

68 FLRA No. 64

UNITED STATES
DEPARTMENT OF THE AIR FORCE
FAIRCHILD AIR FORCE BASE
(Agency)

and

FAIRCHILD FEDERAL EMPLOYEES' UNION
(Petitioner/Exclusive Representative)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO
(Interested Party/Labor Organization)

SF-RP-12-0042
(68 FLRA 268 (2015))

ORDER DENYING
MOTION FOR RECONSIDERATION

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. Department of the Air Force, Fairchild Air Force Base (Fairchild)*,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) Jean M. Perata. The issue before us is whether we should grant the Agency's motion for reconsideration of the notice in *Fairchild*. Even assuming that the notice in *Fairchild* 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.

II. Background

On May 22, 2013, the RD issued a decision and order certifying the consolidation of two bargaining units. On July 19, 2013, the Agency filed an application for review of, and motion to stay, the RD's decision and order, as well as a motion to correct the unit description. The Fairchild Federal Employees' Union and the American Federation of Government Employees (AFGE) filed oppositions to the Agency's application. At the time of all of those filings, the Authority lacked a quorum and, thus, could not issue decisions.

On September 13, 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.³ In this connection, the interim order stated that it "assure[d] the preservation of the parties' rights under the [Federal Service Labor-Management Relations] Statute [(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."⁴

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)*.⁵ *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)*,⁶ the Authority granted reconsideration of, and vacated, *FDIC I*.⁷ In so doing, the Authority analyzed the wording of § 7105(f) of the Statute, which provides, in pertinent part, that the Authority must "undertake to grant review" of a regional director's decision within sixty days of a properly filed application for review, or the regional director's decision becomes "the action of the Authority."⁸ The Authority found that, in deciding *FDIC I*, the Authority had done so "based on an assumption that, by issuing the interim order [in that case], CIP had, on the Authority's behalf, 'undertake[n] to grant review' of the [regional director's] decision" within the meaning of § 7105(f).⁹ In *FDIC II*, the Authority found that this assumption was incorrect because: (1) CIP did not have express, delegated

³ Interim Order at 2.

⁴ *Id.*

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

⁶ 68 FLRA 260 (2015).

⁷ *Id.* at 262.

⁸ 5 U.S.C. § 7105(f).

⁹ *FDIC II*, 68 FLRA at 261 (quoting 5 U.S.C. § 7105(f)).

¹ 68 FLRA 268 (2015).

² 5 C.F.R. § 2429.17.

authority to undertake to grant review of an application for review on the Authority's behalf; and (2) in its interim order in that case, CIP had not purported to do so.¹⁰ The Authority then found that, because the Authority had not undertaken to grant review of the regional director's decision within sixty days of regaining a quorum – specifically, by January 11, 2014 – § 7105(f) supported the agency's claim that the regional director's decision had become “the action of the Authority” after that date.¹¹

The Authority also acknowledged¹² that, in *Naval Air Station Fallon, Fallon, Nevada (Naval Air Station)*,¹³ the Authority had stated that – in “the unique circumstances of [that] case” – it could sua sponte review a regional director's decision that had become the action of the Authority when the Authority had not undertaken to grant an application for review of the regional director's decision within sixty days.¹⁴ But, in *FDIC II*, the Authority stated: “Given the unique circumstances of this case, including the amount of time that has elapsed since the [regional director's] decision became the action of the Authority, we find that it would not be appropriate to take the same approach as in *Naval Air Station*.”¹⁵

The Authority concluded that: “after January 11, 2014, the [regional director's] decision and order [had become] the ‘action of the Authority’ under § 7105(f),” and, thus, *FDIC I* was “without legal effect.”¹⁶ So the Authority granted the agency's motion for reconsideration of, and vacated, *FDIC I*.¹⁷

On the same day that the Authority issued *FDIC II*, it issued notices to parties in three pending cases, including the notice in *Fairchild*.¹⁸ The notice in *Fairchild*, like that in the other two,¹⁹ 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.²⁰

The Agency filed a motion for reconsideration of the notice in *Fairchild*. AFGE requested permission to file, and filed, an opposition to the Agency's motion.

