68 FLRA No. 20

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

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

0-AR-5051

_____

DECISION

December 4, 2014

_____

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

I. Statement of the Case

After the Agency suspended an employee (the grievant), the Union filed a grievance. When the Agency denied the grievance, the Union invoked arbitration. Before the arbitration hearing, the Agency rescinded the suspension and paid the grievant backpay. Arbitrator Sally Steinberg-Brent found that, under those circumstances, the grievant was not a prevailing party and, thus, could not recover attorney fees under the Back Pay Act (the Act).[1] There are three questions before us.

The first and second questions are whether the award fails to draw its essence from the parties' collective-bargaining agreement, and whether the award is based on a nonfact, because the Arbitrator allegedly failed to resolve the issue of attorney fees. Because the arbitrator did resolve that issue, the answer to both questions is no.

The third question is whether the Arbitrator's denial of attorney fees is contrary to law. Because the Agency rescinded the grievant's suspension and paid him backpay before the arbitration hearing, the grievant was not a prevailing party under applicable legal requirements. As attorney fees cannot be awarded unless the prevailing-party requirement is met, the Arbitrator's denial of fees is not contrary to law.

II. Background and Arbitrator's Award

The Agency proposed to suspend the grievant for ten days but later reduced the suspension to one day. The Union filed a grievance requesting cancellation of the suspension, backpay, and attorney fees. The Agency denied the Union's grievance. The Union invoked arbitration, and a hearing was scheduled.

The day before the arbitration hearing, the Agency notified the Union that it had rescinded the grievant's suspension. At arbitration, the sole issue submitted to the Arbitrator was, "Is the Union entitled to attorney[] fees?"[2]

Before the Arbitrator, the Agency claimed that "rescinding the discipline had the effect of mooting the case, as it left nothing to arbitrate."[3] The Union disputed that claim, contending that "the case was not moot, as the issue of attorney[] fees remained to be decided."[4] The Arbitrator found that, because the Agency rescinded the suspension and paid the grievant backpay, "the [*backpay*] issue [was] now moot."[5] However, she also found that, "because the Agency has determined not to pay attorney fees, the issue of *attorney fees* remains to be decided in arbitration, and therefore the case itself is not moot."[6] She then proceeded to address whether attorney fees were warranted.

The Arbitrator found that one of the requirements for an award of attorney fees is that "the employee is the 'prevailing party.'"[7] Citing to *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources* (*Buckhannon*),[8] the Arbitrator stated that the Supreme Court has found that the term "prevailing party" does not include "a party that has failed to secure a judgment on the merits or a consent decree, but has nonetheless achieved the desired result" due to the opposing party's decision to change its own behavior.[9]

The Arbitrator determined that, because the Agency voluntarily rescinded the grievant's suspension and paid the grievant backpay before the arbitration hearing, "the Union ha[d] not achieved a written award or judgment upon which to predicate [the] payment of

[1] 5 U.S.C. § 5596.

[2] Award at 2.
[3] *Id.* at 8.
[4] *Id.* at 9.
[5] *Id.* at 16 (emphasis added).
[6] *Id.* at 14 (emphasis added).
[7] *Id.* at 11 (citing 5 U.S.C. § 5596).
[8] 532 U.S. 598, 602 (2001).
[9] Award at 14.

attorney fees."[10] Accordingly, the Arbitrator concluded that the grievant was not a "prevailing party" and, thus, could not be awarded attorney fees under the Act.[11]

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

III. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties' collective-bargaining agreement.

The Union argues that the award fails to draw its essence from Article 42, Section 4 of the parties' agreement,[12] which pertinently provides that the Agency "must assert any claim of nongrievability or nonarbitrability no later than the Step 3 decision."[13] According to the Union, the issue of attorney fees "is an issue that the Arbitrator must rule on since it is a portion of the grievance," and "[t]he Agency has not rendered the grievance moot[, because] this issue . . . is still unresolved."[14]

In reviewing challenges to an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[15] Using this standard, the Authority will find that an award is deficient as failing to draw its essence from the agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement so as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[16] An exception that is based on a misinterpretation of an award does not provide a basis for finding that the award fails to draw its essence from the agreement.[17]

The Union's essence exception appears to be premised on a belief that the Arbitrator did not resolve the issue of whether attorney fees are appropriate. But the Arbitrator did address that issue; she merely found that the requirements for awarding such fees were not met. As the Union's essence exception appears to be based on a misinterpretation of the award, it provides no basis for finding the award deficient.[18] Accordingly, we deny this exception.

B. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact because it is "premised on the idea that the case is moot once the suspension is rescinded," which the Union claims is incorrect "because the remedy for attorney fees requested in the grievance has not been addressed."[19]

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which a different result would have been reached.[20] An arbitrator's determination as to any factual matter that the parties disputed at arbitration cannot establish that the award was based on a nonfact.[21] In addition, nonfact exceptions that are based on a misinterpretation of an award do not provide a basis for finding the award deficient.[22]

As stated previously, the Arbitrator expressly found that the case was not moot, because "the issue of attorney fees remain[ed] to be decided in arbitration."[23] And, as also stated previously, the Arbitrator resolved that issue. Therefore, the Union's nonfact exception – like its essence exception – appears to misinterpret the award. As such, the nonfact exception provides no basis for finding the award deficient,[24] and we deny that exception.

