70 FLRA No. 143

UNITED STATES
DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
U.S. DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS
(Agency)

and

FEDERAL EDUCATION ASSOCIATION
(Union)

0-AR-5124
0-AR-5218
0-AR-5226
0-AR-5263
0-AR-5267
0-AR-5281
0-AR-5282
0-AR-5283

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DECISION

July 16, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

These matters involve Agency attempts to recover overpayments of various benefits (for example, housing allowances) that it believed it had made to Agency employees stationed in Europe. There is no dispute that the Agency is entitled to collect overpayments that it made to its employees. Rather, the Union argued that the Agency did not follow the procedures set forth in the Debt Collection Act (DCA)[1] and Article 45 of the parties' collective-bargaining agreement (Article 45) in collecting the overpayments and that the Agency miscalculated alleged overpayments. The Arbitrators involved in these cases found that the Agency violated collection procedures and ordered audits to ensure that the Agency had collected the proper amounts from the grievants.

While the parties engaged in continuing compliance measures to calculate exact amounts owed to either the government or the grievants, the Union submitted applications for attorney fees. Because the Arbitrators awarded attorney fees in each case, the specific question before us is whether the Union is entitled to attorney fees under the Back Pay Act (BPA).[2]

The following eight cases have been consolidated because they each present these issues:

- Case Nos. 0-AR-5124, 0-AR-5263, and 0-AR-5267: Arbitrator Daniel F. Brent;
- Case No. 0-AR-5218: Arbitrator Andrée Y. McKissick;
- Case No. 0-AR-5226: Arbitrator Christopher E. Miles; and
- Case Nos. 0-AR-5281, 0-AR-5282, and 0-AR-5283: Arbitrator John E. Sands.

As we discuss below, there is no entitlement to attorney fees under the circumstances of these cases.

II. Background and Arbitrators' Awards

Overseas teachers are entitled to living quarters or a living-quarters allowance, cost-of-living allowances, the ability to participate in Thrift Savings Plans, and other benefits (collectively "overseas allowances") for the time during which they are assigned to work overseas.[3] Department of State regulations also affect the allowances by providing that, when the cost of utilities or other allowable overseas expenses fluctuate, payments are made in even amounts, but are reconciled at the end of the annual period.[4] If, after completing the reconciliations, the Agency determines that it has overpaid an employee, it engages in debt-collection proceedings to recoup the overpayment. Those debt-collection proceedings triggered the instant grievances.

Prior to the debt-collection proceedings at issue in these cases, the parties engaged in years of arbitration concerning Agency payments of overseas allowances, and Agency attempts to recoup overpayments of allowances.[5] Based on the awards in those cases, the Union petitioned for attorney fees. In some cases, the Agency and the Union reached settlement agreements. For example, the Agency paid $522,233 to resolve fee

[1] 5 U.S.C. § 5514; 31 U.S.C. §§ 3701-3720e.

[2] 5 U.S.C. § 5596.

[3] *See* 20 U.S.C. §§ 905, 906.

[4] Dep't of State Standardized Regulations § 131.1; *see, e.g.*, *U.S. DOD Dependents Sch.*, 53 FLRA 196, 198 (1997) (describing the Agency living-quarters-allowance reconciliation process for employees paid an overseas allowance).

[5] *See, e.g.*, 0-AR-5124 Fee Award at 3.

disputes in four cases, including 0-AR-5124.[6] Audits in these cases are ongoing.

Both the DCA and Article 45 set forth debt-collection procedures. The DCA provides that, before an agency deducts money from an employee's salary for a debt owed by the employee (as here, recoupment for the allowance overpayments), the agency must provide the employee with thirty days' written notice, the opportunity to inspect relevant documents, and the opportunity for a hearing.[7] Article 45, which incorporates the DCA by reference, provides employees with the right to hearings to contest the indebtedness, and provides that petitions for such hearings stay the commencement of collection proceedings.[8]

In each grievance, the Union alleged that the Agency (1) failed to provide grievants with appropriate notice and failed to follow the right processes when it attempted to collect the debts, and (2) miscalculated the debts. In the merits awards, the Arbitrators agreed with the Union, and found that the Agency's actions violated the DCA, Article 45, and the BPA.[9] The Arbitrators ordered the Agency to conduct multistage audits of certain categories of payments to, and collections from, the grievants to determine whether over-deductions occurred.[10] The Arbitrators retained jurisdiction over each of the cases for compliance purposes and to consider possible Union petitions for attorney fees.[11]

The Agency conducted the audits that the Arbitrators had ordered, and the Union reviewed the audits for accuracy and completeness. There were deficiencies in many of the initial audits, and many needed to be redone – sometimes multiple times.

