65 FLRA No. 127

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2544
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-4701

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DECISION

March 14, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Jerome H. Ross 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 Authority issued an Order to Show Cause (Order) directing the Agency to show cause why its exceptions should not be dismissed as interlocutory. The Agency filed a response to the Order. The Union filed a consolidated opposition to the exceptions and reply to the Agency's response to the Order.

The Arbitrator issued a supplemental award finding that the Union's request for attorney fees was warranted in the interest of justice. However, the Arbitrator found that issues remained regarding the reasonableness of the amount requested and remanded the case to the parties for resolution, retaining jurisdiction for the sole purpose of resolving the matter if the parties were unable to agree.

For the reasons discussed below, we dismiss the exceptions, without prejudice, as interlocutory.

II. Background and Arbitrator's Award

The grievant filed a grievance challenging his seven-day disciplinary suspension for failure to safeguard government property. Supplemental Award of Attorney Fees (Supplemental Award) at 1; Exceptions at 2. In the original award, the Arbitrator sustained the grievance and reduced the suspension to a written reprimand with backpay. Supplemental Award at 1. As neither party filed exceptions to the original award, it became final and binding.

Subsequent to the issuance of the original award, the Union filed a motion for attorney fees. The Union maintained that the attorney fees request was reasonable and warranted in the interest of justice. *Id.* at 1-2. The Agency filed an opposition asserting, as relevant here, that the Union was not entitled to an attorney fees award because the grievant failed to show that: (1) attorney fees were warranted in the interest of justice as required by the fifth *Allen* criterion[1]; and (2) the attorney fees request was reasonable. *Id.* at 2.

Although the Arbitrator did not frame the issues before him, it is reasonable, based on his summary of the parties' submissions, to construe the award as including issues regarding whether the fees were warranted in the interest of justice and whether the amount requested was reasonable. The Arbitrator determined that the Union's request for attorney fees satisfied *Allen*'s criterion 5, and as a result, a fee award was warranted in the interest of justice. The Arbitrator found that the Agency should have considered another case that was "virtually identical" to the grievant's in which an employee only received a written reprimand. *Id.* at 3. The Arbitrator

1. In *Allen v. U.S.P.S.*, 2 M.S.P.R. 420 (1980) (*Allen*), the Merit Systems Protection Board (MSPB) established criteria to determine whether a fee award was warranted in the "interest of justice." Under *Allen*, an award of attorney fees is warranted in the interest of justice if: (1) the Agency engaged in a prohibited personnel practice; (2) the Agency's actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency; (3) the Agency's actions are taken in bad faith to harass or exert improper pressure on an employee; (4) the Agency committed gross procedural error which prolonged the proceeding or severely prejudiced the employee; or (5) the Agency knew or should have known it would not prevail on the merits when it brought the proceeding. *See, e.g., AFGE, Local 3020*, 64 FLRA 596, 597 n.* (2010). An award of attorney fees is also warranted in the interest of justice when there is either a service rendered to the federal workforce or there is a benefit to the public derived from maintaining the action. *Id.*

concluded that if the Agency had considered the consistency of the discipline, then the Agency would have known that it would not prevail on the merits. *Id.*

However, the Arbitrator postponed his determination as to the reasonableness of the attorney fees request because he found that issues remained unresolved regarding that requirement. *Id.* at 4. Although the Arbitrator determined that the rate "should be in line with the community rates of other attorneys," he did not determine what that rate should be. *Id.* The Arbitrator also found that there could be no resolution of the reasonableness issue without an itemized statement of hours worked in the record. Further, the Arbitrator expressed doubt concerning the reasonableness of the amount of time billed in preparation for the arbitration. *Id.* However, rather than deciding these issues, the Arbitrator remanded the reasonableness question to the parties "for resolution[,]" and retained jurisdiction for the "sole purpose of resolving this matter" if the parties were unable to agree. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency excepts to the award as being contrary to law. The Agency asserts that the Arbitrator's factual findings do not support his legal conclusion that attorney fees are warranted "in the interest of justice" under the Back Pay Act, 5 U.S.C. § 596, 5 U.S.C. § 7701(g), and *Allen.* Exceptions at 7. The Agency also argues that the award is contrary to law because the fees awarded are unreasonable. *Id.* at 16-17.

With respect to whether the fees are warranted, the Agency claims that the Arbitrator misapplied the fifth *Allen* criterion. *Id.* at 11. According to the Agency, the award fails to describe how the Agency "knew or should have known" that it would not prevail when the Arbitrator based his decision on a previous case concerning a similar offense that occurred at least six years earlier involving different deciding officials. *Id.* at 12-14. The Agency also claims that to the extent the award is based on disparate penalties, the Arbitrator failed to conduct a proper analysis to determine whether the grievant was similarly situated to the employee in the previous case who received a lesser penalty. *Id.* at 15.

