FEDERAL LABOR RELATIONS AUTHORITY
1400 K Street, NW, Suite 200
Washington, DC 20424-0001

National Council of HUD Locals 222, AFGE, AFL-CIO Union,	
v.	Case No.: O-AR-4586
	Fair and Equitable Grievance
U.S. Department of Housing and Urban Development, Agency.	June 22, 2018

TABLE OF CONTENTS

FEDERAL LABOR RELATIONS AUTHORITY
1400 K Street, NW, Suite 200
Washington, DC 20424-0001

National Council of HUD Locals 222, AFGE, AFL-CIO, Union,	)	Case No.: O-AR-4586
	)	Fair & Equitable Grievance
v.	)	
U.S. Department of Housing & Urban Development, Agency.	)	Date: June 22, 2018

AGENCY'S OPPOSITION TO UNION'S MOTION FOR RECONSIDERATION

On June 22, 2018, the U.S. Department of Housing and Urban Development (HUD or Agency) respectfully moved the Federal Labor Relations Authority's (FLRA or Authority), pursuant to 5 C.F.R. § 2429.26 for leave to file an Opposition to the Union's June 7, 2018 Motion for Reconsideration concerning the Authority's May 24, 2018 Decision (the Decision) that vacated and set aside all previous orders from Arbitrator McKissick and previous Authority decisions in the case.[1] The Agency now files its Opposition. As will be shown below, the Union's Motion for Reconsideration is merely a disagreement with the Authority's Decision that found that the Arbitrator's awards and orders and the previous FLRA decisions upholding them were not final or binding because the Arbitrator always lacked jurisdiction to hear the case under § 7121(c)(5).

[1] *See U.S. Dept. of HUD v. AFGE Locals 222,* 70 FLRA 605 (2018).

STANDARD OF REVIEW

The Authority has held that a party seeking reconsideration must establish that extraordinary circumstances exist to warrant a party's reconsideration request. *See U.S. Dept. of Health and Human Serv.,* 60 FLRA 789 (2005). Further, a "party seeking reconsideration under § 2429.17 bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action." *United States Dep't of Homeland Sec.*, 66 F.L.R.A. 1042, 1043 (2012) (citing to *U.S. Dep't of the Air Force, 375th Combat Support Grp., Scott Air Force Base, Ill.,* 50 FLRA 84, 85 (1995)).

5 CFR § 2429.17 requires that a motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by appropriate citations. "Attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances." *United States Dep't of Homeland Sec.,* 66 F.L.R.A. at 1043. Additionally, the moving party's mere disagreement with the conclusion reached by the Authority is insufficient to satisfy the extraordinary circumstances requirement. *See U.S. Department of Defense Logistics Agency Defense Distribution,* 48 FLRA 543, 545 (1993) (moving party merely disagreed with conclusions reached by Authority in case and sought to relitigate merits of the case).

Instances where extraordinary circumstances have been identified include: (1) where 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; and (3) the Authority erred in its remedial order process, conclusion of law, or factual finding. *See U.S. Dept. of the Air Force, 375th*

Combat Support Grp., Scott AFB, Ill., 50 FLRA 84 (1995). However, the "Authority has found that errors in its conclusions of law or factual findings constitute extraordinary circumstances that may justify reconsideration." (Emphasis added.) *United States Dep't of Homeland Sec.*, supra. Thus, a finding of a legal or factual error does not automatically or necessarily constitute extraordinary circumstances. *See id.*

In the instant matter, the Union contends that extraordinary circumstances exist that warrant reconsideration of the Authority's May 24, 2018 Decision; however, as will be shown below by addressing each of the Union's arguments, the Union merely disagrees with the Authority's ruling and has attempted to relitigate it. Despite the lack of clearly organized or delineated arguments in the Union's motion, the Agency will attempt to sequentially address the Union's arguments contained on pages 11 to 20 of its motion.

