68 FLRA No. 16

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1210
NATIONAL IMMIGRATION
AND NATURALIZATION SERVICE COUNCIL
(Union)

0-AR-4901
(67 FLRA 718 (2014))

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ORDER DENYING
MOTION FOR RECONSIDERATION

December 2, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Louise Berman Wolitz found that the Agency violated the parties' collective-bargaining agreement, a number of statutory provisions,[1] and a Federal Register notice (the Notice)[2] by not immediately extending the Foreign Language Award Program (FLAP) to employees represented by the Union after they were merged with another bargaining unit that had been receiving FLAP awards. The Agency filed exceptions to the Arbitrator's award, and in *U.S. DHS, U.S. CBP* (*Customs I*),[3] the Authority rejected the Arbitrator's conclusion that the Agency violated federal law. Because the Arbitrator's finding of a contractual violation was based solely on her finding that the Agency violated federal law, the Authority set aside the award in its entirety.

The question before us is whether the Union has established extraordinary circumstances that warrant reconsideration of *Customs I*. In its motion for reconsideration, the Union argues that the Authority failed to consider the Arbitrator's finding that the Agency violated Article 11.B(11) of the parties' agreement, which, according to the Union, provides a separate and independent basis for her award. Because the Authority considered and rejected this argument in *Customs I*, the Union's argument provides no basis for granting reconsideration. We therefore deny the Union's motion.

II. Background

The facts are set forth in detail in *Customs I* and are only briefly summarized here. The Homeland Security Act of 2002 (the Act)[4] resulted in the merger of the inspection functions of the Immigration and Naturalization Service (INS) and the U.S. Customs Service (USCS) into a single agency – U.S. Customs and Border Protection. After the merger, customs inspectors, who had been receiving FLAP awards at USCS, continued to receive FLAP awards. However, following the merger, the Agency did not immediately extend FLAP eligibility to immigration inspectors, who had not been receiving these awards at INS.

The Union filed a grievance alleging that, by not immediately extending FLAP awards to immigration inspectors, the Agency violated federal laws concerning the merit-system principle of equal pay for equal work, which, in turn, constituted a violation of the parties' agreement. As relevant here, the Union alleged that the Agency committed a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(12) and violated Article 11.B(11) of the parties' agreement. Title 5, § 2302(b)(12) of the U.S. Code provides:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit[-]system principles contained in [§] 2301 of this title.

And Article 11.B(11) provides:

> Any employee of the [Agency] who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . [t]ake or fail to take any

[1] 5 U.S.C. §§ 2301, 2302, 9701; 6 U.S.C. § 461; 19 U.S.C. § 267a.
[2] Overtime Compensation and Premium Pay for Customs Officers, 69 Fed. Reg. 35,229 (June 24, 2004) (amending 8 C.F.R. § 103.1, 19 C.F.R. § 24.16).
[3] 67 FLRA 718 (2014).
[4] Pub. L. No. 107-296, 116 Stat. 2135 (2002).

> other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning the merit[-]system principles contained in the Civil Service Reform Act of 1978.[5]

The Arbitrator determined that the Agency violated the Act, the Notice, and 5 U.S.C. § 267a, which authorizes FLAPs. Based on her conclusion that these authorities implemented the merit-system principle of equal pay for equal work,[6] the Arbitrator determined that the violations constituted a prohibited personnel practice under 5 U.S.C. § 2302(b)(12) and, as relevant here, that "[t]hey further establish[ed] [a] violation of Article 11 of the [parties' a]greement."[7]

The Agency filed exceptions to the Arbitrator's award. In *Customs I*, the Authority found that the Agency did not violate the Act or 5 U.S.C. § 267a and that the relevant portion of the Notice did not carry the force of law. Because the Arbitrator relied on violations of these provisions to find that the Agency violated § 2302(b)(12) and, as relevant here, Article 11 of the parties' agreement, the Authority set aside the award in its entirety.

The Union then filed this motion for reconsideration of the Authority's decision, and the Agency filed a response to the Union's motion.

