65 FLRA No. 193

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1592
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
HILL AIR FORCE BASE, UTAH
(Agency)

0-AR-4637
(64 FLRA 861 (2010))

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DECISION

June 15, 2011

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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 Barbara Bridgewater 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 an award on remand from the Authority (remand award), the Arbitrator found that the grievant is entitled to an award of attorney fees. For the reasons that follow, we deny the Agency's exception.

II. Background and Arbitrator's Awards

The Union filed a grievance challenging the Agency's denial of the grievant's request for compensatory time off. *See AFGE, Local 1592*, 64 FLRA 861, 861 (2010) (*Local 1592*). The grievance was not resolved and was submitted to arbitration. *See id.* In the award on the merits (merits award), the Arbitrator awarded the grievant three hours of compensatory time off (comp time), but denied the grievant's request for an award of attorney fees on the ground that comp time does not constitute "pay, allowance[s,] or differential[s]" within the meaning of the Back Pay Act (BPA), 5 U.S.C. § 5596. *See id.*

The Agency did not except to the award, but the Union excepted to the Arbitrator's denial of attorney fees. In *Local 1592*, the Authority found that the award of comp time constituted an award of pay, allowances, or differentials under the BPA. *See id.* at 862. Accordingly, the Authority concluded that the basis for the denial of fees was deficient and remanded the award to the parties for resubmission to the Arbitrator, absent settlement, for a resolution of the fee request. *See id.*

On remand, the Agency contended that, during the arbitration hearing on the merits of the grievance, it had granted the grievant the disputed comp time, and that the time had appeared in time and attendance records prior to the issuance of the merits award. Remand Award at 3. The Agency argued that, as a result, the grievant was not a prevailing party, as required for an award of attorney fees under 5 U.S.C. § 7701(g) (§ 7701(g)). *Id.* (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) (*Buckhannon*)).

The Arbitrator acknowledged that the Agency had granted the grievant the disputed comp time prior to her merits award, but stated that she "did not have a factual basis for considering the instant matter to be moot." *Id.* In this connection, she stated that "because she awarded the [g]rievant [three] hours of . . . comp time in her [merits award], based on the merits of his grievance, the [g]rievant is a prevailing party." *Id.* at 4. Thus, she concluded that the grievant was entitled to an award of attorney fees. *Id.*

III. Positions of the Parties

A. Agency's Exception

The Agency contends that the remand award is contrary to the BPA and § 7701(g). *See* Exception at 2-4. In this regard, the Agency states that, under the definition of "prevailing party" set forth in *Buckhannon* and adopted by the Merit Systems Protection Board (MSPB) under § 7701(g), a grievant prevails only if he or she has received an enforceable judgment or settlement that directly benefited the grievant at the time of the judgment or settlement. *Id.* at 3-4. According to the Agency, the grievant is not a prevailing party because of the Agency's "voluntary and unilateral action" of granting the grievant the disputed comp time before the Arbitrator issued the merits award. *Id.* (citing *Buckhannon;*

Cole v. DoJ, 90 M.S.P.R. 627 (2001) (*Cole*); *Sacco v. DoJ*, 90 M.S.P.R. 37 (2001) (*Sacco*); *Nichols v. Dep't of Veterans Affairs*, 89 M.S.P.R. 554 (2001) (*Nichols*)).

B. Union's Opposition

The Union contends that the award is not contrary to law. In this connection, the Union asserts that, under *Buckhannon*, what is dispositive is that the grievant obtained a favorable and enforceable award on the merits of the grievance. Opp'n at 3. According to the Union, the Agency's reliance on the alleged unilateral grant of the disputed comp time is misplaced because that grant did not moot the grievance. *Id.* at 4. In this connection, the Union maintains that the Arbitrator issued an award sustaining the grievance and determined that it was not moot. *Id.* The Union also maintains that, if the Agency believed that the grievance was moot, then the Agency should have filed exceptions to the merits award. *Id.* Because the Agency did not do so, the Union claims that the grievant is the prevailing party as a result of the merits award. *Id.* at 4.

IV. Analysis and Conclusions

The Agency's exception challenges the consistency of the award with the BPA and § 7701(g). The Authority reviews de novo questions of law raised by the exception and the award. In applying a standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *E.g., U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 320, 322 (2010) (*FAA*).

