**72 FLRA No. 25**

NATIONAL LABOR RELATIONS BOARD
(Agency)

and

NATIONAL LABOR RELATIONS BOARD UNION
(Union)

0-AR-5424

DECISION

March 10, 2021

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

## I. Statement of the Case

In this case, we find that when an agency is determining whether to grant a debt waiver under 5 U.S.C. § 5584, it has sole and exclusive discretion to determine whether there is fraud, misrepresentation, fault, or lack of good faith on the part of the employee requesting the waiver. Accordingly, an authorized official's exercise of this discretion is not grievable and may not be second-guessed by an arbitrator.

After selecting a General Schedule (GS)-13 field examiner (the grievant) for a GS-14 position, the Agency determined that it had erroneously promoted her and returned her to the GS-13 level. The Agency then sought from the grievant the difference between the GS-14 pay that she had received while promoted and the GS-13 pay that the Agency claimed she should have received. Consistent with the plain wording of 5 U.S.C. § 5584 governing such waivers, the Agency denied the grievant's request to waive the salary repayment because it found that the grievant was not without fault. Arbitrator Louis M. Zigman issued an award finding that the Agency wrongly denied the waiver request, and he directed the Agency to re-promote the grievant.

The question before us is whether, under 5 U.S.C. § 5584, the Agency has sole and exclusive discretion to find the grievant at fault for failing to properly inform the Agency of her suspected salary overpayment. Under the plain language of § 5584, the answer is yes. Thus, we set aside the award as contrary to § 5584.

## II. Background and Arbitrator's Award

The grievant was a GS-12 field examiner. In November 2015, she applied and was selected to serve as "acting compliance officer," and in January 2016, she became a GS-13 field examiner.[1] In June 2016, after the grievant had spent about five months performing compliance officer duties, the Agency posted a vacancy announcement for a GS-14 compliance officer position. The grievant's supervisor urged her to apply and indicated that she may be able to obtain an early promotion to the GS-14 level if selected. The grievant was the only applicant, and the Agency selected her for the position in June 2016, about six months after she became a GS-13.

About five months later, in December 2016, the Agency cancelled the promotion and reduced the grievant's grade to the GS-13 level, stating that it had erroneously processed the promotion.[2] Additionally, the Agency directed the grievant to repay the difference between the GS-14 pay that she received while promoted and the GS-13 pay that the Agency claimed she should have received. The grievant applied for a waiver of the debt, but the Agency denied it, saying that the promotion violated Office of Personnel Management (OPM) time-in-grade regulations and the parties' collective-bargaining agreement, which requires GS-14 compliance officers to have one year of "specialized compliance experience."[3] The Agency also asserted that the grievant was "not without fault" because, while she did confirm that the director of human resources approved her promotion on her electronic personnel file, she should have done more to confirm the validity of her "early" promotion.[4] As a result, the Agency recouped the alleged overpayment.

The Union filed a grievance protesting the reduction in the grievant's grade and the denial of her debt-waiver request, but the parties were unable to resolve the grievance, and it proceeded to arbitration.

As relevant here, the Arbitrator framed the issues as (1) whether the Agency violated the parties' agreement or applicable laws, or regulations by denying the debt-waiver request, and (2) whether the Agency acted arbitrarily or unreasonably in its determination that

[1] Award at 6.
[2] *Id.* at 7.
[3] *Id.*
[4] *Id.* at 14.

the grievant was "not without fault, and thereby not entitled to waiver of the debt[.]"[5]

The Arbitrator found that the Agency violated the parties' agreement because it acted unreasonably in determining that the grievant was at fault for the erroneous promotion and in denying her debt-waiver request. As remedies, the Arbitrator directed the Agency to reimburse the grievant for the recouped overpayment, and to promote her retroactively effective to the date that she obtained fifty-two weeks of service as a GS-13.

On October 22, 2018, the Agency filed exceptions to the award, and on November 21, 2018, the Union filed an opposition to the Agency's exceptions.

