69 FLRA No. 62

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL 2219
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
ARMY CORPS OF ENGINEERS
LITTLE ROCK DISTRICT
LITTLE ROCK, ARKANSAS
(Agency)

0-AR-5053
(68 FLRA 448 (2015))

_____

DECISION

June 17, 2016

_____

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

I. Statement of the Case

The Union previously filed an exception to Arbitrator David E. Walker's award that, as relevant here, directed that bargaining-unit employees recover lost premium pay, but denied the Union attorney fees. The Union argued that the denial of fees was contrary to the Back Pay Act (the BPA).[1] In *International Brotherhood of Electrical Workers, Local 2219 (Local 2219)*,[2] the Authority granted the Union's exception and remanded the award, in part, to the parties for resubmission to the Arbitrator to make specific findings addressing the BPA's requirements for an attorney-fee determination. In an award on remand (remand award), the Arbitrator again denied fees, and the Union has now filed exceptions to that denial. There are three substantive questions before us.

The first question is whether the remand award is based on nonfacts because the Arbitrator: (1) found that the Agency made "none of the decisions" that resulted in the unlawful denial of premium pay to bargaining-unit employees;[3] (2) found that the Agency "had no foreknowledge that it would not prevail on the merits" of the parties' dispute at arbitration;[4] or (3) "ignore[d] the facts" in the parties' dispute.[5] Even assuming that these arguments concern factual findings, the first argument fails to identify a clearly erroneous finding; the second argument challenges a matter that the parties disputed at arbitration; and the third argument disagrees with the Arbitrator's evaluation of evidence. Such arguments do not show that an award is based on nonfacts, so the answer to the first question is no.

The second question is whether the Arbitrator erred as a matter of law in finding that attorney fees were not "warranted in the interest of justice" under the BPA.[6] Because the Arbitrator's findings are consistent with the BPA's interest-of-justice criteria, the answer is no.

The third question is whether the award is contrary to public policy, as embodied in § 6128 of the Federal Employees Flexible and Compressed Work Schedules Act (the Schedules Act).[7] Because the Arbitrator did not rely on § 6128 in the remand award, and because the Schedules Act does not address attorney-fee determinations, the answer is no.

II. Background and Arbitrator's Award

A. Background

The Authority more fully detailed the merits of the parties' dispute in *Local 2219*,[8] so this decision discusses only those aspects of the case that pertain to the Union's current exceptions.

In brief, a component of the Department of Defense established a wage schedule that purported to limit the amount of Sunday premium pay (premium pay) that could be paid to the grievants. Relying on a premium-pay guarantee in § 6128 of the Schedules Act, the Union argued that the Agency could not lawfully apply the wage schedule's premium-pay restrictions to the grievants. Nevertheless, the relevant Agency supervisor determined that the wage schedule prevented him from authorizing premium pay for some of the grievants' Sunday work hours. Ultimately, the Arbitrator found that § 6128 required providing the grievants with the premium pay that the Agency had denied them. He directed backpay, but not attorney fees, under the BPA.

[1] 5 U.S.C. § 5596.
[2] 68 FLRA 448 (2015).
[3] Exceptions at 6 (quoting Remand Award at 8).
[4] *Id.* (quoting Remand Award at 10).
[5] *Id.*
[6] Remand Award at 4 (quoting *NAGE, SEIU, Local 551*, 68 FLRA 285, 289 (2015)).
[7] 5 U.S.C. § 6128.
[8] 68 FLRA 448.

