65 FLRA No. 128

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
GREENVILLE, ILLINOIS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1304
COUNCIL OF PRISON LOCALS
(Union)

0-AR-4712

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DECISION

March 14, 2011

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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 exceptions to an award of Arbitrator Steven Briggs filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union did not file an opposition to the Agency's exceptions.

The Arbitrator awarded the Union attorney fees and costs. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Awards

The Union filed a grievance alleging that the Agency had failed to properly compensate employees for pre-shift and post-shift work. In his initial award, the Arbitrator found that the Agency had violated the Fair Labor Standards Act (FLSA), Agency regulations, and the parties' collective bargaining agreement, and he sustained the grievance. The Arbitrator directed the parties to negotiate over a remedy, including "reasonable attorney's fees." Supplemental Award on the Remedy at 7 (supplemental award). He retained jurisdiction to direct a remedy if the parties were unable to agree. *Id.* at 2.

When the parties were unable to agree to a remedy, the Arbitrator held a hearing, after which each party submitted a written position paper. In addition, the Union submitted a verified statement of attorney fees, the Agency submitted a response, and the Union submitted a brief for an award of attorney fees. *Id.* at 2-3. In his supplemental award, the Arbitrator awarded employees backpay with interest "consistent with the Back Pay Act." *Id.* at 6-7 (citation omitted). With regard to attorney fees, the Arbitrator noted that he had previously directed that "reasonable attorney's fees" should be included in any remedy. *Id.* at 7 (quoting Initial Award). Accordingly, he awarded as follows: "Since the Union is the prevailing party in this case[,] I hereby direct the Agency to pay the Union's reasonable attorney's fees and costs as part of the remedy in this case." *Id.* Specifically, the Arbitrator awarded attorney fees in the amount of $409,118.75, and costs in the amount of $24,372.66. *Id.* at 7-8.

III. Agency's Exceptions

The Agency contests only the Arbitrator's award of costs. Exceptions at 4. The Agency first contends that the Arbitrator's award of costs is contrary to the Back Pay Act, 5 U.S.C. § 5596. The Agency maintains that, under the Back Pay Act, an award of attorney fees including costs must be in accordance with the standards established under 5 U.S.C. § 7701(g) (§ 7701(g)), which standards require a fully articulated, reasoned decision setting forth the arbitrator's specific findings supporting the determination on each pertinent statutory requirement. *Id.* at 4-5. The Agency further maintains that § 7701(g) limits the award of costs to those that are "incidental and necessary expenses incurred in furnishing effective and competent representation." *Id.* at 7. The Agency asserts that the Arbitrator's award of costs is contrary to § 7701(g) because: (1) "the Arbitrator failed to provide a 'clear and reasoned explanation' of why the expenses claimed by the Union were recoverable[,]" *id.* at 5 (footnote omitted); and (2) the Union attorney's costs were not incidental and necessary expenses incurred in furnishing effective and competent representation, *id.* at 7.

The Agency also contends that the award of costs fails to draw its essence from the parties' collective bargaining agreement. *Id.* at 8. The Agency notes that, with exceptions not applicable in

this case, Article 32, Section d (Section d) provides: "The arbitrator's fees and all expenses of the arbitration . . . shall be borne equally by the Employer and the Union." *Id.* at 9 (quoting agreement). According to the Agency, it is not disputed that the Arbitrator's award of costs includes the Union's share of the Arbitrator's fee and the Union's share of the hearing transcript fee. Thus, the Agency claims that the award "manifestly disregards" Section d. *Id.* In addition, the Agency asserts that the award, as it pertains to the transcript fee, also disregards Article 32, Section I of the parties' agreement.[1]

IV. Analysis and Conclusions

A. The award of costs is not contrary to the Back Pay Act.

The Authority held in *United States Department of the Navy, United States Naval Academy, Nonappropriated Fund Program Division*, 63 FLRA 100 (2009), that "awards of backpay should not be granted under the Back Pay Act where there is an independent statutory basis for such an award."[2] *Id.* at 103. In addition, the Authority found that the FLSA, 29 U.S.C. § 216(b) (§ 216(b)),[3] constitutes an independent statutory basis for awards of backpay and reasonable attorney fees. *Id.* at 102-03. Thus, the Authority held "the requirement under . . . § 7701(g)[(1)] that attorney fees are 'warranted in the interest of justice' is inapplicable" to award of fees made pursuant to the FLSA. *Id.* at 103.

