FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

American Federation of Government, Employees (AFGE), Council of HUD Locals 222, UNION, v. US Department of Housing & Urban Development, AGENCY.	)	Issue: Fair and Equitable Case No. 03-07743 FLRA Docket No. 0-AR-4586 Arbitrator: Dr. Andree Y. McKissick, Esq.

CERTIFICATE OF SERVICE

I hereby certify that copies of the Union's Response in Opposition to the Agency's Motion to Stay Authority Order were served on this 15th day of June, 2015.

FLRA — ***ONE ORIGINAL & FOUR COPIES SENT VIA CERTIFIED MAIL***

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UNION'S RESPONSE IN OPPOSITION TO AGENCY'S MOTION TO STAY AUTHORITY ORDER

AFGE Council of Locals 222 (the "Union"), by and through its undersigned counsel, hereby files this Response in Opposition to the Agency's Motion to Stay Authority Order. The Motion must be denied because it contains no valid legal argument in support of a Stay and the Authority has noted that its regulations no longer permit the filing of a request to Stay under these circumstances. Moreover, the Agency's reliance on 5 U.S.C. § 705 is misplaced as Section 705 is inapplicable to the instant matter. The Union incorporates by reference its Response in Opposition to the Agency's Motion for Reconsideration, and in support, thereof, states as follows:

Background

On September 4, 2014, the Agency filed Exceptions to the August 2, 2014, Summary of Implementation Meeting issued by Arbitrator McKissick in the instant matter. The Union subsequently filed a Motion for an Order to Show Cause as to why the Exceptions should not be

dismissed as untimely; that Motion was opposed by the Agency. On October 9, 2014, the Authority issued an Order to Show Cause why it should not dismiss the Agency's Exceptions as untimely filed. The Agency responded to the Order and the Union then timely filed, pursuant to a separate Order from the Authority, a combined Response in Opposition to the Agency's Response to Show Cause Order and Exceptions to Arbitrator Modification.

On May 22, 2015, the Authority issued an Order dismissing the Exceptions. *AFGE 222 v. U.S. Department of HUD*, 68 FLRA 631 (2015). In doing so, the Authority correctly ruled that the Agency's Exceptions were untimely because they would have had to have been filed within thirty-days of the issuance of Summary No. 2 because Summary 3 did not modify Summary 2.[1] *Id.*

In addition to filing a Motion for Reconsideration, the Agency filed a Motion to Stay the Authority's Order arguing that a failure to issue a Stay would result in irreparable injury. The Motion to Stay is intrinsically tied to the Motion for Reconsideration, and as is demonstrated *infra*, the Agency's arguments are without merit and must be denied.

Standard of Review

Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision. The regulation also states that: [T]he filing and pendency of a motion under this provision **shall not operate to stay the effectiveness of the action of the Authority**, unless so ordered by the Authority. 5 C.F.R. § 2429.17 (emphasis added).

[1] The Authority's opinion was issued over a dissent. As the majority noted, the dissent contains an attempt at an inappropriate review of final awards and mischaracterizes the events that gave rise to the underlying grievance. It is clear that the Agency's Motion for Reconsideration, is nothing more than an attempt to take a proverbial second bite at the apple.

Argument & Analysis

I. The Authority has ruled that a Stay is not available when the remedy seeking to be Stayed is from an Arbitrator's Award.

The Authority has held that the Authority's Regulations do not provide a basis for filing requests for stays of arbitrators' awards. *NTEU v. U.S. Department of* Treasury, 57 FLRA 592 (2001). ***Id.* at fn.2** ("**[**T]he Authority's Regulations do not provide a basis for filing requests for stays of arbitrators' awards. Effective December 31, 1986, the Authority's Regulations were revised to revoke those portions pertaining to the filing of requests for stays of arbitration awards (51 Fed. Reg. 45,754). Therefore, we deny the Agency's request."

The procedural posture of *NTEU* is identical to the instant matter in that in *NTEU* the Agency was seeking a Stay of an Authority Decision on an underlying arbitrator's award. *Id.* Here too, the Agency is seeking to Stay the remedy ordered by an Arbitrator, and subsequently upheld by the Authority. Indeed, as discussed *infra*, upon information and belief, there are no cases subsequent to 2001, concerning a review of an arbitrator's award in which a request for a stay has been granted. Because the Authority does not permit an underlying Arbitrator's Award to be Stayed, the Agency's Motion must be denied.

II. 5 U.S.C. § 705 is inapplicable to the instant proceedings because there is no pending judicial review and can never be any judicial review of the instant matter.

