64 FLRA No. 100

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4102

_____

DECISION

March 17, 2010

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

Decision by Chairman Pope for the Authority

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Michael S. Jordan filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

In his original award (the original award), the Arbitrator denied the Union's request for attorney fees. Subsequently, the Arbitrator issued an Addendum Award (the fee award) granting attorney fees. The Agency excepts to the fee award. [1]

For the reasons that follow, we deny the exceptions.

II. Background and Arbitrator's Awards

As relevant here, in the original award, the Arbitrator found that management improperly issued the grievant a fourteen-day suspension, and he sustained the grievance. As relevant here, the Arbitrator stated:

> No award of attorney's fees is merited here in light of the facts or the terms of the National Agreement relevant here. Accordingly, attorneys' fees are denied. In the event there is a disagreement or question regarding implementation, computation, or calculation of the remedy, the arbitrator retains jurisdiction until such time as all those matters are resolved and the award is fully implemented.

Original Award at 23-24.

Subsequently, the Arbitrator, the Union's representative, and the Agency's representative participated in a conference call (the conference call) and agreed to a briefing schedule regarding attorney fees. Consistent with that schedule, the Union filed with the Arbitrator an application for attorney fees, and the Agency filed a response thereto.

The Arbitrator then issued the fee award, which he stated was "in response to the [parties'] agreement for me to resolve this issue regarding attorney fees in furtherance of the reserved judgment." Fee Award at 2. The Arbitrator stated that, "[t]o the extent that any language in the prior award in this case holds to the contrary regarding attorney fees, that language is vacated and this . . . award is deemed to be controlling." *Id.* at 15. The Arbitrator acknowledged his "own failure" to clarify previously whether the Union was reserving the issue of fees until after the original award. *Id.* at 12. The Arbitrator stated that it would be a "gross injustice" to have a party suffer as a result of his misunderstanding. *Id.* at 13. Moreover, he rejected the Agency's claim that he lacked authority under the principle of *functus officio* [2] , stating that, "in addition to the equities[,]" the *functus officio* doctrine did not apply because, during the conference call following the initial award, "[i]t was agreed by and announced by the advocates that the parties would be allowed to submit briefs and an award should then follow[.]" *Id.* Therefore, according to the Arbitrator, "the parties have, in effect, also 're-vested' jurisdiction . . . for the limited purpose of addressing the appropriateness of awarding attorney fees in this matter." *Id.*

The Arbitrator granted the Union's request for fees, including fees for its Staff Representative, a non-attorney, as well as the Acting Director of Labor Relations, an attorney who oversaw the Staff Representa-

1. No exceptions were filed to the original award.

2. The principle of *functus officio* means that once an arbitrator has accomplished the resolution of the matter submitted, the arbitrator is without further authority. *See, e.g., AFGE, Local 2172*, 57 FLRA 625, 627 (2001) .

tive's work. In this regard, the Arbitrator stated that the Authority's decision in *United States Department of Transportation, Federal Aviation Administration, Washington, D.C.*, 63 FLRA 492, *recons. den.* 63 FLRA 653 (2009) (*FAA*), where fees were awarded for work performed by a non-attorney, was "controlling precedent . . . to consider the relationship of advocate, attorney, and grievant to be sufficient under the circumstances to meet the standards for an award of attorney fees. Nothing in th[is] matter is materially different[]" from *FAA*. Fee Award at 14. The Arbitrator determined that the Union incurred "necessary attorney fees," and he granted the Union's request. *Id.* at 15.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator exceeded his authority by awarding attorney fees. In this connection, the Agency asserts that, in the original award, the Arbitrator expressly considered the issue of attorney fees and declined to award them, retaining jurisdiction over only limited matters that did not include fees. The Agency asserts that, except with respect to those limited matters, the Arbitrator's authority in this matter ceased with the issuance of that award. According to the Agency, it never agreed that the Arbitrator had jurisdiction to issue the fee award and that, in the conference call subsequent to the original award, it agreed only that the issue could be briefed. The Agency states that, after it received the Union's supplemental brief, it raised the issue of *functus officio*. [3]

