

63 FLRA No. 155

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES
LOCAL 1923
(Union)
0-AR-4157

—
DECISION

July 15, 2009
—

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Laurence M. Evans 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 exception.

The Arbitrator awarded the Union costs and fees under the Back Pay Act, 5 U.S.C. § 5596. For the reasons discussed below, we deny the Agency's exception.

II. Background and Arbitrator's Award

In his original award, the Arbitrator found that the Agency had just cause to discipline the grievant for unauthorized access of records and disclosure of information to his brother. However, he mitigated the grievant's five-day suspension to a two-day suspension. As no exceptions were filed to this award, it became final and the Union filed a petition for attorney fees.

In the award at issue here, the Arbitrator granted the Union one-third of the attorney fees it requested for 24.75 hours of work. Award at 6. Before the Arbitrator, the parties contested only whether an award of attorney fees was "in the interest of justice" under the criteria set forth in *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980) (*Allen*) and whether the requested fees were reasonable.¹ *Id.* at 3-4.

The Arbitrator found that only the fifth of the *Allen* criteria -- whether the Agency "knew or should have known that it would not prevail on the merits" -- applied to this case. *Id.* at 2. In this regard, the Arbitrator concluded that attorney fees were warranted because the Agency should have known that the grievant's five-day suspension would be considered excessive in light of the circumstances. *Id.* at 5. In support of his conclusion, the Arbitrator noted that the grievant had an "unblemished disciplinary record and an exemplary work record" prior to this charge. *Id.* He also found that the grievant had acted in response to a family emergency situation, and not maliciously or for gain. *Id.* The Arbitrator further found that the Agency improperly used the grievant's years of service against him, rather than as a mitigating factor as indicated by the *Douglas* factors.² *Id.* at 5 n.4. According to the Arbitrator, the Agency failed to "undertake a sober and thorough review and analysis of the *Douglas* factors *vis-à-vis* [the Agency's] table of penalties" because it was "hung up" on the grievant's thirty-five years of service. *Id.* at 5. Finding that there was nothing to warrant a penalty that exceeded the two-day minimum required for the charged offense, the Arbitrator found that the Agency "should have known" that the penalty would be mitigated in arbitration.³ *Id.* at 5-6.

The Arbitrator further found that the Union's request for attorney fees was not reasonable and reduced it by two-thirds. In this regard, the Arbitrator found that the grievant conceded the misconduct charge on the merits and that the Union had not been successful in reducing the grievant's discipline to a written reprimand. The Arbitrator therefore concluded that the Union had only "limited success" in bringing this action and "did not substantially prevail." *Id.* at 6. The Arbitrator also found that the case was "simple and straight-

1. Under *Allen*, an award of attorney fees is "in the interest of justice" where: (1) the agency engaged in a prohibited personnel practice; (2) the agency action was clearly without merit or wholly unfounded or the employee is substantially innocent of the agency charges; (3) the agency initiated the action against the employee in bad faith; (4) the agency committed gross procedural error; or (5) the agency knew or should have known that it would not prevail when it brought the proceeding. *Allen*, 2 M.S.P.R. at 434-35.

2. The *Douglas* factors were 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).

3. The Agency's revised "Sanctions for Unauthorized System Access Violations," issued March 2, 2000, provides that the first offense of unauthorized access with disclosure to someone entitled to receive the information carries a two-day minimum suspension. Exception, Joint Exhibit 5 at 3; see also Exception, Attachment 1 at 3 n.3.

forward” and could have been “easily prepared and presented” in less than 24.75 hours. *Id.* Accordingly, the Arbitrator concluded that the Union was entitled to only one-third of the hours of attorney fees it had requested. *Id.* at 6-7.

III. Positions of the Parties

A. Agency’s Exception

The Agency asserts that the Arbitrator’s award is contrary to law because the requested attorney fees are not warranted “in the interest of justice.” Specifically, the Agency argues that the Arbitrator erred in finding that it “should have known” that it would not prevail on the merits when it brought the action against the grievant. Exception at 4. In this regard, the Agency argues that the determination of what it “should have known” must be based on an analysis of whether it proved the charge against the grievant and whether it imposed an appropriate penalty based on the information that it had at the time. *Id.* The Agency notes that the appropriateness of the penalty is based on findings that: (1) the grievant committed the offense; (2) the discipline promoted the efficiency of the service; and (3) the penalty was appropriate. *Id.* at 5 (citing *Lambert v. Dep’t of the Air Force*, 34 M.S.P.R. 501, 505 (1987) (*Lambert*)). According to the Agency, it proved that the grievant committed the charged offense and the disciplinary action it chose promoted the efficiency of the service because it provided a deterrent to others who would knowingly violate the information access policy. *Id.* at 6-7. With regard to the third factor, the Agency contends that it determined, in good faith, that the five-day suspension was appropriate at the time it was imposed because the Agency considered and weighed all of the *Douglas* factors when determining the sanction. It claims that, during the disciplinary process, the grievant’s years of service were balanced against his purposeful and intentional violation of the policy in the face of the known risk of a two-day suspension. *Id.* at 7-8.

