71 FLRA No. 156

UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 476
(Union)

0-AR-5551
(71 FLRA 720 (2020))

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ORDER DENYING
MOTION FOR RECONSIDERATION

June 9, 2020

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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 *U.S. Department of HUD* (*HUD*)[1] and stay implementation of that decision. In *HUD*, the Agency filed exceptions challenging Arbitrator Blanca E. Torres' award finding that the Agency removed the grievant without just cause and that the removal was based on retaliation. The Authority determined that it lacked jurisdiction to review the Agency's exceptions under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) because the claim advanced at arbitration related to a removal.[2]

In a motion for reconsideration (motion), the Agency argues that the Authority erred in its legal conclusions, failed to address the Agency's arguments, and that the Arbitrator's award and the Authority's decision are contrary to public policy. The Agency also requests that the Authority stay *HUD* while the Authority considers its motion. For the reasons discussed below, we find that the Agency's arguments are an attempt to relitigate the Authority's conclusions in *HUD* or otherwise fail to establish any extraordinary circumstances warranting reconsideration, and so, we deny the motion and request for a stay.

II. Background and Authority's Decision in *HUD*

The facts of this case are set forth in greater detail in *HUD*. The issues before the Arbitrator were whether the grievant was removed for just and sufficient cause and whether her removal was based on retaliation for protected Equal Employment Opportunity activity. The Arbitrator found that the record did not support just cause for the removal and that the removal was based on retaliation, and ordered reinstatement and backpay.[3] The Agency filed exceptions to the award.

In *HUD*, the Authority found that it lacked jurisdiction to review the Agency's exceptions under § 7122(a) of the Statute because the award related to a removal, which is appropriately reviewed by the Merit Systems Protection Board (MSPB) and ultimately the United States Court of Appeals for the Federal Circuit (Federal Circuit). The Authority looked to whether the claim advanced at arbitration related to a removal, and not to the arguments advanced in the Agency's exceptions, to make its determination consistent with longstanding precedent.[4] The Authority dismissed the Agency's exceptions.

The Agency filed its motion for reconsideration and request for a stay on May 1, 2020.

III. Analysis and Conclusion: We deny the motion for reconsideration and request for a stay.

The Agency asks the Authority to reconsider its decision in *HUD*.[5] 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.[6] In particular, attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary

[1] 71 FLRA 720 (2020) (Member DuBester concurring).
[2] 5 U.S.C. § 7122(a).
[3] *HUD*, 71 FLRA at 720.
[4] *Id.* at 721.
[5] 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.").
[6] *AFGE, Nat'l Veterans Affairs Council #53*, 71 FLRA 741, 742 (2020) (*Council #53*) (Member DuBester concurring); *AFGE, Local 2338*, 71 FLRA 644, 644 (2020) (*Local 2338*).

circumstances.[7] As relevant here, the Authority has held that errors in its conclusions of law *may* justify granting reconsideration.[8]

The Agency claims that the Authority legally erred in several ways when it concluded "that [Federal Labor Relations Authority (FLRA)] precedent dictates that the relevant inquiry for purposes of determining jurisdiction in this matter is whether the claim advanced at arbitration is reviewable by the MSPB or Federal Circuit."[9] First, the Agency asserts that Authority precedent is "simply not applicable" in light of the United States Court of Appeals for the District of Columbia's decision in *AFGE, AFL-CIO v. Trump* (*AFGE*),[10] which the Agency argues directed federal agencies to bring their claims regarding any aspect of the 2018 executive orders to the FLRA.[11] Next, the Agency contends that the Authority is not statutorily required to look to the claim advanced at arbitration to determine if it has jurisdiction, as it did in *HUD*, and because the Agency's exceptions do not "relate to" the grievant's removal, the Authority is not statutorily required to apply its precedent to the Agency's exceptions.[12] And finally, the Agency maintains that the MSPB and Federal Circuit cannot hear its argument regarding Executive Order 13,839 (EO 13,839)[13] because the MSPB has held that challenges to executive orders are not within its review authority and the Federal Circuit has limited jurisdiction, including over appeals from final decisions of the MSPB, and thus the FLRA is the only proper venue.[14]

The Agency raised each of these arguments, almost verbatim, in *HUD*,[15] and the Authority rejected them when it held that it lacked jurisdiction to resolve the Agency's exceptions.[16] Consequently, these arguments are an attempt to relitigate the Authority's conclusion in *HUD* and fail to establish extraordinary circumstances warranting reconsideration of that decision.[17]

Next, the Agency argues that the Authority's "failure to address" the merits of its arguments regarding EO 13,839, combined with its interpretation of *AFGE*, and its anticipated preclusion from bringing these arguments to the MSPB or Federal Circuit, were a "per se mistake of law, a due process violation, *and* a violation of the arbitrary and capricious standard set out by the [Administrative Procedures Act]."[18]

However, we do not find the Agency's combined argument so persuasive or so demonstrative of error as to warrant reconsideration of *HUD*. Contrary to the Agency's assertions, the Authority did not "ignore" the Agency's arguments, but acknowledged them and concluded that it still lacked jurisdiction over this matter because the Authority's jurisdiction does not hinge on the particular arguments a party happens to advance but upon the claim brought to adjudication below.[19] The Agency never disputes that the grievant was removed and that she contested that removal at arbitration; instead, both in *HUD* and here, the Agency reargues its defenses and reasonings for its actions all while providing no support