## III. Preliminary Issue: The Authority has jurisdiction over the Union's exceptions.

On February 12, 2019, the Authority's Office of Case Intake and Publication issued an order directing the Agency to show cause why the Authority should not dismiss its exceptions for lack of jurisdiction under §§ 7122(a) and 7121(f) of the Federal Service Labor-Management Relations Statute (the Statute) because the award "seems to relate to a reduction in grade or pay."[6]

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to review an arbitration award "relating to a matter described in [§] 7121(f) of [the Statute]."[7] The matters described in § 7121(f) "are those matters covered under 5 U.S.C. §§ 4303 and 7512,"[8] and include reductions in grade and pay.[9] In making that determination, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration[10] is one reviewable by the Merit Systems Protection Board (MSPB), and, on appeal, by the United States Court of Appeals for the Federal Circuit. Therefore, the Authority looks to MSPB precedent for whether a matter is covered under § 7512.[11]

In its response to the show-cause order, the Agency argues that "[a] reduction in grade or pay that is to correct a classification error or pay-setting error that is contrary to law or regulation . . . is not appealable to the [Merit Systems Protection Board]."[12] The MSPB has found that, where an agency reduces an employee's grade or pay from a rate that would be "contrary to law or regulation[,]" the action is not an adverse personnel action under § 7512.[13] Consistent with this MSPB precedent, the Authority has held that it has jurisdiction to review claims alleging that an Agency incorrectly set a grievant's rate of pay.[14]

Here, the Agency argues that it reduced the grievant's grade and, as a result, her pay, because her promotion was contrary to OPM's time-in-grade restrictions under 5 C.F.R. § 300.604(a).[15] That section states that "candidates for advancement to a position at GS-12 and above must have completed a minimum of [fifty-two] weeks in positions no more than one grade lower . . . than the position to be filled."[16] As it is undisputed that the grievant lacked fifty-two weeks of GS-13 experience,[17] the Agency's action was to correct a GS-14 pay rate that was contrary to regulation.

---

[5] *Id.* at 3 (emphasis omitted).

[6] Order to Show Cause at 2.

[7] 5 U.S.C. § 7122(a).

[8] *U.S. EPA, Narragansett, R.I.*, 59 FLRA, 591, 592 (2004).

[9] *AFGE, Loc. 2004*, 59 FLRA 572, 573 (2004).

[10] We note that the Arbitrator determined that the issues at arbitration concerned whether the Agency properly denied the grievant's request for a waiver of debt, rather than a reduction in grade and pay. Award at 3.

[11] *AFGE, Loc. 1738*, 71 FLRA 812, 813 (2020) (*Loc. 1738*) (citing *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 65 FLRA 969, 972 (2011) (*Army*); *U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin.*, 58 FLRA 333, 336 (2003)).

[12] Agency's Resp. to Show Cause Order (Response) at 2 (quoting *Simmons v. Dep't of HUD*, 120 M.S.P.R. 489, 491 (2014)).

[13] *Loc. 1738*, 71 FLRA at 813 (citing *Army*, 65 FLRA at 972; *Gessert v. Dep't of the Treasury*, 113 M.S.P.R. 329, 332 (2010); *Deida v. Dep't of the Navy*, 110 M.S.P.R. 408, 412 (2009)).

[14] *Id.* at 813-14; *see also U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Operating Div.*, 65 FLRA 23 (2010).

[15] *See* Response at 2; *see also* Exceptions at 5-7 (arguing that the award violates time-in-grade rules under 5 C.F.R. § 300.604(a)).

[16] 5 C.F.R. § 300.604(a).

[17] The Union asserts that the reduction in grade and pay was not to correct a pay-setting error and it argues that an exclusion to OPM's time-in-grade restriction applies under 5 C.F.R. § 300.603(b)(7). Union's Reply to Agency's Resp. to Order to Show Cause at 2. That exclusion applies to an "[a]dvancement to avoid hardship to an agency or inequity to an employee," but "only with the prior approval of the agency head or his or her designee" and the promotion "must be consistent with all other applicable requirements, such as qualification standards." 5 C.F.R. § 300.603(b). Although the Union argues that the grievant's promotion would avoid both hardship to the Agency and inequity to the grievant, there is no evidence in the record that the grievant fully met the compliance officer specialized experience qualification standards. *See* Award at 7 (Agency explained denial of waiver request, in part, because the grievant lacked the requisite "one year of specialized compliance experience"). There is also no evidence in the record that the grievant's premature promotion was authorized by the Agency head or his or her designee. *See id.* (noting that the grievant's promotion was approved without notifying the Division of Operations Management "even though the Division of Operations Management was to be consulted on every promotion of a compliance officer from GS-13 to GS-14"). Accordingly, the exclusion in § 300.603(b)(7) does not apply here.

