67 FLRA No. 13

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 73
(Union)

0-AR-4704
(66 FLRA 888 (2012))

ORDER DENYING
MOTION FOR RECONSIDERATION

December 4, 2012

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Agency did not deduct the full amount of taxes from employees' salaries, and later deducted more than the usual amount of taxes from their salaries to make up for it. Arbitrator Terry A. Bethel found that the original failure to deduct the full amount resulted in overpayments to the employees, that the Agency had claims against the employees to recover those overpayments, and that the Agency should have waived its claims rather than deducting additional amounts from the later paychecks. The Agency filed exceptions to the Arbitrator's award, and the Authority denied those exceptions in *U.S. Department of the Treasury, IRS* (*IRS*).[1]

The issues before us are whether *IRS* failed to address a sovereign-immunity argument in the Agency's exceptions and, if it did, then whether we should reconsider *IRS*. Because *IRS* rejected the contentions underlying the Agency's sovereign-immunity argument, and the Agency's attempts to relitigate conclusions reached in an Authority decision do not provide a basis for reconsidering that decision, we decline to reconsider *IRS*.

[1] 66 FLRA 888, 891 (2012).

II. Background

The Agency did not deduct from employees' salaries the full amount of taxes that the employees owed to the City of Florence, Kentucky (the City). To compensate for its error, the Agency then deducted more than the usual amount of City taxes from the employees' salaries. The Union filed a grievance arguing that the Agency should not have deducted the additional amounts, and the grievance went to arbitration.

The Arbitrator found that the original failure to deduct the full amount was an administrative error that resulted in "overpayment[s]" to the employees.[2] He also found that, under Kentucky law, the Agency was responsible for remitting the employees' tax payments to the City, regardless of whether the City could legally compel the Agency to do so. As a result, the Arbitrator determined that the Agency's overpayments to the employees resulted in the Agency having "claims" against those employees.[3]

The Arbitrator then addressed whether, under 5 U.S.C. § 5584 and the parties' agreement, the Agency should have waived these claims. Section 5584 provides that, in certain circumstances, authorized agency officials may waive "claim[s] of the United States . . . arising out of an erroneous payment of pay."[4] Finding that waiving the claims would not "adversely affect the interest" of the United States,[5] the Arbitrator concluded that the Agency should have waived the claims, and he directed the Agency to repay employees the extra amounts that the Agency had deducted from their salaries to make up for the initial failure to deduct the full amounts.

The Agency filed exceptions with the Authority, arguing that the award was contrary to § 5584 because it directed the Agency to waive claims that were not "claims of the United States,"[6] but rather were the City's claims against the employees. The Authority disagreed, finding that the Arbitrator correctly determined that waivable claims under § 5584 arose when the Agency erroneously overpaid employees by initially failing to deduct the full amount of taxes from their salaries.

In addition, the Agency disputed the Arbitrator's finding that the Agency was responsible for remitting employees' tax payments regardless of whether the City could compel such action. More specifically, the Agency asserted that there was "no evidence here that the United States . . . waived its sovereign immunity to consent to any enforcement action or suit by the [C]ity," and that

[2] *Id.* at 889 (quoting Award at 7).
[3] *Id.* (quoting Award at 8).
[4] 5 U.S.C. § 5584(a); *see IRS*, 66 FLRA at 889.
[5] *IRS*, 66 FLRA at 889 (quoting Award at 10).
[6] *Id.* (internal quotation marks omitted) (quoting Exceptions at 11).

even if the City were to sue the Agency for "employer liability for the [C]ity tax . . . such debt would not be enforceable against the Agency."[7] The Authority determined that the Agency neither challenged as a nonfact the Arbitrator's finding that the Agency was responsible for remitting employees' tax payments to the City, nor established how that finding was contrary to § 5584. In that regard, the Authority stated that the "Agency's right to recoup the overpayments – and [its] ability to waive its claims to them – *did not depend* on whether employees owed taxes to the City or the Agency."[8]

Further, the Authority rejected the Agency's arguments that: (1) "no authority exists permitting the Agency to use federal funds to pay its employees' personal city tax obligations,"[9] (2) "[n]either the Union nor [the] Arbitrator . . . cited any precedent that would allow the waiver of third party debts and/or the refund of employee payments of such debts under . . . § 5584,"[10] and (3) the award would "require all federal agencies to pay their employees' third party debts subject to payroll withholding each time an administrative error" occurred.[11]

The Agency has now filed a motion for reconsideration of *IRS* (motion), arguing that *IRS* failed to address the sovereign-immunity argument in the Agency's exceptions. The Agency also requests that we stay *IRS* while we resolve the motion.[12]

III. Preliminary Matters

The Union asked for permission to file, and did file, an opposition to the Agency's motion. The Agency then filed a supplemental submission – a motion to strike the Union's opposition – but did not request permission to file that motion. As the Authority's Regulations require parties to request permission to file supplemental submissions, and the Agency did not request permission to file its motion to strike, we do not consider it.[13]

As for the Union's opposition, it is the Authority's practice to grant requests to file oppositions to motions for reconsideration.[14] Therefore, we grant the Union's request and consider the opposition.

