69 FLRA No. 22

INDEPENDENT UNION
OF PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE
(Union)

and

PENSION BENEFIT
GUARANTY CORPORATION
(Agency)

0-AR-5075
(68 FLRA 999 (2015))

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ORDER DENYING
MOTION FOR RECONSIDERATION
AND MOTION FOR STAY

January 7, 2016

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

I. Statement of the Case

This matter comes before the Authority on the Union's motion for reconsideration (motion for reconsideration) of the Authority's decision in *Independent Union of Pension Employees for Democracy & Justice* (*PBGC*).[1] The Union also moves for the Authority to stay the implementation of its decision in *PBGC* (motion to stay). In *PBGC*, the Union filed exceptions challenging Arbitrator James E. Conway's award finding that the Union violated § 7116(b)(1) of the Federal Service Labor-Management Relations Statute (the Statute)[2] and the parties' collective-bargaining agreement (CBA) when it published a newsletter containing an article threatening an employee. These exceptions challenged not only the Arbitrator's findings on the merits, but also his findings that the CBA bound the parties and that he was properly appointed and selected as the arbitrator. The Authority dismissed, in part, and denied, in part, the Union's exceptions.

The Union's motion for reconsideration presents several arguments for our consideration. First, the Union argues that the Authority erred when it found that the Union failed to raise several matters before the Arbitrator, and, therefore, the Authority would not consider them. Because the Union's arguments fail to demonstrate that the Union raised these matters before the Arbitrator, these arguments fail to demonstrate that extraordinary circumstances warrant the reconsideration of *PBGC*.

Second, the Union alleges that the Authority raised sua sponte the application of the threshold test from *Connick v. Myers* (*Connick*)[3] concerning whether the speech in question involves a matter of public concern (the *Connick* test). However, this argument challenges the Authority's application of an established legal framework in connection with an issue that the Union raised before the Authority. Because such an application does not constitute raising an issue sua sponte, the Union's argument does not present extraordinary circumstances warranting the reconsideration of *PBGC*.

Finally, the Union's remaining arguments attempt to relitigate matters addressed in *PBGC* – including, but not limited to, those arguing that the Arbitrator made a finding concerning his own long-term appointment; that the Arbitrator erred by not holding a hearing, violating due process; that the newsletter did not contain a threat; and that the Arbitrator's award violated the Union's First Amendment rights. Since the Authority has already addressed and decided these matters, these arguments fail to demonstrate that extraordinary circumstances warrant the reconsideration of *PBGC*.

As a result, we deny the Union's motion for reconsideration. Because denying reconsideration renders the motion to stay moot, we deny the motion to stay as well.

II. Background

Because the decision in *PBGC* sets forth the facts in detail, we only briefly summarize them here; additionally, we will only outline arguments and exceptions relevant to the discussion of these motions. In *PBGC*, the Arbitrator found that the Union had violated § 7116(b)(1) of the Statute and the CBA when it published a newsletter containing an article threatening an employee. The award also addressed, and rejected, the Union's allegations that the CBA did not apply and that the Arbitrator had no authority to arbitrate the grievance. The Union filed exceptions to the Arbitrator's award.

As an initial matter, the Union argued before the Authority that: (1) the award's remedy imposes a prior restraint on the Union; (2) the newsletter involved a matter of public concern; (3) the award permits a former

[1] 68 FLRA 999 (2015).
[2] 5 U.S.C. § 7116(b)(1).
[3] 461 U.S. 138 (1983).

union to violate §§ 7114 and 7116(b)(1) of the Statute;[4] (4) the Agency violated §§ 7111 and 7114 of the Statute;[5] and (5) the Authority should apply *Murray v. United Food & Commercial Workers International* (*Murray*)[6] to determine that the arbitration pool used to select arbitrators was inherently unfair, unlawful, and unconscionable. However, the Union did not raise these arguments before the Arbitrator. Consequently, under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[7] the Authority did not consider these arguments on exceptions.

In part, the Union's exceptions challenged the Arbitrator's findings and the grievance, arguing that: (1) the CBA did not apply; (2) the Arbitrator impermissibly made findings on his own appointment; (3) the Arbitrator denied the Union a fair hearing and was biased; and (4) the grievance was not a proper grievance under the CBA. Concerning these exceptions, the Authority found that: (1) the CBA's grievance and arbitration procedures applied; (2) the Arbitrator did not make any findings regarding his own, long-term appointment, and the Union did not successfully challenge the Arbitrator's selection to hear the grievance at issue; (3) the Union did not demonstrate that the Arbitrator was biased or denied the Union a fair hearing; and (4) the Union did not successfully challenge the Arbitrator's procedural-arbitrability determination regarding the validity of the grievance.

Additionally, the Union's exceptions alleged that the Arbitrator based his award on nonfacts, including, but not limited to: (1) that the Union did not seek a hearing; (2) that the newsletter contained a threat; and (3) that the Union published the newsletter. The Authority denied the Union's nonfact exceptions because the parties disputed the alleged nonfacts below; because the Union failed to demonstrate that, but for the alleged nonfacts, the Arbitrator would have reached a different result; or because the Union failed to support its nonfact exception.

