71 FLRA No. 187

EXPORT-IMPORT
BANK OF THE UNITED STATES
(Agency)

and

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

WA-RP-17-0059
(71 FLRA 248 (2019))

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ORDER DENYING
MOTION FOR RECONSIDERATION

September 16, 2020

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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 case, the Union fails to establish that extraordinary circumstances exist to justify reconsideration of the Authority's decision in *Export-Import Bank of the United States* (*Export*).[1]

The Union petitioned the Federal Labor Relations Authority (FLRA) to clarify the bargaining-unit status of numerous Agency positions. Before FLRA Regional Director Jessica Bartlett (the RD), the parties stipulated that some of the positions at issue in the petition are not "professional" under § 7103(a)(15)(A) of the Federal Service Labor-Management Relations Statute (the Statute)[2] – meaning that those positions could be included in the bargaining unit of non-professional employees that the Union represents. As relevant here, the parties continued to dispute the bargaining-unit status of seven positions, and the RD concluded that those positions are non-professional. Accordingly, she directed that the employees occupying the seven positions, and the employees that the parties stipulated are non-professional, be included in the bargaining unit.

Subsequently, the Agency filed an application for review of the RD's decision, and, in *Export*, the Authority reversed the decision as to the seven disputed positions. Specifically, the Authority found that those positions *are* professional within the meaning of § 7103(a)(15)(A). Accordingly, it directed the RD to exclude them from the unit of nonprofessional employees. Regarding the stipulated non-professional employees, the Authority held that because they outnumbered the employees already in the unit, the RD erred by including them in the unit without an election. Thus, the Authority also directed the RD to conduct an election to determine whether the affected employees desire to be represented by the Union.

The Union has now filed the motion for reconsideration (motion) at issue here. For the reasons that follow, we conclude that the Union has not established extraordinary circumstances warranting reconsideration of *Export*. Therefore, we deny its motion.

II. Background

The facts of this dispute are fully detailed in *Export*.[3] As such, this order discusses only those aspects of the case that are pertinent to the motion.

The Union filed a petition seeking to clarify the bargaining-unit status of hundreds of employees occupying about forty different positions. In the petition, the Union alleged that the positions are non-professional and, therefore, the employees occupying the positions should be included in its bargaining unit of "nonprofessional employees . . . employed by the [Agency] in the Washington D.C. metropolitan area."[4]

After the Union filed the petition, the parties narrowed the dispute, stipulating that sixty-four employees, occupying about twenty positions, are non-professional. But, the parties continued to dispute the bargaining-unit status of seven positions: business development specialist; business initiatives specialist; senior business development specialist; business development specialist - broker relations; senior congressional analyst; senior credit review officer; and GS-14 information technology specialist.

The RD held a two-day hearing and, then, issued a decision on the petition finding that each of the seven disputed positions are non-professional. As a result, the RD directed that the employees occupying those positions – and the employees occupying the stipulated non-professional positions – be included in the unit. In doing so, the RD rejected the Agency's contention that an election was necessary given that the

[1] 71 FLRA 248 (2019) (Member DuBester dissenting).
[2] 5 U.S.C. § 7103(a)(15)(A).
[3] 71 FLRA at 248-52.
[4] *Id.* at 248 (quoting RD's Decision at 2).

ninety employees[5] proposed for inclusion outnumbered the approximately twenty employees in the existing unit.

In *Export*, the Authority held that the RD erred in finding that the seven positions are non-professional. Applying established law, the Authority concluded that the employees occupying the seven positions engaged in the performance of work that met all four of the requirements listed in § 7103(a)(15)(A) of the Statute.[6] Thus, the Authority directed the RD to exclude those employees from the unit.

As to the stipulated non-professional positions, the Authority observed that under the "majority standard," when the number of employees proposed for inclusion in a unit exceeds the number of employees in that unit, an election is necessary to ensure that the minority of employees does not dictate the representational status of the majority.[7] Because the sixty-four employees occupying the stipulated non-professional positions outnumbered the roughly twenty employees in the unit, the Authority determined that the RD erred by directing that they be included without an election. Thus, the Authority directed the RD to conduct an election to determine whether the affected employees desired to be represented by the Union.

