65 FLRA No. 95

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R5-66
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
MEMPHIS, TENNESSEE
(Agency)

0-AR-4658

_____

DECISION

January 31, 2011

_____

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 attorney fee award (fee award) of Arbitrator John E. Megley, III 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 did not file an opposition to the Union's exception.

The Arbitrator found that the grievant was eligible for an award of attorney fees under the Back Pay Act, 5 U.S.C. § 5596, but reduced the amount of attorney fees requested by the Union by approximately half. For the reasons discussed below, we deny the Union's exception.

II. Background and Arbitrator's award

The grievant received a fourteen-day suspension for failure to follow his supervisor's instructions and for disorderly conduct. Original Award at 7. The Union filed a grievance claiming that the penalty imposed was inconsistent with the infraction. *Id.* at 10. The grievance was not resolved and proceeded to arbitration. As relevant here, the stipulated issue before the Arbitrator was: "Did the [Agency] violate the Collective Bargaining Agreement by suspending the [g]rievant, and if so, what shall the remedy be?" *Id.* at 4.

The Arbitrator mitigated the fourteen-day suspension to a written reprimand and ordered the grievant's personnel record purged of any reference to "rude and inappropriate conduct." *Id.* at 13. The Arbitrator also ordered backpay for lost wages and benefits, including night-time differential pay, for the time the grievant was suspended. *Id.* Subsequently, the Union requested attorney fees in the amount of $ 9,980.00. *See* Exception, Attach., Ex. C.

In his fee award, the Arbitrator found that the Union met the threshold requirement for attorney fees under the Back Pay Act because the grievant suffered an unwarranted personnel action, which resulted in the reduction of pay, allowances, or differentials. Fee Award at 4. The Arbitrator also addressed whether the Union's request for attorney fees met the criteria set forth in 5 U.S.C. § 7701(g). In this regard, he noted that § 7701(g) requires, as pertinent here, that the grievant be the prevailing party and that the fees be reasonable. *Id.* The Arbitrator found that because the Union did not prevail "in all aspects of the matter," the reasonable fees criterion warranted a proportional reduction of the attorney fees sought. *Id.* Specifically, the Arbitrator found that although the Union had prevailed in part by obtaining a reduction of the grievant's discipline and by obtaining backpay, the Agency also prevailed in part because the disciplinary charges were upheld, although the discipline was reduced. Accordingly, the Arbitrator awarded attorney fees in the amount of $ 4,490.00.[1] *Id.*

III. Union's Exception

The Union argues that the Arbitrator's fee award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because it does not meet the standards set forth in 5 U.S.C. § 7701(g).[2] Specifically, the Union argues that the award does not meet the prevailing party and the reasonableness of the fee criteria. Exception at 3-4. The Union takes the position that it is entitled to the full amount of the attorney fees it requested. *Id.* at 7-8.

1. The record does not reflect why the Arbitrator reduced the requested attorney fees by slightly more than half. However, the precise amount of the award is not at issue in this case.

2. Section 7701(g)'s standards are discussed *infra* section V.

The Union bases its position on a number of principles. The Union acknowledges that to be eligible for an award of attorney fees under § 7701(g), a party must have been the prevailing party. *Id.* at 5. The Union further asserts that to be deemed a prevailing party under § 7701(g), a party must receive an enforceable judgment or settlement, which directly benefited the party at the time of the judgment or settlement. *Id.* Based on these principles, the Union argues that it was the prevailing party and that therefore, it was eligible to receive the full amount of the attorney fees requested. *Id.* at 7-8. The Union contends that although the Arbitrator initially found that the grievant was the prevailing party, he later improperly sought to avoid awarding full compensatory fees to the Union by "split[ting] the baby" and holding that neither party prevailed completely. *Id.* at 5.

With regard to the reasonableness of the fees, the Union claims that to determine whether the amount of attorney fees requested is reasonable within the meaning of § 7701(g), the extent to which the grievant was successful in the underlying action is the most critical factor. *Id.* at 6. The Union further asserts that because the grievant was the prevailing party, it was eligible to receive the full amount of attorney fees requested. *Id.* at 7-8. The Union also claims that the Arbitrator improperly applied the "[p]roportionality [p]rinciple" when he reduced the amount of fees requested by the Union. *Id.* at 6 (emphasis omitted). Citing *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) (*Hensley*), the Union asserts that, in this case, there is no separate unsuccessful claim warranting the Arbitrator's reduction of the fees requested. *Id.* The Union claims that it should receive a fully compensatory fee because it achieved "truly excellent results." *Id.* at 7-8.

IV. The Arbitrator's reduction of the amount of the requested attorney fees is consistent with the requirements of 5 U.S.C. § 7701(g)(1), which the Back Pay Act incorporates.

The Union argues that the Arbitrator's fee award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because it does not meet the standards set forth in 5 U.S.C. § 7701(g). Specifically, the Union argues that the award does not meet the prevailing party and reasonableness of the fees criteria. Exception at 3-4. We review the questions of law raised by the Union's exception to the Arbitrator's 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 a de novo standard of review, the Authority assesses whether the 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 statutory requirements for entitlement to attorney fees.

The threshold requirement for entitlement to attorney fees under the Back Pay Act, 5 U.S.C. § 5596, is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *Ala. Ass'n of Civilian Technicians*, 54 FLRA 229, 232 (1998) (*Ala. Nat'l Guard*). Once such a finding is made, the Act further requires that an award of fees 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 the standards established under 5 U.S.C. § 7701(g), which pertain to attorney fee awards by the Merit Systems Protection Board (MSPB). *Ala. Nat'l Guard*, 54 FLRA at 232.

