**69 FLRA No. 36**

UNITED STATES
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC
AND ATMOSPHERIC ADMINISTRATION
NATIONAL WEATHER SERVICE
(Agency)

and

NATIONAL WEATHER
SERVICE EMPLOYEES ORGANIZATION
(Union)

0-AR-5042
(68 FLRA 976 (2015))

ORDER DENYING
MOTION FOR RECONSIDERATION

March 24, 2016

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

## I. Statement of the Case

Arbitrator Mariann E. Schick found that the Agency violated a memorandum of understanding between the parties (the MOU) and the Federal Service Labor-Management Relations Statute (the Statute)[1] by refusing to continue providing employees with disposable cups, plates, and plastic silverware (disposable dining ware). In *U.S. Department of Commerce, National Oceanic & Atmospheric Administration, National Weather Service* (*Weather Service*),[2] the Authority held that: (1) both parties asserted that the decisions of the Comptroller General of the United States – who heads the Government Accountability Office (GAO) – should determine the legality of the disputed dining-ware expenditures; and (2) assuming the applicability of Comptroller General decisional law, the award was contrary to the necessary-expense doctrine,[3] which we describe further in Section II.A. below.

The Union has now filed a motion for reconsideration of *Weather Service* (reconsideration motion) under § 2429.17 of the Authority's Regulations.[4] In its motion, the Union argues that, in *Weather Service*, the Authority made three errors that warrant reconsideration. Specifically, the Union argues that the Authority erred by: (1) finding that the Union conceded the applicability of the Comptroller General's decisions to evaluate the award's legality;[5] (2) denying the Union's request to file a supplemental submission regarding Comptroller General decisions that issued while the exceptions in *Weather Service* were pending;[6] and (3) allowing the Comptroller General to "overturn" the Arbitrator's award.[7] As more fully explained below, the Union's first and second arguments do not establish that the Authority erred in resolving the Agency's exceptions to the award, and the Union's third argument is based on a misunderstanding of *Weather Service*. Thus, we find that the Union has not established extraordinary circumstances that warrant granting reconsideration.

## II. Background

The Authority more fully detailed the circumstances of this dispute in *Weather Service*,[8] so this order discusses only those aspects of the case that are pertinent to the reconsideration motion.

### A. MOU, Grievance, and Arbitrator's Award

Due to concerns about a flu pandemic, the parties negotiated the MOU, in which the Agency promised, in pertinent part, to "hereafter provide . . . [disposable dining ware]."[9] Several years later, the Agency stopped providing disposable dining ware under the MOU because, according to the Agency, "there was no longer a public-health emergency[,] and it was 'illegal and improper' for the Agency to use appropriated funds to provide 'personal[-]use items' to employees."[10] In response, the Union filed a grievance that went to arbitration, where the stipulated issues before the Arbitrator were, in pertinent part: (1) whether the Agency's actions violated the MOU; and, if so, then (2) whether the Agency's repudiation of the MOU was an unfair labor practice (ULP) in violation of § 7116(a)(1) and (5) of the Statute.[11]

[1] 5 U.S.C. §§ 7101-7135.
[2] 68 FLRA 976 (2015).
[3] *Id.* at 979-80.

[4] 5 C.F.R. § 2429.17.
[5] Mot. for Recons. at 2-3.
[6] *Id.* at 3.
[7] *Id.* at 1.
[8] 68 FLRA at 976-79.
[9] *Id.* at 976 (quoting Award at 4).
[10] *Id.* (second alteration in *Weather Serv.*) (quoting Award at 8 (quoting Agency email to Union official (Apr. 11, 2013))).
[11] *Id.*

At arbitration, the Agency defended its refusal to honor the MOU by relying on a rule that the Comptroller General applies to determine whether an agency may properly spend appropriated funds. This rule, known as the "'necessary[-]expense' doctrine, . . . provides that where an appropriation does not specifically provide for a particular item, its purchase may be authorized as a 'necessary expense' if there is a 'reasonable relationship between the object of the expenditure and the general purpose for which the funds were appropriated.'"[12] According to the Agency, prevailing Comptroller General precedent supported its position that it could not continue to comply with the MOU because using appropriated funds to purchase disposable dining ware primarily benefited employees as individuals, rather than the Agency.