Finally, the Union alleged that, because the newsletter was protected speech, the award violated §§ 7102 and 7116(e) of the Statute,[8] and the First Amendment to the U.S. Constitution. As relevant here, the Authority, applying the *Connick* test, found that the Union had not demonstrated that the newsletter was protected speech, and denied these exceptions.

In conclusion, the Authority dismissed, in part, and denied, in part, the Union's exceptions. The Union now requests that we reconsider our decision in *PBGC*, and that we issue a stay of that decision.

III. Analysis and Conclusions

The Authority's Regulations permit a party to request reconsideration of an Authority decision,[9] but "a party seeking reconsideration 'bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.'"[10]

The Authority has found that extraordinary circumstances exist, and as a result has granted reconsideration, in a limited number of situations. These have included where a moving party has established that: (1) an intervening court decision or change in the law affected dispositive issues;[11] (2) evidence, information, or issues crucial to the decision had not been presented to the Authority;[12] or (3) the Authority had erred in its remedial order, process, conclusion of law, or factual finding.[13] Extraordinary circumstances may also be present when the moving party has not been given an opportunity to address an issue raised sua sponte by the Authority in rendering its decision.[14] The Authority has held that attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.[15]

A. The Authority did not err by not considering arguments that the Union did not raise before the Arbitrator.

The Union challenges several of the Authority's conclusions that the Union did not raise certain arguments before the Arbitrator. Under the Authority's Regulations, the Authority will not consider arguments that were not, but could have been, raised before the arbitrator.[16]

First, the Union argues that the Authority erred in dismissing the Union's argument that the Arbitrator's remedy censored the Union; gave the Agency free rein and license to disparage and suppress the Union's free speech rights; and imposed a prior restraint of the

[4] 5 U.S.C. §§ 7114, 7116(b)(1).
[5] *Id.* § 7111.
[6] 289 F.3d 297 (4th Cir. 2002).
[7] 5 C.F.R. §§ 2425.4(c) & 2429.5.
[8] 5 U.S.C. § 7102.
[9] 5 C.F.R. § 2429.17.
[10] *AFGE, Council 215*, 67 FLRA 164, 165 (2014) (quoting *NAIL, Local 15*, 65 FLRA 666, 667 (2011)).
[11] *U.S. Dep't of HHS, Office of the Assistant Sec'y for Mgmt. & Budget, Office of Grant & Contract Fin. Mgmt., Div. of Audit Resolution*, 51 FLRA 982, 984 (1996).
[12] *NTEU*, 66 FLRA 1030, 1031 (2012) (*NTEU*) (citation omitted).
[13] *Id.* (citation omitted).
[14] *Id.*
[15] *Id.*
[16] 5 C.F.R. §§ 2425.4(c), 2429.5.

Union's speech rights.[17] The Union notes that, in its brief before the Arbitrator, it stated that "[t]he [Agency] seeks to regulate and censor the content of the Union's speech in violation of Supreme Court precedent upholding union First Amendment rights" and the Agency was attempting "to silence the Union."[18] The Union is correct that it argued – and the Authority's decision addressed the argument[19] – that the award had infringed on the Union's free speech rights; however, the Union never argued before the Arbitrator that the Agency's requested relief would violate its free speech rights as a prior restraint of the Union's speech rights. This is a distinct legal argument, focusing on the nature of the remedy sought by the Agency rather than on the protected nature of the article itself. The Union provides no reference to the record supporting its argument that it challenged the Agency's requested remedy as a prior restraint. As a result, this argument does not demonstrate that the Authority erred by not considering this argument.

Second, the Union contends that the Authority erred by not considering – as not raised before the Arbitrator – the Union's argument[20] that the newsletter contained a matter of public concern.[21] In applying the *Connick* test to determine whether the speech in the newsletter was protected speech, the Authority in *PBGC* first addressed the issue of whether the article contained a matter of "public concern," finding that the Union did not raise the issue of public concern before the Arbitrator.[22] The Union argues that "because the Union did argue the First Amendment before the [A]rbitrator, all aspects of the First Amendment were thereby encompassed."[23] However, merely citing a law or regulation before an arbitrator does not thereby raise related arguments.[24] Furthermore, the Union does not indicate where it raised the matter of public concern before the Arbitrator. As such, the Union's argument does not demonstrate that the Authority erred by not considering this argument.

Third, the Union argues that the Authority erred by not considering arguments that: (1) "the award unlawfully allowed the former union . . . to interfere with the ability of the Union to represent employees,"[25] and (2) the actions of the Agency "bypassed the Union."[26] However, the decision found that, at arbitration, the Union never raised allegations that the former union violated §§ 7114 and 7116(b)(1) of the Statute or that the Agency violated §§ 7111 and 7114 of the Statute. Further, although the Union cites to its hearing brief, nothing in the hearing brief indicates that the Union ever alleged these statutory violations before the Arbitrator. Consequently, the Union's arguments here do not demonstrate that the Authority erred.

