73 FLRA No. 82

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3197
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
PUGET SOUND HEALTH CARE SYSTEM
SEATTLE, WASHINGTON
(Agency)

0-AR-5811

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DECISION

January 26, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

As relevant here, in a merits award, Arbitrator Michael Anthony Marr awarded environmental-differential pay (EDP) to housekeepers but denied EDP to pipefitters.[1] The Union then filed a petition for attorney fees (fee petition). In a fee award, the Arbitrator denied the fee petition because it failed to demonstrate that attorney fees were in the interest of justice. The Union did not file exceptions to the fee award, but filed a motion for reconsideration (reconsideration motion) with the Arbitrator. The Arbitrator issued an order denying the reconsideration motion (reconsideration order).

The Union then filed exceptions, and the main question before us is whether those exceptions are timely. The exceptions were not filed within the required period after the fee award, and the reconsideration order did not modify the fee award in a way that gave rise to the exceptions. Therefore, we dismiss the exceptions as untimely.

II. Background and Arbitrator's Award

As relevant here, in the merits award, the Arbitrator awarded EDP to housekeepers but denied EDP to pipefitters, and the Union filed the fee petition. On January 14, 2022, the Arbitrator issued the fee award and found attorney fees were not in the interest of justice.[2]

In evaluating whether the Agency "knew or should have known" that it would not prevail at arbitration, he referenced three previous arbitration awards upon which the Agency had relied.[3] The Arbitrator determined that the Agency was entitled to rely on those awards – in which arbitrators found housekeepers were not entitled to EDP under similar circumstances – when it denied the grievance. Thus, the Arbitrator concluded that the Union failed to establish the Agency "knew or should have known" the housekeepers would be awarded EDP.[4]

[1] In *U.S. Department of VA, VA Puget Sound Health Care System, Seattle, Washington*, 72 FLRA 441, 444-45 (2021) (Chairman DuBester concurring), the Authority partially dismissed and partially denied the Agency's exceptions to the merits award.

[2] The Arbitrator noted that in order to establish an entitlement to attorney fees, the Union needed to show that attorney fees were warranted in the "interest[] of justice." Opp'n, Ex. 3, Fee Award (Fee Award) at 19-21 (citing *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980) (*Allen*); *Naval Dev. Ctr., Dep't of the Navy*, 21 FLRA 131, 137-39 (1986)). Under *Allen*, an award of attorney fees is warranted in the interest of justice if: (1) the agency engaged in a prohibited personnel practice; (2) the agency's action was clearly without merit, or was wholly unfounded, or the employee is substantially innocent of the charges brought by the agency; (3) the agency initiated the action against the employee in bad faith; (4) the agency committed a gross procedural error which prolonged the proceeding or severely prejudiced the employee; or (5) the agency knew or should have known it would not prevail on the merits when it brought the proceeding. 2 M.S.P.R. at 434-35. Because the grievance did not concern a disciplinary matter, the Arbitrator focused on whether the Agency "knew or should have known" that it would not prevail at arbitration or the Agency's position was "clearly without merit." Fee Award at 21-22 (citing *AFGE, Loc. 1633*, 71 FLRA 211 (2019) (*Loc. 1633*) (Member Abbott concurring; Member DuBester concurring in part and dissenting in part)).

[3] Fee Award at 27.

[4] *Id.*

Next, the Arbitrator evaluated whether the Agency should have known that its position regarding the housekeepers' entitlement to EDP was "clearly without merit" before the arbitration hearing.[5] While noting one recent decision supported an award of EDP to the housekeepers, he found "the Agency was nonetheless entitled to defend in good faith against the Union's prosecution of the [grievance] given the arbitration and FLRA decisions in the Agency's favor."[6] The Arbitrator noted two Authority decisions upholding housekeeper entitlement to EDP,[7] and stated he "*would* have considered an argument that these two cases (three including your Arbitrator's decision and award) constituted a trend" supporting fees if they had issued before the grievance was prosecuted.[8] Because they had not, he declined to rely on such a trend to find that the Agency should have known that an arbitrator would grant EDP to the housekeepers.[9]

Neither party filed exceptions to the fee award. Instead, on February 9, 2022, the Union filed the reconsideration motion with the Arbitrator, arguing the fee award was based on a nonfact because the Arbitrator relied on a "trend" of cases instead of the factual evidence.[10] On April 6, 2022, the Arbitrator issued the reconsideration order, pertinently stating: "Your Arbitrator's reference to a 'trend' was not a reason to deny the Union's application for attorney's fees. Rather, if a trend was established, it might have been a reason to grant the Union's application for attorney's fees (most certainly not deny)."[11] The Arbitrator denied the reconsideration motion.

On May 1, 2022, the Union filed the exceptions at issue here. The exceptions allege that: the Arbitrator's denial of fees is contrary to law,[12] based on a nonfact,[13] and fails to draw its essence from the parties' collective-bargaining agreement;[14] and the Authority should reconsider its interest-of-justice precedent.[15]

The Authority's Office of Case Intake and Publication directed the Union to show cause why the exceptions should not be dismissed as untimely (show-cause order), as the fee award issued on January 14, 2022, and the time limit for filing exceptions to an arbitration award is thirty days "after the date of service of the award."[16] The Union filed a response, arguing its exceptions are timely because the reconsideration order modified the fee award.[17] On June 22, 2022, the Agency filed an opposition to the Union's exceptions.[18]

