

72 FLRA No. 132

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VA HOSPITAL MEDICAL CENTER
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 0789
(Union)

0-AR-5593

DECISION

March 3, 2022

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

I. Statement of the Case

In this case, we conclude that Arbitrator Jacalyn J. Zimmerman's award of attorney fees is consistent with the Back Pay Act (BPA)¹ and that fees were warranted in the interest of justice.²

The Agency argues that the award of attorney fees is contrary to the BPA and that it is not in "interest of justice" under 5 U.S.C. § 7701(g)(1). The Agency also argues that the award is contrary to law because the Union did not file a timely motion for attorney fees and that the Arbitrator was functus officio and erred by considering the untimely motion. We find that the award of attorney fees is not contrary to the BPA because the Agency admitted that the grievant's corrected rating necessitated a performance award and the Agency subsequently provided the grievant with a performance award. Additionally, we find that the

¹ 5 U.S.C. § 5596.

² As expressed in *U.S. Marine Corps, Marine Corps Air Ground Combat Center, Twentynine Palms, California*, Member Abbott believes that all Authority decisions should be drafted and issued in a gender-inclusive manner and that the Authority should establish policies that require parties to incorporate gender-neutral language in filings submitted to the Authority. As such, this decision is drafted in a gender-neutral fashion. 72 FLRA 473, 473 n.1 (2021) (Chairman DuBester dissenting on other grounds).

Agency's remaining arguments are without merit. Therefore, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated the parties' agreement by issuing an unsatisfactory evaluation for the grievant's 2013 rating, failing to provide the grievant a required mid-term progress review, not informing the grievant of how performance was measured, and lowering the grievant's rating in a critical element to "fully successful" without justification.³ Following arbitration, the Arbitrator emailed an award (the merits award) to the parties on July 16, 2015 and sustained the Union's grievance. In the merits award, the Arbitrator ordered the Agency to change the grievant's performance rating to "excellent."⁴ Neither party filed exceptions and, consistent with the merits award, the Agency issued the grievant a revised performance appraisal with a higher rating in the challenged critical element and a higher overall rating. Additionally, the Agency provided the grievant with a \$1,000 performance award, which correlated with the overall rating of "excellent."⁵

On September 15, 2015, the Union filed a motion for attorney fees. The Union argued that an award of fees was warranted because the Agency committed an unwarranted and unjustified personnel action under the BPA by failing to fairly and accurately rate the grievant according to the established performance standards. In its response to the Union's motion, the Agency argued, as relevant here, that the fee petition was untimely filed, attorney fees were not warranted in the interest of justice, and that the amount of requested fees was not reasonable. In this response, the Agency stated that the merits award "entitled the [g]rievant to a rating of excellent and an award of \$1000, both of which were received."⁶ However, in a subsequent filing, the Agency changed its characterization of the performance award and argued that because the Agency only paid the award at its "discretion," there was no qualifying award of backpay entitling the Union to attorney fees under the BPA.⁷

Following multiple filings from both parties, the Arbitrator issued a supplemental award of attorney fees (the fee award) in response to the Union's motion for attorney fees. Initially, the Arbitrator found that the motion for attorney fees was timely. The Agency argued that because the Arbitrator had retained jurisdiction for

³ Fee Award at 2-3.

⁴ *Id.* at 3.

⁵ *Id.*

⁶ Exceptions, Attach. 4, Agency Resp. to Union's Mot. for Attorney Fees & Expenses (Agency Resp.) at 1.

⁷ Exceptions, Attach. 3, Agency Second Resp. at 1-2.

sixty days in the merits award to resolve remedial disputes, the Union was required to file its motion no later than September 14, 2015. In response, the Arbitrator noted that the merits award was electronically served on July 16, 2015 at 7 p.m. Because the merits award was served after business hours, the Arbitrator determined that the date of service for the merits award was July 17, 2015. Accordingly, the Arbitrator held that the Union's motion was timely because it was filed on September 15, 2015—which is sixty days after service of the merits award. Furthermore, the Arbitrator noted that Authority precedent dictates that an attorney-fee request must only be filed within a reasonable time after the backpay award becomes final. Because the Union filed its motion less than thirty days after the merits award became final, the Arbitrator found that the motion was timely.

The Arbitrator then considered whether the interest of justice entitled the Union to attorney fees. Relying upon the standards in *Allen v. U.S. Postal Service*⁸ and the Authority's subsequent guidance⁹ the Arbitrator ultimately granted the Union's motion, determined that a fee award was in the interest of justice, and found that the amount sought by the Union was reasonable. In making those determinations, the Arbitrator relied on the fact that the Agency "was unable to produce a single witness or piece of evidence to support" the Agency's lowering of the grievant's rating in the disputed critical element.¹⁰

The Arbitrator rejected the Agency's argument that there was no underlying backpay entitling the Union to attorney fees under the BPA. The Arbitrator determined that the Agency waived this argument by raising it too late in the process. The Arbitrator also found that the grievant was awarded backpay as a result of the merits award because the Agency had acknowledged that the grievant's corrected rating necessitated a performance award and the Agency subsequently provided the grievant with a performance award.¹¹ The Arbitrator awarded a total of \$30,387.50 in attorney fees.

