

**71 FLRA No. 131**

UNITED STATES  
DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
(Agency)

and

NATIONAL AIR TRAFFIC  
CONTROLLERS ASSOCIATION  
(Union)

0-AR-5478

DECISION

April 16, 2020

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

**I. Statement of the Case**

This case concerns drug and alcohol testing for employees in management-referred substance-abuse treatment programs. We determine that an arbitrator's award, requiring the Agency to notify the Union when a substance tester is on-site, is not contrary to 42 C.F.R. Part 2,<sup>1</sup> the Rehabilitation Act,<sup>2</sup> or the Privacy Act.<sup>3</sup>

The Union grieved the Agency's failure to provide notice, as required by Article 73, Section 2 of the parties' collective-bargaining agreement, that a substance tester had arrived to test an employee. Arbitrator James E. Rimmel issued an award sustaining the grievance, finding that application of that article to substance testing of an employee in a management-referred "Treatment Rehabilitation Plan"<sup>4</sup> would not improperly disclose the employee's medical information or substance-abuse status.

We deny the Agency's exceptions arguing that the award is contrary to law and government-wide regulation. We grant one of the Agency's exceeded-authority exceptions, and, consequently, we modify the remedy to clarify its scope.

<sup>1</sup> 42 C.F.R. §§ 2.1-2.67.

<sup>2</sup> 29 U.S.C. § 791(f).

<sup>3</sup> 5 U.S.C. § 552a.

<sup>4</sup> Award at 2.

<sup>5</sup> *Id.*

**II. Background and Arbitrator's Award**

A tester arrived at an Agency facility to conduct an alcohol test on a bargaining-unit employee who was under a management-referred "Treatment Rehabilitation Plan" (management-referred treatment plan).<sup>5</sup> As relevant here, that treatment plan required the employee – who had previously tested positive for alcohol at work – to undergo periodic follow-up alcohol testing. The Agency did not notify the Union of the tester's presence until after the employee took the test.

The Union filed a grievance alleging that the Agency violated Article 73, Section 2 of the parties' agreement, which states, in relevant part, that the Union "shall be notified of the arrival at the facility of [a tester] for the purposes of conducting substance testing of bargaining[-]unit employees" (the notice provision).<sup>6</sup> The Agency contended that, because the employee was receiving follow-up testing as part of a management-referred treatment plan, he was a patient, and application of the notice provision would violate 42 C.F.R. Part 2, the Rehabilitation Act, and the Privacy Act by requiring the disclosure of his protected medical information.

The Arbitrator framed the issues as: "Did the [Agency] violate [the notice provision] when it did not notify the [Union] that a [tester] had arrived at the facility for alcohol testing . . . ? If so, what shall be the remedy?"<sup>7</sup>

The Arbitrator found that the nature of the employee's testing – follow-up testing under a management-referred treatment plan – did not affect the Agency's ability to comply with the notice provision. In this regard, the Arbitrator found that "[e]ven if the [employee] is deemed a patient" under 42 C.F.R. Part 2 and the Rehabilitation Act, the notice, which contained only "the generalized statement that a 'tester is in the building to test one person'" – and did not identify that person – "does not reveal any medical or diagnostic information about the [employee] that would preclude disclosure."<sup>8</sup> And because there were several reasons for only one employee to be tested, the Arbitrator held that it would be "speculation" to infer substance-abuse status based on such a "generalized statement."<sup>9</sup> The Arbitrator also found that such notice would not violate the Privacy Act because it was not a record stored in a system of records, did not contain identifying particulars of the

<sup>6</sup> *Id.* at 12 (quoting Collective-Bargaining Agreement Art. 73, § 2).

<sup>7</sup> *Id.* at 11.

<sup>8</sup> *Id.* at 17.

