74 FLRA No. 70

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

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

0-NG-3528
(72 FLRA 752 (2022))

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ORDER DENYING
MOTION FOR RECONSIDERATION

June 24, 2026

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Before the Authority: Colleen Duffy Kiko, Chairman, and Anne Wagner and Charles O. Arrington, Members
(Member Wagner dissenting)

I. Statement of the Case

The Union requests we reconsider part of the Authority's decision in *NTEU*.[1] In that decision, and as relevant here, the Authority held a proposal requiring the Agency to obtain and offer Voluntary Early Retirement Authority (VERA) and/or Voluntary Separation Incentive Pay (VSIP) to affected employees was not an appropriate arrangement and therefore outside the duty to bargain.[2]

For the reasons that follow, we find the arguments in the Union's motion for reconsideration (motion) merely attempt to relitigate conclusions, and the bases on which they were reached, in *NTEU*. Therefore, we deny the Union's motion as failing to establish extraordinary circumstances warranting reconsideration.

II. Background and the Authority's Decision in *NTEU*

The Union filed a negotiability appeal under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (Statute).[3] The petition for review involved two proposals, Proposal 1 and Proposal 4, but the Union's motion only concerns Proposal 4.[4] Therefore, we will only address the background relevant to Proposal 4.

In *NTEU*, both parties agreed that Proposal 4 would require the Agency to obtain VERA and VSIP authority, and offer VERA and VSIP to the employees impacted by the Agency's reorganization.[5] The Authority found Proposal 4 affected management's right to retain employees and the proposal constituted an arrangement under § 7106(b)(3) of the Statute based on the parties' concessions.[6] After noting the significant benefits provided to employees by Proposal 4, the Authority found the proposal's burden on management's right to retain employees outweighed the benefits provided to employees, as the proposal would require the Agency to incentivize retirements and separations when the Agency wanted to retain all employees.[7] Thus, the Authority concluded Proposal 4 excessively interfered with management's right to retain employees, and therefore, was not an appropriate arrangement.[8] Accordingly, the Authority found Proposal 4 was outside the duty to bargain.[9]

The Union filed its motion on May 13, 2022, and the Agency filed a request for leave to file, and did file, an opposition to the Union's motion on June 30, 2022.[10] In its opposition, the Agency argues Proposal 4 does not have any prospective effect because it already implemented the reassignments.[11] Accordingly, the Authority's Office of Case Intake and Publication issued an order to the Union directing the Union to "address[] the Agency's claim that the reassignments have been implemented, and, if they have, how that development should affect the Authority's processing of the Union's motion."[12] The Union responded arguing Proposal 4 allows the affected employees to seek VERA/VSIP even if the reassignment

[1] 72 FLRA 752 (2022) (Chairman DuBester concurring in part, dissenting in part).
[2] *Id.* at 756-57.
[3] 5 U.S.C. § 7105(a)(2)(E).
[4] *See generally* Motion at 2-8.
[5] 72 FLRA at 756. The complete wording of Proposal 4 is provided in the underlying decision. *See id.*
[6] *Id.* at 757.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] While the Authority's Regulations do not specifically provide for oppositions to motions for reconsideration, the Authority generally allows them. *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 353 (2005). Therefore, we grant the Agency's request and consider its opposition. *See Indep. Union of Pension Emps. for Democracy & Just.*, 73 FLRA 280, 280 n.7 (2022) (granting leave to file and considering an opposition to a motion for reconsideration).
[11] Opp'n at 3-4.
[12] January 23, 2026 Order (Order) at 2.

has occurred.[13] The Agency filed a reply to the Union's response, arguing that Proposal 4 is moot.[14]

III. Analysis and Conclusions: We deny the motion for reconsideration.

Section 2429.17 of the Authority's Regulations permits a party to move for reconsideration of an Authority decision if it can establish extraordinary circumstances.[15] 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.[16] Although errors in the Authority's legal conclusions or factual findings may justify granting reconsideration,[17] mere disagreement with or attempts to relitigate conclusions reached by the Authority – and the bases on which they were reached – are insufficient to establish extraordinary circumstances.[18]