Even assuming the Arbitrator did not exceed his authority, the Agency maintains that the fee award is contrary to law, regulation and public policy. Citing 5 C.F.R. § 550.807(f), the Agency asserts that the award of fees for services provided by the Union's Staff Representative should be set aside because, according to the Agency, that individual is not a law clerk, paralegal, or law student. [4] The Agency also asserts that the Staff Representative was not assisting anyone as required by § 550.807(f), but was performing her regular job duties. The Agency further argues that the award of fees for services of the Union's Acting Director of Labor Relations should be set aside because that individual's role was limited to reviewing the Staff Representative's work and preparing an affidavit seeking fees for his services. According to the Agency, there is no showing that this matter required any attorney time, or that the attorney time expended on it served any purpose other than to generate a basis for a fee claim.

B. Union's Opposition

The Union asserts that the parties, including the Agency, agreed that the Arbitrator had authority to resolve the request for attorney fees. Opp'n at 5-8. The Union also asserts that an arbitrator may retain jurisdiction after issuing an award on the merits for the purpose of resolving attorney fees. *Id.* at 9 (citations omitted).

With regard to the fees awarded, the Union contends that the Merit Systems Protection Board (MSPB) has held that direct supervision by an attorney is necessary for awarding fees for work performed by a non-attorney. For support, the Union cites: *Anderson v. Gov't Printing Office*, 55 M.S.P.R. 548 (1992) (*Anderson*); *Horton v. U.S. Postal Serv.*, 7 M.S.P.R. 232 (1981); and *Mitchell v. U.S. Postal Serv.*, 6 M.S.P.R. 22 (1981) (*Mitchell*). The Union asserts that the Staff Representative performed her duties under the active supervision of an attorney, the Union's Acting Director of Labor Relations, and compensation is available for non-attorneys who assist in representation provided by an attorney. Also according to the Union, the rationale for including charges for such non-attorneys in fee awards is that they provide necessary services which, were they performed by attorneys, would be significantly more costly. Opp'n at 14.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed by the grievance. *See U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996). As set forth *supra*,

3. Specifically, in its response to the Union's brief, the Agency stated that

> the doctrine of Functus Officio applies to the case at hand. While there was agreement between the Parties that the Union could present its case for payment of reasonable attorney fees to the Arbitrator following the rendering of the Arbitrator's decision, the Union's "Memorandum in Support of Union's Application for Attorney Fees" offers no satisfactorily [sic] explanation as to why the issue of attorney fees was not raised during the proceeding, or a reason for the absence of a Union motion for the arbitrator to retain jurisdiction over the case until submission of their post-hearing brief.

Exceptions, Attach. 4, Agency Response at 4.

4. The pertinent wording of 5 C.F.R. § 550.807(f) is set forth *infra*.

note 2, under the principle of *functus officio*, once an arbitrator has accomplished the resolution of the matter submitted to arbitration, the arbitrator is without further authority. *See AFGE, Local 2172*, 57 FLRA 625, 627 (2001). As such, unless an arbitrator retains jurisdiction after issuance of the award, the arbitrator has no authority to take any further action without the joint request of the parties. *See id.*

In this matter, the Union noted its intent to request attorney fees during the arbitration proceedings, both in its opening statement at the hearing (Opp'n, Attach. 8 at 15) and in its brief to the Arbitrator (Opp'n, Attach. 9 at 33). Although finding a violation of the collective bargaining agreement and granting backpay to the grievant, the Arbitrator expressly denied attorney fees. As such, and with exceptions not relevant here [5], the Arbitrator had no authority to issue the fee award absent the parties' agreement.

However, the Arbitrator found, and the Union asserts, that the parties agreed to "re-vest[]" him with jurisdiction to issue an award resolving the Union's request for attorney fees. Fee Award at 13; Opp'n at 5-8. The Agency denies that there was such an agreement. Exceptions at 5. In order to determine whether the Arbitrator exceeded his authority by resolving this issue, it is first necessary to determine whether the Arbitrator erred in finding that the parties reached an agreement to place the attorney-fee issue before the Arbitrator.

Consistent with precedent, whether the parties reached agreement on this issue is a question of fact. *Cf. U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 129, 131-32 (2007) (question of existence of a collective bargaining agreement is a question of fact). Thus, in effect, the Agency is challenging the Arbitrator's factual finding that the parties reached agreement to place the attorney-fee issue before the Arbitrator. Accordingly, we construe this claim as an exception that the award is based on a nonfact. *Id.* at 132 n.4.

