

72 FLRA No. 111

INDEPENDENT UNION
OF PENSION EMPLOYEES FOR
DEMOCRACY AND JUSTICE
(Union)

and

PENSION BENEFIT
GUARANTY CORPORATION
(Agency)

0-AR-5634
(72 FLRA 281 (2021))

ORDER DENYING MOTION FOR
RECONSIDERATION

December 13, 2021

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

I. Statement of the Case

The Agency requests that we reconsider our decision in *Independent Union of Pension Employees for Democracy and Justice (IUPEDJ)*.¹ In that case, the Union filed exceptions to an award in which Arbitrator Charles Feigenbaum found that the Agency did not violate the parties' collective-bargaining agreement or the Federal Service Labor-Management Relations Statute (the Statute) when the Agency terminated an awards program codified in Article 3, Section 2 of the parties' agreement. As relevant here, the Arbitrator reasoned that Article 3, Section 2(A) violated the Agency's "right to determine the criteria for awarding employees."² The Authority set aside that portion of the award.

In its motion for reconsideration (motion), the Agency argues that the Authority erred in a factual finding and a legal conclusion. Because the Agency's arguments fail to establish extraordinary circumstances warranting reconsideration of *IUPEDJ*, we deny the motion.

II. Background and Authority's Decision

The facts of this case are set forth in greater detail in *IUPEDJ*. The dispute concerns the Agency's termination of a special-achievement-awards program in Article 3, Section 2 of the parties' agreement. The issue before the Arbitrator was whether the termination violated the Statute or the parties' agreement. The Arbitrator found, as relevant here, that the Agency could lawfully terminate the program because Article 3, Section 2(A) (Section 2(A)) was unenforceable.³

Section 2(A) provides that a Joint Awards Committee (JAC)—comprised of management and Union representatives in equal measure—"will decide all individual and group [special-achievement] awards for bargaining[-]unit employees."⁴ The Arbitrator held that Section 2(A) "does not permit the Agency to decide whether a bargaining[-]unit employee deserves a [s]pecial[-a]chievement [a]ward, or the specific amount to be awarded."⁵ For that reason, the Arbitrator concluded that Section 2(A) infringed on the "right to determine the criteria for awarding employees."⁶ The Union filed exceptions to the award.

In *IUPEDJ*, the Authority found that the Arbitrator had not articulated an actual management right under § 7106 of the Statute that Section 2(A) affected. Noting that "there is no management right to 'determine the criteria for performance awards'" in § 7106, the Authority set aside the portion of the award concerning Section 2(A).⁷

¹ 72 FLRA 281 (2021) (Chairman DuBester dissenting in part; Member Abbott dissenting in part).

² Award at 15.

³ The Arbitrator separately found that Article 3, Section 2(D) conflicted with management's right to determine the budget under § 7106.

⁴ Award at 14 (quoting Art. 3, § 2(A)). Article 3, Section 1, which concerns performance awards based on the employee's performance rating, was not at issue in *IUPEDJ*.

⁵ *Id.* at 16.

⁶ *Id.* at 15.

⁷ *IUPEDJ*, 72 FLRA at 282.

Subsequently, the Agency filed the motion before us, and, on June 16, 2021, the Union filed an opposition.⁸

III. Analysis and Conclusion: We deny the motion.

The Agency requests that the Authority reconsider its decision in *IUPEDJ*. 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.⁹ In particular, attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.¹⁰ Additionally, the Authority has refused to grant reconsideration of issues that could have been previously raised but are raised for the first time on a motion for reconsideration.¹¹

The Agency alleges that “the Authority committed a factual error when it found the [a]ward failed to identify [an] offended management right.”¹² In support of this claim, the Agency argues that the Authority does not require parties to invoke “magic words” to raise an argument before the Authority.¹³

Although the Statute does not require a party to use magic words in order to raise an argument before the Authority,¹⁴ nothing in the Statute permits arbitrators or parties to invent nonexistent rights. Among the nineteen explicit management rights in § 7106, no “right to determine the criteria for awarding employees” exists.¹⁵ If the Agency believed that the “criteria for awarding employees” is encompassed within one of the veritable § 7106 rights, then it was the Agency’s responsibility to identify for the Arbitrator such a right and explain.¹⁶ The Agency did not fulfill that responsibility, and the Arbitrator did little more than adopt the Agency’s position at arbitration.¹⁷ In *IUPEDJ*, the Authority properly refused to either supply missing arbitral analysis or make arguments on the Agency’s behalf.¹⁸ Accordingly, we conclude that the Agency’s factual-error argument fails to establish extraordinary circumstances warranting reconsideration.¹⁹

