

66 FLRA No. 104

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES
CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4396
(64 FLRA 916 (2010))

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DECISION

March 28, 2012

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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 exceptions to an award of Arbitrator M. David Vaughn 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 resolving the merits of the parties' dispute (the merits award), the Arbitrator found that the Agency committed an unfair labor practice (ULP) and violated the parties' collective-bargaining agreement by stating that it would no longer comply with certain provisions of that agreement. In *United States Department of Homeland Security, United States Customs & Border Protection*, 64 FLRA 916, 916 (2010) (*CBP*), the Authority granted in part and denied in part the Agency's exceptions to the merits award. Then, in a subsequent award (the fee award) – the award at issue here – the Arbitrator awarded the Union attorney fees under the Back Pay Act (BPA), 5 U.S.C. § 5596.

For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Awards**A. Merits Award**

As discussed in greater detail in *CBP*, 64 FLRA 916, under the Homeland Security Act of 2002 (the Act), several federal agencies were transferred to the Department of Homeland Security (DHS). *Id.* at 916. The Act established Customs and Border Protection (CBP) as a division of DHS. *Id.* CBP was staffed with employees who had worked for other federal agencies and had been represented by various unions, including the Union. *Id.* The unions were parties to collective-bargaining agreements (legacy agreements) that had been negotiated with the former agencies prior to the Act and the creation of CBP, with one exception not relevant here. *Id.* All of the legacy agreements had expired, also with one possible exception not relevant here. *Id.*

As a result of an election, the Authority certified the Union as the exclusive representative of a newly defined unit of Agency employees, which included employees who had been part of the (now-defunct) units that had transferred to the Agency. *Id.* After the Union was certified, the Agency notified the Union that it would no longer comply with certain aspects of the legacy agreement to which the Union was a party -- specifically, the provisions concerning "[U]nion institutional benefits," including provisions related to official time for Union activities. *Id.* at 917. Based on its refusal to comply with the official-time provisions, the Agency denied official-time requests of some employees who attended a Union convention. *See* Exceptions at 5-6. As such, the Agency charged those employees with leave. *See id.*

In response to the Agency's refusal to comply with the legacy agreement's provisions concerning Union institutional benefits, the Union filed two grievances, which were unresolved and submitted to arbitration. *CBP*, 64 FLRA at 917. At arbitration, the parties stipulated to an issue of whether the Agency violated § 7116(a)(1) and (5) of the Statute "and/or any applicable past practice or provision of" the legacy agreement by implementing a policy that it would no longer comply with the provisions of that agreement that concern Union institutional benefits. *Id.*

In resolving the grievance, the Arbitrator discussed a decision of an Authority regional director (RD), which had directed the election that had resulted in the Union's certification. *Id.* In particular, the Arbitrator noted that the RD had concluded that, under successorship principles, the newly defined unit of Agency employees was appropriate. *Id.* (citation omitted). In addition, the Arbitrator found that, despite the expiration of the legacy agreement, the Agency was

required to keep in effect existing personnel policies, practices, and matters affecting working conditions to the maximum extent possible. *Id.* In so doing, the Arbitrator rejected the Agency's claim that there was no obligation to continue policies and practices that pertained to the Union rather than unit employees. *Id.* As the Agency implemented a policy stating that it would no longer comply with the legacy agreement's provisions regarding Union institutional benefits, the Arbitrator concluded that the Agency violated the Statute "and/or applicable past practice or provision of" the legacy agreement, as alleged. *Id.* at 918.

The Arbitrator granted all of the Union's requested remedies, which included both monetary and non-monetary remedies. *See* Exceptions, Attach. 6 (Merits Award) at 46, 66. The monetary remedies involved a direction that the Agency restore annual leave or other approved leave to those employees who, as a result of the Agency's denial of official time, used such leave to: (1) attend the Union convention; and (2) engage in training and lobbying. *See id.* at 66. The Agency filed exceptions to the merits award, which the Authority granted in part and denied in part in *CBP*, 64 FLRA at 921.*

