

**72 FLRA No. 62**

UNITED STATES  
DEPARTMENT OF THE AIR FORCE  
WARNER ROBINS AIR LOGISTICS CENTER  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 987  
(Union)

AR-5434  
(71 FLRA 758 (2020))

ORDER DENYING  
MOTION FOR RECONSIDERATION

June 1, 2021

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

Decision by Member Abbott for the Authority

**I. Statement of the Case**

The Union requests that we reconsider our decision in *U.S. Department of the Air Force, Warner Robins Air Logistics Center (Warner Robins)*.<sup>1</sup> That case involved an equal employment opportunity (EEO) complaint and a grievance stemming from discipline based on information gained during the investigation of the EEO complaint. The Authority found that the grievance was barred under § 7121(d) because the grievance concerned the same matter as the earlier-filed EEO complaint.

In a motion for reconsideration (motion), the Union argues that the Authority erred in its factual findings and legal conclusions. Because the Union's arguments fail to establish that the Authority erred, those arguments do not provide a basis for reconsideration. Accordingly, we deny the Union's motion.

**II. Background**

As relevant here, the grievant sent a memorandum to the Agency EEO specialist on February

23, 2016, alleging that her supervisor was creating a hostile work environment by stalking and harassing her. The grievant filed a formal EEO complaint with the Equal Employment Opportunity Commission sometime before November 2016. On June 22, 2017, the Agency issued a notice of proposed suspension to the grievant for lack of candor based on information obtained during the EEO investigation. The deciding official determined that the grievant lacked candor when "accusing [her supervisor] of stalking her, harassing her and discriminating against her because [the investigator] could find no corroboration for grievant's allegations."<sup>2</sup> After returning from the suspension, the grievant filed the instant grievance on October 4, 2017, alleging that the Agency did not have just and sufficient cause for the suspension because it did not prove that she knew the statements to be false, the discipline was untimely, and the discipline was in retaliation for engaging in EEO activity.

The Arbitrator found that the Agency failed to prove that the grievant lacked candor when making allegations about her supervisor, that the Agency failed to comply with the time requirements for effecting disciplinary action set forth by the parties' agreement, and that the suspension constituted unlawful reprisal for the grievant's EEO complaint. The Agency filed exceptions to the award.

In *Warner Robins*, the Authority found that the grievance was barred by the earlier-filed EEO complaint pursuant to § 7121(d).<sup>3</sup> At the start of its analysis, the Authority emphasized that election-of-forum provisions "were intended to prevent unnecessary or redundant filings on related, similar, or same matters."<sup>4</sup> The Authority then found the EEO complaint and the grievance involved the same matter because both involved the grievant's allegations of stalking and harassment, and thus, would require the factfinders in both to address the same underlying allegations of discriminatory harassment.<sup>5</sup> As such, the Authority vacated the award.

Subsequently, the Union filed this motion on June 1, 2020. On June 16, 2020, the Authority's Office of Case Intake and Publication issued an order directing

<sup>2</sup> Award at 7.

<sup>3</sup> 71 FLRA at 759; *see also* 5 U.S.C. § 7121(d) ("[a]n aggrieved employee affected by a prohibited personnel practice . . . may raise the matter under a statutory procedure or the negotiated grievance procedure, but not both").

<sup>4</sup> *Id.* (citing *SSA, Off. of Hearing Operations*, 71 FLRA 123, 124 (2019) (then-Member DuBester dissenting)).

<sup>5</sup> *Id.* at 759-60.

<sup>1</sup> 71 FLRA 758 (2020) (then-Member DuBester dissenting).

the Union to correct a procedural deficiency in its filing.<sup>6</sup> On the same day, the Union corrected the procedural deficiency. The Agency did not file an opposition to the Union's motion.

### III. Preliminary Matter: The Authority is required to address jurisdictional issues.

The Union takes issue with the Authority considering jurisdiction *sua sponte*, arguing that it “had no way to fully brief and/or submit supporting documenting evidence supporting its legal and factual positions in this matter.”<sup>7</sup> As we noted in *Warner Robins*, an award cannot stand if the arbitrator lacked jurisdiction to resolve the grievance in the first place.<sup>8</sup> Further, a “statutory exclusion appl[ies] irrespective of whether a party makes such a claim before the Authority.”<sup>9</sup> Therefore, the Authority is required to address jurisdiction issues – even if they are not raised by either party – prior to reaching the merits of an appeal. Moreover, the Union has had the opportunity to present its § 7121(d) arguments in its motion for reconsideration, which we address below.

