

67 FLRA No. 84

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
NORTHPORT VETERANS AFFAIRS HOSPITAL
NORTHPORT, NEW YORK
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1843
(Union)

0-AR-4945

ORDER DISMISSING EXCEPTIONS

March 21, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Bonnie Siber Weinstock awarded the grievant backpay (backpay award). After the thirty-day time limit for filing exceptions to the backpay award expired, the Union filed an application for attorney fees and expenses (fee application). The Arbitrator then issued an award (fee award) granting the Union's fee application.

The main question before us is whether the Agency's exceptions are untimely. Because the Agency's exceptions challenge the Arbitrator's determinations in the backpay award, and the Agency filed them after the thirty-day time limit for filing exceptions to that award, the answer is yes.

II. Background and Arbitrator's Award

The Agency suspended the grievant for one day based on a charge of inappropriate conduct for driving "dangerously close" to other employees in a parking lot.¹ The Union filed a grievance challenging the suspension. The grievance went to arbitration.

In the backpay award, the Arbitrator noted witness testimony that the grievant "did not mean to hit anyone,"² and she found no proof that the grievant "intended to scare" or "get even" with anyone.³ Therefore, she found no just cause under the parties' collective-bargaining agreement for a suspension. Nevertheless, she determined that the grievant "did not exercise due care," so she found that a reprimand would be appropriate.⁴ She also awarded the grievant backpay. More than thirty days after the Arbitrator served the backpay award on the parties, the Union filed its fee application.

Subsequently, the Arbitrator issued the fee award. In that award, the Arbitrator noted an Agency claim that, in the backpay award, she had "incorrectly impos[ed] the element of intent, a nonfact."⁵ The Arbitrator "disagree[d] with the Agency's characterization"⁶ and said that she had not "impose[d] a requirement of intent; [she had] simply responded to the witnesses' testimony as to their opinion[of] whether the [g]rievant intended to harm them."⁷ In addition, she addressed the Agency's argument that the grievant did not meet the Back Pay Act's⁸ requirement that the grievant be affected by an unjustified or unwarranted personnel action. Noting that the grievant already had "prevailed in the grievance"⁹ and had been awarded backpay,¹⁰ the Arbitrator rejected the Agency's argument, finding that the Agency was "[e]ssentially . . . [re-arguing] the case it presented at [the] hearing"¹¹ that resulted in the backpay award.

Next, the Arbitrator considered the requirements for awards of attorney fees under the Back Pay Act and 5 U.S.C. § 7701(g). She found those requirements met, and she granted the Union's fee application.

After the Arbitrator issued the fee award, the Agency filed exceptions. The Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion

The Agency claims that the fee award is deficient on three grounds. First, the Agency claims that the fee award is based on a nonfact.¹² Specifically, the

² *Id.* at 9.

³ *Id.* at 11.

⁴ *Id.* at 15.

⁵ Fee Award at 3.

⁶ *Id.*

⁷ *Id.* at 4.

⁸ 5 U.S.C. § 5596.

⁹ Fee Award at 4.

¹⁰ *Id.* at 2, 5.

¹¹ *Id.* at 3-4.

¹² Exceptions at 1-3.

¹ Backpay Award at 6.

Agency argues, in finding that the suspension was an unjustified or unwarranted personnel action, the Arbitrator relied on a nonfact in the backpay award – the grievant’s intent – an issue not before her.¹³

Second, the Agency claims that the Arbitrator exceeded her authority by finding that the suspension was an unjustified or unwarranted personnel action.¹⁴ In particular, the Agency challenges again the Arbitrator’s alleged finding in the backpay award concerning the grievant’s intent, and argues that because the charge against the grievant did not involve intent, the Arbitrator exceeded her authority.¹⁵ The Agency further argues that the suspension was consistent with the Agency’s table of penalties for the charge at issue, so the Arbitrator should not have reduced it in order to “justify the award[] of attorney fees.”¹⁶

Third, the Agency claims that the Arbitrator was biased because her statements in the backpay award contradict her findings in the fee award, and therefore demonstrate that she engaged in “semantics” in the fee award, “as in the [backpay award],” to find that the suspension was an unjustified or unwarranted personnel action.¹⁷

The Union argues that the Agency’s exceptions do not challenge the fee award, “but rather attempt[] to challenge the [backpay] award, despite the fact that the [backpay] award is final and binding.”¹⁸ Under § 2425.2(b) of the Authority’s Regulations, the time limit for filing an exception to an arbitration award is thirty days after the date of service of the award.¹⁹ If no exceptions are filed within that thirty-day period, then the award becomes final and binding.²⁰ The record indicates that no exceptions were filed within thirty days of the backpay award, and, therefore, that award is final and binding.

The Agency asserts, however, that Authority precedent establishes that when a party seeks clarification or modification of an arbitration award and the arbitrator issues a supplemental award that modifies or addresses the original award so as to give rise to the deficiencies alleged in the exceptions, the filing period for exceptions begins with the supplemental award.²¹ The Agency

argues that, under Authority precedent, review of the backpay award is appropriate even if the time limit for filing exceptions to that award has expired because the fee award “addresses and seeks to clarify” the backpay award.²²

In order for an arbitrator to grant attorney fees under the Back Pay Act, she or he must award backpay.²³ And in order to award backpay, the arbitrator must find that the grievant was affected by an unjustified or unwarranted personnel action that resulted in a withdrawal or reduction of the grievant’s pay, allowances, or differentials.²⁴ A violation of a collective-bargaining agreement is an unjustified or unwarranted personnel action.²⁵

In the backpay award, the Arbitrator found that the Agency violated the parties’ agreement because there was not just cause for the suspension. Thus, she found that the suspension was an unjustified or unwarranted personnel action, although she did not explicitly characterize it as such. She also found that the suspension should be reduced to a reprimand, and she awarded backpay. In its exceptions, the Agency claims that the fee award is deficient, but actually challenges the Arbitrator’s findings in the backpay award that supported her award of backpay. Further, the fee award does not clarify or modify the backpay award in a way that gives rise to the deficiencies alleged in the Agency’s exceptions. As such, the Agency’s exceptions actually constitute exceptions to the underlying backpay award, not the fee award. Because they were filed after the thirty-day time limit for filing an exception to the backpay award,²⁶ they are untimely, and we dismiss them.²⁷

IV. Order

We dismiss the Agency’s exceptions.

¹³ *Id.* at 2, 3, 7.

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 5.

¹⁸ Opp’n at 2.

¹⁹ 5 C.F.R. § 2425.2(b).

²⁰ 5 U.S.C. § 7122(b).

²¹ Exceptions at 2 (citing *U.S. Dep’t of the Army, U.S. Army Dental Activity Headquarters, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 62 FLRA 70,

71 (2007) (*Fort Bragg*)); see also *U.S. Dep’t of the Army, Corps of Eng’rs, Nw. Div. & Portland Dist.*, 60 FLRA 595, 596 (2005).

²² Exceptions at 2 (citing *Fort Bragg*, 62 FLRA at 70).

²³ See *AFGE, Local 1923*, 66 FLRA 22, 23 n.3 (2011).

²⁴ *Id.*

²⁵ *U.S. DHS, U.S. CBP*, 66 FLRA 556, 558 (2012).

²⁶ See Exceptions, Ex. D at 1; Exceptions, Ex. F at 22.

²⁷ See 5 U.S.C. § 7122(b).