66 FLRA No. 120

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 231
(Union)

0-AR-4734
(66 FLRA 335 (2011))

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ORDER DENYING
MOTION FOR RECONSIDERATION

April 30, 2012

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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 (motion) of the Authority's decision in *U.S. Department of Homeland Security, U.S. Customs & Border Protection*, 66 FLRA 335 (2011) (*CBP*). The Union filed an opposition to the 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 *CBP*. Accordingly, 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 Article 20, Section 4.F. of the parties' collective-bargaining agreement (Section 4.F.) when it directed that the grievants be reassigned.[1] *See CBP*, 66 FLRA at 335. The Arbitrator found that Section 4.F. placed an "affirmative burden on the Agency" to establish that the grievants' reassignments were "based on the needs of the service." *Id.* at 336 (quoting Award at 15) (internal quotation marks and brackets omitted). As relevant here, the Agency argued before the Arbitrator that it directed the reassignments "in order to prevent 'integrity issues,' . . . such as the grievants becoming too familiar, and thus not as vigilant as they should have been, when dealing with repeat customers and passengers at the . . . small" airports where the grievants previously worked. *Id.* (quoting Award at 11) (internal quotation marks and brackets omitted). The Arbitrator found that the Agency violated Section 4.F. because "none of the 'evidence . . . show[ed] that there were any legitimate integrity or complacency issues'" concerning the grievants' work at their previous worksites. *Id.* (alteration in original) (quoting Award at 12). Consequently, the Arbitrator granted the Union its requested remedies, which included directing the Agency to return the grievants to their former positions. *Id.*

B. Agency's Exceptions

The Agency filed exceptions arguing that the award was contrary to management's rights to determine internal security practices, direct and assign employees, and assign work, as well as contrary to 5 C.F.R. § 335.102(a).[2] *CBP*, 66 FLRA at 336-37 (citations omitted). With regard to management's rights, the Agency contended that the Arbitrator should not have sustained the grievance based on an alleged violation of Section 4.F. because, according to the Agency, that provision was not negotiated pursuant to one of the management-rights exceptions in § 7106(b) of the Federal Service Labor-Management Relations Statute (the Statute). *Id.* at 336. The Agency also requested that the Authority decline to consider any assertions in the Union's opposition that the parties negotiated

[1] Section 4.F. states, in relevant part:

> *Directed reassignments*: The [Agency] retains the right to identify and direct the reassignment of an [e]mployee based on the needs of the [s]ervice, including but not limited to the following:
>
> (1) for deficiencies in an employee's work performance which may be corrected or minimized in a different work location; or
>
> (2) for remediation reasons.

CBP, 66 FLRA at 335 n.1 (alterations in original) (quoting Award at 10-11).

[2] 5 C.F.R. § 335.102(a) states, in relevant part, that "an agency may . . . reassign a career or career-conditional employee."

Section 4.F. under § 7106(b), because the Arbitrator made no such finding and the Union presented no such argument at arbitration. *See id.*

In addition, the Agency filed a nonfact exception alleging that "the Arbitrator mistakenly found that the Agency reassigned the grievants due to concerns with their 'personal' integrity." *Id.* (brackets omitted) (citing Exceptions at 13). In that regard, the Agency contended that the Arbitrator failed to understand that it directed the reassignments based, in part, on a determination that all employees in the grievants' former positions were "'*vulnerable* to corruption and other *potential* security or integrity risks.'" *Id.* (quoting Exceptions at 13).

C. Authority's Decision in *CBP*

In *CBP*, the Authority found that nothing in the record indicated that the Agency argued to the Arbitrator that adopting the Union's interpretation of Section 4.F. or granting its remedial requests would be contrary to: (1) management's rights to determine internal security practices or to direct employees; or (2) 5 C.F.R. § 335.102(a). *See* 66 FLRA at 337-38. Thus, the Authority found that 5 C.F.R. §§ 2425.4(c) and 2429.5 (§§ 2425.4(c) and 2429.5) barred the Agency from making those arguments in its exceptions.[3] *See id.* In addition, relying on *U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Oakdale, Louisiana*, 63 FLRA 178 (2009) (*DOJ*), the Authority found that §§ 2425.4(c) and 2429.5 barred the Agency's argument that Section 4.F. was not negotiated under § 7106(b), because the Agency did not present that argument to the Arbitrator. *See CBP*, 66 FLRA at 338 & n.9 (citing *DOJ*, 63 FLRA at 179-80). In that regard, the Authority determined that the Agency "could have, and should have, presented to the Arbitrator all of its . . . challenges to the Union's proposed interpretation of Section 4.F., including challenges to its enforceability under § 7106(b)." *Id.* at 338 (citing 5 C.F.R. § 2429.5; *DOJ*, 63 FLRA at 179-80).