The Union argues extraordinary circumstances warrant reconsidering *NTEU* because the Authority erred in determining Proposal 4's burden on management's right to retain employees outweighed the benefit provided to employees.[19] Specifically, the Union argues the Authority ignored the fact that many employees plan to separate from the Agency in determining the benefit to employees,[20] and the Authority ignored the "significant cost savings that Proposal 4 might yield" in determining the burden on management's right.[21] The dissent also claims the Authority "ignored this evidence" when deciding *NTEU*.[22]

The Agency correctly notes that an argument about whether the Authority sufficiently weighed certain evidence does not establish extraordinary circumstances warranting reconsideration.[23] And the Authority has repeatedly held that contending evidence was "ignored" is nothing more than a challenge to the weight of that evidence.[24] Moreover, the dissent's assertion that the majority in *NTEU* failed to consider all relevant evidence is meritless.[25] Not only did the majority state that it weighed the benefits identified by the Union,[26] the *NTEU* dissent specifically discussed the arguments and evidence relied upon by the Union,[27] and the *NTEU* majority directly responded to the dissent's competing balancing of the benefits and burdens of Proposal 4.[28] Furthermore, the Authority has held that "reiterating the dissenting opinion to the underlying decision, which is reviewed by the majority prior to finalizing a decision for issuance, does

[13] We note the Union requests severance *if* the Authority reconsiders its decision that Proposal 4 is nonnegotiable. Union Resp. at 5. Because we deny the motion for reconsideration – and therefore uphold the underlying decision – we need not address this request. *See U.S. DHS, ICE*, 73 FLRA 299, 301 n.20 (2022) (then-Member Kiko dissenting on other grounds) (declining to address additional requests after denying an appeal); *U.S. Dep't of VA*, 65 FLRA 259, 263 n.9 (2010) (same).

[14] Because we deny the Union's motion, and uphold the underlying decision finding Proposal 4 is nonnegotiable, we find it unnecessary to address whether Proposal 4 has any prospective effect. *See NAGE, Loc. R1-109*, 54 FLRA 521, 526 n.9 (1998) (finding it unnecessary to address threshold issue after dismissing petition for review on other grounds).

[15] 5 C.F.R. § 2429.17 ("After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order.").

[16] *U.S. Agency for Glob. Media*, 73 FLRA 162, 162-63 (2022) (*Global Media*) (Chairman DuBester dissenting) (citing *SPORT Air Traffic Controllers Org.*, 71 FLRA 25, 26 (2019) (Member DuBester concurring); *AFGE, Loc. 2238*, 70 FLRA 184, 184 (2017); *U.S. DHS, U.S. CBP, Swanton, Vt.*, 66 FLRA 47, 48 (2011); *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 63 FLRA 600, 601 (2009); *U.S. Dep't of the Interior, Wash., D.C. & U.S. Geological Surv., Reston, Va.*, 56 FLRA 279, 279 (2000)).

[17] *AFGE, Loc. 2338*, 71 FLRA 723, 723 (2020) (Member Abbott concurring) (citing *SPORT Air Traffic Controllers Org.*, 70 FLRA 345, 345 (2017)); *Indep. Union of Pension Emps. for Democracy & Just.*, 71 FLRA 60, 61 (2019) (Member DuBester concurring) (citations omitted).

[18] *Global Media*, 73 FLRA at 163 (citing *U.S. DHS, U.S. CBP*, 67 FLRA 251, 253 (2014) (Member Pizzella concurring)).

[19] Motion at 2-7.

[20] *Id.* at 5-6.

[21] *Id.* at 7-8.

[22] Dissent at 7.

[23] Opp'n at 2 (citing *U.S. Dep't of the Air Force, 375th Combat Support Grp.*, 50 FLRA 84, 87 (1995) (*Air Force*)).

