

71 FLRA No. 142

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL VETERANS AFFAIRS
COUNCIL #53
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

0-AR-5429
(71 FLRA 410 (2019))

ORDER DENYING
MOTION FOR RECONSIDERATION

May 11, 2020

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

Decision by Member Abbott for the Authority

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 Statute⁶ 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.

¹ 71 FLRA 410 (2019) (Member DuBester concurring).

² See Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41 (codified as amended in scattered sections of 38 U.S.C.) (Accountability Act).

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.⁸ 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.⁹ As relevant here, the Authority has held that errors in its legal conclusions¹⁰ and errors in its remedial orders¹¹ may justify granting reconsideration.¹²

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.¹³ 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.¹⁴

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 Act prior to bargaining with the Union, the Agency violated [the parties' agreement and the Statute]."¹⁵ Elsewhere in the award, the Arbitrator states the issue is "[w]hether the Agency's utilization of the disciplinary procedures of the [Accountability Act] violates [the parties' agreement and the Statute],"¹⁶ and that the grievance "alleged that the Agency failed 'to bargain with the Union over the unilateral implementation' of the Accountability Act 'without bargaining the impact and implementation thereof with the Union.'"¹⁷ Therefore, the Authority did not err by paraphrasing that the stipulated issue at arbitration was "whether the Agency's unilateral implementation of the Accountability Act violated the Statute and the parties' agreement."¹⁸ As such, the Agency has failed to demonstrate how 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.¹⁹

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."²⁰ In *AFGE*, the Authority vacated the award because it was contrary to law.²¹ It is

⁸ 5 C.F.R. § 2429.17 ("After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order.")

⁹ *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 71 FLRA 188, 189 (2019) (Member DuBester dissenting) (citing *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 860, 861 (2018) (Member DuBester dissenting)); *SPORT Air Traffic Controllers Org.*, 71 FLRA 25, 26 (2019) (Member DuBester concurring) (citations omitted); *U.S. DHS, U.S. CBP, Swanton, Vt.*, 66 FLRA 47, 48 (2011); *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 63 FLRA 600, 601 (2009); *U.S. Dep't of the Interior, Wash., D.C. & U.S. Geological Survey, Reston, Va.*, 56 FLRA 279, 279 (2000).

¹⁰ *Indep. Union of Pension Emps. for Democracy & Justice*, 71 FLRA 60, 61 (2019) (*IUPEDJ*) (Member DuBester concurring) (citing *NTEU*, 66 FLRA 1030, 1031 (2012)).

¹¹ *U.S. Dep't of VA, Neb./W. Iowa VA Health Care Sys., Omaha, Neb.*, 66 FLRA 462, 464-65 (2012); *U.S. DOJ, U.S. INS, El Paso Dist. Office*, 39 FLRA 1431, 1438 (1991) (*INS*).

¹² Member Abbott notes that the Agency's arguments here more accurately reflect a general disagreement, or dissatisfaction, with our prior determination. But those are not recognized grounds for granting reconsideration. Thus, it is necessary to rearticulate the standards that may form the basis for granting a request for reconsideration.

¹³ Mot. for Recons. (Mot.) at 5-7. The Agency also argues that the Authority misstated the Arbitrator's conclusion that there was not a duty to bargain because the Accountability Act specifically provided for the disciplinary procedures implemented by the Agency. Mot. at 7. As articulated in *AFGE*, whether a matter is specifically provided for by Statute is a legal conclusion, which the Authority reviews de novo. 71 FLRA at 411 n.9. As such, the Authority does not defer to this conclusion—misstated or not. Accordingly, this argument does not demonstrate that the Authority erred.

¹⁴ Mot. at 5-6.

¹⁵ Award at 1.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 7.

¹⁸ *AFGE*, 71 FLRA at 410.

¹⁹ See *IUPEDJ*, 71 FLRA at 61-62 (finding arguments that mischaracterized a decision did not demonstrate that the Authority erred).

²⁰ Mot. at 8.

²¹ 71 FLRA at 413.

clear from the Agency's motion²² and the Union's opposition²³ 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 *AFGE*. As such, we deny the Agency's motion.

IV. Order

The Agency's motion for reconsideration is denied.

Member DuBester, concurring:

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

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.

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.

²⁴ With the award vacated, the parties should resubmit the issue to the Arbitrator, absent settlement.

²⁵ 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); *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); *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).