

67 FLRA No. 23

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 243
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
COMMANDER NAVAL REGION SOUTHEAST
NAVAL AIR STATION
JACKSONVILLE, FLORIDA
(Agency)

0-AR-4865

ORDER DISMISSING EXCEPTION

December 31, 2012

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

I. Statement of the Case

Three months after Arbitrator Steve A. Shackelford, Jr. issued an award, the Union requested that he clarify whether the award denied the Union attorney fees or simply did not address that issue. Responding by email, the Arbitrator stated that the award addressed the issue of attorney fees as specifically provided for in the collective-bargaining agreement and needed no clarification. The Union then filed the exception in this case, and the question before the Authority is whether the exception is timely. Because the exception challenges a portion of the award and the deadline for filing exceptions to the award expired before the Union filed the exception, we dismiss the exception as untimely.

II. Background and Arbitrator’s Award

In a paragraph of the award that started and ended with the words “Attorney Fees,” the Arbitrator wrote:

Attorney Fees. In its [p]ost-[h]earing [b]rief the Union seeks attorney fees should it prevail. The Arbitrator’s fees and expenses will be shared equally between the [p]arties. Further, the [p]arties will pay the expenses of their

respective needs for the process except that the [p]arties may agree to share equally the expenses of any mutually agreed upon services in connection with the arbitration proceedings. *Collective Bargaining Agreement, Article 33, Section 6. Attorney Fees.*¹

The second and third sentences of that paragraph come directly from Article 33, Section 6 of the parties’ collective-bargaining agreement.

The Federal Service Labor-Management Relations Statute and the Authority’s Regulations provide that if no exceptions to an arbitration award are filed within thirty days of its service date, then the award shall be final and binding.² In this case, neither party filed exceptions to, or sought clarification of, the award within thirty days of its service date. Rather, two months after the deadline for filing exceptions to the award had expired, the Union requested clarification from the Arbitrator about whether the award had “ruled with respect to [attorney] fees.”³ The Arbitrator responded in an email, stating that the award had “addressed the issue of attorney fees as specifically provided for” in the collective-bargaining agreement, and he found that the award “need[ed] no clarification.”⁴

The Union then filed the exception at issue here, and the Agency filed an opposition to the Union’s exception. The Authority issued an order to show cause (order) why the exception should not be dismissed as untimely. In the order, the Authority explained that the Union appeared to be excepting to a deficiency that arose not from the email, but from the award’s denial of attorney fees.⁵ The Union responded to the order (Union’s response). We discuss the parties’ arguments, to the extent necessary, below.

III. Analysis and Conclusions

As stated above, in a paragraph entitled “Attorney Fees,” the award acknowledged a fee request from the Union and then quoted Article 33, Section 6 of the collective-bargaining agreement (CBA), which provides that “the [p]arties will pay the expenses of their respective needs for the process.”⁶ Further indicating the purpose of that paragraph, at its end the Arbitrator added the words “Attorney Fees” to his citation of Article 33,

¹ Award at 13.
² 5 U.S.C. § 7122(b); 5 C.F.R. § 2425.2(b).
³ Exception, Attach. 7, Letter from E. Greenstein to Arbitrator (Mar. 29, 2012) at 2.
⁴ Exception, Attach. 2, Email from Arbitrator to E. Greenstein (July 11, 2012, 10:22 AM).
⁵ Order at 1-2.
⁶ Award at 13 (quoting CBA Art. 33, § 6).

Section 6.⁷ Read as a whole, that paragraph of the award denied the Union attorney fees. And as mentioned earlier, the time limit for filing exceptions to the award expired two months before the Union first sought clarification of the award. Moreover, because the thirty-day deadline for filing exceptions is jurisdictional, the Authority is unable to waive or extend it.⁸

The Union argues that its exception challenges the Arbitrator's email – not the award – and is therefore timely.⁹ To support its argument, the Union relies on Authority decisions stating that if an arbitrator modifies an award in a way that gives rise to the deficiencies alleged in an exception, then the filing deadline for that exception is thirty days after the *modification* was served on the party.¹⁰

According to the Union, the email modified the award in two ways. First, the Union argues that the email modified the award by finding that the Arbitrator “ha[d] no power to grant attorney fees.”¹¹ However, the Arbitrator made no such finding in the email. And to the extent that the Union's argument attempts to challenge the merits of the award's denial of attorney fees, that challenge is untimely. Second, the Union argues that the email held “for the first time . . . that expenses include attorney fees,” and, therefore, the collective-bargaining provision regarding “expenses” foreclosed any attorney-fees award.¹² In this regard, the Union asserts that, prior to reading the email, it did not view the award's discussion of the parties' “expenses” as a denial of “attorney fees,” particularly because the Authority, the Federal Service Impasses Panel, and the Merit Systems Protection Board – as well as the Fair Labor Standards Act, 29 U.S.C. § 216(b) – distinguish “‘expenses’ or ‘costs’ [from] ‘attorney fees.’”¹³ But considering that the paragraph in question starts and ends with the words “Attorney Fees,” and that it introduces the sentences about “expenses” by acknowledging a request for “attorney fees,”¹⁴ it was sufficiently clear from the paragraph as a whole¹⁵ that the award denied attorney fees under Article 33, Section 6 of the collective-bargaining agreement. As such, the Arbitrator's email did not modify the award by equating

“expenses” and “attorney fees”; the award itself equated them.¹⁶

We note that if the Union was unclear about whether the award denied attorney fees, then it could have requested clarification from the Arbitrator *and* timely filed an exception to the award. That approach would have preserved the Union's right to challenge the award's denial of attorney fees in the event that the Arbitrator clarified that he had, indeed, denied them. But the Union allowed the jurisdictional deadline for filing exceptions to the award to lapse months before seeking clarification from the Arbitrator. As the Union has not demonstrated that the email modified the award in such a way as to give rise to the deficiencies alleged in the exception, we dismiss the exception as an untimely challenge to the award.

IV. Order

We dismiss the Union's exception.

⁷ *Id.*

⁸ 5 U.S.C. § 7122(b); 5 C.F.R. § 2429.23(d); e.g., *U.S. Dep't of Commerce, PTO, Arlington, Va.*, 60 FLRA 869, 877 (2005).

⁹ Exception at 6-7; Union's Response at 1.

¹⁰ Exception at 6-7 (citing *NTEU, Chapter 199*, 35 FLRA 668, 671 (1990)); Union's Response at 2 (citing *U.S. Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Cal.*, 52 FLRA 1471, 1474 (1997)).

¹¹ Exception at 7.

¹² Union's Response at 2; *see also id.* at 1-2.

¹³ *Id.* at 2.

¹⁴ Award at 13.

¹⁵ *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 64 FLRA 437, 439 (2010).

¹⁶ *See* Award at 13.