74 FLRA No. 31

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 506
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
(Agency)

0-AR-5967

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DECISION

January 17, 2025

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

The Union filed a petition for attorney fees after receiving a merits award sustaining a grievance concerning overtime under the Fair Labor Standards Act (FLSA).[1] In a fee award, Arbitrator Christian A. Bourgeacq awarded attorney fees in an amount lower than that requested by the Union. The Union filed a contrary-to-law exception to the fee award, arguing that the Arbitrator should have calculated fees using the attorneys' current hourly rates. Because the Union does not demonstrate it was contrary to law for the Arbitrator to award fees using the attorneys' rates at the time they rendered legal services, we deny the Union's exception.

II. Background and Arbitrator's Fee Award

The Union filed a grievance alleging the Agency misclassified certain employees (the grievants) as exempt from the FLSA's overtime requirements. In September 2017, a different arbitrator issued a merits award sustaining the grievance, and directed the parties to agree upon a remedy. The parties' resolution of the remedy issue was delayed for various reasons outside their control, but they ultimately agreed on a backpay amount. In 2024, the parties selected the Arbitrator to address the Union's entitlement to attorney fees and costs. The Union filed a fee petition, requesting $416,534.00 in attorney fees and $9,144.46 in costs.

Noting that the parties did not stipulate to the issue, the Arbitrator framed the issue as "[w]hether the Union is entitled to recover its attorney[] fees and costs and, if so, what shall be the amounts?"[2]

The Arbitrator concluded the Union was entitled to attorney fees and costs because it prevailed on its FLSA claims. In determining the reasonableness of the requested amount of attorney fees, he applied the attorneys' hourly rates consistent with the adjusted *Laffey* matrix, which sets forth a method for determining the hourly rates for attorneys in the Washington, D.C. area.[3] However, the Arbitrator rejected the Union's claim that, to account for the delayed payment of attorney fees, he was required to apply the attorneys' current hourly rates rather than the hourly rates that applied when they rendered the legal services (the historical rates).

In reaching this conclusion, the Arbitrator rejected the Union's reliance on the U.S. Supreme Court's decision in *Missouri v. Jenkins* (*Jenkins*)[4] because the Court awarded fees under 42 U.S.C. § 1988, which "is inapplicable to the instant case."[5] Additionally, he found that the Court's rationale for applying current rather than historical rates in that decision "was to allow for delay in payment of attorneys' fees,"[6] a rationale that he found the Authority "rejected"[7] in *U.S. Department of the Army, U.S. Army Dental Activity, Fort Bragg, North Carolina* (*Army*).[8] Applying the historical rates, he awarded the Union $281,738.00 in attorney fees. Additionally, the Arbitrator awarded $4,570.00 for costs.

On June 6, 2024, the Union filed an exception to the fee award. On July 8, 2024, the Agency filed an opposition to the exception.

[1] 29 U.S.C. § 216.
[2] Fee Award at 2.
[3] *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Carswell, Tex.*, 65 FLRA 960, 962 n.5 (2011).
[4] 491 U.S. 274, 282-83 (1989).
[5] Fee Award at 13.
[6] *Id.* (citing *Jenkins*, 491 U.S. at 282-83).
[7] *Id.*
[8] 65 FLRA 54 (2010).

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Union's contrary-to-law argument.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[9] In its opposition, the Agency argues that the Authority should not consider the Union's argument that it is entitled to attorney fees based on current rates because, in its fee petition, "the Union barely reference[d] the issue of whether the hourly rates used should be current rates" or historical rates.[10] The Agency further argues that the "'sole' argument" the Union cited to the Arbitrator was *Jenkins*, even though the Union could have raised the additional arguments and authorities in its exception below.[11]

