72 FLRA No. 60

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5451

_____

DECISION

May 28, 2021

_____

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

I. Statement of the Case

In this case, we find that § 132(f) of the Internal Revenue Code (Tax Code)[1] is not a law "affecting conditions of employment"[2] because it has only an incidental impact on working conditions of employees.

In 2014, Arbitrator Joshua M. Javits issued two awards (the Javits awards) finding that the Agency violated the parties' collective-bargaining agreement by not retroactively paying eligible employees' transit subsidies. As a remedy, he directed the Agency to reimburse the affected employees up to the maximum nontaxable amount in 26 U.S.C. § 132(f) – a part of the Tax Code.[3] After issuance of the Javits awards, the Agency paid the employees but withheld taxes from the transit-subsidy payments.

Subsequently, the Union filed a grievance alleging the Agency committed an unfair labor practice (ULP) by not complying with the Javits awards. That grievance proceeded to arbitration before Arbitrator Andrew M. Strongin (the Arbitrator). He found that the Javits awards were ambiguous because they did not state whether the transit-subsidy payments were subject to taxation. But, he also found that the Agency's interpretation of those awards – as permitting it to withhold taxes – was inconsistent with the intent of the transit-subsidy payment as a nontaxable subsidy. As a result, the Arbitrator concluded that the Agency failed to comply with the Javits awards, and he directed the Agency to reimburse the withheld taxes.

The main question before us is whether the grievance asking the Arbitrator to resolve the taxability of the transit-subsidy payments is a "grievance" within the meaning of § 7103(a)(9)(C) of the Federal Service Labor-Management Relations Statute (the Statute). Because 26 U.S.C. § 132(f) is not a law "affecting conditions of employment," we find that the Union's grievance does not constitute a "grievance" within the meaning of § 7103(a)(9)(C). Accordingly, the Arbitrator did not have jurisdiction, and we set aside the award.

II. Background and Arbitrator's Award

After Congress authorized all federal agencies to establish transit-subsidy programs through the Federal Employees Clean Air Incentives Act (Incentives Act),[4] the parties incorporated a transit-subsidy provision into the parties' agreement. Article 53 of the parties' agreement provides that the Agency "will subsidize an employee's use of public transit by paying for qualified transit passes up to the non-taxable amount."[5] The transit subsidy is capped at the non-taxable amount specified in 26 U.S.C. § 132(f).[6] In 2013, Congress enacted the American Taxpayer Relief Act of 2012 (ATRA) which amended § 132(f)(2) and retroactively increased the maximum amount of non-taxable transit benefits for 2012 and 2013.[7]

In 2013, the Union filed a grievance alleging, as relevant here, that the Agency violated Article 53 of the parties' agreement by not paying employees the transit subsidy up to the maximum non-taxable amount set forth in § 132(f)(2)(A), as amended by the ATRA. Specifically, the Union requested that the Agency pay the increased transit-subsidy amounts for the period from January 2012 to February 2013. The parties could not resolve the dispute and proceeded to arbitration.

[1] 26 U.S.C. § 132(f) (2013) (amended 2018).
[2] 5 U.S.C. § 7103(a)(9)(C).
[3] 26 U.S.C. § 132(f).
[4] 5 U.S.C. § 7905; *see also* Fed. Workforce Transp., Exec. Order No. 13,150, 65 Fed. Reg. 24,613, 24,613 (Apr. 21, 2000) ("Federal agencies in the National Capital Region shall implement a 'transit pass' transportation fringe benefit program for their qualified Federal employees . . . .").
[5] Exceptions, Attach. 2, Initial Javits Award (Initial Javits Award) at 4.
[6] 26 U.S.C. § 132(f).
[7] Pub. L. No. 112-240, § 203, 126 Stat. 2313, 2323 (2013) (retroactively increasing the maximum amount of non-taxable transit benefits from $125 to $240 per month for 2012, and to $245 for 2013); *see also* Initial Javits Award at 4.

Arbitrator Javits issued an award finding that Article 53 required the Agency "to pay the non-taxable amount of transit subsidy to an employee who incurred commuting costs up to [the] maximum non-taxable amount."[8] Therefore, the Agency was "obligated" to pay the increased amount of non-taxable transit subsidies retroactively set by the ATRA amendment.[9] As a remedy, Arbitrator Javits directed the Agency to reimburse employees' transit subsidies, from January 2012 to February 2013, up to the maximum amount permitted under § 132(f)(2)(A). Because the parties could not agree on how to provide retroactive transit subsidies, Arbitrator Javits issued a supplemental award directing the Agency to provide affected employees with cash reimbursements.

