

64 FLRA No. 178

UNITED STATES
DEPARTMENT OF THE NAVY
COMMANDER, NAVY REGION HAWAII
FEDERAL FIRE DEPARTMENT
NAVAL STATION PEARL HARBOR
HONOLULU, HAWAII
(Agency)

and

FEDERAL FIREFIGHTERS OF HAWAII
INTERNATIONAL ASSOCIATION
OF FEDERAL FIREFIGHTERS
LOCAL F-263
(Union)

0-AR-4580

—
DECISION

June 25, 2010

—
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 Mario R. Ramil 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.

The Arbitrator found that the Agency did not have just cause to suspend the grievants for seven days and ordered the suspensions rescinded. Subsequently, the Arbitrator awarded attorney fees in response to a motion by the Union. For the reasons set forth below, we dismiss the Agency's exceptions in part and deny the Agency's remaining exceptions.

II. Background and Arbitrator's Award

In his initial award, the Arbitrator found that the grievants' seven-day suspensions violated the parties'

agreement. Initial Award at 2.¹ Accordingly, the Arbitrator ordered that the suspensions be rescinded and the grievants be awarded a make-whole remedy for the loss of pay that they suffered as a result of the unjustified suspensions. *Id.* Subsequently, the Union filed a motion for an award of attorney fees. *Id.*

In a separate award, the Arbitrator found that the grievants were entitled to an award of reasonable attorney fees pursuant to the Back Pay Act. Fee Award at 3 (citing 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)). As noted by the Arbitrator, 5 U.S.C. § 5596 provides, in pertinent part, 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 standards established under 5 U.S.C. § 7701(g). *Id.* Moreover, as further noted by the Arbitrator, to establish an entitlement to attorney fees, the Union must show that: (1) the grievants are the prevailing party; (2) the grievants incurred the fees; (3) the award of attorney fees is warranted in the interest of justice; and (4) the amount of fees is reasonable. *Id.* at 4-5 (citing 5 U.S.C. § 7701(g)).

The Arbitrator first found that, because the Union obtained the relief that it had sought in arbitration -- i.e., the grievants' seven-day suspensions were rescinded and the grievants' pay with interest was restored -- the Union was the prevailing party. Fee Award at 4-5. The Arbitrator then determined that, because an attorney-client relationship existed among the Union, the grievants, and counsel, and counsel rendered legal services on behalf of the Union and the grievants in pursuing the arbitration, the Union incurred attorney fees. *Id.* at 5.

The Arbitrator further determined that, pursuant to the standards established in *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980) (*Allen*), the award of fees was warranted in the interest of justice. Fee Award at 6. The Arbitrator found that the Agency had engaged in a "prohibited personnel practice" involving a serious disciplinary matter -- i.e., the grievants' seven day suspensions -- and that the Agency's actions in imposing such discipline were "clearly without merit." *Id.* at 5-8. The Arbitrator noted, in this regard, that the grievants were the only employees to receive suspensions for their violations, while others who had committed similar violations received either no disciplinary actions at all or merely letters of reprimand. *Id.* at 8. Citing to his initial

1. The Agency did not file exceptions to the Arbitrator's initial award.

award, the Arbitrator noted that the Agency's "'Breakdown of Administrative Action' shows a total of [twenty-two] accidents . . . and [the grievants] were the only ones that actually received suspensions; the harshest penalty was a letter of reprimand." *Id.* Therefore, the Arbitrator concluded, "the penalties assessed against [the grievants] were not 'even-handed' as required by the *Douglas* [f]actors and the sixth of the seven tests of just cause."² *Id.* (citing Initial Award at 22). Accordingly, the Arbitrator found that the Agency had committed "prohibited personnel practices" involving serious disciplinary matters, thereby forcing the Union "to incur attorney[] fees to protect" the grievants' job security. Fee Award at 8. The Arbitrator further found that the Agency's actions in imposing the seven-day suspensions were "clearly without merit." *Id.*

