73 FLRA No. 35

UNITED STATES
DEPARTMENT OF DEFENSE
DOMESTIC DEPENDENT ELEMENTARY AND
SECONDARY SCHOOLS
(Agency)

and

FEDERAL EDUCATION ASSOCIATION
STATESIDE REGION
(Union)

0-AR-5590
(72 FLRA 601 (2021))

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ORDER DENYING
MOTION FOR RECONSIDERATION

August 16, 2022

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

I. Statement of the Case

The Union requests that we reconsider our decision in *U.S. DOD, Domestic Dependent Elementary & Secondary Schools* (*DOD*).[1] In that case, the Authority found that an arbitration award was contrary to §§ 7119 and 7114 of the Federal Service Labor-Management Relations Statute (the Statute).[2] Accordingly, the Authority set aside the award.

As further discussed below, we find that the Union's arguments in its motion for reconsideration (motion) fail to establish extraordinary circumstances warranting reconsideration. Therefore, we deny the motion.

II. Background and Authority's Decision in *DOD*

The facts, summarized here, are set forth in greater detail in *DOD*.[3] The parties reached impasse on several issues while negotiating a successor master labor agreement (successor MLA). With the Federal Service Impasses Panel's (the Panel's) assistance, the parties voluntarily resolved the majority of their issues, including those related to Article 18, Section 1(a). The Panel then issued an order resolving the parties' remaining impasses, which, as relevant here, included Article 18, Section 3(f).[4]

Subsequently, the Agency requested that the Union sign what the Agency considered to be the completed successor MLA. The Union refused to sign the agreement. The Agency then submitted the successor MLA for Agency-head review.

The Union filed a grievance alleging that the Agency engaged in bad-faith bargaining by submitting an unexecuted agreement to the Agency head. After the Agency head approved the successor MLA, the Union filed a second grievance. This grievance alleged that the Panel lacked jurisdiction over Article 18, Section 3(f) and that the Agency had unlawfully repudiated the 2005 master labor agreement (2005 MLA). The grievances were consolidated, and the dispute proceeded to arbitration. While the grievances were pending, the Union withdrew from its earlier agreement over Article 18, Section 1(a).

The Arbitrator found that the Panel resolved the impasse over Article 18, Section 3(f), but that the provision was unenforceable because the Panel did not have jurisdiction. As a consequence, the Arbitrator concluded that: (1) the parties' ground-rules agreement permitted the Union to withdraw from Article 18, Section 1(a) because bargaining over Article 18 as a whole was incomplete; (2) the Agency violated the ground-rules agreement and the Statute by submitting an unsigned agreement for Agency-head review; and (3) the Agency's unilateral implementation of the successor MLA resulted in a repudiation of the 2005 MLA in violation of the ground-rules agreement and the Statute.

In *DOD*, the Authority observed that the Union's grievances—by directly contesting the Panel's order regarding Article 18, Section 3(f)—"circumvent[ed] the procedure set [forth] in § 7119" that permits a party to challenge a Panel order only once that party has been charged with a unfair labor practice (ULP) for failing to comply with the Panel order.[5] The Authority found that because the grievances were inconsistent with § 7119, the Statute precluded the Arbitrator from reviewing and setting aside the Panel's order. Accordingly, the Authority concluded that the award was contrary to § 7119.

[1] 72 FLRA 601 (2021) (Chairman DuBester concurring).
[2] 5 U.S.C. §§ 7114, 7119.
[3] 72 FLRA at 601-05.
[4] *In re DOD, Educ. Activity, Domestic Dependent Elementary & Secondary Schs.*, 18 FSIP 073 (2018) (Panel Order).
[5] 72 FLRA at 603.

Next, the Authority found that no further action was required to finalize the successor MLA as of the date the Panel issued its order. In this connection, Article 18, Section 3(f) was resolved by the Panel, and the Arbitrator's conclusion that the Union had properly withdrawn from Article 18, Section 1(a) hinged on the erroneous conclusion that Article 18, Section 3(f) was unresolved. Moreover, the Authority noted that the Arbitrator did not find that there were any other unresolved bargaining issues. As a result, the Authority concluded the Agency properly conducted Agency-head review within thirty days of the Panel's order as required by § 7114, and the Agency's actions did not constitute a repudiation of the 2005 MLA. Accordingly, the Authority determined that the Arbitrator's contrary conclusions conflicted with § 7114.

