69 FLRA No. 9

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF HUD LOCALS 222
(Union)

0-AR-4586
(65 FLRA 433 (2011))
(66 FLRA 867 (2012))
(68 FLRA 631 (2015))

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ORDER DENYING
MOTION FOR RECONSIDERATION
AND MOTION FOR STAY

November 4, 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

As relevant here, after Arbitrator Andrée Y. McKissick found that the manner in which the Agency posted and filled certain positions violated the parties' collective-bargaining agreement, she issued a remedial award (the remedial award) that addressed those contract violations. Later, the Arbitrator held a series of meetings to discuss with the parties how they would implement the remedy that she directed in the remedial award (the implementation meetings). After each implementation meeting, the Arbitrator issued a written summary. The Agency previously filed exceptions to the written summary of the third implementation meeting, and, in *U.S. Department of HUD* (*HUD*),[1] the Authority dismissed the Agency's exceptions as untimely.

The Agency has now filed a motion for reconsideration of *HUD* (reconsideration motion) under § 2429.17 of the Authority's Regulations.[2] In addition, the Agency filed a motion to stay *HUD* (stay motion) while the Authority considers its reconsideration motion, which alleges that *HUD* is based on two factual errors. As such, the primary substantive question before us is whether the two alleged factual errors demonstrate extraordinary circumstances that warrant granting reconsideration of *HUD*. Even assuming, as the Agency asserts, that the reconsideration motion challenges factual determinations that the Authority made in *HUD*, the Agency's arguments concerning these determinations attempt merely to relitigate the Authority's conclusions in *HUD*. And as such relitigation attempts do not establish extraordinary circumstances warranting reconsideration, the answer is no. Further, because denying reconsideration renders the stay motion moot, we deny the stay motion.

II. Background

The Authority more fully detailed the circumstances of this dispute in *HUD*,[3] so this order discusses only those aspects of the case that are pertinent to the reconsideration motion or the stay motion.

A. Remedial Award and Implementation-Meeting Summaries

The parties are engaged in a protracted dispute over a Union grievance alleging that the Agency posted and filled certain positions with promotion potential to general schedule (GS)-13 in a manner that deprived employees occupying similar positions with promotion potential to GS-12 of the opportunity to be promoted to GS-13. The Arbitrator found merit in these allegations, and she sustained the grievance.

Following other proceedings not relevant here, the Arbitrator issued the remedial award, which directed "the Agency, in pertinent part, to 'process retroactive permanent selections of all affected [bargaining-unit employees] into currently existing career[-]ladder positions with promotion potential to the GS-13 level.'"[4] The Arbitrator explained that this direction meant that

> [a]ffected [bargaining-unit employees] shall be processed into positions at the grade level [that] they held at the time of the violations noted in my prior findings, and (if they met time-in-grade requirements and had satisfactory performance evaluations), shall be

[1] 68 FLRA 631, 636 (2015) (Member Pizzella dissenting).
[2] 5 C.F.R. § 2429.17.
[3] 68 FLRA at 631-34.
[4] *Id.* at 632 (alterations in original) (quoting Remedial Award at 2).

> promoted to [the] next career[-]ladder grade(s) until the journeyman level.[5]

The Arbitrator referred to the affected bargaining-unit employees who were entitled to relief as the "[c]lass of [g]rievants."[6]

The Agency filed exceptions to the remedial award, but the Authority dismissed them (for reasons not relevant here). Following this dismissal, "the parties reached 'an impasse regarding the appropriate methodology for identifying' eligible class members."[7] As a result, the Arbitrator held the implementation meetings with the parties "to facilitate implementation of . . . the remedial award . . . [by] 'clarify[ing] the members of the class that was defined in . . . [the remedial a]ward.'"[8] In her summary of the second implementation meeting (second summary), the Arbitrator offered the following guidance to the parties for identifying eligible class members:

> [W]itnesses who testified at the hearing were in two job series, *GS-1101* and GS-2[4]6. *Employees encumbering those job series are clearly within the scope of the* [*remedial a*]*ward . . .*, and[,] therefore[,] will serve as the basis for the next round of [g]rievants to be promoted with [backpay] and interest. A subset of the GS-1101 series is the PHRS (Public Housing Revitalization Specialist) job title. Although *the* [*remedial a*]*ward covers all GS-1101 employees who were not promoted to the GS-13 level (among others)*, the PHRS group is discrete and therefore the [p]arties were directed to work through the GS-1101 series to identify all eligible class members in the PHRS position, and to work to have them retroactively promoted with [backpay] and interest . . . . The [p]arties were directed to then move on . . . until implementation is complete.[9]

