**70 FLRA No. 16**

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 3725
(Union)

0-AR-5154
(69 FLRA 143 (2015))

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DECISION

December 2, 2016

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

## I. Statement of the Case

Arbitrator James R. Collins issued a merits award sustaining the Union's grievance. The Agency filed exceptions to the merits award, and the Authority denied the exceptions.[1]

The Union subsequently filed, with the Arbitrator, a petition for attorney fees under the Back Pay Act (BPA).[2] In the Arbitrator's resulting fee award (fee award), he denied the Union's petition because he found that fees were not warranted in the interest of justice. The Union filed exceptions.

We must decide whether the Arbitrator erred as a matter of law in finding that attorney fees were not warranted in the interest of justice. Because the Arbitrator's findings are consistent with the interest-of-justice criteria, the answer is no.

## II. Background and Arbitrator's Award

The grievant is a border patrol agent with the Agency. The grievant was issued a fourteen-day suspension without pay based on three charges: (1) inappropriate operation of a government-owned vehicle; (2) misuse of position; and (3) making a careless statement to the Agency during a matter of official interest. The Arbitrator found that the grievant engaged in two of the most serious allegations of misconduct, namely, inappropriate operation of a government-owned vehicle and misuse of his position.[3] Although the Arbitrator found that there was cause for discipline, he also determined that the fourteen-day suspension was not warranted because the Agency violated Article 32G of the collective-bargaining agreement (Article 32G) when it "fail[ed] to furnish the grievant with his notice of proposed disciplinary action at the earliest practicable date after the alleged offense had been committed and made known to the employer."[4] The Arbitrator ordered the Agency to rescind its fourteen-day suspension of the grievant, take all administrative action to purge this disciplinary action from its files, and make the grievant whole. The Agency filed exceptions to the Arbitrator's merits award, and the Authority denied those exceptions.[5]

The Union subsequently filed a petition for attorney fees under the BPA. In the fee award, the Arbitrator found that the grievant was the prevailing party; however, based on the criteria set out in *Allen v. U.S. Postal Service (Allen)*,[6] he concluded that attorney fees would not be warranted in the interest of justice. Specifically, the Arbitrator found that the Union failed to establish any of the *Allen* criteria on which it relied – in particular, the first, second, and fifth *Allen* criteria. Respectively, those *Allen* criteria are: (1) the Agency committed a prohibited personnel practice, (2) the Agency's action was clearly without merit or wholly unfounded, or the grievant was substantially innocent, and (3) the Agency knew or should have known that it would not prevail on the merits. Therefore, the Arbitrator denied the petition.

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

## III. Preliminary Matter: We will consider the Union's argument that the grievant was substantially innocent.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any argument that could have been, but was not, presented to the arbitrator.[7]

[1] *U.S. DHS, U.S. CBP*, 69 FLRA 143, 143 (2015) (*CBP*).
[2] 5 U.S.C. § 5596.
[3] Opp'n, Attach. 1 (Merits Award) at 8.
[4] *Id.* at 11.
[5] *CBP*, 69 FLRA at 143.
[6] 2 M.S.P.R. 420 (1980).
[7] 5 C.F.R. §§ 2425.4(c), 2429.5; *e.g.*, *AFGE, Local 3571*, 67 FLRA 218, 219 (2014).

In its exception, the Union argues that attorney fees are warranted in the interest of justice because, as relevant here, the second *Allen* criterion is satisfied. Before the Authority, the Union argues that the grievant was substantially innocent of all charges.[8] The Agency argues that the Union never presented that argument before the Arbitrator.[9] However, the record establishes that the Union sufficiently raised that argument in its petition before the Arbitrator.[10]

Accordingly, we will consider this argument.

## IV. Analysis and Conclusion: The fee award is not contrary to law

The Union argues that the Arbitrator's denial of attorney fees is contrary to the BPA.[11] 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.[12] 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.[13] In making that assessment, the Authority defers to the arbitrator's underlying factual findings,[14] unless a party demonstrates that the findings are deficient as nonfacts.[15]

As the Authority noted in *AFGE, Local 3690*,[16] the threshold requirement for entitlement to attorney fees under the BPA is a finding that an employee (1) has been affected by an unjustified or unwarranted personnel action; which (2) has resulted in the withdrawal or reduction of all or part of the employee's pay, allowances, or differentials.[17] A violation of a collective-bargaining agreement or a law, rule, or regulation constitutes an unjustified or unwarranted personnel action under the BPA.[18]

The Authority reviews an award of attorney fees in accordance with the standards established under 5 U.S.C. § 7701(g).[19] The prerequisites for an award of attorney fees under § 7701(g) are that: (1) the employee is the prevailing party; (2) the award of fees is warranted in the interest of justice; (3) the amount of fees is reasonable; and (4) the fees were incurred by the employee.[20]

The Arbitrator denied the Union's petition for attorney fees solely on the ground that fees were not warranted in the interest of justice. As relevant here, the Authority has resolved whether an award of fees is warranted in the interest of justice in accordance with § 7701(g)(1) by applying the criteria established in *Allen*.[21] In *Allen*, the Merit Systems Protection Board (MSPB) listed five broad categories of cases where an award of attorney fees is warranted in the interest of justice.[22]

An award of attorney fees is warranted in the interest of justice if: (1) the agency engaged in a prohibited personnel practice; (2) the agency's actions were clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency; (3) the agency's actions were taken in bad faith to harass or exert improper pressure on an employee; (4) the agency committed a gross procedural error that prolonged the proceeding or severely prejudiced the employee; or (5) the agency knew or should have known it would not prevail on the merits when it brought the proceeding.[23] An award of attorney fees is warranted in the interest of justice if any of these criteria is satisfied.[24]

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[8] Exceptions Br. at 7.
[9] Opp'n at 6.
[10] Exceptions Br., Attach 1 (Union's Pet. For Attorney Fees) at 9-10 (arguing that the grievant was substantially innocent of the charges).
[11] Exceptions Br. at 5-6.
[12] *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)).
[13] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[14] *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) (citation omitted).
[15] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[16] 69 FLRA 154, 155 (2015).
[17] 5 U.S.C. § 5596(b)(1).
[18] *AFGE, Council of Prison Locals, Local 4052*, 68 FLRA 38, 43 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012); *AFGE, Local 1592*, 64 FLRA 861, 861-62 (2010)).
[19] *NAIL, Local 5*, 69 FLRA 573, 575 (2016) (*Local 5*).
[20] *See U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 819, 820 (2010) (*Air Force*) (citing *U.S. Dep't of Treasury, IRS, Phila. Serv. Ctr., Phila., Pa.*, 53 FLRA 1697, 1699 (1998)).
[21] 2 M.S.P.R. at 434-35; *see AFGE, Local 3294*, 66 FLRA 430, 430 n.3 (2012); *but see Local 5*, 69 FLRA at 577 (stating that the Authority may, in an appropriate case, reconsider its reliance on the *Allen* factors and "fashion interest-of-justice guidelines that are better adapted to the collective-bargaining context").
[22] 2 M.S.P.R. at 434-35.
[23] *Id.*
[24] *Id.* (citation omitted). *See also Local 5*, 69 FLRA at 577-78 (*Allen* factors are not exhaustive, but illustrative).

A. The Union has not demonstrated that the Arbitrator erred in finding that the Agency did not commit a prohibited personnel practice.

The Union contends that an award of attorney fees is warranted in the interest of justice under the first *Allen* criterion.[25] The first *Allen* criterion considers whether the Agency engaged in a prohibited personnel practice.[26] The prohibited personnel practices referenced in *Allen* and § 7701(g)(1) are listed at 5 U.S.C. § 2302(b).[27] Section 2302(b) provides thirteen types of prohibited personnel practices, including, for example, discrimination, coercive political activity, obstruction of employment competition, nepotism, and whistleblower retaliation.[28]

The Union asserts that "an agency's violation of a collective[-]bargaining agreement can constitute an *unjustified or unwarranted personnel action* for purposes of [backpay] under the [BPA],"[29] and that – given the Arbitrator's finding of a contractual violation in the merits award – he "[t]herefore . . . should have found that due to the Agency committing a *prohibited personnel practice*," attorney fees were warranted.[30] The Union appears to be conflating the notion of an unjustified or unwarranted personnel action with that of a prohibited personnel practice. But the Authority has held that these terms have different meanings.[31] Therefore, the Arbitrator's finding of an unjustified or unwarranted personnel action does not support the Union's claim that there was a prohibited personnel practice.

Furthermore, despite the Arbitrator's explicit finding that the Agency did not commit a statutory violation, the Union neither identifies which of the thirteen types of prohibited personnel practices set out in 5 U.S.C. § 2302(b) it believes that the Agency committed, nor explains how the Agency's actions constituted a prohibited personnel practice. Therefore, we find that the Union has not demonstrated that the Arbitrator erred in finding no prohibited personnel practice.[32]

B. The Union has not demonstrated that the grievant was substantially innocent.

The Union alleges that attorney fees are warranted under the second *Allen* criterion because the grievant was substantially innocent.[33] An employee is substantially innocent as a matter of law when he or she "prevail[s] on substantive rather than technical grounds on the major charges."[34] Additionally, an employee is substantially innocent when he or she is "essentially without fault for the charges alleged, and was needlessly subjected to attorney fees in order to vindicate himself."[35]

Here, in the merits award, the Arbitrator found that the grievant engaged in the behavior as charged in the two most serious allegations of misconduct, namely, inappropriate operation of government-owned vehicle and the misuse of his position.[36] However, the Arbitrator dismissed those charges based on the Agency's failure to comply with Article 32G, which required the Agency to issue the proposed disciplinary notice at the earliest practicable date. These findings support the Arbitrator's conclusion that the substantial innocence threshold was not met.[37]

The Union argues that the Arbitrator interpreted Article 32G to provide a "substantive" right,[38] and so, his sustaining the grievance on the basis of the Agency's failure to comply with Article 32G meant that the grievant was substantially innocent. However, the Union cites no authority to support this understanding of the term "substantially." Further, the Authority is not persuaded to depart from its decades-long interpretation of the term "substantially"[39] as pertaining to the substance of the charges. Accordingly, given that the Arbitrator dismissed the charges of misconduct for a technical reason, and because the Arbitrator did not find the grievant himself to be without fault, the Union's second-*Allen*-criterion argument does not provide a reason to find the award deficient.

[25] Exceptions Br. at 8.
[26] 2 M.S.P.R. at 434.
[27] *Id.* at 434-35; 5 U.S.C. § 7701(g)(1).
[28] 5 U.S.C. § 2302(b)(1)-(13).
[29] Exceptions Br. at 8 (emphasis added).
[30] *Id.* at 9 (emphasis added).
[31] *IBEW, Local 2219*, 69 FLRA 431, 434 (2016).
[32] *Id.* (citation omitted).
[33] Exceptions Br. at 7.
[34] *NAGE, Local R5-188*, 54 FLRA 1401, 1407 (1998) (*Local R5-188*) (citation omitted); *see also NAGE, Local R4-6*, 56 FLRA 1092, 1094 (2001) (*Local R4-6*) (grievant not found to be without fault).
[35] *Local R5-188*, 54 FLRA at 1407; *see also Local R4-6*, 56 FLRA at 1094.
[36] Merits Award at 8.
[37] *See Ciarla v. U.S. Postal Serv.*, 43 M.S.P.R. 240, 243-44 (1990) (arbitrator's conclusion that grievant was not substantially innocent was upheld where he dismissed charge for "technical defect," and there was "ample evidence" to support similar charge and other charges were upheld).
[38] Exceptions Br. at 7-8.
[39] *Local R5-188*, 54 FLRA at 1406-08.

C. The Union has not demonstrated that the Agency knew or should have known that it would not prevail on the merits.

The Union's last argument alleges that attorney fees are warranted under the fifth *Allen* criterion.[40] The fifth *Allen* criterion considers whether the agency knew or should have known that it would not prevail on the merits when it brought forth the proceeding.[41] This determination requires the arbitrator to determine the reasonableness of the agency's actions in light of the information available to the agency at the time of the imposed discipline, and it is primarily factual because the arbitrator evaluates the evidence and the agency's handling of the evidence.[42] Consequently, when the factual findings support the arbitrator's legal conclusion, the Authority will deny an exception to the arbitrator's determination.[43]

The Union argues that the Agency's failure to issue the disciplinary notice as soon as practicable, as determined by the Arbitrator, established that the Agency knew or should have known that it would not prevail on the merits.[44] The Union further argues that, because the parties have litigated for years over the interpretation of Article 32G, the Agency had before it, when it issued the proposed discipline, the knowledge that the timing of the disciplinary notice was significant.[45] And so – according to the Union – by concluding that the Agency could not have known it would not prevail on the merits, the Arbitrator impermissibly reexamined the merits of the case in his fee award.[46]

Contrary to the Union's contention, the Arbitrator did not reexamine the factual findings of the merits award when he repeated and commented upon them in the fee award. In the fee award, the Arbitrator found that the Agency neither knew nor should have known that it would not prevail on the merits in several respects. The Arbitrator noted that the varying fact patterns of charged conduct and wide disparity in the resulting arbitration awards meant that the Agency lacked definitive guidance establishing how long of a delay is required to trigger a violation of Article 32G,[47] or at what point notice is considered to have occurred on the "earliest practicable date."[48] Therefore, the Arbitrator determined that the deciding official could not have known how the Arbitrator, or any other arbitrator, would have viewed this disciplinary proceeding. As the Union has not filed nonfact exceptions to the fee award, we defer to the Arbitrator's factual findings in this regard. As these factual findings support the Arbitrator's conclusion, we find that the Union fails to demonstrate that the fifth *Allen* criterion is satisfied.

Accordingly, because the Union has not demonstrated that the Arbitrator erred in denying the Union's petition for attorney fees, we deny the Union's exceptions.

As we have stated before, however, there is a need for the Authority "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 the types of cases that the Authority is called upon to review."[49] As *Allen* itself states, the factors established by the MSPB in that case are not "exhaustive, but illustrative."[50] To accomplish this task, the Authority should consider, as appropriate, the views of the federal labor-management community, to truly ensure that "the interest of justice"[51] is served when attorney fees are sought in cases arising under the collective-bargaining statute the Authority administers.

## V. Decision

We deny the Union's exceptions.

[40] Exceptions Br. at 10.
[41] 2 M.S.P.R. at 435.
[42] *Air Force*, 64 FLRA at 821 (citation omitted).
[43] *Id*.
[44] Exceptions Br. at 12-13.
[45] Union's Pet. For Attorney Fees at 13.
[46] Exceptions Br. at 12.
[47] Fee Award at 4.
[48] *Id*.
[49] *Local 5*, 69 FLRA at 577-78.
[50] 2 M.S.P.R. at 435.
[51] *Local 5*, 69 FLRA at 577.