64 FLRA No. 168

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 987
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
WARNER ROBINS AIR LOGISTICS CENTER
ROBINS AIR FORCE BASE, GEORGIA
(Agency)

0-AR-4529

_____

DECISION

June 16, 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 an exception to an award of Arbitrator M. Scott Milinski 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 exception.

The Arbitrator sustained the Union's grievance in part and mitigated the grievant's three-day suspension to a written reprimand. The Arbitrator also awarded the grievant backpay; however, in a one-sentence denial, he denied the Union's request for attorney fees. For the reasons set forth below, we remand the award to the parties, absent settlement, for resubmission to the Arbitrator for clarification of the award.

II. Background and Arbitrator's Award

The Agency suspended the grievant for three days without pay for: (1) violating the Agency's toolbox maintenance standards on February 7[1]; and (2) for arriving thirty minutes late from lunch on March 7. *See* Award at 4. The Agency proposed this suspension, and first notified the grievant of the same, on April 4. *See id.* at 2.

The Union filed a grievance challenging the suspension on the grounds that it was untimely under the parties' agreement and without just cause. The matter was unresolved and submitted to arbitration. The Arbitrator considered the following issues:

> 1. Was the Agency untimely under the provisions of Section 5.01 of the [parties' agreement] when it issued its April 4 . . . Notice of Proposed Suspension and, if so, what is the appropriate remedy?
>
> 2. Did the Agency have just cause to suspend the [g]rievant and, if not, what is the appropriate remedy?

Id. at 3.

The Arbitrator found that, under Section 5.01, the Agency has forty-five days from the date an employee commits an offense that could lead to discipline to notify the employee that the Agency plans to propose disciplinary action against the employee, or alternatively, to notify the employee that the Agency will require more time to complete its investigation. *See id.* at 5-6.[2] The Agency issued its April 4th proposal to suspend the grievant more than forty-five days after February 7, and did not notify the grievant of this delay. The Arbitrator, accordingly, concluded that the February 7 charge was untimely. *See id.* at 6. The Arbitrator concluded that the March 7 charge was timely, however, because it was issued within the forty-five day time

1. All dates refer to 2008.

2. Section 5.01(b) of the parties' agreement, "Definitions and Coverage," provides, in relevant part:

> The [Agency] further agrees to effect disciplinary action in an efficient and timely manner. In this respect, when an employee is subject to discipline, the [Agency] will strive to effect disciplinary action within either 45 days of the offense, the [Agency's] awareness of the offense, or the completion of an investigation of the matter by other than the supervisor, whichever occurs later. If for reasons of significantly changed circumstances further delay in taking action is anticipated, a notice from the [Agency] to the employee advising that disciplinary action is being considered, the general basis for that action, and that the employee will be informed when a decision has been made satisfies the requirements of this section.

Award at 5.

limit. *See id.* at 6-7. Accordingly, the Arbitrator held that the March 7 charge was properly before him.

The Arbitrator concluded that the Agency did not have just cause to suspend the grievant because his suspension was based, in part, on the untimely February 7 charge; however, he found that, because the March 7 charge was valid, some form of discipline was warranted. *See id.* at 9. After reviewing the Agency's table of penalties, the Arbitrator mitigated the grievant's suspension to a written reprimand. *See id.* at 9, 10.

The Arbitrator found that, because the grievant's suspension was without just cause, he had suffered an unjustified and unwarranted personnel action; accordingly, the Arbitrator awarded the grievant three days of backpay. *See id.* at 10. However, in a one-sentence denial, the Arbitrator denied the Union's request for attorney fees.[3] *See id.*

III. Positions of the Parties

A. Union's Exception

The Union contends that the Arbitrator's denial of attorney fees is contrary to law, specifically, the Back Pay Act (BPA), 5 U.S.C. § 5596. The Union asserts that the Arbitrator correctly found that the grievant suffered an unjustified or unwarranted personnel action; however, the Union contends that the Arbitrator incorrectly concluded that the Union's request for attorney fees did not satisfy the prerequisites of 5 U.S.C. § 7701(g).[4] *See* Exception at 3.