In its fee petition, the Union argued that the Arbitrator should award attorney fees at the current rates rather than at the historical rates.[12] As to the Union's citation to additional authorities on exception, those were raised in response to authority cited in the fee award,[13] or are related to the arguments the Union raised to the Arbitrator.[14] Additionally, the Union asserts on exception that the Arbitrator applied an incorrect legal standard,[15] and there is no basis in the record for finding that, before the Arbitrator, the Union should have known the Arbitrator would have applied that standard. Thus, the Union could not have known to make those arguments, or cite authority supporting such arguments, until it received the fee award.[16]

Consequently, we find §§ 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Union's contrary-to-law arguments, and we address them below.[17]

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

The Union argues that the Arbitrator's application of historical rates to calculate its entitlement to attorney fees is contrary to law.[18] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[19] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[20] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[21]

Citing the Arbitrator's reference to *Army*, the Union argues that the Arbitrator erroneously applied the "interest of justice" standard applicable to cases involving the Back Pay Act to its fee application.[22] According to the Union, that standard is "'irrelevant' to the fee determination in an FLSA case."[23] However, the Union's argument misunderstands the fee award.

As noted, the Arbitrator – citing *Jenkins* – concluded that the legal rationale for awarding current hourly rates in a fee application is to compensate the prevailing party "for delay in payment of attorneys' fees."[24] He then found that the Authority "rejected" this rationale in *Army*.[25]

In *Army*, the Authority considered whether an arbitrator's fee award arising from a grievance contesting a disciplinary action was consistent with 5 U.S.C. § 7701(g)(1) in two respects: (1) whether fees were warranted in the "interest of justice,"[26] and (2) whether the amount of fees – including the hourly rate – was reasonable under § 7701(g)(1).[27] The arbitrator in *Army*

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[9] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DHS, Citizenship & Immigr. Servs.*, 73 FLRA 82, 83-84 (2022) (citing 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Loc. 3627*, 70 FLRA 627, 627 (2018)).

[10] Opp'n at 5; *see id.* at 5-7.

[11] *Id.* at 6-7.

[12] Exception, Attach. 3 (Fee Petition) at 9, 10 n.5.

[13] Exception at 7-8 (citing Fee Award at 13).

[14] Fee Petition at 10-11 & n.5 (arguing entitlement to fees under FLSA and citing *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc) (*Cumberland*)); Exception at 8-10 (citing FLSA cases), 10-11 (citing cases that relied on *Jenkins*).

[15] Exception at 7-8.

[16] *E.g.*, *U.S. Dep't of State, Passport Servs.*, 73 FLRA 631, 633 (2023) (finding argument not barred where party could not have known to raise argument at arbitration).

[17] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 74 FLRA 13, 15 (2024) (finding contrary-to-law argument not barred under §§ 2425.4(c) and 2429.5 of Authority's Regulations).

[18] Exception at 7 ("The Union is only challenging the Arbitrator's legal conclusion that the Union's attorneys are only entitled to recover fees at the hourly rates in effect at the time the legal services were performed rather than the current hourly rates in place at the time of the fee petition.").

[19] *U.S. DOJ, Fed. BOP, U.S. Penitentiary McCreary, Pine Knot, Ky.*, 73 FLRA 865, 867 (2024) (citing *U.S. Dep't of VA, Winston-Salem, N.C.*, 73 FLRA 794, 797 (2024)).

[20] *Id.*

[21] *Id.*

[22] Exception at 8.

[23] *Id.* (quoting *IFPTE, Loc. 529*, 57 FLRA 784, 786 (2002)).

[24] Fee Award at 13.

[25] *Id.*

[26] *Army*, 65 FLRA at 57.

