

71 FLRA No. 172

UNITED STATES
DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
(Agency)

and

ANTILLES CONSOLIDATED
EDUCATION ASSOCIATION
(Union)

0-AR-5427

DECISION

July 28, 2020

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

I. Statement of the Case

In this case, we¹ find that an arbitrator may not retroactively authorize an evacuation of civilian “mission[-]essential” employees – for the purpose of awarding those employees evacuation allowances – by substituting her judgment for that of the management officials designated by regulation to make evacuation decisions.²

The Department of Defense Joint Travel Regulations (JTR) designates certain management officials to authorize an evacuation of – and, correspondingly, evacuation allowances for – civilian employees threatened by emergency circumstances. After Hurricane Maria struck Puerto Rico, some of those officials elected not to authorize an evacuation for the affected employees. As a result, many of the affected

¹ In order to avoid an impasse between the Members, Member Abbott agrees that under the circumstances of this case the majority decision is technically correct. Because the Joint Travel Regulation does not require the action to be taken, a failure to act cannot be a violation; therefore, the award must be set aside in its entirety. His complete view of this matter is addressed in his concurring opinion. *See U.S. Dep’t of VA, Veterans Benefit Admin., Nashville Reg’l Office*, 71 FLRA 322, 322 n.2 (2019) (Member Abbott concurring; Member DuBester dissenting) (noting agreement to avoid an impasse).

² Award at 2.

employees evacuated at their own expense. Arbitrator Marsha C. Kelliher found that one of the JTR-designated officials – the Agency’s director (the director) – failed to exercise his discretion to authorize, or not authorize, an evacuation because he was unaware that he had the authority to do so. And the Arbitrator concluded that this failure to exercise discretion was itself an abuse of discretion.

The main question before us is whether the award is contrary to the JTR. Because the JTR does not require each official that is permitted to authorize an evacuation to independently assess whether an evacuation is appropriate, the director was not required to exercise, and did not abuse, his discretion. Thus, the answer is yes, and we set aside the award.

II. Background and Arbitrator’s Award

In Puerto Rico, the Agency employs teachers (employees) working at four Agency-operated schools. Three of the schools are located at the U.S. Army installation Fort Buchanan, and the other is near a U.S. Coast Guard Air Station.

After Hurricane Maria struck Puerto Rico, the Agency did not authorize an evacuation of, or the accompanying evacuation allowances for, the employees. As a result, many employees at Fort Buchanan evacuated at their own expense, and the Coast Guard provided evacuation assistance to some of the employees working near the U.S. Coast Guard Air Station.

The Union filed a grievance alleging that the director “abuse[d his] discretion” by failing to direct an evacuation and authorize evacuation allowances pursuant to the JTR.³ The parties could not resolve the dispute and submitted it to arbitration.

At arbitration, the parties stipulated to the following issues: “Whether [the Agency] abused its discretion by failing to authorize evacuation allowances for bargaining[-]unit employees . . . following Hurricane Maria; and if so, what shall the remedy be?”⁴

Chapter 6 of the JTR governs evacuations of non-military employees at non-foreign locations outside of the continental United States, such as Puerto Rico. Section 0601 provides that when an area is threatened by unusual or emergency circumstances, the affected

³ Opp’n, Joint Ex. 2, Grievance (Grievance) at 2. The parties’ negotiated grievance procedure authorizes the Union to grieve “any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.” Opp’n, Joint Ex. 1, Collective-Bargaining Agreement Excerpts (quoting Art. 30, § 2(b)(3)).

⁴ Award at 5.

employees “may leave [the] . . . area at their own expense.”⁵ However, § 060101 lists several officials that “may order or authorize” an evacuation, including: the “Secretary of Defense . . . or his or her designee”; the “Secretary concerned”; the “Head of the Component or his or her designee”; the “Commander of the Installation or the Coast Guard District Commander”; and the “Commander, head, chief, or supervisor of the organization or office.”⁶ And if one of those officials orders or authorizes an evacuation, then “the Government authorizes evacuation allowances” for affected employees.⁷