The Authority upheld the Javits awards in *U.S. Department of the Treasury, IRS* (*IRS*), finding that the Agency's exceptions to Arbitrator Javits's initial award were untimely, and the Javits supplemental award was not contrary to law and did not fail to draw its essence from the parties' agreement.[10] Additionally, the Authority concluded that "[b]ecause the Incentives Act and the B[ack] P[ay] A[ct (BPA)] support[ed]" awarding retroactive cash reimbursements for transit subsidies,[11] "an interpretation of 26 U.S.C. § 132 [wa]s unnecessary."[12]

After the Javits awards became final, the parties entered into a settlement agreement. As relevant here, the settlement agreement "d[id] not preclude [the Union] from separately filing a ULP to challenge [a] determination by the [Agency] to withhold taxes from any payments made to bargaining[-]unit employees."[13] The Agency then reimbursed the transit-subsidy payments but withheld taxes from those payments.

In 2017, the Union filed a grievance alleging that the Agency committed a ULP by not complying with the Javits awards, which, according to the Union, directed the Agency to provide "cash reimbursements to impacted bargaining[-]unit employee[s] . . . without withholding . . . taxes."[14] The parties could not resolve the grievance, and the dispute proceeded to arbitration. And at arbitration, the Union proposed the issue, in relevant part, as "[w]hether the [Agency] improperly withheld taxes from any retroactive [transit-subsidy] payments?"[15]

In his award, the Arbitrator did not frame an issue for resolution. But, he stated that the "fundamental question" before him was "[whether the transit-subsidy] payments . . . [are] taxable."[16]

Addressing whether the Agency complied with the Javits awards, the Arbitrator found that those awards did not "unambiguously answer" whether the transit-subsidy payments were taxable.[17] Next, he considered the Agency's argument that it reasonably interpreted the Javits awards as permitting it to withhold taxes from the transit-subsidy payments. After looking at the purpose of the Javits awards,[18] as well as the BPA[19] and its accompanying regulations,[20] the Arbitrator found that the transit-subsidy payments "by definition and design, [are] *not* taxable."[21] In this regard, he held that the cash payments directed by the Javits awards were "never . . . intended to be taxable."[22] Additionally, he noted that, while the Javits awards directed the Agency to make "lump sum payments," the "aggregated amount correspond[s] to . . . reimbursements of subsidies that [were nontaxable] by design."[23] Regarding the Tax Code, the Arbitrator stated that he "consider[ed] the terms of [it] . . . only to . . . establish the maximum amount of non-taxable [transit-]subsidy payable to employees."[24] As a remedy, the Arbitrator directed the Agency to reimburse employees the withheld taxes.

On December 27, 2018, the Agency filed exceptions to the award, and, on February 1, 2019, the Union filed an opposition to those exceptions.

[8] Initial Javits Award at 36.
[9] *Id.* at 38.
[10] 68 FLRA 810, 812-16 (2015), *pet. for review dismissed*, *U.S. Dep't of the Treasury, IRS v. FLRA*, No. 15-1341, 2016 WL 231891, at *1 (D.C. Cir. Jan. 14, 2016).
[11] *See id.* at 815 (noting that "the Incentives Act 'constitutes explicit [c]ongressional authorization for agencies to provide funds for transit subsidies,' and that 'options under the subsidy program include . . . cash reimbursements'" (quoting *U.S. Dep't of HHS, Wash. D.C.*, 68 FLRA 239, 242 (2015))); *id.* ("[T]ransit subsidies constitute 'pay, allowances, and differentials' within the meaning of the BPA." (quoting *U.S. Dep't of HHS*, 54 FLRA 1210, 1222-23 (1998))); *see also* 5 U.S.C. § 5596.
[12] *IRS*, 68 FLRA at 815.
[13] Exceptions, Attach. 4, Settlement Agreement (Settlement Agreement) at 5-6.
[14] Exceptions, Attach. 8, Grievance (Grievance) at 2.
[15] Exceptions, Attach. 6, Union's Post-Hr'g Br. (Union's Post-Hr'g Br.) at 4.
[16] Exceptions, Attach. 5, Tr. (Tr.) at 41.
[17] Award at 9.
[18] *Id.* at 10 (noting that Arbitrator Javits held that "employees should receive up to the maximum non-taxable amount of transit benefits available").
[19] 5 U.S.C. § 5596.
[20] 5 C.F.R. §§ 550.801-808.
[21] Award at 11; *id.* at 13 ("[T]he Agency turned the concept of the non-taxable subsidy on its head by taxing what, by definition, never was intended to be taxable.").
[22] *Id.* at 13.
[23] *Id.* at 12-13.
[24] *Id.* at 13.

