

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, DLA COUNCIL OF AFGE LOCALS

Case No. 19 FSIP 036

DECISION AND ORDER DENYING MOTION FOR RECONSIDERATION

BACKGROUND

The U.S. Department of Defense, Defense Logistics Agency (Agency or Management) filed a Motion for Reconsideration (Motion) of the Panel's Decision and Order in *U.S. Dep't of Defense, Defense Logistics Agency and AFGE, Defense Logistics Agency Council of AFGE Locals, 18 FSIP 080 (2019) (DLA)*. The full background is set forth in the Decision and Order, but in brief, the American Federation of Government Employees, Defense Logistics Agency Council of AFGE Locals (Union) filed a request for assistance with the Panel concerning the Agency's proposed implementation of DoD Joint Travel Regulations (JTR). The Panel asserted jurisdiction over that dispute and ordered the parties to provide written submissions.

As described in the Decision and Order, after the parties presented their initial submissions it became apparent that the Union had decided to argue, for the first time, that the parties' collective bargaining agreement (CBA) foreclosed bargaining over the implementation of the JTR. In this regard, the Union took the position that the CBA required no bargaining during the life of the agreement when a past practice existed. And, it was the position of the Union that a past practice existed that conflicted with the requirements of the JTR. In response to this argument, the Panel asked the parties to address the impact of this argument on the Panel's ability to retain jurisdiction over this dispute. The parties maintained it was appropriate for the Panel to maintain jurisdiction, but they differed over whether the CBA foreclosed bargaining. The Union wanted the Panel to adopt the Union's interpretation of the contract, and the Agency did not.

After reviewing the parties' arguments, the Panel concluded that it was appropriate to reverse its original assertion of jurisdiction and dismiss the request for assistance. In this regard, the Panel determined that the parties' arguments required an analysis of the parties' conflicting arguments concerning their CBA that the Panel lacked the authority to provide. The Panel ordered no further action.

ARGUMENTS AND ANALYSIS

Relying upon Federal Labor Relations Authority (FLRA) regulation 5 C.F.R. §2429.17, the Agency argues that the Panel should reconsider its prior decision for three different reasons. This regulation supports reconsideration for "extraordinary circumstances" where: (1) there has been an intervening change in law; (2) the FLRA did not receive "evidence, information, or issues critical" to the outcome; (3) the FLRA erred in its "remedial order, process, conclusion of law, or factual finding," or; (4) the moving party did not have an opportunity to raise a new issue discussed by the FLRA.

Based on the foregoing, the Agency raises three arguments in support of its contention that reconsideration is warranted. However, as an initial matter, the Agency's reliance upon §2429.17 is questionable. The plain language of the regulation states as follows:

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. (emphasis added).

The emphasized language demonstrates that regulation applies *only* to proceedings before the FLRA. The Agency provided no legal authority to establish that it applies to Panel proceedings. Instead, the Agency merely states that it "understands that the FSIP has adopted the same standard." The Panel therefore clarifies that §2429.17 does not apply to Panel proceedings. Indeed, the plain language of it forbids such an outcome. Accordingly, parties that appear before the Panel should have no expectation that they may seek reconsideration of Panel decisions as a matter of course. Assuming the regulation does somehow apply, however, reconsideration is not warranted under it.¹

A. The Panel Made an Erroneous Factual Finding

I. Agency Argument

The Agency first argues that the Panel made an erroneous factual finding when it stated that the Agency argued to the Panel that the CBA "requires only that the Agency provide notice and an opportunity to bargain prior to implementing a change in past

¹ The Union submitted a reply to the Motion in which the Union argues the Panel correctly declined jurisdiction in *DLA*.

practice.”² In making this statement, Panel erroneously concluded that the Agency asserted that prior adherence to the JTR constituted a past practice. The Agency actually argued to the Panel that it needed to provide only notice and an opportunity to bargain *in response* to the Union’s claim that a past practice existed. Even if there was a past practice, the Agency was required to do no more than provide the Union with notice and an opportunity to bargain, which it did. Management further contends that the Panel should have relied upon the holding of *Commander, Carswell Air Force Base, Texas and AFGE, Local 1364*, 31 FLRA 620 (1988) (*Carswell*) and applied existing FLRA precedent on the topic of past practices to resolve the parties’ dispute on this topic. Thus, in misstating the Agency’s position and failing to apply *Carswell*, the Agency contends the Panel erred.

II. Conclusion

The Panel rejects Management’s argument. The Agency’s argument is based on an assertion that the Panel concluded that a past practice existed in which the Agency was prohibited from implementing JTR changes until the completion of negotiations. The Panel made no such finding. To the contrary, the Panel noted that the very existence of a past practice was a controversy that the Panel had no authority to address which added further wrinkles to the Panel’s ability to retain jurisdiction.³ The Agency’s cited portion of the Panel’s Decision and Order is nothing more than a summary of one of Management’s argument in response to the Union’s claim that a past practice existed. The Panel took no position regarding whether a past practice actually existed.

The Agency also argues that the Panel should have relied upon *Carswell* and examined FLRA precedent on the existence of past practices. In *Carswell*, the FLRA held that the Panel has no authority to resolve statutory duty to bargain issues. However, it may apply existing precedent “to address a substantively identical proposal” that was “previously addressed by” the FLRA.⁴ That is, the Panel may review precedent to ascertain whether the language of proposals have been found within the duty to bargain under prior decisions involving “substantively identical” proposals. The Agency is not asking the Panel to review the language of proposals, however. Rather, it is seeking a determination from the Panel concerning the existence, or lack thereof, of a past practice under the circumstances of this case. Under FLRA precedent, it is the role of the FLRA, ALJs, and arbitrators to assess whether a past practice exists by examining all the facts and evidence in the record.⁵ This point was made clear to the

² Motion at 3 (quoting *DLA* at 6).

