

72 FLRA No. 99

UNITED STATES
DEPARTMENT OF THE ARMY
MONCREIF ARMY HEALTH CLINIC
FORT JACKSON, SOUTH CAROLINA
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1214
(Union)

0-AR-5667
(72 FLRA 207 (2021))

ORDER DENYING
MOTION FOR RECONSIDERATION

October 14, 2021

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

I Statement of the Case

In this case, we distinguish the circumstances presented here from those in *U.S. Department of the Army, White Sands Missile Range, White Sands Missile Range, New Mexico (White Sands)*¹ and remind the labor-management community that parties' collective-bargaining agreements may exclude any matter from their grievance procedure, and the Authority will honor those exclusions.

The Union requests that we reconsider our decision in *U.S. Department of the Army, Moncreif Army Health Clinic, Fort Jackson, South Carolina (Moncreif)*.² In *Moncreif*, the Authority granted the Agency's interlocutory essence exception and set aside the award because Arbitrator Gail Smith's arbitrability determination failed to draw its essence from the parties' collective-bargaining agreement.

In its motion for reconsideration (motion), the Union argues that the Authority improperly granted the

essence exception because the language of the parties' agreement is ambiguous, and the Authority's decision violates *White Sands* and § 7121(b) of the Federal Service Labor-Management Relations Statute (the Statute).³ Because the motion raises the same arguments that the Authority considered in *Moncreif*, and does not otherwise establish extraordinary circumstances warranting reconsideration, we deny it.

II Background

As relevant here, the Union filed a grievance alleging violations of the Fair Labor Standards Act (FLSA) and the Statute. To remedy the alleged violations, the Union requested backpay and related damages for each affected bargaining-unit employee. The Union filed its grievance under Articles 30 and 31 of the parties' agreement. Article 30, titled "Employee Grievance Procedure," allows grievances to be initiated by a bargaining-unit employee, or a group of employees, seeking "personal relief,"⁴ whereas Article 31, titled "Union/Employer Grievance Procedure," specifies that it "cannot be used for grievances involving personal relief of individual employees."⁵ The Agency raised a threshold challenge to the arbitrability and scope of the grievance, which the Arbitrator considered in a preliminary arbitrability award.

The Arbitrator observed that Article 31 precluded Union-initiated "grievances involving personal relief of individual employees."⁶ But, based on the Arbitrator's finding that the Union's grievance involved the FLSA classification of "positions," as opposed to "individuals," the Arbitrator concluded that the grievance was arbitrable under Article 31.⁷ The Arbitrator found that the Union *could* have filed the grievance under Article 30 *if* the Union had followed the applicable procedure. However, because the Union had not followed that procedure the Arbitrator held that the grievance was not arbitrable under Article 30.⁸ The Agency filed exceptions to the award that the Authority considered in *Moncreif*.

In *Moncreif*, the Authority found that the Arbitrator evidenced "a manifest disregard of Article 31's exclusion of grievances seeking personal relief."⁹ In so finding, the Authority noted that the Union's grievance, by its own terms, sought "damages 'on behalf of . . .

¹ 67 FLRA 619 (2014).

² 72 FLRA 207 (2021) (Member Abbot concurring; Chairman DuBester dissenting).

³ 67 FLRA 619; 5 U.S.C. § 7121(b).

⁴ *Moncreif*, 72 FLRA at 207 (quoting Exceptions, Ex. 3, Collective-Bargaining Agreement (CBA) at 51-52).

⁵ *Id.* (quoting CBA at 55).

⁶ *Id.* (quoting Award at 13).

⁷ *Id.* at 207-08 (quoting Award at 14) (emphasis omitted).

⁸ *Id.* at 207.

⁹ *Id.* at 208.

employees.”¹⁰ Because the Arbitrator’s interpretation of Article 31 – as allowing personal relief – conflicted with the plain wording of the parties’ agreement, the Authority granted the Agency’s essence exception and set aside the award.