When delays in implementing the remedial award continued, the Arbitrator held a third implementation meeting with the parties. And, in her written summary of that third meeting (third summary), she reiterated certain guidance from the second summary – specifically:

> As stated in prior [s]ummaries, this Arbitrator has instructed the [p]arties to make substantial progress on identifying class members. . . . [B]ased upon this Arbitrator's [remedial a]ward, *as an example, all GS-1101 employees at the GS-12 level from 2002 to* [*the*] *present were to be promoted . . . with* [*backpay*] *and interest, as of their earliest date of eligibility.* As a simple subset that should be easily identifiable, this Arbitrator instructed the [p]arties to identify all PHRS employees, who would comprise the first set of class members.[10]

Additionally, in the third summary, the Arbitrator stated that "the parties should continue working to identify additional class members as set forth in the [remedial a]ward."[11]

The Agency filed exceptions to the third summary, and the Union filed an opposition to those exceptions.

B. Authority's Order to Show Cause and Decision in *HUD*

After the Agency filed its exceptions to the third summary, the Authority issued an order to the Agency to show cause why the exceptions should not be dismissed as untimely. In that regard, the Agency asserted in its exceptions that certain arbitral determinations in the third summary impermissibly modified the remedial award. But in the order, the Authority noted that the challenged arbitral determinations appeared to originate in either the remedial award itself or the second summary. Because the Authority had previously dismissed the Agency's exceptions to the remedial award, and as the deadline for filing exceptions to the second summary had passed, the Authority directed the Agency to explain why the exceptions should not be dismissed as untimely.

The Agency filed a response to the order. In the response, as pertinent here, the Agency alleged that the

[5] *Id.* (alterations in original) (quoting Remedial Award at 2-3) (internal quotation marks omitted).
[6] *Id.* (alterations in original) (quoting Remedial Award at 4) (internal quotation marks omitted).
[7] *Id.* (quoting Summary of Implementation Meeting Mar. 2014 (First Summary) at 3).
[8] *Id.* (third alteration in original) (third omission in original) (quoting First Summary at 2).
[9] *Id.* at 633 (all but first alteration in original) (emphases added in *HUD*) (quoting Summary of Implementation Meeting May 2014 (Second Summary) at 5).
[10] *Id.* (all but third alteration in original) (second omission in original) (emphasis added in *HUD*) (quoting Summary of Implementation Meeting Aug. 2014 (Third Summary) at 1).
[11] *Id.* (alteration in original) (quoting Third Summary at 5) (internal quotation mark omitted).

third summary modified the remedial award and the second summary in two ways. First, the Agency alleged that the third summary "no longer require[d] that the parties work through the GS-1101 [job series] to identify eligible class members."[12] Second, the Agency alleged that the third summary created a "blanket [remedial] entitlement . . . to all employees encumbering positions in the GS-1101 series," regardless of any eligibility criteria that the Arbitrator previously identified (such as time-in-grade requirements, satisfactory performance, or the existence of another position with promotion potential to GS-13).[13]

In *HUD*, the Authority addressed arguments that the Agency made in both its exceptions and its response to the order.[14] As relevant here, with regard to the argument that the third summary eliminated any requirement for the parties to "work through" various job series to identify eligible class members,[15] the Authority noted that, in the third summary, the Arbitrator repeatedly directed the parties to continue to work together to identify, and agree upon, eligible class members.[16] Thus, the Authority rejected the Agency's assertion that the third summary eliminated the requirement to "work through" eligible class members.[17]

In addition, the Authority addressed the Agency's argument that the third summary modified the class of grievants to include all employees in the GS-1101 series. In particular, the Authority assumed, without deciding, that the third summary described a broader class of grievants than the remedial award itself.[18] But the Authority stated that any such modification first appeared in the *second* summary, to which the Agency had not filed exceptions. In that regard, the Authority reviewed the Arbitrator's statements in the second summary that: (1) employees "encumbering [the GS-1101] job series are clearly within the scope of the [remedial a]ward";[19] and (2) "the [remedial a]ward covers all GS-1101 employees who were not promoted to the GS-13 level (among others)."[20] And the Authority found no meaningful difference between those second-summary statements and the Arbitrator's third-summary statement – to which the Agency excepted – that "all GS-1101 employees at the GS-12 level from 2002 to [the] present were to be promoted . . . with [backpay] and interest, as of their earliest date of eligibility."[21] Moreover, the Authority observed that nothing in the third summary "eliminate[d] the eligibility requirements, set forth in the remedial award, that class members meet 'time-in-grade requirements' and have 'satisfactory performance evaluations' in order to recover."[22] Consequently, the Authority explained that "the Agency should have filed exceptions when the Arbitrator first made th[e] alleged modification in the second summary."[23] And in that regard, the Authority noted that the deadline for filing exceptions to the second summary had passed well before the Agency filed its exceptions to the third summary.[24]

