69 FLRA No. 74

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3749
(Union)

and

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOOD SAFETY INSPECTION SERVICE
(Agency)

0-AR-5165

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DECISION

August 16, 2016

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

I. Statement of the Case

Arbitrator James M. O'Reilly issued an award finding that the Agency had a contractual right to adjust an overtime roster, but that the Agency failed to provide notice to the Union and an opportunity to bargain before doing so. The award was silent as to the Union's request that the Arbitrator retain jurisdiction over the issue of attorney fees. The Union contacted the Arbitrator after the award became final and binding to ask him whether he intended to exercise jurisdiction over the question of attorney fees. The Arbitrator subsequently responded by email that he "did not retain jurisdiction over the [a]ward or attorney fees."[1]

The substantive question before us is whether the Arbitrator's award, as clarified by the Arbitrator's email, is contrary to law. Because, under the Back Pay Act (BPA),[2] an arbitrator has jurisdiction to consider an attorney-fee request at any time during the arbitration or within a reasonable period of time *after* the arbitrator's award of backpay becomes final and binding (absent a governing contractual time limit), and because those requirements are met in this case, the answer is yes. Accordingly, we modify the award, as clarified, to strike the Arbitrator's finding that he "did not retain jurisdiction over . . . attorney fees."[3]

II. Background and Arbitrator's Award

The grievant is a consumer safety inspector (CSI) with the Agency, who worked in a geographic region (circuit) in which several other CSIs were stationed. The Agency employs an overtime roster that previously listed the grievant as one of the first choices to fill in for CSIs who were not available to work their regularly-scheduled shifts. After the grievant was reassigned to a different circuit, the Agency changed the overtime roster to no longer include the grievant. When the grievant discovered that he was no longer being offered overtime opportunities as he had regularly been in the past, the Union filed a grievance alleging that the Agency unilaterally changed the overtime roster without giving notice and an opportunity to bargain, in violation of the parties' collective-bargaining agreement (parties' agreement). The Agency denied the grievance, and the parties proceeded to arbitration.

The Arbitrator framed the issue as "[w]hether or not the Agency violated the [parties' a]greement by changing an established agreed[-]upon overtime pull[-]pattern without first bargaining with the Union and, if so, what is the appropriate remedy."[4] The Arbitrator found that it "ma[de] sense" that the Agency would change the pull-pattern to exclude the grievant and include only CSIs that were located in the same circuit, and that the Agency "had a contractual right" to do so.[5] However, the Arbitrator found that the Agency was obligated to notify the Union of the change prior to implementation. As such, the Arbitrator sustained the grievance "to the extent that the Agency failed to notify the Union prior to unilaterally changing" the pull-pattern roster, and awarded the grievant 40.25 hours of overtime pay as requested by the Union in the grievance.[6] Although the Union requested that the Arbitrator retain jurisdiction over the question of attorney fees, the Arbitrator did not mention the issue of attorney fees in the award.

On October 13, 2015, the Union received a copy of the award dated October 2, 2015. On November 2, 2015, the Union emailed the Arbitrator to clarify whether "the [a]ward requires the parties to bargain the matter of overtime."[7] The Arbitrator responded that he had been "given the authority by both parties to issue an appropriate remedy," "that the amount of [backpay] stated in the grievance was more appropriate to the

[1] Exceptions, Ex. 1 at 1.
[2] 5 U.S.C. § 5596.
[3] Exceptions, Ex. 1 at 1.
[4] Award at 1.
[5] *Id*. at 6.
[6] *Id*. at 7.
[7] Exceptions, Ex. 1 at 2.

violation," and that the Arbitrator "had no further authority in this matter."[8]

On November 24, 2015, the Union again emailed the Arbitrator.[9] Noting that "after an arbitration decision becomes final and binding, a prevailing grievant may seek reasonable attorney fees," the Union asked "to clarify whether [the Arbitrator] intend[ed] to exercise jurisdiction and issue an Opinion over the question of attorney fees."[10] The Arbitrator replied the same day with a one-sentence message that he "did not retain jurisdiction over the Award or attorney fees."[11]

The Union filed its exceptions on December 23, 2015, twenty-nine days after the Arbitrator's November 24, 2015 email. The Agency filed an opposition.