C. The award is not contrary to law.

The Union argues that the award is contrary to law.[25] When exceptions involve an award's consistency with law, the Authority reviews any questions of law raised by the exceptions de novo.[26] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[27] In making that assessment, the Authority defers to the arbitrator's underlying factual

[10] *Id.* at 21.
[11] *Id.*
[12] Exceptions at 3.
[13] *Id.*, Attach. B, Collective-Bargaining Agreement at 165.
[14] Exceptions at 6.
[15] *AFGE, Council 220, 54 FLRA 156, 159 (1998).*
[16] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[17] *AFGE, Local 2382*, 66 FLRA 664, 666 (2012).
[18] *Id.*
[19] Exceptions at 3.
[20] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[21] *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993).
[22] *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, 67 FLRA 609, 612 (2014) (*Red River*).
[23] Award at 14.
[24] *Red River*, 67 FLRA at 612.
[25] Exceptions at 3.
[26] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 621 (2014).
[27] *USDA, Forest Serv.*, 67 FLRA 558, 560 (2014).

findings unless the appealing party establishes that those findings are nonfacts.[28]

The Union argues that all of the requirements for attorney fees are met.[29] With regard to the prevailing-party requirement, the Union contends that the grievant is the prevailing party because the Agency "has acknowledged that the action it took was baseless and the grievance should therefore be sustained."[30] In this connection, the Union states that the grievant's suspension was "completely reversed," and that a grievant who "succeeds in reversing a suspension is the prevailing party."[31]

Awards of attorney fees under the Act must be awarded in accordance with the standards established under 5 U.S.C. § 7701(g), which pertains to awards of attorney fees by the Merit Systems Protection Board (MSPB).[32] The standards established under § 7701(g) include the requirement that the employee be the prevailing party.[33] When exceptions concern the standards established under § 7701(g), the Authority looks to the decisions of the courts and the MSPB for guidance.[34] With regard to the prevailing-party requirement, the Authority applies the definition set forth in *Buckhannon* and adopted by the MSPB under § 7701(g).[35] Under this definition, a grievant is a prevailing party when the grievant obtains an enforceable judgment that benefited the grievant at the time of the judgment.[36] The Authority has noted that, under *Buckhannon*, the MSPB has found that appellants were not prevailing parties in cases where agencies had unilaterally rescinded the appealed actions and the MSPB's administrative judges had dismissed the employees' appeals.[37] Consistent with this principle, where an agency has unilaterally rescinded a grievant's suspension before an arbitration hearing, the Authority has held that the grievant is not a prevailing party.[38]

Here, the Arbitrator concluded that the grievant was not a prevailing party, because the Agency had unilaterally rescinded the grievant's suspension, and paid him backpay, before the arbitration hearing. This conclusion is consistent with the legal principles set forth above. And nothing in the decisions cited by the Union supports a contrary conclusion.[39] Accordingly, the Union has not demonstrated that the Arbitrator erred, as a matter of law, in finding that the grievant was not a prevailing party. Thus, we deny the Union's contrary-to-law exception.

IV. Decision

We deny the Union's exceptions.

[28] *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012).
[29] Exceptions at 7-8.
[30] *Id.* at 9.
[31] *Id.*
[32] *AFGE, Local 446*, 64 FLRA 15, 15-16 (2009) (*Local 446*).
[33] 5 U.S.C. § 7701(g).
[34] *Local 446*, 64 FLRA at 15-16.
[35] *Id.* at 16.
[36] *AFGE, Local 987*, 64 FLRA 884, 887 (2010).
[37] *AFGE, Local 1592*, 65 FLRA 921, 922 (2011) (citations omitted).
[38] *U.S. Dep't of State*, 59 FLRA 129, 130 (2003).
[39] *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (employees achieved partial success in district court); *AFGE, Local 3105*, 63 FLRA 128, 130 (2009) (arbitrator had set aside suspension and awarded backpay); *U.S. GSA, Ne. & Caribbean Region, N.Y.C., N.Y.*, 61 FLRA 68, 70 (2005) (arbitrator mitigated suspension); *NAGE, Local R4-6*, 55 FLRA 1298, 1301 (2000) (arbitrator mitigated suspension); *Heath v. Dep't of Transp.*, 66 M.S.P.R. 101, 105-09 (1995) (agency did not raise prevailing-party issue, and MSPB did not address it); *Stein v. U.S. Postal Serv.*, 65 M.S.P.R. 685, 688 (1994) (appellant was prevailing party because previous order had awarded him fees and costs); *Ray v. Dep't of HHS*, 64 M.S.P.R. 100, 105 (1994) (employee was not prevailing party).