65 FLRA No. 11

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
OAKDALE, LOUISIANA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1007
COUNCIL OF PRISON LOCALS
(Union)

0-AR-4489

DECISION

August 31, 2010

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 initial award and supplemental award of Arbitrator E. Gayle Sheridan 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 exceptions.[1]

The Arbitrator concluded that the Agency violated a settlement agreement with the Union by requiring the grievants to perform higher-graded duties. As a remedy, the Arbitrator ordered the Agency to pay the grievants backpay plus interest and to reimburse the Union for attorney fees and related costs. For the reasons set forth below, the Agency's exceptions are dismissed in part and denied in part.

1. The Authority has consolidated AR-4489 (excepting to initial award) and AR-4489 (excepting to supplemental award). Accordingly, this decision addresses the Agency's exceptions to both the Arbitrator's initial award and his supplemental award.

II. Background and Arbitrator's Award

The Federal Detention Center (FDC) is a part of the Federal Correctional Complex, Oakdale, Louisiana. Initial Award at 8. The FDC primarily houses federal inmates who have completed their terms of incarceration and are awaiting deportation and undocumented immigrants who are awaiting deportation. *Id.* The grievants work as Correctional Counselors (Counselors) at the Alexandria and Ville Platte Units in the FDC. *Id.*

Counselors work as a "team" with Case Managers and Unit Managers. *Id.* Counselors address detainees' internal social needs and "top out" at the GS-9 pay level. *Id.* Case Managers address detainees' external needs and are paid at the GS-11 level. *Id.* Finally, Unit Managers have supervisory responsibility over the "team's" performance. *Id.* During the period at issue in this case, no Case Manager was assigned to the Alexandria and Virginia Platte units. *Id.*

In 2004, the Union filed a grievance over the assignment of certain higher-graded Case Manager duties to the Counselors. *Id.* at 9. Ultimately, the parties settled the grievance. *Id.* Under the terms of the settlement agreement, the parties agreed that the Unit Manager, rather than the Counselors, would perform the higher-graded Case Manager duties involved in detainee screening. *Id.*

In March 2007, the Agency hired a new Acting Unit Manager. *Id.* Shortly after this manager was hired, several Counselors brought the settlement agreement to her attention and told her that, as Unit Manager, she was obliged to perform the Case Manager duties involved in detainee screening. *Id.* The new Manager told the Counselors that, because of a nationwide initiative that the Bureau of Prisons (BOP) was instituting at the time, "those duties were no longer required of the Case or Unit Manager . . . ." *Id.* Based on her statements, the Counselors concluded that the settlement agreement was no longer in effect, and they began to perform the higher-graded Case Manager duties. *Id.*

During the fall of 2007, the FDC conducted a preliminary audit of Unit operations; the audit revealed that the nationwide BOP initiative did not in fact alter the settlement agreement. *Id.* In early November 2007, the Counselors discussed the results of the audit with the Union President, and, immediately thereafter, the Union President discussed the matter with the Assistant Warden. *Id.* The Assistant Warden admitted that the Agency had

breached the settlement agreement but refused to compensate the Counselors "for their performance of the higher[-]graded duties because the breach was unintentional."[2] *Id.* Subsequently, a grievance was filed on December 17, 2007; the grievance alleged a violation of the 2004 settlement agreement and requested backpay. *Id.* at 4-5, 9.

The matter was unresolved and was submitted to arbitration. The Arbitrator framed the following relevant issues: "Did the Agency breach the parties' . . . [s]ettlement [a]greement when . . . the [g]rievants' supervisor assigned various GS-11 Case Manager's duties to the[m] . . . ?" and, if so, "[w]hat should be the remedy?" *Id.* at 17.

The Arbitrator determined that, based on the evidence, testimony, and arguments, the Union proved by "a preponderance of evidence" that the Agency had violated the Agreement "when the Acting Unit Manager assigned certain duties to the Counselors." *Id.* at 21. As a remedy, the Arbitrator ordered the Agency to pay the grievants backpay "plus interest . . . for the period . . . when they were assigned . . . certain Case Manager duties by [the] Acting Unit Manager" and to "reimburse the Union for attorney fees and related cost[s]." *Id.* at 22. The Arbitrator also retained jurisdiction for thirty days "to assist in the resolution of this remedy." *Id.*