In *Local 2219*, the Authority denied the Agency's exceptions to the backpay remedy.[9] But, as mentioned earlier, the Authority granted the Union's exception to the denial of attorney fees because the Arbitrator had not made specific findings that addressed the BPA's requirements for an attorney-fee determination.[10]

B. Remand Award

The parties resubmitted the attorney-fee issue to the Arbitrator for further findings. In the remand award, the Arbitrator stated that a meritorious attorney-fee request under the BPA must satisfy the "standards established under [5 U.S.C. §] 7701(g),"[11] which concerns attorney-fee awards by the Merit Systems Protection Board (MSPB). Under § 7701(g), the MSPB has identified several categories of cases in which an award of attorney fees may be warranted "in the interest of justice" – including, as relevant here, where an agency: (1) engaged in a prohibited personnel practice; (2) took actions that were clearly without merit or wholly unfounded; or (3) knew or should have known that it would not prevail in defending the merits of its actions.[12] The Union contended that its fee request fit within all three of those interest-of-justice categories, and the Arbitrator addressed the Union's contentions regarding each category separately.

First, the Arbitrator found that the Agency did not commit a prohibited personnel practice because it did not deny premium pay based on any discriminatory, deceptive, or otherwise-unlawful intent, and, as relevant here, 5 U.S.C. § 2302(b) made the presence of such unlawful motives necessary to establish any prohibited personnel practice.

Second, the Arbitrator found that the Agency's position was not without merit or wholly unfounded, inasmuch as the Agency paid "careful attention to legal obligations,"[13] but lacked clear authority to deviate from the premium-pay restrictions that other, higher-level officials dictated in the wage schedule.

Third, the Arbitrator found that the Agency had no foreknowledge that it would not prevail at arbitration, in part because the Agency had earnestly attempted to comply with a "panoply of legal obligations."[14]

After rejecting those interest-of-justice arguments presented by the Union, the Arbitrator stated that the Union's attorney-fee request was "denied on that basis alone."[15] But the Arbitrator also stated that he disagreed with some of the Union attorneys' billing practices, as well as the total amount of the fee request. Therefore, the Arbitrator reaffirmed his denial of attorney fees from *Local 2219*.

The Union filed exceptions to the remand award, and the Agency filed an opposition.

III. Preliminary Matter: Section 2425.6(e)(1) of the Authority's Regulations does not require dismissing or denying any of the Union's arguments.

The Agency asserts that the Authority should dismiss or deny some Union arguments that, according to the Agency, do not raise recognized grounds for review[16] or are insufficiently supported[17] under § 2425.6(e)(1) of the Authority's Regulations.[18]

First, the Agency asserts that the Union argues, in its exceptions, that its fee request is "reasonable" and "in the interest of justice," but that neither of those arguments raises a recognized ground for review.[19] However, we find that the Union sufficiently connects both of those arguments to its more general assertion that the denial of fees is contrary to the BPA.[20] Thus, we find that those are supporting arguments that underlie a

[9] *Id.* at 449-51.
[10] *Id.* at 451.
[11] Remand Award at 4 (quoting 5 U.S.C. § 5596(b)(1)(A)(ii)).
[12] *E.g., NTEU, Chapter 32*, 68 FLRA 690, 691 (2015) (citing *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980)).
[13] Remand Award at 9.
[14] *Id.* at 8; *see also id.* at 10 (stating that the Arbitrator's reasoning regarding whether the Agency's action was without merit applied equally to his determination that the Agency lacked foreknowledge that it would not prevail at arbitration).
[15] *Id.* at 10.
[16] Opp'n at 6.
[17] *Id.* at 5.
[18] 5 C.F.R. § 2425.6(e)(1) (Authority may dismiss or deny exception if excepting party "fails to raise and support a [recognized] ground [for review] . . . or otherwise fails to demonstrate a legally recognized basis for setting aside the award").
[19] Opp'n at 6.
[20] *See, e.g.*, Exceptions at 5 (arguing that fees were in the "interest of justice" and citing an Authority decision that addresses the BPA and the interest-of-justice standards); *id.* at 9-10 (arguing that fees were "reasonable" and citing Authority decisions analyzing the reasonableness of fee requests under the BPA).

recognized ground for review – specifically, that the remand award is contrary to law.[21]

Second, the Agency argues that the Union fails to support an assertion that the remand award is contrary to public policy.[22] However, the Agency acknowledges that the Union relies on § 6128 of the Schedules Act to support its public-policy exception.[23] Further, the Union provides arguments about how an attorney-fee award would advance the alleged public policy that the Union identifies in § 6128.[24] Thus, we reject the Agency's claim that the Union fails to support its public-policy exception.[25]

For the reasons above, we decline to dismiss or deny any of the Union's arguments as deficient under § 2425.6(e)(1).

