OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

COMPLAINANT,

v.

FLORIDA HOSPITAL OF ORLANDO,

RESPONDENT.

ARB CASE NO. 11-011

ALJ CASE NO. 2009-OFC-002

DATE: July 22, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

M. Patricia Smith, Esq.; Katherine E. Bissell, Esq.; Christopher Wilkinson, Esq.; Beverly I. Dankowitz, Esq.; Consuela A. Pinto, Esq.; and Theresa Schneider Fromm, Esq.; *United States Department of Labor,* Washington, District of Columbia

For the Defendant:

Leslie Selig Byrd, Esq. and Judy K. Jetelina, Esq.; *Bracewell & Giuliani LLP*, San Antonio, Texas

For the American Hospital Association, as Amicus Curiae:

Melinda Reid Hatton, Esq. and Lawrence Hughes, Esq.; *American Hospital Association*, Washington, District of Columbia; F. Curt Kirschner, Esq. and Christopher T. Scanlon, Esq.; *Jones Day*, San Francisco, California; and Alison B. Marshall, Esq.; *Jones Day*, Washington, District of Columbia

For the Humana Military Health Services, Inc., and Health Net Federal Services, LLC, as Amicus Curiae:

Arthur N. Lerner, Esq.; Christopher Flynn, Esq.; and J. Catherine Kunz, Esq.; *Crowell & Moring LLP*, Washington, District of Columbia

For the TriWest Healthcare Alliance Corporation, as Amicus Curiae:

Janet E. Kornblatt, Esq.; Phoenix, Arizona

For the National Association of Chain Drug Stores, as Amicus Curiae:

Mary Ellen Kleiman, Esq. and Don L. Bell, II, Esq.; *National Association of Chain Drug Stores*, Alexandria, Virginia

For the National Women's Law Center, as Amicus Curiae:

Fatima Goss Graves, Esq. and Devi Rao, Esq.; *National Women's Law Center*, Washington, District of Columbia, and Jennifer Mathis, Esq.; *Bazelon Center for Mental Health Law*, Washington, District of Columbia

For the Leadership Conference on Civil and Human Rights, as Amicus Curiae:

Lisa M. Bornstein, Esq.; *The Leadership Conference on Civil and Human Rights*, Washington, District of Columbia

For the Lawyer's Committee for Civil Rights Under Law, as Amicus Curiae:

Ray P. McClain, Esq. and Jane Dolkart, Esq.; *Employment Discrimination Project, Lawyer's Committee for Civil Rights Under Law*, Washington, District of Columbia

For the National Partnership for Women & Families, as Amicus Curiae:

Sarah Crawford, Esq.; *National Partnership for Women & Families*, Washington, District of Columbia

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*, presiding en banc. Chief Judge Igasaki and Judge Edwards, *dissenting*.

ORDER GRANTING MOTION FOR RECONSIDERATION AND VACATING FINAL DECISION AND ORDER ISSUED OCTOBER 19, 2012

Pursuant to motion filed with the Administrative Review Board (ARB) on November 13, 2012, the Plaintiff, Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), seeks reconsideration of the Board's Final Decision and Order issued in the above-captioned matter on October 19, 2012. For the following reasons, the Board grants OFCCP's Motion for Reconsideration.

This case arises under Executive Order 11246, as amended,[1] Section 503 of the Rehabilitation Act, 29 U.S.C.A. § 793; and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C.A. § 4212 (Veterans' Act).[2] The ARB, presiding en banc, unanimously held that Section 715 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA), 10 U.S.C.A. § 1097b(a)(3), precluded the OFCCP's exercise of jurisdiction over Florida Hospital under "Prong Two" of the "subcontract" definition in OFCCP's regulations at 41 C.F.R. § 60-1.3(2). With regard to OFCCP's alternative argument on appeal that it had enforcement jurisdiction under "Prong One" of the "subcontract" definition, at 41 C.F.R. § 60-1.3(1), the en banc panel was divided. Two judges held that Section 715 of the NDAA similarly precluded OFCCP jurisdiction. Two judges held that Section 715 did not apply to 41 C.F.R. § 60-1.3(1) and thus did not preclude OFCCP jurisdiction. The fifth presiding judge declined to rule on the subject, on the grounds that the question of OFCCP's jurisdiction under Prong One was not properly before the Board.[3] As evident from the Final Decision and Order on Reconsideration, following this order, none of the Board's members have altered their position on the merits, but a majority of the Board has been persuaded to now consider the merits of Prong One jurisdiction and, consequently, the issue of federal financial assistance.

