68 FLRA No. 132

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4933
(68 FLRA 253 (2015))

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ORDER DENYING
MOTION FOR RECONSIDERATION

August 17, 2015

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

I. Statement of the Case

The Agency previously filed exceptions to an award of Arbitrator Susan R. Meredith (second remedial award) that directed the Agency to pay certain employees backpay as a remedy for scheduling practices that had been found unlawful by a previous arbitrator, Margery F. Gootnick. In *U.S. DHS, U.S. CBP* (*DHS*),[1] the Authority dismissed the Agency's exceptions, in part, and denied them, in part. The Agency has now filed a motion for reconsideration of *DHS* under § 2429.17 of the Authority's Regulations,[2] which presents two substantive questions.

The first question is whether the Authority erred in *DHS* by dismissing certain Agency arguments under §§ 2425.4(c) and 2429.5 of the Authority's Regulations because the Agency did not present those arguments to Arbitrator Meredith.[3] The Agency has not established that: (1) it presented any of the barred arguments at arbitration; (2) the Authority should excuse its failure to do so; or (3) any of the barred arguments implicate jurisdictional issues that the Authority's Regulations may not bar from consideration. Thus, the answer to the first question is no.

The second question is whether the Authority erred in rejecting certain arguments in *DHS* on their merits. The Agency's assertions concerning this question merely attempt to relitigate the Authority's conclusions in *DHS*. As such attempts do not establish extraordinary circumstances warranting reconsideration, the answer to the second question is also no.

II. Background

The Authority more fully detailed the circumstances of this dispute in *DHS*,[4] so this order discusses only those aspects of the case that are pertinent to the Agency's motion for reconsideration.

This dispute arose out of the Agency's Revised National Inspectional Assignment Policy (RNIAP). The RNIAP replaced an earlier National Inspectional Assignment Policy that had provided for local negotiations to include staffing levels and tours of duty at the local level. The Union, after receiving complaints, requested bargaining over the RNIAP and a new "bid-and-rotation" system.[5] After the Agency refused the request, the Union filed a grievance alleging that the Agency violated 5 U.S.C. § 6101(a)(3); 5 C.F.R. § 610.121; § 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute[6] (the Statute); and the parties' agreement. The grievance was unresolved, and the parties submitted the matter to arbitration.

A. The Interim Award

Following the first arbitration between the parties, Arbitrator Gootnick found, in pertinent part, that the Agency violated 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a) and (b) when scheduling the grievants' work. Specifically, she found that the Agency changed the grievants' established work schedules "to meet 'operational needs' or to provide service 'at the least cost' to the government and the public," in accordance with the RNIAP, and in violation of the statute and regulation.[7] Arbitrator Gootnick also found that the Agency violated § 7116(a)(1), (5), and (8) of the Statute when it failed to respond to the Union's information request pertaining to the affected grievants' work schedules.

Arbitrator Gootnick's interim award ordered the Agency to cease and desist from continuing these violations; to post a notice; and to provide the Union with

[1] *U.S. DHS, U.S. CBP*, 68 FLRA 253 (2015) (*DHS*).
[2] 5 C.F.R. § 2429.17.
[3] *DHS*, 68 FLRA at 256 (citing 5 C.F.R. §§ 2425.4(c), 2429.5).
[4] *See id.* at 253-56.
[5] *Id.* at 253 (citing *U.S. DHS, U.S. CBP*, 65 FLRA 978, 978 (2011) (*U.S. DHS*) (internal quotations omitted)).
[6] 5 U.S.C. § 7116(a)(1), (5), (8).
[7] *DHS*, 68 FLRA at 254 (citing Second Remedial Award at 2).

information concerning the affected grievants' work assignment changes. She further ordered the parties to meet and confer regarding remedies and retained jurisdiction for sixty days for the limited purpose of considering remedial issues and issuing an appropriate remedy.

