

74 FLRA No. 24

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 68
(Union)

0-AR-5702
(73 FLRA 888 (2024))

ORDER DENYING
MOTION FOR RECONSIDERATION

December 2, 2024

Before the Authority: Susan Tsui Grundmann, Chairman,
and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

The Union requests reconsideration of the Authority's decision in *U.S. Department of the Treasury, IRS (IRS)*.¹ Because the Union's motion for reconsideration does not establish extraordinary circumstances warranting reconsideration, we deny it.

II. Background and Authority's Decision in IRS

The facts, summarized here, are set forth in greater detail in *IRS*.

At a mid-year performance evaluation, the Agency notified an employee (the grievant) that she was not performing at an exceeds-expectations level in three critical job elements. The Agency provided some counseling and assistance before the end of the performance year, but the grievant's final ratings in two critical job elements did not reach the exceeds-expectations level. Thus, the Agency rated the grievant's overall performance lower than the previous year.

The Union grieved the performance rating, "alleging that the Agency failed to provide the grievant the counseling required by Article 12, Section 4.L of the parties' [collective-bargaining] agreement (Article 12)."² Arbitrator Ann R. Gosline sustained the grievance, finding the Agency did not provide timely assistance of the type specified in Article 12. As a remedy, the Arbitrator directed the Agency to raise the grievant's rating and provide her with any associated compensation.

The Agency filed exceptions to the award on the grounds that it failed to draw its essence from the parties' agreement and was contrary to management's rights under § 7106(a) of the Federal Service Labor-Management Relations Statute (the Statute).³ While those exceptions were pending, the Authority issued *Consumer Financial Protection Bureau (CFPB)*,⁴ which revised the test for resolving management-rights exceptions to awards where an arbitrator found a collective-bargaining-agreement violation. On September 27, 2023, the Authority issued an order allowing the parties one month to "file additional briefs addressing how the [CFPB test] applies in [their] case" (the order).⁵ Neither party filed a supplemental brief.

In *IRS*, the Authority dismissed the Agency's essence exceptions and applied the four-part *CFPB* test to the Agency's management-rights exception. First, the Authority determined that the award affected the management rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute, respectively. Addressing the second *CFPB* question, the Authority concluded the Union did not meet its "burden to demonstrate that [Article 12], as interpreted and applied [by the Arbitrator], is enforceable under" § 7106(b) of the Statute.⁶ Specifically, the Authority found that the Union did not support its argument – as set forth in its opposition to the Agency's exceptions – that Article 12 was a method or means of performing work under § 7106(b)(1). Even assuming, without deciding, that the Union argued Article 12 was a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3), the Authority also found those arguments unsupported. Therefore, the Authority ended the *CFPB* inquiry, granted the management-rights exception, and set aside the award.

On July 9, 2024, the Union filed a motion for reconsideration of *IRS* and a request for leave to file a

¹ 73 FLRA 888 (2024).

² *Id.* at 888.

³ 5 U.S.C. § 7106(a).

⁴ 73 FLRA 670 (2023).

⁵ *IRS*, 73 FLRA at 889; *see also* Mot., Ex. 1, Order at 1 (allowing parties to file supplemental briefs by October 27, 2023).

⁶ *IRS*, 73 FLRA at 890 (alteration in original) (quoting *CFPB*, 73 FLRA at 679).

supplemental submission concerning *CFPB*'s application to that case.⁷

III. Preliminary Matter: We consider the Agency's opposition and do not consider its motion to dismiss.

On August 12, 2024, without requesting leave, the Agency filed a motion to dismiss the Union's motion for reconsideration as untimely.⁸ The Authority's Regulations do not provide for the filing of supplemental submissions, but allow the Authority, in its discretion, to grant leave to file "other documents" as it deems appropriate.⁹ A party must request leave to file a supplemental submission, and must explain why the Authority should consider the submission.¹⁰ As the Agency did not request leave to file the motion to dismiss, we do not consider it.¹¹

However, along with the motion to dismiss, the Agency requested leave to file, and did file, an opposition to the Union's motion for reconsideration.¹² Where a party requests leave to file an opposition to a motion for reconsideration, the Authority generally considers it.¹³ Accordingly, we consider the Agency's opposition.

