69 FLRA No. 21

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

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

DECISION

December 28, 2015

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

I. Statement of the Case

The grievant was suspended for two days for misconduct, and the Union filed a grievance disputing the disciplinary action. Arbitrator Thomas G. Humphries found that the grievant "engaged in questionable conduct" that was "a misuse of his [Agency] position, a transgression that warrants admonishment."[1] In his award, however, the Arbitrator reduced the grievant's suspension of two days to a reprimand and awarded backpay for the two days. The award was silent as to the Union's request for attorney fees. The Union contacted the Arbitrator and asked him to supplement his award with attorney fees. The Arbitrator subsequently responded via email to both parties and

[1] Award at 18.

informed them that the award had effectively denied the Union's request for attorney fees.

The issue before us is whether the Arbitrator's award, as clarified by the Arbitrator's email, is contrary to the Back Pay Act (BPA)[2] because the Arbitrator effectively denied the Union's request for attorney fees. Because the record is insufficient for the Authority to resolve the merits of the attorney-fee issue, we remand the award to the parties, absent settlement, for resubmission to the Arbitrator.

II. Background and Arbitrator's Award

The grievant worked for the Agency as a correctional officer. While off-duty and returning home from a non-work trip, the grievant informed the ticketing agent at an international airport that he was a federal law enforcement officer and so would be carrying a personal firearm onboard the plane. However, the Agency had not authorized this action. After an investigation, the Agency imposed a two-day suspension.

The Union filed a grievance, disputing the disciplinary action and noting that the Agency's disciplinary action was issued more than three years after the incident. The Agency denied the grievance and the Union invoked arbitration.

The Agency argued that the two-day suspension imposed on the grievant should be upheld as discipline with just and sufficient cause. The Union argued that the "conclusory and speculative assertion that [the grievant's] conduct had a negative impact on the [Agency] does not . . . warrant . . . [a two-day] suspension."[3]

The Arbitrator found that the grievant "engaged in questionable conduct" and that the grievant's behavior "represents a misuse of his [Agency] position, a transgression that warrants admonishment."[4] In his award, however, the Arbitrator reduced the grievant's suspension of two days to a reprimand and issued backpay for the two days. Although the Union requested attorney fees, the award was silent as to the requested fees. On the same day that the Arbitrator issued his award, the Union emailed the Arbitrator and asked him to supplement his award in regard to attorney fees. Three days later, the Arbitrator emailed the parties and stated that "the purpose of the [a]ward was not to grant attorney[] fees to either of the parties."[5]

Then, within thirty days of both the award and the email, the Union filed exceptions. The Agency subsequently filed an opposition to the Union's exceptions.

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[2] 5 U.S.C. § 5596.
[3] Award at 15.
[4] *Id.* at 18.
[5] Exceptions at 2 (internal quotation marks omitted).

III. Analysis and Conclusion: The award, as clarified by the email, is contrary to the BPA.

The Union contends that the award, as clarified by the email, is contrary to the BPA because the award was silent as to the attorney fees that were requested by the Union, and the email clarified, without explanation, that the award had denied fees.[6]

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.[7] 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.[8]

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.[9] Once such a finding is made, the BPA further requires that an award of attorney 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 5 U.S.C. § 7701(g), which pertain to attorney-fee awards issued by the Merit Systems Protection Board.[10]

Here, the Arbitrator effectively denied the Union's attorney-fee request.[11] However, the award, even as clarified by the email, does not constitute a fully articulated, reasoned decision resolving the Union's attorney-fee request as required by the BPA and § 7701(g).[12] Because (1) neither the award nor the clarifying email contains the necessary findings addressing the pertinent statutory requirements for attorney fees, (2) the necessary findings cannot be derived from the record, and (3) the Arbitrator is the appropriate authority under 5 C.F.R. § 550.807(a) to resolve the Union's attorney-fee request, we remand the attorney-fee issue to the parties for resubmission to the Arbitrator, absent settlement.

IV. Decision

We remand the attorney-fee issue to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

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[6] Exceptions at 3-7.
[7] *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)).
[8] *See U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[9] *E.g., NAGE, Local R5-66*, 65 FLRA 452, 453 (2011).
[10] *Id.*
[11] Award at 19.
[12] *See NAGE, Local R4-106*, 32 FLRA, 1159, 1165 (1988).

Member Pizzella, concurring, in part, and dissenting, in part:

In this case, I join with the Majority and agree that the Arbitrator's award is contrary to law, because it is silent on the issue of attorney's fees. To that extent, I agree that a remand is appropriate.

There is no question that in his award the Arbitrator Thomas Humphries reduced the suspension to a reprimand and that he ordered backpay to be awarded to the grievant. However, the award is silent as to the issue of attorney fees. Because there is no question that the Union's entitlement to those fees was raised as an issue before the Arbitrator, and that the Arbitrator did not address the issue, a remand back to the Arbitrator is appropriate.