III. Analysis and Conclusion: The award is contrary to law.

As relevant here, the Agency argues that the Arbitrator did not have jurisdiction to determine whether the retroactive transit-subsidy payments were taxable.[25] Specifically, the Agency alleges that 26 U.S.C. § 132(f) is not a law "directed [at] employee working conditions,"[26] and the proper forums for challenging the tax determinations are the U.S. Tax Court,[27] the U.S. district courts,[28] or the U.S. Court of Federal Claims.[29] According to the Agency, a dispute regarding whether the retroactive transit-subsidy payments were taxable does not fall within the definition of "grievance" in § 7103(a)(9)(C) of the Statute,[30] and is thus substantively inarbitrable.[31]

In *U.S. Department of the Treasury, U.S. Customs Service v. FLRA*, the U.S. Court of Appeals for the D.C. Circuit found that "a 'law, rule, or regulation affecting conditions of employment' can be only interpreted . . . to confine grievances to alleged violations of a statute or regulation . . . issued for the very purpose of affecting the working conditions of employees – not one that merely incidentally does so."[32] The court further stated that, under the Statute, "arbitrators are given direct authority to interpret 'any law, rule, or regulation affecting conditions of employment' unless the parties' . . . agreement specifically limits the scope of [the] grievance[]."[33] Relying on that case, the Agency argues that the Tax Code has, at most, an "incidental impact on employee working conditions," and, therefore, the Arbitrator did not have jurisdiction to determine tax liability under that section.[34] The question then becomes: was the Tax Code "fashioned for the purpose of regulating the working conditions of employees[?]"[35]

Unlike in *IRS*, where Arbitrator Javits relied on the Incentives Act to determine whether the Agency violated the parties' agreement,[36] this case required the Arbitrator to analyze § 132(f) of the Tax Code to determine whether the Agency properly taxed its employees.[37] Although the grievance alleged a ULP, the issue of whether the Agency complied with the Javits awards is rooted in whether the retroactive transit-subsidy payments were taxable under the Tax Code. This is substantiated by the Union specifically requesting that the Arbitrator determine "[w]hether the [Agency] improperly withheld taxes from any retroactive [transit-subsidy] payments";[38] the Arbitrator stating that the "fundamental question" before him was "[whether the transit-subsidy] payments . . . [are] taxable";[39] and the Arbitrator's acknowledgment that his "job" was "simply to decide

[25] Exceptions Br. at 9-13.

[26] *Id.* at 11. In reviewing arbitration awards for consistency with law, rule, or regulation, the Authority reviews questions of law raised by exceptions to an award de novo. *IFPTE, Ass'n of Admin. Law Judges, Judicial Council No. 1*, 66 FLRA 763, 766 (2012) (*IFPTE*). In applying the standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.*

[27] 26 U.S.C. § 7442.

[28] 28 U.S.C. § 1346(a).

[29] *Id.* §§ 1346, 1491.

[30] 5 U.S.C. § 7103(a)(9)(C) (defining "grievance" to include any complaint "by any employee, labor organization, or agency concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment").

[31] Exceptions Br. at 9-10.

[32] 43 F.3d 682, 689 (D.C. Cir. 1994) (*Customs Serv.*) (citing 5 U.S.C. § 7103(a)(9)). Since *Customs Serv.*, the Authority has "express[ed] no view" on the D.C. Circuit's statement. *U.S. Dep't of the Treasury, U.S. Customs Serv., Pac. Region*, 50 FLRA 656, 659 n.5 (1995) (*Pac. Region*); *see IFPTE*, 66 FLRA at 766; *AFGE, Loc. 987*, 57 FLRA 551, 554 (2001) (Chairman Cabaniss dissenting). Because this case turns on a question of tax liability, we find that the resolution of this case requires us to determine if § 132(f) of the Tax Code is "a statute . . . issued for the very purpose of affecting the working conditions of employees." *Customs Serv.*, 43 F.3d at 689; *see Pac. Region*, 59 FLRA at 659 n.5 ("[W]e reserve for an appropriate case a reconsideration of the interpretation of the phrase 'any law affecting conditions of employment' in § 7103(a)(9)(C)(ii) of the Statute.").

