

70 FLRA No. 38

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
POLLOCK, LOUISIANA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL 1034
(Union)

0-AR-5230

DECISION

April 3, 2017

Before the Authority: Patrick Pizzella, Acting Chairman,
and Ernest DuBester, Member

I. Statement of the Case

Arbitrator Louise B. Wolitz issued a merits award sustaining the Union’s grievance because she found that a disciplinary action was not issued for just and sufficient cause, nor did it promote the efficiency of service. No exceptions were filed to this award, and it became final and binding. The Union then filed a petition for attorney fees. The Arbitrator awarded the Union attorney fees (fee award) under the Back Pay Act (BPA).¹

The issue before us is whether the fee award is contrary to the BPA, because the Arbitrator failed to provide any specific or particular findings regarding the reasonableness of the Union attorney’s hourly rate, or total hours expended. For the reasons discussed below, we dismiss the exception in part and grant in part, thereby remanding the award to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator’s Award

The Agency suspended the grievant for five days, and the Union grieved the action. The matter was

unresolved and submitted to arbitration. The Arbitrator found that the Agency violated the collective-bargaining agreement when it took over twenty-four months to discipline the grievant. The Arbitrator sustained the grievance and awarded the grievant backpay. Neither party filed exceptions, and that award became final and binding.

The Union subsequently petitioned the Arbitrator for \$52,707.13 in attorney fees. This total amount was based on 55.20 hours at a \$500 hourly rate for the senior partner; 53.25 hours at a \$350 hourly rate for the associate attorney; 39.50 hours at a \$150 hourly rate for the paralegals; and \$544.63 for total costs for meals, lodging, and photocopies. To support its petition, the Union submitted copies of previous attorney-fee awards based on similar arbitrations, which demonstrated an hourly rate between \$350 to \$400 for the senior partner; \$200 to \$250 for the associate attorney; and \$75 to \$130 for paralegals.² The Union claimed that its requested hourly rates were reasonable because they were based on the rising rates provided in the 2015 *Laffey* matrix, customary billing rates, and a “survey[of] other leading labor and employment attorneys in the geographic area surrounding Baton Rouge, L[ouisiana].”³ Further, the Union asserted that the total number of hours claimed were reasonable for work performed in the course of arbitration.

The Agency responded that the Union was not entitled to any attorney fees because “such an award is not in the interest of justice.”⁴ The Agency argued in the alternative that the fee award should be substantially reduced because the hourly rate requested was not consistent with the prevailing market rate and the number of hours claimed was not reasonable. Specifically, the Agency argued that the relevant legal market should have been the Western District of Louisiana which provided for substantially lower prevailing market rates than those the Union’s attorney requested. The Agency also argued that the Union’s billing practices suffered from “a multitude of errors” including duplicative work, blocked billing, excessive travel time, and clerical work.⁵ Finally, the Agency asserted that the hourly rate and hours expended for paralegals should be reduced.

The Arbitrator found that an award of attorney fees was warranted in the interest of justice,⁶ and stated that the Union’s attorney had “presented a detailed and itemized [i]nvoice for [p]rofessional [s]ervices to [the Union] and an itemized list of [a]dditional [c]harges

¹ 5 U.S.C. § 5596.

² Opp’n, Exs. A-F (Comparison Fee Awards).

³ Opp’n, Ex. 1, Union’s Fee Petition at 7.

⁴ Exception, Attach. B, Agency’s Response to Fee Petition (Agency Response) at 4.

⁵ *Id.* at 10.

⁶ Fee Award at 2.

for expenses.”⁷ The Arbitrator “considered the Agency’s objections, but [found] no reason to challenge anything . . . on [the Union’s i]nvoice,”⁸ and awarded the Union’s entire attorney-fees request in the amount of \$52,707.13.

The Agency filed an exception to the fee award, and the Union filed an opposition.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar one of the Agency’s arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any argument that could have been, but was not, presented to the arbitrator.⁹

In its exception, the Agency argues that the award for photocopying and transcript costs is contrary to 5 U.S.C. § 7701(g)(1) and should be set aside.¹⁰ The record provides that the Agency challenged numerous aspects of the Union’s attorney-fee petition, but did not raise this argument before the Arbitrator.¹¹ Because the Agency did not make this argument before the Arbitrator, but could have done so, it may not do so now.¹² Therefore, we dismiss the Agency’s argument against photocopying and transcript costs as barred by §§ 2425.4(c) and 2429.5 of the Authority’s Regulations.

