65 FLRA No. 36

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1102
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL DETENTION CENTER
SEATTLE, WASHINGTON
(Agency)

0-AR-4548

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DECISION

October 1, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Joe H. Henderson filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator concluded that the Agency's disclosure of medical information relating to the grievant's back injury was not unlawful because the Agency's disclosure was not willful or intentional. For the reasons set forth below, we deny the Union's exceptions, in part, and we remand the award to the parties for further action consistent with this decision.

II. Background and Arbitrator's Award

The grievant, who works at the Bureau of Prisons, Federal Detention Center in Seattle, Washington, sustained a back injury at work and took a leave of absence to recover. *See* Award at 3. After the grievant was injured, the Agency obtained medical information pertaining to the grievant's back injury and maintained this information in his medical file and his Office of Workers' Compensation Programs records. *See id.* at 5.

Shortly after his injury, management officials conversed about the grievant's injury and absence from work in the front lobby of the Agency's building. *Id.* at 3-4, 11. During their conversation, one of the officials stated that he had the paperwork relating to the grievant's workers' compensation claim on file. *Id.* at 12-13. At least one non-supervisory employee overheard their conversation.[1] *Id.* at 3-4, 11. In response to this incident, the Union filed a grievance. *Id.* at 4. The matter was unresolved and was submitted to arbitration. *Id.*

The parties did not stipulate to any issues, and the Arbitrator did not frame any issues. The Union's statement of the issue was whether "the Agency violate[d] [the grievant's] Rights to Confidentiality of Medical Information under the Americans with Disabilities Act [(ADA)] and the Rehabilitation Act? If [so], what is the appropriate remedy?" *Id.* at 3; *see also id.* at 11. As relevant here, the Agency's statement of the issue was whether it "violate[d] Article 6, Section B of the Labor Agreement when [it] discuss[ed] the [g]rievant's absence from work in the front lobby of the institution on May 6, 2008?"[2] *Id.* at 2.

The Arbitrator agreed with the Agency that management officials have the right to discuss work-related issues, including fellow employees' work-related injuries. *Id.* at 12. However, he determined that a public lobby was an inappropriate location "for management [officials] to engage in conversations about an employee." *Id.* The Arbitrator noted that, although the officials did not include anyone else in their conversation, a non-supervisory employee overheard a portion of their conversation, including the fact that the grievant was injured. *Id.* at 13. The Arbitrator determined that the information revealed was covered by the Privacy Act; that management officials disclosed this information to a third party; and the Agency's "disclosure had an adverse effect on the [g]rievant[.]" *Id.* However, the Arbitrator

1. At arbitration, the Agency and the Union disputed whether a second non-supervisory employee overheard the management officials' conversation; however, there is no dispute that at least one non-supervisory employee overheard the disclosure of the grievant's medical information. *See* Award at 9, 11.

2. The Agency also raised other issues before the Arbitrator. *Id.* at 2. Because no exceptions were filed to the Arbitrator's resolution of those issues, they are not before us.

found that the Agency's disclosure did not violate the Privacy Act because "[t]here was no showing that the 'disclosure was willful or intentional.'" *Id.* at 14. He noted that, even if the grievant's supervisor made a comment about the grievant's back injury in a sarcastic tone of voice, the Agency's disclosure of the grievant's medical information was not willful or intentional, but, rather, was careless and inadvertent. *Id.* According to the Arbitrator, "[a] 'willful act' is one done intentionally as distinguished from an act done carelessly or inadvertently." *Id.* (emphasis omitted). Finally, the Arbitrator suggested that the Agency should require the management officials to send a written apology to the grievant. *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union alleges that the award is contrary to law because it does not comply with the confidentiality provisions of the ADA and the Rehabilitation Act. Exceptions at 5-8. The Union claims that the Arbitrator added an additional, unnecessary requirement for proving a violation of the confidentiality provisions of the ADA and the Rehabilitation Act. *Id.* at 7. According to the Union, although the Privacy Act requires that an entity's disclosure of information be willful or intentional in order for that entity to be liable, the ADA and Rehabilitation Act contain no such requirement. *See id.* The Union alleges that, under the ADA and the Rehabilitation Act, "supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations[,]" but that, if the Agency discloses medical information in a manner that does not conform to the confidentiality provisions of the ADA, then its disclosure would violate the ADA and the Rehabilitation Act. *Id.* at 6-7 (citations omitted).

