**66 FLRA No. 153**

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
(Agency)

0-AR-4835

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DECISION

July 24, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

## I. Statement of the Case

The Union filed exceptions to an award of Arbitrator James M. Harkless 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 found that the Union did not establish that the grievant was required to use "leave due to the Agency's denial of" his request to work a four-day telework schedule. Award at 8; *see also id.* at 7. As a result, the Arbitrator concluded that the grievant was not entitled to backpay. *See id.* at 8. Moreover, the Arbitrator denied the Union's request for attorney fees. *Id.* For the reasons set forth below, we deny the Union's exceptions.

## II. Background and Arbitrator's Award

The Union presented two related grievances to the Arbitrator. *See id.* at 1-2. The grievances were unresolved and were submitted to arbitration. The Arbitrator issued an award on the merits of the first grievance. *Id.* at 1. The Arbitrator determined that the Agency violated the parties' agreement "when [it] failed to consider all of the relevant factors in denying the [g]rievant's [four]-day telework request . . . [and] ordered the Agency to grant the [g]rievant's request to work a [four]-day telework schedule." *Id.* at 1-2.

The Arbitrator then rendered an award on the merits of the second grievance. *Id.* at 2. Specifically, the Arbitrator found that the Agency violated the parties' agreement because it "retaliated against the [g]rievant for filing the initial grievance by issuing him two documents." *Id.* As a result, the Arbitrator ordered the Agency to: (1) "rescind these two documents and remove them from the [g]rievant's personnel records" and (2) restore any annual leave to the grievant that he would not have had to use if the Agency had granted his request for a four-day telework agreement. *Id.* Moreover, the Arbitrator instructed the parties to submit briefs concerning whether the grievant was entitled to be reimbursed for transportation costs and whether the Union was entitled to attorney fees. *Id.* at 2-3.

After the Union presented an application for an award of attorney fees to the Arbitrator, *see id.* at 3; Exceptions at 3, the Arbitrator issued a fee award. In his fee award, the Arbitrator concluded that the Union failed to meet its burden of producing evidence demonstrating that, but for the Agency's denial of the grievant's four-day telework request, the grievant would not have taken leave. Award at 8 (determining that the Union did "not produce[] evidence upon which the Arbitrator [could] conclude that it [was] more likely than not[] that [the grievant] used additional leave due to the Agency's denial of" his request for a four-day telework agreement); *see also id.* at 6. According to the Arbitrator, the evidence presented by the Union did not allow him to determine whether the grievant was entitled to any specific amount of leave. *See id.* at 8. In this regard, the Arbitrator noted that the only testimony presented at the hearings concerning the grievant's leave usage was that the grievant was required to use a substantial amount of leave "because his leave balance exceeded the amount of leave that he could carry over to the next . . . year." *Id.* at 6-7. The Arbitrator also indicated that the only other evidence regarding the grievant's leave usage was "contained in an affidavit filed by the [g]rievant in connection with the Union's application for attorney[] fees." *Id.* at 7. The Arbitrator found that, while the grievant, in his affidavit, noted that he relied on certain records to ascertain the amount of leave he used as a result of the Agency's decision to deny his four-day telework request, the grievant's assertion that he used sixty-eight and a half hours of leave was "purely conclusory." *Id.* Moreover, the Arbitrator determined that the grievant failed to "identify the days on which he used these hours of leave, the purpose of the leave, [and] why he would not have had to use the leave" if he had been working from home. *Id.* Finally, the Arbitrator concluded that, because the Union was unable to establish that the grievant suffered a loss of "pay, allowances, or differentials" as a result of the Agency's

actions, it was not entitled to attorney fees.[1] *Id.* at 8 (internal quotation marks omitted).

## III. Positions of the Parties

### A. Union's Exceptions

The Union excepts only to the Arbitrator's fee award. The Union asserts that the Arbitrator denied it a fair hearing by refusing to consider the grievant's affidavit, which was the only evidence before him concerning the amount of leave the grievant used as a result of the Agency's denial of his four-day telework request. *See* Memorandum in Support of the Union's Exceptions to the Arbitrator's Fee Award (Memorandum) at 7-14. According to the Union, the grievant's affidavit demonstrates that he is entitled to 68.5 hours of leave. *Id.* at 10. The Union also contends that the Arbitrator was required to credit the grievant's affidavit because he did not determine that the affidavit was not credible, and "it was the only evidence before him that [was] probative of the issue of whether [the grievant] . . . [was] owed leave as a result of the [Agency's] violation of the [parties'] agreement." *Id.* at 11. Moreover, the Union maintains that, based on a district court case and the circuit court case affirming that decision, the Arbitrator's refusal to credit the grievant's affidavit was so destructive to the Union's case that the Authority should set aside the award. *Id.* at 12-14 (citing *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas De P.R., Local 910*, 588 F. Supp. 679 (D. P.R. 1984) (*Hoteles Condado Beach I*), *aff'd*, 763 F.2d 34 (1st Cir. 1985) (*Hoteles Condado Beach II*)).

In addition, the Union claims that the Arbitrator denied it a fair hearing by failing to award it attorney fees. *Id.* at 15. The Union asserts that an award of attorney fees is in accordance with the standards established under the Back Pay Act, codified at 5 U.S.C. § 5596. *Id.* In this regard, the Union maintains that the Agency "committed an unjustified or unwarranted personnel action when it denied the grievant's request for a [four]-day telework schedule" and that the Agency's "unjustified or unwarranted personnel action resulted in [a] reduction" of the grievant's pay, allowances, or differentials. *Id.* at 15-16. Similarly, the Union argues that an award of attorney fees is in accordance with 5 U.S.C. § 7701(g). *Id.* at 15. According to the Union, attorney fees are warranted in the interest of justice because the Agency committed a prohibited personnel practice, its actions were clearly without merit, and it acted in bad faith. *Id.* at 17-19. Furthermore, the Union contends that the amount of attorney fees it requested is reasonable and that its fee computation is based correctly on market rates. *Id.* at 19-20.

