66 FLRA No. 184

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

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

0-NG-3073
(66 FLRA 892 (2012))

ORDER DENYING
MOTION FOR RECONSIDERATION

September 25, 2012

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

I. Statement of the Case

This matter is before the Authority on the U.S. Department of Homeland Security's (DHS's) motion for reconsideration (motion) of the Authority's decision in *NTEU*, 66 FLRA 892 (2012). The Union filed an opposition to DHS'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 DHS has not established extraordinary circumstances warranting reconsideration of *NTEU*. Therefore, we deny DHS's motion.

II. Decision in *NTEU*

In *NTEU*, the Authority ordered DHS to rescind its disapproval of a provision that requires any representative of the Agency – including a representative of DHS's Office of Inspector General (DHS-OIG) – to follow the procedures set forth in Article 22 of the relevant collective-bargaining agreement whenever the representative interviews bargaining-unit employees regarding any criminal or noncriminal matter. 66 FLRA at 892. Specifically, the Authority rejected DHS's argument that the provision is inconsistent with the Inspector General Act of 1978 (the IG Act).

The Authority made two general determinations in this regard.

First, the Authority determined that DHS had not shown that the IG Act completely forecloses bargaining over investigation procedures employed by the DHS-OIG (IG-investigation procedures), "regardless of the nature of the particular procedures at issue." *Id.* at 897. Specifically, the Authority rejected DHS's reliance on *U.S. Nuclear Regulatory Commission, Washington, D.C. v. FLRA*, 25 F.3d 229 (4th Cir. 1994) (*NRC*), by stating that "to the extent that *NRC* holds that parties may not bargain over *any* IG-investigation procedures, regardless of their particular terms, we respectfully disagree." *NTEU*, 66 FLRA at 894. For support, the Authority relied on various principles and authorities, including the United States Supreme Court's holding in *NASA v. FLRA*, 527 U.S. 229 (1999) (*NASA*) that the right to representation set forth in § 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute) applies to OIG investigations. *See NTEU*, 66 FLRA at 895. In this regard, the Authority acknowledged that the Supreme Court in *NASA* "did not resolve whether it would conflict with the IG Act to require bargaining over IG-investigation procedures," *id.* (citing *NASA*, 527 U.S. at 244 n.8), but reasoned that "the Supreme Court held that, regardless of IGs' statutory authority to conduct independent investigations, that independence is not unfettered and may be limited by rights set forth in other laws," *id.* (citing *NASA*, 527 U.S. at 242-43). The Authority also found that DHS had not shown that the Statute or "any provision of the IG Act or its legislative history" indicate that "IG-investigation procedures are entirely nonnegotiable, regardless of their particular terms." *Id.* at 895-96.

Second, the Authority held that DHS did not meet its "regulatory burden to demonstrate that the provision is contrary to any specific terms of the IG Act." *Id.* at 898. Specifically, the Authority found that DHS cited only one section of the IG Act – § 6(a)(2) – and did so only indirectly. *Id.* at 899. Moreover, the Authority stated that DHS did not "provide any arguments regarding how any of the [IG-investigation procedures] . . . of Article 22 are contrary to that [section]." *Id.* In this regard, the Authority noted that DHS "quote[d] . . . Sections 3 and 5" of Article 22, *id.*, and asserted that the procedures required by these sections impermissibly "interfere[] with the OIG's statutory right to conduct independent investigations," *id.* (quoting DHS Statement of Position (SOP) at 6) (internal quotation marks omitted). But the Authority found that this "blanket assertion" was "insufficient to demonstrate that the provision is contrary to the IG Act." *Id.*

III. Positions of the Parties

A. DHS's Motion for Reconsideration

DHS argues that *NTEU* warrants reconsideration because "the Authority misapprehended the facts of [DHS's] argument, resulting in an erroneous conclusion of law." Motion at 1. Regarding the Authority's first determination, DHS argues that "[t]he Authority erred in its reasoning that the [U.S. Supreme] Court overruled or otherwise limited the *NRC* holding in *NASA* when, in fact, it expressly declined to do just that." *Id.* at 4 (citing *NASA*, 527 U.S. at 244 n.8). Thus, DHS asserts that *NASA* is not dispositive, *id.* at 6, and that the holding in *NRC* that proposals concerning IG-investigation procedures conflict with the IG Act applies here, *id.* at 4-6 (citing *NRC*, 25 F.3d at 235-36).

Concerning the Authority's second determination, DHS argues that by citing § 6(a)(2) of the IG Act, *id.* at 2-3, and arguing that IG-investigation procedures like those in Sections 3 and 5 of Article 22 "impermissibly interfere with the OIG's ability to conduct independent investigations," *id.* at 3, DHS provided sufficient specific authority for its position that the disputed provision is "contrary to" the IG Act and the *NRC* decision, *id.* at 3-4. Accordingly, DHS claims that it "did not rely on a mere 'blanket assertion' in its SOP," *id.* at 3 (quoting *NTEU*, 66 FLRA at 899), and argues that the Authority "based its conclusion of law on a mistake of fact," *id.* at 2.

B. Union's Opposition

The Union argues that DHS has not shown the "extraordinary circumstances" necessary to warrant reconsideration because DHS's arguments merely "attempt to [relitigate] the merits of the underlying case." Opp'n at 1-2.

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 Group, 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. In addition, 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*).

In support of its first argument, DHS argues that, in *NASA*, the Supreme Court "expressly declined" to limit the holding in *NRC*. Motion at 6 (citing *NASA*, 527 U.S. at 244 n.8). As stated previously, in *NTEU*, the Authority acknowledged that the Court in *NASA* "did not resolve whether it would conflict with the IG Act to require bargaining over IG-investigation procedures." 66 FLRA at 895 (citing *NASA*, 527 U.S. at 244 n.8). But the Authority relied on the reasoning in *NASA*, as well as several other principles and authorities, to conclude that, to the extent that *NRC* bars bargaining over *any and all* IG-investigation procedures, regardless of their particular terms, the Authority would not follow *NRC*. *See id.* at 894-97. As DHS's motion attempts to relitigate this conclusion, it does not establish extraordinary circumstances warranting reconsideration. *FDA*, 60 FLRA at 791; *ACT*, 56 FLRA at 948, 949; *Interior*, 54 FLRA at 12-13.

In its second argument, DHS argues that it provided sufficient specific authority to support its position that the provision is contrary to the IG Act. Motion at 3-4. As stated previously, in *NTEU*, the Authority stated that DHS "quote[d] . . . Sections 3 and 5" of Article 22, 66 FLRA at 899, but did not explain how these IG-investigation procedures impermissibly "interfere[] with the OIG's statutory right to conduct independent investigations," *id.* (quoting SOP at 6) (internal quotation marks omitted). DHS's second argument in its motion attempts to relitigate the Authority's conclusion that this was a "blanket assertion," *id.*, that did not meet DHS's regulatory burden to demonstrate that the provision is contrary to specific terms of the IG Act. Thus, that argument does not establish the extraordinary circumstances necessary to warrant reconsideration. *FDA*, 60 FLRA at 791; *ACT*, 56 FLRA at 948, 949; *Interior*, 54 FLRA at 12-13.

For the foregoing reasons, DHS has not demonstrated extraordinary circumstances warranting reconsideration. Therefore, we deny DHS's motion.

V. Order

DHS's motion for reconsideration is denied.