

71 FLRA No. 56

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS BENEFIT ADMINISTRATION
NASHVILLE REGIONAL OFFICE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2470
(Union)

0-AR-5388

DECISION

September 9, 2019

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

I. Statement of the Case

In this case, we find the Privacy Act¹ was not violated by the Agency's action of handing unredacted copies of performance evaluations to its in-house counsel, and so, there was no violation of the parties' agreement. Arbitrator Ed W. Bankston found that the Agency violated the Privacy Act and ordered the Agency to pay penalties as a result. We vacate the award.²

II. Background and Arbitrator's Award

The relevant facts in this case are not complicated, nor are they disputed.

On June 22, 2016, the Union filed a grievance alleging that the Agency had not properly communicated

all performance standards to bargaining-unit employees within thirty days of the beginning of the performance year (performance year 2016).³ While the parties were preparing to arbitrate that dispute, an attorney from the Agency's Office of the General Counsel (OGC) requested and obtained from the Agency's human resources office the unredacted performance standards and appraisals of the Union representatives who were handling the performance-standards grievance and who the attorney believed might need to testify at the arbitration hearing on that grievance. The OGC attorney thought that the representatives' acknowledged receipt of those standards might show that the grievance was untimely or estopped. The arbitration hearing on the performance-standards grievance occurred on July 17, 2017.⁴

Promptly after that arbitration hearing, the Union filed the grievance at issue here. The Union alleged that the release of the unredacted 2016 performance appraisals of the Union representatives to the Agency's attorney, without their consent, was a violation of the Privacy Act.⁵ The parties could not agree on a resolution, and the Union invoked arbitration.

As relevant to our decision today, in an award dated May 14, 2018, the Arbitrator determined that the release of the performance appraisals to the Agency's attorney violated the Privacy Act because the release was "unauthorized."⁶ He also found that the Agency violated provisions of the parties' collective-bargaining agreement that required compliance with the Privacy Act.

The Arbitrator rejected the Agency's assertion that the OGC attorney needed the standards and appraisals to prepare to arbitrate the performance-standards grievance. The Arbitrator found that the Agency's timeliness and estoppel theories in the performance-standards case lacked merit, and he noted that the Agency never called any of the Union representatives to testify in the previous arbitration. Further, the Arbitrator found that, if the OGC attorney could lawfully access the Union representatives' performance appraisals here, then "every filing of a grievance would justify an illicit look at an unredacted performance appraisal" for a Union representative.⁷

¹ 5 U.S.C. § 552a.

² In order to avoid an impasse between the Members, Member Abbott agrees that under the circumstances of this case there was no release of information that would trigger, let alone violate, the Privacy Act. His view of this matter is addressed in his concurring opinion. *See generally* SSA, 69 FLRA 271, 274 n.42 (2016) (Member DuBester concurring; Member Pizzella dissenting) (noting Members may agree solely to avoid impasse).

³ Award at 8.

⁴ *Id.* at 8-9 (the arbitrator of that dispute rendered his decision on November 2, 2017).

⁵ *Id.* at 9-10.

⁶ *Id.* at 19.

⁷ *Id.* at 16.

The Agency filed exceptions to the award on June 13, 2018. The Union filed an opposition to the Agency's exceptions on July 9, 2018.

III. Analysis and Conclusion: The award is contrary to the Privacy Act.

The award is inconsistent with the Privacy Act – specifically § 552a(b)(1), which allows disclosures to employees of the Agency with a “need . . . in the performance of their duties.”⁸

The Agency expressly delegated litigation duties, which include grievance arbitrations, to its OGC.⁹ While investigating and preparing to litigate the performance-standards grievance, the OGC attorney suspected that the grievance could be untimely or estopped.¹⁰ Because the three Union representatives who advanced the performance-standards grievance to arbitration were members of the allegedly injured bargaining unit, the attorney surmised that the Union knew the content of the purportedly defective performance standards since the beginning of the performance year, yet it did not grieve those standards until the performance year ended.¹¹

The employees' performance standards and appraisals were part of the same form.¹² Consequently, the attorney requested copies of those unredacted forms in order to determine when the representatives acknowledged receiving their standards. It is undisputed that forms that had the names redacted would not provide such information.