In its motion, the Agency argues that the Authority erred in its legal conclusion because the rights to direct employees and assign work under § 7106 support the Arbitrator’s finding that Section 2(A) is unenforceable.²⁰ We need not consider this argument as the Agency failed to make it before now.²¹

⁸ As it is the Authority’s practice to grant requests to file oppositions to motions for reconsideration, we consider the Union’s opposition. See *U.S. Dep’t of the Treasury, IRS*, 67 FLRA 58, 59 (2012). On June 2, 2021, the Union also filed a motion for reconsideration of *IUPEDJ* through the Authority’s eFiling system. Sections 2429.24(e) and (g) of the Authority’s Regulations permit the filing of motions only through commercial mail, first-class mail, certified mail, or facsimile. 5 C.F.R. § 2429.24(e), (g). On August 25, 2021, the Authority’s Office of Case Intake and Publication issued an order directing the Union to show cause why the Authority should not dismiss the Union’s motion as improperly filed. The order stated that the Union’s “failure to respond to or comply with th[e] order by September 8, 2021, will result in dismissal of the Union’s motion for reconsideration.” Show-Cause Order at 2. The Union failed to respond to the order. Accordingly, we dismiss the Union’s motion for reconsideration. See *AFGE, Loc. 2419*, 70 FLRA 319, 320 (2017) (affirming dismissal of exceptions where party failed to timely respond to show-cause order).

⁹ *AFGE, Nat’l VA Council #53*, 71 FLRA 741, 742 (2020) (then-Member DuBester concurring); *AFGE, Loc. 2338*, 71 FLRA 644, 644 (2020) (*Loc. 2338*). The Authority has found that extraordinary circumstances exist, and as a result has granted reconsideration, in a limited number of situations. As relevant here, these have included where a moving party has established that the Authority had erred in its conclusion of law or in a factual finding. *NTEU*, 66 FLRA 1030, 1031 (2012) (citation omitted).

¹⁰ *NTEU*, 66 FLRA at 1031.

¹¹ *NTEU*, 66 FLRA 1004, 1006 (2012); *Pension Benefit Guar. Corp.*, 60 FLRA 747, 748 (2005).

¹² Mot. at 5.

¹³ *Id.* at 4.

¹⁴ See *NTEU v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) (for purposes of preserving an argument for appellate review, “[a] party is not required to invoke ‘magic words’ in order to adequately raise an argument before the Authority”).

¹⁵ Award at 15.

¹⁶ See Exceptions Br. at 14 (Union arguing that the Arbitrator failed to identify a management right, under § 7106 of the Statute, that the special-achievement-awards program violated).

¹⁷ Compare Agency’s Opposition to Union’s Exceptions, Ex. 1, Agency’s Post-Hr’g Br. at 16 (arguing that Section 2(A) “would infringe on the Agency’s right to determine the criteria for awarding employees”), with Award at 15 (stating, “I agree” that Section 2(A) “would infringe on the Agency’s right to determine the criteria for awarding employees”).

¹⁸ Although not at issue in this motion, the Arbitrator separately found that another section of Article 3 (Section 2(D)) was unenforceable. Unlike for Section 2(A), the Arbitrator identified a specific management right under § 7106—the right to determine the budget—with which Section 2(D) conflicted. Award at 12. Similarly, the Agency made specific § 7106 arguments to the Arbitrator regarding that right. *Id.* at 7, 11.

¹⁹ See *U.S. Dep’t of HUD*, 71 FLRA 794, 795 (2020) (then-Member DuBester concurring) (denying motion for reconsideration where the argument was not “so persuasive or so demonstrative of error as to warrant reconsideration”).

²⁰ Mot. at 5.

²¹ See *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 419, 420 (2021) (denying motion for reconsideration where moving party raised issues that could have been raised previously for the first time on a motion for reconsideration); *Loc. 2338*, 71 FLRA at 645 (same).

