

72 FLRA No. 93

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
KANSAS CITY, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 906
(Union)

0-AR-5512
(72 FLRA 243 (2021))

ORDER DENYING
MOTION FOR RECONSIDERATION

September 27, 2021

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

I. Statement of the Case

The Union requests that we reconsider the Authority’s decision in *U.S. Department of VA, Medical Center, Kansas City, Missouri (VA, Kansas City)*.¹ The case arose when the Agency stopped participating in joint labor-management meetings (joint meetings) in order to comply with Executive Order No. 13,812 (the rescission EO).² Arbitrator Danielle L. Carne found that the Agency’s actions violated the parties’ master collective-bargaining agreement, along with an incorporated memorandum of understanding (MOU). In *VA, Kansas City*, the Authority determined that the Arbitrator’s award was deficient on several grounds and vacated it.

In its motion for reconsideration (motion), the Union attempts to relitigate the Authority’s conclusions in *VA, Kansas City*, misconstrues the Authority’s findings, and fails to address all the bases on which the Authority relied to vacate the award. Therefore, we deny the Union’s motion as failing to establish extraordinary

¹ 72 FLRA 243 (2021) (Chairman DuBester dissenting).
² Revocation of Executive Order Creating Labor-Management Forums, 82 Fed. Reg. 46,367 (Sept. 29, 2017).

circumstances warranting reconsideration of *VA, Kansas City*.

II. Background and Authority’s Decision in VA, Kansas City

The circumstances of this dispute are set forth in greater detail in *VA, Kansas City*.³ As relevant here, the Office of Personnel Management (OPM) provided guidance on implementing the September 2017 rescission EO,⁴ which rescinded Executive Order No. 13,522 (the forum EO).⁵ The forum EO had required agencies to establish labor-management forums. OPM’s guidance provided that agencies may be able to declare provisions enacting the forum EO unenforceable.

While the forum EO was in effect, the parties agreed to joint meetings in an MOU that was incorporated into Article 3 of their master agreement (Article 3). The Agency stopped participating in the meetings in July 2018, and, as a result, the Union filed the grievance at issue here.

The Arbitrator determined that the Agency violated Article 3 by discontinuing participation in the joint meetings

In *VA, Kansas City*, we determined that the award failed to draw its essence from the parties’ agreements and the Arbitrator erred by concluding that the Agency could not nullify the joint meeting provisions in Article 3 and the MOU.

On May 18, 2021, a week after the Authority issued *VA, Kansas City*, OPM issued updated guidance on the rescission EO (updated guidance).⁶ The Union filed its motion on May 25, 2021.⁷

³ See 72 FLRA at 243-44.
⁴ OPM, “Guidance for Implementation of Executive Order 13812” (2017), available at <https://www.chcoc.gov/content/guidance-implementation-executive-order-13812>.
⁵ Creating Labor-Management Forums to Improve Delivery of Government Services, 74 Fed. Reg. 66,203 (Dec. 9, 2009).
⁶ OPM, “Guidance on Labor-Management Relations in the Executive Branch” (2021), available at <https://www.chcoc.gov/content/guidance-labor-management-relations-executive-branch>.
⁷ The Agency submitted a response to the Union’s motion on June 1, 2021. Although the Authority’s Regulations do not provide for responses to motions for reconsideration, a party may request leave to file additional documents. 5 C.F.R. § 2429.26. As the Agency did not request leave to do so here, we have not considered its response. See *U.S. DHS, U.S. CBP*, 68 FLRA 109, 110 (2014) (declining to consider response that party did not request leave to file); cf. *U.S. Dep’t of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 353 (2005) (granting request to file response to motion for reconsideration).

III. Analysis and Conclusion: The Union has failed to establish extraordinary circumstances warranting reconsideration of VA, Kansas City.

The Union asks the Authority to reconsider its decision in *VA, Kansas City*.⁸ Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision.⁹ A party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.¹⁰ As relevant here, the Authority has held that errors in its legal conclusions, as well as the impact of an intervening law or court decision, may justify granting reconsideration.¹¹ However attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.¹²

The Union alleges that we erred by failing to defer to the Arbitrator's finding that Article 3 and the MOU were not intended to implement the forum EO.¹³ We considered and rejected this argument in *VA, Kansas City*.¹⁴ Therefore, the Union fails to establish extraordinary circumstances that warrant reconsideration.¹⁵

The Union also argues, contrary to the findings in *VA, Kansas City*, that the rescission EO and OPM guidance do not "authoriz[e] agencies to abrogate negotiated agreements."¹⁶ We reject this argument for two reasons. First, we already addressed and rejected this issue in *VA, Kansas City*,¹⁷ and thus the argument is simply an attempt to relitigate the same issue.¹⁸ Second,

insofar as the Union argues that OPM's guidance did not "mandate" that agencies declare forum provisions unenforceable,¹⁹ our decision, in *VA, Kansas City* made no such determination.²⁰ Consequently, these arguments fail to establish extraordinary circumstances that warrant reconsideration.

