

65 FLRA No. 82

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1148
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE SUPPLY CENTER
COLUMBUS, OHIO
(Agency)

0-AR-4685

—
DECISION

December 23, 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 Harry Graham filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator determined that the Agency's five-day suspension of the grievant was without just cause. As a remedy, the Arbitrator ordered that the grievant be made whole for all monies lost as a result of the unjust suspension. In a subsequent award, the Arbitrator found that he was without authority to award attorney fees to the Union. For the reasons set forth below, we set aside the award and remand it to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator's Award

The Agency suspended the grievant for five days for insubordination. *See* Exceptions, Ex. 6 at 3. The Union filed a grievance challenging the suspension. The matter was unresolved and was submitted to arbitration. In his initial award, the Arbitrator considered the following issue: "Did the [Agency]

have just cause to discipline the [g]rievant? If not, what shall the remedy be?" *Id.* at 1. The Arbitrator sustained the grievance, finding that the suspension of the grievant was not for just cause. *Id.* at 10. Accordingly, the Arbitrator ordered that the grievant's suspension be rescinded and that he be compensated for any monies lost as a result of the suspension. *Id.* The Arbitrator retained jurisdiction for sixty calendar days from the date of his award. *Id.*

Approximately one month later, the Union submitted a request for attorney fees. Exceptions, Ex. 1. The Arbitrator found that he lacked authority to consider this request. According to the Arbitrator, Article 37, Section E of the parties' agreement provides that "[t]he arbitrator's award shall be limited solely to answering the question(s) put to him/her by the parties' submission." Award at 1. The Arbitrator concluded that, because the above issue was the sole issue presented to him, he did not have authority to award the fees requested by the Union. *Id.*

III. Positions of the Parties**A. Union's Exceptions**

The Union contends that the award is contrary to law because the Arbitrator was authorized, by statute, to award attorney fees once the requirements of the Back Pay Act had been met. Exceptions at 5. The Union asserts that, while the parties' agreement limits an arbitrator's award to answering questions submitted by the parties, the issue presented to the Arbitrator included a possible remedy of attorney fees. *Id.* at 5-6. The Union contends that, because nothing in the parties' agreement "prohibits or circumscribes" the authority of an arbitrator to award attorney fees, the Arbitrator was authorized to consider the Union's fee request. *Id.* at 6 (citing *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 39 FLRA 1215 (1991) (*Texarkana*)).

The Union also contends that the attorney fee award is contrary to law because it fails to provide a fully articulated and reasoned opinion, as required by Authority precedent. *Id.* at 8-9. The Union argues that remand is not necessary, however, as the record provides sufficient information for the Authority to analyze properly the statutory requirements. *Id.* at 9-15. In the alternative, the Union contends that the Authority should remand the award to the Arbitrator for specific findings. *Id.* at 15.

B. Agency's Opposition

The Agency's opposition addresses only "whether the [Authority] should render a decision on fees and expenses or whether the issue should be remanded to the parties for submission to the [A]rbitrator." Opp'n at 1. The Agency argues that the award fails to contain sufficient findings and analysis regarding whether an award of attorney fees is warranted under the Back Pay Act. *Id.* Accordingly, the Agency contends that, because there is "nothing in the record that could provide the basis" for the Authority to award attorney fees, the matter should be remanded to the Arbitrator. *Id.* at 2-3.

IV. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The Arbitrator is authorized to consider the Union's request for attorney fees.

The Union contends that the award is contrary to law because the Arbitrator was authorized, by statute, to award attorney fees once the requirements of the Back Pay Act had been met. Exceptions at 5. The Back Pay Act confers jurisdiction on an arbitrator to consider a request for attorney fees at any time during the arbitration or within a reasonable period of time after the arbitrator's award of backpay becomes final and binding. *See, e.g., AFGE, Council of Prison Locals*, 55 FLRA 192 (1999) (citations omitted). In addition, parties can negotiate into their collective bargaining agreement time limits and other procedures to govern the filing of requests for attorney fees. *See id.* Moreover, a union may agree to language that clearly and unmistakably waives its statutory right to attorney fees. *See Texarkana*, 39 FLRA at 1221.

