

67 FLRA No. 158

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 44
NATIONAL JOINT COUNCIL OF FOOD
INSPECTION LOCALS
(Union)

and

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
(Agency)

0-AR-4867

DECISION

September 30, 2014

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

I. Statement of the Case

Arbitrator Robert D. Steinberg issued an award denying the Union's application for attorney fees and expenses (fee award). Stating that his previous award on the merits of the grievance (backpay award) had either expressly or implicitly denied the Union's request for attorney fees and expenses (attorney-fee request), the Arbitrator concluded that the doctrine of *functus officio* (which is described further below) precluded him from considering the attorney-fee request.

The issue before us is whether the fee award is contrary to law. Because the Back Pay Act¹ requires an arbitrator to make a fully articulated, reasoned decision resolving an attorney-fee request, and because the Arbitrator failed to do so, we find that the fee award is contrary to law and remand the fee award to the parties for resubmission to the Arbitrator, absent settlement, to conduct the required analysis.

II. Background and Arbitrator's Award

The Agency suspended the grievant, a consumer safety inspector, for five days. In the backpay award, the Arbitrator directed the Agency to rescind the suspension and replace it with a written reprimand. The Arbitrator

also found that the grievant was entitled to backpay and credit for any lost benefits. The backpay award contains no mention of attorney fees or an attorney-fee request.

No exceptions to the backpay award were filed, and it is not before us. After the backpay award became final and binding, the Union submitted an attorney-fee request to the Arbitrator. The Arbitrator summarily denied the request "[w]ithout addressing from a substantive standpoint whether fees and expenses are justified."² According to the Arbitrator, the backpay award had rejected that request "either expressly or by implication,"³ and because the time period for filing exceptions to the backpay award had passed, he was *functus officio*. The Union then filed exceptions to the fee award, and the Agency filed an opposition.

III. Preliminary Matters

A. The Union's exceptions are timely.

The Agency contends that the Union's exceptions are untimely.⁴ Section 7122(b) of the Federal Service Labor-Management Relations Statute (the Statute) requires that exceptions be filed within thirty days from the date of service of the award.⁵ The Authority presumes, absent evidence to the contrary, that an award was served by mail on the date of the award.⁶ Under § 2425.2(b) of the Authority's Regulations, the thirty-day period for filing exceptions begins to run the day after the award's date of service.⁷ Section 2429.22 of the Authority's Regulations provides that five days will be added if the award is served by mail or commercial delivery.⁸

The Union filed exceptions to the fee award, which stated for the first time that the request for attorney fees "was denied."⁹ The Union's exceptions claim that the denial of fees is deficient.¹⁰ As the claimed deficiency arises only from the fee award, we measure the timeliness of the exceptions from the date of service of that award.¹¹

As there is no evidence in the record regarding when the fee award was served, or the method of service,

² Fee Award at 1.

³ *Id.*

⁴ Opp'n at 1.

⁵ 5 U.S.C. § 7122.

⁶ *IFPTE, Local 77, Prof'l & Scientists Org.*, 65 FLRA 185, 188 (2010) (*Local 77*).

⁷ 5 C.F.R. § 2425.2(b).

⁸ *Id.* § 2429.22.

⁹ Fee Award at 1.

¹⁰ Exceptions at 1.

¹¹ *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 58 FLRA 77, 82 (2002).

¹ 5 U.S.C. § 5596.

it is considered to have been served by mail on July 19, 2012, the date of the award.¹² Counting thirty days beginning on July 20, in accordance with § 2425.2(b), the due date for filing exceptions to the fee award was August 19, 2012. Because the Authority presumes that the fee award was served by mail, this time period is extended by five days, resulting in a due date of August 24, 2012. The Union's exceptions were filed with the Authority on August 20, 2012. Therefore, we find that the Union's exceptions are timely.¹³

B. The Union's exceptions are not procedurally deficient.

The Agency contends that the Union's exceptions are procedurally deficient because the Union: (1) did not provide the Authority with a complete copy of the Agency's response to the Union's attorney-fee request; and (2) provided the Authority with an incorrect Agency address.¹⁴

With regard to the Agency's first claim, the Authority's Regulations provide that the party filing an exception must provide "copies of any documents . . . reference[d] in the arguments" in its exceptions.¹⁵ But "[e]xceptions are not required to include copies of documents that are readily accessible to the Authority."¹⁶ Moreover, the Authority considers whether a party is harmed when deciding a motion to dismiss.¹⁷ The Union's arguments reference the Agency's response to the Union's attorney-fee request, but the Union failed to provide the Authority with a complete copy of the response. The Agency, however, provided the Authority with the complete copy of the response in its opposition. As a complete copy of the response is accessible to the Authority, we find that the Agency is not harmed by this omission, and we reject this claim.

