

71 FLRA No. 26

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2198
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
BECKLEY, WEST VIRGINIA
(Agency)

0-AR-5412

DECISION

May 22, 2019

Before the Authority: Collen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

In this case, we reiterate that an arbitrator's denial of attorney fees in a merits award is premature when a party merely asserts that it is seeking attorney fees at arbitration to preserve its right to file a petition for attorney fees at a later time.

Arbitrator John R. Stepp issued an award reducing the grievant's five-day suspension to an admonishment, and awarded backpay. However, in response to the Union's preliminary request for attorney fees, the Arbitrator denied the Union attorney fees.

The Union files a contrary-to-law exception claiming that the denial of attorney fees is premature. Because the Arbitrator denied the request for attorney fees before the Union had an opportunity to submit a petition for fees, and before the Agency had an opportunity to respond to a petition, the Arbitrator's denial of attorney fees is contrary to law. Accordingly, we modify the award to strike the denial of attorney fees, without prejudice to the Union's right to file a petition for attorney fees with the Arbitrator.

II. Background and Arbitrator's Award

The Agency suspended the grievant for five days without pay for improperly disposing of Agency

equipment. The Union filed a grievance challenging the grievant's five-day suspension. The parties could not resolve the matter, and the Union invoked arbitration.

At arbitration, the Union made a preliminary request for attorney fees to preserve its right to file a petition for attorney fees after the merits award.

The Arbitrator reduced the grievant's five-day suspension to an admonishment, and awarded the grievant backpay. But the Arbitrator denied attorney fees because: (1) the "Agency had no reason to believe that its choice of a five-day suspension would be reversed nor did they engage in a prohibited personnel practice"; (2) the Agency's action "was not wholly unfounded"; and (3) the parties' agreement is silent on awarding attorney fees.¹

The Union filed exceptions to the award on September 17, 2018. The Agency did not file an opposition to the Union's exceptions.

III. Analysis and Conclusion: The Arbitrator's denial of attorney fees is contrary to law.

The Union argues that the award is contrary to law because the Arbitrator prematurely denied the Union attorney fees before it filed a petition requesting the fees.² When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.³ In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.⁴

Under the Back Pay Act's (BPA)⁵ implementing regulations, before an arbitrator may grant or deny attorney fees, a grievant or the grievant's representative must present a request for fees to the arbitrator, and the arbitrator must grant the agency the opportunity to respond to the request.⁶

¹ Award at 10.

² Exceptions Br. at 2-4.

³ *Fraternal Order of Police Lodge NO.1*, 71 FLRA 6, 6 (2019) (FOPL).

⁴ *Id.*

⁵ 5 U.S.C. § 5596.

⁶ *FOPL*, 71 FLRA at 6; *AFGE, Local 2002*, 70 FLRA 17, 18 (2016).

Here, the Arbitrator prematurely denied the Union attorney fees. Although the Arbitrator references the “Union’s request for attorney fees”⁷ at arbitration, he makes no finding that the Union filed a petition for attorney fees or that the Agency had an opportunity to respond to the petition. The Union contends, and the Agency does not dispute, that it merely “requested that the [A]rbitrator retain jurisdiction over the issue of attorney fees following issuance of his award and this was agreed to by the Agency.”⁸ Therefore, the Union’s “request” for attorney fees does not constitute a petition for attorney fees under the BPA and its implementing regulations.⁹

Consistent with Authority precedent and the BPA’s implementing regulations, we find that the Arbitrator prematurely denied the Union attorney fees.¹⁰ Accordingly, we modify the award to strike the denial of attorney fees without prejudice to the Union’s right to file a petition for attorney fees with the Arbitrator.¹¹ Because we have found that the Arbitrator’s denial of attorney fees is contrary to law, we find it unnecessary to address the Union’s additional contrary-to-law argument.¹²

IV. Decision

We grant the Union’s contrary-to-law exception, and modify the award to strike the denial of attorney fees.

⁷ Award at 10.

⁸ Exceptions Br. at 2.

⁹ *FOPL*, 71 FLRA at 7.

¹⁰ *See id.* at 6-7 (modifying award to strike denial of attorney fees where union did not have opportunity to submit fee petition); *see also*, *AFGE, Local 2663*, 70 FLRA 147, 147-48 (2016) (*Local 2663*) (Member Pizzella concurring) (same); *AFGE, Local 2145*, 67 FLRA 438, 439 (2014) (*Local 2145*) (Member Pizzella concurring) (same).

¹¹ *See FOPL*, 71 FLRA at 6-7; *see also*, *Local 2663*, 70 FLRA at 147-48; *Local 2145*, 67 FLRA at 439.

¹² *AFGE, Local 2002*, 69 FLRA 425, 426 (2016). Additionally, in its exceptions form, the Union alleges that the award is incomplete, ambiguous, or contradictory, but it does not present any support for that assertion. Exceptions Form at 5. Accordingly, we deny this exception, as unsupported. *See* 5 C.F.R. § 2425.6(e)(1) (“[a]n exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support” its argument); *see also AFGE, Local 2152*, 69 FLRA 149, 151 (2015).