

**71 FLRA No. 1**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
ST. PETERSBURG REGIONAL BENEFIT OFFICE  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1594  
(Union)

0-AR-5168  
(70 FLRA 1 (2016))  
(70 FLRA 586 (2018))

ORDER DENYING  
MOTION FOR RECONSIDERATION

February 1, 2019

Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Member DuBester dissenting)

**I. Statement of the Case**

This matter comes before the Authority on the Union's motion for reconsideration (motion) and request to stay of the Authority's decision in *United States Department of Veterans Affairs, St. Petersburg Regional Benefit Office (VA II)*.<sup>1</sup>

In *VA II*, after the Authority had already remanded the matter for a proper remedy in *United States Department of Veterans Affairs, St. Petersburg Regional Benefit Office (VA I)*<sup>2</sup> the Authority found that Arbitrator Richard John Miller once again failed to grant an appropriate remedy. Dismissing, in part, and granting, in part, the Agency's exceptions, the Authority vacated the remand award.<sup>3</sup>

Now before us, the Union's motion presents several arguments. In short, the Union alleges that the Authority erred in its conclusions of law, by not deferring to the Arbitrator's various factual findings, and violated

the Administrative Procedure Act (APA)<sup>4</sup> by not remanding the case to the parties for resubmission to the Arbitrator to fashion an appropriate remedy. Because the Union fails to demonstrate extraordinary circumstances warranting reconsideration of *VA II*, we deny the Union's motion.

**II. Background**

Because the decisions in *VA I* and *VA II* set forth the facts in detail, we only briefly summarize them here. The Union originally filed a grievance concerning office space and access to that office space. The Arbitrator found that the Agency had violated the parties' agreement as well as a memorandum of understanding (MOU). In *VA I*, the Authority found that the awarded remedy—ordering the Agency to grant the Union vice president a personal-identity-verification (PIV) card—was contrary to law and remanded the case to the parties for submission to the Arbitrator, absent settlement, “to formulate an appropriate, alternate remedy, if any.”<sup>5</sup>

In *VA II*, the Authority considered the Agency's exceptions to the remedy ordered in the remand award—that the Agency allow the Union vice president to undergo the PIV-credentialing process. The Authority found that the Arbitrator's remedy was contrary to an Office of Personnel Management (OPM) memo dated July 31, 2008 (OPM Memo). Specifically, the Authority found that its

review of the OPM Memo does not allow [the Authority] to go so far as to permit an arbitrator to require an agency to activate the PIV-credentialing process. To hold otherwise would run counter to the very premise underlying that process itself—specifically, that agencies alone have the discretion and the authority to determine which individuals pose security risks that warrant not submitting them to the process.<sup>6</sup>

The Authority dismissed, in part, and granted, in part, the Agency's exceptions and vacated the remand

<sup>1</sup> 70 FLRA 586 (2018) (Member DuBester dissenting).

<sup>2</sup> 70 FLRA 1 (2016) (Member Pizzella concurring in part and dissenting in part).

<sup>3</sup> *VA II*, 70 FLRA at 589.

<sup>4</sup> 5 U.S.C. § 706(2)(A).

<sup>5</sup> *VA II*, 70 FLRA at 587 (quoting *VA I*, 70 FLRA at 5).

<sup>6</sup> *Id.* at 589.

award. The Union now requests that we reconsider our decision in *VA II* and issue a stay of that decision.

### III. Analysis and Conclusions

A party may request reconsideration of an Authority decision,<sup>7</sup> but “a party seeking reconsideration ‘bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.’”<sup>8</sup>

The Authority has found that extraordinary circumstances exist, and as a result has granted reconsideration, in a limited number of situations. As relevant here, these have included where a moving party has established that the Authority had erred in its conclusion of law or factual finding.<sup>9</sup> The Authority has held that attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.<sup>10</sup>

#### A. The Authority did not err in not deferring to the Arbitrator’s findings.

The Union alleges that the Authority failed to apply established law<sup>11</sup> when it did not give the deference due to factual findings made by the Arbitrator.<sup>12</sup> Several of the alleged errors concern the Arbitrator’s evaluation of the Agency’s evidence and arguments concerning the Agency’s security determinations.<sup>13</sup> However, the

<sup>7</sup> 5 C.F.R. § 2429.17.

