72 FLRA No. 76

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS BENEFITS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL VETERANS AFFAIRS COUNCIL #53
(Union)

0-AR-5414
(71 FLRA 1113 (2020))

_____

ORDER DENYING
MOTION FOR RECONSIDERATION AND
MOTION FOR STAY

June 25, 2021

_____

Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and James T. Abbott, Members
(Chairman DuBester concurring; Member Kiko dissenting)

Decision by Member Abbott for the Authority

I. Statement of the Case

The Agency requests that we reconsider our decision in *U.S. Department of VA, Veterans Benefits Administration* (*Veterans Benefits*).[1] That case involved an award finding the Agency violated the parties' agreement when it ceased providing a ninety-day performance improvement plan (PIP) as a prerequisite for performance-based actions. The Authority denied the Agency's exceptions because they failed to demonstrate that the award was contrary to law, failed to draw its essence from the parties' agreement, or that the Arbitrator exceeded his authority.

In a motion for reconsideration (motion), the Agency argues that the Authority erred in its legal conclusions. Because the Agency's arguments fail to establish that the Authority erred, those arguments do not provide a basis for reconsideration. Accordingly, we deny the Agency's motion.

[1] 71 FLRA 1113 (2020) (Chairman Kiko dissenting in part).

II. Background

Congress passed the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Accountability Act),[2] which, as relevant here, provided for an expedited process for removal, demotion, and suspension actions taken under 38 U.S.C. § 714. Based on its understanding of this expedited process, the Agency issued letters to Veterans Service Representatives (VSRs)[3] providing that they had two pay periods to bring their performance to the fully successful level and warning that "failure to perform at 'expected levels' . . . may lead to adverse action up to and including termination."[4] The Union filed a grievance alleging that the issuance of the letters violated Article 27, Section 10 (Section 10) of the parties' agreement, which provided for a ninety-day PIP prior to any performance-based action.[5]

Arbitrator Jerome H. Ross found that the Accountability Act did not supersede Section 10 of the parties' agreement because the Accountability Act only provides the "time periods for notice, response, final decision, and appeal of 'a removal, demotion, or suspension,'"[6] and nothing in the Accountability Act provides for what an agency "may or should do *prior* to any decision to remove, demote, or suspend an employee based on performance."[7] The Arbitrator further found that Section 10 required the Agency to take specific actions to address performance-related problems before resorting to any adverse action.[8] As such, the Arbitrator found that the Agency violated Section 10 by failing to provide PIPs and failing to provide ninety days to improve.

To remedy the violation, the Arbitrator ordered the Agency to comply with Section 10, rescind any performance-based adverse actions taken against bargaining-unit employees who did not first receive a PIP that complied with Section 10, and reinstate any such employees, including back pay, restored leave, and other benefits.

In *Veterans Benefits*, the Authority found that Section 10 of the parties' agreement was not contrary to the Accountability Act.[9] Specifically, the Authority found that the Accountability Act provides for timelines regarding the notice, response, and final decision in a

[2] Pub. L. No. 115-41 (codified in relevant part at 38 U.S.C. § 714).
[3] The Union represents VSRs at the Agency.
[4] Award at 3-4.
[5] *Id.*
[6] *Id.* at 22.
[7] *Id.* at 22-23.
[8] *Id.* at 21-22.
[9] 71 FLRA at 1116.

removal, demotion, or suspension of a covered employee for performance or misconduct, and does not specify what actions an agency can or cannot do *prior* to providing notice of said removal, demotion, or suspension.[10] The Authority also found that Section 10's requirements must occur *before* the Agency initiates a performance-based action, while the procedures provided by the Accountability Act govern *after* the Agency has initiated a performance-based action.[11] As such, the Authority denied the Agency's contrary-to-law exceptions.

Subsequently, the Agency filed this motion on November 27, 2020. The Union filed its opposition to the Agency's motion on December 4, 2020.

