70 FLRA No. 3

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3690
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MIAMI, FLORIDA
(Agency)

0-AR-5123
(69 FLRA 154 (2015))

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DECISION

October 13, 2016

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

I. Statement of the Case

In an award (first award), Arbitrator Thomas G. Humphries found that an employee's (the grievant's) actions warranted admonishment; however, the Arbitrator reduced the grievant's two-day suspension to a reprimand and awarded backpay for those two days. The Arbitrator also denied the Union's request for attorney fees. In *AFGE, Local 3690* (*AFGE I*),[1] the Authority determined that the record was insufficient to resolve the merits of the attorney-fee issue and remanded the issue back to the parties for resubmission to the Arbitrator, absent settlement.

The Arbitrator then issued an award (second award), in which he again denied the Union's attorney-fee request. The Union filed exceptions.

The Union alleges that the denial of attorney fees in the second award is contrary to the Back Pay Act[2] (Act). Because the Union does not demonstrate that the Arbitrator erred in finding that the grievant's discipline was "not an 'unjustified or unwarranted' personnel action"[3] – a threshold requirement for attorney fees under the Act – we deny the Union's exception.

The Union also argues that the Arbitrator exceeded his authority because he failed to apply established law. Because the Union bases this exception on its contrary-to-law exception, which we deny, we also deny this exception.

II. Background and Arbitrator's Awards

A. The First Award and *AFGE I*

As *AFGE I* sets forth the facts of this case in detail, we will only briefly summarize them here.

The Agency had suspended the grievant for two days after the grievant attempted to board an airplane with a personal firearm, stating that he was a federal law-enforcement officer; the grievant was not authorized to carry a personal firearm on an airplane. The Union then filed a grievance. The parties failed to resolve the grievance, and they submitted it to arbitration.

The Arbitrator found that the grievant had misused his position, but the Arbitrator reduced the grievant's two-day suspension to a reprimand and awarded backpay for the two days. In doing so, the Arbitrator did not make a finding that the suspension violated the parties' agreement or any law, rule, or regulation. Additionally, the award was silent as to attorney fees, but the Arbitrator emailed the parties and informed them that the award denied attorney fees.

The Union filed exceptions to the Arbitrator's denial of attorney fees. The Authority found that the award did not have "a fully articulated, reasoned decision resolving the Union's attorney-fee request as required by the [Act] and [5 U.S.C.] § 7701(g)."[4] As such, the Authority remanded the attorney-fee issue back to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

[1] 69 FLRA 154 (2015).
[2] 5 U.S.C. § 5596.
[3] Second Award at 6 (citations omitted).
[4] *AFGE I*, 69 FLRA at 155 (citation omitted).

B. The Second Award

The parties resubmitted the issue to the Arbitrator, and the Arbitrator issued the second award. In this award, the Arbitrator found that "the [g]rievant's discipline resulted from his misconduct and was therefore . . . not an 'unjustified or unwarranted' personnel action."[5] The Arbitrator also found that "based on the information the Agency had at the time, its decision to discipline the [g]rievant had been neither arbitrary nor lacking in some degree of merit" and that "[n]either is it demonstrated in the record or by consideration of the totality of competent and compelling evidence that an award of attorney fees would be in the [interest] of justice."[6] Based on these findings, the Arbitrator denied the Union's request for attorney fees. In doing so, again, the Arbitrator did not make a finding that the grievant's suspension violated the parties' agreement or any law, rule, or regulation.

The Union filed exceptions to this award.

III. Preliminary Matters

A. We will not consider the Agency's opposition.

The time limit for filing an opposition to exceptions is thirty days after the date of service of those exceptions.[7] Authority time limits that can be waived may only be waived where a party demonstrates "extraordinary circumstances" justifying the waiver.[8] Without a waiver – and because the Agency did not request an extension for filing[9] – the Agency's opposition to the Union's exceptions was due on May 16, 2016. On May 24, 2016, the Agency filed its opposition.

