

71 FLRA No. 19

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
U.S. BORDER PATROL
LAREDO, TEXAS
(Agency)

and

NATIONAL BORDER
PATROL COUNCIL
LOCAL 2455
(Union)

0-AR-5351

DECISION

April 10, 2019

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 decision, we hold that the Arbitrator may not substitute her own judgment and second-guess a determination made by the Agency's ethics official that the grievant's outside employment would create an appearance of a conflict of interest.¹

The grievant requested permission to work during his off-duty time as an emergency medical technician (EMT). The Agency sought the advice of its ethics officer and found a potential conflict of interest between the grievant's duties as a border patrol agent to report suspected undocumented immigrants and his duty as an EMT to maintain patient confidentiality under Texas law. Based on that advice, the Agency denied the

¹ Member Abbott would find that the grievant failed to present a cognizable claim because the issue of denying outside employment does not qualify as a "condition[] of employment" encompassed by 5 U.S.C. § 7103(a)(9)(C)(ii). However, because the parties agreed to certain standards to govern approval of outside employment, the disputed action is subject to challenge through the negotiated procedures. See *FDIC, Div. of Depositor & Asset Servs., Okla. City, Okla.*, 49 FLRA 894, 900 (1994).

grievant's request. Arbitrator Kathy L. Eisenmenger determined that the Agency violated the parties' collective-bargaining agreement when it denied the grievant's request to work off-duty.

The question before us is whether the award draws its essence from Article 10 of the parties' agreement. We find that the Arbitrator failed to apply the Article's arbitrary or capricious standard, and her determination is not a plausible interpretation of the agreement. For the reasons explained below, we vacate the award because it fails to draw its essence from the parties' agreement.

II. Background and the Arbitrator's Award

The grievant is a border patrol agent in Laredo, Texas. He earned an EMT certificate through the Agency's internal emergency medical services program.

In March 2015, the grievant requested to moonlight as an EMT for a private ambulance service. Under Article 10 of the parties' agreement, the Agency must consider outside-employment requests to determine whether the employment will result in, "or create the appearance of," a conflict of interest with the employee's official duties.² Article 10 further states that the Agency may not disapprove an outside-employment request for an "arbitrary or capricious" reason.³

The Agency's ethics officer determined that the grievant's performance of EMT duties would result in, or create the appearance of, a conflict of interest with his official duties as a border patrol agent. Specifically, the ethics officer noted that EMTs are prohibited from disclosing communications made during the course of treatment under Texas law.⁴ Thus, any discovery of a patient's unlawful presence in the United States could create a real or apparent conflict between the state's confidentiality law and the grievant's obligation, as a border patrol agent, to report the patient's undocumented-immigration status to the Agency.⁵ The Agency denied the request and the matter proceeded to arbitration in November of 2016.

In her January 15, 2018 award, the Arbitrator found the Agency's denial was "not grounded in fact nor law."⁶ The Arbitrator acknowledged that the grievant holds a position of public trust, and his primary duty is to secure the nation's borders. However, she found that the

² Award at 4 (quoting Collective-Bargaining Agreement (CBA) Art. 10, § A).

³ *Id.*

⁴ *Id.* at 9 (citing to Grievance Denial at 1-2) (citing Tex. Health & Safety Code Ann. § 773.091(a)).

⁵ *Id.* at 8.

⁶ *Id.* at 74.

Agency did not show that the grievant must “continuously fulfill his [official duties] during his off-duty . . . hours when he engages in the other activities.”⁷ Relying on Texas case law, the Arbitrator determined that the grievant would not violate Texas law by reporting a patient’s immigration status to the Agency.⁸ She concluded, therefore, that no actual, or apparent, conflict of interest existed and that the Agency’s decision was arbitrary and capricious.⁹

On February 14, 2018, the Agency filed exceptions to the award. The Union filed an opposition on March 14, 2018.¹⁰

III. Analysis and Conclusion: The award fails to draw its essence from the parties’ agreement.

The Agency argues that the award fails to draw its essence from the agreement, because its decision was not “arbitrary or capricious.”¹¹ Specifically, the Agency contends that it reasonably denied the off-duty work request because of a potential conflict of interest between the grievant’s border patrol duties and his duties as an EMT.¹²

As relevant here, an award fails to draw its essence from the parties’ agreement when the award does not represent a plausible interpretation of the agreement.¹³