Having found the award inconsistent with §§ 7119 and 7114 of the Statute, the Authority set aside the award.

On December 28, 2021, the Union filed this motion.

III. Analysis and Conclusion: We deny the Union's motion for reconsideration.

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to move for reconsideration of an Authority decision.[6] 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.[7] 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.[8]

First, the Union argues that the following assertion from the Authority in *DOD* constituted a change in law: "Only a party that fails or refuses to comply with a Panel order, and is consequently charged with a ULP, may then challenge the Panel's order."[9] However, the Authority and the courts have repeatedly held that Panel orders are not subject to direct review, and a party must decline to abide by the Panel order and wait until *after* it is charged with a ULP to contest such an order.[10] In *DOD*, the Authority cited several cases for this proposition, including one dating back to 1979.[11] Given that no change in law occurred, reconsideration is not appropriate on this basis.

The Union also generally objects to the Panel-review procedure, calling the lack of direct appeal "irrational"[12] and asserting that there is "no incentive" for an agency to file a ULP charge that would "provide a union with an opportunity to challenge the Panel's decision."[13] We note that the scheme of review of Panel orders is statutory in nature,[14] and, thus, any modification to it must come from Congress, not the Authority.[15] The Union's discontent with the statutory review process of Panel orders does not warrant reconsideration of the Authority's decision in *DOD*. Similarly, contrary to the Union's assertion, agencies *have* filed ULP charges against unions for refusing to comply with Panel orders[16]; the Agency's choice not to file such a charge here did not permit the Union to circumvent the Statute.

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[6] 5 C.F.R. § 2429.17.

[7] *AFGE, Loc. 2338*, 71 FLRA 644, 644 (2020).

[8] *U.S. Small Bus. Admin.*, 70 FLRA 988, 989 n.14 (2018) (then-Member DuBester dissenting).

[9] Mot. at 1 (quoting *DOD*, 72 FLRA at 603).

[10] *U.S. Army Corps of Eng'rs, Kan. City Dist., Kan. City, Mo.*, 16 FLRA 456, 459 (1984) (*Army Corps of Eng'rs*) ("[R]eview of a final Panel . . . [o]rder may be obtained through [ULP] procedures initiated by a party alleging noncompliance with a Panel . . . [o]rder . . . ."); *State of N.Y., Div. of Mil. & Naval Affs.*, 2 FLRA 185, 188 (1979) (*State of N.Y.*) ("It is clear, therefore, from the literal language of [§] 7116 of the Statute and the intent of Congress as expressed in the related legislative history, that under the Statute, Authority review of a final Panel Decision and Order . . . may be sought by the party objecting to that order *only after the filing of* [*ULP*] *charges by the other party*, based on noncompliance with the Panel's Decision and Order . . . ." (emphasis added)); *see also Council of Prison Locs. v. Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984) (*Brewer*) (remarking that Panel orders are "not appealable[,] even to the Authority").

[11] 72 FLRA at 603 n.31 (citing *State of N.Y.*, 2 FLRA at 188).

[12] Mot. at 4.

[13] *Id.* at 3.

[14] 5 U.S.C. §§ 7116, 7119.

[15] *See Brewer*, 735 F.2d at 1502 n.9 (noting, in similar context, any "shortcomings of the [ULP] proceeding as the exclusive means for assuring judicial review of Panel orders" would need to be addressed by Congress).

[16] *See AFGE, AFL-CIO, Loc. 1815*, 69 FLRA 309, 314 (2016) (agency filed a ULP charge after union refused to comply with a Panel order resolving the only remaining disputed article); *see also AFGE, AFL-CIO, Loc. 3732*, 16 FLRA 318 (1984) (*Loc. 3732*).