The Authority's Case Intake and Publication Office issued an order directing the Agency to show cause why the Authority should consider the opposition, as it appeared to be untimely. The Agency responded, conceding that its opposition was untimely and admitting that it could not satisfy the "extraordinary circumstances" to justify a waiver.[10]

Instead, the Agency requests that the Authority take official notice of the opposition under § 2429.5 of the Authority's Regulations.[11] Section 2429.5 of the Authority's Regulations states that the Authority "will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator. The Authority may, however, take official notice of such matters as would be proper."[12] Here, the Agency requests that we take official notice of its untimely opposition. The Agency states that its opposition does "not assert[] new facts or evidence that was not previously presented to the [A]rbitrator."[13]

In the past, the Authority has taken official notice of its own decisions,[14] relevant precedent,[15] regulations,[16] guidance,[17] and Authority proceedings.[18] Here, the Agency presents none of these or similar matters, but attempts to circumvent Authority regulations concerning the submission of a timely opposition.[19] Taking official notice of the Agency's untimely opposition would not be proper here, and we decline to do so.

Because the Agency's opposition is untimely and the Agency has conceded that it cannot demonstrate extraordinary circumstances warranting a waiver of the time limit, we will not consider the Agency's opposition.

[5] Second Award at 6 (quoting *AFGE, Local 2718 v. Dep't of Justice*, 768 F.2d 348, 350 (Fed. Cir. 1985)).
[6] *Id.*
[7] 5 C.F.R § 2425.3(b).
[8] *Id.* § 2429.23(b).
[9] *Id.* § 2429.23(a) (The Authority "may extend any time limit . . . for good cause . . . . Requests for extensions of time shall be in writing and received . . . not later than five . . . days before the established time limit for filing.").
[10] Agency's Resp. at 1.
[11] 5 C.F.R. § 2429.5.
[12] *Id.*
[13] Agency's Resp. at 1.
[14] *AFGE, Local 3652*, 68 FLRA 394, 396 (2015) ("[T]he Authority may take official notice of its own issued decisions.").
[15] *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 68 FLRA 932, 935 (2015) ("[W]here necessary to resolve the parties' arguments that are properly raised in the exceptions and opposition, we will take official notice of all current, relevant precedent.").
[16] *AFGE, Local 2142*, 58 FLRA 692, 693 (2003) ("The Authority has generally taken official notice of documents that were not presented for the arbitrator's consideration when those documents have been of widespread application, and not applicable only to one agency."); *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 875, 878 (1990) (taking official notice of agency directive where authenticity unchallenged).
[17] *U.S. DHS, ICE*, 66 FLRA 13, 14 n.2 (2011) ("Because the . . . guidance relates to the disposition of the issues involved in this case, we take official notice of it.").
[18] *U.S. Dep't of the Air Force, Air Force Material Command, Eglin Air Force Base, Hurlburt Field, Fla.*, 66 FLRA 375, 377 n.4 (2011) ("The Authority consistently has found it appropriate to take official notice of other FLRA proceedings.").
[19] 5 C.F.R § 2425.3(b).

B. We will not consider the parties' supplemental submissions.

Section 2429.26(a) of the Authority's Regulations states that the Authority "may in [its] discretion grant leave to file" documents other than those specifically listed in the Regulations (supplemental submissions).[20] When a party seeks to file a supplemental submission, the Authority generally requires the party to request leave to file it.[21] Where the Authority declines to consider a supplemental submission, the Authority also declines to consider a response to that submission because the response is moot.[22]

The Union filed a supplemental submission entitled "Union's request that exceptions be deemed unopposed," without requesting leave to file it under § 2429.26.[23] In response, the Agency requested leave to file, and did file, a supplemental submission in opposition to the Union's request. Because the Union did not request leave to file this supplemental submission, we will not consider it.[24] Consequently, the Agency's submission in response is moot, and we will not consider it.[25]

Additionally, the Union filed a second supplemental submission without requesting leave to file it. Again, because the Union did not request leave to file this supplemental submission, we will not consider it.[26]

IV. Analysis and Conclusion

The Union argues that the second award is contrary to law.[27] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo.[28] 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.[29] In making this assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[30]

As the Authority noted in *AFGE I*, the threshold requirement for the entitlement to attorney fees under the Act is a finding that an employee (1) "ha[s] been affected by an unjustified or unwarranted personnel action" (2) "which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee."[31] A violation of a collective-bargaining agreement or a law, rule, or regulation constitutes an unjustified or unwarranted personnel action under the Act.[32]

Here, although the Arbitrator awarded to the grievant "back[]pay for the period of his [s]uspension,"[33] the Arbitrator found that the grievant's discipline was "not an 'unjustified or unwarranted' personnel action."[34] Consequently, the Arbitrator found that the award did not satisfy the threshold requirement for attorney fees under the Act.

