

68 FLRA No. 65

UNITED STATES
DEPARTMENT OF DEFENSE
PENTAGON FORCE PROTECTION AGENCY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO
(Union/Petitioner)

WA-RP-12-0005
(68 FLRA 266 (2015))

ORDER DENYING
MOTION FOR RECONSIDERATION
AND MOTION FOR STAY

March 23, 2015

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

In *U.S. DOD, Pentagon Force Protection Agency (Pentagon)*,¹ the Authority notified the parties to this case that the Authority would take no further action on the Agency's application for review of a decision and order issued by Federal Labor Relations Authority Regional Director (RD) Barbara Kraft. There are two issues before us.

The first issue is whether we should grant the Agency's motion for reconsideration of the notice in *Pentagon*. Even assuming that the notice in *Pentagon* is a "decision or order" from which the Agency may properly request reconsideration,² the Agency does not demonstrate that extraordinary circumstances warrant reconsidering that notice. Therefore, we decline to do so.

The second issue is whether we should grant the Agency's motion to stay the certification of representative for the bargaining unit at issue. To the extent that the Agency asks for a stay until we resolve the motion for reconsideration, our denial of reconsideration moots the stay request. And to the extent that the Agency

asks for a stay until objections to the election in this case are resolved, the Authority's Regulations already provide for that result – so it is unnecessary for us to separately stay the certification. For these reasons, we deny the motion for a stay.

II. Background

On November 8, 2012, the RD issued a decision and order finding that § 7112(b)(6) of the Federal Service Labor-Management Relations Statute (the Statute) did not preclude including certain law-enforcement and security officers in a bargaining unit. Section 7112(b)(6) provides, in pertinent part, that a bargaining unit "shall not be determined to be appropriate . . . if it includes . . . any employee engaged in intelligence, counterintelligence, investigative, or security work [that] directly affects national security."³ The RD directed an election.

On January 7, 2013, the Agency timely filed an application for review of the RD's decision, along with a motion to seal the record and a motion for pre-publication review of the Authority's decision. The Union filed an opposition to the Agency's application.

On March 5, 2013 – within sixty days of the filing of the Agency's application, and while the Authority continued to lack a quorum – the Authority's Office of Case Intake and Publication (CIP) issued an interim order that "deferred until further notice" consideration of the application.⁴ In this connection, the interim order stated that it "assure[d] the preservation of the parties' rights under the Statute to Authority review of the [RD's] decision" and that, "[i]n light of th[e] interim order, the [RD's] decision ha[d] not become the action of the Authority."⁵

Then, on November 12, 2013, the Authority regained its quorum. And on May 30, 2014 – more than sixty days after the Authority regained its quorum – the Authority issued its decision in another case, *FDIC (FDIC I)*.⁶ *FDIC I* involved a CIP interim order identical in all relevant respects to the interim order at issue here.

The agency in *FDIC I* timely filed a motion for reconsideration of that decision. And, on January 28, 2015, in *FDIC (FDIC II)*,⁷ the Authority granted reconsideration of, and vacated, *FDIC I*.⁸ In short, the Authority found that: CIP's interim order had not undertaken to grant review on the Authority's behalf; and

³ 5 U.S.C. § 7112(b)(6).

⁴ Interim Order at 2.

⁵ *Id.*

⁶ 67 FLRA 430 (2014) (Member Pizzella dissenting).

⁷ 68 FLRA 260 (2015).

⁸ *Id.* at 262.

¹ 68 FLRA 266 (2015).

² 5 C.F.R. § 2429.17.

because the Authority had not undertaken to grant review of the RD's decision within sixty days of regaining a quorum – specifically, by January 11, 2014 – § 7105(f) of the Statute supported the agency's claim that the RD's decision had become “the action of the Authority” after that date.⁹ Accordingly, the Authority concluded that *FDIC I* was “without legal effect,” and the Authority granted the agency's motion for reconsideration of, and vacated, *FDIC I*.¹⁰

On the same day that the Authority issued *FDIC II*, it issued notices to parties in three pending cases, including the notice in *Pentagon*.¹¹ The notice in *Pentagon*, like that in the other two,¹² discussed *FDIC II* and stated:

The application for review in this case also was filed when the Authority lacked a quorum. For the same reasons set forth in *FDIC [II]*, because the Authority did not undertake to grant review of the application by January 11, 2014, the [RD's] decision and order in this case became the action of the Authority after that date. Accordingly, consistent with *FDIC [II]*, we hereby notify the parties that the Authority is taking no further action in this case.¹³

Subsequently, the agency in one of the other two cases in which notices had issued – specifically, *U.S. Department of the Air Force, Fairchild Air Force Base (Fairchild I)*¹⁴ – filed a motion for reconsideration of the notice in *Fairchild I*. In *U.S. Department of the Air Force, Fairchild Air Force Base (Fairchild II)*,¹⁵ issued today, the Authority denied that motion for reconsideration.

