

70 FLRA No. 106

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
U.S. CUSTOMS AND BORDER PROTECTION  
EL PASO, TEXAS  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1929  
NATIONAL BORDER PATROL COUNCIL  
(Union)

0-AR-5304

DECISION

May 2, 2018

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

**I. Statement of the Case**

On July 24, 2017, Arbitrator Angela D. McKee issued an award finding that the Agency violated an Agency directive when it assigned an employee (the grievant) to administrative duty following his arrest. The question before us is whether the Arbitrator’s award is contrary to the Agency directive. The Arbitrator’s findings are inconsistent with the plain words of the directive. Therefore, the answer is yes.

**II. Background and Arbitrator’s Award**

The grievant is a border patrol agent who was arrested off duty on suspicion of driving under the influence of alcohol (DUI). When he returned to work, the Agency assigned him to administrative duty, pending its review of his arrest. While assigned to administrative duty, the grievant was ineligible for the overtime and shift differentials that he earned when assigned to his regular duty.

Subsequently, the State of Texas (the state) suspended the grievant’s driver’s license. The grievant then obtained an “occupational license” from the state, which allowed him to drive for work purposes, with

certain restrictions.<sup>1</sup> In order to obtain – and maintain – the occupational license, the grievant had to comply with various state-court-ordered conditions. After the grievant obtained the occupational license, the Agency kept him assigned to administrative duty. Several months later, the state reinstated the grievant’s unrestricted driver’s license, and the Agency returned him to regular duty.

As relevant here, the Union filed a grievance asserting that the Agency violated Customs and Border Protection Directive No. 51735-014 (the directive) by keeping the grievant assigned to administrative duty after he had obtained an occupational license. The grievance was unresolved, and the parties submitted it to arbitration.

The Arbitrator, focusing on the occupational license, found that the Agency abused its discretion in applying the directive. While the Agency argued that it kept the grievant assigned to administrative duty because it did not know whether the grievant had complied with all of the conditions for the occupational license, the Arbitrator rejected that explanation. Instead, she found that the directive obligated the Agency to notify the grievant about any documentation that he could provide or actions that he could take to expedite the Agency’s decision to return him to regular duty. As part of this finding, the Arbitrator noted that the directive required the Agency to periodically review the grievant’s case, but that, “[o]ther than [a management official’s] testimony that reviews were done, there [was] no specific evidence” that such reviews occurred.<sup>2</sup> Thus, the Arbitrator found that the Agency acted in “bad faith” by “conceal[ing] from the grievant] its concerns” about his compliance.<sup>3</sup> The Arbitrator concluded that the Agency “abused its discretion” under the directive because it “should have . . . accepted” the grievant’s occupational license “as prima facie proof” of his compliance and should have returned him to regular duty as soon as he obtained that license.<sup>4</sup>

The Arbitrator determined that the Agency violated the directive and that the Agency’s violation deprived the grievant of his ability to earn shift differentials and overtime. As a remedy, she directed the Agency to pay the grievant backpay.

On August 18, 2017, the Agency filed exceptions to the Arbitrator’s award, and on September 18, 2017, the Union filed an opposition to the Agency’s exceptions.

<sup>1</sup> Award at 3.

<sup>2</sup> *Id.* at 17.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 16-17.

### III. Analysis and Conclusion: The award is contrary to the directive.

The Agency argues that the award is contrary to the directive.<sup>5</sup> In resolving grievances, arbitrators are empowered to interpret and apply agency rules and regulations,<sup>6</sup> such as the directive. When evaluating exceptions asserting that an arbitrator's award is contrary to a governing agency rule or regulation, the Authority determines whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation.<sup>7</sup>

