

66 FLRA No. 164

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 73
(Union)

0-AR-4704

DECISION

August 22, 2012

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

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

The Arbitrator found that the Agency overpaid employees when it underdeducted taxes from their salaries. The Arbitrator determined that the Agency violated the parties’ agreement when it refused to waive its claims to those overpayments. For the reasons that follow, we deny the Agency’s exceptions.

II. Background and Arbitrator’s Award

The Agency withholds federal, state, and city taxes from employees’ salaries. See Award at 2. Consistent with this practice, the Agency, through its contractor,¹ deducted taxes owed to the City of Florence, Kentucky (the City) from the salaries of the employees at issue here. See *id.* at 1-2, 6 n.1. On July 1, 2007,² the City raised its tax rate from 1.25% to 2%. *Id.* at 1-2. Nevertheless, the Agency continued to deduct City taxes

from employees’ salaries at the 1.25% rate. See *id.* In August, a manager noticed the apparent underdeductions and alerted the Agency. See *id.* On September 15, the Agency began to deduct City taxes from employees’ salaries at the 2% rate. See *id.*

In mid-October, the Agency informed employees that, due to the Agency’s underdeductions, employees owed taxes to the City. See *id.* In order to compensate for the underdeductions, the Agency decided that it would overdeduct City taxes from employees’ salaries for the next several pay periods. See *id.* at 3, 10. In response, the Union filed a grievance asserting that the Agency violated Article 53, Section 9 (Article 53-9) of the parties’ agreement,³ and misapplied 5 U.S.C. § 5584 (§ 5584),⁴ by refusing to waive its claims to the

³ Article 53-9 states, in pertinent part:

An employee, or the Union . . . may make a written request for a waiver of collection of an overpayment. The [Agency] will, consistent with its legal authority, waive a claim arising out of an overpayment to an employee if all the following conditions are satisfied:

1. The [Agency] has determined that the erroneous overpayment occurred due to administrative error, with no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee; and
2. Collection of the claim would be against equity and good conscience and not in the best interest of the United States.

Award at 3.

⁴ Section 5584 states, in pertinent part:

(a) A claim of the United States against a person arising out of an erroneous payment of pay . . . to an employee of an agency, the collection of which would be against equity and good conscience and not in the best interests of the United States, may be waived in whole or in part by--

- (1) the authorized official;
- (2) the head of the agency when--

....

(B) the waiver is made in accordance with standards which the authorized official shall prescribe . . .

....

(b) The authorized official or the head of the agency, as the case may be, may not exercise his authority under this section to waive any claim--

- (1) if . . . there exists . . . an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee . . . ;

....

(c) A person who has repaid to the United States . . . the amount of a claim with respect to which a waiver is granted . . . is entitled . . . to refund . . . of the amount repaid to the United States . . .

¹ The National Finance Center (NFC) performed payroll-processing services for the Agency. See Award at 2, 6 n.1.

² All dates are in 2007 unless otherwise specified.

overpayments that resulted from the underdeductions. *See* Award at 3, 7.

The grievance was unresolved and submitted to arbitration. *See id.* at 2. At arbitration, the parties stipulated to the following issue: “Whether the Agency violated the [parties’ agreement] when it failed to grant a waiver of overpayment to all [Agency] employees in Florence, Kentucky for the under[deduction] of [City] income tax.” *Id.* at 2.

The Arbitrator found that the Agency’s underdeductions “resulted in . . . overpayment[s]” that arose from “administrative error,” not “fraud, misrepresentation, fault[,] or lack of good faith on the part of . . . employees.” *Id.* at 7. Based on these findings, the Arbitrator determined that Article 53-9 applied to the dispute. *See id.* In addition, the Arbitrator found that the Agency: (1) waited until mid-October to inform employees of the underdeductions; (2) did not consult with the Union about the underdeductions; and (3) could have caused employees to fail to pay taxes, subjecting them to interest, penalties, and discipline. *Id.* at 10. Further, the Arbitrator found “[n]o . . . suggest[ion]” that “waiver of the overpayment[s]” would “adversely affect the interest” of the United States Government. *Id.* Based on these findings, the Arbitrator determined that “equitable factors warrant[ed] relief.” *Id.* at 9.