The Authority noted that the Union argued, in its opposition, that the award enforced a provision negotiated under § 7106(b). *See id.* at 337. The Authority added that, as the result of the application of §§ 2425.4(c) and 2429.5 to the Agency's exceptions, the Union's assertion regarding § 7106(b) was uncontested. *Id.* n.10 (citing Opp'n at 15). And as for the Agency's remaining management-rights exceptions – those that were properly before the Authority because the Agency presented them to the Arbitrator – the Authority explained that, absent a claim that Section 4.F. was not a § 7106(b) provision, they were insufficient as a matter of law to establish that the award was contrary to § 7106(a) of the Statute. *Id.* (citing *U.S. Envtl. Prot. Agency*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 107 & n.6 (2010) (Chairman Pope concurring) (*FDIC*)).

With regard to the Agency's nonfact exception, the Authority explained that it will not find an award deficient on the basis of an arbitral determination of any factual matter that the parties disputed at arbitration. *Id.* at 338-39 (citation omitted). Based on testimony in the arbitration-hearing transcript, as well as an assertion in the Union's opposition, the Authority found that the parties disputed at arbitration whether the Agency's "integrity concerns" justified reassigning the grievants. *Id.* (citing Tr. at 19, 21-22; Opp'n at 11). Therefore, the Authority denied the nonfact exception. *Id.* at 339.

III. Positions of the Parties

A. Motion for Reconsideration

The Agency asserts that errors of law and fact warrant reconsideration of the Authority's decision in *CBP*. *See* Motion at 4.

Several of the alleged errors involve the Authority's application of § 2429.5 in *CBP*. First, the Agency contends that the Authority should not have barred any of its arguments without a request from the Union to do so. *Id.* at 11. Second, relying on its closing brief at arbitration (closing brief), the Agency asserts that it presented to the Arbitrator arguments concerning internal security practices, directing employees, and 5 C.F.R. § 335.102(a), and that, as a result, the Authority erred in barring those arguments. *See id.* at 7-9, 17-19 (citing Closing Brief).

Third, the Agency contends that § 2429.5 permitted it to argue for the first time in its exceptions that Section 4.F. was not negotiated under § 7106(b). *See id.* at 14. In that regard, the Agency asserts that the Authority has consistently assigned unions the burden of proving that contract provisions are enforceable under § 7106(b), and, thus, the Agency had no obligation to present a § 7106(b) argument to the Arbitrator. *See id.* at 11 (citing *NTEU*, 66 FLRA 186, 191 (2011); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Beaumont, Tex.*, 62 FLRA 100, 101-02 (2007) (*BOP II*); *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Leavenworth, Kan.*, 53 FLRA 165, 170 (1997) *(BOP I)*); *id.* at 12 (citing *NTEU v. FLRA*, 550 F.3d 1148, 1150 (D.C. Cir. 2008) (*NTEU v. FLRA II*); *NTEU v. FLRA*, 404 F.3d 454,

[3] Section 2425.4(c) provides, in pertinent part, that exceptions may not rely on "any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented to the arbitrator." Section 2429.5 provides, in pertinent part, that the "Authority will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented . . . before the . . . arbitrator."

458 (D.C. Cir. 2005) (*NTEU v. FLRA I*); *U.S. Dep't of the Navy, Phila. Naval Shipyard*, 35 FLRA 990, 995 (1990) (*Naval Shipyard*); *AFGE, AFL-CIO, Dep't of Educ. Council of AFGE Locals*, 34 FLRA 1078, 1085-86 (1990) (*AFGE Locals*); *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*)); *id.* at 13 (citing *SSA, Se. Program Svc. Ctr., Birmingham, Ala.*, 55 FLRA 320, 322 (1999) (*SSA Birmingham*)).

Fourth, the Agency asserts that the Authority erroneously failed to apply § 2429.5 equally to both parties' filings. *See id.* at 14-15 (citing *U.S. Dep't of the Treasury, IRS*, 66 FLRA 120, 121 (2011) (*IRS*)). Specifically, the Agency contends that the Union admitted not making a § 7106(b) argument to the Arbitrator, and yet the Authority considered the § 7106(b) argument in the Union's opposition. *See id.* The Agency contends that, if the Authority had properly applied § 2429.5, then the Agency's assertion to the Authority that Section 4.F. was not a § 7106(b) provision would have been unrebutted. *See id.* at 15-16.