In his supplemental award, the Arbitrator does not expressly identify the statutory authority for his award of fees and costs. However, for the reasons that follow, we conclude that it is implicit in the supplemental award that the Arbitrator awarded fees and costs under § 216(b).

As an initial matter, the award is specifically responsive to the Union's motion for an award of "attorney's fees" and costs of the case. Agency's Exceptions, Attach. E Union's Brief for Attorney's Fees Award (Union's Brief). The Union's motion is unequivocal as to the basis for the motion and the Arbitrator's statutory authority to award fees and costs: "29 U.S.C. § 216(b) of the FLSA mandates the payment of attorney's fees and costs of prevailing plaintiffs." Union's Brief at 3. Although the Union briefly discusses the requirements for an award of costs under the Back Pay Act, the Union is also unequivocal as to the Arbitrator's statutory authority to specifically award costs of the case: "The award of costs to the prevailing party is mandatory under the FLSA." *Id.* at 11. Further, the Arbitrator expressly quotes, without citation, § 216(b) in concluding that "reasonable attorney's fees" should be included in any remedy. Supplemental Award at 7 (quoting Initial Award). We note, in this regard, that § 216(b) (emphasis added) refers to "*attorney's* fee[,]" while the language of the Back Pay Act refers to "*attorney* fees." 5 U.S.C. § 5596(b)(1)(A)(ii) (emphasis added). In addition, the Arbitrator's award of fees and "costs" also tracks the language of § 216(b), while the Back Pay Act does not mention "costs." In this context, and with no reference in the supplemental award to the Back Pay Act with respect to fees and costs, we decline to construe the award of fees and costs as based on the Back Pay Act and, instead, find it implicit that the award is based on § 216(b).

For the foregoing reasons, we find that the Agency's reliance on the Back Pay Act is misplaced, and that its exception regarding the Back Pay Act provides no basis for finding the award deficient. Accordingly, we deny the exception.

B. The award of costs does not fail to draw its essence from the agreement.

For an award to be found deficient as failing to draw its essence from the collective bargaining agreement, it must be established that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; and (4) evidences a manifest disregard of the agreement.

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1. Article 32, Section I provides: "A verbatim transcript of the arbitration will be made when requested by either party, the expense of which shall be borne by the requesting party. If the arbitrator requests a copy, the cost of the arbitrator's copy will be borne equally by both parties. If both parties request a transcript, the cost shall be shared equally . . . ." Exceptions at 10 (quoting agreement); *id.*, Attach. F at 78 (same).

2. As noted above, the Arbitrator awarded employees backpay with interest consistent with the Back Pay Act. As the Agency does not contest this portion of the award, we do not address it further.

3. Section 216(b) provides that courts "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

U.S. Dep't of Labor (OSHA), 34 FLRA 573, 575 (1990).

Pursuant to § 216(b), as the prevailing party, the Union is entitled to have the Agency reimburse it for its "costs of the action[,]" i.e., the costs of bringing the FLSA case. In accordance with this statutory entitlement, the Arbitrator directed the Agency to pay the Union's costs, including the Union's share of the Arbitrator's fee and the Union's share of the hearing transcript fee. In its exception, the Agency does not dispute that the Union is statutorily entitled under § 216(b) to have the Agency reimburse the Union for the Union's costs of bringing the case and does not dispute that the Union's share of the Arbitrator's fee and the Union's share of the hearing transcript fee are "costs of the action" within the meaning of § 216(b). In addition, the Agency does not argue that the fee-sharing provisions of Article 32 were intended to supplant the cost provisions of § 216(b). As the costs were awarded under § 216(b), and there is no claim that Article 32 was intended to supplant § 216(b), the Agency does not demonstrate that the award manifestly disregards the agreement or is implausible, unfounded, or irrational.[4]

Accordingly, we deny the exception.

V. Decision

The Agency's exceptions are denied.

4. Member Beck notes that the parties' collective bargaining agreement explicitly provides that arbitrators' fees and expenses "shall be borne equally by the Employer and the Union." Exceptions, Attach. F at 76-77. Article 32, Section d. identifies several specific exceptions that apply to this shared-cost provision -- the cost for specific categories of witnesses to travel to arbitration hearings and for a limited number of witnesses (not to exceed five) to travel to hearings that arise from Council-level grievances -- for which the Agency bears the full cost. The parties could have negotiated an additional exception that would have required the Agency to pay for all costs associated with matters grieved under the FLSA but they did not do so. Therefore, in view of the agreement's clear language, Member Beck would conclude that the Arbitrator's interpretation is simply not a plausible interpretation of the parties' agreement.