OFCCP argues that the Board's failure to resolve the question of its jurisdiction under "Prong One" will impede the conduct of OFCCP compliance reviews, result in confusion and needless protracted litigation, and adversely affect the rights of employees of TRICARE network hospitals. OFCCP argues that the absence of a majority ruling with respect to its jurisdiction under "Prong One" will impede the effective enforcement of the laws it is charged with enforcing. Without a definitive ruling, it avers, TRICARE network providers will refuse to cooperate when OFCCP initiates compliance reviews pursuant to "Prong One" which, in turn, will result in unnecessary, expensive and time-

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[1] Executive Order 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965), was amended by Executive Order 11375, 32 Fed. Reg. 14303 (Oct, 13, 1967) (adding gender to list of protected characteristics), and Executive Order 12086, 43 Fed. Reg. 46,501 (Oct. 5, 1978) (consolidating enforcement function in the Department of Labor).

[2] These provisions, which give OFCCP authority to ensure that Federal contractors and subcontractors doing business with the Federal government comply with the laws and regulations requiring nondiscrimination and equal opportunity in employment, are implemented through 41 C.F.R. Part 60-30 (pertaining to Executive Order 11246), Part 60-741 (pertaining to the Rehabilitation Act), and Part 60-250 (pertaining to the Veterans' Act).

[3] Given the en banc panel's agreement that Section 715 of the NDAA precluded OFCCP's jurisdiction in this case under 41 C.F.R. § 60-1.3(2), three of the five Board members did not address Florida Hospital's third challenge to OFCCP's jurisdiction, which is based on the argument that Florida Hospital is merely the recipient of federal financial assistance. Two judges concluded that this issue required remand to the ALJ for further consideration.

consuming litigation that will, ultimately, lead back to the ARB for resolution. In the meantime, employees of TRICARE network hospitals will be left vulnerable to discrimination because their rights will be left unprotected.

In support of its motion seeking reconsideration, OFCCP cites *Avlon v. American Express Co*., ARB No. 09-089, ALJ No. 2008-SOX-051 (ARB Sept. 14, 2011), and the four factors identified there that the Board generally considers in determining whether to reconsider a previously rendered decision.[4] OFCCP focuses upon the conclusion reached by one member of the en banc panel that its failure to assert its alternative jurisdictional argument under "Prong One" before the administrative law judge (ALJ) precluded it from raising the argument on appeal. Accordingly, the result was a split and inconclusive decision on this issue. Citing specific examples found in the record before the ALJ, OFCCP demonstrates that it had asserted its jurisdiction under "Prong One" before the ALJ. Thus, OFCCP argues, reconsideration is merited under the factors identified in *Avlon*.

The four factors identified in *Avlon* are most often applied in determining whether or not to grant reconsideration. *See, e.g., Abdur-Rahman v. DeKalb Cnty.*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003 (ARB Feb. 16, 2011). However, the ARB has never considered these four factors to be the sole criteria upon which reconsideration will be granted. For example, in *Macktal v. Brown & Root*, ARB No. 98-112, ALJ No. 1986-ERA-023 (ARB Nov. 20, 1998), the Board granted reconsideration because it initially based its decision on an incorrect assumption central to its analysis. Consistent with *Macktal*, in *Leveille v. New York Air Nat'l Guard*, ARB No. 98-079, ALJ No. 1994-TSC-003 (ARB May 16, 2000), the Board granted reconsideration because the initial decision was based, in part, on erroneous information.

As the Board has previously noted, in the absence of its own rule, the Board has adopted principles employed by federal courts under Rule 40 of the Federal Rules of Appellate Procedure and Rules 59 and 60 of the Federal Rules of Civil Procedure in deciding requests for reconsideration. *Getman v. Southwest Secs.*, ARB No. 04-059, ALJ No. 2003-SOX-008 (ARB Mar. 7, 2006); *Knox v. U.S. Dep't of Interior*, ARB No. 03-040, ALJ No. 2001-CAA-003 (ARB Oct. 24, 2005); *New Mexico Nat'l Elec. Contractors Assoc.*, ARB No. 03-020 (Oct. 19, 2004). More recently, in *Jackson v. Major Transp., Inc.*, ARB No. 09-113, ALJ No. 2009-STA-022, slip op. at 2 (ARB Feb. 28, 2012), the Board again unanimously stated that moving for ARB reconsideration is "analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Rule 40 expressly requires that any petition for rehearing 'state with particularity each point of law or fact that the petitioner believes the court has overlooked

