65 FLRA No. 159

FRATERNAL ORDER OF POLICE
PENTAGON POLICE LABOR COMMITTEE
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
PENTAGON FORCE PROTECTION AGENCY
(Agency)

0-AR-4705

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DECISION

April 27, 2011

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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 Stephen E. Alpern filed by the Union under § 7122 of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations.[1] The Agency filed an opposition to the Union's exceptions.

The Arbitrator sustained a grievance seeking payment for lost overtime opportunities resulting from the Agency's delay in returning the grievant to full duty status. Award at 2, 5. As a remedy, the Arbitrator awarded backpay; however, he denied the Union's request for attorney fees and for prospective relief. For the reasons that follow, we dismiss the Union's exceptions in part and deny them in part.

1. The Union also filed an unopposed motion for leave to supplement the record to add the Arbitrator's Supplemental Opinion and Award issued on December 13, 2010. *See* Union's Motion to Supplement Arbitral Record & Attach. We find that, even assuming that the document is properly before the Authority, it provides no basis for finding the award deficient. Accordingly, we find it unnecessary to resolve this motion. *See, e.g., U.S. Dep't of the Treasury, Fin. Mgmt. Serv., Emeryville, Cal.*, 65 FLRA 547, 549 (2011).

II. Background and Arbitrator's Award

The grievant is employed by the Agency as a police officer. *Id.* at 2. At the time of his hiring, the grievant had a high frequency hearing loss, a condition that he disclosed during an Agency medical examination. *Id.* The grievant was required to have annual medical examinations, each of which confirmed his hearing loss. *Id.* at 3. In 2007, the grievant was required to have a follow-up medical examination, which revealed the same hearing loss. *Id.* Based on this examination, on November 28, 2007, the Agency placed the grievant on light duty status pending an independent medical evaluation. *Id.* Because of this status, he was no longer eligible to work the same overtime as he did previously; as a result, his overtime work was "substantially reduced." *Id.*

On December 7, 2007, the grievant requested a medical waiver. *Id.* An Agency official determined that, because the grievant's case would be reviewed by a Medical Review Board (MRB) after the MRB received the results of the independent medical evaluation, a waiver was not appropriate at that time. *Id.* On December 14, 2007, the grievant was independently examined by an audiologist, who concluded that the grievant "could perform his police officer duties in a safe and effective manner." *Id.* at 3-4. The Agency's Medical Review Officer (MRO) concurred with this conclusion. *Id.* at 4. The grievant, however, remained on light duty. *Id.* In late January 2008, the grievant repeatedly inquired regarding the status of his waiver request. *Id.* at 4. An Agency official informed him that the MRB was "moving forward for a decision." *Id.* 4-5.

On March 14, 2008, the Union presented a grievance on the matter, which "sought, inter alia, a return to full duty status and payment for all lost overtime opportunities as a result of the [g]rievant's placement on light duty status." *Id.* at 5. On March 24, 2008, the Agency denied the grievance, noting that the grievant's reinstatement had been addressed by the MRB on March 19. *Id.* The Agency further stated that it had convened the MRB at the earliest opportunity and that the grievant's "reinstatement to full duty [had been] directed as a result of [that] deliberation . . . ." *Id.* The matter was unresolved and submitted to arbitration. The parties stipulated to the following issue: "Whether or not the Agency unreasonably delayed putting the [g]rievant back on full duty, and, if so, whether the [g]rievant was entitled to overtime." *Id.* at 2.

Before the Arbitrator, the Union asserted that the Agency's regulations require the MRB to conduct an "expeditious review" of the grievant's case; that the Agency had failed to conduct such a review; and that the Agency's unreasonable delay in convening the MRB caused the grievant to lose overtime. *Id.* at 6. The Union sought: (1) backpay for the overtime that he would have otherwise received; (2) an order "directing the Agency to conduct medical reviews in an expeditious manner"; (3) an order "directing the Agency to afford all qualified employees the right to overtime opportunities as set forth in the parties' agreement"; and (4) attorney fees. *Id.* The Agency asserted, among other things, that the grievant is "not entitled to attorney[] fees because it would not be in the interest of justice, as required by 5 U.S.C. § 7701(g)." *Id.* at 7.

