

71 FLRA No. 176

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

0-AR-5595

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DECISION

August 13, 2020

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

I. Statement of the Case

This case concerns an arbitrator's premature denial of attorney fees. Arbitrator Diane S. Mulligan issued an award that rescinded two reprimands and reduced a five-day suspension to a reprimand, but summarily denied attorney fees. The Union challenges the denial of attorney fees on the ground that it is contrary to law. Because the Arbitrator ruled on the attorney-fee issue before the Union submitted a fee request, we find that the award is inconsistent with the Back Pay Act (the Act)¹ and its implementing regulations. Accordingly, we modify the award to strike the denial of attorney fees.

II. Background and Arbitrator's Award

The Union filed a grievance challenging two reprimands and a five-day suspension that the Agency imposed on the grievant. The parties were unable to resolve the grievance, and it proceeded to arbitration. The issues before the Arbitrator were: "Did [the Agency] violate the [parties'] [c]ollective[-b]argaining [a]greement . . . when it reprimanded and suspended the [g]rievant? If so, what is the remedy?"²

At arbitration, the Union requested, and the Agency agreed, that the Arbitrator retain jurisdiction over the issue of attorney fees for consideration after issuance of the merits award.

The Arbitrator found that the Agency had not met its burden with regard to the two reprimands or the five-day suspension. Thus, she rescinded the reprimands and mitigated the suspension to a reprimand. As a remedy, the Arbitrator awarded the grievant backpay, but concluded that "[n]o attorney's fees are awarded."³ The Arbitrator did not provide any explanation for that conclusion.

On February 21, 2020, the Union filed exceptions to the award, and, on March 20, 2020, the Agency filed 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 summarily denied attorney fees before the Union filed a petition for attorney fees.⁴ The Union requests that the Authority remand the issue of attorney fees to the parties, for submission to the Arbitrator, for proper consideration.⁵ In its opposition, the Agency "agrees that the Arbitrator's award is deficient in that it does not indicate any justification or rationale for denying attorney fees."⁶

When an exception involves an award's consistency with law the Authority reviews the question of law de novo.⁷ 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.⁸

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

³ *Id.* at 12.

⁴ Exceptions Br. at 4-5.

⁵ *Id.* at 6.

⁶ Opp'n at 3-4 (also noting that it does not disagree with any arguments that the Union makes in the exceptions).

⁷ *AFGE, Local 2002*, 70 FLRA 17, 18 (2016) (*AFGE*) (citing *AFGE, Local 2002*, 69 FLRA 425, 426 (2016) (*Local 2002*)).

⁸ *Id.* (citing *Local 2002*, 69 FLRA at 426).

¹ 5 U.S.C. § 5596.

² Award at 2.

request.⁹ Here, it is undisputed that the Union did not submit a fee petition or otherwise request an award of fees as part of the merits award.¹⁰ Instead, the Union requested, and the Agency agreed, that the Arbitrator retain jurisdiction over the attorney-fee issue.¹¹ As the Authority recently stated, a request that an arbitrator retain jurisdiction to consider a request for attorney fees “does not constitute a fee petition under the Act and its implementing regulations.”¹²

Because the Union never made a fee request to the Arbitrator, and the Agency did not have an opportunity to respond to any such request, we find that the Arbitrator’s denial of attorney fees was premature under the Act.¹³ 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.¹⁴

IV. Decision

We grant the Union’s contrary-to-law exception and modify the award to strike the denial of attorney fees.¹⁵

⁹ 5 C.F.R. § 550.807(a)-(b); *see, e.g., AFGE, Council of Prison Locals, Local 405*, 67 FLRA 395, 398-99 (2014) (“The Authority has consistently held that an arbitrator may not deny attorney fees in the absence of a fee request.”); *see also AFGE, Local 2342*, 71 FLRA 692, 692-93 (2020) (*Local 2342*) (Member Abbott concurring); *AFGE*, 70 FLRA at 18-19; *Local 2002*, 69 FLRA at 426.

¹⁰ Exceptions Br. at 4; *see also* Opp’n at 4 (stating that the “Arbitrator could have let the parties address the issue of [a]ttorney[] fees after she made her ruling, as was originally discussed”).

¹¹ Exceptions Br. at 4; Opp’n at 4.

¹² *Local 2342*, 71 FLRA at 692-93 (citation omitted).

¹³ *See id.* at 693 (citation omitted) (finding that arbitrator prematurely denied the attorney fees because union never made a fee request); *AFGE, Local 2663*, 70 FLRA 147, 148 (2016) (Member Pizzella concurring) (same); *AFGE, Local 2145*, 67 FLRA 438, 439 (2014) (Member Pizzella concurring) (same); *U.S. Dep’t of the Army, Red River Army Depot, Texarkana, Tex.*, 54 FLRA 759, 761-62 (1998) (same).

¹⁴ *See Local 2342*, 71 FLRA at 693 (modifying award to strike the denial of attorney fees without prejudice to union’s right to file a fee petition with arbitrator).

¹⁵ Member Abbott notes that he would remand the case to the arbitrator with instructions that the petition and any award must be examined in light of *AFGE, Local 1633*, 71 FLRA 211 (2019) (Member Abbott concurring; Member DuBester concurring in part and dissenting in part) and *AFGE, Local 2076*, 71 FLRA 221 (2019) (Member DuBester concurring in part and dissenting in part).