[33] *Customs Serv.*, 43 F.3d at 689 (citing 5 U.S.C. § 7121(a)(2)); *see also* 5 U.S.C. § 7103(a)(9).

[34] Exceptions Br. at 11.

[35] *Customs Serv.*, 43 F.3d at 691.

[36] *IRS*, 68 FLRA at 815. Additionally, Arbitrator Javits had jurisdiction in *IRS* because the grievance alleged a violation of the parties' agreement. *Id.* at 811; *see* 5 U.S.C. § 7103(a)(9) (defining a grievance to include a complaint concerning "the effect or interpretation, or a claim of breach, of a collective bargaining agreement").

[37] The Authority in *IRS* found that the Incentives Act and the BPA supported Arbitrator Javits awarding retroactive cash reimbursements for transit subsides, and, thus, it was "unnecessary" for him to interpret 26 U.S.C. § 132. *IRS*, 68 FLRA at 815. But here, neither the Incentives Act nor the BPA permit the Arbitrator to preclude the Agency from withholding taxes from those reimbursements. *See Veterans Admin. & Veterans Admin. Med. Ctr., Northport, N.Y.*, 25 FLRA 523, 527 (1987) (noting that "courts have held that an agency must deduct from an employee's backpay award those payments for which the employee is legally obligated, including Federal and state taxes").

[38] Union's Post-Hr'g Br. at 4; *see also* Grievance at 1 ("The [Union] . . . file[d] a national grievance over . . . the [Agency's] decision to withhold taxes . . . ."); Opp'n Br. at 10 ("Arbitrator Strongin acted within his authority when he determined that the . . . transit[-]subsidy [payments] were not taxable . . . ."); *id.* at 20-21 ("[T]he cash reimbursements for retroactive transit [subsidy] ordered by the Javits [a]wards were non-taxable under 26 U.S.C. § 132(f) . . . .").

[39] Tr. at 41.

whether or not whatever amounts ultimately are paid to each of the affected employees are taxable or not."[40]

While the Arbitrator stated that he "consider[ed] the terms of the Tax Code only to the extent that they are incorporated into the [parties' agreement] and establish the maximum amount of non-taxable monthly subsidy payable to employees under that agreement,"[41] he could not have determined whether the payments were taxable without looking at the Tax Code itself – specifically § 132(f).[42] As noted above, that section sets forth what constitutes a "qualified transportation fringe" that may be excluded from gross income for tax purposes, and sets forth the maximum dollar amount of any such exclusion.[43] Congress has specifically mandated the following forums where a party can challenge tax determinations like those at issue here: the U.S. Tax Courts,[44] the U.S. district courts,[45] and the U.S. Court of Federal Claims.[46] Moreover, unlike the Incentives Act, which affects employees' working conditions by encouraging agencies to provide their employees with transit subsidies,[47] § 132(f) does not provide any employment-related benefit.[48] Accordingly, § 132(f) does not affect conditions of employment any more than the Tax Code provision providing tax deductions for charitable contributions.[49] We agree with the Agency that the impact, if any, the Tax Code has on working conditions of employees is merely incidental as a law that dictates how certain benefits *will be taxed*.[50] Because Congress has carved out a mechanism for ruling on tax challenges, and the Tax Code was not "fashioned for the purpose of regulating the working conditions of employees," the Arbitrator does not have jurisdiction over this tax dispute.[51]

The Union counters that the Arbitrator had subject matter jurisdiction "because the parties specifically consented to his jurisdiction when they executed the . . . settlement agreement."[52] The settlement agreement states that the Union is not "preclude[d] . . . from separately filing a ULP to challenge [a] determination by the [Agency] to withhold taxes."[53] But the settlement agreement does not,[54] and cannot, waive the jurisdictional requirements that must be met under the Statute for an arbitrator, or the Authority, to hear a dispute.[55]

[40] *Id.* Even the dissent acknowledges that the Arbitrator was "required" to interpret the Tax Code. Dissent at 13.

