

70 FLRA No. 162

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-5199
(70 FLRA 17 (2016))

DECISION

September 13, 2018

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

Arbitrator James M. Klein awarded the Union attorney fees but reduced the requested amount. The main question before us is whether that award is contrary to law because, according to the Union, the Arbitrator failed to make specific findings to support the reduction. Because the Arbitrator clearly explained the reduction, the answer is no.

II. Background**A. Merit Systems Protection Board (MSPB) Proceedings**

The Agency removed an employee (the grievant) from employment for misconduct, and the grievant appealed the action to the MSPB. Months later, the Agency notified the MSPB that it intended to rescind the grievant's removal and return him to work. As a result, the MSPB dismissed the grievant's appeal without prejudice to his right to refile it if the Agency failed to return him to his previous position.¹

On March 25, 2015 – shortly after the Agency rescinded the grievant's removal – the Agency proposed to suspend the grievant for fourteen days for the same alleged misconduct that gave rise to the rescinded removal.

Thereafter, the grievant refiled his MSPB appeal concerning the removal, and the MSPB ordered the grievant to show cause why the appeal should not be dismissed as moot. As relevant here, the grievant argued that the appeal was not moot because the Agency had not paid his attorney fees. The MSPB found that an outstanding claim for attorney fees does not defeat a claim of mootness and “is irrelevant to determining whether the [MSPB] retains jurisdiction over [an] appeal.”² Further, the MSPB found that any motion for attorney fees would be premature at that time, and it dismissed the appeal as moot.

B. Grievance, Arbitrator's Award, and the Authority's Decision in *AFGE, Local 2002*

The Union filed a grievance challenging the fourteen-day suspension, and the grievance went to arbitration. The Arbitrator set aside the grievant's suspension, restored his seniority, and awarded him backpay. But, in response to the Union's request to submit a fee petition, the Arbitrator stated, without explanation: “The Arbitrator denies the request for attorney fees.”³

The Union then filed exceptions to the Arbitrator's denial of attorney fees with the Authority. In its exceptions, the Union requested that the Authority award attorney fees or, in the alternative, remand the attorney-fee issue to the Arbitrator.

¹ See *Medlin v. DHS*, MSPB Docket No. AT-0752-14-0989-I-1, 2015 WL 1976020 (Apr. 27, 2015).

² See *Medlin v. DHS*, MSPB Docket No. AT-0752-14-0989-I-2, 2015 WL 5122777 (Aug. 24, 2015).

³ Merits Award at 12.

In *AFGE, Local 2002*,⁴ the Authority found that the Arbitrator's denial of fees was premature because the Union had not yet submitted a fee request to the Arbitrator.⁵ Accordingly, the Authority modified the award to strike the denial of fees without prejudice to either the Union's right to timely file a fee petition with the Arbitrator or the Agency's right to file a response to any such petition.⁶

C. Fee Petition and Fee Award

The Union then submitted a fee petition to the Arbitrator, requesting \$202,775.50 for 605.3 hours at a billing rate of \$335 per hour which included a claim for 167 hours of work performed before the March 25, 2015 suspension. The Union asserted that, even though a substantial number of the claimed hours preceded the March 25 suspension, the hours claimed were reasonable because the suspension and the removal arose from the same facts. The Union also argued that it had excluded "time that was devoted to MSPB proceedings that did not directly involve the factual presentation for the arbitration hearing."⁷

The Arbitrator found that the statutory requirements for an award of attorney fees were met. As to reasonableness of the amount, the Arbitrator granted the Union attorney's claimed billing rate of \$335, but reduced the number of hours from 605.3 to 140. Specifically, the Arbitrator disallowed fees for 167 hours incurred before March 25, 2015 because he found that "[u]p until [that date], all of the time incurred by [the Union] related to the MSPB case."⁸ In addition, the Arbitrator stated that the Union "attempted to litigate the issue of attorney fees before the MSPB . . . after [the grievant's] proposed removal was rescinded and the . . . [MSPB had] dismissed [the removal appeal] without prejudice," but the MSPB "denied" the attorney-fee claim.⁹ Therefore, according to the Arbitrator, the Union could not "re-litigate that [fee] issue" before him.¹⁰ Finally, the Arbitrator noted that even if the Authority directed him to include hours before March 25, 2015, his "award of fees in this case would not change[,] because the total amount requested by [the Union] is extravagant and not reasonable."¹¹

In addition, the Arbitrator found that "[t]he length of the [Union's post-hearing briefs] and the time

devoted to them[] [was] not reasonable."¹² He also disallowed fees incurred in connection with the Union's previous exceptions to the Authority because the Union's (unsuccessful) "primary objective" in its exceptions had been to have the Authority award attorney fees directly.¹³ Further, the Arbitrator found that this was a fourteen-day suspension case and "the investigative file was only 247 pages."¹⁴ Finally, after considering all of the materials submitted by the parties and the length of the hearing (two days), he awarded: (1) twenty hours for the arbitration hearing; (2) sixty hours for preparation for that hearing; (3) forty hours for post-hearing briefs; and (4) twenty hours for all matters relating to the fee petition. In sum, the Arbitrator awarded \$46,900 in attorney fees.