<sup>8</sup> *AFGE, Council 215*, 67 FLRA 164, 165 (2014) (quoting *NAIL, Local 15*, 65 FLRA 666, 667 (2011)).

<sup>9</sup> *NTEU*, 66 FLRA 1030, 1031 (2012) (*NTEU*) (citation omitted).

<sup>10</sup> *Id.*

<sup>11</sup> The Union also alleges that the Authority erred in its factual findings. Mot. at 4. However, the Authority made no factual findings in this matter. Therefore, this allegation does not provide extraordinary circumstances warranting a reconsideration of *VA II*. See *U.S. DOJ, Fed. BOP, U.S. Penitentiary Atwater, Cal.*, 69 FLRA 238, 240 (2016) (Member DuBester dissenting).

<sup>12</sup> Mot. at 5.

<sup>13</sup> *Id.* (alleging that the Authority erred in rejecting the Arbitrator’s finding that the Agency based its denial of access on anti-union bias rather than any security concern); *id.* at 6 (alleging that the Authority erred in rejecting the Arbitrator’s finding that the Agency did not base its security determination on OPM criteria); *id.* (alleging that the Authority erred in rejecting the Arbitrator’s finding that the credentialing process did not interfere with the Agency’s security discretion); *id.* (alleging that the Authority erred in rejecting the Arbitrator’s finding that there was evidence the Union vice president was not a security risk); *id.* (alleging that the Authority erred in rejecting the Arbitrator’s finding that the Agency’s security concerns “were not supported” and that the Agency “did not provide reciprocity”); *id.* (alleging that the Authority erred in rejecting the Arbitrator’s finding that the PIV card would only be granted as a remedy if the proper criteria were met).

Authority found in *VA II* that the Arbitrator did not have the authority to make such evaluations concerning security determinations.<sup>14</sup> Because the Arbitrator had no authority to make these determinations, the Authority is under no obligation to defer to the Arbitrator’s determinations on that issue but, rather, should defer to the Agency’s security determinations.<sup>15</sup> Consequently, the Authority did not err by not deferring to the Arbitrator’s determinations.

#### B. The Authority did not err by not remanding the case to the parties.

The Union contends that, by not remanding the case yet again for an appropriate remedy, the Authority failed to follow Authority precedent and so violated the APA.<sup>16</sup> After the Authority first found the remedy contrary to law in *VA I*, it remanded the case to the parties for resubmission to the Arbitrator, absent settlement, for an appropriate remedy.<sup>17</sup> On remand, the Union requested only one remedy: that the Agency “allow [the Union vice president] to undergo the PIV credentialing process.”<sup>18</sup> Where an arbitrator has already failed to grant an appropriate remedy on remand based on a party’s sole requested remedy, it is not appropriate to remand that case a second time.<sup>19</sup> Consequently, the Authority followed its precedent when it did not remand the case to the parties in these circumstances.<sup>20</sup> The Union’s arguments do not demonstrate extraordinary circumstances warranting reconsideration.

<sup>14</sup> *VA II*, 70 FLRA at 589 (“[A]gencies alone have the discretion and the authority to determine which individuals pose security risks that warrant not submitting them to the process.”).

<sup>15</sup> See *U.S. Nuclear Regulatory Comm’n*, 65 FLRA 79, 83 (2010) (Neither arbitrators nor the Authority generally may review the merits of security-clearance determinations.).

<sup>16</sup> Mot. at 11.

<sup>17</sup> *VA I*, 70 FLRA at 5; see also *VA II*, 70 FLRA at 586-87.

<sup>18</sup> Opp’n to Remand Award, Attach. 4, Union’s Closing Br. at 43.

