69 FLRA No. 5

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4985
(68 FLRA 524 (2015))

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ORDER DENYING
MOTION FOR RECONSIDERATION

October 21, 2015

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

I. Statement of the Case

The Agency previously filed exceptions to Arbitrator M. David Vaughn's award which directed the Agency to pay certain employees backpay as a remedy for scheduling practices that were found to be unlawful. In *U.S. DHS, U.S. 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] There are four questions before us concerning whether extraordinary circumstances exist warranting reconsideration of *DHS*.

The first question is whether the Authority in *DHS* erroneously "rel[ied] on its own previously decided case,"[3] and failed to analyze the arguments raised by the Agency, in denying the Agency's contrary-to-law exception that the Arbitrator's award violated the Back Pay Act (BPA). The Authority considered and rejected the Agency's arguments in *DHS*, and the Agency's attempt to relitigate conclusions reached in an Authority decision does not provide a basis for reconsidering that decision. Therefore, the answer is no.

The second question is whether the Authority in *DHS* incorrectly "relie[d] on its own faulty precedent,"[4] and disregarded the legal arguments raised by the Agency, in denying the Agency's claim that the award violated the doctrine of sovereign immunity. Because the Agency's arguments regarding the doctrine of sovereign immunity are the same as the sovereign immunity arguments the Agency raised and the Authority rejected in *DHS*, the Agency's argument is an attempt simply to relitigate conclusions reached by the Authority in *DHS*. Because such arguments do not provide a basis for reconsidering an Authority decision, the answer is no.

The third question is whether the Authority erred in *DHS* by denying the Agency's argument that the award was contrary to the Customs Officer Pay Reform Act (COPRA)[5] and the Antideficiency Act.[6] The Agency presents three arguments as to why the Authority erred in this respect. These three arguments either: (1) attempt to relitigate the Authority's conclusions in *DHS*; (2) raise issues for the first time that could have been raised, but were not raised, in the Agency's exceptions below; or (3) are based on a misreading of the Authority's conclusions in *DHS*. Thus, the answer to this question is no.

The fourth question is whether the Authority erred in *DHS* by dismissing, under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[7] the Agency's argument that the remedy ordered by the Arbitrator was contrary to "public policy" as the remedy provided significantly more money than the employees would have earned normally, such that this remedy constituted punitive damages against the Agency.[8] Because the remedy requested by the Union at arbitration was very similar to that which was awarded by the Arbitrator, the Agency could have raised this argument at arbitration, but failed to do so. Therefore, the Agency has failed to demonstrate that the Authority erred, and the answer to this question is no.

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

[1] *U.S. DHS, U.S. CBP*, 68 FLRA 524 (2015) (*DHS*).
[2] 5 C.F.R. § 2429.17.
[3] Motion (Mot.) at 8.
[4] *Id*. at 11.
[5] 19 U.S.C. § 267.
[6] 31 U.S.C. § 1341.
[7] 5 C.F.R. §§ 2425.4(c), 2429.5.
[8] Mot. at 15.

II. Background

The Authority more fully detailed the circumstances of this dispute in *DHS*,[9] so this order discusses only those aspects of the case that are pertinent to the Agency's motion for reconsideration.

This dispute involves the Agency's Revised National Inspectional Assignment Policy (RNIAP). The RNIAP stated that the Agency would no longer bargain at the local level or be bound by any locally bargained assignment policies. After implementing the RNIAP, the Agency made changes to local assignment policies at various Agency ports without providing the Union with notice or an opportunity to bargain, at the national level (the level of recognition), over the impact and implementation of those changes. The Union filed a grievance, which was unresolved, and the parties proceeded to arbitration.

A. The interim award and first remedial award

The Arbitrator found, in pertinent part, that the Agency violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[10] by failing to provide notice and an opportunity to negotiate local assignment-policy changes at the national level. Then, the Arbitrator directed the parties to attempt to agree on an appropriate remedy, and retained jurisdiction to fashion a remedy in the event that the parties were unable to do so.

