

69 FLRA No. 60

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2002
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
FEDERAL LAW
ENFORCEMENT TRAINING CENTERS
GLYNCO, GEORGIA
(Agency)

0-AR-5169

DECISION

June 9, 2016

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Elliot Newman mitigated an employee's (the grievant's) fourteen-calendar-day suspension to a five-working-day suspension, and awarded the grievant backpay. However, in response to the Union's request to submit a petition for attorney fees, the Arbitrator denied attorney fees without explanation.

The main issue before us is whether the Arbitrator's denial of attorney fees is contrary to law. Because, under the Back Pay Act (the Act)¹ and its implementing regulations, an arbitrator may not deny attorney fees in the absence of a fee request – and because the Union never made a fee request to the Arbitrator – the answer is yes. Accordingly, we find that the Arbitrator's denial of attorney fees was premature, and we modify the award to strike the denial of attorney fees.

II. Background and Arbitrator's Award

The Agency suspended the grievant for fourteen calendar days without pay for providing inaccurate information on his employment application. The Union filed a grievance challenging the suspension, and the grievance was unresolved and submitted to arbitration.

The Arbitrator framed the issues as “whether the Agency has shown by a preponderance of the evidence that its imposition on [the grievant] of a fourteen[-]calendar[-]day suspension without pay was a reasonable penalty for one charge of failure to provide accurate information on an official document, and if not, what shall the remedy be?”²

Before the Arbitrator, the Union asked that the Arbitrator rescind the grievant's suspension and award him backpay with interest. In addition, the Union asked the Arbitrator to defer a ruling on attorney fees until after the merits award so that the Union could submit a petition regarding its request for attorney fees.³

The Arbitrator found that the Agency failed to show that a fourteen-calendar-day suspension was a reasonable penalty for the charge. Accordingly, the Arbitrator reduced the suspension to a five-working-day suspension and awarded the grievant backpay. But, in response to the Union's request to submit a fee petition, the Arbitrator concluded, without explanation, that it was “not appropriate to award attorney's fees.”⁴

The Union filed exceptions, and the Agency filed an opposition to the Union's exceptions.

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

The Union argues that the Arbitrator's denial of attorney fees is contrary to the Act and its implementing regulations because the Arbitrator “never established nor rejected the timeframe set forth by the Union . . . for providing a complete [f]ee [p]etition,”⁵ and failed to make specific findings supporting his denial of attorney fees.⁶ The Union contends that the Authority “can award fees here based on the nature of this record and the findings of the Arbitrator,” but concedes that “a remand is necessary to determine the amount and reasonableness of those fees.”⁷ Alternatively, the Union

² Award at 7.

³ Exceptions at 1-2; *id.*, Attach. 2, Union Post-Hr'g Br. at 49.

⁴ Award at 13.

⁵ Exceptions at 4.

⁶ *Id.* at 4-7.

⁷ *Id.* at 7.

¹ 5 U.S.C. § 5596.

asks the Authority to remand “the entire matter of fees” to the Arbitrator.⁸

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.⁹ 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.¹⁰

Under the Act’s implementing regulations, before an arbitrator may grant or deny attorney fees, a grievant or the grievant’s representative must present a request for fees to the arbitrator, and the arbitrator must grant the agency the opportunity to respond to the request.¹¹ Here, the Union did not request an award of attorney fees as part of its merits award, and the Agency was not afforded an opportunity to respond to any fee request.

Because the Union never made a fee request to the Arbitrator, we find that the Arbitrator’s denial of attorney fees was premature. Accordingly, we modify the award to strike the denial of attorney fees.¹²

In modifying the award, we note that the parties make additional arguments concerning the Union’s entitlement to attorney fees.¹³ However, we decline to address these arguments.¹⁴ Under the Act and its implementing regulations, the arbitrator is the “appropriate authority” to whom a request for attorney fees must be presented.¹⁵ Thus, our modification of the award is without prejudice to either the Union’s right to timely file a request for attorney fees in the future

or the Agency’s right to file a response to any such request.¹⁶ In resolving a timely fee request, the Arbitrator should set forth specific findings supporting his determination on each pertinent statutory requirement under the Act and its implementing regulations.¹⁷

Finally, the Union argues that the denial of attorney fees is deficient on two additional grounds: (1) the Arbitrator denied the Union a fair hearing by “not allowing a fee petition”; and (2) the denial of attorney fees fails to draw its essence from the parties’ collective-bargaining agreement because the “Agency knew or should have known it was not adhering to the concept of progressive discipline as it agreed to in [the parties’ agreement].”¹⁸ Because we have found that the Arbitrator’s denial of attorney fees is contrary to law, we find it unnecessary to address the Union’s additional arguments challenging the denial.¹⁹

IV. Decision

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

⁸ *Id.*

⁹ *E.g.*, *AFGE, Council of Prison Locals, Local 405*, 67 FLRA 395, 398 (2014) (*Local 405*) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

¹⁰ *Id.* (citing *U.S. DOD, Dep’t of the Army & the A.F., Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).

¹¹ *E.g.*, *AFGE, Local 2145*, 67 FLRA 438, 439 (2014) (*Local 2145*) (citing 5 C.F.R. § 550.807(a)-(b)); *see also Local 405*, 67 FLRA at 398-99.

¹² *E.g.*, *Local 2145*, 67 FLRA at 439; *AFGE, Local 3615*, 66 FLRA 565, 565 (2012) (*Local 3615*) (citations omitted); *U.S. Dep’t of the Army, Red River Army Depot, Texarkana, Tex.*, 54 FLRA 759, 762-63 (1998) (*Red River*).

¹³ *See, e.g.*, Exceptions at 8 (arguing that “the Union was the prevailing party” for purposes of awarding attorney fees under the Act and 5 U.S.C. § 7701(g)); Opp’n at 8 (arguing that “the [g]rievant was *not* the prevailing party” under the Act and § 7701(g)).

¹⁴ *E.g.*, *Local 405*, 67 FLRA at 399 (modifying award to strike arbitrator’s premature denial of attorney fees and finding it “unnecessary . . . to address the [u]nion’s arguments concerning 5 U.S.C. § 7701(g)(1)”).

¹⁵ 5 C.F.R. § 550.807(a)-(b); *Local 2145*, 67 FLRA at 439 (citations omitted); *Local 405*, 67 FLRA at 399 (citing *Local 3615*, 66 FLRA at 565).

¹⁶ *E.g.*, *Local 2145*, 67 FLRA at 439 (citing *Red River*, 54 FLRA at 763); *Local 405*, 67 FLRA at 399 (citation omitted); *see also Local 3615*, 66 FLRA at 565 (modification of award to strike arbitrator’s premature denial of attorney fees without prejudice “does not prevent the Authority from reviewing exceptions to the [a]rbitrator’s consideration of a request for an award of attorney fees”) (citing *Red River*, 54 FLRA at 763).

¹⁷ *E.g.*, *AFGE, Local 1592*, 66 FLRA 758, 758-59 (2012) (citations omitted).

¹⁸ Exceptions at 7.

¹⁹ *E.g.*, *Local 405*, 67 FLRA at 399; *Red River*, 54 FLRA at 762 n.2.