65 FLRA No. 50

UNITED STATES
DEPARTMENT OF THE AIR FORCE
355 FIGHTER WING
DAVIS MONTHAN AIR FORCE BASE
TUCSON, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2924
(Union)

0-AR-4505
(63 FLRA 331 (2009))

DECISION

October 29, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award (the fee award) of Arbitrator Frederick Day filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator denied the Union's application for an award of attorney fees. For the reasons that follow, we set aside the award and remand it to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator's Awards

A. Merits Award

The Agency suspended the grievant on the basis of two charges: (1) failure to follow proper orders; and (2) inappropriate conduct.[2] The charge of failure to follow proper orders was based on the grievant's refusal of an order to disassemble an aircraft fuel cell. The charge of inappropriate conduct was based on the grievant's behavior towards his supervisor and his behavior in handing in his credentials, quitting his job, and leaving the worksite.[3] Merits Award at 2-6. The parties submitted to arbitration the stipulated issue of whether the Agency had just cause to suspend the grievant.

With regard to the charge of failure to follow proper orders, the Arbitrator acknowledged that, in refusing to disassemble the fuel cell, the grievant disputed whether the cell was "dry," as alleged by the Agency, and expressed safety concerns about exposure to contaminants and inadequate personal protective equipment. *Id.* at 5. As to the condition of the cell, the Arbitrator first noted the testimony of the Agency's occupational safety and health expert, who testified that, under the Agency's technical orders, a "wet" fuel cell is a cell containing jet fuel and a dry fuel cell is a cell in which the jet fuel has been drained and purged from the cell with oil. *Id.* The Arbitrator further noted that the Agency's expert conceded that dry fuel cells are not "literally dry" because they are wet with oil and residual jet fuel, but claimed that there should be only "minimal puddles" in a dry cell. *Id.*

Despite the testimony of the Agency's expert, the Arbitrator found that the grievant was also an expert in the matter of servicing fuel cells and was the only witness to the actual condition of the disputed fuel cell. *Id.* at 12. The Arbitrator credited the grievant's testimony that, although the Agency considers fuel cells purged with oil to be dry, they are often wet with jet fuel foam, puddles of jet fuel and oil, and leaking residual jet fuel from fuel lines. In addition, he found that the disputed fuel cell actually contained wet foam, puddles of jet fuel and oil, and leaky fuel valves that were different from the "ideal conditions" of dry fuel cells described by the Agency's safety expert and the Agency's technical

1. Member Beck's dissenting opinion is set forth at the end of this decision.

2. The Arbitrator noted that the Agency reduced the proposed suspension from fourteen days to five days and then to two days. Merits Award at 2 n.1. However, the Arbitrator acknowledged that the grievant had served a five-day suspension and further acknowledged the Union's claim that, as of the date of submission of its post-hearing brief, the grievant had not been reimbursed for the three days that he served over and above the two-day reduced penalty. *Id.*

3. The grievant, with the Agency's approval, subsequently rescinded his resignation. *Id.* at 5.

orders. *Id.* at 10. He also credited the grievant's testimony that, in working on such cells in the past, his coveralls became saturated with fuel and oil and partially deteriorated, soaking his clothes and body. *Id.* at 9-10. Accordingly, the Arbitrator determined that, when the grievant refused to enter the cell, his safety concerns about the fuel system were legitimate. Additionally, the Arbitrator found that, under the Agency's technical orders, the Agency should have provided the grievant with the proper protective equipment and that, under the parties' collective bargaining agreement, the grievant's supervisor should have requested an inspection of the disputed fuel cell by Agency safety or health officials instead of ordering the grievant to enter and disassemble the cell without examining the condition of the cell himself. *Id.* at 11-13.

For the foregoing reasons, the Arbitrator concluded that the grievant's refusal to follow the order was justified and that no discipline was warranted for the refusal. *Id.* at 13.

With regard to the charge of inappropriate conduct, the Arbitrator found that the grievant's conduct was abrupt, disrespectful, and inappropriate. He concluded that the Agency had just cause to reprimand, but not suspend, the grievant for this conduct. *Id.* at 14. The Arbitrator awarded the grievant backpay. *Id.*

The Agency filed exceptions to the merits award, and the Authority denied them. *U.S. Dep't of the Air Force, 355 Fighter Wing, Davis-Monthan Air Force Base, Tucson, Ariz.*, 63 FLRA 331 (2009). Thereafter, the Union filed an application for attorney fees.