According to the Agency, the Arbitrator's interpretation of the directive imposed obligations on the Agency that the directive does not actually impose.<sup>8</sup> Section 5 of the directive – which addresses the Agency's responsibilities<sup>9</sup> – states that when the Agency reassigns an employee after an arrest, the Agency must provide the employee with “written notification” explaining, among other things, the reasons for the reassignment and the reassignment's “estimated duration.”<sup>10</sup> The directive also specifies that supervisors must review an employee's case periodically and confer with senior management and labor-relations specialists when deciding whether to return an employee to regular duty, but it does *not* provide that the Agency must confer with the employee.<sup>11</sup> The Arbitrator found, however, that the directive obligated the Agency to notify the grievant about any documentation that he could provide or actions that he could take to expedite the Agency's decision to return him to regular duty.<sup>12</sup> The Arbitrator then relied on what she found to be a lack of corroborating evidence regarding the periodic reviews as evidence that the Agency “concealed its concerns” from the grievant.<sup>13</sup> However, because the directive does not require the Agency to confer with the employee, the Arbitrator's

findings impose an obligation on the Agency that the directive does not impose.<sup>14</sup>

Additionally, § 5.5.2 of the directive states that, when determining whether to return an employee to regular duty, the Agency need only “consider” various types of actions that the employee takes after his or her arrest.<sup>15</sup> The Arbitrator found that the Agency should have: (1) accepted the occupational license as “prima facie *proof*” that the grievant had complied with the state-court-ordered conditions for that license; and (2) returned him to regular duty as soon as he obtained that license.<sup>16</sup> In other words, as to the Agency's decision to return the grievant to regular duty, the Arbitrator effectively found that the occupational license should have been dispositive.<sup>17</sup> That finding is inconsistent with the directive's requirement that the Agency merely “consider” such evidence when making its decision.<sup>18</sup>

Further, § 5.5 of the directive states that the Agency “should not” permit an employee to operate a vehicle if the employee is “arrested for criminal driving infractions, including . . . DUI . . . and the employee's driving privileges have been restricted (including driving to, from, and while at work).”<sup>19</sup> Section 5.5 also states that the restriction “will apply until,” as relevant here, “the employee's driving privileges have been restored by the courts.”<sup>20</sup> The Arbitrator found that the Agency abused its discretion by failing to assign the grievant to regular duty as soon as he obtained an occupational license.<sup>21</sup> However, an occupational license is a restricted license,<sup>22</sup> and the Agency returned the grievant to regular duty when the state reinstated his unrestricted driver's license.<sup>23</sup> Thus, the Arbitrator's finding that the Agency should have

<sup>5</sup> Exceptions Br. at 7-9.

<sup>6</sup> *U.S. Dep't of VA, Med. Ctr., Dayton, Ohio*, 68 FLRA 360, 361-62 (2015) (citation omitted).

<sup>7</sup> *Id.* at 362.

<sup>8</sup> Exceptions Br. at 8-9.

<sup>9</sup> Exceptions, Ex. 7 at 510, Directive (Directive) at 2 (Section 4.2 states that “[s]upervisors and managers are responsible for taking appropriate action in accordance with the procedures . . . in [§] 5.”).

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> Award at 17.

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., *U.S. DOD, Office of Dependents Sch., Ger. Region*, 48 FLRA 979, 986-87 (1993) (finding award inconsistent with an agency regulation because the arbitrator's interpretation impermissibly expanded the wording of the regulation); *U.S. Dep't of VA, Reg'l Office, Waco, Tex.*, 41 FLRA 681, 688 (1991) (setting aside award where the arbitrator's interpretation of a statute and agency regulation imposed requirements on the agency in its selection process that were not required by the statute or regulation). Cf. *Pan. DOD Emps. Coal., AFL-CIO/CTRP*, 25 FLRA 680, 683 (1987) (denying contrary-to-agency-regulation exception because the arbitrator's interpretation “added nothing new to the regulatory provisions”).

<sup>15</sup> Directive at 4.

<sup>16</sup> Award at 17 (emphasis added).

<sup>17</sup> *Id.* at 17-18.

<sup>18</sup> Directive at 4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Award at 18.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.* at 4.

returned the grievant to regular duty *before* the state reinstated his unrestricted license is inconsistent with the requirements of § 5.5.

Consequently, we find that the Arbitrator's findings are inconsistent with the plain words of the directive.<sup>24</sup> Therefore, we set aside the award, and we find it unnecessary to resolve the Agency's remaining exceptions.<sup>25</sup>

#### IV. Decision

We set aside the award.