In the instant case, the Agency filed a motion for reconsideration of *Pentagon*, and a motion to stay the certification of representative. The Union requested permission to file, and filed, an opposition to the Agency's motions.

III. Analysis and Conclusions

The Agency argues¹⁶ that we should reconsider the notice in *Pentagon*.¹⁷ Section 2429.17 of the Authority's Regulations permits a party to request reconsideration of an Authority “final decision or order.”¹⁸ A party seeking reconsideration bears a heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.¹⁹ The Authority has found that errors in its conclusions of law or factual findings are extraordinary circumstances that may justify reconsideration.²⁰ 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.²¹ But attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.²²

In its opposition, the Union argues that the notice in *Pentagon* does not constitute a “decision or order” within the meaning of § 2429.17,²³ and that the Agency does not cite any of the above-stated, recognized grounds for reconsideration.²⁴

We assume, without deciding, that the “notice” in *Pentagon* is an Authority “decision or order” subject to reconsideration under § 2429.17,²⁵ and that the Agency's arguments sufficiently raise issues that are appropriately addressed here. But those arguments do not warrant granting reconsideration of *Pentagon*. In this regard, the Agency's arguments are nearly identical²⁶ to those that were raised in the motion for reconsideration of *Fairchild I*, and rejected today in *Fairchild II*.²⁷ The only way in which the arguments differ is that the applications raised different substantive issues on the merits: here, the Agency claims that the application raises “novel[,] national[-]security interests,”²⁸ while the agency in *Fairchild II* argued that its application posed “tough[,] thought[-]provoking legal and/or factual issues” regarding different substantive issues.²⁹ But, as with the agency in *Fairchild II*, the Agency does not cite any support for the notion that the nature of the issues

⁹ *Id.* (quoting 5 U.S.C. § 7105(f)).

¹⁰ *Id.*

¹¹ *U.S. Dep't of the Air Force, Fairchild Air Force Base*, 68 FLRA 268 (2015) (*Fairchild I*) (issued Jan. 28, 2015), *recons. denied*, 68 FLRA 366, 370 (2015) (*Fairchild II*); *USDA, U.S. Forest Serv.*, 68 FLRA 267 (2015) (*Forest Serv.*) (same); *Pentagon*, 68 FLRA at 266 (same).

¹² *Fairchild I*, 68 FLRA at 268; *Forest Serv.*, 68 FLRA at 267.

¹³ 68 FLRA at 266.

¹⁴ 68 FLRA 268.

¹⁵ 68 FLRA 366.

¹⁶ Mot. for Recons. & Stay (Mot.) at 3.

¹⁷ 68 FLRA 266.

¹⁸ 5 C.F.R. § 2429.17.

¹⁹ *U.S. DHS, U.S. CBP*, 68 FLRA 109, 110 (2014).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Opp'n at 5-6 (quoting 5 C.F.R. § 2429.17).

²⁴ *Id.* at 7.

²⁵ 5 C.F.R. § 2429.17.

²⁶ See Mot. at 2-14.

²⁷ 68 FLRA at 368-70.

²⁸ Mot. at 14.

²⁹ 68 FLRA at 370.

presented in its application warrants granting reconsideration of the notice in *Pentagon*, more than a year after the RD's decision became the action of the Authority under § 7105(f).³⁰ For these reasons, and the reasons set out in *Fairchild II*, we find that the Agency has not established extraordinary circumstances warranting reconsideration of the notice in *Pentagon*.

In its motion for a stay, the Agency notes that there has been an election in this case, and states that objections have been filed, challenging “the procedural conduct of the election.”³¹ The Agency requests that we “stay further action including issuance of a [c]ertification of [r]epresentative pending action on this [m]otion [for reconsideration] and/or from any action resulting from the investigation” into the objections.³² Insofar as the Agency is asking us to stay the certification of representative until we resolve its motion for reconsideration, our denial of reconsideration in this case renders the stay request moot.³³ And insofar as the Agency is asking us to stay the certification of representative until the investigation into the election objections is complete, as the Union notes,³⁴ a certification of representative will not issue until the objections to the election are resolved.³⁵ Thus, there is no basis for directing a stay of the certification. For these reasons, we deny the Agency's motion for a stay.

IV. Order

We deny the Agency's motion for reconsideration and motion for a stay.

³⁰ *See id.*

³¹ Mot. at 14.

³² *Id.*

³³ *See, e.g., U.S. Dep't of VA, Neb./W. Iowa VA Health Care Sys., Omaha, Neb.*, 66 FLRA 462, 466 n.4 (2012).

³⁴ Opp'n at 14.

³⁵ 5 C.F.R. § 2422.32(a)(1)(ii) (a regional director will issue an appropriate certification when, as relevant here, “the Region decides and resolves objections” to the election).