The Union filed its motion on May 7, 2021, and the Agency filed a request for leave to file, and did file, an opposition to the Union’s motion on July 7, 2021.¹¹

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

Section 2429.17 of the Authority’s Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision.¹² 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.¹³ As relevant here, the Authority has held that errors in its factual findings or legal conclusions may justify granting reconsideration.¹⁴ But mere disagreements with or attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.¹⁵

Here, the Union contends that the Authority erred in granting the Agency’s essence exception because (1) the plain wording of Article 31 is ambiguous,¹⁶ and (2) the Arbitrator’s interpretation of that article “drew its essence” from the parties’ agreement.¹⁷ However, the Union raised,¹⁸ and the Authority addressed,¹⁹ these same matters in *Moncreif*.²⁰ Thus, these Union arguments do not provide a basis for granting reconsideration.²¹

Additionally, the Union argues that the Authority’s decision in *Moncreif* results in the parties’ agreement not “includ[ing] a negotiated grievance procedure that assures the Union the [statutory] right to file a grievance.”²² Relying on *White Sands*, the Union alleges that *Moncreif* violates § 7121(b) of the Statute by preventing the Union from pursuing unit-wide FLSA grievances with the Union as a “single plaintiff.”²³

In *White Sands*, the union filed a grievance alleging FLSA overtime violations for up to 1,500 employees.²⁴ In response to an argument that the

¹⁰ *Id.* at 207 (quoting Grievance at 3).

¹¹ While the Authority’s Regulations do not specifically provide for oppositions to motions for reconsideration, the Authority generally allows them. *U.S. DOD, Missile Def. Agency, Redstone Arsenal, Ala.*, 71 FLRA 22, 22 n.4 (2019) (then-Member DuBester dissenting) (citing *U.S. Dep’t of the Treasury, IRS*, 67 FLRA 58, 59 (2012)). Therefore, we grant the Agency’s request and consider its opposition.

¹² 5 C.F.R. § 2429.17.

¹³ *U.S. Dep’t of the Air Force, Warner Robins Air Logistics Ctr.*, 72 FLRA 319, 320 (2021) (*Warner Robins*) (Chairman DuBester dissenting) (citing *U.S. Dep’t of the Air Force, Minot Air Force Base, N.D.*, 71 FLRA 188, 189 (then-Member DuBester dissenting); *SPORT Air Traffic Controllers Org.*, 71 FLRA 25, 26 (2019) (then-Member DuBester concurring); *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)).

¹⁴ *Id.* (citing *AFGE, Loc. 2338*, 71 FLRA 723, 723 (2020) (*Loc. 2338*) (Member Abbott concurring); *Indep. Union of Pension Emps. For Democracy & Just.*, 71 FLRA 60, 61 (2019) (*IUPEDJ*) (then-Member DuBester concurring)).

¹⁵ *Id.* (citing *U.S. Dep’t of VA, John J. Pershing Veterans Admin. Med. Ctr.*, 72 FLRA 191, 192 (2021) (Chairman DuBester concurring); *Int’l Brotherhood of Elec. Workers, Loc. 1002*, 71 FLRA 930, 931 (2020); *Loc. 2338*, 71 FLRA at 723; *IUPEDJ*, 71 FLRA at 61; *U.S. Dep’t of the Air Force, Seymour Johnson Air Force Base, N.C.*, 58 FLRA 169, 169 (2002)).

¹⁶ Mot. at 5. Although the Union cites several new arbitral decisions to support its claim that Article 31 is ambiguous, evidence submitted for the first time on reconsideration does not establish extraordinary circumstances that warrant reconsideration. See *U.S. Dep’t of the Navy, Marine Corps Air Station, Cherry Point, N.C.*, 71 FLRA 940, 941 (2020) (Member Abbott concurring).

¹⁷ Mot. at 9.

¹⁸ Opp’n Br. at 8 (arguing that the Arbitrator’s interpretation of Article 31 “does not fail to draw its essence” from the parties’ agreement); *id.* at 9 (asserting that the award “drew its essence” from the parties’ agreement); *id.* (claiming that the “Arbitrator’s interpretation of [Article 31] is correct”); *cf. id.* at 15 (claiming that Article 31’s language is “plain”).