### B. Agency's Opposition

The Agency argues that the Arbitrator did not fail to provide the Union with a fair hearing. *See* Opp'n at 4-9. In this regard, the Agency contends that, contrary to the Union's assertion, the Arbitrator considered the grievant's affidavit. *Id.* at 5. The Agency also claims that the Arbitrator made a negative credibility determination concerning the grievant's affidavit. *See id.* at 5-7. According to the Agency, the Arbitrator clearly found that the assertions that the grievant made in his affidavit were conclusory and that he failed to establish that he was entitled to any amount of leave. *Id.* The Agency asserts that the Union's reliance on *Hoteles Condado Beach I* and *Hoteles Condado Beach II* is misplaced because those cases are inapposite. *Id.* at 7-8. Furthermore, the Agency maintains that the Union "has presented no credible evidence that [the grievant] suffered a loss of leave due to [its] actions" and that, as a result, the Union's "claim for attorney fees must fail." *Id.* at 9.

## IV. Analysis and Conclusion: The Arbitrator did not fail to provide the Union with a fair hearing by not crediting the grievant's affidavit.

The Union asserts that the Arbitrator failed to provide it with a fair hearing by not crediting the grievant's affidavit. *See id.* at 7-14. An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. *AFGE, Local 1668*, 50 FLRA 124, 126 (1995). The Authority has held repeatedly that an arbitrator has considerable latitude in conducting a hearing. *E.g.*, *U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 60 FLRA 869, 879 (2005). Further, Authority case law holds that disagreement with an arbitrator's findings of fact and evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient. *E.g.*, *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72 (2009) (*VAMC Louisville*).

[1] In his fee award, the Arbitrator also concluded that "the Union waive[d] any claim that the" Agency was required to reimburse the grievant for additional transportation costs. Award at 6. The Union does not challenge this conclusion in its exceptions. In fact, the Union concedes that it "waived any claim it may have had for additional transportation costs incurred by the grievant." Exceptions at 3 n.2. Because the Arbitrator's conclusion is not challenged in the Union's exceptions, we do not address it further.

Although the Union claims that the Arbitrator "refused to consider" the grievant's affidavit, Memorandum at 8, the award indicates that he considered the affidavit, but found that it was not credible because the assertions that the grievant made in it were conclusory, *see* Award at 7-8. Moreover, the Union's additional assertions take issue with the arbitrator's evaluation of the affidavit and his determination of the weight to be accorded the affidavit. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 409, 410, 411 (2011) (*DHS*) (finding that the agency's claim – that the arbitrator's limitation on the supervisors' testimony, compounded with her negative credibility determinations concerning the supervisors' written statements, demonstrated that the award was deficient – constituted mere disagreement with the arbitrator's determination of the weight to be accorded such evidence). As discussed above, the Authority has held that exceptions that merely disagree with an arbitrator's findings of fact and evaluation of the evidence, including the weight to be accorded such evidence, do not establish that an award is deficient on this basis. *See, e.g.*, *AFGE, Local 648, Nat'l Council of Field Labor Locals*, 65 FLRA 704, 710 (2011); *VAMC Louisville*, 64 FLRA at 72. Consequently, we find that the Union has failed to demonstrate that the Arbitrator did not provide it with a fair hearing. *See DHS*, 66 FLRA at 410, 411 (determining that the agency did not establish that the arbitrator failed to provide it with a fair hearing because its exception, which challenged the arbitrator's conclusion that the supervisors' written statements were not credible, constituted mere disagreement with the arbitrator's determination of the weight to be accorded such evidence); *U.S. Dep't of Veterans Affairs, VA Md. Healthcare Sys.*, 65 FLRA 619, 621 (2011) (concluding that the agency did not demonstrate that the arbitrator failed to provide it with a fair hearing because, although the agency asserted that the arbitrator "refused to consider" certain witness statements, the award demonstrated that the arbitrator considered the statements but gave them no weight).

The Union's reliance on *Hoteles Condado Beach I* and *Hoteles Condado Beach II* is misplaced as those cases are inapposite. In both cases, the arbitrator whose award was on review had: (1) precluded the husband of the company's sole witness from being present in the hearing room, which resulted in the witness's refusal to testify; and (2) admitted into evidence a transcript from a criminal proceeding, but found that he could not credit the witness testimony contained in that transcript. *See Hoteles Condado Beach II*, 763 F.2d at 37; *Hoteles Condado Beach I*, 588 F. Supp. at 682. The courts held that, because the combination of these two circumstances resulted in the company not being able to prove its case, the arbitrator had denied it a fair hearing. *See Hoteles Condado Beach II*, 763 F.2d at 38-40; *Hoteles Condado Beach I*, 588 F. Supp. at 684-85. In contrast, this case does not present similar circumstances.

Accordingly, we deny the Union's exception.[2]

## V. Decision

The Union's exceptions are denied.

[2] In view of our conclusion that the Arbitrator properly considered and discredited the grievant's affidavit, we find that it is unnecessary to address the Union's remaining exception concerning attorney fees because it is based on the assumption that the grievant's affidavit established a loss of leave. *Cf. Fraternal Order of Police Lodge No. 158*, 66 FLRA 420, 423 (2011) (finding that, after denying the Union's contrary to law exceptions, it was unnecessary to address the Union's request for backpay and attorney fees).