In interpreting the term "prevailing party" in § 7701(g), the Authority has applied the definition of that term set forth in *Buckhannon* and adopted by the MSPB. Specifically, the Authority has held that a grievant is a prevailing party when he or she obtains an enforceable judgment that benefited him or her at the time of the judgment. *Id.* at 324.

Buckhannon, which set forth this definition, involved a lawsuit that challenged a particular requirement in a state law. *See* 532 U.S. at 601. While the lawsuit was pending, the challenged requirement was eliminated from the law, and, consequently, the district court dismissed the lawsuit as moot. *See* 532 U.S. at 601. In assessing whether attorney fees were appropriate, the Supreme Court rejected the petitioners' argument that fees were warranted under a "catalyst theory[,]" i.e., because their lawsuit brought about the change in the respondents' conduct. *Id.* at 605. Instead, the Court found that the term "prevailing party" requires the party to have been awarded some relief by a court, and, thus, only court judgments on the merits and settlement agreements enforced through consent decrees create the "alteration in the legal relationship of the parties[]" that is necessary for an award of fees. *Id.* at 603-05. In contrast, the Court found that a "voluntary change in conduct[] . . . lacks the necessary judicial *imprimatur* on the change." *Id.* at 605.

In reaching its conclusions in *Buckhannon*, the Court rejected the petitioners' claim that the catalyst theory was necessary to prevent defendants from unilaterally mooting an action before judgment in order to avoid an award of attorney fees. Specifically, the Court stated that "so long as the plaintiff has a cause of action for damages [rather than equitable relief], a defendant's change in conduct will not moot the case." *Id.* at 608-09. Moreover, the Court emphasized that "[i]f a case is not found to be moot, and the plaintiff later procures an enforceable judgment, the court may of course award attorney's fees." *Id.* at 609.

Consistent with *Buckhannon*, the MSPB has found that appellants were not prevailing parties in cases where agencies had unilaterally rescinded the appealed actions *and* the MSPB's administrative judges dismissed the employees' appeals. *See, e.g., Cole*, 90 M.S.P.R. at 628; *Sacco*, 90 M.S.P.R. at 39; *Nichols*, 89 M.S.P.R. at 555. In *Sacco* and *Nichols*, the administrative judges dismissed the appeals as moot, and in *Cole*, the administrative judge dismissed the appeal after the agency filed a motion to dismiss as moot and the employee withdrew his appeal. Consequently, in those decisions, there were no judgments on the merits on which the MSPB could base a finding that the employees were prevailing parties. Further, consistent with *Buckhannon* and this MSPB precedent, the Authority has found that a grievant was a prevailing party, despite an agency's claim that its voluntary action mooted the grievance, where the arbitrator rejected the mootness claim. *See FAA*, 65 FLRA at 324.

Unlike the above-cited precedent, here, in issuing the merits award, the Arbitrator did not find the grievance moot; instead, she sustained the grievance and awarded relief in the form of comp time. In the remand award, the Arbitrator specifically found that she "did not have a factual

basis for considering the instant matter to be moot."[*] Remand Award at 3. The Agency did not except to the merits award and, thus, did not argue that the grievance was moot or challenge the Arbitrator's award of comp time, which the Authority subsequently found to be an award of pay, allowances, or differentials. In addition, the Agency's exceptions to the remand award do not expressly challenge the Arbitrator's statement that the matter was not moot. Thus, in the words of the Supreme Court, as this "case [wa]s not found to be moot" and the Arbitrator issued the merits award sustaining the grievance, "the [Arbitrator] may of course award attorney's fees." *Buckhannon*, 532 U.S. at 609.

Based on the foregoing, we conclude that the Agency has not demonstrated that the Arbitrator erred in finding that the grievant is a prevailing party. Accordingly, we deny the exception.

V. Decision

The Agency's exception is denied.

[*] The Arbitrator's conclusion that the Agency's actions did not moot the grievance distinguishes this case from *United States Department of the Army, Womack Army Medical Center, Fort Bragg, North Carolina*, 65 FLRA 632 (2011) (*Ft. Bragg*). In *Ft. Bragg*, the arbitrator stated that there was evidence that the agency had restored the disputed annual leave, but "out of an abundance of caution[,]" the arbitrator directed the agency to do what it had probably done, and, in a subsequent award, expressly found that the agency had in fact restored the disputed leave. *Ft. Bragg*, 65 FLRA at 634.