64 FLRA No. 72

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
(Union)

0-AR-4187

DECISION

January 29, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Alan R. Viani filed by the Agency under § 7122 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 exception.

The Arbitrator awarded the Union attorney fees under the Back Pay Act, 5 U.S.C. § 5596. For the reasons discussed below, we remand the award to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator's Award

In his original award, the Arbitrator found that the Agency had just cause to discipline the grievant for performing approximately thirty criminal background queries on an Agency computer system (TECS) without authorization. Original Award at 6. However, the Arbitrator determined that the Agency's chosen penalty — a fourteen-day suspension — should be mitigated. *Id.* at 6-7. In this regard, the Arbitrator found that the grievant had no record of past discipline or poor work performance, had ceased engaging in improper use of TECS, and had been permitted by the Agency to continue to use TECS. *Id.* at 6. Additionally, the Arbitrator found that the Agency punished two similar offenses by imposing penalties of only two or fewer days. *Id.* The Arbitrator mitigated the penalty from a fourteen-day suspension to a five-day suspension. As no party filed exceptions to the original award, the original award became final.

Subsequently, the Union filed a petition for attorney fees, and the Agency filed a response asserting that attorney fees were not warranted "in the interest of justice" under the criteria set forth in *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980) (*Allen*). * In his second award (the attorney fee award), the Arbitrator awarded attorney fees under the fifth *Allen* criterion, finding that the Agency knew or should have known that "a 14-day suspension of the grievant was excessive[.]" Attorney Fee Award at 4. In support of his conclusion, the Arbitrator stated: "All of the circumstances surrounding this matter, which I will not repeat here, make it abundantly clear that the Agency should reasonably have been expected to know that its proposed penalty was excessive; thus, the 'interest of justice' standard has been met." *Id.* at 3. The Arbitrator also stated that the "Agency's argument that it has already mitigated the penalty does not establish just cause for a fourteen-day suspension." *Id.* (quoting Original Award at 6).

III. Positions of the Parties

A. Agency's Exception

The Agency asserts that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because "the Arbitrator's factual findings do not support the legal conclusion that attorney fees are warranted under the interest of justice" under 5 U.S.C. § 7701(g)(1) (§ 7701(g)(1)). Exception at 8. In this regard, the Agency claims that the Arbitrator failed to consider the "reasonableness of the Agency's actions and its positions in light of what evidence was available at the time of its penalty determination." *Id.* at 13 (citing *NTEU*, 54 FLRA 250, 254 (1998)). To the extent that the Arbitrator based his award on the mitigation of the grievant's penalty, the Agency contends that such mitigation does not, by itself, warrant an award of attorney fees. Exception at 16-17 (citing *Sims v. Dep't of the Navy*, 711 F.2d 1578, 1582 (Fed. Cir. 1983)). Additionally, the Agency contends that it "could not have been reasonably aware that the penalty would be deemed exces-

*. Under *Allen*, an award of attorney fees is "in the interest of justice" where: (1) the agency engaged in a prohibited personnel practice; (2) the agency's action was clearly without merit or wholly unfounded or the employee is substantially innocent of the agency charges; (3) the agency initiated the action against the employee in bad faith; (4) the agency committed gross procedural error; or (5) the agency knew or should have known that it would not prevail on the merits when it brought the proceeding. *Allen*, 2 M.S.P.R. at 434-35.

sive[,]" because the grievant: (1) was guilty as charged; (2) engaged in serious misconduct; and (3) received an appropriate penalty under the Agency's Table of Offenses and Penalties. Exception at 13-14.

B. Union's Opposition

The Union asserts that attorney fees are warranted in the interest of justice because, according to the Union, the Agency knew or should have known that the fourteen-day penalty it imposed was "unreasonably[] harsh as compared to other" penalties the Agency issued in similar cases. Opp'n at 10. In addition, the Union contends that, to the extent that the Agency's exception alleges that the award is based on a nonfact, the exception lacks merit. *Id.* at 11-12.