III. Preliminary Matters

The Authority's Regulations do not provide for responses to motions for reconsideration. And, while a party may request leave to file additional documents under § 2429.26 of the Authority's Regulations,[8] the Agency did not request leave to do so here. Accordingly, we have not considered the Agency's response.[9]

Further, in its motion for reconsideration, the Union seeks clarification of our decision under § 2425.9 of the Authority's Regulations.[10] However, that provision provides that "[w]hen required to clarify a record or when it would otherwise aid in disposition of the matter, *the Authority* . . . may . . . [d]irect *the parties* to provide specific documentary evidence . . . [or] respond to requests for further information . . . ."[11] It does not permit a party to request that the Authority clarify its decisions. Accordingly, we deny the Union's request for clarification.

IV. Analysis and Conclusions: The Union has not established extraordinary circumstances warranting reconsideration of *Customs I*.

Section 2429.17 of the Authority's Regulations permits a party to request reconsideration of an Authority decision if it can establish extraordinary circumstances.[12] A party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[13] The Authority has found that errors in its conclusions of law or factual findings constitute extraordinary circumstances that may justify reconsideration.[14] The Authority also has found extraordinary circumstances where an intervening court decision or change in the law affected dispositive issues, or the moving party has not been given an opportunity to address an issue raised sua sponte by the Authority in its decision.[15] But attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.[16]

The Union argues that extraordinary circumstances warrant reconsideration because the Authority erred by "not consider[ing] the separate contractual basis relied upon by the Arbitrator in her award – namely, Article 11.B(11)."[17]

First, the Authority considered and rejected the Union's arguments concerning Article 11 in *Customs I*. Specifically, the Authority explained that the Arbitrator's "finding that the Agency violated § 2302(b)(12) require[d] a finding that the Agency violated a 'law, rule, or regulation implementing, or directly concerning, the merit[-]system principles,'"[18] and that "Article 11.B(11) essentially repeats 5 U.S.C.

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[5] Opp'n, Ex. 2, Parties' Agreement at 27-28.
[6] *See* 5 U.S.C. § 2301(b)(3) ("Equal pay should be provided for work of equal value . . . .").
[7] Award at 43.
[8] 5 C.F.R. § 2429.26.
[9] *Cf. U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 353 (2005) (granting permission to file response to motion for reconsideration).
[10] 5 C.F.R. § 2425.9.
[11] *Id.* § 2425.9(a)-(b) (emphases added).
[12] *E.g., U.S. DHS, U.S. CBP*, 66 FLRA 1042, 1043 (2012).
[13] *Id.*; *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000); *U.S. Dep't of the Air Force, 375th Combat Support Grp., Scott Air Force Base, Ill.*, 50 FLRA 84, 85 (1995) (*Scott Air Force Base*).
[14] *E.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 65 FLRA 256, 257 (2010); *Scott Air Force Base*, 50 FLRA at 86-87.
[15] *Scott Air Force Base*, 50 FLRA at 86-87.
[16] *E.g., Ass'n of Civilian Technicians, P.R. Army Chapter*, 62 FLRA 144, 145 (2007) (citing *Library of Cong.*, 60 FLRA 939, 941 (2005)) ("The Authority has uniformly held that attempts to relitigate conclusions reached by the Authority are insufficient to satisfy the extraordinary circumstances requirement.").
[17] Mot. for Recons. at 1; *see also id.* at 3.
[18] *Customs I*, 67 FLRA at 720.

§ 2302(b)(12)."[19] Thus, the Authority set aside the award in its entirety "as the Arbitrator's finding of a contractual violation was based solely on [her finding of] legal violations, which [the Authority] set aside."[20]

Second, contrary to the Union, the Arbitrator did not rely on Article 11.B(11) as an independent basis for her award. Rather, the Arbitrator found that the Agency's "violations [of law] . . . establish[ed] [a] violation of Article 11."[21] Moreover, this interpretation is supported by the plain text of Article 11.B(11) – which forbids the Agency from "tak[ing] any . . . personnel action if the taking of or failure to take such action *violates any law, rule, or regulation implementing, or directly concerning the merit[-]system principles*."[22]

Accordingly, we find that the Union has failed to establish that extraordinary circumstances exist to warrant reconsideration of *Customs I*.

V. Order

We deny the Union's motion for reconsideration.

[19] *Id.* at 719.
[20] *Id.* at 720.
[21] Award at 43.
[22] Opp'n, Ex. 2, Parties' Agreement at 28 (emphasis added).