The question under the Privacy Act is whether the OGC attorney “need[ed]” those records to explore all colorable defenses as part of her duty of due diligence, and not whether an arbitrator found those defenses meritorious.¹³ On this record, the attorney did need the records to prepare the Agency's defenses to the performance-standards grievance. Contrary to the Arbitrator's claim, the OGC's lawful access of unredacted records here does not invite privacy violations for all future Union representatives.¹⁴ Therefore, the

Privacy Act was not violated when the OGC attorney received those records,¹⁵ and, consequently, there was no violation of the parties' agreement either.

IV. Decision

We vacate the Arbitrator's award in its entirety.

⁸ 5 U.S.C. § 552a(b)(1); *see also AFGE, Local 1164*, 66 FLRA 74, 77-78 (2011).

⁹ Award at 11 (citing Agency's Grievance Denial (quoting 38 C.F.R. § 14.501(a)-(c) (describing the duties of the Agency's OGC)).

¹⁰ *Id.* at 16.

¹¹ Exceptions, Attach. 4, Agency Post-Hr'g Br. at 9-11.

¹² Exceptions Br. at 5.

¹³ 5 U.S.C. § 552a(b)(1).

¹⁴ Award at 16. In this regard, Chairman Kiko notes that the Privacy Act sanctioned the disclosure of unredacted records here because those records were pertinent to a full investigation

of the Agency's colorable legal defenses to the performance-standards grievance. Similar circumstances will not recur in all, or even most, future grievances.

¹⁵ Although the Arbitrator framed the issues to include the disclosures of (perhaps) four individuals' records, *id.* at 4-5, he found the Privacy Act violated only as to the three Union representatives. *Id.* at 20. Thus, by setting aside the findings as to those three individuals, we set aside the whole award.

Member Abbott, concurring:

Our decision in this case turns on one question – may purported violations of the Privacy Act be pursued as grievances through a negotiated grievance procedure? To me, the answer to that question is no.

Here, the Agency put the question directly before us. Specifically, the Agency argues that the procedures set forth in the Privacy Act are “exclusive”¹ and that disputes arising under the Privacy Act are not grievable because they do not affect conditions of employment.² I would agree.

Within the past few years, the decisions of the U.S. Court of Appeals for the District of Columbia Circuit have led the way for the Authority to discover that the reach of the Statute does have its limitations.³ Much as previous panels sought the incremental extension⁴ of the Statute, we have instead determined that the water’s edge runs up against Title 10 issues⁵ and employment status.⁶

Section 7103(a)(9)(C)(ii) of the Federal Service Labor-Management Relations Statute (the Statute) defines “grievance” as a “claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting *conditions of employment*.”⁷ In *U.S. Department of the Treasury, U.S. Customs Service v. FLRA*, the U.S. Court of Appeals for the D.C. Circuit chastised the Authority for its “farfetched” and “self-serving[] misconstruction” of the definition of

grievance so far as to effectively extend the Authority’s jurisdiction “to construe any and all statutes or treaties of the United States.”⁸ The Court clarified that the Statute “confine[s] grievances to alleged violations of a statute or regulation that can be said to have been issued *for the very purpose of affecting the working conditions* of employees – not one that merely *incidentally* does so.”⁹ The Court, therefore, held that “[o]nce the § 7103(a) language is given that meaning it becomes apparent that a ‘grievance’ predicated on a claim of violation of a law that is *not* directed toward employee working conditions is outside both the arbitrator’s and the FLRA’s jurisdiction.”¹⁰

The purpose of the Privacy Act is to regulate the conduct between federal agencies and “individuals” who are “citizen[s] of the United States or . . . alien[s] lawfully admitted for permanent residence.”¹¹ Federal employees have no separate, identifiable status, as employees, under the Privacy Act insofar as it concerns causes of action or remedies for potential violations.¹² The Privacy Act provides only one avenue of recourse to pursue a remedy for a violation of its provisions – “a civil action against the agency, and the district courts for the United States shall have jurisdiction in the matters under the provisions of this subsection.”¹³ In fact, any references to “[f]ederal personnel” are made in the context of enumerating the responsibilities of federal agencies under the Privacy Act and to specify that certain records are subjected to a computer “matching program,” which permits certain records to be shared between agencies without triggering the Privacy Act.¹⁴

Further, the grievants here are not seeking redress for some form of personnel action, like a denial of

¹ Exceptions Br. at 40.