[7] *Local 2338*, 71 FLRA at 645; *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 71 FLRA 188, 189 (2019) (*Air Force*) (Member DuBester dissenting).
[8] *See Council #53*, 71 FLRA at 742; *Local 2338*, 71 FLRA at 644-45.
[9] Mot. for Recons. (Mot.) at 5.
[10] 929 F.3d 748, 761 (D.C. Cir. 2019) (*AFGE*) (holding that the unions' claims regarding the 2018 executive orders concerning federal labor-management relations "fall within the executive statutory scheme" and so, these claims were to be brought to the FLRA according to the "statutory scheme"). Member Abbott notes that *AFGE* never held that a sheer argument based on the applications of any one of the 2018 federal labor executive orders was the ticket to FLRA review. Instead, the court held the opposite, that claims involving the executive orders were to come to the FLRA in the normal course of business. In order words, an argument based on an executive order did not become its own source of jurisdiction, as the Agency seems to argue before us now.
[11] Mot. at 6.
[12] *Id.*
[13] Exec. Order No. 13,839, 83 Fed. Reg. 25,343 (May 25, 2018) (EO 13,839).
[14] Mot. at 7-9.
[15] *See HUD*, 71 FLRA at 720-21; Resp. to Show Cause Order at 5 (citing *AFGE* and stating "the DC Court of Appeals has directed federal agencies, such as HUD, and federal sector unions to bring their legal claims to the May 2018 EOs to the FLRA under 5 U.S.C. § 7123); *id.* at 5 ("5 U.S.C. § 7122(a) does not dictate that the Authority must look to the claim advanced by the grievant or that the Authority must consider if a removal is inextricably intertwined with the claim advanced in arbitration"); *id.* at 7 ("the MSPB and Federal Circuit do not have jurisdiction to decide the Agency's current Exceptions, which are based on the validity and applicability of EO 13839"); *id.* at 8 ("the Show Cause Order's suggestion that the FLRA does not have jurisdiction to hear the Agency's exceptions because the underlying grievance relates to the removal of an employee is not consistent with the clear order of the DC Court of Appeals in *AFGE*").
[16] *HUD*, 71 FLRA at 721-22.
[17] *Local 2338*, 71 FLRA at 645 (finding that the union's attempt to relitigate its argument did not demonstrate extraordinary circumstances warranting reconsideration of the Authority's earlier decision); *Air Force*, 71 FLRA at 189 (finding that the union's attempt to relitigate the Authority's conclusions in its earlier decision by making the same arguments did not establish reconsideration was warranted); *NAIL, Local 15*, 65 FLRA 666, 667 (2011) (denying a motion for reconsideration where the union presented the same arguments it had previously raised to the Authority).
[18] Mot. at 9 (emphasis added).
[19] *HUD*, 71 FLRA at 720-21.

for the claim that a particular argument *alone* can trigger Authority jurisdiction. Accordingly, we conclude that the Agency's arguments fail to establish any extraordinary circumstances warranting reconsideration.[20]

Finally, the Agency argues that the Arbitrator's award and the Authority's decision in *HUD* are contrary to public policy as expressed in EO 13,839.[21] However, the Agency failed to raise this argument, as it relates to the Arbitrator's award, when this case was before the Authority initially.[22] Furthermore, this argument, as it relates to the Authority's decision in *HUD*, simply restates arguments already addressed and dismissed above.

Consequently, we find that the Agency does not demonstrate that extraordinary circumstances exist to warrant reconsideration of *HUD*, and we deny the Agency's motion.[23]

The Agency also requests that the Authority stay its decision in *HUD* during the pendency of its motion for reconsideration.[24] Because we deny the Agency's motion for reconsideration, we also deny its request for a stay as moot.[25]

IV. Order

The Agency's motion for reconsideration and request for a stay is denied.

[20] *Air Force*, 71 FLRA at 189-90 (rejecting the union's argument that the Authority's earlier decision was arbitrary and capricious); *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 860, 861 (2018) (Member DuBester dissenting) (finding that the union's argument that the Authority's earlier decision was arbitrary and capricious did not establish extraordinary circumstances warranting reconsideration); *SSA, Pittsburg, Kan.*, 27 FLRA 154, 155 (1987) (denying a motion for reconsideration and rejecting the argument that a "brief denial of exceptions, based on full and careful consideration of the entire record in the case and expressly concluding that the exceptions failed to establish that the award was deficient on any of the grounds set forth in section 7122(a), constitutes a denial of due process, a failure to adequately state the grounds of the denial, or a failure to resolve the exceptions.").

[21] Mot. at 12-13. Specifically, "[t]he Agency contends that the disputed award is contrary to public policy because EO 13,839 was promulgated by the President 'to ensure the effective functioning of the executive branch' and directed Agencies to remove negotiated procedures that allow for the arbitration of decisions to remove employees for misconduct (as was attempted to do in this case)." *Id.* (citing EO 13,839 at 25,343).

[22] *Local 2338*, 71 FLRA at 645 (finding that because the union previously failed to raise arguments in its exceptions even though it could have done so, it could not do so for the first time in its motion for reconsideration).

[23] *Council #53*, 71 FLRA at 743 (denying a motion for reconsideration); *Local 2338*, 71 FLRA at 645 (same).

[24] Mot. at 2.

[25] *U.S. Dep't of VA, St. Petersburg Reg'l Benefit Office*, 71 FLRA 1, 3 (2019) (Member DuBester dissenting) (denying a motion for reconsideration and finding the request for a stay moot); *SPORT Air Traffic Controllers Org.*, 70 FLRA 345, 346 (2017) (denying a stay request); *see also* 5 C.F.R. § 2429.17 ("The filing and pendency of a motion [for reconsideration] under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority.").

Member DuBester, concurring:

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