On August 12, 2019, the Union filed this motion for reconsideration.[8]

III. Analysis and Conclusion: The Union fails to establish extraordinary circumstances warranting reconsideration of *Export.*

The Union asks the Authority to reconsider its decision in *Export for three reasons, discussed below.*[9] *Section 2429.17 of the Authority's Regulations* permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision.[10] The Authority has repeatedly recognized that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[11] As relevant here, the Authority has found that errors in its process or conclusions of law may justify granting reconsideration.[12] The Authority has also found that extraordinary circumstances exists when the moving party has not been given an opportunity to address an issue raised sua sponte by the Authority.[13] However, a party's attempt to relitigate conclusions reached by the Authority is insufficient to establish extraordinary circumstances.[14]

First, the Union claims that the Authority erred in its conclusions of law by directing an election for the approximately sixty-four employees occupying the stipulated non-professional positions.[15] Specifically, the Union alleges that there must be a question concerning representation for the Authority to direct an election, and the "sole procedure available . . . to raise a question [of]

[5] Agency's Post-Hr'g Br. at 8 (noting that, depending on the RD's conclusion, up to ninety-three employees could be added to the unit).

[6] 5 U.S.C. § 7103(a)(15)(A) (a professional employee means an employee engaged in the performance of work "(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities); (ii) requiring the consistent exercise of discretion and judgment in its performance; (iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and (iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time").

[7] *Export*, 71 FLRA at 255 (citing *Dep't of the Interior, Bureau of Land Mgmt., Sacramento, Cal.*, 53 FLRA 1417, 1422 (1998) (stating that "the representational status of a minority will not control the representational status of a majority of employees"); *Renaissance Ctr. P'ship*, 239 NLRB 1247, 1247-48 (1979) (where the number of employees a union sought to add to a certified unit exceeded the number currently in that unit, the National Labor Relations Board directed an election, noting that the majority status of the union could "no longer reasonably be presumed")).

[8] The Agency filed an opposition to the Union's motion, but it did not request leave to file that submission. As the Authority's Regulations require parties to request permission to file supplemental submissions, such as an opposition to a motion for reconsideration, and the Agency did not do so here, we do not consider the Agency's opposition. *See* 5 C.F.R. § 2429.26(a) (the "Authority . . . may in [its] discretion grant leave to file other documents as [it] deem[s] appropriate"); *see also U.S. Dep't of HUD*, 69 FLRA 60, 63 (2015) (Member Pizzella dissenting) (declining to consider opposition to motion for reconsideration where union did not request leave to file), *rev'd on other grounds*, 70 FLRA 605 (2018).

[9] Mot. at 5-6.

[10] 5 C.F.R. § 2429.17.

[11] *E.g., U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 860, 861 (2018) (Member DuBester dissenting); *AFGE, Local 2238*, 70 FLRA 184, 184 (2017) (*Local 2238*).

[12] *E.g., Library of Cong.*, 60 FLRA 939, 941 (2005).

[13] *Id.*

[14] *Id.*; *see also Local 2238*, 70 FLRA at 185 ("[A]ttempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances."); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 60 FLRA 88, 89 (2004) (same).

