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
U.S. Department of Housing and Urban Development, Agency.	)	March 9, 2016

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AGENCY'S MOTION FOR RECONSIDERATION

Pursuant to §2429.17 of the Federal Labor Relations Authority's (FLRA or Authority) Regulations, the U.S. Department of Housing and Urban Development (Agency or HUD) files its Motion for Reconsideration of the Authority's February 25, 2016, Decision[1] dismissing and denying the Agency's Exceptions (FLRA Decision) dated June 22, 2015 and July 17, 2015. Given the complexities of this case, including the sizable potential award amount,[2] the Agency also requests that the Authority stay its February 25, 2016, Decision during the pendency of the Agency's Motion for Reconsideration. For the reasons set forth below, the Agency respectfully argues that extraordinary circumstances exist because the Authority erred in factual findings which resulted in dismissal and denial of the Agency's Exceptions and because the FLRA's Decision upholds an award that is contrary to public policy.

[1] *U.S. Department of Housing and Urban Development*, 69 FLRA 30 (2016).
[2] As of December 2014, the Union estimated that the award will cost the Agency $720,296,230 to implement. *See* Agency's June 22, 2015 Exceptions, p. 8, referencing Exhibit 10.

STANDARD OF REVIEW

The Authority has held that a party seeking reconsideration of an Authority decision 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). 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; (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 issued raised sua sponte by the Authority in the decision. *See U.S. Dept. of the Air Force, 375th Combat Support Grp., Scott AFB, Ill.,* 50 FLRA 84 (1995). Extraordinary circumstances are also recognized when an award is contrary to public policy. *See* 5 C.F.R. § 2425.6(b)(2)(iv); *U.S. Dept. of Homeland Sec. United States Customs*, 69 F.L.R.A. 22, 26 (2015).

In the instant matter, the Agency contends extraordinary circumstances exists that warrant reconsideration of the Authority's February 25, 2016 Decision. Namely, the Authority erred in the following factual findings: (1) that the Agency did not object to the 45 day deadline in Summary 6 before the Arbitrator and therefore that 5 C.F.R. §§ 2425.4(c) and 2429.5 preclude consideration of its Argument in its exceptions to Summary 6; (2) that the Agency did not "establish" that it would be impossible to implement the job-series and position-titles orders in 30 days, and; (3) that the Agency failed to raise the argument that the disputed awards involves classification under 5 U.S.C. § 7121(c)(5) in its previous exceptions. The Agency also contends that extraordinary circumstances exist because the disputed awards (Summary 6 and the job-

series and position-titles orders) are contrary to public policy. *See generally U.S. Dept. of Labor*, 60 FLRA 737 (2005) (Authority granted agency motion for reconsideration based on agency claim that Authority erroneously based its decision "on the assumption that Article 16 was at issue throughout the arbitration.")

ARGUMENT

I. The Authority erred in making the factual finding that the Agency did not object to the 45 day deadline in Summary 6 before the Arbitrator and therefore that §§ 2425.4(c) and 2429.5 preclude consideration of its argument.

The Authority's finding[3] that the Agency is precluded by §§ 2425.4(c) and 2429.5 from arguing that it is impossible to implement the award within the forty-five day (45) deadline as required by Summary 6 because it failed to raise this challenge before the Arbitrator is based on its factually inaccurate understanding of implementation meeting (IM) 6. IM 6 was held on March 26, 2015. The Summary of IM 6 was issued by the Arbitrator on May 16, 2015. In pertinent part, it states that "the Agency is directed to, within forty-five (45) days, retroactively promote and make whole 3,777 employees that have so far been identified back to January 18, 2002…"[4] Pursuant to 5 C.F.R. § 2429.5, the Authority will not consider any evidence, factual assertions, arguments, requested remedies, or challenges to an awarded remedy that could have been, but were not, presented in the proceeding before the arbitrator. During the proceeding before the Arbitrator on March 26, 2015, there was no indication that there was a 45 day deadline for the Agency to promote 3,777 employees.[5] Therefore, as related to the 45 day deadline, 5 C.F.R. §

[3] *U.S. Dept. of HUD,* 69 FLRA at [*11].
[4] Exhibit 1, IM 6 Summary, p. 15.
[5] Exhibit 2, Agency's Proposed Summary of IM 6.

