64 FLRA No. 91

BREMERTON METAL TRADES COUNCIL
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
PUGET SOUND NAVAL SHIPYARD
BREMERTON, WASHINGTON
(Agency)

0-AR-4237
(64 FLRA 103 (2009))

ORDER DENYING
MOTION FOR RECONSIDERATION

February 26, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on the Union's motion for reconsideration of the Authority's decision in *Bremerton Metal Trades Council*, 64 FLRA 103 (2009) (*BMTC*). The Agency filed an opposition to the Union's motion.

The Authority's Regulations permit a party to request reconsideration of an Authority decision where it can establish extraordinary circumstances. 5 C.F.R. § 2429.17 (§ 2429.17). We find that the Union has failed to establish extraordinary circumstances warranting reconsideration and deny the Union's motion. [2]

II. Decision in *Bremerton Metal Trades Council*, 64 FLRA 103 (2009)

The circumstances of this case are set forth in *BMTC* and will not be fully repeated here. The Union alleged that the Agency had violated the parties' agreement by failing to pay environmental differential pay (EDP) to those employees exposed to potentially harmful levels of asbestos, including levels below the OSHA PEL. [3] *BMTC*, 64 FLRA at 103. The Agency asserted that it had a past practice of paying EDP to employees exposed to asbestos hazards at or above the OSHA PEL. *Id.* Subsequent to the grievance filing, Congress passed Public Law 108-136, which provides that, in order to trigger EDP, the asbestos exposure must be at the OSHA PEL or higher. *Id.* (citing Pub. L. No. 108-136 § 1122, 117 Stat. 1637-37 (Nov. 24, 2003) (the Act)). The Arbitrator found that: (1) the grievance was not arbitrable because the Act applied retroactively to prevent the Union from proceeding with the grievance unless the grievants had a "vested constitutional property right" to EDP for exposure at or below the OSHA PEL; (2) the grievants did not have a "vested constitutional property right" to EDP payments under § 1122(c) of the Act; (3) nothing in the parties' agreement established "that the [g]rievants had the right to receive EDP for exposure below the PEL even before the Act was passed"; and (4) neither the parties' agreement nor federal law established a right to EDP payments for exposure at or below the OSHA PEL. *Id.* at 103-104, Exceptions Attach. A at 24 (Arbitrator's Award).

The Union filed exceptions alleging that the Arbitrator's award was contrary to law and that he exceeded his authority. *Id.* at 104. Specifically, the Union argued that the Arbitrator erred in applying the Act retroactively to the grievance because the grievants may have had a claim for EDP under the parties' agreement for exposure at or below the OSHA PEL. *Id.* The Union further argued that the award was contrary to federal law regarding "vested constitutional property rights" because the grievants had more than a unilateral expectation of receiving the EDP under the parties' agreement. *Id.* Further, the Union alleged that, because the Arbitrator was restricted to deciding timeliness and arbitrability issues, the Arbitrator exceeded his authority by rendering a determination of the underlying merits of the grievance. *Id.*

1. Member DuBester's concurring opinion is set forth at the end of this order.

2. The Union also requests oral argument. As the record is sufficient to resolve the issue on which the decision is based, we deny the request. *See* 5 C.F.R. § 2429.6. We note that the Union also requests *en banc* reconsideration. As noted above, Member DuBester, who did not participate in the initial decision, is participating here, thereby rendering the Union's request moot.

3. The Federal Office of Safety and Health Administration (OSHA) determines the OSHA permissible exposure level (PEL). The presence of asbestos above this level is deemed hazardous and could trigger the payment of EDP. *See BMTC*, 64 FLRA at 103.

