

72 FLRA No. 40

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VETERANS ADMINISTRATION
MEDICAL CENTER
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5541
(71 FLRA 947 (2020))

ORDER DENYING
MOTION FOR RECONSIDERATION

April 22, 2021

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

Decision by Member Abbott for the Authority

I. Statement of the Case

The Union requests that we reconsider our decision in *U.S. Department of VA, John J. Pershing Veterans Administration Medical Center (Pershing)*.¹ In that case, the Union filed a grievance in March 2017. The Union invoked arbitration on that grievance in October 2018. The Arbitrator found that the Agency had waived any timeliness objections by failing to raise them prior to arbitration; and even if it had not, the grievance alleged a continuing violation which allowed the Union to invoke arbitration at any time. The Authority found that the award failed to draw its essence from the parties' agreement.

In a motion for reconsideration (motion), the Union argues that "the Authority's decision is so erroneous in its application of the facts it is a wrongful conclusion of law,"² and the Authority erred by "fail[ing] to recognize the Arbitrator's findings as stated in [then-]Member DuBester's dissenting opinion."³ Because the Union's arguments fail to establish that the Authority erred, those arguments do not provide a basis for reconsideration. Accordingly, we deny the Union's motion.

II. Background

The Union filed a grievance on March 1, 2017. On March 14, 2017, the Agency granted the grievance resulting in the "settlement agreement."⁴ Arbitrator Cary Morgen was notified that he was to arbitrate the March 1st grievance on October 9, 2018. The Union subsequently notified the Agency that it was invoking arbitration regarding the Agency's failure to comply with March 14th "settlement agreement" on October 26, 2018.

At arbitration, the Agency argued that the grievance was not properly before the Arbitrator because the Union failed to invoke arbitration within thirty days, as required by Article 44 of the parties' agreement.⁵ The Arbitrator found that the Agency had waived its timeliness objection by failing to raise it "during the grievance procedure prior to arbitration."⁶ The Arbitrator further found that, even if the Agency had not waived its timeliness objection, the grievance was procedurally arbitrable "pursuant to the doctrine of continuing violation," and the Union could invoke arbitration at any time.⁷ The Agency filed exceptions to the award.

In *Pershing*, the Authority found that the Arbitrator's procedural-arbitrability determinations failed to draw their essence from the parties' agreement because they were not plausible interpretations of Article 44 of the parties' agreement.⁸ Specifically, the Authority found the Arbitrator's basis for determining that the Agency had waived its timeliness objection was not a plausible interpretation of the parties' agreement because there was no such requirement in the parties' agreement.⁹ The Authority also found that the Arbitrator's determination that the Union could invoke arbitration at anytime was not a plausible interpretation of the parties' agreement because

¹ 71 FLRA 947 (2020) (then-Member DuBester dissenting).

² Mot. for Recons. (Mot.) at 2.

³ *Id.*

⁴ Exceptions, Attach. 3, Joint Ex. 3, Grievance Resp. at 1 ("Based on the above considerations, the [A]gency concurs that, as per [the parties' agreement], a copy of all referral lists will be forwarded to the selecting official and provided to the local union from [thirty] days prior to the time of this grievance forward.").

⁵ Award at 18. Article 44, Section 1 provides: "A notice to invoke arbitration shall be made in writing to the opposite party

within [thirty] calendar days after receipt of the written decision rendered in the final step of the grievance procedure." Exceptions, Attach. 1, Collective-Bargaining Agreement (CBA) at 234.

⁶ Award at 21.

⁷ *Id.* at 22.

⁸ 71 FLRA at 948.

⁹ *Id.* ("The parties' agreement does not contain any requirement concerning when a party must raise an issue during the arbitration process.").

he failed to enforce the plain language of the agreement – requiring arbitration to be invoked within thirty calendar days of the final response to the grievance.¹⁰ As such, the Authority vacated the award.

Subsequently, the Union filed this motion on September 25, 2020. The Agency did not file an opposition to the Union’s motion.

III. Analysis and Conclusion: We deny the motion for reconsideration and request for a stay.

The Union asks the Authority to reconsider its decision in *Pershing*. Section 2429.17 of the Authority’s Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision.¹¹ The Authority has repeatedly held that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.¹² As relevant here, the Authority has held that errors in its legal conclusions may justify granting reconsideration.¹³ However, mere disagreement with, or attempts to relitigate, conclusions reached by the Authority are insufficient to establish extraordinary circumstances.¹⁴

First, the Union argues “the Authority’s decision is so erroneous in its application of the facts it is a wrongful conclusion of law.”¹⁵ Specifically, the Union asserts that the repudiation of the settlement agreement is the “final”

response triggering the thirty-day invocation deadline.¹⁶ Such an assertion is merely disagreement with the Authority’s conclusion that the March 14th “settlement agreement” is the final response triggering the thirty calendar-day invocation deadline.¹⁷ Accordingly, this assertion is insufficient to establish extraordinary circumstances.