[41] Award at 13. This statement is disingenuous; the Arbitrator's award is clearly directed at determining whether the amounts awarded by the Javits awards are taxable under the Tax Code, not whether the amounts awarded are taxable under the parties' agreement. *See id.* at 11-13 (considering whether the amounts awarded in the Javits awards would have been "taxable if paid when properly due" and whether the amounts "became taxable . . . when paid").

[42] 26 U.S.C. § 132(f). Specifically, since § 61(a) of the Tax Code defines gross income to include "all income from whatever source derived," unless excluded by law, *see* 26 U.S.C. § 61(a), and § 132(a)(5) of the Tax Code excludes from "gross income" a "qualified transportation fringe," the Arbitrator would have had to determine whether the payments awarded by the Javits awards constituted a "qualified transportation fringe" within the meaning of § 132(f) and, if so, whether the amount of the retroactive transit subsidy payments awarded in the Javits awards exceeded the limitations in § 132(f)(2).

[43] *Id.* § 132(f).

[44] *Id.* § 7442.

[45] 28 U.S.C. § 1346(a).

[46] *Id.* §§ 1346, 1491.

[47] 5 U.S.C. § 7905 ("The head of each agency may establish a program to encourage employees of such agency to use means other than single-occupancy motor vehicles to commute to or from work.").

[48] 26 U.S.C. § 132(f); *see* 26 C.F.R. § 1.132-9; *see also U.S. DOJ, Fed. BOP, Med. Facility for Fed. Prisons*, 51 FLRA 1126, 1134 (1996) ("Unlike the statutory provision involved in . . . *Customs Serv*[.], which referred to employees only generally, the regulatory provision . . . in this case, 28 C.F.R. § 541 . . . specifically addresses the responsibilities and duties of the staff . . . .").

[49] 26 U.S.C. § 170. We note that the tax liability of the payments at issue does not affect the "circumstances or state of affairs attendant to [the employees'] performance of [their] job[s]." *U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 7, 10 (2021) (then-Member DuBester dissenting in part).

[50] *See Customs Serv.*, 43 F.3d at 689; *see generally* 26 U.S.C. § 61.

[51] *Customs Serv.*, 43 F.3d at 691. Member Kiko notes that – unlike the Tax Code – the laws and regulations involved in *U.S. Dep't of VA, James J. Peters VA Med. Ctr., Bronx, N.Y.*, 71 FLRA 1003 (2020) (*Peters*) (Member Abbott dissenting) and *U.S. Dep't of VA*, 71 FLRA 992 (2020) (*VA*) (Member Abbott dissenting) were fashioned, at least in part, for the purpose of regulating the working conditions of employees. *See Peters*, 71 FLRA at 1003-04, 1003 n.3 (arbitrator found agency violated contractual provision requiring it to pay Environmental Differential Pay (EDP) in accordance with regulations mandating that employees "be paid an [EDP] when exposed to a *working condition* or hazard that falls within one of the categories approved by the Office of Personnel Management" (quoting 5 C.F.R. § 532.511(a) (emphasis added))); *VA*, 71 FLRA at 992 (union alleged violation of parties' agreement where agency reduced per diem rate below rate set forth in Federal Travel Regulations – a regulation that implements statutory requirements *for federal employees*).

[52] Opp'n Br. at 15.

[53] Settlement Agreement at 5-6.

[54] *See id.* (stating that Union is not "preclude[d] . . . from separately filing a ULP" but not consenting to arbitrability of any such filing).

[55] *See Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) (finding that the "lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties"); *Puget Sound Energy, Inc. v. United States.*, 47 Fed. Cl. 506, 513 (2000) (finding that a litigant "cannot contract around a statutory grant of jurisdiction, nor imbue th[e U.S. Court of Federal Claims] with jurisdiction when it has none").

Not only would the dissent permit the Arbitrator – and us – to step into the shoes of the IRS and determine tax liability in this case, the dissent reasons that arbitrators and the Authority have jurisdiction to interpret and apply *any* law, so long as the relevant grievance also alleges a violation of the Statute.[56] But, as the D.C. Circuit has stated,

> Congress could not have contemplated, let alone intended, that all or any part of American law would be definitively interpreted by the FLRA on review of one or a series of cases originally put to arbitration. To give any administrative tribunal such final authority to construe any or all statutes or treaties of the United States would be a staggering delegation, which surely would have provoked considerable congressional debate. That Congress would entrust such sweeping authority to a minor three-member commission with quite restricted expertise is, when one ponders the matter, utterly inconceivable.[57]

We decline to expand our authority, or the authority of arbitrators, beyond what was contemplated by Congress.[58]

Because the Union's allegations and the Arbitrator's award are rooted in a tax question that cannot be answered without interpreting and applying provisions of the Tax Code and its regulations,[59] we find that the Arbitrator did not have jurisdiction over this matter.[60] Therefore, we set aside the award as contrary to law.[61]

IV. Decision

We set aside the award.