The Agency filed exceptions to the fee award on February 11, 2020 and the Union filed an opposition on March 16, 2020.

⁸ 2 M.S.P.R. 420 (1980).

⁹ See *AFGE, Loc. 1633*, 71 FLRA 211 (2019) (*Loc. 1633*) (Member Abbott concurring; then-Member DuBester concurring in part and dissenting in part).

¹⁰ Fee Award at 18.

¹¹ See *id.* at 16 (finding that the Agency "conceded that the [g]rievant was entitled" to the performance award and concluding that the performance award "automatically flowed from the [g]rievant's upgraded performance rating" under an Agency policy).

III. Analysis and Conclusions

A. The fee award is not contrary to the BPA or § 7701(g)(1).

The Agency argues that the fee award is contrary to the BPA because the Arbitrator did not award any backpay to the grievant in the underlying merits award.¹² According to the Agency, because the merits award only directs the Agency to change the grievant's rating, the Agency's discretionary payment of a performance award cannot constitute the requisite "pay, allowance[s,] or differential[s]" for awarding attorney fees under the BPA.¹³ Additionally, the Agency argues that the fee award is not in the interest of justice because "the Agency did produce evidence as to why [it] felt a fully successful rating was justified."¹⁴

The threshold requirement for an entitlement to attorney fees under the BPA is a finding that an employee was affected by an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials.¹⁵ Furthermore, the Authority has previously held that awards of attorney fees under the BPA must be in conjunction with an award of pay, allowances, or differentials.¹⁶

Here, the Agency does not address the Arbitrator's finding that it waived the argument that the grievant was not awarded backpay because the Agency raised this argument too late in the arbitration process. Additionally, the Arbitrator noted that the Union's grievance sought "the appropriate performance award."¹⁷ The Arbitrator sustained the grievance in its entirety and the Agency subsequently issued a \$1,000 monetary award in response to the merits award.¹⁸ Based on these findings, the Arbitrator found that "the [g]rievant was entitled to the performance award as a remedy for the

¹² Exceptions at 8.

¹³ *Id.* 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. *U.S. Dep't of the Navy, Commander, Navy Region Sw., San Diego, Cal.*, 70 FLRA 978, 978 (2018) (*Navy San Diego*) (Member Abbott concurring). 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. *Id.* In making that assessment the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *Loc. 1633*, 71 FLRA at 212 n.12.

¹⁴ Exceptions at 8.

¹⁵ 5 U.S.C. § 5596(b)(1).

¹⁶ See *NTEU*, 69 FLRA 614, 618 (2016).

¹⁷ Fee Award at 2.

¹⁸ *Id.* at 2-3.

contract violation found” in the merits award.¹⁹ The Agency also expressly conceded that “[t]he [merits a]ward entitled the [g]rievant to a rating of excellent and an award of \$1000, both of which were received (by the [g]rievant).”²⁰ Moreover, the Agency failed to provide the Authority with a copy of the merits awards to support its claim that the merits award did not award any backpay.²¹ Therefore, we find that the Agency fails to demonstrate that the fee award is contrary to the BPA.

The Agency’s exceptions also do not establish that the fee award is not in the interest of justice under 5 U.S.C. § 7701(g)(1). The Agency argues that fees are not warranted because the Agency produced evidence that showed its actions were justified.²² However, the Agency only makes generalized claims and it does not cite to or otherwise provide any specific evidence to support its assertions.²³ Consequently, we find that the

Agency’s scant arguments simply constitute mere disagreement with the Arbitrator’s evaluation of the evidence and testimony, and that the Agency has failed to establish that the fee award is not in the interest of justice.²⁴

As the Agency has failed to establish that the fee award is contrary to either the BPA or § 7701(g)(1), we deny the Agency’s exceptions.

- B. The Agency fails to demonstrate that the motion for attorney fees was untimely filed or that the Arbitrator was *functus officio*.

In the merits award, the Arbitrator retained jurisdiction for sixty days “for the sole purpose of resolving disputes concerning the remedy,”²⁵ but the Arbitrator did not award any attorney fees in the merits award.²⁶ In contrary-to-law and exceeded-authority exceptions, the Agency argues that the Arbitrator’s jurisdiction had expired and the Union’s fee petition was therefore untimely.²⁷ Specifically, the Agency argues that the Arbitrator was *functus officio* and that the Arbitrator’s conclusion that the fee petition was timely is contrary to the Authority’s Regulations and the Federal Rules of Civil Procedure.²⁸ Because the merits award was electronically served on July 16, 2015 and the Union electronically served its motion for attorney fees on September 15, 2015, the Agency asserts that Union did not timely file its motion for attorney fees within sixty days of the merits award.²⁹

The Arbitrator correctly noted that an attorney-fee request must only be filed within a “reasonable time” after the backpay award becomes final and binding.³⁰ The Arbitrator then stated that the merits award became final on or about August 17, 2015—when the exceptions-filing period elapsed.³¹ Because the

¹⁹ *Id.* at 16 (“The [e]mployer filed no exceptions to my award, and never disputed that the [g]rievant was entitled to the performance award as a remedy for the contract violation found.”).