Here, the Arbitrator's underlying award rescinded the grievant's suspension and ordered that the grievant be awarded backpay for the loss that he

suffered as a result of the unjust suspension. Exceptions, Ex. 6 at 10. Such an award conferred jurisdiction on the Arbitrator to consider the merits of a request for attorney fees. *See AFGE, Council of Prison Locals*, 55 FLRA at 192 (Back Pay Act conferred jurisdiction on an arbitrator to consider an attorney fee request where the remedy involved payment under the Back Pay Act). Thus, unless precluded by the parties' agreement, the Arbitrator was authorized to address the merits of the Union's request. *See id.* at 193.

The Arbitrator found that, because Article 37, Section E of the parties' agreement limited him to answering solely the questions put before him by the parties and those questions did not specifically include the Union's request for attorney fees, he lacked authority to consider the Union's request. As discussed above, however, the issues before the Arbitrator included resolution of the Union's request for attorney fees. Moreover, no provision of the parties' agreement prohibits or circumscribes the authority of an arbitrator to award attorney fees, nor does any provision of the agreement clearly and unmistakably waive the Union's statutory right to such fees.

Accordingly, we find that the Arbitrator had jurisdiction to consider the Union's request for attorney fees and grant the exception.

B. The record is insufficient for the Authority to resolve the Union's request for attorney fees.

Under the Back Pay Act, 5 U.S.C. § 5596, an award of attorney fees must be in accordance with the standards established under 5 U.S.C. § 7701(g). The threshold requirement for an award of attorney fees under the Back Pay Act is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in a withdrawal or reduction of the grievant's pay, allowances or differential. *See U.S., Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995). The Back Pay Act further requires that an award of fees must be: (1) in conjunction with an award of backpay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with standards established under 5 U.S.C. § 7701(g). *See id.* 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

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. *See id.* Furthermore, if an award fails to contain the findings necessary to enable the Authority to assess the arbitrator's legal conclusions, and those findings cannot be derived from the record, the case will be remanded to the parties for resubmission to the arbitrator so that requisite findings can be made. *See NFFE, Local 1437*, 53 FLRA 1703, 1712 (1998) (award remanded to parties for resubmission to the Arbitrator where award "under review is completely devoid of any discussion or analysis of the issue").

Here, the Arbitrator failed to address the Union's request for attorney fees. Moreover, the record is insufficient for the Authority to determine whether the Union's request met the statutory requirements set forth above. *See Award at 1; Exceptions, Ex. 6 at 8-10* (e.g., containing no analysis or discussion regarding whether the assessment of fees is in the interest of justice or whether the fees charged by the Union were reasonable).

Accordingly, we find that the record is insufficient for the Authority to resolve the Union's request for attorney fees and remand the issue to the parties for resubmission to the Arbitrator, absent settlement, to consider this request.

V. Decision

The award is set aside and remanded to the parties for resubmission to the Arbitrator, absent settlement.

*. An award of attorney fees is warranted in the interest of justice if: (1) the agency engaged in a prohibited personnel practice; (2) the agency actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency; (3) the agency actions are taken in bad faith to harass or exert improper pressure on an employee; (4) the agency committed gross procedural error which prolonged the proceeding or severely prejudiced the employee; or (5) the agency knew or should have known it would not prevail on the merits when it brought the proceeding. *See Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980). The Authority also has stated that an award of attorney fees is warranted in the interest of justice when there is either a service rendered to the Federal workforce or there is a benefit to the public derived from maintaining the action. *Texarkana*, 39 FLRA at 1223 (citing *Naval Air Dev. Ctr., Dep't of the Navy*, 21 FLRA 131, 139 (1986)). An award of attorney fees is warranted if any of these criteria is satisfied. *See U.S. Dep't of Def., Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 47 FLRA 1187, 1194 (1993).