70 FLRA No. 25

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2663
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VA MEDICAL CENTER
KANSAS CITY, MISSOURI
(Agency)

0-AR-5220

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DECISION

December 29, 2016

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

I. Statement of the Case

Arbitrator Thomas J. Erbs mitigated an employee's (the grievant's) fourteen-day suspension to a seven-day suspension, and awarded the grievant backpay. However, in response to the Union's request that the Arbitrator retain jurisdiction so that the Union could submit a petition for attorney fees, the Arbitrator denied attorney fees without explanation.

The main issue before us is whether the Arbitrator's denial of attorney fees is contrary to law. Under the Back Pay Act (the Act)[1] and one of its implementing regulations,[2] an arbitrator may not deny attorney fees without providing the grievant or the grievant's representative an opportunity to present a request for fees and then providing the agency the opportunity to respond to the request. Because the Arbitrator denied attorney fees without providing the Union the opportunity to submit a fee request or allowing the Agency to respond to such request, we find that the Arbitrator's denial of attorney fees was premature. Accordingly, we modify the award to strike the denial of attorney fees.

[1] 5 U.S.C. § 5596.
[2] 5 C.F.R. § 550.807.

II. Background and Arbitrator's Award

The Agency suspended the grievant for fourteen days for allegedly failing to perform her duties with respect to scheduling patients' follow-up appointments. The Union filed a grievance challenging the suspension, and the grievance went to arbitration.

At arbitration, the parties stipulated to the following issue: "Whether the Agency had just and sufficient cause to issue the [g]rievant a [fourteen-]day suspension . . .? If not, what is the proper remedy?"[3]

Before the Arbitrator, the Union asked the Arbitrator to rescind the grievant's suspension. In addition, the Union "request[ed] that the Arbitrator retain jurisdiction for a question of resolving the amount of attorney fees to which the 'Union may be entitled.'"[4]

The Arbitrator found that the grievant failed to perform her duty and that a suspension was an appropriate discipline for such conduct. But the Arbitrator also found that the Agency overlooked "potential mitigating circumstances" in imposing the suspension.[5] Accordingly, the Arbitrator mitigated the grievant's fourteen-day suspension to a seven-day suspension, and awarded the grievant backpay. However, in response to the Union's request to submit a fee petition, the Arbitrator stated, without explanation: "There is no basis in this record to award attorney fees to the Union nor to the [g]rievant[.]"[6]

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

III. Preliminary Matter: We will consider the Agency's opposition.

The Union served its exceptions on the Agency by email, and the Agency filed what appeared to be an untimely opposition. Under the Authority's Regulations, an opposition "must be filed within thirty . . . days after the date the exception is served on the opposing party."[7] As relevant here, the date of service for exceptions is the date they are "deposited . . . in the U.S. mail . . . or transmitted . . . by email."[8] Generally, if a party serves its exceptions by first-class mail, an opposing party is entitled to five additional days for mailing to file its opposition.[9] But if a party serves its exceptions by email,

[3] Award at 6.
[4] *Id.* at 10 (quoting Exceptions Br., Ex. 2 (Union's Post-Hr'g Br.) at 22).
[5] *Id.* at 13.
[6] *Id.*
[7] 5 C.F.R. § 2425.3(b).
[8] *Id.* § 2429.27(d).
[9] *Id.* § 2429.22(a).

then the opposing party is not entitled to the additional five days.[10] Section 2429.27(b)(6) of the Authority's Regulations states that documents may be served by email, "but only when the receiving party has agreed to be served by email."[11]

Based on the date that the Union served its exceptions on the Agency by email, the Agency's opposition was untimely. Accordingly, the Authority's Office of Case Intake and Publication issued an order directing the Agency to show cause why the Authority should not dismiss the opposition.[12]

In its response to the order, the Agency contends that "the parties had not agreed upon email as an appropriate method of service,"[13] and that "without a specific agreement to accept service by email," § 2429.22(a) of the Authority's Regulations – extending filing deadlines by five days when a party is served by mail – applies.[14] Accordingly, the Agency argues that it timely filed its opposition within the additional five-day timeframe.[15] Alternatively, the Agency requests that the Authority exercise discretion under its Regulations to waive the expired time limit.[16]

Assuming that the Agency's opposition is properly before us, considering it would not alter our determination that, for the reasons set forth below, the Arbitrator's denial of attorney fees is premature. Accordingly, we will consider the Agency's opposition.[17]

IV. Analysis and Conclusion: The Arbitrator's denial of attorney fees is contrary to law.

The Union argues that the Arbitrator's denial of attorney fees is contrary to the Act, one of its implementing regulations, and 5 U.S.C. § 7701(g) because he "summarily denied the award[] of attorney's fees with no specific findings and without allowing the Union to file a petition explaining its position as to the award[] of attorney's fees."[18] The Union requests that the Authority either "find that the [g]rievant is entitled to reasonable attorney fees under the [Act]"[19] or remand "the portions of the [a]ward concerning attorney's fees . . . to the Arbitrator for specific findings on the question of attorney fees once the Union and the Agency have had the chance to petition and respond."[20]

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.[21] 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.[22]