[27] *Id.* at 57-58.

explained that he awarded fees at the attorneys' current – rather than historical – rates because "interest is not payable on attorney fees."[28] In modifying the fee award to apply historical rates, the Authority noted that the Merit Systems Protection Board (MSPB) "has recognized that there is no explicit provision for interest on attorney fees" in § 7701(g)(1) and, consequently, § 7701(g)(1) "does not permit the retroactive application of current hourly rates to account for delay in payment of attorney fees."[29]

Reading the Arbitrator's reference to *Army* in context, it is apparent that the Arbitrator did not apply the "interest of justice" standard in § 7701(g)(1) to reject the Union's argument that it was entitled to fees based on current rates. Rather, the Arbitrator was adopting *Army's* conclusion that current rates cannot be used as a means of compensating a prevailing party for delayed payment of attorney fees where the statutory basis for the fee award does not contain an explicit provision allowing for interest on attorney fees. Moreover, at no point in the fee award does the Arbitrator explicitly apply § 7701(g)(1) or the "interest of justice" standard to the Union's fee request. Therefore, we reject the Union's argument on this point.[30]

The Union more generally argues that, because the FLSA "provides an independent statutory right to attorney fees" for prevailing parties, the Arbitrator erred by failing to calculate the Union's fee entitlement based on current rates.[31] For support, the Union cites FLSA decisions in which federal courts awarded adjusted historic hourly fees – by either applying current hourly rates or adjusting historic rates for inflation – in order to compensate for delays in their payment.[32]

However, the U.S. Supreme Court has held that a claim for compensation to account for a delay in payment of attorney fees is tantamount to a request for interest on the fees.[33] Further, as the Authority has acknowledged, "[a]n allowance of interest on a claim against the United States, absent constitutional requirements, requires an explicit waiver of sovereign immunity by Congress."[34] Applying these principles, the United States Court of Appeals for the D.C. Circuit has held that, "absent an explicit waiver of sovereign immunity [allowing for interest], attorneys' fees awarded against the federal government must be based on historical rates."[35] The cases that the Union cites to support its position are inapposite because they are not cases against the United States, and therefore, did not require a waiver of sovereign immunity as a condition for the fee awards.[36]

The Union's claim – that the Arbitrator should have applied current rates to compensate for delay in payment – is tantamount to a request for interest on its attorney fees. The FLSA does not provide a statutory right to interest on attorney fees,[37] and thus does not waive the federal government's sovereign immunity with respect to

[28] *Id.* at 56 (quoting arbitrator).
[29] *Id.* at 58 (citing *Krape v. DOD*, 97 M.S.P.R. 430, 435 (2004)).
[30] *U.S. Dep't of the Army, Fort Huachuca, Ariz.*, 74 FLRA 18, 20 (2024) (denying contrary-to-law exception based on misunderstanding of award (citing *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 420 (2023); *NTEU*, 73 FLRA 315, 320 (2022) (Chairman DuBester concurring))).
[31] Exception at 8 (quoting *U.S. Dep't of the Navy, U.S. Naval Acad., Nonappropriated Fund Program Div.*, 63 FLRA 100, 103 (2009)) (internal quotation mark omitted).
[32] *Id.* at 8-9 (citing *Serrano v. Chicken-Out Inc.*, 209 F. Supp. 3d 179, 197 (D.D.C. 2016); *Portillo v. Smith Commons, LLC*, No. CV20-49 (RC), 2022 WL 3354730, at *8 (D.D.C. Aug. 13, 2022); *Perez v. HITT Contracting, Inc.*, No. 22-CV-03156 (TSC), 2023 WL 7322047, at *3-4 (D.D.C. Nov. 7, 2023); *Becton v. WBY, Inc.*, No. 1:16-CV-4003-MLB, 2024 WL 1961085, at *4 (N.D. Ga. Mar. 20, 2024); *Valley v. Ocean Sky Limo*, 82 F. Supp. 3d 1321, 1327 (S.D. Fla. 2015)); *see id.* at 11 n.9 (citing *Greathouse v. JHS Sec. Inc.*, No. 11 CIV 7845 (PAE) (GWG), 2017 WL 606507, at *7 (S.D.N.Y. Feb. 15, 2017), *report and recommendation adopted*, No. 11 CIV 7845 (PAE) (GWG), 2017 WL 4174811 (S.D.N.Y. Sept. 20, 2017), *aff'd*, 735 F. App'x 25 (2d Cir. 2018); *Lyon v. Whisman*, No. 91-289-SLR, 1994 WL 827159, at *3 (D. Del. Dec. 8, 1994)).
[33] *Libr. of Cong. v. Shaw*, 478 U.S. 310, 322 (1986); *see also id.* at 318-319 (holding that Congress must expressly waive the Government's sovereign immunity from suits for interest payments before claimants can recover interest on attorney fees or other compensation designed to account for delayed receipt of fees).
[34] *U.S. DOD, U.S. Marine Corps, MAGTFTC/MCAGCC/MCCS, Twentynine Palms, Cal.*, 74 FLRA 46, 50-51 (2024) (alteration in original) (quoting *Zumerling v. Marsh*, 783 F.2d 1032, 1034 (Fed. Cir. 1986) (*Zumerling*)) (internal quotation marks omitted); *see also id.* at 51 (concluding that the FLSA "does not independently operate to waive sovereign immunity against awards of post-judgment interest").
[35] *Cumberland*, 857 F.2d at 1525 (internal quotation marks omitted).
[36] *Supra* note 32.
[37] 29 U.S.C. § 216; *see also Zumerling*, 783 F.2d at 1035.

