68 FLRA No. 116

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4968
(68 FLRA 157 (2015))

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ORDER DENYING
MOTION FOR RECONSIDERATION

June 30, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

The Agency previously filed exceptions to an award of Arbitrator Robert T. Simmelkjaer that directed the Agency to pay certain employees backpay as a remedy for scheduling practices that the Arbitrator found unlawful. In *U.S. DHS, CBP* (*DHS*),[1] the Authority dismissed the Agency's exceptions, in part, and denied them, in part. The Agency has now filed a motion for reconsideration of *DHS* under § 2429.17 of the Authority's Regulations,[2] and the motion presents two substantive questions.

The first question is whether the Authority erred in *DHS* by dismissing certain Agency arguments under §§ 2425.4(c) and 2429.5 of the Authority's Regulations because the Agency did not present those arguments to the Arbitrator.[3] The Agency has not established that: (1) it presented any of the barred arguments at arbitration; (2) the Authority should excuse its failure to do so; or (3) any of the barred arguments implicate jurisdictional issues that the Authority's Regulations may not bar from consideration. Thus, the answer to the first question is no.

The second question is whether the Authority erred in rejecting certain arguments in *DHS* on their merits. The Agency's assertions concerning this question attempt merely to relitigate the Authority's conclusions in *DHS*. As such attempts do not establish extraordinary circumstances warranting reconsideration, the answer to the second question is also no.

II. Background

The Authority more fully detailed the circumstances of this dispute in *DHS*,[4] so this order discusses only those aspects of the case that are pertinent to the motion for reconsideration.

A. Grievance and Arbitrator's Award

The Union filed a grievance alleging that the Agency scheduled the work of bargaining-unit employees (unit employees) in violation of 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a) because, according to the grievance, the Agency did not provide: (1) consistent start and stop times for each regular workday in unit employees' basic workweeks; or (2) two consecutive days off outside the basic workweek.[5] The grievance further asserted that the Agency scheduled unit employees according to the Agency's Revised National Inspectional Assignment Policy (RNIAP), but that the RNIAP's "scheduling standards [were not] the same as those" in § 6101(a)(3) and § 610.121(a).[6] The Agency's grievance response "disagree[d]" with the Union's characterization of the RNIAP.[7] Contrary to the Union's position, the grievance response asserted that, "because the RNIAP 'recognize[d] and implemente[d] both the statutory and regulatory requirements regarding work schedule[s],'"[8] the Agency did not violate those requirements. The grievance went to arbitration, where the parties introduced the Agency's grievance response as a joint exhibit.[9]

The Arbitrator found that § 6101(a)(3) and § 610.121(a) require agencies to provide their employees with work schedules that include the same working hours in each regular workday and two consecutive days off outside the basic workweek (the scheduling requirements).[10] But the Arbitrator also found that "an agency could exempt itself from the scheduling requirements if the head of the agency determined that it 'would be seriously handicapped in carrying out its

[1] 68 FLRA 157 (2015) (Member Pizzella dissenting).
[2] 5 C.F.R. § 2429.17.
[3] 68 FLRA at 159-60 (citing 5 C.F.R. §§ 2425.4(c), 2429.5).
[4] *Id.* at 157-65.
[5] *Id.* at 157.
[6] Opp'n, Attach. 1, Nat'l Work Assignment Grievance at 2.
[7] Opp'n, Attach. 2, Agency's Grievance Resp. at 3.
[8] 68 FLRA at 157 (alterations in *DHS*) (quoting Opp'n, Attach. 2, Agency's Grievance Resp. at 3) (citing Award at 10).
[9] *Id.* at 159 (citing Award at 9-10).
[10] *Id.* at 157-58.

functions or that costs would be substantially increased' by complying with the requirements (agency-head exemption)."[11]

The parties disputed at arbitration whether an agency-head exemption applied to the work schedules for unit employees that were in effect during the time period at issue in the grievance (the disputed schedules). Specifically, the Agency asserted that the scheduling requirements did not apply to the disputed schedules because a 1954 agency-head exemption (the 1954 exemption) covered the disputed schedules.[12] The Agency contended that, although the 1954 exemption expressly applied to the Immigration and Naturalization Service (INS), which no longer existed, the 1954 exemption continued to apply to the disputed schedules because the INS became part of the Agency under the Homeland Security Act of 2002.[13] By contrast, the Union argued before the Arbitrator that the 1954 exemption did not apply to unit employees because the agency that the 1954 exemption mentioned – the INS – no longer existed.[14] But the Union also contended that, even if the Arbitrator "determined that the 1954 exemption was still in effect" after the INS became part of the Agency, "he should find that [the 1954 exemption] 'ceased to be effective upon the application' of the RNIAP to unit employees."[15] The Arbitrator agreed with this latter Union contention because he found that, under the RNIAP's plain wording, the RNIAP took "'precedence over any and all other . . . policies or . . . practices executed or applied by the parties previously . . . concerning' employee scheduling – including the 1954 exemption."[16]

