

73 FLRA No. 137

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3184
(Union)

and

SOCIAL SECURITY ADMINISTRATION
(Agency)

0-AR-5814
(73 FLRA 471 (2023))

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DECISION

October 25, 2023

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Before the Authority: Susan Tsui Grundmann,
Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator David E. Walker sustained a grievance challenging a suspension (initial award), and he awarded limited attorney fees (fee award). In *AFGE, Local 3184 (Local 3184)*,¹ the Authority granted the Union's nonfact and contrary-to-law exceptions to the fee award, and remanded the matter to the parties for resubmission to the Arbitrator, absent settlement, to make additional findings on the attorney-fees issue.

In a remand award, the Arbitrator awarded \$5,925 in attorney fees, which did not include any of the Union's requested fees for the post-arbitration litigation of the fee dispute. The Union filed an exception to the remand award on contrary-to-law grounds. Because the remand award is not a fully articulated, reasoned decision, we grant the exception. Further, because we cannot determine from the record the reasonableness of the requested hours for the fee-dispute litigation, we remand that issue to the parties for resubmission to the Arbitrator, absent settlement – or to a different arbitrator, if the Arbitrator is unwilling or unavailable to consider the issue.

II. Background and Arbitrator's Award**A. Initial Award and Fee Award**

As *Local 3184* sets forth the facts of this case in detail, we summarize them only briefly here. In the initial award, the Arbitrator sustained a grievance challenging a suspension, and requested that the parties address an attorney-fee issue raised during the hearing. The Union submitted a motion for \$5,925 in attorney fees, along with a fee invoice, and a proposed order. The Arbitrator awarded \$1,200 for attorney fees and expenses, based on an unspecified document which he erroneously stated limited the amount the Agency was authorized to pay. The Union filed exceptions to the fee award. The Authority granted the Union's nonfact and contrary-to-law exceptions, and remanded the matter to the parties for resubmission to the Arbitrator, absent settlement, to make specific findings resolving the Union's attorney-fee request, consistent with the legal requirements of the Back Pay Act (the Act)² and 5 U.S.C. § 7701(g).

B. Remand Award

After *Local 3184* issued, the Union filed a new motion for attorney fees with the Arbitrator, which included the original request for \$5,925, plus a request for \$5,400 for time spent litigating the attorney-fee issue. In response to the Union's motion, the Arbitrator issued a two-paragraph award concluding that fees were warranted "in the interest[] of justice" because the Agency "failed to properly consider the mitigating factors in proposing discipline," and that "the Union is the prevailing party and the fee sought is reasonable."³ On this basis, the Arbitrator awarded "[a]ttorney fees in the amount of \$5,925.00 . . . as legal fees in this matter."⁴

On June 5, 2023, the Union filed exceptions to the remand award, and the Agency filed an opposition to the Union's exceptions on July 10, 2023.

III. Preliminary Matter: The Union's exceptions are not barred.

The Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.⁵ The Agency asserts that the Union's exceptions are barred because the Union's motion for fees submitted after *Local 3184* did not "include any explanation or analysis concerning why it was legally entitled to th[e] additional amount of fees that the Union had incurred in connection with the FLRA litigation."⁶

¹ 73 FLRA 471 (2023).

² 5 U.S.C. § 5596.

³ Remand Award at 1-2.

⁴ *Id.* at 2.

⁵ 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Loc. 3627*, 70 FLRA 627, 627 (2018); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 343 (2017).

⁶ Opp'n at 3-4.

Specifically, the Agency asserts that the Union: argues for the first time on exceptions that “the interest-of-justice standard that applies to attorney’s fees extends not only to the underlying arbitration but to the subsequent litigation of its fee requests before the FLRA”; and, for support, cites case law that it did not present to the Arbitrator.⁷

In its post-*Local 3184* motion, the Union argued that fees were warranted in the interest of justice and specified that the “reasonable” hours requested included both the merits hearing and the hours spent on the exceptions.⁸ The Agency’s response to the Union’s motion contains no argument that the Union was not entitled to fees for litigating the exceptions.⁹ Rather, the Agency’s response addresses only the interest-of-justice arguments that the Union made in its initial fee petition.¹⁰ There is no basis to conclude that the Union knew or should have known to raise the specific arguments and precedent upon which it relies in its exceptions until it received the remand award. Accordingly, we find that the Union’s exceptions to the remand award are not barred.¹¹