<sup>9</sup> *Id.*

employee, and did not disclose “medical or diagnostic information.”<sup>10</sup> He noted that such notice “merely reveals that a tester is in the building and that [an employee] is subject to some sort of substance testing.”<sup>11</sup> Therefore, the Arbitrator sustained the grievance and directed the Agency to notify the Union “prior to all types of substance or alcohol testing, including follow-up testing performed pursuant to a [management-referred treatment plan].”<sup>12</sup>

On March 1, 2019, the Agency filed exceptions to the award, and, on April 5, 2019, the Union filed an opposition to the Agency’s exceptions.

### III. Analysis and Conclusions

#### A. The award is not contrary to law or government-wide regulation.

The Agency argues that the award is contrary to laws and government-wide regulations<sup>13</sup> that safeguard the privacy of employees’ substance-abuse status and records.<sup>14</sup> Below, we address the Agency’s contentions that the award is contrary to 42 C.F.R. Part 2, the Rehabilitation Act, and the Privacy Act because the award allegedly requires the Agency to disclose information about employees in management-referred treatment plans.<sup>15</sup>

#### 1. The award is not contrary to 42 C.F.R. Part 2.

The Agency alleges that the award – by requiring the Agency to inform the Union that “a ‘tester is in the building for one person’”<sup>16</sup> – conflicts with 42 C.F.R.

Part 2’s restriction on the disclosure of patient records.<sup>17</sup> In support, the Agency claims that any employee in a management-referred treatment plan is a “patient,”<sup>18</sup> and, therefore, notifying the Union of follow-up testing conducted pursuant to such a treatment plan would reveal medical information protected by 42 C.F.R. Part 2.<sup>19</sup>

As relevant here, 42 C.F.R. Part 2 restricts the disclosure of any information that “identif[ies] a patient as having or having had a substance[-]use disorder.”<sup>20</sup> And it defines patient-identifying information as the “name, address, social security number, fingerprints, photograph, or similar information by which the identity of a patient . . . can be determined with reasonable accuracy.”<sup>21</sup>

As interpreted by the Arbitrator, the notice provision requires the Agency to tell the Union when a tester arrives at a facility to test one person, even if the employee being tested is in a management-referred treatment plan.<sup>22</sup> Because the Agency conducts substance testing involving only one person for several reasons, the Arbitrator found that such notice does not reveal substance-abuse status.<sup>23</sup> We agree. Moreover, it is undisputed that the notice provision does not require the Agency to provide the name, address, or social security number of the employee being tested; nor does it require the disclosure of any other similar information.<sup>24</sup> Instead, as the Arbitrator found, the notice provision merely requires a “generalized statement” from the Agency that a tester is on-site.<sup>25</sup> Accordingly, the Agency has not demonstrated that the award is contrary to 42 C.F.R. Part 2, and we deny this exception.

<sup>10</sup> *Id.* at 16.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 19.

<sup>13</sup> The Authority reviews questions of law de novo. *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 conducting a de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the appealing party establishes that they are nonfacts. *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).

<sup>14</sup> Exceptions at 12-13.

<sup>15</sup> *Id.* at 13.

<sup>16</sup> Award at 19.

<sup>17</sup> Exceptions at 13. The Union argues that the Authority should not consider this exception because the Agency failed to present evidence at arbitration that it was bound by the disclosure restrictions in 42 C.F.R. Part 2. Opp’n at 25-26; see 42 C.F.R. § 2.12(a)(ii) (noting that the restrictions on disclosure apply to drug-abuse or alcohol-abuse information obtained by a “federally assisted” program). However, the record establishes that the Agency asserted to the Arbitrator that its

management-referred treatment plan is a federally assisted program covered by the regulation. Exceptions, Ex. 4, Agency’s Post-Hr’g Br. at 11 n.5 (stating that the Agency’s rehabilitation service provider is a “federally assisted program to which 42 C.F.R. Part 2 applies”); Exceptions, Ex. 8, Treatment Rehabilitation Plan template at 2 (identifying service provider). Because the Union did not then, and does not now, contest that evidence, we consider whether the award is contrary to 42 C.F.R. Part 2.

<sup>18</sup> Exceptions at 7.

