party "should not be able to evade judicial review . . . by temporarily altering [its] behavior"); *Pap's*, 529 U.S. at 288 ("Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to . . . [evade judicial] review further counsels against a finding of mootness . . . ."); *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1333 (11th Cir. 2005) (*Miami*) (voluntary cessation of conduct "will only moot litigation if it is clear that the defendant has not changed course simply to deprive the court of jurisdiction").

[24] 5 U.S.C. § 7101(b); *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (signaling reluctance to moot a case due to the amount of litigation that had already taken place).

[25] *See Pap's*, 529 U.S. at 287-88 (voluntarily closing a business did not moot case, because the party urging mootness was "still incorporated under . . . law" and "could again decide to" reopen that business); *Adams v. Bowater Inc.*, 313 F.3d 611, 615 (1st Cir. 2002) ("[W]here a defendant is unwilling to give any assurance that the conduct will not be repeated, a natural suspicion is provoked that recurrence may well be a realistic possibility.").

[26] *See SSA*, 57 FLRA at 268 (reassigning grievant to different supervisor did not moot case because the agency could, in the future, reassign the grievant to the initial supervisor).

[27] 5 C.F.R. § 2422.2(c).

[28] *See* Opp'n at 5, 6-7, 9 (stating that it has an interest in the bargaining-unit status of the employees).

[29] *See Friends*, 528 U.S. at 190 (a party claiming that its voluntary cessation of certain conduct moots a case "bears the formidable burden of showing that it is absolutely clear" that the dispute could not reasonably be expected to recur).

[30] Mot. at 17-20.

[31] Case no. BN-RP-16-0031 (July 27, 2017); *see* Mot., Exs. 1-3.

[32] 70 FLRA 441 (2018).

[33] Mot., Ex. 2., *EPA* Order at 2.

[34] 5 C.F.R. § 2422.2(a).

[35] *See U.S. DHS, Border and Transp. Sec. Directorate, Transp. Sec. Admin.*, 59 FLRA 423, 429 (2003) (the Authority does not have the power to direct an election "for any purpose other than to determine a representative").

[36] 5 C.F.R. § 2422.14(b).

[37] *ICE*, 70 FLRA at 441 (emphasis added).

representation petition, and the parties *disagree* as to whether the Union should be permitted to withdraw.[38]

The Union also alleges that the Authority raised sua sponte, and acted arbitrarily by considering, "the procedural history of the case, the time and resources expended by the FLRA, whether the Union stated a reason for withdrawing, and whether the Agency . . . agreed with the Union's request."[39] But those are the *facts and circumstances* of the case, and, as established above, those facts support the conclusion that the bargaining-unit status of the employees is not a moot issue. Moreover, the Authority only considered those facts (1) *in response* to the Union filing multiple submissions concerning the withdrawal of the petition[40] and (2) to determine, in its discretion, whether to permit the Union's withdrawal request.[41] Accordingly, the Authority did not consider any issue sua sponte,[42] nor did it act arbitrarily or capriciously by addressing the applicability of the facts to the Union's request.[43]

Our dissenting colleague suggests that the Authority should ignore the facts and circumstances of the case;[44] find the dispute moot despite the Agency's legally cognizable interest in the matter;[45] and disregard the Union's motives for attempting to withdraw *even if* the Union's sole motivation was to unilaterally deprive the Agency of the opportunity to have its timely-filed application for review addressed (in effect, attempting to undermine the jurisdiction of the Authority).[46] These suggestions are simply incompatible with federal court precedent, which establishes that facts,[47] motives,[48] and parties' interests[49] *are material considerations* when determining mootness. In addition, contrary to the dissent's assertion,[50] the Union did have an opportunity to address the issue of mootness. In either of its two submissions in *DOL*, the Union could have provided a rationale for, or argument in support of, its attempts to withdraw; it did not do so. The Union has now had *another* opportunity to make arguments in its motion. We have fully considered the Union's motion and, as established above, we find that the Union has not met its "heavy" burden of establishing mootness.[51]

Moreover, the dissent is flat wrong when it asserts that this case is before the Authority "solely" because of the Union's petition.[52] It was the Agency – not the Union – that filed the application for review that brought this dispute before the Authority. And the issues that we address in this case were raised by the Agency, in its application, and the Union, in its multiple requests to withdraw. Thus, the Authority did not raise any issue sua sponte.

C. The Union has not established that the Authority's decision in *DOL* constituted impermissible rulemaking.

The Union alleges that the Authority in *DOL* was engaged in rulemaking in violation of the Administrative Procedures Act.[53] Specifically, the Union contends that the Authority effectively repealed § 2429.10 of the Authority's Regulations by issuing an advisory opinion.[54] But, as established above, the Authority's decision in *DOL did not* constitute an advisory opinion. As such, *DOL* had no effect on § 2429.10.

