**68 FLRA No. 140**

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 67
(Union)

and

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

0-AR-5055

DECISION

August 31, 2015

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

## I. Statement of the Case

After winning two successive grievances to change an employee's "not ratable" appraisal to "exceeds fully successful," and getting her a cash performance award, the Union requested attorney fees. Arbitrator Pilar Vaile denied the request. The Arbitrator found that neither of the remedies the Union obtained – the rating change and the cash performance award – met the Back Pay Act's (the Act)[1] requirements for an award of attorney fees. Specifically, the Arbitrator found that neither remedy constituted pay, allowances, or differentials of which the Agency had deprived the grievant. This case presents two substantive questions.

The first question is whether the fee award is contrary to law. Because neither the performance rating nor the cash performance award is pay, allowances, or differentials under the Act, the answer is no.

The second question is whether the fee award fails to draw its essence from Article 44.1 of the parties' agreement – which mirrors in all relevant respects the applicable attorney-fee provision of the Act – because the Arbitrator failed to mention Article 44.1 in her analysis. Because the Arbitrator considered the elements of the Article, and the Union does not point to any language in the parties' agreement that requires an arbitrator to make separate findings or otherwise explain how the award is consistent with the parties' agreement, the answer is no.

[1] 5 U.S.C. § 5596.

## II. Background and Arbitrator's Award

The grievant is a Chief Union Steward. At the end of a performance year, the Agency gave her a "not ratable" appraisal because, the Agency claimed, she had not performed her position's duties for enough time to be rated. One of the consequences of the grievant's "not ratable" appraisal was that the Agency did not give her a cash performance award.

The Union grieved the appraisal. Two successive "merits" awards by different arbitrators followed. In the first, another arbitrator ordered the Agency to rate the grievant because she had sufficient "ratable hours" during the performance year doing the work of her position. In the second award, the Arbitrator ordered the Agency to give the grievant an "exceeds-fully-successful" rating for her "ratable" work, and a cash performance award. The Agency did not challenge either award.

The Union then applied for attorney fees. In the award at issue in this proceeding, the Arbitrator denied the Union's application (fee award). The Arbitrator found that neither of the merit awards' remedies – a rating and a cash performance award – constituted pay, allowances, or differentials under the Act.[2]

The Arbitrator determined that "[r]ecovery of attorney fees under the [Act] is expressly tied to the unjustified or unwarranted 'withdrawal or reduction of all or part of the *pay, allowances, or differentials* of the employee.'"[3] Because the Union did not argue "that the [performance] rating is 'pay, allowance[s], or differential[s,]'" the Arbitrator found that the only remaining issue before her was whether the cash performance award constituted pay, allowances, or differentials.[4]

The Arbitrator found that pay, allowances, and differentials, are "pay, leave[,] and other monetary employment benefits to which an employee is *entitled by statute or regulation*."[5] The Arbitrator also found that "agency awards – such as [the cash] performance [award] at issue here – are expressly excluded [from being] 'basic pay,'"[6] and are a "discretionary rather than a statutory entitlement."[7] Accordingly, the Arbitrator concluded that

[2] Fee Award at 1; *see also* 5 U.S.C. § 5596.
[3] Fee Award at 10 (citing 5 U.S.C. § 5596(b)(1)).
[4] *Id.*
[5] *Id.* (citing 5 C.F.R. § 550.803).
[6] *Id.* (citing 5 C.F.R. § 451.104(a)(3), (b)).
[7] *Id.*

the cash performance award was not "pay, allowances, or differential[s]" under the Act, and denied the Union's attorney-fee request.[8]

The Union filed exceptions to the Arbitrator's fee award. The Agency filed an opposition to the Union's exceptions.

## III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Union's claim that the fee award is contrary to law because a cash performance award is pay, allowances, or differentials.

The Union contends that the fee award is contrary to law "because [cash] performance awards are pay."[9] Although the Agency argues that the Union did not raise this issue before the Arbitrator,[10] the record shows otherwise.[11] Specifically, the Arbitrator noted that "[t]he Union argues it is entitled to fees because [the grievant] *lost pay* '*in the form of a* [*cash*] *performance award*.'"[12] As the Union raised this issue at arbitration, we find that §§ 2425.4(c) and 2429.5 do not bar the Union's contrary-to-law exception.