B. Fee Award

In the fee award, as relevant here, the Arbitrator addressed whether an award of fees was warranted in the interest of justice under the criteria established by the Merit Systems Protection Board (MSPB) in *Allen v. USPS*, 2 M.S.P.R. 420 (1980) (*Allen*).[4] The Arbitrator considered whether criterion 5 of *Allen* was satisfied because the Agency knew or should have known that it would not prevail on the merits when it suspended the grievant. In this regard, the Arbitrator noted that the Agency's charge of failure to follow proper orders was based on the characteristics of a wet fuel cell, as set forth in the Agency's technical orders. He acknowledged that he had found, in the merits award, that the Agency was wrong about the actual condition of the disputed fuel cell. Fee Award at 10. Nevertheless, the Arbitrator found that the Agency's action was reasonable on the basis of its "by-the-book" view of the disputed fuel cell. *Id.*

In addition, he rejected the Union's contention that criterion 5 was satisfied because "the 'same evidence' presented at the arbitration hearing was available to the Agency" when the Agency decided to suspend the grievant. *Id.* Instead, he emphasized that, when the Agency made that decision, the Agency was under no obligation to credit the grievant's account of the incident because of its belief that he was attempting to avoid the assigned work. He also found that the Agency presented credible evidence at the arbitration hearing and that there was no evidence that the Agency was negligent. *Id.* at 10-11.

The Arbitrator also addressed the Union's claim that *Lambert v. Dep't of the Air Force,* 34 M.S.P.R. 501, 507 (1987), established a *per se* rule that fees are warranted in the interest of justice under criterion 5 whenever an agency's chosen penalty is mitigated. Fee Award at 11. The Arbitrator rejected this claim, noting that, in *Dunn v. Dep't of Veterans Affairs*, 98 F.3d 1308 (Fed. Cir. 1996) (*Dunn*), the court held that a "presumption of fees upon mitigation of a penalty runs counter to the statutory requirement that the employee show that the interests of justice warrant an award." Fee Award at 12 (quoting *Dunn*, 98 F.3d at 1313).

For the foregoing reasons, the Arbitrator concluded that fees were not warranted in the interest of justice under *Allen* criterion 5. In addition, he found that fees were not warranted under *Allen* criteria 1 and 2. Accordingly, he denied the Union's

4. In *Allen*, the MSPB listed five broad categories of cases in which an award of attorney fees would be warranted in the interest of justice: (1) where the agency engaged in a prohibited personnel practice; (2) where the agency action was clearly without merit or wholly unfounded or the employee was substantially innocent of charges brought by the agency; (3) where the agency initiated the action in bad faith; (4) where the agency committed a gross procedural error; and (5) where the agency knew or should have known that it would not prevail on the merits when it brought the proceeding. 2 M.S.P.R. at 434-35. An award of fees is also warranted in the interest of justice in cases brought under the Statute when there is a service to the federal workforce or a benefit to the public derived from maintaining the action. *E.g., U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010).

fee application without addressing the reasonableness of the amount of fees requested. *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the Arbitrator erred by concluding that *Allen* criterion 5 was not satisfied. Exceptions at 11. In this connection, the Union asserts that the Arbitrator failed to address and evaluate the evidence available to the Agency when it suspended the grievant, and notes that the Arbitrator found in the merits award that only the grievant actually knew the condition of the fuel tank. Accordingly, the Union claims that the merits award supports a conclusion that the Agency knew or should have known that it would not prevail when it suspended the grievant, and that the Arbitrator's conclusion otherwise is an inappropriate reexamination by the Arbitrator of his original findings. *Id.* at 12-13. The Union also argues that *Allen* criteria 1 and 2 were satisfied. *Id.* at 7-9. Finally, the Union contends that the award is deficient as based on a nonfact because the Arbitrator incorrectly stated that his merits award reduced a two-day suspension to a letter of reprimand. *Id.* at 14.

B. Agency's Opposition

The Agency contends that the Arbitrator did not err in concluding that an award of fees was not warranted in the interest of justice. Opp'n at 6-9. As to *Allen* criterion 5, the Agency notes that the Arbitrator specifically found in the fee award that there was no evidence that the Agency was negligent in its investigation or otherwise acted in a negligent manner. The Agency argues that the Authority should defer to these factual findings and deny the exception. *Id.* at 9. Further, the Agency contends that the Union fails to establish that the award is based on a nonfact. *Id.* at 10.