III. Analysis and Conclusions

The Agency argues²¹ that we should reconsider the notice in *Fairchild*.²² Section 2429.17 of the Authority's Regulations permits a party to request reconsideration of an Authority “final decision or order.”²³ A party seeking reconsideration bears a heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.²⁴ The Authority has found that errors in its conclusions of law or factual findings are extraordinary circumstances that may justify reconsideration.²⁵ 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.²⁶ But attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.²⁷

In its opposition, AFGE argues that the notice in *Fairchild* does not constitute a “decision or order” within the meaning of § 2429.17,²⁸ and that the Agency does not cite any of the above-stated, recognized grounds for reconsideration.²⁹ We assume, without deciding, that the “notice” in *Fairchild* is an Authority “decision or order” subject to reconsideration under § 2429.17,³⁰ and that the Agency's arguments sufficiently raise issues that are appropriately addressed here. But, for the following reasons, we find that the Agency's motion does not warrant granting reconsideration of the notice in *Fairchild*.

¹⁰ *Id.* at 262.

¹¹ *Id.* (quoting 5 U.S.C. § 7105(f)).

¹² *Id.*

¹³ 51 FLRA 1254 (1996).

¹⁴ *Id.* at 1257.

¹⁵ 68 FLRA at 262.

¹⁶ *Id.* (quoting 5 U.S.C. § 7105(f)).

¹⁷ *Id.*

¹⁸ *Fairchild*, 68 FLRA 268 (issued Jan. 25, 2015); *USDA, U.S. Forest Serv.*, 68 FLRA 267 (2015) (*Forest Serv.*) (same); *U.S. DOD, Pentagon Force Prot. Agency*, 68 FLRA 266 (2015) (*Pentagon*) (same).

¹⁹ *Forest Serv.*, 68 FLRA at 267; *Pentagon*, 68 FLRA at 266.

²⁰ 68 FLRA at 268.

²¹ Mot. for Recons. (Mot.) at 1.

²² 68 FLRA 268.

²³ 5 C.F.R. § 2429.17.

²⁴ *U.S. DHS, U.S. CBP*, 68 FLRA 109, 110 (2014) (*CBP*).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Opp'n at 5 (quoting 5 C.F.R. § 2429.17).

²⁹ *Id.* at 6-7.

³⁰ 5 C.F.R. § 2429.17.

First, the Agency contends that, “[b]ased on the plain language of the [i]nterim [o]rder, . . . the Authority had a statutory duty to consider the application in a timely manner and notify the parties and/or take some action within the [sixty] days after attaining a quorum.”³¹ In this regard, the Agency contends that the wording of the interim order implied that the Authority “intended to take action or advise the parties shortly and within appropriate and reasonable time frames of its decision on review.”³² Also in this regard, the Agency states that, in a previous situation where the Authority lost its quorum, the Authority’s Acting Chairman at the time issued a similar interim order,³³ and that CIP’s use of similar wording in the interim order in this case gave “the impression that . . . CIP had been delegated similar apparent authority to that of the [Acting] Chairman.”³⁴ The Agency notes that, in that previous situation, the Authority “appeared to issue its pending representation cases within [sixty] days from the day the quorum was attained[,] and notified the parties in the decisions that it was considering the applications.”³⁵ According to the Agency, in this case, “the Authority failed to do its due diligence in acting timely and in accordance with . . . [the] [i]nterim [o]rder, [and] now uses *FDIC [II]* as an excuse to thwart its own responsibilities to, at the very least, review the application[.]”³⁶ The Agency also contends³⁷ that the interim order is consistent with § 7101(b) of the Statute, which provides, in pertinent part, that the provisions of the Statute “should be interpreted in a manner consistent with the requirement of an effective and efficient [g]overnment.”³⁸ Moreover, the Agency claims that, “[i]n the circumstances of this case, . . . § 7105(f) [of the Statute] requires that the Authority review the [RD’s] ‘action[.]’ [t]he Authority cannot simply take notice that it failed to act in a timely manner and give no consideration to the appeal.”³⁹