² *Id.* at 39.

³ See *U.S. Dep’t of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I. v. FLRA*, 665 F.3d 1339 (D.C. Cir. 2012), *rev’g sub nom. U.S. Dep’t of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I.*, 64 FLRA 1136 (2010) (Member Beck dissenting).

⁴ See *AFGE, Local 1547*, 67 FLRA 523, 528 (2014) (Member Pizzella dissenting), *rev’d sub. nom. Dep’t of the Air Force v. FLRA*, 844 F.3d 957 (D.C. Cir. 2016) (*Air Force*).

⁵ *Air Force*, 844 F.3d at 963-64 (2016) (finding nonnegotiable proposal allowing access to military facility’s shoppette by civilian bargaining unit employees without military affiliation).

⁶ See *SSA*, 71 FLRA 205, 207-08 (2019) (Concurring Opinion of Member Abbott) (Member DuBester dissenting) (noting arbitrator lacked “OPM-esque” power to convert Schedule A, excepted service, time-limited employee to competitive service employee status); *U.S. DOL*, 70 FLRA 903, 904-05 (2018) (Member DuBester dissenting) (student intern on term appointment); *U.S. DOJ, Fed. BOP, Fed. Med. Ctr. Carswell, Fort Worth, Tex.*, 70 FLRA 890, 891-92 (2018) (Member DuBester dissenting) (medical competence of student intern); *U.S. DOL*, 68 FLRA 927, 929-31 (2015) (Concurring Opinion of Member Pizzella).

⁷ 5 U.S.C. § 7103(a)(9)(C)(ii) (emphasis added).

⁸ 43 F.3d 682, 690 (D.C. Cir. 1994) (*Customs Service*) (specifically criticizing the Authority’s conflation of the terms “law, rule, or regulation” of § 7103(a)(9)(C)(ii) with “applicable law” in § 7106(a)(2)).

⁹ *Id.* at 689 (emphasis added).

¹⁰ *Id.*

¹¹ See *AFGE Local 987*, 57 FLRA 551, 558 (2001) (Dissenting Opinion of Chairman Cabaniss) (quoting 5 U.S.C. § 552a(a)(2)).

¹² 5 U.S.C. § 552a(a)(13) (defining “Federal personnel” as “officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits)”).

¹³ *Id.* § 552a(g)(1); see also *id.* § 552a(g)(5) (“[a]n action to enforce any liability created under this section may be brought in the district court of the United States”).

¹⁴ 5 U.S.C. § 552a(a)(8), (o).

a promotion or a dismissal, or to collaterally attack personnel judgments by other federal managers.¹⁵ Instead, the grievants are seeking redress for an alleged straightforward violation of the Privacy Act, namely, that their performance evaluations were given to others without their knowledge or permission.

Put simply, the Privacy Act was not “issued for the very purpose of affecting the working conditions of employees.”¹⁶ Accordingly, it is not a “law, rule, or regulation affecting conditions of employment” under § 7103(a)(9) of the Statute. Accordingly, I would have found that this matter is not subject to the parties’ negotiated grievance procedure, the arbitrator was without jurisdiction, and the Authority has no jurisdiction.¹⁷

Member DuBester, dissenting:

I disagree with the majority’s conclusion that the award is inconsistent with the Privacy Act.¹ In reaching its conclusion, the majority disregards the Arbitrator’s factual findings and, therefore, misapplies the standard of review that governs our disposition of the Agency’s contrary-to-law exception.