Finally, the Union argues that the Authority erred by not considering the Union's arguments that "the arbitration pool was inherently unfair, unlawful[,] and unconscionable."[27] The Union argues that it "made this argument repeatedly throughout its brief to the [A]rbitrator from several different angles."[28] In *PBGC*, the Authority did not consider, as not raised at arbitration, the Union's argument for the application of *Murray*[29] to determine whether the arbitration pool was fair, lawful, or conscionable.[30] Although the Union cites to its hearing brief, nothing therein indicates that the Union argued before the Arbitrator for the application of the "even-handedness" standards of *Murray*. Consequently, this argument does not demonstrate that the Authority erred.

B. The Authority's application of the *Connick* test does not demonstrate extraordinary circumstances warranting the reconsideration of *PBGC*.

The Union contends that the Authority raised sua sponte its application of the *Connick* test when evaluating the Union's First Amendment arguments.[31] As noted above, extraordinary circumstances warranting reconsideration may exist where a moving party has not been given an opportunity to address an issue raised sua sponte by the Authority.[32] However, the Authority's application of an established legal framework in connection with an issue raised before the Authority does not constitute raising an issue sua sponte.[33] Consequently, the Union's argument does not provide

[17] Mot. for Recons. at 16 (citing *PBGC*, 68 FLRA at 1002).
[18] *Id.* (quoting Union's Hr'g Brief).
[19] *PBGC*, 68 FLRA at 1011-12.
[20] *E.g.*, Exceptions at 115 ("Union speech . . . [is] political and related to general representation and organizing interests, which are matters of public concern.").
[21] Mot. for Recons. at 16.
[22] *PBGC*, 68 FLRA at 1012.
[23] Mot. for Recons. at 16.
[24] *C.f. U.S. DHS, U.S. CBP*, 68 FLRA 829, 832 (2015) (quoting *U.S. Dep't of VA, Bos. Healthcare Sys., Bos., Mass.*, 68 FLRA 116, 117 (2014)).
[25] Mot. for Recons. at 16.
[26] *Id.* at 17.
[27] *Id.* (citing *PBGC*, 68 FLRA at 1003).
[28] *Id.*
[29] 289 F.3d at 303 (refusing to enforce a private, employment-related arbitration agreement "utterly lacking in the rudiments of even-handedness" (citation omitted) (internal quotation marks omitted)).
[30] *PBGC*, 68 FLRA at 1003.
[31] Mot. for Recons. at 26-27.
[32] *U.S. DHS, U.S. CBP*, 68 FLRA 807, 808 (2015) (*DHS*) (citing *U.S. Dep't of the Air Force, 375th Combat Support Grp., Scott Air Force Base, Ill.*, 50 FLRA 84, 86-87 (1995)).
[33] *NTEU*, 61 FLRA 846, 848 (2006); *see generally AFGE Local 2142*, 50 FLRA 44, 47 (1994) (noting that the Authority follows the well-established principle of administrative law that, in general, agencies must apply the law in effect at the time a decision is made).

extraordinary circumstances warranting reconsideration of *PBGC*.

C. The Union's remaining arguments merely attempt to relitigate questions of fact and conclusions already decided in *PBGC*.

As noted above, the Authority will not consider arguments in a motion for reconsideration that merely attempt to relitigate matters already addressed and decided by the Authority.[34] The Union contends that the decision "ignored fundamental due process."[35] However, this contention relies exclusively on the argument that the Union did not waive its right to a hearing, a matter that the Authority addressed in *PBGC*.[36] As such, this argument attempting to religitate a matter addressed in *PBGC* does not demonstrate extraordinary circumstances warranting the reconsideration of *PBGC*.

After considering the Union's remaining arguments – including, but not limited to, those arguing that the Arbitrator made a finding concerning his own long-term appointment; that the Arbitrator erred by not holding a hearing; that the newsletter did not contain a threat; and that the Arbitrator's award violated the Union's First Amendment rights – we conclude that the Union's remaining arguments likewise attempt to relitigate matters already resolved in *PBGC*. Consequently, these arguments do not provide extraordinary circumstances warranting the reconsideration of *PBGC*.[37]

For the foregoing reasons, we deny the Union's motion for reconsideration. Because our denial of the merits of the Union's motion for reconsideration renders the Union's motion to stay moot,[38] we also deny the Union's request for a stay.

IV. Order

We deny the Union's motion for reconsideration and its motion to stay.

[34] *NTEU*, 66 FLRA at 1031.
[35] Mot. for Recons. at 9.
[36] *PBGC*, 68 FLRA at 1009.
[37] *NTEU*, 66 FLRA at 1031.
[38] *See, e.g.*, *DHS*, 68 FLRA at 809 n.29 (citing *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 60 (2014)).