With regard to the reasonableness of the fees, the Agency takes exception to the Arbitrator's finding that the appropriate rate is the market rate in the community. *Id.* at 16-17. The Agency claims that the fees should be based on the fee agreement between the Union and its attorney as the Authority has ruled that there is a presumption that the rate agreed upon by the Union and its attorney is the maximum fee allowed absent evidence to the contrary. *Id.* According to the Agency, although the Union submitted an affidavit from an attorney in the community to establish the market rate, the Authority has held that such evidence does not demonstrate that an hourly rate higher than the fee agreement is reasonable. *Id.* at 17. Therefore, the Agency argues, the award is contrary to law because it establishes a fee rate without consideration of the fee agreement between the Union and its attorney. *Id.*

The Agency also challenges the number of hours billed by the Union's attorney. The Agency argues that it should not be responsible for the hours billed for preparation of the initial arbitration hearing because that hearing was cancelled by the Union. *Id.*, Agency's Brief in Opposition to Union's Motion, Ex. 8 at 10.

B. Union's Opposition

The Union contends that the Agency's exceptions are interlocutory and must be dismissed. Opp'n at 4. In the alternative, the Union argues that the Arbitrator properly found that attorney fees are warranted "in the interest of justice." *Id.* at 7. In the Union's view, the Agency "knew or should have know it would not prevail" when it elected to suspend the grievant because it had only issued a written reprimand in an earlier case with identical facts. *Id.* at 8.

With respect to the reasonableness of the fees requested, the Union argues that there are insufficient facts to determine this issue and consequently, the exceptions are interlocutory.[2] *Id.* at 13. Alternatively, the Union claims that although the Arbitrator did not determine a specific fee amount, a consideration of the available facts establishes that the amount requested is reasonable. *Id.*

2. The Union states that it inadvertently omitted its itemized statement of hours worked from the motion for attorney fees that it submitted to the Arbitrator, but that it sent a copy to both the Arbitrator and the Agency when it discovered the omission. Opp'n at 2. However, the Union states further that it was unaware when it submitted its itemized statement to the Arbitrator that the Arbitrator had already issued the supplemental award. *Id.*

IV. Order to Show Cause

As noted above, the Authority issued an order directing the Agency to show cause why its exceptions should not be dismissed as interlocutory. Order at 1. In response, the Agency asserts that two decisions made by the Arbitrator in his supplemental award are final: (1) the determination that the attorney fees are warranted "in the interest of justice"; and (2) the rate at which those fees should be paid. Response at 2. According to the Agency, Authority precedent provides that an award is final, and an exception is not interlocutory, when the Arbitrator retains jurisdiction for the sole purpose of determining the amount of the award. *Id.* In the Agency's view, the Arbitrator made a final decision that the fees are warranted and all that is left is for the Arbitrator to determine the amount owed. Therefore, the Agency argues, the award is ripe for review and the exceptions are not interlocutory. *Id.* at 2.

In addition, the Agency argues that the Arbitrator made a final determination as to the rate of pay at which the Union's attorney should be compensated. *Id.* The Agency admits that if it were disputing the actual amount of attorney fees awarded, then the matter would be interlocutory. However, the Agency claims that its exception is based on the Arbitrator's error in deciding the proper rate of pay. Therefore, the Agency argues, the Arbitrator's decision as to the rate of pay is final, not interlocutory, and contrary to law. *Id.* at 3.

The Union contends that the Arbitrator remanded more than just the computation issue. Opp'n at 3. According to the Union, on remand, the parties must: (1) determine the community rate; (2) resolve whether the Union's itemized hours are reasonable; and (3) resolve whether the hours spent by Union counsel are reasonable or repetitive because counsel prepared for the arbitration hearing twice. Once these issues are resolved, the Union argues, the Arbitrator must determine what fee amount should be awarded if the parties cannot agree on an amount. *Id.* The Union claims that if the parties cannot agree, additional litigation will require factual findings and legal determinations by the Arbitrator. The Union further contends that the Authority does not have sufficient facts in the record to make a decision regarding the amount of attorney fees that should be awarded. *Id.*

Finally, the Union argues that the cases cited by the Agency to support its contention that the award is not interlocutory are distinguishable. Specifically, the Union argues that those cases address appeals taken from a merits award in which the arbitrator retained jurisdiction to consider attorney fees "if a party sought them." *Id.* at 4. Here, in contrast, the Union asserts that the Agency filed exceptions to the fee award, not the merits award, and unlike the cases cited by the Agency, the sole issue being challenged by the Agency is the award of attorney fees. *Id.*