The issue before the Arbitrator was whether the Agency’s denial of the grievant’s request violated Article 10’s prohibition on denying outside-employment requests for “arbitrary or capricious” reasons.¹⁴ Relying on an unrelated Texas state court decision, the Arbitrator concluded that the grievant could report a patient’s immigration status without violating Texas law.¹⁵ Therefore, the Arbitrator determined there was no actual, or any appearance of a, conflict of interest.¹⁶ The Arbitrator’s reliance on that case is misplaced because it does not involve, or relate to, the Texas law at issue.¹⁷

Article 10’s plain language does not require the Agency to demonstrate that the outside employment would result in an *actual* conflict of interest in order to deny the grievant’s request. In fact, Article 10 specifically permits the Agency to disapprove an outside employment request if it “*create[s] the appearance of*” a conflict of interest.¹⁸ Moreover, the prophylactic nature of ethical rules, such as Article 10’s conflict-of-interest provision, would be pointless if the Agency must prove that an actual conflict exists every time it acts to curtail a potential conflict.¹⁹ By relying on her conclusion that Texas law created no *actual* conflict of interest,²⁰ the Arbitrator disregarded the Agency’s contractual authority to avoid even the appearance of a conflict of interest. Thus, the Arbitrator’s interpretation of Article 10 does not draw its essence from the parties’ agreement.

Our dissenting colleague and the Arbitrator engage in an elongated and unnecessary interpretation of Texas state law. As we explain above, it is unnecessary to do so in order to resolve the very simple dispute over

⁷ *Id.* at 64.

⁸ *Id.* at 68-69 (citing *Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App. 2006) (*Abbott*)).

⁹ *Id.* at 65, 71.

¹⁰ After submitting its opposition, the Union filed a supplemental submission. Because the Union filed its supplemental submission within the time limit for submitting its opposition, we will consider this submission. See *Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1001 (2015).

¹¹ CBA Art. 10, § A.

¹² Exceptions Br. at 6, n.3. As an initial matter, the Agency argues that the award fails to draw its essence from the parties’ agreement, Exceptions Form at 9, but supports this argument in its exceptions brief under the heading “The Arbitrator’s Award is Contrary to Law, Rule, or Regulation.” Exceptions Br. at 5-8. Because the exceptions form and brief adequately present the Agency’s essence argument, we will consider it. See *U.S. Dep’t of the Treasury, IRS*, 68 FLRA 1027, 1038 (2015) (Dissenting Opinion of Member Pizzella) (“the Authority should [not] go out of its way to catch parties in technical trapfalls and summarily dismiss otherwise meritorious arguments” (quoting *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 607 (2014) (Dissenting Opinion of Member Pizzella)).

¹³ When reviewing an arbitrator’s award of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. The

Authority and the courts defer to arbitrators in this context “because it is the arbitrator’s construction of the agreement for which the parties have bargained.” *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (*Bremerton*) (citing *AFGE, Council 220*, 54 FLRA 156, 159 (1998)). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award does not represent a plausible interpretation of the award. *Id.* (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

¹⁴ Award at 4 (quoting CBA Art. 10, § A).

¹⁵ *Id.* at 69 (citing *Abbott*, 212 S.W.3d 648).

¹⁶ *Id.* at 64-65.

¹⁷ *Id.* at 68-69 (the *Abbott* case concerns whether the Health Insurance Portability and Accountability Act of 1996 precludes the disclosure of statistical information to a reporter).

¹⁸ CBA Art 10, § A (emphasis added).

¹⁹ See *Crandon v. United States*, 494 U.S. 152, 164-65 (1990) (acknowledging the value in avoiding “potential conflicts of interest in the performance of government service [as] supported by the legitimate interest in maintaining the public’s confidence in the integrity of the federal service”).

²⁰ Because we need not decide whether the Texas law at issue creates the alleged conflict of interest, we do not rule on the propriety of the Arbitrator’s conclusion except to note, again, that the decision on which she based it is irrelevant.

the plausible interpretation of Article 10's "appearance" of a conflict of interest language. But, more troubling, are the great lengths the dissent and the Arbitrator go to interpret state laws with which they have no familiarity or expertise. It is just this sort of overreach for which the D.C. Circuit Court of Appeals has criticized the Authority at least three times in recent years. In *U.S. Department of the Navy, Naval Undersea Warfare Center Division, Newport, Rhode Island v. FLRA*, the Court criticized the Authority for injecting our own "organic statute [into] another statute . . . not within [the Authority's] area of expertise."²¹ More recently, the Court criticized the Authority's overreach by interpreting a statute which concerned discretions Congress gave solely to the military: "we cannot imagine that Congress intended to empower a civilian agency like the FLRA to second-guess the military's judgment."²² The state law at issue concerns the privacy of communications made between a patient and medical personnel during the course of treatment. That is not a matter which is covered by our Statute or the parties' CBA or falls within our colleague's or the Arbitrator's expertise. And, the determination of whether an employee's outside activities create an apparent conflict of interest is a matter left to the discretion of the Agency's ethics officer.

