

67 FLRA No. 93

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 405
(Union)

and

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

0-AR-4955

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DECISION

April 14, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Josef Rohlik issued an attorney-fee award (fee award) denying the Union's request for attorney fees. The issue before the Authority is whether the fee award is contrary to the Back Pay Act (BPA).¹ Because we find that the Arbitrator erred in concluding that the grievant was not a prevailing party in the underlying merits award (merits award), we remand the fee award to the parties, absent settlement, for resubmission to the Arbitrator.

II. Background and Arbitrator's Award

In the underlying merits award, the Arbitrator reduced the grievant's seven-day suspension to a written reprimand and determined that the grievant was entitled to backpay for any losses suffered during his suspension. As a part of its requested remedy, the Union stated: "[I]f back[p]ay is awarded, the Union would like the opportunity to request attorney fees pursuant to the [BPA]."² However, the merits award did not address attorney fees or the Union's request for an "opportunity to request attorney fees."³ The parties did not file

exceptions to the merits award, and it became final and binding.

The Union submitted a timely petition for attorney fees to the Arbitrator. In the fee award, the Arbitrator denied the petition finding that: (1) in the merits award, he "considered the Union[']s remedial request and refused to award attorney[] fees as a remedy";⁴ (2) the Agency had just cause to discipline the grievant; (3) the grievant was not a prevailing party; (4) the merits award is final under "Sections 9 and 10(4) of the Federal Arbitration Act" and "Section 301 of the [Labor-Management Relations Act];"⁵ and (5) the Arbitrator is *functus officio*.⁶

The Union filed exceptions to the fee award. The Agency did not file an opposition.

III. Analysis and Conclusions: The award is contrary to law.

The Union asserts a number of exceptions to the fee award, including exceptions claiming that the award is contrary to law because the Arbitrator erred in concluding that he is *functus officio*,⁷ and erred in determining that the grievant was not a prevailing party under the merits award.⁸ 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*.⁹ 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.¹⁰

A. The Arbitrator is not *functus officio*.

Under the doctrine of *functus officio*, once an arbitrator resolves matters submitted to arbitration, the arbitrator is generally without further authority to take action.¹¹ As a result, the doctrine of *functus officio* prevents arbitrators from reconsidering a final award.¹² However, the BPA confers jurisdiction on an arbitrator to consider a request for attorney fees at any time during the arbitration, or within a reasonable period of time after the

⁴ *Id.* at 1-2.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ Exceptions Br. at 9.

⁸ *Id.* at 7-8.

⁹ 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)).

¹⁰ See *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

¹¹ *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 64 FLRA 823, 825 (2010).

¹² See *AFGE, Local 2172*, 57 FLRA 625, 627 (2001) (citing *Devine v. White*, 697 F.2d 421, 433 (D.C. Cir. 1983)).

¹ 5 U.S.C. § 5596.

² Fee Award at 1.

³ *Id.*

arbitrator's award of backpay becomes final and binding.¹³ In this case, the merits award is silent as to attorney fees and the Union's request for an "opportunity to request attorney fees."¹⁴ Not until the fee award did the Arbitrator state that he had "considered the . . . request and refused to award attorney[] fees as a remedy."¹⁵ For these reasons, we conclude that the Arbitrator erred in relying on the merits award and the expiration of the period for filing exceptions to the merits award as the bases for finding that he is *functus officio*.

Accordingly, we find that the Arbitrator is not *functus officio* and, thus, has jurisdiction to consider the Union's request for attorney fees.

B. The fee award is contrary to the BPA.

The threshold requirement for entitlement to attorney fees under the BPA is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials.¹⁶ Once such a finding is made, the BPA further requires that an award of attorney fees 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 the standards established under 5 U.S.C. § 7701(g), which pertain to attorney-fee awards issued by the Merit Systems Protection Board (MSPB).¹⁷

Section 7701(g)'s standards for an award of attorney fees are as follows: (1) the employee must be the prevailing party; (2) the award of fees must be warranted in the interest of justice; (3) the amount of the fees must be reasonable; and (4) the fees must have been incurred by the employee.¹⁸ The Authority has held that an employee is a "prevailing party" under § 7701(g) if the employee receives "an enforceable judgment or settlement [that] directly benefitted [the employee] at the time of the judgment or settlement."¹⁹ The Authority has also held that, under MSPB precedent, "an employee who receives a mitigated penalty is considered to have received significant relief and is, therefore, a prevailing

party."²⁰ Here, it is undisputed that the grievant received a mitigated penalty.²¹ The merits award reduced the grievant's seven-day suspension to a written reprimand.²² Thus, the Arbitrator's determination that the grievant was "obviously not a prevailing party" is contrary to the BPA and § 7701(g).²³ Because we find that the Arbitrator erred in concluding that the grievant was not a prevailing party within the meaning of § 7701(g), we remand the fee award to the parties, absent settlement, for resubmission to the Arbitrator. Consistent with this decision, the Arbitrator shall make sufficient findings under the BPA and § 7701(g) in considering the Union's request for attorney fees. In view of this decision, we find that it is not necessary to address the Union's remaining exceptions.

IV. Decision

We set aside the fee award and remand it to the parties, absent settlement, for resubmission to the Arbitrator.

¹³ See *AFGE, Local 1148*, 65 FLRA 402, 403 (2010).

¹⁴ Merits Award at 16-18; Fee Award at 1.

¹⁵ Fee Award at 2.

¹⁶ E.g., *NAGE, Local R5-66*, 65 FLRA 452, 453 (2011) (*NAGE*).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *AFGE, Local 987*, 66 FLRA 143, 148 (2011) (alteration in original) (citation omitted) (applying standard to Back Pay Act claim).

²⁰ *NAGE*, 65 FLRA at 454 (citing *Hutchcraft v. Dep't of Transp.*, 55 M.S.P.R. 138, 142 (1992), *aff'd*, 996 F.2d 1235 (Fed. Cir. 1993)).

²¹ Merits Award at 18.

²² *Id.*

²³ Fee Award at 2.