B. The First Remedial Award

When the parties could not agree to a remedy, they brought the matter back to Arbitrator Gootnick. She found that the Back Pay Act (BPA)[8] would allow recovery during the entire period of the RNIAP, because the Union filed its grievance less than six years after the RNIAP became effective. Individual grievants would have varying recovery periods depending on when the Agency first applied the RNIAP to them. Arbitrator Gootnick also determined that, contrary to the Agency's argument, the grievants were not excluded from the coverage of 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121. She also found that, with certain exceptions, the Agency's unjustified or unwarranted personnel action, in changing the grievants' established work schedules in violation of applicable law and regulation, resulted in the reduction of their pay, allowances, or differentials. Finally, Arbitrator Gootnick found that the Union was the prevailing party, that the award of attorney fees was in the interest of justice, and that the fees sought by the Union were reasonable. Accordingly, Arbitrator Gootnick ordered the relief set out in her interim award, along with compensation under the BPA, and attorney fees.

The Agency filed exceptions to the first remedial award with the Authority, and the Union filed an opposition to the Agency's exceptions. In 2011, the Authority dismissed the Agency's exceptions, in part, and denied them, in part.[9]

C. The Second Remedial Award

When the parties were again unable to resolve the remaining remedial issues, they submitted the matter to Arbitrator Meredith, who was selected by the parties after the death of Arbitrator Gootnick. Arbitrator Meredith noted that the previous arbitrator: found that the grievants whose work schedules were changed in violation of applicable law and regulation were entitled to retroactive adjustments in their pay; determined the period for which retroactive pay could be made; and ruled on objections the Agency asserted to those payments. She concluded, therefore, that the only issue before her was "how these retroactive adjustments are to be accomplished."[10]

The Agency proposed a claims procedure by which the Agency would notify eligible grievants of their ability to make a claim and give them an opportunity to review their prior work schedules. Alternatively, the Union proposed a process by which grievants would not need to file claims. Instead, the parties would apply two formulae to the schedule data to determine the remedy owed to each grievant. One formula would address employees who were scheduled such that the working hours in each day in the basic workweek were not the same by providing that the employees be paid overtime for all hours worked outside of the basic workweek. A second formula would apply to those employees whose schedules were changed such that they did not receive two consecutive non-work days off.

The Agency argued that the Union's formulae: (1) were rejected previously by Arbitrator Gootnick; and (2) would provide payment to grievants in excess of their losses. Arbitrator Meredith rejected these arguments. She reasoned that, while Arbitrator Gootnick did not adopt the formulae, Arbitrator Gootnick's presumption that "the parties would be able to review and jointly resolve what each employee's financial entitlements should be" after the Agency provided the Union with the relevant work schedules was incorrect.[11] Therefore, according to Arbitrator Meredith, the fact that Arbitrator Gootnick did not impose the formulae did not prevent her from imposing the formulae in this award. Moreover, Arbitrator Meredith held that the Union's formulae would not compensate the grievants in excess of their losses, and concluded that "the formulae proposed by the [Union] are most likely to place the [grievants] . . . into the place [that] they would have been absent the unjust action."[12]

Accordingly, Arbitrator Meredith ordered the Agency to cease and desist from violating 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a) and (b) in scheduling its customs officers, and to retain all work scheduling records for all customs officers. She ordered the Agency to post those records electronically within thirty days of the award becoming final and binding and for the records to remain posted until all of the grievants' claims are settled. Arbitrator Meredith also ordered the Agency to "issue to all current employees entitled to a remedy the exact calendar dates and number of hours for which the [A]gency believes the employee is entitled to

[8] 5 U.S.C. § 5596.
[9] *See U.S. DHS*, 65 FLRA 978.
[10] *DHS*, 68 FLRA at 255 (quoting Second Remedial Award at 5) (internal quotation marks omitted).
[11] *Id.* (quoting Second Remedial Award at 6-7) (internal quotation marks omitted).
[12] *Id.* (quoting Second Remedial Award at 8) (internal quotation marks omitted).

compensation," as well as an accounting of the Agency's calculation of the compensation due to the employee.[13] In addition, Arbitrator Meredith outlined two different formulae for determining the compensation due to each employee, depending on the manner in which each employee was affected by the Agency's violations.