Moreover, as noted in *DOL*, there are three primary considerations in distinguishing adjudication from rulemaking: (1) whether the government action

[38] Opp'n at 5 (arguing that issue is not moot); *id.* at 7 (arguing that Authority should not permit Union to withdraw).
[39] Mot. at 19.
[40] *DOL*, 70 FLRA at 453.
[41] *Id.*
[42] *See U.S. Dep't of the Air Force, Air Force Material Command, Eglin Air Force Base, Fla.*, 65 FLRA 1047, 1048 (2011) (Authority did not raise issue sua sponte where union raised it first).
[43] *See AFGE, AFL-CIO, Local 2303*, 815 F.2d 718, 721 (D.C. Cir. 1987) ("The Authority is free to proceed on a case-by-case basis without formally articulating rules of general applicability . . . ."); *NAGE, Local R14-87*, 21 FLRA 24, 33 (1986) ("[A]n adjudicative body must consider the totality of facts and circumstances in each case before it [and] [a]dditional considerations will be applied where relevant and appropriate.").
[44] Dissent at 11-12.
[45] *Id.* at 10.
[46] *Id.* at 11-12.
[47] *See Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 699 (3d Cir. 1996) (a mootness determination "depends in large part on a uniquely individualized process . . . centered on the facts and parties of each case" (omission in original) (quoting 13A WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.5 (2d ed. 1984)).
[48] *See E.I. Dupont De Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 47 (2d Cir. 2006) (a "strategic litigation ploy" to voluntarily cease the conduct at issue will not moot a case if "taken for the deliberate purpose of evading a possible adverse decision by th[e] court"); *Miami*, 402 F.3d at 1333 (voluntary cessation of conduct "will only moot litigation if it is clear that the defendant has not changed course simply to deprive the court of jurisdiction").
[49] *See Davis*, 440 U.S. at 631 (a case is moot when "*neither* party has a legally cognizable interest in the final determination of the underlying question[]" (emphasis added)); *see also Grant*, 345 U.S. at 632 (when assessing mootness, taking into consideration the "public interest" in having "the legality" of a practice settled).
[50] Dissent at 10.
[51] *See Davis*, 440 U.S. at 631 (quoting *Grant*, 345 U.S. at 633).
[52] Dissent at 10.
[53] Mot. at 28 (citing 5 U.S.C. § 551).
[54] *Id.* at 29.

applies to specific individuals or to unnamed and unspecified persons; (2) whether the promulgating agency considers general facts or adjudicates a particular set of disputed facts; and (3) whether the action determines policy issues or resolves specific disputes between particular parties.[55]

In *DOL*, the Authority adjudicated the merits of the dispute based on the specific facts of the case, including a hearing transcript,[56] the parties' exhibits,[57] and the RD's decision.[58] In addition, the Authority resolved only the issue before it: whether the RD failed to apply established law in concluding that the employees are not confidential employees under the Statute.[59]

While the Union argues that *DOL* had no effect on the parties or the employees,[60] the decision specifically "exclude[s]" the employees from the unit as confidential employees under § 7103(a)(13) of the Statute.[61] And by excluding the employees, *DOL* prevents the Union from simply refiling a similar petition, involving the same employees, at a later time.[62] Without *DOL*, the bargaining-unit status of the employees would be unsettled, and the Union – or the Agency[63] – could seek an FLRA determination on that matter. Thus, contrary to the Union's argument, *DOL* applies to specific individuals, establishing that the Authority in *DOL* was properly engaged in adjudication.[64]

In sum, the Union has not met its "heavy burden" of establishing that extraordinary circumstances exist to justify reconsideration of *DOL*.[65] Consequently, we deny the motion.

IV. Decision

We deny the Union's motion.

[55] *DOL*, 70 FLRA at 453 (citing *Gallo v. U.S. Dist. Court for the Dist. of Ariz.*, 349 F.3d 1169, 1182 (9th Cir. 2003), *cert. denied*, 541 U.S. 1073 (2004)).
[56] *Id.* at 454-55 nn.29-33, 35-38, 41, 43, 48, & 50-52 (references to hearing transcript).
[57] *Id.* nn.32-34, 36-37, 47, 49, & 52 (references to parties' exhibits).
[58] *Id.* at 452-53.
[59] *Id.* at 455 ("[T]he RD's conclusion that the support specialist is not a confidential employee is inconsistent with established law."); *id.* ("[C]ontrary to the RD, [we find] that the [program specialist] is a confidential employee.").
[60] Mot. at 15.
[61] *DOL*, 70 FLRA at 456; *see* 5 U.S.C. § 7112(b)(2) (a unit "shall not be determined to be appropriate . . . if it includes . . . a confidential employee").
[62] *Cf. FTC*, 35 FLRA 576, 584 (1990) (absent a demonstration that meaningful changes have occurred in the job duties or functions of the affected employees, a clarification petition is not appropriate for including employees who were previously excluded from the unit).
[63] 5 C.F.R. § 2422.2(c).
[64] We also note that *DOL* does not become an advisory opinion merely because it *may* provide guidance to others in the labor-management community. Mot. at 17. As the Authority in *DOL* stated, the "very nature of adjudication is that it produces precedential decisions that guide the conduct of similarly situated parties." *DOL*, 70 FLRA at 453 (citing *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999)); *see also Grant*, 345 U.S. at 632 (when assessing mootness, taking into consideration the "public interest" in having "the legality" of a practice settled).
[65] *See Local 2238*, 70 FLRA at 184.

