72 FLRA No. 143

DEPARTMENT OF DEFENSE
DOMESTIC DEPENDENT
ELEMENTARY AND SECONDARY SCHOOLS
FORT BUCHANAN, PUERTO RICO
(Respondent)

and

ANTILLES CONSOLIDATED
EDUCATION ASSOCIATION
(Charging Party)

BN-CA-17-0170
(71 FLRA 127 (2019))
(71 FLRA 359 (2019))
(72 FLRA 414 (2021))

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ORDER DISMISSING
MOTION FOR RECONSIDERATION

March 30, 2022

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

I. Statement of the Case

In the original decision in this case,[1] after finding that the Agency committed certain unfair labor practices (ULPs), the Authority ordered the parties to resume bargaining over provisions of their successor collective-bargaining agreement (successor agreement) that concerned work hours and compensation.[2] More than two years after that decision, the Union has filed a motion asking us to reconsider parts of the bargaining order. Because motions for reconsideration must be filed within ten days of a final decision or order,[3] the Union's reconsideration motion is untimely, and we dismiss it accordingly.

II. Background and Previous Decisions

The details of this dispute are thoroughly set forth in three previous Authority decisions and orders,[4] and we only briefly summarize pertinent details here. Among the provisions of the parties' successor agreement, Article 19, Section 1 concerns work hours; and Article 26 and Appendix F concern compensation.

In the original 2019 decision, the Authority found that the Agency committed ULPs under § 7116(a)(1), (5), and (6) of the Federal Service Labor-Management Relations Statute.[5] In its remedial order, the Authority directed the parties to "resume bargaining over the matters addressed in Article 19, Section 1, Article 26, and Appendix F."[6]

The Union appealed the original decision, but the U.S. Court of Appeals for the District of Columbia Circuit denied that appeal in all respects but one.[7] Specifically, the court set aside the Authority's finding that a portion of Article 19, Section 1 was nonnegotiable,[8] and the court remanded the case to the Authority for further proceedings consistent with the court's opinion.[9]

On remand, the Authority vacated its previous negotiability determination concerning Article 19, Section 1, but decided that it need not render another negotiability determination at that time.[10] The Authority's decision on remand concluded by noting that the "order from our original decision remains unchanged."[11] On July 7, 2021, the Union filed its reconsideration motion.

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[1] *DOD, Domestic Dependent Elementary & Secondary Schs., Fort Buchanan, P.R.*, 71 FLRA 127 (2019) (*Fort Buchanan I*) (then-Member DuBester dissenting).
[2] *Id.* at 135.
[3] 5 C.F.R. § 2429.17.
[4] *Fort Buchanan I*, 71 FLRA at 127-31, *recons. denied*, 71 FLRA 359 (2019) (then-Member DuBester concurring), *pet. for review denied in part, granted in part, & decision remanded sub nom. Antilles Consol. Educ. Ass'n v. FLRA*, 977 F.3d 10 (D.C. Cir. 2020) (*Antilles*), *remanded to sub nom. DOD, Domestic Dependent Elementary & Secondary Schs., Fort Buchanan, P.R.*, 72 FLRA 414 (2021) (*Fort Buchanan III*) (Chairman DuBester concurring; Member Abbott dissenting).
[5] 5 U.S.C. § 7116(a)(1), (5), (6).
[6] *Fort Buchanan I*, 71 FLRA at 133-34.
[7] *Fort Buchanan III*, 72 FLRA at 415.
[8] *Id.* (citing *Antilles*, 977 F.3d at 17).
[9] *Id.* (citing *Antilles*, 977 F.3d at 19). It is wholly inaccurate to assert, as the dissent does, that the court's decision "superseded, if not invalidated," the order in the 2019 decision. Dissent at 5. In fact, the court said the exact opposite. *Antilles*, 977 F.3d at 19 ("[W]e set aside the FLRA's [negotiability] determination . . . . *In all other respects, we deny the petition for review.*" (emphasis added)).
[10] *Fort Buchanan III*, 72 FLRA at 415-16 (finding that the "Union may avail itself of the negotiability-appeals process – which, unlike the ULP process, is specifically designed for resolving negotiability disputes").
[11] *Id.* at 416.

III. Analysis and Conclusion: We dismiss the reconsideration motion as untimely.

The Union asserts that it is moving for reconsideration of the Authority's decision on remand, and the motion requests that the Authority "rescind" the order to "renegotiate Article 19, [S]ection 1, Article 26[,] and Appendix F."[12] A motion for reconsideration "shall be filed within ten . . . days after service of the Authority's decision or order."[13] In disputes giving rise to multiple Authority decisions, a motion for reconsideration must be filed within ten days of the decision that first set forth the determination for which reconsideration is sought.[14] Here, the Authority's original 2019 decision first set forth the order to resume bargaining,[15] and the Authority's decision after remand expressly noted that it did not change anything about that order.[16] Further, the present reconsideration motion directly challenges the unchanged 2019 bargaining order.[17] Thus, we dismiss the untimely motion because the Union filed it more than two years after the bargaining order.

IV. Order

We dismiss the motion for reconsideration.

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[12] Mot. at 5.

[13] 5 C.F.R. § 2429.17.

[14] *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 69 FLRA 512, 515 (2016) (refusing, in decision after remand, to reconsider determination set forth in original decision); *Def. Sec. Assistance Dev. Ctr.*, 60 FLRA 292, 295 n.4 (2004) (same); *U.S. Dep't of HHS, Navajo Area Indian Health Serv., Window Rock, Ariz.*, 56 FLRA 1035, 1039 (2000) (same). Despite its attempt to distinguish the decisions on which we rely, the dissent offers no reason why we should measure the timeliness of a reconsideration motion differently following a remand from a court than we would following a remand from the Authority. Dissent at 5. And the ten-day filing deadline in § 2429.17 of the Authority's Regulations admits no distinction on that basis. 5 C.F.R. § 2429.17.