B. Fee Award

After the Authority issued its decision in *CBP*, the Union filed an application for an award of attorney fees with the Arbitrator. *See* Fee Award at 1. In the fee award, the Arbitrator stated that there was no dispute that the restoration of annual leave for those employees who attended the Union's convention was an award of backpay. *See id.* at 12. In addition, although the Agency claimed that the restoration of annual leave for employees who engaged in training and lobbying was not an award of backpay because no employee had yet claimed those benefits, the Arbitrator rejected that claim. *Id.*

Although the Arbitrator acknowledged that the remaining remedies did not involve backpay, he rejected an Agency claim that the Union could not recover fees for litigation connected with those remedies. *See id.* at 13. In this regard, he found that "[t]he Union's case depended upon" a claim that DHS was a successor employer that was required to comply with the legacy agreement, and that, "[i]n order for the Union to prevail on any issue, its representatives had to prove its core claims regarding successorship." *Id.* (emphasis added). While noting that the Union's fee request was "not

sufficiently specific" to distinguish between fees incurred in connection with the portion of the case involving backpay and fees that were not, he stated: "[T]he nature of the claims and defenses could make such a breakout virtually impossible and because of the interrelated, developmental nature of the claim, without significance." *Id.* at 14. Accordingly, he rejected the Agency's request to limit the amount of requested fees, and he granted the Union's requested fees, with one exception that is not relevant here. *See id.* at 14-15.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the fee award is contrary to law because it awarded fees that were not "related to" an award of backpay, as the BPA requires. Exceptions at 12-13. Specifically, while conceding that the direction to restore annual leave that was taken for the Union convention was an award of backpay, the Agency argues that the remaining remedies did not encompass backpay and that, consequently, the Union may not recover fees that are connected solely to those remaining remedies. *See id.* at 17. In this connection, the Agency argues that the restoration of leave for training and lobbying was not an award of backpay. *See id.* According to the Agency, as the BPA is a waiver of sovereign immunity, it must be strictly construed. *See id.* at 13. Also according to the Agency, the Union "misstated the [BPA] threshold" and thereby misled the Arbitrator into finding that an award of fees may be based on "a 'correction of the personnel action' . . . without a related award of backpay." *Id.* at 20. The Agency also argues that the Union failed to submit adequate records to apportion the claims and that, as a result, the Arbitrator "should have solicited more detailed time records from the Union, denied the petition, or awarded only a portion of the requested fees." *Id.* at 24. Finally, the Agency contends that the Arbitrator erroneously failed to provide a "fully articulated, reasoned decision" as to how the fees relate to an award of pay, allowances, or differentials. *Id.* at 20-21.

B. Union's Opposition

The Union contends that the award of attorney fees is not contrary to the BPA. Opp'n at 15. Specifically, the Union alleges that there is "no precedent" to limit fees merely because the Arbitrator directed non-backpay remedies in addition to backpay remedies, and that the award is not deficient for allegedly failing to provide a fully articulated decision. *Id.* at 16.

* The Authority granted the exceptions in part on the ground that the Arbitrator exceeded his authority by addressing an issue regarding newly hired CBP officers. *See* 64 FLRA at 920. There is no claim that any of the fees at issue in this case were incurred in connection with that issue.

IV. 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 BPA provides, in pertinent part, that when an appropriate authority finds that an employee has been "affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the [employee's] pay, allowances, or differentials," the employee "is entitled, on correction of the personnel action, to receive . . . reasonable attorney fees related to the personnel action." 5 U.S.C. § 5596(b)(1)(A)(ii). Under this plain wording, an award of attorney fees must be "related to the personnel action," *id.* -- specifically, the unjustified and unwarranted personnel action that affected the employee. In this regard, the Authority has held that, in assessing requests for fees in a fee award, an arbitrator must focus on "'the agency's personnel action that was at issue in the [original] award.'" *AFGE, SSA Gen. Comm.*, 48 FLRA 1055, 1058 (1993) (quoting *U.S. Dep't of HHS, SSA*, 48 FLRA 1040, 1049 (1993)). Thus, in order to resolve the Agency's exceptions, it is necessary to assess whether the award of attorney fees was "related to" an unjustified and unwarranted personnel action.

