

72 FLRA No. 12

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

0-AR-5503
(71 FLRA 1131 (2020))

ORDER DENYING
MOTION FOR RECONSIDERATION

February 3, 2021

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

I. Statement of the Case

The Union requests that we reconsider our decision in *AFGE, Local 2338 (Local 2338)*.¹ In that case, we denied the Union's exceptions challenging Arbitrator Gerard A. Fowler's findings that exposure to asbestos was not raised in the grievance and that the grievants were not entitled to environmental differential pay for exposure to microorganisms.

In a motion for reconsideration (motion),² the Union again argues that the Arbitrator erred and "prejudiced" the Union by not considering the asbestos issue.³ Because the Union's motion raises the same arguments the Authority considered in *Local 2338* and does not otherwise establish extraordinary circumstances warranting reconsideration, we deny it.

¹ 71 FLRA 1131 (2020) (Member Abbott dissenting in part).

² 5 C.F.R. § 2429.17.

³ Mot. at 1.

II. Arbitrator's Award and Authority's Decision in Local 2338

The facts, summarized here, are set forth in greater detail in *Local 2338*.⁴ The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to pay pipefitters environmental differential pay (EDP).⁵ The parties' agreement requires a party to state "in detail, the basis for the grievance."⁶ The Union had argued that exposure to asbestos was an environmental hazard referenced in the first sentence of the grievance, but the Arbitrator found that the grievance did not specifically reference asbestos exposure as required and therefore concluded that the issue was not properly before him.⁷ Stating that the award "shall be limited to the language of the grievance," the Arbitrator determined that the grievance specifically addressed the pipefitters' exposure to micro-organisms.⁸ And finding that the evidence did not support an entitlement to EDP, he denied the grievance.⁹

In *Local 2338*, the Authority denied the Union's exceptions.¹⁰ The Authority found that the Union failed to provide any evidence that it was denied a fair hearing or that the Arbitrator was biased.¹¹ And more specifically, the Authority found that the Union's disagreement with the Arbitrator's evaluation of the evidence concerning the effectiveness of personal protective equipment (PPE) did not demonstrate that the Union was denied a fair hearing.¹² The Authority also concluded that the Union's arguments did not demonstrate that the award was based on a nonfact or was contrary to law.¹³

On December 4, 2020, the Union filed its motion.

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

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to move for reconsideration of an Authority decision.¹⁴ The Authority has repeatedly held that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances

⁴ 71 FLRA at 1131-32.

⁵ *Id.* at 1131.

⁶ *Id.* (internal quotation marks omitted).

⁷ *Id.*

⁸ *Id.* at 1131-32.

⁹ *Id.* at 1132.

¹⁰ *Id.* at 1132-34.

¹¹ *Id.* at 1132-33.

¹² *Id.*

¹³ *Id.* at 1133-34.

¹⁴ 5 C.F.R. § 2429.17.

exist to justify this unusual action.¹⁵ Errors in the Authority's remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.¹⁶ However, attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.¹⁷

In support of the motion, the Union argues that the Arbitrator "purposely cut off a sentence of the grievance"¹⁸ to leave out the asbestos issue "because of his bias against the Union."¹⁹ According to the Union, the Arbitrator therefore denied the Union a fair hearing.²⁰ However, the Union raised, and the Authority rejected, these arguments in *Local 2338*.²¹ The Union's attempt to relitigate its arguments fails to demonstrate that the Authority erred.²²

Additionally, the Union asserts that "the Authority should not trivialize the [A]rbitrator's misconduct" in failing to provide a fair hearing "by stating the Union 'just' disagrees with the [A]rbitrator."²³ But the Authority carefully reviewed the record, including Union testimony and concluded that the record supported the Arbitrator's finding that PPE practically eliminated the exposure to micro-organisms.²⁴ And following established precedent, the Authority found that the Union's disagreement with the Arbitrator's evaluation of the evidence on this particular issue did not provide a basis for finding that the Union was denied a fair hearing.²⁵ To the extent that the Union is challenging the Authority's process or conclusions of law, the Union's argument does not establish that the Authority erred.

The Union also argues that the Authority erred in finding that the award is not contrary to law because "awarding of EDP is not dependent on voids in the job description."²⁶ However, in *Local 2338*, the Union raised, and the Authority rejected, arguments regarding the Arbitrator's consideration of the grievants' position description.²⁷ Moreover, the Authority's decision was

not based on any legal conclusion regarding the presence or absence of a hazard in the job description. And here, as below, the Union has not explained how the Authority's decision renders the award contrary to law.²⁸ Therefore, the Union's attempt to relitigate arguments made below does not demonstrate how the Authority erred.

Because the Union does not demonstrate that extraordinary circumstances exist to warrant reconsideration of *Local 2338*, we deny the motion.

IV. Decision

We deny the Union's motion.

¹⁵ *SPORT Air Traffic Controllers Org.*, 71 FLRA 25, 26 (2019) (*Sport*) (then-Member DuBester concurring) (citations omitted).

¹⁶ *SPORT Air Traffic Controllers Org.*, 70 FLRA 345, 345 (2017) (citing *Int'l Ass'n of Firefighters, Local F-25*, 64 FLRA 943, 943 (2010)).

¹⁷ *Id.* (citing *Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010) (then-Member DuBester concurring)).

¹⁸ Mot. at 1.

¹⁹ *Id.* at 2.

²⁰ *Id.*

²¹ 71 FLRA at 1132-33.

²² *AFGE, Local 2338*, 71 FLRA 644, 645 (2020); *Sport*, 71 FLRA at 26.

²³ Mot. at 2 (internal quotation marks omitted).

²⁴ See *Local 2338*, 71 FLRA at 1133; Award at 6-8.

²⁵ *Local 2338*, 71 FLRA at 1133.

²⁶ Mot. at 3.

²⁷ 71 FLRA at 1133-34.

²⁸ *Id.*

Member Abbott, concurring:

I agree that the Union does not establish circumstances warranting reconsideration. However, as I did in *AFGE, Local 2338*,¹ I write separately to reaffirm that the Arbitrator and Majority were wrong *not* to remand the matter back to the Arbitrator to address the asbestos exposure claims.

¹ 71 FLRA 1131, 1134 (2020) (Dissenting Opinion of Member Abbott).