Nonetheless, we note that in *IUPEDJ*, we cited Authority and federal-court precedent²² observing the distinction between (1) determining the quantity, quality, and timeliness of work, which the rights to direct employees and assign work encompass,²³ and (2) deciding whether to grant an award *for superior performance*, which is not an exercise of those rights.²⁴ The Authority has held that evaluation of employee performance, including determination of the rating of a given employee, is an exercise of management's right to direct employees and assign work.²⁵ But, while management has the right to establish minimum standards for assigned work and to evaluate employees against those standards, setting incentives for superior performance that goes beyond the effective completion of job requirements does not fall within the management rights to assign work and direct employees.²⁶

Here, the special-achievement-awards program provides monetary recognition for one-time, "non-recurring exceptional achievements or a [s]pecial [p]erformance [a]ct."²⁷ When a peer or supervisor submits an award nomination, the JAC evaluates the employee based on the facts of the one-time achievement outlined in the nomination²⁸—not on the separate and independent rating management gives the employee for

performance of job requirements.²⁹ As the special-achievement-awards program rewards only superior performance, the Agency fails to establish that Section 2(A) affects the Agency's discretion to determine the quantity, quality, or timeliness of assigned work or to evaluate effective performance under those standards. Therefore, no extraordinary circumstances warrant reconsideration.³⁰

For the foregoing reasons, we deny the Agency's motion for reconsideration.³¹

IV. Decision

We deny the Agency's motion.

²² *IUPEDJ*, 72 FLRA at 282 n.21.

²³ *AFGE*, *Loc.* 3295, 44 FLRA 63, 68 (1992).

²⁴ *NTEU v. FLRA*, 793 F.2d 371, 375 (D.C. Cir. 1986) (holding that determinations as to the amount to award for superior performance do not fall under management's right to assign work and direct employees under § 7106(a)); *NATCA*, 65 FLRA 69, 72 (2010) (holding that a proposed memorandum of understanding providing for levels of incentive pay for exceptional work did not violate management's right to assign work because it "would reward the superior performance of assigned work, not establish a minimum standard of performance").

²⁵ *U.S. Dep't of the Treasury, Off. of the Comptroller of the Currency*, 71 FLRA 387, 390 (2019) (then-Member DuBester dissenting in part) (citing *NTEU*, 47 FLRA 705, 709-10 (1993)).

²⁶ *NTEU*, 793 F.2d at 375 ("[T]he terms 'assign work' and 'direct employees' were not meant to be so expansive as to include whatever is useful for getting the agency's work done in a particular manner of priority, but were rather descriptions of a precise, defined management activity.").

²⁷ Exceptions, Joint Ex. 1, Collective-Bargaining Agreement at 8 ("The [s]pecial[-]achievement[-]awards program is intended to provide monetary recognition to eligible . . . employees for one[-]time . . . non-recurring exceptional achievements or a [s]pecial [p]erformance [a]ct that advances the [Agency's] missions, goals, or objectives.").

²⁸ *Id.* at 7 ("[T]he [JAC] will ask the supervisor of the work that is the basis of the nomination to review the nomination, to verify the facts outlined in the nomination, and [to] address whether the acts which occurred meet the criteria for an award and at what level.").

²⁹ *Id.* ("[A]n employee's receipt of an award for a special[-]achievement act does not pre-empt management's obligation to accurately rate the employee for the performance year.").

³⁰ *See Loc.* 2338, 71 FLRA at 645 (finding that attempt to relitigate did not demonstrate extraordinary circumstances warranting reconsideration of the Authority's earlier decision).

³¹ Member Abbott agrees that the Union has not demonstrated extraordinary circumstances that warrant reconsideration in this case. However, as he noted in the initial decision, he does not agree, as the majority concluded, that the Arbitrator failed to identify a management right under § 7106 that was impacted by Article 3, Section 2(A). The Arbitrator *did* identify a management right impacted by Section 2(A), and the Union's exception should have been denied. *See USDA, Off. of the Gen. Couns.*, 71 FLRA 986, 989 (2020) (then-Member DuBester dissenting) (finding that "an automatically renewed agreement is subject to agency-head review beginning 'the day after the expiration of the contractual window period for requesting renegotiation of the expiring agreement'").

Chairman DuBester, concurring:

I agree that the Agency has not demonstrated the extraordinary circumstances necessary to grant a motion for reconsideration.