

**71 FLRA No. 137**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2338  
(Union)

and

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
JOHN J. PERSHING VAMC  
(Agency)

0-AR-5431  
(71 FLRA 343 (2019))

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ORDER DENYING  
MOTION FOR RECONSIDERATION

April 23, 2020

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

**I. Statement of the Case**

The Union requests that we reconsider our decision in *AFGE, Local 2338 (Local 2338)*.<sup>1</sup> In that case, we found that Arbitrator Anthony R. Orman's denial of backpay was not contrary to the Back Pay Act (BPA).<sup>2</sup> We also found that that the Union did not establish that the award failed to draw its essence from the parties' agreement.

In a motion for reconsideration (motion), the Union now argues that the Arbitrator erred in reaching his decision.<sup>3</sup> Because the Union's motion raises the same arguments the Authority considered in *Local 2338*, and does not otherwise establish extraordinary circumstances warranting reconsideration, we deny it.

**II. Arbitrator's Award and Authority's Decision in Local 2338**

The facts, summarized here, are set forth in greater detail in *Local 2338*.<sup>4</sup> The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to distribute overtime in a "fair and equitable manner," thus denying employees overtime opportunities.<sup>5</sup> The Arbitrator found that the Agency violated the parties' agreement, but the Union was not entitled to a backpay remedy. Specifically, he found that the Union did not produce evidence showing which employees were available and would have accepted overtime work if it had been offered to them.

In *Local 2338*, the Authority denied the Union's contrary-to-law and essence exceptions.<sup>6</sup> The Authority deferred to the Arbitrator's unchallenged factual findings that the Union failed to provide evidence of a "specific injury" to any "specific employee,"<sup>7</sup> and therefore failed to establish that a backpay award was appropriate under the BPA. The Authority also found that the Union's essence exception did not provide a basis for finding the award deficient as the BPA was the only authority for a backpay award in this case.

On October 11, 2019, the Union filed its motion.

**III. Analysis and Conclusion: We deny the Union's motion for reconsideration.**

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to move for reconsideration of an Authority decision.<sup>8</sup> The Authority has repeatedly held that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.<sup>9</sup> Errors in the Authority's remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.<sup>10</sup> However, attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.<sup>11</sup> Additionally, the Authority has refused to grant reconsideration of issues that could have been

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<sup>4</sup> 71 FLRA at 343.

<sup>5</sup> *Id.* (citing Award at 4).

<sup>6</sup> *Id.* at 343-44.

<sup>7</sup> *Id.* at 344 & n.18.

<sup>8</sup> 5 C.F.R. § 2429.17.

<sup>9</sup> *SPORT Air Traffic Controllers Org.*, 71 FLRA 25, 26 (2019) (*Sport*) (Member DuBester concurring) (citations omitted).

<sup>10</sup> *SPORT Air Traffic Controllers Org.*, 70 FLRA 345, 345 (2017) (citing *Int'l Ass'n of Firefighters, Local F-25*, 64 FLRA 943, 943 (2010)).

<sup>11</sup> *Id.* (citing *Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010) (Member DuBester concurring)).

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<sup>1</sup> 71 FLRA 343 (2019).

<sup>2</sup> 5 U.S.C. § 5596.

<sup>3</sup> 5 C.F.R. § 2429.17.

previously raised, but were not, and are raised for the first time on a motion for reconsideration.<sup>12</sup>

The Union argues that, under the parties' collective-bargaining agreement, it was not required to prove which employees were available for the overtime work at issue.<sup>13</sup> It also argues that the Arbitrator erred by finding that the Union did not provide specific evidence regarding which employees were harmed by the Agency's violation of the parties' agreement.<sup>14</sup> The Union raised,<sup>15</sup> and the Authority rejected, these arguments in *Local 2338*.<sup>16</sup> The Union's attempt to relitigate these arguments fails to demonstrate that the Authority erred.<sup>17</sup>

Additionally, the Union makes multiple arguments for the first time on reconsideration regarding how the Arbitrator allegedly erred. These arguments include that the Arbitrator failed to "adhere to his agreed up[on] [f]raming of the [i]ssue with the parties," provide the Union with a copy of the Agency's post-hearing brief, and have the hearing transcribed.<sup>18</sup> The Union further argues that the award is contrary to 5 U.S.C. § 7106 because it requires the Union to produce evidence which the Agency controls concerning employee availability for overtime work.<sup>19</sup> The Union did not previously raise these arguments in its exceptions even though it had the opportunity to do so.<sup>20</sup> Consequently, the Union cannot raise these arguments for the first time in its motion for reconsideration.<sup>21</sup>

Therefore, we find that the Union does not demonstrate that extraordinary circumstances exist to warrant reconsideration of *Local 2338*, and we deny the Union's motion.

#### IV. Decision

We deny the Union's motion.

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<sup>12</sup> *Id.*; see also *NTEU*, 66 FLRA 1004, 1006 (2012) (*NTEU*).

<sup>13</sup> Motion at 2-3.

<sup>14</sup> *Id.* at 2, 5.

<sup>15</sup> See Exceptions at 1-2, 3-4.

<sup>16</sup> 71 FLRA at 344.

<sup>17</sup> *Sport*, 71 FLRA at 26; *NTEU*, 66 FLRA at 1006.

<sup>18</sup> Motion at 5.

<sup>19</sup> *Id.* at 4-5.

<sup>20</sup> *NTEU*, 66 FLRA at 1006.

<sup>21</sup> *Sport*, 71 FLRA at 26; *NTEU*, 66 FLRA at 1006.

**Member Abbott, concurring:**

I have noted before that the Authority must be clear and concise and articulate its decisions in a manner that can be easily understood by the federal labor-management community.<sup>1</sup>

Therefore, I can only join my colleagues in the simple outcome that the Union's request for reconsideration must be denied because the arguments it raises herein either were previously raised, or were not raised, below – both of which are valid reasons for denying the request. We could have just said that.

It is inexplicable to me that my colleagues go on to belabor their analysis with matters that have nothing whatsoever to do with the request before us – “[e]rrors in the Authority's remedial order, process, conclusions of law, or factual findings”<sup>2</sup> – and mischaracterize the Union's arguments as an “attempt[] to relitigate conclusions.”<sup>3</sup> The haphazard manner in which the majority analyzes arguments that were previously raised and rejected by the Authority only serves to unnecessarily blur the distinction between such matters and an attempt to relitigate their case. The two are not the same.

Quite simply, I conclude that it is necessary to deny the request for reconsideration because the arguments raised by the Union were either raised, and rejected, in *AFGE, Local 2338*<sup>4</sup> or were not raised at all in the exceptions therein.

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<sup>1</sup> *NTEU*, 70 FLRA 701, 701 n.4 (2018).

<sup>2</sup> Majority at 2.

<sup>3</sup> *Id.*

<sup>4</sup> 71 FLRA 343, 344 (2019).