Further, the Arbitrator declined to defer to the Agency's assertion that it had satisfied the scheduling requirements for the entire period of time to which the grievance applied.[17] Rather, the Arbitrator determined that from July 2004 (when he found that the Agency began applying the RNIAP to the disputed schedules) until April 2008 (when a new agency-head exemption took effect), the Agency "'routinely' violated the scheduling requirements" (the scheduling violations).[18] Thus, the Arbitrator sustained the grievance.[19]

As to the appropriate remedy for the scheduling violations, the Agency contended before the Arbitrator that the Union had not offered sufficient evidence to support any award of backpay.[20] In contrast, the Union argued that its evidence not only satisfied the conditions for awarding overtime backpay under the Back Pay Act (the BPA),[21] but also established that the backpay awards should be calculated at the overtime rates set forth in the Customs Officer Pay Reform Act (COPRA).[22] The Arbitrator agreed with the Union's remedial arguments in both of those respects, and he directed the parties to use a claims process to determine the amounts of unit employees' backpay entitlements.[23]

B. Authority's Decision in *DHS*

In *DHS*, the Authority determined that §§ 2425.4(c) and 2429.5 of the Authority's Regulations barred several arguments in the Agency's exceptions because the Agency could have presented, but did not present, those arguments to the Arbitrator.[24] In particular, the Authority noted that §§ 2425.4(c) and 2429.5 barred: (1) arguments offered in support of an exception that differed from, or were inconsistent with, the Agency's arguments to the Arbitrator; and (2) challenges to arbitral remedies that the Agency could have raised, but did not raise, during arbitration.[25]

First, the Agency asserted in its exceptions that the award was based on the nonfact that the Agency relied on the RNIAP as a defense to the grievance.[26] But the Authority found that nonfact argument barred because it was inconsistent with the Agency's grievance response, which stated that the RNIAP recognized and implemented both the statutory and regulatory requirements for the disputed schedules.[27] In that regard, the Authority noted that the parties submitted the grievance response as a joint exhibit at arbitration.[28] Second, the Authority found that the Authority's Regulations barred an argument that the Agency did not make to the Arbitrator regarding the relationship between the RNIAP and the 1954 exemption – specifically, that an agency policy, such as the RNIAP, could not supersede an agency-head exemption under § 6101(a)(3), such as the 1954 exemption.[29] Third, the Authority found that, although the Agency's exceptions asserted that backpay should not have been calculated at the overtime rates in

[11] *Id.* at 158 (quoting Award at 3 (quoting 5 U.S.C. § 6101(a)(3)) (citing 5 C.F.R. § 610.121(a)).
[12] *Id.*
[13] Award at 31.
[14] *DHS*, 68 FLRA at 159.
[15] *Id.* (quoting Award at 28-29).
[16] *Id.* at 158 (omissions in *DHS*) (quoting Award at 55 (quoting RNIAP, Section 3)).
[17] *Id.*
[18] *Id.* (quoting Award at 52, 58).
[19] *Id.*
[20] *Id.* at 158, 160 (citing Agency's Closing Br. at 42-46).
[21] 5 U.S.C. § 5596; *see DHS*, 68 FLRA at 158.
[22] 19 U.S.C. § 267; *see DHS*, 68 FLRA at 158.
[23] *DHS*, 68 FLRA at 158.
[24] *Id.* at 159-60 (citing 5 C.F.R. §§ 2425.4(c), 2429.5).
[25] *Id.* at 159.
[26] *Id.*
[27] *Id.* (citing Award at 10).
[28] *Id.*
[29] *Id.*

COPRA, the Regulations barred that remedial challenge because the Union requested overtime backpay at COPRA rates, and the Agency did not challenge that request before the Arbitrator.[30]

