

71 FLRA No. 130

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2342
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
BLACK HILLS HEALTH CARE SYSTEM
(Agency)

0-AR-5499

DECISION

April 13, 2020

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

I. Statement of the Case

This case concerns Arbitrator Anthony R. Orman's premature denial of attorney fees, which the Union challenges on contrary-to-law and essence grounds. Because the Arbitrator denied the request for attorney fees before the Union had an opportunity to submit a fee petition, the Arbitrator's denial of attorney fees is contrary to law. Accordingly, we modify the award to strike the denial of attorney fees, without prejudice to the Union's right to file a fee petition with the Arbitrator.

II. Background and Arbitrator's Award

The Agency suspended the grievant for five days without pay. The Union filed a grievance challenging the suspension. The parties could not resolve the matter, and the Union invoked arbitration.

At arbitration, the Union requested that "the Arbitrator retain jurisdiction for purposes of resolving any question of attorney fees" if the grievance was "sustained in whole or in part."¹ The Arbitrator rescinded the grievant's suspension, and awarded the grievant backpay. But the Arbitrator denied the Union's

attorney-fees request because he did not believe that he had the "authority to take such action."²

The Union filed exceptions to the award on April 19, 2019. The Agency did not file an opposition to the Union's exceptions.

III. Analysis and Conclusion: The Arbitrator's denial of attorney fees is contrary to law.

The Union argues that the award is contrary to law because the Arbitrator is the appropriate authority to exercise jurisdiction over the matter of attorney fees.³ When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award *de novo*.⁴ In applying the standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.⁵

The Back Pay Act (the Act)⁶ confers jurisdiction on an arbitrator to consider a request for attorney fees at any time during the arbitration or within a reasonable period of time after the arbitrator's award of backpay becomes final and binding.⁷ In other words, under the Act, the arbitrator is the "appropriate authority" to whom a request for attorney fees must be presented.⁸ Additionally, under the Act's implementing regulations, before an arbitrator may grant or deny attorney fees, a grievant or the grievant's representative must present a request for fees to the arbitrator, and the arbitrator must grant the agency the opportunity to respond to the request.⁹

Here, the Arbitrator made no finding that the Union filed a petition for attorney fees or that the Agency had an opportunity to respond to a fee petition. Rather, at arbitration, the Union requested that "the Arbitrator retain jurisdiction for purposes of resolving any question of attorney fees" if the grievance was "sustained in whole or in part."¹⁰ This "request" that the Arbitrator retain jurisdiction so that he could consider a request for

¹ Award at 29.

² *Id.* at 38.

³ Exceptions Br. at 6-12.

⁴ *Fraternal Order of Police Lodge No. 1*, 71 FLRA 6, 6 (2019) (*Police*) (citing *AFGE, Local 2002*, 70 FLRA 17, 18 (2016) (*Local 2002*)).

⁵ *Id.*

⁶ 5 U.S.C. § 5596.

⁷ *AFGE, Local 1148*, 65 FLRA 402, 403 (2010) (citing *AFGE, Council of Prison Locals*, 55 FLRA 192 (1999)).

⁸ *Local 2002*, 70 FLRA at 19 (citing 5 C.F.R. § 550. 807(a)-(b); *AFGE, Local 3749*, 69 FLRA 519, 521-22 (2016); *AFGE, Local 2002*, 69 FLRA 425, 426 (2016)).

⁹ *AFGE, Local 2198*, 71 FLRA 165, 165 (2019) (citing *Police*, 71 FLRA at 6; *Local 2002*, 70 FLRA at 18).

¹⁰ Award at 29; *see also* Exceptions Br. at 5.

attorney fees does not constitute a fee petition under the Act and its implementing regulations.¹¹

Thus, we find that the Arbitrator has jurisdiction to consider the Union’s request for attorney fees and, consistent with Authority precedent and the Act’s implementing regulations, we find that he prematurely denied the Union attorney fees.¹² Accordingly, we modify the award to strike the denial of attorney fees without prejudice to the Union’s right to file a fee petition with the Arbitrator.¹³

IV. Decision

We grant the Union’s contrary-to-law exception and modify the award to strike the denial of attorney fees.

Member Abbott, concurring:

I agree that the attorney’s fee matter is properly returned to the parties because the Arbitrator’s determination on attorney fees is premature.

However, as I have noted before, the Authority does not “facilitate[] . . . the amicable settlement[] of disputes”¹ when we are less than clear and fail to provide consistent guidance in our decisions. I would thus remand this matter with clear instructions that the petition and award, if any, must be examined in light of our recent decisions in *AFGE, Local 1633*,² and *AFGE, Local 2076*.³

¹¹ *Police*, 71 FLRA at 7.

¹² *See id.* at 6-7 (modifying award to strike denial of attorney fees where union did not have opportunity to submit fee petition); *see also AFGE, Local 2663*, 70 FLRA 147, 147-48 (2016) (*Local 2663*) (Member Pizzella concurring) (same); *AFGE, Local 2145*, 67 FLRA 438, 439 (2014) (*Local 2145*) (Member Pizzella concurring) (same).

¹³ *See Police*, 71 FLRA at 6-7; *see also Local 2663*, 70 FLRA at 147-48; *Local 2145*, 67 FLRA at 439. Because we have found that the Arbitrator’s denial of attorney fees is contrary to law, we find it unnecessary to address the Union’s essence exception. *Local 2002*, 70 FLRA at 19.

¹ 5 U.S.C. § 7101(a)(1)(C).

² 71 FLRA 211 (2019) (Member Abbott concurring; Member DuBester concurring in part and dissenting in part) (clarifying which *Allen* factors the “interest of justice” analysis should focus on in non-discipline cases).

³ 71 FLRA 221 (2019) (Member DuBester concurring in part and dissenting in part) (clarifying how to apply *Allen* factor (5) – whether agency “knew or should have known” that its action would not be sustained – in minor discipline cases).