On February 2, 2009, the Union's counsel requested that the Arbitrator provide a supplemental arbitration award clarifying the Agency's obligation to pay attorney fees and related costs. Supplemental Award, Attach. A at 1. On February 8, 2009, the Arbitrator sent the parties a letter, providing "the Agency [an] opportunity to submit its position regarding [the Union counsel's] request" and stating that he would issue a supplemental award by March 5, 2009. *Id.* The Agency, however, "elected to not submit [its] position at th[at] time, but instead requested [that] the Agency's position be deferred until after [it] filed its exceptions and obtained a ruling from the . . . Authority[;]" the Agency ultimately filed exceptions to the Arbitrator's initial award on February 23, 2009. *Id.*; Initial Exceptions at 10.

On March 5, 2009, the Arbitrator rejected this request, finding that the Agency's filing of exceptions and the Authority's ultimate decision on those exceptions had no impact on his ability to issue a supplemental arbitration award, and issued his supplemental award. Supplemental Award, Attach. A at 1. In that award, the Arbitrator specifically articulated why the award of attorney fees was appropriate under 5 U.S.C. § 7701(g) and ordered the Agency to pay the Union's counsel $25,676.06 in attorney fees and related expenses. Supplemental Award at 3-4. Noting that he had been advised that the Agency had failed to pay the grievants the backpay that he had ordered in his initial award, the Arbitrator further directed the Agency to make such payment within ten days. *Id.* at 4.

III. Positions of the Parties

A. Agency's Exceptions to Initial Award

The Agency alleges that the award is contrary to law because the Arbitrator failed to identify a government-wide regulation, Agency-wide policy, or provision of the parties' agreement that makes "temporary promotions mandatory for details to higher-graded positions, thereby establishing a nondiscretionary agency policy which would provide a basis for back pay." Initial Exceptions at 4-5. According to the Agency, under Authority precedent, the mere fact that a grievant has performed higher-graded duties is insufficient to entitle him or her to backpay; rather, the Agency asserts, a grievant is entitled to backpay only when a government-wide regulation, agency-wide policy, or provision of the parties' agreement mandates compensation for the temporary performance of the higher-graded duties. *Id.* The Agency contends that the 2004 settlement agreement does not satisfy this requirement. *Id.* at 5-6.

The Agency also alleges that the Arbitrator's initial award of attorney fees is premature and contrary to law. *Id.* at 7. The Agency claims that the award is premature because, although the Arbitrator retained jurisdiction to decide the issue of attorney fees, he ordered that the Agency pay the Union attorney fees and related costs in his initial award, without giving the parties the opportunity to make arguments and submit briefs on the issue. *Id.* at 7-8. The Agency also contends that the initial award of attorney fees is contrary to law because "the Arbitrator did not specifically articulate any of the reasons pursuant to 5 U.S.C. § 7701(g) that such an award was appropriate." *Id.* at 8. Finally, the Agency contends "that the award of attorney fees should be denied because . . . [the] award is not in the interest of justice [as] the Agency did not know, nor should it have known, that it would not be the

2. The Counselors' performance of higher-graded duties ceased shortly after the conversation between the Union President and the Assistant Warden took place. Initial Award at 9.

prevailing party in this case on the merits." *Id.* at 9. According to the Agency, it believed that it had "acted in good faith and that its actions comported with law, rule and regulation." *Id.*

B. Union's Opposition to Agency's Exceptions to Initial Award

The Union asserts that the Agency failed to argue before the Arbitrator that the 2004 settlement agreement "did not establish the kind of non-discretionary rule concerning the temporary promotion of Counselors . . . that could form the basis for a[n]" award of backpay; accordingly, the Union argues that the Agency's exception regarding this issue must be dismissed pursuant to 5 C.F.R. § 2429.5. Initial Opp'n at 2-4. The Union argues that it informed the Arbitrator of the "legal requirement that there must be . . . a non-discretionary [A]gency policy [in place] to justify a back pay [sic] award based on a temporary promotion." *Id*. at 6. The Union contends that the Arbitrator found that the 2004 settlement agreement satisfied this requirement. *Id*. at 7-8; *see also id*. at 6 (noting that Arbitrator found that Agency had "made a binding commitment in the 2004 settlement agreement to temporarily promote Counselors to Case Manager positions when they were required to perform those higher[-]graded duties").