By contrast, the Union argued that, although the "decisions of the Comptroller General are useful guidance[, they are] . . . not binding precedent,"[13] and that the "guidance" provided by the Comptroller General supported its position.[14] On this point, the Union argued that the Comptroller General had determined that the "public's money [may] supply equipment and services that inure . . . to the benefit of individual employees when it benefits the agency by promoting efficient operations, employee health[,] or recruitment and retention."[15]

After considering the parties' arguments, the Arbitrator determined that, due to the employees' particular work environments, the Agency's provision of disposable dining ware benefited the Agency more than the employees as individuals. Accordingly, she rejected the Agency's argument that it could not lawfully comply with the MOU. The Arbitrator concluded that the Agency not only violated the MOU, but also committed a ULP under § 7116(a)(1) and (5) of the Statute, by repudiating the MOU. As a remedy, the Arbitrator directed the Agency to resume providing disposable dining ware.[16]

B. Parties' Filings with the Authority Regarding the Arbitrator's Award

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions. In addition, before the Union filed its opposition, the Agency asked the GAO to provide a formal opinion on "the legality of purchasing the disposable items in question."[17]

In its opposition, the Union acknowledged that the Agency had asked the GAO to issue a decision in this matter "over the Union's objection."[18] But the Union did not argue that the Authority should decline to apply Comptroller General precedent to resolve the parties' dispute. In fact, the Union argued to the Authority that the Arbitrator "applied the correct legal test" to decide the grievance[19] based on "many of the Comptroller General's decisions" concerning the necessary-expense doctrine.[20] The Union also stated that it, like the Arbitrator, relied on "the same legal test that the Agency agree[d] should be applied" to the dispute.[21] In that regard, the Union emphasized that the Agency's exceptions did not cite "*a single Comptroller General decision that holds that* [*f*]*ederal agencies cannot use appropriated funds to stock employee break*[ ]*rooms with disposable* [*dining ware*]."[22] As relevant here, the remainder of the Union's arguments focused on the legality of using appropriated funds to comply with the MOU, and cited either Comptroller General case law, or decisions that followed Comptroller General case law. And the opposition included an appendix of Comptroller General decisions.

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[12] *Id.* (first alteration in *Weather Serv.*) (quoting *In re Use of Appropriated Funds to Purchase Kitchen Appliances*, B-302993, 2004 WL 1853469, at *2 (Comp. Gen. June 25, 2004) (*Appliances*)).
[13] Exceptions, Attach. 4, Union's Post-Hr'g Br. at 13.
[14] *Id.*
[15] *Id.* at 18 (first alteration in Union's Post-Hr'g Br.) (quoting *Appliances*, 2004 WL 1853469, at *3).
[16] *Weather Serv.*, 68 FLRA at 977 (citing Award at 24).
[17] *Id.* (quoting Exceptions at 2).
[18] Opp'n at 1-2.
[19] *Id.* at 2.
[20] *Id.* at 3; *see also id.* at 7 (commending the Arbitrator's reliance on "several Comptroller General decisions that approved" expenditures that the Union argued were similar to those that the MOU required).
[21] *Id.* at 3.
[22] *Id.* at 7.

C. *Disposable Dining Ware* and Related Filings

After the Union filed its opposition, the General Counsel of the GAO issued *In re Department of Commerce – Disposable Cups, Plates, & Cutlery* (*Disposable Dining Ware*),[23] in which she concluded that "[t]here can be no doubt that disposable [dining ware] are personal items, and that the benefit of their use (and thus the cost of acquiring them) inures to the individuals who use them."[24] (The Authority refers to decisions by the General Counsel of the GAO as "Comptroller General" decisions,[25] and we follow that convention throughout the remainder of this order.) The Comptroller General also found that there was "no legal basis on which to conclude that [the Agency's] appropriations are available to provide free disposable [dining ware] to [Agency] employees."[26]

In a supplemental submission, the Agency asked the Authority to defer to the Comptroller General's decision in *Disposable Dining Ware* and to grant the Agency's exceptions. In response, "the Union . . . ask[ed] the Authority to 'give no weight or consideration' to *Disposable Dining Ware*."[27] Thereafter, the Authority "issued an order asking the Union to clarify whether it had requested – or would be requesting – [that the Comptroller General] reconsider[] . . . *Disposable Dining Ware*."[28] The Union indicated that it had requested reconsideration. Later, the Union informed the Authority that the Comptroller General denied that request (the Comptroller General's denial).[29] In addition to filing a copy of that denial with the Authority, the Union requested permission to file additional arguments regarding *Disposable Dining Ware* and the Comptroller General's denial.