Finally, the Arbitrator considered the reasonableness of the attorney fee request, analyzing the customary billing rate and the number of hours reasonably devoted to the case. *Id.* at 9-13. The Arbitrator determined that 158.1 of the 173.4 hours requested by the Union were reasonable and awarded the Union \$39,525.00 in fees. *Id.* at 13.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator's attorney fee award is contrary to the Back Pay Act because the attorney fees requested are not warranted in the interest of justice. Exceptions at 7-12. The Agency also asserts that the Union never argued that an award of attorney fees was warranted in the interest of justice. *Id.*

The Agency argues that it did not commit a prohibited personnel practice. *Id.* at 8. The Agency alleges that the Arbitrator failed to support his finding that the Agency committed a prohibited personnel practice, noting, in this regard, that the Arbitrator neither cited to the applicable statute nor identified the statutorily prohibited practices that the

2. In his initial award, the Arbitrator applied the *Douglas* factors and the "Seven Tests of Just Cause." Initial Award at 10. The *Douglas* factors are rules developed by the Merit Systems Protection Board for evaluating whether a particular disciplinary action should be mitigated. See *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981). The "Seven Tests of Just Cause" are a "practical approach" to an analysis of the just cause standard. Initial Award at 11. The Arbitrator determined that the Agency's penalty determination was deficient under both tests.

Agency allegedly committed. *Id.* The Agency further contends that its actions in disciplining the grievants were clearly merited because it prevailed on three of the four charges that it used to substantiate the grievants' suspensions. *Id.* at 9-10. The Agency also asserts that the Arbitrator's determination in the initial award that one grievant "lacked any duties as acting captain absent a written instruction, standard operating procedure or position description" unlawfully abrogates the Agency's right to assign and direct work under § 7106 of the Statute. *Id.* at 11.

The Agency also argues that the Arbitrator "improperly shifted the burden of proof" to the Agency because he concluded that the Agency committed a prohibited personnel practice under 5 U.S.C. § 2302, "despite the fact that the Union did not argue, or even address," this requirement in its motion for attorney fees.³ *Id.* at 12-13. In addition, the Agency asserts that, because the Arbitrator failed to articulate his basis for finding that attorney fees were warranted in the interest of justice, the Arbitrator failed to provide a fully articulated decision. *Id.* at 13.

Moreover, the Agency alleges that the Arbitrator exceeded his authority by failing to resolve an issue submitted to arbitration. *Id.* According to the Agency, the Arbitrator failed to address "the complete charges" brought against the grievants in the underlying case. *Id.* at 14. The Agency contends that, because some of its charges were sustained, "it is clear that the [grievants] were not substantially innocent" and that the Agency's actions were "warranted and justified." *Id.* at 14.

B. Union's Opposition

The Union contends that, because the Arbitrator resolved the issues presented in both the underlying grievance arbitration and the attorney fees award, he did not exceed his authority. Opp'n at 14-21. The Union asserts that the Arbitrator did not exceed his authority by not separately deciding the penalty for each charge, particularly when the Agency did not differentiate the penalty for each individual charge in the Agency's own disciplinary action decisions. *Id.* at 15-16, 19. Further, the Union argues that the Arbitrator "fully and fairly" addressed the issues before him, which had been stipulated to by the parties prior to the hearing. *Id.* at 17, 20.

3. 5 U.S.C. § 2302 sets forth the ways in which an agency can commit a prohibited personnel practice.

The Union also alleges that, under 5 C.F.R. § 2429.5, the Authority is precluded from considering the Agency's arguments concerning the Arbitrator's initial award and that the Agency's failure to file exceptions to the initial award estops it from asserting such arguments now. *Id.* at 20-23. The Union also argues that the Agency has not contested the portion of the Arbitrator's award regarding the reasonableness of the fees or the amount of fees that the Arbitrator awarded. *Id.* at 23-24.

The Union asserts that it is entitled to attorney fees because all of the statutory requirements of the Back Pay Act have been satisfied. *Id.* at 24-25. The Union contends that, because the Arbitrator's initial award vacated the suspension of the grievants and awarded them backpay, the grievants are the prevailing party. *Id.* at 26-27. The Union also argues that it is entitled to attorney fees in the interest of justice because the Arbitrator determined that: (1) the suspensions were not for "just cause"; (2) the penalties against the grievants were "not 'even handed'"; and (3) the Agency's actions in imposing such suspensions were "clearly without merit." *Id.* at 27-36.

