66 FLRA No. 180

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
(Agency)

0-AR-4835
(66 FLRA 835 (2012))

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ORDER DENYING
MOTION FOR RECONSIDERATION

September 19, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on the Union's motion for reconsideration (motion) of an Authority decision denying the Union's exceptions in *NTEU*, 66 FLRA 835 (2012) (*NTEU*). The Agency filed an opposition to the Union's motion.

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority final decision or order. For the reasons that follow, we find that the Union has not established extraordinary circumstances warranting reconsideration of the Authority's decision. Accordingly, we deny the Union's motion for reconsideration.

II. The Authority's Decision in *NTEU*

In a fee award, the Arbitrator concluded that the Union failed to demonstrate that, but for the Agency's denial of the grievant's four-day telework request, the grievant would not have taken leave. *Id.* at 835. According to the Arbitrator, the evidence presented by the Union did not allow him to determine whether the grievant was entitled to any specific amount of leave. *Id.* In this regard, the Arbitrator indicated that the only testimony presented at the hearings concerning the grievant's leave usage was that the grievant was required to use a substantial amount of leave "because his leave balance exceeded the amount of leave that he could carry over to the next . . . year." *Id.* (quoting Award at 6-7) (internal quotation marks omitted). The Arbitrator also noted that the only other evidence regarding the grievant's leave usage was "contained in an affidavit filed by the [g]rievant in connection with the Union's application for attorney[] fees." *Id.* (quoting Award at 7) (internal quotation marks omitted). The Arbitrator determined that, while the grievant, in his affidavit, noted that he relied on certain records to ascertain the amount of leave he used as a result of the Agency's decision to deny his four-day telework request, the grievant's assertion that he used leave was "purely conclusory." *Id.* (quoting Award at 7) (internal quotation marks omitted). Moreover, the Arbitrator found that the grievant failed to "identify the days on which he used these hours of leave, the purpose of the leave, [and] why he would not have had to use the leave" if he had been working from home. *Id.* (quoting Award at 7) (internal quotation marks omitted). Finally, the Arbitrator concluded that, because the Union was unable to establish that the grievant suffered a loss of "pay, allowances, or differentials" as a result of the Agency's actions, it was not entitled to attorney fees. *Id.* (quoting Award at 8) (internal quotation marks omitted); *see also id.* at 836.

The Union filed exceptions to the Arbitrator's fee award. *Id.* at 836. The Union argued that the Arbitrator denied it a fair hearing by refusing to consider the grievant's affidavit, which was the only evidence before him concerning the amount of leave the grievant used as a result of the Agency's denial of his four-day telework request. *Id.* Specifically, the Union claimed that the affidavit demonstrated that the grievant was entitled to restoration of leave. *Id.* The Union also asserted that the Arbitrator was required to credit the affidavit because he did not determine that it was not credible, and "it was the only evidence before him that [was] probative of the issue of whether [the grievant] . . . [was] owed leave as a result of the [Agency's] violation of the [parties'] agreement." *Id.* (quoting Memorandum in Support of the Union's Exceptions to the Arbitrator's Fee Award at 11) (internal quotation marks omitted). Moreover, the Union maintained that, based on *Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas de Puerto Rico, Local 910*, 588 F. Supp. 679 (D. P.R. 1984) (*Hoteles Condado Beach I*), *aff'd*, 763 F.2d 34 (1st Cir. 1985) (*Hoteles Condado Beach II*), the Arbitrator's refusal to credit the affidavit was so prejudicial to the Union's case that the Authority should set aside the award. *NTEU*, 66 FLRA at 836. Finally, the Union contended that the Arbitrator denied it a fair hearing by failing to award it attorney fees. *Id.*

