

63 FLRA No. 140

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2608
(Union)

and

SOCIAL SECURITY ADMINISTRATION
(Agency)
0-AR-4210

—
DECISION

June 23, 2009

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator David Helfeld filed by the Union and 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 exception.

The Arbitrator awarded attorney fees and expenses to the Union under the Back Pay Act, 5 U.S.C. § 5596. However, the Arbitrator denied the Union's request for compensation at Washington, D.C./Baltimore rates, where Union counsel's office is located, and instead applied the rates of the site of the arbitration, Puerto Rico. For the reasons set forth below, we grant the Union's exception and modify the Arbitrator's award of attorney fees, dismiss the Agency's exception concerning Article 25, § 5E of the parties' agreement, and deny the Agency's remaining exception.

II. Background and Arbitrator's Award

In his original award, the Arbitrator found that the Agency improperly suspended the grievant for two days, ordered the grievant's record expunged, and awarded back pay plus interest. The Union filed a petition for attorney fees.

In the award at issue here, the Arbitrator determined that the Union was entitled to attorney fees and expenses in accordance with the Back Pay Act. *See Award at 2-3.* In this connection, he determined that the amount of time claimed by Union counsel, including

15.6 hours for travel time, was reasonable and that counsel's expenses, including travel expenses for airfare and lodging, were appropriate.

The Arbitrator awarded the Union \$4,750 in attorney fees and \$883.53 in travel expenses. The Arbitrator calculated the Union's attorney fees by using the market rate for Puerto Rico, the site of the arbitration, rather than the market rate for the Washington, D.C./Baltimore area, where counsel's office is located, as requested by the Union. The Arbitrator found that the Union's requested rate is only applicable to federal court litigation in Washington, D.C., and not labor disputes subject to arbitration. In addition, the Arbitrator found that the location of Union counsel's office was irrelevant because counsel is a Union staff attorney and, as such, practices wherever the Union asks her to practice.

III. Union's Exception¹

The Union asserts that the Arbitrator's award is contrary to the Authority's decision in *United States Department of the Army, Corpus Christi Army Depot, Corpus Christi, Texas*, 58 FLRA 87 (2002) (*Corpus Christi*). In this regard, the Union argues that it is entitled to have its counsel's rates calculated at the rate for attorneys with eight to ten years of experience in the Washington, D.C./Baltimore area, where counsel ordinarily practices, rather than the Puerto Rico rate used by the Arbitrator. The Union requests that the Authority modify the Arbitrator's award accordingly. *See Union's Exception at 2* (citing *NAGE, Local R1-109*, 51 FLRA 1720 (1996)).

IV. Agency's Exception

The Agency asserts that the Arbitrator's award of attorney fees for travel time and expenses should be reversed or reduced because it is contrary to 5 U.S.C. § 7701(g). In this regard, the Agency asserts that it is unreasonable to charge it for the Union's decision to obtain counsel from Baltimore. The Agency also argues that the Union is solely responsible for non-employee representatives' travel time and expenses because Article 25, § 5E of the parties' agreement states that "[t]he [U]nion will pay all costs for its representatives and witnesses[.]" Agency's Exception at 5.

V. Union's Opposition to Agency's Exception

The Union claims that it is entitled to attorney fees for travel time and expenses because the Arbitrator concluded that the time and expenses the Union claimed

1. The Agency did not file an opposition to the Union's exception.

were reasonable. Relying on *Corpus Christi*, the Union also contends that the availability of counsel from Puerto Rico is irrelevant to the amount of attorney fees that the Union may receive for travel time and expenses. Further, the Union alleges that it did not contractually waive its statutory right to recover attorney fees and expenses, and that the parties' Attorney Fee Hourly Rate Agreement specifically allows for such reimbursement. See Union's Opposition, Attach. 4, ¶ 3.

VI. Analysis and Conclusions

A. Union's Exception

1. The Arbitrator's conclusion that the site of the arbitration was the relevant community for determining the appropriate market rate for attorney fees is contrary to law

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 *United States 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 *United States Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*DAA*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. See *id.*

The Authority follows the practices of the Merit Systems Protection Board (MSPB) to resolve issues arising under 5 U.S.C. § 7701(g) concerning the Back Pay Act. See *Corpus Christi*, 58 FLRA at 90-91. Under 5 C.F.R. § 1201.203(a)(3), a petition for attorney fees must include "[a] statement of the attorney's customary billing rate for similar work, with evidence that that rate is consistent with the prevailing community rate for similar services in the community in which the attorney ordinarily practices[.]" The MSPB has thus concluded that the relevant community for purposes of determining the appropriate market rate for attorney fees is the community in which an attorney ordinarily practices. See *Martinez v. United States Postal Serv.*, 89 M.S.P.R. 152, 161 (2001). Relying upon the MSPB's interpretation, the Authority has also concluded that the relevant market rates are the rates for the community in which an attorney ordinarily practices. See *Corpus Christi*, 58 FLRA at 91. Of particular relevance here, the Authority has held that a union may recover attorney fees at the Washington, D.C. market rate when the union provides sufficient evidence to establish that its counsel's ordi-

nary community of practice is Washington, D.C. See, e.g., *AFGE, Local 1938*, 61 FLRA 645, 646 (2006). In reaching this conclusion, the Authority held that unions are not required to establish that local counsel is unavailable. See *id.*

Although the Arbitrator made no explicit finding as to the location of counsel's office, he stated that Union counsel's "home base" is Baltimore. Award at 5. In addition, the Union submitted counsel's affidavit, which asserts that counsel has been licensed in Maryland and has practiced in the Baltimore area since 1998. See Union's Exception, Attach. 2; see also Union's Exception at 10 (listing counsel's P.O. Box in Baltimore). Union counsel also submitted a copy of the *Laffey* matrix, which lists the applicable rates for an attorney with eight years of experience.² See Union's Exception, Attach. 4. Based on the foregoing, we find that the record is sufficient to establish that Union counsel's ordinary community of practice is the Washington, D.C./Baltimore area.