The Authority also rejected several of the Agency's arguments on their merits. First, the Authority found that the Arbitrator did not err as a matter of law by declining to defer to the Agency's arguments about whether it complied with the scheduling requirements.[31] In that regard, the Authority found that the Agency was not entitled to the deference that it requested.[32] Second, the Authority found that the Agency's argument that the Arbitrator failed to defer to the agency-head determinations in the 1954 exemption was based on a misunderstanding of the award.[33] Specifically, the Authority determined that the award did not question the determinations in the 1954 exemption but, rather, the award found that the RNIAP superseded the 1954 exemption in July 2004.[34] Third, the Authority rejected the Agency's arguments that the Arbitrator could not lawfully award backpay to remedy violations of § 6101.[35] In that regard, the Authority found that: (1) although the Agency relied on the decision of the U.S. Court of Appeals for the Federal Circuit in *Sanford v. Weinberger*,[36] that decision did not address the availability of a backpay remedy under the BPA, whereas the award was based on the BPA;[37] and (2) a decision of the U.S. Claims Court established that the BPA authorized backpay as a remedy for § 6101 violations.[38]

The Agency filed a motion for reconsideration of *DHS*, and the Union filed an opposition to that motion. Thereafter, the Agency filed a motion for a stay of *DHS* (stay motion) while the Authority considered the motion for reconsideration, and the Union filed an opposition to the stay motion.

III. Preliminary Matters: Under § 2429.26 of the Authority's Regulations, we consider one supplemental submission, but do not consider two others.

Section 2429.26 of the Authority's Regulations states that the Authority "may in [its] discretion grant leave to file" documents other than those specifically listed in the Regulations.[39] But if a party wants to file a non-listed document (supplemental submission), then the Authority generally requires the party to request leave to file it.[40] Where the Authority declines to consider a supplemental submission, the Authority also declines to consider a response to that submission because the response is moot.[41]

The Union requested permission to file its opposition to the Agency's motion for reconsideration.[42] As "it is the Authority's practice to grant requests to file oppositions to motions for reconsideration,"[43] we grant the Union's request. Concerning the stay motion, the Agency did not request a stay as part of its motion for reconsideration, but, rather, filed the stay motion separately, after the deadline for requesting reconsideration had passed. As the Agency did not request permission under § 2429.26 to file the stay motion, we do not consider it.[44] And because we decline to consider the stay motion, we also do not consider the Union's opposition to that motion.[45]

IV. Analysis and Conclusion: We deny the Agency's motion for reconsideration.

Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to move for reconsideration of an Authority decision.[46] The Authority has repeatedly recognized that a party seeking reconsideration of an Authority decision bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[47] In that regard, the Authority has held

[30] *Id.* at 160.
[31] *Id.* at 161-62.
[32] *Id.* at 162.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 163.
[36] 752 F.2d 636 (Fed. Cir. 1985).
[37] *DHS*, 68 FLRA at 163 (citing *Sanford*, 752 F.2d at 637).
[38] *Id.* (citing *Gahagan v. United States*, 19 Cl. Ct. 168, 172 (1989)).

[39] 5 C.F.R. § 2429.26.
[40] *See, e.g., SSA, Region VI*, 67 FLRA 493 (2014).
[41] *See, e.g., AFGE, Local 3562*, 68 FLRA 394, 396-97 (2015) (*Local 3562*) (citing *Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011)).
[42] Union's Request for Leave to File Resp. in Opp'n to Agency's Mot. for Recons. at 2.
[43] *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012) (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 353 (2005)).
[44] *See, e.g., U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 535 n.1 (2010) (declining to consider motion to strike without request for leave to file).
[45] *Local 3562*, 68 FLRA at 396-97.
[46] 5 C.F.R. § 2429.17.
[47] *E.g., U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000).

that errors in its remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.[48] But attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances warranting reconsideration.[49]

The Agency challenges the Authority's application of §§ 2425.4(c) and 2429.5 in *DHS* on several bases, each of which is discussed further below.

The Agency's first basis for challenging the Authority's application of §§ 2425.4(c) and 2429.5 is the Authority's decision in *U.S. DHS, U.S. CBP* (*CBP*).[50] In *CBP*, the Authority declined to apply the Authority's Regulations to bar certain contrary-to-law arguments because those arguments: (1) were "inextricably intertwined" with a contention that was undisputedly raised at arbitration; and (2) would necessarily be considered as part of the Authority's de novo review of non-barred legal arguments "in any event."[51] The Agency contends that, under *CBP*, the Authority should not have applied the Regulations to bar any of the Agency's arguments in *DHS* because, according to the Agency, all of the arguments barred in *DHS* were "inextricably intertwined" with arguments that the Authority considered on their merits.[52] But the Authority's resolution of the Agency's exceptions in *DHS* shows that the arguments dismissed under the Regulations there were not similar to those considered in *CBP*. In that regard, by addressing the barred arguments separately and dismissing them, *DHS* demonstrated that they were not "*inextricably* intertwined"[53] with any contrary-to-law arguments that the Authority considered and rejected on the merits.[54] Further, the Authority engaged in de novo review to evaluate the Agency's non-barred contrary-to-law arguments in *DHS* without needing to consider the arguments barred under the Authority's Regulations, which demonstrates that the Authority did not bar arguments that it had to consider "in any event."[55] Thus, the Agency's "inextricably intertwined" challenge does not provide a basis for finding that the Authority erred in applying §§ 2425.4(c) and 2429.5.

