68 FLRA No. 127

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5058
(68 FLRA 276 (2015))

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ORDER DENYING
MOTION FOR RECONSIDERATION

July 30, 2015

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

I. Statement of the Case

Arbitrator Robert T. Simmelkjaer found that the Agency violated the parties' agreement between the Agency and Union by not retroactively paying qualified bargaining-unit employees their mass-transit subsidies of up to $240 per month for the period from January 2012 through December 2012, and up to $245 for January and February 2013. As a remedy, he directed the Agency to reimburse affected employees, under the Back Pay Act (BPA)[1] for the amounts that they would have received absent the contractual violation. The Agency filed exceptions to the award, and in *U.S. DHS, U.S. CBP* (*CBP*),[2] the Authority denied the Agency's exceptions. This matter is before the Authority on the Agency's motions for reconsideration and a stay of the Authority's decision.

This case presents two issues. The first is whether the Agency has demonstrated extraordinary circumstances warranting reconsideration. Specifically, the Agency contends that extraordinary circumstances exist because the Authority acted contrary to law in failing to address a deference argument and in ordering backpay for transit reimbursements purportedly not authorized under appropriations law. Additionally, the Agency asserts that the Authority sua sponte raised a sovereign immunity issue justifying reconsideration so that the Authority could hear the Agency's response. However, because the Agency's arguments merely relitigate issues already decided, reconsideration is unwarranted.

The second issue is whether a stay is appropriate. Because we deny the Agency's motion for reconsideration, we also deny, as moot, the Agency's motion for a stay.

II. Background

The facts, briefly summarized here, are set forth in detail in *CBP*. In *CBP*, the Arbitrator found that the Agency violated the parties' agreement "to provide employees 'with the maximum allowable transportation subsidy they qualify for based on their commute'"[3] when it did not provide eligible bargaining-unit employees the maximum non-taxable amount of transit subsidies allowed by § 132(f)(2) of the Internal Revenue Code,[4] as amended by American Taxpayer Relief Act of 2012 (ATRA).[5] ATRA amended § 132(f)(2)(A) to retroactively increase the maximum amount of non-taxable transit subsidies up to $240 per month for the period from January 2012 through December 2012, and up to $245 for January and February 2013.[6] Finding a contract violation, the Arbitrator issued a remedy directing the Agency to make affected employees whole under the BPA.

The Agency filed exceptions to the Arbitrator's award. The Authority considered the arguments raised in the Agency's exceptions that: (1) ATRA does not authorize retroactive payment of transit subsidies; and (2) the award requires the Agency to spend appropriated funds on retroactive transit subsidies for which there is no authority under the Incentives Act, the statute that authorizes all federal agencies to establish transit-subsidy programs.[7] The Authority found that its recent decision in *U.S. Department of HHS, Washington, D.C. (HHS)* resolved the principal question in *CBP* – whether an award requiring the Agency to pay retroactive transit subsidies is contrary to law because no law authorizes or requires the payment of such subsidies.[8] The Authority concluded that the Incentives Act, in conjunction with the BPA, supported the award.[9] In so concluding, the Authority noted the Agency's challenge to the Arbitrator's interpretation of ATRA. But the Authority

[1] 5 U.S.C. § 5596.
[2] 68 FLRA 276 (2015).
[3] *Id.* (quoting Award at 40 (internal quotation marks omitted)).
[4] *Id.* (citing 26 U.S.C. § 132(f)(2)).
[5] ATRA, Pub. L. No. 112-240, 126 Stat. 2313 (2013) (ATRA).
[6] *CBP*, 68 FLRA at 276-77; ATRA § 203.
[7] 5 U.S.C. § 7905(b)(1).
[8] *CBP*, 68 FLRA at 277 (citing *HHS*, 68 FLRA 239 (2015)).
[9] *Id*. at 278.

determined that, because the Incentives Act and the BPA alone supported the Arbitrator's legal conclusion and thus the remedy, it was unnecessary to address the Agency's other challenges to the Arbitrator's rationale for the award.[10] The Authority therefore denied the Agency's exceptions.

The Agency then filed this motion for reconsideration and a stay of the Authority's decision, and the Union filed a response.

III. Analysis and Conclusions

A. The Agency's motion provides no basis for granting reconsideration because it attempts to relitigate issues the Authority decided in *CBP*.

Section 2429.17 of the Authority's Regulations permits a party to request reconsideration of an Authority decision if it can establish extraordinary circumstances.[11] A party seeking reconsideration 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 may constitute extraordinary circumstances that could justify reconsideration.[13] Extraordinary circumstances also may exist where a moving party has not been given an opportunity to address an issue raised sua sponte by the Authority.[14] But attempts merely to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.[15]

Attempting to demonstrate extraordinary circumstances warranting reconsideration, the Agency proffers three arguments. First, it claims that extraordinary circumstances exist because the Authority erred as a matter of law when it purportedly did not consider the Agency's argument that the Authority should have deferred to other agencies' interpretations of ATRA and § 132(f)(2)(A).[16] Second, again relying on alleged legal error to show extraordinary circumstances, the Agency contends that the Authority erroneously concluded that appropriations law permits retroactive reimbursement of transit subsidies under the BPA and principles of sovereign immunity.[17] Third, the Agency contends that extraordinary circumstances exist because the Authority purportedly raised a sovereign immunity issue sua sponte in *CBP* by relying "entirely" on *HHS* in finding that the Incentives Act authorized retroactive reimbursement, which should entitle the Agency to a chance to respond on reconsideration.[18]