2429.5 is not applicable to the March 26, 2015, proceeding before the Arbitrator because the deadline was not ordered or otherwise mentioned during the proceeding itself. The Authority specifically found that the Union requested the 45 day compliance deadline following the proceeding in its Proposed Summary of Sixth Implementation Meeting and that the Agency failed to object to the proposed deadline before the Arbitrator.[6] However, following the Union's submission of its proposed "summary" on April 14, 2015, on April 28, 2015, the Agency sent an email to the Arbitrator stating:

> "The Agency disputes that the Union's submission, dated April 14, 2015, constitutes a "Summary" of the March 26, 2015, Implementation Meeting (IM). Based upon a thorough review and evaluation by management's team, it is our position that the Union's April 14, 2015, submission incorporates many statements and/or opinions that were neither discussed between the parties, nor raised for your consideration during the March 26, 2015, IM. The Agency believes the Union's submission is inappropriate, and does not provide an accurate accounting of the March 26, 2015, IM. The Agency respectfully requests that you disregard the Union's submission in its entirety, and instruct the Union against submitting wholly inaccurate submissions which they purport by the heading 'Summary of IM' to reflect the parties' IM convened by you."[7] (Emphasis added.)

As noted above, the Agency submitted its own proposed summary of IM 6, which did not include any 45 day deadline as this was not discussed at the March 26, 2015 proceeding.[8] The Agency then sent the above April 28, 2015 email to the Arbitrator, which clearly notes that it disputed the entirety of the Union's April 14, 2015, Summary of IM 6. The April 28, 2015 email was sent prior to the Arbitrator adopting the Union's Proposed Summary of IM 6 and issuing the Summary on May 16, 2015. For the Authority to now find that the Agency did not object to the 45 day deadline when no such deadline was mentioned at the time of proceeding on March 26,

[6] *U.S. Dept. of HUD*, 69 FLRA at [*11-12].
[7] Exhibit 3, April 28, 2015, email from Agency representative Tresa Rice to Arbitrator McKissick.
[8] Exhibit 2.

2015, when it sent an email on April 28, 2015 to the Arbitrator stating that it disputed the Union's entire proposed summary of IM 6, and when it submitted its own proposed summary without the 45 day deadline, is factually inaccurate. There was simply no 45 day deadline discussed at the March 26, 2015 proceeding for the Agency to dispute before the Arbitrator. The Regulations at 5 C.F.R. §§ 2425.4 and 2429.5 only bar the Authority from considering arguments that could have been made at the proceeding before an Arbitrator, which in this case was on March 26, 2015, and does not require that a party respond with specificity to every email proposal it receives at the risk of forever having its argument considered by the Authority.[9]

Additionally, in applying 5 C.F.R. §§ 2425.4 and 2429 to bar the Agency's exceptions to the 45 day deadline, the Authority greatly expands these regulations by applying them not only to the arbitral proceeding itself, but also to all subsequent communications with opposing counsel and the arbitrator, which, as referenced in the footnote below, is beyond the Authority's stated intent of having parties raise those challenges and arguments that they reasonably know before the arbitrator.[10] Because the factual finding that the Agency did not raise the 45 day deadline with the Arbitrator is erroneous, the Agency contends extraordinary circumstances exist that warrant reconsidering the IM 6 Summary Order and our exceptions to the Order. *See U.S. Dept. of the Air Force*, 50 FLRA at 87.

[9] As stated in the words of the Member Pizzella in his dissent, the Authority should not go out of its way to catch parties in "trapfalls." *U.S. Dept. of HUD,* 69 FLRA at [*20].

[10] *See* Authority's reply to comments regarding proposed revisions to 5 C.F.R. parts 2425 and 2429 in the Federal Register. 75 FR 42283, [*42285] (July 21, 2010) (noting that "[t]hus, if a party could not reasonably know to raise an argument or a challenge to an awarded remedy, then the party would not be precluded from filing an exception raising that argument or challenge.')

