

63 FLRA No. 148

UNITED STATES DEPARTMENT
OF THE ARMY
WOMACK ARMY MEDICAL CENTER
FORT BRAGG, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

0-AR-4140

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DECISION

June 30, 2009

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This case is before the Authority on exceptions to an award of Arbitrator Joe D. Woodward filed by the United States Department of the Army (DoA or Agency) under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The DoA operates Womack Army Medical Center, Fort Bragg, N.C. (WAMC). The Arbitrator sustained a grievance challenging WAMC's failure to pay certain employees on-call and/or premium pay as provided under the provisions of Title 38 of the United States Code (Title 38) and ordered, among other things, back pay and attorney fees.

For the reasons that follow, the portion of the award granting attorney fees is remanded to the parties, absent settlement, for resubmission to the Arbitrator for clarification of his award. The remaining exceptions are denied.

II. Background and Arbitrator's Award

The DoA operates WAMC, where the Union represents approximately 1400 employees. In May 2004, the DoA "delegated its authority to use certain Title 38 regulations regarding special pay provisions for on-call and premium pay to the United States Army Medical

Command (MEDCOM) for the purpose of attracting or retaining certain desirable personnel for medical and dental services." Award at 1.

MEDCOM further delegated this authority to the Commander of WAMC. When MEDCOM delegated this authority to WAMC, it issued policy guidance covering the use and administration of pay authority and implementing instructions. MEDCOM delegated authority related to "all activities employing civilian health care personnel who are assigned to authorize positions only affecting physicians' assistants, registered nurses, dental assistants, dental hygienists, and dental laboratory technicians." *Id.* at 1-2. MEDCOM expected WAMC to exercise DoA's authority, per the implementing instructions, to change the premium pay indicator "Code K" for all civilian employees who were covered by its action so that the employees would be paid "on-call, night differential, weekend differential, holiday pay and overtime pay under the provisions of Title 38" *Id.* at 2.

Subsequently, WAMC notified the Union of its intention to implement Title 38 on-call/premium pay consistent with the delegation of authority from MEDCOM. The Union then informed WAMC that it "wished to negotiate appropriate arrangements for its affected employees." *Id.* WAMC responded by informing the Union that it had incorrectly stated the date of implementation and that the correct date was October 31, 2004. The parties communicated concerning negotiations for implementation of Title 38, and later WAMC notified the Union that "with agreement from the Union it would proceed with provisions to compensate employees authorized under Title 38" *Id.* at 3. The letter also stated "*absent written agreement from your office, [WAMC] will be unable to compensate employees. They must be coded 'K' in an agreement from your office.*" *Id.* (emphasis in Award and quoting WAMC letter).

Thereafter, the Union filed two similar grievances that were consolidated, which alleged that WAMC failed to compensate employees who were assigned on-call duties on or after October 31, 2004 pursuant to regulations implementing Title 38 and failed to compensate employees premium pay pursuant to Title 38 policy guidance effective October 31, 2004. *Id.* at 3-4. The parties were unable to resolve the grievance and the matter was submitted to arbitration on the following stipulated issue: "Did [WAMC] fail to implement Title 38 - on-call pay provisions in a timely manner and did [WAMC] fail to implement Title 38 premium pay provisions in a timely manner and, if so, what shall the remedy be?" *Id.* at 5.

The Arbitrator found that it was undisputed that the Commander of WAMC and the U.S. Army Dental Activity (Dental Activity) had the authority to pay on-call and premium pay to certain employees at the facility, effective October 31, 2004. *Id.* at 8. The Arbitrator further found that the evidence clearly showed that affected employees were not paid the rates of pay for on-call and premium pay provided by the “delegated provisions of Title 38 until at least January 23, 2005, when [such provisions] were unilaterally implemented by the Commander of WAMC and the [Dental Activity].” *Id.* at 9. The Arbitrator found that WAMC “erroneously[] contended that it could not pay the . . . employees until the Union either agreed *in writing*, or signed a *Memorandum of Understanding* as required by WAMC and that but for such erroneous contention, the . . . employees would have been paid” *Id.* In sum, the Arbitrator found that WAMC refused to code the subject employees for on-call and premium pay based on its “erroneous conclusion” that it was not authorized and could not do so until the parties successfully engaged in impact and implementation bargaining. *Id.* at 10.