<sup>19</sup> *U.S. Dep’t of the Air Force, 47th Flying Training Wing, Laughlin Air Force Base, Del Rio, Tex.*, 70 FLRA 425, 436 (2018) (“[W]e will not give the [u]nion yet another ‘bite at the apple’ by remanding again for a possible, alternative . . . remedy.”); see also *U.S. DOJ, Fed. BOP Fed. Corr. Inst. Bastrop, Tex.*, 70 FLRA 592, 594 (2018).

<sup>20</sup> Because the Authority is merely following its own precedent, we also reject the Union’s argument that the Authority violated the rulemaking procedures of the APA. Mot. at 4, 11.

- C. Some of the Union's arguments attempt to relitigate a matter already addressed by the Authority.

The Union argues that the Authority erred in its<sup>21</sup> interpretation of the OPM Memo and HSPD-12.<sup>22</sup> However, the issue of the interpretation of the OPM Memo and HSPD-12 were central to the Authority's decision<sup>23</sup> in *VA II*.<sup>24</sup> As such, this argument merely attempts to relitigate a matter already decided by the Authority.<sup>25</sup>

The Union makes several additional allegations that the Authority failed to defer to the Arbitrator on certain factual matters; however, these allegations do not challenge the Authority's factual findings, but the Authority's application of the law to facts.<sup>26</sup> As such, these allegations are a disagreement with the merits of our decision.<sup>27</sup>

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<sup>21</sup> The Union also alleges that the Authority erred in not deferring to the Agency's interpretation of the OPM Memo. Mot. at 5, 8. While the Authority defers to an agency's interpretation of a statute it is charged to administer, this deference is not applicable here. Rather than asking us to defer to an agency's interpretation of a statute it is charged to administer, the Union alleges that the Authority erred by not deferring to an Agency regulation, VA Handbook 0735, interpreting the OPM Memo, which in turn interprets HSPD-12. Although the OPM Memo tasks the Agency to implement HSPD-12, the Agency does not administer either the OPM Memo or HSPD-12. EO 13467, 73 FR 38103 ("[T]he Director of [OPM] will continue to be responsible for developing and implementing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of investigations and adjudications relating to determinations of suitability and eligibility for logical and physical access."). As such, we do not owe the level of deference alleged by the Union here.

<sup>22</sup> Mot. at 7, 9, 10.

<sup>23</sup> *VA II*, 70 FLRA at 588-89 (interpreting the OPM Memo and HSPD-12).

<sup>24</sup> We also reject the Union's argument that we misinterpreted *NASA v. Nelson*, 562 U.S. 134 (2011) (*NASA*), on the same grounds. *VA II*, 70 FLRA at 589 n.29 (interpreting *NASA*).

<sup>25</sup> *NTEU*, 66 FLRA at 1031 (Attempts to relitigate matters decided by the Authority do not demonstrate extraordinary circumstances warranting reconsideration.).

<sup>26</sup> Mot. at 5 (alleging that the Authority erred in rejecting the Arbitrator's finding that the credentialing procedure did not have a provision for the Agency to refuse to appoint a sponsor); *id.* (alleging that the Authority erred in rejecting the Arbitrator's finding that the parties' MOU addressed sponsors); *id.* (alleging that the Authority erred in rejecting the Arbitrator's finding that OPM provides a "reasonable basis" standard for reviewing the credentialing process).

<sup>27</sup> *Dep't of HHS, SSA*, 29 FLRA 194, 195 (1987) (rejecting reconsideration where party argued that a decision "was not based on an inaccurate interpretation of the facts").

Because these arguments merely attempt to relitigate a matter already addressed and decided by the Authority, we are not persuaded that reconsideration is warranted.<sup>28</sup>

- D. The Union's remaining arguments misinterpret *VA II*.

The Union presents two allegations that misinterpret *VA II*. First, the Union contends that the Authority erred by not deferring to the Arbitrator's finding concerning the underlying violations by the Agency.<sup>29</sup> However, the Authority did not address—or base its decision on—the underlying violation by the Agency; in *VA II*, the Authority only considered, and the Agency only challenged, the remedy, not any violations by the Agency.<sup>30</sup>

Second, the Union alleges that the Authority erred because the Agency did not provide the Union vice president required appeal rights.<sup>31</sup> However, *VA II* only concerned whether the Arbitrator had the authority to order the Agency to allow the Union vice president to undergo the credentialing process;<sup>32</sup> it did not concern any rights to appeal an Agency denial.

