61 FLRA No. 12

UNITED STATES
GENERAL SERVICES
ADMINISTRATION
NORTHEAST AND CARIBBEAN REGION
NEW YORK, NEW YORK
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 236, REGION 2
(Union)

0-AR-3900

DECISION

June 30, 2005

Before the Authority: Dale Cabaniss, Chairman, and Carol Waller Pope and Tony Armendariz, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an attorney fee award of Arbitrator Joan Ilivicky filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. [1] The Union filed an opposition to the Agency's exceptions.

For the following reasons, we conclude that the Agency has not established that the award of attorney fees is deficient, and we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant was suspended for 14 days for disorderly conduct and providing a false statement during an official inquiry. The Arbitrator found just cause to discipline the grievant for the first charge, but not the second. In assessing the appropriateness of the 14-day suspension, the Arbitrator explained that, under Article 32 of the parties' agreement, the Agency was required to apply the rules of progressive discipline and the *Douglas* factors. [2] *See* Initial Award at 27. The Arbitrator found that the Agency did not apply the rules of progressive discipline or the *Douglas* factors. Applying these contractual requirements, the Arbitrator found that the grievant's discipline "should be minimal[.]" *Id.* Therefore, the Arbitrator mitigated the suspension to a letter of warning. The Agency filed exceptions to the award, which the Authority denied. *See GSA*, 60 FLRA 864.

The Union filed an application for attorney fees, which the Agency opposed. In granting the Union's fee application, the Arbitrator found that the grievant was the prevailing party and that fees were warranted in the interest of justice. The Arbitrator found that the grievant was the prevailing party because one of the charges against him was dismissed and because his 14-day suspension was reduced to a letter of warning. In concluding that fees were warranted in the interest of justice, the Arbitrator applied the *Allen* criteria that the Authority adopted from the Merit Systems Protection Board (MSPB). *See Naval Air Dev. Ctr., Dep't of the Navy*, 21 FLRA 131, 133 (1986) (citing *Allen v. United States Postal Serv.*, 2 M.S.P.R. 420 (1980)).

The Arbitrator acknowledged precedent finding an employee not "substantially innocent" under the *Allen* criteria, but found the precedent "clearly distinguishable from the instant matter." Attorney Fee Award at 11 (citing *Lambert v. Dep't of the Air Force*, 34 M.S.P.R. 501, 504 (1987) (*Lambert*)). In this regard, the Arbitrator pointed out that, unlike in this case, the mitigated penalty in *Lambert* remained "among the most severe penalties that an agency can impose[.]" Attorney Fee Award at 11.

The Arbitrator found that "the Agency knew or should have known that it would not prevail" on the merits and that "its penalty selection would not be sustained." *Id.* at 12, 15. In this connection, the Arbitrator found that the Agency violated the rules of progressive discipline and did not apply the *Douglas* factors. The Arbitrator also found that the Agency knew or should have known it would not prevail because the Agency's "conduct of the investigation" was "negligent." *Id.* at 10 (citing *Yorkshire v. MSPB*, 746 F.2d 1454, 1457 (Fed. Cir. 1984) (*Yorkshire*) (holding that a showing that an agency's conduct of an investigation was negligent satisfies the knew or should have known criterion)).

1. The Agency also filed exceptions to the Arbitrator's merits award, which the Authority recently denied. *See United States GSA, NE. & Caribbean Region, N.Y., N.Y.*, 60 FLRA 864 (2005) (*GSA*).

2. The Douglas factors, enunciated by the Merit Systems Protection Board in *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 305-06 (1981), govern the appropriateness of penalties in adverse actions under 5 U.S.C. §§ 4303 and 7512. *See United States Dep't of the Army, III Corps and Fort Hood, Fort Hood, Tex.*, 46 FLRA 609, 613 (1992).