IV. Analysis and Conclusion

The Agency argues that the Arbitrator’s fee award is contrary to the BPA.¹³ When exceptions are filed to arbitration awards involving attorney fees under the BPA, the Authority will ensure that the arbitrator complies with the applicable statutory standards.¹⁴

The Authority reviews an award of attorney fees in accordance with the standards established under 5 U.S.C. § 7701(g).¹⁵ An arbitrator must provide a fully

articulated, reasoned decision setting forth the specific findings supporting a determination on each pertinent statutory requirement.¹⁶

When an arbitrator finds an entitlement to fees, but fails to provide a reasoned decision as to the reasonable amount of attorney fees, the Authority will either modify or remand the award to the parties for resubmission to the arbitrator to make the required determinations as to reasonableness, consistent with legal requirements.¹⁷ However, in instances where it is not apparent from the record what the amount of attorney fees would have been if the arbitrator had made a proper determination, the Authority will remand the award for further proceedings.¹⁸

The Agency challenges the Arbitrator’s determination of the reasonableness of the amount of attorney fees. Specifically, the Agency argues that the fee award provides no finding regarding the reasonableness of the number of hours expended, the hourly rate for the Union’s attorney, the appropriate legal market, duplicative billing, and blocked billing practices despite the fact that all of these issues were raised by the Agency before the Arbitrator.¹⁹

The Arbitrator stated in the fee award that she “considered the Agency’s objections, but [found] no reason to challenge anything . . . on [the petition’s] [i]nvoice.”²⁰ However, in making this finding, the Arbitrator did not set forth any factual findings to support her conclusion that the Union’s attorney-fee petition was reasonable.²¹ The Authority notes that while the Union’s attorney submitted copies of his previous attorney-fee awards based on apparently similar arbitrations, these previous fee awards provided a lower customary billing rate than what the Union’s attorney requests now.²² Likewise, the Arbitrator awarded the Union’s requested attorney-fee petition for 147.95 total hours of work without making any determination as to the reasonableness of the hours expended given the

⁷ *Id.* at 3.

⁸ *Id.*

⁹ 5 C.F.R. §§ 2425.4(c), 2429.5; e.g., *AFGE, Local 3571*, 67 FLRA 218, 219 (2014).

¹⁰ Exception Br. at 13.

¹¹ See Agency Response.

¹² See *AFGE, Local 1164*, 66 FLRA 74, 77 (2011).

¹³ See Exception Br. at 3.

¹⁴ *U.S. Dep’t of VA Med. Ctr., Detroit, Mich.*, 64 FLRA 794, 796 (2010) (*VAMC*).

¹⁵ *NTEU, Chapter 32*, 68 FLRA 690, 691 (2015) (citing *U.S. Dep’t of the Navy Commander, Navy Region Haw. Fed. Fire Dep’t, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010)). *But see NAIL, Local 5*, 69 FLRA 573, 577 (2016) (noting that the manner in which attorney fees are evaluated in arbitration may warrant a fresh look to create a standard more suitable in the collective-bargaining context).

¹⁶ *AFGE, Local 2583*, 69 FLRA 538, 539 (2016) (citation omitted).

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ Exception Br. at 8.

²⁰ Fee Award at 3.

²¹ Compare *VAMC*, 64 FLRA at 797-98 (remanding where the arbitrator failed to make specific factual findings to support his conclusion), with *NAGE, Local R5-66*, 65 FLRA 452, 454-55 (upholding arbitrator’s reduction of attorney fees despite union’s claim of obtaining “truly excellent results”).

²² See Comparison Fee Awards (Union’s attorney now requests \$500 per hour for senior partners, versus the \$350-\$400 range indicated in his previous awards; \$350 per hour for associate attorneys, versus the \$200-\$250 range; and \$150 per hour for paralegal work, versus the \$75-\$130 range).

attorney's experience and the complexity of the case.²³ In light of the Agency's numerous challenges to the attorney-fee petition and the utter paucity of factual findings by the Arbitrator, we find that the Arbitrator failed to set forth sufficient factual findings to support the award of attorney fees. Therefore, we find that the Arbitrator's grant of fees is contrary to the BPA.

Because the award is contrary to the BPA, but the record is insufficient to evaluate the additional requirements of an award of attorney fees, we set aside that portion of the award and remand the award to the parties for further proceedings, absent settlement, to address the request for attorney fees and the standards under 5 U.S.C. § 7701(g).

V. Decision

We grant the Agency's exception, and remand the award to the parties for resubmission to the Arbitrator, absent settlement, as to the award of attorney fees.

²³ *VAMC*, 64 FLRA at 798 (“[T]he number of hours expended are not necessarily those reasonably expended.” (quoting *U.S. DOD, Def. Fin. & Accounting Serv.*, 60 FLRA 281, 286 (2004) (Member Pope dissenting) (internal quotation marks omitted))).