68 FLRA No. 153

OVERSEAS PRIVATE
INVESTMENT CORPORATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1534
(Union)

0-AR-4303
(64 FLRA 466 (2010))
(64 FLRA 827 (2010))

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DECISION

September 24, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

The grievant, a long-time federal employee, transferred to the Agency from another agency. The Agency hired the grievant at a compensation level that was higher than her previous position and, after two years, promoted her to the next step in her compensation schedule. Later, the Agency determined that it improperly hired her at a higher compensation level than her previous position, and that it also improperly promoted her before she completed the necessary waiting period for a promotion. Consequently, the Agency calculated, it overpaid the grievant by $17,213.18.

The Agency notified the grievant of the overpayment and sought to collect the debt. Although the grievant requested a waiver of the overpayment, the Agency agreed to waive only a portion. The Union filed a grievance challenging the Agency's decision not to waive the entire debt.

Arbitrator Ira Jaffe sustained the grievance, in part. The Arbitrator found that the Agency's error when it set the grievant's starting salary caused her debt, and that the Agency's failure to waive the debt violated 5 U.S.C. § 5584 and the parties' agreement. The Arbitrator found that the Agency, not the grievant, was at fault, and that the grievant had a good faith belief that her starting salary was correct. However, the Arbitrator upheld the Agency's decision not to waive the portion of the grievant's debt stemming from her premature promotion. There are three substantive questions before us.

The first question is whether the Arbitrator's finding that the grievance is arbitrable is contrary to 5 U.S.C. § 5584. Because § 5584 does not preclude an arbitrator from reviewing an agency's decision not to waive a debt, the answer is no.

The second question is whether the Arbitrator erred as a matter of law in finding that the grievant was entitled to a full waiver of her debt resulting from the incorrect starting salary she received when the Agency hired her. Because the Agency does not show how the award is inconsistent with law, and the Arbitrator's factual findings support his legal conclusion that the grievant was not at fault for that part of the overpayment, the answer is no.

The third question is whether the Arbitrator's award ordering the Agency to pay his fees and expenses fails to draw its essence from Article 27, Section 4 of the parties' agreement because the Agency is not the "losing party."[1] As the Agency does not demonstrate that the Arbitrator's interpretation of Article 27, Section 4 is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

II. Background, Arbitrator's Award, and Prior Federal Labor Relations Authority (FLRA) Proceedings

The Agency hired the grievant, a twenty-nine-year federal employee, at the General Schedule 14, Step 9 (GS-14/9) compensation level. After two years, the Agency promoted her to the GS-14, Step 10 (GS-14/10) level. The following year, the Agency determined that the grievant's GS-14/9 starting salary was improper, and that the Agency should have hired her at the GS-14, Step 6 level, which was equivalent to her compensation level at her prior agency. The Agency also determined that it improperly promoted the grievant to the GS-14/10 level before she completed the necessary three-year waiting period. As a result of these two errors, the Agency concluded, it overpaid the grievant by $17,213.18.

Following this determination, the grievant transferred to a new position with another agency. The grievant requested that the Agency waive the debt. The

[1] Exceptions at 26-27.

Agency agreed to waive $5,750.00 of the debt, but refused to waive the remaining $11,463.18.

The Union filed a grievance challenging the Agency's decision not to waive the entire $17,213.18. The grievance was unresolved and submitted to arbitration. The Arbitrator framed the issues, in relevant part, as:

> [(1) W]hether the Arbitrator has jurisdiction to review the Agency's decision declining to grant the [g]rievant's request for a greater waiver of the debt; . . . [(2)] assuming the Arbitrator has such jurisdiction, whether the Agency's decision declining to grant a greater waiver . . . violat[ed] . . . the [parties' a]greement and/or applicable law[; and, if so, (3) what is] . . . the appropriate remedy[?][2]

As a threshold matter, the Arbitrator found that he had jurisdiction to review "the question of the existence and amount of the debt," as well as the Agency's debt-waiver decision, under the parties' agreement.[3] In particular, the Arbitrator relied on Article 26, Section 1 of the parties' agreement, which defines a grievance as "any complaint . . . concerning the effect or interpretation, or a claim of breach, of this [a]greement; or any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."[4] The Arbitrator also cited Article 26, Section 3, which provides that "[a]n employee affected by a violation of . . . appropriate law or regulation, may raise the matter under a statutory procedure or this procedure, but not both."[5] Further, the Arbitrator cited Article 6, Section 3, which preserves the right to "grieve or appeal the exercise of [a m]anagement right," and the statement in Article 1 that the parties' conduct would be guided by "consideration[s] of equity."[6] The Arbitrator concluded that, "[v]iewed together, and in light of the provisions of [§] 7121 of the [Federal Service Labor-Management Relations] Statute,"[7] the wording of the parties' agreement was "sufficiently broad to encompass" the grievant's claim.[8]

