64 FLRA No. 115

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1923
(Union)

0-AR-4208

DECISION

March 31, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Sean J. Rogers 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.

The Arbitrator awarded attorney fees, attorney travel fees, and costs to the Union under the Back Pay Act, 5 U.S.C. § 5596. For the reasons discussed below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

In his original award, the Arbitrator found that the Agency violated the parties' agreement by failing to grant the grievant four hours of excused absence when her workplace became excessively hot, and ordered the Agency to restore four hours of annual leave to her. As no exceptions were filed to this award, it became final and the Union filed a petition for attorney fees.

In the award at issue here, the Arbitrator granted the Union's entire fee request for 17.25 hours of work, including 10 hours of travel to and from the hearing in Baltimore, Maryland, and hotel expenses. As the Agency did not challenge any of the attorney fees related to preparation for and participation in the hearing, the Arbitrator determined that the only contested issues were whether the fees and costs for the North Carolina-based Union counsel's travel were allowed under the parties' agreement and whether they were reasonable. *See* Award at 2-3, 9.

The Arbitrator rejected the Agency's argument that the fee petition was contrary to Article 25, § 5(E) of the parties' agreement, which provides, in relevant part, that the "[U]nion will pay all costs for its representatives . . . at . . . arbitration." *Id.* at 3. The Arbitrator found that this provision did not constitute a waiver by the Union of its statutory right to attorney fees and costs. *Id.* at 11-12. In support of this conclusion, the Arbitrator credited the affidavit of a Union negotiator, who stated that attorney fees and costs were not addressed during bargaining over Article 25, § 5(E). The Arbitrator found that it was unreasonable to believe that the Union would have waived statutory rights without bilateral discussions resulting in an express waiver. *Id.* at 12. The Arbitrator further concluded that, under this provision, the term "representative" does not include union counsel and that attorney travel time is not a "cost." *Id.*

In response to the Agency's argument that the travel time was unreasonable because it was not necessary to involve a North Carolina attorney in a Maryland arbitration, the Arbitrator found that the parties' agreement was silent regarding the Union's right to assign counsel in grievance-arbitration disputes. *Id.* In addition, the Arbitrator found that 5 U.S.C. § 7102 precluded the Agency from improperly influencing the employee's choice of a representative by limiting the selection of representative based on the costs it might incur. [2] *Id.* at 12-13. As such, the Arbitrator concluded that the Union's assignment of staff counsel was protected under the Statute and, therefore, was not grounds for finding that attorney fees and costs were unreasonable. *Id.* at 13. Contrary to the Agency's assertion that the travel time should be billed at a reduced rate, the Arbitrator found that travel time was compensable at the normal hourly rate because of the opportunity costs incurred while traveling. *Id.*

1. The separate opinion of Member Beck, dissenting in part, is set forth at the end of this decision.

2. 5 U.S.C. § 7102 provides, "Each employee shall have the right to form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right."

Based on the foregoing, the Arbitrator found that all of the requested fees and costs, including those for travel to and from the hearing, were reasonable. *Id.* at 13-14.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to the parties' agreement and 5 U.S.C. § 7701(g)(1).[3] Specifically, the Agency argues that the Arbitrator erred in finding that the attorney's travel fees and costs were reasonable and, therefore, that the award should be set aside.

Addressing its contractual claim, the Agency contends that it should not be required to pay for Union counsel's travel costs because Article 25, § 5(E) of the parties' agreement requires the Union to pay "all travel costs for its representatives[.]" Exceptions at 5. In support of this argument, the Agency states that the Union's request for fees related to travel time is unprecedented. *Id.*

With respect to its contrary-to-law claim, the Agency contends that the presumption that reasonable attorney fees include reasonable travel time billed at the normal hourly rate is rebuttable. *Id.* at 4-5. As Union counsel spent 10 hours traveling to and from the hearing, but only 7.5 hours preparing for and attending it, the Agency argues that it should not be required to bear the costs of the "Union's choice to hire a representative who resided outside of Maryland at the time of the hearing." *Id.* at 5. The Agency further asserts that the reasonableness of attorney fees is based, in part, on the complexity of the issues involved and the expertise of the attorney. *Id.* at 5-6 (citing *U.S. Dep't of Def., Def. Fin. & Accounting Servs.*, 60 FLRA 281 (2004) (*Defense Finance*) (then-Member Pope dissenting in part)). According to the Agency, travel fees and costs were "unnecessarily incurred" in this case because the Union has a staff of Baltimore-based attorneys who could have provided representation at the hearing, which only involved the "straightforward" interpretation of one contract provision. *Id.* at 5, 6.

