

71 FLRA No. 101

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 90
(Union)

0-AR-5446

DECISION

January 24, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we determine that an arbitrator's award, which undermines the restrictions placed on a federal agency's appropriations by Congress, is contrary to law. We thus vacate the award, which would require the Internal Revenue Service (IRS or Agency) to pay a performance award to the grievant, as contrary to restrictions placed on the IRS by Congress in its appropriations for fiscal year 2016.

II. Background and Arbitrator's Award

In 2014, an inspector general audit revealed that between October 2010 and December 2012 more than 2,800 IRS employees, who had received discipline including reprimands, suspensions, and removal for an array of serious misconduct, such as failure to pay taxes, fraud, and misuse of government travel cards, had

received performance awards totaling more than \$2.8 million.¹

In response to the disturbing report, Congress restricted how and under what circumstances the IRS could use appropriated funds for bonuses, awards, or other forms of employee recognition.² Specifically, § 110 of the Department of the Treasury Appropriations Act of 2016 (Appropriations Act) stated that no appropriated funds could be allocated for cash bonuses or awards "unless such program or process *takes into account the conduct and [federal tax compliance of such employee].*"³ As a result, the IRS established a process, and entered into a "Side Letter Agreement" with the Union "to protect the integrity of the [s]ervice" whereby all recommendations for performance awards would be reviewed by a panel of Senior Executive Service employees (executive panel) in order to ensure compliance with § 110 of the Appropriations Act.⁴

The grievant is an Internal Revenue Service appeals officer with 45 years of service with the IRS. Following two different investigations in 2014 and 2015, the grievant admitted that he had underreported his taxes in 2012⁵ and had committed a "security violation" when he "repeatedly sen[t]" personally identifiable information (PII) for over a year to his home computer⁶ concerning a "tax dispute [he] was handling."⁷ After the grievant was notified that the Agency was considering imposing a three-day suspension for this misconduct, the grievant entered into a discipline agreement whereby he was not suspended, but he acknowledged his misconduct and agreed to complete extra training on the proper handling of sensitive taxpayer PII (discipline agreement). Although the discipline agreement was intended to be "confidential," the agreement specified that management officials with a "business need to know" would have access to the agreement (confidentiality clause).⁸

¹ Exceptions, Attach. 6, Agency's Post-Hr'g Br. at 1; Treasury Inspector General for Tax Administration, *The Awards Program Complied With Federal Regulations, but Some Employees With Tax and Conduct Issues Received Awards* (2014), <https://www.treasury.gov/tigta/auditreports/2014reports/201410007fr.pdf>; see also John D. McKinnon, *IRS Workers Disciplined for Misconduct Were Awarded Bonuses*, Wall St. J. (April 22, 2014), <https://www.wsj.com/articles/irs-workers-disciplined-for-misconduct-were-awarded-bonuses-1398214359>.

² Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 110 (2015).

³ *Id.* (emphasis added).

⁴ Award at 7-8.

⁵ *Id.* at 10.

⁶ *Id.* at 11, 18.

⁷ *Id.* at 11.

⁸ Award at 23.

Despite his misconduct, the grievant's supervisors awarded the grievant an "outstanding" rating for the April 1, 2015 to March 31, 2016 period and recommended him for a cash performance award. The recommendation and discipline agreement were referred to the executive panel, which disapproved the performance award. According to the panel, granting a performance award under these circumstances could discredit the Agency if the public learned of the circumstances.

The Union grieved the denial of the performance award and invoked arbitration. In an award dated November 19, 2018, the Arbitrator found that the Agency violated the parties' agreements. As relevant here, the Arbitrator noted that § 110 required the executive panel to consider the grievant's admitted misconduct and tax compliance. However, the Arbitrator found that this "misconduct awards screening" had to take place within the confines of the discipline agreement and the Side Letter Agreement.⁹ The Side Letter Agreement references a provision in the parties' collective-bargaining agreement requiring that performance awards will not be withheld based on "[t]he fact that an employee is the subject of a conduct investigation or has been the subject of a disciplinary action . . . unless such preclusion is necessary to protect the integrity of the [s]ervice."¹⁰ Here, according to the Arbitrator, "there [was] no evidence that the public knew or could have known of [the grievant's] misconduct" because of the confidentiality clause in the discipline agreement.¹¹ As a result, the Arbitrator concluded that the executive panel erred in finding that denying the grievant a performance award was necessary to protect the integrity of the service.

The Arbitrator also found that the documentation sent to the executive panel by the Agency's labor relations staff did not "accurate[ly]" reflect the misconduct.¹² The Arbitrator sustained the grievance and ordered the Agency to pay the award.