The Arbitrator observed that the JTR permitted only specific officials to authorize an evacuation. She then found that the superintendent of the Agency-operated school system and the Commander of Fort Buchanan elected not to authorize an evacuation given “the importance of getting the schools [re]open[ed] as quickly as possible” and because the employees were “mission essential.”⁸ Accordingly, the Arbitrator concluded that the Agency “articulated a rational connection between the facts and [its] decision to not authorize [an] evacuation.”⁹

However, at arbitration, the Agency acknowledged that the director was unaware that the JTR permitted him to authorize an evacuation. Thus, the Arbitrator found that the director failed to exercise his discretion to determine whether or not an evacuation was appropriate. Relying on *Munoz-Pacheco v. Holder*,¹⁰ the Arbitrator concluded that the director’s failure to exercise discretion was based on a “legal mistake”¹¹ and constituted an abuse of discretion.

As a remedy, the Arbitrator directed the Agency to reimburse employees’ evacuation expenses.

III. Analysis and Conclusion: The award is inconsistent with the JTR.

The Agency argues that the award is inconsistent with the JTR.¹² When an exception involves an award’s consistency with law, rule, or regulation, the

Authority reviews any question of law de novo.¹³ And when assessing an exception asserting that an award is contrary to a governing agency rule or regulation,¹⁴ the Authority will determine whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, that rule or regulation.¹⁵

The Arbitrator found that the Agency abused its discretion because the director failed to exercise his discretion under the JTR.¹⁶ But, as noted above, the JTR simply lists the officials that “may order or authorize” an evacuation;¹⁷ it does not *require* each of those officials to independently assess whether an evacuation is appropriate. Therefore, in concluding that the director was required to exercise his discretion under the JTR, the Arbitrator’s award is inconsistent with the JTR’s plain wording.¹⁸

⁵ Opp’n, App. A, Joint Ex. 4 (JTR) at 1.

⁶ *Id.* at 2.

⁷ *Id.* at 1.

⁸ Award at 7; *see also id.* at 9 (finding that the employees were “essential to the fulfillment of the mission” to reopen the schools).

⁹ *Id.* at 9.

¹⁰ 673 F.3d 741 (7th Cir. 2012).

¹¹ Award at 9 (citing *Munoz-Pacheco*, 673 F.3d at 745).

¹² Exceptions Br. at 13 (arguing that “there is no basis under the JTR for evacuation allowances”).

¹³ *Int’l Bhd. of Elec. Workers, Local 2219*, 68 FLRA 448, 449 (2015); *see also U.S. DOD Dependents Sch.*, 53 FLRA 249, 253 (1997) (*DODDS*) (reviewing de novo an allegation that an award was contrary to the JTR).

¹⁴ There is no dispute that the JTR governs this matter. *See* Exceptions Br. at 7; Opp’n at 9.

¹⁵ *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 521, 522 (2018) (*DHS*) (Member DuBester dissenting).

¹⁶ Award at 9-10.

¹⁷ JTR at 2.

¹⁸ *See DODDS*, 53 FLRA at 253 (finding award inconsistent with JTR because arbitrator awarded travel allowances not specifically permitted by the JTR). Chairman Kiko notes that this decision does not address the question of whether one of the lower-ranking officials on the JTR list could override an evacuation decision made by a higher-level official. The JTR does not squarely answer that question, and interpretations of the JTR should be left to the Defense Office of Hearings and Appeals and the Civilian Board of Contract Appeals. This decision applies the plain wording of the JTR and does not interpret any ambiguous provision of it.

Moreover, the Arbitrator's reliance on *Munoz-Pacheco* is misplaced. In that case, the court stated that there must be an *exercise* of discretion for there to be an abuse of discretion, and a "[f]ailure to exercise discretion is *not exercising discretion*."¹⁹ Here, the director failed to exercise his discretion under the JTR. Thus, *Munoz-Pacheco* does not support the Arbitrator's conclusion that the Agency exercised, let alone abused,²⁰ its discretion.²¹

Finally, as noted above, at least two officials permitted to authorize an evacuation under the JTR – the superintendent of the school system²² and the Commander of the Fort Buchanan installation²³ – elected *not* to do so.²⁴ And the Arbitrator found that those officials, on behalf of the Agency, "articulated a rational connection between the facts and the[ir] decision to not

authorize [an] evacuation."²⁵ By directing the Agency to reimburse employees' evacuation expenses, the Arbitrator substituted her judgment for that of those JTR-designated officials and, effectively, authorized a retroactive evacuation.²⁶

Based on the above, we set aside the award as conflicting with the JTR.²⁷

IV. Decision

We set aside the award.