The Arbitrator found that the consolidated grievance was “actual” notice to WAMC of the “Union’s demand that the Title 38 pay adjustments should be placed in effect.” *Id.* The Arbitrator found with respect to nursing personnel that WAMC was required to pay Title 38 pay to these employees who were covered under a separate Memorandum of Understanding (MOU) and were not subject to impact and implementation bargaining. *Id.* With respect to other employees, the Arbitrator found that the parties “did . . . engage in bargaining about impact and implementation of the on-call policies.” *Id.* at 11. In this regard, the Arbitrator found that the Union “negotiated with WAMC on a ‘non-status-quo basis’ which the parties had long recognized as part of their bargaining process[.]” *Id.* According to the Arbitrator, negotiations on a “non-status-quo basis” allowed WAMC to “implement the pay provisions subject to any continuing policy negotiations.” *Id.*

The Arbitrator also found that the Union did not engage in “unfair bargaining as contended by [WAMC].” *Id.* at 13. Accordingly, the Arbitrator concluded that the evidence established that the subject employees were entitled to the on-call and premium pay provided by Title 38 on October 31, 2004, and that “but for the mistaken and erroneous conclusion of [WAMC] that it did not have the authority to legally implement the pay provisions of Title 38, the . . . employees would have received Title 38 pay” on or after such date. *Id.* at 14. The Arbitrator additionally stated that the

“[WAMC] probably violated the terms of the [CBA] when it failed to answer the grievance at step 3” *Id.*

As a remedy, the Arbitrator directed that the employees be coded “K” for pay purposes as of October 31, 2004, and that they be paid back pay, with interest, for on-call and/or premium pay, as appropriate, from and after that date until they were coded properly. *Id.* at 14-15. The Arbitrator also stated that “the [g]rievants are also awarded reasonable attorneys’ fees.” *Id.* at 15.

III. Positions of the Parties

A. Agency’s Exceptions

The Agency contends that the Arbitrator’s determination that “[WAMC] must implement non-negotiable pay provisions while the parties continued to negotiate” the impact and implementation of those provisions does not draw its essence from the parties’ [CBA].” Exceptions at 6. According to the Agency, Article XXXVI of the parties’ CBA provides procedures for negotiating the impact and implementation of management proposed changes in the conditions of employment of unit employees.¹ The Agency asserts that, pursuant to the CBA, WAMC notified the Union of its intent to implement Title 38 pay provisions and the Union expressed its desire to negotiate appropriate arrangements for affected employees. The Agency claims that the award “add[s] additional rights and obligations” to Article XXXVI by requiring WAMC, if the Union requests implementation of a non-negotiable change in conditions of employment, to “implement” the change and then “engage in post-implementation bargaining over the impact and implementation of [such] change”. . . . *Id.* at 9. The Agency asserts that this is not a plausible interpretation of the CBA.

The Agency next asserts that the award “conflicts” with § 7106(b)(2) and (3) of the Statute because it requires WAMC to implement “non-negotiable pay provisions while the parties continue to negotiate” the impact and implementation of such provisions. *Id.* According to the Agency, such requirement would “establish[] a new . . . precedent under . . . § 7106(b)(2) and (3).” *Id.* at 12. The Agency also claims that the Arbitrator “incorrect[ly] rul[ed]” that WAMC was required to pay employees [who were covered under a separate on-call agreement] under Title 38 [pay provisions] while negotiations were on-going over all the effected employees.” *Id.* at 10. The Agency asserts that there “is no provision in law . . . that requires manage-

1. The pertinent text of Article XXXVI of the parties’ CBA is set forth in the Appendix to this decision.

ment to exclude a segment of the bargaining unit when the parties are negotiating a more inclusive agreement.” *Id.*