In resolving the Union's exceptions, the Authority reiterated the Arbitrator's holding that nothing in the parties' agreement established "that the [g]rievants had the right to receive EDP for exposure below the PEL even before the Act was passed." *Id.* at 105. The Authority also found that the Union did not except to the Arbitrator's interpretation of the agreement. The Authority noted that, even if it was "to assume that the Act did not apply retroactively, the grievants would not have a right to EDP for exposure below the OSHA PEL because the Arbitrator found that the parties' agreement does not provide EDP for exposure below the OSHA PEL." *Id.* Accordingly, the Authority concluded that the award denying the grievance was consistent with law. *Id.* The Authority also determined that it was unnecessary to consider whether the Arbitrator exceeded his authority when he determined that the Act applied retroactively because the Arbitrator determined that the parties' agreement did not provide a right to EDP for exposure at or below the PEL – a finding that the Union did not challenge. *Id.*

III. Motion for Reconsideration

A. Union's Motion for Reconsideration

The Union contends that the Authority erred in its remedial order, process, conclusion of law, and factual findings by failing to address one of the Union's exceptions and by "distorting and misstating the holdings of the Arbitrator and the contentions of the Union." Motion for Reconsideration at 2. The Union asserts that the Authority's decision fails to address the Union's exception that the Arbitrator exceeded his authority when he determined that the parties' agreement did not provide for EDP payments at or below the OSHA PEL. *Id.* at 4-5. In support of this assertion, the Union repeats the argument it initially set forth in its exceptions to the award. *Id.* at 5 (citing. Exceptions at 10-13).

According to the Union, it disagreed with the Arbitrator not only because he exceeded his authority, but also because he did not interpret properly the parties' agreement. Motion for Reconsideration at 7 (citing Exceptions at 20-21). The Union further asserts that the Authority committed serious and harmful error by not considering the Union's exception that the Arbitrator exceeded his authority because he reached a determination on the merits of the underlying grievance by interpreting the parties' agreement. *Id.* at 9-10. Finally, the Union alleges that the Authority committed harmful error by denying the Union's exceptions because the Authority: (1) failed to analyze properly its third exception, contending that the Arbitrator exceeded his authority by reaching a determination on the underlying merits of the grievance and (2) misconstrued both the Arbitrator's holding and the Union's exceptions. *Id.* at 3, 10-11.

B. Agency's Opposition

The Agency disagrees with the Union's assertion that the Authority's decision in *BMTC* contains errors of law and fact and fails to address the exceptions raised by the Union. Opposition at 1. The Agency asserts that the Union fails to establish any extraordinary circumstances that would warrant reconsideration of *BMTC*. *Id.* The Agency argues that the Union seeks to relitigate issues that have already been decided by the Authority. *Id.* at 5. Further, the Agency contends that the Union provides no legal support regarding how the Arbitrator exceeded his authority. *Id.* at 6. The Agency also maintains that the Union never alleged that the Arbitrator's award failed to derive its essence from the parties' agreement. *Id.* at 8.

IV. Analysis and Conclusions

The Authority has consistently held that a party seeking reconsideration of an Authority decision under § 2429.17 bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action. *See, e.g., U.S. Dep't of Health and Human Serv., FDA*, 60 FLRA 789, 790 (2005) (*FDA*). The Authority has identified a limited number of situations in which extraordinary circumstances have been found to exist. These include situations where: (1) an intervening court decision or change in the law affected dispositive issues; (2) evidence, information, or issues crucial to the decision had not been presented to the Authority; (3) the Authority erred in its remedial order, process, conclusion of law, or factual finding; and (4) the moving party has not been given an opportunity to address an issue raised *sua sponte* by the Authority in the decision. *See AFGE, Local 491*, 63 FLRA 542 (2009) (citing *U.S. Dep't of the Air Force, 375th Combat Support Group, Scott AFB, Ill.*, 50 FLRA 84, 85-87 (1995)). In addition, the Authority has repeatedly held that attempts to relitigate issues previously raised and resolved by the Authority do not establish extraordinary circumstances. *See Library of Congress*, 60 FLRA 939, 941 (2005); *FDA*, 60 FLRA at 791; *AFGE, Local 1156 and Laborers' Int'l Union, Local 1170*, 57 FLRA 748 (2002) (*Local 1170*).

