71 FLRA No. 59

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

INTERNATIONAL FEDERATION
OF PROFESSIONAL
AND TECHNICAL ENGINEERS
ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES
(Union)

0-AR-5365

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DECISION

September 12, 2019

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

I. Statement of the Case

This case is ultimately about whether the Privacy Act[1] prohibits the Agency from disclosing redacted records related to misconduct allegations against two administrative law judges (the grievants). We find that, because the disclosure would not result in a clearly unwarranted invasion of personal privacy, the Privacy Act does not prohibit disclosure. Accordingly, we agree with Arbitrator Michael A. Marr's conclusion that the Agency violated the parties' collective-bargaining agreement by refusing to disclose the requested information.

II. Background and Arbitrator's Award

The grievants are administrative law judges who decide appeals about disability claims. At informal hearings, the judges review claimants' files, which contain, among other documents, applications for benefits, medical records, and payment records.

As relevant here, a disability claimant may complain to the Agency that a judge engaged in misconduct. Pursuant to Agency policy, the Agency reviews such a complaint and determines whether to investigate further. During any further investigation, the Agency provides the judge with a copy of the complaint and an opportunity to respond.

The Agency notified the grievants that it was investigating misconduct complaints against them.[2] In response, the grievants separately requested that the Agency disclose to their personal attorneys: (1) the audio recordings of the claimants' hearings; (2) the complaints; and (3) the Agency's letters to the judges about the complaints and further investigations. The Agency refused, asserting that the Privacy Act prohibited disclosure of the requested information. Consequently, the grievants each filed a grievance challenging the Agency's refusal to provide the requested information.

The grievances were consolidated and submitted to arbitration. As relevant here, the Arbitrator considered whether the Agency violated Article 1, Section 3 (Article 1) and Article 21, Section 1 (Article 21) of the parties' agreement. Article 1 provides, in relevant part, that the Federal Service Labor-Management Relations Statute (the Statute) governs the parties.[3] Article 21 provides, in pertinent part, that the Agency will maintain judges' personnel files and misconduct complaints in systems of records pursuant to the Privacy Act.

The Arbitrator found that Article 1 incorporates § 7114(b)(4) of the Statute, and that, because the Union had "ratified and adopted" the grievances, the grievances were informal information requests within the meaning of § 7114(b)(4) of the Statute.[4] He noted that § 7114(b)(4) requires an agency to disclose to a union, or its authorized representative, "data" that is, among other things, "normally maintained by the agency," "reasonably available," and "necessary," unless the disclosure is prohibited by law.[5] The Arbitrator concluded that the Agency was required to disclose the requested information unless the Privacy Act otherwise prohibited disclosure.

Regarding the Privacy Act, the Arbitrator found that the requested information was "essential for effective legal representation and to defend against bias complaints."[6] He considered the "potential harm and privacy concerns" to the claimants but found no privacy concerns because the grievants requested redacted records so as not to reveal the claimants' personally

[1] 5 U.S.C. § 552a.

[2] The Arbitrator found that the Agency forwarded a copy of the complaint to one of the grievants at the same time that it notified him of the investigation; it is unclear whether the Agency provided a copy of the complaint to the other grievant. *See* Award at 8-9.

[3] 5 U.S.C. §§ 7101-7135.

[4] Award at 19, 25; *see also id.* at 28.

[5] *See id.* at 11 (quoting 5 U.S.C. § 7114(b)(4)).

[6] *Id.* at 34.

identifiable information.[7] Therefore, he concluded that the Privacy Act did not prohibit disclosure, and the Agency violated the parties' agreement by refusing to disclose the information. As a remedy, the Arbitrator directed the Agency to disclose the redacted materials.

The Agency filed exceptions to the award on April 11, 2018, and the Union filed an opposition to those exceptions on May 11, 2018.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that two of the Arbitrator's findings are based on nonfacts.[8] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have a reached a different result.[9]

First, the Agency argues that the Arbitrator's finding that the grievant's information request was a valid § 7114(b)(4) request is a nonfact because the documents were going to a private attorney and not directly to the Union.[10] On this point, the Agency contends that the Arbitrator impermissibly extended the bounds of the Statute.[11] However, the Arbitrator found that, while the Union did not initiate the grievance, it "ratified and adopted" the grievance, and the grievants' requests for information, as its own.[12] The Arbitrator determined that the Union's actions made the grievants' requests an informal § 7114(b)(4) request.[13]

The Agency's disagreement with these findings does not establish that the Arbitrator's findings are clearly erroneous. Moreover, the Arbitrator based the award on his finding that redacted records do not implicate the Privacy Act, regardless of how the records were requested.[14] Therefore, the Agency's argument does not challenge a finding that was a "central fact" underlying the award.

