

71 FLRA No. 33

UNITED STATES
DEPARTMENT OF THE AIR FORCE
MINOT AIR FORCE BASE, NORTH DAKOTA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 4046
(Union)

0-AR-5323
(70 FLRA 867 (2018))

ORDER DENYING
MOTION FOR RECONSIDERATION

June 13, 2019

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

The Union requests that we reconsider our decision in *U.S. Department of the Air Force, Minot Air Force Base, North Dakota (Air Force)*.¹ In that case, the Union filed both an unfair-labor-practice (ULP) charge and a grievance over the Agency's decision to change its hazardous-duty-pay practices. Arbitrator Michael J. Falvo issued an award finding that the earlier-filed ULP charge did not bar the grievance under § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute).² But the Authority determined that both the ULP and the grievance involved the same issue and, thus, concluded that § 7116(d) barred the grievance.

In a motion for reconsideration (motion), the Union now argues that the Authority erred in its conclusions of law and factual findings. Because the Union's arguments either (1) attempt to relitigate the Authority's conclusions in *Air Force* or (2) fail to establish that the Authority erred, those arguments do not provide a basis for reconsideration. Therefore, we deny the motion.

II. Background

The circumstances of this dispute are fully detailed in *Air Force*.³ Accordingly, this order discusses only those aspects of the case that are pertinent to the motion.

The Agency had relied on a particular form to justify paying certain employees (the grievants) hazard pay. In March 2016, the Agency informed the grievants that the form "[was] no longer valid and [could not] be used as the justification" for claiming hazard pay.⁴ In response, in May 2016, the Union filed a ULP charge alleging that the Agency violated the Statute by retaliating against the grievants by: investigating the grievants' use of hazard pay; determining that their previous hazard-pay approval "was no longer valid"; and directing them "to change time[-]card documentation [of hazard pay] and change the way [that they] enter[ed] coding for payment."⁵ The Federal Labor Relations Authority's Chicago Regional Director dismissed the ULP charge.

The grievants then sought to resume claiming hazard pay, and the Agency informed them that they were not entitled to that pay. In December 2016, the Union filed a grievance alleging, in relevant part, that the Agency violated the Statute by unilaterally terminating its practice of paying the grievants hazard pay and directly dealing with the grievants concerning their entitlement to hazard pay. As a remedy, the grievants requested retroactive hazard pay from March 2016 to the present.

The grievance proceeded to arbitration, where the Agency argued that the Union's earlier-filed ULP charge barred the grievance under § 7116(d) of the Statute. Under that section, an earlier-filed ULP charge bars a grievance if the ULP charge and the grievance involve the same issue.⁶ And a ULP charge and a grievance involve the same issue when they: (1) arise from the same set of factual circumstances, and (2) advance substantially similar legal theories.⁷

The Arbitrator found that "the facts giving rise to the [Union's] ULP [charge] . . . differ[ed] from the facts giving rise to the grievance."⁸ Accordingly, the Arbitrator determined that it was "unnecessary" to address whether the ULP charge and the grievance raised substantially similar legal theories,⁹ and he concluded

³ 70 FLRA at 867-68.

⁴ *Id.* at 867.

⁵ *Id.* (quoting Exceptions, Attach. 8, ULP Charge at 1).

⁶ 5 U.S.C. § 7116(d).

⁷ *Air Force*, 70 FLRA at 868 (noting that legal theories need not be identical for an earlier-filed ULP charge to bar a grievance).

⁸ Award at 20 n.10.

⁹ *Id.*

¹ 70 FLRA 867 (2018) (Member DuBester dissenting).

² 5 U.S.C. § 7116(d).

that the ULP charge did not bar the grievance under § 7116(d). On the merits, the Arbitrator sustained the grievance.

In *Air Force*, the Authority found that the Arbitrator erred in determining that § 7116(d) did not bar the grievance. Specifically, the Authority found that the ULP charge and the grievance arose from the same set of factual circumstances: the Agency's decision to change its hazard-pay practices. And the Authority further determined that the ULP charge and the grievance advanced substantially similar legal theories because they both (1) alleged statutory violations based on the change to hazard pay and (2) sought similar remedies retroactive to March 2016 – the time of the initial change. Accordingly, the Authority set aside the award.