The Agency also challenges the Authority's application of the Authority's Regulations to bar the Agency's nonfact exception, in which the Agency argued that the Arbitrator erred in finding that the RNIAP was part of the Agency's defense to the grievance.[56] According to the Agency, the position that it took in its exceptions was consistent with its position before the Arbitrator.[57] In that regard, the Agency acknowledges that it relied on the RNIAP as a defense to the grievance.[58] But the Agency argues that it *changed its position* between issuing its grievance response and participating in the arbitration hearing in this case.[59] And because it presented both its grievance response and its changed position to the Arbitrator, the Agency contends that the Authority should not have found the argument in its exceptions inconsistent with its position below.[60] But if the Agency intended at arbitration to disavow its earlier RNIAP-based defense, it could have alerted the Arbitrator to that disavowal when the parties jointly introduced the grievance response (setting forth the RNIAP-based defense) as an exhibit for the Arbitrator's consideration. Or the Agency could have made its disavowal clear at any time before the Arbitrator issued his award. As nothing in the record indicates that the Agency did so, this argument does not provide a basis for finding that the Authority erred in barring the Agency's nonfact exception.

Next, the Agency challenges the Authority's application of the Regulations to bar the Agency's argument that an agency policy cannot supersede an agency-head exemption under § 6101(a)(3).[61] The Agency asserts that, contrary to the Authority's conclusion in *DHS*, the Agency presented this argument to the Arbitrator.[62] In particular, the Agency cites passages in its closing brief to the Arbitrator in which the Agency contended that the 1954 exemption "continued in full force and effect" as to unit employees.[63] But the cited passages of the Agency's brief concern a different matter than the argument barred in *DHS*. Those passages concern whether the 1954 exemption applied to unit employees *at all* after the reorganization of various federal agencies to form the Department of Homeland Security.[64] As mentioned earlier, the Arbitrator agreed

[48] *E.g.*, *Int'l Ass'n of Firefighters, Local F-25*, 64 FLRA 943, 943 (2010).
[49] *Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010) (*Bremerton*) (Member DuBester concurring).
[50] *E.g.*, Mot. for Recons. (Mot.) at 5 (citing *CBP*, 66 FLRA 745, 747 (2012)).
[51] *CBP*, 66 FLRA at 747.
[52] Mot. at 5, 7, 8, 15.
[53] *CBP*, 66 FLRA at 747 (emphasis added).
[54] *Compare DHS*, 68 FLRA at 159-60 (separately addressing arguments dismissed under the Regulations), *with id.* at 161-64 (separately conducting de novo review of contrary-to-law arguments and rejecting them on the merits).
[55] *Compare DHS*, 68 FLRA at 159-60, 161-64, *with CBP*, 66 FLRA at 747-49.
[56] Mot. at 4-6.
[57] *Id.*
[58] *Id.* at 4.
[59] *Id.* at 4-6.
[60] *Id.*
[61] *Id.* at 7-9.
[62] *E.g.*, *id.* at 7.
[63] *Id.* (citing Agency's Closing Br. at 13, 15, 21-26) (emphasis omitted).
[64] *See, e.g.*, Agency's Closing Br. at 15 ("Through the [s]avings [p]rovision of the Homeland Security Act, the authority vested in [Agency] management by the 1954 [exemption] . . . continued in full force and effect.").

with the Agency that the 1954 exemption applied to unit employees following this reorganization, but he determined that the RNIAP later superseded that exemption. The Agency has not identified anything in the record to demonstrate that it argued to the Arbitrator that the RNIAP did not supersede the 1954 exemption, or, more generally, that an agency policy could never supersede an agency-head exemption under § 6101. Thus, this challenge to the Authority's application of §§ 2425.4(c) and 2429.5 also fails to establish grounds for granting reconsideration.