Alternatively, the Agency argues that Union counsel's travel time was inappropriately billed at the normal rate. In this regard, the Agency contends that several courts have ruled that travel time should be billed at a fraction of an attorney's regular rate. *Id.* at 6 (citing *Watkins v. Fordice*, 7 F.3d 453, 459 (5th Cir. 1993); *Smith v. Freeman*, 921 F.2d 1120, 1122 (10th Cir. 1990)).

B. Union's Opposition

The Union asserts that the Agency's contractual argument constitutes mere disagreement with the Arbitrator's interpretation of the parties' agreement and, thus, does not establish that the award is deficient.

With respect to the Agency's contrary-to-law claim, the Union states that the Arbitrator properly calculated the amount of attorney fees based on the number of hours reasonably spent on the litigation by Union counsel. Opp'n at 7. According to the Union, there is no basis for the Agency's argument that attorney fees should be based on the number of hours that might have been expended by another attorney. *Id.* The Union also contends that it is within its discretion to designate representatives when fulfilling its statutory responsibilities. *Id.*

With regard to the correct rate of billing travel time, the Union states that there is disagreement among some courts but that the Authority, the Merit Systems Protection Board (MSPB), and the United States Court of Appeals for the Federal Circuit all have held that normal billing rates apply to travel time in fee-shifting cases. *Id.* at 8. The Union further states that all of the fees for travel time are reasonable because it was necessary for Union counsel to attend the hearing. *Id.* Although the Union acknowledges that Union counsel used her own vehicle to drive to the hearing because she was unable to fly, it asserts that her actual travel time exceeded ten hours, and that she exercised billing judgment to exclude time when she was stuck in heavy traffic. *Id.* at 8 n.9. The Union further contends that its request for hotel costs was reasonable because Union counsel could not have driven to and from Baltimore on the day of the hearing. *Id.* at 9-10.

IV. Analysis and Conclusions

A. The award draws its essence from the parties' agreement.

We construe the Agency's argument that the award is contrary to the parties' agreement as a claim that the award fails to draw its essence from Article 25, § 5(E). To demonstrate that an award fails to draw its essence

3. Under 5 U.S.C. § 7701(g)(1), the prerequisites for an award of attorney fees are: (1) the employee must be the prevailing party; (2) the award of fees must be warranted in the interest of justice; (3) the amount of the fees must be reasonable; and (4) the fees must have been incurred by the employee. *See U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995).

from a collective bargaining agreement, a party must show that the award: (1) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (2) does not represent a plausible interpretation of the agreement; (3) cannot in any rational way be derived from the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Agency argues that Article 25 requires the Union to pay its own attorney travel costs. The Arbitrator considered this argument and found that Article 25 did not apply to statutory attorney fees under the Back Pay Act. In this regard, he stated that it was unreasonable to believe that the Union had waived its statutory rights without bilateral discussions resulting in an express waiver. Award at 12. The Arbitrator further found that, under this provision, the term "representative" does not include union counsel and that attorney travel time is not a "cost." *Id.* The Agency has not demonstrated that this interpretation is implausible, unfounded, irrational, or in manifest disregard of the agreement. *See OSHA*, 34 FLRA at 575. Accordingly, we find that the award does not fail to draw its essence from the parties' agreement and, therefore, deny the exception.

