

67 FLRA No. 156

UNITED STATES
DEPARTMENT OF ENERGY
WESTERN AREA POWER ADMINISTRATION
LAKEWOOD, COLORADO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3824
(Union)

0-AR-5001
(67 FLRA 376 (2014))

ORDER DENYING MOTION FOR
RECONSIDERATION

September 26, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator David M. Blair issued an award finding that the Agency violated the parties' agreement when processing the grievance and awarding the grievant his requested relief: twelve hours of overtime compensation and 9% interest on the unpaid compensation. The Agency filed exceptions to the award, and the Authority dismissed the Agency's exceptions, in part, and granted them, in part, in *U.S. Department of Energy, Western Area Power Administration (Western Area Power)*.¹ Specifically, in *Western Area Power*, the Authority granted the Agency's exception that the award was contrary to law to the extent it awards interest at a rate higher than the statutory rate provided in the Back Pay Act (BPA).² Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority dismissed the Agency's exceptions that: (1) the award is contrary to the BPA because the Agency's violation of Article 24, Section 7.A.2.a of the parties' agreement (Section 7.A.2.a) did not result in a withdrawal or reduction of pay; and (2) the award fails to draw its essence from the parties' agreement because it awards the Union the status of "prevailing party" and

finds the Agency solely responsible for the arbitration costs.³ The Agency has now filed a motion for reconsideration of the Authority's decision in *Western Area Power*.

The question before us is whether the Agency has established extraordinary circumstances that warrant reconsideration of *Western Area Power*. Specifically, the Agency asks that we reconsider the Authority's previous conclusion that §§ 2425.4(c) and 2429.5 of the Authority's Regulations precluded the Agency from arguing that the award is contrary to the BPA. Because the Agency's arguments do not provide a basis for granting reconsideration, we deny the motion.

II. Background

The parties submitted an unresolved grievance to the Arbitrator to determine whether the Agency violated Section 7.A.2.a of the parties' agreement by failing to deliver a copy of the Agency's written decision regarding the grievance to the grievant. The Arbitrator found that the Agency's actions violated Section 7.A.2.a. Turning to the remedy, the Arbitrator found that Section 7.A.2.a provides that "[f]ailure to respond at any level[] [within] the time limits identified" for processing the grievance "will constitute an agreement with the grievant and his/her relief sought will be granted in favor of the employee if not prohibited by law."⁴ According to the Arbitrator, the Union's requested remedy was that the grievant "be made whole."⁵ The Arbitrator noted that the Agency had not provided any evidence that this remedy "would be prohibited by law" and further noted that he was not aware of any such prohibition.⁶ Accordingly, the Arbitrator awarded the grievant twelve hours of overtime compensation and interest on the unpaid compensation at a rate of 9% per annum. The Arbitrator then "award[ed] the Union . . . the status of prevailing party" and found that "as such[,] the Agency shall be solely responsible for the . . . costs associated with this decision."⁷

As relevant here, in *Western Area Power*, the Authority dismissed the Agency's exception that the award was contrary to the BPA, because the Agency's violation of Section 7.A.2.a did not result in a withdrawal or reduction of pay, under §§ 2425.4(c) and 2429.5 of the Authority's Regulations. Those sections of the Authority's Regulations provide that the Authority will not consider any arguments that could have been, but

¹ 67 FLRA 376 (2014).

² 5 U.S.C. § 5596.

³ *Western Area Power*, 67 FLRA at 377.

⁴ *Id.* at 376.

⁵ *Id.* (quoting Award at 14) (internal quotation marks omitted).

⁶ *Id.* (quoting Award at 14) (internal quotation marks omitted).

⁷ *Id.* (quoting Award at 15).

were not, presented to the arbitrator.⁸ In *Western Area Power*, the Authority found that “[t]he Agency knew at the time of the hearing that the relief requested in the grievance was for the grievant to ‘be made whole’ with respect to his overtime claim.”⁹ Yet, before the Arbitrator, “[t]he Agency provided no evidence that would suggest that the relief requested by the Union would be prohibited by law.”¹⁰ Thus, because the Authority found that the Agency could have presented its argument that an award of overtime pay would violate the BPA to the Arbitrator, but did not do so, the Authority dismissed the exception under §§ 2425.4(c) and 2429.5.

Subsequently, the Agency filed this motion for reconsideration of the Authority’s decision, and the Union filed an opposition.

III. Analysis and Conclusion: The Agency has failed to establish extraordinary circumstances warranting reconsideration of the Authority’s decision in *Western Area Power*.

Section 2429.17 of the Authority’s Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority decision.¹¹ A party seeking reconsideration under § 2429.17 bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.¹² The Authority has found that errors in its conclusions of law or factual findings constitute extraordinary circumstances that may justify reconsideration.¹³ But attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.¹⁴

The Agency argues that extraordinary circumstances warrant reconsideration because the Authority’s decision in *Western Area Power* “is contrary

to law as well as [Authority] precedent.”¹⁵ Specifically, the Agency contends that the Authority erred in dismissing its claim that the award is contrary to the BPA because the Agency’s violation of Section 7.A.2.a did not result in a withdrawal or reduction of pay.