While the audits were ongoing, the Union filed attorney-fee petitions in all of the cases.[12] In none of those cases had any Arbitrator awarded any backpay to any individual grievant.

The Agency opposed the fee petitions, arguing that there was no legal basis for awarding fees. The Agency noted that the DCA does not provide for the award of attorney fees.[13] Acknowledging that attorney fees may be awarded under the BPA, the Agency argued that the BPA did not apply because the Agency had not committed unjustified or unwarranted personnel actions and because monies over-collected in debt-collection proceedings do not constitute lost pay under the BPA.[14]

In each case, the Arbitrator found that Agency collection efforts violated Article 45, the DCA, and the BPA. Each Arbitrator awarded attorney fees under 5 U.S.C. § 7701(g).[15]

The Agency filed exceptions to each award,[16] and the Union opposed those exceptions.

III. Analysis and Conclusion: The fee awards are contrary to law.

The crux of the Agency's arguments in each case[17] is that attorney fees may not be awarded because

[6] *See* 0-AR-5124 Fee Award at 3-4.
[7] 5 U.S.C. §§ 5514(a)(1), (a)(2)(A)-(B), (D).
[8] *See*, *e.g.*, 0-AR-5263 Fee Award at 6.
[9] 0-AR-5124 Fee Award at 5; 0-AR-5218 Fee Award at 9-10; 0-AR-5226 Fee Award at 1; 0-AR-5263 Fee Award at 9-10; 0-AR-5267 Fee Award at 1-2; 0-AR-5281 Fee Award at 1-2; 0-AR-5282 Fee Award at 1-2; 0-AR-5283 Fee Award at 1-2.
[10] 0-AR-5124 Fee Award at 9-10; 0-AR-5218 Fee Award at 9-10; 0-AR-5226 Fee Award at 1; 0-AR-5263 Fee Award at 9-10; 0-AR-5267 Merits Award at 1-4; 0-AR-5281 Fee Award at 1-3; 0-AR-5282 Fee Award at 1-3; 0-AR-5283 Fee Award at 1-2.
[11] 0-AR-5124 Fee Award at 8-9; 0-AR-5218 Fee Award at 12; 0-AR-5226 Fee Award at 1; *see* 0-AR-5263 Fee Award at 1-2; 0-AR-5267 Merits Award at 8; 0-AR-5281 Fee Award at 2-3; 0-AR-5282 Fee Award at 2-3; 0-AR-5283 Fee Award at 2.
[12] 0-AR-5124 Fee Award at 1-2; 0-AR-5218 Fee Award at 1; 0-AR-5226 Fee Award at 1; 0-AR-5263 Fee Award at 1-2; 0-AR-5267 Fee Award at 1-2; 0-AR-5281 Fee Award at 3; 0-AR-5282 Fee Award at 3; 0-AR-5283 Fee Award at 5.
[13] 0-AR-5124 Fee Award at 2-3; 0-AR-5218 Fee Award at 4; 0-AR-5226 Fee Award at 4-5; 0-AR-5263 Fee Award at 2-3; 0-AR-5267 Fee Award at 2-4; 0-AR-5281 Fee Award at 4-5; 0-AR-5282 Fee Award at 4-5; 0-AR-5283 Fee Award at 6-8.
[14] 0-AR-5124 Fee Award at 2-3; 0-AR-5218 Fee Award at 4; 0-AR-5226 Fee Award at 5-6; 0-AR-5263 Fee Award at 2-3; 0-AR-5267 Fee Award at 2-4; 0-AR-5281 Fee Award at 4-5; 0-AR-5282 Fee Award at 4-5; 0-AR-5283 Fee Award at 6-8, 11.
[15] 0-AR-5124 Fee Award at 18-30; 0-AR-5218 Fee Award at 8-15; 0-AR-5226 Fee Award at 16-20; 0-AR-5263 Fee Award at 18-30; 0-AR-5267 Fee Award at 8-9, 14-21, 23-26; 0-AR-5281 Fee Award at 8-21; 0-AR-5282 Fee Award at 8-21; 0-AR-5283 Fee Award at 11-22.
[16] In Case Nos. 0-AR-5226 and 0-AR-5263, the Authority's Office of Case Intake and Publication ordered the Agency to show cause why its exceptions should not be dismissed as untimely. In its response to the show-cause order in 0-AR-5226, the Agency provided evidence – the envelope that Arbitrator Miles used to serve the fee award on the Agency, postmarked by the U.S. Postal Service on August 17, 2016 – to demonstrate that the award was served on August 17, not August 15 (the date on the award). Relative to the August 17 service date, the Agency's exceptions in 0-AR-5226 were filed timely, and we consider them. In its response to the show-cause order in 0-AR-5263, the Agency provided evidence – a January 4, 2016 email from Arbitrator Brent that served the award on the parties electronically and stated that "a hard copy will be mailed to you" – that shows that the award was served on January 4, 2017, not December 29, 2016 (the date on the award). 0-AR-5263 Agency Resp. to Show-Cause Order at 1-2. Relative to the January 4 service date, the Agency's exceptions in 0-AR-5263 were filed timely, and we consider them.

