64 FLRA No. 68

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
UNITED STATES PENITENTIARY
MARION, ILLINOIS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2343
COUNCIL OF PRISON LOCALS
COUNCIL 33
(Union)

0-AR-3930
(61 FLRA 765 (2006))

ORDER DISMISSING EXCEPTION

January 28, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members.

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator George Deretich filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exception.

In an initial award (the initial award), the Arbitrator sustained a grievance over the Agency's failure to properly compensate employees for pre-shift and post-shift activities. As a remedy, he ordered the parties to apply the same formula to compensate employees as utilized in a settlement agreement of a similar grievance. In a clarification of the remedy, the Arbitrator ordered the Agency to include interest on its payments to employees after a certain date. In a subsequent award (the subsequent award), the Arbitrator stated that the formula for compensating employees included liquidated damages.

For the reasons that follow, we dismiss the exception as untimely filed.

II. Background and Arbitrator's Award

This case relates to the Authority's decision in *United States Department of Justice, Federal Bureau of Prisons, United States Penitentiary, Marion, Illinois*, 61 FLRA 765 (2006) (*USP, Marion*). As discussed in *USP, Marion*, the national union filed a unit-wide grievance (national grievance) in May 1995, alleging that the Agency failed to properly compensate employees for pre-shift and post-shift activities under the Fair Labor Standards Act (FLSA). Subsequently, as relevant here, AFGE Local 2343 (the Union) filed a grievance (the Marion grievance) seeking appropriate compensation for pre-shift and post-shift activities for the period from November 1995, to April 8, 1999, on behalf of employees at the United States Penitentiary, Marion, Illinois. In August 2000, in a settlement agreement, the national union and the Agency resolved the national grievance as it pertained to the period from May 17, 1989, to January 1, 1996. However, the Union and the Agency were unable to settle the Marion grievance for the period from January 1, 1996, to April 8, 1999, and the Marion grievance was submitted to arbitration.

On December 28, 2004, the Arbitrator issued the initial award, in which he sustained the grievance. *USP, Marion*, 61 FLRA at 767. The Arbitrator stated that, for "the period from January 1, 1996 to April 8, 1999 the Union's request for remedy is upheld. The parties are to apply the same formula to those eligible employees as utilized in the National Settlement Agreement." Initial Award at 91. In this regard, the Arbitrator noted that there was no evidence before him as to how backpay under the national settlement agreement was calculated. However, he found that an exact finding on the formula used for the national settlement agreement was not necessary because the parties knew what formula was used. *Id.* at 60.

Shortly after issuance of the initial award, pursuant to the request of the parties, the Arbitrator provided a clarification (first clarification) of the formula for calculating the remedy awarded in the initial award. [1] No exceptions were filed to the first clarification. However, the Agency subsequently filed with the Authority exceptions to the initial award.

While the Agency's exceptions to the initial award were pending, the Union requested the Arbitrator to provide an additional clarification of the initial award. On March 25, 2005, the Arbitrator responded (second clarification). In the second clarification, the Arbitrator

1. The record contains no additional information on this clarification.

stated that "[t]here should be no question that if an award is to be made to the employees, using the National Settlement Agreement, that the same formula used there be applied here." Subsequent Award at 11 (quoting second clarification). He further noted that, at the hearing, the Agency had "clearly and vigorously argued that evidence on monies due need not be submitted because there is in existence a formula for determining the amount(s) of monies." *Id.* The Arbitrator additionally stated that "[r]egarding interest for the period from January 1, 1996 to April 8, 1999, it would be appropriate to include interest only after the April 8, 1999, date, when payments were due." *Id.* No exceptions were filed to the second clarification.

The Authority denied the Agency's exceptions to the initial award. *USP, Marion*, 61 FLRA at 773. Thereafter, the Union filed a petition for attorney fees and a request that the Arbitrator clarify the initial award as to liquidated damages. Subsequent Award at 1, 11. In the subsequent award, the Arbitrator awarded the Union attorney fees and responded to the Union's request for clarification. [2]

With respect to the request for clarification, the Arbitrator noted that the parties were unable to agree on the formula for the calculation of compensable time. Subsequent Award at 3. The Arbitrator stated his belief that the formula had been "made clear" in the initial award. *Id.* He also emphasized that he had already indicated in the first and second clarifications the intent of the remedy. *Id.* at 7. The Arbitrator found that there was "no doubt that the parties know or should know" that the formula "consisted of 15 minutes of compensable time plus 15 minutes of liquidated damages." *Id.* at 4. He emphasized that, because there was never any "hard evidence" that the pre-shift and post-shift activities added up to thirty minutes, the Agency's statement during the hearing that backpay would be paid in accordance with the FLSA meant that the formula had to include fifteen minutes of liquidated damages. *Id.*

As to interest, the Arbitrator quoted the second clarification: "Regarding interest for the period from January 1, 1996 to April 8, 1999, it would be appropriate to include interest only after the April 8, 1999, date, when payments were due." *Id.* at 11. He also stated that he had "already indicated that interest should run from the time monies are due to be paid until they are paid." *Id.* at 12.

