65 FLRA No. 66

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4557

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DECISION

December 14, 2010

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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 Ed W. Bankston 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 filed an opposition to the Agency's exceptions.

After determining that the grievance was not moot and was arbitrable, the Arbitrator concluded that the Agency issued the disputed letter of reprimand without proper cause. The Arbitrator directed the Agency to rescind the letter of reprimand and make the grievant whole with backpay. The Arbitrator also awarded reasonable attorney fees. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency reprimanded the grievant for inattention to duty. Award at 5. He filed a grievance contending that the letter of reprimand was improper and contrary to the collective bargaining agreement. As a remedy, he requested that the Agency rescind the letter of reprimand and that he be awarded any other appropriate relief. *Id.* at 3, 7. The grievance was submitted to arbitration on the following stipulated issues:

> (1) Whether the grievance is moot, or in fact, arbitrable? If so,
> (2) Whether the Agency's issuance of the Letter of Reprimand to [the grievant] was for just cause and such as to promote the efficiency of the service? If not, what is the appropriate remedy?

Id. at 3.

Prior to the arbitration hearing, the Agency notified the grievant that it had removed the letter of reprimand from his official personnel folder. *Id.* at 8. The Agency then argued to the Arbitrator that the grievance was moot because "[t]his case was resolved with the canceling of the action prior to the . . . hearing and the [g]rievant suffered no loss of pay due to this reprimand." *Id.* The Arbitrator rejected the Agency's claim as follows:

> [T]he Agency is flat wrong with respect to arbitrability. We are here because it issued the Letter of Reprimand. We are here because the disciplinary action remained in effect for nearly a year . . . . We are here because the grievant wants the Letter of Reprimand "totally gone away." He wants his "name cleared," and the stigma gone. We are here because the Union grieved the efficacy of the Letter of Reprimand and whatever ill effects as may have befallen the grievant as a result.

Id. at 11 (citations omitted). In sum, the Arbitrator concluded that the grievance was arbitrable and was not moot. *Id.* at 11-12.

During the hearing, the Arbitrator denied the Agency's request to call as witnesses on the issue of arbitrability several Union representatives. He explained that the issue of arbitrability would be decided on the basis of the collective bargaining agreement and that, consequently, the testimony was not necessary to resolve the issue of arbitrability. Tr. at 35, 41. He also found that the testimony the Agency sought to elicit pertained to the merits of the case and had nothing to do with arbitrability. *Id.* at 39.

On the merits, the Arbitrator concluded that the Agency issued the letter of reprimand without proper cause and directed the Agency to rescind the letter of reprimand and expunge it and all associated

documents from employee records. Award at 17. The Arbitrator also addressed the Union's claim that the grievant lost pay as a direct result of the letter of reprimand. In this regard, the Arbitrator noted that the grievant received a superior success increase (SCI) at level 2 that increased his annual salary by 0.6 percent. Citing testimony of the grievant's supervisor, the Arbitrator found that the supervisor admitted that "[b]ut for the Letter of Reprimand and the 'operational error,' wrongfully charged to the grievant, . . . the grievant would have received the 1.8 percent (Level 1) increase." *Id.* at 16. Accordingly, the Arbitrator additionally directed that the "grievant is to be made whole with respect to back pay plus interest to properly reflect the 1.2 percent loss of his SCI (Level 1) wage adjustment in accordance with the Back Pay Act." *Id.* at 17. The Arbitrator also awarded the grievant reasonable attorney fees. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award of backpay is contrary to law. The Agency first argues that the Arbitrator based the award of backpay on statements of the grievant's supervisor that the supervisor never made. Exceptions at 8. The Agency next argues that there is no causal connection between the letter of reprimand and the salary increase awarded by the Arbitrator because the grievant's lesser increase in pay was not the result of the reprimand and because there is "no obligation to pay an employee a performance award[.]" *Id.* at 9. The Agency further argues that, because there is no obligation to provide a performance award, the award is contrary to 5 U.S.C. § 4505 (§ 4505) and 5 C.F.R. § 451.104 (§ 451.104), which, according to the Agency, leave the granting of performance awards to the discretion of agencies. *Id.* at 10.