Therefore, the claim is not one reviewable by the MSPB.[18]

Accordingly, we find that the award does not relate to a matter described in § 7121(f) of the Statute and the Authority has jurisdiction to resolve the exceptions.

**IV. Analysis and Conclusion: The award is contrary to law because the Agency has sole and exclusive discretion to determine the existence of fraud, misrepresentation, or fault under 5 U.S.C. § 5584.**

The Agency argues that the award is contrary to 5 U.S.C. § 5584(b)(1), governing waiver of debt as a result of salary overpayment, because the Agency has the discretion to evaluate any indication of fault by the grievant.[19] The Agency also argues that under 5 U.S.C. § 5584(b)(1), once the Agency's authorized official finds that the grievant is at fault, the official *must* reject any request for a debt waiver.[20]

The Authority has found that if a law indicates that an agency's discretion over a matter is intended to be sole and exclusive, or exercised only by the agency, then, under the Statute, the agency is not required to exercise discretion on that matter through collective bargaining and the matter may not be grieved.[21] In determining whether discretion is sole and exclusive, the Authority examines the plain wording of the relevant law.[22]

Here, 5 U.S.C. § 5584(a) states that an authorized official may properly waive a debt arising from an erroneous payment if, as relevant here, the collection of that payment would be "against equity and good conscience."[23] However, the authorized official's discretion is limited. Under 5 U.S.C. § 5584(b)(1), in granting such a waiver, the authorized official "may not exercise his authority . . . to waive any claim . . . if, in his opinion, there exists, in connection with the claim an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee . . . [requesting] a waiver of the claim."[24] Because § 5584 prohibits the Agency from granting a waiver if the authorized official believes there is fraud, misrepresentation, fault, or lack of good faith on the part of the requesting employee, § 5584 also prohibits an arbitrator from second guessing such an agency determination through the negotiated grievance process.[25]

The Agency's authorized official found that, in his opinion, the grievant was at fault because, as an experienced federal employee, she should have raised the legitimacy of her early promotion with the appropriate personnel.[26] And, under the plain wording of 5 U.S.C. § 5584, once the authorized official finds any amount of fault, he is prohibited from granting a waiver.[27]

---

[18] *Loc. 1738*, 71 FLRA at 813-14.

[19] Exceptions at 8 (arguing that "substantial deference should be accorded to the [A]gency's discretion in determining fault and waiver").

[20] *See id.* at 4-6 (citing Exceptions, Attach. 1, Agency's Post-Hr'g Br. (Agency's Post-Hr'g Br.) at 2).

[21] *NTEU*, 59 FLRA 815, 816 (2004).

[22] *See, e.g.*, *AFGE, Loc. 3295*, 47 FLRA 884, 893-95 (1993).

[23] 5 U.S.C. § 5584(a).

[24] *Id.* § 5584(b)(1); *see also Matter of: Beverly J. Ladmirault*, B-261303, 1995 WL 617801 at *1 (Comp. Gen. Oct. 23, 1995) (*Ladmirault*) ("[I]f . . . a reasonable person, under the circumstances involved, would have made inquiry as to the correctness of payment but the employee did not, then the employee is not free from fault, and the overpayment may not be waived.").