The Union also argues that the Authority erred by “fail[ing] to recognize the Arbitrator’s findings as stated in [then-]Member DuBester’s dissenting opinion.”¹⁸ As stated above, mere disagreement with or attempts to relitigate the Authority’s conclusions are insufficient to establish extraordinary circumstances.¹⁹ Similarly, we find that merely reiterating the dissenting opinion to the underlying decision, which is reviewed by the majority prior to finalizing a decision for issuance, does not demonstrate extraordinary circumstances warranting reconsideration. Therefore, this assertion also fails to establish extraordinary circumstances. Accordingly, we deny the Union’s motion for reconsideration.

IV. Order

The Union’s motion for reconsideration is denied.

¹⁰ *Id.* at 948-49 (rejecting Arbitrator’s reliance on the doctrine of continuing violation because “[t]he parties’ agreement provides that if [a] violation is of [a] continuing nature, the Union may file a grievance at any time, not invoke arbitration at any time.”); see also *id.* at 948 (noting that “the Union apparently conceded that it invoked arbitration ‘beyond the [thirty] days required in Article 44, Section 1’” (quoting Award at 16)).

¹¹ 5 C.F.R. § 2429.17 (“After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order.”).

¹² *U.S. Dep’t of the Air Force, Minot Air Force Base, N.D.*, 71 FLRA 188, 189 (2019) (then-Member DuBester dissenting) (citing *U.S. Dep’t of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 860, 861 (2018) (then-Member DuBester dissenting)); *SPORT Air Traffic Controllers Org.*, 71 FLRA 25, 26 (2019) (then-Member DuBester concurring) (citations omitted); *U.S. DHS, U.S. CBP, Swanton, Vt.*, 66 FLRA 47, 48 (2011); *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 63 FLRA 600, 601 (2009); *U.S. Dep’t of the Interior, Wash., D.C. & U.S. Geological Surv., Reston, Va.*, 56 FLRA 279, 279 (2000).

¹³ *AFGE, Loc. 2338*, 71 FLRA 723, 723 (2020) (*Local 2338*) (Member Abbott concurring) (citing *SPORT Air Traffic Controllers Org.*, 70 FLRA 345, 345 (2017) (*SPORT 2017*)); *Indep. Union of Pension Emps. for Democracy and Just.*, 71 FLRA 60, 61 (2019) (*IUPEDJ*) (then-Member DuBester concurring) (citing *NTEU*, 66 FLRA 1030, 1031 (2012)).

¹⁴ *Int’l Brotherhood of Elec. Workers, Loc. 1002*, 71 FLRA 930, 931 (2020) (finding attempts to relitigate conclusions reached by the Authority are insufficient to demonstrate extraordinary circumstances); *Local 2338*, 71 FLRA at 723 (citing *SPORT 2017*, 70 FLRA at 345) (same); *IUPEDJ*, 71 FLRA at 61 (same); *U.S. Dep’t of the Air Force, Seymour Johnson Air Force Base, N.C.*, 58 FLRA 169, 169 (2002) (citing *U.S. DOD, Def. Logistics Agency, Def. Dist. Reg. W., Stockton, Cal.*, 48 FLRA 543, 545 (1993)) (finding that mere disagreement with the conclusion reached by the Authority is insufficient to establish extraordinary circumstances).

¹⁵ Mot. at 2.

¹⁶ *Id.* at 1-2.

¹⁷ See *Pershing*, 71 FLRA at 948 (“The Agency responded on March 14, 2017.”).

¹⁸ Mot. at 2. The Union bases its argument, in part, on § 7, Step 4 of the parties’ negotiated grievance procedure. *Id.* (“If the grievance is not satisfactorily resolved in Step 3, the grievance may be referred to arbitration as provided in Article 44 – Arbitration” (emphasis omitted) (quoting CBA at 231)). However, the Union did not make this argument in its opposition to the Agency’s exceptions to the Arbitrator’s award. The Authority will not consider arguments in a motion for reconsideration that could have been, but were not, raised to the Authority during its initial review of the award, so we do not consider this argument. *U.S. Small Bus. Admin.*, 70 FLRA 988, 989 (2018) (then-Member DuBester dissenting) (citing *U.S. Dep’t of HHS, Food & Drug Admin.*, 60 FLRA 789, 791 (2005)).

¹⁹ *Supra* note 14.

Chairman DuBester, concurring:

For the reasons set forth in my dissenting opinion in the underlying decision,¹ I continue to believe the Arbitrator correctly found that the Agency waived its right to challenge the grievance's arbitrability. However, because I agree that the Union has failed to establish extraordinary circumstances warranting reconsideration of this decision, I concur in the decision to deny the Union's motion.

¹ See *U.S. Dep't of VA, John J. Pershing Veterans Admin. Med. Ctr.*, 71 FLRA 947, 950 (2020) (Dissenting Opinion of then-Member DuBester).