Under the Act's implementing regulations, before an arbitrator may grant or deny attorney fees, a grievant or the grievant's representative must present a request for fees to the arbitrator, and the arbitrator must grant the agency the opportunity to respond to the request.[23] Here, the Union did not request that the Arbitrator award attorney fees as part of his merits award; rather, the Union requested that the Arbitrator retain jurisdiction to allow the Union to file an application for attorney fees.[24]

Because the Union never made a fee request to the Arbitrator, and the Agency did not have an opportunity to respond to any fee request, we find that the Arbitrator's denial of attorney fees was premature. Accordingly, we modify the award to strike the denial of attorney fees.[25] However, our modification of the award is without prejudice to either the Union's right to timely file a request for attorney fees in the future or the Agency's right to respond to any such request.[26] In

[10] *See id.* § 2429.22(a)-(b); *U.S. DHS, CBP*, 68 FLRA 157, 159 (2015).
[11] 5 C.F.R. § 2429.27(b)(6).
[12] Order to Show Cause at 1-2.
[13] Response to Order at 6.
[14] *Id.* at 4 (citing 5 C.F.R. § 2429.22(a)).
[15] *Id.*
[16] *Id.* at 5.
[17] *See, e.g.*, *AFGE, Local 1547*, 68 FLRA 557, 558 (2015) (Member Pizzella dissenting) (assuming, without deciding, that party's corrected motion for reconsideration was properly before the Authority where considering it would not alter the ultimate decision in the case); *cf. U.S. Dep't of the Interior, Nat'l Park Serv.*, 70 FLRA 41, 42 (2016) (Member Pizzella dissenting) (finding it unnecessary to decide whether argument supporting exceptions was properly before the Authority – and considering it – because the argument lacked merit); *U.S. Dep't of Agric., U.S. Forest Serv., Law Enf't & Investigations, Region 8*, 68 FLRA 90, 92-93 (2014) (assuming, without deciding, that argument supporting exceptions was properly before the Authority where the argument provided no basis for finding the award deficient).
[18] Exceptions Br. at 3; *see also* Exceptions Form at 4-5.
[19] Exceptions Br. at 10.
[20] *Id.* at 2.
[21] *E.g.*, *AFGE, Local 2002*, 70 FLRA 17, 18 (2016) (*Local 2002*) (citing *AFGE, Local 2002*, 69 FLRA 425, 426 (2016) (*AFGE*)).
[22] *Id.* (citing *AFGE*, 69 FLRA at 426).
[23] *E.g.*, *id.* (citing *AFGE*, 69 FLRA at 426).
[24] *See* Award at 10; *see also* Union's Post-Hr'g Br. at 22.
[25] *E.g.*, *Local 2002*, 70 FLRA at 19 (citing *AFGE*, 69 FLRA at 426).
[26] *E.g.*, *id.* (citation omitted).

resolving a timely fee request, the Arbitrator should set forth specific findings supporting his determination on each pertinent statutory requirement under the Act and its implementing regulations.[27]

V. Decision

We modify the award to strike the denial of attorney fees

[27] *See, e.g.*, *AFGE, Local 1592*, 66 FLRA 758, 758-59 (2012) (citations omitted).

Member Pizzella, concurring:

As I noted in *AFGE, Local 3690*,[1] "the arbitrator *should have addressed* the question of attorney fees *in his award* and explained to the parties why attorney fees were denied. That much is required by the Back Pay Act."[2] And that is why today, I agree with my colleagues that the Arbitrator here should have retained jurisdiction so that the Union could make a request for attorney fees. Therefore, I agree to modify the award.

I do not join with my colleagues, however, as they try to sort out the "consequences" of the "Pandora-esque-electronic box" they have created.[3] As I warned in *AFGE, Local 3749*, to accord official status to electronic-mail communications between parties and arbitrators only serves to drag the Authority into the role of a "referee [of] emails, voice mail messages, texts, and tweets between parties and arbitrators"[4] rather than addressing "issues relating to the duty to bargain in good faith,"[5] "complaints of unfair labor practices,"[6] and "exceptions to arbitrator's awards."[7]

And as I predicted, the majority spends fully one-half of their analysis in this case assessing which communications are timely and which are not simply because some communications were sent by email and others by mail service. Despite the time and attention devoted to refereeing the inane procedural questions regarding the parties' communications, the majority's decision does not even directly resolve the question so that these and other parties in the future may benefit from the analysis.

At the end, my colleagues "[a]ssum[e] that the Agency's opposition is properly before us" because it doesn't make any difference after all.[8]

Thank you.

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[1] 69 FLRA 154 (2015) (Dissenting Opinion of Member Pizzella).
[2] *Id.* at 156; *AFGE, Local 3749*, 69 FLRA 519, 523 (2016) (*Local 3749*) (Dissenting Opinion of Member Pizzella).
[3] *Local 3749*, 69 FLRA at 523.
[4] *Id.* at 524.
[5] 5 U.S.C. § 7105(a)(2)(E).
[6] *Id.* § 7105(a)(2)(G).
[7] *Id.* § 7105(a)(2)(H).
[8] Majority at 3.