64 FLRA No. 146

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
DETROIT, MICHIGAN
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 933
(Union)

0-AR-4428

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DECISION

May 24, 2010

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

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Marvin J. Feldman filed by the Agency under § 7122 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 exception.

The Arbitrator awarded the Union attorney fees under the Back Pay Act, 5 U.S.C. § 5596. For the reasons discussed below, we deny the exception in part and remand the award to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator's Award

The Agency suspended the grievant for ten days, and the Union filed a grievance challenging the discipline. Exceptions, Attach. B, Op. and Award at 3 (Merits Award); Exceptions, Attach. A, Agency Post Hr'g Br. at 1. The Arbitrator found that the default provision of the parties' agreement required that the Agency's failure to respond in a timely manner to the grievance result in an outcome in favor of the grievant. Merits Award at 8. The Arbitrator thus sustained the grievance and awarded the grievant backpay for lost wages. *Id.* at 8-9. As neither party filed exceptions to that award, the award became final.

The Union then petitioned the Arbitrator for $20,470.00 in attorney fees, based on 102.35 hours of work at the hourly rate of $200.00 that the Union's attorney charged.[1] Exceptions, Attach. C, Mot. Requesting Payment of Att'y Fees by Agency Subsequent to Arbitrator's Award at 2-3 (Mot.); Exceptions, Attach. C, Union's Br. in Supp. of its Mot. Requesting Payment of Att'y Fees by Agency Subsequent to Arbitrator's Award at 8 (Br.); Exceptions, Attach. C, Billing R. (Billing R.). The Union claimed that the $200.00 hourly rate is: the "customary rate that the [law] firm [for which the attorney works] charges the Union to handle its arbitration matters[;]" and "consistent [with], if not lower than the prevailing community rate for similar services" in the Detroit, Michigan metropolitan area, where the Union's attorney practices. Mot. at 2. In addition, the Union submitted a copy of its retainer agreement, indicating that the Union would be billed at the rate of $200.00 per hour, Exceptions, Attach. C, Retainer Agreement (Retainer Agreement), which, it asserted, is "less tha[n] what the Agency has paid the Union's counsel in the past." Br. at 8. Further, the Union asserted that the total number of hours claimed is reasonable because the Union's attorney: did not have the assistance of paralegals or other staff; had twenty-six years of legal experience; was working on his first federal-sector arbitration; and conducted his research at a local law library. Br. at 3, 8. For support, the Union submitted a billing record, Billing R., and asserted that the Union's attorney "maintained accurate and current time records for his efforts on behalf of the Union relative to the handling of the arbitration." Mot. at 2.

In response, the Agency argued that the number of hours claimed was not reasonable because: the Union spent "more than 100 hours to develop and present a case at a hearing which lasted less than four hours and at which it presented two witnesses[;]" the claimed hours are "not consistent with the brevity of the hearing [and] . . . the lack of complexity of both the issues and the testimony presented[;]" and, in another case that involved "two full days of hearings

1. The billing records indicate that the Union's attorney billed 102.95 hours. Exceptions, Attach. C, Billing R. However, for reasons not explained in the record, the Union appears to seek reimbursement only for 102.35 hours, which, at $200.00 per hour, equals $20,470.00, the total amount requested by the Union.

at which eight witnesses testified and numerous exhibits were entered[,]" the Union claimed only "49.5 hours of compensation[.]" Exceptions, Attach. D, Resp. at 2, 7-8.

In his award, the Arbitrator stated that "the metropolitan area of Detroit, Michigan, is one of the largest cities in the United States with an experienced and sophisticated bar[,]" Award at 5, and that Detroit is "comparable to" Cleveland, Ohio, where the hourly rate is "approximately $250.00 per hour[.]" *Id.* at 6. The Arbitrator also stated that the Agency did not submit an affidavit or present other evidence to demonstrate that $200.00 is an unreasonable hourly rate, and he concluded that $200.00 per hour is a reasonable rate. *Id.* at 5-6.

