66 FLRA No. 188

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4359
(66 FLRA 904 (2012))

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ORDER DENYING
MOTION FOR RECONSIDERATION

September 26, 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 Agency's motion for reconsideration of the Authority's decision in *U.S. Department of Homeland Security, U.S. Customs & Border Protection*, 66 FLRA 904 (2012) (*Customs*).[1] The Union filed an opposition to the Agency's motion for reconsideration (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 Agency has not established extraordinary circumstances warranting reconsideration of *Customs*. Therefore, we deny the Agency's motion.

II. Background

A. Arbitrator's Award

The parties submitted an unresolved grievance to arbitration to determine, as relevant here, whether the Agency violated the parties' collective-bargaining agreement (the agreement) because personnel from the U.S. Department of Homeland Security's (DHS's) Office of Inspector General (DHS-OIG) did not follow procedures set forth in Article 41 of the agreement when they interviewed Agency employees. *Customs*, 66 FLRA at 904. Before the Arbitrator, the Agency argued, in pertinent part, that, under *U.S. Nuclear Regulatory Commission, Washington, D.C. v. FLRA*, 25 F.3d 229 (4th Cir. 1994) (*NRC*), contractual provisions concerning procedures that apply in Inspector General (IG) investigations (IG-investigation procedures) are barred by the Inspector General Act of 1978 (IG Act). *See Customs*, 66 FLRA at 905. However, the Arbitrator found that *NRC* was not persuasive because it was decided prior to, and inconsistent with reasoning in, *NASA v. FLRA*, 527 U.S. 229 (1999) (*NASA*). *Id.* In addition, as relevant here, the Arbitrator found that the Agency had violated the agreement, and held that "'[i]f [DHS-]OIG continues to fail to follow Article 41,' then [the Agency] would be prohibited from relying on any information obtained by DHS-OIG in investigatory interviews." *Id.* at 906 (quoting Award at 27).

B. Authority's Decision in *Customs*

In *Customs*, the Authority denied the Agency's exceptions to the Arbitrator's award. Specifically, the Authority rejected the Agency's argument that the Arbitrator erred by relying on *NASA* and refusing to apply *NRC* to conclude that Article 41 is contrary to the IG Act. 66 FLRA at 908. As part of this analysis, the Authority cited a recent negotiability decision – *NTEU*, 66 FLRA 892 (2012) (*NTEU II*), *reconsid. denied*, 66 FLRA 1028 (2012) (*NTEU III*) – in which it declined to follow *NRC* "to the extent that *NRC* held that parties may not bargain over *any* IG-investigation procedures, regardless of their particular terms." *Customs*, 66 FLRA at 908 (quoting *NTEU II*, 66 FLRA at 894) (internal quotation marks omitted). Instead, the Authority stated that it will assess whether provisions concerning IG-investigation procedures are contrary to specific terms of the IG Act. *Id.* (citing *NTEU II*, 66 FLRA at 897). Citing longstanding Authority precedent regarding the review of arbitration awards, the Authority stated that "a party contending before the Authority that an award is deficient bears the burden of ensuring that the record contains sufficient information for the Authority to render a decision on that issue." *Id.* at 907 (citing *U.S. Dep't of the Army, Fort Campbell Dist., Third Reg., Fort Campbell, Ky.*, 37 FLRA 186, 195 n.2 (1990) (*Fort Campbell*)). The Authority found that the Agency had not met this burden by merely citing the entire IG Act, without the supporting "explanation or analysis" required to demonstrate that the award is contrary to any specific provisions of that Act, *id.* at 908 (quoting *AFGE, Local 3354*, 64 FLRA 330, 334 (2009) (*Local 3354*)) (internal quotation marks omitted). Accordingly, the

[1] In addition, the Agency requested leave to file – and did file – a motion to waive the expired time limit for its motion for reconsideration. But we find that the Agency timely filed its motion for reconsideration by depositing it with a commercial-delivery service. *See* 5 C.F.R. § 2429.21(b)(iv). Thus, the Agency's motion for reconsideration is properly before us, and its motion to waive the time limit is moot.

Authority denied the Agency's exception arguing that the Arbitrator's enforcement of Article 41 was contrary to law. *See id.*

Regarding the Agency's arguments that the awarded remedy was unlawful because DHS-OIG is not a party to the agreement, and that "the Arbitrator exceeded his authority by 'fashioning a remedy which improperly imposed contractual obligations on' DHS-OIG," *id.* (quoting Exceptions at 13), the Authority stated that the Arbitrator "did not find that DHS-OIG violated the agreement or direct DHS-OIG to take any actions," *id.* Further, the Authority stated that it has held that DHS-OIG investigators are representatives of the Agency because DHS-OIG "serves as [the Agency's] own OIG." *Id.* As a result, the Authority stated that "'there is no basis for finding that the result of . . . bargaining' between the Union and [the Agency] 'is unenforceable merely because DHS-OIG allegedly controls the conditions of employment that were the subject of that bargaining.'" *Id.* (quoting *NTEU II*, 66 FLRA at 897).