## IV. Analysis and Conclusions

### A. The fee award is not contrary to law.

The Union argues that the fee award is contrary to law because the Arbitrator erred when she determined that the grievant's cash performance award does not constitute pay, allowances, or differentials under the Act.[13] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award de novo.[14] 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.[15] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[16]

The threshold requirement for entitlement to attorney fees under the Act is a finding that the grievant was affected by an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials.[17] Under the Authority's case law, performance awards do not constitute "pay, allowances, or differentials" unless they are required by statute, regulation, or the provisions of a collective-bargaining agreement.[18] But where "performance awards required by a collective-bargaining agreement . . . are improperly withheld from bargaining[-]unit employees[, they] constitute 'pay, allowances, or differentials,' within the meaning of the Act, and the agency's failure to pay them as required by the agreement constitutes the 'withdrawal or reduction' of those benefits."[19]

The Union fails to demonstrate that the grievant's cash performance award constitutes "pay, allowances, or differentials" under the Act. The Union does not claim that the grievant's cash performance award is required by statute or regulation. Moreover, to the extent that the Union argues that the performance award is required by the parties' agreement,[20] the Union does not identify or include with its exceptions any agreement provision addressing the subject. In addition, although the Arbitrator found in the second merits award that "[t]o get the . . . performance-based cash bonus, . . . [the grievant] would have been required to obtain a performance appraisal of 3.4 or greater," citing a contract provision,[21] the Arbitrator did not find that the provision "entitled" the grievant to an award. And the provision that the Arbitrator cites is not set forth in any award, or elsewhere in the case's record, including the Union's exceptions. Further, although the Arbitrator found that cash performance awards are discretionary with the Agency,[22] the Union does not challenge that finding as failing to draw its essence from the parties' agreement. In short, there is no basis in this case's record for determining that the grievant's cash performance award constitutes "pay allowances, or differentials" under the Act, and we deny the Union's contrary-to-law exception on this issue. Because the Union's remaining contrary-to-law and nonfact exceptions assume that the Union has satisfied the basic requirements for an entitlement to attorney fees under the Act, and because we find that the Union has not done so, we further find that it is not necessary to address the Union's remaining contrary-to-law and nonfact exceptions.

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[8] *Id.* at 1.
[9] Exceptions Br. at 7.
[10] Opp'n Br. at 10-11.
[11] Fee Award at 7.
[12] *Id.* (emphasis added).
[13] Exceptions Br. at 7-8.
[14] *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)).
[15] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[16] *Id.*
[17] *NFFE, Local 405*, 67 FLRA 352, 353 (2014).
[18] *See NLRB, Wash., D.C.*, 61 FLRA 154, 162 (2005); *FAA*, 55 FLRA 1271, 1276 n.9 (2000) (*FAA*).
[19] *FAA*, 55 FLRA at 1276 n.9 (2000).
[20] *See* Exceptions Br. at 8.
[21] Award at 14.
[22] Fee Award at 10.

B. The fee award does not fail to draw its essence from the parties' agreement.

The Union argues that the Arbitrator's award fails to draw its essence from the parties' agreement. In reviewing an arbitrator's interpretation of a parties' agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[23] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' 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 parties' agreement 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.[24] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[25]

The Union contends that the fee award fails to draw its essence from Article 44.1 of the parties' agreement because Article 44.1 grants the Union separate authority for an award of attorney fees, and the Arbitrator did not mention Article 44.1 in her denial.[26] Article 44.1 of the parties' agreement states:

> Reasonable attorney fees will be provided to employees (the Union) who suffer unwarranted and unjust personnel actions *which result in the withdrawal or reduction of all or part of the employee's pay, allowances, or differential*; if the employees (the Union) is the prevailing party and the arbitrator determines that payment of attorney fees is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the Employer or any case in which the Employer's action was clearly without merit, and is otherwise consistent with applicable law.[27]

As relevant here, the Act has the same requirements for an award of attorney fees.[28]

Here, the Arbitrator considered the Act's requirements – which Article 44.1 of the parties' agreement mirrors in all relevant respects – and denied the attorney-fee request because the grievant did not suffer a withdrawal or reduction of pay, allowances, or differentials.[29] Therefore, the Arbitrator effectively considered Article 44.1's requirements.[30] And the Union does not point to any language in the parties' agreement that requires an arbitrator to make separate findings, or to otherwise explain how the award is consistent with the parties' agreement.

Accordingly, the Union has failed to show that the fee award does not draw its essence from the parties' agreement, and we deny the Union's essence exception.

## V. Decision

We deny the Union's exceptions.

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[23] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[24] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[25] *Id.* at 576.
[26] Exceptions Br. at 15.
[27] *Id.* (emphasis added).
[28] 5 U.S.C. § 5596(b)(1).
[29] Fee Award at 8-11.
[30] *Id.*