Under § 2429.26 of its Regulations, the Authority opted to consider *Disposable Dining Ware* and the Comptroller General's denial.[30] But because "the Union conceded that Comptroller General precedent should apply" – until the Comptroller General issued *Disposable Dining Ware* – the Authority found that the Union had "not explained what it could argue in a supplemental submission that would affect the disposition" of the exceptions in *Weather Service*,[31] and denied the Union's request to file supplemental arguments.[32]

D. Authority's Decision in *Weather Service*

In addressing the Agency's argument that the award was contrary to the Comptroller General's decisions applying the necessary-expense doctrine, the Authority noted that the "decisions of the Comptroller General are not binding on the Authority,"[33] although they are "expert opinion[s] that should be prudently considered."[34, 35] The Authority also noted that, in previous cases where parties and the arbitrator had mutually relied on Comptroller General decisions as authoritative precedent for resolving grievances, the Authority "assumed the applicability of that precedent" when the Authority assessed contrary-to-law exceptions.[36] Further, the Authority observed that both parties in *Weather Service* had submitted information for the Comptroller General's consideration, and, thus, *Disposable Dining Ware* and the Comptroller General's denial showed that the Comptroller General had considered both parties' arguments.[37] Moreover, as both parties "previously conceded" the applicability of the Comptroller General's decisions to their dispute,[38] the Authority found that its precedent supported "assum[ing]

[23] 2014 WL 7331168.
[24] *Weather Serv.*, 68 FLRA at 978 (alterations in *Weather Serv.*) (quoting *Disposable Dining Ware*, 2014 WL 7331168, at *2).
[25] *Id.* at 977 (citing *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Operating Div.*, 65 FLRA 23, 26 (2010)).
[26] *Id.* at 978 (alterations in *Weather Serv.*) (quoting *Disposable Dining Ware*, 2014 WL 7331168, at *5).
[27] *Id.* (quoting Union's Supp. Submission at 1).
[28] *Id.*
[29] *See Richard J. Hirn*, B-327146, 2015 WL 4719865 (Comp. Gen. Aug. 6, 2015).
[30] *Weather Serv.*, 68 FLRA at 978.
[31] *Id.* at 978-79.
[32] *Id.* at 979.
[33] *Id.* (citing *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (*NOAA*)).
[34] *Id.* (quoting *AFGE, Local 1458*, 63 FLRA 469, 471 (2009)).
[35] For the same reasons that he set forth in his dissenting opinion in *U.S. Department of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 975 (2015) (Dissenting Opinion of Member Pizzella) and in our original consideration of this case, 68 FLRA 976, 979 n.50, Member Pizzella notes that he welcomes the majority's recognition that decisions of the Comptroller General "serve[] as an expert opinion that should be prudently considered" but does not agree insofar as today's decision perpetuates the perception that Comptroller General decisions are ones which may simply be ignored by the Authority. Member Pizzella notes that he would adopt instead the approach of the U.S. Court of Federal Claims which accords "persuasive weight" to decisions of the Comptroller General and GAO and recognize them as experts in matters concerning fiscal issues, appropriations law, and federal employee salary, benefits, and reimbursements. *Hawaiian Dredging Constr. Co. v. United States*, 59 Fed. Cl. 305, 311 (Fed. Cl. 2004).
[36] *Weather Serv.*, 68 FLRA at 979 (citing *NOAA*, 67 FLRA at 358; *U.S. Dep't of the Navy, Naval Underseas Warfare Ctr., Newport, R.I.*, 54 FLRA 1495, 1499-1500 & n.2 (1998) (*Navy*) (and cases cited therein)).
[37] *Id.*
[38] *Id.*

the applicability of Comptroller General decisions, generally – and *Disposable Dining Ware* [and the Comptroller General's denial], in particular" – to resolve the Agency's contrary-to-law exceptions.[39]

