
In the Matter of Arbitration Between *

NATIONAL COUNCIL OF HUD *

LOCALS 222, AFGE, AFL-CIO *

and *

U.S. DEPARTMENT OF HOUSING AND *

URBAN DEVELOPMENT *

RE: Timely Payment of
Performance Awards

OPINION AND AWARD OF
ROGER P. KAPLAN, ESQ., ARBITRATOR

APPEARANCES:

For AFGE: Michael J. Snider, Esq.
Jason I. Weisbrot, Esq.

For HUD: James L. Keys
Agency Representative

STATEMENT OF THE CASE

On March 1, 2006, the parties notified the undersigned of his appointment as the Arbitrator in the above-captioned case. The parties did not desire a hearing and none was held. The parties agreed that the case should be decided on the briefs and the Stipulation of the Parties (Stipulation). Both parties filed briefs on approximately August 28, 2006.

ISSUE

The parties could not agree on a stipulation of the issue. Therefore, I find that the issue is:

1. What is the appropriate remedy, if any, for HUD's failure to make timely payments of awards pursuant to the CBA?

PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT (CBA)

Article 11 - Incentive Awards Program

11.02 Awards for Overall Performance

(1) All Employees who have received an Outstanding performance rating for the year shall be eligible for:

(b) A cash award of up to three (3) percent of the entrance level salary of the employee's grade for which the period of the award covers, rounded by the nearest five dollars (\$5).

(3) ... Management shall process the award granted within three (3) pay periods of the date of the decision to make awards or the appraisal, whichever is later.

11.06 Prompt Presentation of Award

Recognizing that awards are most effective when presented as promptly as possible after the performance or act that is being recognized, Management agrees to make awards as promptly as possible after the decision is made by Management to grant an award.

Article 22 - Grievance Procedures

22.06 Time Limits

(1) Time limits for the filing of a grievance... shall begin to run from the next workday after the grievant became aware or should have become aware of the matter being grieved. The date of expiration of a time limit shall be close of business hours the last day of the stated period...

22.15 Grievance of the Parties

(1) Should either party have a grievance over any matter covered by this procedure, it shall inform the designated representative of the other party of the specific nature of the complaint in writing within forty-five (45) days of the date or when the party became aware or should have become aware of the matter being grieved. Either party may grieve a continuing condition at any time.

Article 23 - Arbitration

23.04 Arbitration Fees and Expenses

The losing party shall pay the arbitrator's fees and expenses. The arbitrator should indicate which party is the losing party. If, in the arbitrator's judgment, neither party is the clear losing party, costs shall be shared equally.

PERTINENT STIPULATED FACTS

4. HUD's Performance Management Plan states on page 9: Reason for Appraisal Delays "(1) The employee has not worked under a performance plan for 90 days. The rating is delayed until the employee works under a performance plan for 90 days, at which point a rating will be given. (2) Sufficient performance information does not exist for a new supervisor who has not supervised an employee for at least 90 days or a reviewing official to rate."

5. All Bargaining Unit employees have been paid performance awards for years 2003 thru 2005.

6. The Agency failed to timely pay thousands of Bargaining Unit employees their awards under the CBA provisions cited above.

7. The Agency has not given any employee any other remedy for the stipulated failure to timely pay these Awards.

AGENCY'S ARGUMENTS

The U.S. Department of Housing and Urban Development (HUD or Agency) took the position in its brief that the American Federation of Government Employees, National Council of HUD Locals 222, AFL-CIO (AFGE or Union) did not establish that the Agency failed to pay awards timely. It maintained that there was an established past practice of paying the awards that the Union did not contest for several years. HUD also argued that the failure to pay interest on the awards did not violate the Back Pay Act, 5 U.S.C. § 5596, or meet the requirements to require that the Agency pay interest or attorney's fees. Therefore, HUD contended that there should be no remedy in this case.

UNION'S ARGUMENTS

The AFGE contended in its brief that HUD violated the CBA and the Back Pay Act when it failed to timely process and pay awards over the past six (6) years. The Union protested that the failure to timely pay awards was an unwarranted and unjustified personnel action under the Back Pay Act, which requires the payment of interest, reasonable attorney's fees, costs and expenses.

DISCUSSION AND ANALYSIS

The Agency argued in its brief that AFGE did not establish that the Agency failed to pay awards timely. HUD asserted that it paid awards timely, consistent with its interpretation of the requirements of Article 11.02 (3) of the CBA. Regardless of the reasonableness, or not, of the Agency's interpretation of Article 11.02 (3) of the CBA, this argument is directly contrary to Stipulation 6. Stipulation 6 states, "The Agency failed to timely pay thousands of Bargaining Unit employees their awards under the CBA provisions cited above." In light of Stipulation 6, there can be only one conclusion. I find that HUD failed to timely pay awards.

HUD claimed that there was an established past practice of paying the awards. It explained in its brief the procedure for paying awards that it alleged was followed since 1999, without objection from the Union. While the HUD brief set out the details of how the Agency processed, approved and paid awards, there are no facts in the Stipulation that support the argument. The problem with this Agency argument is that there is no evidence to support the argument. Under these circumstances, I cannot find that there was an established past practice.