The Union contends that it argued before the Arbitrator that it was entitled to attorney fees under 5 U.S.C. § 5596(b)(1). *Id.* at 32, 34. According to the Union, the seven-day suspensions constitute "unjustified or unwarranted personnel actions" within the meaning of that provision. *Id.* at 34-36. As a result, the Union asserts, the Agency's "imposition of the suspensions [on the [g]rievants was clearly without merit." *Id.* at 36.

The Union also alleges that, contrary to the Agency's contention, the award does not violate management rights under § 7106 of the Statute. *Id.* at 36. As an initial matter, the Union reiterates its argument above that, because the Agency did not file exceptions to the Arbitrator's initial award, the Agency is foreclosed from making this argument now. *Id.* at 36-37. The Union argues that, even if this argument is not foreclosed: (1) the argument is based on a misreading of the Arbitrator's award and (2) the Agency has failed to establish that the award affected a management right under § 7106 of the Statute or the two prong test set forth in *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Det. Ctr., Miami, Fla.*, 57 FLRA 677, 679 (2002). *Id.* at 37-39.

The Union also contends that the Arbitrator did not improperly shift the burden of proof. Opp'n at 40. According to the Union, it did not base its request for attorney fees upon 5 U.S.C. § 2302(b), but

rather upon 5 U.S.C. § 5596(b)(1). The Union contends that the Arbitrator "merely addressed" the assertions of both the Agency and the Union. *Id.* Moreover, the Union asserts that "5 U.S.C. § 2302(b) is not a 'dispositive' issue" because the Arbitrator based his award on other grounds as well. *Id.*

Finally, the Union contends that the Arbitrator's attorney fee award provided a fully articulated decision, explaining the basis on which the "interest of justice" standard was determined and setting forth the substantive findings pertaining to 5 U.S.C. § 5596 and § 7701(g). *Id.* at 41.

IV. Preliminary Issue

We find that the Agency's contentions that (1) the Arbitrator exceeded his authority by failing to address the complete charges brought against the grievants in the underlying case, and (2) the Arbitrator's initial award violated the Agency's management rights under § 7106 of the Statute, are not properly before the Authority. The time limit for filing an exception to an arbitration award is thirty days beginning on the date the award is served on the filing party. 5 C.F.R. § 2425.2(b). It is well established that an arbitrator may retain jurisdiction after issuing a final and binding award on the merits for the purpose of resolving questions relating to attorney fees. *See U.S. Dep't of Interior, Bureau of Reclamation, Lower Colo. Dams Project Office, Parker & Davis Dams*, 42 FLRA 76, 81 (1991); *U.S. Dep't of Veterans Admin., Med. Ctr., Leavenworth, Kan.*, 38 FLRA 232, 240 (1990). The retention of jurisdiction by the arbitrator to resolve questions concerning attorney fees does not affect the finality of the award on the merits. Moreover, the retention of jurisdiction by the arbitrator for the purpose of resolving questions relating to attorney fees does not interfere in any way with a party's right to file exceptions to the award under § 7122 of the Statute. *See U.S. Dep't of Def., Army & Air Force Exch. Serv., George Air Force Base, Cal.*, 40 FLRA 79, 83 (1991).

In this case, the Arbitrator's initial award was dated and served on the parties on June 8, 2009. The Arbitrator's initial award addressed the merits of the Union's grievance and resolved that grievance, ordering that the grievants' suspensions be rescinded and that the grievants be provided a make-whole remedy. The attorney fee award was dated and served on the parties on October 2, 2009. The Agency filed its exceptions on October 22, 2009. The Agency's exceptions alleged deficiencies in both the initial award and the attorney fee award. The

thirty-day period for filing exceptions alleging deficiencies in the initial award, however, expired long before the Agency filed its exceptions.