We acknowledge that CIP’s interim order in this case stated that “consideration of the [Agency’s] application . . . [was] deferred until further notice,” and that “[t]his action assure[d] the preservation of the parties’ rights under the Statute to Authority review of the [RD’s] decision.”⁴⁰ But, as with the interim order discussed in *FDIC II*, the interim order in this case did

not undertake to grant review on the Authority’s behalf,⁴¹ and CIP did not have express, delegated authority to take such an action.⁴² Additionally, as discussed in *FDIC II*, the Authority had only sixty days after regaining its quorum to review the application pending in that case,⁴³ and in *Fairchild*, the Authority found that the same reasoning applied to the application in this case.⁴⁴ Thus, although the interim order indicated that it was preserving the parties’ right to Authority review of the application, that does not change the fact that the RD’s decision became the action of the Authority after January 11, 2014 – and that further Authority review was not appropriate after that date. That the Authority, in a previous situation, decided its cases within sixty days of regaining its quorum – and that the interim order in this case used wording similar to the wording used in that previous situation – does not change that fact. Further, with regard to the Agency’s reliance on § 7105(f), nothing in that statutory section *requires* the Authority to issue a decision reviewing a regional director’s decision.⁴⁵ In fact, § 7105(f) provides that the Authority “*may*” review such a decision, and specifies the consequences of an Authority failure to do so within sixty days of the filing of an application for review.⁴⁶ Thus, the Agency’s reliance on § 7105(f) in this regard does not support granting reconsideration in this case.

Second, the Agency contends that “the Authority has acted inconsistently” in its handling of cases where CIP issued similar interim orders in 2013.⁴⁷ Specifically, the Agency states that, of the “nine representation cases affected by the lack of a quorum and subsequently issued”:⁴⁸ two issued within sixty days after the Authority regained its quorum;⁴⁹ four, including *FDIC I*, issued after the expiration of the sixty-day period for review had expired;⁵⁰ and three, including this case, “were issued as [n]otice[s].”⁵¹ The Agency argues that “[t]he Authority should have considered a sensible, fair, consistent[,] and appropriate approach to the subject case and the two other [notices] issued on the same date,”⁵² but, instead, “used its admitted confusion [discussed] in *FDIC [II]* and the passage of time to summarily dispose of the subject case in an arbitrary and capricious

³¹ Mot. at 7.

³² *Id.* at 14.

³³ *Id.* at 6.

³⁴ *Id.*

³⁵ *Id.* at 7 (citing *VA Med. Ctr., Allen Park, Mich.*, 34 FLRA 423 (1990); *U.S. Dep’t of the Interior, Bureau of Indian Affairs, Navajo Area Office, Gallup, N.M.*, 34 FLRA 413 (1990)).

³⁶ *Id.* at 6.

³⁷ *Id.*

³⁸ 5 U.S.C. § 7101(b).

³⁹ Mot. at 10.

⁴⁰ Interim Order at 2.

⁴¹ *See id.* at 1-2.

⁴² *See FDIC II*, 68 FLRA at 262.

⁴³ *Id.*

⁴⁴ *Fairchild*, 68 FLRA at 268 (finding that RD’s decision became the action of the Authority “[f]or the same reasons set forth in” *FDIC II*).

⁴⁵ 5 U.S.C. § 7105(f).

⁴⁶ *Id.* (emphasis added).

⁴⁷ Mot. at 8.

⁴⁸ *Id.*

⁴⁹ *Id.* at 8-9 (citations omitted).

⁵⁰ *Id.* at 9 (citations omitted).

⁵¹ *Id.*

⁵² *Id.* at 10.

manner.”⁵³ According to the Agency, the Authority’s decision in *FDIC II* “should be the decision of that case alone,”⁵⁴ and should neither be “retroactively applied to the three cases decided after the [sixty-]day time period, nor . . . be applied in this case.”⁵⁵ Further, the Agency contends that, in *U.S. Department of the Army, Army Corps of Engineers, Directorate of Contracting, Southwestern Division, Fort Worth District, Fort Worth, Texas (Corps of Engineers)*,⁵⁶ the Authority “conceded” that the 2013 interim orders were “misleading,” because the Authority in *Corps of Engineers* stated that “the [i]nterim [o]rder” in that case had “granted the application for review.”⁵⁷