V. The exceptions are interlocutory.

Section 2429.11 of the Authority's Regulations pertinently provides that "the Authority . . . ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11. Thus, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration. *See, e.g.*, *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Med. Ctr., Carswell, Tex.*, 64 FLRA 566, 567-68 (2010) (*Carswell*); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 60 FLRA 247, 248 (2004) (*Army Corps of Eng'rs*); *U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs.*, 57 FLRA 924, 926 (2002) (*HHS*). Consequently, an arbitration award that postpones the determination of an issue submitted does not constitute a final award subject to review. *See Carswell*, 64 FLRA at 567; *Army Corps of Eng'rs*, 60 FLRA at 248; *HHS*, 57 FLRA at 926. However, where an arbitrator has ordered a remedy but has not made a computation as to the amount of attorney fees, the mere fact that the arbitrator retains jurisdiction to assist parties with the details of the remedy's implementation does not render exceptions to that award interlocutory.[3] *See, e.g.*, *Office of Pers. Mgmt.*, 61 FLRA 358, 361 (2005) (then-Member Pope dissenting in part on unrelated grounds), *reconsid. denied*, 61 FLRA 657 (2006).

The supplemental award does not constitute the Arbitrator's final award on attorney fees because it does not resolve all of the issues necessary to make that determination. With particular regard to the requirement that attorney fees awarded must be "reasonable," the Arbitrator postponed that determination by "remanding the question to the parties for resolution." Supplemental Award at 4. As the Arbitrator made clear, he would exercise his retained jurisdiction to render a final award resolving

3. The Authority has found interlocutory review to be appropriate where the exceptions present a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case. *E.g.*, *U.S. Dep't of the Treasury, Customs Serv., Tucson, Ariz.*, 58 FLRA 358, 359 n.* (2002). There is no claim in this case that the exceptions raise a plausible jurisdictional defect.

the reasonableness of the attorney fees requested only "[i]n the event that [the parties] are unable to reach agreement" on this issue. *Id.*

The determination that the Arbitrator postponed concerning the reasonableness of the fees goes beyond a matter of computation. A reasonable attorney fee award "begins with an analysis of two objective variables: The attorney's customary billing rate; and the number of hours reasonably devoted to the case." *Stewart v. Dep't of the Army*, 102 M.S.P.R. 656, 662 (2006); *see also Dep't of the Air Force Headquarters, 832d Combat Support Group DPCE, Luke Air Force Base, Ariz.*, 32 FLRA 1084, 1100 (1988) (*Luke Air Force Base*). The Authority requires that fee requests "be closely examined to ensure that the number of hours expended was reasonable[,]" because "the number of hours expended are not necessarily those 'reasonably expended.'" *U.S. Dep't of Def., Def. Fin. & Accounting Serv.*, 60 FLRA 281, 286 (2004) (quoting *Luke Air Force Base*, 32 FLRA at 1101). Additionally, an arbitrator must support his or her determination as to the reasonableness of a fee request. *See U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995).

The standard of review as to the reasonableness of the number of hours awarded is deferential. In this connection, the MSPB has stated that the fact-finder is "in the best position to determine whether the number of hours expended is reasonable[.]" *McKenna v. Dep't of the Navy*, 108 M.S.P.R. 404, 411 (2008). "[A]bsent a specific showing that the [fact-finder's] evaluation was incorrect," the fact-finder's evaluation will not be second-guessed. *Id.* at 411. Consistent with this approach, the Authority has rejected an agency's "unsupported" exception to the number of hours that an arbitrator awarded a union attorney. *U.S. Dep't of Def., Educ. Activity, Arlington, Va.*, 57 FLRA 23, 26 (2001) (Chairman Cabaniss concurring in part and dissenting in part).

Based on the foregoing, it is evident that the Arbitrator left unresolved legal issues and factual determinations bearing on the reasonableness of the fees requested. Even though the Arbitrator determined that the rate "should be in line with the community rate of other attorneys," he did not determine what that rate should be. Supplemental Award at 4. Furthermore, the Arbitrator postponed a determination of the number of billable hours devoted to the case that would be considered "reasonably expended." *Luke Air Force Base*, 32 FLRA at 1101. Therefore, as the Arbitrator did not fully resolve the reasonableness issue, the supplemental award does not constitute a complete resolution of all the issues submitted to arbitration regarding the Union's entitlement to attorney fees, and the exceptions are interlocutory.

VI. Decision

The Agency's exceptions are dismissed, without prejudice, as interlocutory.