The Agency also contends that the Arbitrator exceeded his authority by addressing the issue pertaining to the letter of reprimand because the letter had been "rescinded[.]" *Id.* at 11. The Agency further contends that, by addressing the SCI salary increase issue, the award fails to draw its essence from the collective bargaining agreement and the Arbitrator exceeded his authority by disregarding the specific limitation set forth in Article 9.12 of the agreement.[1] *Id.* at 9. In this regard, the Agency asserts that the grievance made no mention of the SCI salary increase issue because it had not occurred at the time the grievance was filed. *Id.* at 6. The Agency also asserts that the SCI issue is precluded by Article 9.12 because the grievant filed a separate grievance disputing his salary increase that has not been submitted to arbitration. *Id.*

In addition, the Agency contends that, by refusing to allow the Agency to call Union witnesses, the Arbitrator denied the Agency a fair hearing and demonstrated bias against the Agency. *Id.* at 10. The Agency asserts that the testimony was crucial to the issues of the justification of the letter of reprimand and the preclusion of the SCI salary increase. *Id.*

Finally, the Agency contends that the award of attorney fees is contrary to law. The Agency asserts that the grievant is not a prevailing party because the Agency "rescinded" the letter of reprimand during the pendency of the grievance. *Id.* at 3. The Agency maintains that the award is in direct conflict with the Supreme Court's rejection of the "catalyst theory" in *Buckhannon Board and Care Home, Inc., v West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) (*Buckhannon*).

B. Union's Opposition

The Union contends that the Arbitrator did not exceed his authority and disputes the Agency's assertion that it rescinded the letter of reprimand when it removed the letter of reprimand from the grievant's personnel file. The Union maintains that the Arbitrator properly concluded that the grievance was not moot because the merits of the grievance and the remedy were unresolved. Opp'n at 5. The Union further argues that nothing in Article 9.12 required the grievant to pursue a separate grievance to obtain relief. *Id.* at 7.

The Union also disputes the Agency's claim that the grievant is not a prevailing party for purposes of attorney fees. The Union asserts that the Arbitrator's award constitutes the required enforceable judgment and that the Agency did not voluntarily rescind the letter of reprimand, as it asserts. *Id.* at 8-9. Finally, the Union argues that the Agency does not establish that the Arbitrator's refusal to permit the Agency to call Union witnesses denied it a fair hearing or demonstrated bias against the Agency. *Id.* at 9-10.

1. According to the Agency, Article 9.12 provides that arbitrators are confined "to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issue(s) not so submitted[.]" Exceptions at 9 (quoting Article 9.12).

IV. Analysis and Conclusions

A. The award of backpay is not contrary to law; the award does not fail to draw its essence from the collective bargaining agreement; and the Arbitrator did not exceed his authority.

When an exception involves an award's consistency with law, the Authority reviews de novo any questions of law raised by the exception and the award. *E.g., U.S. Dep't of Transp., Fed. Aviation Admin.*, 64 FLRA 922, 923 (2010) (*FAA*). 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. In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.*

As relevant here, the Authority will find that arbitrators exceed their authority when they disregard a specific limitation on that authority or when they resolve an issue not submitted to arbitration. *E.g., U.S. DHS, U.S. Customs & Border Prot.*, 65 FLRA 160, 164 (2010). In assessing whether arbitrators have exceeded their authority, the Authority grants arbitrators broad discretion to fashion remedies that they consider appropriate. *Id.* In addition, as to asserted limitations set forth in a collective bargaining agreement, the Authority will find that the award fails to draw its essence from the agreement when the appealing party establishes 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; or (4) evidences a manifest disregard of the agreement. *E.g., FAA*, 64 FLRA at 924.

In *FAA*, a grievant filed a grievance over his decertification that was submitted to arbitration on the stipulated issues of whether the decertification was in compliance with Agency regulations and, if not, what the remedy should be. The arbitrator found that the Agency improperly decertified the grievant and that, but for the unwarranted action, the Agency would have awarded the grievant an operational success increase (OSI) or an SCI. Accordingly, the arbitrator awarded the grievant backpay in the amount of the increase that the grievant would have received if he had not been decertified.

