

72 FLRA No. 94

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5451
(72 FLRA 308 (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 our decision in *U.S. Department of the Treasury, IRS (IRS)*.¹ In that case, the Authority held that the Union's grievance did not constitute a "grievance" within the meaning of § 7103(a)(9)(C) of the Federal Service Labor-Management Relations Statute (the Statute).² Accordingly, the Authority set aside the award.

As further discussed below, we find that the Union's arguments in its motion for reconsideration (motion) are attempts to relitigate conclusions reached in *IRS*. Therefore, we deny the Union's motion as failing to establish extraordinary circumstances warranting reconsideration.

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

The facts, summarized here, are set forth in greater detail in *U.S. Department of the Treasury, IRS*,³ and *IRS*.⁴

As relevant here, the Union filed a grievance alleging that the Agency failed to comply with a 2014 award by withholding taxes from retroactive transit-subsidy payments. The Arbitrator stated that the "fundamental question" before him was whether the transit-subsidy payments were "taxable."⁵ The Arbitrator concluded that the payments were taxable and directed the Agency to reimburse the withheld taxes to employees. The Agency filed exceptions to the award, arguing the Arbitrator did not have jurisdiction to determine whether the retroactive transit-subsidy payments were taxable.

In *IRS*, the Authority determined that the award was contrary to law because the Arbitrator lacked jurisdiction over the Union's grievance.⁶ Specifically, the Authority concluded that the grievance required the Arbitrator to analyze § 132(f) of the Internal Revenue Code (Tax Code)⁷ to determine the taxability of the transit-subsidy payments. The Authority found that § 132(f) of the Tax Code does not affect working conditions, in part because whether transit-subsidy payments are taxed has no effect on the "circumstances or state of affairs attendant to [the employees'] performance of [their] job[s]."⁸ As such, the Authority concluded that the Union's grievance was not a "grievance" within the meaning of § 7103(a)(9)(C) of the Statute.⁹

On June 14, 2021, the Union filed this motion. On July 8, 2021, the Agency requested leave to file an opposition under § 2429.26 of the Authority's Regulations.¹⁰

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

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to move for reconsideration of an Authority decision.¹¹ 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.¹² Errors in the

⁵ *Id.* at 309.

⁶ *Id.* at 310-12.

⁷ 26 U.S.C. § 132(f).

⁸ *IRS*, 72 FLRA at 311 n.49 (quoting *U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 7, 10 (2021) (then-Member DuBester dissenting in part)).

⁹ 5 U.S.C. § 7103(a)(9)(C); *IRS*, 72 FLRA at 310-12.

¹⁰ 5 C.F.R. § 2429.26. As an initial procedural matter, we grant the Agency's request to file an opposition, and we consider the Agency's opposition. See *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 353 (2005) ("Authority practice is to grant requests to file oppositions to motions for reconsideration . . .").

¹¹ 5 C.F.R. § 2429.17.

¹² *AFGE, Loc. 2338*, 71 FLRA 644, 644 (2020) (*Loc. 2338*).

¹ 72 FLRA 308 (2021) (Member Abbott concurring; Chairman DuBester dissenting).

² 5 U.S.C. § 7103(a)(9)(C); *IRS*, 72 FLRA at 310-12.

³ 68 FLRA 810 (2015).

⁴ 72 FLRA at 308-15.

Authority's remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.¹³ However, attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.¹⁴ 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.¹⁵

In the motion, the Union argues that (1) the grievance alleged the Agency violated laws that affect working conditions;¹⁶ (2) § 132(f) of the Tax Code affects working conditions;¹⁷ (3) the Authority's decision is contrary to the Statute's purpose;¹⁸ (4) the statutory scheme required the Union to bring its unfair-labor-practice (ULP) claims through the grievance procedure;¹⁹ (5) *IRS* is contrary to Authority precedent;²⁰ and (6) the Authority failed to defer to the Arbitrator's representation regarding the scope of his evaluation of the Tax Code.²¹

We find that the Union's arguments attempt to relitigate the Authority's determination that the Union's grievance did not constitute a "grievance" under § 7103(a)(9)(C) of the Statute.²² Additionally, we determine that the Union raised issues that the Union could have,²³ but did not, advance in *IRS* in response to the Agency's exceptions alleging the grievance was outside the Authority's jurisdiction.²⁴ Accordingly, we conclude that the Union does not demonstrate that extraordinary circumstances exist to warrant

reconsideration of *IRS*, and we deny the Union's motion.²⁵

IV. Decision

We deny the motion.

¹³ *Id.* at 644-45.

¹⁴ *Id.* at 645.

¹⁵ *Id.*

¹⁶ Mot. at 4-6 (noting that the grievance alleged violations of the Back Pay Act, 5 U.S.C. § 5596; 5 U.S.C. §§ 7116(a)(1) and (8); and 5 U.S.C. § 7122(b)).

¹⁷ *Id.* at 6-8.

¹⁸ *Id.* at 8-9.

¹⁹ *Id.* at 10-13.

²⁰ *Id.* at 13-16.

²¹ *Id.* at 16-17.

²² See *IRS*, 72 FLRA at 310-12.

²³ See Mot. at 6-8 (arguing that § 132(f) affects working conditions of employees); *id.* at 10-13 (contending that the Union had to bring its ULP claim through the statutory scheme); *id.* at 13-16 (alleging that *IRS* is contrary to FLRA precedent).

²⁴ See Exceptions Br. at 11 (arguing that § 132(f) does not affect working conditions of employees); *id.* (alleging that the proper forum for challenging the Agency's tax determinations are the U.S. Tax Courts, the U.S. district courts, or the U.S. Court of Federal Claims); *id.* at 12 (noting that "Congress could not have contemplated, let alone intended, that all or any part of American law would be definitely interpreted by the FLRA on review" (quoting *U.S. Dep't of Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 689-90 (D.C. Cir. 1994))).

²⁵ See *U.S. Dep't of VA, John J. Pershing, VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 419, 420 (2021) (refusing to grant reconsideration of an issue that could have been raised, but was not, and was raised for the first time on a motion for reconsideration); *id.* (finding that the union's attempt to relitigate its argument did not demonstrate extraordinary circumstances warranting reconsideration of the Authority's earlier decision); *Loc. 2338*, 71 FLRA at 645 (denying the union's motion for reconsideration because the union did not raise arguments to the Authority when it had the opportunity to do so).

Chairman DuBester, dissenting:

For the reasons set forth in my dissent to the majority's decision in the underlying case,¹ I continue to believe that the majority erred by concluding that the Arbitrator did not have jurisdiction over the parties' dispute. The Union's grievance, which alleged that the Agency committed an unfair labor practice by failing to comply with earlier arbitration awards, falls squarely within the definition of a "grievance" in § 7103(a)(9)(C) of the Federal Service Labor-Management Relations Statute.² And the Arbitrator was not divested of jurisdiction to consider the grievance merely because he was required to resolve the question of whether the Agency's interpretation of the awards was reasonable under the Back Pay Act. Accordingly, I believe the Union has established extraordinary circumstances that warrant the granting of its motion for reconsideration.

¹ *U.S. Dep't of the Treasury, IRS*, 72 FLRA 308, 314-15 (2021) (Dissenting Opinion of Chairman DuBester).

² 5 U.S.C. § 7103(a)(9)(C).