III. Preliminary Matter: The Union's exceptions are timely.

Section 7122 of the Federal Service Labor-Management Relations Statute (the Statute) requires that exceptions be filed within thirty days from the date of service of the award.[12] The Authority presumes, absent evidence to the contrary, that an award was served by mail on the date of the award.[13] Under § 2425.2(b) of the Authority's Regulations, the thirty-day period for filing exceptions begins to run the day after the award's date of service.[14] Section 2429.22 of the Authority's Regulations provides that five days will be added if the award is served by mail or commercial delivery.[15]

The Arbitrator's original award is dated October 2, 2015, and was delivered to the Union by mail.[16] Because there is no evidence to the contrary, we presume that the award was served by mail on that date.[17] Counting thirty days beginning with the next day,[18] October 3, the due date for filing exceptions would have been November 1. However, as that date was a Sunday, the due date then became Monday, November 2.[19] Because the award was served by first-class mail, the Union was entitled to an additional five days,[20] which pushed the due date to November 7. But because that date was a Saturday, the Union's exceptions were due on the following Monday, November 9 (which was not a federal holiday).[21]

The Union submitted its attorney-fee request to the Arbitrator fifteen days later, on November 24. The Arbitrator replied by email the same day. The Union then filed the exceptions in this case twenty-nine days later, on December 23.

Based on the foregoing, if the Union's exceptions challenge the October 2 award, then they are untimely; if they challenge the award as clarified by the November 24 email, then they are timely. Therefore, it is necessary to determine whether the exceptions challenge the October 2 award or the award as clarified on November 24.

The Authority has held that, when a party seeks clarification of an arbitration award, and the arbitrator then modifies the award in a way that gives rise to the deficiencies alleged in the exceptions, the filing period for exceptions begins with the service of the modification.[22] Accordingly, where a backpay award is silent regarding attorney fees, and a later modification states for the first time that the arbitrator will not consider a request for attorney fees, the timeliness of exceptions to the fee denial is measured from the date of service of the modification.[23] This is consistent with the principle that, under the BPA, an arbitrator has jurisdiction to consider an attorney-fee request at any time during the arbitration or within a reasonable period of time *after* the arbitrator's award of backpay becomes final and binding (absent a governing contractual time limit).[24]

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[8] *Id*.
[9] *Id*. at 1.
[10] *Id*.
[11] *Id*.
[12] 5 U.S.C. § 7122(b). Our dissenting colleague's view that this time limit is "jurisdictional," Dissent at 9, is wrong. *See U.S. Dep't of VA Med. Ctr., Richmond, Va.*, 68 FLRA 231, 232-33 (2015) (Member Pizzella dissenting).
[13] *AFGE, Local 44*, 67 FLRA 721, 721 (2014) (citing *IFPTE, Local 77, Prof'l & Scientists Org.*, 65 FLRA 185, 188 (2010) (*IFPTE, Local 77*)).
[14] 5 C.F.R. § 2425.2(b).
[15] *Id*. § 2429.22(a).
[16] Exceptions at 7.
[17] *AFGE, Local 44*, 67 FLRA at 721 (citing *IFPTE, Local 77*, 65 FLRA at 188).
[18] 5 C.F.R. § 2425.2(b) ("In computing the [thirty-day] period, the first day counted is the day after, not the day of, service of the arbitration award.").
[19] *Id*. § 2429.21(a)(1)(v).
[20] *Id*. § 2429.22(a); *see also id*. § 2425.2(c)(1).
[21] *Id*. § 2429.22(a).
[22] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 66 FLRA 737, 739 (2012).
[23] *Cf. AFGE, Local 44, Nat'l Joint Council of Food Inspection Locals*, 67 FLRA 721, 723 (2014) (Member Pizzella dissenting) (where a claimed deficiency arises from a fee award, the timeliness of the exceptions is measured from the date of the service of the fee award, not the date of the service of the merits award); *cf. AFGE, Council 243*, 67 FLRA 96, 97 (2012) (where it was "sufficiently clear" from an award that the arbitrator intended to deny attorney fees, exceptions needed to be filed timely relative to that award, not relative to a later (allegedly "clarifying") email).
[24] *AFGE, Local 1148*, 65 FLRA 402, 403 (2010) (*Local 1148*) (emphasis added).