³ See *DLA* at 8 n.5 (citations omitted).

⁴ *Carswell*, 31 FLRA at 624-25.

⁵ See, e.g., *Passport Services and NFFE, Local 1998*, 70 FLRA 918, 920 (2018).

parties in the underlying Decision and Order.⁶ The Agency offered no instance in which the Panel has previously made a conclusion concerning the existence of a past practice. The Agency's reliance on *Carswell*, therefore, is misplaced.

B. The Panel Erred in its Remedial Order

I. Agency Argument

The Agency next argues that by "ordering the Agency to delay implementing the changes to the JTR until negotiations for a new CBA have been completed," the Panel has hamstrung the Agency's efforts to reduce operational costs.⁷ The Panel acknowledged that the parties' CBA will expire in May 2019. This fact, coupled with the Union's claims concerning the JTR, "should have prompted" the Panel to issue a decision on the merits. The Agency maintains the Agency provided the Union with notice, the parties "went to impasse," and both parties "requested that the FSIP issue a decision on the merits." Accordingly, the Panel should have issued a decision "consistent with [the Agency's] reasoning on the merits of the issues" and adopted the Agency's proposal. Doing so, the Agency maintains, would have eliminated any duty-to-bargain claim. Delaying a decision on the merits is not consistent with principles of effective and efficient government.

II. Conclusion

The Panel denies the Agency's argument. Management's argument is premised on a conclusion that the Panel somehow ordered the Agency to retain the status quo until the parties completed CBA negotiations. This premise is inaccurate.

As the Agency notes, the Panel did indeed state in its Decision and Order that the parties' CBA "expires in May 2019."⁸ However, this recitation was in the portion of the Panel's decision entitled "*Background*." That is, the Panel was doing nothing more than setting forth the factual background of the dispute. Aside from the foregoing language, the Agency cites to no other language or portion of the Panel's Decision and Order in support of its claim that the Panel imposed any sort of action (or inaction) upon the Agency. Indeed, in the section entitled "*Order*," the Panel stated only as follows:

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby dismisses jurisdiction over this dispute.⁹

⁶ See *DLA* at 8 n.5 (citations omitted).

⁷ Motion at 4.

⁸ *DLA* at 1.

⁹ *Id.* at 9.

From the above language, which, again is in the *Order* section, it should have been apparent that the Panel did nothing more than dismiss jurisdiction over this dispute. The Panel imposed no action or obligation upon either party. It offered no interpretation of the Agency's obligations under the CBA; indeed, the Decision and Order is replete with references to the Panel's inability to take action pursuant to the parties' contract. The Agency's argument, which is based on an erroneous interpretation of the Decision and Order, is misplaced.

Additionally, as part of its argument, the Agency appears to take the position that the Panel should have imposed Management's proposals because the parties agreed to bargain and requested a decision on the "merits." However, as described throughout the Decision and Order, the Union's request for a decision on the "merits" was actually a request for an interpretation of the parties' CBA. The Panel had no authority to interpret that agreement.

C. The Union Waived Further Bargaining Rights

I. Agency Argument

The Agency next argues that, because the Union requested a "decision on the merits" the Union "waived its right to engage in further bargaining on implementation of changes to the JTR."¹⁰ Management contends that the FLRA has held that a waiver of a party's bargaining rights may be found when a topic has been "fully discussed and consciously explored during negotiations and the union [has] consciously yielded or otherwise clearly and unmistakably waived its interest in the matter."¹¹ The Union "extensively bargained" this matter and, in doing so, waived further bargaining in this matter. Thus, the Agency maintains "no further bargaining" is required.

II. Conclusion

The Agency's argument is rejected. The primary thrust of the Agency's argument is that the Panel should have applied the holding of *AFGE* and concluded that the Union has waived all bargaining rights. The Agency's reliance upon *AFGE* in this forum is misplaced. In *AFGE*, the FLRA reviewed an Administrative Law Judge's factual and legal conclusions to ascertain whether a union waived its statutory right to bargain by not timely seeking the assistance of the Panel.¹² The FLRA did not, however, speak to the Panel's ability to engage in a similar analysis. Indeed, as already discussed, the Panel has no ability to resolve legal disputes involving the parties' bargaining

¹⁰ Motion at 5.

¹¹ *Id.* (quoting *Headquarters, 127th Technical Fighter Wing, Michigan Air National Guard, Selfridge Air National Guard Base and AFGE, Local 2077*, 46 FLRA 582 (1992) (*AFGE*)).

¹² *AFGE*, 46 FLRA at 585-86.

obligations. Thus, to the extent that the Agency is requesting that the Panel apply this precedent, its argument is misplaced.

In addition, the Agency's argument is also premised upon the erroneous claim that the Union previously sought a decision on the "merits." But, as already discussed, they actually sought an impermissible contract interpretation. Additionally, while not clear, the Agency's argument that the Union "waived" its right to further bargaining appears to be conditioned on the idea that the Panel ordered the maintenance of the status quo pending completion of additional bargaining over a successor contract. But, as discussed above, the Panel ordered no such action. Finally, we note that the Agency does not cite any of the four categories for reconsideration listed in 5 C.F.R. §2429.17. Nor is it clear from a review of the Agency's argument that it actually falls within one of these categories.

CONCLUSION

The Agency's Motion for Reconsideration is denied. The Panel takes this opportunity to clarify that it does not, and has not, ordered either party to take any action pursuant to the CBA. Similarly, the Panel has *not* offered any interpretation of the same document. The parties are free to exercise whatever rights they believe arises from applicable law.



Mark A. Carter
FSIP Chairman

May 30, 2019
Washington, D.C.