<sup>19</sup> *Id.* at 11 (arguing that the notice provision would result in “indirect disclosure” of an employee’s identity).

<sup>20</sup> 42 C.F.R. § 2.12(a)(1)(i); see also *id.* § 2.12(e)(3) (noting that “[t]he restrictions on disclosure apply to any information which would identify a patient as having or having had a substance[-]use disorder”).

<sup>21</sup> *Id.* § 2.11.

<sup>22</sup> Award at 14.

<sup>23</sup> *Id.* at 17.

<sup>24</sup> See *id.* at 16 (finding “subject being tested is not identified [and] no identifying data are provided”); Exceptions at 11 (stating disclosure is “indirect[ ]”); Opp’n at 28 (stating that notice provision “does not identify any person in any way”).

<sup>25</sup> Award at 17.

2. The award is not contrary to the Rehabilitation Act.

The Agency contends that the award violates the Rehabilitation Act by requiring the disclosure of “confidential medical information.”<sup>26</sup> The Rehabilitation Act applies the employment standards of the Americans with Disabilities Act (ADA) to federal agencies.<sup>27</sup> As relevant here, the ADA obligates employers to protect “information regarding the medical condition or history of their employees”<sup>28</sup> by treating it as confidential and releasing it only in certain situations.<sup>29</sup> The Authority has stated that, except as specifically authorized, an agency “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.”<sup>30</sup>

In support of its exception, the Agency relies on an Equal Employment Opportunity Commission decision finding a violation of the Rehabilitation Act where an employee’s medical condition could be inferred from the “circumstances of the situation.”<sup>31</sup> We find that case to be inapposite because it involved an overt medical statement made about an identified employee,<sup>32</sup> whereas, here, the notice provision requires only a “generalized statement” that reveals no “medical or diagnostic” information about any employee.<sup>33</sup> Moreover, notice that “a ‘tester is in the building for one person’”<sup>34</sup> does not disclose an employee’s “medical condition or history” – let alone identify any employee – and is obtained from a management official’s direct observation of a tester’s presence, rather than a “medical examination or inquiry.”<sup>35</sup> Therefore, the Agency has not demonstrated that the award is contrary to the Rehabilitation Act, and we deny this exception.

3. The award is not contrary to the Privacy Act.

The Agency alleges that the award requires the disclosure of substance-abuse information found in records protected by the Privacy Act.<sup>36</sup> As relevant here, the Privacy Act generally prohibits the disclosure of any information contained in an agency “record” within a “system of records.”<sup>37</sup> The Privacy Act defines the term “system of records” as a grouping of records “from which information is retrieved by the name of the individual” or some other personal identifier.<sup>38</sup>

Here, the Arbitrator found that the notice provision requires the Agency to inform the Union only that a tester *has arrived* at a facility.<sup>39</sup> The Agency would not retrieve that information from any system of records based on some identifying particular, such as an employee’s name. Rather, the information that the Agency provides to the Union is based on a management official’s direct observation that a tester is on-site.<sup>40</sup> Accordingly, the award is not contrary to the Privacy Act’s prohibition on disclosing information retrieved from a “system of records,”<sup>41</sup> and we deny this exception.

B. The Arbitrator exceeded his authority.

The Agency argues that the Arbitrator exceeded his authority because the awarded remedy, by requiring notice of “*all* types of substance or alcohol testing,”<sup>42</sup> would apply to testing under self-referred treatment plans,

<sup>26</sup> Exceptions at 16.

<sup>27</sup> 29 U.S.C. § 791(f); *see also* *AFGE, Local 1045*, 64 FLRA 520, 522 (2010) (*Local 1045*) (“Congress has specifically adopted the standards of the ADA for determining violations of the Rehabilitation Act.”).

<sup>28</sup> *Local 1045*, 64 FLRA at 522.

<sup>29</sup> 29 C.F.R. § 1630.14(c).

<sup>30</sup> *AFGE, Local 1102*, 65 FLRA 148, 151 (2010) (*Local 1102*) (citations omitted).