Furthermore, the Arbitrator – citing Authority precedent that found claims under § 5584 to be "proper subjects for . . . arbitration[]"[9] – rejected the Agency's argument that it had unreviewable discretion to determine whether a debt waiver is appropriate under § 5584. In this regard, he quoted portions of § 5584, which provides that an authorized official "may" waive a debt "arising out of the erroneous payment of pay" when:

> the collection of [the debt] would be against equity and good conscience and not in the best interests of the United States . . . [and] there [does not] exist[], in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee . . . .[10]

Rejecting "the Agency's claim that the decision to waive or not waive a debt is . . . exempt from any review," the Arbitrator found that "[t]he word 'may' [under § 5584] . . . is far too slender a reed upon which to rest a conclusion that the Agency enjoyed unreviewable discretion to decline to waive a debt, even when collection of the debt would be against equity and good conscience."[11]

Next, the Arbitrator determined that the grievant was not at fault for her initial overpayment when the Agency set her starting salary at the GS-14/9 level. The Arbitrator found that the grievant was not at fault for the overpayment because she "honestly and reasonably believed that she was entitled to [the higher rate of pay]."[12] He held that the grievant's belief was reasonable and honest because: (1) the grievant "understood . . . from her interviews . . . that there was sufficient [hiring] flexibility to encompass the increase in pay;"[13] (2) "the [g]rievant . . . thanked . . . [her immediate supervisor] . . . both orally and in writing" for the pay increase;[14] and (3) the grievant did not "remain secretive and silent about her pay increase."[15] Accordingly, the Arbitrator found that the Agency's decision to not waive that part of the debt was contrary to § 5584 and the parties' agreement.

However, the Arbitrator reached a different conclusion regarding the debt that resulted from the grievant's promotion to the GS-14/10 level. He found that as a long-time federal employee, the grievant was

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[2] Award at 2.
[3] *Id.* at 41.
[4] Exceptions, Ex. 2 Collective-Bargaining Agreement Excerpts (CBA) at 42.
[5] *Id.* at 44.
[6] Award at 38.
[7] *Id.*
[8] *Id.* at 37.
[9] *Id.* at 41.
[10] 5 U.S.C. § 5584(a) and (b) (emphasis added); *see* Award at 51-52.
[11] Award at 50.
[12] *Id.* at 44.
[13] *Id.*
[14] *Id.* at 45.
[15] *Id.*

presumed to have been aware of 5 C.F.R. § 531.405's three-year waiting period for pay increases from Step 9 to Step 10. The Arbitrator concluded that the portion of the debt related to the grievant's overpayment for her promotion should not be waived.

Accordingly, the Arbitrator sustained the Union's grievance, in part. In this regard, he found that "[i]f the Agency had complied with the [parties' a]greement and applicable law relative to the handling of the [g]rievant's request for waiver," then the Agency would have waived the entire portion of the debt that resulted from the Agency setting the grievant's starting salary at the GS-14/9 level.[16]

As a remedy, the Arbitrator directed the Agency to "promptly repay . . . the [g]rievant the difference between any monies already collected for the claimed debt," less the difference between the Step 9 and Step 10 pay.[17] The Arbitrator also ordered the Agency to make the grievant whole, including any interest due, and to pay reasonable attorney fees. Finally, the Arbitrator found that, as the losing party, the Agency was responsible for all of his fees and expenses in accordance with Article 27, Section 4 of the parties' agreement. The Arbitrator stated that his award was conditioned upon a determination, by the FLRA, that the grievant was a member of the bargaining unit and thus able to utilize the negotiated-grievance procedure.

The Agency filed exceptions to the award and the Union filed an opposition to the Agency's exceptions. The Authority dismissed the exceptions as interlocutory and remanded the matter to the parties to place the grievance in abeyance until the grievant's bargaining-unit status was resolved.[18] The Union filed a motion for reconsideration of the Authority's decision but the Authority affirmed its decision.[19] The parties pursued the representation issue, and the FLRA Washington Regional Director (RD) determined that the grievant was a member of the bargaining unit.[20] As the RD's decision and order is now final, the Agency refiled its exceptions to the award and the Union refiled its opposition to the Agency's exceptions.

[16] *Id.* at 55.
[17] *Id.* at 54.
[18] *Overseas Private Inv. Corp.*, 64 FLRA 466 (2010).
[19] *Overseas Private Inv. Corp.*, 64 FLRA 827 (2010).
[20] Exceptions at 1 (citing *Overseas Private Inv. Corp. & AFGE, Local 1534*, WA-RP-12-0028, at 4 (2010)).

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's argument regarding 22 U.S.C. § 2199.

