

71 FLRA No. 60

UNITED STATES
DEPARTMENT OF THE AIR FORCE
POPE AIR FORCE BASE, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

0-AR-4830
(66 FLRA 848 (2012))
(70 FLRA 421 (2018))

DECISION

September 24, 2019

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case we deny all exceptions to a series of awards by Arbitrator Stanley H. Sergent because they were either untimely, unsupported, or unpersuasive.

The Agency filed exceptions to the following awards: the March 27, 2012 award (merit award), which sustained the underlying grievance concerning the Agency's implementation of Alternative Work Schedules (AWS); the April 10, 2017 award (damages award), in which the Arbitrator found that the Union's calculation of damages was the appropriate remedy; and the August 23, 2018 award (fee award) in which the Arbitrator granted the Union's petition for attorney fees and costs under the Fair Labor Standards Act (FLSA)¹ and Back Pay Act (BPA).²

II. Background and Arbitrator's Award

On February 17, 2010, the Union filed a grievance alleging that the Agency violated the parties'

agreement and various laws and regulations by unilaterally implementing AWS, including compressed work schedules, and scheduling bargaining-unit employees for overtime work without proper compensation.

By agreement of the parties, the merits and damages phases of the case were bifurcated. On March 27, 2012, the Arbitrator issued the merit award, which sustained the grievance based on his conclusion that "the Agency violated laws, rules[,] and regulations when it implemented AWS without properly bargaining for the right to do so and expressly providing for the same in the CBA."³ The Arbitrator referred the issue of damages to the parties and retained jurisdiction for the limited purpose of resolving any issues of damages upon which the parties were unable to reach an agreement. Shortly thereafter, the Agency filed exceptions to the merit award, and on July 27, 2012, the Authority dismissed those exceptions, without prejudice, as interlocutory.⁴

The parties were unable to reach agreement on the issue of damages, and the matter was referred back to the Arbitrator for a final and binding disposition on that issue. In the April 10, 2017 damages award, the Arbitrator determined that the Union's calculation of damages was the appropriate remedy. Because the bargaining unit included both exempt and non-exempt employees, the award included damages under both the BPA and FLSA, as applicable. The Arbitrator determined that the Union was entitled to an award of attorney fees and costs, and noted that the Union could file a fee petition in the event the parties could not agree on the appropriate amount.

On May 17, 2017, the Agency filed exceptions to the damages award. Ultimately, the Agency's response to a show-cause order was untimely, and so, the Authority's Office of Case Intake and Publication dismissed those exceptions on August 25, 2017. The Agency requested reconsideration, and on March 6, 2018, the Authority issued a decision denying reconsideration of the dismissed exceptions.⁵

On May 17, 2018, the Union filed a petition for attorney fees and costs pursuant to the BPA and FLSA. In the course of that proceeding, the Agency requested an evidentiary hearing. The Arbitrator denied the Agency's request. On August 23, 2018, the Arbitrator issued the fee award, granting the fee petition and awarding the Union all requested fees and costs, totaling \$627,062.93.

³ Merit Award at 38.

⁴ *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848 (2012) (*Pope AFB I*).

⁵ *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 70 FLRA 421 (2018) (*Pope AFB II*).

¹ 29 U.S.C. § 216(b).

² 5 U.S.C. § 5596(b)(1)(A)(ii).

On September 27, 2018, the Agency filed exceptions to the merit, damages, and fee awards. The Union filed a timely opposition on November 13, 2018.⁶

III. Preliminary Matters: The Agency's exceptions to the merit and damages awards are untimely.

Under 5 C.F.R. § 2425.2(b), the time limit for filing exceptions to an arbitration award is thirty days after the date of service of the award. The time limit may not be extended or waived by the Authority.⁷

As noted above, the parties agreed to bifurcate the proceedings by deferring the issue of the appropriate remedy until the Arbitrator ruled on the merits. Thus, when the Agency first filed exceptions to the merit award, that award was not yet final, as the Arbitrator had yet to determine the appropriate remedy.⁸ However, as of April 10, 2017, when the Arbitrator issued the damages award, the issues submitted to arbitration were resolved,⁹ and the merit and damages awards were therefore both final for purposes of filing exceptions.¹⁰ The Authority has since dismissed as untimely the Agency's May 17,

2017 exceptions to the damages award, and denied the Agency's request for reconsideration of the dismissal.¹¹

Accordingly, we dismiss the Agency's exceptions here to the merit and damages awards as untimely filed. We do not consider the arguments concerning the merits of those decisions.¹² The Agency's exceptions to the fee award are timely, however, and we address those exceptions below.