In addition, the Arbitrator found that fees were warranted in the interest of justice because the Agency's actions were "clearly without substantial merit" and because "the Agency acted in bad faith when it brought the action against [the g]rievant to exert improper pressure on a Union officer/employee[.]" Attorney Fee Award at 12, 9. Based on the foregoing, the Arbitrator awarded attorney fees to the Union.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the attorney fee award is contrary to law. Specifically, the Agency argues that the grievant cannot be considered the "prevailing party" while exceptions to the merits award are pending before the Authority, and therefore, the fee award was "premature[.]" Exceptions at 4. The Agency also argues that fees are not warranted in the interest of justice because its actions were not "wholly unfounded" and the grievant was not "substantially innocent[.]" *Id.* at 5. In this regard, the Agency notes that one of the two charges against the grievant was sustained. The Agency also notes the Arbitrator's findings that certain of the grievant's actions were unjustified and that his discipline "would not be minimal but for his seventeen years of unblemished service to the Agency and based upon his two promotions during said service[.]" *Id.* (quoting Initial Award at 27). Finally, the Agency argues that the Arbitrator erred in finding that it "should have known that it would not prevail on the merits." *Id.* at 6. In this regard, the Agency asserts that, "[e]ven if a particular charge was dismissed, it is not established that the agency action as a whole was inappropriate." *Id.*

B. Union's Opposition

The Union disputes the Agency's argument that the award of attorney fees is premature. *See* Opposition at 2 n.2. The Union also disputes that the Arbitrator erred in finding that the Agency knew or should have known that it would not prevail on the merits. According to the Union, the Arbitrator's determination is supported by the Agency's failure to apply the principles of "progressive discipline" and its failure to consider the grievant's "superior employment record" and management's "culpability[.]" *Id.* at 6. The Union also asserts that the "Agency 'should have known' it would not prevail" because "its own investigation (into [the] alleged misconduct) was flawed." *Id.*

IV. Analysis and Conclusions

A. Standard of Review

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 *United States 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 United States Dep't of Defense, 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.*

B. The Statutory Requirements for Attorney Fees

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 United States Dep't of Defense, Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995) (*DOD*). Once such a finding is made, the Act 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 5 U.S.C. § 7701(g), which pertains to attorney fee awards by the MSPB. *See id.*

The prerequisites for an award of attorney fees under § 7701(g)(1) are: (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.* The Agency claims the award is contrary to law because it does not meet the first two requirements under § 7701(g)(1), namely, that the grievant is the prevailing party and that the award of fees is warranted in the interest of justice. As the Agency does not dispute the reasonableness of the fees awarded or that the fees were incurred by the grievant, we assume that those requirements have been satisfied and we will not address them further. *See, e.g., United States Dep't of Defense, Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 47 FLRA 1187, 1192 (1993).

C. The Grievant Is the Prevailing Party

Under 5 U.S.C. § 7701(g)(1), an employee is the prevailing party if the employee has received "an enforceable judgment or settlement which directly benefitted [the employee] at the time of the judgment or settlement." *United States Dep't of Defense, Dep't of Def. Dependents Schools*, 54 FLRA 773, 788 (1998) (quoting *DiGiulio v. Dep't of the Treasury*, 66 M.S.P.R. 659, 663 (1995)). There is no dispute that the merits award benefitted the grievant, as the award rescinded a 14-day suspension. Nevertheless, the Agency argues that the grievant is not the prevailing party because, at the time the fee petition was filed, exceptions to the merits award were pending before the Authority. This argument is without merit, however, because an arbitrator is not required to refrain from granting a request for attorney fees until after the Authority resolves any exceptions that may have been filed to the underlying award. *See Dep't of Defense Dependents Schools, Pac. Region*, 30 FLRA 1206, 1216 (1988), reconsideration granted as to other matters, 32 FLRA 757 (1988). Moreover, as the Authority has denied the Agency's exceptions to the merits award, there is no question that the award is final and binding and the grievant is the prevailing party. Therefore, we deny the Agency's exception.

D. The Award of Attorney Fees Is Warranted In the Interest of Justice

It is well settled that an award of fees is warranted in the interest of justice in cases: (1) involving prohibited personnel practices; (2) where agency actions are clearly without merit or wholly unfounded, or where the employee is substantially innocent of charges brought by the agency; (3) where agency actions are taken in bad faith to harass or exert improper pressure on an employee; (4) where gross procedural error by an agency prolonged the proceeding or severely prejudiced the employee; (5) where the agency knew or should have known it would not prevail on the merits when it brought the proceeding; or (6) where there is a service rendered to the federal work force or there is a benefit to the public derived from maintaining the action. *See DOD*, 51 FLRA at 161-62. An award of attorney fees is warranted in the interest of justice if any one of these criteria is met. *See id.* at 162.