[4] *I.e*., whether the party seeking reconsideration has demonstrated "(i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision; (iii) a change in the law after the court's decision, and (iv) failure to consider a material fact presented to [the] court before its decision." *Avlon*, ARB No. 09-089, slip op. at 5.

or misapprehended . . . .'" Fed. R. App. P. 40(a)(2). On its face, Rule 40(a) is a more general and lenient standard than the ARB's four-part test. We note that Rule 40(b) of the Local Rules of Appellate Procedure in the United States Court of Appeals for the Fourth Circuit also permits reconsideration where "[t]he proceeding involves one or more questions of exceptional importance." Though not binding, we are persuaded that the Fourth Circuit's local rule provides additional valid grounds for reconsideration in this case, given the widespread significance of its unresolved jurisdictional issue. In short, the purpose of a petition for rehearing or reconsideration is "to provide the court with a final opportunity to see that justice is done." 5 Am. Jur. 2d Appellate Review § 821 (2013). Accordingly, in addition to the four factors cited in *Avlon* (see footnote 4, *supra*), the Board has recognized that reconsideration and the amendment of a prior judgment may be appropriate "to correct manifest errors of law or fact upon which the judgment is based" or to otherwise "prevent manifest injustice." *New Mexico Nat'l Elec. Contractors,* ARB No. 03-020, slip op. at 2.[5] In this case, we are persuaded that a majority of the Board failed to appreciate the extent to which OFCCP raised an independent ground for Prong One jurisdiction. We also find reconsideration proper in this case where reconsideration results, not in a reconsideration of the merits, but in the Board's decision to consider the merits of an important legal issue in an exceptional case in which it previously bypassed the issue on procedural grounds.

CONCLUSION

Upon consideration of OFCCP's motion for reconsideration in light of the foregoing factors and principles, and having taken Florida Hospital's arguments in opposition into consideration,[6] we are persuaded that reconsideration is warranted in this

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[5] Among the federal appellate court decisions often cited in support of the federal principles the Board has adopted for considering the appropriateness of reconsideration are *Shader v. CSX Transp.*, 70 F.3d 255, 257 (2d Cir. 1995) (affirming district court's decision to reconsider prior ruling based on lower court having overlooked and failed to consider applicable legislative history and controlling court precedent) and *Virgin Atlantic Airways v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (acknowledging, inter alia, "the need to correct a clear error or prevent manifest injustice" as grounds justifying reconsideration).

[6] In addition to arguing that OFCCP's motion for reconsideration does not meet the standards applied by the Board for granting reconsideration, Florida Hospital argues that OFCCP's motion is untimely. Absent rules of procedure governing the timeliness of such filings, the Board has generally insisted upon a "reasonable period" following issuance of the decision for which reconsideration is sought. The Board notes that federal court rules allow the federal government or its officers and agencies a longer period for the filing of such motions. *See, e.g.*, Rule 40(a)(1) of the Federal Rules of Appellate Procedure (FRAP). The explanatory comments to FRAP Rule 40(a)(1) note that this additional time is in recognition of the fact "that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." The Board considers this rationale of no less import where, as in this case, the Department of Labor's Solicitor must necessarily conduct a

case to avoid the manifest injustice that would, as OFCCP argues, otherwise result. Accordingly, we **GRANT** OFCCP's motion for reconsideration, and **VACATE** the Board's October 19, 2012 decision. Following the Board's further consideration of the merits of this appeal, we shall issue a Final Decision and Order on Reconsideration.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Chief Judge Igasaki and Judge Edwards, *dissenting*.

The majority's decision to reconsider OFCCP's authority to conduct a compliance review of Florida Hospital under Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 404 of the Veterans' Act contravenes ARB's well-established precedent for granting motions for reconsideration. Accordingly, we respectfully dissent.

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007). "The [ARB] has adopted principles federal courts employ in deciding requests for reconsideration." *Getman v. Southwest Secs., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 1 (ARB Mar. 7, 2006). In assessing motions for reconsideration, the ARB determines whether the movant has demonstrated "(i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision. *Id.* (citing *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) ("The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court."). The ARB has consistently applied this standard in determining whether to reconsider a final decision. *See, e.g., Castillo v. Bayside Eng'g Inc.*, ARB No. 11-046, ALJ No. 2010-NTS-002, slip op. at 2 (ARB Apr. 24, 2013); *Toland v. FirstFleet, Inc.*, ARB No. 09-091,

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thorough review and consideration of the merits of a decision before requesting reconsideration.