Apart from the alleged errors in the Authority's application of § 2429.5, the Agency also argues that the Authority denied its non-barred management's rights exceptions "without engaging in the required legal analysis." *Id.* at 16. The Agency contends that, before denying those exceptions, the Authority was obligated to conduct further analysis applying: (1) *KANG*; (2) *U.S. Dep't of the Treasury, Bureau of Engraving & Printing, Wash., D.C.*, 53 FLRA 146 (1997) (*BEP*); and (3) *EPA*. Motion at 16.

Finally, the Agency contends that the Authority misunderstood its nonfact exception, *see id.* at 21, because, rather than arguing that the award "was deficient based upon a factual matter . . . disputed at arbitration," the exception argued that the award was "deficient because the [A]rbitrator completely misstated the reason the Agency reassigned" the grievants, *id.* at 20. The Agency asserts that, properly construed, its nonfact exception required the Authority to address whether the Arbitrator "erroneously believed that the Agency reassigned the [grievants] because of integrity and vigilance concerns . . . specific to" them. *Id.* at 21.

B. Union's Opposition

The Union argues that the motion largely repeats arguments rejected in *CBP*, Opp'n at 1, and that the Agency is relying on documents to support the motion that it did not submit with the exceptions – among them, the Agency's closing brief, *id.* at 1-2 & n.1.

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.* 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). When evaluating motions for reconsideration, the Authority has declined to consider documents that the moving party could have, but did not, submit in the original proceeding. *See, e.g., Sport Air Traffic Controllers Org.*, 64 FLRA 1142, 1143 (2010) (*SATCO*), *denying mot. to reconsider* 64 FLRA 606 (2010); *Pension Benefit Guar. Corp.*, 60 FLRA 747, 748 (2005) (denying motion to reconsider order dismissing exceptions). In addition, attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances. *See SATCO*, 64 FLRA at 1143; *U.S. Dep't of Health & Human Servs., Food & Drug Admin.*, 60 FLRA 789, 791 (2005) (*FDA*).

A. The Authority in *CBP* did not err in applying § 2429.5 or in analyzing the Agency's management-rights exceptions.

As noted previously, *supra* note 3, § 2429.5 of the Authority Regulations provides, in pertinent part, that the "Authority will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented . . . before the . . . arbitrator."[4] 5 C.F.R. § 2429.5. The Authority may rely on § 2429.5 to bar an argument or evidence even if a party does not assert that the argument or evidence is barred. *E.g.*, *IRS*, 66 FLRA at 121 (barring opposition argument under § 2429.5); *AFGE, Local 507*, 58 FLRA 578, 579 (2003) (Chairman Cabaniss concurring) (without request from opposing party, Authority barred argument in exceptions). In particular, the Authority has – without any union request – barred an agency's claim that a contract provision was not negotiated under § 7106(b), where the agency should have known at arbitration to make that claim, but the record did not indicate that the agency did so. *See DOJ*, 63 FLRA at 179-80. *Cf. U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 502 (2000) (without union request, Authority barred

[4] Although the Authority in *CBP* found that both §§ 2425.4(c) and 2429.5 barred certain Agency arguments, *see* 66 FLRA at 337-38, § 2425.4(c) merely reiterates the requirements of § 2429.5 in the context of filing exceptions, *see* 5 C.F.R. § 2425.4(c) ("Consistent with [§] 2429.5. . ."). As such, we do not discuss the application of § 2425.4(c) separately from the application of § 2429.5.

agency's argument that award violated management's right to elect not to negotiate § 7106(b)(1) matter).

With regard to the Agency's contention that the Authority in *CBP* should not have applied § 2429.5 absent a Union request to do so, the Authority's action was consistent with the above-cited precedent. *See IRS*, 66 FLRA at 121; *AFGE, Local 507*, 58 FLRA at 579. As for the Agency's reliance on its closing brief to argue that the Authority barred certain arguments that the Agency *did* raise at arbitration, the Agency could have, but did not, submit the closing brief with its exceptions in order to demonstrate that it presented these arguments to the Arbitrator. *See* 5 C.F.R. § 2425.4(a)(2) (stating that exceptions must "includ[e] specific references to the record . . . and *any other relevant documentation*" (emphasis added)). Consequently, the Agency may not rely on the closing brief to support the motion, and, as such, the Agency provides no basis for the Authority to reconsider the dismissal of these arguments in *CBP*. *See SATCO*, 64 FLRA at 1143; *Pension Benefit Guar. Corp.*, 60 FLRA at 748.