The Arbitrator concluded that the Agency's delay in reviewing the grievant's case "was not reasonable." *Id.* at 8. In reaching this conclusion, the Arbitrator noted that the results of the grievant's December 2007 examination and the recommendations of the audiologist and the MRO "should have alerted" the MRB that "there was a substantial likelihood" that the MRB would find the grievant was able to "perform the full range of his law enforcement duties . . . ." *Id.* Further, because the grievant was being "substantially harmed" by remaining on light duty, the Arbitrator found the Agency should have "promptly" sought MRB review of the grievant's case. *Id.*

The Arbitrator rejected the Agency's claim that its standard practice was to delay consideration of a case until the MRB had other cases to review. *Id.* at 9. The Arbitrator found that, because the Agency's regulations entitle an employee to "expeditious" review, this practice "was not reasonable." *Id.* Noting that "expeditious" does not necessarily mean "immediate," the Arbitrator found that, under the circumstances, "it would have been reasonable for the MRB to take up to thirty days, or until January 18, 2008, to resolve" the [g]rievant's case. *Id.*

The Arbitrator rejected the Union's "request[]" for "an award of attorney fees." *Id.* at 12. As an initial matter, the Arbitrator noted that the grievant failed to "point to any specific criterion which he believes is satisfied and makes no argument as to why he should be awarded fees." *Id.* Applying the criteria set forth by the Merit Systems Protection Board in *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980) (*Allen*) for an award of attorney fees, the Arbitrator found that the record before him "[did] not support a finding that any of the criteria were met." *Id.* In this regard, the Arbitrator found that: (1) the Agency did not engage in a prohibited personnel practice; (2) the Agency's action involving the delay of the grievant's case before the MRB and his return to full duty status was not clearly unfounded; (3) the Agency's action involving the delay of the grievant's case before the MRB and his return to full duty status was not taken in bad faith to harass or exert improper pressure on the grievant; (4) the Agency's action involving the delay of the grievant's case before the MRB and his return to full duty status did not involve a gross procedural error; and (5) the Agency did not know, nor should it have known, that it would not prevail on the merits when it sought review of the grievant's case before the MRB. *Id.*

The Arbitrator sustained the grievance and awarded the grievant backpay for the overtime that he lost as a result of the Agency's delay in returning him to full duty status. *Id.* at 13. The Arbitrator rejected the Union's request for remedial orders directing the Agency to "conduct medical reviews in an expeditious manner" and "afford all qualified employees the right to overtime opportunities" pursuant to the parties' agreement because the Union had failed to demonstrate that either order was warranted.[2] *Id.* at 11-12.

III. Positions of the Parties

A. Union's Exceptions

Initially, the Union asserts that its "exceptions involve the award['s] consistency with settled law. Exceptions at 1. Specifically, the Union argues that the Arbitrator's conclusion denying attorney fees is contrary to law. *Id.* at 7. The Union contends that, contrary to the "[A]rbitrator's implication," an award of attorney fees does not have to be made within the same proceeding that determines the merits of a grievance and that, had it "been afforded the opportunity" to file an application for fees, it "would have been able to demonstrate entitlement and reasonableness of the fees claim[ed]." *Id.* at 11.

The Union further argues that the requirements of the Back Pay Act were met. In this regard, the Union challenges the Arbitrator's finding that fees were not warranted in the interest of justice, contending that such fees are warranted under *Allen* criteria 2, 4, and 5. *Id.* at 11, 13-14. With respect to criterion 2, the Union asserts that the facts

2. The Arbitrator retained jurisdiction to resolve disputes concerning implementation of the award. Award at 13.

demonstrate that the Agency's actions were "clearly without merit or wholly unfounded." With respect to criterion 4, the Union asserts that the Agency was fully aware that it was not in compliance with its own procedural regulations; accordingly, the Union contends, the Agency's actions involved gross procedural error. *Id.* at 13-14. Finally, with respect to criterion 5, the Union asserts that, based on the "unreasonable and subjective interpretation" the Agency "placed on the meaning of the word expeditious" in its regulation, the Agency knew or should have known that it would not prevail on the merits when it brought the proceeding. *Id.* at 19.