The Union argues that, contrary to the Arbitrator's findings, the Agency "did commit an unwarranted personnel action."[35] On this point, the Union contends that the Agency committed a prohibited personnel practice,[36] which is a violation of 5 U.S.C. § 2302. As a violation of law, a prohibited personnel practice would constitute an unjustified or unwarranted personnel action under the Act.[37] However, the Arbitrator made no finding that the Agency committed a prohibited personnel practice. Further, the Union neither identifies which of the prohibited personnel practices set forth in 5 U.S.C. § 2302(b) it believes the Agency committed, nor explains how the Agency's actions constituted a prohibited personnel practice. Therefore, the Union's claim that the Agency committed a prohibited personnel practice amounts to a bare assertion, and we reject it.[38]

The Union does not allege – and the Arbitrator did not find – any other violation of a law, rule, or regulation. The Union also does not allege – and the

[20] *Id.* § 2429.26(a).
[21] *SSA, Region VI*, 67 FLRA 493, 496 (2014).
[22] *AFGE, Local 3652*, 68 FLRA 394, 396-97 (2015) (*Local 3652*) (citation omitted).
[23] Union's Supp. Submission at 1.
[24] *SPORT Air Traffic Controllers Org.*, 68 FLRA 107, 107-08 (2014) (*SPORT*).
[25] *Local 3652*, 68 FLRA at 396-97.
[26] *SPORT*, 68 FLRA at 107-08.
[27] Exceptions at 2-3.
[28] *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)).
[29] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[30] *E.g.*, *AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016).
[31] 5 U.S.C. § 5596(b)(1).
[32] *AFGE, Council of Prison Locals, Local 4052*, 68 FLRA 38, 43 (2014) (*Local 4052*) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012); *AFGE, Local 1592*, 64 FLRA 861, 861-62 (2010)).
[33] First Award at 19.
[34] Second Award at 6 (citation omitted).
[35] Exceptions at 12.
[36] *Id.* at 7 ("[A] prohibited personnel practice was committed.").
[37] *Local 4052*, 68 FLRA at 43 ("A violation of . . . a law, rule, or regulation constitutes an unjustified or unwarranted personnel action under the Act.").
[38] *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 819, 821 (2010).

Arbitrator did not find – that the grievant's suspension violated the parties' agreement. As such, the Union does not demonstrate that the Arbitrator erred in finding that the grievant's discipline was "not an 'unjustified or unwarranted' personnel action."[39] Consequently, the Union fails to establish the threshold requirements for an award of attorney fees, or that the Arbitrator erred in denying attorney fees.

The Union also argues[40] that it was the prevailing party and that attorney fees are warranted in the interest of justice.[41] Because the Arbitrator found that the Union did not meet the threshold requirements for an award of attorney fees, we need not address these arguments.

For the above reasons, we deny the Union's contrary-to-law exception.

Additionally, the Union argues that the Arbitrator exceeded his authority because "he ignored the law and the precedents in the standards for granting or denying attorney[] fees."[42] Because the Union bases this exception on its contrary-to-law exception, which we have denied, we also deny this exception.[43]

Consequently, we deny the Union's exceptions.

V. Decision

We deny the Union's exceptions.

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[39] Second Award at 6 (citations omitted).

[40] Exceptions at 11 ("[T]he Arbitrator failed to apply the analysis for the interest[-]of[-]justice standard."); *id.* at 13 (The Arbitrator exceeded his authority because "[t]he Union was indeed the prevailing party and has clearly complied with the 'interest[-]of[-]justice' standard.").

[41] *See NAGE SEIU, Local 551*, 68 FLRA 285, 289 (2015) ("[I]n addition to the threshold requirements, the [Act] further requires that an award of 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 standards established under 5 U.S.C. § 7701(g), which pertains to attorney fees awarded by the Merit Systems Protection Board. The prerequisites for an award under 5 U.S.C. § 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) the amount of fees must be reasonable; and (4) the fees must have been incurred by the employee." (citations omitted)).

[42] Exceptions at 13.

[43] *Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1007 (2015) (denying exceptions based on exceptions already denied).