

**67 FLRA No. 16**

NATIONAL TREASURY  
EMPLOYEES UNION  
CHAPTER 231  
(Union)

and

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
U.S. CUSTOMS AND BORDER PROTECTION  
SCOBEY, MONTANA  
(Agency)

0-AR-4842  
(66 FLRA 1024 (2012))

ORDER DENYING  
MOTION FOR RECONSIDERATION

December 12, 2012

Before the Authority: Carol Waller Pope, Chairman, and  
Ernest DuBester, Member

**I. Statement of the Case**

Arbitrator Jerry B. Sellman found that the Agency violated an Agency policy by failing to assign an overtime opportunity to the grievant, but the Arbitrator denied the grievant backpay. The Union filed exceptions to the award, and in *NTEU, Chapter 231 (NTEU)*,<sup>1</sup> the Authority held that the Arbitrator erred in denying backpay.

The question before us in this case is whether to grant the Agency's motion for reconsideration of *NTEU*. The motion includes only arguments that the Agency could have made, but did not make, in exceptions to the Arbitrator's award. Because such arguments do not provide a basis for granting reconsideration, we deny the motion.

**II. Background**

The Arbitrator determined that the Agency violated an Agency policy by failing to assign an overtime opportunity to the grievant. The Arbitrator rejected the Agency's argument that the only permissible remedy for the violation was assignment to the next

overtime opportunity, as set forth in the policy. Specifically, he found that "[i]f the action of the Agency . . . is deemed an unjustified or unwarranted personnel action, then [backpay] is warranted, notwithstanding the [policy] remedy."<sup>2</sup> But he determined that the grievant could not receive backpay under the Back Pay Act (the Act) because the Agency's violation of the policy was not an unjustified or unwarranted personnel action. As a remedy, the Arbitrator granted the grievant the next available overtime assignment.

The Union filed exceptions to the award; the Agency did not. In *NTEU*, the Authority resolved the Union's exceptions and held that the Arbitrator erred in denying backpay. The Authority determined that the Arbitrator's finding of a policy violation satisfied the first requirement of the Act – that the grievant was affected by an unjustified or unwarranted personnel action. And the Authority found that the award as a whole satisfied the second requirement of the Act – that the personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. Specifically, the Authority found that "[t]he Arbitrator's '[i]f . . . then' construction explicitly identifies a causal connection"<sup>3</sup> between the violation of the policy and the loss of pay. Because the Arbitrator's findings supported an award of backpay under the Act, the Authority found that the Arbitrator was required to award backpay. Accordingly, the Authority modified the award to direct the Agency to make the grievant whole for overtime pay lost because of the Agency's violation.

The Agency then filed a motion for reconsideration of *NTEU*, and the Union filed an opposition to the Agency's motion. We resolve the Agency's motion below.

**III. Analysis and Conclusions**

The Agency argues that *NTEU* warrants reconsideration because the decision violates the Act and the doctrine of sovereign immunity by granting a remedy different from the only remedy available under the policy. Specifically, the Agency contends that the policy's only permissible remedy is assignment to the next overtime opportunity – not backpay. But the Arbitrator found to the contrary in his award, and the Agency did not except to any aspect of that award, even though it could have done so. Because arguments that could have been, but were not, made in exceptions do not provide a basis for reconsideration,<sup>4</sup> the Agency's arguments provide no basis for reconsidering *NTEU*.

<sup>2</sup> Award at 32.

<sup>3</sup> *NTEU*, 66 FLRA at 1026.

<sup>4</sup> *EEOC*, 49 FLRA 7, 11 (1994).

<sup>1</sup> 66 FLRA 1024 (2012).

The Agency also argues that it can raise its claim that *NTEU* violates the doctrine of sovereign immunity because such claims may be raised at any time. The Agency is correct that a sovereign-immunity claim may be raised at any time.<sup>5</sup> But the Agency concedes that the Act is a waiver of sovereign immunity and that the Act applies here.<sup>6</sup> Thus, the Agency's claim provides no basis for finding that *NTEU* violates the doctrine of sovereign immunity. Moreover, although labeled as a sovereign-immunity claim, the basis of the claim is the Agency's argument that the requirements of the Act have not been satisfied and, as a result, *NTEU* violates the Act.<sup>7</sup> That is, the Agency's claim that *NTEU* is inconsistent with the doctrine of sovereign immunity is expressly an extension of, and depends on, its argument that the requirements of the Act are not satisfied.<sup>8</sup> As stated above, the Agency could have, but did not, raise its claim regarding the Act on exceptions to the Arbitrator's award. Because the Agency did not raise its argument regarding the requirements of the Act at the appropriate time, its argument provides no basis for reconsidering *NTEU*.

For the foregoing reasons, we deny the Agency's motion.

#### **IV. Order**

We deny the Agency's motion for reconsideration.

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<sup>5</sup> *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 151 (2005).

<sup>6</sup> Motion for Reconsideration at 4-7.

<sup>7</sup> *Id.*

<sup>8</sup> *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189-90 (2009).