IV. Analysis and Conclusions

The Agency contends that the award is contrary to § 7701(g)(1) because the Arbitrator failed to support his conclusion that the Agency knew or should have known that it would not prevail on the merits when it brought the proceeding. 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*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See U.S. Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The threshold requirement for entitlement to attorney fees under the Back Pay Act, 5 U.S.C. § 5596, is a finding that the grievant was affected by an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *See U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995) (*Defense Distrib.*). 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 standards established under § 7701(g)(1). *See id.* Section 7701(g)(1) 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. *See id.*

In this case, the Agency claims that fees were not warranted in the interest of justice within the meaning of § 7701(g)(1). The Authority evaluates "interest of justice" issues under § 7701(g)(1) by applying the criteria originally established by the Merit Systems Protection Board (MSPB) in *Allen*, 2 M.S.P.R. 420. *See, e.g., Laborers' Int'l Union of N. Am., Local 1376*, 54 FLRA 700, 702-03 (1998) (*LIUNA, Local 1376*). Here, the parties dispute only whether the award satisfies the fifth criterion of *Allen*, i.e., whether the Agency "knew or should have known that it would not prevail on the merits when it brought the proceeding." *Allen*, 2 M.S.P.R. at 435. It is well-settled that the penalty imposed by an agency is an aspect of the merits of an agency's case. *See U.S. GSA, N.E. & Caribbean Region, N.Y., N.Y.*, 61 FLRA 68, 70 (2005) (*GSA*) (citing *AFGE, Local 12*, 38 FLRA 1240, 1253 (1990)). Thus, attorney fees are warranted in the interest of justice if an agency knew or should have known that its choice of penalty would be reversed. *GSA*, 61 FLRA at 70.

A determination as to whether an agency "knew or should have known" that it would not prevail on the merits "requires evaluation of the nature and weight of the evidence available to the agency at the time of its disputed action." *LIUNA, Local 1376*, 54 FLRA at 703. This "requires an arbitrator to determine the reasonableness of an agency's actions and positions in light of what information was available to it in the case." *Id.* Additionally, an arbitrator's assessment of whether an agency "knew or should have known" it would not prevail is primarily factual. *Id.* As such, an arbitrator's decision on this issue must be "fully articulated [and] reasoned . . . setting forth the [a]rbitrator's specific findings supporting the determination on each pertinent statutory requirement[.]". *Defense Distrib.*, 51 FLRA at 158.

In the attorney fee award, the Arbitrator stated: "All of the circumstances surrounding this matter, which I will not repeat here, make it abundantly clear that the Agency should reasonably have been expected to know that its proposed penalty was excessive; thus, the 'interest of justice' standard has been met." Attorney Fee Award at 3. He did not issue a fully articulated and reasoned decision and did not set forth specific findings supporting his determination. *Defense Distrib.*, 51 FLRA at 158. In this regard, the attorney fee award did not contain the necessary analysis set out in *LIUNA, Local 1376*, 54 FLRA at 703. Moreover, even assuming that the Arbitrator was referring back to findings in the original award when addressing the interest of justice issue, nothing in the original award supports the award

of attorney fees. In this connection, although the original award mitigated the Agency's chosen penalty, "[p]enalty mitigation alone . . . does not create a presumption in favor of satisfaction of any of the *Allen* factors." *Del Prete v. U.S. Postal Serv.*, 104 M.S.P.R. 429, 433 (2007) (Chairman McPhie dissenting). *Accord Dunn v. Dep't of Veterans Affairs*, 98 F.3d 1308, 1313 (Fed. Cir. 1996)).

Further, there is nothing in the record that would permit the Authority to determine whether attorney fees are warranted in the interest of justice. Where, as here, neither the attorney fee award nor the record indicates whether attorney fees are warranted in the interest of justice, the Authority will remand the case to the arbitrator. *See U.S. Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 56 FLRA 477, 479 (2000). Therefore, we remand this matter for a determination as to whether attorney fees are warranted in the interest of justice.

V. Decision

We remand the award to the parties for resubmission to the Arbitrator, absent settlement.