The Agency filed exceptions to the second remedial award, and the Union filed an opposition to the Agency's exceptions.

D. The Authority's 2015 Decision in *DHS*

In *DHS*, the Authority determined that §§ 2425.4(c) and 2429.5 of the Authority's Regulations barred several arguments in the Agency's exceptions because the Agency could have presented, but did not present, those arguments to Arbitrator Meredith.[14] In particular, the Authority found that §§ 2425.4(c) and 2429.5 barred the Agency's arguments that: (1) the second remedial award is contrary to the Customs Officer Pay Reform Act[15] (COPRA); (2) Arbitrator Meredith violated the doctrine of functus officio in awarding the remedy; and (3) the second remedial award is contrary to public policy, because it constitutes punitive damages against the federal government.[16]

The Authority then rejected the Agency's remaining arguments on their merits. First, the Authority rejected the Agency's argument that the second remedial award was contrary to the BPA because it awarded backpay without determining whether individual grievants had suffered an actual (as opposed to speculative) loss in pay, allowances, or differentials.[17] In that regard, the Authority found that the question of whether the grievants suffered a loss in pay, allowances, or differentials due to the Agency's prohibited actions was resolved by Arbitrator Gootnick and was not before Arbitrator Meredith.[18] Second, the Authority rejected the Agency's contention that the second remedial award was contrary to the doctrine of sovereign immunity.[19] In particular, the Authority noted that when a sovereign-immunity claim depends on an argument that an arbitration award is contrary to the BPA, and the Authority finds that the award is consistent with the BPA, the Authority denies the sovereign-immunity claim.[20] Third, the Authority rejected the Agency's argument that the second remedial award is based on four nonfacts.[21] Specifically, the Authority found that three of these alleged nonfacts had been disputed between the parties at arbitration, and that for the fourth, the Agency failed to identify a clearly erroneous central fact underlying the award, but for which Arbitrator Meredith would have reached a different result.[22]

The Agency filed a motion for reconsideration of *DHS*, as well as a motion to stay implementation of the Authority's decision (motion to stay). The Union filed an opposition to the Agency's motion for reconsideration, as well as an opposition to the motion to stay.

III. Preliminary Matters: Section 2429.26 of the Authority's Regulations bars two of the parties' supplemental submissions.

Section 2429.26 of the Authority's Regulations states that the Authority may in its discretion grant leave to file documents other than those specifically listed in the Regulations.[23] But if a party wants to file a non-listed document (supplemental submission), then the Authority generally requires the party to request leave to file it.[24] Where the Authority declines to consider a supplemental submission, the Authority also declines to consider a response to that submission because the response is moot.[25]

The Union requested permission to file its opposition to the Agency's motion for reconsideration.[26] As it is the Authority's practice to grant requests to file oppositions to motions for reconsideration, we grant the Union's request.[27] Concerning the motion to stay, the Agency did not request a stay as part of its motion for reconsideration, but, rather, filed the motion to stay, separately. As the Agency did not request permission under § 2429.26 to file the stay motion, we do not consider it.[28] Because we decline to consider the motion

[13] *Id.* (quoting second remedial award at 12) (internal quotation marks omitted).
[14] *DHS*, 68 FLRA at 256.
[15] 19 U.S.C. § 267.
[16] *DHS*, 68 FLRA at 255.
[17] *Id*. at 256.
[18] *Id*. at 257.
[19] *Id*. at 257-58.
[20] *Id*. at 258; *see also U.S. DHS, U.S. CBP*, 67 FLRA 461, 464 (2014) (*U.S. CBP*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189-90 (2009) (*FCI Milan*).
[21] *DHS*, 68 FLRA at 258-59.
[22] *Id*. at 259.
[23] 5 C.F.R. § 2429.26.
[24] *See, e.g., SSA, Region VI*, 67 FLRA 493 (2014).
[25] *AFGE, Local 3562*, 68 FLRA 394, 396-97 (2015) (*Local 3562*) (citing *Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011)).
[26] Union's Request for Leave to File Resp. in Opp'n to CBP's Mot. for Recons. at ii.
[27] *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012); *see also U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 353 (2005) (citing *Library of Cong.*, 60 FLRA 939, 939 n.2 (2005)).
[28] *See, e.g., 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).