<sup>31</sup> Exceptions at 16 (citing *Becki P.*, EEOC Decision No. 0720180004, 2018 WL 6334106, at \*5 (Nov. 15, 2018) (*Becki P.*), *aff’d*, EEOC Appeal No. 2019002712, 2019 WL 3335273 (June 28, 2019)).

<sup>32</sup> *Becki P.*, EEOC Decision No. 0720180004 at \*5 (finding Rehabilitation Act violation where a supervisor’s comment that an employee was “‘on medication’ implied . . . a mental health condition”).

<sup>33</sup> Award at 17.

<sup>34</sup> *Id.* at 19.

<sup>35</sup> *See Local 1102*, 65 FLRA at 151.

<sup>36</sup> Exceptions at 18.

<sup>37</sup> *Pension Benefit Guar. Corp., Wash., D.C.*, 69 FLRA 323, 327 (2016) (citing 5 U.S.C. § 552a(b)).

<sup>38</sup> 5 U.S.C. § 552a(a)(5).

<sup>39</sup> Award at 16 (“[T]he statement merely reveals that a tester is in the building . . .”).

<sup>40</sup> Award at 13 (noting management official notifies Union while tester prepares for test); *see Thomas v. U.S. Dep’t of Energy*, 719 F.2d 342, 345 (10th Cir. 1983) (no Privacy Act violation where manager disclosed information based on independently acquired knowledge, even when identical information was found in system of records).

<sup>41</sup> *Naval Ordnance Station of Louisville, Ky.*, 34 FLRA 687, 689 (1990) (Privacy Act did not apply when information was not stored in a “system of records”).

<sup>42</sup> Award at 19 (emphasis added); *see id.* at 7, 13 (listing “self-referral” alongside other reasons for substance testing).

which was not a subject of the grievance.<sup>43</sup> The Authority will find that arbitrators exceed their authority when, as relevant here, they resolve an issue that was not submitted to arbitration.<sup>44</sup>

When he framed the issue to be resolved, the Arbitrator limited his inquiry to application of the notice provision found in Article 73 of the parties' agreement.<sup>45</sup> As noted by both parties, testing for self-referred treatment plans is governed by a different article of the parties' agreement and involves different procedures.<sup>46</sup> The parties agree that the off-site substance testing<sup>47</sup> that occurs pursuant to self-referred treatment plans is not subject to the notice provision.<sup>48</sup> Therefore, to the extent that the Arbitrator found that the notice provision required the Agency to notify the Union of testing conducted pursuant to a self-referred treatment plan, we find that he exceeded his authority.<sup>49</sup>

Accordingly, we modify the awarded remedy to clarify that it does not require the Agency to notify the Union of testing in this situation.<sup>50</sup>

## V. Decision

We deny the Agency's contrary-to-law exceptions. We dismiss, in part, and grant, in part, the Agency's exceeded-authority exceptions, and we modify the awarded remedy to clarify that it does not apply to testing conducted pursuant to self-referred treatment plans.

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<sup>43</sup> Exceptions at 23 (noting that testing under self-referred treatment plans was not included in the grievance). The Agency also argues that the Arbitrator exceeded his authority by awarding a remedy that extends beyond the collective bargaining agreement in effect at the time the grievance was filed. Exceptions at 25. The parties entered into their current agreement within days of the Union filing the grievance, and more than two and a half years before the Arbitrator issued his award. See Exceptions, Ex. 6(D) (grievance dated July 6, 2016); Exceptions at 25 (current agreement came into effect on July 14, 2016); Award at 1 (dated January 2019). But, as the Agency itself acknowledges, it never notified the Arbitrator of the new agreement or raised this as an issue at arbitration, despite having the opportunity to do so. See Exceptions at 25. The Authority will not consider any arguments that could have been, but were not, presented to the arbitrator. 5 C.F.R. §§ 2425.4(c), 2429.5. Accordingly, we dismiss this exception as barred by §§ 2425.4(c) and 2429.5. See *U.S. DHS, U.S. CBP*, 66 FLRA 335, 337-38 (2011) (declining to consider arguments a party should have known to make to the arbitrator).