### IV. Analysis and Conclusion: We deny the motion for reconsideration.

The Union asks the Authority to reconsider its decision in *Warner Robins*. Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision.<sup>10</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>11</sup> As relevant here, the Authority has held that errors in its factual findings or legal conclusions may justify granting reconsideration.<sup>12</sup> However, mere disagreement with or attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.<sup>13</sup>

First, the Union argues that the Authority erred in its legal conclusions. Specifically, the Union argues that the Authority erred in applying § 7121(d) because the grievance and the EEO complaint do not involve the same matter.<sup>14</sup> Despite the Union's general assertion, it fails to explain how the Authority erred in applying case precedent to find the grievance was barred under § 7121(d).<sup>15</sup> In particular, the Union fails to address the judicial precedent that *Warner Robins* cited for the proposition that discriminatory harassment is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(xii).<sup>16</sup> Further, the grievant's EEO counselor's report confirms that, like the

<sup>11</sup> *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 71 FLRA 188, 189 (2019) (then-Member DuBester dissenting) (citing *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 860, 861 (2018) (then-Member DuBester dissenting)); *SPORT Air Traffic Controllers Org.*, 71 FLRA 25, 26 (2019) (then-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 Surv., Reston, Va.*, 56 FLRA 279, 279 (2000).

<sup>12</sup> *AFGE, Loc. 2338*, 71 FLRA 723, 723 (2020) (*Loc. 2338*) (Member Abbott concurring) (citing *SPORT Air Traffic Controllers Org.*, 70 FLRA 345, 345 (2017) (*SPORT 2017*)); *Indep. Union of Pension Emps. for Democracy & Just.*, 71 FLRA 60, 61 (2019) (*IUPEDJ*) (then-Member DuBester concurring) (citing *NTEU*, 66 FLRA 1030, 1031 (2012)).

<sup>13</sup> *U.S. Dep't of VA, John J. Pershing Veterans Admin. Med. Ctr.*, 72 FLRA 191, 192 (2021) (Chairman DuBester concurring) (citations omitted); *Int'l Brotherhood of Elec. Workers, Loc. 1002*, 71 FLRA 930, 931 (2020) (finding attempts to relitigate conclusions reached by the Authority are insufficient to demonstrate extraordinary circumstances); *Loc. 2338*, 71 FLRA at 723 (citing *SPORT 2017*, 70 FLRA at 345) (same); *IUPEDJ*, 71 FLRA at 61 (same); *U.S. Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.*, 58 FLRA 169, 169 (2002) (citing *U.S. DOD, Def. Logistics Agency, Def. Dist. Reg. W., Stockton, Cal.*, 48 FLRA 543, 545 (1993)) (finding that mere disagreement with the conclusion reached by the Authority is insufficient to establish extraordinary circumstances).

<sup>14</sup> Mot. at 2-3 (arguing that the Authority's conclusion goes against the “precedential decisions cited to in the present case” because the grievance and the EEO complaint do not involve the same personnel action).

<sup>15</sup> See generally *id.*

<sup>16</sup> *Warner Robins*, 71 FLRA at 759 n.13 (citing *Leber v. Buzbee-Stiles*, No. 19-CV-412-JPG-GCS, 2019 WL 6173815, at \*1 (S.D. Ill. Nov. 20, 2019); *Dekeyser v. Zimmermann*, No. 16-CV-422-WMC, 2017 WL 3484963, at \*5 (W.D. Wis. Aug. 14, 2017)).

<sup>6</sup> Procedural Deficiency Order at 1 (“The Union's ‘Certificate of Service’ fails to show that the Union served the Agency's representative of record . . . with its motion.”).

<sup>7</sup> Mot. at 1.

<sup>8</sup> 71 FLRA at 759 (citing *SSA*, 71 FLRA 205, 205-06 (2019) (Member Abbot concurring; then-Member DuBester dissenting)).

<sup>9</sup> *Id.* at 759 n.8 (quoting *U.S. Dep't of HUD*, 70 FLRA 605, 607 (2018) (then-Member DuBester dissenting) (internal quotation marks omitted)).

<sup>10</sup> 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.”).

grievance, the EEO complaint concerned discriminatory harassment.<sup>17</sup> Therefore, it is clear that the Union merely disagrees with the Authority's legal conclusion.<sup>18</sup> As such, the argument does not establish extraordinary circumstances.

