

72 FLRA No. 84

UNITED STATES
AGENCY FOR GLOBAL MEDIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1812
(Union)

0-AR-5648

DECISION

August 17, 2021

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we reiterate that an authorized official's exercise of discretion to grant or deny a debt waiver under 5 U.S.C. § 5584 (§ 5584) is not grievable.

The Agency reinstated certain employees who were wrongly affected by a reduction-in-force (RIF) and issued payments to the employees for any backpay they lost due to the RIF. Thereafter, the Agency informed the employees that it miscalculated the amount of backpay owed to them and that they owed a debt to the Agency for the overpayments. The employees then asked the Agency to waive collection of the debts. The Agency denied the requests because it found that the employees were at fault for not informing the Agency of the substantial overpayments. The matter then proceeded to arbitration and the Arbitrator held that the Agency violated the parties' agreement and § 5584 by denying the debt waiver requests.

The main question before us is whether the award is contrary to law because the Agency has the "sole authority" to grant or deny a debt waiver under § 5584.¹ Because the Agency has sole and exclusive discretion to find the employees at fault for failing to properly inform the Agency of their alleged

overpayments, we set aside the award as contrary to § 5584.

II. Background and Arbitrator's Award

Due to a RIF,² the Agency reinstated several bargaining-unit employees (BUEs) that were affected by the RIF and paid them backpay.³ Subsequently, the Agency notified the BUEs that they had been overpaid as a result of a backpay miscalculation. Only four of the six BUEs at issue here submitted a formal request for a debt waiver pursuant to § 5584. The Agency denied the requests because it determined that the four BUEs were at fault for not informing the Agency of the overpayments—more than \$240,000 in total.

Subsequently, six BUEs filed an appeal of the denial of the debt waiver requests. The Agency denied the appeal as to five of the BUEs—even though one of them never submitted a formal debt waiver request—because it determined that they should have known that they were overpaid and were at fault for failing to take action to correct the overpayments. The Agency also denied the sixth BUE's appeal based on the assertion that it never received a formal debt waiver request on her behalf. The Union filed a grievance and the matter proceeded to arbitration.

Initially, the Arbitrator determined that he had authority to hear the grievance because language in § 5584 did not preclude him from reviewing the Agency's decision and the Agency failed to provide any precedent to contradict this finding. Additionally, the Arbitrator determined that the grievance included all six BUEs—despite the fact two of them were not named in the grievance and did not submit a request for a debt waiver—because the grievance pertained to any BUE affected by the overpayments.

As to the merits of the grievance, the Arbitrator noted that the total amount of overpayment was

² Previously, the Authority upheld an arbitration decision (the RIF award) which found that the Agency violated the parties' agreement by not bargaining over the impact and implementation of the Agency's decision to conduct a RIF. *See Broad. Bd. of Governors, Off. of Cuba Broad.*, 66 FLRA 1012, 1018 (2012) (holding that the Agency violated the parties' agreement by not bargaining over the impact and implementation of the Agency's decision to conduct a RIF), *pet. for review dismissed sub nom. Broad. Bd. of Governors, Off. of Cuba Broad. v. FLRA*, 752 F.3d 453 (D.C. Cir. 2014).

³ We note that this is the second case arising from the Agency's decision to deny a BUE's request for a debt waiver as a result of overpayments stemming from the RIF award. *See U.S. Agency for Glob. Media*, 70 FLRA 946, 946 (2018) (then-Member DuBester dissenting) (finding that the arbitrator exceeded her authority by determining that she had jurisdiction to order the Agency to waive the overpayments).

¹ Exceptions Br. at 7-8.

substantial. Despite this fact, the Arbitrator found that the Agency should have granted the debt waiver requests because the “calculation of the backpay amounts to affected employees was highly technical and complex.”⁴ Consequently, he determined that the BUEs could not reasonably have known that they were overpaid by the Agency, that the waiver of the payments did not go against § 5584, and that the Agency violated the parties’ agreement and § 5584 by denying the debt waiver requests. He ordered the Agency to grant the debt waiver requests, to return any collected overpayments, and he awarded reasonable attorney fees to the Union.

On June 17, 2020, the Agency filed exceptions to the award, and on July 16, 2020, the Union filed an opposition to the Agency’s exceptions.

III. Analysis and Conclusion: The award is contrary to law.

The Agency argues that the award is contrary to law because Congress vested it with the sole authority under § 5584 “to form an opinion about the waiver request . . . and to ultimately waive a debt.”⁵ Therefore, the Agency argues that the grievance was not arbitrable as a matter of law and that the Arbitrator did not have jurisdiction to grant the debt waiver requests.