The Arbitrator rejected the Agency’s assertion that employees were not indebted to the Agency and that the Agency therefore had no “claims” against employees. *See id.* at 8. In this regard, the Arbitrator determined that since “employees were paid more than they had earned,” and since the Agency “made the mistake and . . . recovered the overpayment[s],” employees were indebted to the Agency. *Id.* at 8. Additionally, the Arbitrator stated that, under Kentucky law, the Agency was “responsibl[e] for payment” of taxes to the City. *Id.* In this connection, the Arbitrator found it irrelevant that, according to the Agency, the City could not compel the Agency to submit employees’ City taxes. *See id.* at 9. The Arbitrator also cited two arbitration awards as supporting the Union’s arguments. *See id.* at 8. In those awards, arbitrators found that an agency was required to waive claims to overpayments that occurred when the agency failed to deduct union dues from employees’ salaries. *See id.* Finally, the Arbitrator rejected the Agency’s assertion that Kentucky law was not applicable. *See id.* at 8-9.

Based on the foregoing, the Arbitrator sustained the grievance, *see id.* at 11, and directed the Agency to “restore funds to employees in an amount equal to the overpayments they received” as a result of the Agency’s underdeductions, *id.* at 10. The Arbitrator retained jurisdiction to resolve issues pertaining to attorney fees. *See id.*

III. Positions of the Parties

A. Agency’s Exceptions

The Agency asserts that the award is contrary to § 5584 because it directs the Agency to waive claims that are not claims “of the United States.” Exceptions at 11 (quoting 5 U.S.C. § 5584(a)). There are no such “claims,” the Agency argues, because “employee debt to the Agency was never established.” *Id.* at 17; *see also id.* at 11-12. Rather, the Agency argues, the “only liabilities” were “owed to the [C]ity . . . , not the United States.” *Id.* at 10.

In this regard, the Agency asserts that “[n]either the Union nor [the Arbitrator] . . . cited any precedent that would allow the waiver of third party debts.” *Id.* at 14-15. In this connection, the Agency cites Authority decisions that involved “employee debts [owed] to the[] employing agencies.” *Id.* at 14 (citing *AFGE, Local 3615*, 57 FLRA 19 (2001) (*Local 3615*); *U.S. Dep’t of Def. Dependents Sch.*, 53 FLRA 196 (1997) (*DoD*); *U.S. Navy Pub. Works Ctr.*, 27 FLRA 156 (1987) (*Navy*)). Similarly, the Agency argues that Comptroller General decisions relied on by the Union at arbitration “did not [involve] liabilities to third parties.” *Id.* at 15 (citing *In re Damon R. Short—Underdeduction of FICA—Waiver*, Comp. Gen. B-230903, 1988 WL 228012 (Oct. 7, 1988) (unpublished decision) (*Short*); *In re Mrs. Patricia J. Engevik - Corr. of Payroll Deduction Errors*, Comp. Gen. B-202201, 1981 WL 22962 (Dec. 23, 1981) (unpublished decision) (*Engevik*)).

With regard to the Arbitrator’s finding that the Agency was “solely responsible for the payment of . . . the [C]ity tax,” the Agency contends that employees were “personally liable” for those taxes. *Id.* at 12. Also, the Agency again disputes the Arbitrator’s finding that the City could not compel the Agency to submit taxes to the City. *See id.* at 12-13. With regard to the awards cited by the Arbitrator, the Agency contends that those awards are distinguishable because the agency involved “paid an obligation on behalf of . . . employees and subsequently sought to receive reimbursement.” *Id.* at 13. Additionally, the Agency contends that, “[l]ogically extended,” the award would “require all . . . agencies to pay their employees’ third party debts . . . each time an administrative error” occurs. *Id.* at 15.

