73 FLRA No. 162

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY GARRISON
PICATINNY ARSENAL, NEW JERSEY
(Agency)

and

INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS
LOCAL F-169
(Union)

0-AR-5864
(73 FLRA 700 (2023))

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ORDER DENYING
MOTION FOR RECONSIDERATION

March 13, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

The Agency requests reconsideration of the Authority's decision in *U.S. Department of the Army, U.S. Army Garrison, Picatinny Arsenal, New Jersey* (*Picatinny*).[1] Because the Agency's motion for reconsideration (motion) does not establish extraordinary circumstances warranting reconsideration, we deny it.

II. Background and Authority's Decision in *Picatinny*

The facts of this case are set forth in greater detail in *Picatinny*.

The Agency operates a fire department that comprised two fire stations. On September 28, 2021,[2] the Agency notified the Union that it planned to close one of the stations—station two. The Agency closed station two on October 12 and reduced the fire department's per-shift staffing level from twelve to nine positions.

In a November 8 grievance, the Union alleged the Agency "failed to properly staff" the fire department on "October 12-17, 20-31, November 1-3, and on a continuing occurrence" (the alleged improper-staffing events).[3] The Union asserted the staffing reduction violated the parties' collective-bargaining agreement and various guidelines, instructions, standards, and regulations.

At arbitration, the Agency alleged the Union failed to timely file the grievance. Under Article 15 of the parties' collective-bargaining agreement, grievances must be filed within twenty-one days "after receipt of the notice of action, occurrence of the incident[,] or knowledge of the incident (whichever occurs first)."[4] The Agency argued Article 15 required the Union to file the grievance within twenty-one days of September 28, when the Agency notified the Union it would close station two. However, Arbitrator A. Martin Herring credited the Union's position on arbitrability: that the grievance arose from the alleged improper-staffing events and was "continuing . . . s[uch] that each day that passed created a new timeline for filing."[5] The Arbitrator issued an arbitrability award reflecting these findings.

In a separate merits award, the Arbitrator sustained the grievance and directed the Agency to "restore the [f]ire[-d]epartment staffing . . . as it existed prior to the [closure of station two]."[6]

In *Picatinny*, the Authority addressed the Agency's exceptions to both awards. As relevant here, the Agency alleged the Arbitrator's procedural-arbitrability determination (that the grievance was timely) failed to draw its essence from the parties' agreement. The Authority observed that some of the Agency's essence arguments contended the Arbitrator's application of the continuing-violation theory was contrary to the parties' agreement and "legally erroneous."[7] However, the Authority found the Agency did not present such arguments to the Arbitrator, and had asserted only that the Union failed to "prove" the existence of a continuing violation.[8] Applying §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[9] the Authority found the Agency could not raise those essence arguments for the first time

[1] 73 FLRA 700 (2023).
[2] Unless otherwise stated, all dates occurred in 2021.
[3] Exceptions, Ex. 2, Grievance (Grievance) at 1.
[4] Opp'n, Ex. 2, Collective-Bargaining Agreement (CBA) Art. 15, § 7.
[5] Arbitrability Award at 4.
[6] Merits Award at 12.
[7] *Picatinny*, 73 FLRA at 701 (quoting Exceptions Br. at 7-9).
[8] *Id.* at 701 n.24 (quoting Opp'n, Attach. 6, Agency Merits Br. (Agency Merits Br.) at 10).
[9] 5 C.F.R. §§ 2425.4(c) ("[A]n exception may not rely on any . . . arguments . . . that could have been, but were not, presented to the arbitrator."), 2429.5 ("The Authority will not consider any . . . arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator.").

on exceptions, and the Authority dismissed those arguments.[10]

The Authority did, however, consider the Agency's other essence arguments. Specifically, the Agency alleged the Arbitrator "ignored the unambiguous language" in Article 15 "limiting the time within which grievances must be filed" to twenty-one days after notice, occurrence, or knowledge of an event, "whichever occurs first."[11] As it did before the Arbitrator, the Agency maintained that its September 28 notice to the Union "started the clock for [the] Union to file a grievance."[12] However, the Authority found the Arbitrator credited the Union's position that the grievance alleged continuing violations arising from the alleged improper-staffing events. Consequently, under the Arbitrator's interpretation, the alleged improper-staffing events from October 20 to November 3 formed the basis for a timely grievance under Article 15. Because the Agency provided no basis for finding that interpretation deficient, the Authority rejected these essence arguments.

However, the Authority granted an Agency exception arguing the Arbitrator's remedy—directing the Agency to "restore . . . [f]ire[-d]epartment staffing"[13]—was ambiguous so as to make implementation impossible.[14] The Authority remanded the matter for the Arbitrator to "specify the actions necessary to bring the Agency into conformity with the 'staffing' that existed prior to the indefinite closure of station two."[15]

On October 12, 2023, the Agency filed this motion. The Union requested leave to file, and did file, an opposition to the motion.[16]

III. Analysis and Conclusion: The Agency does not establish extraordinary circumstances warranting reconsideration of *Picatinny*.