[24] *E.g.*, *NTEU, Chapter 172*, 74 FLRA 80, 88 (2024) (finding argument that arbitrator ignored evidence "merely dispute[s] the [a]rbitrator's evaluation of evidence"); *U.S. Dep't of the Air Force, Dover Air Force Base, Del.*, 66 FLRA 916, 921 (2012) (same); *Dep't of the Army, Fort Carson Fire & Emergency Servs., Fort Carson, Colo.*, 73 FLRA 1, 3 (2022) ("[A]n argument that the [Regional Director (RD)] ignored certain evidence merely challenges the weight the RD ascribes to such evidence."); *U.S. Dep't of the Interior, Nat'l Park Serv., Ne. Region*, 69 FLRA 89, 91, 92 (2015) (same); *U.S. Dep't of VA, Reg'l Off. Winston-Salem, N.C.*, 66 FLRA 34, 41 (2011) ("The . . . argument that the [a]rbitrator ignored testimony challenges the [a]rbitrator's . . . evaluation of the weight to be accorded the testimony."); *AFGE, Loc. 1395*, 64 FLRA 622, 626 (2010) (same).

[25] Dissent at 7-8.

[26] *NTEU*, 72 FLRA at 757 ("While the benefits to employees identified by the Union are significant, they do not outweigh the burden on the Agency's exercise of its right to retain employees.").

[27] *Id.* at 759-60.

[28] *See id.* at 757 n.61 ("By arguing that Proposal 4 is an appropriate arrangement, our dissenting colleague diminishes the very real burden that the Union's proposal imposes on management's right to retain employees."); *id.* ("To assert that 'Proposal 4's burdens on management's right to retain are relatively slight,' and cite a distinguishable decision in which an agency had eliminated the functions and positions of employees covered by the proposals, ignores Proposal 4's direct and substantial burden on management's right to retain employees.").

not demonstrate extraordinary circumstances warranting reconsideration."[29]

Additionally, there is nothing extraordinary about the Union's claim that Proposal 4 could save the Agency relocation expenses. The Union's speculation that "[t]hese cost savings would mitigate the . . . concern about the [A]gency potentially needing to 'hire new employees' to replace those who depart" misses the point.[30] The right to *retain* employees under § 7106(a)(2)(A) of the Statute is "the right to establish policies or practices that encourage or discourage employees from *remaining employed by* an agency."[31] Undeniably, "requiring [an agency] to offer . . . employees an incentive to terminate their employment would hamper its ability to retain those employees,"[32] and that detriment remains regardless of how much money the Union speculates the Agency could save. Moreover, the Union overlooks Proposal 4's requirement to incentivize the separation of "employees with training experience[,] when the [Agency] is experienc[ing] staffing shortages and is in dire need of additional personnel to assist with . . . [t]raining."[33] No amount of alleged savings could provide the Agency with *experienced* trainers to replace those who departed,[34] and the Union's argument fails to take into account the tangible costs – let alone the intangible costs, including loss of institutional knowledge – the Agency would incur to replace the employees who accepted VERA/VSIP offers.[35] As discussed in the underlying decision, the Union's arguments fail to acknowledge that the Agency is not eliminating any positions and instead wants to *keep all employees*[36] – a fact that distinguishes the instant case from the case where the Authority has held VERA/VSIP does not excessively interfere with management's right to retain employees.[37] Simply stated, the burden on management's right to retain outweighs the benefits of the proposal because, among the other considerations discussed in *NTEU*, management is *not* eliminating any position or transferring functions.[38]

The Authority considered all of Proposal 4's benefits to employees and burdens on management's right in determining Proposal 4 was not an appropriate arrangement.[39] The Union's motion challenges the Authority's weighing of the evidence and attempts to relitigate the Authority's conclusion that Proposal 4's burden on management's right to retain employees outweighed the benefits provided to employees.[40] Accordingly, the Union's argument does not establish extraordinary circumstances warranting reconsideration of the Authority's decision in *NTEU*, and we deny the Union's motion for reconsideration.[41]