As to the number of hours claimed, the Arbitrator rejected the argument that the Union's request constituted "an overstatement of the actual time spent," because, according to the Arbitrator, "a time sheet was presented[.]" *Id.* at 5. In addition, the Arbitrator stated: "100 hours of preparation and presentation seems reasonable to this [A]rbitrator. While the hearing lasted only four hours, a presentation is made in a short period of time, especially when the presenting attorney is especially well prepared. Such was the case here[.]" *Id.* at 6. Thus, the Arbitrator stated that "there is no question in this [A]rbitrator's mind that the fees are reasonable[,]" and he concluded that the $20,470.00 claimed is "a reasonable amount" of attorney fees. *Id.*

III. Preliminary Matter

The Agency served the Union its exception to the award on October 7, 2008, when it deposited the exception in the U.S. mail. Order to Show Cause (Order) at 1; 5 C.F.R. § 2429.27(d). An opposition to an exception may be filed by a party within thirty days after the date of service of the exception. 5 C.F.R. § 2425.1(c). Where, as here, an exception is served by mail, the opposing party receives an additional five days to file its opposition. Order at 1. *See* 5 C.F.R. § 2429.22. Applying these rules, and under the regulations that were in effect at the time when the Union filed its opposition, in order for the opposition to be timely, it had to be postmarked by the U.S. Postal Service, filed in person, or received from commercial delivery by the Authority no later than November 12, 2008.[2] Order at 1-2. On November 13, 2008, the Authority received the opposition by commercial delivery. *Id.* Consequently, the Authority issued an Order to the Union to show cause why its opposition should not be rejected as untimely filed. *Id.* at 1-2.

In its response to the Order, the Union concedes that the opposition is untimely, but asserts that the "one-day delay" would not prejudice the Agency and that a failure to consider the opposition would prejudice the Union. Resp. to Order at 1. Additionally, the Union's attorney contends that he had "mistakenly or not . . . determined the due date for the . . . opposition [was] based upon our date of receipt." *Id.*

The Authority has held that a simple mistake in filing does not constitute a basis for waiving an expired time limit. *AFSCME, Local 3870*, 50 FLRA 445, 448 (1995). Thus, the Union's response to the Order provides no basis for finding its opposition to the Agency's exceptions to have been timely filed and, therefore, we do not consider the Union's opposition. *See, e.g.*, *SSA*, 61 FLRA 315, 315 n.2 (2005) (then-Member Pope dissenting as to other matters) (refusing to consider untimely filed opposition).

IV. Agency's Exception

The Agency contends that the amount of the award of attorney fees is unreasonable and, thus, contrary to the Back Pay Act, 5 U.S.C. § 5596. Exception at 8. With regard to the Union attorney's hourly rate, the Agency asserts that the Arbitrator's "brief discussion . . . about the fairness of the hourly fee charged is not enough[]" to meet the requirement under 5 U.S.C. § 7701(g) that an attorney fee award be a "fully articulated, reasoned decision setting forth the specific findings supporting the determination of each pertinent statutory requirement, including the reasonableness of the amount of the award."[3] *Id.* at 9. With regard to the number of hours claimed, the

2. Prior to November 9, 2009, the filing date of any paper sent by commercial delivery was the date on which the Authority received it. The Authority amended 5 C.F.R. § 2429.21(b), effective November 9, 2009, to change this rule to provide that the filing date of any paper sent by commercial delivery is the date on which it is deposited with a commercial delivery service.

3. The requirements of § 7701(g) as relevant here, are set out *infra* section V.

Agency asserts that the "102 hours . . . charged is excessive[,]" *id.* at 9, "for a relatively short arbitration without complex issues . . . with each side presenting two witnesses." *Id.* at 8. Additionally, the Agency claims the Arbitrator failed to satisfy the requirements of 5 U.S.C. § 7701(g)(1) because "[o]ne statement that the attorney was 'especially well prepared' does not meet the standard of a fully articulated reason for the excessive attorney fee award." *Id.* (quoting Award at 6).