The Agency argues that 5 U.S.C. § 705 provides the Authority with the "flexibility to postpone an order to prevent irreparable injury." **Agency Motion, p. 6**. Section 705 states:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, **pending judicial review**. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all

> necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705 (emphasis added).

Section 705 does not provide the Authority with any such flexibility in the instant matter because there **cannot be any judicial review** of the Authority's decision. 5 U.S.C. § 7123 sets forth the availability of judicial review of any Authority decision and, pursuant to Section 7123(a)(1), there is no judicial review of Authority decisions that resolve exceptions to arbitration awards, unless the [Authority's] Order involves an unfair labor practice. 5 U.S.C. § 7123(a)(1). Because the instant matter does not involve an unfair labor practice, the Authority's decision is final and there can never be any "pending judicial review." Indeed, the Union's exhaustive research of prior Authority decisions has not revealed a **single** case in which a stay of an Authority's decision on an Arbitrator's decision **not** involving a ULP has been granted. The only decisions found by the Union which do contain the applicability of Section 705 are those where judicial review is available, such as a decision of the FSIP, or an Authority decision involving a ULP. See, e.g., *NTEU v. U.S. Department of Homeland Security,* 63 FLRA 183 (2009). As such, Section 705 is inapplicable and cannot form the basis of any stay.

III. The Agency has not established that extraordinary circumstances exist or that irreparable injury will result if a Stay is not granted

While it is clear that a Stay cannot be granted in the instant matter, assuming *arguendo* that one could be, the Agency would be required to prove that extraordinary circumstances exist. In this case the Agency has alleged that the extraordinary circumstances are that irreparable injury will exist if the Stay is denied. **Agency Motion, pp. 5-6**. The Agency alleges that the irreparable injury that will occur if the Motion for Stay is not granted is: (1) Agency staff and

resources will have to expend time on the determination process of eligible class members; and (2) the Agency will have to incur unknown costs to effectuate the promotions and back pay payments. ***Id.* at pp. 6-7.** However, none of these allegations contain any "irreparable injury." Irreparable injury has been defined as an injury or harm which cannot be compensated adequately with money damages. *Hess Newmark Owens Wolf, Inc. v. Owens*, 415 F.3d 630, 632–34 (7th Cir. 2005). Examples include cutting down shade trees, polluting a stream, or not giving a child needed medication. The general rule is that economic harm does not constitute an irreparable injury. *Davis v. Pension Benefit Guar. Corp*., 571 F.3d 1288, 1295, 387 U.S. App. D.C. 205 (D.C. Cir. 2009). Here the only harm alleged by the Agency is economic – that is, expenditure of Agency resources and finances. However, that potential harm **is not** irreparable and cannot prove to be the basis for the requested Stay. Therefore, the request for Stay must be denied.

IV. The Agency cannot be permitted to re-litigate issues already decided by the Authority.

The Agency's Motion argues that the Authority's recent May 22, 2015, decision amounts to an illegal organizational upgrade. **Agency Motion, pp. 2-5.** The Agency no doubt does this in an attempt to gain sympathy from the dissent, which would have allowed the re-litigation of this case. However, the majority properly stated:

> We note that, although even the Agency acknowledges that the remedial award is "final and binding," the dissent finds it necessary to reach back and address the merits of the Arbitrator's earlier awards – and the Authority decisions that reviewed them. Even were that appropriate at this stage – which it is not – the dissent also mischaracterizes the events that gave rise to the underlying grievance. In this regard, the dissent asserts that "[the Agency] decided that current employees, as well as outside candidates, should be required to compete for [the new positions]." But the Arbitrator found that, rather than encouraging competition between internal and external candidates, the Agency actively discouraged the grievants from applying for the positions. Specifically, as

> discussed above, the Arbitrator "credited the grievants' unrebutted testimony that they were 'told by their supervisors that their applications to [the new] . . . positions would be destroyed, or not considered, and [that] they should *not* apply.'" Although the dissent mischaracterizes these findings as being mere Union allegations, that is incorrect. They are arbitral factual findings, to which no nonfact exceptions were filed.
>
> In addition, the dissent disagrees with the Authority's dismissal – in 2012 – of the Agency's exceptions to the remedial award. As discussed above, in that decision, the Authority held that the Agency could not challenge the awarded remedy in exceptions to the remedial award because the Agency had failed to do so before the Arbitrator. The dissent asserts that the Agency had sufficiently "raised its . . . arguments" opposing the Union's proposed remedies merely by making various arguments in the "numerous" prior "proceedings." The dissent fails to explain, however, why the Authority should have rewarded the Agency's refusal to participate in arbitration proceedings on remand by considering arguments that the Agency declined to make to the Arbitrator in those proceedings. In this regard, the Agency neither complied with the Arbitrator's directive to propose alternative remedies nor responded to the Union's proposed alternative remedies. And the Authority has stated that "a party's refusal to participate in the arbitration process results in the hindrance or obstruction of grievance resolution through binding arbitration, which is contrary to the mandate and intent of Congress in enacting § 7121" of the Statute. So it is not clear how rewarding the Agency's conduct in these circumstances – or, for that matter, otherwise reaching back to challenge the prior, final awards to which no party now objects – would promote "efficient [g]overnment" or "the prompt 'settlement[] of disputes.'"