IV. Analysis and Conclusion: The Union does not establish extraordinary circumstances warranting reconsideration of *IRS*.

The Union argues extraordinary circumstances warrant reconsideration of *IRS*.¹⁴ Section 2429.17 of the Authority's Regulations permits a party to move for reconsideration of an Authority decision.¹⁵ However, a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to

justify this unusual action.¹⁶ Such circumstances include where: (1) an intervening court decision or change in the law affected dispositive issues; (2) evidence, information, or issues crucial to the decision had not been presented to the Authority; (3) the Authority erred in its remedial order, process, conclusion of law, or factual finding; and (4) the moving party has not been given an opportunity to address an issue raised sua sponte by the Authority in its decision.¹⁷ Untimely filings caused by delays or problems with internal mail systems do not present extraordinary circumstances warranting reconsideration.¹⁸

In support of its motion, the Union argues that: (1) *CFPB* is an intervening change in law that the Authority applied retroactively to resolve the Agency's management-rights exception;¹⁹ (2) the Union was unable to supply the Authority with information "crucial to the [*IRS*] decision" because it was unaware of the order allowing parties to address the new *CFPB* test;²⁰ and (3) the Union was "denied the opportunity to address the [*CFPB*] issue raised sua sponte by the Authority."²¹ These three arguments are based on the Union's assertion that it did not receive the order mailed by the Authority because an unknown and "unauthorized" individual signed for it and then failed to provide it to the Union.²²

According to the Union, it first learned of the order when it received the *IRS* decision, at which time it contacted the Authority's Office of Case Intake and Publication (CIP) for clarification.²³ CIP sent the Union a copy of the order and the return receipt establishing that an individual at the Union's mailing address signed for the order.²⁴ The Union asserts that none of its employees

⁷ We address the Union's supplemental submission in Section IV, below.

⁸ Agency Submission at 1.

⁹ 5 C.F.R. § 2429.26; *AFGE, Loc. 2516*, 72 FLRA 567, 568 (2021) (*Local 2516*) (citing 5 C.F.R. § 2429.26; *IFPTE, Loc. 4*, 70 FLRA 20, 21 (2016) (*IFPTE*)).

¹⁰ *Local 2516*, 72 FLRA at 568 (citing *IFPTE*, 70 FLRA at 21).

¹¹ See *AFGE, Council 215*, 66 FLRA 137, 137 n.1 (2011) (rejecting motion to dismiss where moving party failed to request leave to file under 5 C.F.R. § 2429.26); *AFGE, Loc. 1738*, 63 FLRA 485, 485 n.1 (2009) (same).

¹² Agency Submission at 1.

¹³ *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 628, 628-29 (2023) (citing *U.S. Dep't of the Army, Moncrief Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 506, 507 n.11 (2021) (Chairman DuBester dissenting on other grounds); *AFGE, Loc. 1822*, 73 FLRA 22, 22 n.3 (2022) (declining to consider opposition filed *without* leave)).

¹⁴ Mot. at 8-15.

¹⁵ 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.").

¹⁶ *U.S. Dep't of the Army, U.S. Army Garrison, Picatinny Arsenal, N.J.*, 73 FLRA 827, 828 (2024) (citing *Indep. Union of Pension Emps. for Democracy & Just.*, 73 FLRA 280, 280 (2022)).

¹⁷ *U.S. Dep't of the Air Force, Air Force Materiel Command, Eglin Air Force Base, Fla.*, 65 FLRA 1047, 1048 (2011) (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 65 FLRA 256, 257 (2010)).