neither the DCA nor Article 45 provides for attorney-fee awards and an agency's recovery of debts (in this case an overpayment of overseas allowances) from employees does not constitute a "withdrawal or reduction of . . . pay, allowances[,] or differentials."[18] "Pay, allowances, or differentials" are "pay, leave, and other monetary employment benefits to which an employee is *entitled by statute or regulation* and which are payable by the employing agency to an employee during periods of [f]ederal employment."[19]

In order to establish liability under the BPA, the party requesting relief has the burden of showing "a causal connection between" an unjustified or unwarranted personnel action and "a withdrawal or reduction in pay, allowances or differentials. This connection is shown only where 'it is clear that the violation . . . resulted in the loss of some pay.'"[20] A union is thus eligible for BPA remedies, such as attorney fees, only to the extent that it has been able to prove that grievants suffered an actual loss of pay to which they are legally entitled. Agency attempts to recoup moneys that it actually overpaid grievants, however, do not constitute unwarranted or unjustified personnel actions that result in the withdrawal or withholding of pay under the BPA.

In none of the cases has the Union shown that any of the grievants had lost pay to which they were legally entitled. Indeed, it is entirely possible that the audits will show that grievants owe the Agency a refund of overpayments. Given the lack of clear record evidence of net losses of pay or overseas allowances – and the fact that the Union has the burden of showing such losses – we find that the Union has not established an entitlement to attorney fees in these cases.

The Union also argues that because each Arbitrator found in previous awards that the Agency had violated the BPA, the Agency is collaterally estopped from challenging the awards of fees in these cases. However, it is important to note that the applicability of the BPA to debt-collection practices raises any number of sovereign-immunity issues that cannot be waived.[21] Therefore, we reject the Union's collateral-estoppel claim.[22]

For the above reasons, we set aside the fee awards as contrary to the BPA and the DCA.[23] Accordingly, we do not address the Agency's remaining exceptions.[24]

IV. Decision

We set aside the fee awards.

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[17] 0-AR-5124 Exceptions Br. at 3-4, 7-12; 0-AR-5218 Exceptions Br. at 2-9; 0-AR-5226 Exceptions Br. at 2-9; 0-AR-5263 Exceptions Br. at 3-11; 0-AR-5267 Exceptions Br. at 3-11; 0-AR-5281 Exceptions Br. at 5-11; 0-AR-5282 Exceptions Br. at 5-11; 0-AR-5283 Exceptions Br. at 5-11.