Accordingly, we find that the exceptions alleging deficiencies in the initial award are not properly before the Authority and dismiss these exceptions.⁴ See, e.g., *U.S. Dep't of the Treasury, U.S. Customs Serv., Nogales, Ariz.*, 47 FLRA 1391 (1993) (agency's exceptions dismissed as untimely where exceptions regarding initial award were filed within thirty days of the arbitrator's subsequent award, which solely concerned the issue of attorney fees).

V. The award is not contrary to law.

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 *U.S. 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 *U.S. Dep't of Def., Dep'ts of the Army & 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.*

The threshold requirement for 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, which resulted in a withdrawal or reduction of the grievant's pay, allowances or differential. See *U.S., Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995). The Back Pay Act further 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 standards established under 5 U.S.C. § 7701(g), which pertains to attorney fee awards by the Merit Systems Protection Board (MSPB). See *id.* 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. See *id.*

The Authority has long held that, when resolving a request for attorney fees, arbitrators must set forth specific findings supporting their determinations on each pertinent statutory requirement. *Id.*; accord *U.S. Dep't of the Treasury, IRS, Phila. Serv. Ctr., Phila., Pa.*, 53 FLRA 1697, 1699-1700 (1998) (*IRS*). When arbitrators do not sufficiently explain their determinations, the Authority will examine the record to see if it permits the Authority to resolve the matter. If so, the Authority will modify the award or deny the exception as appropriate. If not, the Authority will remand the award for further proceedings. *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1694 (1998) (*USDA*).

The Agency's exceptions to the attorney fee award are based on whether the attorney fees are warranted in the interest of justice. As such, we address only this requirement. E.g., *IRS*, 53 FLRA at 1700 (addressing only the requirements disputed by the parties).

A. Attorney fees were warranted in the interest of justice.

The Authority evaluates whether an award of attorney fees is warranted in the interest of justice by applying the criteria established by the MSPB in *Allen*. See *Allen*, 2 M.S.P.R. 420. According to *Allen*, an award of attorney fees is warranted in the interest of justice under § 7701(g)(1) if any one of the following criteria is met: (1) the agency engaged in a prohibited personnel practice; (2) the agency actions are clearly without merit or wholly unfounded or the employee is substantially innocent of the charges brought by the agency; (3) the agency actions are taken in bad faith to harass or exert improper pressure on an employee; (4) the agency committed gross procedural error which 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. *Id.* at 434-45. The Authority also has stated that an award of fees is warranted in the interest of justice when there is a service rendered to the federal work force or there is a benefit to the public derived from maintaining the action. *AFGE, Council 220*, 61 FLRA 582, 583 n.1 (2006) (citing *Naval Air Dev. Ctr., Dep't of the Navy*, 21 FLRA 131, 139 (1986)).

The Arbitrator held that an award of attorney fees was warranted in the interest of justice because:

4. Similarly, to the extent that the Agency challenges the Arbitrator's underlying factual findings from his initial award that are reiterated in the attorney fee award, we do not consider those challenges either for the reasons set forth above.

(1) the Agency committed a prohibited personnel practice (first criterion) and (2) the Agency's actions were clearly without merit (second criterion). The Agency challenges both of these holdings. Exceptions at 8-9.

In evaluating the second criterion, the issue of whether the agency's actions were "clearly without merit [or] wholly unfounded" is addressed independently from the grievant's 'substantial[] innocen[ce].'" *NAGE, Local R4-6*, 56 FLRA 1092, 1094-95 (2001) (quoting *NAGE, Local R5-188*, 54 FLRA 1401, 1407 (1998)). In determining whether fees are required under this criterion, the "competing interests to be examined are the degree of fault on the employee's part and the existence of any reasonable basis for the [A]gency's action." *NAGE, Local R4-6*, 56 FLRA at 1095 (quoting *AFGE, Local 12*, 38 FLRA 1240, 1251 (1990); *Uhlig v. Dep't of Justice*, 86 M.S.P.R. 660, 669 (2000)). This standard is met if it is plain "that the agency's action was based on incredible or unspecific evidence fully countered by the appellant (i.e., the action was 'clearly without merit' or 'wholly unfounded')." *Ala. Ass'n of Civilian Technicians*, 56 FLRA 231, 234 (2000) (quoting *Hutchcraft v. Dep't of Transp.*, 55 M.S.P.R. 138, 148 (1992)); see also *U.S. Dep't of Def., Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 47 FLRA 1187, 1193-94 (1993) (agency's actions are clearly without merit where agency presents little or no evidence to support its actions).