Additionally, the Union contends that the Agency's second exception regarding the Arbitrator's initial award of attorney fees "was premature and is now moot." *Id.* at 8. The Union argues that the Arbitrator retained jurisdiction over the case and provided both parties an opportunity to present briefs on the issue of attorney fees; however, the Union asserts, the Agency never filed a response to the Union's fee request. *Id.* at 9. The Union notes that the Arbitrator issued a supplemental award in which he explained fully "how the Union's fee request comports with the legal requirements for a fee award under the Back Pay Act." *Id.* The Union contends that, given the issuance of the supplemental award, the Agency should have excepted to the merits of that award and that the Agency's exception to the initial award is now moot. *Id.*

C. Agency's Exception to Supplemental Award

The Agency filed a single exception to the Arbitrator's supplemental fee award. Supplemental Exception at 4. The Agency alleges that the Arbitrator's supplemental award is contrary to law because it requires the Agency to pay the backpay and attorney fees immediately, before the underlying award and the supplemental award are "final and binding." *Id.* at 4-6. The Agency contends that, because it filed timely exceptions to both awards, neither award is final and binding. *Id.* at 5-6. According to the Agency, such awards will not be final and binding until all exceptions are fully resolved by the Authority. *Id.* at 6.

D. Union's Opposition to Agency's Exception to Supplemental Award

The Union argues that, under Authority precedent, "an arbitrator is not required to refrain from granting a request for attorney fees until after the Authority resolves any exceptions that may have been filed to the underlying award." Supplemental Opp'n at 3 (quoting *U.S. GSA, Ne. & Caribbean Region*, 61 FLRA 68, 70 (2005)). The Union contends that the Agency's concern that it must pay attorney fees before the Authority resolves all of the exceptions is unwarranted and does not provide a basis for overturning the Arbitrator's supplemental fee award. *Id.* The Union argues that, because arbitration awards are not self-enforcing, the "Agency's concern about being forced to comply with an arbitration award that is not yet final and binding does not become timely until . . . [an unfair labor practice (ULP)] charge is filed." *Id.* According to the Union, it had not filed a ULP charge and did not contemplate filing one at that time. *Id.*

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The award of backpay is not contrary to law.

The Agency alleges that the award of backpay is contrary to law because the Arbitrator failed to identify a government-wide regulation, Agency-wide policy, or provision of the parties' agreement that makes "temporary promotions mandatory for details to higher graded positions, thereby establishing a

nondiscretionary agency policy which would provide a basis for back pay." Initial Exceptions at 4-5.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. *See, e.g., U.S. DHS, U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 64 FLRA 841, 843 (2010) (*JFK Airport*). However, where an issue arises from the issuance of the award and could not have been presented to the arbitrator, it is not precluded by § 2429.5. *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 57 FLRA 4, 5 (2001) (citing *Prof'l Airways Sys. Specialists, Dist. No. 1, MEBA/NMU (AFL-CIO)*, 48 FLRA 764, 768 n.* (1993)).

The record establishes that the Agency was on notice that the Union raised the temporary promotion issue before the Arbitrator. The grievance clearly alleged a violation of the 2004 settlement agreement and requested backpay, thereby putting the Agency on notice that it should have made the argument that it now makes in its exceptions. *See* Initial Award at 4-5. Despite this notice, the record contains no indication that the Agency ever argued to the Arbitrator that the settlement agreement does not establish an Agency policy mandating compensation for the temporary performance of higher-graded duties; rather, the Agency claimed only that: (1) the requested remedy of temporary promotion would exceed 120 days, in violation of 5 C.F.R. § 335.103(c)(1)(i); (2) the work assigned to the Counselors was not, in fact, higher-graded; and (3) the extent of the extra duties performed by Counselors was *de minimis* in nature. Initial Award at 16, 20; *see also* Initial Opp'n at 2-3.

Because the Agency did not present to the Arbitrator its argument regarding the lack of a nondiscretionary Agency policy regarding compensation for the temporary performance of higher-graded duties, it may not do so now. *See JFK Airport*, 64 FLRA at 843 (finding § 2429.5 barred arguments that arbitrator's remedy was contrary to law because arguments could have been, but were not, presented to arbitrator). Accordingly, we find that the Agency's exception is barred by § 2429.5 of the Authority's Regulations and dismiss it.