IV. Analysis and Conclusions

A. The fee award is not contrary to law.¹³

The Agency argues that the fee award is contrary to law because the Arbitrator "erred" when he determined that the damages award was final, and so, he could award attorney fees.¹⁴ In particular, the Agency challenges as improperly awarded the "interim fees."¹⁵ The Agency contends that the Authority revised its criteria for the finality of awards in the 2018 decision *U.S. Department of the Treasury, IRS (IRS)*, and so, rendered the damages award susceptible to exceptions and Authority review; therefore, any attorney fees petition was premature.¹⁶ But, *IRS* did no such thing. In that decision, the Authority clarified what circumstances may be found to be "extraordinary circumstances" allowing review of *interlocutory* exceptions.¹⁷ Indeed, the Authority reaffirmed the criteria for finality. The Agency's misinterpretation of *IRS* provides no support for its argument. Therefore, the damages award is final,

⁶ On October 19, 2018, the Authority extended the deadline for filing an opposition to the Agency's exceptions to November 13, 2018.

⁷ 5 C.F.R. § 2425.2(b); see 5 U.S.C. § 7122(b); see also *U.S. Dep't of the Navy, Portsmouth Naval Shipyard*, 70 FLRA 429, 430 (2018); *U.S. DOL, Wash., D.C.*, 59 FLRA 131, 132-33 (2003). But see *U.S. Dep't of VA, Med. Ctr., Richmond, VA*, 68 FLRA 231 (2015) (Member Pizzella dissenting) (finding that the 2013 government shutdown equitably tolled the filing period).

⁸ *Pope AFB I*, 66 FLRA at 851.

⁹ As the Arbitrator observed, "[t]he fact that the [damages award] may require calculation adjustments to the payouts to some of the affected [bargaining-unit employees] does not mean that the award is not final; the methodology for all calculations and the Agency's liability has already been established." Fee Award at 33.

¹⁰ See *U.S. Dep't of the Navy, Trident Refit Facility, Kings Bay, Ga.*, 65 FLRA 672, 674 (2011) (holding that an award is considered final for purposes of filing exceptions when it fully resolves all issues submitted to arbitration); see also *U.S. DHS, U.S. Citizenship & Immigration Servs.*, 68 FLRA 1074, 1076 (2015) (Member DuBester dissenting) (stating that an award is final even "where an arbitrator has retained jurisdiction solely to assist the parties in the implementation of awarded remedies, including the specific amount of monetary relief awarded"); *U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 159 (2009) (finding an award final where it resolved all issues submitted to arbitration even though the arbitrator retained jurisdiction while the parties determined the amount of backpay and expenses); *OPM*, 61 FLRA 358, 361 (2005) (Member Pope dissenting, in part) (award is final when it awards fees or damages, but leaves the amount of those damages to be determined).

¹¹ *Pope AFB II*, 70 FLRA at 421-22.

¹² The Agency cites to our recent interlocutory-appeals decision, *U.S. Department of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (*IRS*) (Member DuBester dissenting), as support for the submission of exceptions here to the damages award. Exceptions at 26. As we discuss later in this decision, the Agency's misinterpretation of *IRS* provides no support for its argument.

¹³ When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo. *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maintenance Facility, Bremerton, Wash.*, 71 FLRA 240, 241 n.10 (2019) (*Puget Sound*) (Member DuBester concurring). In reviewing de novo, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *Id.*

¹⁴ Exceptions at 53-58.