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

III. Analysis and Conclusions

A. The Arbitrator properly denied fees for the MSPB proceedings.

The Union contends that the Arbitrator erroneously denied fees for hours for work performed in connection with the MSPB proceedings.¹⁵ Specifically, the Union argues that although it "sought to have the MSPB litigate an attorney[-]fee application," it "never submitted an attorney[-]fee request to the MSPB."¹⁶ Therefore, according to the Union, the MSPB never determined that the Union was not entitled to attorney fees for those hours.¹⁷

As noted above, the grievant challenged his removal before the MSPB, but the grievant filed a grievance to challenge the suspension which was issued on March 25. In considering the Union's request for fees, the Arbitrator disallowed 167 hours for work performed before March 25 because he found that those hours related to the grievant's MSPB proceedings, not the grievance and arbitration. Because the Union has not demonstrated that the MSPB proceedings were related to

⁴ 70 FLRA 17 (2016).

⁵ *Id.* at 19.

⁶ *Id.*

⁷ Exceptions, Ex. B, Fee Petition at 14.

⁸ Fee Award at 6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 6 n.2.

¹² *Id.* at 7.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Exceptions at 8-10.

¹⁶ *Id.* at 10.

¹⁷ *Id.*

the arbitration case, we agree with the Arbitrator. Therefore, we deny the Union's exception.¹⁸

- B. The remainder of the fee award is not contrary to law.

The Union contends that the remainder of the fee award is contrary to the Back Pay Act (BPA)¹⁹ and 5 U.S.C. § 7701(g) because the Arbitrator did not provide a fully articulated, reasoned decision setting forth specific findings justifying his reduction of the Union's claimed hours.²⁰ 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.²¹ In making that assessment, the Authority will typically defer to an arbitrator's underlying factual findings, but in determining whether an arbitrator's legal conclusions are consistent with the applicable standard of law, we conduct a de novo review.²²

The BPA requires that an award of fees be in accordance with the standards established under § 7701(g).²³ Section 7701(g)(1) requires, as relevant here, that the amount of fees be reasonable.²⁴ When exceptions concern the attorney-fee standards established under § 7701(g)(1), the Authority has looked to the decisions of the MSPB and the U.S. Court of Appeals for the Federal Circuit for guidance.²⁵ Under those standards, arbitrators must support their award with "a

concise but clear explanation of [their] reasons for any reduction of the hours awarded from those claimed."²⁶ The Authority has also stated that, under MSPB precedent, a fact-finder must "determine 'whether the hours claimed are justified' and . . . 'make a judgment – considering the nature of the case and the details of the request, . . . and defend[] his [or her] judgment in a reasoned (though brief) opinion – on what the case should have cost the party[.]'"²⁷

Here, the Arbitrator considered and disallowed specific hours claimed by the Union after considering the parties' submissions, the length of the investigative file (only 247 pages), the nature of the case (as involving a fourteen-day suspension), and the length of the hearing (two days). Thus, in reducing the number of hours allowed, the Arbitrator considered "the nature of the case" and determined that certain hours were not "justified."²⁸ Moreover, the Arbitrator also considered "what the case *should have cost* the [Union]."²⁹ Under these circumstances, we find that the Arbitrator clearly explained his reasons for reducing the Union's claimed hours,³⁰ and we deny the Union's exceptions.^{31,32}

¹⁸ Cf. *U.S. DOD, Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 47 FLRA 1187, 1196 (1993) (excepting party's claim that arbitrator erroneously awarded attorney fees not incurred in connection with an employee's grievance and arbitration denied by Authority because "exception constitute[d] mere disagreement with the [a]rbitrator's findings of fact and evaluation of the evidence, and [was] an attempt to relitigate the case before the Authority").

¹⁹ 5 U.S.C. § 5596.

²⁰ Exceptions at 7-11, 13-17.

²¹ See, e.g., *U.S. Dep't of VA, Med. Ctr., Detroit, Mich.*, 64 FLRA 794, 796 (2010) (VA) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

²² *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)); *U.S. DOD, Def. Fin. & Accounting Serv.*, 60 FLRA 281, 283 (2004) (*DOD*) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).