[18] *NTEU, Chapter 143*, 68 FLRA 871, 873 (2015) (citing *U.S. Dep't of the Treasury, IRS*, 66 FLRA 342, 347 (2011) (*IRS*)).

[19] 5 C.F.R. § 550.803 (emphasis added); *see generally SSA., Balt., Md. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000) (discussing meaning of "pay, allowances, or differentials").

[20] *See NTEU, Chapter 98*, 60 FLRA 448, 450 (2004) (quoting *U.S. Dep't of the Air Force, Travis Air Force Base, Cal.*, 56 FLRA 434, 437-38 (2000)).

[21] *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 962 (2015) (citing *SSA, Office of Disability Adjudication & Review, Region 1*, 65 FLRA 334, 338 (2010)).

[22] The decisions that the Union cites are distinguishable and do not provide a basis for awarding attorney fees in these cases. With regard to *U.S. DOD Dependents School – Europe*, 66 FLRA 181, 183-84 (2011), that decision addressed whether the initial merits award in 0-AR-4665 (which was a precursor to 0-AR-5124) was contrary to law. The Authority determined that it was not, because auditing grievants' overseas allowances was an appropriate remedy for the Agency's violations of the DCA and Article 45. *Id.* The Authority did not, however, address the separate issue of whether those violations gave rise to a claim for attorney fees under the BPA. Similarly distinguishable is *U.S. DOD Dependents Sch., Germany Region*, 39 FLRA 13, 19-20 (1991). That decision involved a single grievant who demonstrated that the Agency erroneously withheld money to which she was entitled. As a result of that proof, the grievant was able to establish a clear causal link between the Agency's violation and her damages – a necessary element of a BPA claim. *See NTEU, Chapter 143*, 68 FLRA at 873 (citing *IRS*, 66 FLRA at 347) (the BPA requires a causal link between an agency's violation and grievant's injury). In contrast, final Agency liability for any sum certain has not been established in any of the grievances at issue here.

[23] Member Abbott notes that the dissent seeks to complicate the matter before us by clouding and confusing the clear distinctions between "pay" and "allowances," between the "merits" and "implementation" phases of these proceedings, simple disputes in calculating and recalculating allowances and "unlawful conduct," and the circumstances under which the BPA applies and the circumstances under which the DCA applies. Dissent at 8. And though there is no entitlement to attorney fees under these circumstances, the Union was already awarded attorney fees, totaling at least half a million dollars, in those phases of these proceedings to which it was entitled to fees under the BPA.

[24] *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 68 FLRA 151, 152 (2014) (declining to address exceeded-authority exception after finding the award contrary to law).

Member DuBester, dissenting:

These cases are part of a twenty-one-year history of the Agency's failure to accurately calculate pay and other benefits to which Agency teachers are contractually and statutorily entitled. That history includes numerous arbitrations, arbitrators, and Authority decisions – all arising from related pay issues.[1] The Agency has now compounded these pay errors by violating law and contract when collecting alleged overpayments – resulting in eight more arbitrations.[2]

Bypassing the record, and misreading applicable law, the majority summarily concludes that the Union is not entitled to attorney fees accrued to respond to the Agency's continued unjustified and unwarranted personnel actions. Because the majority's opinion is contrary to the facts and law, I dissent.

The background here is critical to understanding the majority's error. Over the decades of Agency malfeasance, the parties have agreed to different processes to fix the Agency's pay errors. In some of the cases now before us, the parties jointly drafted merits awards for arbitrators – awards acknowledging the Agency's unjustified and unwarranted personnel actions, requiring full audits of the grievants' pay histories, and allowing the Union to petition for attorney fees.[3] In other cases, the parties agreed to an expedited process without full adversarial arbitration hearings[4] – agreeing that these arbitrations will result in enforceable awards in which the arbitrator retains jurisdiction to ensure compliance.[5]

