72 FLRA No. 46

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

0-AR-5572
(71 FLRA 1141 (2020))

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DECISION

May 3, 2021

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

Decision by Member Abbott for the Authority

I. Statement of the Case

The Union filed an application for attorney fees under the Back Pay Act (BPA)[1] after Arbitrator Jerome A. Diekemper sustained its grievance on the merits of the case. The Arbitrator denied the Union's request for attorney fees because he found that the Union failed to meet any of the bases set forth in the BPA.

The Union argues in its exceptions that the Arbitrator's denial of attorney fees was contrary to the BPA and contrary to public policy. Because we find that the Union has failed to establish that the attorney-fee award is contrary to law or to public policy, we deny the Union's exceptions.

II. Background

The grievants are physicians that work a regular forty-hour workweek in addition to performing rounding duties two weekend days per month.[2] In his November 13, 2019 award (merits award), the Arbitrator found that the Agency violated the parties' collective-bargaining agreement (CBA) by scheduling the grievants to perform weekend rounding outside of the basic forty-hour workweek.[3] As a remedy, he ordered the Agency to provide the grievants with retroactive "rest and relaxation."[4] The Arbitrator retained jurisdiction for sixty days to decide any issues raised concerning remedies.

The Union filed a timely application for attorney's fees and costs. On January 14, 2020, the Arbitrator issued an attorney-fee award – the award at issue here – denying the Union's application. The Arbitrator found that the Agency's violation of the CBA was not "the kind of unjustified or unwarranted personnel action contemplated by the [BPA]."[5] He noted that the Union did not argue that the Agency's manner of scheduling weekend rounding was done for any "improper," "disciplinary," "discriminatory," or "punitive purpose."[6] He also found that the remedy of retroactive rest and relaxation was not "pay, allowances, or differentials" under the BPA,[7] and that an award of attorney fees would not be in the interest of justice. According to the Arbitrator, the Agency's defense was not frivolous and the Agency reasonably believed that it would not lose the arbitration because its position was not clearly without merit. The Union filed exceptions to the attorney-fee award on February 13, 2020.

[1] 5 U.S.C. § 5596.

[2] *See U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 1141, 1141 (2020) (*VA*) (then-Member DuBester dissenting).

[3] *Id.* at 1141-42.

[4] *Id.* at 1142. Article 35, Section 20 of the parties' CBA authorizes hospital directors to approve absences for "rest and relaxation." *Id.* at 1141.

[5] Fee Award at 6 (internal quotation marks omitted). The threshold requirement for entitlement to attorney fees under the BPA is a finding that an employee (1) has been affected by an unjustified or unwarranted personnel action, (2) which has resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *AFGE, Loc. 342*, 69 FLRA 278, 279 (2016) (*Loc. 342*) (then-Member DuBester concurring).

[6] Fee Award at 5.

[7] *Id.* at 7.

III. Analysis and Conclusions

A. The Union failed to establish that the denial of attorney fees is contrary to the BPA.

The Union argues that the denial of attorney fees is contrary to the BPA.[8] Specifically, the Union argues that "rest and relaxation" is an "allowance" under the BPA and that this case meets the standard for awarding attorney fees in the "interest of justice" under 5 U.S.C. § 7701(g)(1).[9]

The Union would be entitled to an award of attorney fees under the BPA if, as relevant here, the grievants were affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of the grievants' pay, allowances, or differentials.[10] The BPA also requires that an award of attorney fees must be based on the standards established under 5 U.S.C. § 7701(g), which requires that an award of fees must be warranted in the interest of justice.[11]

As to the first requirement, the Arbitrator determined that the Agency's actions did not amount to "the kind of unjustified or unwarranted personnel action contemplated by the [BPA]."[12] The Union does not challenge or address that finding.[13] As a result, the Union has not established the threshold requirement for an award of attorney fees, or that the Arbitrator erred in denying attorney fees. Consequently, we need not consider the Union's arguments that rest and relaxation constitutes an "allowance" and that attorney fees are warranted in the interest of justice.[14] We deny the Union's exception that the Arbitrator's denial of attorney fees was contrary to law.[15]

B. The attorney-fee award is not contrary to public policy.

The Union argues that the award is contrary to public policy because an award of attorney fees "is in the interest of justice" and that "it is in the best interest of the [f]ederal workforce and public policy to have rested physicians."[16] Here, the Union has not clearly shown a violation of an explicit, well-defined, and dominant public policy, as required by our precedent.[17] It is not sufficient to merely state, as the Union does, that a fee award would be in the public interest. Because the Union

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[8] When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *AFGE, Loc. 2076*, 71 FLRA 1023, 1026 n.26 (2020) (then-Member DuBester concurring) (citing *AFGE, Loc. 933*, 70 FLRA 508, 510 n.13 (2018)). 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. *Id.* In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *Id.*

[9] Exceptions at 5-7.