Here, the Arbitrator's October 2 award was silent regarding whether he intended to retain jurisdiction over the issue of attorney fees, as the Union had requested. It was not until his November 24 email that it became clear that the Arbitrator did not intend to retain such jurisdiction. Therefore, the timeliness of the Union's exceptions – which challenge the Arbitrator's refusal to exercise jurisdiction – is measured relative to the award as clarified on November 24. As the exceptions were filed within thirty days of that clarification, they are timely, and we consider them.[25]

We disagree with our colleague's assertion that "the Union's exception[s are] untimely and should be dismissed" because the Arbitrator's November 2 email triggered the filing deadline.[26] The Arbitrator's November 2 email clarified an issue concerning the award's remedy for the Agency's contract violation – whether the award required as a remedy that the parties bargain over the issue of overtime.[27] The Arbitrator clarified that he "had no further authority" concerning that issue.[28] The November 2 email did not concern attorney fees. As discussed above, the Arbitrator clarified the attorney-fee jurisdictional issue in his November 24 email. Thus, there is no basis for finding that the timeliness of the Union's exceptions concerning attorney fees should be measured relative to the Arbitrator's unrelated November 2 email.

IV. Analysis and Conclusion: The award, as clarified by the Arbitrator's November 24 email, is contrary to the BPA.

The Union argues that the award, as clarified, is contrary to the BPA. The Union contends that the Arbitrator erroneously denied that he had jurisdiction over the issue of attorney fees.[29] 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.[30] 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.[31]

The BPA confers jurisdiction on an arbitrator to consider a request for attorney fees at any time during the arbitration or within a reasonable period of time after the arbitrator's award of backpay becomes final and binding.[32] In addition, parties can negotiate into their collective-bargaining agreement time limits and other procedures to govern the filing of requests for attorney fees.[33] Moreover, a union may agree to language that clearly and unmistakably waives its statutory right to attorney fees.[34]

Regarding the BPA's backpay requirement, the Arbitrator awarded the grievant backpay in the form of overtime pay for the Agency's contract violation. As a result, the BPA conferred jurisdiction on the Arbitrator to consider the merits of a request for attorney fees.[35]

Regarding the BPA's reasonable-period-of-time requirement, even assuming that the award became final and binding in early November, we find that the Arbitrator had jurisdiction on November 24 over attorney-fee requests. There is no assertion that the parties agreed to establish a contractual time limit, or any other type of restriction, on an arbitrator's jurisdiction to consider an attorney-fee request. Moreover, the Authority has found that an attorney-fee request submitted to an arbitrator approximately forty days after a backpay award became final and binding was submitted within a reasonable period of time.[36]

Consequently, the Arbitrator's finding on November 24 that he had no jurisdiction to consider attorney fees is contrary to the BPA. Accordingly, we modify the award, as clarified on November 24, to strike the Arbitrator's finding that he had no jurisdiction over attorney fees.

In modifying the award, as clarified, we note that the Agency argues in its opposition that the Authority should deny the Union's exceptions because the requirements for such an award under § 7701(g) are not met.[37] However, we decline to address these arguments. Under the BPA and its implementing regulations, the Arbitrator is the "appropriate authority"

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[25] *Cf. U.S. DHS, U.S. Citizenship & Immigration Servs.*, 65 FLRA 723, 724-25 (2011) (addressing, but dismissing as interlocutory, exceptions to an arbitrator's email).
[26] Dissent at 8.
[27] Exceptions, Ex. 1.
[28] *Id.*
[29] Exceptions Br. at 10-12.
[30] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)); *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994).
[31] *AFGE, Local 3506*, 65 FLRA at 123 (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[32] *E.g., Local 1148*, 65 FLRA at 403.
[33] *Id.*
[34] *Id.* (citing *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 39 FLRA 1215, 1221 (1991)).
[35] *See Local 1148*, 65 FLRA at 403 (BPA conferred jurisdiction on an arbitrator to consider an attorney-fee request where the remedy involved payment under the BPA).
[36] *AFGE, Local 44*, 67 FLRA 721, 722 (2014) (Member Pizzella dissenting).
[37] Opp'n at 3-6.

to whom a request for attorney fees must be presented.[38] Thus, our modification of the award, as clarified, is without prejudice to either the Union's right to timely file a request for attorney fees in the future or the Agency's right to file a response to any such request.[39] In resolving a timely fee request, the Arbitrator should set forth specific findings supporting his determination on each pertinent statutory requirement under the BPA and its implementing regulations.[40]

Finally, the Union argues that the Arbitrator erred (1) when the Arbitrator "constructively denied" the Union attorney fees before the Union filed a petition,[41] and (2) when the Arbitrator did not articulate specific findings when he denied the Union attorney fees.[42] Because we have found that the Arbitrator's finding that he had no jurisdiction over attorney fees is contrary to law, and because the Arbitrator will have the opportunity to address these matters if the Union files a timely request for attorney fees, we find it unnecessary to address the Union's additional arguments challenging the award, as clarified.[43]

V. Decision

We modify the award, as clarified, to strike the Arbitrator's finding that he had no jurisdiction over attorney fees.