¹⁹ *Moncreif*, 72 FLRA at 208 (finding that Article 31 “plainly” stated that it could not be used for personal relief of individual employees (emphasis added)); *id.* (concluding that the award “fails to draw its essence from the parties’ agreement”). In the motion, the Union also contends that the Authority should adopt “a reasonable reading of Article 31[], advocated by the Union in its [o]pposition to the Agency’s [e]xception.” Mot. at 7. By arguing that the Authority should now adopt the interpretation of Article 31 that the Union advocated for in *Moncreif*, the Union effectively acknowledges that its essence challenges constitute an attempt to relitigate.

²⁰ See *AFGE, Loc. 2338*, 72 FLRA 77, 78 (2021) (Member Abbott concurring) (holding that “attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances”); Opp’n at 13 (arguing that the parties’ agreement “must provide for a grievance procedure that permits the Union to file and process grievances”); Award at 14 (finding a “latent ambiguity in the contract”).

²¹ *Warner Robins*, 72 FLRA at 320 (holding that “attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances”).

²² Mot. at 5.

²³ *Id.* at 4-5; 5 U.S.C. § 7121(b).

²⁴ *White Sands*, 67 FLRA at 619.

grievance was an inarbitrable class action, the Authority held that the Statute “provides ‘an exclusive representative the right, in its own behalf or on behalf of any employee in the unit . . . to present and process grievances.’”²⁵ Thus, the Authority found that the grievance was “neither a class action nor a collective action because there [wa]s only one plaintiff: the [u]nion.”²⁶

Unlike the parties in *White Sands*, the parties here agreed to impose restrictions on institutional grievances pursuant to § 7121(a)(2).²⁷ That section of the Statute provides that a “collective[-]bargaining agreement may exclude *any* matter from the application of the grievance procedures which are provided for in the agreement.”²⁸ Article 31 evidences that the parties specifically negotiated for a grievance procedure that prohibits Union-filed “grievances involving personal relief.”²⁹ In *Moncreif*, the Authority was simply enforcing the plain wording of that agreed-to exclusion from Article 31.³⁰ Therefore, the *Moncreif* decision neither conflicts with *White Sands* nor the Statute.³¹

Moreover, nothing in *Moncreif* prohibits the Union from pursuing FLSA grievances under Article 31, as long as those grievances do not seek individual relief. In addition, nothing in *Moncreif* disturbed the Arbitrator’s finding that if the Union had followed proper procedure, it could have brought the grievance under Article 30.³² So, the Union has not demonstrated that the Authority’s decision in *Moncreif* denies it the right to file collective grievances.

Based on the above, we deny the Union’s motion for reconsideration.³³

IV. Order

We deny the Union’s motion.

²⁵ *Id.* at 621 (quoting 5 U.S.C. § 7121(b)(1)(C)(i)).

²⁶ *Id.* (internal quotation marks omitted).

²⁷ See *Moncreif*, 72 FLRA at 208 (holding that “Article 31 expressly excludes grievances seeking personal relief . . . [so] the Arbitrator’s interpretation of Article 31 conflicts with the plain wording of the parties’ agreement”); see generally *White Sands*, 67 FLRA at 619.

²⁸ 5 U.S.C. § 7121(a)(2) (emphasis added).

²⁹ *Moncreif*, 72 FLRA at 207 (quoting CBA at 55).

³⁰ See *id.* at 208.

³¹ 5 U.S.C. § 7121(a)(2).

³² *Moncreif*, 72 FLRA at 207.

³³ In the event that we granted the motion and reconsidered *Moncreif*, the Union makes an argument about a contrary-to-law exception that the Agency filed, but the Authority did not consider, in *Moncreif*. Mot. at 12. As we are denying the motion, we need not reach this argument.

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 vacating the Arbitrator's arbitrability award. As I noted in my dissent, the Arbitrator did not "disregard" the parties' contract language.² Rather, she analyzed and interpreted the relevant provisions to resolve the arbitrability issue before her. As I further noted, the U.S. Court of Appeals for the D.C. Circuit recently reminded the Authority that its "sole inquiry" in resolving an essence exception to an arbitral award should be "whether the Arbitrator was 'even arguably construing or applying the [CBA].'"³ In denying the Union's motion, the majority continues to disregard this well-established principle.

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 Army, Moncreif Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 207, 210-11 (2021) (Dissenting Opinion of Chairman DuBester).

² *Id.* at 210.

³ *Id.* (quoting *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020)).