For those reasons, as pertinent here, the Authority dismissed the exceptions as untimely filed. Thereafter, the Agency simultaneously filed the reconsideration motion and the stay motion concerning *HUD*. The parties also filed several supplemental submissions, which we discuss further below.

III. Preliminary Matters: Under § 2429.26 of the Authority's Regulations, we consider one supplemental submission but do not consider the 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.[25] 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.[26] Moreover, 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.[27]

In its reconsideration motion, the Agency asserts that: (1) before the Authority issued its decision in *HUD*, the Agency moved to strike the Union's opposition to the exceptions (strike motion); (2) the Authority failed to address the strike motion in *HUD*; and (3) the Agency

[12] Resp. to Order to Show Cause (Resp. to Order) at 4.
[13] *Id.* at 6; *see also id.* at 5.
[14] *E.g.*, 68 FLRA at 634 nn.34-36 (citing Exceptions); *id.* at 635 n.47 (citing Resp. to Order at 6).
[15] Resp. to Order at 4.
[16] *HUD*, 68 FLRA at 634-35 & n.48 (citing Third Summary at 2) (quoting Third Summary at 5) ("The Union and Agency shall continue working to identify additional class members as set forth in the [remedial a]ward." (alteration in original) (internal quotation mark omitted)).
[17] *Id.* at 635.
[18] *Id.* at 634.
[19] *Id.* (alterations in original) (emphasis omitted) (quoting Second Summary at 5).
[20] *Id.* (alteration in original) (emphasis omitted) (quoting Second Summary at 5).
[21] *Id.* (alterations in original) (emphasis omitted) (quoting Third Summary at 1) (internal quotation mark omitted).
[22] *Id.* at 635 (quoting Remedial Award at 3).
[23] *Id.* at 634.
[24] *Id.* at 635.
[25] 5 C.F.R. § 2429.26.
[26] *See, e.g., SSA, Region VI*, 67 FLRA 493, 496 (2014).
[27] *See, e.g., AFGE, Local 3652*, 68 FLRA 394, 396-97 (2015) (*Local 3652*) (citing *Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011)).

renews the strike motion here.[28] However, in its first supplemental submission, the Agency requests permission to "correct the record" regarding these matters, and the Union does not oppose the request.[29] Specifically, the Agency now recognizes that it did not file a strike motion in *HUD*, and asks that we correct the reconsideration motion so that it does not refer to a strike motion.[30] The Authority has previously granted a party's unopposed request to correct an inconsistency in its brief,[31] and the Agency makes a comparable request here. Thus, we grant the Agency's unopposed motion to correct the record in the manner just described.[32] And as a result, we find that the Agency has effectively withdrawn the reconsideration motion's request to *renew* a strike motion, so we do not address that renewal request further.

Next, the Union filed an opposition to the Agency's reconsideration motion[33] and an opposition to the Agency's stay motion[34] (Union's opposition briefs). The Authority's Regulations do not provide for filing oppositions to motions for reconsideration, so such oppositions are subject to § 2429.26's requirement to request leave to file a supplemental submission.[35] Here, the Union did not request leave to file either of its opposition briefs. Accordingly, we do not consider the Union's opposition briefs.[36]

In addition, the Agency submitted a motion for leave to file, and did file, a reply to the Union's opposition briefs (Agency's reply submissions),[37] and the Union filed an opposition to the Agency's reply submissions.[38] Because we do not consider the Union's opposition briefs, we also do not consider the Agency's moot reply submissions concerning those briefs.[39] Likewise, we do not consider the Union's opposition to the Agency's reply submissions because it is moot.[40]

IV. Analysis and Conclusions: We deny the reconsideration motion and the stay motion.

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to move for reconsideration of an Authority decision.[41] 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.[42] In that regard, the Authority has held that errors in its remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.[43] But attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances warranting reconsideration.[44]

