

**72 FLRA No. 79**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
JOHN J. PERSHING VA MEDICAL CENTER  
POPLAR BLUFF, MISSOURI  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2338  
(Union)

0-AR-5622  
(72 FLRA 200 (2020))

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ORDER DENYING  
MOTION FOR RECONSIDERATION

July 9, 2021

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

**I. Statement of the Case**

The Union requests that we reconsider our decision in *U.S. Department of VA, John J. Pershing VA Medical Center, Poplar Bluff, Missouri (VA)*.<sup>1</sup> In that case, we granted the Agency's exception contesting the Arbitrator's jurisdiction to resolve a grievance challenging a probationary employee's termination. The Authority held that because the grievance concerned the termination of a probationary employee, which is excluded from the scope of the negotiated grievance procedure, the Arbitrator did not have jurisdiction to resolve the grievance.<sup>2</sup> Accordingly, the Authority set aside the award.

In its motion for reconsideration (motion), the Union now argues that the Authority erred in reaching its decision. The Union's motion raises for the first time an issue that could have been previously raised, but was not, and also raises the same arguments that the Authority considered in *VA*. Because the Union does not establish extraordinary circumstances warranting reconsideration, we deny the motion.

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

The facts, summarized here, are set forth in greater detail in *VA*.<sup>3</sup> As relevant here, after the Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement and law by failing to protect the grievant from racial harassment, the Agency terminated the grievant during her probationary period for being absent without requesting leave.

In his award, the Arbitrator found that the Agency violated the parties' agreement and law by creating a hostile work environment that caused the grievant to be absent from work. Because the grievant's absence was the reason underlying her removal, he found that the Agency did not have just cause to terminate her. As a remedy, the Arbitrator ordered the Agency to reinstate the grievant. The Agency filed exceptions to the award, arguing that it was contrary to law because the Arbitrator did not have jurisdiction over a probationary employee's termination.<sup>4</sup>

In *VA*, the Authority granted the Agency's contrary-to-law exception. Specifically, the Authority found that the Arbitrator lacked jurisdiction over the termination of a probationary employee, even where the grievance alleged that the Agency based its decision on discrimination.

On May 12, 2021, the Union filed a motion for reconsideration of *VA*.

**III. Analysis and Conclusion: We deny the Union's motion for reconsideration.**

The Union asks the Authority to reconsider its decision in *VA*. Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to move for reconsideration of an Authority decision.<sup>5</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>6</sup> Errors in the Authority's remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.<sup>7</sup> However, attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary

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<sup>3</sup> *Id.*

<sup>4</sup> In *VA*, the Union filed a cross-exception to the award, but because the Union's exception challenged the award's remedy, and the Authority dismissed the award because the Arbitrator lacked jurisdiction, the Authority found it unnecessary to address the Union's exception. *Id.* at 200 n.3.

<sup>5</sup> 5 C.F.R. § 2429.17.

<sup>6</sup> *AFGE, Loc. 2338*, 71 FLRA 644, 644 (2020) (*Local 2338*).

<sup>7</sup> *SPORT Air Traffic Controllers Org.*, 70 FLRA 345, 345 (2017).

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<sup>1</sup> 72 FLRA 200 (2021) (Member Abbott concurring).

<sup>2</sup> *Id.*

circumstances.<sup>8</sup> Additionally, the Authority has refused to grant reconsideration of issues that could have been previously raised, but were not, and are raised for the first time on a motion for reconsideration.<sup>9</sup>

The Union argues that the Authority “exceeded its authority” by concluding that the Arbitrator lacked jurisdiction to resolve the grievance.<sup>10</sup> To support this argument, the Union asserts that the grievant was terminated beyond her one-year probationary period, which it argues cannot be extended under 5 C.F.R. § 315.802(a).<sup>11</sup> But the Union did not previously raise this argument in VA, even though it had the opportunity to do so.<sup>12</sup> Consequently, the Union cannot raise this argument now.<sup>13</sup>

The Union also reiterates the arguments that it made in VA that the Agency discriminated against the grievant and caused her work-related medical condition to worsen.<sup>14</sup> The Authority rejected these arguments when it held that the Arbitrator lacked jurisdiction to resolve the grievance, even where the grievance alleged discrimination claims.<sup>15</sup> The Union’s attempt to relitigate these arguments fails to demonstrate that the Authority erred.<sup>16</sup>

Finally, the Union argues that the Authority erred “when it stated [that] the [U]nion could only file a complaint of discrimination through the Office [of] Resolution Management.”<sup>17</sup> However, the Authority did not make this finding in VA, nor has the Union otherwise supported or explained its assertion. Therefore, the Union’s argument does not establish that the Authority erred in its factual findings.<sup>18</sup>

Accordingly, we find that the Union does not demonstrate that extraordinary circumstances exist to warrant granting reconsideration of VA and we deny the Union’s motion.

#### IV. Decision

We deny the Union’s motion for reconsideration.

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<sup>8</sup> *Local 2338*, 71 FLRA at 645.

<sup>9</sup> *Id.*

<sup>10</sup> Mot. at 6; *see id.* at 7.

<sup>11</sup> *Id.* at 7; *see id.* at 3-4.

<sup>12</sup> Opp’n Form at 4 (arguing that “[t]erminating an [e]mployee based on racial discrimination is not permissible during a probationary period”); *see id.* at 5; *see also* Award at 5 (“[g]rievant was employed as a probationary” employee).

<sup>13</sup> *Local 2338*, 71 FLRA at 645.

<sup>14</sup> Mot. at 7; *see* Exceptions Form at 6; *see* Opp’n Form at 4-8; *see also* Opp’n, Attach. 1, Union’s Post-Hr’g Br. at 38.

<sup>15</sup> VA, 72 FLRA at 201.

<sup>16</sup> *Local 2338*, 71 FLRA at 645 (finding that union’s attempt to relitigate its argument did not demonstrate extraordinary circumstances warranting reconsideration of Authority’s earlier decision).

<sup>17</sup> Mot. at 6.

<sup>18</sup> *Local 2338*, 71 FLRA at 645 (arguments that Authority made finding that it did not make do not establish extraordinary circumstances warranting reconsideration).