Citing *United States Department of the Army, United States Corps of Engineers, Northwestern Division*, 65 FLRA 131 (2010) (Member Beck dissenting, in part) (*U.S. Dep't of the Army*), the Union contends that the Arbitrator erred in denying its request for prospective relief, specifically an order directing the Agency to "conduct medical reviews in an expeditious manner . . . ." *Id.* at 21. According to the Union, its requested remedy included "such further relief as is deemed necessary, appropriate, applicable and just." *Id.* As a result, the Union claims, the remedy "was not limited" to the grievant, but "included all police officers who might appear before the MRB." *Id.*

B. Agency's Opposition

The Agency asserts that the exceptions are barred by § 2429.5 of the Authority's Regulations because the arguments could have been, but were not, raised below. Opp'n at 6-8. The Agency contends that, as a remedy, the Union requested overtime payment, "attorney[] fees and costs now, and any other remedy the [A]rbitrator would deem appropriate or just under the circumstances." *Id.* at 4 (citing Tr. at 12). The Agency asserts that, although the Union requested such remedies before the Arbitrator, the Union did not "raise any arguments for them" at that time. *Id.* at 7.

Alternatively, the Agency contends that the award is consistent with law. *Id.* at 8-12. The Agency contends that its actions "were not clearly without merit or wholly unfounded," noting that the Arbitrator held the Agency's delay in placing [the] grievant back in full duty status was "'not clearly unfounded.'" *Id.* at 9 (quoting Award at 12). The Agency further asserts that the Arbitrator held that its "delay in placing the grievant back on full duty status 'did not involve gross procedural error.'" *Id.* at 10 (quoting Award at 12). Moreover, according to the Agency, "there is no evidence in the record, nor does the Union assert, that the Agency delayed the grievance process, or the arbitration . . . to harm [the] grievant." *Id.* at 11. Finally, the Agency contends that an award of attorney fees is not warranted because, as the Arbitrator found, it neither knew, nor should have known, that it would not prevail on the merits. *Id.* at 11-12.

The Agency contends that the denial of prospective relief is not contrary to law. *Id.* at 12-13. The Agency states that, at the arbitration hearing, "neither party offered testimony or documentary evidence concerning other individuals" because the issue before the Arbitrator "dealt only with the grievant." *Id.* at 13.

IV. Analysis and Conclusions

A. Preliminary Matter: The exceptions are barred, in part, by § 2429.5 of the Authority's Regulations.

Under 5 C.F.R. § 2429.5, the Authority will not consider "any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the . . . arbitrator." [3] 5 C.F.R. § 2429.5; *see also U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008) (exception dismissed under § 2429.5, where record established agency could have made argument before arbitrator but did not); 5 C.F.R. § 2425.4(c) (expressly prohibits exceptions from including "arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented to the arbitrator").

There is no indication in the record that the Union argued to the Arbitrator, as it does in its exceptions, that fees were warranted in the interest of justice because *Allen* criteria 2, 4, and 5 were satisfied. *See* Award at 12. To the contrary, the Arbitrator found that, although the Union requested attorney fees, it failed to "point to any specific

3. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed Reg. 42,283 (2010). Because the Union's exceptions were filed after this date, we apply the revised Regulations here. *See* § 2429.1. We note that the revised version of § 2429.5 "merely incorporates into regulation" the Authority's practice under the prior version of § 2429.5. 75 Fed. Reg. 42,283 (2010).

criterion" that it believed was satisfied and "ma[de] no argument" regarding why fees should be awarded. *Id.* Because the Union could have, but did not, raise such arguments before the Arbitrator, it may not do so now. Accordingly, we dismiss this portion of the exceptions.

B. The Arbitrator's determination that the Union requested an award of attorney fees is not contrary to law.

The Union asserts that, "[c]ontrary to the [A]rbitrator's implication, an award of attorney fees does not have to be made within the same proceeding" and that, had it "been afforded the opportunity" to file its application for fees, it "would have been able to demonstrate entitlement and reasonableness of the fees claim[ed]." Exceptions at 11.