¹⁵ *Id.* at 53-54 (citing *Avera v. Sec'y of HHS*, 515 F.3d 1343, 1352 (Fed. Cir. 2008); *Dupuy v. Samuels*, 423 F.3d 714, 723 (7th Cir. 2005)).

¹⁶ *Id.* at 58 (citing *IRS*, 70 FLRA at 808).

¹⁷ *IRS*, 70 FLRA at 808 (holding the Authority will review interlocutory exceptions if resolution of the exception will advance the ultimate disposition of the case (i.e., will end the case)).

notwithstanding the Agency's continued efforts to relitigate the matter.¹⁸ Because the Arbitrator did not in fact award interim fees, we deny this exception.

The Agency further contends that the award is contrary to law because the Arbitrator erred in determining the reasonableness of the fees.^{19,20} The Agency contends that the Arbitrator improperly relied on vague documentation and information in determining the reasonableness of the fee award. Specifically, the Agency contends that the "[thirty-nine]-page attorney time spreadsheet" provided by Union counsel lacks specific details and includes numerous generic and vague time entries, including improper "internal conference" entries.²¹ The Agency requests that the Authority set the entire award aside or, alternatively, that the Authority reduce the awarded attorney fees by a percentage.²²

¹⁸ The Agency also argues that the Arbitrator "committed an error of law" by treating the damages award as final despite the Agency's remaining arguments, "supporting caselaw", and "outstanding" factual and legal issues regarding the amount of damages "due to each" employee. Exceptions at 55-57. The finality of the damages award is resolved and the Agency otherwise provides no case law to support the argument that an award cannot become final when one party has "outstanding" factual and legal questions. *Id.* To the extent this argument attempts to raise an "exceeds" exception to further displace the finality of the damages award, we reject it as well. See generally *U.S. Dep't of Navy, Naval Base Norfolk, Va.*, 51 FLRA 305, 307-08 (1995) (arbitrator exceeds authority when he fails to resolve an issue submitted to arbitration). Finally, the Agency's motion for reconsideration was denied in *Pope AFB II*, and the Agency fails to explain how *IRS vacated Pope AFB II*.

¹⁹ The Authority recently clarified the analysis that parties should undertake when assessing whether a fee award in a non-disciplinary case is warranted in the "interest of justice." *AFGE, Local 1633*, 71 FLRA 211 (2019) (Member Abbott concurring; Member DuBester concurring, in part, and dissenting, in part). Member Abbott notes that in its exceptions, the Agency does not challenge the Arbitrator's finding that the fee petition was in the "interest of justice," and so, *AFGE, Local 1633* has no application here.

²⁰ This case implicates two fee-shifting statutes: the BPA and the FLSA. In a case such as this one, where the decision to award backpay was not based on a finding of discrimination, the BPA requires that an award of fees be in accordance with the standards set forth at 5 U.S.C. § 7701(g)(1). *AFGE, Local 3294*, 66 FLRA 430, 431 (2012) (Member Beck dissenting). As relevant here, § 7701(g)(1) requires that the fees be reasonable. See *NAGE, Local R5-66*, 65 FLRA 452, 454 (2011). The FLSA similarly provides that a party that prevails on an FLSA claim is entitled to reasonable attorney fees and costs. 29 U.S.C. § 216(b); *AFGE, Local 3828*, 69 FLRA 66, 71 (2015). The Authority has stated that, because arbitrators are "in the best position to determine whether the number of hours expended [was] reasonable," it reviews those determinations under a deferential standard. *U.S. DHS, ICE*, 64 FLRA 1003, 1008 (2010).

²¹ Exceptions at 65, 68-69.

²² *Id.* at 68-71.

