70 FLRA No. 46

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1482
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
U.S. MARINE CORPS
MARINE CORPS LOGISTICS BASE
BARSTOW, CALIFORNIA
(Agency)

0-AR-5266

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DECISION

May 9, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Agency suspended an employee (the grievant) for fourteen days because of an altercation with another employee. In an initial award (the merits award), Arbitrator Joseph F. Gentile reduced the grievant's suspension to two days, and awarded backpay. In a subsequent award (the fee award), the Arbitrator denied the Union's petition for attorney fees.

The sole issue before us is whether the fee award is contrary to law because it does not contain specific findings on each of the pertinent statutory requirements for attorney fees under the Back Pay Act (the Act).[1] In its brief to the Arbitrator, the Agency addressed the pertinent statutory requirements for attorney fees. Then, in his fee award, the Arbitrator adopted the Agency's analysis as his own. Therefore, we find that the fee award is not contrary to law.

II. Background and Arbitrator's Award

The Agency suspended the grievant for fourteen days because of an altercation between the grievant and another employee. The Union filed a grievance challenging the suspension. The grievance was unresolved, and the parties submitted it to arbitration.

In the merits award, the Arbitrator found that the grievant deserved discipline, but reduced the suspension to two days and awarded backpay. No exceptions were filed.

Subsequently, the Union petitioned the Arbitrator for attorney fees. In its petition, the Union argued that it should be awarded fees because it was the prevailing party and fees were in the interest of justice under three of the factors set forth by the Merit Systems Protection Board in *Allen v. U.S. Postal Service*.[2] Specifically, the Union argued that: (1) the discipline was clearly without merit and wholly unfounded, and the grievant was substantially innocent; (2) the Agency initiated the discipline in bad faith; and (3) the Agency knew or should have known that it would not prevail on the merits.

In its brief, the Agency responded that the Union was not the prevailing party because the Arbitrator reduced, but did not reverse, the suspension. As to the *Allen* factors, the Agency argued that, because the Arbitrator found that the grievant deserved discipline, he was not substantially innocent and the discipline was not clearly without merit or wholly unfounded. The Agency also asserted that it acted in good faith because the Agency's deciding official relied upon evidence obtained from a law-enforcement investigation of the altercation to determine the appropriate discipline, and the Arbitrator did not find any disparate treatment between the grievant and the other employee involved in the altercation. And, finally, the Agency argued that the Arbitrator's mitigation of the suspension did not establish that it knew or should have known that it would not prevail on the merits. In particular, the Agency asserted that the deciding official relied on "trustworthy"[3] evidence from the law-enforcement investigation and followed the parties' collective-bargaining agreement in deciding the appropriate discipline; therefore, the Agency had no reason to know that the Arbitrator would not sustain the fourteen-day suspension. Consequently, according to the Agency, the Union was not entitled to attorney fees.

In the fee award, the Arbitrator denied the Union's petition. The fee award states: "Having considered the authority and argument presented, the Arbitrator found the position taken by the Agency . . . in its [brief] . . . to be well taken."[4]

[1] 5 U.S.C. § 5596.

[2] 2 M.S.P.B. 582, 593 (1980).

[3] Exceptions, Attach. 4, Agency Br. (Agency Br.) at 9.

[4] Fee Award at 1 (emphasis omitted).

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

III. Analysis and Conclusion: The fee award is not contrary to law.

The Union argues that the fee award is contrary to the Act because the Arbitrator failed to make specific findings supporting his denial of attorney fees.[5] Therefore, the Union asks the Authority to remand the award to the Arbitrator for further findings.[6] When an exception raises a question of law, the Authority conducts a de novo review[7] and, as relevant here, assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[8]

When resolving a request for attorney fees, arbitrators must set forth specific findings supporting their determinations on each pertinent statutory requirement.[9] Here, in denying the Union's fee petition, the Arbitrator stated that he found the Agency's position in its brief "to be well taken."[10] The Agency contends that the Arbitrator's statement indicates that he "adopted the . . . authorities, findings, and arguments" that were set forth in the Agency brief.[11] We agree.

The Agency brief addresses each pertinent statutory requirement for attorney fees, and argues why the Union is not entitled to attorney fees under each requirement.[12] Thus, we find that the fee award, read together with the Agency brief, sufficiently explains the Arbitrator's determinations on each pertinent statutory requirement. In this regard, this case is distinguishable from *U.S. Department of the Navy, Naval Undersea Warfare Center, Newport, Rhode Island* (*Navy*),[13] which the Union cites.[14] In *Navy*, the arbitrator stated that she had "considered" both parties' arguments, but made no findings regarding which arguments she relied on in determining to grant fees.[15] In contrast, the Arbitrator here stated that he considered the arguments of both parties and that he found the Agency's position "to be well taken."[16] The remaining decisions cited by the Union in its exceptions are similarly inapposite.[17]

In conclusion, we find that the Arbitrator adopted the detailed analysis set forth in the Agency brief. Therefore, the Union's sole exception – that the fee award is deficient because the Arbitrator failed to articulate specific findings regarding each statutory requirement for attorney fees[18] – lacks merit. Because the Union does not explain, in its exceptions, why any of the adopted analysis is contrary to the requirements of the Back Pay Act, there is no basis for setting aside the fee award as contrary to law.

IV. Decision

We deny the Union's exception.

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[5] Exceptions Form at 4; Exceptions Br. at 6-8.
[6] Exceptions Br. at 2, 8.
[7] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).
[8] *E.g.*, *GSA*, 70 FLRA 14, 15 (2016) (citation omitted).
[9] *AFGE, Local 342*, 69 FLRA 278, 279 (2016) (citing *NAGE, SEIU, Local 551*, 68 FLRA 285, 289 (2015)).
[10] Fee Award at 1 (emphasis omitted).
[11] Opp'n at 3.
[12] Agency Br. at 3-10.
[13] 56 FLRA 477 (2000).
[14] Exceptions Br. at 7.
[15] *Navy*, 56 FLRA at 477.
[16] Fee Award at 1 (emphasis omitted).
[17] Exceptions Br. at 7-8 (citing *AFGE, Local 2663*, 70 FLRA 147, 148-49 (2016) (modifying award to strike arbitrator's denial of fees when union had not yet made a fee request to the arbitrator); *AFGE, Local 1592*, 66 FLRA 758, 759 (2012) (arbitrator's one-sentence, unexplained denial of fees did not reference either party's arguments); *NFFE, Local 1437*, 53 FLRA 1703, 1712 (1998) (in a case that did not involve attorney fees, Authority remanded because award was "completely devoid" of any findings on the relevant statutory requirement)).
[18] Exceptions Form at 4; Exceptions Br. at 6-8.