²³ See, e.g., VA, 64 FLRA at 796; *DOD*, 60 FLRA at 284; *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1690-91 (1998) (*USDA*).

²⁴ See, e.g., VA, 64 FLRA at 796; *DOD*, 60 FLRA at 284; *USDA*, 53 FLRA at 1691.

²⁵ See, e.g., VA, 64 FLRA at 796; *DOD*, 60 FLRA at 286; *USDA*, 53 FLRA at 1691. *But see NAIL, Local 5*, 69 FLRA 573, 577-78 (2016) (noting that the manner in which the Authority evaluates attorney fees may warrant a fresh look to create a standard more suitable in the collective-bargaining context).

²⁶ See, e.g., *Dep't of the Air Force, Headquarters, 832d Combat Support Group DPCE, Luke Air Force Base, Ariz.*, 32 FLRA 1084, 1101 (1987) (citing *Crumbaker v. MSPB*, 781 F.2d 191, 195 (Fed. Cir. 1986), *modified on other grounds*, 827 F.2d 761 (Fed. Cir. 1987)); see also VA, 64 FLRA at 796; *Mudrich v. Dep't of Agric.*, 92 M.S.P.R. 413, 419 (2002) ("the reasons for a reduction must be carefully explained"); *Overseas Educ. Ass'n*, 39 FLRA 1261, 1267 (1991) (*Overseas*).

²⁷ VA, 64 FLRA at 797 (quoting *Casali v. Dep't of the Treasury*, 81 M.S.P.R. 347, 354 (1999)).

²⁸ *Id.*

²⁹ *Id.* (emphasis added).

³⁰ See *DOD*, 60 FLRA at 285 (finding arbitrator supported fee award); cf. VA, 64 FLRA at 797 (finding fee award not supported where arbitrator found that the numbers of hours requested "seems reasonable" because the union's attorney was "well prepared" but "did not make specific factual findings to support his conclusion that the amount of fees requested [was] reasonable"); *Overseas*, 39 FLRA at 1267 (finding award not supported where "the [a]rbitrator found that '[a]n award based on 200 hours . . . would be more reasonable[]'" but "provided no clear, articulated explanation for the reduction in hours").

³¹ See *DOD*, 60 FLRA at 285 n.7 (noting that "[e]ven if the [a]rbitrator had failed to sufficiently articulate his award, such a failure would not have rendered the award deficient" because "where the record permits [the Authority] to properly resolve [such an] exception, [it] will modify the award or deny the exception, as appropriate" and "[i]n cases where the record does not permit [the Authority] to determine the proper resolution of the exception, [it] will remand for further proceedings").

³² We note that we dismiss the Agency's arguments, in its opposition, that the fee award is contrary to law and based on a nonfact because these arguments constitute exceptions but the Agency did not file them within the applicable time period under 5 U.S.C. § 7122(b) and 5 C.F.R. § 2425.2(b).

IV. Decision

We deny the Union's exceptions.

Member DuBester, dissenting:

I disagree with the majority's treatment of the Union's hours of work in the MSPB proceeding. I would set aside as contrary to law the Arbitrator's finding that the Union is precluded from seeking fees for these hours in the grievance proceeding because, in his view, the Union is merely "re-litigat[ing]" attorney-fee issues previously litigated before the MSPB.¹

Further, in my opinion, the Arbitrator's findings do not constitute a "fully articulated, reasoned decision."² A number of the findings on which the Arbitrator relies; for example, that "this was a 14-day suspension case," and that "the investigative file was only 247 pages,"³ are merely descriptions or observations, not conclusions of law.

I would therefore remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

¹ Fee Award at 6. See *NAGE, Local R5-188*, 46 FLRA 458, 468 (1992) (finding that such time "is compensable if (a) the issues involved in the prior proceeding arose from the common core of facts that formed the basis of the [current proceeding], (b) the legal work performed was reasonable, and (c) the work performed in the prior proceeding significantly contributed to the success of the [current] proceeding and eliminated the need for work that would otherwise have been required" in that proceeding (quoting *Wiatr v. Dep't of the Air Force*, 50 M.S.P.R. 441, 446 (1991)). *Wiatr* remains good law on this issue. See also *Bonggat v. Dep't of the Navy*, 59 M.S.P.R. 175, 178 (1993) ("Fees may be awarded for time spent on a separate and optional, but factually related, proceeding if, among other things, the work performed contributes to the success of a Board proceeding.").

² *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 70 FLRA 195, 196 (2018).

³ Fee Award at 7.