71 FLRA No. 6

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))
(69 FLRA 60 (2015))
(69 FLRA 213 (2016))
(70 FLRA 38 (2016))
(70 FLRA 605 (2018))

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ORDER DENYING
MOTION FOR RECONSIDERATION

February 8, 2019

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

Decision by Member Abbott for the Authority

I. Statement of the Case

The Union comes before the Authority requesting that we reconsider our correction of a continuing and compounding error. We decline to do so.

In *U.S. Department of HUD* (*HUD VIII*),[1] the Authority found that the grievance concerned classification and vacated *U.S. Department of HUD, Washington D.C.* (*HUD I*)[2] through *U.S. Department of HUD* (*HUD VII*)[3] as well as the awards and written summaries of implementation meetings held by Arbitrator Andrée McKissick.

The Union argues in its motion for reconsideration (motion) that the Authority refused to acknowledge the final and binding nature of the previously issued awards and written summaries. Because the Authority did not deny the final and binding nature of the previous decisions, these arguments misinterpret *HUD VIII* and do not present extraordinary circumstances warranting a reconsideration of that decision.

The Union also alleges that the Authority's decision in *HUD VIII* violated the due process rights of the Union and of the bargaining-unit employees it represents. Because the Union does not demonstrate that it—or the grievants—either had a legitimate property interest in the remedy or had any substantive due process rights violated, this argument does not present extraordinary circumstances warranting the reconsideration of *HUD VIII*.

We deny the Union's motion.

II. Background

Because *HUD VIII* exhaustively sets forth the longer-than-a-decade history of this case, we will not do so here. As relevant now, the Authority found in *HUD VIII* that "[a]t all times . . . the essential nature of [the underlying] grievance—as demonstrated by the requested remedy—concerned classification."[4] As such, the Authority found that § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (Statute)[5] excluded the grievance from the negotiated grievance procedure and dismissed the grievance.

The Authority granted the Agency's exceptions and vacated *HUD I* through *HUD VII* as well as the Arbitrator's written summaries. The Union now requests that we reconsider our decision in *HUD VIII*. On June 8, 2018, the Union filed its motion for reconsideration. On June 25, 2018, the Agency requested leave to file—and did file—an opposition to the motion. As it is the Authority's practice to grant such requests, we grant the Agency's request and will consider the Agency's opposition.[6]

[1] 70 FLRA 605 (2018) (Member DuBester dissenting).
[2] 59 FLRA 630 (2004).
[3] 70 FLRA 38 (2016) (Member Pizzella dissenting).
[4] *HUD VIII*, 70 FLRA at 608.
[5] 5 U.S.C. § 7121(c)(5).
[6] *E.g., U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012) (citation omitted) (granting a request to file an opposition to a motion for reconsideration).

III. Analysis and Conclusions

A party may request reconsideration of an Authority decision[7] but then "bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action."[8]

The Authority has found that extraordinary circumstances exist, and as a result has granted reconsideration, in a very 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 findings.[9] But attempts to relitigate conclusions already reached by the Authority are insufficient.[10]

A. The Authority did not err by vacating final and binding decisions.

Most of the Union's exceptions argue that the Authority was ultra vires[11] and erred by "refusing to accept and acknowledge final and binding decisions," namely the prior arbitration awards and summaries."[12] [13] Under § 7122(b), "[i]f no exception to an arbitrator's award is filed . . . during the [thirty]-day period beginning on the date the award is served on the party, the award shall be final and binding."[14]

The Union is correct that the prior arbitration awards and written summaries, with the exclusion of the tenth written summary,[15] were final and binding. Either the Agency filed exceptions to the awards[16] and written summaries[17]—and those exceptions were denied or dismissed[18]—or the Agency did not file exceptions within the thirty-day, statutory limit;[19] thus the awards and written summaries, except the tenth written summary, were final and binding.

However, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has agreed with the Authority that it may consider jurisdictional questions even where the merits of an underlying final and binding award are not at issue.[20] Thus, the Authority is not precluded from considering whether jurisdiction existed.

As with unfair labor practices (ULPs), the Authority may reach into the merits of final and binding awards when a jurisdictional question is present.[21] It would be unreasonable, as well as inefficient and ineffective,[22] for the Authority to consider such jurisdictional questions on final and binding awards only after a ULP complaint has been filed but be unable to address that question directly now on exceptions. Fundamentally, questions of jurisdiction must be addressed when they appear, and the mere technicality of when in the process a party files exceptions does not act to extend jurisdiction to situations where statutorily none exists.[23]

As the Authority has not denied the final and binding nature of the previous awards and written

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[7] 5 C.F.R. § 2429.17.

[8] *AFGE, Council 215*, 67 FLRA 164, 165 (2014) (quoting *NAIL, Local 15*, 65 FLRA 666, 667 (2011)).