Based on the above, we find that the Arbitrator erred in substituting her own judgment over that of the Agency's ethics officer.²³ The Agency's determination that the grievant's outside employment would create the appearance of a conflict of interest was neither arbitrary nor capricious. Therefore, we vacate the award.²⁴ In light of this determination, it is unnecessary²⁵ to resolve the Agency's remaining arguments.²⁶

IV. Decision

We vacate the award.

Member DuBester, dissenting:

Yet once again, I take strong issue with the majority's continuing effort to undermine our longstanding national policy favoring labor-management arbitration and to erode the attendant deference that should be accorded to arbitrators in their interpretation of collective-bargaining agreements.¹ And, I dissent.

The majority chides the Arbitrator for substituting her judgment for that of the Agency in denying the grievant's request for outside employment.² But, that is precisely what the Arbitrator is called upon to do. Specifically, the issue before the Arbitrator here is whether the Agency's actions were "arbitrary or capricious" in accordance with Article 10?³ Based on a thorough evaluation of the record, including testimonial evidence and pertinent law, the Arbitrator concluded that the Agency's decision was arbitrary and capricious because there is no actual or apparent conflict of interest between the grievant's outside employment and his obligations as a border patrol agent.⁴

And the majority chides me, as well as the Arbitrator, for our "unnecessary interpretation of Texas state law" with which we have "no familiarity or expertise."⁵ But, the most distinguishing characteristic of federal sector arbitration is the requirement that the Federal Labor Relations Authority (FLRA) and arbitrators assure compliance with laws, rules, and regulations, in addition to assuring compliance with the collective-bargaining agreement.⁶ As a consequence, the FLRA and arbitrators must consider thousands of law, rules, and regulations regarding which they have no particular expertise.

Contrary to the majority's suggestion, moreover, it is not necessary to engage in an "elongated" consideration of the Texas state law at issue.⁷ As the majority acknowledges, that law "concerns the privacy of

²¹ 665 F.3d 1339, 1348 (D.C. Circuit 2012) (quoting *U.S. Dep't of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base v. FLRA*, 648 F.3d 841, 846 (D.C. Cir. 2011)).

²² *U.S. Dep't of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957, 961 (D.C. Cir. 2016).

²³ See *Navy*, 70 FLRA at 672 (finding award deficient where the arbitrator did not adequately address the "arbitrary and capricious" phrase in an agreement, and it was clear that the agency had not acted in such a manner).

²⁴ *Id.*

²⁵ See *AFGE, Local 1992*, 70 FLRA 313, 315 (2017).

²⁶ Exceptions Br. at 5 (arguing that award is contrary to law); *id.* at 8 (arguing that the Arbitrator exceeded her authority).

¹ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phx., Ariz.*, 70 FLRA 1028, 1031 (2018) (Dissenting Opinion of Member DuBester) ("The majority's non-deferential treatment . . . ignores the Supreme Court's declaration that '[t]he federal policy of settling labor disputes by arbitration would be undermined if [a reviewing body] ha[s] the final say on the merits of [an] award[]'; a reviewing body has 'no business overruling' an arbitrator simply because '[its] interpretation of the contract is different.'" (internal cites omitted)).

² Majority at 1.

³ Award at 4.

⁴ *Id.* at 64-65, 71.

⁵ Majority at 4.

⁶ 5 U.S.C. § 7122(a); see generally 5 U.S.C. §§ 7101-7135; *Elkouri & Elkouri*, *How Arbitration Works*, 20-10-20-15 (Kenneth May ed., 7th ed. 2012).

⁷ Majority at 4.

communications made between a patient and medical personnel during the course of treatment.”⁸ On its face, this law has nothing whatsoever to do with a border patrol agent’s obligation to report suspected undocumented immigrants, the concern proffered by the Agency for its denial of the grievant’s request to work during his off-duty time as an EMT.

And the Agency provided little or nothing to support its conflict of interest claim. As the Arbitrator found, the Agency’s denial of the grievant’s request is based on “unsubstantiated,”⁹ “hypothetical[,]”¹⁰ and “highly fictionalized”¹¹ scenarios, with no facts supporting how the grievant would learn about a patient’s undocumented-immigration status while working as an off-duty EMT.¹² Accordingly, the Arbitrator needed to consider the Texas state law at issue, but only to the extent of determining whether the Agency’s proffered explanation was contrived, or more precisely, was “arbitrary and capricious” within the meaning of Article 10.¹³

Furthermore, consideration of the Texas state law is necessary here because the Agency’s essence claim, which is directly before us, is premised on its erroneous claim that the award is contrary to Texas law. Specifically, the Agency contends that the Arbitrator erroneously concluded that Texas Health and Safety Code § 733.091(a)¹⁴ did not prohibit an EMT from disclosing to the Agency a patient communication about the patient’s immigration status.¹⁵

Given the Agency’s claim, a few more observations about the Texas law are in order.