Finally, the Agency notes for the record that because no unfair labor practice (ULP) was part of the Authority's Decision, should the Authority deny the Union's current Motion for Reconsideration, it is the Agency's position that the Union has no right to appeal to the D.C. Circuit Court of Appeal.[2]

---

[2] *See Begay v. Dep't of the Interior*, 145 F.3d 1313, 1316 (Fed. Cir. 1998) (ULP was not "an explicit or a necessary ground" addressed in the Authority decision, as grievance did not allege ULP, grievant did not otherwise file ULP charge with Authority, and the Authority did not address any ULPs in its decision); *AFGE, Local 916 v. FLRA*, 951 F.2d 276, 278-79 (10th Cir. 1991) (to support judicial review, a ULP "must be an actual part, not just a foregone alternative characterization or a potential consequence, of the underlying controversy," and review was not appropriate where the arbitrator and Authority did not consider, "explicitly or impliedly," whether a statutory ULP had been committed); *Tonetti v. FLRA*, 776 F.2d 929, 931 (11th Cir. 1985) (ULP was not "a necessary ground" for Authority's decision where there was no assertion that agency violated § 7116, and the Authority's decision made no reference to any such violation).

ARGUMENT

1. **The Union's contention that Summary 10 did not contain any orders or requirements that could give rise to the Decision is not an extraordinary circumstance. Rather, it is a simple disagreement with the Authority's ruling and does not establish a mistake or error of law or fact.**

The Union's Motion for Reconsideration, section "A," pp. 12-14, contain various arguments concerning the Agency's Exceptions to Summary Order 10.First, it is noted that "Summary 10 does not contain any specific orders or requirements which could possibly result in the actions taken by the Authority in its Decision." Motion for Reconsideration, p. 12. As noted in the Decision, the Authority was required to address the statutory classification/jurisdictional issue on a *sua sponte* basis. Decision, p. 607. The Authority found that the grievance concerned classification and therefore that the Arbitrator lacked jurisdiction to hear the grievance under § 7121(c)(5). *Id.* at 608. Given that the Authority properly found that it was required to raise jurisdictional issues, such as whether the grievance involves prohibited classification under § 7121(c)(5), *sua sponte* pursuant to FLRA precedent,[3] whether "Summary 10 contained any specific orders or requirements"[4] related to, in the Union's view, classification is inconsequential. Thus, the Union's contention is mere disagreement with the Authority's findings and does not establish extraordinary circumstances under 5 C.F.R. § 2429.17. *See United States Dep't of Homeland Sec.,* supra.

---

[3] The Authority, noted that it has previously raised jurisdictional issues *sua sponte* and cited to *USDA, Food & Consumer Serv., Dall., Tex.*, 60 FLRA 978, 981 (2005). *See* Decision at 607. These Authority decisions are consistent with the Supreme Court's ruling in *Liberty Mutual Ins. Co. v. Wetzel*, which notes that: "Though neither party has questioned the jurisdiction of the Court of Appeals to entertain the appeal, we are obligated to do so on our own motion if a question thereto exists. Because we conclude that the District Court's order was not appealable to the Court of Appeals, we vacate the judgment of the Court of Appeals with instructions to dismiss petitioner's appeal from the order of the District Court." 24 U.S. 737, 740 (1976).

[4] Motion for Reconsideration, p. 12.

Second, it is alleged that the Authority's Decision erroneously found that the Agency's Exceptions to Summary 10 included the "ongoing assertion that the grievance concerns classification." Motion for Reconsideration, p. 13. As noted above, whether the Agency asserted a § 7121(c)(5) classification argument in its Exceptions to Summary Order 10 is entirely irrelevant because the Authority can and did raise the argument *sua sponte*. Further, the Agency's Exceptions to Summary 10, p. 41, in fact, did note that the "The Agency incorporates by reference its argument in its Exceptions to Implementation Meeting Summary 6 dated June 22, 2015, pp. 29-33, which included an argument related to Arbitrator McKissick's finding that she had jurisdiction based on her reference to "reclassified positions."[5] Thus, the Motion for Reconsideration's claim that the Authority's Decision contains an erroneous factual finding is both irrelevant and inaccurate.

Next, the Union contends that the Agency's Exceptions to Summary 10 were untimely because Summary 9 contained the same formal hearing requirement as Summary 10. Clearly, the Authority found that the Agency's Exceptions to Summary 10 were timely and, therefore, it is obvious that this argument is both a disagreement with as well as an attempt to relitigate the Authority's conclusions. Thus, the Union has failed to set forth extraordinary circumstances. *See United States Dep't of Homeland Sec.*, supra. Moreover, the Agency's Exceptions to Summary 10 were timely as they were filed within 30 days of Summary Order 10 as required by 5 C.F.R. § 2425.2 (b). With regards to the Union's contention that an earlier Summary Order (Order 9) from Arbitrator McKissick contained the same formal hearing under oath order as Summary Order 10, and thus barred the filing of Exceptions to Summary Order 10, such a contention is not based on

