

73 FLRA No. 90

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3184
(Union)

and

SOCIAL SECURITY ADMINISTRATION
(Agency)

0-AR-5814

DECISION

March 9, 2023

Before the Authority: Susan Tsui Grundmann,
Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator David E. Walker sustained a grievance challenging the grievant's three-day suspension and awarded limited attorney fees. The Union filed exceptions to the fee award. We find the fee award is based on a nonfact and is contrary to law, and we remand it to the parties for resubmission, absent settlement, to the Arbitrator.

II. Background and Arbitrator's Award

The Agency suspended the grievant for insubordination. The Union grieved the suspension, and the grievance proceeded to expedited arbitration.

Before issuing the award, the Arbitrator requested the parties address the attorney-fee issue raised during the hearing. In response, the Union submitted a motion for \$5,925 in attorney fees, along with a fee invoice and a proposed order. The Agency sent the Arbitrator an email asserting that the attorney-fee motion was premature because the Union was not yet the prevailing party.

The Arbitrator concluded the Agency did not have just cause to suspend the grievant, and he vacated and reversed the suspension. In addition, the Arbitrator granted the Union's attorney-fee motion, but stated that the amount of attorney fees "logically should be limited to the value of those services as shown by the arbitration's originating authority – in this case [the Agency]."¹ Without specifying the document on which he was relying, the Arbitrator found that the Agency "authorized a maximum award of \$1200.00 against it for which the appointed arbitrator would 'provide arbitration services on FMCS Case No. DFD2020E.'"² The Arbitrator awarded the Union "attorney[] fees and reimbursable expenses not to exceed \$1200.00."³

The same day the parties received the award, the Union asked the Arbitrator to clarify it. The Union noted that the parties' agreement did not limit the award of attorney fees, argued the Arbitrator had the discretion to determine the amount of reasonable attorney fees, and reiterated its request for \$5,925. The Arbitrator did not respond.

The Union filed exceptions to the award on May 17, 2022. The Agency filed an opposition to the Union's exceptions on June 21, 2022.

III. Preliminary Issue: Several of the Agency's arguments are untimely exceptions to the award.

The time limit for filing exceptions to an arbitration award is thirty days after the date of service of the award.⁴ The Authority may not extend or waive this time limit.⁵

The Arbitrator issued his award – which resolved both the grievance's merits and the attorney-fee motion – on April 25, 2022. The Agency concedes that it "made the decision not to file exceptions on the merits on this award."⁶ Nevertheless, in its opposition, the Agency challenges the Arbitrator's merits determination on nonfact and contrary-to-law grounds.⁷ The Agency also argues the attorney-fee award should be set aside as contrary to the Back Pay Act (the Act),⁸ due to "substantial deficiencies on the merits,"⁹ and because the Agency was denied an opportunity to respond to the Union's fees request.¹⁰

¹ Award at 2.

² *Id.*

³ *Id.* at 3.

⁴ 5 C.F.R. § 2425.2(b) ("The time limit for filing an exception to an arbitration award is thirty (30) days after the date of service of the award."); *see also* 5 U.S.C. § 7122(b).

⁵ 5 C.F.R. § 2429.23(d); *AFGE, Loc. 3954*, 73 FLRA 39, 40 (2022) (*Local 3954*) (citing 5 U.S.C. § 7122(b); 5 C.F.R.

§ 2425.2(b); *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338, 339 (2019) (Member DuBester concurring)).

⁶ Opp'n Br at 5.

⁷ *Id.* at 4-5 & n.4.

⁸ *Id.* at 6-10.

⁹ *Id.* at 5.

¹⁰ *Id.* at 6 n.5.

The Agency's arguments are exceptions to the award.¹¹ Because the Agency filed these exceptions more than thirty days after the service of the award, we dismiss them as untimely.¹² However, we consider those portions of the Agency's opposition that do not constitute untimely exceptions.

IV. Analysis and Conclusions

A. The award is based on a nonfact.

The Union argues the award is based on a nonfact because the Arbitrator erroneously relied on a "work[]order" to find the Agency imposed a limit on attorney fees, even though the parties had no agreement to limit fees.¹³

To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.¹⁴ The Authority will not find an award deficient where the parties disputed the alleged nonfact before the arbitrator.¹⁵

Here, the Arbitrator awarded \$1200 in attorney fees based on his finding that the Agency had authorized that amount as the maximum award of attorney fees.¹⁶ However, the Agency acknowledges it made "no prior agreement regarding attorney[] fees" and "[t]he only communication between the Agency and the [A]rbitrator was to forward the standard purchase order to arrange[] payment of the [A]gency's portion of his fees for the arbitration."¹⁷ Moreover, the record shows that the "purchase order" does not limit attorney fees.¹⁸ Therefore,

to the extent that the Arbitrator relied on this document to find the Agency imposed a limitation on attorney fees, that finding is clearly erroneous. Further, there is no claim or record evidence that the parties disputed, at arbitration, whether the purchase order limited attorney fees.