to stay, we also do not consider the Union's opposition to that motion.[29]

IV. Analysis and Conclusions

The Authority's Regulations permit a party who can establish extraordinary circumstances to move for reconsideration of an Authority decision.[30] The Authority has repeatedly recognized that a party seeking reconsideration of an Authority decision bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[31] In that regard, the Authority has held that errors in its remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.[32] But, attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances warranting reconsideration.[33]

A. The Agency does not establish that the Authority erred in its application of §§ 2425.4(c) and 2429.5 in *DHS*.

The Agency challenges the Authority's application of §§ 2425.4(c) and 2429.5 in *DHS* on several bases, each of which is discussed below.

1. The Agency has not demonstrated that the Authority erred in dismissing the Agency's contrary-to-COPRA exception under §§ 2425.4(c) and 2429.5.

The Agency challenges the application of §§ 2425.4(c) and 2429.5 to bar the Agency's argument that the backpay award was contrary to COPRA.[34] In that regard, the Agency asserts that it sufficiently raised this argument before the Arbitrator. The Agency makes four arguments to support this assertion.

First, the Agency states that the Authority in *DHS* dismissed the Agency's exception regarding COPRA "on the basis that this argument was not raised before Arbitrator Gootnick."[35] According to the Agency, because the significance of COPRA "was not squarely at issue until the case was before Arbitrator Meredith," the Authority erred in denying this exception "on the grounds that it was not raised before Arbitrator Gootnick."[36] Yet the Authority never stated in *DHS* that the Agency failed to raise the COPRA issue only before Arbitrator Gootnick; rather, we held that this issue "could have been presented below" to either Arbitrator Gootnick *or* Arbitrator Meredith.[37] Therefore, the Agency has not demonstrated that the Authority erred on this basis.

Second, the Agency argues that it raised the issue of COPRA: (1) in its closing brief at arbitration; and (2) through testimony at the hearing before Arbitrator Meredith.[38] The Authority readily acknowledges that the Agency's closing brief made general references to COPRA; however, this does not establish that the Agency argued at arbitration that the Union's proposed remedial formulas were *contrary to* COPRA.[39] The Authority has held that "merely submitting rules and regulations as part of the record without further explanation is not an argument."[40] As such, these brief references to COPRA do not establish that the Agency raised this issue in its closing brief at arbitration, and by rearguing this contention, the Agency has not demonstrated that the Authority erred in dismissing this argument.

Further, the Agency cites to testimony from arbitration indicating that the issue of COPRA arose in some capacity before Arbitrator Meredith.[41] Yet the Agency does not demonstrate that it argued at arbitration that COPRA overtime rates are limited to work that is "officially assigned," as it did in its exceptions before the Authority. The Authority will not consider arguments offered in support of an exception if those arguments differ from, or are inconsistent with, a party's arguments to the arbitrator.[42] Accordingly, the Agency has not demonstrated that the Authority erred in *DHS* by holding that the Agency failed to raise its COPRA argument at arbitration.

