70 FLRA No. 195

UNITED STATES
SMALL BUSINESS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3841
(Union)

0-AR-5260
(70 FLRA 525 (2018))

ORDER DENYING
MOTION FOR RECONSIDERATION

December 17, 2018

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

I. Statement of the Case

The Union requests that we reconsider our decision in *U.S. Small Business Administration* (*SBA*),[1] wherein the Authority found that the Union's request to arbitrate was untimely. We decline to reconsider that decision because the Union has failed to establish circumstances that are sufficiently extraordinary to warrant reconsideration.

As relevant here, Arbitrator Barton W. Bloom issued an award concluding that the Union's grievance was procedurally arbitrable, despite the Union failing to timely request a panel of arbitrators under the terms of the parties' master collective-bargaining agreement. The Agency filed exceptions to the award, and, in *SBA*, the Authority granted those exceptions and set aside the award.

In a motion for reconsideration (motion), the Union now argues that the Authority in *SBA* erred in its factual findings and conclusions of law. Because reconsideration of *SBA* is not warranted, we deny the motion.

[1] 70 FLRA 525 (2018) (Member DuBester concurring, in part, and dissenting, in part).

II. Background

The facts, summarized here, are set forth in greater detail in *SBA*. The parties' agreement sets forth the process for requesting a panel of arbitrators once a party has invoked arbitration. As relevant here, Article 40, Section 2 (Section 2) states that the invoking party must submit a Federal Mediation and Conciliation Service (FMCS) "form[,] . . . along with [its] portion of the required fee[,] to the opposing party" "[w]ithin fourteen . . . calendar days of invoking arbitration."[2] Under Article 40, Section 1 (Section 1), the parties must "strictly observe[]" that fourteen-day timeframe unless they "mutually agree[]" otherwise.[3]

Roughly *six months* after the Union invoked arbitration of a grievance, it began the process of requesting a panel of arbitrators by submitting the FMCS form and fee (the Union's submission), to the Agency. The Agency completed the form, wrote in "timeliness" and "arbitrability" on the "issue line," and submitted it to FMCS.[4] However, the Agency did not forward a completed copy of the form to the Union.

The Arbitrator found that the Union's nearly six-month-late submission was "[c]learly" untimely.[5] Nonetheless, he concluded that the grievance was procedurally arbitrable because (1) the Agency had waived the right to contest the timeliness of the Union's submission by failing to object to it until the arbitration hearing, and (2) even if the Agency had objected before the hearing, the parties' past practice had "modified" Section 2's fourteen-day timeframe.[6]

On exceptions to the award, the Agency argued that the Arbitrator was required, under Article 39, Section 6.a.1. (Section 6), to cancel the grievance once he determined that the Union's submission was untimely. Section 6 states that a failure "to adhere to the time limitations . . . at any step of the [grievance] procedure shall result in cancellation of the grievance."[7] The Authority concluded that the Arbitrator erred by failing to cancel the grievance once he found that the Union did not adhere to Section 2's fourteen-day timeframe.

Regarding the Arbitrator's waiver determination, the Authority found that it had no basis in the parties' agreement. The Authority also examined the applicability of the U.S. Court of Appeals for the Federal Circuit's decision in *Gunn v. Veterans*

[2] Award at 24 (quoting Collective-Bargaining Agreement (CBA) Art. 40, § 2).
[3] *Id.* (quoting CBA Art. 40, § 1).
[4] *SBA*, 70 FLRA at 525 (quoting Award at 34).
[5] *Id.* at 527 n.24 (quoting Award at 47).
[6] Award at 48.
[7] *Id.* at 20 (quoting CBA Art. 39, § 6.a.1.).

Administration Medical Center, Birmingham, Alabama (*Gunn*).[8] The Authority found *Gunn* was both inapplicable and distinguishable, and concluded that it did not support the waiver determination.