V. Analysis and Conclusions

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 threshold requirement for entitlement to attorney fees under the Back Pay Act, 5 U.S.C. § 5596, is a finding that the grievant was affected by an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *E.g., U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995) (*Defense Distrib.*). The Back Pay Act further 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). *Id.* 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. *Id.* The only requirement in dispute here is the requirement that the fees be reasonable. Accordingly, we address only that requirement. *See NAGE, Local R5-188*, 46 FLRA 458, 465 (1992) (addressing only the issues raised by the excepting party).

An award resolving a request for attorney fees under § 7701(g)(1) must set forth specific findings supporting determinations on each pertinent statutory requirement, *e.g., U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 63 FLRA 524, 528 (2009) (*Womack*), including the basis on which the reasonableness of the amount of any attorney fees was determined. *Defense Distrib.*, 51 FLRA at 158. However, the Authority will not "simply find an award deficient that is not sufficiently explained or articulated." *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 58 FLRA 87, 92 (2002). Rather, in cases where the record permits the Authority to properly resolve the exception, the Authority will modify the award or deny the exception, as appropriate. *AFGE, Local 1061*, 63 FLRA 317, 321 n.5 (2009) (*Local 1061*). If the record does not permit the Authority to resolve the exception, then the Authority will remand the award for further proceedings. *Womack*, 63 FLRA at 528.

When exceptions concern standards established under § 7701(g), the Authority looks to the decisions of the Merit Systems Protection Board (MSPB) and the United States Court of Appeals for the Federal Circuit for guidance. *Local 1061*, 63 FLRA at 319. Under those standards, the computation of a reasonable attorney fee award "begins with an analysis of two objective variables: The attorney's customary billing rate; and the number of hours reasonably devoted to the case." *Stewart v. Dep't of the Army*, 102 M.S.P.R. 656, 662 (2006) (*Stewart*). *Accord U.S. Dep't of Def., Def. Fin. & Accounting Serv.*, 60 FLRA 281, 286 (2004) (then-Member Pope dissenting in part as to Authority's imposition of fee reduction) (stating that the Authority assesses the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate") (*DOD*). We address these two variables separately below.

A. Reasonableness of the hourly rate

MSPB regulations require, in pertinent part, that a motion for attorney fees be supported by evidence substantiating the amount of the request, including a "statement of the attorney's customary billing rate for similar work, with evidence that that rate is consistent with the prevailing community rate for similar services in the community in which the attorney ordinarily practices[.]" 5 C.F.R. § 1201.203(a). Consistent with this regulation, the MSPB has found that the submission of a fee arrangement showing what the attorney charged the client per hour, and an affidavit in which the attorney attested that he

charged other clients the same rate for similar work, is sufficient to demonstrate that the hourly rate claimed is reasonable. *See Stewart*, 102 M.S.P.R. at 663. In addition, the MSPB has upheld an administrative judge's determination as to the reasonableness of an hourly rate that was based in part on the administrative judge's knowledge of the hourly rates that were standard in her region. *See Thomas v. U.S. Postal Service*, 87 M.S.P.R. 331, 340-41 (2000) (*Thomas*).

Here, the Union's attorney submitted a copy of the retainer agreement indicating a $200.00 hourly rate, Retainer Agreement, and asserted that $200.00 per hour is the customary rate that the firm charges the Union to handle its arbitration matters, Mot. at 2, and is "either at or below the standard in metropolitan Detroit[.]" Br. at 8. Additionally, the Arbitrator found that the hourly rate charged by the Union's attorney was reasonable because it was lower than the standard rate charged in a city of comparable size. Award at 5-6. The evidence put forth by the Union is consistent with the requirements of § 1201.203(a), and is sufficient to demonstrate that the hourly rate claimed is reasonable, *see Stewart*, 102 M.S.P.R. at 663 and the Arbitrator's determination, based on his personal knowledge of standard hourly rates in the region, is consistent with MSPB precedent. *See Thomas*, 87 M.S.P.R. at 340-41. Further, the Agency does not cite any contrary evidence.