[5] *See* attached Ex. 1, Agency's July 29, 2016 Exceptions to Summary Order 10; *see also*, attached Ex. 2, Agency's June 22, 2015, Exceptions to Summary Order 6.

the Authority's regulatory requirements but, rather, on the Arbitrator and FLRA's former majority's erroneous interpretation of FLRA regulations and precedent. Additionally, the Agency established in its Exceptions to Summary Order 10, p. 15,[6] that:

> "[N]o IM Summary Order prior to the current IM Summary 10 has ordered the Agency to produce witnesses to give testimony in the effort to implement the award. *See* IM Summary 10, p. 5. Rather, IM Summary 9, stated only that the Arbitrator agreed to "conduct a formal hearing on the record, with testimony, if necessary." IM Summary 9, p. 4. (Emphasis added.) Thus, it is indisputable that the current IM Summary 10 has modified the January 12, 2012 Remedial Award and subsequent Summary Orders 1-9 by including a requirement or order that a formal evidentiary hearing will be conducted with testimony from Agency officials. Thus, the award has been modified by adding an additional order or requirement. An arbitrator may clarify an ambiguous award, but the clarification must conform to the arbitrator's original findings. *See, SSA, Region 1, Boston, Mass.*, 59 F.L.R.A. 614, 616, (2004)."

Furthermore, as noted on p. 16, of the Agency's Exceptions to Summary Order 10, Summary Order 10 required that the Agency produce information regarding the Union's Fair Labor Standards Act (FLSA) Request for Information so that adjustments to overtime paid to class members could be made, which was not contained in the original orders or Summary Orders 1-9. Thus, the Union's contention with regards to the timeliness of the Agency's Exceptions to Summary Order 10 is without merit and does not establish extraordinary circumstances under 5 C.F.R. § 2429.17.

2. The Union's contention that the Authority's actions vacating the Arbitrator's Awards and Orders and prior FLRA Decisions was "ultra vires" because such Orders and Decisions were final under § 7122(b) is merely a disagreement with the Authority's ruling.

The Motion for Reconsideration contains separate sections which address its "*ultra vires*" argument and § 7122 (b) argument. When reading these two sections together, it is clear that the Union's argument is simply that because the Authority previously addressed the classification issue

[6] *See* attached Ex. 1.

in this case, that § 7122 (b) requires that those Authority "decisions" remain final. *See* Motion for Reconsideration, pp. 14-17. The Motion for Reconsideration does acknowledge that the Union does not agree with footnote 29 of the Authority's Decision and states that the "premise of legality of the entire Decision is based on" two sentences that found that the previous decisions in this case by the Authority may not in any reasonable context be considered final and binding. Thus, on its face, it is clear that the Union simply disagrees with the Authority's conclusion in its Decision and has not established extraordinary circumstances under 5 C.F.R. § 2429.17.

Further, the Authority's Decision found that because the Arbitrator lacked jurisdiction, she did not have legal authority to issue any orders and awards ("final" or otherwise) concerning classification of employees that violated § 7121(c)(5). Thus, because the Authority found that Arbitrator McKissick's Remedial and Merits Awards and Summary Order's 1-10 were all in violation of § 7121(c)(5), they were never "final and binding" for purposes of § 7122. Certainly, the FLRA has the legal authority to vacate an arbitrator's award that violates § 7121(c)(5). Thus, the Authority's Decision is not "*ultra vires*."[7] *See Office & Prof'l Emples. Int'l Union Local 2001*, 62 F.L.R.A. 67, 69 (2007) (finding that "under § 7121(c)(5) of the Statute, a grievance concerning the classification of any position... is excluded from the scope of the negotiated grievance procedure."). Consequently, the Union's argument concerning § 7122(b) is a mere disagreement with the Authority's findings and does not establish extraordinary circumstances under 5 C.F.R. § 2429.17. *See United States Dep't of Homeland Sec.,* supra. The Union's argument also violates the principle set out by the Supreme Court in *Liberty Mutual Ins. Co. v. Wetzel*, that a finding of a lack of jurisdiction is a proper basis to vacate previously upheld rulings. *See* 24 U.S. at 740.

[7] Merriam Webster dictionary defines ultra vires as "beyond the scope or in excess of legal power or authority." *See* https://www.merriam-webster.com/dictionary/ultra%20vires.