Next, the Agency argues that the Arbitrator erred in finding that there is a "redaction exception" within the Privacy Act.[15] The Agency merely challenges the Arbitrator's description of cases in which disclosures of redacted information were permitted under the Privacy Act.[16] Further, the Privacy Act contains a provision that mandates redaction of any exempt information.[17] As such, there is no basis for finding that the award is based on a nonfact.[18]

Accordingly, we deny this exception.

[7] *Id.; see also id.* at 28 (finding that the "[r]edacted documents do not implicate the Privacy Act.").
[8] Exceptions at 19-20.
[9] *U.S. Dep't of VA, VA Reg'l Office, St. Petersburg, Fla.*, 70 FLRA, 799, 800 (2018) (Member DuBester concurring, in part, and dissenting, in part).
[10] Exceptions at 19.
[11] *Id.*
[12] Award at 19, 25; *see also id.* at 28.
[13] *Id.* at 24-25.
[14] *Id.* at 28; *see also id.* at 25 ("the requests . . . were valid 7114(b) requests, assuming such requests were necessary").
[15] Exceptions at 20.
[16] Award at 23-25 (citing *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976); *Health Care Fin. Admin.*, 56 FLRA 503 (2000) (*Health*)).
[17] 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").
[18] Additionally, in its exceptions, the Agency alleges that the Arbitrator exceeded his authority by "extending" § 7114(b)(4) and ordering the Agency to violate the Privacy Act. Exceptions at 20. However, aside from its assertion, the Agency makes no argument that the Arbitrator failed to resolve an issue that was before him, resolved an issue that was not in front of him, disregarded a specific limit on his authority, or awarded relief to persons not encompassed within the grievance. *E.g.*, *AFGE, Local 12*, 70 FLRA 582, 583 (2018); *U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 308 (1995) (citations omitted). Accordingly, we deny this exception as unsupported. *See* 5 C.F.R. § 2425.6(e)(1) ("[a]n exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support" its argument).

B. The award is not contrary to law.

The Agency bases its initial contrary-to-law argument on the same argument we have rejected above – that the Arbitrator improperly converted an information request from a private attorney into a § 7114(b)(4) request.[19] However, as discussed previously, the Arbitrator found that, by the Union's ratification and adoption of the grievance, the grievance was an informal § 7114(b)(4) request from the Union,[20] and the Agency has not demonstrated that his finding is a nonfact. Therefore, the Agency's reiteration of its nonfact argument provides no basis for finding the award contrary to law.[21]

The Agency also asserts that the award is contrary to the Privacy Act because it directs the Agency to disclose the claimants' personal information without their consent.[22] As relevant here, § 7114(b)(4) of the Statute requires an agency to furnish information to a union, or its authorized representative, upon request and "to the extent not prohibited by law."[23] The Privacy Act generally prohibits the disclosure of any record concerning an individual in a "system of records" – i.e., a system that allows information to be retrieved by name – if the individual has not consented to the disclosure.[24] However, the Privacy Act is subject to the Freedom of Information Act (FOIA).[25] FOIA broadly requires the disclosure of government records, but FOIA Exemption 6 prohibits the disclosure of "personnel and medical files and similar files" if the disclosure "would constitute a clearly unwarranted invasion of personal privacy."[26] If such an invasion would result, then disclosure is not required by FOIA.

The Authority has held that "the redaction of documents to permit disclosure of nonexempt portions is appropriate under [FOIA] Exemption 6."[27] For instance, in *Health Care Financing Administration* (*Health*),[28] the union requested, in sanitized form, information related to the selection process for two job vacancies, including the applications of all internal and external applicants.[29] The Authority found that the redaction of identifying information protects the privacy of affected individuals such that "there would be no unwarranted invasion of privacy under Exemption 6."[30] Here, it is undisputed that the requested information would be sanitized to protect the claimants' privacy concerns.[31] Therefore, the Arbitrator's conclusion that disclosure of the redacted records does not implicate privacy concerns is not contrary to law.