AFGE 222, 68 FLRA 631 (internal citations and footnotes omitted).

Even more disturbing is the fact that the Agency is well aware that only issues raised before the Arbitrator can be raised on appeal, yet the Agency still attempts to raise new arguments in this case. Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider issues or arguments in exceptions that could have been, but were not, presented to the arbitrator. *See, e.g.*, *NATCA v. U.S. Department of Transportation*, 64 FLRA 387, 389 (2010). Here, the Agency provides a conclusory statement, without any citation that: "[T]he record demonstrates that, at all times relevant, the Agency has maintained that the Arbitrator's remedies involve classification matters, and that her remedies result in an unlawful organizational upgrade of certain positions within the Agency's workforce." **Agency Motion, p.**

5. This is the entirety of the Agency's argument on this issue. No citation is presented in support of this argument and the Agency has not presented any evidence, nor did it raise any arguments concerning classification issues before the Arbitrator at any of the Implementation Meetings relevant to the pending Motion, nor before the Arbitrator when she was considering the proper remedy in this case. In fact, as the Authority noted, the Agency declined to participate in the briefing and argument over the proper remedy. The Agency fully participated in the Implementation Meetings and could have raised whatever issues or arguments it desired[2] - its failure to do so is fatal to its argument. As such, the Motion must be denied.

V. The Agency provides conflicting arguments in its Motion for Reconsideration and Motion for Stay which is fatal to both Motions.

In its Motion to Stay the Agency argues:

> "Based upon a cursory review of Agency records, absent a stay of the Authority's Order, the Agency will have to consider whether approximately 2,500 current and former GS-12 employees are entitled to a retroactive promotion without due consideration of the Agency's argument that additional eligibility criteria were contemplated by the Arbitrator at the time of IM Summary 2 and 3, that the Arbitrator directed the parties to develop these criteria, which the Arbitrator subsequently disregarded in Summary 3…
>
> . . . In the event the Motion to Stay is not granted, Agency staff and resources would have to be unnecessarily expended **on the determinations** for **potentially** 2,500 individuals.

Agency Motion, p. 6-7 (emphasis added).

However, Agency previously argued, in its Exceptions (dated September 4, 2014) and Motion for Reconsideration (dated June 8, 2015) that the Arbitrator's Summary now improperly requires the Agency to summarily promote every GS-1101-12 bargaining unit employee

[2] It is likely that the reason that the Agency did not raise any classification related arguments at the implementation meetings is because it recognized the finality of the Remedial Award after the Authority's decision in 66 FLRA 867. It was only after the dissenting opinion's attempt, sua sponte to allow the Agency re-litigate these issues and turn back the clock on binding Authority precedent that the Agency thought to raise such arguments.

represented by the Union. Yet, in its Motion to Stay, the Agency argues that a **determination process** would be required to determine eligibility in the class and that such a determination would require the expenditure of significant Agency resources. If the Agency truly believed that the Arbitrator's order required retroactive upgrades for **every single** GS-1101-12 without **any other** eligibility requirements, there would be **no determination process** and promotions would be a simple matter of going into the system and promoting every GS-1101-12.

Rather, the Agency clearly recognizes that the Arbitrator's order **did** contain eligibility factors and those factors must be applied to the entire bargaining unit to determine eligibility. The Agency asserts that there might be 2,500 class members based upon the Authority's decision. However, in proving that a methodology requirement does exist, the Union believes, based upon data provided by the Agency to date, that there are far fewer, by hundreds upon hundreds, than 2,500 eligible GS-1101 class members.

The Agency's argument in the Motion to Stay, that a determination process would be required if the Authority's Order was not stayed proves that the Arbitrator did not disregard any previously ordered methodology as argued in the Agency's Motion for Reconsideration.

Conclusion

The Agency's Motion to Stay Authority Order must be denied. The Agency failed to provide any valid legal support for a Stay and no extraordinary circumstances which would warrant a Stay, exist. As such, the Agency's Motion must be denied.

Respectfully Submitted,

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