In conjunction with the above argument, the Agency contends that attorney fees in any amount would be unreasonable because it, and not the Union, is the “true victor” in the case, having “prevailed in its chief goal of effecting a short suspension to attempt to correct the grievant’s misconduct.” *Id.* at 11, 10. In this regard, the Agency argues that no attorney fees are warranted “in the interest of justice,” despite the fact that the Union is legally the prevailing party, because the grievant admitted fault and the Agency achieved its disciplinary goal. *Id.* at 11 (citing *United States Dep’t of the Navy, Norfolk Naval Shipyard*, 34 FLRA 725 (1990) (*Navy*)).

B. Union’s Opposition

According to the Union, the Agency’s exception does not demonstrate that the Arbitrator’s award is contrary to law because it challenges only the conclusions he reached, and not the interpretation of the law that led to those conclusions. Opposition at 6-8. The Union also argues that the Arbitrator’s conclusions are correct and in accordance with law. *Id.* at 8-14.

IV. Analysis and Conclusions

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 Def., Dep’t 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.*

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, Defense Distribution 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 the standards established under 5 U.S.C. § 7701(g)(1). See *id.* Section 7701(g)(1) requires that: (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.* An award resolving a request for attorney fees under § 7701(g)(1) must set forth specific findings supporting determinations on each pertinent statutory requirement. See *id.*

As the parties dispute only whether attorney fees are warranted in the interest of justice, we address only that issue.⁴ The Authority evaluates the “interest of justice” issue by applying the criteria originally established by the Merit Systems Protection Board (MSPB) in *Allen*. See e.g., *Laborers’ Int’l Union of N. Am., Local*

1376, 54 FLRA 700, 702-03 (1998) (*LIUNA, Local 1376*). The fifth *Allen* criterion provides that an award of attorney fees is warranted if the agency knew or should have known that it would not prevail on the merits when it brought the proceeding. *Allen*, 2 M.S.P.R. at 435. It is well-established 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.” *United States GSA, N.E. & Caribbean Region, N.Y., N.Y.*, 61 FLRA 68, 70 (2005) (*GSA*) (citing *AFGE, Local 12*, 38 FLRA 1240, 1253 (1990)). See also *Lambert*, 34 M.S.P.R. at 505 (same). Applying this principle, the Authority has held that “attorney fees may be warranted based on mitigation of a penalty[.]” *AFGE, Local 12*, 38 FLRA at 1253.

Determining whether attorney fees are warranted under the fifth *Allen* criterion requires evaluation of the nature and weight of the evidence available to the agency at the time of its disputed action. See *LIUNA, Local 1376*, 54 FLRA at 703. Therefore, the arbitrator must 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 *id.* The assessment of whether an agency knew or should have known it would not prevail is primarily factual, because it is based on the arbitrator’s evaluation of the evidence and the agency’s handling of the evidence. See *id.* Consequently, when the factual findings support the arbitrator’s legal conclusion, the Authority will deny the exceptions to the arbitrator’s determination. See *id.*

Here, the Arbitrator set forth specific factual findings in support of his legal conclusion that attorney fees were warranted in the interest of justice because the Agency should have known that it would not prevail in its choice of penalty. Specifically, the Arbitrator found that the Agency did not conduct a “sober and thorough” review of the *Douglas* factors because it was “hung up” on the length of the grievant’s service and the fact that he held a position of trust above the clerical level. Award at 5. The Arbitrator further found that the grievant had an “unblemished disciplinary record and an exemplary work record” and that he did not act maliciously or for gain, but because he was facing a family emergency. *Id.* Therefore, the Arbitrator found that there was nothing to warrant a penalty that was three days more than the two-day minimum. In view of the

Arbitrator’s factual findings, to which we defer, the legal conclusion that the Agency “should have known” that it would not prevail is consistent with the applicable standard of law. See *United States Dep’t of Def., Dep’t of Def. Dependents Schools*, 54 FLRA 773, 790-91 (1998). Thus, although the Agency disagrees with the Arbitrator’s factual findings, and the weight that he gave those findings in his analysis, it has not established that the Arbitrator erred.

Further, we note that the Agency’s reliance on *Navy* is misplaced. See Exception at 11 (citing *Navy*, 34 FLRA at 732-33). In that case, the arbitrator made a specific factual finding, based on his evaluation of the evidence, that an award of attorney fees would not be in the interest of justice because the agency had no way of knowing that its choice of penalty would not be sustained. *Navy*, 34 FLRA at 727. In denying the union’s exception to the arbitrator’s finding, the Authority noted that the union had not established that the finding was erroneous or that it violated any applicable law or regulation. *Id.* at 733. Similarly, here, the Arbitrator made specific factual findings, based on his evaluation of the evidence, and the Agency has not established that they were made in error or in violation of law or regulation.

Based on the foregoing, we deny the exception because the award is not contrary to 5 U.S.C. § 7701(g)(1). See *GSA*, 61 FLRA at 71 (agency exception denied when arbitrator’s factual findings supported conclusion that it should have known it would not prevail on the merits).

V. Decision

The Agency’s exception is denied.

4. We note that, although the Agency argues that an award of attorney fees is not reasonable, which is a separate issue under 5 U.S.C. § 7701(g)(1), it does so as an element of its “warranted in the interest of justice” argument. Accordingly, we do not separately address this claim.