¹⁹ *Munoz-Pacheco*, 673 F.3d at 745 (emphasis added) (citations omitted).

²⁰ Contrary to the dissent's assertion, there is no meaningful distinction between the director being unaware that the JTR permitted him to authorize an evacuation and the director failing to exercise discretion to authorize, or not authorize, an evacuation. The former is merely the reason for the latter. Perhaps the court in *Munoz-Pacheco* put it best: "[I]f you forget an appointment, you don't explain your forgetfulness by saying that you must have been exercising discretion." 673 F.3d at 745. Nor would you say that by forgetting that appointment, you somehow abused your discretion about whether to attend, or not attend, the appointment. Simply stated, in the absence of an exercise of discretion, there can be no abuse of discretion. *See id.* And here, the director did not exercise any discretion. The dissent engages in technical hair splitting of the highest order and a machination that we refuse to engage. *See SSA, Office of Hearings Operations*, 71 FLRA 123, 124 (2019) (Member DuBester dissenting) ("We do not believe that Congress intended for the application of election-of-forum provisions . . . to be based on 'technical hair-splitting and artful pleading.'"); *U.S. Dep't of Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 514-15 (2018) (Member DuBester dissenting) (stating that the Authority would no longer entertain the "technical hair-splitting and artful pleading" of parties to subvert the plain language and intent of the Statute).

²¹ *Munoz-Pacheco*, 673 F.3d at 745 (addressing, *as a jurisdictional matter*, whether a failure to exercise discretion is a "legal mistake" – or question of law).

²² *See* Grievance at 2 (acknowledging that that superintendent – as the "head," "chief[.], or supervisor of an organization or office" – could have authorized an evacuation under the JTR).

²³ *See* JTR at 2 (designating the "Commander of the [affected] Installation" to authorize an evacuation); *see also* Award at 4 (highlighting testimony establishing that the Commander of Fort Buchanan could authorize an evacuation).

²⁴ Award at 2-3, 7-8; *see also* Exceptions, Attach. 2, Tr. at 314 (stating that high-level Department of Defense officials, with the authority to authorize an evacuation, elected not to do so based on "fly-over assessments").

²⁵ Award at 9; *see also id.* at 7 (finding that the employees were essential to the mission of getting the schools reopened "as quickly as possible").

²⁶ *See* JTR at 1 (making evacuation allowances contingent on a JTR-approved official ordering or authorizing an evacuation).

²⁷ *See DHS*, 70 FLRA at 523 (setting aside award as contrary to a governing agency rule). Because we set aside the award, we need not address the Agency's other exceptions or determine whether they are properly raised before us. *See U.S. Dep't of the Navy, Naval Supply Sys. Command, Fleet Logistics Ctr.*, 70 FLRA 817, 818 n.14 (2018) (Member DuBester dissenting).

Member Abbott, concurring

I agree with my colleagues that the Arbitrator's award is contrary to law. But, as I have noted before, there are limits to the reach of our Statute.¹ Therefore, I do not agree that the matters at issue in this may be grieved under the parties' negotiated grievance procedure.

The Statute does not permit an arbitrator or us to determine who, under given circumstances, may authorize an evacuation of an OCONUS military base, any more than an arbitrator or we have the authority to determine whether that evacuation was appropriate. Although the Union cleverly couched its grievance as "whether [the Agency] abused its discretion by failing to authorize evacuation allowances . . ."², that is not the issue upon which our determination must turn.

This grievance did not challenge administrative processes (that might be described as procedures or arrangements). Rather, it directly challenged determinations that were made by military officials – the Commanding Officer of Fort Buchanan and the DODEA School Superintendent at the nearby U.S. Coast Guard Air Station (whose determination mirrored the Commander at Fort Buchanan) – that the circumstances following the hurricane did not warrant evacuation of teachers who were "mission essential". Even though the supervisor of the organization or office is designated as an official who *may* have the authority to order an evacuation, it is preposterous to presume that the lowest-ranking official on the list could effectively override a determination (evacuation unnecessary) that already had been made by a higher-ranking base commander and DOD official (superintendent). The authority to make such determinations stems from Title 10 and Title 37³ authorities and cannot be subordinated to a contrary call of a lower-ranking civilian official.