The Authority found the Arbitrator's award contrary to law.[40] Relying on *Disposable Dining Ware* and the Comptroller General's denial, the Authority concluded that: (1) the parties' "MOU [was] illegal to the extent that it require[d]" spending appropriations on disposable dining ware;[41] and (2) the Agency did not violate the Statute by refusing to continue honoring the MOU. Consequently, the Authority set aside the award.[42]

As mentioned above, the Union then filed its motion for reconsideration regarding *Weather Service*. We address the motion's arguments below.

## III. Analysis and Conclusion: We deny the reconsideration motion.

Section 2429.17 of the Authority's Regulations permits a party to move for reconsideration of an Authority decision if the party can establish extraordinary circumstances.[43] 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.[44] In that regard, the Authority has held that errors in its remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.[45] However, an argument based on a misinterpretation of the Authority's decision does not establish extraordinary circumstances warranting reconsideration of that decision.[46]

The Union contends that, in *Weather Service*, the Authority erred by "patently misstat[ing]" the Union's position on the applicability of Comptroller General decisions,[47] denying the Union's request to file supplemental arguments concerning the Comptroller General's decision in *Disposable Dining Ware* while "simultaneously" applying that decision to the Union's dispute,[48] and unlawfully permitting the Comptroller General to "overturn" the Arbitrator's award.[49]

The Union's first argument concerns its contention that it did not "concede" the applicability of the Comptroller General's decisions.[50] In support, the Union quotes a passage from its brief *to the Arbitrator*.[51] But in its opposition, which was filed *with the Authority*, the Union: (1) focused all of its arguments about the legality of purchasing disposable dining ware on either Comptroller General opinions, or decisions that followed those opinions;[52] and (2) criticized the Agency's exceptions for allegedly not identifying a decision of the Comptroller General to support the Agency's position.[53] As the Authority stated in *Weather Service*, it "appl[ied] . . . Comptroller General decisions . . . in resolving the Agency's contrary-to-law exceptions to the Arbitrator's award" "because 'the parties and the [A]rbitrator have examined Comptroller General precedent to address legal questions raised by [the] grievance.'"[54] Thus, even if the Union did not expressly state that Comptroller General precedent should determine the legality of the disputed disposable-dining-ware expenditures, the Authority reasonably found in *Weather Service* that the Union's opposition effectively presented the decisions of the Comptroller General as authoritative precedent in *this* case.

In its second argument, the Union contends that the Authority could not: (1) "appropriately claim that the [U]nion . . . conceded the applicability" of Comptroller General precedent; and (2) "simultaneously den[y]" the Union an opportunity to file supplemental arguments after the Comptroller General issued the decision in *Disposable Dining Ware*.[55] We acknowledge that, when the Agency offered *Disposable Dining Ware* to support its exceptions, the Union sought to file a supplemental submission regarding the applicability of Comptroller General decisions.[56] But, as explained above, the Authority found in *Weather Service* that the Union had *already* relied on Comptroller General decisions as authoritative precedent

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[39] *Id.* at 979-80 (citing *NOAA*, 67 FLRA at 358 (where arbitrator and parties resolve legal questions in a grievance using Comptroller General precedent, Authority assumes applicability of that precedent)).
[40] *Id.* at 980.
[41] *Id.*
[42] *Id.* at 981.
[43] 5 C.F.R. § 2429.17.
[44] *E.g.*, *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000).
[45] *E.g.*, *Int'l Ass'n of Firefighters, Local F-25*, 64 FLRA 943, 943 (2010).
[46] *NAIL, Local 7*, 68 FLRA 133, 135 (2014) (*NAIL*) (Member Pizzella dissenting) (citations omitted); *e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 68 FLRA 716, 717 (2015) (*BOP*).
[47] Mot. for Recons. at 1.
[48] *Id.* at 3.
[49] *Id.* at 1.
[50] *Id.* at 3.
[51] *Id.* at 2 (quoting Union's Post-Hr'g Br. at 13-14).
[52] *See* Opp'n at 2-15.
[53] *See id.* at 7.
[54] *Weather Serv.*, 68 FLRA at 979-80 (citations omitted).
[55] Mot. for Recons. at 3.
[56] *See Weather Serv.*, 68 FLRA at 978 (after *Disposable Dining Ware* issued, Union asked that Authority give it "no weight or consideration").