As the Arbitrator correctly found, under § 733.091(a), a patient’s immigration status is not protected information.¹⁶ Section 773.91(a) is expressly

limited to protecting communications “made in the course of emergency medical services.”¹⁷ This statute is part of the Texas “Health & Safety” code, and falls within a subchapter titled “Emergency Medical Services.” The term “communication,” undefined in the Texas Health & Safety Code, must be read in context. And, by doing so, the statute serves the state’s interest in protecting personal privacy, by limiting disclosure of private *medical information* – details the grievant would not be required to disclose as a border patrol agent.

Moreover, § 773.091(a)’s confidentiality requirements are subject to several exceptions.¹⁸ As relevant here, confidential communications “may be disclosed to . . . governmental agencies if the disclosure is required or authorized by law.”¹⁹ This broad exception – explicitly allowing disclosure of otherwise confidential information to a government entity such as the Agency – reflects the Texas Legislature’s apparent concern that § 773.091 does not conflict with other laws requiring or authorizing these communications.²⁰ Simply put, the award does not contravene § 773.091(a), regardless of whether the grievant does or does not have a duty to report an undocumented immigrant. If the grievant has a duty to report, § 773.092(e)(2) would allow the grievant to fulfill his duties under the law and disclose a patient’s suspected undocumented-immigration status to the Agency. If the grievant has no duty to report this type of information, then § 773.091(a) would not conflict with the grievant’s official duties. Therefore, I agree with the Arbitrator, that nothing – including § 773.091 – would prevent the grievant from disclosing a patient’s undocumented-immigration status while moonlighting as an EMT.

Finally, and most significant, the Agency’s prior conduct belies its asserted conflict of interest claim. As found by the Arbitrator, the Agency had no policy against its agents working as EMTs for private or public entities.²¹ And, the Agency had permitted its border

⁸ *Id.* at 4-5.

⁹ Award at 63.

¹⁰ *Id.* at 68.

¹¹ *Id.* at 58.

¹² The Arbitrator found that the Agency “presented no evidence to demonstrate how, in what way or manner, pattern of behavior or any other factors by which the [g]rievant would encounter [a patient] while an EMT during his off[-]work time from the Agency and have probable cause or reasonable suspicion about” that patient’s immigration status. *Id.* at 66-67. And, the Arbitrator also found, the record did not demonstrate that the transport service would even inquire into the immigration status of its patients or that immigration status was part of the intake information routinely gathered by the service. *Id.* at 67.

¹³ *Id.* at 4.

¹⁴ Tex. Health & Safety Code Ann. § 773.091(a).

¹⁵ Exceptions Br. at 5, 7.

¹⁶ Award at 57-63; *Cf. Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App. 2006) (*Abbott*)

(holding that Health Insurance Portability and Accountability Act of 1996 (HIPAA) does not prohibit disclosure of non-individually identifiable health information).

¹⁷ Tex. Health & Safety Code Ann. § 773.091(a).

¹⁸ *Id.* states: “A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed *except as provided by this chapter.*” (emphasis added).

¹⁹ *Id.* § 773.092(e)(2).

²⁰ See also *Abbott*, 212 S.W.3d at 654 (discussing federal privacy rule implementing HIPAA that allows disclosure of “protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law”).

²¹ Award at 62.

patrol agents to ride as EMTs in “municipal ambulances . . . in a duty status” – showing a “presumptive waiver of the Agency’s concerns” about a real or apparent conflict of interest when performing this type of activity.²² But perhaps most indicative of the Agency’s “profound lack of concern” is the disparate treatment of the grievant when compared to other border patrol agents who not only worked as EMTs while in duty status, but also while in an off-duty status.²³

I agree with the Arbitrator. But, *agreement* with the Arbitrator is not what matters here. The only question for the Authority is whether the award manifests an infidelity to the obligation that it draw its essence from the parties’ agreement. In my view, by any objective standard, the award at issue here reflects a plausible interpretation of the parties’ agreement. And, the majority should not be substituting its own judgment simply to reach a different outcome on the merits.

²² *Id.*

²³ *Id.* at 70-71, 73; *see also id.* at 15-18.