In its exceptions in *FAA*, the Agency claimed many of the same deficiencies that it has claimed in this case. In particular, the Agency claimed that the award of an OSI or SCI was contrary to the Back Pay Act because the grievant was not automatically entitled to an increase. Similarly, the Agency claimed that the award of an OSI or SCI was contrary to § 4505 and § 451.104 because such awards are discretionary. The Agency further claimed that the issue regarding an OSI and an SCI was not raised in the grievance and that, because the arbitrator addressed that issue, she exceeded her authority and the award failed to draw its essence from the same provision of the parties' agreement that is in dispute in this case. *Id.* at 922-23.

The Authority denied the Agency's exceptions. *Id.* at 924. As relevant here, the Authority noted that an award of backpay is authorized when an arbitrator finds that an unjustified or unwarranted personnel action directly resulted in a loss of pay, allowances, or differentials. The Authority stated that it does not look behind an award when the arbitrator finds a causal relationship and the finding is supported by other factual findings. The Authority concluded that the arbitrator found the requisite causal connection and that the finding was supported by other factual findings. *Id.* at 923-24. As to § 4505 and § 451.104, the Authority concluded that the arbitrator effectively found that, absent the unwarranted action, the Agency would have exercised its discretion and granted the grievant an OSI or SCI. *Id.* at 924. As to the claims that the arbitrator exceeded her authority and that the award failed to draw its essence from the agreement, the Authority noted that the parties expressly stipulated that the arbitrator could craft a remedy if the disputed decertification was improper, and the Authority stated that arbitrators enjoy particularly broad discretion in fashioning remedies when the parties specifically authorize them to determine the appropriate remedy for a violation. *Id.* In view of this stipulation and broad remedial discretion, the Authority rejected the Agency's claims. *Id.*

For the reasons set forth in *FAA*, we reject the similar claims raised by the Agency in this case. More specifically, the Agency provides no basis for finding the Arbitrator's award of backpay contrary to law. As in *FAA*, the Arbitrator in this case found the requisite causal connection, and the finding is supported by the Arbitrator's factual finding as to the testimony of the grievant's supervisor.[2] Also, as in

2. Although the Agency disputes the finding as to this testimony, as stated previously, the Authority defers to an arbitrator's underlying factual findings when assessing whether the award is contrary to law, *e.g., FAA*, 64 FLRA

FAA, the Arbitrator effectively found that, absent the unwarranted action, the Agency would have exercised its discretion and granted the grievant a SCI at level 1.

The Agency also provides no basis for finding that the Arbitrator exceeded his authority or that the award fails to draw its essence from the agreement. As in *FAA*, the parties expressly stipulated that the Arbitrator could craft a remedy. In this case, the parties expressly authorized the Arbitrator to craft a remedy if the issuance of the letter of reprimand was not for just cause. Award at 3. In view of this express authorization and the broad remedial authority it conveys, the Agency does not establish that the award of a SCI level 1 exceeded the Arbitrator's authority or disregarded the limitation of Article 9.12 of the agreement.

In this case, the Agency additionally argues that the Arbitrator exceeded his authority by addressing the issue pertaining to the letter of reprimand. However, the parties expressly stipulated that the Arbitrator would resolve whether the issuance of the letter of reprimand was for just cause if the Arbitrator found that the grievance was arbitrable. The Arbitrator specifically determined that the grievance was arbitrable and resolved the reprimand issue, as stipulated.[3] Consequently, the Agency provides no basis for finding that the Arbitrator exceeded his authority in this regard.

Accordingly, we deny these exceptions.