Finally, with regard to the remedy, the Agency argues that the Arbitrator provided ““money damages”” that are “not authorized” under § 5584. *Id.* at 16 (citing *Lawrence v. United States*, 69 Fed. Cl. 550, 554-55 (2006) (*Lawrence*)). In this connection, the Agency argues that the Arbitrator’s remedy was issued “apparently under the authority of . . . § 5584(c)” and that § 5584(c), which “permits . . . refund[s] only for debts ‘repaid to the United States,’” *id.* (quoting 5 U.S.C.

§ 5584(c)), does not apply because employees “did not repay any debt to the Agency,” *id.* at 17.

B. Union’s Opposition

The Union asserts that the Agency had a claim under § 5584 because the Agency: (1) overpaid employees, *see* Opp’n at 13; (2) had a “right to withhold” funds to “make up for the overpayment[s],” *id.* at 9; and (3) was “obligated to collect . . . funds on behalf of the City,” *id.* at 8 (citing 5 U.S.C. § 5520) (§ 5520); Ky.Rev.Stat. (KRS) §§ 67.780, 67.783).⁵ With regard to the Agency’s arguments, the Union asserts that: (1) a claim under § 5584 can “exist without . . . a debt,” *id.* at 9 n.1; (2) claims under § 5584 can be for funds “owed to third part[ies],” *id.* at 8-9 (citing *Dep’t of the Air Force, 3480th Air Base Group, Goodfellow Air Force Base, Tex.*, 9 FLRA 394 (1982), *pet. for review granted sub nom. AFGF v. FLRA*, 715 F.2d 224 (5th Cir. 1983)); (3) waiver under § 5584 can “apply to failure to withhold taxes,” *id.* at 8 (citing *Short*, 1988 WL 228012); (4) the City’s alleged inability to compel the Agency to submit taxes does not “prevent[] waivers of claims under . . . § 5584,” *id.* at 13; and (5) denying the Agency’s exceptions would “not require the waiver of all debts ultimately payable to third parties when there is an overpayment,” *id.*, because § 5584 contains “requirements” that “limit [its] application,” *id.* at 14. Additionally, the Union contends that the Agency’s exceptions challenge the Arbitrator’s factual findings and do not demonstrate that the award is deficient. *See id.* at 6-8.

⁵ Section 5520 states, in pertinent part:

(a) When a city . . . ordinance—

(1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to a designated city . . . officer . . . ; and (2) imposes the duty to withhold generally on the payment of compensation earned within the jurisdiction of the city . . . ; the Secretary of the Treasury . . . shall enter into an agreement with the city The agreement shall provide that the . . . agency . . . shall comply with the requirements of the . . . ordinance

KRS § 67.780 states, in pertinent part, that “[e]very employer making payment of compensation to an employee shall deduct and withhold . . . any tax imposed against the compensation by a tax district.”

KRS § 67.783 states, in pertinent part, that “[e]very employer who fails to withhold or pay to the tax district any sums required . . . to be withheld and paid shall be . . . liable to the tax district for any sum or sums . . . required to be withheld”

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 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. DoD, Dep’t 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 did not err in finding that the Agency had claims under § 5584.

Generally, and as relevant here, a claim is a right to payment. *See Black’s Law Dictionary* 240 (7th ed. 1999) (defining a claim as, among other things, a “right to payment”). Under § 5584, a right to payment “arising out of an erroneous payment of pay” can be waived by the agency that made the erroneous payment. 5 U.S.C. § 5584(a)-(b); *see also Short*, 1988 WL 228012 at *1. Thus, and as relevant here, “as long as [an] employee receives an erroneous overpayment of wages,” there is a waivable claim under § 5584. *Short*, 1988 WL 228012 at *1. Additionally, when an agency underdeducts taxes from an employee’s salary, the agency erroneously overpays the employee. *See id.* at *2.

Here, waivable claims under § 5584 arose when the Agency erroneously overpaid employees by underdeducting taxes from their salaries. *See Award* at 7; 5 U.S.C. § 5584(a); *Short*, 1988 WL 228012 at *1-2. The Arbitrator’s determination that the Agency erroneously overpaid employees and thus had waivable claims against the employees, *see Award* at 8, is consistent with § 5584 and *Short*.