B. The award of attorney fees is not contrary to law.

The Back Pay Act expressly provides that an employee affected by an unjustified or unwarranted personnel action is entitled, on correction of the personnel action, to receive "reasonable attorney fees related to the personnel action . . . ." 5 U.S.C. § 5596(b)(1)(A)(ii).

The Agency contends that the attorney fee award is contrary to law because it is premature. Initial Exceptions at 7-8. The Agency asserts that the award is premature because the Arbitrator awarded attorney fees at the same time he made a decision on the merits. *Id.* The Authority has determined that arbitrators may rule on requests for attorney fees simultaneous to rendering a decision on the merits of a grievance. *See Health Care Fin. Admin., Dep't of HHS*, 35 FLRA 274, 290 (1990) (citations omitted). Therefore, the Agency's assertion that the Arbitrator's initial award of attorney fees is premature because it was made at the same time the Arbitrator issued his decision on the merits of the case is without merit.

The Agency also contends that the award is premature because the Agency had no opportunity to respond to the Union's attorney fee request. Initial Exceptions at 7-8. However, after the Arbitrator issued his initial award, the Agency had at least two opportunities to respond to the Union's fee request. The Agency could have submitted its position after the Union submitted its fee request to the Arbitrator on February 2, 2009. Moreover, the Agency could have filed a response after the Arbitrator informed the Agency on February 8, 2009 that he was providing it an opportunity to respond to the Union's fee request. Instead of submitting its position before the Arbitrator issued his supplemental award on March 5, 2009, however, the Agency elected to file exceptions on February 23, 2009, and seek a ruling from the Authority. Ultimately, because the Arbitrator gave the Agency an opportunity to respond to the fee request and issued the second award only after giving the Agency that opportunity, the exception to the original award is moot. *See U.S. Dep't of the Army, Army Info. Sys. Command, Savanna Army Depot*, 38 FLRA 1464, 1468 (1991) (*Savanna Army Depot*) (finding that, because a deficiency in the initial award was later cured when the arbitrator issued a supplemental award, the union's exceptions to the initial award were moot).

The Agency further contends that the initial award of attorney fees is contrary to law because "the Arbitrator did not specifically articulate any of the reasons pursuant to 5 U.S.C. § 7701(g) that such an award was appropriate." Initial Exceptions at 8. Although the Arbitrator's initial award failed to explain the prerequisites for an award of attorney fees under § 7701(g)(1), his supplemental award

specifically addressed these factors. Consequently, in view of the Arbitrator's supplemental award, this exception also is now moot. *See U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1074 n.17 (2001) (dismissing agency's exception that arbitrator failed to define employees entitled to environmental differential pay in his initial award as moot because arbitrator corrected this deficiency when he issued a supplemental award); *Savanna Army Depot*, 38 FLRA at 1468.

Finally, the Agency contends that the attorney fee award is contrary to law because it is not in the interest of justice; the Agency alleges that it "did not know, nor should it have known, that it would not be the prevailing party in this case on the merits." Initial Exceptions at 9. As stated above, under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. *See, e.g., U.S. Dep't of Def. Educ. Activity*, 56 FLRA 985, 987 (2000). After the Union submitted its fee request, and the Arbitrator gave the Agency an opportunity to respond, the Agency could, and should, have submitted to the Arbitrator its position that an award of attorney fees is not in the interest of justice; however, the Agency failed to do so. Thus, because the Agency failed to raise this issue before the Arbitrator, the Agency is barred from doing so now.

Accordingly, we deny the Agency's exception that the award is contrary to law because the Arbitrator prematurely awarded attorney fees at the same time he made a decision on the merits; we dismiss as moot the exceptions pertaining to the Agency's inability to respond to the attorney fee request and the failure to address the prerequisites for an award of attorney fees under § 7701(g); and we find that the exception claiming the award is not in the interest of justice is barred from the Authority's consideration by § 2429.5 of the Authority's Regulations.

V. Decision

The Agency's exceptions are dismissed in part and denied in part.[3]

3. The Agency also alleges that the Arbitrator's supplemental award is contrary to law because it requires the Agency to pay the award of backpay and attorney fees immediately, before the underlying award and the supplemental award are "final and binding." Supplemental Exception at 4-6. We find it unnecessary to resolve this exception because, as we have fully resolved the Agency's exceptions in our decision, both awards are now final and binding. *See U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 296 (1999) (determining that an award becomes final and binding when timely filed exceptions are denied by the Authority).