

67 FLRA No. 116

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

0-AR-4994

DECISION

June 5, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator Saul Scheier found that the Agency violated the parties' collective-bargaining agreement by failing to conduct a desk audit and to keep certain employees' (the grievants') position descriptions properly updated. As remedies, he directed the Agency to complete a desk audit, and he awarded backpay in the event that any grievant's position is upgraded as a result of the desk audit. The Arbitrator denied the Union's request for attorney fees on the ground that the parties' agreement contains no provision permitting the recovery of fees.

The issue before us is whether the Arbitrator's denial of attorney fees is contrary to law. Because the Arbitrator's denial of attorney fees was premature and based on an improper ground, we find that part of the award contrary to law and modify the award to strike the denial of attorney fees.

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of the grievants – classified as Wage-Grade (WG)-2 laundry workers – alleging that their position descriptions were outdated because they were performing additional duties. According to the Union, certain of the grievants were no

longer working as WG-2 laundry workers, but were working as drivers.¹ In its grievance, as relevant here, the Union sought a desk audit and, according to the Arbitrator, the Union anticipated that a position description “formulated after the results of a desk audit” and revised “with Union input” would result in a reclassification at a higher grade.² Without notifying the Union and allowing it to provide input, the Agency revised the grievants' position descriptions, submitted them “to [c]lassification for review,” and notified the grievants that their positions remained classified as WG-2 laundry workers.³ The Agency did not perform a desk audit.⁴ Dissatisfied with the Agency's response, the Union filed an appeal of its grievance, and when the Agency denied the appeal, the grievance went to arbitration.

The Arbitrator found that even though the Union anticipated that the grievants' positions would ultimately be upgraded, the dispute before him did not involve the anticipated *result* of the desk audit – an inarbitrable classification matter – but the Agency's failure to complete the desk audit upon the Union's request. The Arbitrator found that the Agency's actions violated the parties' agreement, which requires that position descriptions be “current and accurate,” that the Union “be provided the opportunity to review proposed changes in [position descriptions],” and that desk audits “be completed within [ninety] days of the local union or employee request.”⁵ As remedies, the Arbitrator directed that a desk audit be conducted and that the Union be permitted to review and submit proposed changes to the position descriptions. In addition, the Arbitrator “grant[ed] the Union's request for [backpay]” in the event that the desk audit and position-description revisions resulted in upgrading any of the grievants' positions.⁶ The Arbitrator denied attorney fees, stating that “[t]here is no provision in the grievance and arbitration provisions of the [parties' agreement] . . . for attorney[] fees.”⁷

The Union filed an exception to the award. The Agency filed an opposition to the Union's exception.

¹ Exception at 2.

² Award at 7.

³ *Id.* at 3-4.

⁴ *Id.* at 9 (Arbitrator found that the Agency “ignor[ed], without explanation, the Union's request for a desk audit when one was so manifestly appropriate.”).

⁵ *Id.* at 8 (quoting Article 9, Sections D. and E. of the parties' agreement) (emphasis omitted) (internal quotation marks omitted).

⁶ *Id.* at 10.

⁷ *Id.*

III. Analysis and Conclusion: The denial of attorney fees is contrary to law.

The Union argues that the Arbitrator's denial of attorney fees is contrary to law,⁸ specifically the Back Pay Act (the Act).⁹ As stated above, the Arbitrator based his denial on his finding that the parties' agreement does not include a provision that permits the recovery of fees.¹⁰ However, as a matter of law, the Act confers statutory jurisdiction on arbitrators to award fees.¹¹ As a result, an arbitrator errs as a matter of law by finding that he or she cannot award fees only because a collective-bargaining agreement does not authorize such fees.¹² Thus, the Arbitrator's stated rationale for denying attorney fees is incorrect as a matter of law.

Further, under the Act and its implementing regulations, the arbitrator who "corrected or directed the correction of the unjustified or unwarranted personnel action" is the "appropriate authority" to whom a request for attorney fees must be presented.¹³ As the Arbitrator corrected the unjustified or unwarranted personnel action by directing the Agency to complete a desk audit and pay backpay in the event any grievant's position is upgraded as a result of the audit, he is the appropriate authority to whom the Union must present a fee request. While we acknowledge the Agency's argument that the Arbitrator could not award attorney fees because he did not find that the grievants suffered any actual loss of pay,¹⁴ the Arbitrator expressly stated that he was ordering backpay if it is warranted when the desk audit is complete,¹⁵ and the Agency has not excepted to the award. Therefore, the Agency's argument provides no basis for finding the award deficient.¹⁶