The Agency argues that under 22 U.S.C. § 2199 its discretion to waive a debt is not subject to further review because it is not a federal agency but a government corporation.[21] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[22] At arbitration, although the Agency argued that its decision not to waive the grievant's debt in full was unreviewable,[23] it did not base this argument – and could have done so – on its status as a government corporation under § 2199. Accordingly, §§ 2425.4(c) and 2429.5 bar this argument, and we decline to consider it.[24]

IV. Analysis and Conclusions

A. The Arbitrator's finding that the grievance is arbitrable is not contrary to law.

The Agency argues that the grievance is not substantively arbitrable because under § 5584, "Congress has precluded the Arbitrator and the Authority from reviewing th[e] Agency's decision *not* to compromise or waive [the g]rievant's debt."[25] Specifically, the Agency claims that "absent a contractual provision in the [parties' agreement], § 5584 provides no basis for review of the Agency's decision declining to waive [the grievant's] debt."[26]

Substantive arbitrability involves questions as to whether the dispute's subject matter is arbitrable.[27] When an arbitrator's substantive-arbitrability determination is based on law, the Authority reviews that determination de novo.[28] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[29] In making this assessment,

[21] Exceptions at 14-15; 22 U.S.C. § 2199.
[22] 5 C.F.R. §§ 2425.4(c), 2429.5; *see e.g.*, *SSA, Region V*, 67 FLRA 155, 156 (2013) (*SSA*).
[23] Award at 29-34.
[24] *See e.g.*, *SSA*, 67 FLRA at 156.
[25] Exceptions at 10.
[26] *Id.* at 12.
[27] *AFGE, Local 1815*, 65 FLRA 430, 431 (2011) (internal quotation marks omitted).
[28] *U.S. Dep't of VA, Med. Ctr., Hampton, Va.*, 65 FLRA 125, 127 (2010) (*Hampton*) (citing *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 466 (2009)).
[29] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).

the Authority defers to the arbitrator's underlying factual findings.[30] When an arbitrator's substantive-arbitrability determination is based on an interpretation of the parties' agreement, the Authority reviews that determination under the deferential "essence" standard.[31]

The issues before the Arbitrator included the existence and amount of the grievant's debt, and whether the Agency's decision not to waive the debt violated the parties' agreement or law.[32] We find that the Arbitrator did not err by finding the grievance arbitrable. We arrive at that conclusion for three reasons: (1) the language of § 5584 does not expressly prohibit review of an agency's debt-waiver decision; (2) the Authority has reviewed awards involving § 5584 and has found the issue substantively arbitrable;[33] and (3) the Arbitrator determined that the parties' agreement encompasses the resolution of grievances such as the one underlying this case, and the Agency does not except to the Arbitrator's interpretation of the parties' agreement on essence grounds.

Section 5584 does not prohibit review of an agency's debt-waiver decision through a negotiated grievance procedure (NGP). Section 5584(a)(1) provides that an erroneous payment "may be waived in whole or in part by" an "authorized official."[34] The Arbitrator focused his analysis on the Agency's claim that the word "may" under § 5584(a) allowed it unreviewable discretion.[35] Rejecting "the Agency's claim that the decision to waive or not waive a debt is . . . exempt from any review," the Arbitrator found that "[t]he word 'may' [under] § 5584 . . . is far too slender a reed upon which to rest a conclusion that the Agency enjoyed unreviewable discretion to decline to waive a debt, even when collection of the debt would be against equity and good conscience."[36] We agree with the Arbitrator's reading of § 5584. Thus, the Agency has not demonstrated that § 5584 excludes its debt-waiver decision from the NGP.

Moreover, the Authority has reviewed arbitration awards involving agency actions under § 5584 and has found such actions to be substantively arbitrable.[37] The Agency has not identified any precedent to the contrary. As the Agency has not shown that the grievance is prohibited by § 5584, the Arbitrator's determination that the grievance is substantively arbitrable is not contrary to law.

The dissent relies on several cases to support its claim that an agency's discretion in making a § 5584 debt-waiver determination is "exclusive."[38] However, this reliance is misplaced. *Lawrence v. United States*[39] does not address whether an agency's discretion to waive a debt under § 5584 is reviewable by an arbitrator under an NGP. Indeed, in *Lawrence*, the Court of Federal Claims (Claims Court) – recognizing its limited jurisdiction – explained that it had neither "general federal question jurisdiction, . . . nor the right generally to review final agency action under the Administrative Procedure Act [(APA)]."[40] Because of its general lack of jurisdiction, the Claims Court in *Lawrence* did not specifically hold, as the dissent claims, that "an agency's exercise of its discretionary authority under § 5584 is not subject to judicial review."[41] Instead, in *Lawrence*, quoting *Krug v. United States*,[42] the Claims Court noted that "it is an *open question* whether an agency's denial of a discretionary award is reviewable at all" under the APA.[43] And *Krug* does not even concern § 5584.