IV. Analysis and Conclusions: The remand award is contrary to law.

Neither party disputes the Union’s entitlement to the awarded \$5,925 in attorney fees.¹² The Union argues that the remand award is contrary to law because the Arbitrator did not provide a “fully articulated decision” explaining why he declined to award the additional \$5,400 requested.¹³ The Authority reviews questions of law raised by the exceptions de novo.¹⁴ In applying a standard of de novo review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings.¹⁵ In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless

the excepting party establishes they are based on nonfacts.¹⁶

As we explained in *Local 3184*, an attorney-fee award requires a fully articulated, reasoned decision setting forth specific findings that support the following statutory requirements: (1) the employee must be the prevailing party; (2) the award of attorney fees must be warranted in the interest of justice; (3) the amount of fees must be reasonable; and (4) the fees must have been incurred by the employee.¹⁷ The Arbitrator provided no explanation as to why he did not award the additional requested \$5,400. Where an arbitrator has not sufficiently explained the attorney-fee determination, the Authority will examine the record to determine whether it permits the Authority to resolve any entitlement to attorney fees.¹⁸

It is undisputed that the Union was the prevailing party on both the merits and its exceptions to the fee award, and that the Union incurred fees. Further, the Authority has held that if an arbitrator determines that an agency’s conduct in the underlying case meets any of the interest-of-justice criteria so as to warrant attorney fees, then the “determination that fees are warranted in the interest of justice applies to all subsequent phases of litigation involving the case if the grievant prevails in the subsequent litigation.”¹⁹

While the Agency does not dispute the Arbitrator’s determination that fees for litigating the underlying grievance were warranted in the interest of justice, it does contest the Union’s entitlement to the additional \$5,400 requested because the additional work performed was not a result of any agency action.²⁰ Specifically, the Agency argues the Union is not entitled to fees for time spent litigating the attorney-fee issue because the Agency “did not refuse to pay the fees” and it

⁷ *Id.*

⁸ Exceptions, Ex. 11 at 8-9

⁹ Opp’n, Attach. 1 at 2-7.

¹⁰ *Id.*; see also Exceptions, Ex. 6b at 6-8.

¹¹ See, e.g., *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Centro Sector*, 65 FLRA 752, 754 (2011) (explaining that 5 C.F.R. § 2429.5 does not preclude consideration of arguments in support of exceptions where such arguments arise from the issuance of an award and could not have been presented to the arbitrator).

¹² Consequently, we assume that the requirements of the Act have been satisfied and we will not address them as to the \$5,925 award. See, e.g., *U.S. GSA, Ne. & Caribbean Region, N.Y.C., N.Y.*, 61 FLRA 68, 69 (2005) (assuming unchallenged requirements of Act were satisfied (citing *U.S. DOD, Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 47 FLRA 1187, 1192 (1993)); *U.S. DOD, Dep’t of Def. Dependents Schs.*, 54 FLRA 773, 780 (1998) (finding it unnecessary to consider unchallenged arbitral determinations regarding the requirements for awarding attorney fees under the Act (citing *U.S. Dep’t of VA, Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 398 n.9 (1996))).

¹³ Exceptions Br. at 7; see also *id.* at 5 (arguing that it is “well-settled law” that fees may be awarded for fee-dispute litigation).

¹⁴ *U.S. DOL, Off. of Workers Comp.*, 72 FLRA 489, 490 (2021) (Member Abbott concurring) (citing *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021) (*Local 1953*)).

¹⁵ *Id.* (citing *Local 1953*, 72 FLRA at 306-07).

¹⁶ *Id.* (citing *AFGE, Loc. 2002*, 70 FLRA 812, 814 (2018) (Member DuBester dissenting)).