None of these arguments have merit, as each merely attempts to relitigate issues that the Authority already decided in *CBP*. First, the Authority considered—but found irrelevant—the Agency's argument regarding deference to other agencies' interpretations of ATRA. In *CBP*, relying on *HHS*, the Authority concluded that the Incentives Act *alone* provided authority for agencies to pay retroactive transit subsidies pursuant to their agreements with labor organizations.[19] Thus, the Authority concluded that it was unnecessary to pass on the Arbitrator's discussion of whether ATRA authorized retroactive reimbursements,[20] declining to consider the Arbitrator's discussion of deference to other agencies' guidance on ATRA.[21] Because the Agency already litigated this issue in its exceptions – and the Authority has already decided it – extraordinary circumstances warranting reconsideration are not present.

Next, the Agency attempts to proffer two separate "extraordinary circumstances" justifying reconsideration of the Authority's finding in *CBP* that the Incentives Act authorizes, and the BPA requires, payment of retroactive transit benefits as required by the Agency's contract with the Union. Specifically, the Agency argues that retroactive payments would require expenditure of non-appropriated funds contrary to appropriations law and sovereign immunity and that by citing to *HHS*, which discussed sovereign immunity principles, the Authority injected sovereign immunity into the case sua sponte, requiring an Agency response on reconsideration. But these arguments merely reframe, in sovereign immunity terms and without substantive difference, the same arguments concerning the breadth of the Incentives Act

[10] *Id*.
[11] 5 C.F.R. § 2429.17; *e.g.*, *SPORT Air Controllers, Org.*, 68 FLRA 107, 108 (2014) (denying motion for reconsideration for failure to show extraordinary circumstances).
[12] *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] *Scott Air Force Base*, 50 FLRA at 86-87.
[15] *Ass'n of Civilian Technicians, P.R. Army Chapter*, 62 FLRA 144, 145 (2007) ("The Authority has uniformly held that attempts to relitigate conclusions reached by the Authority are insufficient to satisfy the extraordinary circumstances requirement.").
[16] Mot. for Recons. at 5-9.
[17] *Id.* at 9-15.
[18] *Id.* at 15-17.
[19] *CBP*, 68 FLRA at 278 (citing *HHS*, 68 FLRA at 241-42).
[20] *Id.*
[21] *Id*. (citing *SSA*, 67 FLRA 534, 538 (2014)) (noting that de novo review only requires the Authority to assess the legality of the arbitrator's conclusion, not his or her reasons).

that the Agency made in its exceptions,[22] and that the Authority conclusively rejected in *CBP* and *HHS*.[23] Further justifying the denial of reconsideration in *CBP*, the Agency did not argue, as it does now, that an award of retroactive transit subsidies to remedy a contract violation is beyond the scope of the BPA.[24] It is too late to raise that issue for the first time.[25]

Moreover, the Agency's argument on sovereign immunity does not provide a basis for granting reconsideration for an additional reason. The D.C. Circuit has recently recognized that the BPA itself is a waiver of sovereign immunity, and, as here, "[r]outine statutory and regulatory questions [regarding its application] . . . are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity."[26] The Authority resolved the routine statutory argument regarding the Incentives Act and its application to the BPA in *CBP*. Dressing up the argument in "sovereign immunity" clothing does not change the Authority's response.

As the Agency's motion only attempts to relitigate the conclusions reached in the Authority's *CBP* decision, it does not provide a basis for granting reconsideration.[27] Therefore, we deny the motion.

B. The Agency's motion for a stay is moot.

The Agency requests a stay of the Arbitrator's award "until the Authority resolves the arguments" in the Agency's motion for reconsideration.[28] Because we have denied the Agency's motion for reconsideration, the stay request is moot, and we deny it.[29]

IV. Order

We deny the Agency's motions for reconsideration and a stay of the Arbitrator's award.

[22] *Compare* Exceptions at 22-23 (arguing that no appropriations authority exists for retroactive reimbursement for transit benefits because the Incentives Act works prospectively to create incentives for future use of public transportation), *with* Mot. for Recons. at 11-15 (same, but contending that the award also violates sovereign immunity).
[23] *CBP*, 68 FLRA at 278; *HHS* 68 FLRA at 242.
[24] *Compare* Mot. for Recons. at 9, 11, 15, *with* Exceptions at 21-25.
[25] *See* 5 C.F.R. § 2429.5.
[26] *See DHS, CBP v. FLRA*, 784 F.3d 821, 823-24 (D.C. Cir. 2015).
[27] *E.g., U.S. Dep't of Treasury, IRS*, 67 FLRA 58, 60 (2014); *NAIL, Local 15*, 65 FLRA 666, 667 (2011); *SPORT Air Traffic Controllers Org.*, 64 FLRA 1142, 1143 (2010).
[28] Mot. for Recons. at 17.
[29] *IRS*, 67 FLRA 58, 60 (2014) ("As the motion [for reconsideration]'s disposition moots the Agency's request to stay . . . , we deny that request as well.").