Moreover, in *Lubow v. U.S. Department of State*,[44] the U.S. Court of Appeals for the District of Columbia Circuit was specifically asked to review "the [Foreign Service Grievance Board's] decision upholding the [agency's] denial of discretionary waivers under 5 U.S.C. § 5584."[45] The court conducted a detailed analysis to determine whether the agency's action under § 5584 was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA.[46] Consequently, contrary to the dissent's assertion regarding *Lubow*, the agency's discretion under § 5584 *was* reviewed (albeit ultimately upheld) by a federal court.[47] Therefore, those decisions do not support the dissent's assertion that a grievance alleging that an

[30] *Id.*
[31] *Hampton*, 65 FLRA at 127.
[32] Award at 2.
[33] *See, e.g.*, *U.S. Dep't of the Treasury, IRS*, 66 FLRA 888, 890-91 (2012) (*IRS*) (finding claims that arose under § 5584 may be properly waived when an agency erroneously overpaid employees by under-deducting taxes from their salaries); *U.S. Dep't of VA, Charles George VA Med. Ctr., Asheville, N.C.*, 65 FLRA 797, 798 (2011) (*VA*) (finding award ordering waiver of debt not contrary to § 5584); *AFGE, Local 3615*, 57 FLRA 19, 21-22 (2001) (*Local 3615*) (finding agency's decision to not waive overpayment not contrary to § 5584); *U.S. Navy Pub. Works Ctr.*, 27 FLRA 156, 157-58 (1987) (*Navy*) (finding award ordering waiver of overpayment not contrary to § 5584).
[34] 5 U.S.C. § 5584.
[35] Award at 50.
[36] *Id.*
[37] *See, e.g. IRS*, 66 FLRA at 890-91; *VA*, 65 FLRA at 798; *Local 3615*, 57 FLRA at 21-22; *Navy*, 27 FLRA at 157-58.
[38] Dissent at 13.
[39] 69 Fed.Cl. 550, 557 (Fed. Cl. 2006).
[40] *Id.* at 554 (citations omitted).
[41] Dissent at 14 (internal quotation marks omitted).
[42] 168 F.3d 1307 (Fed. Cir. 1999).
[43] *Id.* at 1310 (emphasis added).
[44] 783 F.3d 877 (D.C. Cir. 2015).
[45] *Id.* at 883.
[46] *Id.* (internal quotation marks omitted).
[47] *Lubow*, F.3d at 887; *see* Dissent at 15-16.

agency's debt-waiver decision violated law and the parties' agreement is not arbitrable.

For the foregoing reasons, we deny this contrary-to-law exception.

B. The Arbitrator did not err as a matter of law in finding that the grievant was entitled to have part of her debt waived.

The Agency argues that the Arbitrator's award ordering the Agency to waive a portion of the debt is contrary to law.[48] Specifically, the Agency argues that "the Arbitrator's factual findings compel the legal conclusion that [the g]rievant was at fault [for the debt] and, therefore, the Agency was not permitted to waive [it]" under § 5584.[49] In particular, the Agency contends that the grievant is "at fault" for the overpayment because the "[g]rievant [k]new [s]he was [r]ecieving [a]dditional [p]ayments,"[50] and failed to "adequately" "inquire" about the overpayment.[51]

The Authority has held that "[a]rbitrators' awards requiring an agency to waive . . . a claim against an employee [under § 5584] are not contrary to law where the statutory criteria for such a waiver are met."[52] As discussed above, § 5584(a) permits an Agency to waive a claim arising from an erroneous payment to an employee where collecting the debt would be "against equity and good conscience and not in the best interests of the United States."[53] And, under § 5584(b), a waiver "may not [be granted] . . . if, in [an authorized official's] opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, *fault*, or lack of good faith on the part of the employee."[54] The Comptroller General clarified that an employee will be found to be at fault under § 5584:

> if, in light of all the circumstances, the individual concerned should have known that an error existed but failed to take action to have it corrected. In deciding this, we ask whether a reasonable person in the employee's position should have been aware that she was receiving payment more than she was entitled to receive[].[55]

We note that opinions of the Comptroller General are not binding on the Authority,[56] but that the Authority has stated that those opinions serve as "expert opinion[s] that should be prudently considered."[57] There is no apparent basis for declining to rely on the Comptroller General's opinion on this issue, particularly as it is consistent with the Arbitrator's award and not challenged by the parties.

The Arbitrator considered whether the grievant was at fault for the overpayment, and concluded that the grievant "honestly and reasonably believed that she was entitled to be paid at the GS-14[/9] rate."[58] Applying § 5584, he found that the grievant was not at fault for the overpayment because: (1) the grievant "understood . . . from her interviews . . . that there was sufficient [hiring] flexibility to encompass the increase in pay;"[59] (2) consistent with her honest and reasonable belief, "the [g]rievant . . . thanked . . . [her immediate supervisor] . . . both orally and in writing" for the pay increase; and (3) the grievant did not "remain secretive and silent about her pay increase."[60] Based on these factual findings, to which the Agency does not except,[61] the Arbitrator concluded that the evidence presented by the Union supports the conclusion that the grievant would not have known that the Agency erred when it hired her at the GS-14/9 level.[62] Thus, the Agency has not shown that the Arbitrator erred as a matter of law in finding that the grievant was entitled to have part of her debt waived because she was not at fault under § 5584.

Accordingly, we deny this contrary-to-law exception.