IV. Analysis and Conclusions

A. The remand award is not based on nonfacts.

The Union argues that the remand award is based on several nonfacts,[26] discussed further below, and we assume that these arguments concern factual findings.[27] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[28] However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[29] Further, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, provides no basis for finding that an award is based on a nonfact.[30] Moreover, an "[a]rbitrator's statement [that] is unnecessary to the disposition of his decision . . . constitutes dictum and provides no basis" on which to find an award deficient.[31]

First, the Union contends that the remand award is based on a nonfact because the Arbitrator found that higher-level officials – rather than the Agency in its capacity as an employer – made the decisions that resulted in denying premium pay to the grievants.[32] In that regard, the Arbitrator stated that the Agency did not "originate or issue" the wage schedule that prompted the denial of premium pay,[33] and he found that Agency management followed the wage schedule's premium-pay restrictions "because it considered itself legally obligated" to do so.[34] The Union does not contend that the Agency manager who denied the grievants premium pay either created or issued the wage schedule, or considered himself empowered to disregard it. Consequently, the Union does not show that it was "clearly erroneous" for the Arbitrator to find that higher-level officials made the decisions resulting in the premium-pay denial.[35]

Second, the Union challenges as a nonfact the Arbitrator's finding that the Agency "had no foreknowledge that it would not prevail on the merits" of the parties' dispute at arbitration.[36] However, the record shows that the parties disputed that matter before the Arbitrator.[37] Thus, this argument does not provide a basis for finding that the remand award is based on a nonfact.[38]

The Union's third nonfact argument is that the Arbitrator ignored relevant "facts"[39] – such as disagreement among Agency managers about the interpretation of the Schedules Act,[40] or a decision by a

[21] 5 C.F.R. § 2425.6(a)(1) (recognizing that the Authority will review awards to determine whether they are contrary to law).
[22] Opp'n at 5.
[23] *Id.*
[24] Exceptions at 8-9.
[25] *Cf., e.g., SSA, Region VI*, 67 FLRA 493, 495-96 (2014) (rejecting opposing party's contention that exceptions were not adequately supported under § 2425.6(e)(1), where excepting party "cite[d] to evidence in the record").
[26] Exceptions at 6-8.
[27] *E.g., U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 68 FLRA 932, 935 (2015).
[28] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*NFFE*) (citing *U.S. Dep't of the A.F., Lowry A.F. Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry*)).
[29] *Id.* (citing *Lowry*, 48 FLRA at 594).
[30] *AFGE, Local 953*, 68 FLRA 644, 646 (2015) (*Local 953*) (citing *AFGE, Local 2382*, 66 FLRA 664, 668 (2012)).
[31] *AFGE, Local 2152*, 69 FLRA 149, 151 (2015) (*Local 2152*) (citing *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009) ("Statements that are dicta do not provide a basis for finding an award deficient because . . . [they] do not constitute a determination on the merits.")).
[32] Exceptions at 6 (citing Remand Award at 8).
[33] Remand Award at 8.
[34] *Id.*
[35] *NFFE*, 56 FLRA at 41 (nonfact must be "clearly erroneous" finding).
[36] Exceptions at 6 (quoting Remand Award at 10).
[37] *Compare* Exceptions, Ex. 2, Pet. for Att'y Fees at 7 ("A careful reading of 5 U.S.C. § 6128 regarding compressed work schedules . . . should have alerted the Agency [that] it was in violation . . . and that its interpretation was erroneous."), *with* Exceptions, Ex. 4, Agency's Reply Br. Regarding Att'y Fees at 7 (arguing that Agency managers thought they "had a good chance at prevailing").
[38] *NFFE*, 56 FLRA at 41-42 (determinations on factual matters disputed at arbitration may not be successfully challenged as nonfacts).
[39] Exceptions at 6.
[40] *Id.* at 6-7.