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[29] *E.g.*, *Local 3562*, 68 FLRA at 396-97.
[30] 5 C.F.R. § 2429.17.
[31] *E.g.*, *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000).
[32] *Int'l Ass'n of Firefighters, Local F-25*, 64 FLRA 943, 943 (2010) (citing *U.S. Dep't of Transp., FAA, Wash., D.C.*, 63 FLRA 653, 653-54 (2009)).
[33] *Bremerton Metal Trades Council*, 64 FLRA 543, 544 (2010 (*Bremerton*).
[34] Agency's Mot. for Recons. (Agency's Mot.) at 5.
[35] *Id*.
[36] *Id*.
[37] *DHS*, 68 FLRA at 256.
[38] Agency's Mot. at 6 (citing Agency's Post-Hr'g Br. at 5-17; Hr'g Tr., Dec. 18, 2012 at 133 (Hr'g Tr.)).
[39] *See* Agency's Post-Hr'g Br. at 5-17.
[40] *U.S. Dep't of VA, Bos. Healthcare Sys., Bos., Mass.*, 68 FLRA 116, 117 (2014) (*VA Bos.*).
[41] Agency's Mot. at 6 (citing Hr'g Tr. at 133).
[42] *U.S. DOJ, Fed. BOP, Fed. Correctional Complex, Forrest City, Ark.*, 68 FLRA 672, 673 (2015) (citing *VA Bos.*, 68 FLRA at 118).

Third, the Agency relies on the Authority's decision in *U.S. DHS, U.S. CBP* (*CBP*)[43] for the proposition that, even assuming that the COPRA issue was not explicitly raised before the Arbitrator, the Authority must consider it on appeal because it is "inextricably intertwined with the Agency's overall argument."[44] But the Authority's resolution of the Agency's exceptions in *DHS* shows that the arguments dismissed under the Regulations were not similar to those considered by *CBP*. In that regard, by addressing the barred arguments separately and dismissing them, *DHS* demonstrated that they were not "*inextricably* intertwined"[45] with any contrary-to-law arguments that the Authority considered and rejected on the merits.[46] Thus, the Agency's "inextricably intertwined" challenge does not provide a basis for finding that the Authority erred in applying §§ 2425.4(c) and 2429.5.

The Agency continues its reliance on *CBP* by arguing in its motion for reconsideration that "in February 2013, when the parties presented this case to Arbitrator Meredith, the Authority had not issued its final decision in *CBP*," and therefore, the "intervening legal decision" in *CBP* requires reconsideration of *DHS*.[47] However, the Authority issued *CBP* in June 2012, and denied the motion to reconsider that decision in February 2014.[48] As such, this decision was in effect, and available to the parties, before the February 2013 hearing before Arbitrator Meredith.[49] Accordingly, the holding in *CBP* does not warrant the Authority's reconsideration of *DHS*.

Fourth, the Agency argues that compliance with COPRA implicates the doctrine that the federal government is immune from money damages unless a federal statute waives that immunity (the doctrine of sovereign immunity), so §§ 2425.4(c) and 2429.5 could not bar COPRA-compliance arguments.[50] But, as the Authority stated in *DHS*, sovereign immunity is waived in this case because the Second Remedial Award is consistent with the BPA.[51] And as the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently explained, in cases where the sovereign-immunity waiver in the BPA applies, other "[r]outine statutory and regulatory questions" – such as the second remedial award's compliance with COPRA in this case – "are not transformed into constitutional or jurisdictional issues merely because" a backpay award relies upon a sovereign-immunity waiver.[52] Although the Agency's sovereign-immunity argument here invokes the Appropriations Clause of the U.S. Constitution,[53] the D.C. Circuit indicated that its holding regarding the non-jurisdictional nature of "[r]outine statutory and regulatory questions" applies even when a sovereign-immunity argument rests on the Appropriations Clause.[54] Therefore, the Agency's reliance on the doctrine of sovereign immunity does not demonstrate that the Authority erred when finding that §§ 2425.4(c) and 2429.5 barred the Agency's COPRA arguments.

2. The Agency has not demonstrated that the Authority erred in dismissing the Agency's arguments that Arbitrator Meredith violated the doctrine of functus officio, or that the second remedial award is contrary to public policy, under §§ 2425.4(c) and 2429.5.