To establish that the award is based on a nonfact, the Agency must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *E.g., U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry*). However, the Authority will not find an award deficient as based on a nonfact on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. *Id.* at 594.

The Agency asserts that, during the conference call, its representative — a different representative from the one filing exceptions — preferred "not to argue the issue over the phone, and consented to briefing on whether the Arbitrator's award was erroneous as a matter of law." Exceptions at 5. However, in neither the exceptions nor the response to the Union's request for fees does the Agency explicitly deny that the parties agreed during the conference call that the Arbitrator was permitted to resolve the request for attorney fees. Thus, the Agency has not demonstrated that the Arbitrator's finding is clearly erroneous. Moreover, even if we construed the Agency's response to the Union's request for fees as denying that the parties agreed that the Arbitrator could resolve the attorney-fee request, that denial would demonstrate that the issue was disputed before the Arbitrator and, as a result, does not constitute a nonfact. *See Lowry*, 48 FLRA at 594.

As the Agency does not demonstrate that the Arbitrator erred in finding that the parties agreed to place the attorney-fee issue before him, the Agency fails to establish that the Arbitrator resolved an issue that was not before him. Accordingly, the Agency does not demonstrate that the Arbitrator exceeded his authority, and we deny the exception.

B. The award of attorney fees is not contrary to law.

5 C.F.R. § 550.807(f) provides, in pertinent part, that "[t]he payment of reasonable attorney fees shall be allowed only for the services of members of the Bar and for the services of law clerks, paralegals, or law students, when assisting members of the Bar." As the Authority has recognized, the rationale for allowing fees for time spent by such law clerks, paralegals or law students is that they provide necessary services that, if performed by attorneys, would be more costly. *See FAA*, citing *Fed. Deposit Ins. Corp, Div. of Info. Res. Mgmt, Atlanta, Ga.*, 53 FLRA 1657, 1661 (1998) (*FDIC*). In *FDIC*, the arbitrator found that a national counsel, an attorney, was responsible for directing and overseeing all aspects of the case and that a field representative performed services as a paralegal under the supervision of, and as the agent for, the national counsel. The Authority upheld the award of fees for the paralegal services of the field representative as consistent with case precedent and § 550.807(f). In addition, the Authority noted that in at least two decisions, the MSPB awarded attorney

5. An arbitrator may clarify an ambiguous award if the clarification conforms to the arbitrator's original findings, or may correct an award to correct clerical mistakes or obvious errors in arithmetical computation. *See, e.g., U.S. Dep't of the Army, Army Info. Sys. Command, Savanna Army Depot*, 38 FLRA 1464, 1467 (1991); *Health Care Fin. Admin., Dep't of Health and Human Serv.,* 35 FLRA 274, 281 (1990).

fees for the services of law students and legal assistants. *See id.* (citing *Anderson*, 55 M.S.P.R. 548, and *Mitchell*, 6 M.S.P.R. 22). In both decisions, the MSPB found that an award of fees for the services of non-attorneys was appropriate because their involvement was under the direct supervision of, and as the agent for, an attorney. In *FAA*, the Authority applied *FDIC* and found that a non-attorney, union staff representative was entitled to attorney fees for reasons similar to those in *FDIC*. *See* 63 FLRA at 493-94.

As discussed above, the Arbitrator considered *FDIC* materially indistinguishable from this case. Moreover, it is clear from the fee award as a whole that the Arbitrator found that the Union's Acting Director of Labor Relations was responsible for directing and overseeing Staff Representative's work. Thus, the Arbitrator effectively found that the Staff Representative worked under the direct supervision of an attorney, as required by § 550.807(f). Moreover, by finding that the Union incurred "necessary attorney fees," the Arbitrator effectively rejected the Agency's assertion that the services of the Acting Director of Labor Relations were provided solely to form the basis for a fee request. Fee Award at 15.

In sum, the Arbitrator's award of attorney fees for the services of the Staff Representative and the Acting Director of Labor Relations is consistent with § 550.807(f) and precedent interpreting that regulation. Thus, we deny the Agency's contrary-to-law exception.

V. Decision

The exceptions are denied.