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. *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. Dep't of Def., Dep'ts 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.*

The Back Pay Act expressly provides that an employee affected by an unjustified or unwarranted personnel action is entitled, on correction of the personnel action, to receive "reasonable attorney fees related to the personnel action." 5 U.S.C. § 5596(b)(1)(A)(ii). Regulations implementing this portion of the Act require that, to be awarded attorney fees by an arbitrator, the grievant or the grievant's representative must present a request for fees to the arbitrator, who must provide the employing agency with an opportunity to respond. *See* 5 C.F.R. § 550.807(a)-(b); *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 54 FLRA 759, 762 (1998) (*Red River Army Depot*). Also, the Authority has held that it is not premature to request attorney fees as part of an arbitrator's award on the merits of a grievance. *See Health Care Fin. Admin., Dep't of HHS*, 35 FLRA 274, 289-90 (1990) (*HHS*) (quoting *Phila. Naval Shipyard*, 32 FLRA 417, 420 (1988) ("While such requests [for attorney fees] may be submitted during the course of an arbitration proceeding, nothing . . . requires that a request for attorney fees be made before an award is final and binding."). Further, the Authority has determined that "[a]rbitrators may rule on requests for attorney fees simultaneous to rendering a decision on the merits of a grievance." *See id.* at 290 (citations omitted).

In this case, we find that the Union has not demonstrated that the Arbitrator erred in deciding the issue of attorney fees. Before the Arbitrator, the Union stated that it was seeking, among other remedies, "attorney[] fees and costs now . . . ." *See* Exceptions, Attach. B, Tr. at 12; *see also* Award at 6 (noting that Union requested, among other things, "attorney[] fees under the Back Pay Act"). Moreover, the record reveals that, in response, the Agency asserted that the Union was "not entitled to attorney[] fees because it would not be in the interest of justice, as required by 5 U.S.C. § 7701(g)." Award at 7. In his award, the Arbitrator stated that the Union "request[ed] an award of attorney fees." *Id.* at 12. In these circumstances, the Union has not established that a request for attorney fees was not made before the Arbitrator. *See, e.g., HHS*, 35 FLRA at 289 (union's claim that no application for attorney fees request had been filed with arbitrator rejected because in its post-hearing brief union requested that "[c]ounsel for the [g]rievant . . . be awarded attorney[] fees in accordance with law" and arbitrator noted that grievant had requested attorney fees); *cf. Red River Army Depot*, 54 FLRA at 761 (union did not request fees as part of merits award because union "repeatedly stated in its post-hearing brief . . . that the [a]rbitrator retain jurisdiction in order to entertain a subsequent motion for an award of fees with supporting memorandum").

Accordingly, we deny this exception.

C. The Arbitrator's denial of the Union's request for prospective relief is not contrary to law.

The Union asserts that the "exceptions involve the award['s] consistency with settled law." Exceptions at 1. Citing *U.S. Dep't of the Army*, the Union contends that the Arbitrator erred in denying its request for prospective relief, specifically an order directing the Agency to "conduct medical reviews in an expeditious manner . . . ." *Id.* at 21.

Under 5 C.F.R. § 2425.6(b), a party arguing that an award is deficient on private-sector grounds -- including the ground that an arbitrator "[e]xceeded his or her authority[,]" *id.* § 2425.6(b)(1)(i) -- has an

express duty to "explain how, under standards set forth in the decisional law of the Authority or Federal courts[,]" *id.* § 2425.6(b), the award is deficient. In addition, 5 C.F.R. § 2425.6(e)(1) provides that an exception "may be subject to dismissal or denial if[] . . . [t]he excepting party fails to raise and support a ground as required in" § 2425.6(b).

In support of its assertion that the award is contrary to law, the Union cites *U.S. Dep't of the Army*. However, the Union has not explained how, under *U.S. Dep't of the Army*, the award is deficient. Because the Union has not explained how the award is deficient under *U.S. Dep't of the Army* and has not cited any law that required the Arbitrator to grant the requested remedy, we find that the Union has failed to demonstrate that the award is contrary to law.

Accordingly, we deny this exception.

V. Decision

The Union's exceptions are dismissed in part and denied in part.