Next, the Union alleges that it did not have an opportunity to brief why it could "collaterally attack[]" "the legality of [the] Panel's decision."[17] In support, the Union cites several Authority decisions.[18] However, the Union's grievances constitute a *direct*, as opposed to a collateral, attack on the Panel's decision.[19] Thus, the decisions that the Union cites exemplify a procedure for contesting a Panel order that was not followed here. Accordingly, this allegation is insufficient to establish extraordinary circumstances.[20]

The Union also alleges that intervening litigation and court decisions have addressed whether a union may appeal a Panel order by bringing a ULP charge or grievance.[21] Specifically, the Union cites the Federal Labor Relations Authority Office of the Solicitor's (FLRA's) briefs in federal court litigation[22] and federal district court decisions as evidence that a union is "not relegated to waiting for an agency to file a charge against it."[23] But none of the briefs or cases the Union cites state that a party can directly appeal a Panel order.[24] Additionally, the FLRA's briefs are litigation documents that do not constitute an intervening court decision. Therefore, this argument fails to establish extraordinary circumstances warranting reconsideration.[25]

In addition, the Union contends the Authority misread the award as finding that the only unresolved bargaining issues were Article 18, Sections 1(a) and 3(f).[26] Specifically, the Union argues that Article 22, Section 3

[17] Mot. at 1.

[18] *Id.* at 2, 7 (citing *DOD, Domestic Dependent Elementary & Secondary Schs., Fort Buchanan, P.R.*, 71 FLRA 127 (2019) (then-Member DuBester dissenting), *vacated in part*, 72 FLRA 414 (2021) (Chairman DuBester concurring; Member Abbott dissenting); *NTEU*, 61 FLRA 729 (2006); *Headquarters, Nat'l Guard Bureau, Wash., D.C., Nev. Air Nat'l Guard, Reno, Nev.*, 54 FLRA 316 (1998); *U.S. Dep't of Energy, Wash., D.C.*, 51 FLRA 124 (1995); *Loc. 3732*, 16 FLRA at 318).

[19] Opp'n, Ex. 2, Union Post-Hr'g Br. (Union Post-Hr'g Br.) at 29 ("[I]t is [the Union's] position that [the Panel] lacked jurisdiction over [Article 18, Section 3(f)]."); *id.* at 39 ("[The Panel e]xceeded its [a]uthority [b]y [a]dopting the Agency's [p]roposed Article 18, Section 3(f) . . . ."); *see also* Exceptions, Attach. 2, Tr. at 5 ("The [Union] believes that the [P]anel quite clearly exceeded its authority in the December 2018 order involving an impasse that occurred during bargaining."); *id.* at 27 ("[T]he Union did not believe that the [P]anel had jurisdiction over [Article 18, Section 3(f)] . . . .").

[20] *See Indep. Union of Pension Emps. for Democracy & Just.*, 72 FLRA 571, 573 (2021) (*IUPEDJ*) (Chairman DuBester concurring) (denying motion for reconsideration, in part, because the legal error argument failed to establish that the Authority erred in its application of Authority and federal-court precedent); *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr.*, 72 FLRA 319, 320-21 (2021) (Chairman DuBester dissenting) (denying motion for reconsideration that failed to explain how the Authority erred in applying precedent to find the grievance barred under § 7121(d)).

[21] Mot. at 2-8.

[22] *Id.* at 5-7. As the Authority has consistently found it appropriate to take official notice of other FLRA proceedings, we take official notice of the FLRA's briefs. *See* 5 C.F.R. § 2429.5 ("The Authority may . . . take official notice of such matters as would be proper."); *NTEU*, 70 FLRA 57, 58 (2016) (taking official notice of a pending ULP case); *cf. U.S. DOJ, Exec. Off. for Immigr. Rev.*, 72 FLRA 622, 627 n.54 (2022) (Member Kiko concurring; Chairman DuBester dissenting) (taking official notice of a consolidated ULP complaint).

[23] Mot. at 4 (*citing Ass'n of Admin. L. Judges v. Fed. Serv. Impasses Panel*, No. 20-1026 (ABJ), 2021 WL 1999547 (D.D.C. May 19, 2021) (*AALJ*); *Nat'l VA Council v. Fed. Serv. Impasses Panel*, 552 F. Supp. 3d 21 (D.D.C. 2021) (*VA Council*)).