²⁰ *Id.* at 5 (emphasis added in Fee Award); *see also id.* at 14 (“In its initial response to the Union’s [m]otion for fees, the [Agency] did not dispute that there was an award of backpay in this matter. On the contrary, it stated that the award ‘entitled’ the [g]rievant to a \$1000 award, which it had paid [the grievant].”).

²¹ 5 C.F.R. § 2425.4 (excepting party must ensure that exceptions are “self-contained” and include “[l]egible copies of any documents . . . that you reference in the arguments . . . and that the Authority cannot easily access”); *see U.S. Dep’t of VA, James A. Haley Veterans Hosp.*, 71 FLRA 699, 699-700 (2020) (then-Member DuBester dissenting on other grounds) (“[B]ecause the [excepting party] failed to meet its obligation under the Authority’s regulations by supporting these exceptions with the necessary documents, we deny them as unsupported.”); *U.S. Dep’t of VA, John J. Pershing Veterans Admin.*, 71 FLRA 511, 512 (2020) (denying exception as unsupported where excepting party failed to provide the Authority with necessary supporting documents); *AFGE, Loc. 12*, 68 FLRA 754, 755 (2015) (then-Member DuBester dissenting on other grounds) (denying essence exception where the pertinent CBA wording was not recited in the award and the excepting party failed to provide a copy of the cited CBA provision); *U.S. DOJ, Fed. BOP, Corr. Inst., McKean, Pa.*, 49 FLRA 45, 49 (1994) (same).

²² Exceptions at 8.

²³ *Id.*; *see* 5 C.F.R. § 2425.6(e)(1) (providing that an exception “may be subject to . . . denial if: [t]he excepting party fails to . . . support” it); *U.S. Dep’t of the Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338, 340 n.24 (2019) (then-Member DuBester concurring) (denying as unsupported exception challenging the sufficiency of attorney billing records when the excepting party did not provide the Authority a copy of the records at issue, and reminding the parties that “exceptions must be accompanied by any relevant documents that the Authority cannot easily access, such as exhibits presented during arbitration”).

²⁴ *AFGE, Council of Prison Locs. 33, Loc. 3690*, 69 FLRA 127, 129 (2015) (“[T]he Authority has held that a disagreement with an arbitrator’s evaluation of evidence provides no basis for finding an award deficient.”).

²⁵ Fee Award at 8.

²⁶ *Id.* at 2.

²⁷ Exceptions at 8, 42.

²⁸ *Id.*; *see* Fed. R. Civ. P. 5(b)(2)(E).

²⁹ Exceptions at 8. As stated above, 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*. *Navy San Diego*, 70 FLRA at 978. 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. *Id.*

³⁰ Fee Award at 9 (citing *AFGE, Loc. 44, Nat’l Joint Council of Food Inspection Locs.*, 67 FLRA 721, 722 (2014) (*Loc. 44*) (Member Pizzella dissenting)).

³¹ *Id.*

Union filed its request within thirty days from that date, the Arbitrator concluded that the Union's motion was filed within a reasonable time.³² The Agency does not claim that the parties agreed to establish a sixty-day deadline for motions requesting attorney fees.³³ Therefore, we agree that the Union was only required to file a motion for attorney fees within a reasonable time after the merits award became final—not within sixty days of the merits award.³⁴ As a result, the Agency's exception fails to demonstrate that the Arbitrator's timeliness findings are contrary to law.³⁵ Furthermore, the Authority has also held that "the *functus officio* doctrine does not preclude an arbitrator from considering" a fee request in such circumstances.³⁶ Therefore, we deny the Agency's exceptions.

IV. Decision

We deny the Agency's exceptions.

³² *Id.*

³³ *See Loc. 44*, 67 FLRA at 722 ("Parties may agree to establish a time period governing when an attorney-fee request may be filed with an arbitrator. However, [where] there is no indication in the record that the parties agreed to an established time period . . . , a request for attorney fees may be filed during an arbitration hearing or within a reasonable time after a backpay award becomes final and binding.").

³⁴ *See id.*; *Phila. Naval Shipyard*, 32 FLRA 417, 421 (1988) (*Naval Shipyard*).

³⁵ *Loc. 44*, 67 FLRA at 722. Regarding the Agency's reliance on the Authority's Regulations and the Federal Rules of Civil Procedure, we note that: (1) the Agency conceded that the cited regulation applied to filing exceptions, not attorney-fee petitions, Exceptions at 8; and (2) the Authority has long held that the Federal Rules of Civil Procedure do not apply in federal sector arbitrations. *U.S. Dep't of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.*, 57 FLRA 280, 285 (2001) ("[W]e note that the Authority's long-standing precedent does not require that arbitration proceedings be governed by the Federal Rules of Civil Procedure. In so holding, the Authority has noted that the Federal Rules were designed to govern procedures in the United States district courts and do not purport to be applicable in administrative proceedings." (internal citations omitted)).

³⁶ *Naval Shipyard*, 32 FLRA at 421.