C. The award does not fail to draw its essence from the parties' agreement.

The Agency argues that the award's direction that it pay the Arbitrator's fees and expenses fails to draw its essence from Article 27, Section 4 of the parties' agreement because the Agency is not the "losing party."[63] Article 27, Section 4 states that "[t]he Arbitrator's fee and expenses, if any, shall be borne by the losing party."[64]

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[48] Exceptions at 16-19.
[49] *Id.* at 19.
[50] *Id.*
[51] *Id.* at 22-25.
[52] *VA*, 65 FLRA at 798.
[53] 5 U.S.C. § 5584(a).
[54] *Id.* § 5584(b)-(b)(1) (emphasis added).
[55] *In re Joan R. Edwards -- Request for Recons. of Waiver of an Erroneous Salary Payment*, B-271616, 1996 WL 562040 (Comp. Gen. Oct. 3, 1996).
[56] *U.S. Dep't of HHS, Wash., D.C.*, 68 FLRA 239, 242 (2015) (*HHS*); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (*NOAA*).
[57] *HHS*, 68 FLRA at 242; *NOAA*, 67 FLRA at 358 (internal quotation marks omitted).
[58] Award at 44.
[59] *Id.*
[60] *Id.* at 45.
[61] Exceptions at 3 ("[the Agency] is not challenging the Arbitrator's factual findings").
[62] Award at 42-45.
[63] Exceptions at 26.
[64] CBA at 46.

In reviewing an arbitrator's interpretation of a parties' agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[65] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the parties' agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the parties' agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the parties' agreement; or (4) evidences a manifest disregard of the parties' agreement.[66] The Authority has found that an award failed to draw its essence from the parties' agreement when the award was expressly contrary to the wording of the agreement.[67] 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.[68]

The Agency does not identify any language in the parties' agreement defining what it means to be a "losing party." Rather, the Agency argues that it is not the "losing party" because "the Arbitrator ruled in favor of the Agency on three of the four possible issues."[69] The Agency's argument is incorrect. The issues on which the Agency alleges the Arbitrator ruled in its favor are different from the issues the Arbitrator determined were before him.[70] As to the issues the Arbitrator framed, the Arbitrator ruled against the Agency on two of the three: whether the grievance was arbitrable and whether the Agency's decision to grant a greater waiver violated law and the parties' agreement.[71] Because the basis for the Agency's essence exception is incorrect, and because the interpretation is not directly contrary to any wording in the parties' agreement, the Agency fails to establish that the award's direction that the Agency pay the Arbitrator's fees and expenses, based on the "losing party" language of Article 27, Section 4, is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Therefore, the Agency has not established that the award fails to draw its essence from the agreement.

Accordingly, we deny the Agency's essence exception.

V. Decision

We deny the Agency's exceptions.

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[65] *AFGE, Council 220*, 54 FLRA 156, 159 (1998) (citing 5 U.S.C. § 7122(a)(2)).
[66] *SSA, Office of Disability Adjudication & Review*, 64 FLRA 1000, 1001 (2010) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).
[67] *U.S. Small Bus. Admin.*, 55 FLRA 179, 182 (1999).
[68] *Id.*
[69] Exceptions at 27.
[70] *Compare* Award at 2, *with* Exceptions at 2, 26-27.
[71] Award at 2, 36-41, 41-45, 52-53.

Member Pizzella, dissenting:

Laurence J. Peter was widely renowned for formulating a management theory which became known as the "Peter Principle." As part of his theory, Peter observed: "*If two wrongs don't make a right, try three*."[1]

In this case, the Overseas Private Investment Corporation (OPIC) and the grievant, Ivette Gosser, both made mistakes which ultimately ended with Gosser owing OPIC more than $17,000.00. In trying to resolve the dispute, Arbitrator Ira Jaffe contributed to the mess when he determined that he had the authority to second guess OPIC's determination to waive only part of Gosser's debt, an agency-head discretionary option that Congress gave exclusively to federal agencies.

When Gosser, a GS-14, Step 6 computer specialist transferred to a new position at OPIC, she asked for a starting pay rate of GS-14, Step 9.[2] Because she was "transferring from another [federal] agency"[3] (she had twenty-nine years of federal service), she was not entitled to start at a higher step. But when she began her new job at OPIC, her pay was set incorrectly at Step 9. No one at OPIC noticed the error.[4] To make matters worse, OPIC prematurely promoted her to Step 10 two years later even though she was not eligible for that promotion either until she had served at a Step 9 for three years.[5] Gosser said nothing and OPIC did not discover either error for one more year.

As a result of these two errors, the grievant was overpaid by $17,213.18. Using the discretionary authority it had under 5 U.S.C. § 5584, OPIC opted to "waive" $5,750.00 of Gosser's debt but asked that she repay the remainder. AFGE, Local 1534 filed a grievance, and the matter went to arbitration.