When the parties could not agree to a remedy, they resubmitted the matter to the Arbitrator. The Arbitrator directed the Agency to provide the Union with notice and an opportunity to bargain, and ordered a status-quo-ante remedy.

The Arbitrator also stated that any remedy should make whole individual employees who lost wages and benefits as a result of the Agency's improper action. He further found that the Union had established the necessary causal nexus between the Agency's violation and losses to employees and that the Union was entitled to make its case to establish losses suffered by individual employees, so that these employees could be awarded monetary compensation. To this end, the Arbitrator granted, in part, the Union's motion to compel the Agency to disclose documents necessary for the Union to ascertain and demonstrate individual employees' lost wages and benefits. In addition, he set forth detailed instructions concerning the process by which the parties would share information and determine individual employees' entitlement to backpay. The parties stipulated that the Arbitrator would retain jurisdiction for purposes of enforcement.

The Agency filed exceptions to the interim award and the first remedial award with the Authority, and the Union filed an opposition to the Agency's exceptions. The Authority denied the Agency's exceptions.[11]

B. The second remedial award

When the parties again were unable to resolve the remaining remedial issues, they resubmitted the matter to the Arbitrator. The Arbitrator declared that the sole remaining issue was to determine what methods, procedures, and schedules were to be used to ascertain the entitlements, if any, of individual employees or groups of employees covered by the grievance.

The Agency proposed a claims procedure by which the Agency would notify potential grievants of their eligibility to make a claim and, once the claim was received, the Agency would determine whether there was a loss in pay as a result of the Agency's scheduling policies. Alternatively, the Union proposed that several different formulae be used to calculate backpay for different categories of violations committed by the Agency.

The Arbitrator constructed a remedy that combined the two approaches suggested by the Agency and the Union. He ordered the Agency to provide to all employees covered by the grievance a detailed list of all changes made to RNIAP at each facility or facilities to which each employee was assigned. The Arbitrator further ordered the parties to jointly design procedures and claims forms for individual grievants to use. In cases where the Agency could not, or did not, provide such records and documentation with respect to a grievant, the Arbitrator ordered the Union to assert covered employees' entitlement to wages and benefits lost on an individual or group basis using formulae to estimate actual damages, similar to the formulae proposed by the Union at arbitration, or to formulae adopted in an award issued in a similar case between the two parties by Arbitrator Susan R. Meredith (the Meredith award).[12]

The Agency filed exceptions to the second remedial award, and the Union filed an opposition to the Agency's exceptions.

[9] *See DHS*, 68 FLRA at 524-26.
[10] 5 U.S.C. §§ 7101-7135.
[11] *U.S. DHS, CBP*, 64 FLRA 989, 998 (2010) (Member Beck dissenting).
[12] *See U.S. DHS, U.S. CBP*, 68 FLRA 253, 254-256 (2015) (*CBP*).

C. The Authority's decision in *DHS*

In *DHS*, the Authority determined that §§ 2425.4(c) and 2429.5 of the Authority's Regulations[13] barred the Agency's exception that the second remedial award was contrary to public policy. The Authority then denied the Agency's remaining arguments on their merits.

First, the Authority rejected the Agency's argument that the second remedial award was contrary to the BPA insofar as it ordered the parties to compute economic losses using formulae "similar to" those proposed by the Union at arbitration or those found in the Meredith award.[14] As the Authority had already upheld the legality of the Meredith award's formulae in *U.S. DHS, U.S. CBP* (*CBP*),[15] the Authority found that, consistent with the decision in *CBP*, the second remedial award was not contrary to the BPA insofar as it required the parties to apply formulae similar to those contained within the Meredith award.

Second, the Authority rejected the Agency's contention that the second remedial award was contrary to the doctrine of sovereign immunity. In particular, the Authority noted that when a sovereign-immunity claim depends on an argument that an arbitration award is contrary to the BPA, and the Authority finds that the award is consistent with the BPA, the Authority denies the sovereign-immunity claim.

