69 FLRA No. 39

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 342
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
WILMINGTON, DELAWARE
(Agency)

0-AR-5143

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DECISION

March 28, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member DuBester concurring)

I. Statement of the Case

The Agency hired an employee (the grievant) as a nurse in one of its medical facilities. After requiring the grievant to attend orientation at another facility about eighty-six miles away, the Agency refused to pay the grievant's per diem and mileage expenses. The Union filed a grievance alleging that the Agency violated the parties' agreement when it failed to reimburse the grievant. Arbitrator Randi E. Lowitt sustained the grievance and ordered the Agency to reimburse the grievant for both his per diem and mileage expenses. In addition, the Arbitrator denied the Union's request for attorney fees.

The question before us is whether the denial of attorney fees is contrary to law. Because the Union requests attorney fees pursuant to the Back Pay Act (BPA),[1] which does not cover the reimbursement of the per diem and mileage expenses at issue here, the answer is no.

[1] 5 U.S.C. § 5596.

II. Background and Arbitrator's Award

After hiring the grievant as a nurse in its Wilmington, Delaware, medical facility, the Agency required him to attend a ten-day orientation at its Georgetown, Delaware, facility – some eighty-six miles away. The grievant paid out of pocket for his lodging and meal expenses during orientation, and his expenses for car travel to and from the orientation facility. The grievant requested reimbursement for per diem and mileage expenses. The Agency refused the request.

The Union filed a grievance alleging that the Agency violated the parties' agreement when it failed to reimbuse the grievant. The grievance was not resolved, and the parties submitted it to arbitration.

At arbitration, the parties framed the issue differently, and the Arbitrator adopted the Union's framing of the issue, as follows: "Did the Agency violate the [parties'] agreement by failing to compensate the [g]rievant for his travel to orientation? If so, what shall be the remedy?"[2]

The Arbitrator concluded that the Agency violated the parties' agreement when it failed to reimburse the grievant for both per diem and mileage expenses. As a remedy, she ordered that the Agency reimburse the grievant for these expenses. In addition, the Arbitrator denied the Union's request for attorney fees.

The Union filed an exception to the Arbitrator's award. The Agency did not file an opposition to the Union's exception.

III. Analysis and Conclusions

The Union contends that the award is contrary to law because the Arbitrator failed to make specific findings supporting her denial of attorney fees, as required by the BPA.[3] Therefore, the Union asks the Authority to remand the award to the Arbitrator to make those findings.[4]

The Union's exception involves the consistency of the award with law. We review the questions of law raised by the Union's exception de novo.[5] 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.[6] In making that assessment, the Authority defers to the arbitrator's

[2] Award at 3.
[3] Exceptions at 3-5.
[4] *Id.* at 5.
[5] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).
[6] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

underlying factual findings unless the excepting party establishes that they are nonfacts.[7]

When resolving a request for attorney fees, arbitrators must set forth specific findings supporting their determinations on each pertinent statutory requirement.[8] When arbitrators do not set forth specific findings supporting their determinations, the Authority will examine the record to determine whether it permits the Authority to resolve the matter.[9] If the record does, then the Authority will modify the award or deny the exception as appropriate.[10] As discussed below, the record in this case permits the Authority to resolve the matter.

The threshold requirement for entitlement of attorney fees under the BPA is a finding that an employee (1) has been "affected by an unjustified or unwarranted personnel action" (2) "which [has] resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials."[11]

Regarding the first requirement, a violation of a collective-bargaining agreement is an unjustified or unwarranted personnel action within the meaning of the BPA.[12] Thus, the Arbitrator's finding that the Agency violated the parties' agreement when it failed to reimburse the grievant for per diem and mileage expenses satisfies the first requirement of the BPA.[13]

Regarding the second requirement, the Office of Personnel Management defines "[p]ay, allowances, and differentials" as "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation."[14] Consistent with this definition, the Authority has concluded that "pay, allowances, and differentials encompassed by the [BPA] 'constitute normal legitimate employee benefits in the nature of employment compensation or emoluments' that do not extend to reimbursement payments such as per diem"[15] or travel to a temporary duty station.[16] Therefore, an order requiring reimbursement of those expenses does not amount to an award of backpay.[17]

Consistent with Authority precedent, reimbursing the grievant for per diem and mileage expenses does not constitute an award of backpay under the BPA. Therefore, the Arbitrator's denial of attorney fees is consistent with law. Because the Union's request for a remand is based on the premise that the Union meets the threshold requirement for entitlement to attorney fees under the BPA, which we reject, we deny the remand request. Accordingly, we deny the Union's exception.

IV. Decision

We deny the Union's exception.

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[7] *U.S. Dep't of the Air Force, Warner Robins Air Logistics Complex, Robins Air Force Base, Ga.*, 68 FLRA 102, 103 (2014).
[8] *NAGE, SEIU, Local 551*, 68 FLRA 285, 289 (2015) (*NAGE*) (citing *U.S. DHS, U.S. CBP*, 66 FLRA 335, 341 (2011)).
[9] *Id.*
[10] *Id.*
[11] *NFFE, Local 405*, 67 FLRA 352, 353 (2014).
[12] *NAGE*, 68 FLRA at 289.
[13] *See id.*
[14] 5 C.F.R. § 550.803; *see also SSA, Balt., Md. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000) ("In summary, the phrase 'pay, allowances, or differentials' includes only payments and benefits of the sort that an employee normally earns or receives as part of the regular compensation for performing his job.").
[15] *DOD Dependents Schools*, 54 FLRA 259, 265 (1998) (*DOD*) (quoting *Cmty. Servs. Admin.*, 7 FLRA 206, 209 (1981)).
[16] *U.S. Dep't of the Treasury, IRS & IRS, Austin Dist. & IRS, Hous. Dist.*, 23 FLRA 774, 782 (1986) (*IRS*); *see also U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 741-42 (2015).
[17] *DOD*, 54 FLRA at 265; *IRS*, 23 FLRA at 782.

