

65 FLRA No. 135

UNITED STATES
DEPARTMENT OF THE ARMY
WOMACK ARMY MEDICAL CENTER
FORT BRAGG, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 1770
(Union)

0-AR-4349

DECISION

March 24, 2011

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 Clarence D. Rogers, Jr. filed by the Agency and the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union and the Agency filed oppositions to each other's exceptions.

The Arbitrator determined that the Union satisfied the requirements for receiving attorney fees under the Back Pay Act, 5 U.S.C. § 5596, and awarded the Union a portion of the attorney fees it had requested. For the reasons discussed below, we dismiss the Agency's exceptions in part and grant them in part, and we find it unnecessary to resolve the Union's exceptions.

II. Background and Arbitrator's Awards¹

The grievant asked for and received permission to use annual leave to take a day off. *See* Initial Award at 10. Later, the grievant realized that she

could have taken that day off without using annual leave, because that day was treated as a holiday under the parties' agreement. *See id.* After the Agency failed to restore the grievant's annual leave, *see id.* at 2, the Union filed a grievance, which was unresolved and submitted to arbitration, *see id.* at 5.

In his initial award, the Arbitrator framed the issue as whether the Agency violated the parties' agreement by "requir[ing the grievant] to take annual leave" on her contractual holiday, and if so, what should be the remedy. *Id.* at 2. The Arbitrator found that the Agency violated the parties' agreement and that the grievant was "entitled to have the leave time . . . restored[.]" *Id.* at 11. Based on the testimony of two Agency witnesses, *see id.* at 8-9, the Arbitrator found that there was "evidence . . . that the Agency . . . already repaired any damage done by restoring the time . . . charged to [the grievant's] annual leave account" the day before the hearing, *id.* at 11-12. The Arbitrator concluded that there was "no reason" not to accept that evidence as being "anything less than true." *Id.* at 12. However, "out of an abundance of caution" the Arbitrator stated that the award would "include an order to do what has probably already been done." *Id.* The Arbitrator thus sustained the grievance and directed the Agency to "restore the annual leave that was charged to [the grievant's] account[.]" *Id.* The Arbitrator denied the Union's request for attorney fees, finding that there was "no evidence of bad faith or any other justification" that would warrant an award of attorney fees. *Id.*

Neither party filed exceptions to the initial award. *See* First Supplemental Award at 2. Approximately one month after the Arbitrator issued the initial award, the Union filed a motion with the Arbitrator, Exceptions, Attachment 2, Union's Motion for Clarification and Reconsideration (Union's Motion), alleging that the Agency had not restored the grievant's annual leave. *See* First Supplemental Award at 2. The Union also requested permission to file a brief in support of its request for attorney fees. *See id.* In response, Exceptions, Attachment 3, Agency's Response to Union Motion for Clarification and Reconsideration (Agency's Response), the Agency argued to the Arbitrator that it had restored the grievant's annual leave and that the Union was not entitled to attorney fees because it was not a prevailing party. *See* First Supplemental Award at 2.

In the first supplemental award, the Arbitrator granted the Union's request to file a brief in support of its request for attorney fees, and permitted the

1. The Arbitrator issued three awards in this matter: the initial award, the first supplemental award, and the second supplemental award.

Agency to file a response. *See id.* at 3. The Union then submitted a brief, Exceptions, Attachment 5, Union's Petition for Attorney Fees and Costs (Union's Brief), in support of its request for attorney fees, and the Agency filed a brief in opposition, Exceptions, Attachment 6, Agency's Response to the Union's Petition for Attorney Fees (Agency's Brief). *See* Second Supplemental Award at 2. In its brief, the Agency again argued that the Union was not a prevailing party, *see id.* at 4, and contended that the amount of fees requested by the Union was excessive, *see* Agency's Brief at 8-9.

In the second supplemental award, the Arbitrator stated that he was "clarifying" the initial award in certain respects. Second Supplemental Award at 5. First, the Arbitrator stated that the Agency "did not violate" the Arbitrator's direction in the initial award, *id.* at 4, because the Agency had in fact "restored" the grievant's annual leave "the day before the arbitration" hearing, *id.* at 5. Next, the Arbitrator stated that the grievant was a prevailing party and was therefore eligible for attorney fees, reasoning that the grievance caused the Agency to voluntarily restore the grievant's annual leave. *Id.* at 5-6. Further, the Arbitrator stated that the fact that he had sustained the grievance in the initial award was "indicative" that the grievant was a prevailing party. *Id.* at 5. The Arbitrator awarded the Union attorney fees, but at a lower hourly rate and for fewer hours than the Union had requested. *See id.* at 6-7.