[56] Dissent at 13 (stating that "[t]here is *no question* that the Arbitrator had jurisdiction to consider the Union's grievance [because it] . . . alleged that the Agency committed a ULP") (emphasis added). If, as the dissent seems to contend, parties could obtain arbitral jurisdiction simply by styling their grievance as one alleging a ULP, then the limits on arbitral jurisdiction in § 7103(a)(9)(C)(ii) of the Statute would cease to "impose a real limitation on an arbitrator's authority." *Customs Serv.*, 43 F.3d at 689. The dissent's view of § 7103(a)(9)(C)(ii), like the interpretation rejected in *Customs Serv.*, "deprive[s] it of any limiting principle" and "in essence reduces [it] to a standing requirement." *Id.*

[57] *Customs Serv.*, 43 F.3d at 689-90.

[58] Under the BPA, awards of backpay are paid with interest calculated "at the rate or rates in effect under [§] 6621(a)(1) of the . . . [Tax] Code," which is known as the "[o]verpayment rate." 5 U.S.C. § 5596. An arbitrator applying an established rate of interest under the Tax Code is not equivalent to an arbitrator *interpreting* provisions of the Tax Code to determine tax liability for hundreds or thousands of federal employees. Congress directed arbitrators to compute interest under § 6621(a)(1) for backpay awards, but did not authorize arbitrators to assess whether an agency properly withheld taxes from the transit-subsidy reimbursement. *See* 5 U.S.C. § 5596; 26 U.S.C. §§ 1346(a), 7442; 28 U.S.C. §§ 1346, 1491; *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same [law], it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." (citation omitted)).

[59] *See* Award at 12 (determining "[u]nder the applicable regulation . . . whether the [transit-subsidy payments] would have been taxable if paid when properly due").

[60] *Cf. IFPTE*, 66 FLRA at 766 (finding that the Administrative Procedure Act, 5 U.S.C. §§ 551-596, "is a 'law . . . affecting conditions of employment'").

[61] Because we set aside the award on this basis, we do not address the Agency's remaining exceptions. *U.S. Dep't of VA*, 71 FLRA 785, 787 n.24 (2020) (then-Member DuBester dissenting).

Member Abbott, concurring:

I agree that this grievance falls outside the scope of the negotiated grievance procedure. However, I have two concerns with the grievance generally and, more specifically, with the dissent's characterization of the grievance and the extent to which our Statute may be extended into matters that fall under the purview of other statutes.[1]

As I have noted before, there is an outer edge to the reach of our Statute,[2] and the courts have held that we cannot simply inject our Statute into the realm of other statutes.[3] The matters grieved here concern administration of the Tax Code, not the parties' CBA. Simply put, the Tax Code has nothing to do with the *BUEs' working conditions*, and no provision in any CBA can transform the Tax Code, or how it is administered, into a *condition of employment* that would trigger a bargaining obligation.[4] Thus, our decision is neither "reckless" nor does it impose an "unwarranted restriction" on the arbitrator's ability to find or remedy ULPs. Rather, our decision respects the admonition of the Court that we not "inject our statute [into matters] that are not within [our] area of expertise" and also recognizes that neither we, nor arbitrators, are experts in interpreting the Tax Code. Without any doubt, the Tax Code is not a statute subject to our authority.

Were we to follow the dissent's rationale to its logical conclusion, the reach of an arbitrator's remedial authority would know no bounds in interpreting any law, rule or regulation, so long as the grievance also alleges a violation of the Statute. From my perspective, that logic is not sound, if not (as worded by the Chairman) "reckless." It most certainly does not respect the outer edges of our authority.