#### Member DuBester, dissenting:

I disagree with the majority's decision to set aside the award. Contrary to the majority, I agree with the Arbitrator's findings that the Agency violated the Arrest Directive, and thereby abused its discretion, by not returning the grievant to regular duty after the grievant obtained an occupational driver's license from a local court. The Arbitrator found that the court's authorization of an occupational driver's license should have been dispositive, because it was "prima facie proof" that the grievant had complied with the court's conditions for removing the restrictions on his driving privileges.<sup>1</sup>

The Arbitrator gave careful consideration to the case's circumstances, and the procedures the Agency followed. Upholding the Agency's basic requirements for Border Patrol Agents in cases such as this, the Arbitrator found "that the Agency's act of revoking the [g]rievant's law enforcement status and placing him on administrative duty was not itself a violation of . . . the Arrest Directive."<sup>2</sup> Similarly, the Arbitrator found that "[t]he record contains no evidence to suggest that the Arrest Directive itself is unreasonable or unlawful," and that the Directive is a "valid policy."<sup>3</sup> So, the Arbitrator found, it was "not unreasonable for the Agency to decline to return [the grievant] to regular duty that required driving while the suspension of [the grievant's] license by the state was either pending or in effect."<sup>4</sup>

However, giving careful consideration to the case's circumstances, and the procedures the Agency followed, the Arbitrator also found that the Agency violated the Directive, and abused its discretion, "by not giving adequate consideration to returning the [g]rievant to full duty status after . . . [the grievant] had been authorized by a court to have an occupational driver's license."<sup>5</sup> This is in keeping with un rebutted testimony that the grievant "was informed by [a manager] that he could return to full duty if he were to obtain such a license."<sup>6</sup> Further, the Arbitrator found that the Agency acted in "bad faith" when it "concealed its concerns about [the grievant's] compliance with the court order."<sup>7</sup>

I agree with the Arbitrator. The Arrest Directive, § 5.5.2, requires the Agency to "periodically review" the grievant's restricted duty status, and "consider actions taken by the [grievant] subsequent

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<sup>24</sup> Member Abbott notes that he is troubled that this grievance appears to have been driven by nothing more than a desire to reward overtime for an employee charged with, and disciplined for, serious misconduct. It is no small matter that the grievant was arrested and charged with DUI. Even the Arbitrator agreed the Agency acted *within its discretion* by placing him on administrative leave and restricted duty. The Arbitrator simply disagreed when the Agency should have reinstated him to full duties. I cannot agree that this is a call that the Arbitrator is entitled to make. Bad choices have consequences. The notion that a Customs and Border Protection officer charged with DUI can be paid overtime for hours that he never worked, because of his own misconduct, is not a result I am willing to applaud.

<sup>25</sup> Exceptions Br. at 2, 9-13 (arguing that the award is contrary to law), 3-6 (arguing that the award is based on a nonfact), 6-7 (arguing that the award fails to draw its essence from the parties' collective-bargaining agreement).

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<sup>1</sup> Award at 16-17.

<sup>2</sup> *Id.* at 14.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 15.

<sup>5</sup> *Id.* at 16.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 17.

to the arrest.”<sup>8</sup> The Agency did not comply with these requirements. “[T]here is no specific evidence to substantiate that any such periodic reviews occurred,” or that the Agency took any actions to find out “whether the [g]rievant had complied with” the court’s requirements.<sup>9</sup> By failing to comply with these Directive requirements, the Agency acted in bad faith.

Moreover, the Agency failed to comply with the Arrest Directive’s requirement, in § 5.5, that the restrictions on an employee’s operation of an Agency vehicle will be restored when “the employee’s driving privileges have been restored by the courts.”<sup>10</sup> It is undisputed that the court restored the grievant’s driving privileges, for all purposes relevant to the grievant’s work for the Agency, when the court issued him an occupational driver’s license “authoriz[ing him to] drive an [Agency]-owned vehicle up to twelve hours per day.”<sup>11</sup>

For these reasons, I dissent from the majority’s determination that the award is inconsistent with the Arrest Directive. Accordingly, I would reach the Agency’s other exceptions.

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<sup>8</sup> Exceptions, Ex. 7 at 511-12, Directive (Directive) at 3-4.

<sup>9</sup> Award at 16-17.

<sup>10</sup> Directive at 4.

<sup>11</sup> Award at 16.