<sup>44</sup> *U.S. Dep't of Transp., FAA*, 64 FLRA 612, 613 (2010).

<sup>45</sup> Award at 11.

<sup>46</sup> Exceptions at 23 (testing under self-referred treatment plans is subject to Art. 93, § 7 of the parties' agreement); Exceptions, Ex. 5, Union's Post-Hr'g Br. at 2 (explaining differences between self-referred and management-referred treatment plans).

<sup>47</sup> Opp'n at 30 & n.11.

<sup>48</sup> *Id.*; Exceptions at 23.

<sup>49</sup> *VA*, 24 FLRA 447, 450 (1986) (arbitrator exceeded authority when remedy concerned an issue that was not submitted to arbitration).

<sup>50</sup> See *U.S. Dep't of the Army, U.S. Corps of Eng'rs, Nw. Div.*, 65 FLRA 131, 134 (2010) (modifying an award to clarify that it applied only to the grievant); see also *U.S. Dep't of Agric., Forest Serv., Chattahoochee-Oconee Nat'l Forests, Gainesville, Ga.*, 45 FLRA 1310, 1311 (1992) (modifying an award in the "interest of clarity").

**Member Abbott, concurring in part and dissenting in part:**

I join my colleagues in finding that the Agency's exceptions concerning 42 C.F.R. Part 2 and the Rehabilitation Act are properly denied. I also agree that the Arbitrator exceeded his authority to the extent he applied Article 73 to self-referred treatment plan testing. However, for the reasons that I articulated in my separate opinion for *U.S. Department of VA, Veterans Benefit Administration, Nashville Regional Office*,<sup>1</sup> I do not agree that questions concerning compliance with the Privacy Act constitute conditions of employment that may be subjected to grievance procedures or upon which we may make a determination.<sup>2</sup>

I write separately, however, to once again emphasize a concerning aspect of this case that was addressed by Member Pizzella five years ago in a case involving the same parties and same provision. In that case, the Agency argued that Article 73 interfered with its right to determine internal security practices and could impact the "integrity" of the testing program.<sup>3</sup> However, the Agency failed to make a "reasonable connection" between the award and the Federal Aviation Administration's (FAA's) security objective.<sup>4</sup> In my view, a provision of this nature, which could impact the integrity or effectiveness of the testing program, unquestionably impacts the FAA's internal security practices. But because the mission of the FAA is to ensure air safety for the American public,<sup>5</sup> a leap of faith is not required to conclude that – for employees who require random drug or alcohol screening because of on- or off-duty conduct indicative of substance or alcohol abuse – the lapse or compromise of the testing program has the potential to impact national security as well. But, as Member Pizzella noted in *U.S. Department of Transportation, FAA*, "contracts have consequences" and we do not allow agencies "to wriggle out of a poorly thought out and constructed contract provision."<sup>6</sup>

<sup>1</sup> 71 FLRA 322, 324-25 (2019) (Concurring Opinion of Member Abbott) (Member DuBester dissenting).

<sup>2</sup> *Id.* at 325 ("Put simply, the Privacy Act was not 'issued for the very purpose of affecting the working conditions of employees.' Accordingly, it is not a 'law, rule, or regulation affecting conditions of employment' under § 7103(a)(9) of the Statute.") (internal citation omitted).

<sup>3</sup> *U.S. Dep't of Transp., FAA*, 68 FLRA 402, 404 (2015) (*FAA*).

<sup>4</sup> *Id.* at 404-05.

<sup>5</sup> FAA, *Mission* (last modified Nov. 5, 2019), <https://www.faa.gov/about/mission/> ("Our continuing mission is to provide the safest, most efficient aerospace system in the world.").

<sup>6</sup> *FAA*, 68 FLRA at 405 n.40.