The Agency is correct that the Authority has disposed of the different cases differently. In two cases, *U.S. Department of the Air Force, Air Force Materiel Command (Materiel Command)*⁵⁸ and *U.S. Department of VA, Washington, D.C. (VA I)*,⁵⁹ the Authority resolved the applications within sixty days of regaining its quorum.⁶⁰ In four others – *FDIC I*,⁶¹ *USDA, Rural Housing Service, Centralized Servicing Center (Agriculture)*⁶² (to which no motion for reconsideration was filed), and *U.S. Department of VA (VA II)*⁶³ (which consolidated two cases for decision,⁶⁴ and to which no motion for reconsideration was filed) – the Authority resolved the applications more than sixty days after regaining its quorum.⁶⁵ The Authority later granted reconsideration and vacated the decision in only one of those four cases – *FDIC I*.⁶⁶ And in the instant case and two others – *U.S. DOD, Pentagon Force Protection Agency (Pentagon)*⁶⁷ and *USDA, U.S. Forest Service (Forest Service)*⁶⁸ – the Authority found, based on *FDIC II*, that the regional directors’ decisions had become the actions of the Authority after January 11, 2014, and

notified the parties that the Authority was taking no further action.⁶⁹

The Authority’s different treatment of the different cases was based on the fact that, as discussed in *FDIC II*, the Authority was proceeding on the assumption that CIP’s interim order already had undertaken to grant review of the regional directors’ decisions – and, thus, that the Authority was not required to take further action within any particular time period.⁷⁰ It was not until a party filed a motion for reconsideration of *FDIC I* that the Authority realized its error and, in *FDIC II*, held that it had been required to act within sixty days of regaining its quorum.⁷¹ Once the Authority realized its error, it found – in *Fairchild*,⁷² *Pentagon*,⁷³ and *Forest Service*⁷⁴ – that there was no basis for taking action with regard to the pending applications for review in those cases.⁷⁵ While we regret that the Authority did not undertake to grant or deny review of all of the pending applications in those cases within sixty days of regaining its quorum, that fact does not provide a basis for reconsidering *Fairchild*. With regard to the Agency’s reliance on *Corps of Engineers*,⁷⁶ as AFGE notes,⁷⁷ that case involved a situation where the Authority had issued an order granting review of a regional director decision, and deferred action on the merits of the filing party’s application – not a situation where CIP issued an interim order like the one at issue in this case.⁷⁸ Thus, *Corps of Engineers* is inapposite here.

Third, the Agency argues that “[t]he Authority must exercise its inherent authority to reconsider . . . the notice issued in this case.”⁷⁹ In particular, the Agency contends that “[t]he passage of time in this matter[,]”⁸⁰ “[a]ny confusion about the interim orders,”⁸¹ and “[t]he magnitude and scope of the merit[s] issues raised in the [a]pplication,” warrant the Authority “reviewing the

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 67 FLRA 211 (2014).

⁵⁷ Mot. at 8.

⁵⁸ 67 FLRA 117 (2013).

⁵⁹ 67 FLRA 152 (2013).

⁶⁰ See *VA I*, 67 FLRA at 152 (decision issued Dec. 19, 2013); *Materiel Command*, 67 FLRA at 117 (decision issued Dec. 18, 2013).

⁶¹ 67 FLRA 430.

⁶² 67 FLRA 207 (2014).

⁶³ 67 FLRA 266 (2014).

⁶⁴ See *id.* at 266.

⁶⁵ See *FDIC I*, 67 FLRA at 430 (order issued May 30, 2014); *VA II*, 67 FLRA at 266 (order issued Feb. 19, 2014); *Agric.*, 67 FLRA at 207 (order issued Jan. 31, 2014).

⁶⁶ See 68 FLRA at 262.

⁶⁷ 68 FLRA 266.

⁶⁸ 68 FLRA 267.

⁶⁹ *Fairchild*, 68 FLRA at 268; *Forest Serv.*, 67 FLRA at 267; *Pentagon*, 67 FLRA at 266.

⁷⁰ 68 FLRA at 261.

