

67 FLRA No. 77

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
BALTIMORE, MARYLAND
(Petitioner/Agency)

and

ASSOCIATION OF ADMINISTRATIVE
LAW JUDGES
INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
AFL-CIO
(Exclusive Representative/Union)

WA-RP-11-0022

ORDER DENYING
MOTION FOR RECONSIDERATION

March 12, 2014

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

I. Statement of the Case

Then-Acting Regional Director (RD) Jean M. Perata of the Federal Labor Relations Authority concluded that certain administrative law judges (ALJs) should not be included in a bargaining unit composed of other Agency ALJs because they perform supervisory duties within the meaning of the Federal Service Labor-Management Relations Statute (the Statute). Twenty months after the RD issued this decision, one of the excluded ALJs (the applicant) filed an application for review (application) of the RD's decision. The Authority dismissed the application because it was untimely under the Authority's Regulations. The applicant subsequently filed a motion for reconsideration (motion) requesting that the Authority reconsider its decision. For the reasons discussed below, we find that the applicant has failed to establish the extraordinary circumstances necessary to warrant reconsideration and, accordingly, we deny the motion.

II. Background

In *SSA, Office of Disability Adjudication & Review, Baltimore, Maryland*,¹ the Authority concluded that ALJs in the Agency's national-hearing centers in Falls Church, Virginia and Albuquerque, New Mexico are supervisors as defined by the Statute. As a result, the ALJs could not be included in a bargaining unit with other Agency ALJs.²

Following this decision, the Agency filed a petition to clarify the bargaining-unit status of ALJs in its national-hearing centers in Baltimore, St. Louis, and Chicago. The RD instructed the Agency to post a notice about the processing of its petition. After investigating the matter, the RD concluded that the ALJs at these additional hearing centers are supervisors within the meaning of the Statute and, therefore, should be excluded from the bargaining unit. The RD served her decision on the Agency and the Union.

Twenty months after the RD issued her decision, the applicant – an ALJ at the Chicago national-hearing center – filed a motion with the Authority to vacate the RD's decision because he did not receive notice of the proceedings. He asserted that the Agency never posted notice of this matter in its Chicago national-hearing center, despite being instructed to do so by the RD. The Authority assumed, without deciding, that the motion was an application for review and issued an order directing the applicant to show cause (order) why it should not be dismissed as untimely. In response to the order (response), the applicant again argued that he had not received sufficient notice.

The Authority then issued an order dismissing the petition. In that order, the Authority concluded that the applicant's application for review was untimely. It noted that, under the Authority's Regulations, a party must file an application for review of an RD's decision within sixty days. Because the applicant filed his application well beyond this deadline, the Authority held that its dismissal was warranted. The applicant then filed this motion asking the Authority to reconsider its dismissal.

After the applicant filed his motion, he also filed a petition with the U.S. Court of Appeals for the Seventh Circuit concerning the Authority's dismissal of his application.³ That petition is pending with the court.

¹ 64 FLRA 896 (2010).

² See *id.* at 901-04.

³ *Paul Armstrong v. FLRA*, No. 14-1288 (7th Cir. filed February 11, 2014).

III. Analysis and Conclusion

The applicant contends that the Authority should grant his motion because he did not receive sufficient notice of the underlying proceedings. The Authority's Regulations permit a party to request reconsideration of an Authority decision.⁴ But a party seeking reconsideration "bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action."⁵ Moreover, in resolving a motion for reconsideration, the Authority will not consider claims that are raised for the first time in the motion when they could have been raised previously.⁶ For the following reasons, we find that the applicant has not demonstrated that reconsideration is warranted.

In his motion, the applicant contends that reconsideration is warranted because his circumstances "come within the doctrine of equitable tolling."⁷ The applicant, however, failed to raise this argument in either his application or his response. Because the applicant could have raised this argument previously, but did not do so, we do not consider it.⁸

The applicant also contends that, under § 7111(b) of the Statute, the Authority is required to "investigate and provide an opportunity for a hearing *after reasonable notice*."⁹ Although unclear, the applicant appears to be arguing that the Authority violated this provision by dismissing his application as untimely.

This argument also is not properly before us. In his application and his response, the applicant argued that he did not receive notice *under the Authority's Regulations*.¹⁰ But in his motion, the applicant contends that he did not receive notice *under the Statute*.¹¹ In a previous case, the Authority did not consider an argument in a motion for reconsideration concerning hearing requirements under § 7111(b) of the Statute because the filing party previously made arguments regarding such requirements only under the Authority's Regulations.¹² Consistent with that precedent, because the applicant raised his argument regarding notice under § 7111(b) for

the first time in his motion, when he could have raised it previously, it is not properly before us.¹³

Moreover, even if the applicant's argument regarding notice were properly before the Authority, we would find that it does not provide a basis for granting reconsideration. In this regard, the applicant appears to argue that he and all potentially affected bargaining-unit members must have received personal and direct notice of the pending unit clarification proceeding for the RD's decision to be legally valid. But the applicant cites no statutory or regulatory authority to support this proposition. And there is no statutory or regulatory requirement of which we are aware that all potentially affected bargaining-unit employees must receive personal and direct notice of such proceedings.

Because the applicant presents no other arguments in his motion, we conclude that the applicant has not established the extraordinary circumstances necessary to warrant reconsideration. We, accordingly, deny the motion.¹⁴

IV. Order

We deny the applicant's motion for reconsideration.

⁴ 5 C.F.R. § 2429.17.

⁵ *NAIL, Local 15*, 65 FLRA 666, 667 (2011).

⁶ *E.g., U.S. Dep't of HHS, Office of the Assistant Sec'y for Management & Budget, Office of Grant & Contract Fin. Management, Div. of Audit Resolution*, 51 FLRA 982, 984 (1996) (*HHS*).

⁷ Motion at 1.

⁸ *See HHS*, 51 FLRA at 984.

⁹ Motion at 1 (citations omitted).

¹⁰ *See Response to Show Cause Order (Response) at 3* (citing 5 C.F.R. § 2422.4); Application at 1 (same).

¹¹ Motion at 1 (citing 5 U.S.C. § 7111(b)).

¹² *See U.S. EPA*, 61 FLRA 806, 807 (2006).

¹³ *See id.*

¹⁴ *See HHS*, 51 FLRA at 984-85.