The Agency argues the Authority committed factual and legal errors in *Picatinny*.[17] Section 2429.17 of the Authority's Regulations permits a party to move for reconsideration of an Authority decision.[18] A party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[19] Errors in the Authority's remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.[20] However, mere disagreement with, or attempts to relitigate, the Authority's conclusions are insufficient to establish extraordinary circumstances.[21]

The Agency first claims there was no factual basis for the Authority to dismiss some of the Agency's essence arguments.[22] According to the Agency, it argued at arbitration that the continuing-violation theory is contrary to the parties' agreement and legally erroneous, and the Authority in *Picatinny* erred in concluding otherwise.[23] However, the Agency's position is undermined by discrepancies between its exception arguments and its arbitration arguments.

In its exceptions, the Agency alleged Article 15 contains "no exceptions" to the twenty-one-day filing deadline, and there is "certainly no exception for a 'continuing violation.'"[24] Further, the Agency cited multiple Authority decisions to support the contention that it was "legally erroneous" for the Arbitrator to apply the continuing-violation theory.[25] Before the Arbitrator, the Agency did not raise these arguments, despite the Union explicitly asking the Arbitrator to assess the grievance's timeliness under the continuing-violation theory.[26] In its arbitrability brief to the Arbitrator, the Agency did not: assert that Article 15 or law precluded the Arbitrator from applying the continuing-violation theory; reference the

[10] *Picatinny*, 73 FLRA at 701-02 (applying §§ 2425.4(c) and 2429.5 of the Authority's Regulations).
[11] *Id.* at 702 (quoting Exceptions Br. at 5-7).
[12] Exceptions Br. at 7.
[13] Merits Award at 12.
[14] *Picatinny*, 73 FLRA at 703 (finding it unclear whether "the Arbitrator directed the Agency to (1) reopen station two and restore its staffing level to four positions; (2) staff station one with twelve positions—the total staffing level that existed when both stations one and two were open; or (3) take some other action").
[15] *Id.* (quoting Merits Award at 12).
[16] It is the Authority's practice to grant requests to file oppositions to motions for reconsideration. Therefore, we grant the Union's request and consider its opposition. *See U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 353 (2005).
[17] Mot. at 2.
[18] 5 C.F.R. § 2429.17.
[19] *Indep. Union of Pension Emps. for Democracy & Just.*, 73 FLRA 280, 280 (2022).
[20] *Id.*
[21] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 628, 629 (2023).
[22] Mot. at 4-5.
[23] *Id.* at 2, 4-5.
[24] Exceptions Br. at 8.
[25] *Id.* at 7-8 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Terre Haute, Ind.*, 72 FLRA 711 (2022) (*BOP*) (Chairman DuBester dissenting); *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 947 (2020) (*Pershing*) (Member DuBester dissenting)).
[26] Opp'n, Attach. 9, Union's Arbitrability Br. at 11-12 (alleging the grievance was timely as a "continuing violation"); *see also* Grievance at 1 (grieving violations of a "continuing occurrence").

Authority precedent it later cited in its exceptions; or claim that Article 15's filing deadline has "no exceptions."[27] In fact, the phrase "continuing violation" does not appear anywhere in that brief. It was not until the later-filed merits briefs that the Agency directly challenged the continuing-violation theory. Even then, the Agency argued only that the Union failed to "*prove*" a continuing violation[28]—not that the continuing-violation theory is contrary to the parties' agreement or law.

The record demonstrates the Agency did not assert at arbitration that the parties' agreement or law precluded the Arbitrator from applying the continuing-violation theory. As such, the Agency's motion does not warrant reconsideration of *Picatinny* on this point.

Citing the Authority decisions it raised in its exceptions—but failed to raise to the Arbitrator—the Agency next contends the Authority erred by denying the remaining essence arguments.[29] As noted above, by adopting the Union's position on arbitrability, the Arbitrator applied the continuing-violation theory to find that certain of the alleged improper-staffing events occurred within twenty-one days of the Union's grievance.[30] In *Picatinny*, the Agency provided no basis for finding the Arbitrator's interpretation and application of Article 15 deficient, so the Authority denied that exception. The Agency's attempt to relitigate that conclusion here does not establish extraordinary circumstances.[31]

For the above reasons, we deny the motion.

IV. Decision

We deny the Agency's motion for reconsideration.

[27] Exceptions Br. at 8.

[28] Agency Merits Br. at 10 (emphasis added) (asserting it was "the Union's burden to" establish the existence of a continuing violations, and stating, "It is true the Union alleged a continuing violation, but it is altogether another matter to prove one.").

[29] Mot. at 5-6 (citing *BOP*, 72 FLRA at 712; *Pershing*, 71 FLRA at 948-49).

[30] *Picatinny*, 73 FLRA at 702.

[31] *See AFGE, Loc. 2338*, 71 FLRA 644, 645 (2020) (denying motion for reconsideration where moving party was attempting to relitigate Authority's previous denial of essence exception).