[25] For the reasons discussed in this decision, we overrule prior Authority decisions holding to the contrary. *E.g.*, *Overseas Priv. Inv. Corp.*, 68 FLRA 982 (2015) (*OPIC*) (Member Pizzella dissenting). The dissent cites a 1987 Authority decision upholding an arbitrator's debt-waiver determination. Dissent at 7 n.1. However, that decision contains minimal legal analysis and no analysis whatsoever of whether agency determinations of fault may be grieved. *See U.S. Navy Pub. Works Ctr.*, 27 FLRA 156, 157-58 (1987) (rejecting agency exception arguing that the arbitrator's award conflicted with Comptroller General decisions as "mere disagreement" with the arbitrator). Even if the Authority has repeatedly considered exceptions to such awards, that is no reason to keep repeating the same mistake. *See OPIC*, 68 FLRA at 988 (Dissenting Opinion of Member Pizzella) ("If . . . 'two wrongs don't make a right,' it is readily obvious that a third will not bring about a good result."). The dissent fails to explain how the plain wording of § 5584 empowers arbitrators to do what the Agency itself cannot – grant a debt waiver where the authorized official, "in his opinion," believes there is fraud, misrepresentation, fault, or lack of good faith on the part of the requesting employee. 5 U.S.C. § 5584(b)(1).

[26] Agency's Post-Hr'g Br. at 10; *see, e.g.*, *Ladmirault*, 1995 WL 617801 at *1 (where a nurse resigned and then was reemployed in a lower-paying position, but continued receiving her previous position pay for several months, she "should have known that an error had been made" and her "failure to . . . inquir[e] as to the correctness of her salary constitute[d] fault on her part"); *see also Matter of: F. Keith Porter – Waiver of Erroneous Overpayment of Pay*, B-198769, 1980 WL 16129 at *2 (Comp. Gen. Aug. 15, 1980) (finding that an affirmative obligation lies with the employee to review pay documents for accuracy).

[27] 5 U.S.C. § 5584(b)(1) (prohibiting the authorized official from waiving a claim "if, in his opinion, there exists, in connection with the claim, an indication of . . . fault . . . on the part of the employee" seeking the waiver).

Because the Agency has sole and exclusive discretion to determine whether the grievant was at fault, we grant the Agency's contrary-to-law[28] exception and set aside the award.

## V. Order

We set aside the award.

[28] Because we grant the Agency's contrary-to-law exception, we find it unnecessary to address its remaining exceptions. *E.g.*, *U.S. DHS, Citizenship and Immigr. Servs., Dist. 18*, 71 FLRA 167, 168 n.10 (2019) (then-Member DuBester dissenting).

**Chairman DuBester, dissenting:**

For decades, the Authority has considered exceptions from arbitration awards concerning agencies' decisions whether to waive employee debt pursuant to 5 U.S.C. § 5584.[1] And in considering those exceptions, the Authority has specifically rejected the premise that this provision prohibits review of these decisions through a negotiated grievance procedure.[2]

In today's decision, the majority casually discards this precedent[3] based upon its finding that § 5584 affords the Agency "sole and exclusive discretion to determine whether the grievant was at fault."[4] And it reaches this conclusion because this statute "prohibits the Agency from granting a waiver if the authorized official believes there is fraud, misrepresentation, fault, or lack of good faith on the part of the requesting employee."[5]

This conclusion reflects a fundamental misunderstanding of the doctrine upon which it is based. It is true enough that § 5584 grants the Agency discretion, acting through its authorized official, to grant or deny a debt-waiver request. But that does not answer the question of whether Congress intended this discretion "to be sole and exclusive" – in other words, "that it is intended to be exercised *only by the agency*."[6]

Until now, the Authority has answered this question by engaging in a thorough examination of the pertinent statute's language and legislative history to determine if it contains language "excluding or limiting the application of other laws" to the discretion afforded the agency.[7] And while the Authority has held that a law "need not use any specific phrase or words in order to confer sole and exclusive discretion,"[8] it has found that the absence of wording expressly preempting application of other laws to the agency's discretion is a "strong indication that Congress did not intend the [agency] to have unfettered discretion" over the matter at issue.[9] At a bare minimum, we have consistently required *some* expression of legislative intent to afford an agency unfettered discretion over the matter in question.[10]

