

**73 FLRA No. 138**

NATIONAL TREASURY  
EMPLOYEES UNION  
CHAPTER 14  
(Union)

and

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

0-AR-5855  
(73 FLRA 613 (2023))

ORDER DENYING  
MOTION FOR RECONSIDERATION

October 27, 2023

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

**I. Statement of the Case**

The Union requests reconsideration of the Authority's decision in *NTEU, Chapter 14 (Chapter 14)*.<sup>1</sup> The Union's motion for reconsideration (motion) merely attempts to relitigate *Chapter 14*'s conclusions and raises arguments that the Union could have made, but did not make, in its exceptions. Thus, the Union does not establish extraordinary circumstances warranting reconsideration, and we deny the motion.

**II. Background and Authority's Decision in Chapter 14**

The facts, summarized here, are set forth in greater detail in *Chapter 14*.<sup>2</sup>

The Union filed a grievance alleging that the Agency's evaluation of an employee's (the grievant's) work performance violated the parties' collective-bargaining agreement. In a merits award, Arbitrator Amadeo Greco sustained the grievance, and

directed the Agency to raise the contested performance scores and provide the grievant the "monetary award he deserve[d]" based on the increase in his overall rating.<sup>3</sup> The Agency did not file exceptions to the merits award and, instead, implemented the awarded remedies.

The Union then requested attorney fees under the Back Pay Act (the Act).<sup>4</sup> In a fee award, the Arbitrator considered the parties' agreement and determined that it contained "no contractual language mandating that [p]erformance [a]wards *must* be given."<sup>5</sup> Because the parties' agreement did not require payment of performance awards, the Arbitrator found the grievant's performance award did not constitute pay under the Act. Therefore, the Arbitrator found the Union was ineligible for attorney fees and denied the attorney-fee request.

The Union excepted to the fee award, arguing that it conflicted with the Act. In *Chapter 14*, the Authority noted that "performance awards do not constitute pay under the Act unless they are required," and "the Arbitrator explicitly found that performance awards are discretionary under [the parties' agreement]."<sup>6</sup> Citing Authority precedent, the Authority found the Union's contrary-to-law exception was "misplaced" to the extent it challenged the Arbitrator's interpretation of the parties' agreement.<sup>7</sup> Regarding that interpretation, the Authority observed that the Arbitrator did not find a contractual entitlement to performance awards. Although some statements in the merits award "could, by themselves, be read as *implicitly* finding [a contractual performance-award] entitlement," the Authority found that those statements "must be read in the context of the Arbitrator's *explicit*, contrary findings in the fee award."<sup>8</sup> Accordingly, the Authority denied the Union's exception.

On August 2, 2023, the Union filed this motion.

**III. Preliminary Matter: We consider the Agency's opposition but do not consider the Agency's motion to dismiss or the Union's responsive motion.**

On August 23, 2023, the Agency requested leave to file, and filed, an opposition under § 2429.26 of the Authority's Regulations.<sup>9</sup> Consistent with Authority

<sup>1</sup> 73 FLRA 613 (2023) (Chairman Grundmann concurring).

<sup>2</sup> *Id.* at 613-14.

<sup>3</sup> *Id.* at 613.

<sup>4</sup> 5 U.S.C. § 5596.

<sup>5</sup> *Chapter 14*, 73 FLRA at 613.

<sup>6</sup> *Id.* at 614.

<sup>7</sup> *Id.* (citing *NLRB Pro. Ass'n*, 68 FLRA 552, 556 (2015); *AFGE, Loc. 779*, 64 FLRA 672, 674 (2010)).

<sup>8</sup> *Id.* at 615.

<sup>9</sup> 5 C.F.R. § 2429.26 (providing that the Authority may "grant leave to file other documents as [it] deem[s] appropriate").

practice, we grant the Agency's request and consider the opposition.<sup>10</sup>

With its opposition, the Agency included a motion to dismiss the Union's motion for reconsideration as untimely. On September 5, 2023, the Union requested leave to file, and filed, a motion to strike the Agency's motion to dismiss.<sup>11</sup> On September 11, 2023, the Agency withdrew its motion to dismiss, "conced[ing] that the Union's [motion for reconsideration] was timely filed."<sup>12</sup>

Because the Union timely filed the motion for reconsideration,<sup>13</sup> and the Agency withdrew its motion to dismiss, we need not address the Agency's motion or the Union's responsive motion.<sup>14</sup>

#### IV. Analysis and Conclusion: We deny the motion for reconsideration.

The Union argues that, in *Chapter 14*, the Authority erred in its factual and legal conclusions.<sup>15</sup> Section 2429.17 of the Authority's Regulations permits a party to move for reconsideration of an Authority decision.<sup>16</sup> A party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.<sup>17</sup> Errors in the Authority's remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.<sup>18</sup> However, mere disagreement with, or attempts to relitigate, the Authority's conclusions are insufficient to establish extraordinary circumstances.<sup>19</sup> Additionally, the Authority has declined to grant

reconsideration based on arguments that could have been, but were not, raised in the underlying exceptions.<sup>20</sup>

