

73 FLRA No. 123

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-5762
(73 FLRA 498 (2023))

ORDER DENYING
MOTION FOR RECONSIDERATION

August 21, 2023

Before the Authority: Susan Tsui Grundmann,
Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

The Agency requests reconsideration of the Authority's decision in *U.S. Department of VA, John J. Pershing VA Medical Center, Poplar Bluff, Missouri (Poplar Bluff)*.¹ The Agency's motion for reconsideration (motion) does not establish extraordinary circumstances warranting reconsideration, because it relies on evidence that came into existence after the arbitration and it merely attempts to relitigate *Poplar Bluff's* conclusions. Therefore, we deny the motion.

II. Background and Authority's Decision in *Poplar Bluff*

The facts, summarized here, are set forth in greater detail in *Poplar Bluff*.²

The Union filed a grievance alleging the Agency failed to provide an employee (the grievant) with a safe working environment and a reasonable accommodation. Arbitrator Ann Breen-Greco issued an award finding that the Agency violated the parties' agreement, and various laws and regulations, by failing to provide the grievant with a reasonable accommodation and by obstructing the grievant's attempts to seek workers' compensation.

The Agency filed exceptions to the award, arguing, among other things, that the award was contrary to the Rehabilitation Act (the Act).³ The Agency claimed the grievant was not a "qualified" individual with a disability under the Act because he did not demonstrate that he could perform his job functions even with the accommodations the Arbitrator awarded.⁴

In *Poplar Bluff*, the Authority found the award was not contrary to the Act.⁵ Although the Agency claimed that the grievant sought a completely mold-free environment, the Authority noted the grievant testified to the contrary.⁶ In addition, the Authority deferred to the Arbitrator's unchallenged factual finding that the grievant does not experience any negative symptoms when using one of the requested accommodations: a high-efficiency particulate-air (HEPA) filter.⁷ The Authority determined that the Arbitrator's findings supported her conclusion that the grievant can perform his job functions with a HEPA filter. Further, while acknowledging the Arbitrator's statement that the Agency "conceded" the grievant was a qualified individual with a disability, the Authority noted that she also relied on separate and independent grounds in reaching that conclusion.⁸ The Authority partially dismissed and partially denied the Agency's exceptions.⁹

On May 12, 2023, the Agency filed this motion.

III. Preliminary Matter: We will consider the Union's amended opposition to the Agency's motion.

On May 18, 2023, the Union filed an opposition to the Agency's motion, but did not request leave to do so.¹⁰ Then, on May 22, 2023, the Union filed an amended opposition, along with a motion requesting leave to file it. While the Authority's Regulations do not specifically provide for oppositions to motions for reconsideration, the

¹ 73 FLRA 498 (2023).

² *Id.* at 498-500.

³ 29 U.S.C. §§ 701-96.

⁴ 29 C.F.R. § 1630.2(m) ("The term 'qualified,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.").

⁵ 73 FLRA at 503.

⁶ *Id.*

⁷ *Id.* ("We defer to the Arbitrator's finding that a portable HEPA filter alleviates the grievant's symptoms because the Agency has not argued it is a nonfact.").

⁸ *Id.*

⁹ *Id.* at 505.

¹⁰ Resp. to Mot. at 1.

Authority generally considers them when parties request leave to file them.¹¹ Accordingly, we consider the Union's amended opposition.¹²

IV. Analysis and Conclusions: We deny the motion.

The Agency argues that extraordinary circumstances warrant reconsideration of *Poplar Bluff* because (1) evidence, information, or issues critical to that decision were not presented to the Authority; and (2) the Authority erred in its remedial order, process, conclusion of law, or fact finding.¹³

Section 2429.17 of the Authority's Regulations permits a party to move for reconsideration of an Authority decision.¹⁴ A party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.¹⁵ Although the Authority has recognized that errors in its legal conclusions may justify granting reconsideration in certain circumstances, mere disagreement with or attempts to relitigate the Authority's conclusions are insufficient to establish extraordinary circumstances.¹⁶ In addition, arbitration awards are not subject to review on the basis of evidence that comes into existence after the arbitration.¹⁷ "Even where new evidence or testimony is discovered that would have resulted in a different award if it had been presented at the arbitration hearing, this is not a sufficient ground for 'vitiating the required finality of the original award.'"¹⁸ Consistent with this principle, the Authority has declined to consider such evidence or find that it establishes extraordinary circumstances warranting reconsideration of an Authority decision.¹⁹

First, the Agency argues that it has new evidence – the grievant's February 22, 2022 requests for medical documentation and reasonable accommodation – that demonstrates the grievant is not a qualified individual under the Act.²⁰ According to the Agency, this evidence shows that – contrary to the Authority's conclusion in *Poplar Bluff* – the grievant was seeking a mold-free environment.²¹ The Agency contends that achieving a mold-free environment is not feasible and, because the grievant said his condition is "life threatening," the Arbitrator's awarded remedies put the grievant's life in danger.²²