Furthermore, the administration of the Joint Travel Regulation (JTR), and how it is applied under specific circumstances, is not a grievable matter that meets the definition of a grievance⁴ or a condition of employment.⁵ It would have been one thing if this grievance had addressed a provision in the parties' agreement such as, for example, how bargaining-unit employees should be notified about changes to the JTR,

to which office a travel form must be directed, or to whether travel claim forms will be processed electronically or by hard copy. Those matters would likely be negotiable as procedures⁶ or arrangements.⁷

The issue here, however, is not so benign.

The JTR is unique because it is "derived" from Title 10 and Title 35, although, for civilian employees, Title V comes into play.⁸ As the United States Court of Appeals for the District of Columbia circuit held recently, the "starting point" for matters concerning Title 10 military discretion is § 113(b), which gives the Secretary of Defense "the authority, direction, and control over the DOD . . . and the authority necessary to conduct[] *all* affairs of the Department."⁹ The JTR "has the force and effect of law" for both "Uniformed Service members and DOD civilian travelers."¹⁰ The issue here – whether or not to evacuate Fort Buchanan – directly concerns military discretion that flows directly from Title 10, rather than the limited application of Title V to travel authorizations.

JTR Chapter 6 "Evacuation Travel" limits the application of Title V to "[p]ayments [d]uring [e]vacuation" which are subject to Department of State policies and DOD directives.¹¹ But the actual determination as to whether an evacuation is necessary, and who may be evacuated, clearly is subject to Title 10, DOD directives, and clearly defined lines of authority beginning with the Secretary of Defense and ending with the "supervisor of the organization or office."¹² As noted above, when a higher-ranking military official makes a determination that evacuation of a military base is not necessary, neither a lower-ranking civilian supervisor, an arbitrator, nor the Authority override that determination.

¹ See *U.S. Dept of VA, Veteran Benefits Admin., Nashville Reg'l Office*, 71 FLRA 322, 324 (2019) (*VBA Nashville*) (Member Abbott concurring; Member DuBester dissenting) (Concurring Opinion of Member Abbott, discussing the Privacy Act).

² Award at 5; Opp'n, J.A., Stipulated Issues and Exhibits at 2.

³ 37 U.S.C. §§ 452, 464.

⁴ 5 U.S.C. § 7103(a)(9)(C)(ii).

⁵ See *id.* § 7103(a)(14)(C) ("matters [that] are specifically provided for by [another] Federal Statute").

⁶ *Id.* § 7106(b)(2).

⁷ *Id.* § 7106(b)(3).

⁸ See DOD, *The Joint Travel Regulations at Cover Summary* (Sept. 2017) (JTR), [https://www.defensetravel.dod.mil/Docs/perdiem/browse/Travel_Regulations/JTR/2017/2017-09\(JTR\).zip](https://www.defensetravel.dod.mil/Docs/perdiem/browse/Travel_Regulations/JTR/2017/2017-09(JTR).zip). (last visited July 27, 2020).

⁹ *U.S. Dep't of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F3d 957, 961 (D.C. Cir. 2016) (emphasis added).

¹⁰ JTR at Introduction, Authority, Applicability, and Administration of the JTR.

¹¹ Exceptions, Attach. 4, JTR Chapter 6 at 6-1.

¹² See *id.* at 6-2.

The Authority has recognized that matters concerning the recoupment of overpaid sums fell, not under the Statute, but under the umbrella of the Debt Collection Act.¹³ Here, the JTR, as in *DODEA*, provides an exclusive avenue of redress: “A traveler who disagrees with a decision by a certifying officer may submit an appeal or reclaim . . . [i]n cases of specific travel circumstances in need of clarification, the General Counsel of the [DOD], the Defense Office of Hearings and Appeals (for a service member), and the Civilian Board of Contract Appeals (for a civilian employee) to determine how the JTR . . . should be interpreted.”¹⁴

For these reasons, I would conclude that this dispute is not one that may be addressed under the parties’ negotiated grievance procedure because it is a “matter[] specifically provided for by Federal statute,”¹⁵ but also because the JTR, much like the Privacy Act¹⁶ and Debt Collection Act,¹⁷ provides an exclusive avenue of redress.