[24] The briefs provided potential options for parties that seek to challenge a Panel order but emphasize the highly fact-dependent nature of ULP proceedings. *See* Defendants' & Intervenor-Defendant's Motion to Dismiss for Lack of Jurisdiction at 22, *Nat'l Weather Serv. Emps. Org. v. Fed. Serv. Impasses Panel*, No. 1:20-CV-01563-TJK (D.D.C. Sept. 10, 2020) ("The [u]nion *may* have affirmative options for bringing a[ULP] charge . . . . Those options *may depend* on how the parties' *ongoing negotiations* and finalization of a [collective-bargaining agreement] evolve." (emphasis added)); Defendants' & Intervenor-Defendant's Reply in Support of Motion to Dismiss for Lack of Jurisdiction at 17, *Nat'l Weather Serv. Emps. Org. v. Fed. Serv. Impasses Panel*, No. 1:20-CV-01563-TJK (D.D.C. Oct. 23, 2020) ("Because grounds for bringing a[ULP] charge *are highly fact-dependent*, it would be impossible at this stage to identify with certainty the range of options the [u]nion may have available to it . . . ." (emphasis added)); Defendants' Motion to Dismiss for Lack of Jurisdiction at 21-22, *NLRB Pro. Ass'n v. Fed. Serv. Impasses Panel*, No. 1:20-CV-00888-ABJ (D.D.C. May 8, 2020) ("[T]here are several events that *may* trigger a[n ULP] proceeding . . . . the [u]nion *could have* provoked the [agency] to file a[n ULP] charge or grievance . . . by refusing [to] participate in Panel proceedings . . . ." (emphasis added)). Similarly, the district court decisions the Union cites made general statements about how parties *could* seek review of the Panel decisions, and did not find that parties can directly appeal a Panel order by filing a ULP grievance. *See AALJ*, 2021 WL 1999547, at *6 (noting the Statute "provide[s] for review of Panel decisions through the [ULP] procedures, and that process eventually leads to the [D.C.] Court of Appeals"); *VA Council*, 552 F. Supp. 3d at 29 ("[B]y provoking [a ULP] proceeding, the Union may ensure that the Panel's decision is reviewable, first before the Authority, then in court, in [a ULP] proceeding." (internal citations omitted)). To the extent that these court decisions suggests that a party could directly contest a Panel order by filing a ULP grievance, we reiterate that Panel orders are not subject to direct review, and review can only be obtained through ULP procedures initiated by a party alleging noncompliance with a Panel order. *See Brewer*, 735 F.2d at 1500 (noting the legislative history of the Statute stated that "Final action of the Panel . . . is not subject to appeal, and failure to comply with any final action ordered by the Panel constitutes [a ULP]"); *see also AFGE, AFL-CIO v. FLRA*, 778 F.2d 850, 854 (D.C. Cir. 1985); *Army Corps of Eng'rs*, 16 FLRA at 458-59.

[25] *See IUPEDJ*, 72 FLRA at 573.

[26] Mot. at 8-9.

was also unresolved, and the Union asserts that the parties did not resolve Article 22 until after the Panel issued its order.[27] But the Arbitrator did not adopt the Union's argument that Article 22 was an unresolved bargaining issue.[28] In addition, as determined in *DOD*, the Union had an opportunity to file exceptions to challenge the award, but instead argued in its opposition that Article 22 was unresolved.[29] Therefore, the Union's assertion in its opposition was an untimely exception.[30] To the extent the Union challenges that conclusion from *DOD*, it fails to demonstrate that the Authority erred. Thus, the Union's argument fails to establish extraordinary circumstances warranting reconsideration.[31]

Based on the above, we find the Union has failed to meet the heavy burden of establishing extraordinary circumstances that would warrant reconsideration of *DOD*. Therefore, we deny the Union's motion.[32]

IV. Decision

We deny the Union's motion for reconsideration.

