



### **III. The Union's Exception**

The Union seeks review of the Arbitrator's Award on the ground that the portion concerning attorney fees is deficient and contrary to law. Specifically, the Union contends that the Award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because it fails to provide a fully articulated, reasoned decision on the attorney fee issue, and that it is also contrary to 5 U.S.C. § 7701(g) because it does not consider whether an award of fees is in the interest of justice. The Union contends that "it is in the interests of judicial efficiency for the Board to address the Union's request for fees in full." The AOC has filed a submission in opposition to the Union's exception contending that it should be denied, or, in the alternative, that the attorney fee issue should be remanded to the parties for resubmission to the Arbitrator.

### **IV. Standard of Review**

The standard for the Board's review of exceptions to an arbitration award is whether the award is deficient: (a) because it is contrary to any law, rule, or regulation; or (b) on other grounds similar to those applied by federal courts in private sector labor-management relations. Substantive Regulations § 2425.3.

### **V. Analysis**

Section 220(a) of the CAA extends to employing offices, employees, and collective bargaining representatives the rights, protections, and responsibilities established under various portions of the Federal Service Labor Management Relations Statute ("FSLMRS") including 5 U.S.C. §§7121-22, relating to grievance arbitration. *U.S. Capitol Police Bd. & FOP, U.S. Capitol Police Labor Comm.*, No. 01-ARB-01 (CP), 2002 WL 34461687, at \*3 (OOC Feb. 25, 2002). Under the FSLMRA, the entitlement to attorney fees is determined by reference to the Back Pay Act. *See U.S. Dep't of Veterans Affairs Med. Ctr., Detroit, Mich.*, 64 F.L.R.A. 794, 796 (2010) ("DVA"); *see also AFSCME Council 26 & Office of the Architect of the Capitol*, No. 00-LMR-03, 2001 WL 36175209 (OOC Jan. 29, 2001) (finding that the Back Pay Act is incorporated by reference through the CAA).

The Federal Labor Relations Authority ("FLRA" or "Authority") has determined that 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. *U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 F.L.R.A. 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). *Id.* Section 7701(g), in turn, requires that: (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. *DVA*, 64 F.L.R.A. at 796.\*

The FLRA has also determined that an award resolving a request for attorney fees under section 7701(g) must set forth specific findings supporting determinations on each pertinent statutory requirement and must state the specific reasons for approving or denying the request. *Id.*; see also *NTEU*, 66 F.L.R.A. 577, 582 (2012); *DVA*, 64 F.L.R.A. at 796; *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 63 F.L.R.A. 524, 528 (2009) ("*Womack*"); *AFGE Local 1770*, 63 F.L.R.A. 524, 528 (2009). 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 F.L.R.A. 808, 809 (2006); *Womack*, 63 F.L.R.A. at 528. However, the Authority will not "simply find an award deficient that is not sufficiently explained or articulated." *DVA*, 64 F.L.R.A. at 796. Rather, in cases where the record permits the Authority to properly resolve the exception, it will modify the award or deny the exception, as appropriate. *Id.*; see also Substantive Regulation 2425.4. If, however, the record does not permit the Authority to resolve the exception, it will remand the award for further proceedings. *Id.*; *AFGE Local 933*, 64 F.L.R.A. 794, 797 (2010); *Womack*, 63 F.L.R.A. at 528.

Here, the Award lacks an express determination as to whether 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. Further, the Arbitrator's statement that "[t]he circumstances warrant that attorney fees and expenses are not awarded" fails to articulate the reasons for his determination. The record does not permit the Board to discern the Arbitrator's basis for his determination or whether, in making it, he considered the applicable statutory standards set forth above. Accordingly, this portion of the Award is deficient under Substantive Regulation 2425.3.

Although, as stated above, the Union contends that it would be in the interests of judicial efficiency for the Board to address its request for fees, we agree with the AOC that the issue should be remanded to the parties for resubmission to the Arbitrator. The FLRA has consistently held that the arbitrator, and not the Authority, is the appropriate authority for resolving a union request for attorney fees. See *Ala. Ass'n of Civilian Technicians*, 56 F.L.R.A. 231, 235 (2000). We therefore remand this matter to the parties, absent settlement, for resubmission to the Arbitrator for specific findings and supporting determinations on each pertinent statutory requirement for deciding whether an award of attorney fees is warranted under the circumstances of this case. See *NTEU*, 66 F.L.R.A. at 577 (2012); *Womack*, 63 F.L.R.A. at 524; *AFGE Council 220*, 60 F.L.R.A. 1, 4 (2004).

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\* Attorney fees are "incurred" within the meaning of section 7701(g)(1) where a labor union attorney renders legal services on behalf of an employee grievant. See *AFGE Local 3882 v. FLRA*, 944 F.2d 922 (D.C. Cir. 1991) (attorney fees are available under Back Pay Act to union attorneys who have served the cause of employees in grievance or unfair labor practice matters); see also *Dep't of Health & Human Servs. & AFGE Local 1923*, 48 F.L.R.A. 1040 (1993); *Naval Air Dev. Ctr., Dep't of the Navy & AFGE Local 1928*, 21 F.L.R.A. 131 (1986).

## **ORDER**

The Union's exception to the Arbitrator's award is granted. The portion of the Award concerning attorney fees is remanded to the parties, absent settlement, for resubmission to the Arbitrator.

It is so ORDERED.

Issued, Washington, DC, July 26, 2017.