

70 FLRA No. 9

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF HUD LOCALS 222
(Union)

0-AR-4586
(65 FLRA 433 (2011))
(66 FLRA 867 (2012))
(68 FLRA 631 (2015))
(69 FLRA 60 (2015))
(69 FLRA 213 (2016))

ORDER DENYING MOTION FOR
RECONSIDERATION
AND MOTION FOR STAY

November 3, 2016

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

As relevant here, Arbitrator Andrée Y. McKissick held a series of meetings with the parties to clarify how they would implement her previous remedial award,¹ and after those implementation meetings occurred, the Arbitrator issued written meeting summaries (summaries) and written remedial orders. Also as relevant here, the Agency previously filed exceptions to one of the Arbitrator's summaries, and two of her remedial orders (collectively, the disputed awards). In *U.S. Department of HUD (HUD VI)*,² the Authority issued a consolidated decision that dismissed, in part, and denied, in part, the Agency's exceptions to the disputed awards.³

¹ See *U.S. Dep't of HUD*, 66 FLRA 867, 868-69 (2012) (*HUD III*) (dismissing exceptions to remedial award).

² 69 FLRA 213 (2016) (Member Pizzella dissenting).

³ *Id.* at 213 (consolidating cases for decision), 223 (dismissing, in part, and denying, in part, the Agency's exceptions to the disputed awards).

The Agency has now filed a motion for reconsideration of *HUD VI* (reconsideration motion) under § 2429.17 of the Authority's Regulations.⁴ In support of the reconsideration motion, the Agency argues that *HUD VI* rests on erroneous "factual findings,"⁵ violates the "rulemaking procedures" in the Administrative Procedure Act (the APA),⁶ and contravenes "public policy."⁷ In addition, the Agency has filed a motion to stay *HUD VI* (stay motion) while the Authority considers its reconsideration motion.

For the reasons stated in Section III. below, we deny both motions.

II. Background and Preliminary Matter

The Authority more fully detailed the circumstances of this dispute in *HUD VI*,⁸ as well as in several earlier decisions and orders.⁹ Consequently, this order does not repeat those background details.

Regarding a preliminary matter, the Union requested permission to file, and did file, an opposition to the reconsideration motion.¹⁰ As "it is the Authority's practice to grant requests to file oppositions to motions for reconsideration,"¹¹ we grant the Union's request under § 2429.26 of the Authority's Regulations.¹²

III. Analysis and Conclusions

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to move for reconsideration of an Authority decision.¹³ The Authority has repeatedly recognized that a party seeking reconsideration of an Authority decision bears the heavy burden of establishing

⁴ 5 C.F.R. § 2429.17.

⁵ Mot. for Recons. at 2.

⁶ *Id.* at 7 (citing 5 U.S.C. § 553).

⁷ *Id.* at 2.

⁸ 69 FLRA at 214-17.

⁹ See *U.S. Dep't of HUD*, 68 FLRA 631 (Member Pizzella dissenting), *recons. denied*, 69 FLRA 60 (2015) (*HUD V*) (Member Pizzella dissenting); *HUD III*, 66 FLRA 867; *U.S. Dep't of HUD*, 65 FLRA 433 (2011); *U.S. Dep't of HUD, Wash., D.C.*, 59 FLRA 630 (2004).

¹⁰ Union's Request for Leave to File a Resp. in Opp'n to Agency's Mot. for Recons. at 3.

¹¹ *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012) (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 353 (2005)).

¹² 5 C.F.R. § 2429.26 (stating that the Authority "may in [its] discretion grant leave to file" documents other than those specifically listed in the Authority's Regulations).

¹³ *Id.* § 2429.17.

that extraordinary circumstances exist to justify this unusual action.¹⁴

Even assuming that the Agency's challenges to *HUD VI*'s alleged factual findings¹⁵ concern "factual" matters,¹⁶ the Agency's reconsideration-motion arguments either: (1) reflect a misunderstanding of *HUD VI*;¹⁷ (2) attempt to relitigate the Authority's previous conclusions;¹⁸ (3) rely on evidence¹⁹ or

arguments²⁰ that the Agency failed to present in its underlying exceptions to the disputed awards; or (4) otherwise fail to demonstrate that the Authority erred in *HUD VI*.²¹ As such arguments do not establish extraordinary circumstances warranting reconsideration of *HUD VI*,²² we deny the reconsideration motion. And because our denial of the reconsideration motion renders the stay motion moot, we deny the stay motion as well.²³

¹⁴ E.g., *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000).

¹⁵ Mot. for Recons. at 4-10; see *id.* at 4-6 (alleging error in finding that Agency did not object to the Union-proposed – and Arbitrator-adopted – relief deadline), 8 (alleging error in finding that "the Agency failed to show that it was 'impossible to implement any of the Union's suggested methods of compliance'" with the Arbitrator's remedial instructions (quoting *HUD VI*, 69 FLRA at 220)), 9-10 (alleging error in finding that Agency did not timely raise its argument that the number of relief-eligible employees affects a determination of whether a remedy involves classification under 5 U.S.C. § 7121(c)(5)).

¹⁶ See, e.g., *HUD V*, 69 FLRA at 63 & n.47 (citing *NLRB Prof'l Ass'n*, 68 FLRA 552, 555 & n.54 (2015) ("We assume, without deciding, that the [a]rbitrator's interpretation of . . . [another arbitrator's] opinion is a factual determination that is subject to challenge on nonfact grounds." (alterations in *HUD V*))).

