70 FLRA No. 12

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 2554 AND 2595
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
U.S. BORDER PATROL,
EL CENTRO AND YUMA SECTOR
(Agency)

0-AR-5202

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DECISION

November 18, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member DuBester, dissenting in part)

I. Statement of the Case

Arbitrator Katherine J. Thomson issued a merits award in 2012 sustaining the Union's grievance, but issued an award in 2016 that denied the Union's subsequent request for attorney fees (fee petition) because it was untimely filed.

The substantive question before us is whether the Arbitrator's timeliness determination is contrary to the Fair Labor Standards Act (FLSA).[1] As the Union does not demonstrate that the Arbitrator erred, as a matter of law, in reaching this conclusion, the answer is no.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency "improperly compensated agents for . . . overtime work with 'administratively uncontrollable overtime' pay rather than . . . the correct method of compensation."[2]

In the merits award, the Arbitrator sustained the grievance and found that the Agency was liable for liquidated damages to all affected agents. No exception was filed to the merits award, and it became final and binding in July of 2012.

Initially, the parties agreed to retain the Arbitrator's jurisdiction "over the award for a period of [twelve] months for purposes of resolving any dispute over implementation of the remedy, but not to reconsider the merits of the decision."[3] Prior to the expiration of the Arbitrator's jurisdiction, the parties agreed to extend the Arbitrator's jurisdiction indefinitely, but their attempts to reach a settlement for the backpay and attorney fees were unsuccessful.

In December of 2015, more than three years after the merits award became final and binding, the Union requested an attorney-fee determination from the Arbitrator, claiming that it "is ripe for adjudication [because the Union] does not anticipate incurring any additional fees or costs."[4]

In response to the Union's petition, the Agency argued that the fee petition was untimely under Merit Systems Protection Board (MSPB) guidelines as well as Rule 54(d) of the Federal Rules of Civil Procedure (Rule 54(d)).[5] In response to the Agency's opposition, the Union argued that MSPB guidelines on attorney fees and Rule 54(d) did not apply because FLSA proceedings differ from disciplinary cases. The Agency filed a "[s]ur-[r]eply" conceding that the Authority has not directly addressed the application of 5 C.F.R. § 1201.203(d)[6] in FLSA matters, but arguing that the "sixty days allowed for by the MSPB is lengthier than what is generally applied to FLSA cases."[7]

On this issue, the Arbitrator acknowledged that "[n]either party has pointed to a time limit in the [FLSA], under [Federal Labor Relations Authority (FLRA)] case law or regulations, or in the collective[-]bargaining agreement for filing a [fee petition]."[8] In such instances, the Arbitrator explained, "the parties are in a situation similar to parties proceeding under the Back Pay Act [(BPA)] before the [MSPB]"[9] and that fee petitions must be filed within a "reasonable time."[10] The Arbitrator thus determined that the Union: (1) did not obtain an extension of time to file its fee petition; (2) failed to point

[1] 29 U.S.C. § 201.
[2] Award at 2.
[3] *Id.* at 3.
[4] Mot. for Fee Award at 5.
[5] Fed. R. Civ. P. 54(d).
[6] 5 C.F.R. § 1201.203(d).
[7] Opp'n, Ex. C at 2.
[8] Award at 5.
[9] *Id.*
[10] *Id.* (citing *Phila. Naval Shipyard*, 32 FLRA 417, 421 (1988)).

to any persuasive authority to support a conclusion that filing a three-year-old petition falls within a "reasonable time"; and (3) did not have good cause to delay filing the fee petition.[11] Accordingly, the Arbitrator denied the Union's fee petition.

The Union filed exceptions to the Arbitrator's fee award, and the Agency filed an opposition.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Union's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[12] the Authority will not consider any argument that could have been, but was not, presented to the arbitrator.

In its exceptions, the Union argues that it was tasked with additional work to provide a list of claimants to the Arbitrator following the issuance of the merits award and that this additional work extended the deadline for filing a fee petition.[13] The Agency argues that the Union never presented this argument before the Arbitrator.[14] However, the record establishes that the Union raised this argument before the Arbitrator.[15] Accordingly, we will consider this argument.

