

66 FLRA No. 151

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 15
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL SCHOOL EXPLOSIVE
ORDNANCE DISPOSAL
EGLIN AIR FORCE BASE, FLORIDA
(Agency)

0-AR-4822

—
DECISION

July 20, 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 an exception to a fee award of Arbitrator Merry C. Hudson filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exception.¹

¹ The parties requested leave to file, and filed, several supplemental submissions. Specifically, the Union filed a motion for the Authority to consider "new and material evidence," Union's Supp. Submission at 1, to which the Agency filed an opposition, Agency's Supp. Submission, to which the Union filed a motion to respond, Union's Second Supp. Submission. Arbitration awards are not subject to review on the basis of evidence that comes into existence after the arbitration hearing. See, e.g., *Office & Prof'l Emps. Int'l Union, Local 268*, 54 FLRA 1154, 1156 n.1 (1998) (citations omitted). Accordingly, as there is no dispute that the "new evidence" the Union wishes the Authority to consider came into existence only after the arbitration hearing, we do not consider it. *Id.* In addition, where the Authority does not consider a submission, it also generally does not consider filings that respond to that submission. *AFGE, Local 1815*, 65 FLRA 430, 431 (2011) (citations omitted). Accordingly, we also do not consider the parties' other supplemental submissions. *Id.*

The Arbitrator denied the Union's request for attorney fees under the Back Pay Act, 5 U.S.C. § 5596.² For the reasons discussed below, we find that the award is not contrary to the Back Pay Act and deny the Union's exception.

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of the grievant seeking hazard pay differential (HPD). The parties reached a partial settlement pursuant to which the Agency agreed to pay the grievant HPD for work performed before a certain date. Fee Award 1-2. But the parties could not agree on whether the grievant was entitled to HPD beyond that date, and they submitted that matter to arbitration. *Id.* at 2. Following the arbitration hearing – but before the Arbitrator issued her initial award – the Agency removed the grievant. See Exception, Attach., Initial Decision of the Merit Systems Protection Board (MSPB) in *Glover v. Dep't of the Navy* (2011). The Arbitrator issued an initial award, finding that the grievant was eligible for HPD and directing the Agency to determine the amount of HPD owed him for performing certain specified duties. Fee Award at 2.

The Union subsequently filed a motion for attorney fees with the Arbitrator. *Id.* at 2. The Union also submitted to the Arbitrator a letter stating that the grievant's removal had been reversed by the MSPB. *Id.* In this connection, the Union argued that because the grievant was reinstated, he would be entitled to "some backpay," and consequently, the Union would be entitled to attorney fees. *Id.* at 3. The Agency opposed the motion, arguing that the Union was not the prevailing party, and the grievant suffered no actual loss of pay, allowances, or differentials because he "performed no hazardous duty work." *Id.*

In the fee award, the Arbitrator determined that the Union is not entitled to attorney fees under the Back Pay Act. In making this determination, the Arbitrator stated that the arbitration and MSPB proceedings are "two entirely different proceedings," and the Union's motion "must be decided on the basis of the record developed at the arbitration." *Id.* at 5. And she found that "the [arbitration] record fails to demonstrate that [the g]rievant suffered any actual loss." *Id.* Based on the

² The Back Pay Act provides, in pertinent part, that when an appropriate authority finds that an employee has been "affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the [employee's] pay, allowances, or differentials," the employee "is entitled, on correction of the personnel action, to receive . . . reasonable attorney fees related to the personnel action." 5 U.S.C. § 5596(b)(1)(A)(ii).

foregoing, the Arbitrator denied the Union's motion for attorney fees.³ *Id.* at 10.

III. Positions of the Parties

A. Union's Exception

The Union argues that the award is contrary to the Back Pay Act. Exception at 3. Specifically, the Union asserts that it was "successful" at arbitration, *id.* at 4, and the initial award "entitled [the] grievant to [HPD]," *id.* at 5. In addition, the Union contends that the MSPB ordered the grievant reinstated with backpay and benefits, including HPD, and, "[a]s a result of receiving th[at] differential, he would be entitled to attorney fees." *Id.* Therefore, the Union asserts, it is entitled to attorney fees. *Id.* at 4, 5.

B. Agency's Opposition

The Agency asserts that the Union has failed to establish that the fee award is deficient under the Back Pay Act. According to the Agency, the grievant sustained no loss of pay because he performed no work entitling him to HPD. Opp'n at 2-3. The Agency further argues that the grievant's reinstatement by the MSPB has no bearing on this matter because it is "separate and distinct" from the matter at arbitration. *Id.* at 3.

IV. Analysis and Conclusion

The Union argues that the award is contrary to the Back Pay Act. 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). In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those factual findings are deficient as nonfacts. *See, e.g., AFGE, Local 1164*, 66 FLRA 74, 77-78 (2011) (*Local 1164*).

A threshold requirement for an award of attorney fees under the Back Pay Act is a finding that the grievant was affected by an unjustified or unwarranted personnel action that resulted in the withdrawal or

reduction of the grievant's pay, allowances, or differentials. *U.S. Dep't of State*, 59 FLRA 129, 130 (2003) (*State*) (citations omitted). And it is well established that to find that a personnel action resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials, there must be an *actual loss* suffered by the grievant. *Id.* Moreover, in assessing requests for fees in a fee award, an arbitrator must focus on "the agency's personnel action that was at issue in the arbitrator's initial award." *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 556, 558 (2012) (*Customs*) (internal citations and quotation marks omitted).

The personnel action at issue at arbitration is the Agency's alleged failure to pay the grievant HPD. Fee Award at 2. And the Arbitrator concluded in the fee award that the Union is not entitled to attorney fees because "the [arbitration] record fails to demonstrate that [the grievant suffered any *actual loss*" of pay. *Id.* at 5 (emphasis added). The Union does not argue that this factual finding is deficient as a nonfact. As the Back Pay Act requires that an employee suffer an actual loss of pay, allowances, or differentials to be entitled to an award of attorney fees, *State*, 59 FLRA at 130, and based on the Arbitrator's factual finding, to which we defer, that the grievant suffered no such loss, *Local 1164*, 66 FLRA at 77-78, we find that the Arbitrator's denial of attorney fees is consistent with the Back Pay Act.

Moreover, the Union's argument that it is entitled to attorney fees based on the MSPB decision is misplaced. The MSPB proceeding challenged the Agency's removal of the grievant. But the arbitration proceeding concerns the Agency's alleged failure to pay the grievant HPD. Noting that the two proceedings are different, the Arbitrator correctly found that the fee award "must be decided on the basis of the record developed at the arbitration." *Id.* at 5; *Customs*, 66 FLRA at 558. Therefore, the Union's reliance on the MSPB decision fails to demonstrate that the fee award for the arbitration matter is deficient.

Accordingly, we deny the Union's exception.

V. Decision

The Union's exception is denied.

³ The Arbitrator also rejected the Agency's claim that the Union was not the "prevailing party," and found that it was. *See Fee Award* at 5-9. But, as the Agency does not challenge this finding, we do not address it further.