As to the second claim concerning the Agency's incorrect address, the Agency does not argue that the Union did not serve it with the Union's exceptions, and there is nothing in the record that indicates otherwise. The Agency also does not argue that it has been harmed in any way. Rather, the record shows that the Agency filed a timely opposition to the exceptions and informed

the Authority of the correct address.¹⁸ Therefore, we find that the Agency is not harmed by this omission, and we reject this claim.¹⁹

IV. Analysis and Conclusion: The fee award is contrary to law.

The Union argues that the fee award is contrary to law because the Arbitrator failed to make specific findings supporting his attorney-fee decision, as required by the Back Pay Act and 5 U.S.C. § 7701(g)(1).²⁰ In response, the Agency argues that the Union's attorney-fee request must be denied as untimely.²¹

We first address the Agency's timeliness argument. Parties may agree to establish a time period governing when an attorney-fee request may be filed with an arbitrator.²² However, there is no indication in the record that the parties agreed to an established time period. Absent such an agreement, a request for attorney fees may be filed during an arbitration hearing or within a reasonable time after a backpay award becomes final and binding.²³

The Agency asserts that the Union's attorney-fee request, which the Union filed with the Arbitrator approximately forty days after the backpay award became final and binding, is untimely.²⁴ But the Agency does not cite any authority establishing that forty days, in the circumstances of this case, is an unreasonable period of time for the Union to file its request. Moreover, MSPB regulations permit the filing of attorney-fee requests within sixty days of the date on which an MSPB decision becomes final.²⁵ In these circumstances, we reject the Agency's claim that the Union's request for attorney fees is untimely.

As to the Union's claim that the fee award is contrary to law, 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.²⁶

¹² *Local 77*, 65 FLRA at 188.

¹³ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 730, 731 (2011) (finding exceptions timely after presuming that date of award was date of service).

¹⁴ Opp'n at 2, 6.

¹⁵ 5 C.F.R. § 2425.4(a)(3).

¹⁶ *Id.* § 2425.4(b).

¹⁷ See *NAGE, Local RI-109*, 61 FLRA 593, 595 (2006) (*Local RI-109*) (denying motion to dismiss where union not harmed by delay in service).

¹⁸ Opp'n at 1-7; see also Agency Correction of Address at 1.

¹⁹ See *Local RI-109*, 61 FLRA at 595.

²⁰ Exceptions at 5, 7.

²¹ Opp'n at 2-3.

²² *Phila. Naval Shipyard*, 32 FLRA 417, 421 (1988) (*Naval Shipyard*).

²³ *Id.*; see also *U.S. DOJ, BOP, Wash. D.C.*, 64 FLRA 1148, 1152 (2010) ("While . . . requests [for attorney fees] may be submitted during the course of an arbitration proceeding, nothing . . . requires that a request for attorney fees be made before an award is final and binding.") (citing *Naval Shipyard*, 32 FLRA at 421)).

²⁴ Opp'n at 2-3.

²⁵ 5 C.F.R. § 1201.203(d).

