63 FLRA No. 171

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
BORDER AND TRANSPORTATION
SECURITY DIRECTORATE
BUREAU OF CUSTOMS
AND BORDER PROTECTION
WASHINGTON, D.C.
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
(Charging Party)

WA-CA-02-0811
(60 FLRA 943 (2005))
(63 FLRA 406 (2009))

ORDER DENYING MOTION FOR
RECONSIDERATION

August 11, 2009

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Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on the Respondent's motion for reconsideration of the Authority's decision in *United States Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Washington, D.C.*, 63 FLRA 406 (2009) (*Customs II*). The Respondent also requests a stay of the decision, in part, in *Customs II*. The General Counsel (GC) and the Charging Party filed oppositions to the Respondent's motion.

The Authority's Regulations permit a party that can establish extraordinary circumstances to request reconsideration of an Authority decision. 5 C.F.R. § 2429.17. For the reasons below, we conclude that the Respondent has failed to establish extraordinary circumstances warranting reconsideration. Accordingly, we deny the Respondent's motion for reconsideration.

II. Decision in *Customs II*

The decision in *Customs II* resulted from a remand from the United States Court of Appeals for the District of Columbia Circuit in *AFGE, National Border Patrol Council v. FLRA*, 446 F.3d 162 (D.C. Cir. 2006) (*Nat'l Border Patrol*). In *Nat'l Border Patrol*, the court set aside the Authority's decision in *United States Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Washington, D.C.*, 60 FLRA 943 (2005) (*Customs I*) and remanded the complaint for further proceedings.

In *Customs II*, the Authority concluded, as relevant here, that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by changing the number of hours of remedial firearms training without providing the Charging Party with notice and an opportunity to bargain over the impact and implementation of the change. To remedy the unfair labor practice (ULP), we directed, among other things, that the Respondent refrain from violating the Statute and post a notice "at all facilities where bargaining unit employees are assigned[.]" *Custom II*, 63 FLRA at 409.

III. Positions of the Parties

A. Respondent's Motion for Reconsideration

The Respondent contends that the notice directed in *Customs II* is unwarranted and should be modified because of "new evidence of events that occurred" after the issuance of the Administrative Law Judge's decision and the filing of pleadings in this case. Motion for Reconsideration at 1. As to its contention that the notice is unwarranted, the Respondent argues that the notice would confuse bargaining unit employees because it states that the Respondent violated the Statute when actually it was the Immigration and Nationalization Service (INS) that improperly refused to bargain. Motion for Reconsideration at 2, 5. [1] The Respondent also argues that the notice will mislead employees to believe that the notice pertains to current renegotiations on the issue of remedial firearms training. *Id.* at 6. Accordingly, the Respondent requests that the Authority modify the order in *Customs II* to delete the notice posting requirement.

1. After the filing of the ULP charge in this case, the INS became part of the Department of Homeland Security. The Respondent, which became the successor employer, was named in the ULP. *See Customs I*, 60 FLRA at 954 n.1.

In the alternative, the Respondent contends that the Authority should modify the notice to indicate that the INS, and not the Respondent, failed to bargain. *Id.* at 8. The Respondent also requests that the Authority confine the posting of the notice only to the training academy for Border Patrol trainees "because that is the location where the change occurred." *Id.* In addition, the Respondent requests a stay of the posting of the notice until the Authority issues a decision on the Respondent's motion for reconsideration. *Id.* at 10.

B. The GC's Opposition

The GC contends that the Respondent has failed to establish extraordinary circumstances warranting reconsideration. The GC states that the Respondent, and not the INS, was named in the complaint. GC's Opposition at 2. The GC also states that the notice ordered by the Authority in *Customs II* is identical, in relevant part, to the notice recommended by the Administrative Law Judge (ALJ) in *Customs I*. *Id.* The GC argues that, in these circumstances, the Respondent's arguments regarding the notice could have been, but were not, raised while the case was pending before the Authority. *Id.*

C. The Charging Party's Opposition

The Charging Party argues that the Respondent's argument that the notice would confuse bargaining unit employees is based on speculation. Charging Party's Opposition at 3. The Charging Party also argues that limiting the posting of the notice only to the training academy for Border Patrol trainees, as sought by the Respondent, would not effectuate purposes of the Statute because Respondent's unlawful conduct affected the entire bargaining unit *Id.* at 3.

IV. Analysis and Conclusions

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority decision. The Authority has repeatedly recognized that a party seeking reconsideration under § 2429.17 bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action. *See, e.g., United States Dep't of the Treasury, Internal Revenue Serv., Wash., D.C.*, 56 FLRA 935 (2000). The Authority has identified a limited number of situations in which extraordinary circumstances have been found to exist. These include situations: (1) where an intervening court decision or change in the law affected dispositive issues; (2) where evidence, information, or issues crucial to the decision had not been presented to the Authority; (3) where the Authority erred in its remedial order, process, conclusion of law, or factual finding; and (4) where the moving party has not been given an opportunity to address an issue raised *sua sponte* by the Authority in the decision. *See United States Dep't of the Air Force, 375th Combat Support Group, Scott Air Force Base, Ill.*, 50 FLRA 84, 85-87 (1995). In addition, the Authority has refused to grant reconsideration of issues "where they could have been previously raised, but are raised for the first time on motion for reconsideration." *United States Environmental Protection Agency*, 61 FLRA 806, 807 (2006) (*EPA*); *United States Dep't of Health and Human Services, Office of the Asst. Sec'y. for Mgmt. and Budget, Office of Grant and Contract Fin. Mgmt. Div., of Audit Resolution*, 51 FLRA 982, 984 (1996).

The Respondent's arguments do not establish extraordinary circumstances under this standard. In particular, the Respondent fails to establish that any of the situations, set forth above, which the Authority has identified as constituting extraordinary circumstances are present. Moreover, as noted by the GC, the notice ordered by the Authority in *Customs II* is virtually identical to the notice recommended by the ALJ in *Customs I*. *See Customs I*, 60 FLRA at 964-65. Accordingly, as the Respondent's arguments as to the wording and scope of the notice could have been previously raised, but are raised for the first time on motion for reconsideration, the Respondent's arguments do not establish the extraordinary circumstances warranting reconsideration of the Authority's decision in *Customs II*. *EPA*, 61 FLRA at 807. The Respondent's remaining argument that the notice will mislead employees to believe that the notice pertains to current renegotiations are unsupported and do not establish the extraordinary circumstances warranting reconsideration.

Based on the foregoing, the Respondent's arguments do not provide a basis for reconsideration.

V. Order

The Respondent's request for reconsideration is denied.[2]

[2] In light of this decision, we also deny the Respondent's request for a stay.

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