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews *de novo* any questions of law raised by the exception and the award. *E.g., U.S. Dep't of the Navy, Commander, Naval Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010). In applying a standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. The award in this case must be in accordance with the standards established under 5 U.S.C. § 7701(g)(1) (§ 7701(g)(1)).[5] *Id.* According to the Union, the award is not in accordance with the standard that an award of fees is warranted when in the interest of justice. As such, we only address this requirement. *Id.*

The Authority resolves whether an award of fees is warranted in the interest of justice in accordance with § 7701(g)(1) by applying the criteria established by the MSPB in *Allen*. In resolving whether an arbitrator properly applied the criteria, the Authority looks to the decisions of the MSPB and the United States Court of Appeals for the Federal Circuit. *NAGE, Local R5-188*, 54 FLRA 1401, 1406 (1998). In addition, an award of fees is warranted in the interest of justice if any one of the *Allen* criteria is satisfied. *E.g., U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 819, 821 (2010).

Under *Allen* criterion 5, an award of fees is warranted in the interest of justice when the agency knew or should have known that it would not prevail on the merits when it disciplined the employee. *Allen*, 2 M.S.P.R. at 435. Making this determination requires the arbitrator to evaluate the reasonableness of the agency's actions and positions in light of the information available to it when it disciplined the employee. *U.S. Dep't of Homeland Sec., ICE*, 64 FLRA 1003, 1006-07 (2010) (*ICE*).

In disciplinary actions, the penalty imposed by the agency is an aspect of the merits of an agency's case, and fees are warranted in the interest of justice when the agency knew or should have known that its choice of penalty would not be sustained. *Id.* at 1006. The critical point is that agencies act unreasonably by imposing penalties that it knows or should know will not withstand scrutiny. *NATCA*, 64 FLRA 799, 801 (2010). In this regard, the MSPB has found that, when the penalty is mitigated based on evidence before, or readily available to, the agency at the time of the disciplinary action, and no new information was presented at the merits hearing that was not available to the agency at the time of the discipline, such mitigation establishes that the agency knew or should have known that its choice of penalty would not be sustained. *E.g., Miller v. Dep't of the*

5. Section 7701(g)(1) provides, in pertinent part, that the MSPB "may require payment by the agency involved of reasonable attorney fees incurred by an employee . . . if the employee . . . is the prevailing party and the [MSPB] . . . determines that payment by the agency is warranted in the interest of justice[.]"

Army, 106 M.S.P.R. 547, 551 (2007); *Del Prete v. USPS,* 104 M.S.P.R. 429, 434-35 (2007). In addition, the MSPB has held that "by imposing an unreasonably excessive penalty, an agency acts irresponsibly and . . . knows or should know that the penalty will not survive [MSPB] scrutiny." *Hutchcraft v. Dep't of Transp.,* 55 M.S.P.R. 138, 142 (1992).

An arbitrator's assessment of whether the agency knew or should have known that it would not prevail is *primarily* factual. *ICE*, 64 FLRA at 1007. When the arbitrator's factual findings support the arbitrator's *legal* conclusion, the Authority denies exceptions to the arbitrator's determination. *Id.* However, in resolving fee requests, arbitrators may not reexamine or reevaluate the findings on the merits of the grievance. *See Miller*, 106 M.S.P.R. at 552 (Chairman McPhie dissenting as to another matter) (administrative judge's decision on the merits of the disciplinary action is not subject to recharacterization in support of a fee decision). In other words, the arbitrator cannot disregard the findings in the merits award in determining whether the agency knew or should have known that it would not prevail. *See Brunning v. GSA,* 63 M.S.P.R. 490, 493 (1994) (*Brunning*). Consequently, when the arbitrator's findings in the merits award support a conclusion that the agency knew or should have known that it would not prevail, the Authority will find a legal conclusion to the contrary (in a fee award) deficient. *Dep't of Health & Human Servs., Public Health Serv., Region IV, Atlanta, Ga.,* 34 FLRA 823, 831 (1990) (*Public Health Service*).

In *Public Health Service*, the arbitrator concluded that an award of fees was not warranted in the interest of justice under *Allen* criterion 5. However, the Authority found that the arbitrator's factual findings established that the agency relied on incomplete facts and information. *Id.* at 832. As the complete facts and information were available to the agency at the time of its disputed actions, the Authority concluded that the agency should have known that it would not prevail in arbitration. *Id.* Accordingly, the Authority determined that the arbitrator's legal conclusion to the contrary was not consistent with his factual findings and was deficient. *Id.* at 831-32.