I would conclude that this dispute does not constitute a grievance because the underlying dispute involves a “matter[] specifically provided for by Federal Statute,” the JTR provides an exclusive avenue of redress, and that it does not fall under our purview.

¹³ *U.S. DOD Educ. Activity, U.S. DOD Dependent Schs.*, 70 FLRA 718, 720 (2018) (Member DuBester dissenting) (*DODEA*); *see also U.S. DOJ, Fed. BOP, Fed. Med. Ctr. Carswell, Fort Worth, Tex.*, 70 FLRA 890, 892 (2018) (Member DuBester dissenting) (medical competence of intern training to become clinical psychologist not a grievance under 5 U.S.C. § 7103(a)(9)).

¹⁴ JTR at Intro-2.

¹⁵ 5 U.S.C. § 7103(a)(9), (a)(14)(C).

¹⁶ *See VBA Nashville*, 71 FLRA at 324 (Concurring Opinion of Member Abbott).

¹⁷ *See DODEA*, 70 FLRA at 720.

Member DuBester, dissenting:

The Agency's exceptions present a number of challenges to the Arbitrator's award that, in my view, warrant further scrutiny. However, I disagree with the majority's conclusion that the award must be set aside because it is inconsistent with the Joint Travel Regulations (JTR).

The majority reasons that, because the JTR does not require any Agency officials "to independently assess whether an evacuation is appropriate," the Arbitrator erred by "concluding that the director was required to exercise his discretion under the JTR."¹ But this misstates both the Arbitrator's conclusion and its supporting rationale.

The Arbitrator concluded that the Agency abused its discretion under the JTR not, as the majority asserts, because the director was *required* to assess whether an evacuation was appropriate, but rather because the Agency *was not aware* the director had the authority to do so.² This finding is supported by record evidence demonstrating considerable "confusion" by Agency officials regarding the exercise of this authority while the events surrounding Hurricane Maria were unfolding,³ and by the Agency's subsequent concession that the director in fact possessed this authority.

Moreover, the record shows that the Agency, acting through several officials, *did* independently assess whether the teachers should have been evacuated (as well it should have, given the severity of the situation).⁴ And as part of its decision not to order an evacuation, the Agency relied upon its mistaken understanding that the director was not authorized to do so under the JTR.⁵ Under these circumstances, the Arbitrator correctly concluded that the Agency abused its discretion.⁶

This conclusion is not undermined, as the majority suggests, by the fact that two Agency officials

who *were* authorized to order an evacuation elected not to do so, or by the fact that the Arbitrator found that those officials had "articulated a rational connection between the facts" and their decisions.⁷ As noted, the Arbitrator's conclusion that the Agency abused its discretion was based not upon the decisions of these two officials, but rather upon its mistaken assumption that a third official could not have reached a contrary decision. Particularly in light of the grave consequences such decisions can have for the safety and well-being of Agency employees and their families, I believe that the Arbitrator did not err in reaching this conclusion.

¹ Majority at 4.

² Award at 9.

³ *Id.* at 8.

⁴ *Id.* at 3-4.

⁵ *Id.* at 4.

⁶ See, e.g., *United States v. Ross*, 848 F.3d 1129, 1134 (D.C. Cir. 2017) ("Where a statute grants an agency discretion but the agency erroneously believes it is bound to a specific decision, we can't uphold the result as an exercise of the discretion that the agency disavows." (citing *Prill v. NLRB*, 755 F.2d 941, 947-48 (D.C. Cir. 1985) (*Prill*)); *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998) ("An agency action, however permissible as an exercise of discretion, cannot be sustained 'where it is based not on the agency's own judgment but on an erroneous view of the law.'" (quoting *Prill*, 755 F.2d at 947)).

⁷ Majority at 5 (quoting Award at 9).