Additionally, the Authority's finding in footnote 29 is not based on a mistake of fact or law. Rather, the finding constitutes the Authority's reasonable and, in fact, sensible interpretation of the Fair and Equitable case. Footnote 29 states, "My dissenting colleague ignores the fact that the progression of decisions--propagated by past majorities of the Authority (of which he was a common denominator) and which we must vacate --are all part of the same case, same matter, and same parties. The 'decisions' which we vacate may not in any reasonable context be considered 'final and binding.' It is quite obvious that if HUD I had resolved the case, there would have been no need for HUD II; if HUD II had resolved the case..."

The Agency's Exceptions to Summary Order 10 argued that because in Summary Order 10 the Arbitrator specifically claimed that her "jurisdiction extends to all outstanding items in this matter," which included the orders in Summary Orders 3 and 6 to retroactively promote 3,777 employees with backpay, the Agency could properly bring an exception to it in under 5 U.S.C. § 7122(a) and 5 C.F.R. §§ 2425.2, 2425.6." *See* Ex. 1, Exceptions to Summary Order 10, pp. 16-17; Ex., 3, Summary Order 10, p. 5. The Agency again contends that because Arbitrator McKissick in Summary Order 10 asserted her continued jurisdiction to implement Summary Orders 3 and 6, and the earlier Merits and Remedial Awards, these Orders and Awards were not "final" in any real sense of the word, which is clearly evidenced by the fact that Summary Order 10 ordered the Agency to produce FLSA payment information, which could only function to increase the amount of monetary damages. That Arbitrator McKissick's Awards and Orders lacked finality is further established by the fact that Summary Order 9 (attached as Ex. 4), p. 5, notes that the Arbitrator wanted to revisit the back pay date for the original seventeen (17) class members who had previously been promoted and paid backpay. [8] Clearly, the Union was happy

[8] Additional evidence of the non-final nature of the Awards and Orders is Summary Order 4, attached as Ex. 5. It notes that the Arbitrator determined that the damages period for her January 10, 2012, Award

to have the Arbitrator continually expand and enlarge her Merits and Remedial Awards, however, such changes demonstrate that the Awards cannot be considered final and binding in any "reasonable context." *See* Decision, p. 609. Thus, given that the Arbitrator's Awards and Orders were never final or binding, or, in the alternative, that she claimed continual jurisdiction to implement them, the Authority was well within its legal authority under *USDA, Food & Consumer Serv., Dall., Tex.*, supra. and *Liberty Mutual Ins. Co.,* supra., to declare *sua sponte* that they were in violation of § 7121 (c)(5).

Moreover, the Union's construction of § 7122(b) is in conflict with, or even abrogates, § 7121 (c)(5) because it would insulate unlawful arbitration awards from Authority review, which nullifies the entire purpose of the Authority being able to raise jurisdictional issues *sua sponte.* It is a fundamental tenant of Authority and Supreme Court precedent that jurisdiction may properly be raised at any time. As the Supreme Court has observed, "it is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *Settles v. United States Parole Comm'n*, 429 F.3d 1098, 1105 (2005) citing to *United States v. Mitchell,* 463 U.S. 206, 212 (1983) ("consent to a particular remedy must be unambiguous as well.")

Here, it is clear that the statutory limitation imposed on an arbitrator's jurisdiction by § 7121(c)(5) precludes Arbitrator McKissick's awards and orders. Accordingly, the Union's interpretation of § 7122(b) is incorrect. Thus, the Union's contention that the Authority's Decision is "*ultra vires*" or violated final orders under § 7122(b) is a mere disagreement that does not meet the extraordinary circumstances requirement set out in 5 CFR § 2429.17.

---

would begin on January 18, 2002, rather than the Agency's proposed date of November 13, 2002, which was the day the grievance was filed. *See* Summary Order 4 at pp. 2-3. The Summary declared that it did not modify or add new requirements to the Award. *Id.* at p. 3.