¹⁷ See Mot. for Recons. at 8 (arguing that Authority erred in a factual matter by allegedly finding that Agency was obligated to implement one of the Union's suggestions for satisfying the Arbitrator's remedial deadlines, whereas *HUD VI* cited the Union's suggestions only as *examples* that Agency had failed to show were impossible), 9 (arguing that Authority erred in a factual matter by allegedly finding that Agency had not previously raised classification arguments *at any stage* of this long-running dispute, whereas *HUD VI* stated that Agency failed to make its § 7121(c)(5) size-of-the-remedial-class argument in exceptions "to any of the preceding *implementation-meeting summaries*" (69 FLRA at 221 (emphasis added))); see also *id.* at 9-10 (identifying two arguments in Agency's prior submissions that Agency asserts were "related to" classification, but that alleged only that Arbitrator exceeded her authority).

¹⁸ *Id.* at 5 (arguing that Agency preserved argument regarding impossibility of meeting challenged summary's remedial-compliance deadline, but relying on sweeping, generalized assertion before the Arbitrator that *HUD VI* expressly considered, and rejected as insufficient to preserve Agency's argument); see *HUD VI*, 69 FLRA at 219 & n.61 (recounting and discussing all Agency submissions to Arbitrator concerning the challenged summary).

¹⁹ Mot. for Recons. at 8 (arguing that Authority failed to rebut the Agency's "evidence . . . that it could not have . . . obtained a . . . supplemental appropriation from Congress within [thirty] days to comply with the [remedial] orders[.]" without acknowledging that Agency never presented such "evidence"); see Exceptions in 4586-005 at 26-27 (regarding impossibility argument, asserting only that remedial-order deadlines failed to provide "relevant position information" or sufficient time to follow "*internal* personnel and payroll procedures" (emphasis added)); see also *id.* at 27 (making purely hypothetical

contention that "*if*" Agency could not secure funds "within [the Agency]" to comply with remedial award, *then* there would be "a *potential* . . . [need] to submit a request for a supplemental appropriation" (emphases added)).

²⁰ Mot. for Recons. at 11-12 (contending for the first time that disputed awards violate public policy); see *HUD VI*, 69 FLRA at 218-23 (identifying all arguments that Agency presented in exceptions to disputed awards, with no mention of public-policy exception).

²¹ See *SSA Headquarters, Woodlawn, Md.*, 63 FLRA 302, 304, 305 (2009) (where Authority applies one of its regulations in a manner that "merely explain[s] what the regulation already provides," APA does not require formal rulemaking); accord *U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1152 (2010) (under § 2429.5 of Authority's Regulations, where parties simultaneously filed post-hearing briefs with arbitrator, because agency did not show it was prohibited from responding to union's brief before arbitrator, Authority barred agency's argument challenging union's brief for first time on exceptions). Compare Mot. for Recons. at 10 (arguing that relief-eligible employees were not previously identified by name and that, consequently, Authority erred in finding that Agency could have raised its § 7121(c)(5) size-of-the-remedial-class argument sooner), with *HUD VI*, 69 FLRA at 217 (stating that challenged remedial orders merely identified by name those relief-eligible employees whom Arbitrator had previously awarded relief based on their job series or position titles), 221 (finding that specifying relief-eligible employees' names "did not change the composition of the remedial class").

²² See, e.g., *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 68 FLRA 716, 717 (2015) (an argument based on a misinterpretation of the Authority's decision does not establish extraordinary circumstances warranting reconsideration of that decision); *Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010) (Member DuBester concurring) (relitigation attempts fail to establish extraordinary circumstances); *U.S. Dep't of HHS, Office of the Assistant Sec'y for Mgmt. & Budget, Office of Grant & Contract Fin. Mgmt., Div. of Audit Resolution*, 51 FLRA 982, 984 (1996) (citing *U.S. Dep't of HHS, SSA, Kan. City, Mo.*, 38 FLRA 1480, 1483-84 (1991)) (Authority will not consider claims raised for the first time in a motion for reconsideration if those claims could have been, but were not, raised in the underlying exceptions to an arbitration award); see also *Int'l Ass'n of Firefighters, Local F-25*, 64 FLRA 943, 943 (2010) (extraordinary circumstances justifying reconsideration may include "*err[ors]* in [Authority's] . . . conclusion of law[] or factual finding" (emphasis added)).

²³ See, e.g., *U.S. DHS, U.S. CBP*, 68 FLRA 807, 809 & n.29 (2015) (citing *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 60 (2014)) ("Because we have denied the [a]gency's motion for reconsideration, the stay request is moot, and we deny it.").

IV. Order

We deny the Agency's motion for reconsideration and its motion for a stay.

Member Pizzella, dissenting:

For the same reasons that I explained in *HUD VI*¹ and *HUD IV*,² I do not believe that the Authority should have dismissed and denied the Agency's exceptions and accordingly should reconsider both decisions.

I also disagree with the pellet approach used by the majority to deny the Agency's exceptions. The majority does not explain to the Agency which of the four cited bases the Agency supposedly fails to establish – i.e., (1) misunderstanding; (2) attempt to relitigate; (3) arguments that the Agency failed to present; or (4) fail to demonstrate . . . error.³

Thank you.

¹ 69 FLRA 213, 224-25 (2016) (Dissenting Opinion of Member Pizzella).

² 68 FLRA 631, 639 (2015) (Dissenting Opinion of Member Pizzella).

³ Majority at 3-4.