Also, the Act's regulations state that before an arbitrator may grant or deny fees, a union must file a request for fees, and the arbitrator must permit the agency to respond.¹⁷ The Union contends, and the Agency does not dispute, that the Arbitrator precluded the Union from filing a motion for attorney fees and denied its request that he retain jurisdiction to resolve fees later.¹⁸ Although the Arbitrator stated that the "remedy sought by the Union" included "[a]ttorney fees,"¹⁹ he did not find that the Union had actually filed a fee petition or that the Agency had an opportunity to respond to any such petition.²⁰ In similar circumstances, the Authority has held that denials of attorney fees were premature and has modified awards to strike the denials without prejudice to the unions' right to file petitions for attorney fees in the future.²¹ Consistent with these principles, we find that the Arbitrator's denial of fees was premature, and we modify the award to strike the denial without prejudice to the Union's right to file a fee petition in the future.²²

IV. Decision

We modify the award to strike the denial of attorney fees.

⁸ Exception at 3.

⁹ 5 U.S.C. § 5596.

¹⁰ Award at 10.

¹¹ *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 39 FLRA 1215, 1221 (1991).

¹² *Id.*

¹³ *U.S. Dep't of the Army, U.S. Army Garrison, Fort Drum, N.Y.*, 66 FLRA 402, 405 n.11 (2011) (quoting 5 C.F.R. § 550.807(a)); see also *AFGE, Local 1592*, 66 FLRA 758, 759 (2012).

¹⁴ Opp'n at 3.

¹⁵ Award at 10.

¹⁶ 5 U.S.C. § 7122(b) ("If no exception to an arbitrator's award is filed under subsection (a) of this section during the [thirty]-day period beginning on the date the award is served on the party, the award shall be final and binding."); see also *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 63 FLRA 237, 237 n.1 (2009) (stating that because no exception was filed to one part of the award, the Authority would not address arguments pertaining to that part); *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 60 FLRA 52, 52 n.4 (2004) ("As no exception is taken to this conclusion, we do not address it further."); *U.S. DOJ, Fed. BOP, Fed. Med. Ctr. Carswell, Fort Worth, Tex.*, 58 FLRA 210, 210 n.2 (2002)

("No exception was raised to that portion of the award . . . , and we will not address it further.")

¹⁷ 5 C.F.R. § 550.807(a)-(b).

¹⁸ Exception at 2-3.

¹⁹ Award at 2.

²⁰ *AFGE, Local 3615*, 66 FLRA 565, 565 (2012) (*Local 3615*) (citing 5 C.F.R. § 550.807) ("To be awarded attorney fees by an arbitrator under the [Act], the grievant or the grievant's representative must present a request for fees to the arbitrator[,] and the employing agency must have an opportunity to respond.")

²¹ *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 54 FLRA 759, 761-62 (1998) (*Red River*) (striking a denial of attorney fees on the basis that although "the [u]nion made some general assertions of entitlement to an award of fees," it "did not request an award of fees as part of the merits award," and, therefore, the arbitrator's denial of fees was premature because the union had not yet presented a fee request); see also *Local 3615*, 66 FLRA at 565; *U.S. DOD Educ. Activity*, 60 FLRA 254, 256-57 (2004).

²² *Red River*, 54 FLRA at 763.

Member Pizzella, concurring:

I join my colleagues to strike the Arbitrator's denial of attorney fees as premature because the Agency does not challenge the Arbitrator's award. I, therefore, can only assume that the Agency agrees that it violated the collective-bargaining agreement in the manner it reviewed and revised the grievants' position description.

Nonetheless, I fail to see how any aspect of this odd case contributes to the "effective conduct of [government] business"¹ or facilitates the "amicable settlement[] of disputes between employees and their [agencies]."²

The parties to this case apparently have forgotten that they may actually speak to one another. Over the past four years, VA Medical Center Richmond and AFGE, Local 2145 have appeared before us in now twelve different cases on a variety of issues ranging from, for example, discipline of the Union president,³ distribution of overtime,⁴ discontinuing Union-sponsored "lunch and learn" sessions that were disturbing patients,⁵ and a grievance that argued the Agency could not terminate the Union president's access to Agency computers after she was fired.⁶

If parties earned frequent flier miles for each case filed with the Authority, these folks would qualify for platinum/premier status. AFGE, Local 2145 represents just 1,417 members at for VA medical facilities in the greater-Richmond area. The Department of Health and Human Services (DHHS) employs approximately 83,745 civilian employees,⁷ at locations across the United States, but it has sent only three cases to the Authority during the same timeframe. To put this into perspective, if DHHS and its unions had elevated an equivalent number of cases, per capita, to the Authority (as did VA Richmond Medical Center and AFGE, Local 2145), that total would be 383 cases!!