I disagree, however, with my colleagues' characterization of the Arbitrator's one-sentence email message.[1]

What should be a simple, straight-forward remand is instead clouded by the Majority elevating the status of a routine communication – a one-sentence email message – to that of an award. Arbitrator Humphries' email to the parties simply noted what was already obvious from his award – that "the purpose of the [a]ward was *not* to grant attorneys[']fees to either of the parties."[2] The email did not clarify anything nor did it add to or supplement the award in any manner. It did not correct a clerical mistake[3] or correct an "obvious error[]" in mathematical computations;[4] "restate the basis" for the award;[5] or "interpret[] and clarify[]" any ambiguity in the award.[6] I dare say that had the Arbitrator not responded at all, or had used his mobile phone to respond to the parties, not one word of this remand would change except that there would be no mention of the subsequent communication. Therefore, I am not inclined, as is the Majority, to accord the same dignity, to what in essence was an I-said-what-I-said message, as we would give to an award.

The Authority has never before found an email to be contrary to law, and I see no reason to depart from that course and to do so here. An email is simply a method of communication. I am concerned that according routine communications the same status of an award, which may be declared contrary to law, only serves to create uncertainty for the labor-management relations community. Such uncertainty is bound to generate unpredictable volumes of future arbitration exceptions that would focus on any number of email exchanges, facsimile transmissions, and telephone calls between the parties and the arbitrator. The panoply of arguments that could be, and are certain to be raised, in future

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[1] Majority at 3.
[2] Exceptions at 2 (emphasis added) (internal quotation marks omitted).
[3] *NFFE, Local 11*, 53 FLRA 1747, 1749 (1998) (*Local 11*) (citing *Overseas Fed'n of Teachers AFT, AFL-CIO*, 32 FLRA 410, 414 (1988)). *See generally U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 302 (2011) (reviewing an arbitrator's limited jurisdiction after issuance of an award).
[4] *Local 11*, 53 FLRA at 1749.
[5] *AFGE, Local 1923, AFL-CIO*, 33 FLRA 88, 93 (1988).
[6] *NTEU, Chapter 33*, 44 FLRA 252, 268 (1992).

cases, purportedly in the hopes of clearing, or adding to, ambiguity where none exists, would be limited only by the creative imaginations of agency and union representatives alike. I do not look forward to navigating disputes arising out of that electronic-Pandora's box.

I also write separately to note several aspects of this case which present a teachable moment for the federal labor-management relations community.

This saga began over seven years ago, in November 2008, when an employee of the U. S. Department of Justice, Federal Bureau of Prisons (BOP), made a public spectacle of himself at an international airport in Puerto Rico.[7] This well-documented instance of misconduct turned into a drawn-out drama, as the proposed suspension of the employee was not served upon the employee *until May of 2011*.[8]

As sunrise follows sunset (my apologies to *Fiddler on the Roof*), the belated decision to suspend the employee was effected, the employee grieved, and seven years after the incident, this matter made its way Arbitrator Humphries. It seems that both parties contributed to the inexplicable delays and these delays certainly did not promote an effective and efficient government.[9]

It entirely escapes me how it could take the Bureau of Prisons, Federal Correctional Institution in Miami (Bureau) three years to bring a disciplinary action against a guard who abused his federal law-enforcement credentials and his firearm privileges at an international airport. Not to be outdone, AFGE, Local 3690, no doubt diligently advocating for the guard, nonetheless managed to file its grievance *late*, after BOP finally got around to effecting the suspension.[10]

That leads me to the issue of arbitrability. The Arbitrator's invocation of equitable principles, to excuse the Union's obviously late filing of the grievance, far exceeds the authority extended to him and certainly does not draw its essence from the parties' agreement which clearly established a forty-day timeframe under which the Union had to file its grievance. Therefore, it is inexplicable to me that the Bureau did not raise an exception, which I would have considered, to that erroneous determination.[11] As I have observed in previous decisions, I do not share the Authority's unbending obeisance that, in all cases, the Authority must defer to an arbitrator's erroneous procedural-arbitrability determination no matter how wrong and without any consideration of the consequences of the erroneous determination.[12] It may be that the

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[7] Award at 10.
[8] *Id.* at 3.
[9] *See AFGE, Local 12*, 68 FLRA 1061, 1072 (2015) (Dissenting Opinion of Member Pizzella).
[10] Award at 4, 10-12.
[11] *Id.* at 4.
[12] *See U.S. Dep't of the Treasury, IRS*, 68 FLRA 1027, 1037 (2015) (Dissenting Opinion of Member Pizzella); *U.S. DHS, U.S. CBP*, 68 FLRA 1015, 1025 (2015) (Dissenting Opinion of Member Pizzella).

Authority's obeisance contributed to the BOP's reluctance to challenge that aspect of the award.

In light of these conundrums, would anyone be willing to step forward and argue that any aspect of this case has been handled well or come close to promoting an effective and efficient government? I for one am not willing to take that step.

Thank you.

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STATEMENT OF SERVICE

I hereby certify that copies of the Decision of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

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Dated: December 28, 2015
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Deborah Johnson
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