IV. Analysis and Conclusions

The Authority's Regulations permit a party to request reconsideration of an Authority decision.[15] But a party seeking reconsideration "bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action."[16]

The Authority has found that errors in its conclusions of law are extraordinary circumstances that may justify reconsideration.[17] The Agency alleges that the Authority erred as a matter of law in *IRS* because it failed to address a claim that the Agency advanced before the Arbitrator and on exceptions: a claim regarding "sovereign immunity as applied to . . . § 5584."[18] More specifically, the Agency asserts that if it had not remitted the employees' taxes to the City, then "the [C]ity . . . would have an enforceable debt against the employees, not the Agency," and "there is no evidence that the United States has waived its sovereign immunity to consent to any enforcement action or suit by the [C]ity."[19] In other words, the Agency argues that because it is part of the federal government, the City could not sue it to get the employees' taxes.

But this argument provides no basis for reconsidering *IRS*. It is immaterial whether the City could initiate an enforcement action against the Agency because *IRS* neither held that the City had a right to pursue money damages against the Agency, nor directed the Agency to pay any money to the City. Rather, *IRS* held that the Arbitrator correctly found that § 5584 authorized the Agency to waive its claims to overpayments to the employees, and the Agency's ability to waive those claims "*did not depend* on whether employees owed taxes to the City or the Agency."[20]

The Agency also asserts that reconsideration of *IRS* is warranted because, "logically extended,"[21] *IRS* would: (1) effectively impose a debt on the government that is not legally payable, because federal appropriated funds may only be used to pay necessary expenses, and

[7] Exceptions at 12-13.
[8] *IRS*, 66 FLRA at 890 (emphasis added).
[9] Exceptions at 10; *see IRS*, 66 FLRA at 890 (citing § 5584; *In re Damon R. Short—Underdeduction of FICA—Waiver*, B-230903, 1988 WL 228012 (Comp. Gen. Oct. 7, 1988) (unpublished decision)) (rejecting argument).
[10] Exceptions at 14-15; *see IRS*, 66 FLRA at 891 (rejecting argument).
[11] Exceptions at 15, 16; *see IRS*, 66 FLRA at 891 (rejecting argument).
[12] Motion at 13.
[13] See 5 C.F.R. § 2429.26(a), which states in pertinent part that the "Authority . . . may in [its] discretion grant leave to file other documents as [it] deem[s] appropriate." *Accord U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 535 n.1 (2010) (declining to consider motion to strike without request for leave to file).
[14] *See, e.g.*, *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 353 (2005).
[15] 5 C.F.R. § 2429.17; *e.g.*, *NAIL, Local 15*, 65 FLRA 666, 667 (2011) (*NAIL*).
[16] *NAIL*, 65 FLRA at 667.
[17] *See, e.g.*, *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 65 FLRA 256, 257 (2010).
[18] Motion at 1; *see also id.* at 10.
[19] *Id.* at 11.
[20] *IRS*, 66 FLRA at 890 (emphasis added).
[21] Motion at 12.

necessary expenses do not include employees' personal tax obligations;[22] (2) "effectively impose a tax on the Government" for the personal liabilities of its employees;[23] and (3) "require all federal agencies to pay their employees' third party debts subject to payroll withholding each time an administrative error" occurs affecting the withholding.[24] In support of these arguments, the Agency asserts that "[n]either the Union nor [the] Arbitrator . . . cited any precedent that would allow the waiver of third party debts and/or the refund of employee payments of such debts under . . . § 5584."[25]

These are the same arguments that the Agency raised,[26] and that the Authority rejected,[27] in *IRS*. Thus, the Agency is attempting to relitigate conclusions that the Authority reached in *IRS*. But attempts to relitigate an Authority decision do not provide a basis for granting reconsideration of that decision,[28] so the Agency's arguments provide no basis for reconsidering *IRS*.

In sum, the Agency's motion does not demonstrate that extraordinary circumstances warrant reconsideration of *IRS*. We therefore deny the motion. And as the motion's disposition moots the Agency's request to stay *IRS*, we deny that request as well.[29]

V. Order

We deny the Agency's motion for reconsideration and its stay request.

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[22] *Id.* (citing *In re Dep't of the Navy – Lunch for Volunteer Focus Grp.*, B-318499, 2009 WL 5184704 (Comp. Gen. Nov. 19, 2009)).
[23] *Id.* at 12-13.
[24] *Id.* at 13.
[25] *Id.* at 12.
[26] *See* Exceptions at 10-15.
[27] *See IRS*, 66 FLRA at 890-91.
[28] *See NAIL*, 65 FLRA at 667; *SPORT Air Traffic Controllers Org.*, 64 FLRA 1142, 1143 (2010).
[29] *See U.S. DHS, U.S. CBP*, 66 FLRA 1042, 1045 n.2 (2012) (in an order denying motion for reconsideration, Authority denied as moot a request to stay original decision pending resolution of the motion).