Citing our decision in *Pension Benefit Guaranty Corp., Washington, D.C.* (*PBGC*),[32] the Agency further argues that redaction of the claimants' hearing records cannot mitigate the claimants' privacy concerns because the records pertain to a single claimant. But our decision in *PBGC* is distinguishable. In *PBGC*, the requested information concerned the privacy-protected performance information of a single employee.[33] Because the information sought – namely, the employee's performance rating – was itself protected, it could only be disclosed if the employee's name was redacted, but even this redaction would not cure the violation if the employee's name was known to the requesting party. Thus, in *PBGC*, it was not possible to protect the privacy concerns at stake – namely, the performance rating received by the single employee – while still providing the requested information.

Here, on the other hand, the Agency can provide the requested records related to the claimants' hearings while still redacting any protected information within those records. In other words, it is possible here to

[19] Exceptions at 8.
[20] Award at 19, 25, 28.
[21] When an exception involves an award's consistency with law, the Authority reviews the exception and the award de novo. In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *E.g., AFGE, Local 704*, 70 FLRA 676, 677 (2018) (citations omitted); *U.S. DHS, U.S. Citizenship & Immigration Servs.*, 68 FLRA 272, 274 (2015) (*DHS*) (citations omitted).
[22] *See* Exceptions at 13-14. Although the Agency broadly asserts that the award requires disclosure of "personal information," *id.* at 11, 13, it does not specify what information is of concern. At arbitration, the Agency argued that as part of a claim for disability benefits it collects a claimant's social security number, birthdate, phone number, home address, and medical information. Award at 12. However, there is no dispute that the grievants have requested sanitized records in which all such information would be redacted.
[23] 5 U.S.C. § 7114(b)(4).
[24] *See* 5 U.S.C. § 552a(a)(4)-(5), (b); *see also Pension Benefit Guar. Corp., Wash., D.C.*, 69 FLRA 323, 327 (2016) (*PBGC*); *DHS*, 68 FLRA at 274. There is no dispute that the hearing records are maintained in an Agency system of records and that the claimants have not consented to the disclosure of their personal information.
[25] *See* 5 U.S.C. § 552a(b)(2); *id.*; § 552(a)(2); *PBGC*, 69 FLRA at 327.
[26] *PBGC*, 69 FLRA at 327 (quoting 5 U.S.C. § 552(b)(6)).
[27] *Health*, 56 FLRA at 506; *see also U.S. Dep't of State v. Ray*, 502 U.S. 164, 174 (1991) (*Ray*) (concluding that "redaction . . . is expressly authorized by FOIA" and authorizing disclosure of records after redaction of names, addresses, and other identifying details).
[28] 56 FLRA 503.
[29] *Id.* at 503 & n.1.
[30] *Id.* at 506.
[31] Award at 3-4.
[32] 69 FLRA at 327.
[33] *Id.* at 328.

protect the claimants' private information because the *requested* information can be provided even with redaction of the *protected* information.[34]

As the Agency has failed to show that the redacted disclosures would be an "unwarranted invasion"[35] of the claimants' personal privacy, we find that the Privacy Act does not prohibit the disclosure of the requested information.[36] Consequently, the award is not contrary to law.

IV. Decision

We deny the Agency's exceptions.

Member Abbott, concurring:

I agree that the Agency's exceptions should be denied in their entirety, and that the award here should stand. Accordingly, I concur in the decision.[1]

However, I write separately because it was enough for me that the arbitrator found the Agency violated the parties' agreement. The Agency's myopic view of its obligations to its own employees who have been accused of misconduct, subject of investigation, and who have, in turn, availed themselves of the negotiated grievance procedure was as unpersuasive as it was stunning. While the arbitrator, and the majority, go to great lengths to analyze the Privacy Act, this analysis is unnecessary and a distraction.

Once again, we are presented with a case where the grievants here are not seeking redress for some form of personnel action that was taken against them. Instead, the grievants are seeking relief for the agency's inexplicable refusal to supply documents and information that should have been provided as a matter of course as a result of an investigation of the grievants and the prosecution of their grievance.

In this case, as I argued in my separate opinion for *U.S. Department of VA, Veterans Benefit Administration, Nashville Regional Office*[2], there was no release of information that would trigger, let alone violate, the Privacy Act.

[34] *See, e.g.*, *Ray*, 502 U.S. at 178 (redacted information not required to satisfy the reason for which records were requested).
[35] 5 U.S.C. § 552(b)(6).
[36] *E.g.*, *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Houston, Tex.*, 60 FLRA 91, 94-95 (2004) (agency did not meet burden of demonstrating that privacy concerns would be affected by disclosure of files).

