

73 FLRA No. 20

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF FIELD LABOR LOCALS
(Union)

and

UNITED STATES
DEPARTMENT OF LABOR
DIVISION OF
FEDERAL EMPLOYEE'S COMPENSATION
(Agency)

0-NG-3460

ORDER GRANTING
MOTION FOR RECONSIDERATION

June 23, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members
(Member Kiko dissenting)

I. Statement of the Case

After the Union filed a petition for review (petition), the Authority's Office of Case Intake and Publication (CIP) ordered the Union to show cause, by a specific date, why the Authority should not dismiss the petition because one of the Union's proposals appeared to raise only a bargaining-obligation dispute rather than a negotiability dispute (show-cause order). The Union did not respond to the show-cause order. Accordingly, CIP dismissed the Union's petition.

In a motion for reconsideration (motion), the Union argues that the Authority should reconsider its

dismissal of the Union's entire petition. Because the Union establishes extraordinary circumstances warranting reconsideration, we grant the motion and direct the Agency to file a statement of position.

II. Background and Dismissal Order

The Union filed its petition on October 31, 2019, seeking a negotiability determination on seven proposals. On November 22, 2019, CIP issued an order directing the Union to correct a deficiency in the petition by providing the complete wording of its proposals. The Union filed a timely response correcting the deficiency.

On December 10, 2019, CIP then issued the show-cause order. The show-cause order stated that because the Agency had asserted that the Union's proposal 3 – "Position Description/Classification" – was covered by the parties' collective-bargaining agreement, that proposal concerned only a bargaining-obligation, rather than a negotiability, dispute.¹ The show-cause order directed the Union "to show cause why the Authority should not dismiss proposal 3 as raising only a bargaining-obligation dispute" by filing a response by December 24, 2020.² The show-cause order also advised that a failure to respond by that date "may result in the Authority dismissing the Union's petition."³

The Union did not respond to the show-cause order. On January 30, 2020, citing the Union's failure to respond to the show-cause order, the Authority issued an order dismissing the Union's petition (dismissal order). The Union filed its motion on February 14, 2020.

III. Analysis and Conclusion: The Union demonstrates extraordinary circumstances warranting reconsideration of the dismissal order.

The Union asks the Authority to reconsider its dismissal of the petition.⁴ The Authority has repeatedly held that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.⁵

¹ Show-Cause Order at 2 (citing Pet., Attach. 1, Agency's Written Allegation of Nonnegotiability at 7).

² *Id.*

³ *Id.*

⁴ 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.")

⁵ *AFGE, Nat'l VA Council #53*, 71 FLRA 741, 742 (2020) (then-Member DuBester concurring); *AFGE, Loc. 2338*, 71 FLRA 644, 644 (2020); *U.S. Dep't of the Air Force, Pope Air*

Force Base, N.C., 70 FLRA 421, 422 (2018) (citing *AFGE, Loc. 2419*, 70 FLRA 319, 319 (2017)); see also *AFGE, Loc. 1301*, 51 FLRA 1294, 1296-97 (1996) (the Authority has identified "a limited number of situations in which extraordinary circumstances have been found to exist, including situations where a moving party has established that the Authority erred in its remedial order, process, conclusions of law, factual finding or 'when the moving party has not been given an opportunity to address an issue raised sua sponte by the Authority in rendering its decision'" (quoting *U.S. Dep't of the Air Force, 375th Combat Support Grp., Scott Air Force Base, Ill.*, 50 FLRA 84, 87 (1995))).

The Union does not dispute that it did not respond to the show-cause order, and states that its “intent” was to “forego a challenge on proposal 3 as a bargaining obligation” because it understood that the “consequence” of not responding to the show-cause order “would be dismissal of proposal 3 *only*.”⁶ The Union claims that the “ambiguous and misleading language” of the show-cause order presents extraordinary circumstances warranting reconsideration of the dismissal of the other proposals in the petition.⁷

In support of its argument, the Union notes that the show-cause order directed the Union “to show cause why part of its petition should not be dismissed,” and stated that in cases where only a bargaining-obligation dispute exists, the Authority “will dismiss . . . the portion of the petition that presents only a bargaining-obligation dispute.”⁸ The Union also cites the order’s direction to the Union to “show cause why the Authority should not dismiss proposal 3 as raising only a bargaining-obligation dispute.”⁹

We find that the show-cause order could be misconstrued because of its discussion of bargaining-obligation disputes generally and proposal 3 specifically. Therefore, we agree that it was sufficiently ambiguous to warrant reconsideration of the order dismissing the Union’s entire petition. However, in its motion, the Union conceded that proposal 3 should be dismissed.¹⁰ Accordingly, we grant the Union’s motion, in part, as to proposals 1-2, and 4-7, and deny the Union’s motion as to proposal 3.

Because the petition was dismissed before the Agency filed a statement of position, we are unable to render a decision on the Union’s remaining proposals. Therefore, we direct the Agency to file a statement of position within thirty days of receipt of this decision.¹¹

IV. Decision

We grant the Union’s motion for reconsideration, in part, and deny it, in part.¹² We direct the Agency to file a statement of position within thirty days of receipt of this decision.

⁶ Mot. at 2.

⁷ *Id.*

⁸ *Id.* at 1 (quoting Show-Cause Order at 1).

⁹ *Id.* at 1-2 (quoting Show-Cause Order at 2).

¹⁰ *Id.* at 2.

¹¹ See 5 C.F.R. § 2424.24(b).

¹² Member Grundmann notes that she does not take the decision to grant this reconsideration request lightly. She agrees with the dissent’s concern that generally, timelines must be strictly followed. This matter could have otherwise been addressed if the

Union responded to the order as directed, if only to clarify that it was waiving its position regarding Proposal 3, but not the entire petition. However, the show-cause order was less-than-clear, and under these circumstances, Member Grundmann believes it fair to allow the Agency an opportunity to respond to the Union’s petition. The Authority is committed to making Authority Orders clear, concise and easy to understand for the entire labor-management relations community.

Member Kiko, dissenting:

As the majority recognizes, the “Authority has repeatedly held that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.”¹ But the majority grants reconsideration even though the Union has not satisfied its heavy burden.

The Union notes that the Authority ordered it to “show cause why the Authority should not dismiss proposal 3 . . . as raising only a bargaining-obligation dispute.”² On the basis of similar statements in the Authority’s order, the Union explains that it “understood that the consequence” of not responding to the order “would be the dismissal of proposal 3 *only*.”³ If the Union had bothered to respond to the order as directed, then the Union could have ensured that the Authority would address the remainder of the Union’s petition, regardless of the disposition of proposal 3. But the Union chose to ignore an Authority order by not responding at all.

The Union’s professed understanding was unreasonable because the order identified *only one* potential consequence for a failure to respond: “the Authority dismissing the Union’s *petition*.”⁴ By dismissing the petition, the Authority imposed the very consequence about which the Union was warned. Thus, the Union has no cause to complain that it was misled, and the Authority should not reward the Union for its choice to ignore an order.

Accordingly, I dissent.

¹ Majority at 2 (citing *AFGE, Nat’l VA Council #53*, 71 FLRA 741, 742 (2020) (then-Member DuBester concurring); *AFGE, Loc. 2338*, 71 FLRA 644, 644 (2020); *U.S. Dep’t of the Air Force, Pope Air Force Base, N.C.*, 70 FLRA 421, 422 (2018) (citing *AFGE, Loc. 2419*, 70 FLRA 319, 319 (2017))).

² Mot. for Recons. at 1-2 (quoting Order to Show Cause (Order) at 2).

³ *Id.* at 2.

⁴ Order at 2 (emphasis added).