[29] *U.S. DOJ, Exec. Off. for Immigr. Rev.*, 72 FLRA 622, 625 (2022) (*DOJ*) (then-Member Kiko concurring; Chairman DuBester dissenting).
[30] Motion at 6-7.
[31] *NAIL, Loc. 5*, 67 FLRA 85, 87 (2012) (*NAIL*) (emphasis added) (quoting *U.S. Dep't of Com., Pat. & Trademark Off.*, 60 FLRA 839, 841 (2005)) (internal quotation marks omitted).
[32] *Id.* at 88.
[33] Reply Br. at 18-19; *see NTEU*, 72 FLRA at 757 ("The Agency, which seeks to keep all of the employees covered by the proposals, would instead be forced to incentivize employee retirements and separations." (footnote omitted)).
[34] *See NAIL*, 67 FLRA at 88 (analyzing agency burdens from proposal requiring VSIP, and noting that "while the [u]nion claim[ed] that the [a]gency could hire additional employees if current employees accept[ed] a VSIP offer, the proposal would deprive the [a]gency of the services of employees who perform specialized work necessary to accomplish the [a]gency's mission until it could hire new employees" (internal citations omitted)).
[35] *See* Michael Hassett, *Want to Keep New Employees? Invest in Onboarding*, FedSmith, (March 13, 2023), https://www.fedsmith.com/2023/03/13/want-to-keep-new-employees-invest-in-onboarding/ ("[I]t is estimated that the cost to replace one employee can range from 50% to 200% of the employee's annual salary. Moreover, these costs include loss of institutional knowledge (brain drain), loss of productivity and morale, and the failure to meet the organization's mission.").
[36] *Id*.
[37] *AFGE, Loc. 1827*, 58 FLRA 344, 347 (2003) (*Loc. 1827*) (agency's claim that requiring it to offer VERA/VSIP would result in the loss of skilled employees was "undercut by the fact that the [a]gency ha[d] already eliminated the functions and positions of the employees covered by the proposals").
[38] *Compare NAIL*, 67 FLRA at 88 (finding proposal requiring agency to offer VSIP for a second time was not an appropriate arrangement because the burden on management's right to retain – depriving it "of the services of employees who perform specialized work necessary to accomplish the [a]gency's mission until it could hire new employees" – outweighed the benefits to employees), *with Loc. 1827*, 58 FLRA at 347 (finding proposals requiring the agency to offer VERA/VSIP were appropriate arrangements because the agency *eliminated* the "functions and positions of the employees").
[39] *NTEU*, 72 FLRA at 757 ("While the benefits to employees identified by the Union are significant, they do not outweigh the burden on the Agency's exercise of its right to retain employees."); *see also DOJ*, 72 FLRA at 625 (reiterating arguments from a dissent cannot establish extraordinary circumstances, because the arguments in separate opinions are always reviewed by the majority and found unpersuasive prior to finalizing a decision for issuance).
[40] *See U.S. DHS, U.S. CBP*, 69 FLRA 22, 25-26 (2015) (making argument that was raised and rejected in underlying decision was an attempt to relitigate Authority's previous conclusion and did not provide a basis for granting reconsideration).
[41] *Int'l Bhd. of Elec. Workers, Loc. 1002*, 71 FLRA 930, 931 (2020) (denying motion for reconsideration because attempts to relitigate the Authority's conclusions do not establish extraordinary circumstances warranting reconsideration); *U.S. DHS, U.S. CBP*, 67 FLRA 251, 253 (2014) (Member Pizzella concurring) (same); *Air Force*, 50 FLRA at 87 (an "assertion that the Authority did not appropriately weigh certain evidence does not establish extraordinary circumstances necessary to warrant reconsideration").

IV. Order

We deny the Union's motion for reconsideration.