The Agency contends that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g) because the Arbitrator failed to provide a fully, articulated, reasoned decision when he awarded the Union “reasonable attorney fees.” *Id.* at 12. The Agency asserts that the Arbitrator’s “conclusory finding does not constitute a fully reasoned and articulated decision.” *Id.* at 14. The Agency further contends that the award is contrary to the Back Pay Act and 5 U.S.C. § 7701(g), because it does not “satisfy the interest of justice standard.” *Id.* at 14-15. Citing *United States Department of the Army, Red River Army Depot, Texarkana, Texas*, 39 FLRA 1215 (1991) (*Red River Army Depot*), the Agency asserts that applying the factors set out in *Red River Army Depot* for determining whether attorney fees are warranted in the interest of justice to the facts in this case demonstrates that such fees are not warranted.

B. Union’s Opposition

The Union asserts that the award draws its essence from the parties’ CBA. Opposition at 5. In this regard, the Union contends that the Arbitrator “did not . . . add additional rights and obligations” to the parties’ CBA. *Id.* at 7. The Union asserts that the Arbitrator found that the Union did provide sufficient notice of its consent to implementation of Title 38 pay. The Union claims that the award is a “reasonable application of the CBA provisions and relevant laws, rules, and regulations.” *Id.* at 8.

As to the Agency’s claim that the award “conflicts” with § 7106(b)(2) and (3) of the Statute, the Union asserts that the award “places no restrictions on [WAMC’s] ability to determine its administrative or functional structure, or its ability to bargain over on-call duty policies and procedures.” *Id.* at 11. The Union claims the fact that the parties did complete impact and implementation bargaining regarding the matter is “further evidence that management’s rights were not impinged.” *Id.* Also, according to the Union, the Arbitrator found that there was a “past practice of non-status quo bargaining in which [the parties] agreed to implement provisions while negotiating on an on-going basis.” *Id.* The Union also contends that the Agency’s further arguments that challenge the Arbitrator’s determination that WAMC was required to pay the subject employees Title 38 pay are attempts by the Agency to re-litigate the facts of the case based on disagreement

with the Arbitrator’s interpretation of the CBA. *Id.* at 12.

Lastly, the Union contends that the Arbitrator’s grant of attorney fees is not contrary to the Back Pay Act. *Id.* at 14. The Union acknowledges that the Arbitrator “did not articulate the reasons for granting reasonable attorney fees.” *Id.* at 16. However, according to the Union, the “record does contain some evidence [for] determining whether the statutory requirements were met.” *Id.* The Union asserts that the Agency does not contest that the Arbitrator found an “unwarranted and unjustified personnel action that resulted in withdrawal of pay, allowances or differentials[]” of the subject employees. *Id.* The Union asserts that the Authority “must . . . decide” whether the record is sufficient to determine whether the statutory requirements are met, and if it is not, the Authority should remand this portion of the award to the parties for submission to the Arbitrator. *Id.* at 16-17.

IV. Analysis and Conclusions

A. The award draws its essence from the parties’ CBA

In order for an award to be found deficient because it does not draw its essence from a collective bargaining agreement, a party must show that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purpose of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) evidences a manifest disregard for the agreement; or (4) does not represent a plausible interpretation of the agreement. See *United States Dep’t of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context “because it is the arbitrator’s construction of the agreement for which the parties have bargained.” *Id.* at 576.

The Agency claims that the award “add[s] additional rights and obligations” to Article XXXVI by requiring WAMC, if the Union requests implementation of a non-negotiable change in conditions of employment, to “implement . . . [the] change and to engage in post implementation bargaining over the impact and implementation of that change.” Exceptions at 9. The Arbitrator noted WAMC’s contention that Article XXXVI, Sections 1 and 2 of the parties’ CBA, read together, required impact and implementation bargaining. The Arbitrator interpreted Article XXXVI and found that the Union did engage in impact and implementation bargaining, and did negotiate on a “non-sta-

tus-quo basis which the parties had long recognized as part of their bargaining process.” Award at 11. Negotiations on a “non-status-quo basis,” as found by the Arbitrator, allowed WAMC to implement the pay provisions subject to continuing negotiations. *Id.* The Arbitrator thus concluded that the parties were negotiating the impact and implementation of the pay provisions on a non-status-quo-basis and that WAMC was on notice that the Union understood the pay provisions would be implemented.