The crux of the dispute between the parties, given the Stipulation, is whether the failure to timely pay awards, in violation of the CBA, meets the requirements of the Back Pay Act for the payment of interest, reasonable attorney's fees, costs and expenses. HUD disputed that there was a "withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee." AFGE contended that the violation of the CBA was an unwarranted or unjustified personnel action under the Back Pay Act. It further argued that the fact that the Agency belatedly paid the awards without

being ordered to do so by an arbitrator, does not preclude the undersigned from awarding interest, reasonable attorney fees, costs and expenses.

An award of backpay is authorized under the Back Pay Act only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials. See U.S. Department of Health and Human Services and National Treasury Employees Union, 54 FLRA 1210, 1218-19 (1998) (Authority clarified that a requirement that the pay loss would not have occurred but for the unwarranted action is not a separate, independent requirement of the Act, but merely amplifies the causal connection requirement of the Act). A violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action under the Act. See U.S. Department of Defense, Department of Defense Dependents Schools and Federal Education Association, 54 FLRA 773, 785 (1998).

Under the provisions of the Back Pay Act, "interest must be paid" on backpay awards. See United States Dep't of Defense, Marine Corps Logistics Base, Barstow, Cal., 37 FLRA 796 (1990). The Back Pay Act itself provides the method for computing interest. Under § 5596(b)(2)(B)(i), interest "shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made." In addition, in calculating the amount of backpay due, the Authority has held that there is "no basis in law or regulation on which to conclude that procedural delays form a basis to withhold the payment of interest under 5 U.S.C. § 5596(b)(2)(A)." *Id.* at 798.

The threshold requirement for entitlement to attorney fees under the Back Pay Act is a finding that the grievant was effected 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 Defense, Defense Distribution Region East, New Cumberland, Pa., 51 FLRA 155, 158 (1995). Once such a finding is made, the Back Pay Act further requires that an award of fees must be: (1) in conjunction with an award of backpay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with the standard established under 5 U.S.C. § 7701(g), which pertains to attorney fee awards by the Merit Systems Protection Board (MSPB). See *id.* at 158.

Section 7701(g) applies to all cases, except those involving employment discrimination. The prerequisites for an award of attorney fees under § 7701(g) are 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.

Had the grievants not already been awarded backpay by HUD, I would have found (1) that they were affected by an unjustified or unwarranted personnel action; and (2) that the personnel action resulted in the withdrawal or the reduction of their pay. Such a finding would have entitled the grievants to backpay and interest.

In Department of the Navy, Naval Surface Warfare Center, Indian Head Division, Maryland and AFGE, Local 1923, 57 FLRA 417, 422 (2001), the Authority rejected the agency's argument that the arbitrator lacked jurisdiction to award attorney

fees because he did not award backpay. As noted by the Union, an arbitrator does not need to award backpay in order to determine that attorney fees should be awarded in the interest of justice. The Authority has stated:

There is no requirement in our precedent or the Back Pay Act that an award of backpay be in the same proceeding as the proceeding that determines entitlement to attorney fees. Rather, as long as employees have, in fact, been determined to be entitled to an award of backpay under the Back Pay Act, that this award was made in advance of the proceeding at issue has no bearing on a party's entitlement to the other remedies provided for in the Back Pay Act.

United States Dep't of Defense, Dependents Schools, 54 FLRA 514, 519 (1998).

Consistent with the FLRA decisions cited and discussed above, I find that the Grievants are entitled to interest on the awards. Interest is payable pursuant to and consistent with the provisions of the Back Pay Act. Additionally, I find that reasonable attorney fees are payable by HUD.

REMEDY

Stipulation 5 reads, "All Bargaining Unit employees have been paid performance awards for years 2003 thru 2005." There is no other evidence in the record concerning when awards were paid. The AFGE requested that interest be awarded for six (6) years, the maximum amount of time permitted under the Back Pay Act. HUD responded to the grievance by attempting to limit the period to 2005, citing Article 22.06 of the CBA. I find that interest should only be paid back to 2003, since the Stipulation establishes that awards were paid late in 2003, 2004 and 2005. There is no evidence of awards being paid prior to 2003, or if paid, whether they were paid late. Article 22.15(1) of the CBA allows either party to grieve "a continuing condition at any time." I find that the failure

to timely pay awards was a continuing condition. Therefore, I reject the Agency's effort to limit the grievance to 2005.

I hereby grant the Union's request for reasonable attorney fees. I direct the parties to attempt to resolve the specific amount of attorney fees payable by the Agency. I will retain jurisdiction for 60 days to allow time for the filing of a petition for attorney fees, should the parties be unable to resolve the amount of attorney fees without further consideration by the undersigned.

Article 23.04 of the CBA provides that the losing party shall pay the arbitrator's fees and expenses. It directs that the arbitrator should indicate which party is the losing party. I find that the Agency is the losing party.

AWARD

After carefully considering all of the evidence in the Stipulation of the Parties and the arguments raised in the briefs, I find that:

1. The grievance is granted;
2. Employees who were not paid awards timely, going back to 2003, shall be paid interest pursuant to and consistent with the provisions of the Back Pay Act;
3. The AFGE is entitled to reasonable attorney fees; I will retain jurisdiction for 60 days from the date of this decision;
4. HUD is the losing party responsible under the CBA for the payment of the undersigned's fees and expenses.

DATED: (NOV 13 2006)


Roger P. Kaplan, Esq.
Arbitrator

Alexandria, Virginia