Furthermore, because the Authority's Decision improperly expands 5 C.F.R. parts 2425 and 2429, the Decision violates the rulemaking procedures set out in the Administrative Procedures Act (APA)[11] and is not supported by substantial evidence and is arbitrary and capricious under the APA because the Authority's decision lacked any reasoned basis and was based on a factually erroneous finding that the Agency did not object to the 45 day deadline and a misinterpretation of its own regulations.[12] *See AFGE, Local 2441 v. Federal Labor Relations Authority,* 864 F.2d 178, 184 (D.C. Cir. 1988)(noting that "[t]he Federal Service Labor-Management Statute requires that orders of the Fair Labor Relations Authority (FLRA) be reviewed in accordance with § 706 of the Administrative Procedure Act, 5 U.S.C.S. § 706.")

II. The Authority erred in making the factual finding that the Agency did not show that it would be impossible to implement the 30 day deadline to promote and pay backpay to the named 372 employees in the job-series order and position-titles order.

In its exception to the job-series order and position-titles order the Agency argued that it could not comply with the 30 day timeline order to promote the 372 employees listed in the orders because, among other reasons, it lacked the funding to comply with the orders and risked an Anti-Deficiency Act violation if it did comply with them. *See* Agency's July 17, 2015, Exceptions, p. 27. The Agency also stated that its internal payroll and personnel procedures and protocols would not allow the promotions, backpay, and TSP adjustments to be accomplished in 30 days. *See id.*

[11] 5 U.S.C. § 553.
[12] 5 U.S.C. § 706.

Rather than addressing the actual job-series and positon-title orders, which require the Agency to promote the named 372 employees in 30 days, the Authority instead found that "the Agency has not shown that it would be impossible to implement any of the Union's suggested methods of compliance." FLRA Decision at 13. The Authority noted that the Union proposed the 30 day deadline and that the Agency could have satisfied the 30 day deadline by hiring or transferring employees to process the personnel actions, paying overtime to existing staff, or approaching the Union to negotiate a different time period to complete the promotions. *Id.* The Authority also found that the Agency failed to show that it was "impossible to implement any of the Union's suggested methods of compliance." *Id.* This finding is factually incorrect. The job-series order and position-titles order did not require that the Agency implement any and all of the Union's suggested methods of compliance that they sent to the Agency via email, but rather that the Agency promote with backpay the listed 372 employees within 30 days. The Authority misinterprets the 30 day requirement of the job-series order and position-titles order, which results in it avoiding the evidence offered by the Agency in its Exception that it could not have unilaterally obtained a multimillion supplemental appropriation from Congress within 30 days to comply with the orders' requirement to pay backpay to 372 employees.[13] Thus, the Authority's Decision is also arbitrary and capricious under the APA.[14] *See AFGE, Local 2441,* 864 F.2d at 184.

[13] In addition to arguments offered in the July 17, 2015 Agency Exceptions, *see also* U.S. Constitution, Article I, section 9, clause 7; Budget and Accounting Act of 1921 (67 P.L. 13).
[14] 5 U.S.C. § 706.

The Agency clearly established that it was impossible to comply with the 30 day requirement in the job-series order and position-titles orders. However, instead of recognizing the fact that an executive agency cannot pay backpay to 372 employees for a period of 14 years without Congress granting them a supplemental appropriation, the Authority, once again, seeks to avoid this issue by contending that the Agency could have instead complied with the Union's proposals that are nowhere contained in the actual job-series order and position-titles orders. As such the Authority made a factual error regarding the 30 day requirement in the job-series order and position-titles order. Because this factual finding is erroneous, the Agency contends extraordinary circumstances exist that warrant reconsideration of the job-series and position-titles orders. *See U.S. Dept. of the Air Force,* 50 FLRA at 87.

III. The Authority erred in making the factual finding that the Agency failed to raise the argument that the ordered remedy concerns classification within the meaning of 5 U.S.C. § 7121(c)(5) in any of its prior exceptions.