The Union claims that the Arbitrator incorrectly rendered a substantive determination on the merits of the underlying grievance by concluding that (1) the Act applied retroactively and (2) the grievants did not have a "vested constitutional property right" to EDP for exposure at or below the OSHA PEL. The Union presented these same arguments in its exceptions. The Authority considered each of these arguments in *BMTC* and found that they must be denied for the reasons set forth in *BMTC*. The Union provides no additional argument to warrant a finding of extraordinary circumstances; rather it is merely attempting to relitigate issues already presented and resolved. As such, the Union's arguments do not establish that reconsideration is warranted. *See, e.g., FDA*, 60 FLRA at 791; *U.S. Info. Agency, Broad. Bd. of Governors, Wash., D.C.*, 58 FLRA 143, 143 (2002); *Local 1170*, 57 FLRA at 748.

The Union also asserts that the Arbitrator incorrectly interpreted the parties' agreement by finding that the parties' agreement did not provide a basis for EDP for exposure at or below the OSHA PEL. This is a new argument that was not raised in the Union's exceptions to the Arbitrator's award. The Authority will not consider, in resolving a request for reconsideration, issues that were not raised in its review of an award upon a party's exceptions. *See U.S. Dep't of Health & Human Serv., Office of the Asst. Sec'y for Mgmt. & Budget, Office of Grant and Contract Fin. Mgmt., Div. of Audit Resolution*, 51 FLRA 982, 984 (1996). Accordingly, the Union's assertion does not establish that reconsideration is warranted. *Id.*

Based on the above precedent, we deny the Union's motion for reconsideration.

V. Order

The Union's motion for reconsideration is denied.

Member DuBester, concurring:

As the parties are aware, I did not participate in the Authority's underlying decision from which the Union seeks reconsideration. * Central to the Union's request for reconsideration is the assertion that the Authority erred in its remedial order, process, conclusion of law, or factual finding, by failing to address the Union's third exception. According to the Union's third exception, the Arbitrator exceeded his authority in reaching a determination of the underlying merits of the Union's group grievance. In support of its claim, the Union maintains that the Arbitrator "was only allowed to determine timeliness and coverage issues." Union's Motion for En Banc Reconsideration and Oral Argument at 4.

In evaluating the Union's request, I have reviewed the entire record of this somewhat complicated matter, including the Union's Post-Hearing Brief to the Arbitrator (U's PHB), submitted before issuance of the Arbitrator's award. Significant in my view is the Union's acknowledgment of the nature of the coverage question the parties placed before the Arbitrator. *See* U's PHB at 29. Specifically, the Union states:

> Here, in order to determine the coverage question raised by Part 9 of the Shipyard's Section 3007 decision, it is necessary to determine a merits issue-whether the union has a legitimate expectation of being able to seek EDP for exposure to airborne asbestos where there is risk of illness or injury and the risk has not been practically eliminated in instances where exposure is below the PEL.

Id. n.6.

Addressing this coverage question, the Arbitrator concluded "that the paragraph 9 portion of the Employer's 3007 decision is properly before the Arbitrator since it raises arbitrability as opposed to strictly substantive issues." Award at 20. In so finding, the Arbitrator considered and rejected the Union's contention that it had a "'legitimate expectation'" that the Grievants could receive EDP for exposure below the PEL, reasoning that a "'legitimate expectation'" is not comparable to a "'vested constitutional property right'" as required by the statute in question. Award at 21.

While I do not necessarily agree with the Arbitrator's disposition of this issue, I am satisfied that the Arbitrator was resolving an issue of substantive arbitrability that is within the contemplation of the parties' CBA and the parties' jointly-stipulated issue. Accordingly, I conclude that the Union has not met its heavy burden of establishing that the Authority erred in its remedial order, process, conclusion of law, or factual finding, and I will therefore join my colleagues in denying reconsideration.

*. The underlying decision issued on September 28, 2009. Between August 17, 2009, when I began to serve as a Member and September 30, 2009, there were several cases in which I did not participate when my colleagues were in agreement.