[27] *Id.*

[28] *See* Union's Post-Hr'g Br. at 51 ("The parties did meet telephonically on January 23, 2019 and resolved a number of issues including reaching a new tentative agreement on Article 22, [S]ection 3."). Moreover, as stated in *DOD*, the Arbitrator did not mention Article 22, Section 3 in the award. 72 FLRA at 604.

[29] 72 FLRA at 604 n.45.

[30] *See id.*; 5 C.F.R. § 2425.2(b) ("The time limit for filing an exception to an arbitration award is thirty (30) days after the date of service of the award.").

[31] *See IUPEDJ*, 72 FLRA at 572 (denying the factual-error argument as failing to establish extraordinary circumstances warranting reconsideration).

[32] Member Grundmann notes, and the Chairman's concurrence acknowledges, the majority decision does not limit the methods by which a union can challenge matters pertaining to an order by the Panel and should not be viewed as such. This case addresses only the statutory framework for "review of Panel orders" and does not pertain to the types of ULPs described by the concurrence.

Chairman DuBester, concurring:

I agree with the majority's decision to deny the Union's motion for reconsideration of the Authority's decision in *U.S. DOD, Domestic Dependent Elementary & Secondary Schools* (*DOD*).[1] However, I am concerned that the majority's decision could be misconstrued to improperly limit the methods by which a union can challenge matters pertaining to an order by the Federal Service Impasses Panel (Panel).

In *DOD*, the majority vacated the award in part because the Union had "circumvent[ed] the procedure set [forth] in § 7119."[2] And as part of its analysis on this point, the majority concluded that "[o]nly a party that fails or refuses to comply with a Panel order, and is consequently charged with [an unfair labor practice], may then challenge the Panel's order."[3] The majority reiterates this conclusion in today's decision.[4] But as the Union points out in its motion for reconsideration, a union may challenge matters pertaining to a Panel decision by bringing an unfair labor practice charge alleging that an agency action related to the Panel proceeding constituted an unfair labor practice.

For instance, it is well-established that a party commits an unfair labor practice by bargaining to impasse over permissive subjects.[5] Additionally, an agency could be found liable for failing or refusing to bargain in good faith over matters left unresolved by a Panel decision.[6] Indeed, in its motion for reconsideration, the Union argues that it is entitled to relief precisely because there were unresolved bargaining issues at the time the Agency sought Agency-head review.[7]

However, because I agree with the majority that the Union has failed to demonstrate that the Authority erred in rejecting this argument in *DOD*, and has otherwise failed to establish extraordinary circumstances warranting reconsideration, I concur with the decision to deny the Union's motion.

[1] 72 FLRA 601 (2021) (Chairman DuBester concurring).

[2] *Id.* at 603.

[3] *Id.*

[4] Majority at 3-4.

[5] *AFGE, Loc. 3937*, 64 FLRA 17, 21 (2009) ("It is well established that insisting to impasse on a permissive subject of bargaining violates the Statute." (citing *U.S. Food & Drug Admin., Ne. & Mid-Atl. Regions*, 53 FLRA 1269, 1273-74 (1998); *SPORT Air Traffic Controllers Org. (SATCO)*, 52 FLRA 339, 347 (1996); *USDA, Food Safety & Inspection Serv.*, 22 FLRA 586, 587-88 (1986); *FDIC, Headquarters*, 18 FLRA 768, 771-72 (1985))).

[6] In this regard, I note that bargaining is not complete if the Panel does not resolve all issues and the parties have not reached agreement on all issues within the duty to bargain. *See, e.g.*, *NTEU*, 39 FLRA 848, 849 (1991) (where parties engaged in further, substantive negotiations following issuance of a Panel-directed interest arbitrator's decision, bargaining was not complete and therefore issuance of the arbitrator's decision did not constitute the date on which the agreement was executed for agency-head review purposes); *Dep't of HHS, Health Care Fin. Admin.*, 39 FLRA 120, 131 (1991) (citations omitted) (unilateral implementation of a policy while matter was before the Panel was an unfair labor practice).

[7] Union's Mot. for Reconsideration at 8-9.