72 FLRA No. 133

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ASHLAND, KENTUCKY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1286
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5719

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DECISION

March 4, 2022

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

I. Statement of the Case

Arbitrator Jay Nadelbach issued a merits award finding that the Agency violated the Fair Labor Standards Act (FLSA)[1] and the parties' collective-bargaining agreement. The Arbitrator retained jurisdiction indefinitely to resolve implementation issues, including the amount of attorney fees, and set a deadline for an attorney-fee petition (petition). The Union submitted a petition one day after the deadline. The Arbitrator excused the Union's late petition and awarded the Union the entire attorney fees that it requested. The Agency filed exceptions to the fee award on contrary-to-law grounds, alleging that the Arbitrator was functus officio and that the fee award lacks the necessary specificity. We find that the Arbitrator was not functus officio, but that the fee award is deficient as alleged.

II. Background and Arbitrator's Awards

Certain aspects of the background are more fully explained in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Ashland, Kentucky* (*Ashland*).[2]

The Union filed a grievance alleging the Agency violated the parties' agreement and the FLSA. The parties could not resolve the dispute and proceeded to arbitration, and the Arbitrator issued a merits award sustaining the grievance. The Arbitrator retained jurisdiction "for the limited purpose of resolving any issues that may arise in the implementation of the remedy granted," including the "appropriate calculation of the overtime compensation and damages amount, as well as attorney fees."[3] The Arbitrator also directed the Union to submit a request for attorney fees "within forty-five . . . calendar days of the issuance of the [a]ward."[4]

The Agency filed exceptions to the merits award. On October 1, 2020, the Authority denied the Agency's exceptions in *Ashland*.[5] The Union subsequently filed the petition on November 16, 2020.[6]

In response, the Agency asserted that the Union filed its petition after the forty-five-day deadline that the Arbitrator had established in the merits award. Specifically, the Agency argued that the Union should have filed its petition no later than November 15, 2020 – forty-five days after October 1, 2020, when the merits award became a final award. The Arbitrator acknowledged that the merits award directed the Union to file a petition within forty-five days. However, the Arbitrator found that the Union's delay was "understandable" because the parties were "attempting to resolve" the attorney-fee issue and there was no reason to incur additional attorney fees by litigating a petition while settlement discussions were pending.[7] The Arbitrator further found that the Union had notified the Agency that, despite settlement negotiations, the Union was reserving its right to file a petition.

After reviewing the parties' arguments and the evidence submitted in support of the petition, the Arbitrator found that the requested hourly rates were

[1] 29 U.S.C. §§ 201-219.
[2] 71 FLRA 997 (2020).
[3] Fee Award at 2.
[4] *Id.* at 1.
[5] 71 FLRA at 997-98.
[6] We note that the fee petition lists November 16, 2020 on the first page and states that it contains "entries up to and including November 16, 2020." Exceptions, Attach. B, Union's Initial Att'y Fee Pet. at 1, 2 n.1. However, the petition also states that it was submitted on October 16, 2020, and the certificate of service indicates that the petition was served on the Agency and the Arbitrator on October 16. *Id.* at 2, 12; *see also* Fee Award at 2. Because the Arbitrator treated the petition as filed on November 16, 2020, Fee Award at 5, and the Union does not dispute that the petition was filed on that date, Opp'n Br. at 6-7, we find that the record demonstrates that the Union filed the petition on November 16. *See also* Opp'n Br. at 2 ("[The Union] submitted its first request for attorney fees on November 16, 2020.").
[7] Fee Award at 7.

reasonable and in line with the prevailing market rate in the relevant community. Therefore, the Arbitrator awarded the Union the entire requested amount of $145,508.25.

On March 31, 2021, the Agency filed exceptions to the fee award, and on May 5, 2021, the Union filed an opposition.