[15] *Fort Buchanan I*, 71 FLRA at 135.

[16] *Fort Buchanan III*, 72 FLRA at 415. The dissent's claim that leaving the order in the 2019 decision unchanged "was in all practical . . . respects a *new* order," Dissent at 5 (emphasis added), perverts the English language. *Compare New*, DICTIONARY.COM, https://www.dictionary.com/browse/new (last visited Mar. 28, 2022) ("of a kind now existing or appearing for the first time; novel"), *and Unchanged*, DICTIONARY.COM, https://www.dictionary.com/browse/unchanged (last visited Mar. 28, 2022) ("not altered or different in any way").

[17] Mot. at 5 (arguing that the "Authority should reconsider . . . *leav*[*ing*] *the order in its original decision unchanged*" (emphasis added)).

Chairman DuBester, concurring:

For the reasons expressed in my dissent in that case, I continue to disagree with the Authority's decision in *DOD, Domestic Dependent Elementary and Secondary Schools, Fort Buchanan, Puerto Rico*.[1] However, under the circumstances of this case, I agree with the Decision to dismiss the Union's motion for reconsideration.[2]

[1] 71 FLRA 127, 137-38 (2019) (Dissenting Opinion of then-Member DuBester).

[2] As I noted in the March 8, 2022 order denying the parties' joint motion requesting to keep this case in abeyance while they attempt voluntary resolution, I would have granted the parties' joint request. Nevertheless, I agree with the Decision to dismiss the Union's motion.

Member Abbott, dissenting:

I cautioned my colleagues in *DOD, Domestic Dependent Elementary & Secondary Schools, Fort Buchanan, Puerto Rico* (*Fort Buchanan III*) that a remand back to the parties was ill-advised after the United States Court of Appeals for the District of Columbia Circuit (the Court) rejected our finding that the Union had "conceded" to the Agency's characterization of Article 19, Section 1.[1] As I noted, the Court "expect[ed] us to determine which argument is the more reasonable and whether the provision is or is not negotiable"[2] in light of their conclusion that the Union had "vigorously contested" the Agency's characterization of the workday provision.[3]

In the underlying petition and the instant reconsideration, the Agency and Union submitted sufficiently-argued positions from which we could have issued a reasoned decision – considering the fact that the Union had challenged, and not conceded, to the Agency's characterization – that would have ended this seven-year dispute. That my colleagues would not take that step not only failed to bring it to an end, but, quite predictably, has made it run on even longer.[4]

Now, the majority concludes that the Union's request for reconsideration is untimely. In reaching that conclusion, my colleagues rely on cases dealing with motions for reconsideration to Authority orders that remanded matters to the *parties for resubmission to an arbitrator*, not a remand order from a Court.[5] Therefore, those cases are not dispositive.

Here, the Union appealed our decision in *DOD, Domestic Dependent Elementary & Secondary Schools, Fort Buchanan, Puerto Rico* (*Fort Buchanan I*) to the Court.[6] When the Court directed us to reconsider our negotiability determination, the 2019 Order to resume bargaining, which was based on that determination was superseded, if not invalidated.[7] Therefore, in light of the intervening appeal, the 2021 Order was in all practical and rationale respects a new order from which the Union may seek reconsideration.

Thus, I do not agree that the Union's decision not to seek reconsideration of the 2019 Order makes this request untimely. In every respect, the Union's motion for reconsideration is timely and presents extraordinary circumstances that warrant reconsideration. I also agree with the Union that the order to resume negotiations on proposals that are about to expire is unreasonable.

Therefore, I dissent.

[1] 72 FLRA 414, 418 (2021) (Chairman DuBester concurring; Member Abbott dissenting) (Dissenting Opinion of Member Abbott).

[2] *Id.*

[3] *Id.* at 415 (quoting *Antilles Consol. Educ. Ass'n v. FLRA*, 977 F.3d 10, 17 (D.C. Cir. 2020) (*Antilles*)).

[4] *Id.* at 418.

[5] Majority at 3 n.14 (citing *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 69 FLRA 512, 515 (2016) (refusing, in decision after remand *to the parties to resubmit the matter to an arbitrator*, to reconsider determination set forth in original decision); *Def. Sec. Assistance Dev. Ctr.*, 60 FLRA 292, 295 n.4 (2004) (same); *U.S. Dep't of HHS, Navajo Area Indian Health Serv., Window Rock, Ariz.*, 56 FLRA 1035, 1039 (2000) (same)).

[6] 71 FLRA 127 (2019) (then-Member DuBester dissenting), *recons. denied*, 71 FLRA 359 (2019) (then-Member DuBester concurring), *pet. for rev. denied in part, granted in part, & decision remanded sub nom. Antilles*, 977 F.3d. 10, *remanded sub nom. Fort Buchanan III*, 72 FLRA 414.

[7] *Antilles*, 977 F.3d at 19 ("For these reasons, we set aside the FLRA's determination that Article 19, section 1(b) of the parties' agreement is nonnegotiable."); *Fort Buchanan I*, 71 FLRA at 133-34 ("[I]n the event that we find Article 19's work-hours provisions unenforceable – as we have now done – the Union asks us to direct resumed bargaining on compensation as well. Given that both parties have asked us to direct them to resume bargaining over matters addressed in Article 19, Section 1, Article 26, and Appendix F, we grant their requests and direct resumed bargaining.").