Although the Agency asserts that § 2429.5 permitted it to argue for the first time on exceptions that Section 4.F. was not negotiated under § 7106(b), this assertion is contrary to Authority precedent. *See DOJ*, 63 FLRA at 179-80. In *CBP*, the Authority expressly relied on existing precedent – in particular, *DOJ* – for the proposition that, where an agency should have known to argue to an arbitrator that a contract provision was not negotiated under § 7106(b), and the agency did not do so, the Authority will not consider that argument for the first time on exceptions to the arbitrator's award. *CBP*, 66 FLRA at 338 (citing *DOJ*, 63 FLRA at 179-80). In addition, since deciding *CBP*, the Authority has continued to follow *DOJ*'s holding. *See, e.g., U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Louisville Dist., Louisville, Ky.*, 66 FLRA 426, 428 & n.5 (2012) (citing *CBP* and *DOJ*). In other words, both before and after *CBP*, the Authority has barred agency exceptions claiming that contract provisions were not enforceable under § 7106(b), where those claims were not made at arbitration. The Agency does not address *DOJ* or claim that the Authority erred in *CBP* by following *DOJ*'s holding. Consequently, the Agency does not provide a basis for finding that the Authority erred in *CBP* by barring the Agency's § 7106(b) argument.

The Agency also contends that the Authority's precedent prior to *CBP* consistently placed a burden on unions to establish the enforceability of contract provisions under § 7106(b), and that the Authority erred in *CBP* because it did not place a similar burden on the Union. Motion at 11-13. But Authority precedent prior to *CBP* required, as relevant here, that *agencies* argue that an award did not enforce a § 7106(b) provision in order to establish that the award was contrary to management rights. *E.g., U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 242 (2011) (*Wage Inv. Div.*) (where agency did not assert that award enforced provisions "not negotiated under § 7106(b)," agency "implicitly concede[d]" enforceability). In fact, the Authority has denied agencies' management-rights exceptions even when unions filed untimely oppositions or no oppositions at all – i.e., even in cases where unions did not properly raise *any* arguments, including § 7106(b) arguments, before the Authority. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Prison Camp, Duluth, Minn.*, 65 FLRA 588, 590-91 (2011) (untimely opposition not considered); *SSA, Indianapolis, Ind.*, 66 FLRA 62, 65 (2011) (no opposition); *U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs.*, 60 FLRA 437, 440-41 (2004) (then-Member Pope dissenting in part) (no opposition); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 57 FLRA 158, 160-63 (2001) (Chairman Cabaniss dissenting) (no opposition); *U.S. Dep't of the Navy, Naval Air Warfare Ctr., Aircraft Div., Indianapolis, Ind.*, 49 FLRA 18, 20 (1994) (no opposition).

The decisions cited in the motion do not support a contrary conclusion. In this regard, the motion relies on several negotiability decisions, as well as a decision resolving exceptions to an arbitrator's finding that a proposal was within the duty to bargain. *See* Motion at 11 (citing *NTEU*, 66 FLRA at 191); *id.* at 12 (citing *NTEU v. FLRA II*, 550 F.3d at 1150; *NTEU v. FLRA I*, 404 F.3d at 458; *AFGE Locals*, 34 FLRA at 1085-86; *KANG*, 21 FLRA at 31). In doing so, the motion confuses the burden that a union bears to establish that *a proposal is within the duty to bargain* under § 7106(b), with the burden that an excepting party bears to establish that *an arbitration award is contrary to management's rights*.[5] *E.g.*, Motion at 12 (quoting *NTEU v. FLRA II*, 550 F.3d at 1150 (reviewing court's application of *KANG* in a negotiability dispute)). Negotiability decisions do not establish which party bears the burden of demonstrating that an arbitration award enforces, or does not enforce, a § 7106(b) provision. *Cf., e.g., EPA*, 65 FLRA at 116 n.9 (Authority does not apply the "tailoring" analysis from negotiability disputes when reviewing exceptions to arbitration awards). Rather, the Authority applies the framework set forth in *FDIC* and *EPA* to evaluate management-rights exceptions. *See EPA*, 65 FLRA at 115; *FDIC*, 65 FLRA at 106-07.