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[1] *See U.S. Dep't of Educ.*, 71 FLRA 968, 971 (2020) (then-Member DuBester dissenting) ("[T]he Authority finds that a substantial-impact test is the appropriate means for determining whether a change to a condition of employment is significant enough to trigger a duty to bargain. Specifically, an agency will not be required to bargain over a change to a condition of employment unless the change is determined to have a substantial impact on a condition of employment."); *see also U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 7, 11 n.47 (2021) (*El Paso*) (then-Member DuBester dissenting in part).

[2] *See, e.g.*, *NLRB Pro. Ass'n*, 71 FLRA 1149, 1153 (2020) (then-Chairman Kiko concurring; Member Abbott dissenting) (Dissenting Opinion of Member Abbott) ("Yet, once again, we have before us a case that brings us to the outer edge of our Statute . . . . [T]he grievance does not meet the statutory definition of 'grievance.'"); *U.S. Dep't of VA, VA Med. Ctr., Decatur, Ga.*, 71 FLRA 428, 432 n.53 (2019) ("Member Abbott observes that he has expressed reservations about employees pursuing alleged Privacy Act violations as grievances through the negotiated grievance procedure because he questions whether the Privacy Act is a law, rule, or regulation affecting conditions of employment under 5 U.S.C. § 7103(a)(9)(C)(ii)."); *U.S. Dep't of VA, Veterans Benefit Admin., Nashville Reg'l Off.*, 71 FLRA 322, 324-25 (2019) (Member Abbott concurring; then-Member DuBester dissenting) (Concurring Opinion of Member Abbott) (stating that complaints arising under the Privacy Act are not grievable because they do not affect conditions of employment).

[3] *U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) ("[The Authority] receives no deference, however, when it has endeavored to reconcile its organic statute with another statute . . . not within its area of expertise") (internal quotation omitted).

[4] *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 689 (D.C. Cir. 1994) ("We think, rather, that a law, rule, or regulation affecting conditions of employment can be only interpreted, as it initially was by the arbitrator in this case, to confine 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. Once 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*.") (emphasis added); *see also U.S. Dep't of Educ.*, 71 FLRA at 971; *El Paso*, 72 FLRA at 11 n.47.

Chairman DuBester, dissenting:

I disagree that the Arbitrator lacked jurisdiction over the Union's grievance. The majority's decision to set aside the award on this basis is premised upon a fundamental misunderstanding of the grievance and the precedent upon which it relies.

The majority concludes that the Arbitrator did not have jurisdiction over the parties' dispute because the Union's grievance does not fall within the definition of a "grievance" in § 7103(a)(9)(C) of the Federal Service Labor-Management Relations Statute (Statute).[1] And it bases this conclusion upon its finding that resolution of the dispute "required the Arbitrator to analyze § 132(f) of the Tax Code,"[2] which, the majority concludes, was not "fashioned for the purpose of regulating the working conditions of employees."[3]

But the majority's analysis fundamentally misconstrues the nature of the Union's grievance. The Union alleged in its grievance that the Agency violated § 7116(a)(1) and (8) of the Statute by failing to comply with the remedial terms of earlier arbitration awards when it subjected payments owed under the awards to tax withholding. In determining whether the Agency's interpretation of the award was reasonable, the Arbitrator considered the Agency's argument that the Back Pay Act (BPA) required taxation of the payments.[4] And noting that the BPA "requires taxation of such awards only to the extent that such awards would have been taxable if paid when properly due,"[5] the Arbitrator considered provisions of the tax code to resolve this question "to the extent that they are incorporated into the [parties' national agreement] and establish the maximum amount of non-taxable monthly subsidy payable to employees under that agreement."[6]

It is well-established that, under § 7122(b) of the Statute, "an agency must take the action required by an arbitrator's award when that award becomes 'final and binding.'"[7] An agency's failure to comply with an unambiguous award constitutes an unfair labor practice (ULP) under § 7116(a)(1) and (8) of the Statute.[8] And when the award at issue is ambiguous, "the test of compliance is whether the agency's action is consistent with a reasonable construction of the award,"[9] which may be determined by assessing whether the agency's "construction is consistent with the entire award and consistent with applicable rules and regulations."[10]

It is equally well-established that arbitrators have authority under our Statute to resolve ULP claims provided that the parties have not agreed to exclude such matters from the scope of the negotiated grievance procedure and the issue of whether the agency committed the ULPs has been properly submitted to arbitration.[11] And when resolving a grievance alleging a ULP, "an arbitrator functions as a substitute for an Authority administrative law judge (ALJ)."[12]

