

72 FLRA No. 113

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1633
(Union)

and

UNITED STATES
DEPARTMENT OF VETERAN AFFAIRS
MICHAEL E. DEBAKEY MEDICAL CENTER
HOUSTON, TEXAS
(Agency)

0-AR-5701

December 13, 2021

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and James T. Abbott, Members
(Chairman DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

This case involves Arbitrator Peter J. Clarke's denial of attorney fees. The Union, in its post-hearing closing brief, requested reasonable attorney fees to preserve its right to file a petition for attorney fees at a later time. The Arbitrator denied the Union's request for attorney fees in the award. Because the Arbitrator denied attorney fees before the Union had an opportunity to submit a fee request, we find that the award is inconsistent with the Back Pay Act (the Act).¹ Accordingly, we modify the award to strike the denial of attorney fees, without prejudice to the Union's right to file a petition for attorney fees with the Arbitrator.

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of Wage-Grade Laundry Workers seeking environmental differential pay. The parties were unable to resolve the matter and it was submitted to arbitration. The Arbitrator framed the issues as: "[w]hether the Agency violated Article 29 of the Master Agreement or 5 U.S.C. § 5343(c)(4) when it denied Environmental Differential Pay to EMS – Laundry Workers at the Michael E. DeBakey VA Medical Center in Houston,

TX. If so, what is the remedy? [and] [w]hether either party is entitled to fees associated with the arbitration, i.e., attorney fees or court reporting services?"²

The Arbitrator found that the laundry workers were exposed to "unusually severe hazards" and therefore entitled a differential of 4%, retroactive to 30 days before the filing of the grievance and so long as they continue to perform those hazardous duties.³ Although the Arbitrator acknowledged that the Union had requested an award of attorney fees in its closing brief, no fees were awarded because the Union failed to "provide any documentation to assess if the fees were reasonable."⁴

The Union filed an exception to the award on February 1, 2021.⁵

III. Analysis and Conclusion: The Arbitrator's denial of attorney fees is contrary to law.

The Union argues that the award is contrary to law because the Arbitrator denied attorney fees before giving the Union an opportunity to file a petition for fees.⁶ Arbitrators are conferred jurisdiction by the Act to consider requests for attorney fees at any time during an arbitration or within a reasonable time following an award of backpay.⁷ However, an arbitrator may not deny fees before the union has had an opportunity to present its fee request to the arbitrator and the agency has had an opportunity to respond to the request.⁸ Only then may the arbitrator determine whether or not attorney fees are warranted.⁹

Here, the Union never had the opportunity to support the request for attorney fees after the merits determination.¹⁰ Therefore, the Arbitrator's denial of

² Award at 2.

³ *Id.* at 20.

⁴ *Id.*

⁵ The Agency did not file an opposition in response.

⁶ Exceptions Br. at 2.

⁷ *AFGE, Loc. 2342*, 71 FLRA 692, 692 (2020) (citing *AFGE, Loc. 1148*, 65 FLRA 402, 403 (2010)).

⁸ *Id.* (citing *AFGE, Loc. 2198*, 71 FLRA 165, 165 (2019) (*Loc. 2198*)).

⁹ *AFGE, Loc. 2145*, 71 FLRA 916, 916-17 (citing 5 C.F.R. § 550.807(a)-(b)).

¹⁰ The Authority has previously found that a union's mere request for attorney fees does not constitute a petition for attorney fees under the Act and its implementing regulations. *Loc. 2198*, 71 FLRA at 166. Similarly, here, the Arbitrator's statement that the Union "requested reasonable attorney's fees" is not equivalent to a finding that the Union filed a petition for attorney fees. Award at 12; e.g., *Loc. 2198*, 71 FLRA at 166 ("Although the [a]rbitrator references the '[u]nion's request for attorney fees' at arbitration, he makes no finding that the [u]nion filed a petition for attorney fees or that the [a]gency had an opportunity to respond to the petition.").

¹ 5 U.S.C. § 5596.

attorney fees before the Union had an opportunity to support its request was premature.¹¹ Accordingly, we modify the award to strike the denial of attorney fees without prejudice to the Union's right to file a petition for attorney fees with the Arbitrator.

IV. Decision

We grant the Union's contrary-to-law exception and modify the award to strike the denial of attorney fees.

¹¹ See *Fraternal Ord. of Police Lodge No. 1*, 71 FLRA 6, 7 (2019).

Chairman DuBester, concurring:

I agree with the Decision to grant the Union's contrary-to-law exception and modify the award to strike the denial of attorney fees.