

70 FLRA No. 5

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

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DECISION

October 17, 2016

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

I. Statement of the Case

Arbitrator James M. Klein rescinded an employee's (the grievant's) fourteen-day suspension, restored the grievant's seniority, and awarded the grievant backpay under the Back Pay Act (the Act).¹ 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 Act 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 days for allegedly creating a false impression that he had law-enforcement authority. The Union filed a grievance challenging the suspension, and the grievance went to arbitration.

At arbitration, the parties stipulated to the following issues: "Was the Agency's fourteen[-]day suspension of the [g]rievant fair, timely, equitable, and for such cause as will promote the efficiency of the [s]ervice? . . . If not, what shall the remedy be?"²

Before the Arbitrator, the Union requested that the Arbitrator rescind the grievant's suspension and award him backpay. In addition, the Union asked the Arbitrator to defer a ruling on attorney fees until after he issued an award on the merits, so that the Union could submit a petition for attorney fees under the Act.³

The Arbitrator found that the Agency's imposed discipline was untimely, and that the grievant did not create any false impressions. As remedies, the Arbitrator rescinded the grievant's suspension, restored his seniority, and awarded him backpay.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."⁴

The Union filed exceptions to the award, and the Agency filed an opposition to the Union's exceptions. The Union also requested leave to file, and did file, a reply to the Agency's opposition (Union's reply).⁵

III. Preliminary Matter: Under § 2429.26 of the Authority's Regulations, we do not consider the Union's reply.

As noted above, the Union requested leave to file a reply to the Agency's opposition.⁶ Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 of the Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as it deems appropriate.⁷ Generally, a party must request leave to file

² Award at 1.

³ Exceptions at 6; *id.*, Ex. F, Union's Post-Hr'g Br. at 70-71, Ex. G, Union's Reply to Agency's Post-Hr'g Br. at 24.

⁴ Award at 12.

⁵ Request for Leave to Reply to Opp'n (Request) at 1; Reply to Opp'n (Reply) at 1.

⁶ Request at 1; Reply at 1.

⁷ 5 C.F.R. § 2429.26(a); *see also* AFGE, *Local 3652*, 68 FLRA 394, 396 (2015) (*Local 3652*).

¹ 5 U.S.C. § 5596.

a supplemental submission,⁸ and explain why the Authority should consider the submission.⁹ Where a party seeks to raise issues that it could have addressed, or did address, in a previous submission, the Authority ordinarily denies requests to file supplemental submissions concerning those issues.¹⁰ The Authority also has denied a party's request to file a supplemental submission where the party contends that a party-opponent "mischaracterized the party's position or misstated matters of law."¹¹

Portions of the Union's reply merely repeat or expand on arguments that the Union already addressed in its exceptions,¹² and contend that the opposition "misunderstands" the law or the Union's arguments.¹³ Consistent with the principles set forth above, these arguments do not merit granting leave to file a supplemental submission, and we decline to consider them.¹⁴

In addition, to support its argument that it is entitled to reasonable attorney fees¹⁵ under the Act – including the requirements of 5 U.S.C. § 7701(g)¹⁶ – the

⁸ *E.g.*, *SSA, Region VI*, 67 FLRA 493, 496 (2014) (citing *U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 535 n.1 (2010)); *see also U.S. DHS, U.S. CBP*, 68 FLRA 1015, 1018 (2015) (Member Pizzella dissenting) (noting that the Authority may consider submissions filed without permission if those submissions address jurisdictional issues).

⁹ *Local 3652*, 68 FLRA at 396 (citing *U.S. Dep't of Transp., FAA*, 66 FLRA 441, 444 (2012)).

¹⁰ *U.S. Dep't of HUD*, 69 FLRA 213, 218 (2016) (Member Pizzella dissenting) (citations omitted); *see also Local 3652*, 68 FLRA at 396 (citing *U.S. DHS, U.S. CBP*, 68 FLRA 184, 185 (2015)).

¹¹ *NTEU*, 65 FLRA 302, 305 (2010) (*NTEU*) (citing *Bremerton Metal Trades Council*, 64 FLRA 103, 104 (2009); *U.S. Dep't of the Navy, Naval Sea Sys. Command*, 57 FLRA 543, 543 n.1 (2001)).

¹² Reply at 2-3 (arguing that the stipulated issue did not involve a request for attorney fees, and that the Union asked the Arbitrator to retain jurisdiction to consider its fee petition), 4-6 (asserting that an attorney-client relationship existed regarding the suspension), 7-20 (contending that the grievant is entitled to recover attorney fees under 5 U.S.C. § 7701(g)).

¹³ Reply at 2 (arguing that the Agency "misunderstands the jurisdiction conferred on an arbitrator under the [Act]"), 5-6 (contending that the Agency "misunderstand[s] that proof of an attorney-client relationship must appear in a written contract").