In its decision, the Authority made a factual finding that the Agency failed to raise the argument that the remedy contained in Summary 6 and the job-series and position-titles orders concerns classification within the meaning of 5 U.S.C. § 7121(c)(5) in any prior exceptions. FLRA Decision at 15. This is factually erroneous because the Agency made this exact argument as far back as 2004. *See U.S., HUD, Wash., D.C.*, 59 F.L.R.A. 630 (2004) (noting that "[i]n particular, the Agency claims that the award is contrary to § 7121(c)(5) because the grievance involves a classification matter. The Agency claims, in this regard, that the grievance sought reclassification of the grievant' positions.") Additionally, the Agency made an argument related to

classification in its September 4, 2014, Agency Exceptions to Arbitrator Modification[15], and September 23, 2014, Agency Opposition to Union Motion for Order to Show Cause or, in the Alternative, Extension of Time to File Opposition.[16]

Furthermore, the Authority's finding that the disputed awards did not change the composition of the remedial class[17] is also based on a false premise. The IM 6 Summary and job-series order and position-titles order ordered the Agency to promote at least 3,777 employees and most certainly represent a different class of employees than in the previous IM Summaries because it was not until the IM 6 Summary that the Arbitrator adopted the Union's methodology. *See* Exhibit 1, Summary 6, p. 15. It is simply not possible that the eligible class of grievants prior to IM 6 could have been identical to the class after the Arbitrator selected the Union's methodology in the IM Summary 6 because the Union and Agency's methodologies that established the class were not identical. Because the Authority's factual findings related to classification and the composition of the remedial class are erroneous, the Agency contends extraordinary circumstances exist that warrant reconsideration of the IM 6 Summary and job-series and position-titles orders. *See U.S. Dept. of the Air Force,* 50 FLRA at 87.

IV. The disputed awards upheld by the Authority are contrary to public policy.

The Agency contends that the disputed awards are contrary to public policy because, due to the adverse inference and adoption of the Union's methodology in Summary 6, the disputed awards provide compensation to at least 3,777 grievants

[15] See Exhibit 4, p. 9-10.
[16] See Exhibit 5, p. 3.
[17] FLRA Decision at 15.

many of whom suffered no actual harm. Therefore the award of backpay and TSP and annuity adjustments to these individuals constitutes an award of damages that is in excess of actual damages. *See U.S. Dept. of Homeland Sec.*, 68 F.L.R.A. 253 (2015); *U.S. Dept. of the Treasury*, 56 F.L.R.A. 292, 300 (2000) (setting aside an arbitrator's award of punitive damages). Given that the disputed awards compensate employees who suffered no loss, the awards, regardless of any past adverse inference, are essentially punitive damages against the U.S. government. *See* 28 U.S.C. § 2674 (noting that the United States will not be liable for punitive damages); *see also Molzof v. United States*, 502 U.S. 301, 307 (1992) (noting as a general rule, the common law recognizes that damages intended to compensate the plaintiff are different in kind from punitive damages.")

The Agency raised this issue with the Arbitrator during IM 6 when it proposed its methodology which would limit the class of eligible grievants to those 439 employees who were actually identified as being harmed by the Agency's improper job postings based on a review of available data regarding the past job postings and other factors. *See* 5 C.F.R. §§ 2425.4(c) and 2429.5. However, the Arbitrator rejected the Agency's proposed methodology and adopted the Union's, which provides blanket inclusion for 3,777 GS-12 employees as long as they met the time in grade requirement of 1 year and had a fully successful rating or better.

Therefore, the award contained in IM Summary 6 and the job-series and position-titles orders, which the Union estimated, as of December 2014, will cost $720,296,230 dollars to implement[18] is based on a methodology that provides an

[18] *See* Agency's June 22, 2015 Exceptions, p. 8.

award to certain employees who suffered no actual harm and that is therefore contrary to public policy. Likewise, until the Agency is granted sufficient funds through the Congressional appropriations process to pay the class of 3,777 employees backpay and TSP and annuity adjustments, if the disputed awards were to be implemented a violation of the Anti-Deficiency Act[19] would occur, which is also contrary to public policy. Therefore, because the IM Summary 6 order and the job-series and position-title orders are contrary to public policy they warrant reconsideration. *See* 5 C.F.R. § 2425.6(b)(2)(iv); *U.S. Dept. of the Treasury*, 56 F.L.R.A. at 300.

CONCLUSION

For the foregoing reasons, the Agency requests that the Authority grant its Motion for Reconsideration and stay its February 25, 2016, Decision during the pendency of the Agency's Motion for Reconsideration.

Respectfully submitted,

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[19] 31 U.S.C. 1341.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served on the following this 9th day of March, 2016, via the method specified below:

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