III. Analysis and Conclusions

A. The Arbitrator was not functus officio.

The Agency argues that the award violates the doctrine of functus officio.[8] Specifically, the Agency argues that the Arbitrator became functus officio forty-six days after the merits award became final, and, as a result, the Arbitrator "was no longer allowed to entertain requests, make clarifications[,] or make additional findings."[9]

Under the doctrine of functus officio, once an arbitrator resolves matters submitted to arbitration, the arbitrator is generally without further authority.[10] The Authority has found that Arbitrators that impose limitations on their retentions of jurisdiction, and fail to observe those self-imposed limitations, violate the doctrine of functus officio.[11] However, the Authority has held that where an arbitrator has statutory jurisdiction to consider an attorney-fee request, "the functus officio doctrine does not preclude the arbitrator from considering [a fee] request."[12]

The Agency erroneously bases its claim that the Arbitrator was functus officio on a deadline that the Arbitrator imposed *on the Union* to submit a petition.[13] Contrary to the Agency's argument, the merits award did not set a deadline for the Arbitrator's jurisdiction. Rather, the Arbitrator retained jurisdiction indefinitely to resolve implementation issues, including the attorney-fee issue.[14] And the Agency did not file an exception to the merits award challenging the Arbitrator's retention of jurisdiction. Therefore, the Arbitrator still maintained jurisdiction over the unresolved attorney-fee issue.[15]

[8] Exceptions Br. at 6-11. The Authority reviews questions of law raised by exceptions to an arbitrator's award de novo. *U.S. DOL, Off. of Workers' Comp.*, 72 FLRA 489, 490 (2021) (*DOL*) (Member Abbott concurring) (citing *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021) (*NFFE*)). In applying a standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* (citing *NFFE*, 72 FLRA at 306-07).

[9] Exceptions Br. at 7.

[10] *NTEU*, 70 FLRA 57, 61 (2016).

[11] *See U.S. DOD, Dependents Schs.*, 49 FLRA 120, 123 (1994) (where the arbitrator limited jurisdiction to sixty days, with the caveat that any unresolved issues would be brought to hearing, the arbitrator violated the doctrine of functus officio by issuing another award – after the sixty days elapsed and without holding a hearing – that reversed the arbitrator's previous findings).

[12] *DOL*, 72 FLRA at 491 (quoting *Ala. Ass'n of Civilian Technicians*, 52 FLRA 1386, 1388 (1997) (*Alabama*)) (Back Pay Act confers statutory jurisdiction to consider an attorney-fee request); *see also AFGE, Nat'l Border Patrol Council, Loc. 2554 & 2595*, 70 FLRA 52, 54 (2016) (*Local 2554*) (then-Member DuBester dissenting in part on other grounds) (arbitrator had jurisdiction under the FLSA to consider a fee petition and determine whether the petition filed more than three years after merits award was final was timely).

[13] In the merits award, the Arbitrator stated that "Union counsel, within forty-five (45) days of the issuance of the [a]ward herein, shall submit for approval to the undersigned Arbitrator a written request for attorney fees together with an itemized billing statement in support of the request." Fee Award at 1 (quoting merits award).

Chairman DuBester notes that, while acknowledging that the merits award directed the Union to file a petition within forty five days, the Arbitrator excused the Union's one-day delay in filing the petition. On this point, the Arbitrator found the delay "understandable" as the parties were attempting to resolve the matter and "there was no reason for Union counsel to expend even more time to file a [p]etition." Fee Award at 7. And in deciding to consider the petition, the Arbitrator properly exercised discretion over a procedural matter in an arbitration proceeding over which the Arbitrator had jurisdiction. *See* Elkouri & Elkouri, *How Arbitration Works* 7-4 (Kenneth May ed., 8th ed. 2016) ("'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator" (quoting *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964); citing *AFGE, Loc. 916*, 34 FLRA 850, 853 (1990) (arbitrator's refusal to allow "sufficient" time for briefs is within arbitrator's discretion)); *see also U.S. Dep't of the Air Force, Randolph Air Force Base, Tex.*, 45 FLRA 727, 734-35 (citing *U.S. Dep't of HHS, SSA, Off. of Hearings & Appeals*, 39 FLRA 407, 413 (1991)) (finding award not deficient where arbitrator accepted agency brief submitted after filing deadline).

[14] Fee Award at 2.