The protracted history of the Agency's compounded errors has required repeated and lengthy audits of employees' pay to detect Agency mistakes depriving teachers of income and benefits, and Agency mistakes in withholding pay to offset alleged overpayments. The long and complicated pay audits have also led the parties to agree to an implementation process subject to continuing arbitral jurisdiction. In one case, the Union petitioned for fees for the "merits" phase; the Arbitrator then issued an interim award for attorney fees; the parties settled the merits-phase attorney fees; after seeking compliance and verifying the audits of grievants' pay, the Union later filed a petition for the implementation-phase fees; and, the Arbitrator issued a separate award for implementation-phase attorney fees.[6]

Whatever protocol the parties have followed, at each stage of these proceedings, Union attorneys were integral to resolving the nature and extent of the Agency's unlawful conduct. As one Arbitrator found, the history here suggests that the Agency "has intentionally avoided fixing its broken compensation system by using [Union] . . . attorneys to identify and remedy its pay problems."[7]

In the underlying merits awards, arbitrators find – and the Agency admits – that the Agency has not only failed to properly pay its teachers for decades; it has also erroneously collected alleged overpayments of pay, benefits, or allowances – alleged overpayments resulting from the very same pay issues. And in every underlying merits award, every arbitrator finds that the Agency has taken its various actions without complying with the parties' agreement or the Debt Collection Act (DCA).[8]

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[1] *U.S. DOD, Educ. Activity, U.S. DOD, Dependents Sch.*, 70 FLRA 84 (2016) (Arbitrator Andree Y. McKissick); *U.S. DOD., Dependents Sch. - Eur.*, 66 FLRA 181 (2011) (Arbitrator Andree Y. McKissick); *U.S. DOD, Educ. Activity*, 60 FLRA 254 (2004) (Arbitrator John E. Sands); *U.S. DOD, Educ. Activity, Arlington, Va.*, 60 FLRA 24 (2004) (Arbitrator Daniel F. Brent); *U.S. DOD, Educ. Activity, Arlington, Va.*, 59 FLRA 806 (2004) (Arbitrator Andree Y. McKissick); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 1009 (2000) (Arbitrator Timothy D. W. Williams); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 996 (2000) (Arbitrator Norman J. Stocker); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 887 (2000) (Arbitrator Bernard Wray); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 873 (2000) (Arbitrator James A. Gross); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 880 (2000) (Arbitrator Hugh D. Jascourt); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 836 (2000) (Arbitrator Joseph Duffy); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 779 (2000) (Arbitrator Joseph A. Sickles); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 768 (2000) (Arbitrator William A. Babiskin); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 762 (2000) (Arbitrator Maurice C. Benewitz); *U.S. DOD, Educ. Activity, Ger. Region*, 56 FLRA 755 (2000) (Arbitrator Irving N. Tranen); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 749 (2000) (Arbitrator Michael Wolf); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 744 (2000) (Arbitrator Robert T. Moore); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 711 (2000) (Arbitrator Robert Bennett Lubic); *U.S. DOD, Dependents Sch.*, 54 FLRA 773 (1998) (Earle W. Hockenberry); *U.S. DOD, Dependents Sch.*, 54 FLRA 514 (1998) (Arbitrator John J. Popular); *U.S. DOD, Dependents Sch.*, 53 FLRA 196 (1997) (Arbitrator John B. LaRocco).

[2] *See* Majority at 2.

[3] 0-AR-5281 Fee Award at 2; 0-AR-5282 Fee Award at 1-2; 0-AR-5226 Fee Award at 1.

[4] (0-AR-5263, 0-AR-5267, 0-AR-5124); 0-AR-5263 Merits Award at 4 ("Following discussions between the Arbitrator and the parties at the January, 2013 . . . hearings, the parties have agreed to resume a process in which pay disputes and other [unjustified and unwarranted personnel actions] are addressed in a procedure that does not utilize a formal full adversarial arbitration hearing to create a record chronicling the relevant facts.").

[5] 0-AR-5263 Merits Award at 4.

[6] *See* 0-AR-5124 Fee Award; 0-AR-5124 Merits Award.

[7] 0-AR 5283 Fee Award at 2.