The Union argues that OPM's updated guidance is a change in law that "affect[s] dispositive issues in [this] case."²¹ Even if we assume that the updated guidance could be applied retroactively,²² this argument fails to address the other bases upon which we based our decision: the Agency could not have unlawfully abrogated Article 3 because Article 3 contained "suggestions, not prescriptions";²³ and, to the extent the rescission EO prevented agencies from rescinding *existing* agreements, the agreement under which the Agency discontinued participation in the joint meetings did not exist when the rescission EO was issued.²⁴ Accordingly, we find that the Union does not establish extraordinary circumstances sufficient to warrant reconsideration of *VA, Kansas City*.²⁵

IV. Decision

We deny the Union's motion for reconsideration.

⁸ Mot. at 2.

⁹ 5 C.F.R. § 2429.17.

¹⁰ See *AFGE, Nat'l VA Council #53*, 71 FLRA 741, 742 & n.9 (2020) (then-Member DuBester concurring).

¹¹ *U.S. Small Bus. Admin.*, 70 FLRA 988, 989 n.14 (2018) (then-Member DuBester dissenting).

¹² *Int'l Brotherhood of Elec. Workers, Loc. 1002*, 71 FLRA 930, 931 (2020) (*IBEW*).

¹³ Mot. at 3-4.

¹⁴ *VA, Kansas City*, 72 FLRA at 245 (finding that Arbitrator had disregarded "critical elements of the forum EO" contained in Article 3 and the MOU).

¹⁵ See *IBEW*, 71 FLRA at 931 (finding attempts to relitigate conclusions reached by the Authority insufficient to demonstrate extraordinary circumstances).

¹⁶ Mot. at 3.

¹⁷ *VA, Kansas City*, 72 FLRA at 246-47 (noting that (1) the Agency "could not have abrogated the obligations of Article 3 . . . because there were none;" and (2) the rescission EO's prohibition on abrogation applied only to agreements in effect at its issuance, and the parties' automatically renewed contract was not).

¹⁸ See *IBEW*, 71 FLRA at 931 (finding previously rejected arguments did not warrant reconsideration).

¹⁹ Mot. at 3.

²⁰ See *VA, Kansas City*, 72 FLRA at 246 (finding that Agency was "permitted" to declare certain provisions unenforceable under the OPM guidance); see also *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 69 FLRA 256, 260 (2016) (finding no extraordinary circumstances to warrant reconsideration where party's arguments "reflect[ed] a misunderstanding" of the Authority's holding).

²¹ Mot. at 5-6.

²² See *Dep't of Transp., FAA, Little Rock, Ark.*, 51 FLRA 216, 225-26 (1995) (finding changed OPM guidance did not apply retroactively to actions taken under earlier guidance).

²³ *VA, Kansas City*, 72 FLRA at 246-47 & n.52 (quoting *Exceptions, Joint Ex. 1, Collective-Bargaining Agreement Art. 3, § 1* at 9).

²⁴ *Id.* at 247.

²⁵ See *U.S. Dep't of the Air Force, Albrook Air Force Base, Pan.*, 39 FLRA 629, 631-32 (1991) (in reconsideration case, noting existence of "separate and independent basis" supporting Authority order).

Chairman DuBester, dissenting:

For the reasons set forth in my dissent to the majority's decision in the underlying case,^{*} I continue to believe that the majority erred by concluding that the Agency was permitted by Executive Order 13,812 to declare unenforceable Article 3 of the parties' collective bargaining agreement and the parties' memorandum of understanding. Accordingly, I believe the Union has established extraordinary circumstances that warrant the granting of its motion for reconsideration.

^{*} *U.S. Dep't of VA, Med. Ctr., Kan. City, Mo.*, 72 FLRA 243, 248-49 (2021) (Dissenting Opinion of Chairman DuBester).