Subsequently, the Union filed this motion for reconsideration.

III. Analysis and Conclusion: The Union fails to establish extraordinary circumstances warranting reconsideration of *Air Force*.

The Union asks the Authority to reconsider its decision in *Air Force*.¹⁰ Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision.¹¹ The Authority has repeatedly recognized that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.¹² As relevant here, the Authority has found that errors in its conclusions of law or factual findings may justify granting reconsideration.¹³ However, the Authority has repeatedly held that attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.¹⁴

First, the Union claims that the Authority erred in its conclusions of law and factual findings.¹⁵ Specifically, it argues that the ULP charge and the

grievance arose from different factual circumstances¹⁶ and advanced different legal theories.¹⁷ However, the Union made these very arguments in *Air Force*.¹⁸ Therefore, the arguments are an attempt to relitigate the Authority's conclusions in *Air Force*¹⁹ and do not establish that reconsideration is warranted.²⁰

Next, the Union claims – in what has now become a tired refrain – that the Authority's decision arbitrarily and capriciously²¹ “contravenes precedent” and public policy “by ignoring the Arbitrator's . . . factual findings.”²² Specifically, the Union contends that the Authority was required to defer to the Arbitrator's finding that the ULP charge and the grievance arose from different factual circumstances.²³ But the Union does not cite any Authority decision establishing that such a finding is purely factual. And the Authority has previously reviewed an arbitrator's conclusion as to whether a ULP charge and a grievance involved similar

¹⁰ Mot. for Recons. (Mot.) at 3-13.

¹¹ 5 C.F.R. § 2429.17.

¹² E.g., *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 860, 861 (2018) (Member DuBester dissenting); *AFGE, Local 2238*, 70 FLRA 184, 184 (2017) (*Local 2238*).

¹³ E.g., *Local 2238*, 70 FLRA at 184 (citing *U.S. DHS, U.S. CBP*, 66 FLRA 634, 636 (2012)).

¹⁴ *Library of Cong.*, 60 FLRA 939, 941 (2005); see also *Local 2238*, 70 FLRA at 185 (“[A]ttempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.”); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 60 FLRA 88, 89 (2004) (same).

¹⁵ Mot. at 4-9.

¹⁶ *Id.* at 5-6.

¹⁷ *Id.* at 7-9.

¹⁸ Opp'n Br. at 12 (contending that the “underlying facts for the ULP [charge] and [g]rievance are different”); *id.* (referring to its post-arbitration brief to argue that the ULP charge and the grievance present “different legal theories”).

¹⁹ 70 FLRA at 868 (finding that the ULP and the grievance arose from the same set of factual circumstances and advanced similar legal theories).

²⁰ See, e.g., *Indep. Union of Pension Emps. for Democracy & Justice*, 71 FLRA 60, 61 (2019) (Member DuBester concurring) (finding attempt to “relitigate” a conclusion reached by the Authority did not establish extraordinary circumstances warranting the reconsideration); *U.S. DOD, Missile Def. Agency, Redstone Arsenal, Ala.*, 71 FLRA 22, 23 (2019) (same).

²¹ AFGE has asserted variations of this same argument in at least three reconsideration requests where they disagreed with our determination. See *U.S. Dep't of HUD*, 71 FLRA 17 (2019) (Member DuBester dissenting); *U.S. Dep't of VA, Kan. City VA Med. Ctr., Kan. City, Mo.*, 70 FLRA 960 (2018) (Member DuBester dissenting); *U.S. DOL*, 70 FLRA 953 (2018) (Member DuBester dissenting). Our dissenting colleague has made the same argument in even more cases where he disagreed with the Authority's determination. Let's be clear. Staking a different position, taking a different approach, or interpreting the Statute different from prior Authorities is not arbitrary and capricious, particularly where the rationale for those decisions is carefully explained (as the Authority did in each of the above-cited cases). Taking AFGE's and our colleague's rationale to its logical end, erroneous precedent could never be changed.