Member Wagner, dissenting:

In *NTEU*,[1] a majority of the Authority (the *NTEU* majority) cited the correct legal standard in concluding that Proposal 4 was not an appropriate arrangement within the meaning of § 7106(b)(3) of the Federal Service Labor-Management Relations Statute.[2] Specifically, in relevant part, the Authority stated that, "[i]n determining whether an arrangement is appropriate, the Authority weighs the benefits afforded to employees under the arrangement against the proposal's burden on the exercise of management's rights."[3]

Typically, where the governing legal standard requires balancing identified factors, agencies have considerable discretion to weigh the evidence that supports or derogates from those factors in reaching the outcome.[4] However, an agency may nonetheless commit *legal* error in applying the balancing test if it fails to address a necessary factor.[5] Consistent with this principle, U.S. courts of appeals have reversed Authority decisions that have failed to consider relevant record evidence in conducting the appropriate-arrangement balancing.[6]

Here, in seeking reconsideration, the Union contends that the *NTEU* majority erred by ignoring undisputed record evidence that tended to show that the proposed arrangement would not impose a burden on the Agency to the extent that the Agency claimed it would.[7] Specifically, the Union contends that the Authority erroneously ignored evidence that: (1) nearly half of the affected employees planned to retire, resign, or transfer with the intention of subsequently resigning if a position in their existing duty stations became available; and (2) offering voluntary separation incentive pay (VSIP) to the forty-seven affected employees would have saved the Agency $86,000 in relocation expenses for each affected employee who accepted the VSIP offer.[8]

I agree with the Union that the *NTEU* majority ignored this evidence. The *dissent* in *NTEU* specifically discussed the cited evidence.[9] But, in responding to the dissent – and in its entire discussion of whether Proposal 4 was an appropriate arrangement – the *NTEU* majority never discussed that evidence or even cited to the relevant pages of the Union's response.[10]

I acknowledge that it is a close case as to whether Proposal 4 is an appropriate arrangement, and that the *NTEU* majority might have reached the same outcome had it not committed legal error in its application of the test. However, in my view, the *NTEU* majority *did* commit legal error in its application of the balancing test for the reasons stated above. As such, I would grant the Union's request for reconsideration.

Accordingly, I dissent.

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[1] 72 FLRA 752 (2022) (Chairman DuBester concurring in part, dissenting in part).

[2] *Id.* at 757.

[3] *Id.* (citing *NTEU*, 70 FLRA 701, 704 (2018)); *see also NAGE, Loc. R14-87*, 21 FLRA 24, 31-32 (1986) (stating that, in determining whether an arrangement is appropriate or is inappropriate because it excessively interferes with management's rights, the Authority "weigh[s] the competing practical needs of employees and managers").

[4] *See, e.g.*, *MD Pharm., Inc. v. Drug Enf't Admin.*, 72 F.3d 920, at *1 (D.C. Cir. 1986) (unpublished judgment) ("We generally defer to an agency's decision regarding the weight that it assigns to one factor in a multi-part balancing test, so long as its decision is consistent with the governing statute.") (citing *Air Line Pilots Ass'n, Int'l v. Dep't of Transp.*, 791 F.2d 172, 177-78 (D.C. Cir. 1986)).

[5] *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that agency action is arbitrary and capricious if, as relevant here, an agency "entirely failed to consider an important aspect of the problem").

[6] *See, e.g.*, *NTEU v. FLRA*, 550 F.3d 1148, 1152 (D.C. Cir. 2008) (reversing Authority's determination that proposal was not an appropriate arrangement because Authority failed to consider record evidence); *NTEU v. FLRA*, 437 F.3d 1248, 1252-56 (D.C. Cir. 2006) (same).

[7] Mot. at 5-7.

[8] *Id.*

[9] *NTEU*, 72 FLRA at 759-60.

[10] *See id.* at 757 & n.61. I note that the only page of the Union's response that the *NTEU* majority cited in discussing whether Proposal 4 was an appropriate arrangement was page 17. *See id.* at 757 n.56. The Union discussed the pertinent evidence at pages18 and 19 of its response. *See* Resp. at 18-19.