73 FLRA No. 158

UNITED STATES
DEPARTMENT OF THE ARMY
ARIZONA DEPARTMENT OF
EMERGENCY & MILITARY AFFAIRS
ARIZONA ARMY NATIONAL GUARD
(Agency)

and

ASSOCIATION OF CIVILIAN TECHNICIANS
CHAPTER 61
(Union)

0-AR-5860
(73 FLRA 617 (2023))

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ORDER DENYING
MOTION FOR RECONSIDERATION

February 28, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

The Union requests reconsideration of the Authority's decision in *U.S. Department of the Army, Arizona Department of Emergency & Military Affairs, Arizona Army National Guard* (*Arizona Army National Guard*).[1] The Union's motion for reconsideration (motion) merely attempts to relitigate *Arizona Army National Guard*'s conclusions and raises arguments the Union could have made, but did not make, in its underlying opposition. Thus, the Union does not establish extraordinary circumstances warranting reconsideration, and we deny the motion.

II. Background and Authority's Decision in *Arizona Army National Guard*

The facts, summarized here, are set forth in greater detail in *Arizona Army National Guard*.[2]

The Agency employs technicians, who are required to maintain membership in the Arizona National Guard as a condition of employment.[3] Under 32 U.S.C. § 709, technicians who lose military membership "shall be promptly separated from . . . technician (dual[-]status) employment by the adjutant general of the jurisdiction concerned."[4] Prior to the underlying dispute, the Agency followed Technician Personnel Regulation (TPR) 715,[5] a National Guard Bureau (bureau) regulation, which permitted the Agency to continue to employ technicians who lost military membership, and filed disability-retirement claims, until those claims were processed.[6] However, the bureau rescinded TPR 715, and the parties engaged in impact-and-implementation bargaining over the rescission. The parties reached agreement on an August 10, 2021 memorandum, which contained a provision (the provision) that allowed technicians who lose military membership due to medical disability to "request a four[-]month extension (renewable, if required) to accommodate [the Office of Personnel Management (OPM)] disability determination."[7]

Subsequently, the Agency notified the Union that it was rescinding the provision because it was contrary to 32 U.S.C. § 709.[8] The Union filed a grievance, alleging the Agency violated the parties' collective-bargaining agreement (CBA) and § 7116 of the Federal Service Labor-Management Relations Statute (the Statute) by rescinding the provision. The grievance went to arbitration. The Arbitrator found 32 U.S.C. § 709 does not define the term "promptly," so the parties were free to negotiate that term's meaning.[9] As such, the Arbitrator concluded that the rescinded provision – allowing technicians to remain employed for four-month, renewable periods pending OPM's disability-retirement determinations – was not contrary to 32 U.S.C. § 709's requirement that the Agency "promptly separate[]" them.[10] The Arbitrator concluded the Agency violated the Statute and the CBA by rescinding the provision.

[1] 73 FLRA 617 (2023).
[2] *Id.* at 617.
[3] 32 U.S.C. § 709(b)(2).
[4] *Id.* § 709(f)(1)(A).
[5] 73 FLRA at 617 ("The one exception to the requirement for prompt termination upon loss of military membership is in pending disability[-]retirement claims. Under these circumstances, a technician who has lost military membership may be retained until the [Office of Personnel Management] adjudication is received." (quoting TPR 715)).
[6] *Id.*
[7] Exceptions, Ex. 2, Memorandum (Memorandum) at 1.
[8] *Compare* Memorandum at 1, *with* Exceptions, Ex. 3, Revised Memorandum at 1.
[9] Award at 7-8.
[10] *Id.*

The Agency filed exceptions with the Authority, arguing the award was contrary to law.[11] Specifically, the Agency argued it was permitted to rescind the provision because the provision was contrary to 32 U.S.C. § 709(f)(1)(A).[12] The Union filed an opposition.