First, the Union contends that it is a prevailing party under § 7701(g) because the Arbitrator mitigated the grievant's three-day suspension to a reprimand letter and awarded him backpay. *See id.* at 3-4. Second, the Union argues that an award of attorney fees is warranted in the interest of justice, as required by § 7701(g), because: (1) the Agency knew, or should have known, that its proposed suspension would not be sustained because it was based on the February 7 charge, which was untimely under Section 5.01(b) of the parties' agreement, *see id.* at 5-6; and (2) the Arbitrator's award confers a benefit on "public employees" -- specifically, the Union's bargaining unit employees -- because the Agency will "no doubt" now comply with Section 5.01(b). *Id.* at 8. Third, the Union contends that its requested fees are reasonable and that, because the Arbitrator did not give the Union a chance to submit evidence on this issue, the Authority should determine whether its requested fees are reasonable. *See id.* at 9.

Based on the foregoing, the Union asks the Authority to find that it is entitled to attorney fees; alternatively, the Union asks the Authority to conclude that attorney fees are warranted and remand solely on the issue of whether its requested fees are reasonable.

B. Agency's Opposition

The Agency contends that the Union is not entitled to an award of attorney fees because the Union has not satisfied the prerequisites of § 7701(g).

First, the Agency asserts that the grievant is not a prevailing party under § 7701(g) because the Arbitrator based his decision to mitigate the suspension on a procedural determination -- the timeliness of the February 7 charge -- rather than on the merits of the grievance. *See* Opp'n at 4. As part of this argument, the Agency also contends that, to be a prevailing party, an employee must obtain all or a significant portion of the relief he or she sought in his or her claim; because the Arbitrator only mitigated the grievant's suspension to a reprimand, the Agency asserts that the grievant did not receive "significant relief." *Id.* Second, the Agency contends that attorney fees are not warranted in the interest of justice because: (1) the award does not establish that the Agency knew, or should have known, that the Union would prevail on the merits or that there was a gross procedural error; (2) the Union has not established that the grievant was substantially innocent; and (3) the Union has not established that the award would confer a benefit on the Federal workforce. *See id.* at 6.

IV. The award is contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any

3. The Arbitrator's full denial states: "[A]fter a thorough review of the facts in this instant case, this Arbitrator does not grant the Union's request for attorney fees." Award at 10.

4. To receive an award of attorney fees under the BPA, a party must, among other things, satisfy the prerequisites of § 7701(g). The prerequisites of § 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 U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995).

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.*

Under the BPA, 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 BPA 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 BPA 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).[5] *See id.* As stated above, 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;[6] (3) the amount of fees must be reasonable; and (4) the fees must have been incurred by the employee. *See id.*

The Arbitrator did not articulate his reasons for denying the Union's request for attorney fees, and the record does not contain sufficient evidence for the Authority to determine the Arbitrator's basis for denying the Union's request for attorney fees. In such situations, the Authority "take[s] the action necessary to assure that the award is consistent with applicable statutory standards." *AFGE, Local 3020*, 64 FLRA 596, 598 (2010) (citing *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1695 (1998) (citation omitted)). Based on the record before us, we find that we are able to resolve whether the grievant is a prevailing party under § 7701(g), but remand the award for resubmission, absent settlement, for clarification on the remaining § 7701(g) prerequisites. *AFGE, Local 3020*, 64 FLRA at 598 (after concluding that record revealed that grievant was "clearly . . . the prevailing party[,]" Authority remanded award for clarification of other § 7701(g) prerequisites).