B. The Arbitrator did not deny a fair hearing and did not demonstrate bias against the Agency.

The Authority will find that an arbitrator denied a fair hearing when it is demonstrated that the arbitrator refused to hear or consider pertinent or material evidence or conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceedings as a whole. *E.g., U.S. Dep't of Commerce, PTO, Arlington, Va.*, 60 FLRA 869, 879 (2005) (*PTO*). However, the Authority has consistently held that arbitrators have considerable latitude in the conduct of hearings and that a party's objection to the manner in which the arbitrator conducted the hearing does not alone provide a basis for finding the award deficient. In particular, an arbitrator's exclusion of testimony alone does not establish that the arbitrator denied a fair hearing. *E.g., U.S. Dep't of HHS, SSA*, 24 FLRA 959, 961 (1986) (*SSA*). Arbitrators are required only to grant a fundamentally fair hearing, which provides adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. *PTO*, 60 FLRA at 879.

The Agency contends that the Arbitrator's refusal to allow it to call Union witnesses on the issue of arbitrability denied it a fair hearing and demonstrated bias against the Agency. In this regard, the Arbitrator stated to the Agency that he would decide the issue of arbitrability on the basis of the collective bargaining agreement and that the disputed testimony was not necessary to resolve the issue of arbitrability. Tr. at 35, 41. The Agency's assertions of the relevance of the testimony to the issues on the merits fail to demonstrate that the Arbitrator's refusal was not within his latitude to control the conduct of the hearing by ensuring that testimony was relevant and material to the resolution of the arbitrability issue. Consequently, the assertions provide no basis for finding that the Arbitrator failed to conduct a fair hearing. *See PTO*, 60 FLRA at 879; *SSA*, 24 FLRA at 961-62. Accordingly, we deny the exception contending that the Arbitrator denied a fair hearing.

When the Authority denies a party's fair hearing exception, and the party's bias exception is based on the asserted denial of a fair hearing, the Authority also denies the bias exception. *PTO*, 60 FLRA at 879. Consistent with this precedent, as the Agency's bias exception is based on its fair hearing exception, which we have denied, we also deny the bias exception.

C. The award of attorney fees is not contrary to law.

Awards of attorney fees under the Back Pay Act must be awarded in accordance with the standards established under 5 U.S.C. § 7701(g), which pertains to awards of attorney fees by the Merit Systems Protection Board (MSPB). *E.g., AFGE, Local 446*, 64 FLRA 15, 15-16 (2009). The standards established under § 7701(g) include the requirement

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at 923, and the Agency does not contend that the finding is deficient as based on a nonfact.

3. To the extent that the Agency's argument is directed at the mootness determination, no basis is provided for finding the determination deficient. Under Authority precedent, the Arbitrator correctly determined that, as the grievance sought relief for the unjustified reprimand, the grievance was not moot. *See AFGE, Local 2145*, 62 FLRA 505, 506 (2008) (asserted claims for relief preclude an appeal from being moot); *AFGE, Local 1741*, 62 FLRA 113, 118 (2007) (party urging mootness must establish that interim relief or events completely or irrevocably eradicated the effects of the alleged violation).

that the employee must be the prevailing party. When exceptions concern the standards established under § 7701(g), the Authority looks to the decisions of the courts and the MSPB for guidance. *Id.* at 16. In regard to the requirement pertaining to prevailing party, the Authority applies the definition set forth in *Buckhannon* and adopted by the MSPB under § 7701(g). *Id.* Under this definition, a grievant is a prevailing party when the grievant obtains an enforceable judgment that benefited the grievant at the time of the judgment. *E.g., AFGE, Local 987*, 64 FLRA 884, 887 (2010).

Contrary to the claim of the Agency, the grievant is a prevailing party within the meaning of § 7701(g) and the Supreme Court's decision in *Buckhannon*. *See id.* at 887. The Arbitrator's award is an enforceable judgment that benefited the grievant at the time of the award. The Agency asserts that the grievant is not a prevailing party because it "rescinded" the letter of reprimand during the pendency of the grievance. Exceptions at 3. However, the Arbitrator rejected the Agency's claim that it had rescinded the reprimand and issued an award directing the Agency to rescind the reprimand and make the grievant whole, which, in accordance with our denial of the Agency's other exceptions, the Agency fails to establish is not enforceable.

Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.