Article XXXVI concerns changes in conditions of employment, including procedures for impact and implementation bargaining. The Arbitrator’s conclusion is based on his interpretation of Article XXXVI and is supported by his factual findings, including his finding that the parties’ past practice, which was “long recognized,” showed that the bargaining process under Article XXXVI “allowed [WAMC] to implement the pay provisions subject to any continuing policy negotiations.” *Id.* The Agency has not identified any contract language that would contradict the Arbitrator’s conclusion. As such, the Agency has not demonstrated that the award is implausible, irrational, or in manifest disregard of the parties’ CBA. The Agency thus has not established that the award fails to draw its essence from the parties’ CBA. *See, e.g., United States Dep’t of Def., Educ. Activity, Arlington, Va.*, 56 FLRA 1009, 1014 (2000).

B. Contrary to law

When a party’s exception challenges an arbitration award’s consistency with law, the Authority reviews the questions of law raised in the exception and the arbitrator’s award *de novo*. *See NFFE, Local 1437*, 53 FLRA 1703, 1709 (1998). When applying a *de novo* standard of review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law. *Id.* at 1710. In making that assessment, the Authority defers to the arbitrator’s factual findings. *See id.*

1. The award is not contrary to § 7106(b)(2) and (3) of the Statute

In this case, the Agency contends that the award is inconsistent with § 7106(b)(2) and (3) of the Statute because it requires WAMC to implement “non-negotiable pay provisions while the parties continue to negotiate” the impact and implementation of the Title 38 pay provisions. Exceptions at 9. The Agency states that such requirement would establish a new precedent under § 7106(b)(2) and (3). *Id.* at 12.

Authority precedent does not support the Agency’s claim that the Arbitrator’s finding, that the Union in effect agreed to WAMC’s implementation of the pay provisions subject to post-implementation bargaining, is contrary to § 7106(b)(2) and (3). For example, in *375th Combat Support Group, Scott Air Force Base, Illinois*, 46 FLRA 640, 677 (1992), the Authority adopted a judge’s findings, as relevant here, that the union agreed to an agency’s implementation of a certain program, subject to post-implementation bargaining. Also, in *United States Department of the Treasury, United States Custom Service, Region I, Boston, Mass., and St. Albans, Vermont District Office*, 10 FLRA 566, 567, 578-80 (1982), the Authority adopted a judge’s finding that the union waived its right to bargain over the substance of a proposed change by requesting impact and implementation bargaining and agreeing to negotiate after implementation of the decision. The Authority held that certain rights, such as the right to bargain prior to the implementation of a proposed change, may be waived as long as the waiver is clear and unmistakable. *See id.* Applying this precedent to the Arbitrator’s factual findings in the instant case, we find that the Union clearly waived its right to bargain prior to the Agency’s implementation of the title 38 pay provisions, subject to post implementation bargaining. *See* Award at 11 and 12. Accordingly, we conclude that the Agency has failed to establish that the award is inconsistent with § 7106(b)(2) and (3) of the Statute.

Additionally, the Agency claims that the Arbitrator’s determination that WAMC was required to pay nursing employees who were covered under a separate MOU Title 38 pay is erroneous because there “is no provision in law . . . that requires management to exclude this group” when negotiating a more inclusive agreement. Exceptions at 10. Such contention challenges the Arbitrator’s interpretation and application of the MOU,² and thus provides no basis for finding the award contrary to law. *See United States Dep’t of the Navy, Puget Sound Naval Shipyard and Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 6 n.2 (2007) (citing *United States Dep’t of Justice, Fed. Bur. of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 110 (2002) (Chairman Cabaniss and Member Armendariz concurring; Member Pope concurring as to result) (in conducting a contrary-to-law analysis, the Authority examines the provisions of the agreement “as interpreted and applied by the arbitrator”).

2. We note that no essence exception was filed that challenged the Arbitrator’s award on this point.

Accordingly, we find that the award is not contrary to the Statute.