Concerning the motion's reliance on *Naval Shipyard*, 35 FLRA at 995, the Authority did state in that

[5] In the negotiability context, the Authority's Regulations expressly place the burden on unions "to, among other things, state why the proposal or provision . . . falls within an exception to management rights" under § 7106(b), 5 C.F.R. § 2424.25(a), and to "rais[e] and support[] arguments that the proposal or provision is within the duty to bargain," *id.* § 2424.32(a).

decision that it would not consider a union's contention that a contract provision was enforceable under § 7106(b) because the union did not advance such an argument at arbitration. But a subsequent decision "specifically overrule[d]" that holding, and, as such, the Authority no longer follows it. *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 314-15 (1990). As for the remaining decisions cited in the motion, although they do involve exceptions to arbitration awards, none states that it is a union's burden in an arbitration case to demonstrate that an award enforces a § 7106(b) provision. *See BOP II*, 62 FLRA at 101-02 (both parties presented arguments regarding whether award enforced a § 7106(b) provision); *SSA Birmingham*, 55 FLRA at 322 (despite union's failure to file opposition, Authority assessed whether it had previously found a similar provision to be a § 7106(b)(2) or (b)(3) provision); *BOP I*, 53 FLRA at 170-71 (while noting that there was no claim that award enforced a § 7106(b) provision, Authority went on to find that it was not "apparent" that provision was negotiated under § 7106(b)). Thus, these decisions do not establish that *CBP* erroneously failed to place a burden on the Union to demonstrate that the award enforced a § 7106(b) provision.

The Agency also argues that the Authority in *CBP* failed to apply § 2429.5 equally to both parties and that, if it had: (1) the Union would have been barred from arguing that the award enforced a § 7106(b) provision; and (2) the Agency's arguments that the award violated management rights would have been unrebutted. But even if the Authority in *CBP* had barred the Union's § 7106(b) argument, the Authority still would have denied the Agency's management-rights exceptions. Under *FDIC*, in order to show that an award is contrary to § 7106(a), an agency must allege, as relevant here, that the award does not enforce a contract provision negotiated under § 7106(b). *See FDIC*, 65 FLRA at 107 & n.6. Without such an allegation, management-rights exceptions fail as a matter of law. *See id. Accord Wage Inv. Div.*, 66 FLRA at 242 (given the absence of an allegation that provisions enforced by arbitrator were "not negotiated under § 7106(b)," Authority denied management-rights exceptions). For the reasons discussed above, the Authority correctly barred the Agency's § 7106(b) argument in *CBP*. Because the Agency did not properly allege that the award enforced a contract provision that was not negotiated under § 7106(b), the management-rights exceptions in *CBP* failed as a matter of law.[6] *See FDIC*, 65 FLRA at 107 & n.6; *Wage Inv. Div.*, 66 FLRA at 242. In other words, *FDIC* required the Authority to deny the management-rights exceptions in *CBP*, regardless of whether the Union made a § 7106(b) argument, and regardless of whether the Authority barred such an argument under § 2429.5.[7]

Based on the foregoing, we find that the motion does not establish extraordinary circumstances warranting reconsideration of the Authority's application of § 2429.5, or its analysis of the management-rights exceptions, in *CBP*.

B. The Authority did not err in denying the Agency's nonfact exception.

As stated previously, in its nonfact exception in *CBP*, the Agency contended that the Arbitrator failed to understand that it directed the grievants' reassignments based, in part, on a determination that *all* employees in the grievants' former positions were "'*vulnerable* to corruption and other *potential* security or integrity risks.'" 66 FLRA at 336 (quoting Exceptions at 13). The Authority in *CBP*, based on testimony in the arbitration-hearing transcript and an assertion in the Union's opposition, found that the parties disputed at arbitration whether the Agency's "integrity concerns" justified reassigning the grievants. *Id.* at 338-39 (citing Tr. at 19, 21-22; Opp'n at 11). Assuming, as the Agency alleged, that the matter involved a factual finding, the Authority denied the nonfact exception as contesting an arbitral determination of a factual matter that the parties disputed at arbitration. *See id.* (citation omitted). The motion presents the same arguments as the nonfact exception presented originally, *compare* Motion at 20-22, *with* Exceptions at 12-14, and provides no basis for finding that the Authority "[mis]understood" those arguments in *CBP*, Motion at 21. Further, an attempt to relitigate the Authority's conclusions in *CBP* is insufficient to establish extraordinary circumstances justifying reconsideration. *See SATCO*, 64 FLRA at 1143; *FDA*, 60 FLRA at 791. Therefore, we find that the motion does not establish extraordinary circumstances justifying reconsideration of the denial of the Agency's nonfact exception.

V. Order

The Agency's motion for reconsideration is denied.

[6] Because the management-rights exceptions failed as a matter of law under *FDIC*, the Authority was not required, as the Agency contends, *see* Motion at 16, to engage in further legal analysis before denying those exceptions. To the extent that the Agency is arguing that the Authority in *CBP* did not properly apply *BEP*'s "reconstruction" requirement, *FDIC* explicitly rejected continued application of that requirement. *See FDIC*, 65 FLRA at 106-07.

[7] Thus, we need not reach the question of whether the Authority should have barred the Union's § 7106(b) argument in *CBP*.