The Agency filed exceptions on December 18, 2018, and the Union filed an opposition on February 21, 2019.

III. Analysis and Conclusion

A. The award is contrary to law.

In its exceptions, the Agency argues that the award is contrary to law¹³ because it conflicts with the requirements of § 110.¹⁴ According to the Agency, § 110 creates a "condition precedent" before any appropriated funds may be used for a cash award.¹⁵

To ensure that it complied with § 110's restrictions, the Agency established a process that required all recommended performance awards to be reviewed by the executive panel to determine whether an employee's conduct warranted denying the award.¹⁶ Here, the Arbitrator ordered the Agency to issue a performance award to the grievant¹⁷ despite the fact that he admitted to tax noncompliance and to repeatedly sending PII to his home computer over the course of a year. Importantly, the executive panel had carried out the process required by § 110 and determined that the grievant's conduct warranted denial of the award recommended by his supervisor. But the Arbitrator found that the confidentiality clause of the grievant's discipline agreement essentially prohibited the panel from considering the effect it would have on the integrity of the service to reward an employee who admitted to misconduct and tax noncompliance.

Under these circumstances, the Arbitrator's award effectively undermines § 110 of the Appropriations Act. The Arbitrator himself acknowledged that "[t]he plain language of [§] 110 require[d] that the [e]xecutive [p]anel's

¹³ When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo. *U.S. Dep't of State, Bureau of Consular Affairs, Passport Servs. Directorate*, 70 FLRA 918, 919 (2018) (citing *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (*NOAA*)). 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. *Id.* (citing *NOAA*, 67 FLRA at 358). In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the appealing party establishes that those findings are nonfacts. *Id.* (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014)).

¹⁴ Exceptions Br. at 9-10.

¹⁵ *Id.* at 10; U.S. Const. art. I, § 9, cl. 7 ("[n]o [m]oney shall be drawn from the [t]reasury, but in [c]onsequence of [a]ppropriations made by law").

¹⁶ See *U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr.*, 69 FLRA 599, 605 (2016) (Dissenting Opinion of Member Pizzella) ("Congress appropriates money for federal agencies to use but instructs, quite specifically, how, when, and for what purposes those monies may be used.").

¹⁷ Award at 20.

⁹ *Id.* at 22.

¹⁰ *Id.* at 7 (quoting Side Letter Agreement).

¹¹ *Id.* at 29.

¹² *Id.* at 25.

misconduct awards screening *must take into account*” the grievant’s admitted misconduct and tax noncompliance.¹⁸ But he then proceeded to interpret the Side Letter Agreement and disciplinary agreement in a manner that runs counter to the appropriations restriction placed on the Agency by Congress.¹⁹ As the U.S. Court of Appeals for the District of Columbia Circuit has repeatedly held, the Appropriations Clause “does not permit an agency, by contract with a union, ‘to authorize the expenditure of funds beyond what Congress has approved.’”²⁰ Thus, by effectively nullifying the Agency’s consideration of that which Congress required the Agency to consider before expending appropriated funds on a performance award for the grievant, the Arbitrator’s award is contrary to law.²¹

We grant the Agency’s contrary-to-law exception.²²

B. The award does not draw its essence from the parties’ agreement.

The Agency also argues that the award does not draw its essence from the parties’ agreement. The Authority will find that an arbitration award fails to draw its essence from the parties’ agreement when, as relevant here, the award is so unfounded in reason and fact and so unconnected with its wording and purposes as to manifest an infidelity to the obligation of the arbitrator.²³

¹⁸ *Id.* at 22 (emphasis added).

¹⁹ *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 792, 794 n.37 (2018) (Member DuBester dissenting) (explaining “the distinct role of the FLRA in determining whether an arbitrator’s interpretation of a negotiated contract provision is consistent with or contrary to law”).

²⁰ *U.S. Dep’t of the Navy v. FLRA*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) (quoting *Dep’t of the Air Force v. FLRA*, 648 F.3d 841, 845 (D.C. Cir. 2011)).

²¹ The Agency also argues that the award is contrary to law because the Arbitrator misapplied the Merit Systems Protection Board’s harmful error doctrine and substantive due process concepts. Exceptions Br. at 11. Because of our determination above, it is unnecessary to address this argument further.