I have no doubt that the VA hospital at Richmond, and its satellite facilities, could not operate without the vital services that are provided by these employees. But I am stunned by the futility of the Union's quest in this case.

In its grievance, the Union seeks a "retroactive promotion" to wage grade (WG)-5⁸ for WG-2 laundry workers simply because the Agency failed to "giv[e] the Union the opportunity to review proposed . . . changes in [position] descriptions"⁹ after the Agency reviewed and made changes to the grievants' position description after the grievants "complain[ed] that their [position descriptions] were outdated and inaccurate."¹⁰ But if anyone, from either Local 2145 or the labor relations office, had actually performed even a rudimentary search of the Office of Personnel Management's (OPM's) website, *and then actually spoke to each other*, someone might have noticed that the OPM Classification Guide caps out laundry workers at WG-2.¹¹ This issue appears to be well-settled throughout the rest of the federal government. Oddly enough, not one other employee, union, or agency has challenged the validity of the laundry-worker duties, and their grading, since October 1989, when OPM reaffirmed its prior 1968 determination that the classification guide "appropriately covers the primary work of the [WG-7304] positions."¹²

In this case, it appears that the Union proved nothing more than that the Agency should have provided the Union with "the opportunity to review and comment"¹³ on the changes the Agency made, *at the request of the Union*,¹⁴ to the laundry workers' position description. The Union technically is correct, but it is unfortunate that the American taxpayer gets stuck with the entire bill for this grievance – Union official time, Agency attorney and labor-relations specialist time, witness time, and, of course, the Arbitrator's bill for his services. And, in addition, the Union and the Agency's representatives will use more official time, and on remand pay the Arbitrator even more fees, as they argue with each other over the appropriate amount of Union attorney fees (which will also be paid by the taxpayer)

¹ *AFGE, Local 2595, Nat'l Border Patrol Council*, 67 FLRA 190, 192 (2014) (Concurring Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)(B)); *NTEU, Chapter 32*, 67 FLRA 174, 177 (2014) (Concurring Opinion of Member Pizzella).

² *AFGE, Council 215*, 67 FLRA 164, 167 (2014) (Concurring Opinion of Member Pizzella) (quoting 5 U.S.C. 7101(a)(1)(C)).

³ *U.S. Dep't of VA Med. Ctr., Richmond, Va.*, 64 FLRA 701 (2010); *AFGE, Local 2145*, 64 FLRA 661 (2010).

⁴ *AFGE, Local 2145*, 66 FLRA 760 (2012); *U.S. Dep't of VA Med. Ctr., Richmond, Va.*, 64 FLRA 619 (2010).

⁵ *AFGE, Local 2145*, 66 FLRA 911 (2012).

⁶ *U.S. Dep't of VA Med. Ctr., Richmond, Va.*, 65 FLRA 615 (2011).

⁷ *About HHS*, www.hhs.gov/about, (last visited May 1, 2014).

⁸ Award at 4.

⁹ *Id.* at 8.

¹⁰ *Id.* at 3.

¹¹ U.S. OPM, *Federal Wage System Job Grading Standard for Laundry Working, 7304*, TS-02, at 4 (Sept. 1968); U.S. OPM, *Introduction to the Federal Wage System Job Grading System*, TS-1, at 19 (Appendix II) (Sept. 1968), updated by TS-13 (Sept. 1970) and TS-44 (Sept. 1981).

¹² U.S. OPM, Office of Merit System Oversight and Effectiveness, *Digest of Significant Classification Decisions and Opinions No. 13*, at 9 (Oct. 1989).

¹³ Award at 9.

¹⁴ *Id.* at 3.

that should be awarded by the Arbitrator because the Union prevailed in its futilely successful grievance.

It seems obvious that the time and resources consumed by the Agency and the Union in this futile dispute could have been focused more productively on some of the systemic problems that have contributed to the current investigation of service issues at VAMC Richmond.¹⁵

As I noted in *AFGE, Local 3571*, I doubt that “Congress envisioned that such futile endeavors would ‘contribute[] to the effective conduct of [the government’s] business’ or facilitate the ‘amicable settlement[] of disputes’”¹⁶ when it enacted the Federal Service Labor-Management Relations Statute.

Thank you.

¹⁵ U.S. Dep’t of VA, *VA Medical Center Waitlists Audited*, <http://www.richmond.va.gov>, (last visited May 21, 2014).

¹⁶ 67 FLRA 218, 220 (2014) (Concurring Opinion of Member Pizzella) (internal citations omitted).