Section 7701(g)'s standards for an award of attorney fees are as follows: (1) the employee must be the prevailing party; (2) the award of fees must be warranted in the interest of justice; (3) the amount of the fees must be reasonable; and (4) the fees must have been incurred by the employee. *See U.S. Dep't of the Treasury, IRS, Phila. Serv. Ctr., Phila., Pa.*, 53 FLRA 1697, 1699 (1998); *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420, 427 (1980). When an exception concerns the standards established under § 7701(g), the Authority looks to precedent of the MSPB and the United States Court of Appeals for the Federal Circuit for guidance. *AFGE, Local 1061*, 63 FLRA 317, 319 (2009).

In this case, the Union challenges the Arbitrator's determination regarding the prevailing party and reasonableness of the fees criteria. Accordingly, we address only those requirements. *See, e.g., NFFE, Forest Serv. Council, Local 1771*, 56 FLRA 737, 741 (2000) (*Forest Serv. Council*) (addressing only the Back Pay Act issues raised by excepting party).

B. The Arbitrator's prevailing party determination is consistent with § 7701(g)(1).

The Union argues that to the extent that the Arbitrator found that the grievant was not the prevailing party, and on that basis awarded a reduced fee, the award is contrary to § 7701(g)(1).

The Authority applies the definition of "prevailing party" adopted by the MSPB. Under this definition, an employee is the prevailing party within the meaning of § 7701(g)(1) when the employee "received an enforceable judgment or settlement which directly benefited [the employee] at the time of the judgment or settlement." *AFGE, Local 987*, 64 FLRA 884, 886 (2010) (quoting *U.S. GSA, Ne. & Caribbean Region, N.Y., N.Y.*, 61 FLRA 68, 70 (2005) (citation omitted)). Under MSPB precedent, an employee who receives a mitigated penalty is considered to have received significant relief and is, therefore, a prevailing party. *E.g.*, *Hutchcraft v. Dep't of Transp.*, 55 M.S.P.R. 138, 142 (1992), *aff'd*, 996 F.2d 1235 (Fed. Cir. 1993).

The Union's claim that the Arbitrator did not find that the grievant was the prevailing party appears to be based on a misinterpretation of the award. As the Arbitrator found, it was undisputed that the grievant was the prevailing party. Fee Award at 3.

However, the Arbitrator's finding that the grievant was the prevailing party does not totally resolve the fee issue. As the Arbitrator correctly recognized, the amount of the fees must also be reasonable. *Id.* at 4; *see Ala. Nat'l Guard*, 54 FLRA at 232. Accordingly, we find that the Arbitrator's determinations that the grievant was the prevailing party, but that the reasonableness of the fee must also be considered, are consistent with the applicable legal standard.

C. The Arbitrator's reasonable fee determination is consistent with § 7701(g)(1).

The Union argues that the award is contrary to law because the Arbitrator should not have considered the extent to which each party prevailed.

The Authority has held that it is reasonable to reduce requested attorney fees based on the degree of success achieved at arbitration. *See, e.g.*, *Forest Serv. Council*, 56 FLRA at 742. In arriving at this conclusion, the Authority relied on Supreme Court cases holding that, when awarding attorney fees, the extent to which a plaintiff prevailed in the underlying litigation is the most critical factor to consider in determining the reasonableness of the fees. *Id.* (citing *Farrar v. Hobby*, 506 U.S. 103, 114 (1992)). In addition, the Authority has adopted the Supreme Court's ruling that "in cases involving a single successful claim, '[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.'" *Id.* (quoting *Hensley*, 461 U.S. at 440). The Supreme Court has also held that "[t]here is no precise rule or formula" for reducing attorney fees, and that district courts "may simply reduce the award to account for . . . limited success[,]" so long as the reduction is otherwise consistent with the principles that the Court identified. *Hensley*, 461 U.S. at 436-37.

The Arbitrator's consideration of the Union's degree of success is consistent with the applicable legal standard. In this case, although the Arbitrator mitigated the penalty against the grievant from a fourteen-day suspension to a written reprimand, he also sustained both charges against the grievant that the parties pursued at arbitration. The Arbitrator concluded that a reasonable attorney fee award should reflect the grievant's degree of success. The Arbitrator's award in this regard, reducing the amount of fees requested, is consistent with the above-cited precedent. *See also NAGE, Local R4-6*, 54 FLRA 1594, 1599-1600 (1998) (upholding arbitrator's determination that it was reasonable to reduce requested attorney fees to an amount proportionate to degree of success achieved).

The Union acknowledges that an attorney fee award may be reduced by the number of hours devoted to unsuccessful claims. Exception at 6-7. However, the Union contends that a proportionate attorney fee award is not appropriate in this case because there is no separate claim in which the grievant was unsuccessful. *Id.* The Union's contention does not demonstrate that the award is deficient. As discussed above, under Authority precedent, arbitrators may reduce requested attorney fees based on the degree of success achieved even in situations involving a single successful claim. *Forest Serv. Council*, 56 FLRA at 742.

The Union also claims that it should receive a fully compensatory fee because it obtained "truly excellent results." Exception at 8. However, as stated above, arbitrators may reduce attorney fees based on the degree of success achieved. *Forest Serv. Council*, 56 FLRA at 742. Therefore, as the

Arbitrator here found that the Union did not prevail in all aspects of the matter, it was not impermissible for him to reduce the attorney fees sought. Accordingly, we find that the Arbitrator's determination regarding the reasonableness of the fee is consistent with § 7701(g)(1).

V. Decision

The Union's exception is denied.