3. **The Union's contentions that the Authority's Decision violated the Administrative Procedures Act, did not address the Show Cause Order, is "incompatible" with the "Statute," and deprived employees of property rights and demoted them without due process, lacks merit.**

The Motion for Reconsideration, p. 17, alleges that the Authority violated 5 CFR § 2425.2(b) by setting aside "final and binding" Awards and Summary Orders and this somehow equates to a violation of the Administrative Procedures Act (APA). As previously noted, the Authority's Decision found that the awards or orders that were vacated were not "final or binding." Decision, p. 608, Footnote 29. Thus, the Union's attempt to couch its § 7122(b) argument in the APA fails to establish extraordinary circumstances within the meaning of § 2429.17. The APA requires Federal agencies to act in accordance with law and in non-arbitrary ways.[9] Here it is clear that the Authority applied § 7121 (c)(5) to find Arbitrator McKissick lacked jurisdiction to retroactively reclassify 3,777 employees. This is neither arbitrary, capricious, nor in violation of law despite the Union's disagreement with the Decision.

Regarding the Union's claim that the Authority's Decision did not address a September 15, 2016 Show Cause Order, it is unclear how (or whether) this is supposed to establish that extraordinary circumstances exist which warrant the Authority to reconsider its Decision. Clearly, the Show Cause Order became moot when the Agency's July 29, 2016 Exceptions were granted.

Concerning the claim that the Authority's Decision is "incompatible" with § 7101(a) as it would create "chaos in its wake" because the Authority could reopen any past decision, such a claim fails to show that extraordinary circumstances exist that warrant the Authority to

[9] *See AFGE, Local 2924 v. FLRA*, 470 F.3d 375, 380 (D.C. Cir. 2006) (noting that the Court will set aside an order of the Authority if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if it is unsupported by substantial evidence.)

reconsider its Decision. This argument is entirely speculative and does not relate to harm AFGE Local 222 allegedly suffered and, thus, should not be considered by the Authority. *See Debt Buyers' Ass 'n v. Snow,* 481 F. Supp. 2d 1, 15 (D.D.C. 2006) (refusing to weigh asserted speculative harm in injunctive relief analysis). Furthermore, the Authority's Decision simply applied § 7121 (c)(5), and is therefore entirely consistent with its function under Title 5.

Finally, the Union argues that the Authority's Decision effectively demoted employees and deprived them of their substantive property interest in the Arbitrator's awards without due process. Motion for Reconsideration, p. 19. This argument is groundless. The Union and its members were granted all the process due them by law. Therefore, they were neither denied any property interest nor improperly demoted. Additionally, the Union's contention, to the extent that it is offered in any serious manner, would imply that whenever an arbitrator's order is reversed by the Authority an employee is impermissibly deprived of a property interest and has a cognizable Constitutional claim. Such an argument ignores the structure of Title 5 of the U.S. Code and must therefore fail. Further, the relevant Union members were never lawfully promoted and therefore they cannot be demoted, and, similarly, they were never entitled to a monetary award. Finally, the *AFGE, AFL-CIO, Local 446 v. Nicholson*[10] case cited by the Union actually holds "an arbitration award under chapter 71 of title 5 is not constitutionally equivalent to a judgment of an Article III court..." This case weighs heavily against the Union's Fifth Amendment or any other Constitutional due process claim. Thus, these arguments do not meet the extraordinary circumstances requirement set out in 5 CFR § 2429.17.

[10] 475 F.3d 341 (2007).

CONCLUSION

For the foregoing reasons, which clearly show that the Union has failed to meet its burden under applicable Authority regulations and precedent, the Agency respectfully requests that the Authority deny the Union's Motion for Reconsideration of the Authority's May 24, 2018 Decision.

Respectfully submitted,

/s/ David M. Ganz
David M. Ganz
Agency Representative
Department of Housing and Urban Development
451 Seventh Street, SW, Room 2124
Washington, DC 20410
Telephone (202) 402-3641
Fax: (202) 401-7400
david.m.ganz@hud.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Opposition has been served on all parties on this 22nd day of June, 2018, via the method indicated below:

First Class Mail

Federal Labor Relations Authority (x5 Copies)
Office of Case Intake and Publication
Docket Room, Suite 200
1400 K Street, NW
Washington, DC 20424-0001
Phone: (202) 218-7740
Fax: (202) 482-6657

First Class Mail

Arbitrator Andree McKissick (1 Copy)
2808 Navarre Drive
Chevy Chase, MD 20815-3802
Phone: (301) 587-3343
Fax: (301) 587-3609

First Class Mail

Mark Vison, Esq.
Office of General Counsel, Assistant General Counsel
AFGE, AFL-CIO
80 F St., NW
Washington, DC 20001

Phone: (202) 639-6426

June 22, 2018
(Date)

/s/ David M. Ganz
DAVID M. GANZ
Agency Representative