As the Authority explained in *AFGE, Local 1164 (AFGE)*² – a case cited by the majority in its decision – we review the question of whether an arbitrator’s award is contrary to the Privacy Act on a de novo basis.³ In applying this standard of review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. Significantly, in making that determination, the Authority defers to the arbitrator’s underlying factual findings.⁴

In the case before us, the Arbitrator made extensive factual findings supporting his conclusion that the Agency’s attorney did not need the Union representatives’ unredacted performance appraisals to prepare the Agency’s defense in the earlier-filed grievance. Specifically, he found that the arbitrator in the earlier case did not “buy into [the Agency’s] makeshift argument” that the grievance was untimely or estopped,⁵ and that the Agency neither offered the performance appraisals as evidence nor called the Union representatives to testify during the earlier arbitration hearing.⁶ The Arbitrator further found that “there was never a nexus between the Agency’s estoppel theory of the case and [the attorney’s] proper performance of duty in response to the grievance,”⁷ and that the attorney “had no need to examine those performance appraisals in order to perform her duties properly.”⁸ On this basis, he determined that the Agency’s “need to know” argument was “unsupported by the record,”⁹ and he rejected the Agency’s justifications as “spurious, tenuous, [and] even superfluous.”¹⁰

¹⁵ See *Elgin v. Dep’t of the Treasury*, 567 U.S. 1, 5 (2012) (Civil Service Reform Act is exclusive avenue for judicial review for covered adverse action, here, non-adversarial removal from service); *Minshew v. Donley, et al.*, 911 F.Supp.2d 1043, 1067 (D. Nev. 2012) (Civil Service Reform Act is exclusive means to pursue redress for prohibited personnel practices). *But see Mudge v. U.S.*, 308 F.3d 1220, 1232 (Fed. Cir. 2002) (discussing how the 1994 amendment to 5 U.S.C. § 7121(a)(1) to provide for “administrative” procedures means subsection no longer restricts federal employee’s right to pursue employment grievance in court).

¹⁶ *Customs Service*, 43 F.3d at 689.

¹⁷ Accordingly, because the Arbitrator based his contractual-violation finding on his erroneous determination that he had jurisdiction to consider a violation of the Privacy Act, I would have found that the Arbitrator erred in finding a contractual violation, too.

¹ 5 U.S.C. § 552(a) *et. seq.*

² 66 FLRA 74 (2011).

³ *Id.* at 77.

⁴ *Id.*; see also *U.S. DOL*, 62 FLRA 153, 156 (2007) (Chairman Cabaniss concurring) (when applying de novo review, “the Authority defers to the arbitrator’s factual findings because the parties bargained for the facts to be found by an arbitrator chosen by them”).

⁵ Award at 17.

⁶ *Id.* at 18.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 19.

In *AFGE*, the Authority denied a union's exception challenging the arbitrator's conclusion that recipients of privacy-protected information did not need to know the information for purposes of applying the Privacy Act. We noted that, although the union disagreed with the arbitrator's factual findings supporting his conclusion, "it [did] not argue that they are based on a nonfact."¹¹ We therefore deferred to the arbitrator's factual findings, and then determined whether they supported his application of the "need to know" exception.¹²

Here, by contrast, the majority simply disregards the Arbitrator's factual findings on its way to concluding that his application of the Privacy Act was contrary to law. Because this violates the standard of review governing contrary-to-law exceptions by failing to afford the deference owed to the Arbitrator's factual findings, I dissent from the majority's decision.¹³

¹¹ *AFGE*, 66 FLRA at 78.

¹² *Id.* ("Consequently, based on the Arbitrator's factual findings, the Union has not established that the Arbitrator improperly found that the recipients did not need to know the Privacy Act-covered information contained in the attachments."); *see also AFGE, Local 1102*, 65 FLRA 148, 150-51 (2010) (concluding that the union's exception failed to demonstrate that the award was deficient because, based on the arbitrator's factual findings, his application of the confidentiality provisions of the Privacy Act was not contrary to law).

¹³ Based upon the Arbitrator's factual findings, I would deny the Agency's contrary-to-law exception, and would consider the Agency's remaining exceptions.