¹⁸ *AFGE, Loc. 1858*, 73 FLRA 296, 297 (2022) (citing *AFGE, Loc. 1102*, 63 FLRA 343, 343-44 (2009); *U.S. Dep't of the Army, U.S. Army Rsv. Pers. Ctr., St. Louis, Mo.*, 49 FLRA 95, 95 n.1 (1994); *U.S. Dep't of VA, Hosp., Bedford, Mass.*, 42 FLRA 1364, 1366 (1991) (*VA Bedford*)).

¹⁹ Mot. at 9-10.

²⁰ *Id.* at 11.

²¹ *Id.* at 14; see also *id.* at 12.

²² *Id.* at 13.

²³ *Id.* at 12.

²⁴ *Id.* at 12-13; see also Mot., Ex. 2 (Return Receipt) at 1-2.

signed the return receipt or recognized the signature on it.²⁵ The Union states it also inquired at the local post office and the management office for its building, but was unable to determine who signed the return receipt.²⁶ Based on these assertions, the Union argues that “the unusual circumstance of an unauthorized individual signing for the certified mailing of the [o]rder and never forwarding it to [the Union is] an issue beyond the control of the Union that constitutes an extraordinary circumstance that justifies reconsideration.”²⁷

Although the Union’s situation is unfortunate, it does not establish an extraordinary circumstance warranting reconsideration of *IRS*. The record establishes that an individual at the Union mailing address on record with the Authority received the order.²⁸ Addressing similar circumstances, the Authority has held that where there is evidence that an Authority order was delivered to a party’s address of record, the “responsibility for ensuring that the [correct individual] received [it] rest[s] within the [party’s] internal administrative mail procedures.”²⁹ Accordingly, the circumstances giving rise to the Union’s failure to respond to the order – which arose from problems with the Union’s internal procedures for receiving and acknowledging Authority orders – do not constitute extraordinary circumstances warranting reconsideration.³⁰

For these reasons, we deny the Union’s motion and, accordingly, we do not consider its concurrently filed supplemental submission.³¹

V. Order

We deny the Union’s motion for reconsideration.

²⁵ See Mot. at 13; Mot., Ex. 3 (Counsel Aff.) at 1 (stating she did not sign for the order or recognize the signature on the return receipt); Mot., Ex. 4 (Assistant Counsel Aff.) at 2 (same); Mot., Ex. 5 at 1-9 (same, in affidavits by other Union employees).

²⁶ Mot. at 13; Counsel Aff. at 2 (inquiring with building management); Assistant Counsel Aff. at 2 (inquiring with post office).

²⁷ Mot. at 14 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mia., Fla.*, 73 FLRA 154, 155-56 (2022) (granting motion for reconsideration where postal service’s misdelivery of timely filed document was beyond party’s control)).

²⁸ See Counsel Aff. at 1 (noting mailing address at time of order’s delivery); Return Receipt at 2 (verifying delivery to same address).

²⁹ *VA Bedford*, 42 FLRA at 1366-67 (noting deficiency order’s verified delivery to office of party’s attorney (citing *U.S. Dep’t of HHS, SSA, Area II, Phila. Region*, 42 FLRA 1105, 1107-08 (1991)); see also *NAGE, Loc. RI4-89*, 43 FLRA 1276, 1278 (1992) (*NAGE*) (rejecting assertion that party did not receive deficiency order where “Authority received a signed certified mail return receipt card acknowledging receipt” of an order by a party).

³⁰ *VA Bedford*, 42 FLRA at 1367 (denying motion for reconsideration where party alleged it did not receive duly delivered order); *NAGE*, 43 FLRA at 1278 (same); see also *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 426, 426, 427 (2019) (Member DuBester concurring) (rejecting argument that party “did not ‘know’ about” order delivered to party’s “front desk, reception area, or mail room” (citing *AFGE, Council 236*, 52 FLRA 1531, 1532 (1997))).

³¹ See, e.g., *Loc. 2516*, 72 FLRA at 568 (declining to consider supplemental submission after finding party’s reason for untimely filing did not establish extraordinary circumstances).