Accordingly, the fee award is based on a nonfact.¹⁹

B. The fee award is contrary to the Act.

The Union argues the fee award is contrary to the Act because the Arbitrator erroneously relied on Agency information to limit the award instead of assessing whether the Union's request was "reasonable."²⁰

The Authority reviews questions of law raised by the exceptions de novo.²¹ In applying a standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings.²² In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are based on nonfacts.²³

Under the Act, an attorney-fee award must be in accordance with the standards established under 5 U.S.C. § 7701(g), which require a fully articulated, reasoned decision resolving an attorney-fee request setting forth specific findings that support the determination on each pertinent statutory requirement.²⁴ The prerequisites for an award under § 7701(g) are that: (1) the employee must be the prevailing party; (2) the award of attorney fees must be

¹¹ E.g., *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 72 FLRA 541, 544 n.34 (2021) (Member Abbott concurring; Member DuBester concurring in part, dissenting in part on other grounds) (citing *U.S. Dep't of the Army, U.S. Army Garrison, Fort Drum, N.Y.*, 66 FLRA 402, 402 n.1 (2011); *SSA, Off. of Lab. Mgmt. Rels.*, 60 FLRA 66, 67 (2004) (SSA)) (challenges to award's validity made in a party's opposition are exceptions to the award); *AFGE, Loc. 3627*, 63 FLRA 116, 116 n.1 (2009) (citing *SSA*, 60 FLRA at 67) (same).

¹² *Local 3954*, 73 FLRA at 41 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 1172, 1174 (2020) (Member DuBester dissenting in part on other grounds); *U.S. Dep't of the Navy, Trident Refit Facility, Kings Bay, Ga.*, 65 FLRA 672, 674 (2011)).

¹³ Exceptions Br. at 6 & n.4. The Union also asserts, as part of its nonfact argument, that the Arbitrator's finding that the Agency could unilaterally limit a fee award is contrary to the Act. *Id.* at 6-7. We address the Union's contrary-to-law arguments below.

¹⁴ *U.S. DOL, Off. of Workman's Comp. Programs*, 71 FLRA 726, 727 (2020) (Member DuBester concurring) (citing *U.S. DHS, Citizenship & Immigr. Servs., Dist. 18*, 71 FLRA 167, 167 (2019) (Member DuBester dissenting)).

¹⁵ *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023).

¹⁶ Award at 2.

¹⁷ Opp'n Br. at 3 n.1 (citing Opp'n, Ex. A).

¹⁸ Opp'n, Ex. A.

¹⁹ See, e.g., *U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 170, 171 (2019) (Member Abbott dissenting on other grounds) (finding nonfact where arbitrator's determination was based on conceded misinterpretation of witness testimony); *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010) (finding nonfact where nothing in award or portion of the record cited by the arbitrator supported the arbitrator's determination, and there was no basis for finding the matter was disputed at arbitration).

²⁰ Exceptions Br. at 7-8.

²¹ *U.S. DOL, Off. of Workers Comp.*, 72 FLRA 489, 490 (2021) (Member Abbott concurring) (citing *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021) (*Local 1953*)).

²² *Id.* (citing *Local 1953*, 72 FLRA at 306-07).

²³ *Id.* (citing *AFGE, Loc. 2002*, 70 FLRA 812, 814 (2018) (Member DuBester dissenting)).

²⁴ *AFGE, Loc. 44, Nat'l Joint Council of Food Inspection Locs.*, 67 FLRA 721, 723 (2014) (*Local 44*) (Member Pizzella dissenting on other grounds) (citing *NAGE, Loc. R4-106*, 32 FLRA 1159, 1165 (1988)).

warranted in the interest of justice; (3) the amount of fees must be reasonable; and (4) the fees must have been incurred by the employee.²⁵

The Arbitrator made no determinations as to why fees were warranted under the Act and § 7701(g). Further, as discussed above, the Arbitrator erroneously relied on a nonfact in determining the fee amount. Therefore, the fee award is not a fully articulated, reasoned decision, as the Act and § 7701(g) require, and it is thus contrary to law.²⁶

The Union requests the full amount of its requested fees, or in the alternative, that the Authority remand the matter to the Arbitrator.²⁷ The Authority has held that if an award does not contain the findings necessary to enable the Authority to assess the arbitrator's legal conclusions, and those findings cannot be derived from the record, then we will remand the attorney-fee issue to the parties for resubmission to the arbitrator, absent settlement, so the requisite findings can be made.²⁸

The award does not contain the necessary findings for us to assess the Arbitrator's fee award, and those findings cannot be derived from the record. Therefore, we remand the fee award to the parties for resubmission to the Arbitrator, absent settlement, to make specific findings resolving the Union's attorney-fee request, consistent with the legal standards required by the Act and § 7701(g).²⁹

V. Decision

We dismiss the Agency's untimely exceptions. We grant the Union's exceptions, in part, and remand the matter to the parties for resubmission, absent settlement, to the Arbitrator.

²⁵ *Id.* (citing 5 U.S.C. § 7701(g)).

²⁶ *See id.*

²⁷ Exceptions Br. at 9.

²⁸ *Local 44*, 67 FLRA at 723 (citing *AFGE, Loc. 1592*, 66 FLRA 758, 759 (2012)); *see also Ala. Ass'n of Civilian Technicians*, 56 FLRA 231, 235 (2000) (Chairman Wasserman dissenting in part) (the arbitrator, and not the Authority, is the appropriate authority for resolving a union request for attorney fees); *Martinez v. U.S. Postal Serv.*, 89 M.S.P.R. 152, 162 (2001).

²⁹ The Union also filed exceptions on fair-hearing grounds and asserts that the award is incomplete, ambiguous, or contradictory as to make implementation impossible. Exceptions Br. at 8 & n.5. Because we find the fee award deficient on nonfact and contrary-to-law grounds, and given our decision to remand, we do not find it necessary to address the Union's remaining exceptions at this time. *Local 3954*, 73 FLRA at 44 n.59 (citing *U.S. Dep't of VA*, 72 FLRA 212, 214 (2021) (Member DuBester concurring in part); *U.S. Dep't of Transp., FAA, Nashua, N.H.*, 65 FLRA 447, 450 (2011); *AFGE, Loc. 3230*, 59 FLRA 610, 612 n.4 (2004)).