

65 FLRA No. 186

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
CENTRAL TEXAS VETERANS
HEALTH CARE SYSTEM
TEMPLE, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2109
(Union)

0-AR-4709

DECISION

May 31, 2011

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 Charles R. Greer 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 exception.

The Arbitrator directed the Agency to pay the Union attorney fees. For the reasons that follow, we deny the Agency's exception.

II. Background and Arbitrator's Award

In his initial award dated September 17, 2010,¹ the Arbitrator, among other things, directed the Agency to pay the Union's attorney fees, "if allowed by federal regulations[.]" Initial Award at 9. On October 12, the Union submitted an "Application for Attorney's Fees" to the Arbitrator. Exception, Attach. at 21-40. As part of its application, the Union included the following items: (1) an affidavit from its attorney regarding his education, experience and

current market rates; (2) an invoice of fees and costs; and (3) a statement of the prevailing market rate for similar work. *Id.* The invoice submitted by the Union reflected 44.5 total hours worked, including 36.5 hours spent on the case prior to the four-hour, three-witness hearing. *Id.* at 28-29. Just twelve days later, on October 24, the Arbitrator issued the following one sentence order (Attorney Fee Award): "After reviewing the Union's October 12, 2010 application for attorney's fees and attached documents, I find the application to be reasonable and supported by the facts, and hereby direct the Agency to pay the Union the sum of \$15,048.46." Attorney Fee Award at 1.

On October 26, the Union notified the Arbitrator that the Agency was "not in compliance with [his] award" because, among other things, the Agency had failed to pay the attorney fees. Exception, Attach. at 46. In response, the Agency contended that the fees submitted by the Union were "excessive and violate[d] Title 5 statu[t]e 2430.4."² *Id.* at 44. According to the Agency, the requested fees were based on a \$320 hourly rate, which exceeds the statutory hourly maximum of \$125. *Id.* at 45. Moreover, the Agency argued that the amount of the attorney fees awarded was inconsistent with the arbitration award. *Id.* In this regard, the Agency asserted that: (1) it continues to make the same payments as before the award; (2) the Union's

² Although the Agency, in its response, referred to "Title 5 statu[t]e 2430.4," it quoted 5 C.F.R. § 2430.4. Exceptions, Attach. at 4. Accordingly, we construe this argument as contending that the fees violated 5 C.F.R. § 2430.4. 5 C.F.R. § 2430.4 governs awards of attorney fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and provides, in relevant part:

(a)(1)(i) No award for the fee of an attorney or agent under this part may exceed \$125.00 per hour

(b) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the following matters may be considered: (1) If the attorney, agent or witness is in practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services; (2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services; (3) The time actually spent in the representation of the applicant; (4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and (5) Such other factors as may bear on the value of the services provided.

1. All dates refer to 2010.

attorney is an appellant representative of the Union and is compensated by the Union “for services rendered;” and (3) “the fees submitted far exceed the arbitration expenses for both parties.” *Id.* The Union replied that 5 C.F.R. § 2430.4 did not apply to this case. Rather, the Union argued, “attorney fees in arbitration are set in accordance with local market rates, which were fully documented” in the Union’s application. *Id.* at 42.

The Arbitrator first found that 5 C.F.R. § 2430.4 was not relevant and that the parties’ agreement “allows for reasonable attorney fees.” Attorney Fee Award at 41. The Arbitrator then determined that the amount of fees requested by the Union was reasonable because the fees were based on average local fee data. *Id.*

III. Positions of the Parties

A. Agency’s Exception

The Agency contends that the award of attorney fees is contrary to law, rule or regulation. Exception at 4. The Agency notes that it is “not disput[ing] the [A]rbitrator’s authority to award attorney fees,” but, rather, is contesting “the reasoning [the Arbitrator] used to justify the excessive amount awarded.” *Id.* The Agency contends that, contrary to the Arbitrator’s award, 5 C.F.R. § 2430.4 is relevant and provides “guidance on how to determine appropriate attorney fee amounts.” *Id.* Referring to that regulation, the Agency argues that the amount of fees awarded is inconsistent with the complexity of the arbitration. *Id.* According to the Agency, the attorney invoice submitted by the Union is not justified by a “one day, 4 hour” arbitration, particularly when the Arbitrator denied part of the Union’s requested relief and ordered the Union to pay its portion of the arbitrator’s expenses. *Id.* As a result, the Agency requests that the Authority adjust the attorney fees awarded to an “appropriate amount.” *Id.*

B. Union’s Opposition

The Union agrees with the Agency that 5 C.F.R. § 2430 “provides guidance in the calculation of appropriate attorney fees.” Opp’n at 3. However, it contends that the Agency’s “analysis and application” of the regulation is “flawed.” *Id.* As an initial matter, the Union contends it provided sufficient justification for the amount of fees that it requested and was awarded. *Id.* at 3-4. The Union further contends that the fees awarded are reasonable because: (1) the rate upon which the fees were based

is within the prevailing market rate and (2) the hours expended working on the case are consistent with the facts and nature of the case. *Id.* at 4-7.

IV. Analysis and Conclusion: The award of attorney fees is not contrary to law.

The Agency contends that the award of attorney fees is contrary to law, rule or regulation. Exception at 4. The Agency bases its exception on 5 C.F.R. § 2430.4, which, it contends, provides “guidance on how to determine appropriate attorney fee amounts.” *Id.* Referring to that regulation, the Agency argues that the amount of fees awarded is excessive because, among other things, the amount awarded is inconsistent with the complexity of the arbitration. *Id.*

The Agency’s assertion is without merit. 5 C.F.R. § 2430 governs awards of attorney fees under the EAJA. *See U.S. Dep’t of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 163 n.7 (1995). However, the Authority has held that proceedings before arbitrators under the Statute are not adversary adjudications for purposes of the EAJA because they are not subject to the procedural requirements of the Administrative Procedure Act. *Id.* The attorney fees in this case, thus, were not awarded under the EAJA. Accordingly, 5 C.F.R. § 2430 is inapposite and does not demonstrate that the award is deficient.

Accordingly, we deny the Agency’s exception.

V. Decision

The Agency’s exception is denied.