Even though I do not agree that any part of this matter is grievable, I agree with Arbitrator Ira Jaffe that OPIC – an agency of the U.S. government which has been granted unique budget[6] and human resource flexibilities "not available to other federal [agencies]"[7] – is responsible for the original error which set Gosser's starting pay too high. I also agree that, as a long-time federal employee, the grievant was aware that she was not entitled to a promotion from Step 9 to Step 10 after only two years and should have brought this to the attention of OPIC immediately. Instead, she chose to sit by idly hoping that OPIC would never notice the mistake.

I do not agree with Arbitrator Jaffe, however, insofar as he determined that OPIC's "waive[r]" decision is a matter that may be grieved under the parties' negotiated-grievance procedure[8] and that OPIC should be required to waive more of Gosser's debt.[9]

If, as Laurence Peter observed, "*two wrongs don't make a right*," it is readily obvious that a third will not bring about a good result. Such a situation creates bad law, however, when, as in this case, the majority endorses the Arbitrator's erroneous award.

Section 5584 of Title V of the U.S. Code gives to the head of a federal agency – *only* the agency head or its "authorized official"[10] – the discretion to waive, or to not waive, the debt of any employee that result[s] from "an erroneous payment of pay."[11]

Federal courts have recognized that even they *do not have the authority to review* a waiver determination made under § 5584.[12] Viewing its power as more expansive than that of the federal courts, the majority once *again ignores* (in what has now become a recurring and predictable pattern) the boundaries of its own powers and *presumes upon itself* the right to second guess how a federal agency exercises discretion which Congress gave *exclusively* to federal agencies.[13]

Under similar circumstances, the majority in *AFGE, Local 1547* presumed upon itself the authority to second guess powers which Congress granted solely to the Secretary of Defense.[14] I strongly disagreed in that case, observing that "the majority reads our Statute more 'expansively' than Congress intended."[15]

[1] http://www.brainyquote.com/quotes/authors/l/laurence_j_peter.html (emphasis added).
[2] Award at 2, 4-5.
[3] *Id*. at 6.
[4] *Id*.
[5] *Id*. at 7; Majority at 2.
[6] https://www.opic.gov/who-we-are/overview.
[7] Award at 3.
[8] *Id*. at 35.
[9] *Id*. at 55.
[10] 5 U.S.C. § 5584(a)(2)(B).
[11] *Id*. § 5584(a).
[12] *Lawrence v. United States*, 69 Fed.Cl. 550, 557 (Fed. Cl. 2006) ("Although this [c]ourt has jurisdiction over an alleged [t]akings claim, [p]laintiff has failed to state a claim upon which relief can be granted. Plaintiff has no property interest in keeping erroneous payments to which he is not entitled. The [agency] has the authority [under § 5584] to recoup funds that it erroneously paid and is not estopped from doing so by the mistakes of its officers or agents.")
[13] *Id.*
[14] 67 FLRA 523, 532 (2014) (Dissenting Opinion of Member Pizzella).
[15] *Id*.

A few weeks before the decision in *AFGE, Local 1547*, the majority determined, in *U.S. DHS, U.S. ICE* (*DHS, ICE*),[16] that a federal union could prevent the Department of Homeland Security (DHS) from acting before it could secure its information-technology systems until the union approved the decision, even though Congress, by the Federal Information Security Management Act,[17] had granted the DHS exclusive authority to make those determinations. Again, I strongly disagreed, observing that "those determinations are left to the [DHS's] senior leadership and technical experts, in consultation with the recognized experts."[18]

Before that, the U.S. Court of Appeals for the District of Columbia Circuit (the court) criticized the Authority for injecting our own "organic statute [into] another statute . . . not within [the Authority's] area of expertise."[19] In that case, the court held that the Authority could not tell the Navy that it must purchase bottled water for its employees in contravention of federal appropriations law.[20] Since then the majority has been scolded by the courts for using the Federal Service Labor-Management Relations Statute (the Statute)[21] to tell DHS's Inspector General how they should interpret various provisions of the Inspector General Act.[22]

More recently, in *U.S. Department of the Treasury, IRS* (*IRS*),[23] the majority used our organic statute to order the Internal Revenue Service (IRS) to "waive" tax debts that its employees "owed" to the city of Florence, Kentucky.[24]

Time and again, the majority seeks to expand the reach of the Statute and the jurisdiction of the Authority far beyond what Congress ever intended.

In this case, the majority is fully aware that its determination will not be subject to judicial review and thus ignores prior judicial warnings and presumes the power to subject to the parties' negotiated-grievance procedure discretionary authority that Congress gave exclusively to federal agencies in 5 U.S.C. § 5584 to waive (or not to waive) debts that those agencies are owed.

According to the majority, the exclusive discretionary authority that Congress gave to federal agencies, to waive (or not to waive) debts, is neither *exclusive* nor *discretionary*. More specifically, the majority asserts that "[§] 5584 *does not prohibit* review of an agency's debt-waiver decision provision through the negotiated grievance procedure"[25] and "waiver of overpayment is *not* a subject *excluded* from the negotiated grievance procedure under 5 U.S.C. § 7121(c)."[26] The majority concludes that Arbitrator Ira Jaffe may second guess the authority that Congress gave exclusively to OPIC.