Under § 5584, an authorized official may properly waive a debt arising from an erroneous payment if the collection of that payment would be “against equity and good conscience.”⁶ However, an authorized official’s discretion to grant a debt waiver is limited because the authorized official “may not exercise his authority . . . to waive any claim . . . if, in his 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 . . . [requesting] a waiver of the claim.”⁷

In *NLRB*, the Authority held that, once the authorized official finds any amount of fault, the plain wording of § 5584 prohibits granting a waiver.⁸ Under § 5584, Congress defined an “authorized official” as being the Director of the Office of Management and Budget (OMB).⁹ However, OMB previously delegated

its § 5584 authority to agencies.¹⁰ Consequently, because OMB delegated its sole and exclusive discretion to agencies, agencies exercise unreviewable discretion to deny a debt waiver if the agency believes there is fraud, misrepresentation, or lack of good faith on the part of the employee requesting a debt waiver.¹¹ Therefore, because agencies have the delegated sole and exclusive discretion to determine whether an employee is at fault, § 5584 prohibits an arbitrator from second guessing such an agency determination through the negotiated grievance process.¹²

Here, the Agency’s authorized official denied the debt waiver requests because the BUEs should have known that the substantial overpayments were in error.¹³ He determined that the grievants should have taken corrective action to rectify the overpayments.¹⁴ Therefore, because the Agency exercised its delegated sole and exclusive discretion to find that the BUEs were at fault, we find that the dispute was not grievable and that the Arbitrator lacked jurisdiction under § 5584 to grant a debt waiver.¹⁵ We grant the Agency’s exception.¹⁶

IV. Decision

We grant the Agency’s contrary-to-law exception and set aside the award.

⁴ Award at 25.

⁵ Exceptions Br. at 9.

⁶ *NLRB*, 72 FLRA 133, 135 (2021) (Chairman DuBester dissenting) (quoting § 5584(a)).

⁷ *Id.* (quoting § 5584(b)(1)).

⁸ *Id.*

⁹ 5 U.S.C. § 5584(g)(2). We note that there are two § 5584 (g)s in the United States Code, apparently due to typographical error. The quoted language can be found in the second § 5584(g)(2).

¹⁰ See OMB, Exec. Off. of the President, OMB Memorandum, Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316 (Dec. 17, 1996).

¹¹ See *id.*; 5 U.S.C. § 5584(g)(2); *NLRB*, 72 FLRA at 135-36.

¹² See 5 U.S.C. § 5584(b)(1). Member Abbott notes that prior members of the Authority have argued that a denial of a debt waiver under § 5584 is not a grievable matter. *Overseas Priv. Inv. Corp.*, 68 FLRA 982, 990 (2015) (Dissenting Opinion of Member Pizzella) (“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.”).

¹³ Award at 7-9.

¹⁴ See Exceptions, Attach. 19 at 1-8; Opp’n, Ex. 41 at 1-2.

¹⁵ *NLRB*, 72 FLRA at 135 (“The [a]gency’s authorized official found that, in his opinion, the grievant was at fault because, as an experienced federal employee, she should have raised the legitimacy of her early promotion with the appropriate personnel. And, under the plain wording of . . . § 5584, once the authorized official finds any amount of fault, he is prohibited from granting a waiver.”).

¹⁶ Because we set aside the award as contrary to law, we do not address the Agency’s remaining exceptions. See *id.* at 136 n.28; *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017).

Chairman DuBester, dissenting:

For the reasons I expressed in my dissenting opinion in *NLRB*,¹ I do not agree that 5 U.S.C. § 5584 grants agencies the sole and exclusive discretion to determine whether an employee was at fault for purposes of granting or denying a debt-waiver request. As I explained in *NLRB*, the majority failed to provide “any plausible basis for concluding that Congress intended to afford agencies unfettered, and unreviewable, discretion” over debt-waiver claims.² Nor did it explain its departure from long-standing Authority precedent rejecting this very premise. And it has similarly failed to supply a “reasoned explanation for its decision to depart from that precedent” in today’s decision.³

Accordingly, I would reject the Agency’s argument that the Union’s grievance was not arbitrable as a matter of law, and would consider the Agency’s remaining exceptions challenging the merits of the award.

¹ 72 FLRA 133, 137-38 (2021) (Dissenting Opinion of Chairman DuBester).

² *Id.* at 137.

³ *Id.* (quoting *NFFE, FD-I, IAMAW, Loc. 951 v. FLRA*, 412 F.3d 119, 124 (D.C. Cir. 2005)). While the majority notes, in today’s decision, that the Office of Management and Budget (OMB) delegated its § 5584 authority to agencies by virtue of a 1996 memorandum, it has failed to explain how that delegation affords agencies “sole and exclusive” discretion to determine whether an employee was at fault for purposes of granting or denying a debt-waiver request. Nor has it explained how the delegation justified its departure in *NLRB* from the Authority’s long-standing precedent governing this matter.