¹⁷ 73 FLRA at 472-73 (citing 5 U.S.C. § 7701(g); *AFGE, Loc. 44, Nat’l Joint Council of Food Inspection Locs.*, 67 FLRA 721, 723 (2014) (*Local 44*) (Member Pizzella dissenting on other grounds)).

¹⁸ *Id.* at 473 (citing *Local 44*, 67 FLRA at 723; *Ala. Ass’n of Civilian Technicians*, 56 FLRA 231, 235 (2000) (Chairman Wasserman dissenting in part); *Martinez v. U.S. Postal Serv.*, 89 M.S.P.R. 152, 162 (2001)).

¹⁹ *U.S. Dep’t of HHS, SSA*, 48 FLRA 1040, 1049-50 (1993).

²⁰ Opp’n at 6.

was the Union that “chose to file exceptions to the [fee] award.”²¹ However, federal courts and the Authority have held that fees may be incurred for time spent litigating fee disputes, because those fees are related to the underlying personnel action.²² Indeed, in *AFGE, AFL-CIO, Local 3882 v. FLRA*, the court specifically rejected the premise underlying the Agency’s argument, concluding that a union was entitled to fees for litigation it initiated to reverse a prior denial of fees, and that “the merit of the agency’s position in the fee litigation is not relevant to” a petition for fees related to that litigation under the Act.²³ Accordingly, we find that the fees for litigating the fee dispute are also warranted in the interest of justice, and the only remaining question is whether the additional \$5,400 is “reasonable.”

As noted, the remand award is silent as to the reasonableness of the Union’s attorney-fee request. The Authority consistently has held that the arbitrator, not the Authority, is the appropriate authority under 5 C.F.R. § 550.807(a) for resolving a fee request.²⁴ Therefore, we remand the matter to the parties for resubmission to the Arbitrator, absent settlement, to make specific findings as to the reasonableness of the attorney fees the Union incurred for the fee-dispute litigation, and to issue a fee award incorporating those findings.

Consistent with Authority precedent, if the Arbitrator is unwilling or unavailable to consider the award on resubmission, we direct the parties to jointly submit the matter to another arbitrator.²⁵

V. Decision

This case is remanded to the parties for resubmission, absent settlement, to the Arbitrator for specific findings in accordance with this decision. However, if the Arbitrator is unwilling or unavailable to consider the award on resubmission by the parties, we direct the parties to jointly submit the question of attorney fees to another arbitrator.

²¹ *Id.* (further arguing that “[h]ad the [A]gency filed exceptions that were subsequently determined to be without merit by the Authority, an award of fees related to the Union’s opposition of those exceptions might have been appropriate” (citing *Keely v. MSPB*, 760 F.2d 246 (Fed. Cir. 1985))).

²² See *AFGE, AFL-CIO, Loc. 3882 v. FLRA*, 994 F.2d 20, 21-24 (D.C. Cir. 1993) (*AFGE, Local 3882*) (fees recoverable for time spent litigating entitlement to fees because the purpose of the Act is to make employees reasonably financially whole); see also *U.S. DHS, U.S. CBP*, 66 FLRA 556, 558 (2012) (recognizing that attorney fees are “recoverable for time spent litigating entitlement to fees” (citing *AFGE, Local 3882*, 994 F.2d at 21-24)); *Ala. Ass’n of Civilian Technicians*, 56 FLRA 231, 233

(2000) (Chairman Wasserman dissenting in part on other grounds) (“attorney fees are routinely awarded for time spent litigating entitlement to attorney fees”); *U.S. DOD, Dependents Schs.*, 54 FLRA 514, 520 (1998) (same (citing *AFGE, Local 3882*, 994 F.2d at 22)).

²³ *AFGE, Local 3882*, 994 F.2d at 23 (further concluding that “to determine whether ‘fees for fees’ requested under the [Act] are ‘warranted in the interests of justice,’ we must look primarily to the government’s conduct in the underlying case”).

²⁴ *AFGE, Loc. 1592*, 66 FLRA 758, 759 (2012) (citing *AFGE, Loc. 3105*, 63 FLRA 128, 131(2009)).

²⁵ *Ala. Ass’n of Civilian Technicians*, 52 FLRA 1386, 1389 n.2 (1997).