

66 FLRA No. 106

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3615
(Union)

and

SOCIAL SECURITY ADMINISTRATION
(Agency)

0-AR-4778

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DECISION

March 30, 2012

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

Decision by Member Thomas M. Beck for the Authority

I. Introduction and Background

The Agency suspended the grievant for three days after finding that the grievant had failed properly to safeguard personally identifiable information. Award at 1. Arbitrator Jonathan E. Kaufmann mitigated the grievant's suspension from three days to one day and ordered the Agency to reimburse the grievant for two days' pay and benefits. Additionally, the Arbitrator stated that "[t]here is no award of attorney[] fees or any other relief." *Id.* at 3.

In exceptions to the Arbitrator's award filed under § 7122(a) of the Federal Service Labor-Management Relations Statute, the Union argues that the Arbitrator erred as a matter of law because he did not support his denial of attorney fees by making findings as to each statutory requirement. Applicable law requires that, before an award of attorney fees may be made, the grievant or grievant's representative must present a request for attorney fees to the arbitrator. Because the Union never requested attorney fees, the Arbitrator's denial of fees is deficient, and we modify the award to strike the denial of attorney fees.

II. Analysis and Conclusion: The award is contrary to law.

The Union argues that the Arbitrator's denial of attorney fees is contrary to law because the Arbitrator failed to make any specific findings supporting the denial of fees. Exceptions at 5. When an exception challenges an award's consistency with law, the Authority reviews the question of law raised by the exception and the award *de novo*. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). To be awarded attorney fees by an arbitrator under the Back Pay Act (BPA), the grievant or the grievant's representative must present a request for fees to the arbitrator and the employing agency must have an opportunity to respond. *See* 5 C.F.R. § 550.807; *see also Fraternal Order of Police, Pentagon Police Labor Comm.*, 65 FLRA 781, 784 (2011) (citing 5 C.F.R. § 550.807(a)-(b)); *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 54 FLRA 759, 762 (1998) (*Red River*).

Here, nothing in the record indicates that the Union requested an award of attorney fees or that the Agency had a chance to respond to a request for fees. The Agency asserts, and the Union does not dispute, that "[t]he Union never submitted a request or motion for attorney[] fees to the Arbitrator for a decision." Opp'n at 2. Because the Union never made a fee request to the Arbitrator, we find that the Arbitrator's denial of fees is deficient for failing to conform with § 550.807, and we modify the Arbitrator's award to strike the denial of attorney fees.* *See U.S. Dep't of Def., Educ. Activity*, 60 FLRA 254, 257 (2004) (setting aside award of attorney fees because the arbitrator awarded fees before the union requested them); *Red River*, 54 FLRA at 762 (modifying an award to strike the refusal to award fees because the union did not request fees).

Additionally, the Authority has consistently held that the arbitrator, not the Authority, is the appropriate authority for resolution of a request for attorney fees. *AFGE, Local 1923*, 66 FLRA 22, 24 (2011) (Member Beck dissenting) (citing *AFGE, Local 3105*, 63 FLRA 128, 131 (2009)). Therefore, our action is without prejudice and does not prevent the Authority from reviewing exceptions to the Arbitrator's consideration of a request for an award of attorney fees. *See Red River*, 54 FLRA at 763.

* The Agency incorrectly argues that, because the Union never requested fees, the exceptions are premature. *See* Opp'n at 2. Rather, because the Union never requested attorney fees, and the BPA requires a request for fees to be made to an arbitrator, the Arbitrator's denial of fees is contrary to law. *See Red River*, 54 FLRA at 762.

III. Decision

The award is modified to strike the denial of attorney fees.