I. Statement of the Case

The Agency requests that we reconsider our decision in AFGE, National Veterans Affairs Council #53 (AFGE),\(^1\) In that case, the Union filed a grievance regarding the Agency’s failure to bargain over the implementation of the Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Accountability Act).\(^2\) Arbitrator Hyman Cohen found that the Agency did not have a duty to bargain, and therefore, did not violate the parties’ agreement or § 7116(a)(5) of the Federal Service Labor-Management Relations Statute (Statute)\(^3\) by unilaterally implementing the Accountability Act without providing notice and an opportunity to bargain. But the Authority found the Accountability Act does not specifically provide for all aspects that would preclude bargaining under § 7106(b)(2) and (3) of the Statute and does not provide the Agency with sole and exclusive discretion that would excuse it from its statutory duty to bargain. Accordingly, we vacated the award.

In a motion for reconsideration (motion), the Agency argues that the Authority erred in its legal conclusions by mischaracterizing the stipulated issue and failing to defer to the Arbitrator’s interpretation of the stipulated issue. The Agency also argues that the Authority erred in its remedial order by failing to provide specificity concerning the parties’ obligations. Because the Agency’s arguments fail to establish that the Authority erred, those arguments do not provide a basis for reconsideration. Accordingly, we deny the Agency’s motion.

II. Background

On June 23, 2017, the Accountability Act was signed into law, providing authority under Title 38 for the Agency to address performance and misconduct concerns. On July 1, 2017, the Union submitted a demand to bargain implementation of the Accountability Act. The Agency proceeded to unilaterally implement the applicable provisions and procedures of the Accountability Act, without bargaining. Soon thereafter, the Union filed a national grievance against the Agency for its failure to engage in the bargaining process before implementing the Accountability Act, and subsequently invoked arbitration.

The Arbitrator found that the Agency did not have a duty to bargain because, while the Accountability Act provided new procedures that would otherwise be conditions of employment, the procedures were not conditions of employment due to the Statute’s exclusion of matters “specifically provided for by federal statute” from the definition of conditions of employment.\(^4\) He also found that the Agency did not have a duty to bargain because it had sole and exclusive discretion over the matter.

In AFGE, the Authority found that the Arbitrator erred in determining that the Agency did not have a duty to bargain over appropriate arrangements and procedures regarding the implementation of the Accountability Act.\(^5\) Specifically, the Authority found that the Accountability Act did not specifically provide for all aspects of the disciplinary process that would preclude bargaining under § 7106(b)(2) and (3) of the Statute\(^6\) and did not provide the Agency with sole and exclusive discretion that would excuse it from its statutory duty to bargain.\(^7\) Accordingly, the Authority set aside the award.

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\(^1\) 71 FLRA 410 (2019) (Member DuBester concurring).
\(^3\) 5 U.S.C. § 7116(a)(5).
\(^4\) AFGE, 71 FLRA at 410.
\(^5\) Id. at 411-13.
\(^6\) Id. at 411-12.
\(^7\) Id. at 412-13.
Subsequently, the Agency filed this motion on December 9, 2019. The Union filed an opposition to the Agency’s motion on December 21, 2019.

III. Analysis and Conclusion: We deny the motion.

The Agency asks the Authority to reconsider its decision in AFGE. Section 2429.17 of the Authority’s Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision. 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. As relevant here, the Authority has held that errors in its legal conclusions and errors in its remedial orders may justify granting reconsideration.

First, the Agency argues that the Authority erred in its legal conclusions because the Authority mischaracterized the stipulated issue and failed to defer to the Arbitrator’s interpretation of the stipulated issue. In support of its argument, the Agency claims the Arbitrator narrowed the issue to whether the Agency was required to bargain over the specific timelines and procedures provided by the Accountability Act.

However, this assertion is not supported by the record. On the first page of the award, the Arbitrator provided that the Union claims that by implementing the Accountability Act without bargaining the impact and consequences for so doing, may move for reconsideration of such final decision or order.”

The Authority erred because the Authority did not mischaracterize the issue at arbitration, and therefore, did not fail to defer to the Arbitrator’s interpretation of the stipulated issue.

Next, the Agency argues that the Authority erred in its remedial order by failing to provide specificity concerning the parties’ obligations because the order “did not remand the matter or direct the parties to take any affirmative action.” In AFGE, the Authority vacated the award because it was contrary to law. It is

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2 The Agency asks the Authority to reconsider its decision in AFGE. Section 2429.17 of the Authority’s Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision. 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. As relevant here, the Authority has held that errors in its legal conclusions and errors in its remedial orders may justify granting reconsideration.

3 First, the Agency argues that the Authority erred in its legal conclusions because the Authority mischaracterized the stipulated issue and failed to defer to the Arbitrator’s interpretation of the stipulated issue. In support of its argument, the Agency claims the Arbitrator narrowed the issue to whether the Agency was required to bargain over the specific timelines and procedures provided by the Accountability Act.

4 However, this assertion is not supported by the record. On the first page of the award, the Arbitrator provided that the Union claims that by implementing the Accountability Act without bargaining the impact and consequences for so doing, may move for reconsideration of such final decision or order.”

5 The Authority erred because the Authority did not mischaracterize the issue at arbitration, and therefore, did not fail to defer to the Arbitrator’s interpretation of the stipulated issue.

6 Next, the Agency argues that the Authority erred in its remedial order by failing to provide specificity concerning the parties’ obligations because the order “did not remand the matter or direct the parties to take any affirmative action.” In AFGE, the Authority vacated the award because it was contrary to law.
clear from the Agency’s motion\(^{22}\) and the Union’s opposition\(^{23}\) that the parties disagree on how the grievance should be resolved.\(^{24}\) However, that does not demonstrate that the Authority erred in its remedial order by vacating the award.\(^{25}\) Therefore, we find that the Agency does not demonstrate extraordinary circumstances that warrant reconsideration of \textit{AFGE}. As such, we deny the Agency’s motion.

\section*{IV. Order}

The Agency’s motion for reconsideration is denied.

\textbf{Member DuBester, concurring:}

I agree with the decision to deny the Agency’s motion for reconsideration.

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\textsuperscript{22} The Agency argues that the Authority should clarify the order to require post-implementation bargaining over the impact and implementation of the Accountability Act. Mot. at 8.

\textsuperscript{23} The Union argues that if the Authority clarifies the remedial order, it should order the Agency to “cease and desist the proposing of all disciplinary actions . . . using the authority of the [Accountability] Act until bargaining obligations are complete[, and] return to the status quo ante before the implementation of the new procedures.” Opp’n at 10.

\textsuperscript{24} With the award vacated, the parties should resubmit the issue to the Arbitrator, absent settlement.

\textsuperscript{25} \textit{See Dep’t of the Navy, N. Div., Naval Facilities Eng’r Command, 28 FLRA 52, 53 (1987)} (denying a motion for reconsideration requesting the Authority to modify a remedial order to the extent it was consistent with law because it was the Agency’s responsibility to comply with the order to the extent consistent with law and regulation); \textit{but see SSA, Office of Hearings and Appeals, Bos. Reg’l Office, Bos., Mass., 60 FLRA 105, 108} (granting a motion for reconsideration to modify a notice posting to correctly identify the respondent); \textit{INS, 39 FLRA at 1438} (granting a motion for reconsideration to modify a remedial order to include a qualification that limited rescission of disciplinary actions to only those involving solely the issue at arbitration).