Member DuBester, dissenting:

For the reasons expressed in my *U.S. DOL* (*DOL*) dissent[1], the Authority should have granted the Union's request to withdraw its petition. It should also grant the Union's motion for reconsideration because the Union has demonstrated extraordinary circumstances.

I agree with the Union's argument that extraordinary circumstances exist because the majority acted contrary to law.[2] The moment the Union no longer sought to represent the disputed employees, this matter became moot.[3] Accordingly, when the majority nonetheless reached the merits, it issued an advisory opinion, violating its own regulations and the Administrative Procedure Act.[4]

The majority's decision rests on an erroneous conclusion of law.[5] Contrary to the majority's findings, this case is moot because it no longer presents an actual, live controversy.[6] A live controversy is one where the adjudicator can provide "meaningful relief"[7] based on the "existing interests of the parties."[8] The majority's ruling on the merits serves no meaningful purpose because it is based on pure speculation about whether the Union might possibly, at some indeterminate time in the future, "seek to include the employees in th[e] unit."[9] Nothing in this record suggests that this matter has any likelihood of recurrence.[10] The majority's unsupported conjecture is "too remote and too speculative . . . to save this case from mootness."[11] If a decision resolving the bargaining unit status of the employees can serve no purpose in *this* case, the case is patently moot.

The majority misrepresents case law to support its claim that this matter cannot be moot unless it is "absolutely clear" that the same controversy will never recur.[12] That is not the applicable legal standard. The cases on which the majority relies reaffirm the inapplicable principle that cessation of *unlawful conduct* does not render a matter moot.[13] But this case does not involve an unfair labor practice or any conduct that is otherwise contrary to law. This case involves solely a representation issue.

The majority's related claim that it properly denied the Union's motion because the Agency continues to have a "cognizable interest"[14] is meritless. As I have stated previously, this case came to an Authority regional office based solely on the Union's "petition to clarify the bargaining unit status of certain Agency positions, contending that these positions should be included in the unit it represents."[15] The Agency excepted to the RD's finding that the disputed employees should be included in the applicable unit. When the Union withdrew the petition, the sole catalyst for that finding, the Agency's articulated interest ended – as did any basis for the Agency to proceed with its application for review. The Union is no longer seeking to include the employees in the unit, so the only basis for the Agency's petition for review is no longer a live, actual controversy. Nothing in the Statute permits an Agency to ask the Authority to effectively enjoin a Union from filing a future representation petition. And the majority has no statutory authority to adjudicate issues that could arise, only theoretically, in the future. "[A]djudication [cannot] be purely prospective, since otherwise it would constitute rulemaking."[16]

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[1] 70 FLRA 452, 458-59 (Dissenting Opinion of Member DuBester).
[2] Mot. at 12.
[3] *See DOL*, 70 FLRA at 458-59 (Dissenting Opinion of Member DuBester).
[4] *Id.*
[5] *See, e.g., U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012) (Authority error in its conclusions of law is a ground for granting reconsideration.).
[6] *See, e.g., NATCA*, 63 FLRA 591, 592 (2009) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (*City of Erie*) ("a case is moot when the issues presented are no longer 'live'")).
[7] *Ethredge v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993).
[8] *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007) (*Lohn*).
[9] Majority at 4.
[10] *See id.* at 4. *Cf. SSA, Boston Region (Region I), Lowell Dist. Office, Lowell, Mass.*, 57 FLRA 264, 268 (2001), cited by the majority at 3 n.15, 4 n.18 (finding that the reassignment at issue could recur where the record showed that such reassignments were "routine").
[11] *Lohn*, 511 F.3d at 964; s*ee also DeFunis v. Odegaard*, 416 U.S. 312, 320 n.5 (1974) ("speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide . . . in the absence of 'evidence that this is a prospect of 'immediacy and reality'" (citations omitted)); *Hall v. Beals*, 396 U.S. 45, 49 (1969) (there is no live controversy when the possibility of recurrence is merely a "speculative contingency").
[12] Majority at 4-5.
[13] *Id.* at 4; *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 173, 190 (2000) (considering whether a "defendant's voluntary cessation of allegedly unlawful conduct" rendered a citizen suitor's claim for civil penalties moot); *City of Erie*, 529 U.S. 277 (involving constitutionality of a city ordinance prohibiting certain conduct and a continuing injury to the city); *L.A. Cnty. v. Davis*, 440 U.S. 625, 631 (1979) (recognizing the "general rule" that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." (citation omitted)).
[14] Majority at 5.
[15] *DOL*, 70 FLRA at 458 n.1 (Dissenting Opinion of Member DuBester).
[16] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Concurring Opinion of J. Scalia) (citing *NLRB v. Wyman–Gordon Co.*, 394 U.S. 759, 759 (1969)).

