64 FLRA No. 43

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES
CUSTOMS AND BORDER PROTECTION
WASHINGTON, D.C.
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1458
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-4280

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DECISION

November 30, 2009

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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 exceptions to an award of Arbitrator Ann Gosline 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. The Union filed an opposition to the Agency's exceptions.

In ruling on an application for attorney fees and expenses, the Arbitrator awarded a total of $10,049.79 to the Union. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The incident underlying the grievance in this case occurred in conjunction with the evacuation of the grievant and her dependents from the grievant's post of duty in the Bahamas because of an oncoming hurricane. Merits Award at 2, Exceptions, Attach. During the evacuation, two of the grievant's dependents, her mother and 6-year old son, remained in Florida with other family members, while the grievant continued her travel to Atlanta, Georgia, with her 7-month old daughter. *Id.* at 2, 9. Once the hurricane threat subsided, the grievant and her daughter returned to the Bahamas. *Id.* at 10. Shortly after returning, the grievant was advised that her mother and son were detained in Florida because they did not have their passports. *Id.* Realizing that she had their passports in her possession, the grievant gave them to a personal acquaintance, who worked for an airline, for relay to the two dependents waiting in Florida. *Id.* The acquaintance gave the passports to an airline pilot, who, in turn, gave them to an airline agent in Florida, who gave them to the grievant's dependents. *Id.* at 10-11. On receiving the passports, the grievant's mother and son returned to the Bahamas. *Id.* at 11.

The Agency initially proposed to remove the grievant based on failure to appropriately safeguard diplomatic passports and two additional charges. *Id.* at 3-4. Subsequently, the Agency dropped the two other charges and reduced the penalty for the charge relating to the passports to a 2-day suspension**,** citing the grievant's 20 years of service with no prior disciplinary history. *Id.* at 8.

In resolving the grievance filed over the suspension, the Arbitrator found that the Agency had proved that the grievant failed to safeguard the passports and used poor judgment. *Id.* at 18. However, based on mitigating circumstances, the Arbitrator found that the 2-day suspension was excessive and should be mitigated to a written reprimand. *Id.* at 19. Among the mitigating circumstances cited by the Arbitrator were: (1) the grievant's 20 years of service without prior discipline; (2) the unavailability of the usual, authorized methods for sending the passports to her dependents in Florida; (3) the grievant's need for her mother to return and provide childcare so that she could continue to work; (4) the unanticipated and pressing nature of the problem; and (5) the fact that the grievant attempted to find a method for transporting the passports that seemed to her to be responsible in the "unique circumstances" involved. *Id.* The Arbitrator also found that it was unlikely that a suspension would serve as a more effective deterrent than the written reprimand. *Id.* In her decision, the Arbitrator retained jurisdiction to consider a petition for attorney fees by the Union, who represented the grievant. *Id.* at 20.

Subsequently, the Arbitrator concluded that attorney fees and expenses should be awarded to the Union because the grievant had prevailed and because the fees and expenses were warranted in the interest of justice. Fee Award at 2-3, 6. In this latter regard, the Arbitrator found that the evidence established that the Agency knew or should have known that it would not prevail in the grievance. *Id.* at 3. In particular, the Arbitrator stated that the penalty was unreasonable and resulted from the Agency's failure to consider relevant, readily available, facts and adequately weigh significant, miti-

gating factors. *Id.* Additionally, the Arbitrator found that the fees and expenses requested were reasonable. *Id.* at 4-6.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is deficient because it: (1) misapplies the legal standard for attorney fees; and (2) is based on a non-fact. Exceptions at 2.

With respect to the first exception, the Agency concedes that, under the Back Pay Act, 5 U.S.C. § 5596, a union is entitled to attorney fees if the employee that it represents is the prevailing party and the fee award is warranted in the interest of justice. *Id.* at 2. The Agency does not dispute that the grievant is the prevailing party, but argues that the arbitrator misapplied the factors set forth in *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980) (*Allen*) for determining whether an award of fees is warranted in the interest of justice. *Id.* at 2-3. Specifically, the Agency disputes the Arbitrator's application of the fifth factor set forth in *Allen*: whether the agency knew or should have known that it would not prevail on the merits when it brought the action. *Id.* at 3. The Agency asserts that the Arbitrator erred by limiting her analysis of this factor to a determination of whether the penalty was mitigated. *Id.* The Agency contends that, by effectively making the fee award automatic upon mitigation of the penalty, the Arbitrator's action is inconsistent with *Dunn v. Department of Veterans Affairs*, 98 F.3d 1308 (Fed. Cir. 1996), which it characterizes as rejecting automatic fee awards in such circumstances. *Id.* at 4.

With respect to its second exception, the Agency maintains that the Arbitrator's finding that it failed to consider relevant facts and adequately weigh significant mitigating factors is a "complete fabrication." *Id.* The Agency argues that the record demonstrated that the deciding official substantially reduced the penalty imposed from what was originally proposed after considering the grievant's length of service and lack of disciplinary history, as well as the stressful and confusing circumstances surrounding the evacuation. *Id.* at 4-5.