former Agency supervisor to provide the grievants premium pay despite the wage-schedule restrictions.[41] But the Union is disagreeing with the Arbitrator's evaluation of evidence, which does not provide a basis for finding that the remand award is based on a nonfact.[42]

We acknowledge that the Union makes other nonfact assertions about whether: (1) the Union's attorneys had support staff;[43] (2) non-attorneys may be paid on a contingent-fee basis;[44] (3) the work of non-attorney staff would generate attorney fees for necessary supervision;[45] (4) the attorneys "double bill[ed]";[46] and (5) the total amount of fees should exceed the amount of backpay by a large degree.[47] But the Arbitrator made clear that he denied fees based on his rejection of the Union's interest-of-justice arguments "alone."[48] His other statements, therefore, were dicta because they were unnecessary for his disposition of the Union's attorney-fee request. Because dicta do not provide a basis for finding an award deficient,[49] the Union's assertions do not establish that the remand award is based on nonfacts.

B. The remand award is not contrary to the BPA.

The Union argues that the remand award is inconsistent with the BPA in several respects.[50] 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.[51] 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.[52] Under this standard, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[53]

First, regarding the Arbitrator's denial of fees due to the absence of any prohibited personnel practice, the Union argues that the Arbitrator erroneously found that the phrase "unjustified or unwarranted personnel action" in the BPA has a different meaning than the phrase "prohibited personnel practice" in Title 5 of the U.S. Code.[54] But Authority precedent fully supports the Arbitrator's finding that those phrases have distinct meanings.[55] Thus, the Union's argument lacks merit.

Second, the Union argues that, because it successfully recovered employee compensation that federal law "mandated" and that otherwise would have been lost,[56] the Arbitrator should have recognized the Union's success as demonstrating that attorney fees were in the interest of justice here.[57] For support, the Union relies on Chairman Calhoun's concurring opinion in *Naval Air Development Center, Department of the Navy* (*Navy*),[58] in which he stated that attorney fees may be in the interest of justice where an agency acts "in disregard of prevailing law" to deny employees compensation for "shift differentials."[59] But in *Navy*'s other concurring opinion, Member Frazier clarified that "prevailing in an arbitration award which calls for backpay . . . is not, standing alone, a sufficient basis for an award of attorney fees. It is only the first step in meeting the requirements under the [BPA]."[60] And the Authority has never found that Chairman Calhoun's concurrence supports granting fees based solely on the existence of a legal violation that resulted in lost compensation.[61] In that regard, the Union's argument is inconsistent with the principle that correcting an "unwarranted or unjustified personnel action"[62] and recovering backpay will not, standing alone, support an attorney-fee award under the

[41] *Id.* at 7.
[42] *Local 953*, 68 FLRA at 646 (disagreement with an arbitrator's evaluation of evidence does not establish that an award is based on a nonfact).
[43] Exceptions at 7 (citing Remand Award at 11, 12).
[44] *Id.*
[45] *Id.*
[46] *Id.* at 8.
[47] *Id.*
[48] Remand Award at 10.
[49] *Local 2152*, 69 FLRA at 151.
[50] Exceptions at 2-5, 9-10.
[51] *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)).
[52] *U.S. DOD, Dep'ts of the Army & the A.F., Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).
[53] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).
[54] Exceptions at 2-4.
[55] *E.g.*, *U.S. DHS, U.S. CBP*, 69 FLRA 412, 415 (2016) (setting aside, as contrary to law, arbitrator's finding that "an 'unjustified and unwarranted personnel action' under the BPA . . . meet[s] § 7701(g)(1)'s 'prohibited personnel action' requirement" (first quoting 5 U.S.C. § 5596(b)(1); then quoting *id.* § 7701(g)(1))); *U.S. Dep't of the A.F., Davis-Monthan A.F. Base, Tucson, Ariz.*, 64 FLRA 819, 821 (2010) (rejecting union's argument that, due to arbitrator's finding that agency committed an unwarranted or unjustified personnel action, agency necessarily committed a prohibited personnel practice).
[56] Exceptions at 5.
[57] *See id.*
[58] 21 FLRA 131 (1986) (Chairman Calhoun and Member Frazier concurring).
[59] Exceptions at 5 (quoting *Navy*, 21 FLRA at 138 (Concurring Opinion of Chairman Calhoun)).
[60] 21 FLRA at 156 (Concurring Opinion of Member Frazier).
[61] *Accord* Remand Award at 4 n.3 (observing that "backpay standing alone does not satisfy" the interest-of-justice standard).
[62] 5 U.S.C. § 5596(b)(1).

