

65 FLRA No. 138

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
SAINT LOUIS DISTRICT
ST. LOUIS, MISSOURI
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 405
(Union)

0-AR-4720

DECISION

March 30, 2011

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 James L. Reynolds 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.

The Arbitrator found that the Agency did not have just cause to suspend the grievant for ten days. Award at 30. The Arbitrator ordered the Agency to set aside the grievant's suspension, expunge the suspension from his personnel records, and pay him backpay equal to what he would have earned had he not been suspended. *Id.* Additionally, the Arbitrator awarded interest and attorney fees as prescribed in 5 U.S.C. § 5596. *Id.* For the reasons set forth below, we remand the portion of the award granting attorney fees to the parties for resubmission to the Arbitrator, absent settlement. We deny the Agency's remaining exceptions.

II. Background and Arbitrator's Award

The grievant has worked for the Agency as a Park Ranger for approximately twenty-two years. *Id.*

at 6. Approximately two years ago, the grievant was elected president of the Union. *Id.* The grievant uses official time to perform his Union duties. *Id.* at 7.

After the Agency received reports that employees were engaging in improper conduct while on duty, it scheduled employee interviews to investigate these reports. *See id.* at 11. The grievant met with a group of employees to discuss the upcoming interviews. *Id.* According to the grievant, bargaining unit members requested, at that time, to have Union representation at the interviews. *Id.* The grievant then requested and received official time from his first-line supervisor to represent bargaining unit members during the interviews. *Id.* As the interviews were about to begin, the grievant arrived with two Union stewards. *Id.* at 12. The Agency's labor counsel told the grievant that "he did not have a role in the interviews and that he should not be there because his presence had not been requested as a Union representative . . . by any employee." *Id.* Despite the grievant's protests, the interviews commenced without a Union representative present. *Id.*

Later that day, the grievant spoke with the labor counsel and a human relations representative in the hallway. *Id.* at 12-13. During their conversation, the grievant insisted that, because bargaining unit employees had requested his presence prior to the interviews, they "had a right to Union representation, and . . . he had an absolute right to talk to them." *Id.* at 13. Moreover, the grievant became animated, pointed his finger, and said "what are you going to do about it" when asserting his right to represent the bargaining unit employees[.]" *Id.* at 28; *see also id.* at 13, 27. Following this incident, a threat management team met to discuss whether the grievant posed a threat to other employees. *Id.* at 14. The team determined that the grievant did not pose a threat. *Id.* at 14-15.

The Agency charged the grievant with committing an "overt [act] causing the apprehension of physical harm to at least two (2) [Agency] employees" and suspended him for ten days.¹ *Id.* at 24; *see also id.* at 5, 15. The Union timely grieved the suspension. *Id.* at 16. The matter was unresolved

1. The Agency also based the suspension on the grievant's conduct during an initial and follow-up meeting with his first-line and second-line supervisors regarding his use of official time. *See* Award at 5-6, 7, 8. Because the Agency does not except to the Arbitrator's findings regarding the grievant's conduct during these meetings, they are not before us.

and was submitted to arbitration. *See id.* At arbitration, the parties stipulated to the following issue: “[w]hether the [Agency] had just cause to suspend [the grievant] for two weeks ([e]ight [ten] hour work days)? If not, what shall the remedy be?” *Id.* at 3.

The Arbitrator determined that the grievant was acting in a representational capacity during the incident and that his conduct did not cross “the line of vigorous Union and management discussions.” *Id.* at 27; *see also id.* at 25. Moreover, the Arbitrator found that, although the Agency conducted a thorough, fair investigation before imposing discipline, and the grievant was not disciplined for serving as president of the Union, the Agency did not have just cause to suspend the grievant. *See id.* at 23-24, 29, 30. According to the Arbitrator, “there [was] no evidence in the record that the [g]rievant ‘threatened or attempted to inflict bodily harm without bodily contact.’” *Id.* at 28. The Arbitrator found that a reasonable person would not consider the grievant’s words and actions to be threatening. *Id.* at 27. In this regard, the Arbitrator determined that the grievant’s conduct was simply rude and boisterous and that the grievant’s statement “what are you going to do about it” was merely rude and provocative. *Id.* at 28; *see also id.* at 27. Additionally, the Arbitrator found that the grievant’s actions only could be considered “[d]iscourtesy,” a lesser offense listed in the Agency’s table of penalties. *Id.* at 28.