The evidence that the Agency relies on came into existence after the arbitration. As described above, the Arbitrator determined in August 2021 that the grievant could perform the essential functions of his job with his requested reasonable accommodation of a portable HEPA filter.²³ Even if the grievant's February 2022 reasonable-accommodation request demonstrates that the grievant cannot perform his essential job functions even with a HEPA filter – a factual question that is not for the Authority to decide – it could not demonstrate that the Arbitrator erred based on the record before her in 2021.²⁴ In other words, what the grievant seeks *now* does not establish that the Arbitrator erred in interpreting the evidence before her to make a determination about what the grievant sought *then*.²⁵ Therefore, we do not consider the Agency's new evidence, and the arguments that rely on it do not demonstrate extraordinary circumstances warranting reconsideration of *Poplar Bluff*.²⁶

Second, the Agency argues that, in *Poplar Bluff*, the Authority confused two different issues: (1) whether the grievant's workplace was the cause of his injury, which

¹¹ *U.S. Dep't of the Army, Moncrief Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 506, 507 n.11 (2021) (*Moncrief Health Clinic*) (Chairman DuBester dissenting on other grounds) (citing *U.S. DOD, Missile Def. Agency, Redstone Arsenal, Ala.*, 71 FLRA 22, 22 n.4 (2019) (Member DuBester dissenting on other grounds)). *But see AFGE, Loc. 1822*, 73 FLRA 22, 22 n.3 (2022) (citing *Int'l Bhd. of Elec. Workers, Loc. 1002*, 71 FLRA 930, 931 (2020) (*IBEW*)) (declining to consider opposition to motion for reconsideration where party did not request leave to file it).

¹² *See, e.g., Moncrief Health Clinic*, 72 FLRA at 507 & n.11 (considering an opposition to a motion for reconsideration where the opposition was filed two months after the reconsideration motion).

¹³ Mot. at 2-6.

¹⁴ 5 C.F.R. § 2429.17 ("After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order.")

¹⁵ *Indep. Union of Pension Emps. for Democracy & Just.*, 73 FLRA 280, 280 (2022).

¹⁶ *See AFGE, Loc. 3197*, 73 FLRA 477, 478 (2023) (*Loc. 3197*); *IBEW*, 71 FLRA at 931.

¹⁷ *NFFE, Loc. 2030*, 54 FLRA 615, 618 (1998) (*Loc. 2030*).

¹⁸ *Id.* at 617 (quoting *NAGE, Loc. R4-45*, 53 FLRA 517, 519 (1997)); *see also Veterans Admin. Reg'l Off.*, 5 FLRA 463, 470-71 (1981) ("Federal courts in private sector labor-management relations cases have consistently held that arbitration awards are not subject to review on the basis of . . . evidence that has come into existence only since the arbitration hearing.")

¹⁹ *AFGE Loc. 2338*, 71 FLRA 644, 645 n.20 (2020) (*Loc. 2338*); *Loc. 2030*, 54 FLRA at 618.

²⁰ Mot. at 2-4.

²¹ *Id.*

²² *Id.* at 2.

²³ *See Poplar Bluff*, 73 FLRA at 503 (citing Award at 38-39).

²⁴ *See Loc. 2030*, 54 FLRA at 618 (evidence that "came into existence after the arbitration . . . may not be introduced to refute material on the record made before the [a]rbitrator").

²⁵ In this regard, should a subsequent dispute arise between these parties concerning whether – in light of the February 2022 reasonable-accommodation request – the grievant is a qualified individual with a disability, the new evidence would be relevant to that dispute.

²⁶ *Loc. 2338*, 71 FLRA at 645 n.20; *Loc. 2030*, 54 FLRA at 618.

the Agency asserts was a “repackaged” workers’ compensation claim; and (2) whether the grievant is a qualified individual under the Act because he can perform his job functions with the awarded accommodations.²⁷ The Agency also “takes issue with the new conclusion of fact and/or law that an [a]gency may waive or concede an employee’s qualification to perform the essential functions of his job.”²⁸

As an initial matter, as discussed above, the Authority in *Poplar Bluff* did not rely on the Arbitrator’s finding that the Agency “conceded” the grievant was a qualified individual with a disability.²⁹ Rather, the Authority held that, notwithstanding that finding, the Arbitrator had separate and independent grounds for determining the grievant is a qualified individual with a disability.³⁰ Again, as summarized above, the Authority found that the Arbitrator’s determination that the grievant could perform his essential job functions with the reasonable accommodation of a HEPA filter was supported by factual findings that the Agency had not challenged as nonfacts.³¹ The Agency’s “waive[r]” argument,³² as well as its allegation of legal “confusion,”³³ are merely attempts to relitigate the Authority’s conclusion that the Arbitrator did not err in making that determination. Therefore, they do not establish extraordinary circumstances warranting reconsideration of *Poplar Bluff*.³⁴

As the Agency’s arguments do not establish extraordinary circumstances warranting reconsideration of *Poplar Bluff*, we deny the motion.

V. Order

We deny the Agency’s motion for reconsideration.

²⁷ Mot. at 4-6.

²⁸ *Id.* at 5.

²⁹ *Poplar Bluff*, 73 FLRA at 503.

³⁰ *Id.*

³¹ *Id.*

³² Mot. at 5.

³³ *Id.* at 2 n.1; *see also id.* at 4-5.

³⁴ *See Loc. 3197*, 73 FLRA at 478 (finding a mere attempt to relitigate the Authority’s conclusions insufficient to demonstrate extraordinary circumstances); *IBEW*, 71 FLRA at 931 (same).