Such an expression is absent from § 5584. As noted, the majority hinges its conclusion upon the "plain language" of the provision stating that the Agency's authorized official may not waive a claim if, "in his opinion," there exist grounds to deny the waiver.[11] But this provision simply establishes that the Agency has discretion to deny a waiver request, not that Congress intended for its exercise of this discretion to be unreviewable.[12]

As I have repeatedly noted, the Authority has been warned that it "must either follow its own precedent or 'provide a reasoned explanation for' its decision to depart from that precedent."[13] Today's decision fails on all counts. It does not provide any plausible basis for concluding that Congress intended to afford agencies unfettered, and unreviewable, discretion over their employees' debt-waiver claims. And it utterly fails to explain its departure from well-established precedent in which we rejected this very premise.

---

[1] *See, e.g.*, *Overseas Priv. Inv. Corp.*, 68 FLRA 982 (2015) (Member Pizzella dissenting) (*OPIC*); *U.S. Dep't of the Treasury, IRS*, 66 FLRA 888 (2012); *U.S. Dep't of VA, Charles George VA Med. Ctr., Asheville, N.C.*, 65 FLRA 797 (2011); *AFGE, Loc. 3615*, 57 FLRA 19 (2001); *U.S. Navy Pub. Works Ctr.*, 27 FLRA 156 (1987).

[2] *OPIC*, 68 FLRA at 985 (rejecting argument that the agency enjoyed unreviewable discretion to decline to waive a debt under § 5584).

[3] Majority at 5 n.25. The majority claims its reversal of precedent is warranted because the Authority's decision in *U.S. Navy Public Works Center* "contains minimal legal analysis and no analysis whatsoever of whether agency determinations of fault may be grieved." *Id.* Had the majority continued its research, it would have found the analysis it was seeking in the *OPIC* decision. *See OPIC*, 68 FLRA at 985.

[4] Majority at 6.

[5] *Id.* at 5.

[6] *NTEU*, 59 FLRA 815, 816 (2004) (*NTEU*) (Member Pope dissenting) (emphasis added).

[7] *Dep't of VA, VA Med. Ctr., Veterans Canteen Serv., Lexington, Ky.*, 44 FLRA 162, 164 (1992) (*VAMC*); *see also NTEU*, 71 FLRA 808, 810-11 (2020) (then-Member DuBester concurring).

[8] *U.S. Dep't of the Interior, Bureau of Indian Affs., Sw. Indian Polytechnic Inst., Albuquerque, N.M.*, 58 FLRA 246, 248 (2002) (citing *Ass'n of Civilian Technicians, Tex. Lone Star Chapter 100*, 55 FLRA 1226, 1229 n.7 (2000)).

[9] *VAMC*, 44 FLRA at 165.

[10] *See, e.g.*, *NTEU*, 59 FLRA at 816 (concluding that agency's discretion under statute in question was intended to be "sole and exclusive" where it is exercised "without regard to the provisions of other laws applicable to officers or employees of the United States" (quoting 12 U.S.C. § 481)).

[11] Majority at 2, 5 (quoting 5 U.S.C. § 5584(b)(1)).

[12] *See, e.g.*, *VAMC*, 44 FLRA at 164 (concluding that a statutory provision that "simply grants" the agency discretion over a matter does not establish that the agency is prohibited from exercising that discretion "through negotiation with the [u]nion").

[13] *NFFE, FD-1, IAMAW, Loc. 951 v. FLRA*, 412 F.3d 119, 124 (D.C. Cir. 2005) (quoting *Loc. 32, AFGE, AFL-CIO v. FLRA*, 774 F.2d 498, 502 (D.C. Cir. 1985)); *see also AFGE, Loc. 32, AFL-CIO v. FLRA*, 853 F.2d 986, 992 (D.C. Cir. 1988) (concluding that the Authority's did not set forth a "reasoned analysis" where it was "offered only [as a] bare conclusion").

Accordingly, I disagree with the majority's conclusion that the Arbitrator was not authorized to review the Agency's denial of the debt-waiver request through the parties' negotiated grievance procedure. I would therefore reject this basis for setting aside the award, and would consider the Agency's remaining exceptions.