The Agency disputes the Arbitrator's findings, but has neglected to provide the Authority a copy of the billing records which it alleges were inadequate.²³ Because the Agency's exception is unsupported, we deny it.²⁴

B. The Agency was not denied a fair hearing.

The Agency argues it was denied a fair hearing because the Arbitrator was prejudiced against the Agency for not settling this case, as exemplified by comments made to the Agency representative at one hearing and through the Arbitrator's factual and legal findings, and because the Arbitrator failed to grant an evidentiary hearing on attorney fees.²⁵

The Authority will find an award deficient on the ground that an arbitrator failed to conduct a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.²⁶ It is well established that an arbitrator has considerable latitude in conducting a hearing, and an arbitrator's limitation on the submission of evidence does not, by itself, demonstrate that the arbitrator failed to provide a fair hearing.²⁷ Disagreement

²³ Exceptions at 65-66. The Agency identified the "Union counsel's time sheet" as an attached exhibit "AX FLRA 18." *Id.* "AX FLRA 18" is further identified as "AFGE 1770 POPE AWS Attorney's Fee Petition 5-14-2018" which is listed as page numbers AXF-2602-AXF-2614. Exceptions Form at 5. While the record before the Authority indeed contains pages 2602-2614, these pages correspond to the text of the Union's thirteen page "Union's Petition for Attorney's Fees, Costs, and Expenses," and only to the text, signature block, and the exhibit page. Exceptions, Agency Ex. 18, Attorney Fee Petition at 1. The final page of the petition, AXF-2614, is a list of exhibits that identifies an "Exhibit H - Timekeeping entries." *Id.* at 13. However, none of these exhibits, identified on page AXF-2614 have been included in the record before the Authority. No "39 page attorney time spreadsheet" was otherwise located in the record before the Authority. Exceptions at 65.

²⁴ 5 C.F.R. § 2425.6(e)(1); see, e.g., *Puget Sound*, 71 FLRA at 242. Parties are reminded that exceptions must be accompanied by any relevant documents that the Authority cannot easily access, such as exhibits presented during the arbitration proceeding. See *Puget Sound*, 71 FLRA at 242 n.21; 5 C.F.R. § 2425.4(a)(3).

²⁵ Exceptions at 47-50.

²⁶ *U.S. DHS, U.S. CBP*, 66 FLRA 409, 411 (2011) (*CBP*) (citing *AFGE, Local 1668*, 50 FLRA 124, 126 (1995)); see also *Nat'l Nurses United*, 70 FLRA 166, 167 (2017) (denying the Union's fair-hearing exception); *AFGE, Local 3438*, 65 FLRA 2, 3-4 (2010) (rejecting the Union's argument that the arbitrator denied it a fair hearing).

²⁷ *CBP*, 66 FLRA at 411.

with an arbitrator's evaluation of evidence and testimony, including the weight to be accorded such evidence, provides no basis for finding an award deficient on fair-hearing grounds.²⁸

We are unpersuaded that cited comments and the factual or legal findings by the Arbitrator denied the Agency a fair hearing.²⁹ Further, we agree with the Arbitrator that there is nothing in the damages award, or generally accepted legal principles, which would require an evidentiary hearing on the issue of attorney's fees.³⁰ Because the Arbitrator did not improperly deny the Agency's request for a hearing, we deny the exception.

C. The fee award is not incomplete, ambiguous, or contradictory.

The Agency contends that the fee award is unclear and uncertain, despite the Arbitrator's ruling that the Agency owed a specific amount in attorney fees, because the Agency contends the amount of damages is still in dispute.³¹

The Authority will set aside an award that is "incomplete, ambiguous, or contradictory as to make implementation of the award impossible."³² For an award to be found deficient on this ground, the appealing party must show that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain.³³ Here, the meaning and effect of the fee award is entirely clear: the Agency was ordered to pay the Union the precise sum of \$627,062.93.³⁴ While the Agency may object to the size of the figure, it cannot be said that the award is unclear. Accordingly, we deny this exception.

D. The arbitrator was not biased.

Here, the Agency contends that the Arbitrator exhibited bias "because the Agency chose to exercise its right to defend its clients and not capitulate to the

²⁸ *Id.*

²⁹ The Agency also argues that the Arbitrator "committed an error of law" by denying the Agency an evidentiary hearing to determine the reasonableness of the attorney fees. Exceptions at 67, 70. As the Agency failed to identify the "law" that mandated an evidentiary hearing in these circumstances, we dismiss this argument as unsupported.

³⁰ *CBP*, 66 FLRA at 411.