Next, the Agency argues that the Authority erred in applying §§ 2425.4(c) and 2429.5 to dismiss the Agency's exception that Arbitrator Meredith violated the doctrine of functus officio by effectively requiring the Agency to predict that Arbitrator Meredith could have chosen to award a remedy that violated this doctrine and to argue against it below.[55] The Agency then restates its arguments as brought before the Authority in *DHS*, claiming that Arbitrator Meredith exceeded the jurisdiction she retained from Arbitrator Gootnick.[56] However, the record remains clear that at arbitration the Union specifically requested the remedy contained in the second remedial award.[57] Accordingly, the Agency was aware that the Union was seeking this remedy, and could have challenged it before Arbitrator Meredith, but failed to do so. Therefore, the Agency has not demonstrated that the Authority erred in dismissing the Agency's argument that Arbitrator Meredith violated the doctrine of functus officio under §§ 2425.4(c) and 2429.5.

[43] 66 FLRA 745, 747 (2012), *recons. denied*, 67 FLRA 251 (2014).
[44] Agency's Mot. at 6 (citing *CBP*, 66 FLRA at 747).
[45] *CBP*, 66 FLRA at 747 (emphasis added).
[46] *Compare DHS*, 68 FLRA at 253, 256 (separately addressing arguments dismissed under the Regulations), with *CBP*, 66 FLRA at 747 (separately conducting de novo review of contrary-to-law arguments and rejecting them on the merits).
[47] Agency's Mot. at 8 (citing *CBP*, 66 FLRA at 747).
[48] *See CBP*, 66 FLRA at 745; *DHS*, 68 FLRA at 253.
[49] 5 C.F.R. § 2429.17 ("A motion for reconsideration . . . shall not operate to stay the effectiveness of the action of the Authority . . . .").
[50] Agency's Mot. at 9-13.
[51] *DHS*, 68 FLRA at 257-58; *see also U.S. CBP*, 67 FLRA at 464; *FCI Milan*, 63 FLRA at 189-90.
[52] *U.S. DHS, U.S. CBP, Scobey, Mont. v. FLRA*, 784 F.3d 821, 823 (D.C. Cir. 2015) (*Scobey*).
[53] Agency's Mot. at 12.
[54] *Scobey*, 784 F.3d at 823 (citing U.S. Const. Art. I, § 9, cl. 7).
[55] Agency's Mot. at 13-14.
[56] *Id.* at 14.
[57] *Compare* Second Remedial Award at 12-13, *with* Union's Post-Hr'g Br. at 30.

Similarly, the Agency argues that the Authority erred in dismissing the Agency's exception that the second remedial award is contrary to public policy because the Agency "could not have known in advance" the contents of the second remedial award.[58] However, as explained above, the Union requested this remedy at arbitration, and the Agency could have objected to it then as contrary to public policy, but failed to do so. Accordingly, the Agency has not demonstrated that the Authority erred in dismissing the Agency's argument that the second remedial award is contrary to public policy under §§ 2425.4(c) and 2429.5.

B. The Agency does not establish that the Authority erred in *DHS* by rejecting the Agency's contrary-to-law and nonfact exceptions.

The Agency also contends that the Authority erred in *DHS* by rejecting several of the Agency's contrary-to-law and nonfact arguments on their merits. In particular, the Agency asserts that the Authority erred in: (1) finding that the grievants were entitled to backpay for the Agency's violations of 5 U.S.C. § 6101; (2) not accepting the Agency's argument that the second remedial award is contrary to the BPA; and (3) not accepting the Agency's argument that the second remedial award is based on nonfacts.[59] The Authority considered and rejected these very same arguments in *DHS*.[60] As the Agency's attempts to relitigate the conclusions in *DHS* do not establish extraordinary circumstances, we find that these arguments do not warrant granting reconsideration.[61]

In sum, the Agency's motion does not establish extraordinary circumstances warranting reconsideration of *DHS*.

V. Order

We deny the Agency's motion for reconsideration.

[58] Agency's Mot. at 15.
[59] *Id.* at 15-27.
[60] *See DHS*, 68 FLRA at 256-59.
[61] *See, e.g.*, *Bremerton*, 64 FLRA at 545.