Contrary to the Arbitrator's conclusion, the Authority has routinely applied the rates found in the *Laffey* matrix to arbitration matters. See, e.g., *United States Dep't of the Navy, United States Naval Academy, Nonappropriated Fund Program Div.*, 63 FLRA 100, 103 (2009); *AFGE Local 1938*, 61 FLRA at 646; *United States Dep't of the Treasury, IRS, Wash., D.C.*, 48 FLRA 931, 936 (1993).

With regard to the Arbitrator's finding that Union counsel practices wherever the Union requires her services, *Corpus Christi* and its progeny do not suggest that an attorney is not entitled to community rates merely because he or she routinely practices in locations outside of his or her office's location. In addition, neither the Arbitrator nor the Agency cite any authority that supports this conclusion.

2. The *Laffey* matrix sets forth the method for determining the appropriate rate for attorneys in the Washington, D.C. area based on their qualifications and years of experience. See *Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.D.C. 1983). Use of an updated *Laffey* matrix was endorsed by the Court of Appeals in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated *Laffey* matrix prepared by the United States Attorney's Office as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. See *Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n.14, 1109 (D.C. Cir. 1995), cert. denied, 516 U.S. 1115 (1996). The matrix is regularly updated by the United States Attorney's Office for the District of Columbia. See http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_3.html.

Based on the foregoing, we conclude that the Arbitrator's determination that the Puerto Rico rate was the appropriate rate for attorney fees is contrary to law. Accordingly, we grant the Union's exception and modify the Arbitrator's award to provide attorney fees at the Washington, D.C./Baltimore rate. *See AFGE, Local 1938*, 61 FLRA at 646 (Authority modified arbitrator's award of attorney fees).

B. Agency's Exception

1. Preliminary Issue

The Agency asserts that the Arbitrator's award of travel fees and expenses should be reversed, in part, because Article 25, § 5E of the parties' agreement prohibits the Union from receiving such an award.

Under 5 C.F.R. § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. *See, e.g., United States Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003). The Agency filed an opposition to the Union's petition for attorney fees to the Arbitrator. *See* Union's Exceptions, Attach. 5. The Agency's opposition does not contain any indication that the Agency raised any argument concerning Article 25, § 5E of the parties' agreement in its opposition. Further, there is no indication in the record that the Agency raised an argument concerning Article 25, § 5E in any other form while it was before the Arbitrator. To the contrary, the record establishes that the Agency raised its argument regarding Article 25, § 5E for the first time in its exceptions. Accordingly, we find that the Agency's argument that Article 25, § 5E prohibits the award of travel fees and expenses is barred by § 2429.5.

2. The Arbitrator's award of travel fees and expenses is not contrary to law.

An attorney's time spent traveling in connection with an arbitration hearing is recoverable as part of an award of attorney fees and is compensable at an attorney's normal billing rate. *NAGE, Local R5-188*, 46 FLRA 458, 466 (1992); *see also Crumbaker v. MSPB*, 781 F.2d 191, 193 (Fed. Cir. 1986) (*modified on reh'g* at 827 F.2d 761 (Fed. Cir. 1987)). In addition, a prevailing party may receive travel and lodging expenses as part of an award of attorney fees. *See, e.g., United States Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. and Quarantine*, 53 FLRA 1688, 1693 (1998) (arbitrator's award of airfare expense upheld); *AFGE, AFL-CIO*, 49 FLRA 1666, 1670 (1994) (arbitrator's award of lodging expense upheld). However, the Authority will not uphold an award of travel fees when

the award is unreasonable. *See, e.g., United States Dep't of Def., Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 47 FLRA 1187, 1197-98 (1993) (remanding award to arbitrator to determine whether several charges, including travel time, were reasonable).

The Agency contends that the Arbitrator's award of fees and expenses for travel is unreasonable, and should therefore be reversed, because the Union would not have incurred travel fees and expenses had it obtained counsel from the site of the arbitration, Puerto Rico. The Agency does not cite any precedent that holds that an award for travel fees and expenses must be denied or reduced because a union does not select local counsel. Further, as discussed above, the Authority held in *Corpus Christi* that a union is not required to demonstrate that local counsel is unavailable in order to obtain attorney fees at the market rate where the counsel normally practices. *See Corpus Christi*, 58 FLRA at 90-91. Although *Corpus Christi* did not address the issue of travel time, it did make clear that attorney fees cannot be reduced because a union does not obtain local counsel. *See id.* As attorney fees encompass travel time, it logically follows that there is no basis for denying or reducing travel fees and expenses solely because the Union did not select local counsel. Accordingly, we find the Arbitrator's award of travel fees and expenses is not contrary to law.

VII. Decision

We grant the Union's exception and modify the Arbitrator's award of attorney fees to grant the Union attorney fees at the rate of \$305 an hour, so that the Union receives an award of \$12,473.53.³ Further, we dismiss the Agency's exception concerning Article 25, § 5E of the parties' agreement and deny the Agency's remaining exception.

3. The Authority reaches this figure by applying the *Laffey* matrix rate of \$305 per hour for thirty-eight hours of work, and by adding \$883.53 in travel expenses.