68 FLRA No. 46

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP
AND IMMIGRATION SERVICES
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL CITIZENSHIP
AND IMMIGRATION SERVICES
COUNCIL 119
(Union)

0-AR-5040

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DECISION

February 4, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Philip Tamoush found that the Agency violated the parties' collective-bargaining agreement and § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by violating a memorandum of agreement (MOA) provision concerning the release of performance-award data.

This case presents the Authority with three questions: (1) whether the award is contrary to the Privacy Act[2] and the Freedom of Information Act (FOIA);[3] (2) whether the Arbitrator's unfair-labor-practice (ULP) determination is contrary to law; and (3) whether the award fails to draw its essence from the MOA. The Arbitrator's conclusions regarding the Privacy Act rely on flawed reasoning, and his factual findings are inadequate for us to determine whether the Privacy Act applies. Similarly, the Arbitrator did not explain his conclusion that the Agency committed a ULP, making it impossible for us to determine whether his ULP finding is consistent with law. Accordingly, we remand the award to the parties, absent settlement, for resubmission to the Arbitrator for further findings regarding the Agency's Privacy-Act claim and the basis for his ULP determination. Finally, in light of our decision to remand the award, it is unnecessary to resolve the Agency's essence exception at this time.

II. Background and Arbitrator's Award

The Union and the Agency are parties to an MOA concerning performance awards. Section 1.4 of the MOA provides:

> The Agency will provide the Union, on a semiannual basis (March 31st and September 30th):
>
> a. The award recipient's series and grade;
>
> b. The type and amount of awards granted (i.e., Performance, Special Act);
>
> c. Justification for all awards other than performance.
>
> Unless prohibited by law or government[-]wide rule or regulation, the Agency shall provide the Union with any information that is normally maintained by the Agency and is reasonable and necessary to process a grievance if it has not provided such information pursuant to this provision.[4]

Section 2.2 of the MOA provides that the Agency will pay performance awards according to the following scale:

> a. Achieved Excellence up to 3% of Employee's Annual Salary
> b. Exceeds Expectations up to 2% of Employee's Annual Salary
> c. Achieved Expectations up to 0.5% of Employee's Annual Salary[5]

And in fiscal year (FY) 2010, which was before the MOA went into effect, the Agency's awards guidance provided:

> • Employees rated at the "Achieved Excellence" or "Outstanding" level

[1] 5 U.S.C. §§ 7101-7135.
[2] *Id.* § 552a.
[3] *Id.* § 552.
[4] Award at 3 (quoting Exceptions, Attach. A.5, Jt. Ex. 2, MOA (MOA) at 1-2).
[5] MOA at 2.

> can receive 2.5 to 4% of their annual base salary.
>
> • Employees rated at the "Exceeded Expectations'' or "Excellent" level can receive up to 2.5% of their annual base salary.
>
> . . .
>
> • Employees rated at the "Achieved Excellence" or "Outstanding" level may receive a minimum of [twenty-four] hours and a maximum of [forty] hours per year [as a time off award].
>
> • Employees rated at the "Exceeded Expectations" or "Excellent" level may receive a minimum of [eight] hours and a maximum of [twenty-four] hours per year.[6]

In September 2011, the Agency provided the Union with the data specified in Section 1.4 of the MOA for FY2010 and part of FY2011. After receiving the data, the Union requested, as relevant here, the names of the award recipients, claiming that the information was necessary to process a grievance. The Agency refused to provide the additional information, claiming that providing the names of award recipients would violate the Privacy Act. Specifically, it claimed that because awards are based on performance ratings, revealing the amount of an employee's award would reveal the employee's performance rating. The Union then filed a grievance, which was unresolved, and the parties submitted the issue to arbitration.

Before the Arbitrator, the Agency argued that the plain language of the MOA did not require it to provide names, and that although the parties discussed the topic of including recipients' names during bargaining, the parties intentionally omitted this information from the MOA. Further, the Agency claimed that the final sentence of Section 1.4 did not apply because, under the circumstances, providing the names of award recipients would violate the Privacy Act.

Although "the Agency acknowledge[d] that the Privacy Act does not bar disclosure of award recipients' names in all circumstances," it noted that the Authority "has found that 'where the disclosure of award recipient[s'] names would necessarily reveal those recipients' performance ratings, the Privacy Act bars the disclosure of the names.'"[7] It argued that "with little effort, a person or entity, like the Union, could ascertain, with certainty, a significant number of employees' ratings based on the information provided under the . . . MOA."[8] Specifically, an employee who received an award worth more than 2% of her salary in FY2011 (or 2.5% in FY2010) necessarily received an outstanding rating. Moreover, the Agency claimed that in many offices, supervisors gave the same amount to every employee at a given grade level with the same rating – for example, $ 700 for general-schedule, grade 12 (GS-12) employees rated as outstanding and $ 500 for GS-12 employees who received an excellent rating – making it possible to determine an employee's rating based on where the employee falls on the range of awards for the employee's grade level.