Consequently, these allegations misinterpret the decision and do not demonstrate extraordinary circumstances warranting reconsideration.<sup>33</sup>

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,<sup>34</sup> we also deny the Union's request for a stay.

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<sup>28</sup> *Ind. Union of Pension Emps. for Democracy & Justice*, 69 FLRA 158, 161 (2016); *NTEU*, 66 FLRA at 1031.

<sup>29</sup> Mot. at 6 (The Authority erred by not deferring to the Arbitrator's finding that, "[b]y denying the process the OPM Memo mandates, the Agency repudiates the OPM Memo, [VA Handbook] 0735, and [the] MOUs.").

<sup>30</sup> *VA II*, 70 FLRA at 587 ("On remand, the parties resubmitted the issue to the Arbitrator to address an appropriate, alternate remedy.").

<sup>31</sup> Mot. at 6.

<sup>32</sup> *VA II*, 70 FLRA at 588-89.

<sup>33</sup> *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 69 FLRA 256, 259 (2016) ("[A]n argument based on a misinterpretation of the Authority's decision does not establish extraordinary circumstances warranting reconsideration of that decision."); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 68 FLRA 716, 717 (2015); *NAIL, Local 7*, 68 FLRA 133, 135 (2014).

<sup>34</sup> *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)).

**IV. Order**

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

**Member DuBester, dissenting:**

Accordingly, I dissent.

For reasons stated in my dissent in the underlying case, *U.S. Department of VA, St. Petersburg Regional Benefit Office (VA II)*,<sup>1</sup> the majority erred. In *VA II*, the majority erroneously rejected “the Arbitrator’s findings and conclusion that the Agency improperly refused to allow the grievant, a Union official, access to the Agency’s PIV credentialing process.”<sup>2</sup> In my view, the Union’s arguments seeking reconsideration raise extraordinary circumstances, and I would grant the Union’s motion for reconsideration.

I also agree with the Union that the majority violated the Administrative Procedure Act<sup>3</sup> by not remanding the case to the parties for resubmission to the arbitrator to fashion an appropriate remedy. The majority’s decision veers from the Authority’s long-established principle that determining whether a remand is appropriate is not dependent on the number of times an arbitrator attempts to remedy a violation. That determination is based on the facts and circumstances of each case.<sup>4</sup>

My view of this case and the majority’s error in its conclusion of law is most succinctly explained in footnote 10 of my dissent in *VA II*. As I stated there: “Like the majority, I take seriously national security requirements and an agency’s right to determine who may access agency facilities . . . . But contrary to the majority’s decision, I do not consider that right to include the discretion to ignore government-wide and agency directives addressing access issues, as the Agency did in this case. Nor do I consider that right to include the discretion to ignore other legal requirements to which the Agency is subject, such as the requirement that the Agency not base decisions on anti-union bias. Finally, and in any event, I note, contrary to the majority’s misunderstanding of this case, that what is at issue is not the Union official’s access to the Agency’s facilities. The only issue is the Union official’s access to the Agency’s PIV credentialing process, which will provide data giving the Agency an objective, factual basis for granting or denying the Union official access to Agency facilities. The award, and the scope of this dissent, is no broader.”<sup>5</sup>

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<sup>1</sup> 70 FLRA 586, 590 (2018) (Dissenting Opinion of Member DuBester).

<sup>2</sup> *Id.*

<sup>3</sup> 5 U.S.C. § 500.

<sup>4</sup> *U.S. Dep’t of HHS, Food & Drug Admin.*, 60 FLRA 250, 252-53 (2004) (citing *U.S. Dep’t of VA, Cleveland Reg’l Office, Cleveland, Ohio*, 59 FLRA 248, 251-52 (2003) (“The guiding principle as to what particular [remedy] is necessary is whether [a remedy], under the facts and circumstances presented, would promote the purposes and policies of the Statute.”)).

<sup>5</sup> *VA II*, 70 FLRA at 590 n.10.