[1] In order to avoid an impasse between the Members, I join the majority decision. The parties have waited long enough for a decision. *See generally SSA*, 69 FLRA 271, 274 n.42 (2016) (Member DuBester concurring; Member Pizzella dissenting) (noting Members may agree solely to avoid impasse).
[2] 71 FLRA 322, 324-25 (2019) (Concurring Opinion of Member Abbott) (Member DuBester dissenting).

Chairman Kiko, dissenting:

I disagree with the majority's conclusion that the award is consistent with § 7114(b)(4) of the Federal Service Labor-Management Relations Statute (the Statute).[1] Because the only information requests in this case came from individual employees on behalf of their private attorney, rather than from the Union or a Union representative, § 7114(b)(4) did not require the Agency to furnish the requested information.[2]

Initially, I note that whether a request for information is ultimately sufficient to trigger an agency's obligations under § 7114(b)(4) is a legal question that the Authority assesses de novo[3] – not a factual finding to which we defer, as the majority states.[4] Thus, it is improper for the majority to deny the argument that the Arbitrator expanded the Agency's obligations under § 7114(b)(4)[5] merely by referencing a nonfact analysis.[6]

The Arbitrator found that the Union "intervened at Step 3" of the grievance procedure and, "by doing so, ratified and adopted" the employees' previous "request[s] for disclosure as its own request[s]."[7] But the Statute allows only the Union, "or its authorized representative," to request information within the ambit of § 7114(b)(4).[8] Thus, for § 7114(b)(4) to apply, *the Union or its representative must make a request.* That did not happen here. And, contrary to the Arbitrator's finding, the Statute does not allow the Union to retroactively lend its institutional power to previous information requests from individuals who were not acting as Union representatives. Indeed, neither the Arbitrator nor the majority has cited a single case where the Authority has found that such a practice is consistent with the Statute.

I do not doubt the Union's power to designate representatives to act on its behalf in making § 7114(b)(4) requests, or to designate a non-employee attorney to receive information pursuant to properly made requests.[9] But, in this case, the Union did not authorize the grievants or their private attorney to act on the Union's behalf when the information requests were presented to the Agency. Therefore, the Agency never received a request from the Union or its authorized representative. I would find that the award is contrary to law for holding otherwise.

And because the Arbitrator found that the Agency violated the parties' agreement by failing to disclose information requested pursuant to § 7114(b)(4), I would find that those contract violations cannot stand without the underlying § 7114(b)(4) violation.[10] Therefore, I would set aside the contractual violations as well.

For the foregoing reasons, I dissent.

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[1] 5 U.S.C. § 7114(b)(4).

[2] *Id.* (agency must "furnish to the *exclusive representative* involved, or its *authorized representative*, upon request," certain information not prohibited by law (emphases added)).

[3] *E.g.*, *NLRB*, 60 FLRA 576, 578, 580-81 (2005) (*NLRB*) (Member Pope dissenting).

[4] Majority at 4.

[5] Exceptions at 16-18 & n.6 (arguing that the award is contrary to § 7114).

[6] Majority at 4.

[7] Award at 25.

[8] 5 U.S.C. § 7114(b)(4).

[9] *Cf. U.S. Dep't of the Army, Army Corps of Eng'rs, Portland Dist., Portland, Or.*, 60 FLRA 413, 417 (2004) (citing *Bureau of Indian Affairs, Isleta Elementary Sch., Pueblo of Isleta, N.M.*, 54 FLRA 1428, 1438-40 (1998) ("[T]he Authority has found that an agency's interference with a union's right to designate the union's representatives violates § 7116(a)(1), even when the intended union representative is a non-employee."); *Food & Drug Admin., Newark Dist. Office, W. Orange, N.J.*, 47 FLRA 535, 566-67 (1993) (finding that agency violated § 7116(a)(1) and (5) by failing to recognize an attorney as a union-designated representative at step two of the negotiated grievance procedure).

[10] *See NLRB*, 60 FLRA at 581 n.9 (where arbitrator found that agency's failure to provide information violated § 7114(b)(4) and the parties' agreement, but arbitrator applied the same standards in finding the statutory and contract violations, Authority found that setting aside the § 7114(b)(4) violation also required setting aside the contract violation).