Additionally, the Agency argued that it did not violate the MOA because the last sentence of Section 1.4 simply restated the Agency's statutory duty under 5 U.S.C. § 7114(b)(4). Thus, it claimed that the Union was required to establish a "particularized need" for the information,[9] and that the Union never explained why it needed the information.

Finally, the Agency claimed that it did not repudiate the MOA, in violation of § 7116(a)(1) and (5), because repudiation requires a clear and patent breach that goes to the heart of the agreement, and that even assuming it breached the MOA, the breach was not clear and patent, nor did it go to the heart of the MOA.

Conversely, the Union claimed that it would not be possible to determine employees' ratings based on their awards. Moreover, it noted that the Agency had provided name-identified awards information in the past.

The Arbitrator found in favor of the Union. He found that the relevant portion of Section 1.4 was "a narrow exception to not providing names of employees when it is critical to resolving a specific issue," and that "[t]he requirement does not mean the Agency must provide all names at all locations, but only those where relevant to the processing of a grievan[ce] in a particular location."[10] However, he found that the Agency violated the MOA. He further found that the Privacy Act and FOIA did not apply because "there would be no 'unwarranted invasion [of privacy],' since providing information would permit the parties to discuss and negotiate."[11] Finally, he found, without analysis or

[6] Exceptions, Attach. A5, Agency Ex. 1 at 9.

[7] Exceptions, Attach. A.3, Agency's Post-Hr'g Br. (Agency's Post-Hr'g Br.) at 19 (citation omitted).

[8] *Id.* at 20.

[9] *Id.* at 30 (citing *IRS, Wash., D.C. & IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 50 FLRA 661, 669 (1995) (*IRS*)).

[10] Award at 8.

[11] *Id.* at 9.

explanation, that the Agency violated § 7116(a)(1) and (5).

The Agency filed exceptions to the Arbitrator's award.

III. Analysis and Conclusions: We cannot determine whether the award is contrary to law.

The Agency alleges that the award is contrary to the Privacy Act and to § 7116(a)(1) and (5) of the Statute. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[12] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[13] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[14]

The Privacy Act generally forbids the release of information records stored in a "system of records" – i.e., a system that allows information to be retrieved by name;[15] however, the Privacy Act is subject to FOIA.[16] FOIA broadly requires the disclosure of government records, but contains an exemption (Exemption 6) for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[17] To determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy,"[18] the Authority balances the public interest in disclosure against the employee privacy interests at stake.[19] The only relevant public interest in this context is the extent to which the requested disclosure would shed light on the agency's performance of its statutory duties, or otherwise inform citizens as to the activities of their government.[20]

The Authority has recognized that performance-award information is contained in a system of records.[21] However, the Authority has held that there is a public interest in: (1) ensuring that the appraisal and awards systems are administered in a fair and equitable manner, without discrimination, and in accordance with laws, rules, and regulations and (2) monitoring the public fisc to ensure that the agency's expenditure of money for awards is appropriate.[22] Thus, the Authority has held that the Privacy Act does not categorically forbid the disclosure of the names of award recipients; however, "where the disclosure of award recipients' names would necessarily reveal those recipients' performance ratings, the Privacy Act bars disclosure of their names."[23]

Here, the Arbitrator found that "there would be no 'unwarranted invasion,' since providing information would permit the parties to discuss and negotiate."[24] However, this reasoning is contrary to Authority and U.S. Supreme Court precedent.[25] Rather, under FOIA Exemption 6, "the only relevant public interest to be considered in this context is the extent to which the requested disclosure would shed light on the agency's performance of its statutory duties, or otherwise inform citizens as to the activities of their [g]overnment."[26] In particular, "the public interest in collective bargaining that is embodied in the Statute, or specific to a union in fulfilling its obligations under the Statute, [are not] considered in [the Authority's] analysis under Exemption 6 of the FOIA."[27]

Moreover, the Arbitrator made no factual findings as to whether it would be possible to determine employee performance ratings based on the award data – i.e., whether there is a privacy interest in the nondisclosure of recipients' names. Nor did the Arbitrator address how the inclusion of the names of award recipients would add to the public interest in disclosure of the information.[28] Accordingly, we cannot determine whether the Arbitrator's Privacy-Act determination is consistent with law.