Viewed in the light of these fundamental principles, the majority's analysis crumbles. There is no question that the Arbitrator had jurisdiction to consider the Union's grievance, which – as noted – alleged that the Agency committed a ULP by failing to comply with the earlier awards.[13] And in resolving the question of whether the Agency's interpretation of the awards was reasonable under the BPA, the Arbitrator was required to

[1] 5 U.S.C. § 7103(a)(9)(C).
[2] Majority at 5.
[3] *Id.* (quoting *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 691 (D.C. Cir. 1994) (*Customs Serv.*).
[4] *See* Award at 7 (noting the Agency's argument that it "acted reasonably in subjecting the payments to tax withholding consistent with its legal obligations under the Back Pay Act," including its implementing regulations which "require income tax withholding from back pay awards").
[5] Award at 11 (citing 5 C.F.R. § 550.805(e)(3)(ii), (v)).
[6] *Id.* at 13.
[7] *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 296 (1999) (*DOT*) (Member Segal concurring). There is no dispute that the award at issue was final. *See U.S. Dep't of the Treasury, IRS*, 68 FLRA 810, 813-14 (2015) (*IRS*).
[8] *DOT*, 55 FLRA at 296; *see also U.S. Dep't of the Treasury, IRS, Austin Compliance Ctr., Austin, Tex.*, 44 FLRA 1306, 1313 (1992) (considering whether an agency violated § 7116(a)(1) and (8) of the Statute by improperly deducting certain earnings from an arbitrator's backpay award).
[9] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Marianna, Fla.*, 59 FLRA 3, 4 (2003) (Member Pope dissenting) (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 53 FLRA 55, 60 (1997); *U.S. Dep't of the Treasury, IRS & U.S. Dep't of the Treasury, IRS, Austin Serv. Ctr., Austin, Tex.*, 25 FLRA 71, 72 (1987) (*IRS Austin*)).
[10] *Id.* (quoting *IRS Austin*, 25 FLRA at 72).
[11] *AFGE, Loc. 3529*, 57 FLRA 464, 465 (2001).
[12] *U.S. Dep't of the Treasury, IRS*, 66 FLRA 120, 122 (2011) (citing *U.S. DHS, U.S. CBP*, 65 FLRA 870, 872 (2011)) (noting that, "in resolving the grievance, the arbitrator must apply the same standards and burdens that are applied by ALJs under § 7118 of the Statute"); *see also U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 431 (2010) (same).
[13] Because the FLRA did not have a General Counsel, or an Acting General Counsel, from November 2017 until March 2021, it is by no means surprising that unions used their negotiated grievance procedures to litigate ULP claims during this time period.

examine the Agency's assertion that its interpretation was consistent with the tax code.[14]

As such, the premise upon which the majority bases its entire analysis – namely, that § 132(f) of the Internal Revenue Code "does not affect conditions of employment"[15] – does not divest the Arbitrator of jurisdiction to resolve the Union's grievance. And unless the majority is now contending that our Statute is not a law issued "for the very purpose of affecting the working conditions of employees,"[16] its reliance upon the court's decision in *U.S. Department of the Treasury, U.S. Customs Service v. FLRA*[17] is similarly misplaced.[18]

In sum, the majority's reckless conclusion imposes an unwarranted restriction upon arbitrators' authority to determine whether a party committed a ULP by failing to comply with an arbitration award. Accordingly, I would not set aside the award on this basis, and would consider the Agency's remaining exceptions

[14] The Authority has already concluded, in its decision denying the Agency's exceptions to the Javits Award, that the transit subsidy payments at issue in this case constitute "pay, allowances, and differentials" within the meaning of the BPA. *IRS*, 68 FLRA at 815. Moreover, it is undisputed that the BPA is a law affecting conditions of employment. *See, e.g.*, *Customs Serv.*, 43 F.3d at 689 (noting that the BPA "undisputedly was designed to deal directly with employee working conditions").

[15] Majority at 7.

[16] *Customs Serv.*, 43 F.3d at 689.

[17] 43 F.3d 682.

[18] In *Customs Service*, the union's grievance alleged that the agency violated a statute regulating coastwide trade. The majority has failed to demonstrate how this decision deprived the Arbitrator of jurisdiction over the instant grievance, which alleged that the Agency violated our own Statute by failing to comply with an award granting retroactive transit benefits under the parties' collective-bargaining agreement.