such compensation.[38] Accordingly, the Union was not entitled to the retroactive application of current hourly rates to account for the delay in payment of its attorney fees.

The Union's reliance on the MSPB's decision in *Kelly v. Tennessee Valley Authority* (*Kelly*)[39] does not affect this conclusion. The Union argues *Kelly* demonstrates that the MSPB calculates attorney fees at the current hourly rate where separate statutory authority exists, as in the FLSA, for awarding attorney fees.[40] However, the statutory authority underlying the attorney-fee award in *Kelly* was § 706(k) of the Civil Rights Act of 1964, which *explicitly* provides for interest to compensate for a delay in payment.[41] By contrast, as discussed above, the FLSA contains no provision waiving sovereign immunity for interest on attorney fees.[42]

In sum, the Union does not demonstrate the fee award is contrary to law.

V. Decision

We deny the Union's exception.

[38] *See Doyle v. U.S.*, 931 F.2d 1546, 1550 (Fed. Cir. 1991) ("Neither § 216 nor § 260 [of the FLSA] expressly waives the Government's sovereign immunity against interest."); *see also Libr. Of Cong.*, 478 U.S. at 322 (rule that government is not liable for interest absent explicit statutory waiver of sovereign immunity "has been applied to prevent parties from holding the United States liable on claims grounded on the belated receipt of funds, even when characterized as compensation for delay").

[39] No. AT-0752-15-0064-A-1, 2024 WL 81198 (MSPB Jan. 5, 2024).

[40] Exception at 10-11.

[41] *Kelly*, 2024 WL 81198, at *4 (explaining that, under 42 U.S.C. § 2000e-5(k), the MSPB was authorized to award attorney fees at current, rather than historic, rates to compensate for delay, because that provision was affected by amendment to the Civil Rights Act which explicitly waived sovereign immunity for "the same interest to compensate for delay in payment" as is available in Civil Rights Act cases involving nonpublic parties (internal quotation mark omitted)).

[42] We note that as part of its arguments concerning attorney fees, the Union references "attorney fees and costs," but provides no explanation as to how the Arbitrator's award of costs is deficient. Exception at 6, 8, 11. Therefore, to the extent the Union separately challenges the awarded costs, we find that portion of the exception unsupported, and deny it. 5 C.F.R. § 2425.6(e)(1) ("[a]n exception may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" for review listed in § 2425.6(a)-(c)); *see, e.g.*, *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 176-77 (2017) (denying a contrary-to-law exception as unsupported where the agency failed to support its exception with any arguments).