

**67 FLRA No. 144**

NATIONAL TREASURY  
EMPLOYEES UNION  
CHAPTER 67  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
(Agency)

0-AR-5014

DECISION

September 10, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

Arbitrator Patrick J. Halter denied the Union's attorney-fees petition as untimely. The question before us is whether the Arbitrator's timeliness determination is contrary to the Back Pay Act (the Act)<sup>1</sup> and 5 U.S.C. § 7701(g). Because the Union does not establish that any provision of law required the Arbitrator to find that the attorney-fees petition was timely, the answer is no.

**II. Background and Arbitrator's Award**

The grievant's immediate supervisor designated the grievant's job performance "[n]ot [r]atable" for a particular rating cycle, on the ground that the supervisor had not personally observed the grievant's work for at least 120 hours during the rating cycle.<sup>2</sup> The Union grieved the not-ratable designation as an alleged violation of the parties' collective-bargaining agreement (first grievance), and the dispute went to arbitration. In an award on the merits of the first grievance (merits award), the Arbitrator found that Article 12 of the agreement entitled the grievant to an "adjectival rating" because she had worked under the same performance plan for at least 120 hours over a sixty-day period.<sup>3</sup> As such, the Arbitrator set aside the not-ratable designation

and directed the Agency to "re-evaluate the grievant" consistent with Article 12.<sup>4</sup> The Arbitrator also stated that he would require additional briefing before considering an award of attorney fees. Subsequently, the parties notified the Arbitrator that they "agreed to postpone the submission of any [attorney-]fees request" related to the merits award "until [twenty] days after" the grievant's performance re-evaluation "issued."<sup>5</sup>

Thereafter, the Agency issued the grievant's performance re-evaluation. The Union filed a second grievance alleging that: (1) the re-evaluation did not comply with the merits award; and (2) if the re-evaluation had complied with the merits award, then the grievant would have received a performance bonus. The parties selected another arbitrator (rather than the author of the merits award) to resolve the second grievance. That arbitrator sustained the second grievance in pertinent part and directed the Agency to comply with the merits award by raising the grievant's performance rating and paying her a performance bonus (compliance award). (The Union requested attorney fees from the arbitrator of the second grievance, but that fees request is not at issue in this case.)

Following the compliance award, and more than a year and a half after the Agency issued the grievant's performance re-evaluation, the Union filed a petition for attorney fees (the petition) with the Arbitrator. In an attorney-fees award (fees award) – the award at issue here – the Arbitrator found that the parties had agreed to a twenty-day window for filing the petition "beg[inning] when the [Agency] issued its re-evaluation" of the grievant's performance.<sup>6</sup> Because the Union submitted the petition "beyond the [twenty]-day window," the Arbitrator "denied" the petition as "not timely."<sup>7</sup>

The Union filed exceptions to the fees award, and the Agency filed an opposition to the Union's exceptions.

**III. Analysis and Conclusions**

A. The Union fails to support one of its exceptions.

Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c).<sup>8</sup> Consistent with § 2425.6(e)(1), when a party does not provide any arguments to support its exception, the

<sup>1</sup> 5 U.S.C. § 5596.

<sup>2</sup> Exceptions, Attach., Merits Award at 2.

<sup>3</sup> *Id.* at 8.

<sup>4</sup> *Id.* at 9.

<sup>5</sup> Exceptions, Attach. 6.

<sup>6</sup> Fees Award at 1.

<sup>7</sup> *Id.*

<sup>8</sup> 5 C.F.R. § 2425.6(e)(1).

Authority will deny the exception.<sup>9</sup> Here, although the Union asserts that the fees “award is incomplete, ambiguous, or contradictory as to make implementation . . . impossible,”<sup>10</sup> the Union does not offer any arguments to support this assertion. Thus, we deny this exception as unsupported under § 2425.6(e)(1).

B. The fees award is not contrary to law.

The Union argues that the fees award is contrary to the Act and § 7701(g), which establishes standards for awarding attorney fees under the Act.<sup>11</sup> In particular, the Union argues that, because the Act’s requirements for an award of attorney fees were not satisfied until after the compliance award directed a performance bonus for the grievant, the Arbitrator should have found that the petition “was filed within a reasonable time after the basis for fees was determined.”<sup>12</sup> In addition, the Union argues that the Arbitrator erred as a matter of law by failing to address whether an award of fees would be “in the interest of justice” under § 7701(g).<sup>13</sup>

The Authority has recognized that, although the Act does not establish a specific filing period for negotiated grievances,<sup>14</sup> parties “can negotiate . . . time limits . . . to govern the filing of requests for attorney fees” under the Act.<sup>15</sup> Here, the Arbitrator found that the petition was untimely based on the twenty-day window that the parties negotiated, and the Union has not identified a provision of law with which that timeliness determination conflicts. Moreover, in cases where the Authority has either found,<sup>16</sup> or denied exceptions to an arbitrator’s finding,<sup>17</sup> that an attorney-fees request was untimely, the Authority has not required further analysis of whether an award of fees would have satisfied any applicable statutory criteria. Consistent with this precedent, we find that § 7701(g) did not require the Arbitrator to address the merits of the petition after finding it untimely. In sum, the Union has not established that the fees award is contrary to law.

#### IV. Decision

We deny the Union’s exceptions.

<sup>9</sup> E.g., *AFGE, Nat’l Border Patrol Council, Local 2595*, 67 FLRA 361, 366 (2014).

<sup>10</sup> Exceptions Form at 5.

<sup>11</sup> See *U.S. DOD, Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995) (setting forth standards).

<sup>12</sup> Exceptions Br. at 1.

<sup>13</sup> 5 U.S.C. § 7701(g).

<sup>14</sup> E.g., *AFGE, Nat’l Council of Field Labor Locals*, 67 FLRA 264, 265 (2014).

<sup>15</sup> *AFGE, Local 1148*, 65 FLRA 402, 403 (2010) (citing *AFGE, Council of Prison Locals*, 55 FLRA 192 (1999)).

<sup>16</sup> *Dep’t of the Air Force Headquarters, 832d Combat Support Grp. DPCE, Luke Air Force Base, Ariz.*, 32 FLRA 1084, 1094 (1988).

<sup>17</sup> *AFGE, Local 1923*, 48 FLRA 1117, 1120-22, 1123 n.\* (1993).