The Arbitrator ordered the Agency to set aside the grievant’s suspension, expunge the suspension from his personnel records, and pay the grievant backpay equal to what he would have earned had he not been suspended. *Id.* at 30. Additionally, the Arbitrator awarded interest and attorney fees as prescribed in 5 U.S.C. § 5596. *Id.*

III. Positions of the Parties

A. Agency’s Exceptions

The Agency argues that the award is based on a nonfact because “the [A]rbitrator was under the mistaken factual belief that he was without authority to mitigate the penalty imposed by management.” Exceptions at 6. Moreover, the Agency claims that, absent the Arbitrator’s misunderstanding, he likely would have ordered a different remedy. *See id.*

Also, the Agency contends that the Arbitrator exceeded his authority by not resolving “the second issue presented to him, i.e., ‘what shall the remedy be?’” *Id.* at 7 (quoting Award at 3). According to the Agency, the Arbitrator had the authority “to fashion an appropriate remedy and not just uphold or overturn the grievant’s suspension.” *Id.*

Finally, the Agency claims that the award is contrary to law. *Id.* at 3-6, 7-9. The Agency argues that the award is contrary to § 7102 of the Statute because, as in *AFGE, Local 987*, 63 FLRA 362 (2009), the grievant’s behavior exceeded the bounds of protected activity. *Id.* at 7-9.

Moreover, the Agency asserts that the Arbitrator’s award of attorney fees is contrary to law because the Arbitrator failed to make “specific findings with regard to any of the pertinent statutory requirements associated with the award of attorney fees.” *Id.* at 4; *see also id.* at 5. The Agency claims that the record is insufficient for the Authority to determine whether the Arbitrator properly awarded attorney fees. *Id.* at 5. As a result, the Agency asserts that the award “of attorney fees must be set aside, or[,] in the alternative, be remanded to the parties for resubmission to the [A]rbitrator[,] absent settlement.” *Id.* at 6.

B. Union’s Opposition

The Union argues that the award is not based on a nonfact. Opp’n at 2. According to the Union, the Arbitrator properly rescinded, rather than mitigated, the suspension because he found that the Agency failed to prove that the grievant was guilty of the offense with which he was charged. *Id.*

Also, the Union argues that the Arbitrator’s finding that the grievant’s actions constituted protected activity is not contrary to law. *Id.* at 2-3. The Union notes that the Arbitrator found that the grievant’s actions could not be considered threatening and “that the Agency, at most, proved that the [g]rievant acted in a discourteous manner.” *Id.*

Finally, the Union contends that the award of attorney fees is not contrary to law because the

Arbitrator found that the grievant was disciplined improperly and rescinded the suspension.² *Id.* at 2.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). The Authority has found that an exception challenging an arbitrator's legal conclusions will not demonstrate that an award is based on a nonfact. *See, e.g., U.S. Dep't of Health & Human Servs., Nat'l Insts. of Health*, 64 FLRA 266, 269 (2009); *NTEU*, 63 FLRA 198, 201 (2009); *AFGE, Local 3690*, 63 FLRA 118, 120 (2009).

The Agency contends that the award is based on a nonfact, but does not challenge any of the Arbitrator's factual findings. Instead, the Agency disputes the Arbitrator's opinion that, although arbitrators should not impose their own sense of appropriate discipline, they also should not hesitate to set aside discipline imposed by an agency when the record shows that it is excessive. Exceptions at 6; Award at 29. Consequently, the Agency's exception does not demonstrate that the award is based on a nonfact. *See AFGE*, 63 FLRA 627, 628 n.3 (2009) (denying the union's nonfact exception because it challenged the arbitrator's legal conclusion based on his interpretation of the evidence); *AFGE, Nat'l Border Patrol Council, Local 2455*, 62 FLRA 37, 40 (2007) (determining that the union failed to establish that the arbitrator's finding that an award of backpay was not authorized was based on a nonfact because his finding constituted a legal conclusion, rather than a factual determination).

Accordingly, we deny the Agency's exception.

2. The Union concedes that precedent requires an arbitrator to provide detailed analysis when granting attorney fees and allows the Authority to remand an award to the parties for resubmission to the arbitrator, absent settlement, if the arbitrator fails to make detailed findings. Opp'n at 1 n.1. Also, the Union notes that, although it "offered to submit a fee petition to the Arbitrator[,] [t]he Agency decided to file exceptions instead." *Id.*

B. The Arbitrator did not exceed his authority.

The Agency also contends that the Arbitrator exceeded his authority by not resolving "the second issue presented to him [at arbitration], i.e., 'what shall the remedy be?'" Exceptions at 7 (quoting Award at 3).

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999).

The Agency's contention that the Arbitrator exceeded his authority is without merit. The Arbitrator here clearly resolved the second issue presented to him by rescinding the grievant's suspension and awarding him backpay. Award at 30. Moreover, the Arbitrator's remedy is directly responsive and properly confined to the stipulated issues. *See U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement*, 65 FLRA 529, 536 (2011) (determining that arbitrator's award, which ordered that reprimand be voided and removed from grievant's file because it was not issued for appropriate cause, was directly responsive and properly confined to the stipulated issues, namely whether the reprimand was for appropriate cause and, if not, what remedy was appropriate). Consequently, the Agency has failed to demonstrate that the Arbitrator exceeded his authority by failing to resolve an issue submitted to arbitration.

Accordingly, we deny the Agency's exception.

C. The award is not contrary to law, rule, or regulation.

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) (*Ala. Nat'l Guard*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The Arbitrator's finding that the Agency did not have just cause to suspend the grievant is not contrary to law.