I believe my colleagues are wrong on both accounts. The majority's decision will effectively subject to negotiated-grievance procedures and arbitration (and by default the jurisdiction of the Authority) *any federal statute or policy*, unless Congress remembered to include the exculpatory clause, "oh, by the way, this matter cannot be grieved under any grievance procedure." (In some respects that is not unlike receiving an unsolicited letter from your bank stating that they automatically will subtract money from your account unless you tell them not to.)

It is self-evident that some statutes, such as those that concern matters directly related to *conditions of employment* (i.e. leave procedures, overtime, safety and health) may require such a specific exclusion in order to be excluded from negotiated-grievance procedures.[27]

But, it should be equally self-evident that most federal statutes are not even remotely related to the relationship of federal agencies and federal unions or have anything whatsoever to do with the *conditions of employment* of federal employees. To the contrary, most federal statutes relate to such matters as the operations and budgeting of the federal government, the appropriation of federal tax dollars, laws against specific activities, the security of the nation, environmental conditions, and other myriad matters. It is simply incredible to presume, as does the majority, that just because a federal statute *does not specifically exempt itself* from the coverage of 5 U.S.C. §§ 7101-7135 that statute automatically becomes the business of federal

[16] 67 FLRA 501, 505-08 (2014) (Dissenting Opinion of Member Pizzella).
[17] 44 U.S.C. §§ 3551-3558.
[18] *DHS, ICE*, 67 FLRA at 507 (Dissenting Opinion of Member Pizzella).
[19] *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I.*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) (*Naval Undersea Warfare Center*) (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) (*Air Force*)) (internal quotation marks omitted).
[20] *Id*. at 1350-1351.
[21] 5 U.S.C. §§ 7101-7135.
[22] *U.S. DHS, U.S. CBP v. FLRA*, 751 F.3d 665, 669 (D.C. Cir. 2014) ("The Authority therefore knew that the agency's argument was that bargaining . . . was incompatible with the [Inspector General] Act *as a whole*.").
[23] 66 FLRA 888 (2012).
[24] *Id.* at 890.
[25] Majority at 13 (internal quotation marks omitted).
[26] *Id*. (internal quotation marks omitted).
[27] 5 U.S.C. § 7102(2) ("the right . . . to engage in collective bargaining with respect to *conditions of employment* through representatives") (emphasis added).

unions and arbitrators (and thus subject to the jurisdiction of the Federal Labor Relations Authority).

As noted above, the court rebuked the Authority for injecting our "organic statute [into other statutes] . . . not within [the Authority's] area of expertise."[28] Therefore, unlike the majority, I would rely on the decision of the U.S. Court of Federal Claims in *Lawrence v. United States*[29] to resolve this case. In that case, the court held that an agency's exercise of its discretionary authority under § 5584 is *not subject* to "*judicial review*" (let alone arbitral review) and noted that "it is an open question whether an agency's denial of a discretionary award is reviewable at all."[30] And, lest there be any question as to the exclusivity of an agency's § 5584-waiver determination, the court in *Lawrence* went even further and held that "[t]he *only statutory limitations* on the agency official's discretion [under § 5584] are prohibitions *against granting* a waiver [when] . . . there exists an indication of fraud, misrepresentation, fault[,] or lack of good faith on the part of the employee."[31]

The majority asserts that *Lawrence* "does not address whether an agency's discretion to waive a debt under § 5584 is reviewable by an arbitrator under a[negotiated grievance procedure]" and that my "reliance [on *Lawrence* and *Krug v. United States*] is *misplaced*."[32] Contrary to the majority's judgment, however, I am confident that my "reliance" on *Lawrence* is well placed. If an agency's discretion, under § 5584 is not reviewable by a federal court, then it certainly is not subject to review under a negotiated grievance procedure, by an arbitrator, or on appeal by the Federal Labor Relations Authority. That is particularly true when the court could have, but did not, include negotiated grievances in the list of "statutory limitations"[33] on an agency's discretion.

It is particularly telling that the majority attempts to circumvent *Lawrence* and *Krug* by an inapposite reference to *Lubow v. U.S. Department of State*[34] and by obfuscating the narrow question that was before that court. As discussed below, the circumstances in *Lubow* could not be more different than the case before us or the circumstances that presented themselves to the courts in *Lawrence* and *Krug*.

As relevant in *Lubow*, the Foreign Service Act of 1946, as amended in 1976, created the Foreign Service Grievance Board (FSGB).[35] The FSGB was granted jurisdiction to review *agency-head determinations* of the State Department (and several other agencies with similar foreign-service missions) to provide an *internal* agency review in several specific subject-matter areas, including "discipline," "separation," "assignment," and, as relevant here, "*financial*."[36] Members of the FSGB, who are appointed at the pleasure of the Secretary of State, are appointed based on their "experience[]" in the foreign service and their "expertise" in the enumerated subject-matter areas.[37] In essence, then, the FSGB is an *extension of* the foreign-service component of the State Department (the Department) and the process by which the Department reviews its own administrative determinations when a determination is challenged by a foreign-service employee.