The Union claims the Authority erred in basing its decision in *Chapter 14* on the Arbitrator's conclusion that the parties' agreement does not require the Agency to pay performance awards.<sup>21</sup> The Union argues that the Arbitrator's finding is "irrelevant" to whether the grievant actually received backpay.<sup>22</sup> In support, the Union notes: the Arbitrator found that the Agency violated the parties' agreement; the Arbitrator directed the Agency to provide the grievant a performance award as a remedy for that violation; and the Agency paid the grievant a performance award.<sup>23</sup> According to the Union, these facts independently establish that the grievant's performance award meets the legal requirements of pay under the Act.<sup>24</sup>

As discussed in *Chapter 14*, the Authority has held that a performance award does not constitute pay under the Act unless, as relevant here, the parties' agreement *requires* such an award.<sup>25</sup> In *Chapter 14*, the Authority essentially found that the Arbitrator's "explicit" interpretation in the fee award – that the parties' agreement does not require the Agency to pay performance awards – carried more weight than any prior, "implicit[]" findings in the merits award.<sup>26</sup> The Authority considered, and rejected, the Union's arguments to the contrary in *Chapter 14*.<sup>27</sup> As those arguments merely relitigate the Authority's conclusions in *Chapter 14*, they do not provide a basis for granting reconsideration.<sup>28</sup>

The Union also argues that § 550.803 of the Act's implementing regulations<sup>29</sup> does not support the

<sup>10</sup> 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").

<sup>11</sup> Union's Mot. to Strike at 2 (arguing that the Agency failed to request leave to file the portion of the filing concerning the motion to dismiss).

<sup>12</sup> Agency's Notice of Partial Withdrawal at 2.

<sup>13</sup> The Authority served *Chapter 14* on the parties by certified mail on July 18, 2023. Under Authority Regulations, the parties had fifteen days to timely file a motion for reconsideration. See 5 C.F.R. § 2429.17 (ten-day time limit for filing motion for reconsideration); *id.* § 2429.22(a) (five-day service extension for responding to document served by mail). As the Union's motion was postmarked August 2, 2023 – fifteen days after July 18 – it is timely filed. See *Nat'l Mediation Bd.*, 56 FLRA 320, 322 (2000) (Chairman Wasserman dissenting in part and concurring in part on other grounds) (finding timely motion for reconsideration that utilized five-day extension).

<sup>14</sup> See *Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011) (Member Beck dissenting on other grounds) (declining to consider motion to strike a document that the Authority did not consider).

<sup>15</sup> Mot. at 2.

<sup>16</sup> 5 C.F.R. § 2429.17.

<sup>17</sup> *Indep. Union of Pension Emps. for Democracy & Just.*, 73 FLRA 280, 280 (2022).

<sup>18</sup> *Id.*

<sup>19</sup> *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 628, 629 (2023).

<sup>20</sup> *AFGE, Loc. 2338*, 71 FLRA 644, 645 (2020) (*Loc. 2338*).

<sup>21</sup> Mot. at 11.

<sup>22</sup> *Id.* at 9.

<sup>23</sup> *Id.* at 7; see also *Chapter 14*, 73 FLRA at 613 (listing these facts).

<sup>24</sup> Mot. at 7-8.

<sup>25</sup> *Chapter 14*, 73 FLRA at 614 (citing *NTEU, Chapter 67*, 68 FLRA 868, 869 (2015)).

<sup>26</sup> See *id.* at 615 (determining that findings from merits award "must be read in the context of the Arbitrator's explicit . . . findings in the fee award" that performance awards are discretionary under the parties' agreement).

<sup>27</sup> *Id.*

<sup>28</sup> See *AFGE, Loc. 3197*, 73 FLRA 477, 478 (2023) (finding previously "considered and rejected" arguments to be "mere attempt to relitigate," not extraordinary circumstance warranting reconsideration).

<sup>29</sup> 5 C.F.R. § 550.803 (defining "[u]njustified or unwarranted personnel action" as an "act . . . unjustified or unwarranted under . . . [a] mandatory personnel policy established . . . through a collective[-]bargaining agreement").

Authority's "framework" for determining whether a performance award constitutes pay.<sup>30</sup> According to the Union, the regulation "provide[s] the legal basis for an award of backpay under a contract" and does not require consideration of whether a performance award is required under an agreement.<sup>31</sup> Instead, the Union asserts, the determining factor is whether an agency violated a "mandatory agency policy" contained in the agreement.<sup>32</sup> The Union did not make these arguments in its exception, even though it had the opportunity to do so. Therefore, we do not consider those arguments now.<sup>33</sup>

## V. Decision

We deny the Union's motion for reconsideration.

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<sup>30</sup> Mot. at 10.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Loc. 2338*, 71 FLRA at 645 (declining to consider new arguments that party "had the opportunity" to raise in its exceptions).