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[38] 5 C.F.R. § 550.807(a)-(b); *Local 2145*, 67 FLRA at 439 (citations omitted); *Local 405*, 67 FLRA at 399 (citing *Local 3615*, 66 FLRA at 565).

[39] *See, e.g.*, *AFGE, Local 2002*, 69 FLRA 425, 426 (2016) (*Local 2002*) (modification of award to strike arbitrator's premature denial of attorney fees without prejudice to union's right to file a timely request for attorney fees or the agency's right to file a response to any such request).

[40] *E.g.*, *AFGE, Local 1592*, 66 FLRA 758, 758-59 (2012) (citations omitted).

[41] Exceptions Br. at 10-12.

[42] *Id*. at 12-13.

[43] *Cf., e.g.*, *Local 2002*, 67 FLRA at 399 (finding that arbitrator erred by denying attorney fees in the absence of a request for attorney fees by union).

Member Pizzella, dissenting:

According to classical Greek mythology, the gods gave Pandora a box which contained the evils of the world. When Pandora unwittingly opened the box, all of its contents were irreversibly released.[1]

In *AFGE, Local 3690* (*Local 3690*), I cautioned my colleagues that they were creating an "electronic-Pandora's box" by "elevating the status of a routine communication – a one-sentence email message – to that of a[supplemental] award."[2] In that case, however, the majority seemingly recognized that, at least, there was a potential problem with according supplemental-award status to an email because they found, albeit circumspectly, that "[t]he award, *as clarified by the email*, is contrary to the [Back Pay Act]."[3] But, in this case, the majority does not even try to close the door to the Pandora-esque-electronic box it created. Today, the majority opens the door even wider and releases even worse consequences when it determines that a routine email communication from an arbitrator carries the full force and effect of an arbitral award.

In *Local 3690*, the arbitrator's award did not award attorney fees to either party. After receiving the award, the union, however, sent the arbitrator an email.[4] The union could have asked the arbitrator for a restaurant recommendation but, instead, asked the arbitrator if he intended to clarify his award in regard to attorney fees. In his one-sentence email reply, the arbitrator simply repeated what was already obvious – that "the purpose of the award was *not* to grant attorneys' fees to either of the parties."[5]

It was obvious to me in *Local 3690* that the arbitrator *should have addressed* the question of attorney fees *in his award* and explained to the parties why attorney fees were denied. That much is required by the Back Pay Act.[6] I disagreed with the majority in that case, however, because my colleagues unnecessarily accorded the union's email the status of a motion for attorney fees and the arbitrator's email the significance of a supplemental award − something the Authority had never done before.[7] I noted in my separate opinion that "an email is simply a method of communication."[8] An email may be grammatically *wrong* or it may be drafted so poorly that it is virtually *unintelligible*. But an email is *not* an award; unlike an award, an email cannot be contrary to law.

Unfortunately, my colleagues did not heed my warning about the certain consequences of that ill-advised approach – "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."[9]

In this case, the Arbitrator issued his award by mail on October 2, 2015.[10] According to the Federal Service Labor-Management Relations Statute (the Statute)[11] and the Authority's regulations,[12] the Union had until November 9 to file its exceptions. But no exceptions were filed. One would reasonably presume, therefore, that the case became "final and binding"[13] on November 9.[14] At that point, it would seem that the parties had effectively used their grievance procedure to "amicabl[y] settle[]" their "dispute[]."[15] But on November 2 (with one week ***still*** remaining to file a timely exception), Bradley Turflinger, AFGE's Eighth District Legal Rights Attorney – either because he wanted to chat with Arbitrator James O'Reilly or because he was simply trying to buy more time (the latter presumption seems far more plausible to me) − sent the Arbitrator an ex parte, *one-line email* asking the Arbitrator to "clarify[y]" his award.[16] Apparently not wanting to get dragged back into a dispute which he had already fully addressed, the Arbitrator replied in a *one-line* email *fifty-three minutes later* that he would entertain *no further discussion* on this case because he "ha[d] no further authority."[17]