III. Analysis and Conclusion: The Union's exceptions are untimely.

Under § 2425.2(b) of the Authority's Regulations, the time limit for filing exceptions begins to run when the arbitrator serves a final award on the parties.[19] The Authority may not extend or waive the time limit for filing exceptions to an arbitration award.[20] The Authority has repeatedly held that a party's filing of a motion for reconsideration or clarification of an arbitration award does not affect the award's finality for purposes of filing exceptions.[21] However, where an arbitrator *modifies* an award in response to such a motion, the time limit for filing exceptions to the modified award begins upon service of the modified award.[22] Such exceptions will be timely only as to alleged deficiencies that result from the modification.[23]

In its response to the show-cause order, the Union asks the Authority to reverse its precedent that states a motion for reconsideration does not affect an award's finality for exception-filing purposes.[24] The Union asserts that federal courts treat motions for reconsideration and

[5] *Id.* at 27-28 (citing *Loc. 1633*, 71 FLRA at 217).
[6] *Id.* at 28.
[7] *Id.* (citing *U.S. Dep't of VA, Boise Veterans Admin. Med. Ctr.*, 72 FLRA 124 (2021) (Member Abbott concurring; Chairman DuBester dissenting in part); *U.S. Dep't of VA, James J. Peters VA Med. Ctr., Bronx, N.Y.*, 71 FLRA 1003 (2020) (Member Abbott dissenting)).
[8] *Id.* at 28-29 (emphasis added).
[9] *Id.* at 29; *see also id.* at 30 (finding that the Union "failed to show that at some point prior to the close of arbitration, the Agency knew [its] position was 'clearly without merit' [such that] . . . the Agency's failure to reverse its position made it blameworthy for . . . arbitration hearing days that [were] unnecessary"). The Arbitrator also noted that if the Agency had not completed arbitration proceedings, it would not have been able to successfully rebut the Union's position regarding the pipefitters' entitlement to EDP. *Id.* at 30.
[10] Exceptions, Attach. 4, Recons. Mot. at 3-4.
[11] Exceptions, Attach. 2, Recons. Order (Recons. Order) at 15 (emphasis omitted).
[12] Exceptions at 4-18.
[13] *Id.* at 19-30.
[14] *Id.* at 30-36.
[15] *Id.* at 36-41.
[16] *See* Show-Cause Order at 1-2 (quoting 5 C.F.R. § 2425.2(b)).
[17] Resp. to Show-Cause Order (Resp.) at 4-5.
[18] Because the Authority gave the Agency extensions of time to file its brief, its brief is timely filed.
[19] 5 C.F.R. § 2425.2(b).
[20] *Id.* § 2429.23(d).
[21] *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 68 FLRA 1074, 1076 (2015) (*DHS*) (Member DuBester dissenting on other grounds); *AFGE, Loc. 12*, 61 FLRA 628, 630 (2006) (*Loc. 12*); *U.S. Dep't of HHS, SSA*, 23 FLRA 157, 158 (1986); *Portsmouth Naval Shipyard*, 15 FLRA 181, 182 (1984).
[22] *DHS*, 68 FLRA at 1076; *Loc. 12*, 61 FLRA at 630.
[23] *U.S. Dep't of the Interior, U.S. Park Police*, 73 FLRA 276, 277 (2022); *DHS*, 68 FLRA at 1076; *Loc. 12*, 61 FLRA at 630; *see also U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 71 FLRA 240, 241 n.9 (2019) (Member DuBester concurring).
[24] Resp. at 2-3.

motions for clarification differently,[25] treating the former as a post-trial motion that makes a decision final only once the motion is denied.[26]

We see no basis for reversing the Authority's well-established precedent on this issue. For purposes of assessing whether arbitration exceptions are timely, the pivotal determination is what the arbitrator *does* in response to a post-award motion – not what that motion is labeled. If the arbitrator's response to a motion does not modify the previous award in a way that gives rise to the exceptions, then the filing period begins with the previous award – not the arbitrator's response to the motion,[27] however that motion is captioned.

Thus, the central issue here is whether the reconsideration order modified the fee award in a way that gives rise to the Union's exceptions. The Union argues the Arbitrator's statement "he . . . wasn't relying on the existence of a 'trend'" is "a definite change of position" that modifies the fee award.[28] The Union claims the Arbitrator's finding that a trend did not exist is central to his denial of fees,[29] and that the Arbitrator relied on a nonfact because he relied on a "trend" of cases instead of factual evidence.[30]

However, the reconsideration order's discussion of a trend did not modify the fee award. Rather, the Arbitrator merely reiterated that the fee award's "reference to a 'trend' was not a reason to deny" the fee petition.[31] In fact, in its exceptions, the Union concedes that the reconsideration order's discussion of a trend "reiterates" the fee award's findings.[32]

The Union does not allege the reconsideration order modified the fee award in any other way, and the exceptions do not challenge any findings that arose solely from the reconsideration order. As such, the Union was required to file its exceptions within thirty days of the fee award. Because it did not do so, we dismiss its exceptions as untimely.[33]

IV. Decision

We dismiss the Union's exceptions.

[25] *Id.*
[26] *Id.* at 3.
[27] *See U.S. Dep't of VA, Northport VA Hosp., Northport, N.Y.*, 67 FLRA 325, 326 (2014).
[28] Resp. at 5 (emphasis omitted).
[29] *Id.*
[30] Exceptions at 23.
[31] Recons. Order at 15 (emphasis omitted).
[32] Exceptions at 9 ("[t]he Arbitrator reiterates his stance [from his decision denying attorney fees] in his denial of the [m]otion for [r]econsideration"), 21 ("[t]he Arbitrator reiterates his stance [from his decision denying attorney fees] in his denial of the [m]otion for [r]econsideration").
[33] *DHS*, 68 FLRA at 1076 (dismissing exceptions, arising from a motion for reconsideration, as untimely to the extent they alleged deficiencies in an order that did not modify the original award); *Loc. 12*, 61 FLRA at 630 (same).