Third, the Authority rejected the Agency's claim that the second remedial award was contrary to COPRA and the Antideficiency Act because COPRA premium pay can be awarded only for work actually performed on Sundays, holidays, or at night. Specifically, the Authority observed that the Agency's own COPRA-implementing regulations allow for compensation to be awarded under COPRA for "work not performed."[16]

The Agency filed a motion for reconsideration of *DHS*, as well as a motion to stay implementation of the Arbitrator's second remedial award. The Union filed an opposition to the Agency's motion for reconsideration, as well as an opposition to the motion to stay.

III. Preliminary Matters

A. The Agency's motion to stay is properly before us, but we deny it as moot.

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.[17] The Agency requested leave to file, and did file, a supplemental submission – a motion to stay the Arbitrator's second remedial award (motion to stay). As the Agency requested leave to file its motion to stay, we find that it is properly before us.[18] However, as discussed below, we deny the Agency's motion for reconsideration. Therefore, the Agency's motion to stay the second remedial award pending the outcome of its motion for reconsideration is rendered moot, and we deny it as such.[19]

The Union also requested leave to file, and did file, a response to the Agency's motion to stay. As we are denying the Agency's motion to stay as moot, we decline to consider the Union's response.

B. We will consider the Union's opposition to the Agency's motion for reconsideration.

The Union requested permission to file – and did file – an opposition to the Agency's motion for reconsideration.[20] As it is the Authority's practice to grant such requests,[21] we consider the Union's opposition.

IV. Analysis and Conclusions

The Authority's Regulations permit a party who can establish extraordinary circumstances to request reconsideration of an Authority decision.[22] 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.[23] In that regard, the Authority has held that errors in its remedial order, process, conclusions of law, or factual findings may

[13] 5 C.F.R §§ 2425.4(c), 2429.5.
[14] *DHS*, 68 FLRA at 527.
[15] *CBP*, 68 FLRA at 256-57.
[16] *DHS*, 68 FLRA at 529 (quoting 19 C.F.R. § 24.16(h)) (internal quotation mark omitted).
[17] 5 C.F.R. § 2429.26.
[18] *See, e.g., SSA, Region VI*, 67 FLRA 493, 496 (2014).
[19] *See U.S. DHS, U.S. CBP*, 68 FLRA 807, 809 n.29 (2015) (citing *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 60 (2012) (*IRS*)).
[20] Union's Request for Leave at 2.
[21] *IRS*, 67 FLRA at 59 (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 353 (2005)).
[22] 5 C.F.R. § 2429.17.
[23] *AFGE, Local 1547*, 68 FLRA 557, 558 (2015) (citing *U.S. Dep't of the Treasury, IRS*, 56 FLRA 935, 936 (2000)).

justify granting reconsideration.[24] But, attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances warranting reconsideration.[25]

A. The Authority did not err in determining that the second remedial award is not contrary to the BPA.

The Agency contends that the Authority erred in *DHS* by denying the Agency's arguments that the second remedial award is contrary to the BPA because the Authority incorrectly "rel[ied] on its own previously decided case."[26] Specifically, the Agency argues that the Authority mistakenly relied on its finding in *CBP* that "using formulae to compute economic losses is permissible," while simultaneously disregarding the arguments advanced by the Agency.[27]

The Agency asserts that, as a result of the Authority's decision in *DHS*, "thousands of employees are entitled to potentially millions of dollars in [backpay] regardless of the fact that those employees" cannot show: (1) that they did not suffer an actual loss in pay, (2) the specific amount of any such losses, and (3) whether they were actually ready, willing, and able to work a particular overtime opportunity.[28] However, the Agency fails to demonstrate extraordinary circumstances that justify reconsidering *DHS*.

In *DHS*, the Agency challenged only a very small, independent segment of the second remedial award – that is, the portion of the award that required the parties to use formulae to determine economic losses *only* when the Agency cannot or does not provide the records and documentation necessary to determine actual losses.[29] Therefore, the only circumstance in which (allegedly) "thousands of employees"[30] would be entitled to damages without demonstrating actual losses is if the Agency fails to provide the necessary documentation needed for those employees to determine such losses.