Applying these principles here, the Arbitrator found, in the merits award, that the parties' agreement provides, in pertinent part: "If the supervisor believes that the condition or corrected condition does not pose an imminent danger, but the employee still believes that an imminent danger situation exists, then the supervisor shall request an inspection by an agency safety or health official." Merits Award at 11. The Arbitrator then found that the grievant's supervisor, "instead of requesting 'an inspection by an agency safety or health official' as the [a]greement directs, ordered [the g]rievant to enter and disassemble the fuel cell." *Id.* Further, the Arbitrator determined that the supervisor, "who ordered [the g]rievant to enter the cell, had not himself inspected the cell[,]" and that, "by the condition of the cell and by the directives for entry into cells in such condition, the Agency should have had [appropriate protective equipment] available." *Id.* at 12. The Arbitrator then concluded that the Agency did not have just cause for the charge of failure to follow proper orders, and mitigated the suspension to a reprimand. *Id.* at 14. By finding that the Agency improperly failed to inspect the fuel cell, the Arbitrator implicitly – and necessarily – found that information regarding the actual condition of the fuel cell was before and available to the Agency at the time of the decision to suspend the grievant.[6]

The Arbitrator's own findings in the merits award, which he acknowledged in the fee award, support a conclusion that -- as a matter of law -- an award of fees was warranted in the interest of justice. In this connection, as in *Miller,* it is evident from the merits award that, in mitigating the suspension, the Arbitrator relied solely on evidence that was before, or reasonably available to, the Agency when it suspended the grievant. *See Miller*, 106 M.S.P.R. at 551. In addition, as discussed previously, these findings were not subject to reevaluation and could not be disregarded by the Arbitrator in concluding whether an award of fees was not warranted in the interest of justice. As in *Public Health Service,* the Arbitrator's findings establish that the Agency relied on incomplete facts and information in failing to determine the actual condition of the fuel cell and that the complete facts and information were available to the Agency when it suspended the grievant.

As the Agency knew or should have known that it would not prevail, the Arbitrator's general statements in the fee award with regard to the credibility of the Agency's evidence and the reasonableness of the Agency's investigation cannot establish otherwise. *See Brunning,* 63 M.S.P.R. at 493. The decision in *Dunn*, cited by the Arbitrator,

6. In addition, we note that the Agency does not argue that information regarding the actual condition of the fuel cell was not available to the Agency when it suspended the grievant.

also does not establish otherwise. The court in *Dunn* held that penalty mitigation alone does not create a presumption in favor of satisfaction of any of the *Allen* factors and that fees were not warranted in the interest of justice in that case because the record did not show that the agency chose the penalty negligently or in disregard of relevant facts. *Dunn*, 98 F.3d at 1313. We are not holding that fees are warranted merely because the imposed penalty was mitigated. Rather, we are holding that fees are warranted because the Arbitrator's findings from the merits award demonstrate that the Agency disregarded relevant facts in failing to determine the actual condition of the fuel cell and acted irresponsibly in its choice of penalty.

For the reasons set forth above, we conclude that fees are warranted in the interest of justice and that the Arbitrator's fee award is deficient in concluding otherwise.[7] As the Arbitrator did not make a determination as to a reasonable amount of fees, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to determine that matter.

V. Decision

The award is set aside and remanded to the parties for resubmission to the Arbitrator, absent settlement.

7. In view of this conclusion, it is unnecessary to address the Union's remaining exceptions.

Member Beck, Dissenting:

I do not agree with my colleagues that the Arbitrator's denial of attorney fees is contrary to law insofar as the Arbitrator concluded that fees are not warranted under the fifth criterion of *Allen v. USPS*, 2 M.S.P.R. 420 (1980) (*Allen*).

This case is a close call. The Authority has long held that we defer to an arbitrator's "underlying factual findings" when we review an interest of justice determination. *NTEU, Chapter 50*, 54 FLRA 250, 255 (1998). Therefore, when an arbitrator "fully articulates the reasons supporting one of the interest of justice criteria, the Authority will defer to the arbitrator's findings." *U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 162 (1995).

Accordingly, I cannot conclude, as my colleagues, that the Arbitrator "disregarded" the findings that he made in the Merits Award and that the Agency acted irresponsibly in its choice of penalty.

In the Merits Award, the Arbitrator finds that the grievant's concerns were "reasonable" and that the supervisor could have requested "an inspection by an agency safety or health official." Merits Award at 11. Based on those findings, the Arbitrator concludes that the Agency did not have just cause for discipline. In the Fee Award, the Arbitrator concludes that, even though the Agency was "wrong based upon the actual, as opposed to the by-the-book, condition of the fuel [cell]," the Agency's case was "well reasoned" and that the Agency was under "no obligation to credit [g]rievant's accounts of the incident[.]" Fee Award at 10.

These conclusions are reasonable and consistent, unlike the inconsistent findings of the arbitrator in *Department of Health and Human Services, Public Health Service, Region IV, Atlanta, Georgia,* 34 FLRA 823, 831-32 (1990). The findings of the Arbitrator support his denial of fees and are entitled to our deference.

Accordingly, I would deny the Union's exception insofar as it relies on the "knew or should have known" criterion under *Allen*.