The Agency asserts that that the award is contrary to § 7102 of the Statute because the grievant's behavior exceeded the bounds of protected activity. Exceptions at 7-9.

Under the Statute, a union official acting in a representative capacity may not be disciplined for actions taken in performing representative duties unless such actions constitute flagrant misconduct or otherwise exceed the bounds of protected activity. *See, e.g., U.S. Dep't of Veterans Affairs Med. Ctr., Richmond, Va.*, 63 FLRA 553, 555 (2009) (*VAMC Richmond*); *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis Monthan Air Force Base, Tucson, Ariz.*, 58 FLRA 636, 636 (2003).

The Authority has held that arbitrators are required to apply statutory burdens of proof when resolving an alleged unfair labor practice. *See, e.g., U.S. GSA, Ne. & Caribbean Region, N.Y., N.Y.*, 60 FLRA 864, 866 (2005). By contrast, where an arbitrator resolves a claim under a collective bargaining agreement rather than a statutory claim, an arbitrator may establish and apply whatever burden the arbitrator considers appropriate unless a specific burden of proof is required. *Id.* In this connection, the Authority distinguishes allegations that an agency lacked just cause for discipline under a collective bargaining agreement from allegations of unlawful interference with protected rights under the Statute. *AFGE, Local 2923*, 65 FLRA 561, 563 (2011). In addition, when an arbitrator is not required to apply a statutory standard, alleged misapplications of that standard do not provide a basis for finding the arbitrator's award deficient. *See Soc. Sec. Admin.*, 65 FLRA 286, 288 (2010).

Here, the issue before the Arbitrator was whether there was "just cause to suspend [the grievant] for two weeks[.]" not whether the suspension violated §7102 of the Statute. Award

at 3. Moreover, although the Arbitrator found that the Agency did not have just cause to suspend the grievant, he made no determination regarding whether the Agency violated § 7102 of the Statute. *See id.* at 29, 30. Consequently, the Arbitrator was not required to apply statutory standards, and the Arbitrator's alleged misapplication of those standards does not provide a basis for finding the award contrary to law. *See AFGE, Local 2923*, 65 FLRA at 563 (finding that there was no need to address the union's claim that the arbitrator improperly applied the flagrant misconduct test when the issue before the arbitrator was whether there was "just and sufficient cause" for the suspension" rather than whether the suspension violated the Statute).

Accordingly, we deny the Agency's exception.

2. The record is insufficient for the Authority to resolve the Agency's exception regarding the Arbitrator's award of attorney fees.

Under the Back Pay Act, 5 U.S.C. § 5596, an award of attorney fees must be in accordance with the standards established under 5 U.S.C. § 7701(g). The threshold requirement for an award of attorney fees under the Back Pay Act is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in a withdrawal or reduction of the grievant's pay, allowances, or differentials. *See U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995). The Back Pay Act further requires that an award of fees must be: (1) in conjunction with an award of backpay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with standards established under 5 U.S.C. § 7701(g). *See id.* The prerequisites for an award under § 7701(g) are that: (1) the employee must be the prevailing party; (2) the award of attorney fees must be warranted in the interest of justice;³ (3) the amount of

3. 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 actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency; (3) the agency 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 Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980). The Authority also has

fees must be reasonable; and (4) the fees must have been incurred by the employee. *See id.*

The Arbitrator did not articulate his reasons for granting attorney fees, and the record, as submitted to the Authority, does not assist the Authority in determining the Arbitrator's basis for granting attorney fees. *See Award at 30* (awarding only reasonable attorney fees). In such situations, the Authority "take[s] the action necessary to assure that the award is consistent with applicable statutory standards." *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1695 (1998).

The record reveals that the grievant was the prevailing party. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 320, 324 (2010) (finding that the grievant was the prevailing party when the arbitrator ordered the agency to rescind the reprimand and make the grievant whole); *AFGE, Local 933*, 64 FLRA at 718, 719 (determining that the grievant was clearly the prevailing party when the arbitrator rescinded the grievant's suspension). However, the record does not permit the Authority to resolve whether the fees requested were "warranted in the interest of justice," were reasonable, or were incurred by the employee. *See AFGE, Local 933*, 64 FLRA at 719. Accordingly, because the Arbitrator has not explained sufficiently the determination of pertinent statutory requirements, and the record does not permit the Authority to resolve the Agency's exception, we remand this portion of the award to the parties for resubmission to the Arbitrator, absent settlement, to clarify, consistent with the foregoing standards, his reasons for awarding reasonable attorney fees. *See U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 63 FLRA 524, 528 (2009) (finding that the award of attorney fees should be remanded to the parties for resubmission to the arbitrator, absent settlement, so that the arbitrator could clarify his reasons for awarding reasonable attorney fees).

V. Decision

The attorney fee award is remanded to the parties for resubmission to the Arbitrator, absent settlement. The Agency's remaining exceptions are denied.

stated that an award of attorney fees is 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. *See, e.g., AFGE, Local 1148*, 65 FLRA 402, 404 n.* (2010). An award of attorney fees is warranted if any of these criteria is satisfied. *Id.*