

71 FLRA No. 2

FRATERNAL ORDER OF POLICE
 LODGE NO. 1
 (Union)

and

UNITED STATES
 DEPARTMENT OF DEFENSE
 PENTAGON FORCE PROTECTION AGENCY
 (Agency)

0-AR-5383

—————
 DECISION

February 1, 2019

—————

Before the Authority: Collen Duffy Kiko, Chairman, and
 Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

In this case, we determine that an arbitrator's denial of attorney fees in a merits award is premature when a party merely asserts that it is seeking attorney fees at arbitration to preserve its right to file a petition for attorney fees at a later time.

Arbitrator James Oldham issued an award sustaining the Union's grievance and reversing the grievant's fourteen-day suspension. However, in response to the Union's statement that it sought attorney fees, the Arbitrator denied the Union attorney fees because the Union made no attempt to demonstrate a statutory entitlement to the fees before he issued the merits award.

The Union files a contrary-to-law exception claiming that the denial of attorney fees is premature. Because the Arbitrator denied the request for attorney fees before the Union had an opportunity to submit a petition for fees, and before the Agency had an opportunity to respond to a petition, the Arbitrator's denial of attorney fees is contrary to law. Accordingly, we modify the award to strike the denial of attorney fees, without prejudice to the Union's right to file a petition for attorney fees with the Arbitrator.

II. Background and Arbitrator's Award

The grievant is an Agency police officer. The Agency suspended the grievant for fourteen days without pay for failing to follow the procedures in an Agency regulation concerning accidents involving Agency-issued vehicles. The Union filed a grievance challenging the grievant's fourteen-day suspension. The parties could not resolve the matter, and the Union invoked arbitration.

As a remedy, the Union requested backpay for the grievant. The Union also requested that "the Arbitrator grant all costs, including attorney's fees, of defending this unwarranted action."¹

The Arbitrator sustained the grievance and awarded the grievant backpay. But the Arbitrator denied attorney fees because the Union made "[n]o attempt . . . at the hearing or in its post-hearing brief " to demonstrate its statutory entitlement to the fees.²

The Union filed an exception to the award on June 4, 2018. The Agency did not file an opposition to the Union's exception.

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

The Union argues that the award is contrary to law because the Arbitrator prematurely denied the Union attorney fees before it filed a petition requesting the fees.³ When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.⁴ 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.⁵

Under the Back Pay Act's (BPA)⁶ 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.⁷

¹ Exception, Ex. 3, Union's Post-Hr'g Br. at 24; *see also* Exception, Ex. 2 Hr'g Tr. at 6; Exception at 5.

² Award at 9 n.9.

³ Exception at 5, 7.

⁴ *AFGE, Local 2002*, 70 FLRA 17, 18 (2016) (*Local 2002*).

⁵ *Id.*

⁶ 5 U.S.C. § 5596.

⁷ *Local 2002*, 70 FLRA at 18.

The Arbitrator prematurely denied the Union attorney fees. The Union's assertion that it "sought"⁸ attorney fees as a remedy did not amount to a petition for attorney fees under the BPA and its implementing regulations. The Union contends, and the Agency does not dispute, that it merely sought to preserve its right to recover attorney fees "should it prevail" on the merits.⁹ Further, although the Arbitrator stated that the Union "requests a grant . . . of attorney fees,"¹⁰ he did not find that the Union "had actually filed a fee petition or that the Agency had an opportunity to respond to any such petition."¹¹

In similar circumstances, the Authority has found that denials of attorney fees were premature because the denial occurred in the merits award before the union had an opportunity to submit a petition for fees.¹² Consistent with Authority precedent and the BPA's implementing regulations, we find that the Arbitrator prematurely denied the Union attorney fees, and we modify the award to strike the denial of attorney fees without prejudice to the Union's right to file a petition for attorney fees with the Arbitrator.¹³

IV. Decision

We grant the Union's contrary-to-law exception, and modify the award to strike the denial of attorney fees.

⁸ Union's Post-Hr'g Br. at 24.

⁹ Exception at 5.

¹⁰ Award at 9 n.9.

¹¹ *AFGE, Local 2145*, 67 FLRA 438, 439 (2016) (*Local 2145*) (Member Pizzella concurring). Additionally, the Union requested attorney fees pursuant to the parties' agreement, which applies the Merit Systems Protection Board's (MSPB) procedures for seeking attorney fees. And under the MSPB's procedures, an attorney fee request "must be made by filing a motion" in an "addendum proceeding" after a decision on the merits. 5 C.F.R. § 1201.203(b)-(c).

¹² See *Local 2145*, 67 FLRA at 439; see also *AFGE, Local 2663*, 70 FLRA 147, 147-48 (2016) (*Local 2663*) (modifying award to strike denial of attorney fees where union did not request arbitrator to award fees as part of merits award but merely requested arbitrator to retain jurisdiction to resolve amount of fees to which union may be entitled); *Local 2002*, 70 FLRA at 19 (modifying award to strike denial of attorney fees where union never made fee request); *AFGE, Local 2002*, 69 FLRA 425, 426 (2016) (same).

¹³ See, e.g., *Local 2663*, 70 FLRA at 148-49.