²² Mot. at 9.

²³ See *id.* at 5 n.1; see also *id.* at 10 (alleging that the Authority's decision in *Air Force* is inconsistent with the public policy favoring finality, speed, and economy in arbitration).

factual circumstances as a question of law.²⁴ Accordingly, the Union does not establish that the Authority erred in reviewing the Arbitrator's application of § 7116(d) to the facts.²⁵

The Union also contends that the Authority erred by failing to address whether the ULP and the grievance advanced sustainably similar legal theories.²⁶ Although the Arbitrator failed to address that issue,²⁷ the Authority specifically found that the ULP charge and the grievance alleged substantially similar statutory violations and sought similar pay remedies.²⁸ Thus, the Union's contention misinterprets *Air Force* and does not establish extraordinary circumstances warranting reconsideration.²⁹

Based on the above, we conclude that the Union's motion does not establish extraordinary circumstances warranting reconsideration of *Air Force*. Therefore, we deny the motion.

IV. Decision

We deny the Union's motion.

²⁴ E.g., *U.S. DOL, Wash., D.C.*, 59 FLRA 112, 114-15 (2003) (finding that the "factual circumstances presented" in the ULP charge and grievance were "the same factual issues for purposes of § 7116(d)" and that the arbitrator's "conclusion to the contrary was in error").

²⁵ See *U.S. Dep't of VA, St. Petersburg Reg'l Benefit Office*, 71 FLRA 1, 3 (2019) (Member DuBester dissenting) (rejecting claim on reconsideration that the Authority had failed to defer to arbitrator's factual findings because claim actually challenged the Authority's application of the law to the facts) (citing *Dep't of HHS, SSA*, 29 FLRA 194, 195 (1987) (rejecting reconsideration where party argued that a decision was "based on an inaccurate interpretation of the facts").

²⁶ Mot. at 7-8 (arguing that "the Authority focused exclusively upon the proposition that the earlier-filed ULP and the [g]rievance were based upon the same set of factual circumstances").

²⁷ Award at 20 n.10; see also Mot. at 8 (noting that the Arbitrator "did not make any findings as to the underlying legal theories").

²⁸ *Air Force*, 70 FLRA at 868.

²⁹ See *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 69 FLRA 256, 259 (2016) ("[A]n argument based on a misinterpretation of the Authority's decision does not establish extraordinary circumstances warranting reconsideration of that decision."); see also *U.S. Dep't of Transp. Mar. Admin.*, 61 FLRA 816, 822 (2006) (noting that a remand is necessary only when "an arbitrator has not made sufficient factual findings . . . and those findings cannot be derived from the record" (emphasis added) (citation omitted)).

Member DuBester, dissenting:

For reasons set forth in my dissent in the underlying case, *U.S. Dep't of the Air Force, Minot Air Force Base, North Dakota*,¹ it remains my opinion that the majority errs by failing to defer to the Arbitrator's undisputed, detailed factual findings showing that the earlier-filed unfair labor practice (ULP) charge and the grievance concerned different subject matters. It also remains my opinion that the majority's expansive interpretation of 5 U.S.C. § 7116(d)'s bar in *U.S. Dep't of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia*² – which the majority applied in the underlying case to conclude that the grievance was barred by the ULP charge – constitutes an unwarranted departure from Authority precedent.³ Accordingly, I believe that the Union's arguments seeking reconsideration of the Authority's decision raise extraordinary circumstances. I would therefore grant the Union's request for reconsideration.

¹ 70 FLRA 867 (2018) (*Air Force*) (Member DuBester dissenting).

² 70 FLRA 512 (2018) (*Navy*) (Member DuBester dissenting).

³ Contrary to the majority's suggestion, and as I explained in my dissent in the underlying case, I disagreed with the majority's decision in *Navy* not simply because it changed Authority precedent, but because it "lack[ed] any discussion or analysis of § 7116(d)'s origins, legislative history, or purpose, and reject[ed] without reason established court and Authority precedent." *Air Force*, 70 FLRA at 869 (Dissenting Opinion of Member DuBester).