A. The grievant is a prevailing party.

The Agency contends that the grievant was not a prevailing party because the Arbitrator's decision to mitigate the grievant's suspension was based on a procedural determination that the February 7 charge was untimely, rather than on a determination regarding the merits of the grievance. The Authority applies the definition of "prevailing party" adopted by the Merit Systems Protection Board (MSPB), under which 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." *U.S. GSA, Ne. & Caribbean Region, N.Y., N.Y.*, 61 FLRA 68, 70 (2005) (quoting *U.S. Dep't of Def., Dep't of Def. Dependents Sch.*, 54 FLRA 773, 788 (1998) (citation omitted)). Moreover, under MSPB precedent, an employee that 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) (Table) (*Hutchcraft*).

5. The parties argue only whether the Union's request for attorney fees satisfies the prerequisites of § 7701(g); accordingly, we will limit our discussion to this issue. *See AFGE, Council 220*, 61 FLRA 582, 585 (2006).

6. 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. *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 39 FLRA 1215, 1223 (1991) (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).

It is undisputed that the Arbitrator's award resulted in a mitigation of the grievant's suspension and an award of backpay. Consequently, regardless of the basis of the Arbitrator's determination, the grievant clearly received an enforceable judgment that benefited him. *See AFGE, Local 3105*, 63 FLRA 128, 130 (2009) (Authority reversed arbitrator's conclusion that grievant was not prevailing party where arbitrator determined that grievant was not prevailing party because his decision was based on agency's procedural error). Moreover, the Agency cites no precedent in support of its assertion that the grievant's reduced penalty is not "significant relief." To the contrary, under MSPB precedent, an employee who receives a mitigated penalty is considered to have received significant relief and is, therefore, a prevailing party. *See Hutchcraft*, 55 M.S.P.R. at 142. We, therefore, find that the grievant is a prevailing party within the meaning of § 7701(g).

B. The remaining § 7701(g) prerequisites.

The Union asks that the Authority determine that attorney fees are warranted in the interest of justice and that its requested fees are reasonable. The Arbitrator, however, offered no analysis of these issues, and there is nothing in the record that would permit the Authority to determine them.[7] *See, e.g.*, *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 64 FLRA 459, 460 (2010) (remanding issue of whether agency knew or should have known it would not have prevailed on merits of grievance); *AFGE, Local 3105*, 63 FLRA at 131 (remanding award on issue of whether attorney fees were reasonable); *U.S. Dep't of Army, Red River Army Depot, Texarkana, Tex.*, 39 FLRA 1215, 1223 (1991) (remanding issue of whether arbitrator's award would confer benefit on other Federal employees). Moreover, although the parties do not address whether the grievant incurred the requested fees, the Arbitrator was required to address this issue as well. *See AFGE, Local 3239*, 61 FLRA 808, 809-10 (2006) (remanding award, in part, because arbitrator failed to address whether fees were incurred by employee).

Because the Arbitrator has not sufficiently explained the determination of the above pertinent statutory requirements and the record does not permit the Authority to resolve the remainder of the Union's exception, we remand the award to the parties, absent settlement, for resubmission to the Arbitrator to clarify, consistent with the foregoing standards, the reasons for the denial of attorney fees. *See AFGE, Local 3020*, 64 FLRA at 598; *Ala. Ass'n of Civilian Technicians*, 54 FLRA 229, 233 (1998). The Arbitrator, thus, will be required to examine: (1) whether the grievant incurred fees; (2) whether fees are warranted in the interest of justice; and (3) whether the requested fees are reasonable.

V. Decision

The award is remanded to the parties for resubmission to the Arbitrator, absent settlement, for clarification of his award, consistent with this decision.

7. The Union submitted several exhibits with its exception, and based on these exhibits, asks the Authority to conclude that its fees are reasonable; however, the Union also states that it did not have an opportunity to present this evidence to the Arbitrator. *See* Exception at 8. Similarly, we note that it is unclear from the record which, if any, interest of justice factors were argued before the Arbitrator. Thus, it is unclear whether the Union is asking the Authority to consider arguments that were not presented to the Arbitrator, which the Authority may not do. *See, e.g.*, *AFGE, Council 220*, 61 FLRA 582, 583 n.2 (2006) (Authority declined to consider interest of justice factors that were not presented to the arbitrator).