²⁶ 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.²⁷

Under the doctrine of *functus officio*, once an arbitrator resolves matters submitted to arbitration, the arbitrator is generally without further authority.²⁸ As a result, the doctrine of *functus officio* prevents arbitrators from reconsidering a final award.²⁹ However, the Back Pay Act confers jurisdiction on arbitrators to resolve attorney-fee requests.³⁰ This includes jurisdiction to resolve attorney-fee requests submitted after an underlying award on the merits has become final and binding.³¹

Further, under the Back Pay Act, an award of attorney fees must be in accordance with the standards established under § 7701(g),³² which require a fully articulated, reasoned decision resolving an attorney-fee request setting forth specific findings that support the determination on each pertinent statutory requirement.³³ 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; (3) the amount of fees must be reasonable; and (4) the fees must have been incurred by the employee.³⁴

Here, the backpay award is silent as to attorney fees and the Union's attorney-fee request.³⁵ Not until the fee award did the Arbitrator state that the backpay award had "rejected, either expressly or by implication, the Union's request for attorney fees."³⁶ Therefore, not until the fee award was the Union aware that attorney fees had been denied. In these unique circumstances, we conclude that the Arbitrator erred in relying on the expiration of the period for filing exceptions to the backpay award as the basis for finding that he was *functus officio*.³⁷

Moreover, the fee award does not constitute a fully articulated, reasoned decision resolving the Union's attorney-fee request as required by the Back Pay Act and

§ 7701(g).³⁸ Accordingly, we find that the fee award is contrary to law. And because we find that the fee award is contrary to the Back Pay Act and § 7701(g), we do not address the Union's argument that the fee award is contrary to 5 C.F.R. § 550.807.³⁹

The Union also asks that the Authority resolve its attorney-fee request rather than remand the matter to the Arbitrator.⁴⁰ If an award does not contain the findings necessary to enable the Authority to assess the arbitrator's legal conclusions, and those findings cannot be derived from the record, then the attorney-fee issue will be remanded to the parties for resubmission to the arbitrator, absent settlement, so that the requisite findings can be made.⁴¹ Here, the fee award does not contain the necessary findings for the Authority to assess the Arbitrator's legal conclusion. And those findings cannot be derived from the record. Therefore, because the Arbitrator is the appropriate authority under 5 C.F.R. § 550.807(a) to resolve the Union's attorney-fee request,⁴² we remand the fee award to the parties for resubmission to the Arbitrator, absent settlement, to make specific findings resolving the Union's attorney-fee request, consistent with the legal standards required by the Back Pay Act and § 7701(g).

V. Decision

We remand the fee award to the parties for resubmission to the Arbitrator, absent settlement, to make specific findings resolving the Union's attorney-fee request, consistent with the legal standards required by the Back Pay Act and § 7701(g).

²⁷ See *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

²⁸ *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 64 FLRA 823, 825 (2010).

²⁹ See *AFGE, Local 2172*, 57 FLRA 625, 627 (2001) (citing *Devine v. White*, 697 F.2d 421, 433 (D.C. Cir. 1983)).

³⁰ *AFGE, Local 1148*, 65 FLRA 402, 403 (2010) (citations omitted) (*Local 1148*); *Naval Shipyard*, 32 FLRA at 420.

³¹ *Local 1148*, 65 FLRA at 403; *Naval Shipyard*, 32 FLRA at 420.

³² *Local 1148*, 65 FLRA at 403-04.

³³ *NAGE, Local R4-106*, 32 FLRA 1159, 1165 (1988) (*NAGE*).

³⁴ 5 U.S.C. § 7701(g).

³⁵ Backpay Award at 1-11.

³⁶ Fee Award at 1.

³⁷ *NFFE, Local 405*, 67 FLRA 352, 353 (2014).

³⁸ See *NAGE*, 32 FLRA at 1165.

³⁹ 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).

⁴⁰ Exceptions at 8.

⁴¹ *AFGE, Local 1592*, 66 FLRA 758, 759 (2012).

⁴² *Id.*

Member Pizzella, dissenting:

The facts of this case are probably better suited to a reality TV show produced by the Food Network in conjunction with Animal Planet than they are for a decision of the Federal Labor Relations Authority. I disagree with my colleagues' determination that the Union's attorney-fee request was timely – more on that in a minute. But, although I recognize that it is not before us, I write first to address my concerns about the underlying award that made the grievant potentially eligible for attorney fees in the first place.

In 2010, a federal food-safety inspector employed by the U.S. Department of Agriculture, Food Safety and Inspection Service (Agency) negligently failed to discover evidence of rat infestation and rat feces throughout a pasta production plant located in Bridgeview, Illinois. Arbitrator Robert D. Steinberg had before him a simple question: did the food-safety inspector's "negligent performance"¹ – which could have resulted in a serious health issue and idled an entire plant for over a week – warrant a five-day suspension without pay?