[15] Mot. at 7-11.

representation is a petition for an election."[16] According to the Union, a clarification petition – like the one that it filed – cannot form the basis for an election.[17]

Section 7111(b)(2) of the Statute provides, in relevant part, that if a "clarification" petition is filed with the Authority, and it concerns a matter "relating to representation," then "the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists . . . the Authority *shall* supervise or conduct an election on th[at] question."[18] By its plain terms, § 7111(b)(2) of Statute not only contradicts the Union's claim that clarification petitions cannot result in elections; that section specifically *requires* an election when a clarification petition involves a question of representation.[19] Here, such a question exists. The Agency, "[b]eginning with its first formal submission . . . , has repeatedly raised the issue of the majority principle and its application to the [Union's] clarification petition."[20] In fact, the Agency raised the issue during the hearing, stating that "under the basic majority principle," the unrepresented employees covered by the Union's clarification petition were not permitted into the existing unit without an election.[21] And the Agency maintained that argument in its post-hearing brief to the RD[22] and, again, to the Authority in *Export*.[23] Given the record evidence and the plain terms of the Statute, we reject the Union's claim that the petition does not involve a question[24] for which an election is required.[25]

Second, the Union argues that it did not have an opportunity to articulate its position regarding the Authority's application of the majority standard.[26] But, as previously stated, both before the RD and the Authority in *Export*, the Agency contended that the majority standard required an election *whenever* the number of employees proposed for inclusion outnumbered those in the existing unit, including under the circumstances of this case.[27] Thus, the Union had the opportunity, during the hearing and in its post-hearing brief to the RD, to address that issue. Moreover, the record shows that the Union *did* address the applicability of that standard before the Authority in *Export*.[28] And here, in its motion, the Union has had yet another opportunity to do so. For these reasons, we conclude that the Authority in *Export* did not raise the application of the majority standard sua sponte, and, contrary to the Union's contention, the Union had the opportunity to, and did, advance its position on that issue.[29] To the extent that the Union maintains, in its motion, that application of the majority standard is improper,[30] it is merely attempting to relitigate the Authority's conclusion in *Export*. As noted above, that does not establish extraordinary circumstances warranting reconsideration.[31]

[16] *Id.* at 7.
[17] *Id.* at 9.
[18] 5 U.S.C. § 7111(b)(2) (emphasis added).
[19] *See U.S. Dep't of the Air Force, Materiel Command, Wright-Patterson Air Force Base*, 47 FLRA 602, 612 (1993) (*Wright-Patterson*) (stating that elections are not conducted when there is an attempt to clarify the bargaining-unit status of employees with the "one exception" of "situations where the number of employees proposed for inclusion nearly equals or exceeds the number of employees in the existing unit").
[20] Agency's Post-Hr'g Br. at 7.
[21] Tr. at 13 (Agency arguing that "if the number of employees covered by this petition is greater than [twenty two] . . . which is the number of employees in the current bargaining unit, . . . that reinforces the need to have an election under the basic majority principle").
[22] Agency's Post-Hr'g Br. at 7.
[23] Application for Review (Application) at 7-9.
[24] *See Wright-Patterson*, 47 FLRA at 612 (indicating that a "question[] concerning representation" exists "where the number of employees proposed for inclusion . . . exceeds the number of employees in the existing unit").
[25] We also reject the Union's related claim that the Authority directed an election "without a hearing," as required by § 7111(b)(2). Mot. at 5. The RD held a two-day hearing, RD's Decision at 1, and, as established, a question of representation was raised. *See* Tr. at 12-13. In addition, to the extent that the Union argues that the Authority's decision in *Export* is inconsistent with *Export-Import Bank of the United States*, 70 FLRA 907 (2018) (*Import*) (Member DuBester concurring), that argument is misplaced. Mot. at 7-8. While *Import* involved the same parties and the same bargaining unit, the Authority in *Import* noted that it was not ruling on the bargaining-unit status of any "pending" "additional employees," such as the stipulated non-professional employees at issue in *Export*. *Import*, 70 FLRA at 908 n.5. Thus, the Agency's failure to demonstrate a good faith doubt as to whether the Union continued to represent a majority of the *approximately twenty employees* in the unit in *Import* has no effect on the Authority's application of the majority standard in *Export*, and vice versa.
[26] Mot. at 11-13.
[27] *See* Tr. at 13; Agency's Post-Hr'g Br. at 7; Application at 7-9.
[28] *See* Opp'n to Application at 4-7 (arguing that the "majority principle d[oes] not apply to the instant matter").
[29] *See U.S. DOL*, 70 FLRA 953, 956 (2018) (Member DuBester dissenting) (denying motion for reconsideration where record established that Authority did not raise mootness issue sua sponte in original decision, and moving party had an opportunity to address that issue prior filing its motion).
[30] Mot. at 11-13.
[31] *AFGE, Local 2338*, 71 FLRA 644, 645 (2020) (*Local 2338*) (denying motion for reconsideration where moving party was attempting to relitigate Authority's conclusion regarding its essence challenge).