¹⁴ *See NTEU*, 65 FLRA at 306 (declining to consider any arguments in a supplemental submission that a party "already had an opportunity to – and did in fact – address . . . in its exceptions," and arguments that the "opposition contains 'misstatements'"); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 200 (2016) (declining to consider any arguments in a supplemental submission that the party "raised, or could have raised, in its exceptions").

¹⁵ Reply at 5-20.

¹⁶ 5 U.S.C. § 7701(g).

Union submitted with its reply additional documentation. Specifically, the Union attached to its reply three affidavits, sections of the parties' agreement, and an invoice for legal services.¹⁷ As discussed in more detail in section IV. below, we find that the Arbitrator's denial of attorney fees is premature and, therefore, contrary to law. Accordingly, as discussed below, we do not reach the Union's arguments that it has satisfied § 7701(g)'s requirements for an award of attorney fees. Therefore, it is not necessary for us to consider portions of the Union's reply – or attachments to the reply – concerning the Union's entitlement to attorney fees under § 7701(g).¹⁸

In sum, we decline to consider the Union's reply.

IV. 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 he "inexplicably 'denie[d] the request for attorney fees' that was neither made nor litigated."¹⁹ The Union requests that the Authority either award the grievant its requested attorney fees or remand "the attorney[-]fees issue" to the Arbitrator.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 applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.²²

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.²³ Here, the Union did not request that the Arbitrator award attorney fees as part of his merits award;

¹⁷ Reply, Ex. K, Aff. of Henry Harris, Ex. L, Aff. of E. Michael Ruberti, Ex. M, Articles 7-9 of the parties' 2014 agreement, Ex. N, Aff. of Albert V. Medlin, Ex. O, Invoice.

¹⁸ *See, e.g., Broad. Bd. of Governors*, 66 FLRA 380, 386 n.18 (2011) (where Authority did not reach a party's contrary-to-law and public-policy exceptions, it was unnecessary to consider petitioner's supplemental submission addressing those arguments).

¹⁹ Exceptions at 7 (quoting Award at 12).

²⁰ *Id.* at 17.

²¹ *E.g., AFGE, Local 2002*, 69 FLRA 425, 426 (2016) (*Local 2002*) (citing *AFGE, Council of Prison Locals, Local 405*, 67 FLRA 395, 398 (2014) (*Local 405*)).

²² *Id.* (citing *Local 405*, 67 FLRA at 398).

²³ *E.g., id.* (citing *AFGE, Local 2145*, 67 FLRA 438, 439 (2014); *Local 405*, 67 FLRA at 398-99).

rather, the Union requested that the Arbitrator retain jurisdiction to allow the Union to file an application for attorney fees.

Because the Union never made a fee request to the Arbitrator, and the Agency did not have an opportunity to respond to any fee request, we find that the Arbitrator's denial of attorney fees was premature. Accordingly, we modify the award to strike the denial of attorney fees.²⁴

In modifying the award, we note that the parties raise additional arguments concerning the Union's entitlement to attorney fees under 5 U.S.C. § 7701(g).²⁵ Under the Act and its implementing regulations, the arbitrator is the "appropriate authority" to whom a request for attorney fees must be presented.²⁶ Accordingly, we decline to address the parties' arguments concerning § 7701(g).²⁷ However, 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.²⁸ 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.²⁹

Finally, the Union argues that the denial of attorney fees is deficient on two additional grounds: (1) the Arbitrator's denial of attorney fees is "contrary to public policy as expressed in the [Act] and related statutes and regulations";³⁰ and (2) the Arbitrator exceeded his authority when "he improperly resolved the attorney[-]fee issue – which was not submitted to him – without making the required specific factual findings" under § 7701(g).³¹ 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.³²

²⁴ *E.g., id.* (citations omitted).

²⁵ *See, e.g.,* Exceptions at 8-17 (arguing that the grievant is entitled to attorney fees under § 7701(g)); Opp'n at 4 (arguing that "[u]nder [§ 7701(g),] [t]he [g]rievant is not entitled to attorney fees").

²⁶ 5 C.F.R. § 550.807(a)-(b); *AFGE, Local 3749*, 69 FLRA 519, 521-22 (2016) (*Local 3749*) (citations omitted); *Local 2002*, 69 FLRA at 426 (citations omitted).

²⁷ *E.g., Local 2002*, 69 FLRA at 425 (citing *Local 405*, 67 FLRA at 399).

²⁸ *E.g., Local 3749*, 69 FLRA at 522 (citing *Local 2002*, 69 FLRA at 426).

²⁹ *See, e.g., AFGE, Local 1592*, 66 FLRA 758, 758-59 (2012) (citations omitted).

³⁰ Exceptions at 4 (citations omitted).

³¹ *Id.* at 8.

³² *E.g., Local 3749*, 69 FLRA at 522 (citation omitted); *Local 2002*, 69 FLRA at 426 (citations omitted).

V. Decision

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