The Agency believed it did. The rat infestation in the pasta-production facility was "extensive" and "widespread," and the grievant failed to discover the presence of rat feces in a storage room where bags of raw flour were stored.² And because of the grievant's negligent inspection, the pasta production facility was shut down "for more than a week."³

Nonetheless, these facts failed to "impress" the Arbitrator as being sufficiently "egregious" to warrant a suspension.⁴ Instead, the Arbitrator ignored the Agency's reasoned justification for its decision to suspend the grievant and determined that, in his judgment, a suspension was unwarranted because the grievant's actions were "negligen[t]," rather than "willful[]" or "reckless."⁵ He also emphasized that the grievant was a longstanding employee with a "'fully' satisfactory performance record."⁶ Accordingly, the Arbitrator mitigated the five-day suspension to a reprimand and ordered the Agency to pay the grievant for backpay and lost benefits, even though the Arbitrator determined that the plant was shut down for more than a week because of the grievant's negligent inspection!

In other words, the grievant suffered no significant consequence, even though his inexcusable

negligence could have affected the health of hundreds, if not thousands, of consumers and was directly responsible for idling the plant for more than a week.

The mission of the Agency is to ensure that "the nation's commercial supply of meat, poultry, and egg products is safe . . . [and] wholesome."⁷ I doubt that it makes one bit of difference to the idled worker or consumer whether the grievant's actions were "negligent" or "willful." What is significant is the unavoidable conclusion that the grievant's failure to properly inspect the pasta production facility – the very reason the Agency exists and the specific purpose for which the grievant is employed – created the potential for a serious health crisis and idled an entire plant for over a week.

As a result, the only parties that survive this outrageous tale are:

- (1) The grievant (with full backpay and benefits) as a consequence of the Arbitrator's award;
- (2) The Union attorneys (with an additional award of attorney fees);
- (3) The Arbitrator (with additional fees and costs); and
- (4) The rats who set up house in the pasta plant as a consequence of the grievant's negligent inspection that failed to discover their presence in the first place.

But in a bizarre twist, the taxpayers – including the idled workers and affected consumers – are left to pay for all of these unwarranted costs. Under these circumstances, the Arbitrator's award is indeed a bitter pill that is difficult to swallow and cures nothing.

Turning to the matter at hand, I disagree with my colleagues' conclusion that the Union submitted a timely fee request.

Authority precedent holds that, in the absence of an agreed upon deadline for requesting attorney fees, "a request must be filed within a reasonable period of time after the award is issued or becomes final and binding, if an appropriate request had not been filed before the award issued."⁸ Here, the Union filed its request forty days after the award became final and binding. So is forty days a reasonable period of time?

The longest delay in filing an attorney-fee request that the Authority has ever held to be reasonable

¹ Merits Award at 5 (explaining decision of deciding official).

² *Id.* at 4.

³ *Id.*

⁴ *Id.* at 9.

⁵ *Id.* at 10.

⁶ *Id.* at 9.

⁷ USDA, Food Safety & Inspection Serv., About FSIS (Apr. 29, 2014),

<http://www.fsis.usda.gov/wps/portal/informational/aboutfsis>.

⁸ *NAGE, Local R4-106*, 32 FLRA 1159, 1164 (1988).

is twenty-five days.⁹ Moreover, although the Authority's Regulations are silent as to attorney fees awarded under the Back Pay Act,¹⁰ the Regulations provide that, in unfair-labor-practice proceedings, requests for attorney fees under the Equal Access to Justice Act¹¹ must be filed within thirty days of a final order of the Authority.¹² Contrary to my colleagues, I would hold that thirty days is the outer limit of what can be considered to be a reasonable period of time to file an attorney-fee request. Because the Union's request was filed more than thirty days after the award became final, I would hold that the Union's request was untimely. I would, therefore, deny the Union's exception.

Thank you.

⁹ See *Phila. Naval Shipyard*, 32 FLRA 417, 418 (1988).

¹⁰ 5 U.S.C. § 5596.

¹¹ 5 U.S.C. § 504.

¹² 5 C.F.R. § 2430.7(a).