

63 FLRA No. 142

UNITED STATES DEPARTMENT
OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4048

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DECISION

June 30, 2009

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

Decision by Chairman Carol Waller Pope for the
Authority

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Joseph M. Sharnoff filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exception.

The Agency disputes the Arbitrator's award of attorney fees. For the reasons that follow, we deny the Agency's exception.

II. Background and Arbitrator's Award

In the initial award, the Arbitrator vacated the grievant's 5-day suspension and awarded the grievant backpay. The Union filed a motion for attorney fees on behalf of the grievant in the amount of \$29,626.54. Of that amount, \$15,045.95 was for the services of a Union staff attorney and \$14,580.49 was for the services of a Union staff representative.

The Agency asserted to the Arbitrator that attorney fees were not payable for the services of the Union's staff representative because she is not an attorney. The Agency acknowledged that case precedent of the Merit Systems Protection Board (MSPB) and the Authority authorizes attorney fees for the work of non-attorneys

when the work is under the supervision of an attorney. However, the Agency claimed that the precedent did not apply because the staff representative acted independently without any supervision by the Union's attorney. The Agency alleged that the staff representative was the primary representative, and not the assistant, and that she was not the agent of the Union staff attorney.

The Arbitrator agreed with the Agency that the staff representative had performed most of the work and was the "lead representative." Award at 11. However, he concluded that attorney fees were payable for her services because her work was performed "under the active supervision" of the Union staff attorney. *Id.* He found that the requirement that the non-attorney presenting a case be supervised by, and under the direction of, an attorney "was fully met in this case." *Id.* Because both the staff representative and the staff attorney are employed by the Union, which provided the legal services to the grievant, the Arbitrator found that there was no statutory requirement that the staff representative be employed by the staff attorney or that she be an agent of the staff attorney. As the Arbitrator found that all of the other statutory requirements for an award of attorney fees had been satisfied, he granted the application for attorney fees in the amount requested of \$29,626.54.

III. Positions of the Parties**A. Agency's Exception**

The Agency contends that the award of attorney fees for the services of the Union's staff representative is contrary to 5 C.F.R. § 550.807(f).¹ The Agency asserts that the staff representative does not qualify for attorney fees because she is not an attorney, a law clerk, a paralegal, or a law student. Exceptions at 3. The Agency maintains that for a non-attorney to be entitled to fees, the non-attorney must be assisting an attorney and must be under the direct supervision of, and acting as an agent for, the attorney. The Agency claims that, although the staff attorney "actively participated in presenting the Union case at the hearing[.]" the staff representative was the "lead" representative for the Union. Consequently, the Agency argues that she "was not 'assisting' a member of the Bar, as required by [§ 550.807(f)]." *Id.* at 4.

1. Section 550.807(f) provides:

The payment of reasonable attorney fees shall be allowed only for the services of members of the Bar and for the services of law clerks, paralegals, or law students, when assisting members of the Bar.

In addition, the Agency claims that the staff representative asserted that she is a law clerk, but disputes whether she qualifies for attorney fees as a law clerk. *Id.* The Agency notes that the Arbitrator did not address whether the staff representative is a law clerk and did not address her entitlement to attorney fees as a law clerk. *Id.* at 5. The Agency acknowledges that, in *Federal Deposit Insurance Corporation, Division of Information Resource Management, Atlanta, Georgia*, 53 FLRA 1657 (1998) (*FDIC*), the Authority upheld fees for a union staff representative, but claims that the entitlement to fees was based on the arbitrator's determination that the staff representative was a "professionally trained paralegal." *Id.* at 6. The Agency argues that there is no basis for reaching the same result in this case. *Id.*

B. Union's Opposition

As a preliminary matter, the Union alleges that the Agency's exception was not timely filed. Opposition at 3. The Union claims that, for the Agency's exception to have been timely filed, it must have been filed no later than January 9, 2006. The Union notes that the copy of the exception that the Agency served on it was post-marked January 11, 2006. *Id.* at 4. Although the Union concedes that the exception may have been timely filed with the Authority, the Union argues that the exception should still be dismissed because the Agency did not serve the Union by January 9. *Id.*

In opposition to the Agency's exception, the Union argues that the requirement of direct supervision of the non-attorney by the attorney was satisfied. The Union maintains that the staff attorney was present at the hearing where he observed, directed, and assisted the staff representative, even though the staff representative was the primary representative at the hearing, and that the staff attorney supervised the staff representative's written work. *Id.* at 5-6. The Union also argues that the award of attorney fees for the services of the staff representative is fully consistent with *FDIC*. *Id.* at 6-7. The Union further challenges the Agency's questioning of whether the staff representative qualified for attorney fees as a law clerk. The Union argues that the job title of the non-attorney representative is irrelevant to the entitlement to attorney fees as long as the governing standards set forth in *FDIC* are met. *Id.* at 8. The Union emphasizes that the rationale for compensating the services of non-attorneys in these circumstances is that they provide necessary services that would be more costly if they had been performed by attorneys. *Id.* at 9. The Union also disputes the Agency's attempt to establish a new standard for entitlement of non-attorneys to

attorney fees based on the amount of work performed by the attorney and the non-attorney. *Id.* at 9.