Further, the Agency challenges the Authority's application of the Regulations to bar the Agency's argument that the backpay award was contrary to COPRA.[65] In that regard, the Agency asserts that it sufficiently raised this argument before the Arbitrator.[66] The Agency makes three arguments to support this assertion.

First, the Agency argues that its closing brief at arbitration: (1) stated that COPRA applied to unit employees; (2) quoted the text of COPRA; and (3) quoted the Agency's COPRA-implementing regulations.[67] But those general references to COPRA do not establish that the Agency argued at arbitration that the Union's proposed remedial formulas were *contrary to* COPRA.[68]

Second, the Agency argues that the Authority should have addressed its COPRA arguments on their merits because the Authority "reasonably should have understood" what the Agency was arguing.[69] But the Authority in *DHS* did not deny understanding the Agency's COPRA arguments. Rather, the Authority determined that §§ 2425.4(c) and 2429.5 barred those arguments because the Agency did not present them to the Arbitrator.

Third, the Agency argues that compliance with COPRA implicates the doctrine that the federal government is immune from money damages unless a federal statute waives that immunity (the doctrine of sovereign immunity), so §§ 2425.4(c) and 2429.5 could not bar COPRA-compliance arguments.[70] But, as the Authority stated in *DHS*, the BPA waives sovereign immunity in this case.[71] And as the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently explained, in cases where the sovereign-immunity waiver in the BPA applies, other "[r]outine statutory and regulatory questions" – such as the award's compliance with COPRA in this case – "are not transformed into constitutional or jurisdictional issues merely because" a backpay award relies upon a sovereign-immunity waiver.[72] Although the Agency's sovereign-immunity argument here invokes the Appropriations Clause of the U.S. Constitution,[73] the D.C. Circuit indicated that its holding regarding the non-jurisdictional nature of "[r]outine statutory and regulatory questions" applies even when a sovereign-immunity argument rests on the Appropriations Clause.[74] Therefore, the Agency's reliance on the doctrine of sovereign immunity does not provide a basis for finding that §§ 2425.4(c) and 2429.5 could not bar the Agency's COPRA-compliance arguments.

For the foregoing reasons, none of the Agency's contentions establishes that the Authority erred in *DHS* by dismissing certain Agency arguments under §§ 2425.4(c) and 2429.5.

In addition to its numerous challenges to the Authority's application of §§ 2425.4(c) and 2429.5, the Agency also contends that the Authority erred in *DHS* by rejecting several of the Agency's contrary-to-law arguments on their merits. In particular, the Agency asserts that the Authority should have accepted its arguments that the Arbitrator erred as a matter of law by failing to: (1) defer to the Agency's assessment of whether it complied with the scheduling requirements;[75] (2) defer to the agency-head determinations in the 1954 exemption;[76] (3) find that the Union's evidence was insufficient to justify an award of backpay;[77] and (4) find that *Sanford* precluded an award of backpay for violations of § 6101.[78] The Authority considered and rejected these very same arguments in *DHS*. As the Agency's attempts to relitigate the conclusions in *DHS* do not establish extraordinary circumstances, we find that these arguments do not warrant granting reconsideration.[79]

In sum, the Agency's motion does not establish extraordinary circumstances warranting reconsideration of *DHS*.

[65] Mot. at 3.
[66] *Id.* at 13-16.
[67] *Id.* at 13-14.
[68] *See DHS*, 68 FLRA at 160.
[69] Mot. at 14 (quoting *U.S. DHS, U.S. CBP v. FLRA*, 751 F.3d 665, 669 (D.C. Cir. 2014)) (internal quotation mark omitted).
[70] *Id.* at 17-20.
[71] 68 FLRA at 163-64.
[72] *U.S. DHS, U.S. CBP, Scobey, Mont. v. FLRA*, 784 F.3d 821, 823 (D.C. Cir. 2015).
[73] Mot. at 17.
[74] *Scobey*, 784 F.3d at 823 (citing U.S. Const. Art. I, § 9, cl. 7).
[75] Mot. at 12-13.
[76] *Id.*
[77] *Id.* at 16.
[78] *Id.* at 20-23.
[79] *See Bremerton*, 64 FLRA at 545.

V. Order

We deny the Agency's motion for reconsideration.

Member Pizzella, dissenting:

For the reasons I discussed in *U.S. DHS, CBP*,[*] I would conclude again that the Arbitrator's award is contrary to law.

Because the majority was wrong when it denied the Agency's contrary-to-law exceptions, I would grant the Agency's request to reconsider that erroneous decision.

Thank you.

[*] 68 FLRA 157, 166-69 (2015) (Member Pizzella dissenting).