Further, as the Union argues, extraordinary circumstances exist because "the Authority *sua sponte* raised new considerations and standards for processing withdrawal requests."[17] The majority's issuance of a new rule, establishing a limitations period during which a Union may withdraw its own representation petition, is rulemaking masquerading as adjudication.[18]

And, the majority compounds its error by unfairly applying its new rule retroactively.[19] The Union had no notice or opportunity to address these announced standards before the majority's issuance of its decision.[20] Not surprisingly, the majority does not cite a single instance, before this case, where the Authority has denied a Union's motion to withdraw its own representation petition before issuance of a final order.[21] Against this background, the retroactive imposition of a limitations period is manifestly unjust.[22] There is no prior precedent, or any regulation, that put the Union on notice that it would lose its ability to withdraw its representation petition based solely on the passage of time.[23]

Moreover, the majority's rationale for taking this *sua sponte* action does not outweigh the harm to the Union which reasonably relied on the Authority to act consistently and predictably.[24] The Authority's purported "institutional interests"[25] include the false notion that any "time and resources"[26] the Authority spent on this matter entitles the majority to issue an advisory opinion.

Nor does the Union's timing of its motion, filed prior to issuance of a final decision, have any legal significance.[27] The majority's suggestion that the Union has improperly sought to "undermine the jurisdiction of the Authority"[28] serves only to raise questions about the majority's own rationale for issuing an advisory opinion.[29] What I have stated previously bears repeating here: the majority's preoccupation with a party's motives, rather than on the merits of their cases "has no place in Authority decision-making."[30]

At bottom, what is "absolutely clear," is this case is moot, and the majority issued an unlawful advisory opinion. The continuing unlawfulness of the Authority's actions in this case is an extraordinary circumstance demanding reconsideration.

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[17] Mot. at 3.

[18] *See DOL*, 70 FLRA at 458 n.8 (Dissenting Opinion of Member DuBester).

[19] *See, e.g.*, *Shalala v. Guernsey Mem'l Hosp*., 514 U.S. 87, 100 (1995) (notice and comment procedures are required where an agency "effect[s] a substantive change" in its regulations).

[20] Mot. at 3; *see also U.S. Dep't of the Air Force, 375th Combat Support Grp., Scott Air Force Base, Ill.*, 50 FLRA 84, 85-87 (1995) (extraordinary circumstances exist where the moving party has not been given an opportunity to address an issue raised *sua sponte* by the Authority in the decision); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 737 F.3d 779, 785 (D.C. Cir. 2013) (citation omitted) (an Authority negotiability finding will be reversed if it "represents an unexplained departure from prior agency determinations").

[21] Accordingly, the majority misses the relevant point (Majority at 5) by attempting to distinguish the Union's cited examples.

[22] *See, e.g.*, *Heckler v. Cmty. Health Servs., Inc.*, 467 U.S. 51, 60 n.12 (1984) ("an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests"); *see also, Bowen*, 488 U.S.at 208 ("Retroactivity is not favored . . . . [R]ulemaking authority [does not] encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms . . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.").

[23] *See, e.g.*, *South Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 103 (1st Cir. 2002) (*"*patently inconsistent applications of agency standards to similar situations are by definition arbitrary").

[24] *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006) (when an agency's "explanation for its determination . . . lacks any coherence," the agency is entitled to "no deference"); *see also Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) ("courts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests").

[25] Majority at 2.

[26] *Id.* at 4; *see also DOL*, 70 FLRA at 453.

[27] As I have said previously, the majority's decision rests on a distortion of the Authority's role in a representation proceeding. *DOL*, 70 FLRA at 458 n.4 (Dissenting Opinion of Member DuBester). A Union has no statutory obligation to seek to represent employees. Accordingly, the Union here was not required to argue that the disputed employees should be included in the bargaining unit. Therefore, the Union's "rationale" (Majority at 7) for seeking to withdraw its voluntary petition is irrelevant.

[28] Majority at 6.

[29] Again, the majority (at 7 n.48-49) purports to support its conclusion by citing irrelevant case law, involving cessation of unlawful conduct.

[30] *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 70 FLRA 680, 686 (2018) (Dissenting Opinion of Member DuBester).