66 FLRA No. 54

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3354
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE CONTRACT MANAGEMENT AGENCY
SALT LAKE CITY, UTAH
(Agency)

0-AR-4768

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DECISION

October 27, 2011

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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 Allan S. McCausland 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.[1] The Agency filed an opposition to the Union's exceptions.

In the underlying award (merits award), the Arbitrator mitigated the grievant's five-day suspension to a letter of discipline (letter of discipline) and awarded him backpay. The Union subsequently requested attorney fees and expenses. In a subsequent award (fee award), the Arbitrator granted the Union's request for fees, but reduced the amount of fees requested by 50%. The Arbitrator also denied the Union's request for expenses. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant received a five-day suspension for conduct unbecoming a federal employee because he impermissibly placed his hands on a contractor. *See* Exceptions at 2. The Union presented a grievance arguing that the penalty was excessive and that a reduced penalty was warranted. *See id.* The Union also requested that "all actions be dismissed." Exceptions, Jt. Ex. 5 (grievance). The grievance was not resolved and proceeded to arbitration. The parties stipulated to the following issue: "Was the five (5) day suspension of the [g]rievant issued for just and sufficient cause? If not, what shall the remedy be?" Merits Award at 2.

At arbitration, the Union did not dispute that the grievant improperly touched the contractor; however, it argued that a lesser penalty – such as an oral or written reprimand, or an admonishment – was appropriate. *See* Exceptions, Ex. 4 (Union's Post-Hearing Brief) at 14, 18-19; *id.*, Ex. 6 (Tr.) at 9. The Arbitrator found that the Agency had "just and sufficient cause for disciplin[ing]" the grievant, and that "[t]he question . . . involves what the degree of discipline should be for [the grievant's] actions." Merits Award at 8. The Arbitrator mitigated the suspension to a letter of discipline and ordered the grievant be made whole for any lost wages. *Id.* at 33. The Union subsequently requested $15,972.50 in attorney fees and $1,435.17 in related expenses. *See* Exceptions, Ex. 3 (Union's Application for Attorney Fees and Expenses) at 18.

The Arbitrator concluded that the Union was entitled to attorney fees. However, he found that the amount of fees requested should be reduced by 50% because the grievant was "found guilty of conduct unbecoming a federal employee" and received a letter of discipline. Fee Award at 11. Accordingly, the Arbitrator awarded the Union $7,986.25 in attorney fees. *Id.* Additionally, the Arbitrator concluded that the Union was not entitled to any expenses because "they may very well have been incurred even if the Agency had not committed 'prohibited personnel practices' and/or acted in 'bad faith.'" *Id.*

[1] The Authority issued an Order to Show Cause (Order), directing the Union to explain why its exceptions should not be dismissed as untimely filed. The Union filed a response to the Authority's Order, arguing that its exceptions were timely. Specifically, it contends that the Arbitrator did not serve his award until June 16, 2011, when he placed it in the mail. *See* Union's Response to Order (Response) at 2. According to the Union, because the Arbitrator mailed his award, the Union had an additional five days to file its exceptions. Moreover, because the original due date fell on a Saturday, the Union contends it had until the following Monday, or July 25, 2011, to file its exceptions. *See id.* The Union filed its exceptions on July 22, 2011. *See id.* The record supports the Union's contentions that the award was served on the parties by mail on June 16, 2011, *see id.*, Ex. 1, and that the exceptions were filed on July 22, 2011, *see* Response at 2. Accordingly, we find that the exceptions are timely. *See* 5 C.F.R. §§ 2425.2(b), 2429.21(a), 2429.22, 2429.7(d).

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the Arbitrator's decision to reduce the amount of attorney fees is contrary to law. The Union contends that the Authority has adopted the test set forth by the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (*Hensley*), for determining when a fee reduction is appropriate. Exceptions at 5 (citing *NAGE, Local R5-66*, 65 FLRA 452 (2011) (*NAGE*)). The Union asserts that, under *Hensley*, fees may be reduced based on the degree of success achieved, *see id.* at 5-6 (citation omitted), but that a party must receive "less than complete success" before a reduction is justified, *id.* at 6. The Union avers that it achieved "complete and total success" because it fully succeeded on the sole issue at arbitration, i.e., whether the grievant's penalty should be reduced. *Id.* Because the Union spent no time litigating the merits of the grievant's charge, it asserts that a 50% reduction of fees was not warranted. *Id.*

Moreover, the Union avers that this matter is distinguishable from the Authority's decision in *NAGE*, in which the Authority upheld the arbitrator's decision to reduce the union's attorney fees by 50%. *Id.* at 7. According to the Union, although the arbitrator in *NAGE* mitigated the grievant's penalty, he also "sustained both charges against the grievant that the parties pursued at arbitration." *Id.* (quoting *NAGE*, 65 FLRA at 454). The Union contends that *NAGE*, therefore, is distinguishable because the parties in *NAGE* disputed the merits of the underlying charges. *See id.*

