65 FLRA No. 55

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
UNITED STATES PENITENTIARY
ATWATER, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 1242
(Union)

0-AR-4435
(64 FLRA 810 (2010))

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ORDER DENYING MOTION
FOR RECONSIDERATION

November 23, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on the Agency's motion for reconsideration of the Authority's decision to dismiss the Agency's exception in *United States Department of Justice, Federal Bureau of Prisons, United States Penitentiary, Atwater, California*, 64 FLRA 810 (2010) (*DOJ, Atwater*). The Union did not file an opposition to the Agency's motion for reconsideration.

Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision. For the reasons set forth below, we conclude that the Agency has failed to establish extraordinary circumstances warranting reconsideration. Accordingly, we deny the Agency's motion for reconsideration.

II. Decision in *DOJ, Atwater*

In the underlying proceedings in *DOJ, Atwater*, the Agency filed an exception challenging the Arbitrator's determination that its "willful" violation of the Fair Labor Standards Act (FLSA) warranted the application of a three-year, rather than a two-year, statute of limitations period to the scope of the remedy. Exception at 3-4. *See* 29 U.S.C. § 255(a) (providing for a two-year statute of limitations in which to bring a claim under the FLSA and a three-year statute of limitations where the violation of the law is willful). In resolving the exception, the Authority found that the Agency failed to address what it believed to be the appropriate statute of limitations period before the Arbitrator even though the Union requested that the Arbitrator apply the three-year statute of limitations. Therefore, the Authority dismissed the Agency's exception because "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5.*

III. Motion for Reconsideration

The Agency claims that extraordinary circumstances exist warranting reconsideration of the Authority's decision in *DOJ, Atwater*. First, the Agency claims that the Authority erred in its findings of fact and its legal conclusions. Motion at 5. Specifically, the Agency claims that the Authority "misinterpreted" its arguments before the Arbitrator. *Id.* at 3. According to the Agency, it presented "substantial and persuasive evidence" at arbitration that was intended to show that it did not willfully violate the FLSA. *Id.* The Agency contends that the Authority should have understood that it presented this evidence to persuade the Arbitrator to apply the two-year statute of limitations without it having to use those "magic words." *Id.* at 5. Therefore, the Agency asks that the Authority reconsider its decision to dismiss the exception and render a decision on the merits of the case. *Id.* at 5-6.

Second, the Agency argues that the Authority legally erred by failing to ensure that the award is consistent with the law. *Id.* at 8. Specifically, the Agency argues that reconsideration is warranted because the remedy is not based on a valid waiver of sovereign immunity. The Agency explains that, although the FLSA provides a waiver of sovereign

* Section 2429.5 was amended October 1, 2010. *See* 75 Fed. Reg. 42, 283 (2010). For purposes of this case, we apply the previous version of the Regulation that was in effect at all times relevant to the processing of this case.

immunity, since the Arbitrator's factual findings do not support the application of the three-year statute of limitations under the FLSA, the waiver of sovereign immunity is invalid. Accordingly, the Agency claims, the Authority "is allowing an improper monetary award against the United States Government to stand," in violation of the doctrine of sovereign immunity. *Id.* at 6. As such, the Agency requests that the Authority grant its motion for reconsideration.

IV. Analysis and Conclusions

The Agency has failed to establish extraordinary circumstances warranting reconsideration.

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority decision. The Authority has repeatedly recognized that a party seeking reconsideration under § 2429.17 bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action. *See Int'l Ass'n of Firefighters, Local F-25*, 64 FLRA 943 (2010). 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 its decision. *See id.*

First, we deny the Agency's claim that the Authority made erroneous findings of fact and legal conclusions that led to the improper dismissal of the Agency's exception under § 2429.5.

The record shows that, although the Agency provided the Arbitrator with factual assertions and background information relating to the parties' general dispute, the Agency failed to present any argument at arbitration relating to the applicable statute of limitations period. The case law interpreting 5 C.F.R. § 2429.5 makes clear that the Authority will not consider a contention that was not presented to the Arbitrator. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Oakdale, La.*, 63 FLRA 178, 179-80 (2009). In particular, the Authority will not consider arguments made by excepting parties who had notice of, and an opportunity to respond to, opposing parties' arguments prior to filing their exceptions with the Authority. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, USP Admin. Maximum (ADX) Florence, Colo.*, 64 FLRA 1168, 1170 (2010) (*BOP, Florence*) (exception dismissed under § 2429.5 where agency had notice of specific remedy sought by union at arbitration and could have, but did not, present its argument to the arbitrator disputing that remedy); *U.S. Dep't of Homeland Security, U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008) (same). Here, the record shows that the Agency had notice at the hearing that the Union was requesting that the Arbitrator apply the three-year statute of limitations period. However, the Agency failed to respond to the Union's argument or make a clear argument for a two-year statute of limitations prior to filing its exception. Accordingly, we reject the Agency's contention that reconsideration is warranted on the ground that extraordinary circumstances exist because the Authority erred in its findings of fact and its legal conclusions. *Cf. U.S. Dep't of Labor*, 60 FLRA 737, 738 (2005) (motion for reconsideration granted where agency challenged decision dismissing exception on § 2429.5 grounds where agency had no notification prior to union's post- hearing brief of argument under collective bargaining agreement).

Second, we deny the Agency's motion for reconsideration based on the doctrine of sovereign immunity. A claim of federal sovereign immunity can be raised at any time. *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 151 (2005) (citing *Dep't of the Army v. FLRA*, 56 F.3d 273, 275 (D.C. Cir. 1995); *accord Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1105 (D.C. Cir. 2005) (sovereign immunity is a matter of "jurisdiction and may properly be raised at any time")). It is clear that a federal agency is subject to a monetary claim only if the statute on which the claim is based unambiguously establishes a waiver of sovereign immunity permitting such claim. *See Lane v. Pena*, 518 U.S. 187 (1996).

The Agency concedes that the FLSA constitutes a waiver of sovereign immunity, *see* Motion at 7, but argues that the requirements warranting a three-year statute of limitations under the FLSA were not met. Thus, the Agency's claim that the award contravenes the doctrine of sovereign immunity is merely a restatement of its claim that the Arbitrator erroneously applied the three-year statute of limitations under the FLSA — an issue that the Authority found untimely raised in *DOJ, Atwater*. The Agency has not provided any reason for us to reconsider the dismissal of the Agency's claim

regarding the three-year statute of limitations issue. Moreover, the award is based on the FLSA and the FLSA provides a valid waiver of sovereign immunity. We therefore reject the Agency's contention that reconsideration is warranted because the award violates the doctrine of sovereign immunity.

Accordingly, because the Agency has failed to establish that extraordinary circumstances exist warranting reconsideration, we deny the Agency's motion for reconsideration.

V. Order

The Agency's motion for reconsideration is denied.