Under that process, an employee *may* seek review by the FSGB, or may opt to seek review "outside" the Department such as a hearing before the General Services Administration Board of Contract Appeals.[38] On most matters, such as the "financial" matters at issue in this case, the decision of the FSGB is made "on the written record without [any] testimony" or hearing.[39] In other words, it is a paper review.

Against this backdrop, the employees in *Lubow* went to the FSGB to challenge an initial determination made by Deputy Assistant Secretary (DAS) James Millette. DAS Millette would not exercise the Department's discretionary authority to waive the compensation caps imposed by 5 U.S.C. § 5547(b)(2) and would not grant a waiver from collection of the debt under § 5584, as requested by the affected employees.[40] The FSGB ultimately "upheld the waiver denials" of

[28] *Naval Undersea Warfare Ctr.*, 665 F.3d at 1348 (quoting *Air Force*, 648 F.3d at 846) (internal quotation marks omitted).
[29] 69 Fed.Cl. 550, 554 (2006).
[30] *Id*. at 554, n.7 (quoting *Krug v. U.S.*, 168 F.3d 1307, 1310 (Fed.Cir. 1999) (*Krug*) (internal quotation marks omitted).
[31] *Id*. at 555 (emphasis added).
[32] Majority at 7. The majority's contention that *Krug* "does not concern § 5584" is entirely disingenuous and suggests that it may simply be ignored. Specifically, the court in *Krug* held that the IRS's exercise of a comparable, discretionary authority under 26 U.S.C. § 7623 was not subject to judicial review and that "it is an open question whether an agency's denial of a discretionary award [under any statutory authority, including § 5584] is *reviewable at all*." *Krug*, 168 F.3d at 1310 (emphasis added).
[33] *Lawrence*, 69 Fed. Cl. at 554.
[34] 783 F.3d 877 (D.C. Cir. 2015).
[35] The Foreign Service Grievance Board, http://www.fsgb.gov/Pages/About.aspx (Jan. 8, 2015).
[36] FSGB 2014 Annual Report (Annual Report) at 10-11 (emphasis added); *see Lubow*, 783 F.3d at 881 (Employees of the foreign service have the "opt[ion] for an *outside* hearing before an administrative law judge of the General Services Administration Board of Contract Appeals." (emphasis added)).
[37] Annual Report at 2-3.
[38] *Lubow*, 783 F.3d at 881.
[39] Annual Report at 3. (In "separation for cause" and "disciplinary" cases, the FSGB may hold "hearings" if requested by the employee).
[40] *Lubow*, 783 F.3d at 881.

DAS Millette[41] and that decision then became *the final decision of the Department*.[42]

The employees in *Lubow* tried to appeal the Department's determination to federal district court, but the court refused to review the Department's discretionary waiver determinations under §§ 5547(b)(2) and 5584 and dismissed the employees' appeals on the summary judgment motion filed by the Department.[43] When the employees then appealed to the U.S. Court of Appeals for the District of Columbia Circuit, the only question before the court was whether the district court erred when it declined to review the Department's discretionary waiver determinations and dismissed the cases on summary judgment. The court simply "affirm[ed] the district court's grant of summary judgment."[44]

Thus, it strains all credulity for the majority to assert that either the court or the FSGB "review[ed]" the Department's denials of discretionary waivers under 5 U.S.C. § 5584[45] in order to justify its assumption of that authority in this case.

In every respect, there is no comparison to draw between the role of the FSGB and the negotiated-grievance procedures of federal employees and the jurisdiction of the Federal Labor Relations Authority. And though my colleagues seem ever intent on expanding the Authority's reach into matters that go far beyond our statutory purview, the Federal Labor Relations Authority has no similar jurisdiction to review agency-head determinations, as does the FSGB, under § 5584 or any other discretionary authority granted to federal agencies by federal statute.

Unlike the majority, therefore, I am unwilling to ignore the U.S. Court of Federal Claims and the U.S. Court of Appeal for the Federal Circuit. To follow the majority's rationale would be to interject "[the Authority's] organic statute with another statute . . . not within [our] area of expertise."[46]

Accordingly, I would conclude that Local 1534's challenge to OPIC's decision not to waive Gosser's debt under § 5584 is not a grievable matter. And, to the extent Arbitrator Jaffe's award dictates to OPIC how much of Gosser's debt should have been waived, the award is contrary to law.

Thank you.

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[41] *Id*. at 882.
[42] *Id*.
[43] *Id.* (citing *Lubow v. U.S. Dep't of State* (*Lubow II*), 923 F.Supp.2d 28, 30 (D.D.C. 2013)).
[44] *Id*. at 888.
[45] Majority at 7.
[46] *Naval Undersea Warfare Ctr.*, 665 F.3d at 1348 (quoting *Air Force*, 648 F.3d at 846) (internal quotation marks omitted).