Moreover, the Union claims that, based on the "Agency's clear legal obligation to maintain the confidentiality of employee medical records," the Agency's disclosure clearly violates the confidentiality provisions of the ADA and the Rehabilitation Act. *Id.* at 8. According to the Union, it is undisputed that the grievant, before the disclosure occurred, provided the Agency with confidential medical information pertaining to his back injury and that Agency management officials "disclosed medical information, . . . that [the grievant] was out of work due to a back injury, to at least one bargaining unit employee . . . who had no prior knowledge of [the grievant's] injury." *Id.* at 7-8. Also, the Union claims that the Agency clearly "had no business[-]related reason for disclosing this information to" an individual who "was not a supervisor or manager responsible for determining the necessary restrictions on the work or duties of [the grievant]." *Id.* at 8. Furthermore, the Union alleges that, even if the disclosure occurred because the management officials were concerned about the grievant's health, the disclosure constitutes a violation of the confidentiality provisions of the ADA and the Rehabilitation Act. *Id.*

The Union also alleges that the award is contrary to law because it does not comply with the confidentiality provisions of the Privacy Act. *Id.* at 5, 9-10. The Union claims that the Arbitrator incorrectly found that the management officials did not disclose the grievant's medical information in an intentional or willful manner. *Id.* at 9-10. According to the Union, the Arbitrator misapplied the intent requirement by requiring the management officials to have intended to cause harm to the grievant, rather than merely intending to disclose the information. *Id.* at 10. The Union alleges that the Agency's disclosure was willful or intentional because the management officials admit that they were aware that a non-supervisory employee was standing mere steps away from them during their conversation. *Id.*

B. Agency's Opposition

The Agency argues that the award is not contrary to the confidentiality provisions of the ADA and the Rehabilitation Act. Opp'n at 4-6. The Agency contends that, although it is undisputed that management officials had a brief conversation in the lobby regarding the grievant's back injury that was overheard by at least one non-supervisory employee, their conversation did not reveal any confidential medical information pursuant to the regulations because it "did not contain any specific information regarding the grievant's diagnosis and/or symptoms." *Id.* at 5-6. Also, the Agency argues that "[i]t is undisputed that the brief conversation at issue contained no reference . . . to the relevant medical documentation . . . ." *Id.* at 6. Moreover, according to the Agency, the Equal Employment Opportunity Commission (EEOC) has held that statements made by an agency that an employee has used sick leave or that an employee is medically disabled for a position do not violate the Rehabilitation Act. *Id.* at 5-6 (citations omitted).

The Agency also contends that the award is not contrary to the confidentiality provisions of the Privacy Act. *Id.* at 6-9. The Agency argues that the Arbitrator did not misapply the intent requirement of

the Privacy Act. *Id.* at 7-8. Also, the Agency contends that "[t]he Union simply disagrees with the Arbitrator's evaluation of the facts and is attempting through its exceptions to re-litigate the merits of the grievance before the Authority." *Id.* at 8 (citations omitted). Furthermore, the Agency argues that the Arbitrator rightfully used his discretion when he fashioned the award. *Id.*

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The Arbitrator's application of the confidentiality provisions of the Privacy Act is not contrary to law.

The Privacy Act limits the disclosure of information. *See U.S. Dep't of Veterans Affairs Med. Ctr., Charleston, S.C.*, 58 FLRA 706, 710 (2003) (*VAMC Charleston*). Section 552a(e)(2) of the Act permits federal agencies to disclose information only in accordance with the Act, and § 552a(g)(1)(D) and (g)(4) entitle an individual to relief if the agency intentionally or willfully fails to comply with the provisions of the Act. *Id.* (quoting 5 U.S.C. § 552(a)). To establish an unauthorized disclosure of information under 5 U.S.C. § 552(g)(1)(D), a claimant must prove the following four elements: (1) the information is covered by the Privacy Act as a "record" contained in a "system of records"; (2) the agency disclosed the information; (3) the disclosure had an "adverse effect" on the claimant; and (4) the disclosure was "willful or intentional." *See, e.g., AFGE, Local 1592*, 58 FLRA 584, 585 (2003) (quoting *Quinn v. Stone*, 978 F.2d 126, 131 (3d Cir. 1992)).

The Union alleges that the award is contrary to law because the Arbitrator incorrectly concluded that the Agency's disclosure was not willful or intentional. Exceptions at 9-10. The Union claims that the Arbitrator misapplied the intent requirement by requiring the management officials to have intended to cause harm to the grievant, rather than merely intending to disclose the information. *Id.* at 10.

