

66 FLRA No. 142

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1592
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE COMMISSARY AGENCY
(Agency)

0-AR-4838

DECISION

July 11, 2012

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 Jim Bailey filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Regulations. The Agency did not file an opposition to the Union's exceptions.

The Arbitrator set aside the grievant's three-day suspension and awarded backpay. But, in a one-sentence statement, the Arbitrator denied the Union's request for attorney fees. For the following reasons, we remand the award to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator's Awards

The Agency suspended the grievant for three days for stealing a bottle of Nesquik from the Agency. *See* Award at 7-8. The Union grieved the suspension, which was unresolved and submitted to arbitration. *See id.* at 9-12.

The Arbitrator framed the issues as: "Is the grievant proven guilty of [stealing a bottle of Nesquik] as charged? If so, is the penalty appropriate? If not proven guilty[,] what is the remedy?" *Id.* at 14. *See also id.* at 2.

The Arbitrator found that the Agency failed to prove that the grievant had stolen from the Agency.

See id. at 24. Accordingly, he determined that the three-day suspension was inconsistent with the parties' agreement, *see id.* at 22-23, and directed the Agency to rescind the suspension and award backpay, *see id.* at 24. Finally, in response to the Union's request for attorney fees, the Arbitrator stated, without further explanation: "The Union is not entitled . . . to have the Agency pay any of its legal fees in litigating" the dispute. *Id.*

III. Union's Exceptions

The Union argues that the Arbitrator's denial of attorney fees is contrary to the Back Pay Act (BPA), 5 U.S.C. § 5596, and 5 U.S.C. § 7701(g) (§ 7701(g)). *See* Exceptions at 2. According to the Union, the statutory requirements for an award of fees are met. *See id.* at 15.

IV. Analysis and Conclusions

The Union asserts that the Arbitrator's summary denial of attorney fees is contrary to the BPA and § 7701(g)(1). *See* Exceptions at 2-3, 7-12. 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).

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. *E.g., NAGE, Local R5-66*, 65 FLRA 452, 453 (2011). Once such a finding is made, the BPA 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 the standards established under § 7701(g), which pertain to attorney fee awards by the Merit Systems Protection Board. *Id.*

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. *Id.* An award of fees is warranted in the interest of justice if: (1) the agency engaged in a prohibited personnel practice; (2) the

agency's actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency; (3) the agency's actions are taken in bad faith; (4) the agency committed gross procedural error; or (5) the agency knew or should have known that it would not prevail on the merits when it brought the proceeding. *See, e.g., AFGE, Local 3020*, 64 FLRA 596, 597 n.* (2010) (citing *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420, 434-35 (1980)). An award of fees is also warranted in the interest of justice when there is either a service rendered to the federal workforce or a benefit to the public derived from maintaining the action. *Id.*

When an arbitrator grants or denies attorney fees, the arbitrator must set forth specific findings supporting his or her determinations on each pertinent statutory requirement under § 7701(g). *See, e.g., NTEU*, 66 FLRA 577, 582 (2012). Where an arbitrator's attorney-fee determination is deficient, the Authority "take[s] the action necessary to assure that the award is consistent with applicable statutory standards." *AFGE, Local 3020*, 64 FLRA 596, 597-98 (2010) (citing *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1695 (1998)). If an award does not contain the findings necessary to enable the Authority to assess the arbitrator's legal conclusions, and those findings cannot be derived from the record, then the attorney-fee issue will be remanded to the parties for resubmission to the arbitrator, absent settlement, so that the requisite findings can be made. *See, e.g., NTEU*, 66 FLRA at 582. *See also, e.g., AFGE, Local 1148*, 65 FLRA 402, 404 (2010). Additionally, the Authority consistently has held that the arbitrator, not the Authority, is the appropriate authority under 5 C.F.R. § 550.807(a) for resolving a request for attorney fees. *E.g., AFGE, Local 3105*, 63 FLRA 128, 131 (2009).

Here, the Arbitrator's award — which provides a one-sentence, unexplained denial of attorney fees — does not discuss or apply any of the statutory requirements set forth above. *See NTEU*, 66 FLRA at 582. Moreover, the record is insufficient for the Authority to determine whether the Arbitrator's denial of attorney fees is consistent with those requirements. As the Arbitrator is the appropriate authority under 5 C.F.R. § 550.807(a) for resolving the fee request, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to address whether the Union's fee request satisfies the requirements of the BPA and § 7701(g).

V. Decision

The award is remanded to the parties for resubmission to the Arbitrator, absent settlement.