B. Union's Opposition

In response to the Agency's contention that the Arbitrator's award of attorney fees is contrary to law, the Union argues that the Arbitrator reasonably determined in the merits award that the 2-day suspension was excessive based on the evidence before her. Opp'n at 8-9. The Union contends that, in reaching this determination, the Arbitrator relied on information and evidence available to the Agency at the outset of the action that it took against the grievant. *Id.* at 9. Moreover, the Union maintains that the Arbitrator did not make an "automatic" fee award based on her mitigation of the penalty, but, instead, articulated a reasoned basis for the award, citing the Agency's failure to consider relevant facts and weigh mitigating circumstances. *Id.* at 10.

The Union disputes the Agency's contention that the award is based on a nonfact. *Id.* at 10. The Union asserts that the Arbitrator specifically considered the weight the Agency gave to the mitigating factors in the grievant's case and found that the Agency did not accord appropriate significance to them in selecting a penalty. *Id.* at 11.

IV. Analysis and Conclusions

A. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews the legal question *de novo*. *E.g., U. S. Gen. Servs. Admin., Ne. & Caribbean Region, N.Y., N.Y.,* 61 FLRA 68, 69 (2005) (*GSA*). 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. *E.g., AFGE Council 220*, 61 FLRA 582, 584 (2006). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id*. at 585.

When exceptions are filed to arbitration awards resolving requests for attorney fees, the Authority's role is to ensure that the award complies with applicable legal standards. *Id.* The threshold requirement for entitlement to an award of attorney fees under the Back Pay Act 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. *Id*. Once that requirement is satisfied, the Back Pay Act further requires that an award of fees must be: (1) in conjunction with an award of backpay to the grievant ; (2) reasonable and related to the personnel action; and (3) in accordance with the standards established under 5 U.S.C. § 7701(g). *Id*. In cases such as here that do not involve employment discrimination, the standards for attorney fees established under § 7701(g) 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 fees must be reasonable and (4) the fees must have been incurred by the employee. *Id*.

As the parties here dispute only whether attorney fees are warranted in the interest of justice, only that issue requires examination. The Authority resolves this

issue by applying the factors established by the Merit Systems Protection Board (MSPB) in *Allen*. As relevant here, fees are warranted in the interest of justice under the fifth *Allen* factor when the agency knew or should have known that it would not prevail on the merits when it brought the proceeding. *Id.* at 583 n.1. Determining whether fees are warranted under this factor requires evaluation of the nature and weight of the agency's evidence. *Id*. at 586. 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 when the agency knew or should have known that its choice of penalty would be reversed. *GSA,* 61 FLRA at 70. Additionally, the Authority has stated that the assessment of whether fees are warranted under this factor is primarily factual. *Id.*

The Arbitrator found that the Agency failed to afford appropriate weight to numerous circumstances and mitigating factors and that, as a result, the Agency imposed an unreasonable penalty. The Arbitrator's determination is supported by her factual findings regarding the grievant's employment history and the circumstances surrounding the incident that gave rise to the disciplinary action. In this regard, the Arbitrator found that the grievant, who had a lengthy, discipline-free employment history, found herself in a unique, difficult, and unanticipated situation and took a course of action that, although flawed, was one that the grievant thought to be responsible under the circumstances. Moreover, the Arbitrator found that a lesser penalty than the suspension imposed by the Agency would serve sufficiently as a deterrent. The Agency has not established that the Arbitrator's finding that it could not have expected its choice of penalty to withstand scrutiny fails to comply with applicable statutory standards.

The two cases on which the Agency relies are distinguishable. In *United States Department of the Navy, Norfolk Naval Shipyard,* 34 FLRA 725, 732 (1990), the arbitrator specifically found that the agency did not know and could not have known that the penalty imposed would not be sustained. Here, the Arbitrator specifically found that the Agency should have known that, under the circumstances, the penalty imposed was excessive. In *Shelton v. O.P.M.,* 42 M.S.P.R. 214 (1989), the MSPB found that the agency could not have been expected to anticipate the factors on which a reviewing court relied to mitigate the penalty. The MSPB further noted that the original penalty was based on multiple charges and that the subsequent decision to mitigate the penalty was based, in part, on the fact that not all of the charges were sustained. Here, in contrast, the penalty originally imposed was based on the single charge that was before, and upheld by, the Arbitrator.

Based on the foregoing, we deny this exception.

B. The award is not based on a nonfact.

To establish that an award is based on a nonfact, 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. *E.g., U. S. Dep't of the Treasury, Internal Revenue Serv., Andover, Mass.,* 63 FLRA 202, 205 (2009) (*IRS*). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of a factual matter that the parties disputed at arbitration. *Id*.

The Agency asserts that the Arbitrator's finding that it failed to give appropriate weight to mitigating factors in determining the penalty to be imposed on the grievant is a nonfact. The weight that should be accorded the mitigating factors was a matter that the parties disputed at arbitration. The Agency acknowledged this in the opposition that it filed to the Union's request for attorney fees**:**

> [T]his case does not present a situation in which the Employer totally failed to consider relevant mitigating factors. This case presents only a disagreement on the appropriate weight that should have been accorded to these factors. Other than this disagreement over the weight to which various mitigating factors should have been accorded, there has been no evidence in the record that indicates that any of the *Allen* factors have been met.

Opp'n to Union's Request for Attorney's Fees at 5, Union's Opp'n to Exceptions, Attach.

The Arbitrator addressed this dispute and determined that the Agency did not give due consideration to mitigating factors. As this matter was disputed by the parties at the arbitration, there is no basis on which to find that the award is based on a nonfact. *IRS*, 63 FLRA at 205. Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.