Additionally, the Union argues that since "there was no time limit in the [FLSA], under FLRA case law or regulations, or in the collective[-]bargaining agreement for filing a [fee petition] . . . the Arbitrator should have followed the [U.S. Court of Appeals for the Eleventh Circuit's] approach . . . that, absent a controlling local rule, 'only unfair surprise or prejudice' may render untimely" a fee petition.[16] Similarly, the Union also argues that the Arbitrator should have applied the equitable doctrine of laches, holding that "[a filing] delay alone, however, is not sufficient justification for dismissal of a fee petition" unless there is a clear change in position or detrimental reliance.[17] In this regard, the Union claims that unlike "a simple [BPA matter] . . . the Arbitrator's ruling ignores the realities faced in a complex FLSA case, such as the instant one involving more than 1000 claimants and over 30,000 pages of documents."[18]

There is no evidence that, before the Arbitrator, the Union raised any arguments or precedent concerning unfair surprise, prejudice, or laches. It could have done so because, as discussed above, the record shows that the parties extensively litigated the matter of the fee petition's timeliness prior to the issuance of the fee award. Because the Union could have raised – but did not raise – these arguments and related precedent before the Arbitrator, we dismiss these exceptions under §§ 2425.4(c) and 2429.5.[19]

IV. Analysis and Conclusion: The Union does not demonstrate that the fee award is contrary to law.

The Union contends that the fee award is contrary to law because the Arbitrator erroneously determined that its fee petition was untimely.[20]

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.[21] 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.[22] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[23]

The Union argues that the award is contrary to law because the Arbitrator erroneously applied the "[BPA]'s timeliness requirement[]."[24] The Union contends that no law, rule, regulation, or case law prescribes a timeliness requirement in FLSA cases.[25]

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[11] *Id.* at 6.
[12] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also* AFGE, Local 3571, 67 FLRA 218, 219 (2014).
[13] Exceptions Br. at 15-16.
[14] Opp'n Br. at 3.
[15] Opp'n, Ex. B at 7 ("[A] great deal of work may be involved post award in calculating and verifying damages . . . as is evident in the instant proceeding.").
[16] Exceptions Br. at 14 (quoting *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1051-52 (11th Cir. 1989) (citation omitted); *see also id.* at 12-13 (citing *Brown v. Palmetto*, 681 F.2d 1325, 1326-27 (11th Cir. 1982)) (arguing Arbitrator should have found the fee petition timely, absent unfair surprise or prejudice to the Agency).
[17] *Id.* at 14; *see also id.* at 13-15 (citing *Fulps v. Springfield*, 715 F.2d 1088, 1096 (6th Cir. 1983)) (arguing Arbitrator should have applied the doctrine of laches).
[18] *Id.* at 11.
[19] *See NTEU, Chapter 52*, 69 FLRA 308, 308 (2016) (finding that the union should have known to raise the agency's violation of the parties' agreement to the arbitrator and dismissing the exceptions).
[20] Exceptions Br. at 7.
[21] *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)).
[22] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[23] *U.S. Dep't of the Navy Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (citation omitted).
[24] Exceptions Br. at 7.
[25] *Id.* at 10.

Specifically, the Union makes two arguments. First, the Union claims that because the FLSA establishes an "independent statutory right to attorney fees" to the prevailing party, attorney fees are mandatory and there is no timeliness requirement.[26] Second, the Union alleges that the Arbitrator's indefinite jurisdiction required her to authorize attorney fees because the "award of [attorney] fees sought by the [f]ee [petition] was part of the remedy to which the employees are entitled," especially given that the Arbitrator tasked the Union with "months of additional work" after the merits award was final.[27] We find the Union's arguments unpersuasive.