³¹ Exceptions at 71-73. The Agency argues that the merit and damages awards remain "impossible" to implement because of its outstanding questions as to the Union's methodology in calculating the sums owed to individual employees. *Id.* at 71-72. However, as noted previously, we dismiss any exceptions to the merit and damages awards as untimely.

³² 5 C.F.R. § 2425.6(b)(2)(iii).

³³ *U.S. DOD, Def. Logistics Agency*, 66 FLRA 49, 51 (2011).

³⁴ Fee Award at 39.

Union's settlement demands."³⁵ In particular, the Agency cites the Arbitrator's statement that "a significant portion of [the] Union's incurred fees were largely due to the Agency's ongoing bad faith and refusal to cooperate in settlement discussions [and] negotiations[.]"³⁶

An Arbitrator demonstrates bias when (1) the award is procured by improper means, (2) the arbitrator shows partiality, or (3) the arbitrator engages in misconduct that prejudiced the rights of the appealing party.³⁷ Partiality is evident when (1) a reasonable person would conclude the arbitrator was partial, (2) when the circumstances are powerfully suggestive of bias, or (3) the evidence of partiality is direct, definite, and capable of demonstration.³⁸ When possible, the allegation of bias must be raised before the arbitrator.³⁹

Contrary to the Agency's assertion, the statement in question is not a gratuitous expression of hostility, but a finding of fact directly relevant to the reasonableness of the hours expended by the Union's attorneys. The mere fact that the Arbitrator's finding favored the Union does not demonstrate bias.⁴⁰ Accordingly, we deny the exception.

E. The fee award is not contrary to public policy.

The Agency argues that the fee award violates public policy because "implementation of the Awards require the expenditure of public funds without valid supporting evidence."⁴¹

For an award to be found deficient on public policy grounds, the asserted public policy must be explicit, well-defined, and dominant, and a violation of

³⁵ Exceptions at 73. To the extent the Agency contends the Arbitrator demonstrated bias in the merit and/or damages proceedings, its exceptions are untimely and we do not consider them. The Agency also reasserts its arguments that that the Arbitrator improperly denied its request for an evidentiary hearing, that he improperly granted "interim" attorney fees, and that the Union did not prove the reasonableness of the fees claimed. These arguments have already been addressed above, and we do not revisit them here. *Id.* at 76.

³⁶ *Id.* at 77.

³⁷ *NTEU, Chapter 299*, 68 FLRA 835, 839 (2015) (*Chapter 299*).

³⁸ *Nat'l Gallery of Art*, 39 FLRA 226, 234 (1991).

³⁹ *EPA, Region 5, Chi., Ill.*, 61 FLRA 247, 250 n.3 (2005).

⁴⁰ See *Chapter 299*, 68 FLRA at 839 (stating that "an assertion that an arbitrator's findings were adverse to the excepting party, without more, does not establish bias"); see also *AFGE, Local 648, Nat'l Council of Field Labor Locals*, 65 FLRA 704, 711 (2011) (noting that the "Authority has denied exceptions based on an arbitrator's remarks indicating concern with a party's conduct").

⁴¹ Exceptions at 78.

the policy must be clearly shown.⁴² In addition, the appealing party must identify the policy by reference to the laws and legal precedents and not from general considerations of the supposed public interests.⁴³

The Agency duly cites various legal authorities, but the substance of its argument amounts to the truism that it is required to “utilize taxpayer money in a responsible manner consistent with statutory and regulatory requirements.”⁴⁴ While that is certainly the case, it is likewise uncontroversial that the attorney fee provisions of the FLSA and BPA are among those requirements. In the absence of a clear demonstration that the fee award violates an explicit, well-defined, and dominant policy consideration, we deny the exception.

V. Decision

We deny the Agency’s exceptions.

Member DuBester, concurring:

I concur in the Decision to deny the Agency’s exceptions.

⁴² *Chapter 299*, 68 FLRA at 840.

⁴³ *Id.*

⁴⁴ Exceptions at 78. To the extent the Agency’s policy exceptions relate to the damages award, they are untimely and we do not consider them.