The Agency disputes the Arbitrator's finding that the fifth criterion is met because the Agency knew or should have known it would not prevail on the merits and that its penalty would not be sustained. A determination of whether an agency knew or should have known 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. This criterion essentially requires an arbitrator to determine the reasonableness of an agency's actions and positions in light of what information was available to it at the time discipline was imposed. *See NTEU, Chapter 50*, 54 FLRA 250, 254 (1998). The assessment of whether an agency knew or should have known it would not prevail is primarily factual because the arbitrator evaluates the evidence and the agency's handling of the evidence. Consequently, when the factual findings support the arbitrator's legal conclusion, the Authority will deny the exceptions to the arbitrator's determination. *See id.* at 255.

In addition, the Authority has held that "the penalty is part of the merits of the case, and that attorney fees are warranted in the interest of justice where the agency knew or should have known that its choice of penalty would be reversed." *AFGE, Local 12*, 38 FLRA 1240, 1253 (1990) (citing *Lambert*, 34 M.S.P.R. at 505). Applying this principle, the Authority held that "attorney fees may be warranted based on mitigation of a penalty[.]" *AFGE, Local 12*, 38 FLRA at 1253. In this connection, the Authority explained that the "critical point" is that "an agency should not act irresponsibly or unreasonably in imposing a penalty if it either knows or should have known that the penalty would not withstand . . . scrutiny[.]" *Id.* (citing *Ciarla v. United States Postal Serv.*, 43 M.S.P.R. 240, 245 (1990) (*Ciarla*)).

The Arbitrator found that attorney fees were warranted in the interest of justice under the "knew or should have known" criterion for two reasons: (1) the 14-day suspension was mitigated because one of the charges against the grievant was not sustained; (2) the Agency knew or should have known that its choice of penalty would not be sustained.

With respect to the first reason, the Arbitrator found that the Agency's "conduct of the investigation" was "negligent[,]" Attorney Fee Award at 10, because the investigation was untimely and depended on unreliable witness statements. Under Authority precedent, reliance on such unreliable information supports a conclusion that an agency knew or should have known it would not prevail on the merits. *See United States Army Headquarters, XVIII Airborne Corps, Fort Bragg, N.C.*, 35 FLRA 390, 394 (1990) (citing *Yorkshire*, 746 F.2d at 1457 (knew or should have known criterion satisfied where agency possessed no trustworthy, admissible evidence, or was negligent in its conduct of the investigation)).

With respect to the second reason, the Arbitrator found that the Agency "fail[ed] to observe the rules of

progressive discipline" or consider the *Douglas* factors, as required by Article 32 of the parties' agreement. Attorney Fee Award at 12; Initial Award at 27. In particular, the Arbitrator found that the Agency failed to consider mitigating circumstances such as the grievant's superior employment record and the Agency representative's "egregious misconduct" during the incident that prompted the disciplinary action. Attorney Fee Award at 12. According to the Arbitrator, the grievant's discipline should have been "minimal" in view of these considerations. Initial Award at 27. These arbitral findings also support the Arbitrator's conclusion that the Agency knew or should have known that it would not prevail on the merits. *See, e.g., Ciarla*, 43 M.S.P.R. at 244 (knew or should have known criterion established where discipline exceeded bounds of reasonableness).

United States Dep't of the Navy, Norfolk Naval Shipyard, 34 FLRA 725, 732-33 (1990), which the Agency cites, is inapposite because the arbitrator there specifically found that the agency had no way of knowing that its choice of penalty would not be sustained. Similarly, in *Shelton v. OPM*, 42 M.S.P.R. 214, 221 (1989), which the Agency also cites, the Board found that "the agency could not have been expected to anticipate that the mitigating factors . . . would have been applied to mitigate" the penalty. Finally, the Agency's reliance on *McMonagle v. Bureau of Alcohol, Tobacco & Firearms*, 26 M.S.P.R. 49 (1985), is misplaced because there, the arbitrator found that the agency possessed credible evidence that the employee committed the alleged offense. In this case, by contrast, the Arbitrator found no credible evidence to support the relevant charge.

Based on the foregoing, we conclude that the award satisfies the fifth criterion of the interest of justice requirements. Consequently, we deny the Agency's exception.[3]

V. Decision

The Agency's exceptions are denied.

3. In view of this decision, it is unnecessary to consider the Agency's additional exceptions. See, e.g., *DOD*, 51 FLRA at 162 (an award of attorney fees is warranted in the interest of justice if any one of the criteria is met).