III. Positions of the Parties

A. Agency's Motion for Reconsideration

The Agency argues that *Customs* warrants reconsideration because "the Authority erred in its process and legal conclusions, raised an issue sua sponte, and issued an intervening decision affecting dispositive issues." Motion at 1-2. Specifically, the Agency argues that the Authority applied an "inapplicable negotiability standard . . . sua sponte" when it relied on *NTEU II* in its analysis, *id.* at 5, and that the Agency could not have anticipated that the Authority would "respectfully disagree" with the holding in *NRC*, *id.* (quoting *NTEU II*, 66 FLRA at 894) (internal quotation marks omitted). In addition, the Agency argues that even if this "negotiability standard were applicable," the Authority held the Agency to a "more rigorous standard" than the one it applied in *NTEU II* by requiring the Agency to show that the Arbitrator's interpretation of Article 41 "is inconsistent with *specific provisions* of the IG Act" rather than only "*generally*" inconsistent with that Act. *Id.* at 4-5 (citing *NTEU II*, 66 FLRA at 894).

Regarding the Arbitrator's remedy, the Agency asserts that the Authority erred when it stated that "the Arbitrator did not 'direct DHS-OIG to take any actions.'" *Id.* at 6 (quoting *Customs*, 66 FLRA at 908). According to the Agency, when the Arbitrator prohibited the Agency from relying on any information DHS-OIG obtained while violating Article 41, he imposed obligations on DHS-OIG investigators "by implication," *id.*, and, thus, awarded relief to persons who are not encompassed by the grievance, *id.* at 7. Further, the Agency states that "[w]hile it may be appropriate for an agency to be required to bargain over proposals even though control over a condition of employment resides in another component of the same agency," *id.* at 8, the Arbitrator's remedy was inappropriate here because: (1) applying Article 41 to limit the independence of IGs conflicts with the IG Act, *id.* at 9; and (2) the Authority has held that DHS-OIG employees are prohibited from collective bargaining, *id.*

Finally, the Agency asks the Authority to stay the implementation of the Arbitrator's award until: (1) the Authority issues decisions on this motion, and on the motion for reconsideration filed by DHS in *NTEU II*; and (2) the resolution of "any further judicial appeal" in *NTEU II*. *Id.* at 10. In addition, the Agency requests oral argument before the Authority. *Id.* at 11.

B. Union's Opposition

The Union argues that the Agency has not shown the "extraordinary circumstances" necessary to warrant reconsideration, Opp'n at 1, because the Authority did not err in its legal conclusions and did not "act[] sua sponte to impose a new standard," *id.* at 2. In addition, the Union opposes the Agency's requests for a stay and oral argument. *Id.* at 7.

IV. Analysis and Conclusions

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority decision. *E.g.*, *Nat'l Ass'n of Indep. Labor, Local 15*, 65 FLRA 666, 667 (2011). A party seeking reconsideration under § 2429.17 bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action. *Id.*; *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*). As relevant here, the Authority has found that errors in its conclusions of law or factual findings constitute extraordinary circumstances that may justify reconsideration. *See, e.g.*, *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Atwater, Cal.*, 65 FLRA 256, 257 (2010); *Scott Air Force Base*, 50 FLRA at 86-87. The Authority also has found extraordinary circumstances where an intervening court decision or change in the law affected dispositive issues, or the moving party has not been given an opportunity to address an issue raised sua sponte by the Authority in its decision. *Scott Air Force Base*, 50 FLRA at 87. But attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances. *See U.S. Dep't of Health & Human Servs., Food & Drug Admin.*, 60 FLRA 789, 791 (2005) (*FDA*); *ACT, Tony Kempenich Memorial, Chapter 21*, 56 FLRA 947, 948, 949 (2000) (*ACT*); *U.S. Dep't of the Interior, Bureau of Indian Affairs, Navajo Area Office*, 54 FLRA 9, 12-13 (1998) (*Interior*).