BPA.[63] Moreover, the Arbitrator did not find that the Agency acted "in disregard of prevailing law,"[64] but, rather, that the Agency made a mistake despite "careful attention to [its] legal obligations."[65] Thus, the Union's argument provides no basis for finding the award contrary to law.

Therefore, we deny the Union's exception contending that the remand award is inconsistent with the BPA generally, or the interest-of-justice standards in particular.

The Union also argues that the Arbitrator legally erred in finding that the amount of the Union's fee request was not "reasonable" under the BPA.[66] But, as relevant here, an award of attorney fees under the BPA must be *both*: (1) in the interest of justice; *and* (2) "reasonable" in amount.[67] Because we have denied all of the Union's arguments that the Arbitrator's interest-of-justice findings are deficient, those findings – by themselves – preclude an attorney-fee award in this case. Therefore, we need not resolve the Union's argument about the reasonableness of its fee request.[68]

C. The remand award is not contrary to the public policy embodied in § 6128 of the Schedules Act.

The Union contends that denying it attorney fees is inconsistent with the public policies underlying the Schedules Act – particularly the premium-pay guarantees in § 6128.[69] The Authority construes public-policy exceptions "extremely narrow[ly],"[70] and a violation of the alleged policy "must be clearly shown."[71] Here, the Arbitrator's denial of fees did not rely on § 6128 or the Schedules Act more broadly. Further, the Schedules Act does not concern attorney-fee awards, and the Union fails to explain how a denial of attorney fees could "clearly" violate the public policies that the Schedules Act advances.[72] Thus, we deny the Union's public-policy exception.[73]

V. Decision

We deny the Union's exceptions to the Arbitrator's denial of attorney fees.

[63] *See U.S. DHS, CBP Agency, N.Y., N.Y.*, 60 FLRA 813, 818 (2005) (remanding attorney-fee award as insufficiently explained because, although arbitrator's "finding that the [a]gency violated the parties' agreement . . . and awarding backpay satisfie[d] the [BPA's] threshold requirement[s,]" those determinations did not adequately support arbitrator's finding that attorney fees were "warranted in the interest of justice").

[64] Exceptions at 5 (quoting *Navy*, 21 FLRA at 138 (Concurring Opinion of Chairman Calhoun)).

[65] Remand Award at 9.

[66] Exceptions at 9-10.

[67] *AFGE, Local 12*, 38 FLRA 1240, 1248 (1990).

[68] *See AFGE, Council of Prison Locals 33, Local 3690*, 69 FLRA 127, 130, 132 (2015) (stating that, because arbitrator found attorney fees unavailable under the BPA due to absence of proven loss of pay, allowances, or differentials – and union did not successfully challenge that finding – there was no need to analyze BPA's other attorney-fee requirements).

[69] Exceptions at 8 (citing 5 U.S.C. § 6128).

[70] *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 459 (2012) (quoting *NTEU*, 63 FLRA 198, 201 (2009) (citing *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 810 F.2d 1239, 1241 (D.C. Cir. 1987))).

[71] *Id.* (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987)).

[72] *Id.*

[73] *E.g.*, *NTEU, Chapter 299*, 68 FLRA 835, 835 (2015) (denying exception that did not "clearly show that the award violate[d] the alleged public policy").