The Union's argument is without merit. The Arbitrator's findings are consistent with case precedent. The Authority has found that the Privacy Act "does not make the [g]overnment strictly liable for every affirmative or negligent action that might be said technically to violate the Privacy Act's provisions" and that liability is imposed "only when the agency acts in violation of the Act in a willful or intentional manner, *either by committing the act without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act*." *VAMC Charleston*, 58 FLRA at 710 (quoting *Albright v. United States*, 732 F.2d 181, 189 (D.C. Cir. 1984) (*Albright*)) (emphasis added).

Based on the Arbitrator's factual findings, the Agency did not disclose the grievant's medical information without grounds for believing its action to be lawful. The Arbitrator found that the management officials only intended to discuss the grievant's medical information among themselves. *See* Award at 13. The Arbitrator noted that, when the disclosure was made, the officials believed that they had the right to discuss work-related issues, including work-related injuries of employees. *Id.* at 12; *VAMC Charleston*, 58 FLRA at 710 (quoting *Albright*, 732 F.2d at 189) (citing *Wisdom v. Dep't of HUD*, 713 F.2d 422, 424 (8th Cir. 1983), *cert denied*, 465 U.S. 1021 (1984) & *Bruce v. United States*, 621 F.2d 914, 917 (8th Cir. 1980)) (finding that the Privacy Act is not violated when agencies have acted pursuant to regulations or other authority that they justifiably believed authorized their actions). Additionally, the Arbitrator determined that, although a public lobby was an inappropriate place to engage in a conversation about an employee's back injury, management officials were authorized to discuss the grievant's work-related injuries among themselves. Award at 12; 29 C.F.R. § 1630.14(c)(1) (authorizing "[s]upervisors and managers [to] be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations"); *VAMC Charleston*, 58 FLRA at 710 (citations omitted) (determining that, even when an agency does not follow proper procedures in order to fully comply with the authority that authorized its actions, no violation of the Privacy Act occurs). Consequently, the Arbitrator's findings demonstrate that the officials justifiably believed that they were authorized to discuss the grievant's medical condition among themselves.

Also, based on the Arbitrator's factual findings, the Agency did not flagrantly disregard the grievant's rights under the Act. Although the Union alleges that the Arbitrator misapplied the intent requirement by requiring the management officials to have intended to cause harm to the grievant, the Arbitrator simply determined that the Agency did not intentionally disclose the information. Exceptions at 10. The Arbitrator specifically found that the disclosure was not directed at any non-supervisory employees and that the disclosure was made carelessly or inadvertently, rather than willfully or intentionally. Award at 13, 14. Moreover, the Arbitrator determined that the Union's contention – that the grievant's supervisor commented on his medical condition in a sarcastic tone of voice – did not provide a basis for proving that the Agency's disclosure was willful or intentional. *Id.* at 14. Therefore, the Arbitrator's findings demonstrate that the Agency did not flagrantly disregard the grievant's rights under the Act.

Based on the foregoing, the Arbitrator's conclusion that the Agency's disclosure was not willful or intentional is not contrary to law. Accordingly, we deny the Union's exception.

B. The record is insufficient for a determination as to whether the award is contrary to law.

In this case, the Union alleges that the award is contrary to law because it does not comply with the confidentiality provisions of the ADA and the Rehabilitation Act. Exceptions at 5-8. The Union claims that the Arbitrator added an additional, unnecessary requirement for proving a violation of the confidentiality provisions of the ADA and the Rehabilitation Act. *Id.* at 7. According to the Union, although the Privacy Act requires that an entity's disclosure of confidential medical information be willful or intentional for that entity to be liable, the ADA and Rehabilitation Act contain no such requirement. *See id.*

Based on the record, the Arbitrator failed to address the merits of the Union's claim that the Agency's disclosure violated the confidentiality provisions of the ADA and the Rehabilitation Act. Although the Arbitrator noted the Union's statement of the issue and summarized the Union's arguments regarding the ADA and the Rehabilitation Act, he devoted his entire discussion to reiterating the parties' arguments and addressing the elements of the Privacy Act. Award at 11-14. Finally, the Arbitrator only set forth the legal standard for the Privacy Act, and his findings mirror the elements of that Act. *Id.* at 13-14.

Because the Arbitrator failed to address whether the Agency's disclosure violated the confidentiality provisions of the ADA and the Rehabilitation Act, we must determine whether the record permits us to ascertain whether the award is contrary to the ADA and the Rehabilitation Act or whether a remand is necessary. *See U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 60 FLRA 298, 300 (2004) (finding that, in cases where an arbitrator fails to make requisite factual findings, the Authority may remand the award if the record does not permit it to make a determination on the merits) (*U.S. Penitentiary, Terre Haute*).