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[12] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[13] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[14] *Id.*
[15] 5 U.S.C. § 552a(a)(4-5), (b); *U.S. Dep't of Transp., FAA, N.Y. TRACON, Westbury, N.Y.*, 50 FLRA 338, 341 (1995) (*TRACON*).
[16] 5 U.S.C. § 552a(b)(2); *TRACON*, 50 FLRA at 341.
[17] 5 U.S.C. § 552(b)(6).
[18] *Id.*
[19] *E.g.*, *TRACON*, 50 FLRA at 345 (citing *Veterans Admin. Med. Ctr., Jackson, Miss.*, 32 FLRA 133, 138 (1988)).
[20] *Id.* at 343 (citing *U.S. DOD v. FLRA*, 510 U.S. 487, 495-96 (1994)).
[21] *E.g., U.S. Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 599, 604 & 604 n.4 (1995) (*Scott*) (citing *TRACON*, 50 FLRA at 346; *SSA, S.F. Bay Area*, 51 FLRA 58, 63 (1995); System of Records Notice, 57 Fed. Reg. 35,698, 35,709-10 (Aug. 10, 1992)).
[22] *U.S. Dep't of Transp., FAA, New Eng. Region, Bradley Air Traffic Control Tower, Windsor Locks, Conn.*, 51 FLRA 1054, 1064 (1996) (citing *Scott*, 51 FLRA at 606-07).
[23] *U.S. Dep't of Energy, Nat'l Energy Tech. Lab.*, 64 FLRA 1174, 1176 (2010).
[24] Award at 9.
[25] *U.S. DOD*, 510 U.S. at 495-96; *TRACON*, 50 FLRA at 343-44.
[26] *Scott*, 51 FLRA at 603.
[27] *Id.* at 603-04.
[28] *See TRACON*, 50 FLRA at 349 (citing *U.S. Dep't of State v. Ray*, 502 U.S. 164 (1991); *Norwood v. FAA*, 993 F.2d 570 (6th Cir. 1993); *Ripskis v. Dep't of HUD*, 746 F.2d 1, 3-4 (D.C. Cir. 1984)).

Similarly, the Arbitrator found that the Agency violated § 7116(a)(1) and (5), but did not explain his finding, or even identify precisely what the violation was.[29] Accordingly, we cannot determine whether the Arbitrator's ULP finding is consistent with law.

When the Authority is unable to determine whether an award is contrary to law, the Authority remands the award for further findings by the arbitrator.[30] Consistent with this principle and the discussion above, we remand the case to the parties for resubmission to the Arbitrator, absent settlement, for further findings regarding the Agency's Privacy-Act claim and the basis for the Arbitrator's ULP determination.

Finally, the Agency's essence exception also turns on the applicability of the Privacy Act. The Agency claims that interpreting the MOA to require the Agency to provide information in violation of the Privacy Act fails to draw its essence from the MOA – in particular, the "[u]nless prohibited by law or government[-]wide rule or regulation" proviso.[31] Thus, the Agency's essence claim essentially restates its contrary-to-the-Privacy-Act exception. And, because we are remanding the award for further findings regarding the Privacy Act, it would be premature to resolve the Agency's essence exception at this time.[32]

IV. Decision

We remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings and clarification of the basis of the award, consistent with this decision.

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[29] *See, e.g.*, *AFGE, Local 3927, AFL-CIO*, 64 FLRA 17 (2009) (insistence to impasse over permissive subject of bargaining violates § 7116(a)(1) and (5)); *SSA*, 55 FLRA 978 (1999) (bypassing union violates § 7116(a)(1) and (5)); *U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79 (1997) (unilaterally changing conditions of employment violates § 7116(a)(1) and (5)); *Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 52 FLRA 225 (1996) (repudiation of negotiated agreement violates § 7116(a)(1) and (5)); *IRS*, 50 FLRA 661 (failure to provide information violates § 7116(a)(1), (5), and (8)).

[30] *E.g.*, *U.S. Dep't of the Army, U.S. Army Aviation & Missile Research Div., Redstone Arsenal, Ala.*, 68 FLRA 123, 124 (2014) (*Redstone*) (Member Pizzella dissenting) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 66 FLRA 978, 980 (2012)).

[31] Exceptions at 20 (quoting MOA at 2).

[32] *Redstone*, 68 FLRA at 125-26.