Thus, we find that the Agency has not demonstrated that the Arbitrator's finding that the requested rate is reasonable is contrary to law, and we deny the exception as to the reasonableness of the rate.

B. Reasonableness of the number of claimed hours

When an arbitrator considers a union's request for attorney fees, such requests "must be closely examined to ensure that the number of hours expended was reasonable[,]" *DOD*, 60 FLRA at 286 (quoting *U.S. Dep't of Def. Educ. Activity, Arlington, Va.*, 57 FLRA 23, 26 (2001), because "the number of hours expended are not necessarily those 'reasonably expended.'" *Id.* (quoting *Dep't of the Air Force Headquarters, 832d Combat Support Group DPCE, Luke Air Force Base, Ariz.*, 32 FLRA 1084, 1101 (1988) (*Luke AFB*). In addition, when an arbitrator makes a determination as to a union's request for attorney fees, the arbitrator must support his or her determination as to the reasonableness of the fee request. *See Defense. Distrib.*, 51 FLRA at 158 (requiring specific findings as to the reasonableness of a fee award); *cf. DOD*, 60 FLRA at 285 (finding arbitrator supported fee award). *See also Luke AFB*, 32 FLRA at 1100 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (noting Court's statement that it is "'important' that [a] district court provide 'a concise but clear explanation of its reasons for the fee award[]'"). The MSPB similarly requires that an administrative judge considering an attorney fee request "determine 'whether the hours claimed are justified' and . . . 'make a judgment-considering the nature of the case and the details of the request, taking evidence if need be, and defending his judgment in a reasoned (though brief) opinion-on what the case should have cost the party[.]'" *Casali v. Dep't of the Treasury*, 81 M.S.P.R. 347, 354 (1999) (*Casali*) (quoting *Crumbaker v. MSPB*, 781 F.2d 191, 195 (Fed. Cir. 1986), *modified on other grounds*, 827 F.2d 761 (Fed. Cir. 1987)).

Here, the Arbitrator found that the number of hours requested "seems reasonable" because the Union's attorney was "well prepared." Award at 6. However, there is no indication in the award that, in making that finding, the Arbitrator considered "the nature of the case and the details of the request," and he did not "defend[] his judgment in a reasoned . . . opinion on what the case should have cost[.]" *Casali*, 81 M.S.P.R. at 354. Thus, the Arbitrator did not make specific factual findings to support his conclusion that the amount of the fees requested is reasonable.

As noted previously, where an award does not sufficiently explain a determination that attorney fees meet the statutory requirements of § 7701(g)(1), the Authority will examine the record to determine whether it permits the Authority to resolve the matter, and if it does not, then the Authority will remand the award for further proceedings. *Womack*, 63 FLRA at 528. In addition, both the Authority and the MSPB have held that the fact-finder is often in the best position to make determinations as to the reasonableness of the amount of attorney fees claimed. *See Ala. Ass'n of Civilian Technicians*, 56 FLRA 231, 235 (2000) (Chairman Wasserman dissenting in part) (the arbitrator, and not the Authority, is the appropriate authority for resolving a union request for attorney fees); *Martinez v. U.S. Postal Serv.*, 89 M.S.P.R. 152, 162 (2001) ("[T]he administrative judge is in the best position to evaluate the documentation submitted by counsel to determine whether the amount requested is reasonable, and to evaluate the quality of representation afforded by counsel[.]").

Here, the record contains the Union attorney's detailed billing record. Billing R. However, the billing records alone do not indicate whether the amount of attorney fees requested is reasonable for, as noted above, "the number of hours expended are not necessarily those 'reasonably expended.'" *DOD*, 60 FLRA at 286 (quoting *Luke AFB*, 32 FLRA at 1101). Therefore, we remand the matter as to the claimed number of hours to the parties for resubmission to the Arbitrator, absent settlement.

VI. Decision

For the foregoing reasons, we deny the exception as to the claimed hourly rate and remand the award to the parties for resubmission to the Arbitrator, absent settlement, as to the claimed number of hours.