2. As the Agency does not contest the award of fees, we do not discuss that award further.

III. Positions of the Parties

A. Agency's Exception

The Agency contends that "[t]he Arbitrator erred in ruling that interest is to be applied for the period from January 1, 1996 to April 8, 1999, after the April payments were due." Exception to Subsequent Award at 5. More specifically, the Agency asserts that the award is contrary to the FLSA because the Arbitrator awarded both interest and liquidated damages.

B. Union's Opposition

The Union contends that the Back Pay Act authorizes the award of interest.

IV. Order to Show Cause and Response

The Authority ordered the Agency to show cause why its exception should not be dismissed as untimely filed, stating that it appeared that the deficiency alleged in the exception arose in the second clarification, not the subsequent award. In response, the Agency asserts that the subsequent award, not the second clarification, gave rise to the alleged deficiency and that its exception was timely filed relative to that award. Response to Show Cause Order at 4. The Agency alleges that it was not until the subsequent award that the Arbitrator made it clear that the initial award included liquidated damages. *Id.* In addition, the Agency claims that it would prejudice the parties to dismiss the exception because the order to show cause was served so long after the exception was filed.

V. Analysis and Conclusions

Under the Statute and the Authority's Regulations, the time limit for filing exceptions to an arbitration award is 30 days beginning on the date the award is served on the filing party. 5 U.S.C. § 7122(b); 5 C.F.R. § 2425.1(b). When an arbitrator has issued several awards concerning a matter, the timeliness of an exception is calculated on the basis of the award that gives rise to the deficiency alleged in the exception. *E.g.*, *U.S. Dep't of the Army, U.S. Dental Activity Headquarters, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 62 FLRA 70, 71 (2007) (*Ft. Bragg*).

In this case, the deficiency alleged in the Agency's exception is that "[t]he Arbitrator erred in ruling that interest is to be applied for the period from January 1, 1996 to April 8, 1999, after the April 8 payments were due." Exception to Supplemental Award at 5. Specifically, the Agency contends that awarding both interest and liquidated damages is contrary to law. It is not disputed that the Arbitrator first ordered interest in the sec-

ond clarification and that the subsequent award merely reaffirmed that order. Consequently, for the Agency's exception to have been timely filed, it must not have been sufficiently clear until the subsequent award that the Arbitrator had awarded both liquidated damages and interest.

The Authority previously has considered clarification awards in which arbitrators were "advising the parties of the clear intent of the remedy [the arbitrators] had ordered previously." *NTEU, NTEU Chapter 33*, 44 FLRA 252, 268 (1992). In such cases, the Authority has dismissed exceptions filed to clarification awards as untimely filed because the exceptions relate to the original awards, and not the clarification awards. *Id.; Dep't of the Air Force, Headquarters 832d Combat Support Group, DPCE, Luke Air Force Base, Ariz.*, 24 FLRA 1021, 1022 (1986) (agency failed to demonstrate that it was unclear, until clarified, that a *status quo ante* remedy included backpay).

Applying the foregoing here, the Arbitrator specifically stated in the subsequent award that he had already indicated in the first and second clarifications the intent of the remedy granted in the initial award. Subsequent Award at 7. As discussed previously, the Arbitrator found that there was "no doubt that the parties know or should know" that the formula adopted in the initial award included liquidated damages. Subsequent Award at 4. In its response to the order to show cause, the Agency does not acknowledge or address this finding. Instead, the Agency responds with the bare assertion that it was not sufficiently clear, prior to the subsequent award, that the Arbitrator had awarded both liquidated damages and interest. In view of the Arbitrator's finding and explanation, such a bare assertion by the Agency does not show cause why its exception should not be dismissed as untimely filed. *See, e.g., U.S. Dep't of Transp., Fed. Aviation Admin.*, 63 FLRA 530, 533 (2009) (agency's bare assertion provided no basis for disputing the arbitrator's findings).

The Agency additionally argues that it would prejudice the parties to dismiss the exception because the order to show cause was issued long after the exception was filed. However, the Authority has repeatedly and uniformly held that the time limit for filing exceptions to arbitration awards is jurisdictional. *E.g., Bremerton Metal Trades Council*, 59 FLRA 583, 584 (2004). Consequently, the Authority is not empowered to waive the time limit for untimely filed exceptions, and equitable considerations are not relevant. *See id.*

For the forgoing reasons, we dismiss the Agency's exception as untimely filed.

VI. Decision

The Agency's exception is dismissed.