[9] *NTEU*, 66 FLRA 1030, 1031 (2012) (*NTEU*) (citation omitted).

[10] *Id.*

[11] Mot. at 12; *see also id.* at 14.

[12] The Union alleges that that the Authority "disregarded prior Authority decisions which were final and binding." Mot. at 12. However, it is arbitration awards, not Authority decisions that become final and binding. 5 U.S.C. § 7122(b) ("If no exception to an arbitrator's award is filed [timely] . . . the *award* shall be final and binding." (emphasis added)).

[13] Mot. at 11, *see also id.* at 15, 17-18.

[14] 5 U.S.C. § 7122(b).

[15] Although the Authority did not directly address its Order to Show Cause concerning the timeliness of the Agency's exceptions to the tenth written summary, the decision in *HUD VIII*, by addressing the issue of classification present in the tenth written summary, implicitly found the exceptions timely. Consequently, any arguments that exceptions to the tenth summary were untimely are merely an attempt to relitigate an issue already decided by the Authority. Mot. at 17.

[16] *U.S. HUD*, 66 FLRA 867 (2012) (*HUD III*) (exceptions to remedial award); *U.S. HUD*, 65 FLRA 433 (2011) (*HUD II*) (exceptions to remand award); *HUD I*, 59 FLRA at 630 (2004) (exceptions to award).

[17] *U.S. HUD*, 69 FLRA 213 (2016) (*HUD VI*) (Member Pizzella dissenting) (exceptions to sixth written summary); *U.S. HUD*, 68 FLRA 631 (2015) (*HUD IV*) (Member Pizzella dissenting) (exceptions to third written summary).

[18] *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 56 FLRA 848, 852 (2000) ("An award becomes final and binding when there are no timely exceptions filed or when timely-filed exceptions are denied by the Authority.").

[19] *See, e.g.*, Exceptions in *HUD VIII*, Attach. 4 at 1 (noting that the Agency did not file exceptions to the first and second written summaries).

[20] *AFGE, AFL-CIO, Local 446 v. Nicholson*, 475 F.3d 341, 352 (D.C. Cir. 2007) (*Local 446 v. Nicholson*) ("[T]here is nothing troubling about the FLRA's conclusion that its jurisdiction was properly challenged in a ULP proceeding. In the analogous private sector context, an arbitrator's jurisdiction may be challenged in an enforcement proceeding brought in a district court."); *AFGE, AFL-CIO v. FLRA*, 850 F.2d 782, 785 (D.C. Cir. 1988) (*AFGE v. FLRA*) (rejecting the argument that the Authority is not authorized to consider "challenges to the validity of an arbitrator's award in an unfair labor practice proceeding").

[21] *See Local 446 v. Nicholson*, 475 F.3d at 352; *AFGE v. FLRA*, 850 F.2d at 785.

[22] 5 U.S.C. § 7101(b) ("The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient [g]overnment.").

[23] *HUD VIII*, 70 FLRA at 607.

summaries, the Union's arguments rely on a misinterpretation of *HUD VIII*.[24] Consequently, these arguments do not present extraordinary circumstances warranting the reconsideration of *HUD VIII*.[25]

B. The Authority did not deprive the Union or the grievants of due process.

The Union asserts that the Authority erred in its conclusions of law and "findings of fact"[26] and deprived the Union and the grievants of a property interest without substantive due process.[27] We disagree.

As relevant here, in order to show a substantive due process violation,[28] the Union must first demonstrate that it had a vested property interest in "an expectation of continued employment," specifically the employment granted in the erroneous award.[29] In the current case, any property right of the Union or the grievants could arise from either a legitimate expectation of a particular grade arising from the Arbitrator's awards or a legitimate claim of entitlement to the remedies.[30]

Courts have held that federal employees do not have a legitimate expectation in "promises of appointment to a particular grade or step level"[31] or even "promises of promotion upon satisfaction of certain conditions."[32] Consequently, neither the Union nor the grievants can claim a property right based solely on any expectation arising from the remedies.

Further, the Union cannot claim a legitimate property interest through an entitlement to the remedies granted in the awards. The D.C. Circuit has ruled that "due process 'property interests' in public benefits are 'limited, as a general rule, by the governmental power to remove, through prescribed procedures, the *underlying source of those benefits*.'"[33] As found in *HUD VIII* and confirmed above, the Arbitrator was without jurisdiction to issue any awards, and the Authority vacated those awards. Consequently, the underlying source of any purported legitimate claim of entitlement—the erroneous awards—has been removed. Because the Authority acted within its authority to review arbitration awards, the removal of the underlying and erroneous awards vitiates any claim the Union or grievants might have in the awards' remedies.[34]

