

66 FLRA No. 11

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
SWANTON, VERMONT
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 2774
NATIONAL BORDER PATROL COUNCIL
(Charging Party/Union)

BN-CA-09-0171
(65 FLRA 1023 (2011))

ORDER DENYING MOTION FOR
RECONSIDERATION

August 26, 2011

Before the Authority: Carol Waller Pope, Chairman, and
Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on the Respondent's motion for reconsideration (motion) of the Authority's decision in *United States Department of Homeland Security, U.S. Customs & Border Protection, Swanton, Vermont*, 65 FLRA 1023 (2011) (*CBP Swanton*). Neither the General Counsel (GC) nor the Charging Party properly filed an opposition to the Respondent's motion.¹

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority final decision or order. For the reasons that follow, we conclude that the Respondent has failed to establish extraordinary circumstances warranting reconsideration. Accordingly, we deny the Respondent's motion.

¹ Although the GC submitted an opposition by facsimile (fax), oppositions to motions for reconsideration may not be filed by fax. See 5 C.F.R. § 2429.24(e). Accordingly, we do not consider the GC's opposition.

II. Decision in *CBP Swanton*

As relevant here, in *CBP Swanton*, the Authority found that the Respondent committed an unfair labor practice (ULP) by failing to comply with a final and binding arbitration award that had directed the Respondent to fully reinstate an employee (the affected employee) to perform Border Patrol Agent duties (agent duties) while he underwent a periodic reinvestigation (PRI). See 65 FLRA at 1029. With regard to the GC's request for a nationwide posting signed by the highest official of the Respondent, the Authority stated:

The Judge found, and there is no dispute, that the Respondent's national [headquarters (HQ)] directed the Respondent not to assign agent duties to the affected employee upon his reinstatement. . . . In addition, the Respondent does not address, and thus does not oppose, the GC's request for a nationwide posting signed by the highest official of the Respondent's national office.

Id. at 1030. Accordingly, the Authority granted the GC's request for a nationwide posting signed by the Chief of the Border Patrol (Chief). See *id.*

III. Respondent's Motion

The Respondent argues that extraordinary circumstances warrant reconsideration of the Authority's Order to post a nationwide notice signed by the Chief. According to the Respondent, it is inappropriate to require the Chief to sign the notice because HQ's decision to keep the affected employee from performing agent duties "was based upon information [that HQ] received from [the Respondent's Office of Internal Affairs], and not a decision [that HQ] made independently." Motion at 3. In addition, the Respondent contends that a nationwide posting is inappropriate because: (1) the ULP involved the discipline of only one employee; (2) HQ did not independently decide to not restore the affected employee to agent duties; (3) there is no indication that HQ's decision "reflects national policy"; and (4) HQ "had no control over the requirement" that the affected employee pass a PRI before he could perform agent duties. *Id.* at 5. Finally, the Respondent requests that the Authority stay the order to post the notice until the Authority rules on the motion for reconsideration. See *id.* at 6.

IV. Analysis and Conclusions

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority decision. *E.g.*, *Nat'l Ass'n of Indep. Labor, Local 15*, 65 FLRA 666, 667 (2011). A party seeking reconsideration under § 2429.17 bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action. *Id.* The Authority has identified a limited number of situations in which extraordinary circumstances have been found to exist. *See, e.g.*, *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Atwater, Cal.*, 65 FLRA 256, 257 (2010). These include situations 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. *Id.* In addition, the Authority has declined to grant reconsideration of issues "where they could have been previously raised, but are raised for the first time on motion for reconsideration." *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Wash., D.C.*, 63 FLRA 600, 601 (2009) (*DHS*) (citations omitted).

As stated previously, in *CBP Swanton*, the Authority found that the Respondent did not "address," and thus did not "oppose," the GC's request for a nationwide posting signed by the Chief. 65 FLRA at 1030. The Respondent does not challenge this finding and, instead, provides arguments regarding why that remedy is inappropriate. Although the Respondent could have raised these arguments in its opposition to the GC's exceptions, it failed to do so and, as such, cannot raise them for the first time in its motion. *See DHS*, 63 FLRA at 601. Accordingly, we decline to consider those arguments, and we deny the Respondent's motion.

V. Order

The Respondent's motion is denied.²

² In light of this decision, we also deny the Respondent's request for a stay. *See, e.g.*, *DHS*, 63 FLRA at 601 n.2.