Additionally, in *CBP*, the Authority found that using formulae to assess economic losses is permissible "as long as an award sufficiently identifies the specific circumstances under which employees are entitled to backpay."[31] Applying *CBP*, the Authority in *DHS* rejected the Agency's claim that grievants were required to show actual losses in pay, the specific amounts of such losses, or whether they were ready, willing, and able to work that particular opportunity.[32] Although the Agency argues that the Authority's reliance on *CBP* was erroneous, the Agency fails to demonstrate why this is the case.

Moreover, the Agency's assertions that the second remedial award is contrary to the BPA were raised and rejected in *DHS*, and the Agency's request for reconsideration of *DHS*'s resolution of this issue is nothing more than an attempt to relitigate this conclusion and the bases on which it was reached.[33] As such, it does not provide a basis for granting reconsideration.[34]

B. The Authority did not err in holding that the second remedial award is not contrary to the doctrine of sovereign immunity.

The Agency asserts that the Authority erred in *DHS* by holding that the second remedial award does not violate the doctrine of sovereign immunity. Specifically, the Agency alleges that the Authority incorrectly "relie[d] on its own faulty precedent to conclude that 'even if employees do not actually work overtime, they may receive backpay.'"[35] The Agency claims that the BPA waives the government's sovereign immunity "*only* where there is an underlying entitlement to monetary compensation," and argues that no such entitlement exists under the BPA when overtime is not actually worked.[36]

However, the claim that the BPA does not waive sovereign immunity unless an employee actually works overtime was raised and rejected in *DHS*.[37] The Agency's argument seeking reconsideration of *DHS*'s resolution of this issue is nothing more than an attempt to relitigate the Authority's conclusion that the BPA waives sovereign immunity even if employees do not actually work overtime, so long as an unjustified or unwarranted personnel action precluded them from working overtime.[38] As such, it does not provide a basis for granting reconsideration.[39] The Agency also does not demonstrate how the precedent relied upon by the Authority in *DHS* is incorrect or was otherwise

[24] *E.g.*, *Int'l Ass'n of Firefighters, Local F-25*, 64 FLRA 943, 943 (2010).
[25] *U.S. DHS, U.S. CBP*, 68 FLRA 829, 834 (2015); *Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010) (*Bremerton*) (Member DuBester concurring).
[26] Mot. at 8.
[27] *Id*. (quoting *DHS*, 68 FLRA at 527) (internal quotation marks omitted).
[28] *Id*. at 8-9.
[29] *DHS*, 68 FLRA at 526.
[30] Mot. at 8.
[31] *CBP*, 68 FLRA at 257 (citing *IAMAW, Lodge 2261 & AFGE, Local 2185*, 47 FLRA 427, 434-35 (1993)).
[32] *DHS*, 68 FLRA at 527.
[33] *See id*.
[34] *See Bremerton*, 64 FLRA at 545.
[35] Mot. at 11 (quoting *DHS*, 68 FLRA at 528).
[36] *Id*. at 10.
[37] *DHS*, 68 FLRA at 528.
[38] *See id*.
[39] *See Bremerton*, 64 FLRA at 545.

misapplied to this case, other than by making the unsupported assertion that such precedent is "faulty."[40] Accordingly, the Agency has failed to establish the extraordinary circumstances necessary for granting reconsideration.

C. The Authority did not err by denying the Agency's argument that the award was contrary to COPRA and the Antideficiency Act.

The Agency also argues that the Authority erred in *DHS* by denying the Agency's argument that the second remedial award was contrary to COPRA and the Antideficiency Act. The Agency begins by reasserting the same argument that the Authority considered and rejected in *DHS* – namely, that COPRA premium pay may be awarded only for work that was *actually* performed on Sundays, holidays, and at night.[41] As stated above, because attempts to relitigate the conclusions in *DHS* do not establish extraordinary circumstances, this argument does not warrant granting reconsideration.[42]

Second, the Agency contends that the Authority erred by finding that the second remedial award did not violate COPRA and the Antideficiency Act because the Authority failed to provide the Agency with *Chevron* deference regarding the Agency's interpretation of its own law, i.e., COPRA.[43] This is the first time that the Agency has advanced this argument. In resolving a request for reconsideration, the Authority will not consider arguments that could have been raised, but were not raised, in a party's exceptions.[44] As the Agency could have raised, but did not raise this *Chevron*-deference argument in its exceptions in *DHS*, we find that this argument does not warrant granting reconsideration.