Based on the above, the Authority held that the Arbitrator's procedural-arbitrability determinations failed to draw their essence from the parties' agreement.[9]

Next, the Authority addressed the Arbitrator's alternative rationale – that even if the Agency had not waived its right to contest the timeliness of the Union's submission, the grievance was procedurally arbitrable based on the parties' past practice. The Authority held that arbitrators may not look beyond a collective-bargaining agreement, to extraneous considerations such as past practice, "to modify an agreement's clear and unambiguous terms."[10] The Authority observed that Sections 1 and 2 unambiguously required the Union to strictly observe the fourteen-day timeframe for requesting a panel of arbitrators. Because the Arbitrator inappropriately found that the agreement's unambiguous procedural requirements "ha[d] been modified by . . . past practice,"[11] the Authority concluded that the Arbitrator's alternative rationale did not provide a basis for the award. Accordingly, the Authority set aside the award.

Subsequently, the Union filed this motion for reconsideration of *SBA*.[12]

III. Analysis and Conclusion: The Union has failed to establish that there are extraordinary circumstances warranting reconsideration of *SBA*.

The Authority's Regulations permit a party to request reconsideration of an Authority decision.[13] However, the "party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action."[14]

The Union makes three arguments in support of its motion. First, it argues that the Authority in *SBA* erred by finding that Section 6 required the Arbitrator to cancel the grievance.[15] In *SBA*, the Agency argued that Section 6's cancellation requirement was applicable to the Union's untimely submission.[16] The Union did not argue then, as it does now, that its untimely submission was exempt from Section 6. Because 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 an award, we do not consider this argument.[17]

Second, the Union argues that the Authority erred by concluding that the Arbitrator's waiver determination was not founded in the parties' agreement and was not supported by *Gunn*.[18] However, the Union does not identify any provision in the parties' agreement that forms either an explicit or implicit basis for the Arbitrator's waiver determination.[19] And, as for *Gunn*, the Authority fully addressed that case in *SBA*, finding it inapplicable[20] and distinguishable.[21] Accordingly, these

[8] 892 F.2d 1036 (Fed. Cir. 1990).

[9] Consistent with the Authority's statutory mandate to review arbitral awards on grounds "similar to those applied by [f]ederal courts in private[-]sector labor-management relations," the Authority held that it would permit parties to directly challenge arbitrators' procedural-arbitrability determinations on essence grounds. *SBA*, 70 FLRA at 527 (quoting 5 U.S.C. § 7122(a)(2)).

[10] *Id.* at 528 (citing *Judsen Rubber Works, Inc. v. Mfg., Prod. & Serv. Workers Union, Local No. 24*, 889 F. Supp. 1057, 1064 (N.D. Ill. 1995)).

[11] Award at 48.

[12] In response, the Agency requested leave to file, and did file, an opposition to that motion. As it is the Authority's practice to grant requests to file oppositions to motions for reconsideration, we grant the Agency's request and consider its opposition. *See U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012).

[13] 5 C.F.R. § 2429.17.

[14] *E.g.*, *AFGE, Local 2238*, 70 FLRA 184, 184 (2017). There are only a limited number of situations in which extraordinary circumstances have been found to exist, such as 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. *E.g.*, *NTEU*, 66 FLRA 1030, 1031 (2012).

[15] Mot. at 13, 17.

[16] Exceptions at 26.

[17] *See, e.g.*, *U.S. Dep't of HHS, Food & Drug Admin.*, 60 FLRA 789, 791 (2005) (refusing to consider an argument made in a motion for reconsideration that could have been, but was not, made in the opposition to exceptions).

[18] Mot. at 20-23.

[19] *See SBA*, 70 FLRA at 527 (finding that nothing in the agreement provides for waiver "in the event that the Agency fails to give the Union advance notice of an argument that it plans to raise at arbitration").

[20] *Id.* at 528 n.32 (noting that, in *Gunn*, the court reviewed the arbitrator's arbitrability ruling under 5 U.S.C. § 7703(c) – not the Federal Service Labor-Management Relations Statute).