In evaluating the Agency's exception, the Authority stated it will not find unlawful repudiation where the repudiated provision is contrary to law.[13] The Authority found that 32 U.S.C. § 709 does not define "promptly," and that the Arbitrator and the parties did not cite – and the Authority did not find – regulations, case precedent, or legislative history defining that term in the context of § 709.[14] Thus, the Authority found it appropriate to consider dictionary definitions of the term.[15] Because the dictionary defines "promptly" as "without delay,"[16] the Authority found 32 U.S.C. § 709(f)(1)(A) requires technicians who lose military membership to be separated without delay.[17] As such, the Authority found the rescinded provision – which effectively allowed indefinite deferral of separation in renewable, four-month increments, until OPM made a disability-retirement determination – contradicted § 709(f)(1)(A)'s requirement that the Agency promptly remove technicians who lose military membership.[18] The Authority concluded the rescinded provision was contrary to 32 U.S.C. § 709(f)(1)(A), so the Agency's recission of it was not an unlawful repudiation.[19] Accordingly, the Authority granted the Agency's exception and vacated the Arbitrator's award.[20]

On July 31, 2023, the Union filed this motion.

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

The Union argues that, in *Arizona Army National Guard*, the Authority erred in its legal conclusions.[21] Section 2429.17 of the Authority's Regulations permits a party to move for reconsideration of an Authority decision.[22] A party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[23] Errors in the Authority's remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.[24] However, mere disagreement with, or attempts to relitigate, the Authority's conclusions are insufficient to establish extraordinary circumstances.[25] Additionally, the Authority has declined to grant reconsideration based on arguments that could have been, but were not, raised in the original proceedings.[26]

The Union notes that, in its exceptions, the Agency argued it reevaluated its interpretation of 32 U.S.C. § 709(f)(1)(A) and rescinded the provision after the bureau rescinded TPR 715 because, at that point, there was no longer "any regulatory basis" for the Agency to continue complying with the provision.[27] According to the Union, the Authority erred in finding the provision contrary to law, because the rescission of TPR 715 cannot have changed the meaning of § 709(f)(1)(A).[28] In this regard, the Union contends that, if § 709(f)(1)(A)'s "plain meaning" is clear, then the presence or absence of any regulation is irrelevant.[29]

The Union's arguments do not demonstrate the Authority erred as a matter of law. The Agency – which is required to follow bureau regulations – followed TPR 715 while it existed. However, after TPR 715 was no longer in place, and the parties agreed to the provision, the Agency concluded the provision was contrary to 32 U.S.C.

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[11] *Ariz. Army Nat'l Guard*, 73 FLRA at 618.
[12] *Id.*
[13] *Id.* (citing *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Newport News, Va.*, 65 FLRA 1052, 1054 (2011)).
[14] *Id.*
[15] *Id.*
[16] *Id.* (citing *Promptly*, Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/promptly (last visited February 13, 2024)).
[17] *Id.*
[18] *Id.*
[19] *Id.* at 618-19.
[20] *Id.* at 619.
[21] Mot. at 1-13.
[22] 5 C.F.R. § 2429.17.
[23] *NTEU, Chapter 14*, 73 FLRA 718, 719 (2023) (*Chapter 14*).
[24] *Id.*
[25] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 628, 629 (2023).
[26] *Chapter 14*, 73 FLRA at 719-720 (declining to consider arguments raised for the first time in a motion for reconsideration); *U.S. Dep't of Transp., FAA*, 58 FLRA 389, 390 (2003) (declining to consider, in resolving a request for reconsideration, issues that were not raised in an underlying opposition to exceptions).
[27] Mot. at 3.
[28] *Id.* at 2-4.
[29] *Id.* at 2-3.

§ 709. The Authority agreed with that conclusion.[30] To the extent the Union's argument contends otherwise, we reject it as mere disagreement with the Authority's legal conclusion.

The Union also argues the Authority erred because TPR 715 defined "promptly,"[31] the Agency did not dispute the lawfulness of TPR 715,[32] and TPR 715 is a reasonable interpretation of § 709(f)(1)(A).[33] As stated above, TPR 715 was rescinded. Therefore, it cannot provide a regulatory basis for interpreting § 709(f)(1)(A). In *Arizona Army National Guard*, the Authority relied on a dictionary definition of "promptly" because that term is undefined in § 709(f)(1)(A) and, among other things, regulations.[34] The Union's argument merely attempts to relitigate that conclusion and, as such, provides no basis for granting reconsideration.