The Agency challenges what it characterizes as two "factual findings" by the Authority in *HUD*.[45] Specifically, the Agency asserts that the Authority erred in matters of fact by determining that: (1) the third summary did not eliminate the requirement that the parties "work through" eligible class members in certain job series; and (2) any modification that broadened the class of grievants in the GS-1101 job series first appeared in the second summary, rather than the third summary.[46] Consistent with the Authority's prior practice in similar circumstances, we assume, without deciding, that the challenged aspects of the Authority's interpretation of arbitral awards in *HUD* constitute "factual" determinations.[47]

The Agency contends that extraordinary circumstances exist to warrant granting reconsideration of *HUD* due to the previously mentioned, alleged factual errors. But the Agency's reconsideration motion merely repeats arguments that the Authority considered and

[28] Mot. for Recons. at 3 & n.2.
[29] Agency's Mot. to Correct the Record (June 10, 2015) at 1-2.
[30] *Id.* at 2.
[31] *U.S. DOJ, BOP, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1339 n.1 (1996); *see also NTEU*, 60 FLRA 782, 782 n.1 (2005) (granting unopposed request to withdraw exceptions).
[32] *See id.*; Mot. for Recons. at 3 n.2.
[33] Union's Resp. in Opp'n to Agency's Mot. for Recons. (June 15, 2015).
[34] Union's Resp. in Opp'n to Agency's Mot. to Stay Authority Order (June 15, 2015).
[35] *See, e.g., SPORT Air Traffic Controllers Org.*, 68 FLRA 107, 107-08 (2014).
[36] *See, e.g., id.*
[37] Agency's Mot. for Leave to File Reply (July 28, 2015).
[38] Union's Opp'n to Agency's Mot. for Leave (Sept. 16, 2015).
[39] *See, e.g., Local 3652*, 68 FLRA at 396-97.
[40] *See, e.g., id.*
[41] 5 C.F.R. § 2429.17.
[42] *E.g., U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000).
[43] *E.g., Int'l Ass'n of Firefighters, Local F-25*, 64 FLRA 943, 943 (2010).
[44] *Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010) (*Bremerton*) (Member DuBester concurring).
[45] Mot. for Recons. at 2.
[46] *Id.* (internal quotation marks omitted).
[47] *See NLRB Prof'l Ass'n*, 68 FLRA 552, 555 & n.54 (2015) (citing *U.S. DHS, U.S. CBP*, 68 FLRA 253, 259 (2015)) ("We assume, without deciding, that the [a]rbitrator's interpretation of . . . [another arbitrator's] opinion is a factual determination that is subject to challenge on nonfact grounds.").

rejected in *HUD*.[48] In particular, the Authority explained in *HUD* that the third summary reiterates, rather than eliminates, the Arbitrator's direction that the parties "work through" eligible class members in certain job series.[49] And the Authority thoroughly described in *HUD* why, even assuming that the Arbitrator's written summaries broadened the class of grievants beyond those specified in the remedial award, any such remedial modification first appeared in the *second* summary, to which the Agency did not timely file exceptions.[50] Consistent with the standards described earlier, attempts to relitigate the conclusions in *HUD* do not establish extraordinary circumstances warranting reconsideration.[51] Therefore, we find that the Agency does not demonstrate that extraordinary circumstances exist to support granting reconsideration of *HUD*, and we deny the Agency's reconsideration motion accordingly.

Finally, because our denial of the Agency's reconsideration motion renders the Agency's stay motion moot, we deny the stay motion as well.[52]

V. Order

We deny the Agency's motion for reconsideration and its motion for a stay.

[48] *Compare* Exceptions at 9 (arguing that third summary impermissibly modified class of grievants to include all employees in GS-1101 job series, without regard for previously identified eligibility criteria), Resp. to Order at 4-6 (same), *and* Resp. to Order at 4, 5-6 (contending that third summary eliminated "work[-]through" requirement), *with* Mot. for Recons. at 2 (identifying two alleged errors in *HUD* – the Authority's conclusions that third summary did not uniquely modify class of grievants, and did not eliminate "work[-]through" requirement).

[49] 68 FLRA at 634-35.

[50] *Id.*

[51] *See Bremerton*, 64 FLRA at 545.

[52] *See, e.g., 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 (2014)) ("Because we have denied the Agency's motion for reconsideration, the stay request is moot, and we deny it.").

Member Pizzella, dissenting:

For the reasons that I explained in *U.S Department of HUD*,[*] the Arbitrator exceeded her authority and the remedies awarded were contrary to law. Accordingly, I would grant the Agency's request for reconsideration and vacate the Arbitrator's award.

Thank you.

[*] 68 FLRA 631, 636-39 (2015) (Dissenting Opinion of Member Pizzella).