The Authority concluded that the Arbitrator did not fail to provide the Union with a fair hearing. *Id.* at 837. In this regard, the Authority found that, although the Union claimed that the Arbitrator "refused to

consider" the grievant's affidavit, the award indicated that the Arbitrator considered the affidavit, but found instead that it was not credible because the assertions made by the grievant were conclusory. *Id.* (internal citations and quotation marks omitted). The Authority determined that, because the Union's additional assertions took issue with the Arbitrator's evaluation of the affidavit and his determination of the weight to be accorded the affidavit, those assertions failed to establish that the award was deficient. *Id.* The Authority also found that the Union's reliance on *Hoteles Condado Beach I* and *Hoteles Condado Beach II* was misplaced because those cases were inapposite. *Id.* Moreover, the Authority determined that it was unnecessary to address the Union's remaining exception concerning attorney fees because it was based on the assumption that the grievant's affidavit established a loss of leave. *Id.* at 837 n.2. Accordingly, the Authority denied the Union's exceptions. *Id.* at 837.

III. Positions of the Parties

A. Union's Motion

In its motion, the Union asserts that extraordinary circumstances warrant reconsideration of the Authority's decision in *NTEU*. Memorandum in Support of the Union's Motion (Memorandum) at 8. In this regard, the Union claims that the Authority should grant its motion because the Arbitrator violated the parties' agreement by failing to allow it "to present . . . testimony on the . . . issues of leave restoration and attorney fees." *Id.* at 11. The Union notes that Article 33 of the parties' agreement states that "[t]he parties have the right to present and cross examine witnesses and issue opening and closing statements." *Id.* According to the Union, "once [the] Arbitrator . . . determined that the affidavit was conclusory, he was required" to permit the Union to provide live testimony. *Id.* The Union also asserts that various courts have acknowledged the significance of witness testimony in making credibility determinations. *Id.* at 11-12 (citing *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) and *Bischoff v. Osceola Cnty., Fla.*, 222 F.3d 874, 882, 885 (11th Cir. 2000)). Further, the Union argues that, based on *Hoteles Condado Beach II*, the Arbitrator's refusal to credit the grievant's affidavit was so destructive to the Union's case that the Authority should set aside the fee award. *Id.* at 12-13 (citing *Hoteles Condado Beach II*, 763 F.2d at 40).

In addition, the Union claims that the Authority erred in its factual finding, namely that the Arbitrator made a negative credibility determination regarding the grievant's affidavit. *Id.* at 7, 8. The Union argues that the Arbitrator refused to consider the affidavit because he determined that the assertions the grievant made in the affidavit were conclusory. *Id.* at 9. Moreover, the Union contends that the Arbitrator was required to consider the affidavit because "it was the only evidence before him that [was] probative of the issue of whether [the grievant] . . . [was] owed leave as a result of the [Agency's] violation of the [parties'] agreement." *Id.* at 10; *see also id.* at 9.

B. Agency's Opposition

The Agency argues that the Union has failed to establish extraordinary circumstances warranting reconsideration of the Authority's decision in *NTEU*. Opp'n at 4. Specifically, the Agency claims that the Union's assertion – that the Authority improperly found that the Arbitrator made a negative credibility determination regarding the grievant's affidavit – provides no basis for reconsideration because it constitutes an attempt to relitigate the Authority's conclusions in *NTEU*. *Id.* at 5-6. Similarly, the Agency maintains that, because the Union contends, for the first time in its motion, that the Arbitrator violated the parties' agreement by failing to allow it to provide "testimony on the issues of leave restoration and attorney fees," its contention provides no basis for reconsideration. *Id.* at 8; *see also id.* at 6-7. Additionally, the Agency argues that, even if the Union maintained before the Authority that the Arbitrator improperly precluded it from presenting testimony regarding the grievant's entitlement to leave restoration, the Union had an opportunity to present testimony at arbitration, and to provide detailed evidence in the grievant's affidavit, concerning this issue. *Id.* at 7- 9.

IV. Analysis and Conclusion: The Union has failed to establish extraordinary circumstances warranting reconsideration of the Authority's decision in *NTEU*.

