64 FLRA No. 4

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 446
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
ASHEVILLE, NORTH CAROLINA
(Agency)

0-AR-4218

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DECISION

August 28, 2009

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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 John J. Popular II 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 did not file an opposition to the Union's exceptions.

The Arbitrator denied the Union's motion for an award of attorney fees. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant was suspended for 1 day, and the Union filed a grievance on his behalf that was submitted to arbitration. During the arbitration hearing, the Agency "voluntarily and unilaterally rescinded" the suspension and agreed to award the grievant backpay. Award at 5. The Arbitrator retained jurisdiction pending proof of the cancellation of the suspension, which was provided by the Agency. *Id.* at 2-3. On request of the Union, the Arbitrator further retained jurisdiction to resolve the Union's motion for attorney fees on behalf of the grievant. *Id.* at 3.

The Arbitrator denied the motion for attorney fees. He concluded that the grievant was not the prevailing party within the meaning of 5 U.S.C. § 7701(g) because the cancellation of the grievant's suspension "did not result from a consent decree, settlement agreement or arbitration award." *Id.* at 5-6 (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Servs.*, 531 U.S. 1004 (2000) (*Buckhannon*); *Sacco v. Dep't of Justice*, 90 M.S.P.R. 37 (2001); *AFGE Local 1547*, 58 FLRA 241 (2002)).

III. Union's Exceptions

The Union contends that the award is contrary to law by concluding that the grievant was not the prevailing party. Exceptions at 2. The Union asserts that "[t]he Arbitrator erred as a matter of law when he found that the agency's actions unilaterally deprived the Union of its standing in the case." *Id.* at 2-3. The Union also asserts that this finding is based on a nonfact. *Id.* at 3. The Union claims that "[t]he agency's concession in this case is enforceable as a ruling" and that it "obtained an enforceable judgment." *Id.* at 4. For this reason, the Union maintains that this case is distinguishable from *Buckhannon* and *AFGE Local 1547*. *Id.* at 4-5. The Union also maintains that this case is distinguishable from *Sacco* because the grievance was not dismissed as moot. *Id.* at 4. The Union further claims that *Buckhannon* is "ill[-]suited" for application in grievance arbitration because a court proceeding is different from an arbitration proceeding. *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*. *E.g., NTEU Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *E.g., NFFE Local 1437*, 53 FLRA 1703, 1710 (1998).

Under the Back Pay Act, an employee entitled to backpay may also receive "reasonable attorney fees related to the personnel action[.]" 5 U.S.C. § 5596(b)(1)(A)(ii). If fees are sought in a grievance, then they are awarded "in accordance with standards established under § 7701(g) of [title 5]," which pertains to attorney fee awards by the Merit Systems Protection Board (MSPB). *Id.* The standards for an award of attorney fees under § 7701(g) include, among other things, that the employee must be the "prevailing party." When exceptions concern the standards established under § 7701(g), the Authority looks to the decisions of the

*. Member DuBester did not participate in this decision.

courts and the MSPB for guidance. 58 FLRA at 243. In *AFGE Local 1547*, the Authority held that it would apply the definition of "prevailing party" set forth in *Buckhannon* and adopted by the MSPB under § 7701(g). *Id.* As a result, for a grievant to be a prevailing party within the meaning of § 7701(g), the grievant must obtain an enforceable judgment, order, consent decree, or settlement agreement. *Id.*

Applying this precedent, we find that the Arbitrator correctly concluded that the grievant was not the prevailing party within the meaning of § 7701(g) because he did not obtain an enforceable arbitration award, consent decree, or settlement agreement. *See id.* We reject the Union's claim that the grievant is the prevailing party because the Agency's rescission of the suspension "is enforceable as a ruling" and that it "obtained an enforceable judgment." Exceptions at 4. In *AFGE Local 1547,* the Authority specifically adopted the MSPB's interpretation of § 7701(g), holding that an employee is not the prevailing party when an agency unilaterally rescinds an adverse action during the pendency of an appeal. 58 FLRA at 243. Because the Arbitrator correctly concluded that the grievant was not the prevailing party under § 7701(g), the Union's claim that the cases cited by the Arbitrator are distinguishable provides no basis for finding the award deficient. *See id.* (express terms of § 7701(g) provide the standards under which an employee may recover attorney fees). Accordingly, we deny this exception.

In addition, because the Union provides no argument to support its claim that the award is based on a nonfact, we deny the exception as a bare assertion. *E.g., United States Dep't of Homeland Sec., United States Customs & Border Prot., Port of Seattle, Seattle, Wash.*, 60 FLRA 490, 492 n.7 (2004).

V. Decision

The Union's exceptions are denied.