A party violates the confidentiality provisions of the ADA and the Rehabilitation Act by disclosing confidential medical information regarding the medical condition or history of any employee obtained during a medical examination or inquiry.[3] *See, e.g.*, *Dominguez v. U.S. Postal Serv.*, EEOC Appeal No. 0120070258, 2009 WL 2205379, at *8 (July 15, 2009) (citing 29 C.F.R. § 1630.14(c)); *Goodman v. Dep't of the Navy*, EEOC Appeal No. 01A43290, 2004 WL 1719214, at *3 (July 22, 2004) (citations omitted). Not all medically-related information constitutes confidential medical information. *See, e.g., Coley v. Dep't of Transp.*, EEOC Appeal No. 0120101294, 2010 WL 3008274, at *2 (July 22, 2010) (noting that the agency did not disclose the complainant's confidential medical information when an agency attorney "stated that he had empathy for [c]omplainant 'because of her personal and mental health history'"); *see also Myrah v. Dep't of Agric.*, EEOC Appeal No. 01A52157, 2006 WL 1209770, at *4 (April 26, 2006) (determining that not all medically-related information "falls within the proscription of a confidential medical record" and that "a notation that an individual has taken sick leave or had a doctor's appointment [did] not [constitute] confidential medical information"). Moreover, 29 C.F.R. § 1630.14(c)(1) authorizes the release of confidential medical information in limited situations, including where "[s]upervisors and managers may be informed regarding necessary restrictions on the work or duties

3. The ADA confidentiality provisions apply to the Agency and unit employees through the Rehabilitation Act. *AFGE, Local 1045*, 64 FLRA 520, 522 (2010). Moreover, Congress has adopted the standards of the ADA for determining violations of the Rehabilitation Act. *Id.* (citing 29 U.S.C. § 791(g); *Office of Pers. Mgmt.*, 61 FLRA 358, 361 (2005)).

of the employee and necessary accommodations." Award at 4; *see also Tyson v. U.S. Postal Serv. (E. Area)*, EEOC Appeal No. 01992086, 2002 WL 1999045, at *2 (Aug. 23, 2002).

In this case, the record does not permit us to determine whether the confidentiality provisions of the ADA and the Rehabilitation Act were violated when management officials conversed about the grievant's back injury and leave status. As noted above, the Arbitrator failed to address the merits of the Union's claim that the Agency's disclosure violated the confidentiality provisions of the ADA and the Rehabilitation Act. Moreover, although there are sufficient factual findings for the Authority to establish whether a disclosure occurred under the ADA and the Rehabilitation Act, the record does not permit us to determine whether the information disclosed constituted confidential medical information. In this regard, it is impossible, based on the findings that the Arbitrator made, for the Authority to ascertain whether the information disclosed related to the grievant's medical condition or history or whether the information was obtained during a medical examination or inquiry. *See* Award at 3-4, 11-14 (containing no finding regarding whether "a back injury" is a medical condition, no discussion regarding how the information disclosed was obtained by the agency, and no determination regarding whether management officials conversed about grievant's confidential medical information). Consequently, the record does not permit us to determine whether the confidentiality provisions of the ADA and the Rehabilitation Act were violated. As a result, the award must be remanded to the parties for resubmission to the arbitrator, absent settlement, for further findings. *See AFGE, Local 1741*, 62 FLRA 113, 118 (2007) (citations omitted) (finding that, when the record does not contain sufficient findings for the Authority to resolve whether the award is contrary to law, the award should be remanded to the parties for resubmission to the arbitrator, absent settlement, for further findings); *U.S. Penitentiary, Terre Haute*, 60 FLRA at 300 (determining that, because the Arbitrator made no factual findings concerning whether the agency's violation was willful, and the record did not permit the Authority to make that determination, the case should be remanded); *see also Gibson v. U.S. Postal Serv.*, EEOC Appeal No. 0120082861, 2008 WL 4287707, at *1 (Sept. 10, 2008) (remanding the case to the agency because it failed to investigate whether it disclosed the complainant's confidential medical information in violation of the confidentiality provisions of the ADA and the Rehabilitation Act, and the "complainant . . . alleged a viable claim of unlawful medical disclosure").

Accordingly, we remand this case to the parties for resubmission to the Arbitrator, absent settlement. Upon remand, we ask the Arbitrator to determine whether the Agency violated the confidentiality provisions of the ADA and the Rehabilitation Act.

V. Decision

The Union's exception that the award is contrary to the Privacy Act is denied. The award is remanded to the parties for further action consistent with this decision.