[21] *Id.* (finding that the court in *Gunn* "found that the union was prejudiced by the agency waiting until the arbitration hearing to raise a timeliness objection," whereas, here, "the Arbitrator did not find, and nothing in the record indicates, that the Union was prejudiced by the timing of the Agency's objection to the Union's untimely submission").

arguments do not establish extraordinary circumstances warranting reconsideration of *SBA*.[22]

Third, the Union alleges that the Authority erred by finding that the Arbitrator modified the terms of the parties' agreement based on the parties' past practice.[23] According to the Union, the Arbitrator merely "consider[ed]" the past practice in order to determine whether the parties had mutually agreed – under Section 1[24] – not to strictly observe Section 2's fourteen-day timeframe.[25] But, as noted above, the Arbitrator specifically concluded that the parties' agreement had been "*modified* by a . . . past practice."[26] Consequently, the Arbitrator effectively transformed Section 2's fourteen-day timeframe into a six-month timeframe.[27]

In addition, even if the Arbitrator concluded that the past practice evinced some mutual agreement between the parties not to "strictly observe[]" the fourteen-day timeframe,[28] he did not find that the parties ever – let alone "consistently"[29] – permitted submissions that were *six months past* the original deadline. Nor did he find that the parties had mutually agreed, under the particular circumstances of this case, to allow the Union's untimely submission. Because there is no evidence of a mutual agreement to allow such a late submission, the Authority in *SBA* properly concluded that the award failed to draw its essence from Sections 1 and 2.[30]

Based on the above, we find that the Union has failed meet its heavy burden of establishing extraordinary circumstances that would warrant reconsideration of *SBA*. Therefore, we deny the motion.

IV. Decision

We deny the Union's motion.

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[22] *See U.S. Dep't of the Army, Army Transp. Ctr., Fort Eustis, Va.*, 40 FLRA 945, 946 (1991) (denying motion for reconsideration where arguments presented in motion had been fully addressed in earlier decision).
[23] Mot. at 18-20.
[24] *See* CBA Art. 40, § 1 ("Unless *mutually agreed upon*, all time limits contained in this procedure shall be strictly observed." (emphasis added)).
[25] Mot. at 19.
[26] Award at 48 (emphasis added).
[27] *Id.* at 47-48 (permitting a six-month-late submission despite acknowledging that the Union submitted it "well beyond the time limit for doing so prescribed by . . . Section 2").
[28] CBA Art. 40, § 1.
[29] *U.S. DOL, Wash., D.C.*, 38 FLRA 899, 908 (1990) (a past practice must, among other things, "be consistently exercised over a significant period of time").
[30] *SBA*, 70 FLRA at 528 (finding that "the Arbitrator's procedural-arbitrability determinations evidence a manifest disregard of, and do not represent a plausible interpretation of, the parties' agreement"); *see also id.* at 527 (finding that the Arbitrator's determination that the grievance was procedurally arbitrable conflicted with the plain wording of Section 1 (citing *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (finding that an award evidenced a manifest disregard of an agreement where the arbitrator's interpretation was "not compatible with" the "plain wording" of that agreement))).

Member DuBester, dissenting:

For reasons set forth in my dissent in the underlying case, *U.S. Small Business Administration* (*SBA*),[1] it remains my opinion that the Authority made a number of errors that invalidate its decision. In *SBA*, the Authority erroneously rejected "the Arbitrator's finding that the Agency waived its right to object to the grievance's procedural-arbitrability, despite judicial precedent recognizing that a party may waive its contractual rights even if the parties' agreement does not expressly discuss waiver."[2] Also, "addressing a separate and independent ground for the award, the majority erroneously overturns long-standing Authority past-practice precedent, despite established arbitral practice and the predominant view of the courts holding that past practices may modify even the express terms of an agreement."[3] Further, it is my opinion that the Union's arguments seeking reconsideration of the Authority's decision raise extraordinary circumstances. I would therefore grant the Union's request for reconsideration.

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[1] 70 FLRA 525, 529 (2018) (Dissenting Opinion of Member DuBester).

[2] *Id.*

[3] *Id.* at 529-30.