[8] *See* 0-AR-5124 Merits Award; 0-AR-5218 Merits Award; 0-AR-5226 Merits Award; 0-AR-5263 Merits Award; 0-AR-5267 Merits Award; 0-AR-5281 Merits Award;

Specifically, it is undisputed that the Agency "repeatedly and chronically" seized payments that had been made to bargaining unit teachers without adequate notice of the nature of the debt, or the due process required by contract provision or statute.[9] The Agency also does not contest that it deducted amounts from wages that employees did not owe, or that exceeded the amounts that should have been deducted from employees' paychecks.[10] Accordingly, each arbitrator interprets the Back Pay Act (BPA), the DCA, the parties' agreement, and the record, and finds that the Agency's multiple failures to properly pay the grievants resulted in the withdrawal or reduction of pay, allowances, or differentials under the BPA.[11]

Notwithstanding the Agency's agreement to the procedures above, and notwithstanding its failure to file exceptions to the underlying merits awards,[12] the Agency now claims – and the majority agrees – that the Union is not entitled to attorney fees. Ignoring this dispute's extensive history, the Agency now asserts that there was no "withdrawal or reduction of pay" – a BPA prerequisite to awarding fees.[13]

I disagree. As Arbitrator John E. Sands finds, the Agency "raises an absurd argument."[14] It is undisputed that the Agency has committed numerous unfair and unwarranted personnel actions denying employees their pay, allowances and differentials. The fee awards at issue are a byproduct of this "pervasive and recurring pattern of arbitrary and unwarranted personnel actions."[15] Absent the Agency's malfeasance, there would have been no asserted overpayments to collect. Moreover, every erroneous Agency attempt to attach an employee's wages and benefits was an improper deprivation of employee pay because the Agency acted with "repeated" and "willful disregard" of law.[16]

The majority strains to deny fees based on the irrelevant observation that the current state of any one employee's paycheck may include an overpayment. The majority's view is premised on a deficiently literal and narrow reading of the BPA.[17] The Agency admittedly denied employees pay and made errors correcting these failed payments, but now claims that if, by its own additional errors it overpaid rather than underpaid any particular employee, the BPA does not authorize fees.

It is the Agency's responsibility to determine – accurately – the exact amount of pay the grievants would have earned had its unjustified and unwarranted personnel actions not occurred. The Agency repeatedly failed to do that here.[18] Any overpayments were the result of this failure. The work of Union attorneys in the implementation phase of these cases was to ensure that the Agency's miscalculations did not also extend to the erroneous collection of asserted overpayments.

Contrary to the majority, for purposes of evaluating entitlement to fees here, it is legally meaningless whether the result of any individual pay audit ultimately requires withholding pay to adjust for an overpayment. Any uncertainty regarding a particular employee's pay status is the result of the Agency's repeated failures to calculate proper pay for its employees.[19]

0-AR-5282 Merits Award; 0-AR-5283 Merits Award; 5 U.S.C. § 5514; 31 U.S.C. § 3716.

[9] 0-AR-5263 Fee Award at 10; 0-AR-5367 Fee Award at 10; 0-AR-5124 Fee Award at 9.

[10] 0-AR-5263 Exceptions Br. at 9 (Agency admits erroneous debt collections).

[11] *See, e.g.*, 0-AR-5263 Fee Award at 7-8, 27.

[12] The Agency did not file exceptions to the merits awards, and, therefore, did not except to the merits awards' findings that the Agency's violations of the collective-bargaining agreement and DCA resulted in withdrawal of the grievants' pay under the BPA. Although the Agency now argues that the fee awards are contrary to law because they do not satisfy the second requirement under the BPA, the Agency may not attempt to relieve itself from liability in the fee awards by relitigating findings that the Arbitrators already made in their merits awards, and which are now final and binding. Further, the fee awards do not clarify or modify the merits awards in a way that gives rise to the deficiencies alleged in the Agency's exceptions. Because the Agency's argument actually challenges the merits awards, it is untimely. *See U.S. Dep't of VA, Northport VA Hosp., Northport, NY*, 67 FLRA 325, 326 (2014).

[13] 5 U.S.C. § 5596 (an award of backpay under the BPA requires a showing that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or reduction of an employee's pay, allowances, or differentials).