2. The portion of the award granting attorney fees is remanded for clarification

The Agency contends that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g) because the Arbitrator awarded attorney fees without providing a fully articulated, reasoned decision and also because the award does not satisfy the interest of justice standard.

The threshold requirement for entitlement to attorney fees under the Back Pay Act 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. See *United States Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995). Once such a finding is made, the Act requires that an award of fees must be: (1) in conjunction with an award of back pay 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). See *id.*

The prerequisites for an award of attorney fees under § 7701(g)(1) are: (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. See *id.* An award resolving a request for attorney fees under section 7701(g)(1) must set forth specific findings supporting determinations on each pertinent statutory requirement. See *id.* Where an award does not sufficiently explain the determinations, the Authority will examine the record to see if it permits the Authority to resolve the matter. If so, the Authority will modify the award or deny the exception as appropriate. If not, the award will be remanded for further proceedings. See *United States Dep't of Agric., Animal and Plant Health Inspection Serv., Plant Prot. and Quarantine*, 53 FLRA 1688, 1695 (1998) (*Animal and Plant Health Inspection Serv.*).

In this case, the Arbitrator did not articulate the reasons for granting attorney fees and the record, as submitted to the Authority, does not contain any evidence that would assist the Authority in determining the Arbitrator's basis for granting attorney fees. The Authority's approach to attorney fees awards under the Back Pay Act that are not sufficiently explained is to "take the action necessary to assure that the award is consistent with applicable statutory standards." See *AFGE, Local*

3239, 61 FLRA 808, 809 (2006) (citing *Animal and Plant Health Inspection Serv.*, 53 FLRA at 1695) and *AFGE, Council 220*, 60 FLRA 1, 4 (2004).

With respect to the interest of justice standard, the Arbitrator did not address any of the interest of justice factors.³ Because the Arbitrator has not explained his award of attorney fees and the record does not permit the Authority to resolve the Agency's exceptions, this portion of the award is remanded to the parties, absent settlement, for resubmission to the Arbitrator to clarify, consistent with the foregoing standards, the reasons for granting attorney fees. See, e.g., *AFGE, Local 3239*, 61 FLRA at 810; and *AFGE, Council 220*, 60 FLRA at 4.

V. Decision

The portion of the award granting attorney fees is remanded to the parties, absent settlement, for resubmission to the Arbitrator for clarification of his award, consistent with this decision. The remaining exceptions are denied.

APPENDIX

Article XXXVI provides, in relevant part, as follows:

ARTICLE XXXVI

CHANGES IN CONDITIONS OF EMPLOYMENT

SECTION 1. The Union will be notified of any proposed change in conditions of employment affecting any Bargaining Unit Employee. The Employer will notify the Union, in writing, through the Labor Relations Office, of the proposed change. Notification will include: what employee(s) the change will effect, why the change is being implemented, proposed effective date of the change and what condition of employment will change.

SECTION 2. Impact and Implementation Bargaining Procedures. In the event that the Employer proposes changes in conditions of employment including those which involve management rights reserved under 5 U.S.C. 7106 or which are otherwise not negotiable, the following procedures shall apply with regard to negotiations concerning the impact and implementation (5 U.S.C. [§] 7106(b)(2) and (3)) of those changes:

- a. The Employer shall notify the Union at least seven (7) calendar days, or as soon as the

3. See *AFGE, Local 3239*, 61 FLRA at 809 n.* (discussing the interest of justice standard as addressed by the Merit Systems Protection Board in *Allen v. United States Postal Serv.*, 2 M.S.P.R. 420 (1980), and by the Authority under the Statute).

Employer is aware, prior to the planned implementation date of any proposed nonnegotiable change in conditions of employment, giving the Union at least seven (7) calendar days from the date of receipt to request impact and implementation bargaining.

b. If the Union does not request impact and implementation bargaining within the time limit, the Employer may implement the proposed changes.

c. Upon timely request by the Union, the Employer shall promptly enter into good faith negotiations regarding the impact and implementation of the proposed changes.

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