ALJ No. 2009-STA-011 (ARB Mar. 8, 2011); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051 (ARB May 30, 2007).

OFCCP fails to demonstrate that reconsideration is warranted here because it fails to advance an argument that it satisfies the criteria ARB requires for a grant of reconsideration. *See, e.g., San Juan v. U.S. Att'y General*, 486 Fed. App'x 66, 68 (11th Cir. 2012) (petition for review of BIA decision denied where petitioner "does not cite any law about motions for reconsideration."). Specifically, there is no showing by OFCCP of material differences in fact or law from that presented to the ARB; moreover, OFCCP asserts no new material facts that have occurred since the ARB's October 19, 2012, decision, and OFCCP asserts no change in law since that decision. OFCCP's motion for reconsideration asserts as error Judge Brown's conclusion that "OFCCP's Prong One argument was not properly before the Board." OFCCP Motion for Recon. at 4. This argument apparently purports to satisfy the fourth criteria for a grant of reconsideration: a showing that ARB "fail[ed] to consider material facts presented to [ARB] before its decision." *Getman*, ARB No. 04-059, slip op. at 2.

To the extent that this is the argument that OFCCP advances, this is not a proper basis for reconsideration. The ARB had the administrative record of proceedings before the ALJ, including briefs and motions, while the petition for review was pending before the Board. Moreover, the dissenting opinions of Judges Corchado and Royce analyze fully the arguments advanced by OFCCP asserting its Prong One jurisdiction before the ALJ and ARB, citing fully from the administrative record. See Final Decision and Order, slip op. at 34-38 (ARB Oct. 19, 2012). The record Judges Corchado and Royce relied on is the same record of proceedings that OFCCP analyzes in its Motion, and certainly the record that was fully available to all ARB panel members. See OFCCP Motion for Recon. at 4, 8-14. "Unless the [adjudicative body] has misapprehended some material fact . . . a motion [for reconsideration] is normally not a promising vehicle for revisiting a party's case and rearguing theories previously advanced and rejected." *Palmer v. Champion Mortg.*, 465 F.3d 24, 29-30 (1st Cir. 2006). Material facts are facts which are defined by substantive law and are necessary to apply the law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Based on the sequence of proceedings in this case, there is no showing that ARB misapprehended a material fact in this case, and thus no basis for granting OFCCP's motion for reconsideration.

Despite OFCCP's failure to articulate a ground for granting reconsideration that is rooted in ARB precedent, the majority reasons that the enumerated grounds for reconsideration are not exhaustive. In support of that reasoning, the majority relies on ARB's grant of reconsideration in *Macktal v. Brown & Root*, ARB No. 98-112, ALJ No. 1986-ERA-023 (ARB Nov. 20, 1998), stating that the Board "granted reconsideration because the initial decision had been based on an incorrect assumption central to the Board's analysis." See *supra* at 4. The majority's reliance on *Macktal*, however, is misplaced. The ARB in *Macktal* granted reconsideration based on an incorrect fact that the respondent failed to file a brief with the agency, and thus abandoned the case. After issuing a decision adopting the ALJ's decision and awarding attorney's fees and costs to the complainant, ARB learned on motion for reconsideration that the respondent had

timely filed a brief, but that the brief had been filed with the incorrect administrative agency within the Department. *Macktal*, ARB No. 98-112, slip op. at 2. The ARB's grant of reconsideration in *Macktal* is based on the fact that the agency failed to analyze a party's brief – because the timely-filed brief had been mis-filed within the agency. The circumstances presented in this case are not analogous to *Macktal.*

The four criteria that we rely on in deciding administrative motions for reconsideration, and that are well-established in *Getman* and relied on by ARB in countless cases, are not meaningless and we do not, nor does the majority suggest, that they are being eliminated. For those grounds to be meaningful, however, something more is required than just, as is apparently the case here, a change of heart by a judge or judges. It is different, for example, if the law has changed or new or unknown evidence is provided. The majority suggests that, in this case, a "material fact" was not considered. We do not agree. As the majority indicates, the issue, for one judge, was a procedural, not a material, fact. The grounds continue to be important for the ARB's decisions to provide some reliable guidance to parties and to potential parties. Precedent can, when new cases present new situations, be adjusted – but at some point particular cases must be decided and be made final.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge