

**69 FLRA No. 83**

NATIONAL ASSOCIATION  
OF INDEPENDENT LABOR  
LOCAL 5  
(Union)

and

UNITED STATES  
DEPARTMENT OF DEFENSE  
DEFENSE LOGISTICS AGENCY  
TEXARKANA, TEXAS  
(Agency)

0-AR-5178

—  
DECISION

September 20, 2016

—

Before the Authority: Carol Waller Pope, Chairman, and  
Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

Arbitrator Bruce Ponder found, in an initial award (merits award), that the Agency violated the parties' collective-bargaining agreement when it failed to timely place an employee (the grievant) on an overtime roster and provide him with access to an Agency computer system needed to perform overtime work. Subsequently, the Union petitioned for attorney fees, which the Arbitrator denied in his supplemental award (fee award). There are three questions before us.

The first question is whether the Union supports its exceeds-authority exception. As the Union does not provide any arguments supporting its exceeds-authority exception, the answer is no.

The second question is whether the award is based on a nonfact. Because the Union's nonfact arguments either challenge the Arbitrator's legal conclusions or fail to identify alleged factual errors, the answer is no.

The third question is whether the Arbitrator's fee award is contrary to law. Because the Union does not demonstrate that attorney fees are warranted in the interest of justice under 5 U.S.C. § 7701(g)(1), the answer is no.

**II. Background and Arbitrator's Award**

The Agency transferred the grievant to a new position. Although daily overtime hours were available, the Agency delayed placing the grievant's name on the overtime roster and did not provide him access to a computer system necessary for most overtime work. The Union filed a grievance, which was unresolved, and the parties submitted it to arbitration.

In the merits award, the Arbitrator found that there was "no explicit [contract] language"<sup>1</sup> governing the scheduling of newly assigned employees for overtime hours. Interpreting the parties' agreement, the Arbitrator determined that the Agency violated the agreement by failing to timely place the grievant's name on the overtime roster so that he would be eligible for overtime work.<sup>2</sup> The Arbitrator relied on Article XI, Section 2 of the agreement, which provides, in relevant part, that "overtime offers will be equitably distributed on a rotational basis among the employees who meet the requirements of the prospective assignment."<sup>3</sup> He also relied on Article XI, Section 3 of the agreement, which states, in part, that "[o]vertime rosters will be . . . maintained current."<sup>4</sup> He further noted Appendix A, Section j of the agreement, which requires the Agency to place "newly assigned" employees on the overtime roster.<sup>5</sup>

Based on these provisions, the Arbitrator determined that the Agency was required to put the grievant on the overtime roster and "to expedite [the grievant's] access" to the computer system.<sup>6</sup> The Arbitrator concluded that the Agency's failure to timely provide the grievant with access to the computer system "was the cause of [the grievant's] inability to be placed in rotation for overtime[-]work assignments."<sup>7</sup> He sustained the grievance and found that the grievant was entitled to overtime backpay from the time that the grievant should have been placed in the overtime rotation, approximately three weeks after his transfer.<sup>8</sup> Neither party excepted to the merits award.

<sup>1</sup> Merits Award at 24.

<sup>2</sup> *Id.* at 32.

<sup>3</sup> *Id.* at 16.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 17.

<sup>6</sup> *Id.* at 28.

<sup>7</sup> *Id.* at 29.

<sup>8</sup> *Id.* at 33.

In the subsequent fee award, the Arbitrator declined to award attorney fees under the Back Pay Act (Act)<sup>9</sup> and 5 U.S.C. § 7701(g)(1).<sup>10</sup> In doing so, he considered the factors discussed by the Merit Systems Protection Board (MSPB) in *Allen v. U.S. Postal Service (Allen)*<sup>11</sup> for determining whether attorney fees are warranted in the interest of justice. He found that the Union failed to establish that attorney fees were warranted under the factors relied upon by the Union – factors two, four, and five – because, among other things, the Agency’s arguments “were reasoned, . . . it provided evidence that supported its position,”<sup>12</sup> and there was a “legitimate and good[-]faith dispute about the meaning of the [parties’] agreement.”<sup>13</sup> Finding that the Union was not entitled to attorney fees, the Arbitrator did not address the reasonableness of the requested fees.

The Union filed exceptions to the fee award and the Agency filed an opposition to the Union’s exceptions.

### III. Analysis and Conclusions

#### A. The Union does not support its exceeds-authority exception.

The Union argues that the Arbitrator exceeded his authority.<sup>14</sup> This is a recognized ground for Authority review of an arbitration award.<sup>15</sup> However, § 2425.6(e)(1) of the Authority’s Regulations provides that an exception “may be subject to dismissal or denial if . . . [t]he excepting party fails to raise *and support* a ground” listed in 5 C.F.R. § 2425.6(a)-(c).<sup>16</sup>

As the Union does not provide any arguments for finding that the Arbitrator exceeded his authority, the Union fails to support that exception. Accordingly, we deny the Union’s exceeds-authority exception under § 2425.6(e)(1).

#### B. The fee award is not based on nonfacts.

The Union alleges that the Arbitrator’s fee award is based on nonfacts.<sup>17</sup> In order for a party to establish that an award is based on nonfacts, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>18</sup> The Authority will not find an award deficient on the basis of an arbitrator’s determination of any factual matter that the parties disputed at arbitration.<sup>19</sup> And an arbitrator’s legal conclusions cannot be challenged on nonfact grounds.<sup>20</sup>

The Union argues that the Arbitrator “erred as a matter of [f]act and [l]aw in concluding that attorney fees are not merited in the interest of justice.”<sup>21</sup> Specifically, the Union challenges the following as based on nonfacts: (1) the Arbitrator’s finding that the second, fourth, and fifth *Allen* factors were inapplicable;<sup>22</sup> (2) the Arbitrator’s finding that “the [A]gency did not initiate this action” for purposes of *Allen* factor two;<sup>23</sup> (3) the Arbitrator’s finding that the Agency had not committed a “gross procedural error”;<sup>24</sup> (4) the Arbitrator’s finding that “there is no express contract language imposing a duty on the [A]gency”;<sup>25</sup> and (5) the Arbitrator’s failure to find that the “[A]gency knew or should have known that it would not prevail.”<sup>26</sup> Because the Union’s arguments either challenge the Arbitrator’s legal conclusions, or fail to identify any factual findings and explain how these findings are clearly erroneous, they provide no basis for finding that the award is based on nonfacts.<sup>27</sup> Therefore, we deny the nonfact exceptions.<sup>28</sup>

<sup>9</sup> 5 U.S.C. § 5596.

<sup>10</sup> Fee Award at 3, 6.

<sup>11</sup> 2 M.S.P.R. 420 (1980).

<sup>12</sup> Fee Award at 4.

<sup>13</sup> *Id.* at 5.

<sup>14</sup> Exceptions at 14.

<sup>15</sup> 5 C.F.R. § 2425.6(a)(2), (b)(1)(i).

<sup>16</sup> *Id.* § 2425.6(e)(1) (emphasis added); *Fraternal Order of Police, Pentagon Police Labor Comm.*, 65 FLRA 781, 785 (2011).

<sup>17</sup> Exceptions at 8-13.

<sup>18</sup> *U.S. Dep’t of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 172 (2015) (VA) (Member Pizzella dissenting); *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*Local 1984*).

<sup>19</sup> VA, 68 FLRA at 172; *Local 1984*, 56 FLRA at 41.

<sup>20</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 200 (2016) (*DOJ*); *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 744, 749 (2000) (*DOD*).

<sup>21</sup> Exceptions at 8.

<sup>22</sup> *Id.* at 9-13.

<sup>23</sup> *Id.* at 10.

<sup>24</sup> *Id.* at 11.

<sup>25</sup> *Id.* at 13.

<sup>26</sup> *Id.*

<sup>27</sup> See e.g., *DOJ*, 69 FLRA at 200; *DOD*, 56 FLRA at 749.

<sup>28</sup> See e.g., *Indep. Union of Pension Emp. for Democracy & Justice*, 68 FLRA 999, 1010 (2015).

C. The fee award is not contrary to law.

The threshold requirement for an award of attorney fees under the Act is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in a withdrawal or reduction of the grievant's pay, allowances, or differentials.<sup>29</sup> The Act further requires that an award of attorney 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.<sup>30</sup> The prerequisites for an award under § 7701(g) are that: (1) the employee must be the prevailing party; (2) the award of attorney fees must be warranted in the interest of justice; (3) the amount of fees must be reasonable; and (4) the fees must have been incurred by the employee.<sup>31</sup> The Union argues that the Arbitrator erred in evaluating the "interest of justice" standard.<sup>32</sup> Therefore, we address only this requirement.<sup>33</sup>

The Authority resolves whether an award of fees is warranted in the interest of justice in accordance with § 7701(g)(1) by applying the factors established by the MSPB in *Allen*.<sup>34</sup> Attorney fees are warranted in the interest of justice under *Allen* when any one of these factors is satisfied:<sup>35</sup> (1) the agency engaged in a prohibited personnel practice; (2) the agency action was clearly without merit or wholly unfounded or the employee was substantially innocent of charges brought by the agency; (3) the agency initiated the action in bad faith; (4) the agency committed a 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.<sup>36</sup> Additionally, citing MSPB precedent, the Authority has stated that an award of attorney fees is warranted in the interest of justice when there is a service to the federal workforce or a benefit to the public derived from maintaining the action.<sup>37</sup>

Here, we address only the second, fourth, and fifth *Allen* factors, the only factors relied on by the Union.

1. The second *Allen* factor

The Union argues that attorney fees should be awarded under the second *Allen* factor because the Agency's actions were "clearly without merit and wholly unfounded."<sup>38</sup> The second factor is applicable if it is plain that an agency's actions are based on incredible or unspecific evidence fully countered by the appellant, or if an agency presents little or no evidence to support its actions.<sup>39</sup>

The Arbitrator found that the second factor did not support the Union's petition for attorney fees. Specifically, he determined that the "[A]gency's arguments were reasoned, and it provided evidence that supported its position."<sup>40</sup> Further, he cited his own need "to resort to the record to give the contract language sufficient clarity in reaching a decision."<sup>41</sup>

Disagreeing with the Arbitrator, the Union contends that the merits award itself demonstrates that the Agency's failure to timely place the grievant on the overtime roster and offer him overtime was "clearly without merit."<sup>42</sup> But prevailing on the merits alone does not demonstrate that an agency's actions were "clearly without merit" or "wholly unfounded" under the second factor.<sup>43</sup>

The Union further argues that the Arbitrator improperly limited the second factor's applicability to disciplinary actions brought by the Agency and that he did "not articulate specific valid findings supporting the determination that an award of attorney fees was not warranted in the interest of justice."<sup>44</sup> The Union's argument is unpersuasive. Although the Arbitrator stated that the second factor was inapplicable because "[n]o discipline was imposed,"<sup>45</sup> he nonetheless made additional findings supporting his decision to deny attorney fees under this factor. Specifically, the Arbitrator found that the Agency's arguments and the evidence provided support for the Agency's position that

<sup>29</sup> *NTEU, Chapter 32*, 68 FLRA 690, 691 (2015) (*NTEU*) (citing *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)).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Exceptions at 8.

<sup>33</sup> See *NTEU*, 68 FLRA at 691.

<sup>34</sup> See *id.*

<sup>35</sup> *U.S. Dep't of the Army, Med. Activity (MEDDAC), Fort Drum, N.Y.*, 65 FLRA 575, 578 (2011).

<sup>36</sup> *AFGE, Local 3294*, 66 FLRA 430, 430 n.3 (2012) (citing *Allen*, 2 M.S.P.R. at 434-35).

<sup>37</sup> *Naval Air Dev. Ctr., Dep't of the Navy*, 21 FLRA 131, 139 (1986) (citing *Wells v. Harris*, 2 M.S.P.R. 409, 413-14 (1980)); see also *AFGE, Local 2583*, 69 FLRA 538, 540 (2016).

<sup>38</sup> Exceptions at 10.

<sup>39</sup> *NTEU*, 68 FLRA at 691.

<sup>40</sup> Fee Award at 4.

<sup>41</sup> *Id.*

<sup>42</sup> Exceptions at 10.

<sup>43</sup> See *NTEU*, 68 FLRA at 692 (finding that union offered no evidence or explanation as to why agency's actions were clearly without merit or wholly unfounded, outside of the fact that union prevailed, and therefore denying union's exceptions on second *Allen* factor).

<sup>44</sup> Exceptions at 10.

<sup>45</sup> Fee Award at 4.

its conduct was justified.<sup>46</sup> Thus, the Arbitrator did not reject the Union's reliance on the second *Allen* factor only by strictly limiting the factor's applicability to disciplinary actions.

Finally, the Union argues that this factor was satisfied because the grievant was "substantially innocent."<sup>47</sup> But when a matter does not involve a disciplinary action, as here, the "substantially innocent" analysis is not applicable.<sup>48</sup> Therefore, the Union's reliance on the grievant's "innocen[ce] of any wrongdoing"<sup>49</sup> is misplaced. The only facts before the Arbitrator that were relevant in assessing whether to award attorney fees under the second factor were those concerning the nature of the Agency's basis for taking the actions that the Union grieved.

Therefore, we conclude that the Union fails to establish that attorney fees are warranted under the second *Allen* factor.<sup>50</sup>

## 2. The fourth *Allen* factor

The Union also argues that attorney fees should be awarded under the fourth *Allen* factor.<sup>51</sup> This factor requires a party to show that an agency committed "a gross procedural error that prolonged the proceeding[] or severely prejudiced the employee[]." <sup>52</sup> In order to prove that there was a gross procedural error, a party must establish that the error amounts to more than "simple harmful error" warranting reversal of an agency action.<sup>53</sup> For example, the MSPB found that gross procedural error occurred warranting an award of attorney fees when an agency, while conducting a reduction-in-force (RIF), failed to give an employee the required specific RIF notice, did not establish required competitive areas, competitive levels, and retention lists, did not consider or honor the employee's bump and retreat rights, and did not accord him priority placement required for preference-eligible employees.<sup>54</sup>

The Arbitrator found that the Agency's conduct did not warrant an award of attorney fees under the fourth factor.<sup>55</sup> He concluded that the matter involved a

"legitimate and good[-]faith dispute about the meaning of the [parties'] agreement,"<sup>56</sup> and that "the [A]gency here violated no procedural duty."<sup>57</sup>

The Union claims that the Arbitrator erred when he found that the Agency had not committed a gross procedural error.<sup>58</sup> But the Union fails to point to any evidence demonstrating that the Agency's violation of the overtime procedures in the parties' agreement amounts to more than simple harmful error. Specifically, the Union does not assert that the Agency's error "prolonged the proceeding[]." <sup>59</sup> Further, even if the contractual duty that the Agency owed the grievant could properly be characterized as "procedural,"<sup>60</sup> the Union fails to demonstrate that the Agency's action, based on a "legitimate and good[-]faith dispute about the meaning of the [parties'] agreement,"<sup>61</sup> constitutes the kind of disregard of a contractual duty that would rise to the level of a "gross procedural error."<sup>62</sup>

Moreover, the Arbitrator did not, as the Union asserts, "impermissibly reexam[in]e or reevaluat[e]"<sup>63</sup> his merits award when he found that the Agency "violated no procedural duties."<sup>64</sup> Rather, the Arbitrator's examination of the record, in response to the Union's fee petition, was solely for the purpose of determining the applicability of the fourth *Allen* factor, and the conclusions the Arbitrator reached were fully consistent with the Arbitrator's finding that the Agency committed a contract violation.<sup>65</sup>

Finally, the Union's additional claim – that the fee award fails to draw its essence from the parties' agreement – merely restates its contrary-to-law claim that the Arbitrator erred by not finding that attorney fees were warranted under the fourth *Allen* factor, despite finding that the Agency violated overtime procedures in the parties' agreement.<sup>66</sup> As such, we do not address the Union's essence exception separately.<sup>67</sup>

<sup>56</sup> *Id.* at 5.

<sup>57</sup> *Id.*

<sup>58</sup> Exceptions at 11.

<sup>59</sup> *AFGE*, 61 FLRA at 586.

<sup>60</sup> *Id.*

<sup>61</sup> Fee Award at 5.

<sup>62</sup> *Cf.*, e.g., *Thomas*, 77 M.S.P.R. at 507 (finding that an agency's violation of virtually all of an employee's procedural protections in a RIF situation "was not only harmful, but gross" procedural error).

<sup>63</sup> Exceptions at 12.

<sup>64</sup> Fee Award at 5.

<sup>65</sup> *Id.* at 4-5.

<sup>66</sup> Exceptions at 11.

<sup>67</sup> *See AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009) (union's essence claim not separately addressed where claim did nothing more than restate claim that arbitrator's substantive arbitrability determination is contrary to law).

<sup>46</sup> *Id.* at 2-4.

<sup>47</sup> Exceptions at 9.

<sup>48</sup> *See Simmons v. OPM*, 31 M.S.P.R. 559, 565 (1986) (finding inapplicable concept of substantial innocence in retirement-related appeal context where there are no charges of misconduct against employee).

<sup>49</sup> Exceptions at 9.

<sup>50</sup> *NTEU*, 68 FLRA at 692.

<sup>51</sup> Exceptions at 11.

<sup>52</sup> *AFGE, Council 220*, 61 FLRA 582, 586 (2006) (*AFGE*).

<sup>53</sup> *Id.*

<sup>54</sup> *See id.* (citing *Thomas v. U.S. Postal Serv.*, 77 M.S.P.R. 502 (1998) (*Thomas*)).

<sup>55</sup> Fee Award at 4.

Accordingly, we conclude that the Union fails to establish that attorney fees are warranted under the fourth *Allen* factor.<sup>68</sup>

### 3. The fifth *Allen* factor

Last, the Union argues that attorney fees should be awarded under the fifth *Allen* factor. Under this factor, an award of attorney fees is warranted where the agency “knew or should have known that it would not prevail on the merits.”<sup>69</sup> The arbitrator must determine the reasonableness of an agency’s action in light of the information available to the agency at the time of the disputed action.<sup>70</sup> That assessment is primarily factual, because the arbitrator evaluates the evidence and the agency’s handling of the evidence.<sup>71</sup>

The Arbitrator determined that attorney fees should not be awarded under the fifth factor. He found that the Union’s grievance did not involve an “express” contractual duty and, therefore, it would be “a reach beyond the evidence . . . to conclude [that the Agency] should have known that it would not prevail on the merits.”<sup>72</sup> The Arbitrator also “note[d] that [f]actor 5 is limited to situations in which the agency brought the proceeding.”<sup>73</sup>

The Union argues that the Arbitrator’s findings in the fee award concerning the nature of the relevant contract provisions are inconsistent with the Arbitrator’s conclusion in the merits award that the Agency unreasonably delayed in making overtime work available to the grievant.<sup>74</sup> The Union also argues that the Arbitrator reevaluated his merits award in the fee award.<sup>75</sup> We find these arguments unpersuasive. In the merits award, the Arbitrator sustained the Union’s grievance after interpreting the parties’ agreement and finding that the Agency unreasonably delayed making overtime available to the grievant. Then, in the fee award, the Arbitrator declined to find, under the fifth factor, that the Agency should have known that its inaction would violate the parties’ agreement, noting that the agreement did not impose an “express contractual duty” on the Agency.<sup>76</sup> This finding is consistent with the Arbitrator’s finding in the merits award that the Agency violated the parties’ agreement, even though “[t]here is no explicit

[contract] language” addressing the issue that was before him.<sup>77</sup> Therefore, the Union fails to demonstrate that the fee award is inconsistent with the merits award or that the Arbitrator reevaluated his merits-award’s findings in the fee award.

The Union also challenges the Arbitrator’s statement “that [f]actor 5 is limited to situations in which the agency brought the proceeding.”<sup>78</sup> However, the Arbitrator’s inaccurate statement concerning the applicability of the fifth factor<sup>79</sup> does not, as the Union suggests,<sup>80</sup> refute the Arbitrator’s ultimate conclusion that attorney fees were not warranted in the interest of justice. As discussed above, the Arbitrator went on to apply the fifth factor and evaluated the nature and weight of the evidence available to the Agency at the time of its disputed action.

Accordingly, we conclude that the Union fails to establish that attorney fees are warranted under the fifth *Allen* factor. And based on the foregoing, we deny the Union’s contrary-to-law exception.

Finally, there is no doubt that attorney fees are not warranted in this case applying the various *Allen* factors on which the Union relies, and that our determination is consistent with the Authority’s current precedent. And because neither party asks us to reconsider this precedent, we do not do so here.

However, we note that, to the extent that the Authority has sometimes implied that attorney fees are warranted only if they satisfy one of the five *Allen* factors,<sup>81</sup> that is inconsistent with *Allen* itself. As *Allen* itself states, the factors are “not exhaustive, but illustrative,” and are not intended to serve as a “litmus . . . test[] for award or denial of attorney fees. Rather, these examples should serve primarily as directional markers toward ‘the interest of justice.’”<sup>82</sup> Further, taking into account the very different purposes for which Congress established the Authority and the MSPB, we believe that it may be time – in an appropriate case – to reconsider our nearly exclusive reliance on the *Allen* factors in this area and to fashion interest-of-justice guidelines that are better adapted to the collective-bargaining context and to

<sup>68</sup> *AFGE*, 61 FLRA at 586.

<sup>69</sup> *Id.*

<sup>70</sup> *SSA, Balt., Md.*, 63 FLRA 550, 552 (2009).

<sup>71</sup> See *U.S. Army Headquarters, XVIII Airborne Corps, Fort Bragg, N.C.*, 35 FLRA 390, 394-95 (1990) (in evaluating fifth *Allen* factor, arbitrator relied on factual findings).

<sup>72</sup> Fee Award at 5.

<sup>73</sup> *Id.* at 5-6.

<sup>74</sup> Exceptions at 12.

<sup>75</sup> *Id.* at 12-13.

<sup>76</sup> Fee Award at 5.

<sup>77</sup> Merits Award at 24.

<sup>78</sup> Fee Award at 5-6.

<sup>79</sup> See *AFGE*, 61 FLRA at 586-587 (reviewing request for attorney fees under fifth *Allen* factor in case where union filed grievance).

<sup>80</sup> Exceptions at 13.

<sup>81</sup> See, e.g., *U.S. DHS, U.S. CBP*, 69 FLRA 412, 415 (2016) (Member Pizzella concurring) (“The Authority resolves whether an award of fees is warranted in the interest of justice . . . by applying the [*Allen*] criteria.”).

<sup>82</sup> *Allen*, 2 M.S.P.R. at 435.

the types of cases that the Authority is called upon to review.

**IV. Decision**

We deny the Union's exceptions.