[10] *See* 5 U.S.C. § 5596; *AFGE, Loc. 1633*, 71 FLRA 211, 214 (2019) (*Loc. 1633*) (Member Abbott concurring; then-Member DuBester concurring in part and dissenting in part); *Loc. 342*, 69 FLRA at 279. A violation of a collective-bargaining agreement is an unjustified or unwarranted personnel action within the meaning of the BPA. *Loc. 342*, 69 FLRA at 279 (citing *NAGE, SEIU, Loc. 551*, 68 FLRA 285, 289 (2015)).

[11] *Loc. 1633*, 71 FLRA at 214-15; *see also* 5 U.S.C. § 5596(b)(1)(A)(ii).

[12] Fee Award at 6 (internal quotation marks omitted).

[13] The Union states that "[t]he Arbitrator determined that the Agency had violated the Master Agreement between the parties as set forth in: ARTICLE 35 – TIME AND LEAVE (Jx1 Pg. 205) Section 20 – Rest and Relaxation Title 38 Physicians, Podiatrists, and Optometrists." Exceptions at 7. However, in the merits award, the Arbitrator found that the Agency violated the CBA by scheduling weekend rounding outside of the basic forty-hour workweek, not by failing to schedule rest and relaxation. *VA*, 71 FLRA at 1142. And in the fee award at issue here, the Arbitrator only discusses that scheduling rounding outside of the regular forty-hour workweek did not amount to an unjustified or unwarranted personnel action. Fee Award at 5-6. Thus, if the Union was attempting to argue that there was an unjustified or unwarranted personnel action through the above statement, the Union does not correctly identify the contract violation in this case, and we would further reject such a brief argument as unsupported. *See* 5 C.F.R. § 2425.6(e)(1).

[14] *See AFGE, Loc. 2959*, 70 FLRA 309, 311 (2017) (finding the second requirement of the BPA not satisfied, and not addressing the union's remaining contrary-to-law arguments because there was no basis for an attorney-fee award under the BPA); *AFGE, Loc. 3690*, 70 FLRA 10, 13 (2016) (finding that the union did not demonstrate that the arbitrator erred in finding that the grievant's discipline was not an unjustified or unwarranted personnel action and thus that it failed to establish the threshold requirements for an award of attorney fees, and not addressing the union's argument that attorney fees were warranted in the interest of justice).

[15] *See Loc. 342*, 69 FLRA at 279 (denying the union's exception that the arbitrator's denial of attorney fees was contrary to law).

[16] Exceptions at 9.

[17] For an award to be found deficient on public policy grounds, the asserted public policy must be explicit, well-defined, and dominant, and a violation of the policy must be clearly shown. *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338, 341-42 (2019) (*Pope AFB*) (then-Member DuBester concurring) (citing *NTEU, Chapter 299*, 68 FLRA 835, 840 (2015)). In addition, the appealing party must identify the policy by reference to the laws and legal precedents and not from general considerations of the supposed public interests. *Id.* at 342. The Union's cursory citation to two Authority decisions applying *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980), is insufficient to meet these requirements. *See* Exceptions at 9 (citing *Loc. 1633*, 71 FLRA at 211; *Naval Air Dev. Ctr., Dep't of the Navy*, 21 FLRA 131 (1986)).

has not demonstrated that the award is contrary to public policy, we deny this exception.[18]

IV. Decision

We deny the Union's exceptions.

Chairman DuBester, concurring:

I agree with the Decision to deny the Union's exceptions.

[18] *See Pope AFB*, 71 FLRA at 342 (denying the agency's exception in the absence of a clear demonstration that the fee award violated an explicit, well-defined, and dominant policy consideration); *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 622 (2014) (denying the agency's contrary-to-public-policy exception because it failed to demonstrate that the alleged public policy existed); *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 459 (2012) (denying a contrary-to-public-policy exception).