III. Positions of the Parties

A. Agency's Exceptions

The Agency alleges that the Arbitrator exceeded his authority, arguing that under the doctrine of *functus officio*, the Arbitrator's authority to award attorney fees ceased once he denied the Union's request in the initial award. *See* Agency's Exceptions at 5. The Agency asserts, in this regard, that the Arbitrator did not retain jurisdiction after the initial award, and that the parties' agreement does not "permit an arbitrator to conduct further proceedings[.]" *Id.* Additionally, the Agency contends that the award is contrary to the Back Pay Act and 5 U.S.C. § 7701(g) (§ 7701(g)). Specifically, the Agency argues that the grievant is not a prevailing party under § 7701(g) because the Agency restored the grievant's annual leave prior to the hearing. *See id.* at 6-7.

B. Union's Opposition

The Union argues that the Arbitrator was authorized to clarify his initial award because that award was ambiguous. *See* Union's Opp'n at 2-3. Additionally, the Union argues that the grievant was a prevailing party because the Agency's "attempt to restore the leave before the [a]rbitration itself, and the [o]rder from the Arbitrator failed. . . . [L]eave was in fact not restored until afterwards." *Id.* at 4.

C. Union's Exceptions

The Union argues that the second supplemental award is contrary to Authority precedent because the Arbitrator failed to explain why he was awarding attorney fees for fewer hours and at a lower hourly rate than the Union had requested. *See* Union's Exceptions at 3, 7, 10.

D. Agency's Opposition

The Agency argues that the hourly rate on which the Arbitrator based his award is not contrary to law. *See* Agency's Opp'n at 3.

IV. Analysis and Conclusions

A. 5 C.F.R. § 2429.5 bars the Agency's exceeded authority exception.

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5 (§ 2429.5).² Under § 2429.5, the Authority will not consider an issue that could have been, but was not, presented to the arbitrator. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008).

Here, the Agency was on specific notice that, subsequent to the initial award, the Union requested permission to address its request for attorney fees. *See* First Supplemental Award at 2. In response, the Agency could have raised its *functus officio* argument to the Arbitrator in either its Agency Response or Agency Brief. However, the Agency

2. The Authority's Regulations concerning the review of arbitration awards, as well as certain related Regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Union's exceptions were filed before that date, we apply the earlier Regulations.

did not raise the argument in either filing. See Agency's Response at 1-2; Agency Brief at 4-6. As the Agency could have, but did not raise this argument, we dismiss the Agency's exceeded authority exception.

B. The award is contrary to § 7701(g).

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and 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.*

Awards of attorney fees under the Back Pay Act must be in accordance with the standards established under § 7701(g), which pertains to awards of attorney fees by the Merit Systems Protection Board (MSPB). *U.S. Dep't of Transp., FAA*, 65 FLRA 320, 323 (2010). The standards established under § 7701(g) include the requirement that the employee must be the prevailing party. *Id.* at 323-34. See also *U.S. Dep't of State*, 59 FLRA 129, 130 (2003) (grievant who is not a prevailing party is not entitled to attorney fees) (*State Department*).

The Authority has held that a grievant is not a prevailing party under § 7701(g) in instances where an agency has unilaterally rescinded a disputed action during the pendency of an appeal. See *AFGE, Local 446*, 64 FLRA 15, 16 (2009) (agency unilaterally rescinded suspension); *State Department*, 59 FLRA at 130 (same); *AFGE, Local 1547*, 58 FLRA 241 (2002) (agency voluntarily restored grievant's overtime). *Accord Sacco v. Dep't of Justice*, 90 M.S.P.R. 37, 41-42 (2001) (agency unilaterally rescinded constructive suspension).

In the initial award, the Arbitrator stated that there was "evidence . . . that the Agency . . . restor[ed]" the grievant's annual leave, Initial Award at 11, but "out of an abundance of caution[.]" the Arbitrator directed the Agency to restore the grievant's annual leave, *id.* at 12. In the second supplemental award -- the award at issue here -- the Arbitrator "clarif[ied]" the initial award to find expressly that the Agency had in fact "restored" the

grievant's annual leave "the day before the arbitration" hearing. Second Supplemental Award at 5. Therefore, the Arbitrator's conclusion that the grievant was a prevailing party, and his award of attorney fees based on that conclusion, are contrary to § 7701(g). See, e.g., *State Department*, 59 FLRA at 130.

Based on the foregoing, we find that the award of attorney fees is contrary to § 7701(g), and we set it aside. As such, it is unnecessary to consider the Union's exceptions claiming that the Arbitrator's reduction in the amount of fees requested was contrary to Authority precedent.

V. Decision

The Agency's exceeded authority exception is dismissed, and the award of attorney fees is set aside.