Applying the foregoing standard, we conclude that the Arbitrator did not err in finding that the Agency's actions in imposing the seven-day suspensions were clearly without merit because the record demonstrates that the unreasonableness of the Agency's actions in imposing the suspensions outweighs the degree of fault on the part of the grievants. Although the Arbitrator, in his initial award, determined that the evidence supported some of the charges against the grievants, the Arbitrator also rescinded the suspensions and awarded the grievants backpay. See Fee Award at 8; Initial Award at 22-26. The Arbitrator determined that, because the Agency had failed to impose the suspensions in an "even-handed" manner, the Agency did not have "just cause" to impose the suspensions. Initial Award at 22. In making this determination, the Arbitrator noted that the Agency had twenty-two disciplinary actions for charges similar to those of the grievants within a four-year period and that, in each of those other cases, the harshest penalty awarded was a letter of reprimand. See Fee Award at 8; Initial Award at 22. Further, the Arbitrator found that the

seven-day suspensions imposed by the Agency "did not relate to the 'seriousness of the employee[s]' proven offense[s]." Fee Award at 4; see also Initial Award at 26. The Arbitrator also determined that the Agency's actions -- failing to apply "its rules, orders and penalties even-handedly and without discrimination to all employees" -- provided the Union with "no choice . . . but to incur attorney[] fees to protect and maintain [the grievants'] job security." Fee Award at 7-8.

In addition, the award establishes that the imposition of the seven-day suspensions was based on incredible, non-specific assertions by the Agency that were fully refuted. The Arbitrator found that the Agency's assertion that the suspensions were consistent with penalties it had imposed for similar offenses was not credible in light of specific evidence submitted of prior Agency action. See Initial Award at 21-26. As noted above, contrary to the Agency's assertion, the Arbitrator determined that, based on the evidence submitted, the harshest penalty the Agency had imposed in similar cases within the previous four years was a letter of reprimand. See Fee Award at 8; Initial Award at 22. Accordingly, the Arbitrator determined that the Agency, in imposing the suspensions, had failed to apply "its rules, orders and penalties even-handedly and without discrimination to all employees" and sustained the grievance in whole. Fee Award at 7. Moreover, as a remedy, the Arbitrator did not merely mitigate the grievants' penalties, but rather, eliminated their suspensions and awarded them backpay. *Id.* at 27-28.

As a result, we find that the Arbitrator did not err in finding that the Agency's actions in imposing the seven-day suspensions were clearly without merit and we deny the Agency's exception.⁵

B. The Arbitrator set forth a fully articulated decision.

The Agency claims that the award is deficient because the Arbitrator's award is not sufficiently articulated. This claim is without merit because, as is

5. Based on this finding, we need not address the Agency's remaining exceptions that: (1) the Arbitrator erred in finding that the Agency's actions constituted a prohibited personnel practice under 5 U.S.C. § 2302 and (2) the Arbitrator improperly shifted the burden of proof by awarding attorney fees to the Union on that basis. See *Allen*, 2 M.S.P.R. 420 (an award of attorney fees is warranted in the interest of justice if any one of the criteria is met).

clear from the award, the Arbitrator sufficiently articulated his reasons with respect to each of the elements necessary to support an award of attorney fees. As such, the record permits us to resolve the exceptions.⁶

Accordingly, we deny this exception.

VI. Decision

The Agency's exceptions to the initial award are dismissed and the exceptions to the fee award are denied.

6. Even if the Arbitrator had failed to sufficiently articulate the reasons for his award, such a failure would not have rendered the award deficient. As the Authority has previously explained, when an arbitrator has not sufficiently explained a determination on a pertinent statutory requirement, the Authority will examine the record to determine whether it permits us to properly resolve the exception. *See USDA*, 53 FLRA at 1695.