Turflinger still did not file an exception. He, instead, ignored the Arbitrator's clear and unmistakable instruction that he was done with the case. Turflinger sent *yet another email* to the Arbitrator *three weeks later*, on November 24, *fifteen days after* any exception was due. Perhaps Turflinger was hoping that the Arbitrator had changed his mind because in the *new email* he *again* asked the Arbitrator "whether you intend to exercise jurisdiction . . . over . . . attorney fees."[18] In a ***twelve-word*** *email*, Arbitrator O'Reilly again replied, in no uncertain terms, that he had "*not* retain[ed] jurisdiction over the [a]ward or attorney fees."[19]

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[1] https://en.wikipedia.org/wiki/Pandora%27s_box.
[2] 69 FLRA 154, 156 (2015) (Dissenting Opinion of Member Pizzella).
[3] *Id*. at 155 (emphasis added).
[4] *Id*. at 154.
[5] *Id*. at 156.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] Majority at 3 (citing Exceptions at 7).
[11] 5 U.S.C. § 7122(b).
[12] Majority at 3 (citing 5 C.F.R. § 2429.22(a)).
[13] 5 U.S.C. § 7122(b).
[14] Majority at 4.
[15] 5 U.S.C. § 7101(a)(1)(C).
[16] Exceptions, Ex. 1 at 2.
[17] *Id*.
[18] *Id*.
[19] *Id*. (emphasis added).

The majority ignores entirely the fact that the Union did not file, nor attempt to file, a timely exception in which it could have argued that the Arbitrator erred by not addressing its request for attorney fees.

Therefore, the Union's exception is untimely and should be dismissed.

Unlike the majority, I am unwilling to subscribe to the notion that a party may unilaterally extend jurisdictional filing deadlines, which are established by the Statute and the Authority's regulations, simply because they inundate an arbitrator with repeated emails (like an electronic robomail center) asking for clarification of matters that have already been made abundantly clear.

Ironically, the Authority itself does not permit the filing by facsimile, let alone by email, exceptions, or oppositions to exceptions, from arbitration awards.[20] Service of such documents (and those elevated to the Authority from unfair-labor-practice, negotiation, and representation petitions and oppositions) must be served "in person, by commercial delivery, by first-class mail, or by certified mail."[21]

By according award status to a routine email communication between the Arbitrator and the Union, the majority assumes a responsibility which Congress did not give to the Authority. The Statute authorizes the Authority to resolve "issues relating to the duty to bargain in good faith,"[22] "complaints of unfair labor practices,"[23] and "exceptions to arbitrator's awards"[24] but not to referee emails, voice mail messages, texts, and tweets between parties and arbitrators.

The majority has effectively blurred the line between an arbitration award and a routine communication and it is impossible to predict where all of this will end. The only result of which I can be certain is that the Authority will be called upon to resolve an "unpredictable volume[] of future arbitration exceptions" that will focus on any number of email exchanges, facsimile transmissions, telephone calls, voice mails, and tweets between the parties and arbitrators.[25]

Applying the majority's rationale, if the Union had used its Twitter account to tweet the same question to the Arbitrator and the Arbitrator had tweeted back, the majority would recognize the return tweet (whether or not the Arbitrator added the hashtag "#lateraward") as a supplemental award that would excuse the Union from its late filing.

Suffice it to say, the majority's decision runs directly counter to our responsibility to "facilitate[] and encourage[] the amicable *settlement*[] of disputes."[26] Instead, this decision encourages parties to define their own filing deadlines by engaging in endless unsolicited queries of arbitrators who have already rendered a decision which is obviously final.

In this case, I do not believe that the Arbitrator's one-sentence email should be accorded the legal and procedural status of an award. Accordingly, I would dismiss the Union's exceptions as untimely.

Thank you.

[20] 5 C.F.R. § 2429.24(f).
[21] *Id*. § 2429.24(e).
[22] 5 U.S.C. § 7105(a)(2)(E).
[23] *Id*. § 7105(a)(2)(G).
[24] *Id*. § 7105(a)(2)(H).
[25] *Id*.

[26] 5 U.S.C. § 7101(a)(1)(C) (emphasis added).