The Authority has held that ULPs and violations of collective-bargaining agreements are unjustified and unwarranted personnel actions. See, e.g., *U.S. Sec. & Exch. Comm'n*, 62 FLRA 432, 438 (2008) (ULP); *U.S. DoJ, U.S. Marshals Serv.*, 66 FLRA 531, 535 (2012) (collective-bargaining-agreement violation). In the merits award, the Arbitrator found that the Agency committed a ULP and violated the parties' legacy agreement. See *CBP*, 64 FLRA at 918. Thus, the Agency committed unjustified and unwarranted personnel actions, and the Union is entitled to fees that are "related to" those actions.

The Agency does not dispute that the unjustified and unwarranted personnel actions resulted in a loss of pay, allowances, or differentials in the form of lost annual leave to attend the Union convention. See Exceptions at 9. Rather, the Agency claims that the award of fees must be set aside or limited because it also related to remedies that are not backpay. See *id.* at 17. But nothing

in the plain wording of the BPA or relevant precedent supports such a narrow interpretation. In fact, the Authority has indicated to the contrary by holding that the BPA "provides that fees are paid when 'related to the personnel action,' and does not limit attorney fees to proceedings for pay, allowances, or differentials." *U.S. DoD, DoD Dependents Sch.*, 54 FLRA 773, 789 (1998) (*DoDDS*). Consistent with this principle, the courts and the Authority have found that fees may be incurred for time spent litigating issues other than the entitlement to backpay itself. See, e.g., *AFGE, Local 3882 v. FLRA*, 994 F.2d 20, 21-24 (D.C. Cir. 1993) (*Local 3882*) (fees recoverable for time spent litigating entitlement to fees); *Ala. Ass'n of Civilian Technicians*, 56 FLRA 231, 233-34 (2000) (Chairman Wasserman dissenting) (same); *DoDDS*, 54 FLRA at 789-90 (fees recoverable for collecting interest on backpay); *U.S. DoD Dependents Sch.*, 54 FLRA 514, 520 (1998) (same). In this regard, the Authority previously has indicated that fees may be warranted for time spent litigating entitlement to non-monetary remedies, as long as those non-monetary remedies are linked to an award of backpay correcting an unjustified or unwarranted personnel action. See, e.g., *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 56 FLRA 848, 853-54 (2000) (remanding fee award because record was insufficient to determine whether award related to prior awards that corrected unjustified and unwarranted personnel actions by awarding backpay). Further, in *Local 3882*, the court found that connecting the amount of fees that was due to the underlying personnel action -- there, a ULP -- was consistent with the legislative purposes of the BPA, which include: (1) making "reasonably financially whole" those employees who have been subjected to unjustified personnel actions that resulted in reductions of their pay; and (2) "facilitat[ing] suits to enforce federal labor policy." 994 F.2d at 23. This authority supports rejecting the Agency's proffered, narrow interpretation of the BPA.

Further, the Arbitrator found that "[t]he Union's case depended upon the issue of successorship[.]" and "[i]n order for the Union to prevail on any issue" -- i.e., including its claim regarding official time for the Union convention -- "its representatives had to prove its core claims regarding successorship." Fee Award at 13 (emphasis added). The Agency does not claim that these findings are based on nonfacts or deficient on any other basis. And these findings further support a conclusion that the fees that the Union incurred should not be parsed in the manner that the Agency suggests.

In sum, the Agency has provided no basis for finding that the Arbitrator erred by awarding attorney fees that were incurred in connection with litigating the unjustified and unwarranted personnel actions -- i.e., the ULP and contract violations. Accordingly, we deny the

Agency's exception alleging that the awarded fees are not "related to the personnel action" within the meaning of the BPA. As the award of leave restoration for attendance at the Union convention provides the requisite award of backpay, it is unnecessary to resolve the Agency's claim that the restoration of leave for training and lobbying was not an award of backpay. With regard to the Agency's claim that the Arbitrator failed to provide an articulated decision as to how the fees relate to an award of pay, allowances, or differentials, the Arbitrator articulated how the fees related to an award of pay, allowances, or differentials in the form of restored leave for time spent at the Union convention. Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.