A. The Authority in *Customs* did not impose a new standard or rely on an intervening decision sua sponte.

As the Authority stated in *Customs*, a party arguing that an arbitration award is contrary to law "bears the burden of ensuring that the record contains sufficient information for the Authority to render a decision," *Customs*, 66 FLRA at 907 (citing *Fort Campbell*, 37 FLRA at 195 n.2), and a "'mere citation' to legal authority, 'without explanation or analysis'" does not meet this burden, *id.* at 907-08 (quoting *Local 3354*, 64 FLRA at 334). The Agency appears to argue that this is a new standard that applies in negotiability cases, and that the Authority raised it sua sponte as the result of the Authority's negotiability decision in *NTEU II*, 66 FLRA 892, which issued after the Agency filed its exceptions to the award on review in *Customs*. *See* Motion at 4-5. But in *Customs*, the Authority merely applied its longstanding standard for the review of arbitration awards, as evidenced by its citation to *Fort Campbell*. *See Customs*, 66 FLRA at 907-08 (citing *Fort Campbell*, 37 FLRA at 195 n.2). The Authority did not raise any issues "sua sponte." Motion at 5. Further, the Agency's argument that it could not have anticipated that the Authority would "respectfully disagree" with *NRC*, *id.* (quoting *NTEU II*, 66 FLRA at 894) (internal quotation marks omitted), is unavailing because, as the Agency acknowledges in its motion, *id.* at 2, the question of whether *NRC* prohibited the Arbitrator's enforcement of Article 41 was precisely the issue the Agency presented to the Authority in its exceptions, *see Customs*, 66 FLRA at 906. That this issue required the Authority to consider how *NTEU II*'s holding regarding the legality of IG-investigation-procedure provisions affects the *enforceability* of similar provisions was appropriate because "[provisions] that are not contrary to law . . . are enforceable in arbitration." *Customs*, 66 FLRA at 908 (citing *NTEU*, 65 FLRA 509, 513 (2011) (Member Beck dissenting in part), *pet. for review denied sub nom. U.S. Dep't of the Treasury, Bureau of the Public Debt, Wash. D.C. v. FLRA*, 670 F.3d 1315 (D.C. Cir. 2012)).

In addition, the Agency asserts that the Authority held the Agency to a "more rigorous standard" than the one it applied in *NTEU II*. Motion at 4. However, in both *NTEU II* and *Customs*, the Authority stated that a party challenging the legality of provisions concerning IG-investigation procedures must show how such provisions are contrary to specific terms of the IG Act. *See Customs*, 66 FLRA at 908; *NTEU II*, 66 FLRA at 898. Thus, the Agency's assertion is unfounded. Moreover, to the extent that the Agency attempts to challenge this requirement for specificity by relying on *NRC* to argue that *any* provision concerning IG-investigation procedures is "*generally*" inconsistent with the IG Act, Motion at 5, the Authority considered and rejected that argument, and the Agency may not relitigate that conclusion in its motion. *See FDA*, 60 FLRA at 791; *ACT*, 56 FLRA at 948, 949; *Interior*, 54 FLRA at 12-13.

For the foregoing reasons, these arguments do not demonstrate extraordinary circumstances warranting reconsideration.

B. The Agency's arguments concerning the Arbitrator's remedy do not show extraordinary circumstances.

The Agency argues that the Authority erred in denying its exceeded-authority exception because the awarded remedy imposes obligations on DHS-OIG investigators "by implication." Motion at 6. The Agency also argues that the awarded remedy conflicts with the IG Act. *Id.* at 9. As stated previously, in *Customs*, the Authority held that the Arbitrator "did not find that DHS-OIG violated the agreement or direct DHS-OIG to take any actions," and that the Agency did not establish that the Arbitrator's enforcement of Article 41 conflicted with the IG Act. 66 FLRA at 908. As the Agency's arguments attempt to relitigate these conclusions, they do not establish extraordinary circumstances warranting reconsideration. *FDA*, 60 FLRA at 791; *ACT*, 56 FLRA at 948, 949; *Interior*, 54 FLRA at 12-13.

In addition, in *Customs*, the Authority concluded that the Agency's ability to lawfully agree to contract provisions concerning conditions of employment controlled by its representatives – DHS-OIG investigators – does not depend upon a bargaining relationship between the Union and those representatives. 66 FLRA at 908. Because the Agency's argument based on the lack of collective-bargaining rights of DHS-OIG employees attempts to relitigate this conclusion, it also does not establish extraordinary circumstances warranting reconsideration. *FDA*, 60 FLRA at 791; *ACT*, 56 FLRA at 948, 949; *Interior*, 54 FLRA at 12-13.

For the foregoing reasons, the Agency's arguments concerning the Arbitrator's remedy do not demonstrate extraordinary circumstances warranting reconsideration.

V. Order

The Agency's motion for reconsideration is denied.[2]

[2] We deny as moot the Agency's request for a stay until the Authority issues decisions on this motion and the motion for reconsideration in *NTEU II* because this Order, and the Authority's order denying reconsideration in *NTEU II*, *see NTEU III*, 66 FLRA at 1029, resolve the issues presented therein. *See, e.g.*, *U.S. Dep't of Veterans Affairs, Neb./W. Iowa VA Health Care Sys., Omaha, Neb.*, 66 FLRA 462, 466 n.4 (2012). Similarly, we deny as moot the Agency's request for a stay until the resolution of "any further judicial appeal" in *NTEU II*, Motion at 10, because we are unaware of any pending judicial appeal in that case. Finally, as the record in this case provides a sufficient basis on which to rule on the Agency's motion, we deny the Agency's request for oral argument. *See, e.g.*, *AFGE, Local 2823*, 64 FLRA 1144, 1146 (2010) (denying request for oral argument where record provided sufficient basis on which to render a decision).