III. Analysis and Conclusion: We deny the motion for reconsideration.

The Agency asks the Authority to reconsider its decision in *Veterans Benefits*. Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision.[12] The Authority has repeatedly held that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[13] As relevant here, the Authority has held that errors in its legal conclusions may justify granting reconsideration.[14] However, mere disagreement with or attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.[15]

The Agency argues that the Authority erred in its legal conclusions by finding that Section 10 was consistent with the Accountability Act.[16] The Agency argues, again, that the Accountability Act precludes PIPs because it provides "[t]he procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section,"[17] and that Section 10 of the parties' agreement is inconsistent with the Accountability Act.[18] These are the same arguments that the Authority addressed in *Veterans Benefits*,[19] and are therefore merely disagreement with and an attempt to

[10] *Id.*

[11] *Id.*

[12] 5 C.F.R. § 2429.17 ("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.").

[13] *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 71 FLRA 188, 189 (2019) (then-Member DuBester dissenting) (citing *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 860, 861 (2018) (then-Member DuBester dissenting)); *SPORT Air Traffic Controllers Org.*, 71 FLRA 25, 26 (2019) (*SPORT 2019*) (then-Member DuBester concurring) (citations omitted); *U.S. DHS, U.S. CBP, Swanton, Vt.*, 66 FLRA 47, 48 (2011); *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 63 FLRA 600, 601 (2009); *U.S. Dep't of the Interior, Wash., D.C. & U.S. Geological Surv., Reston, Va.*, 56 FLRA 279, 279 (2000).

[14] *AFGE, Loc. 2338*, 71 FLRA 723, 723 (2020) (*Local 2338*) (Member Abbott concurring) (citing *SPORT 2019*, 71 FLRA at 26); *Indep. Union of Pension Emps. for Democracy and Just.*, 71 FLRA 60, 61 (2019) (*IUPEDJ*) (then-Member DuBester concurring) (citing *NTEU*, 66 FLRA 1030, 1031 (2012)).

[15] *U.S. Dep't of VA, John J. Pershing Veterans Admin. Med. Ctr.*, 72 FLRA 191, 192 (2021) (Chairman DuBester concurring) (citations omitted); *Int'l Brotherhood of Elec. Workers, Loc. 1002*, 71 FLRA 930, 931 (2020) (finding attempts to relitigate conclusions reached by the Authority are insufficient to demonstrate extraordinary circumstances); *Local 2338*, 71 FLRA at 723 (citing *SPORT Air Traffic Controllers Org.*, 70 FLRA 345, 345 (2017)) (same); *IUPEDJ*, 71 FLRA at 61 (same); *U.S. Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.*, 58 FLRA 169, 169 (2002) (citing *U.S. DOD, Def. Logistics Agency, Def. Dist. Reg. W., Stockton, Cal.*, 48 FLRA 543, 545 (1993)) (finding that mere disagreement with the conclusion reached by the Authority is insufficient to establish extraordinary circumstances).

[16] Mot. at 4-9.

[17] *Id.* at 4 (quoting 38 U.S.C. § 714(c)(3)).

[18] *Id.* at 7 (arguing that the Accountability Act supersedes "any collective[-]bargaining agreement to the extent that such agreement is inconsistent with [the Act]") (quoting 38 U.S.C. § 714(c)(1)(D)).

[19] 71 FLRA at 1116.

relitigate the Authority's conclusions.[20] As such, the arguments do not establish extraordinary circumstances.[21]

The Agency also requests that the Authority stay its decision in *Veterans Benefits* during the pendency of its motion for reconsideration.[22] Because we deny the Agency's motion for reconsideration, we also deny its request for stay as moot.[23]

IV. Order

The Agency's motion for reconsideration and request for stay are denied.