[15] *See, e.g.*, *DOL*, 72 FLRA at 491-92; *Local 2254*, 70 FLRA at 54 (arbitrator retained indefinite jurisdiction over attorney-fee issue and thus had authority to decide that union's attorney-fee petition – filed three years after merits award became final – was untimely); *cf. NFFE, Loc. 405*, 67 FLRA 352, 352-53 (2014) (finding arbitrator erred in finding he was functus officio because Back Pay Act confers statutory jurisdiction for arbitrators to consider a fee request within a reasonable period of time after backpay award becomes final and binding); *Alabama*, 52 FLRA at 1388 (same).

Accordingly, the Agency fails to establish that the award is contrary to law because the Arbitrator was functus officio.[16]

B. The fee award lacks the required specificity.

The Agency also argues that the award is contrary to law because the Arbitrator failed to make specific findings to support the fee award.[17] The Authority has held that arbitrators must support a fee award under the FLSA with specific findings to support their conclusions.[18] When an award fails to provide specific findings as to the reasonable amount of attorney fees, the Authority will modify the award or, if there is insufficient evidence in the record, remand the award to the parties for resubmission to the arbitrator to make the required determinations.[19]

Here, the Arbitrator merely stated that the awarded "hourly rates and total legal charges" were based on a review of the "claimed legal fees" and "the attorneys' years of service, experience, specialties and practice areas, and prior rates charged and approved in all previous cases" provided by the Union.[20] The Arbitrator further stated that the fees were "in accordance with the prevailing market rates in the relevant community," but did not identify the rate.[21] These conclusory statements are insufficient. Additionally, the Arbitrator made no determination as to the reasonableness of the hours expended. Accordingly, we find that the Arbitrator failed to set forth sufficient factual findings to support the fee award.[22]

Because the record is insufficient to evaluate the reasonableness of the fees, we set aside that portion of the award and remand the award to the parties for further proceedings, absent settlement.

IV. Decision

We deny the exceptions, in part, and grant them, in part. We remand the award to the parties for further proceedings, absent settlement, as to the requested amount of attorney fees.

[16] Member Abbott notes that outcome of this case is based on the Agency's failure to make the correct argument. The Agency *did not* advance an exceeds-authority exception based on the Arbitrator's failure to dismiss the Union's petition for attorney fees because it was filed after the forty-five-day deadline. *See generally* Exceptions Br. at 6-14; *see also* Fee Award at 1 ("Union counsel, within forty-five (45) calendar days of the issuance of the Award herein, shall submit for approval to the undersigned Arbitrator a written request for attorney fees together with an itemized billing statement in support of the request." (quoting merits award)). Because the Agency failed to make this argument, the Authority is constrained to allow the fee award to stand, even though the petition is clearly untimely. *See* Fee Award at 7 (finding the fee petition timely even though it was filed after the forty-five-day deadline); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 790, 791 (2020) (then-Member DuBester dissenting) (finding in the essence context that when parties agree to a procedural deadline – with no mention of any exception – the parties must adhere to that deadline).

[17] Exceptions Br. at 11-14.

[18] *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Carswell, Tex.*, 65 FLRA 960, 967 (2011) (stating that the Authority applies the specificity requirements for fees under the Back Pay Act and other fee-shifting statutes to fee awards under the FLSA).

[19] *Id.*; *see also AFGE, Loc. 987*, 66 FLRA 143, 148 (2011) (remanding a fee award under the FLSA where arbitrator did not make findings as to what constituted a reasonable amount of attorney fees and the Authority could not determine reasonable amount from the record).

[20] Fee Award at 7-8.

[21] *Id.*

[22] *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 70 FLRA 195, 196-97 (2017) (noting that union's submission of previous fee awards were based on lower hourly rates, and finding arbitrator failed to set forth sufficient factual findings where she merely stated that she considered agency's objections to amount of fees and found the amount requested reasonable); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 56 FLRA 477, 479 (2000) (finding arbitrator failed to make specific findings supporting attorney-fee award where arbitrator merely stated she considered attorney-fee petition and arguments in opposition).