Consequently, the Union has not demonstrated a legitimate property interest. Furthermore, even assuming the Union could claim a legitimate property interest in the remedies, the Union has failed to demonstrate a violation of law, let alone an action that "shocks the conscience" in violation of substantive due process.[35] The D.C. Circuit ruled that, where a court rejects an appeal challenging an exercise of jurisdiction, there is no substantive due process violation.[36] The Court also held that, for substantive due process claims, "[t]he threshold for such a constitutional violation is unclear, but this court has

[24] For the same reasons, we reject the Union's argument that the Authority violated the Administrative Procedures Act by "disregarding" our own regulation concerning the deadline for filing exceptions and "impermissibly set aside prior final and binding decisions." Mot. at 17. As noted above, although the awards were final and binding, the Authority was not precluded from addressing the jurisdictional questions before it.

[25] *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).

[26] Mot. at 3.

[27] *Id.* at 19 (citing *AFGE, AFL-CIO, Local 446 v. Nicholson*, 475 F.3d 341; *Kizas v. Webster*, 707 F.2d 524 (D.C. Cir. 1983) (*Kizas*)); *see also New Vision Photography Program, Inc. v. District of Columbia*, 54 F. Supp. 3d 12, 33 (D.D.C. 2014) (Allegations challenging a departure from procedures constitutes a substantive due process claim while allegations challenging an inherent infirmity of those procedures constitutes a procedural due process claim.).

[28] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) ("Respondents' federal constitutional claim depends on their having had a property right in continued employment.") (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 576-78 (1972); *Reagan v. United States*, 182 U.S. 419, 425 (1901)).

[29] Mot. at 19.

[30] *Kizas*, 707 F.2d at 539 ("[T]heir entitlement to pay and other benefits 'must be determined by reference to the statues and regulations governing [compensation], rather than to ordinary contract principles.'"); *id.* at 535("[F]or purposes of procedural due process guarantees, a person has a 'property interest' in a governmentally conferred benefit if he has a 'legitimate claim of entitlement' to the benefit.").

[31] *Id.* at 535; *see also Riplinger v. United States*, 695 F.2d 1163, 1164 (9th Cir. 1983); *NTEU v. Reagan*, 663 F.2d 239, 249-50 (D.C. Cir. 1981); *Ganse v. United States*, 376 F.2d 900, 902 (Ct. Cl. 1967); *Price v. United States*, 80 F. Supp. 542, 542-43 (Ct. Cl. 1948).

[32] *Kizas*, 707 F.2d at 535; *see also Qualls v. United States*, 678 F.2d 190, 193-97 (Ct. Cl. 1982); *Applegate v. United States*, 211 Ct. Cl 380, 380-82 (1975); *Peters v. United States*, 534 F2d 232, 234-35 (Ct. Cl. 1975).

[33] *Kizas*, 707 F.2d at 539.

[34] 5 U.S.C. § 7122(a).

[35] *Local 446 v. Nicholson*, 475 F.3d at 353.

[36] *See id.* ("We have held that the timing of the [jurisdictional-challenging d]ecision was not unlawful, and so our discussion of the [u]nion's due process claim comes to an end.").

held that a mere violation of law does not give rise to a due process claim."[37]

Therefore, the Union has not demonstrated that the Authority erred in its jurisdictional finding in *HUD VIII* or violated the substantive due process rights of the Union or the grievants.[38] Consequently, this argument does not demonstrate extraordinary circumstances warranting the reconsideration of *HUD VIII*.

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

IV. Order

We deny the Union's motion for reconsideration.

[37] *See id.* at 353 (noting the court has held that mere violation of law does not give rise to due process claim); *see also Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1988), *abrogated on other grounds by Saucier v. Katz*, 533 U.S. 194 (2001) (To establish a violation of substantive due process, one must show conduct "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."); *U.S. DHS, U.S. CBP Scobey, Mont. v. FLRA*, 784 F.3d 821, 823 (2015) ("Routine statutory and regulatory questions . . . are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity.").

[38] *Local 446 v. Nicholson*, 475 F.3d at 353.

Member DuBester, dissenting:

As stated in my underlying dissent, the majority's decision to reach "back well over a decade to eliminate a series of Authority decisions, and arbitration awards, they do not like . . . has neither a legal foundation nor a legal justification, and leaves chaos rather than greater certainty and stability in its wake."[39] In my view, moreover, the Union's arguments seeking reconsideration of the Authority's decision, including its argument that the Authority's ultra vires decision is arbitrary and capricious,[40] raise extraordinary circumstances. I would therefore grant the Union's request for reconsideration.

[39] *U.S. Dep't of HUD*, 70 FLRA at 609.

[40] *See* Mot. at 12-17 (alleging that the majority lacked legal authority to, sua sponte, review and vacate past decisions); *see also id.* at 19 (alleging that the majority deprived employees of vested property rights without due process of law).