in its arguments to the Authority before *Disposable Dining Ware* issued.[57] In *Weather Service*, the Authority also explained that granting the Union permission to file supplemental arguments disputing the applicability of *Disposable Dining Ware* would serve no purpose because the Union had "not explained what it could argue . . . that would affect the disposition" of the exceptions.[58] Moreover, the Union has not established that denying it the opportunity to change its position upon the receipt of an adverse Comptroller General decision was an improper exercise of the Authority's discretion under § 2429.26 of the Authority's Regulations.[59]

Based on the foregoing, the Union's arguments challenging the Authority's finding of a concession do not show that the Authority erred and, thus, do not provide a reason to grant reconsideration.

Third, the Union contends that, contrary to the Statute, *Weather Service* grants the Comptroller General the authority to overturn arbitration awards.[60] Specifically, the Union argues that the Authority "improperly deferred to the Comptroller General's factual findings,"[61] illegally permitted the Comptroller General to "review arbitration awards,"[62] and issued an "open invitation to other agencies to appeal arbitration awards to the Comptroller General in any case that involves the expenditure of funds."[63] But these arguments reflect a misunderstanding of the limited holding in *Weather Service*.

*Weather Service* merely followed the Authority's precedent that, where the parties mutually rely on Comptroller General decisions as authoritative, the Authority assumes the applicability of those decisions to resolve contrary-to-law exceptions.[64] And we note that this approach is one that courts have likewise employed to decide non-jurisdictional legal questions.[65] Thus, *Weather Service* did not endorse: (1) the Agency's decision to request a formal opinion from GAO regarding an adverse arbitration award; (2) the factual findings by the Comptroller General; or (3) the propriety of the Comptroller General's decision to issue *Disposable Dining Ware* while exceptions to the Arbitrator's award were pending before the Authority. Rather, because the parties and the Arbitrator relied on Comptroller General precedent, and the Authority consequently found it appropriate to "assume[] the applicability of that precedent,"[66] the Authority relied on *Disposable Dining Ware* and the Comptroller General's denial – decisions *pertaining to the very expenditure at issue* – to resolve exceptions to the Arbitrator's award. Therefore, the Union's contention that *Weather Service* grants the Comptroller General the authority to overturn arbitration awards misunderstands the holding in *Weather Service*. As a result, the Union's contention does not establish an extraordinary circumstance warranting reconsideration.[67]

For the foregoing reasons, we find that the Union has not shown that extraordinary circumstances exist to warrant granting reconsideration of *Weather Service* under § 2429.17 of the Authority's Regulations.

## IV. Order

We deny the Union's motion for reconsideration.

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[57] *Id.* at 979.
[58] *Id.* at 978-79.
[59] *Cf. New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (finding that courts may exercise discretion to prevent a litigant from "changing positions according to the exigencies of the moment" "simply because [the litigant's] interests have changed").
[60] Mot. for Recons. at 1, 5-8.
[61] *Id.* at 5.
[62] *Id.*
[63] *Id.* at 7.
[64] *Weather Serv.*, 68 FLRA at 979 (citing *NOAA*, 67 FLRA at 358; *Navy*, 54 FLRA at 1499-1500 & n.2 (and cases cited therein)).
[65] *See, e.g.*, *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (assuming parties' shared interpretation of non-jurisdictional statutory provision when assessing plaintiff's asserted entitlement to relief).
[66] *Weather Serv.*, 68 FLRA at 979 (citing *NOAA*, 67 FLRA at 358; *Navy*, 54 FLRA at 1499-1500 & n.2 (and cases cited therein)).
[67] *E.g.*, *BOP*, 68 FLRA at 717 (an argument based on a misinterpretation of the Authority's decision does not establish extraordinary circumstances warranting reconsideration of that decision); *NAIL*, 68 FLRA at 135 (same).