The Authority has consistently held that a party seeking reconsideration of an Authority decision under § 2429.17 bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action. *E.g.*, *U.S. Dep't of HHS, FDA*, 60 FLRA 789, 790 (2005) (*HHS*). The Authority has identified a limited number of situations in which extraordinary circumstances have been found to exist. These include situations where: (1) an intervening court decision or change in the law affected dispositive issues; (2) evidence, information, or issues crucial to the decision had not been presented to the Authority; (3) the Authority erred in its remedial order, process, conclusion of law, or factual finding; and (4) the moving party has not been given an opportunity to address an issue raised sua sponte by the Authority in the decision. *E.g.*, *AFGE, Local 491*, 63 FLRA 542, 542 (2009) (citing *U.S. Dep't of the Air Force, 375th Combat Support Grp., Scott AFB, Ill.*, 50 FLRA 84, 85-87 (1995)). The Authority repeatedly

has held that attempts to relitigate issues previously raised and resolved by the Authority do not establish extraordinary circumstances. *E.g.*, *Library of Cong.*, 60 FLRA 939, 941 (2005); *HHS*, 60 FLRA at 791. Further, the Authority has refused to grant reconsideration of issues that could have been raised, but were not raised in the Authority's review of an award upon a party's exceptions. *E.g.*, *Pension Benefit Guar. Corp.*, 60 FLRA 747, 748 (2005).

Upon careful consideration of the Union's motion and record, we find that the Union has failed to establish extraordinary circumstances warranting reconsideration of the Authority's decision in *NTEU*. In this regard, the Union claims that the Arbitrator violated the parties' agreement by failing to allow it to present "testimony on the . . . issues of leave restoration and attorney fees." Memorandum at 11. However, the Union had the opportunity to raise this claim in its exceptions to the award but failed to do so. As discussed above, the Authority will not consider, in resolving a request for reconsideration, issues that were not raised in its review of an award upon a party's exceptions. *E.g.*, *Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010) (*Bremerton*). Therefore, the Union's claim provides no basis for reconsideration. *See Sport Air Traffic Controllers Org.*, 64 FLRA 1142, 1143 (2010) (finding that, because the union's claim in its motion essentially set forth an additional argument as to why the arbitrator's award was improper, it provided no basis for reconsideration); *Bremerton*, 64 FLRA at 545 (determining that the union failed to establish that reconsideration was warranted when it asserted, for the first time in its motion, that the arbitrator incorrectly interpreted the parties' agreement).

In addition, although the Union cites further precedent in support of arguments it raised in its exceptions in *NTEU*, *see* Memorandum at 11-13, the Union has not raised any other new arguments in its motion that were not presented in its exceptions, *see id.* at 8-10, 12-13. Because the Union's remaining arguments are substantially the same as those raised in its exceptions, they constitute an attempt to relitigate conclusions reached by the Authority in resolving those exceptions. *See HHS*, 60 FLRA at 791 (finding that, while the union cited different precedent in support of arguments that it initially raised in its opposition, the union's contentions in its motion were substantially the same as arguments raised earlier, and, as a result, they constituted an attempt to relitigate conclusions reached by the Authority); *U.S. Info. Agency, Broad. Bd. of Governors, Wash., D.C.*, 58 FLRA 143, 143 (2002) (*U.S. Info. Agency*) (determining that, although the agency contended that the authority made errors of fact, its contentions were nothing more than an attempt to relitigate the Authority's conclusions). As noted above, the Authority has found that attempts to relitigate conclusions reached by it are insufficient to establish extraordinary circumstances. *E.g.*, *U.S. Info. Agency*, 58 FLRA at 143. Consequently, the Union's remaining arguments provide no basis for reconsideration. *See HHS*, 60 FLRA at 791 (concluding that the union's contentions provided no basis for reconsideration because they merely constituted an attempt to relitigate conclusions reached by the Authority in the underlying decision).

Accordingly, we find that the Union has failed to establish that reconsideration of the Authority's decision in *NTEU* is warranted.

V. Order

The Union's motion for reconsideration is denied.