Third, the Agency argues that the Authority erred in *DHS* by relying on the Agency's own COPRA-implementing regulations, which state that compensation may be awarded under COPRA for "*work not performed*, which includes . . . awards made in accordance with [backpay] settlements."[45] The Authority cited this provision in *DHS* to deny the Agency's argument that COPRA pay may be awarded only for work that was actually performed.[46] The Agency argues in its motion for reconsideration that this was an error because "the award in this case is not a [backpay] settlement, but a formulaic remedy ordered on the Agency by the Arbitrator."[47]

This represents a misreading of the Authority's decision in *DHS*. The Authority did not deny the Agency's contrary-to-COPRA exception because it found that the second remedial award was a "[backpay] settlement" as contemplated by 19 C.F.R. § 24.16(h). Rather, the Authority denied this exception because § 24.16(h) expressly allows COPRA pay to be awarded for "work not performed," which invalidates the Agency's argument that COPRA pay must be awarded exclusively for work that was *actually performed* on Sundays, holidays, or at night. Accordingly, the Agency does not demonstrate that the Authority erred on this basis, and therefore fails to establish the extraordinary circumstances necessary for granting reconsideration.

D. The Agency does not establish that the Authority erred by dismissing the Agency's public policy exception pursuant to 5 C.F.R. §§ 2425.4(c) and 2429.5.

Finally, the Agency argues that the Authority erred in *DHS* by wrongfully dismissing the Agency's public policy exception under 5 C.F.R. §§ 2425.4(c) and 2429.5 because the Agency failed to raise this argument at arbitration.[48] In its exceptions in *DHS*, the Agency claimed that the second remedial award was contrary to public policy because it instructed the parties to utilize a "formulaic approach to estimate actual damages,"[49] which would result in some grievants "receiving compensation in excess of actual damages, i.e., punitive damages."[50] According to the Agency, the Authority erred in dismissing this argument because the Agency "could not have known in advance" that the remedy set forth in the second remedial award would have provided "significantly more money" than employees normally would have earned, and so, the Agency could not have known that the remedy would violate "public policy" by constituting, essentially, punitive damages.[51]

[40] Mot. at 11.
[41] *Compare* Mot. at 11-12 *with DHS*, 68 FLRA at 529.
[42] *See Bremerton*, 64 FLRA at 545.
[43] Mot. at 13; *see generally AFGE, Local 1547*, 67 FLRA 523, 526 (2014) (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).
[44] *See Pension Benefit Guaranty Corp.*, 60 FLRA 747, 748 (2005); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 60 FLRA 88, 89-90 (2004).
[45] 19 C.F.R. § 24.16(h) (emphasis added).
[46] *DHS*, 68 FLRA at 529.
[47] Mot. at 14.
[48] *Id*. at 15-16.
[49] Exceptions at 28 (quoting Second Remedial Award at 39) (internal quotation marks omitted).
[50] *Id*.
[51] Mot. at 15; *but see SSA*, 63 FLRA 274, 278 (2009) (award of punitive damages against the federal government is contrary to law).

However, the Agency has failed to meet its burden to demonstrate that the Authority erred. The Union had requested a formulaic remedy in its post-hearing brief following the arbitration hearing.[52] In its response to this request the Agency argued that the Arbitrator should not adopt a formulaic approach.[53] However, the Agency did not argue to the Arbitrator that the proposed remedy would violate public policy.[54] As such, the Agency fails to establish the extraordinary circumstances necessary for granting reconsideration on this basis.

V. Order

We deny the Agency's motions for reconsideration and a stay of the Arbitrator's second remedial award.

[52] *See generally* Union Post-Hr'g Br.
[53] *See* Agency's Response to Union Post-Hr'g Br., Sections IV.A. and IV.C. at 1-4.
[54] *Id*.