²² Because we grant this exception, it is unnecessary for us to address the Agency’s nonfact exception. Exceptions Br. at 23; *U.S. Dep’t of Commerce, Nat’l Inst. of Standards & Tech.*, 71 FLRA 199, 202 n.28 (2019) (Member DuBester dissenting) (citing *U.S. DOD Educ. Activity*, 70 FLRA 937, 938 n.18 (2018) (Member DuBester dissenting)).

²³ *Nat’l Weather Serv. Emps. Org.*, 71 FLRA 275, 276 (2019) (Member DuBester dissenting) (footnote omitted). Under this standard, the Authority also will grant an exception claiming that an arbitration award fails to draw its essence from the parties’ agreement if the excepting party establishes that the award cannot in any rational way be derived from the agreement, does not represent a plausible interpretation of the agreement, or evidences a manifest disregard of the agreement. *AFGE, Local 2152*, 69 FLRA 149, 152 (2015) (citing *AFGE, Council 220*, 54 FLRA 156, 159 (1998)).

The Agency argues that the award “conflicts with the plain language of,” “nullifies an express term of,” and “effectively rewrites” the discipline agreement.²⁴ In particular, the award characterizes the discipline agreement’s confidentiality clause as a restriction on the executive panel’s ability to consider the documentation of the grievant’s conduct and tax noncompliance. This interpretation ignores unambiguous wording in the confidentiality clause that permits disclosure to “responsible [m]anagement . . . official[s] who have a business need to know.”²⁵ To that extent, the Arbitrator’s interpretation evidences a manifest disregard of the discipline agreement.²⁶

We grant the Agency’s essence exception.

IV. Decision

We grant the Agency’s contrary-to-law and essence exceptions and vacate the award.

²⁴ Exceptions Br. at 15; *Monongahela Valley Hosp. Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union*, 946 F.3d 195 (3d Cir. 2019) (arbitrator may not ignore restrictions in the parties’ agreement and insert exclusions to which they did not agree).

²⁵ Award at 23.

²⁶ *U.S. Dep’t of Transp., FAA*, 70 FLRA 687, 688 (2018) (Member DuBester dissenting) (setting aside award where arbitrator’s interpretation effectively eliminated a provision of the parties’ agreement); *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (Member DuBester dissenting) (ignoring plain wording of parties’ agreement evidenced manifest disregard for it); *U.S. Dep’t of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (Member DuBester dissenting) (setting aside award where parties’ agreement contained no language that excused arbitrator’s non-compliance with its procedural requirement).

Member DuBester, dissenting:

I disagree with the majority's decision that the award is contrary to law because it conflicts with § 110 of the Department of the Treasury Appropriations Act of 2016 (Appropriations Act).¹ This provision states that no appropriated funds may be expended by the Agency to "make a payment to any employee under a bonus, award, or recognition program . . . unless such program takes into account the conduct and Federal tax compliance of such employee."²

As noted by the majority, the Agency ensured that it complied with the Appropriations Act's restrictions by establishing a process that required all recommended performance awards to be reviewed by an Executive Panel to determine whether an employee's conduct warranted denying the award. The parties further defined this process through Article 18, Section 1(C) of their collective-bargaining agreement and an Awards and Misconduct Side Letter Agreement (Side Letter Agreement).³

Acting in accordance with this process, the grievant challenged the Executive Panel's denial of his award through the parties' negotiated grievance procedure, and the Arbitrator found that the Panel's denial of the award violated the standards and procedures governing award denials established by the parties' agreements. Contrary to the majority, I do not believe that the Arbitrator's award "undermines" the Agency's ability to comply with the Appropriations Act.⁴ Rather, the award simply enforces the requirement that the Agency "take into account" employees' conduct and Federal tax compliance in a manner consistent with the standards and procedures established by the parties for this purpose.

Accordingly, under the unique facts and circumstances presented by this case, I dissent from the majority's conclusion to the contrary.

¹ Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 110 (2015).

² Award at 8 (quoting § 110 of the Appropriations Act).

³ *Id.* at 22. Article 18, Section 1(C) of the parties' agreement states: "The fact that an employee is the subject of a conduct investigation or has been the subject of a disciplinary action during the rating period will not preclude a performance award that would otherwise be granted unless such preclusion is necessary to protect the integrity of the Service." *Id.* at 4. It further provides that "[t]he merits of the Employer's decision to withhold an award are subject to the negotiated grievance procedure." *Id.* The Side Letter Agreement negotiated by the parties reiterates that "determinations concerning the ineligibility of a bargaining unit employee for an award . . . based on alleged misconduct and Federal tax non-compliance during the applicable rating period will be made by the Employer by applying the standard set forth in Article 18, Subsection 1(C)." *Id.* at 7.

⁴ Majority at 4.