We reject the Agency’s assertion that, because employees owed debt — specifically, taxes — to the City and not the Agency, the Agency did not have “claims” against its employees. *See Exceptions* at 10-12, 17. As explained above, the Agency’s claims arose when it erroneously overpaid its employees. *See* 5 U.S.C. § 5584(a); *Short*, 1988 WL 228012 at *1-2. The Agency’s right to recoup the overpayments — and the Agency’s ability to waive its claims to them — did not depend on whether employees owed taxes to the City or the Agency. *See* 5 U.S.C. § 5584(a); *Short*, 1988 WL 228012 at *1-2.

The Agency's remaining assertions do not demonstrate that the award in this regard is deficient. The Agency asserts that previous decisions interpreting § 5584 have not involved debts owed to third parties. *See* Exceptions at 14-15. However, none of the decisions cited by the Agency holds that "claims" cannot involve debts owed to third parties. *See Local 3615*, 57 FLRA at 21-22; *DoD*, 53 FLRA at 206-07; *Short*, 1988 WL 228012 at *2; *Navy*, 27 FLRA at 157-58; *Engevik*, 1981 WL 22962 at *5. The Agency also disagrees with certain findings of the Arbitrator, specifically that: (1) the Agency was responsible for the payment of City taxes, *see* Award at 8; (2) it was irrelevant whether the City could compel the Agency to pay the taxes, *see id.* at 9; and (3) certain arbitration awards were applicable, *see id.* at 8. But the Agency does not challenge these findings as nonfacts, and the Agency does not demonstrate how these findings are contrary to § 5584. *See* Exceptions at 12-13. To the extent the Agency's arguments challenge the Arbitrator's reasoning, such arguments do not demonstrate that the award is deficient. *See, e.g., U.S. Dep't of the Navy, Supervisor of Shipbuilding Conversion & Repair, Pascagoula, Miss.*, 57 FLRA 744, 746 n.5 (2002). Finally, the Agency asserts that the award could "require . . . agencies to pay their employees' third party debts." Exceptions at 15. But arbitration awards are not precedential, *see, e.g., AFGI, Local 2382*, 66 FLRA 664, 667 (2012), and, thus, the Agency's assertion is unfounded.

Based on the foregoing, the Agency has not demonstrated that the Arbitrator erred in finding that the Agency held waivable claims against the employees it erroneously overpaid. Accordingly, we deny the Agency's exception.

- B. The Agency does not demonstrate that the Arbitrator's remedy is contrary to law.

The Agency argues that the Arbitrator provided "money damages" to employees that are "not authorized" under § 5584. *Id.* at 16-17 (citing 5 U.S.C. § 5584(c); *Lawrence*, 69 Fed. Cl. at 554-55).

Under § 5584(a)(2)(B), an "authorized official" is empowered to prescribe standards for determining when a waiver is appropriate. 5 U.S.C. § 5584(a)(2)(B). Section 5584(g)(2) defines "authorized official" as the Director of the Office of Management and Budget (OMB). 5 U.S.C. § 5584(g)(2). OMB has delegated this power to individual agencies. *See* OMB Memorandum, *Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316* (Dec. 17, 1996). Thus, the Agency has the discretion to prescribe the standards for determining whether a waiver is appropriate. *See, e.g., Lawrence*, 69 Fed. Cl. at 554-55. Here, the

Agency has not argued or demonstrated that the award is contrary to Agency-prescribed standards. *See* Exceptions at 16-17. Therefore, the Agency has not demonstrated that directing the Agency to waive its claims is contrary to § 5584.

With regard to the Agency's reliance on § 5584(c), *see* Exceptions at 16-17, that subsection entitles an employee to receive a refund if the employee has repaid a claim that is subsequently waived, *see* 5 U.S.C. § 5584(c). The subsection does not bar the Arbitrator from directing the Agency to waive its claims under § 5584(a). *See* 5 U.S.C. § 5584(a), (c).

Based on the foregoing, the Agency has not demonstrated that the Arbitrator's remedy is contrary to law.

V. Decision

The Agency's exceptions are denied.