Third, the Union contends that the RD followed established Authority precedent in determining that the seven position were non-professional.[32] But whether the RD followed precedent in deciding that matter was one of the issues that the Agency raised,[33] the Union contested,[34] and the Authority decided in *Export*.[35] Consequently, the Union's contention is merely an attempt to relitigate *Export*, and, for that reason, it does not establish that reconsideration is warranted.[36]

Based on the above, we deny the Union's motion.

IV. Decision

We deny the Union's motion for reconsideration.

[32] Mot. at 14-16.
[33] Application at 7-9, 25-31.
[34] Opp'n to Application at 7-20.
[35] *Export*, 71 FLRA at 251-56.
[36] *See Local 2338*, 71 FLRA at 645.

Member DuBester, dissenting:

For the reasons set forth in my dissenting opinion in the underlying case,[1] I agree with the Union that the majority erred by disregarding the Regional Director's (RD) extensive factual findings as applied to law showing that the seven positions at issue are not excluded from the bargaining unit as professional employees. I also believe that the Union has established that the majority erred by directing the RD to conduct an election.

The majority's denial of the Union's motion for reconsideration regarding the directed election merely confirms that its original decision was contrary to the Federal Service Labor-Management Relations Statute (Statute). The majority concludes that § 7111(b)(2) of the Statute, "[b]y its plain terms . . . *requires*" that the RD conduct an election regarding the Union's unit clarification petition.[2] However, as the majority itself notes, this provision only directs that an election be held where a "question of representation exists."[3] And as I noted in my original dissent, that condition was not met by the Union's clarification petition, the purpose of which is to "clarify, consistent with the parties' intent, inclusions or exclusions from a unit *after the basic question of representation has been resolved*."[4]

As the Union's motion explains, the Statute provides agencies with a clear mechanism for raising a question concerning representation if they harbor a good faith doubt that a labor organization represents a majority of the employees in a unit. Indeed, as the Union also observes, the Agency availed itself of that very mechanism by filing a petition alleging good faith doubt regarding the bargaining unit at issue in this case.[5] I agree with the Union's argument in its motion that the majority's decision essentially allows the Agency to "bypass having to show a good faith doubt and instead undertake wholesale, unjustified [and] unilateral exclusions from the unit to force an election."[6] And I strongly disagree with the majority that § 7111(b)(2) allows for – much less *requires* – such an outcome.

[1] *Export-Import Bank of the U.S.*, 71 FLRA 248, 257-59 (2019) (Dissenting Opinion of Member DuBester) (*Export-Import*).
[2] Majority at 4.
[3] *Id.* (quoting 5 U.S.C. § 7111(b)(2)).
[4] *Export-Import*, 71 FLRA at 259 (Dissenting Opinion of Member DuBester) (quoting *Fed. Trade Comm'n*, 35 FLRA 576, 583 (1990) (emphasis added)).
[5] Mot. at 7-8. Upon receiving the Agency's petition, the RD afforded the parties a hearing on that question and dismissed the Agency's petition after finding that the Agency failed to demonstrate a good faith doubt. We subsequently affirmed the RD's decision in *Export-Import Bank of the U.S.*, 70 FLRA 907 (2018) (Member DuBester concurring).
[6] Mot. at 9.

I therefore believe that the Union's motion sufficiently raises the extraordinary circumstances necessary for us to reconsider our original decision in this case. Accordingly, I would grant the Union's motion.