Member DuBester, concurring:

I concur in the decision to deny the Union's exception. Under current Authority precedent, travel expenses and per diem are not "pay, allowances, or differentials" within the meaning of the Back Pay Act (BPA),[1] and the Union does not discuss or ask the Authority to overrule that precedent. And an award of "pay, allowances, or differentials" within the meaning of the BPA is a necessary condition for the award of attorney fees in a case such as this. Therefore, as the Authority rules, the Union is not entitled to an award of attorney fees in connection with Arbitrator Randi E. Lowitt's determination to reimburse the grievant for his per diem and mileage expenses when he attended Agency-directed training. I write separately, however, because of my concerns about our precedent in this area.

Authority precedent holds that "the 'pay, allowances, or differentials' that are proper components of an award of backpay do not include the payment of per diem"[2] or other travel expenses.[3] This precedent has a long lineage.[4] But this precedent is largely unexplained. Moreover, this precedent has its origin in cases, unlike this case, where employees claimed an entitlement to per diem when they were *not* in a travel status.[5] Further, there is only one Authority decision that offers any informative rationale for the idea that the BPA does not apply where an agency improperly fails to reimburse an employee for travel expenses that an employee incurs while on agency-directed travel.[6] This decision relies on the General Services Board of Contract Appeals' (GSBCA's) interpretation of legislative history concerning a 1998 law that amended not the BPA, but the Travel Expenses Act (Travel Act).[7]

But this legislative history is a questionable basis for concluding that the BPA categorically does not apply to travel-expense reimbursements. The legislative history does not establish that any members of Congress intended to exclude travel-expense reimbursements from the BPA. Indeed, the committee report that the GSBCA relied on does not even mention the BPA. Rather, it shows only that Congress amended the Travel Act to encourage agencies to timely reimburse employee travel expenses, by requiring agencies to pay late fees for a failure to do so. From this, the GSBCA concluded that the BPA does not apply to travel expenses, because "th[e 1998] amendment would have been unnecessary if preexisting law (such as the [BPA]) provided for the payment of interest on delayed reimbursements."[8] I think that this is a stretch.

In my view, to determine the meaning of "pay, allowances, and differentials," it is more appropriate to focus on the BPA's aim, and its role within the dispute-resolution procedures established by the Federal Service Labor-Management Relations Statute.[9] In this regard, Congress' aim in enacting the BPA was to ensure that an employee affected by an unjustified or unwarranted personnel action "should obtain neither penalty nor profit from the government's unjustified action; rather, he should be made whole."[10] The award in this case does this. And concerning the BPA's role in a case like this, as the D.C. Circuit stated, "[i]t is inconceivable that Congress, after imposing vital representational duties on unions, meant to deny fee awards" to union attorneys where the union is forced to litigate in order to recover funds improperly withheld from a member of its bargaining unit.[11]

As I noted at the outset, I join my colleagues in denying the Union's exception because the Union does not challenge the Authority's existing precedent holding that travel-expense reimbursements are not covered by the BPA. However, I think that the Authority should reconsider its precedent in this area in a future, appropriate case.

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[1] 5 U.S.C. § 5596.

[2] *Cmty. Servs. Admin.*, 7 FLRA 206, 208 (1981) (*Cmty. Servs.*).

[3] *U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 741-42 (2015) (*Interior*).

[4] *Cmty. Servs.*, 7 FLRA at 208.

[5] *Id.* at 207 (employees not entitled to additional per diem where trip should have been longer than it in fact was); *see also Hurley v. United States*, 624 F. 2d 93, 95 (10th Cir. 1980) (employee who changed residences after transfer not entitled to per diem reimbursement for ordinary living expenses in new location, after transfer found to be improper); *Morris v. United States*, 595 F. 2d 591, 594 (Cl. Ct. 1979) ("[A]lthough plaintiff's expenses may be a consequence of his erroneous transfer, they are not allowances that he would have received had he not undergone the improper personnel action.").

[6] *Interior*, 68 FLRA 734.

[7] *Id.* at 742 (2015) (citing *In re Revels*, GSBCA No. 14935-RELO, 00-1 BCA ¶ 30,716 n.7 (1999) (*Revels*), *recons. denied*, 00-1 BCA ¶ 30,896 (2000) (discussing Travel & Transportation Reform Act of 1998, Pub. L. No. 105- 264, § 2(g), 112 Stat. 2350, 2352 (1998); S. Rep. No. 105-295, at 4 (1998))).

[8] *Revels*, 00-1 BCA ¶ 30,716 n.7.

[9] 5 U.S.C. §§ 7101-7135.

[10] *In re Wilson*, 66 Comp. Gen. 185, 189 (1987) (cited favorably, and applied in, *DOD Dependents Schools*, 54 FLRA 259, 267 (1998)) (employee entitled to relocation-expense reimbursement that he would have received but for his agency's unjustified and unwarranted personnel action).

[11] *AFGE, AFL-CIO, Local 3882 v. FLRA*, 944 F.2d 922, 931 (D.C. Cir. 1991).