The Agency offers three arguments in support of its motion for reconsideration. First, the Agency claims that “[r]egardless [of] whether the Agency could or should have made its argument during arbitration, to allow the Arbitrator’s remedy to stand would be to force the Agency to violate the [BPA].”¹⁶ This argument is unavailing. The Authority has consistently held that, under §§ 2425.4(c) and 2429.5, an agency is barred from arguing that an award is contrary to the BPA where the union requested the chosen remedy in proceedings before the arbitrator and the agency could have, but did not, object to the remedy before the arbitrator.¹⁷ Therefore, the Agency’s first argument fails to establish extraordinary circumstances warranting reconsideration.

Second, the Agency argues that the Authority “has previously allowed exceptions regarding back[pay], similar to those initially advanced here by the Agency, to be made even where such arguments were not apparently made during arbitration.”¹⁸ In support of this argument, the Agency cites *U.S. Department of VA, Medical Center, Kansas City, Missouri (VA, Kansas City)*.¹⁹

But the Agency’s reliance on *VA, Kansas City* is misplaced. In that case, the Authority did not consider whether §§ 2425.4(c) and 2429.5 barred the agency’s arguments that the award was contrary to the BPA. And, contrary to the Agency’s claim, there is no indication that the agency in that case failed to raise its arguments before the arbitrator. Thus, *VA, Kansas City* is not controlling. In fact, as mentioned above, the Authority has held that an agency is barred from excepting to an arbitration award as contrary to the BPA when the agency did not raise its contrary-to-law arguments before the arbitrator, but could have done so.²⁰ Accordingly, we find that the Agency’s second argument also fails to establish extraordinary circumstances warranting reconsideration.

Finally, the Agency contends that extraordinary circumstances warrant reconsideration of the Authority’s decision because “the decision overlooks [Authority]

⁸ 5 C.F.R. §§ 2425.4(c), 2429.5; see also *AFGE, Local 3571*, 67 FLRA 218, 219 (2014).

⁹ *Western Area Power*, 67 FLRA at 377 (quoting award at 14).

¹⁰ *Id.* (quoting Award at 14).

¹¹ E.g., *U.S. DHS, U.S. CBP*, 66 FLRA 1042, 1043 (2012).

¹² *Id.*; *U.S. Dep’t of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000); *U.S. Dep’t of the Air Force, 375th Combat Support Grp., Scott Air Force Base, Ill.*, 50 FLRA 84, 85 (1995) (*Scott Air Force Base*).

¹³ E.g., *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 65 FLRA 256, 257 (2010); *Scott Air Force Base*, 50 FLRA at 86-87.

¹⁴ E.g., *Ass’n of Civilian Technicians, P.R. Army Chapter*, 62 FLRA 144, 145 (2007) (*ACT*) (“The Authority has uniformly held that attempts to relitigate conclusions reached by the Authority are insufficient to satisfy the extraordinary circumstances requirement.”) (citing *Library of Cong.*, 60 FLRA 939, 941 (2005)).

¹⁵ Mot. for Recons. at 1.

¹⁶ *Id.* at 2.

¹⁷ E.g., *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189-90 (2009) (*BOP Milan*); *U.S. DOD, Educ. Activity*, 60 FLRA 254, 256 (2004) (*DOD*); *U.S. Dep’t of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 58 FLRA 87, 91 (2002) (*Army*).

¹⁸ Mot. for Recons. at 3.

¹⁹ 51 FLRA 762 (1996).

²⁰ E.g., *BOP Milan*, 63 FLRA at 189-90; *DOD*, 60 FLRA at 256; *Army*, 58 FLRA at 91.

cases holding [that] where an issue arises from the issuance of the award and could not have been presented to the arbitrator, it is not precluded by § 2429.5.”²¹ According to the Agency, it “did not present any argument on the illegality of an award of back[pay] for a procedural error causally unrelated to any reduction in pay because it could not have predicted the need at the time of the arbitration.”²²

In *Western Area Power*, however, the Authority explicitly found that the Agency could have presented its argument to the Arbitrator because “[t]he Agency knew at the time of the hearing that the relief requested in the grievance was for the grievant to ‘be made whole’ with respect to his overtime claim.”²³ And the Agency offers no argument for why this factual finding was erroneous. Accordingly, we find that this argument, too, fails to demonstrate extraordinary circumstances warranting reconsideration of *Western Area Power*.

IV. Order

We deny the Agency’s motion for reconsideration.

²¹ Mot. for Recons. at 4 (citation omitted) (internal quotation marks omitted).

²² *Id.* at 5.

²³ *Western Area Power*, 67 FLRA at 377 (quoting Award at 14).