Further, the Union asserts the Authority erred for the following reasons: (1) TPR 715 was lawful because it is consistent with OPM's interpretation of disability-retirement statutes;[35] (2) § 709(f)(1)(A) must be harmonized with the disability-retirement statutes if possible, and if not possible, the disability-retirement statutes prevail because they are more specific than § 709(f)(1)(A);[36] (3) TPR 715 and "OPM [r]etention [p]olicy" are reasonable because they implement "[c]ongressional [p]olicy" against unwarranted gaps in income reflected in the Severance Pay Statute;[37] (4) the elimination of TPR 715 was arbitrary and capricious;[38] (5) 10 U.S.C. § 10216 does not require the repudiation of the negotiated provision;[39] and (6) *Dyer v. Department of the Air Force*[40] does not support the conclusion that the provision is contrary to § 709.[41] However, the Union did not previously raise these arguments in *Arizona Army National Guard*, even though it had the opportunity to do so. Consequently, the Union cannot raise them now.[42]

As such, the Union has not demonstrated extraordinary circumstances warranting reconsideration of *Arizona Army National Guard*.[43]

IV. Decision

We deny the Union's motion for reconsideration.

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[30] We note that, in finding the provision inconsistent with 32 U.S.C. § 709, the Authority did not rely upon TPR 715's rescission, but, rather, the absence of a definition of "promptly" in "regulations, case precedent, or legislative history" concerning § 709. *Ariz. Army Nat'l Guard*, 73 FLRA at 618. To the extent the Union's arguments challenge the legal reasoning of "[t]he Agency's position," such arguments do not provide a basis for granting reconsideration of *the Authority's* decision. Mot. at 2-4; *see id. passim* (alleging errors in "[t]he Agency's position" throughout motion).

[31] Mot. at 4-5.

[32] *Id.* at 5.

[33] *Id.* at 9-10.

[34] 73 FLRA at 618.

[35] Mot. at 5-7.

[36] *Id.* at 7-8.

[37] *Id.* at 8-9.

[38] *Id.* at 10.

[39] *Id.* at 10-12.

[40] 971 F.3d 1377 (Fed. Cir. 2020).

[41] Mot. at 12-13.

[42] *Indep. Union of Pension Emps. For Democracy & Just.*, 72 FLRA 571, 572 (2021) (Chairman DuBester concurring) (declining to consider argument in motion for reconsideration that could have been, but was not, argued in the party's underlying opposition to exceptions); *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 419, 420 (2021) (same). However, we note the Authority's finding was consistent with its decision in *Laborers International Union of North America, Local 1776*, 73 FLRA 215, 217 (2022) (Member Kiko dissenting on other grounds), where the Authority found an agency did not commit an unlawful repudiation by implementing a similar policy in order to comply with 10 U.S.C. § 10216.

[43] Consistent with her concurrence in *Laborers Int'l Union of N. Am., Loc. 1776*, 73 FLRA 591, 595 (2023) (Concurring Opinion of Member Kiko), Member Kiko reiterates that she respects the decision of the United States Supreme Court concerning whether Adjutants General are "subject to the authority of the [Federal Labor Relations Authority] when acting in their capacities as supervisors of [national guard] dual-status technicians." *Ohio Adjutant Gen.'s Dep't v. FLRA*, 598 U.S. 449, 461 (2023). Therefore, despite her previously expressed reservations on this issue, *see, e.g.*, *U.S. DOD, Ohio Nat'l Guard*, 71 FLRA 829, 833 (2020) (Member Abbott concurring in part) (Dissenting Opinion of Chairman Kiko), *pet. for review denied sub nom. Ohio Adjutant Gen.'s Dep't v. FLRA*, 21 F.4th 401, 409 (6th Cir. 2021), *aff'd*, 598 U.S. 449, 461 (2023), Member Kiko no longer raises jurisdictional objections to the Authority's resolution of cases involving units of the national guard.