---

[20] Member Abbott notes that he agrees with Member Kiko that the very purpose of the Accountability Act was to expedite the processing of such actions for employees "who don't meet the standards our veterans deserve." However, in this instance, he feels constrained by the *plain language* of Section 10 of the parties' agreement (which was interpreted by the Arbitrator in reaching his decision) when it is juxtaposed against the Accountability Act. As we noted in our original decision, this matter concerns a PIP, an action that occurs *before* the "notice, response, and final decision in a removal, demotion, or suspension." *Veterans Benefits*, 71 FLRA at 1116 (emphasis omitted). And there lies the distinction that demands the conclusion that Section 10's requirement – that employees must be afforded an improvement period (PIP) before issuing a formal notice – is not inconsistent with the Accountability Act. He would even go so far to agree that the Arbitrator's interpretation, and our decision, are not consistent with the spirit and intent of the Accountability Act. However, the Arbitrator's interpretation – that the *plain language* of Section 10 is not inconsistent with the *plain language* of the Accountability Act – is most certainly a plausible interpretation.

[21] The Agency also argues that the Authority erred in upholding the award because it is contrary to the Back Pay Act. Mot. at 9-10. However, the Agency did not make this argument in its exceptions to the Arbitrator's award. The Authority will not consider arguments in a motion for reconsideration that could have been, but were not, raised to the Authority during its initial review of the award, so we do not consider this argument. *See U.S. Dep't of VA, John J. Pershing Veterans Admin. Med. Ctr.*, 72 FLRA 191, 192 n.18 (2021) (Chairman DuBester concurring) (citing *U.S. Small Bus. Admin.*, 70 FLRA 988, 989 (2018) (then-Member DuBester dissenting); *U.S. Dep't of HHS, Food & Drug Admin.*, 60 FLRA 789, 791 (2005)).

[22] Agency Request for Stay at 2. The Union filed an opposition to the Agency's request for stay on December 16, 2020.

[23] *See U.S. Dep't of HUD*, 71 FLRA 794, 796 (2020) (then-Member DuBester concurring) (citations omitted) (denying a motion for reconsideration and finding the request for stay moot); 5 C.F.R. § 2429.17 ("The filing and pendency of a motion [for reconsideration] under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority.").

Chairman DuBester, concurring:

I agree with the Order denying the Agency's motion for reconsideration and request for stay.

Member Kiko, dissenting:

For the reasons set forth in my dissenting opinion in *U.S. Department of VA, Veterans Benefits Administration* (*Veterans Benefits*),[1] I continue to believe that the award is inconsistent with the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (the Accountability Act).[2] Because the Accountability Act imposes a fifteen-day limit on adverse action procedures[3] *and* states that the "procedures under chapter 43 of title 5"[4] – which include performance improvement plans – "*shall not apply* to a removal, demotion, or suspension under this section,"[5] the Arbitrator erred in concluding that the parties were still governed by the PIP procedure in the parties' agreement.[6] The Authority has granted motions for reconsideration to correct errors in our legal conclusions.[7] The Authority should take this opportunity to grant the Agency's motion for reconsideration, correct the erroneous analysis in *Veterans Benefits*,[8] and set aside the award as contrary to the Accountability Act. By refusing to apply the Accountability Act's plain and unambiguous wording, the majority seems determined to frustrate Congress's stated purpose when passing the Accountability Act: to give the VA Secretary "the tools he needs to swiftly and effectively discipline employees who don't meet the standards our veterans deserve."[9]

[1] 71 FLRA 1113, 1119-20 (2020) (Dissenting Opinion of Chairman Kiko).

[2] 38 U.S.C. § 714.

[3] *Id.* § 714(c)(1)(A) ("The aggregate period for notice, response, and final decision in a removal, demotion, or suspension under this section *may not exceed 15 business days*." (emphasis added)).

[4] *Id.* § 714(c)(3).

[5] *Id.* (emphasis added).

[6] *See id.* § 714(c)(1)(D) ("The procedures in this subsection *shall supersede any collective bargaining agreement* to the extent that such agreement is inconsistent with such procedures." (emphasis added)).

[7] *E.g.*, *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 219, 221 (2021) (Chairman DuBester concurring; Member Kiko concurring).

[8] 71 FLRA 1113.

[9] 163 Cong. Rec. H2174-03 (daily ed. Mar. 17, 2017) (statement of Rep. LaMalfa).