The Union further contends that the Arbitrator's denial of expenses is also contrary to law. The Union asserts that, in denying the expenses, the Arbitrator erroneously relied on "what might have happened if the Agency had not violated the contract." *Id.* at 5. The Union argues that the Arbitrator should have limited himself to "the facts in front of him." *Id.*

B. Agency's Opposition

The Agency disputes the Union's assertion that the award is contrary to law. The Agency contends that the Arbitrator found that the grievant was guilty of conduct unbecoming an officer and also imposed discipline upon the grievant. Opp'n at 3. Therefore, according to the Agency, the Union did not achieve total success. As such, the Agency avers that the Arbitrator had a proper basis to reduce the Union's requested fees. *Id.*

IV. Analysis and Conclusions

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 reduction of fees

The Union challenges the Arbitrator's decision to reduce its requested attorney fees. 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.*, *NAGE*, 65 FLRA at 454; *NFFE, Forest Serv. Council, Local 1771*, 56 FLRA 737, 742 (2000). 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 "'[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 Court also has 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 Union contends that the Arbitrator's decision to reduce the amount of fees is deficient because the Union succeeded on the only issue before the Arbitrator, i.e., whether the grievant's penalty should be reduced. Contrary to the Union's assertion, this issue was not the sole issue before the Arbitrator. Rather, the issues before him also included whether the grievant was guilty of the alleged misconduct. *See* Merits Award at 2 (stating that the parties stipulated that the issue was whether "the five (5) day suspension of the [g]rievant [was] issued for just and sufficient cause? If not, what shall the remedy be?"). The Arbitrator, as part of the merits award, found that the grievant was guilty of conduct unbecoming an officer. *See id.* at 8. As a result, the Union was not fully successful at arbitration.

Moreover, even if the only issue before the Arbitrator was whether the grievant's penalty should be reduced, the Union also did not fully succeed on this issue. The Union requested, but did not receive, several other, less severe types of discipline. Specifically, the Union questioned whether a written or oral reprimand or an admonishment was appropriate. *See* Union's Post-Hearing Brief at 14, 18-19; Tr. at 9. The Arbitrator determined that the grievant's conduct warranted the letter of discipline, thereby rejecting the Union's other forms of requested relief. Thus, the Union was not fully successful because it did not receive the full relief it requested.

Accordingly, we find that the Arbitrator's decision to reduce attorney fees is not contrary to law.[2] *See, e.g.*, *NAGE*, 65 FLRA at 454 (citing *NAGE, Local R4-6*, 54 FLRA 1594, 1599-60 (1998) (*Fort Eustis*)) (upholding arbitrator's decision to reduce fees by 50% because, although he mitigated grievant's penalty, he also sustained the charges against the grievant); *Fort Eustis*, 54 FLRA at 1599-60 (upholding arbitrator's decision to reduce fees by 75% because grievant received two hours of leave instead of the eight he requested).

B. The denial of expenses

The Union argues that the Arbitrator's decision to deny its request for expenses is contrary to law. Specifically, the Union contends that the Arbitrator should have based his award "on the facts in front of him" and not "on what might have happened if the Agency had not violated the contract." Exceptions at 5.

The Authority's Regulations specifically enumerate the grounds that the Authority currently recognizes for reviewing awards. *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (*Local 3955*) (Member Beck dissenting in part) (citing 5 C.F.R. § 2425.6(a)-(b)). Further, "an exception 'may be subject to dismissal or denial if[] . . . [t]he excepting party fails to raise and support a ground as required in'§ 2425.6(b)." *Fraternal Order of Police, Pentagon Police Labor Comm.*, 65 FLRA 781, 785 (2011) (*Pentagon Police*) (quoting 5 C.F.R. § 2425.6(e)). As the Authority has explained, "an exception that fails to support a properly raised ground is subject to denial." *Local 3955*, 65 FLRA at 889.

The Union avers that the Arbitrator's denial of expenses is contrary to law because the Arbitrator's rationale for denying them was flawed. However, the Union cites no statute, regulation or legal precedent in support of this proposition. Because the Union has not cited any law in support of its claim that this portion of the fee award is deficient, we find that the Union has failed to establish that it is contrary to law. *See Pentagon Police*, 65 FLRA at 785. Accordingly, we deny the exception.

V. Decision

The Union's exceptions are denied.

[2] The Union has not challenged the amount of the Arbitrator's reduction of fees; rather, it has contested only the Arbitrator's ability to reduce the amount of fees requested. Therefore, the precise amount of the award is not at issue in this case. *See, e.g.*, *NAGE*, 65 FLRA at 452 n.1 (noting that precise amount of award was not at issue).