IV. Preliminary Matter

The Union moves to dismiss the Agency's exception because it was not timely filed with the Authority. Alternatively, the Union argues that, even if the exception was timely filed, the exception should be dismissed because the Agency did not serve the Union until two days after the filing period for exceptions had expired.

The Agency's exception was timely filed with the Authority by personal delivery on January 9, 2006. When timely filed exceptions have been served on the opposing party after the expiration of the filing period for exceptions, the Authority views such service to be procedurally sufficient unless the opposing party establishes that it was prejudiced by such service. *Office of Personnel Mgmt.*, 61 FLRA 358, 360-61 (2005). In this case, the Union does not claim that it was prejudiced by the Agency's service, and no prejudice is apparent. The Union did not request an extension of time to file its opposition. In fact, it filed its opposition one week before the expiration of the filing period for the opposition. Accordingly, we deny the Union's motion to dismiss the Agency's exception.

V. Analysis and Conclusions

When an exception involves an award's consistency with law or regulation, the Authority reviews *de novo* the questions of law raised by the exception and the arbitrator's award. *NTEU Chapter 24*, 50 FLRA 330, 332 (1995). 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. *NFFE Local 1437*, 53 FLRA 1703, 1710 (1998).

The Agency contends that attorney fees are not payable for the services of the non-attorney, staff representative and that this case is distinguishable from *FDIC*. In *FDIC*, the arbitrator awarded attorney fees for the services of a non-attorney, union field representative, who performed services as a paralegal under the supervision of, and as an agent for, a union staff attorney. *FDIC*, 53 FLRA at 1657-58. Relying on the decisions of the MSPB in *Anderson v. Government Printing Office*, 55 M.S.P.R. 548 (1992) (*GPO*) and *Mitchell v. United States Postal Service*, 6 MSPR 22 (1981), the Authority stated the standards for the payment of attorney fees for the services of a non-attorney, as follows: (1) the existence of an attorney-client relationship; and (2) the functioning of the non-attorney representative under the supervision of, and as an agent for, the attor-

ney. *Id.* at 1663. The Authority rejected the agency's claim that attorney fees were not payable for the services of the field representative because he did not act as a paralegal assisting an attorney, but, instead, acted as the grievant's representative before the arbitrator. The agency asserted that, for attorney fees to be payable for paralegal services, the legal services of the attorney must predominate and the paralegal services must be ancillary to those legal services. *Id.* at 1659. The Authority concluded that the standards do not preclude an award of attorney fees for paralegals representing grievants before arbitrators, as long as the representative is functioning under the supervision of, and as an agent for, an attorney. *Id.* at 1663. The Authority explained that the rationale for including such services in attorney fee awards is that the non-attorney provides necessary services, which, if they were performed by an attorney, would be more costly. *Id.* at 1661.

FDIC fully supports the award in this case. In both cases, a non-attorney, union staff representative represented a grievant before an arbitrator, while supervised by a union staff attorney. Although the Arbitrator in this case found it unnecessary to specifically address whether the staff representative acted as an agent for the staff attorney, the necessary relationship is clearly established. As the Arbitrator emphasized, both the staff representative and the staff attorney are employed by the Union and together represented the grievant on behalf of the Union. This relationship is identical to the relationship found to satisfy the legal and regulatory requirements in *FDIC*. Accordingly, we conclude that the standards are satisfied and that attorney fees are payable for the non-attorney services provided by the Union staff representative. The Agency's arguments fail to establish otherwise.

The Agency argues that the award of attorney fees for the services of the staff representative is deficient because she was the "lead" representative for the Union and, consequently, was not "assisting" a member of the Bar, as required by § 550.807(f). Exception at 4. The Authority rejected such an argument in *FDIC*. The Authority held that there is no statutory or regulatory requirement that the legal services of the attorney must predominate and that the paralegal services must be ancillary to those legal services. *See FDIC*, 53 FLRA at 1659, 1663. We also reject the Agency's argument that this case is distinguishable from *FDIC* because attorney fees were payable for the services of the non-attorney in *FDIC* on the basis that he was a "professionally trained paralegal[.]" Exception at 6. Section 550.807(f) specifically provides for the payment of attorney fees for the services of paralegals while

assisting members of the Bar. The regulation does not define "paralegal" or "services of . . . paralegals[.]" 5 C.F.R. § 550.807(f). The regulation also does not require professional training as a paralegal to be entitled to attorney fees. *Id.* In construing § 550.807(f) in *FDIC*, the Authority held that the standards do not go beyond the existence of an attorney-client relationship and the functioning of the non-attorney representative under the supervision of, and as an agent for, the attorney. *FDIC*, 53 FLRA at 1663. Accordingly, neither § 550.807(f) nor *FDIC* imposes requirements that preclude payment for the services of the staff representative in this case.²

Accordingly, we deny the Agency's exception.

VI. Decision

The Agency's exception is denied.

2. In addition, the Agency claims that the staff representative asserted that she is a law clerk and disputes that she is entitled to attorney fees as a law clerk. Exception at 4. It is not clear that the staff representative made such an assertion. However, because the staff representative's services are properly viewed as paralegal services, the Agency's claim provides no basis on which to find the award of attorney fees for those services deficient.