The Union also argues that the Authority erred in its factual findings because the grievance and the EEO complaint "involved very different personnel actions, were separated in time by [approximately] one and a half years, and were taken by different Agency management officials."<sup>19</sup> However, the Union does not contest any of the facts relied on in *Warner Robins*, but instead points to slight differences between the grievance and the EEO complaint in an attempt to get around the § 7121(d) bar.<sup>20</sup> It is clear the Union's "factual findings" argument is mere disagreement with the Authority's conclusion that the grievance and the EEO complaint involve the same matter.<sup>21</sup> Therefore, the argument does not establish extraordinary circumstances.<sup>22</sup>

## V. Order

The Union's motion for reconsideration is denied.

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<sup>17</sup> Compare Mot., Attach. 1, EEO Counselor's Report at 2-3 (showing Claim 1 concerns discriminatory harassment), 3-4 (showing Claims 2 and 3 concern discriminatory harassment), 4 (showing Claim 4 concerns discriminatory harassment), with Mot., Attach. 2, Suspension Proposal at 1 (showing suspension arose from lack of candor in grievant's statements supporting EEO complaint about discriminatory harassment).

<sup>18</sup> *Warner Robins*, 71 FLRA at 759 ("[D]iscriminatory harassment is a 'personnel action' for purposes of applying § 7121(d) . . . ." (citing 5 U.S.C. § 2302(a)(2)(A)(xii))); *id.* at 760 ("[G]rievance . . . was barred by an earlier-filed EEO complaint . . . because they involved nearly identical facts, or matters." (citing *U.S. Dep't of HUD*, 42 FLRA 813, 817-18 (1991))); *id.* at 760 n.17 ("finding that the term 'matter' in 5 U.S.C. § 7121(d) refers to the 'factual basis of the employee's adverse action'" (citing *Heimrich v. U.S. Dep't of the Army*, 947 F.3d 574, 580 (9th Cir. 2020))).

<sup>19</sup> Mot. at 4.

<sup>20</sup> *Id.* at 3-4 (arguing that the EEO complaint involved different management officials than the grievance); *id.* (arguing that the EEO complaint occurred approximately seventeen months before the grievance). *But see id.* at 4 (admitting that the "allegations of discrimination were factually relevant to both [the] EEO complaint and [the] grievance").

<sup>21</sup> *Warner Robins*, 71 FLRA at 759-60.

<sup>22</sup> The Union also takes issue with a personal footnote by Member Abbott. Mot. at 4. However, personal footnotes are like separate opinions and not part of the majority decision. Therefore, personal footnotes are not subject to motions for reconsideration.

**Chairman DuBester, dissenting:**

As I noted in my dissenting opinion in *U.S. Department of the Air Force, Warner Robins Air Logistics Center (Warner Robins)*<sup>1</sup> – the decision for which the Union seeks reconsideration – the majority vacated the Arbitrator’s award on grounds that were not raised by either party to the dispute. And even though the Authority may consider jurisdictional defects *sua sponte*, the majority failed to provide the Union with the opportunity to respond to its jurisdictional concerns through a show-cause order.

Under these circumstances, one might expect the majority to take this opportunity to carefully re-examine its flawed analysis in *Warner Robins*. Instead, it casually dismisses the Union’s arguments on equally defective grounds. Specifically, the majority rejects the Union’s assertion that the grievance and the earlier-filed equal employment opportunity (EEO) complaint did not involve the same “matter” under § 7121(d) because the Union “merely disagrees with the Authority’s legal conclusion,” and because the Union only “points to slight differences between the grievance and the EEO complaint in an attempt to get around the § 7121(d) bar.”<sup>2</sup>

But the Union thoroughly details in its motion how the grievance and the EEO complaint involved entirely separate matters. And as I explained in my dissenting opinion, this should have been “the end of the analysis.”<sup>3</sup> Accordingly, I would grant the Union’s motion for reconsideration, vacate *Warner Robins*, and address the merits of the Agency’s exceptions to the Arbitrator’s award.

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<sup>1</sup> 71 FLRA 758, 761-62 (2020) (then-Member DuBester dissenting).

<sup>2</sup> Majority at 4.

<sup>3</sup> *Warner Robins*, 71 FLRA at 761 (Dissenting Opinion of then-Member DuBester).