[14] 0-AR-5283 Fee Award at 11.

[15] 0-AR-5263 Fee Award at 14; 0-AR-5267 Fee Award at 14; 0-AR-5124 Fee Award at 13.

[16] 0-AR-5263 Fee Award at 14; 0-AR-5267 Fee Award at 15; 0-AR-5124 Fee Award at 14.

[17] The Supreme Court has "repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute . . . 'for literalness may strangle meaning.'" *Lynch v. Overholser*, 369 U.S. 705, 710 (1962) (quoting *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946)).

[18] As one arbitrator found, the Agency "has intentionally avoided fixing its broken compensation system by using FEA's attorneys to identify and remedy its pay problems." 0-AR-5283 Fee Award at 2.

[19] The majority points to the possibility of any one employee being overpaid while disregarding the clear evidence that the Agency erroneously offset asserted overpayments. *See, e.g.*, 0-AR-5283 Merits Award at 29-32. (One employee received a debt letter, and despite invoking her DCA rights, had her pay erroneously reduced for alleged overpayments. After filing a grievance and invoking arbitration, her grievance was sustained and the Agency refunded her erroneously withheld pay). The

The majority's conclusion that there is no entitlement to attorney fees in these cases undermines the BPA's purposes. As I've written previously, Congress enacted the BPA to ensure that employees affected by unjustified or unwarranted personnel actions are made whole.[20] Denial of fees here impedes this congressional mandate.

The D.C. Circuit's statement involving another BPA issue is instructive: "It is inconceivable that Congress, after imposing vital representational duties on unions, meant to deny fee awards"[21] in these circumstances. The Union's attorneys were forced to litigate in order to account for and recover funds improperly withheld from members of its bargaining unit. The denial of fees for Union attorneys who worked hundreds of hours to respond to the Agency's unlawful and erroneous debt collections, interferes with employees' right to have the benefit of their collective bargaining representative to respond to their employer's egregious conduct.

By enacting the BPA, Congress recognized the public interest in awarding attorney fees to remedy unjustified and unwarranted personnel actions. The majority's decision is not only without legal merit. It ignores Congress' recognition of the public interest in ensuring that public employees have the right to bargaining collectively.[22]

Fifteen years ago, Arbitrator Sands aptly summarized the Agency's conduct as follows:

> The "story" of this case reads like a Franz Kafka novel. It is a frustrating tale of administrative incompetence, stonewalling, and arrogance that ill behooves this government agency. It began with a number of errors affecting bargaining unit employees' compensation; it continued with ineffective attempts to correct those errors that in some cases compounded the problems, and it concludes with a graceless effort to stonewall and leave grievants with no remedy for the harm they have suffered.[23]

Reaching beyond the record and the law, the majority denies attorney fees to which Union counsel is entitled under the BPA. The cases before us all originate from the Agency's admitted unlawful withholding of employee pay and benefits. The BPA's waiver of sovereign immunity applies to these proceedings regardless of the misleading "debt collection" label.

At this very late stage of the proceeding, the Agency's attempt to avoid paying fees is utterly baseless. The majority's willingness to embrace the Agency's effort is patently wrong. Accordingly, I dissent.

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majority makes the assumption that some employees were overpaid while ignoring the clear record evidence that the Agency made numerous erroneous attempts to collect debts that did not exist. *See, e.g.*, 0-AR-5283 Merits Award at 25-27 (Another employee received a debt letter, grieved, had her grievance sustained, and had her pay audited multiple times with wildly different results.).

[20] *AFGE, Local 342*, 69 FLRA 278, 280 (2016) (Member DuBester concurring).

[21] *Id.* (quoting *AFGE, AFL-CIO, Local 3882 v. FLRA*, 944 F.2d 922, 931 (D.C. Cir. 1991)).

[22] 5 U.S.C. § 7101 ("labor organizations and collective bargaining are in the public interest").

[23] 0-AR-5283 Merits Award at 5 (citing *DODDS v. FEA*, available on Westlaw 2003 WL 23469327).