

64 FLRA No. 132

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 933
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
DETROIT, MICHIGAN
(Agency)

0-AR-4441

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DECISION

April 28, 2010

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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 Ildiko Knott filed by the Union under § 7122 (a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an untimely opposition to the Union's exception.*

The Arbitrator sustained the Union's grievance because she found that the Agency did not have just and sufficient cause to suspend the grievant for fourteen days. While the Arbitrator awarded the grievant back-pay for the days he was improperly suspended, she did not award the attorney fees sought by the Union. The Union contends that the failure to award the requested attorney fees is contrary to law. For the following reasons, we remand the portion of the award involving the issue of attorney fees to the parties, absent settlement,

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* The Agency filed its opposition with several errors, including a failure to provide a signed and dated statement of service and a failure to provide the appropriate number of copies. Accordingly, the Authority issued a deficiency order indicating that the Agency must file with the Authority corrected copies of its opposition, including its statement of service. The Agency filed its response to the deficiency order by commercial delivery, correcting the deficiencies, three days after the due date set forth in the Authority's order. Accordingly, we do not consider the Agency's opposition because the Agency failed to timely correct the deficiencies in its opposition.

for resubmission to the Arbitrator for clarification of the award.

II. Background and Arbitrator's Award

The grievant is employed by the Agency as a caretaker at a cemetery. Award at 1. He was active in organizing the other caretakers and became a Union steward when the Union was certified as the exclusive representative. *Id.* The grievant, in the course of his duties, was directed by his supervisor to adjust the sprinklers in a section of the cemetery. *Id.* While the grievant was completing this task, another caretaker was working in the same general area preparing gravesites. *Id.* at 1-2. When the sprinklers were turned on, water sprayed into a gravesite that the other caretaker was preparing. *Id.* at 2. The grievant and the other caretaker then had a verbal altercation. *Id.* at 2-3. After this incident, the grievant reported the encounter to his Foreman, who told him "not to worry about it" and to "write it up[.]" *Id.* at 3.

As a result of this incident, the Agency suspended the grievant for fourteen days. *Id.* at 9. The Union filed a grievance regarding the grievant's suspension. *Id.* at 9-10. The grievance was unresolved and submitted to arbitration. *Id.* at 11. The Arbitrator framed the following issue: "whether the [Agency] had just cause to suspend the [g]rievant for fourteen days." *Id.* at 31.

The Arbitrator found that the Agency's front line supervisors failed to establish that there was sufficient evidence to warrant the grievant's fourteen day suspension. *Id.* at 33. The Arbitrator held that the Agency's representatives did not sufficiently investigate the alleged events and did not establish enough evidence to warrant the disciplinary action. *Id.* Further, the Arbitrator found that similar actions by other employees did not result in discipline. *Id.* at 39. In addition, the Arbitrator found that there was at least circumstantial evidence "that Union animus may have played some role." *Id.* at 41. Accordingly, the Arbitrator held that the grievant's fourteen day suspension would be rescinded and cleared from his record and that he would be made whole for all losses of pay and benefits. *Id.* The Arbitrator also denied the Union's request for attorney fees. *Id.*

III. Union's Exception

The Union argues that the grievant met each of the four statutory requirements for an award of attorney fees. Exception at 10. The Union asserts that: (1) the grievant was the prevailing party; (2) the award of fees was warranted in the interest of justice because the Agency's actions were clearly without merit; (3) the

amount of fees was reasonable; and (4) the fees requested were in accordance with the standards set forth under the Back Pay Act. *Id.* at 9-10 (citing 5 U.S.C. § 7701(g)(1)).

The Union also contends that the Arbitrator's ruling regarding attorney fees is required to be a fully articulated decision and that the Arbitrator is required to make specific findings under 5 U.S.C. § 7701(g)(1). *Id.* at 11 (citing 5 U.S.C. § 7701(g)(1)). The Union asserts that the Arbitrator's one sentence denial of its attorney fees request is contrary to law because it denies the request without any consideration of the statutory requirements set forth in § 7701. Therefore, the Union asserts, if the Authority is unable to determine that the attorney fee request is appropriate, then the Authority should remand the award to the Arbitrator so that the requisite findings can be made. Exception at 12.

IV. Analysis and Conclusion

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.*

Under the Back Pay Act, 5 U.S.C. § 5596, an award of attorney fees must be in accordance with the standards established under 5 U.S.C. § 7701(g). The threshold requirement for an award of attorney fees under the Back Pay Act is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in a withdrawal or reduction of the grievant's pay, allowances or differential. See *U.S., Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995). The Back Pay Act further requires that an award of fees must be: (1) in conjunction with an award of backpay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with standards established under 5 U.S.C. § 7701(g). *See id.* The prerequisites for an award under § 7701(g) are that: (1) the employee must be the prevailing party; (2) the award of attorney fees must be warranted in the interest of justice; (3) the amount of fees must be rea-

sonable; and (4) the fees must have been incurred by the employee. *See id.*

The Arbitrator did not articulate her reasons for denying the Union's request for attorney fees, and the record does not contain sufficient evidence for the Authority to determine the Arbitrator's basis for denying the Union's request for attorney fees. In such situations, the Authority "take[s] the action necessary to assure that the award is consistent with applicable statutory standards." *AFGE, Local 3020*, 64 FLRA 596, 598 (2010) (citing *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1695 (1998) (citation omitted)).

The record clearly reveals that the grievant was the prevailing party. See *AFGE, Local 3020*, 64 FLRA at 598; see also *U.S. Gen. Serv. Admin., Ne. & Caribbean Region, N.Y., N.Y.*, 61 FLRA 68, 70 (2005) (citation omitted) (employee is the prevailing party within the meaning of § 7701(g)(1) when the employee received an enforceable judgment or settlement which directly benefitted the employee at the time of the judgment or settlement). However, the Arbitrator did not address whether the fees as requested were "warranted in the interest of justice," were reasonable, or were incurred by the employee. 5 U.S.C. § 7701(g)(1); see also *AFGE, Local 3239*, 61 FLRA 808, 809 n.* (2006) (discussing the interest of justice standard as addressed by the Merit Systems Protection Board in *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980), and by the Authority under the Statute). Because the Arbitrator has not sufficiently explained the "determination of a pertinent statutory requirement" and the record does not permit the Authority to resolve the Union's exception, we remand this portion of the award to the parties, absent settlement for resubmission to the Arbitrator to clarify, consistent with the foregoing standards, the reasons for the denial of attorney fees. *AFGE, Local 3020*, 64 FLRA at 598; see also *AFGE, Local 3239*, 61 FLRA at 810; *AFGE, Council 220*, 60 FLRA 1, 4 (2004).

V. Decision

We remand the portion of the award involving the issue of attorney fees to the parties, absent settlement, for resubmission to the arbitrator for clarification of her award, consistent with this decision.