B. The award is not contrary to law.

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*. *See 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)). 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. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Back Pay Act requires that an award of fees must be: (1) in conjunction with an award of backpay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with the standards established under 5 U.S.C. § 7701(g)(1). *See U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.,* 51 FLRA 155, 158 (1995). Section 7701(g)(1) requires that: (1) the employee must be the prevailing party; (2) the award of fees must be warranted in the interest of justice; (3) the amount of the fees must be reasonable; and (4) the fees must have been incurred by the employee. *See id.* An award resolving a request for attorney fees under § 7701(g)(1) must set forth specific findings supporting determinations on each pertinent statutory requirement. *See id.*

As the only factor in dispute is whether the awarded attorney fees are reasonable, we address only that issue. The Agency asserts that the travel fees are unreasonable and should be set aside because they were "unnecessarily incurred." Exceptions at 6. According to the Agency, the Union's Baltimore staff attorneys could have handled the "straightforward" legal issues of the arbitration. *Id.* at 5. Although the Agency frames its argument in terms of reasonableness, it is, essentially, a challenge to the Union's assignment of an out-of-town attorney to the case. [4] However, Authority precedent is clear that the Union is not required to justify its decision under the Back Pay Act. In this regard, in *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.,* 58 FLRA 87, 90-91 (2002) (*Corpus Christi*) (citing *Martinez v. U.S. Postal Serv.*, 89 M.S.P.R. 152, 161 (2001)), the Authority made clear that failure to obtain local counsel is not a valid basis for reducing attorney fees. Although *Corpus Christi* did not explicitly address travel time, the Agency has presented no authority that this holding should not apply with equal force to fees and costs associated with travel. Accordingly, we find that there is no basis to reduce attorney fees for Union counsel's reasonable travel solely because the Union chose not to assign a local attorney.

In the alternative, the Agency argues that Union counsel's travel time should be billed at a fraction of her normal rate. In addressing such arguments, the Authority applies the decisions of the MSPB and the Federal Circuit. *See Defense Finance*, 60 FLRA at 286. In accordance with that precedent, the Authority has previously held that attorney fees for time spent traveling in connection with an arbitration hearing are recoverable under the Back Pay Act and are compensable at an attorney's normal billing rate. *See NAGE, Local R5-188*, 46 FLRA 458, 466 (1992). *See also Crumbaker v. MSPB*, 781 F.2d 191, 193 (Fed. Cir. 1986), *modified on reh'g*, 827 F.2d 761 (Fed. Cir. 1987); *Lopez v. U.S. Postal Serv.*, 54 M.S.P.R. 230, 236 (1992) (holding that

4. We note that the Agency does not directly challenge the Arbitrator's finding that the Union's assignment of attorneys was protected by the Statute.

travel time should be billed at the same hourly rate as the lawyer's normal working time). Based on the foregoing, Union counsel is entitled to compensation for travel time at her normal hourly rate. Accordingly, as the Agency has not established that the rate of billing was inconsistent with law, we find that the award is not contrary to law and deny the exception.

V. Decision

The Agency's exceptions are denied.

Member Beck, Dissenting in part:

I join my colleagues in upholding the Arbitrator's award of attorneys' fees associated with the travel time of the Union's lawyer. However, I disagree with my colleagues to the extent they affirm the Arbitrator's award of travel costs.

Our precedent distinguishes "fees" from "costs." *FAA, Wash. Flight Serv. Station*, 27 FLRA 901, 904-05 (1987) (citing *Bennett v. Dep't of the Navy*, 699 F.2d 1140, 1145-46 (Fed. Cir. 1983)). The conclusion that fees (that is, charges for professional services rendered by a lawyer) were properly awarded does not lead inexorably to the conclusion that costs (that is, out-of-pocket or per diem expenses) should also have been awarded.

Through Article 25, Section 5 of the collective bargaining agreement, the Union has contractually waived its right to be reimbursed for all travel-related (or other) costs incurred by its representatives – "[t]he [U]nion will pay all costs for its representatives[.]" Award at 3. It cannot reasonably be disputed that the lawyer who advocated for the Union at the arbitration hearing was acting as the Union's "representative" in that proceeding. Accordingly, the Arbitrator's award of costs reflects a manifest disregard for the plain language of the agreement that he was charged with construing. *SSA, Office of Labor Mgmt. Relations*, 60 FLRA 66, 67 (2004) (award deficient as not representing plausible interpretation of agreement); *U.S. Small Bus. Admin.*, 55 FLRA 179, 182 (1999) (award deficient because arbitrator's interpretation of agreement was incompatible with its plain wording).

I would grant the Agency's exceptions as they relate to the award of costs.