⁷¹ *Id.* at 262.

⁷² 68 FLRA 268.

⁷³ 68 FLRA 266.

⁷⁴ 68 FLRA 267.

⁷⁵ *Fairchild*, 68 FLRA at 268; *Forest Serv.*, 68 FLRA at 267; *Pentagon*, 68 FLRA at 266.

⁷⁶ 67 FLRA 211.

⁷⁷ Opp’n at 12.

⁷⁸ See 67 FLRA at 211 (“In an order, the Authority granted the application and deferred action on the merits.”) (emphasis added).

⁷⁹ Mot. at 11 (citing *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084 (10th Cir. 1980) (*Trujillo*); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980) (*Gonzalez*); *Albertson v. FCC*, 182 F.2d 397 (D.C. Cir. 1950) (*Albertson*)).

⁸⁰ *Id.* at 15.

⁸¹ *Id.* at 14.

application sua sponte.”⁸² In the latter regard, the Agency contends that its application presents “tough[,] thought[-]provoking legal and/or factual issues” that the Authority should not “evade.”⁸³ The Agency also “disagrees with the Authority’s conclusion in *FDIC [II]*” that sua sponte reconsideration was not warranted.⁸⁴

As discussed previously, in *FDIC II*, the Authority stated: “Given the unique circumstances of this case, including the amount of time that has elapsed since the [regional director’s] decision became the action of the Authority, we find that it would not be appropriate to take the same approach as in *Naval Air Station*.”⁸⁵ And, in *Fairchild*, the Authority stated that, “consistent with *FDIC [II]*,” the Authority would take no further action in this case.⁸⁶ Although the Agency argues that the passage of time supports granting its motion to reconsider *Fairchild*,⁸⁷ *Fairchild* issued on the exact same day as *FDIC II*.⁸⁸ As a result, the same considerations regarding the passage of time that the Authority discussed in *Fairchild* actually support denying reconsideration of *Fairchild*.⁸⁹ And the Agency does not cite any support for the notion that the alleged complexity of the issues presented in its application warrant granting reconsideration of the notice in *Fairchild*, more than a year after the RD’s decision became the action of the Authority under § 7105(f). In this regard, when the Authority issued the notice in *Fairchild*, the Authority was aware of the issues raised by the application, but nonetheless declined to reconsider the RD’s decision sua sponte.⁹⁰ To the extent that the Agency is attempting to relitigate issues that the Authority resolved in *Fairchild*,

that is not an appropriate basis for granting reconsideration.⁹¹

For the foregoing reasons, the Agency has not demonstrated extraordinary circumstances for reconsidering the notice in *Fairchild*. Therefore, we deny the motion for reconsideration.

IV. Order

We deny the Agency’s motion for reconsideration.

⁸² *Id.* at 15.

⁸³ *Id.* at 13.

⁸⁴ *Id.* at 11.

⁸⁵ 68 FLRA at 262.

⁸⁶ 68 FLRA at 268.

⁸⁷ Mot. at 15.

⁸⁸ See *Fairchild*, 68 FLRA at 268 (issued Jan. 28, 2015); *Forest Serv.*, 68 FLRA at 267 (same); *Pentagon*, 68 FLRA at 266 (same).

⁸⁹ Cf. *Trujillo*, 621 F.2d at 1086 (court found reconsideration of first right-to-sue notice was permissible when it occurred “well within” ninety days of notice); *Gonzalez*, 610 F.2d at 246 (court found issuance of second right-to-sue notice was permissible because, unlike in other cases, reconsideration of the initial determination “began, with notice to both parties, prior to the expiration of the period in which the plaintiff could permissibly file suit under the first right-to-sue notice.”); *Albertson*, 182 F.2d at 398-99 (court found reconsideration permitted in situation where party applied for rehearing within one month, and reconsideration occurred within two months, of original order).

⁹⁰ Cf. *Fairchild*, 68 FLRA at 268 (notifying the parties that no further action would be taken, “consistent with” *FDIC II*); *FDIC II*, 68 FLRA at 262 (declining to reconsider the regional director’s decision sua sponte).

⁹¹ *CBP*, 68 FLRA at 110.