In this case, it is undisputed that the Union is the prevailing party. And it is equally undisputed that the FLSA provides for attorney fees to the prevailing parties. However, the Arbitrator determined that the Union's filing of a fee petition over three years after the award became final and binding was unreasonable.[28] And – other than the principles and precedent that we have found barred in Section III. above – the Union cites no other authority to support its argument that the Arbitrator erred, as a matter of law, in concluding that the fee petition was untimely here. Accordingly, regardless of whether the Arbitrator properly or improperly relied on BPA principles in her *reasoning*, the Union has not demonstrated that the Arbitrator's *conclusion* – that the fee petition was untimely – is contrary to law in this respect.[29]

Finally, the Union argues that the Arbitrator erred by denying its fee petition in two respects: (1) by retaining jurisdiction to "resolve any further disputes that require adjudication, including, but not limited to a motion for attorney fees";[30] and (2) tasking the Union with "months of additional work"[31] after the award became final. The Union misreads the award. The Arbitrator did not find that she was without jurisdiction to address the Union's fee petition. Rather, the Arbitrator denied the Union's fee petition because it was untimely. Additionally, the Union also fails to support how the assignment of additional work after the merits award became final excused the late filing of any petition for attorney fees as a matter of law.[32] Therefore, the Union's arguments provide no basis for finding that the award is contrary to law.[33]

Accordingly, we deny the Union's contrary-to-law exceptions.

V. Decision

We dismiss, in part, and deny, in part, the Union's exceptions.

[26] *Id.* at 7-8.
[27] *Id.* at 9.
[28] Award at 6.
[29] *See, e.g.*, *GSA*, 70 FLRA 14, 15 (2016) (in applying de novo review, the Authority assesses whether an arbitrator's legal conclusions – not his or her underlying reasoning – are consistent with the applicable standard of law).
[30] Exceptions Br. at 9.
[31] *Id.*
[32] *Id.*

[33] Member Pizzella would stress that the Authority will not vacate an Arbitrator's award unless the exception demonstrates that the Arbitrator's legal conclusion is inconsistent with law. He would have found that the Arbitrator's adoption of a reasonable timeliness standard, though here ultimately reached by analogy, is within the Arbitrator's discretion and is consistent with the Authority's precedent that allows an arbitrator to determine a standard of review when there is no such established standard.

Member DuBester, dissenting in part:

Disagreeing with my colleagues, I would grant the Union's exception claiming that the award is contrary to law because the Arbitrator erroneously applied the Back Pay Act (BPA)'s "reasonable time" requirement. When the Authority determines whether an award is contrary to law, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law, based on the arbitrator's underlying factual findings.[1]

The Arbitrator's timeliness conclusion in this case relies on precedent that merely cites the "extensive period of time" (three-and-one-fourth years) that elapsed between an award becoming final and binding and a union's submission of its attorney-fee petition.[2] But this precedent, which provides the foundation for the Arbitrator's ruling, does not include consideration of circumstances comparable to those in this case. These circumstances, as found by the Arbitrator or undisputed in the record, explain why the Union waited to submit its attorney-fee petition until after the parties' protracted settlement discussions finally ended – unsuccessfully.

Circumstances that demonstrate the reasonableness of the time the Union waited to submit its fee petition include that "the Arbitrator, in the Merits Award, tasked the Union with months of additional work reviewing tens of thousands of pages of Agency documents in order for the Union to prepare the list of claimants, which ended up totaling more than 1000 agents";[3] that "[t]he parties agreed to extend the Arbitrator's jurisdiction several times due to the complicated nature of the remedy calculations and efforts at settlement";[4] that the last agreement the parties reached concerning the Arbitrator's jurisdiction was to extend it "indefinite[ly]";[5] that the Union submitted its fee request only after the Union had a reasonable basis for "not anticipat[ing] incurring any additional fees or costs" – because the parties' protracted attempts to reach a settlement of the backpay and attorney-fee issues had finally ended – unsuccessfully;[6] and that the parties' settlement discussions extended throughout most of the time that elapsed between when the award issued and the Union submitted its fee request.[7]

Therefore, I agree with my colleagues that the Arbitrator's determination to apply the BPA's "reasonable time" requirement does not render the award deficient. However, against the background described above, and noting particularly the filing of the fee request shortly after the conclusion of settlement discussions, I would find that the request satisfied the BPA's "reasonable time" requirement. Accordingly, contrary to my colleagues, I would set the award aside and remand for further proceedings.

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[1] *E.g.*, *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[2] *Dep't of the Air Force Headquarters, 832D Combat Support Grp. DPCE, Luke Air Force Base, Ariz.*, 32 FLRA 1084, 1094 (1988).
[3] Exceptions Br. at 9.
[4] Award at 3.
[5] *Id.*
[6] Mot. for Fee Award at 5.
[7] *See id.*