64 FLRA No. 192

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS
ENFORCEMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1924
(Union)

0-AR-4600

_____

DECISION

July 21, 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 attorney-fee award (the Fee Award) of Arbitrator Samuel A. Vitaro filed by the Agency under § 7122 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.[1]

The Arbitrator granted in part the Union's request for attorney fees under the Back Pay Act, 5 U.S.C. § 5596. For the reasons discussed below, we modify the Fee Award to reflect a $330 hourly rate and to exclude any costs granted for photocopies and transcripts, and we deny the remaining exceptions.

II. Background and Arbitrator's Award

In his original award (Original Award), the Arbitrator found that the Agency's seven-day suspension of the grievant for offensive language was unreasonable under the factors set forth in *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981). *See* Original Award at 15, 20-21. The Arbitrator mitigated the suspension to a letter of reprimand and awarded the grievant backpay. *Id.* at 22. As neither party filed an exception to the Original Award, it became final.

In the Fee Award, the Arbitrator addressed, as relevant here, whether fees were warranted in the interest of justice under *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980) (*Allen*). Fee Award at 9. Specifically, he considered whether the Agency knew or should have known that it would not prevail on the merits -- including its choice of penalty -- when it brought the disciplinary action. *See id.* at 10. First, he found that the Agency "relied on the wrong 'Disruptive Behavior' category[]" in its table of penalties when the Agency selected a penalty, a "mistake [that] was avoidable based on the evidence the Agency had before it when it made its decision[.]" *Id.* at 14. Second, he found that, without justification, the Agency had penalized the grievant as if his conduct had been his second disciplinary offense, finding that the Agency's asserted justification was "inconsistent with the Agency's failure to even identify the previous [disciplinary action] in its decision." *Id.* Third, he determined that the Agency "failed to consider certain mitigating factors," for example, that an Agency witness "regretted reporting the [grievant's] statement" and that the witness was "pressured to provide" evidence of the statement. *Id.* at 13-14. The Arbitrator found that the Agency had "exaggerated [the] offense[,]" and that the Agency "knew or should have known that it would not succeed in sustaining the 7-day suspension."[2] *Id.* at 14-15.

The Arbitrator also considered the reasonableness of the requested fee. Citing *Miller v.*

1. In addition, the Agency moved for leave to file a response to the Union's opposition (Agency Motion), and filed a supplemental submission (Agency Submission). The Union moved to strike the Agency Submission (Union Motion to Strike), and the Agency filed another supplemental submission in response (Agency Response). Additionally, the Agency submitted a revised version of the exceptions (Revised Exceptions) to correct typographical errors in the Exceptions. These filings are discussed further below.

2. We note that the Arbitrator found that the Agency had failed to penalize another employee who had committed a similar offense. Original Award at 19. However, the Arbitrator determined that, as there was insufficient evidence to indicate that the Agency official who imposed the penalty on the grievant knew about the Agency's handling of the other employee's misconduct, this failure did not support a conclusion that the Agency knew or should have known that it would not prevail on the merits. *See* Fee Award at 14-15.

Department of Army, 106 M.S.P.R. 547 (2007), *appeal after remand*, 108 M.S.P.R. 576 (2008), and *Del Prete v. United States Postal Serv.*, 104 M.S.P.R. 429 (2007), the Arbitrator stated that "even though [he did] not find the hours excessive[,] . . . [as] argued by the Agency[,]" the fees "must be reduced" because the grievant "succeeded on [the] penalty but . . . the Agency has proven the charge." Fee Award at 17. As the Arbitrator was "unable to separate out the time spent on the charge as contrasted with the penalty[,]" the Arbitrator found that "50% of the time involved in this case was spent on the charge[,]" and he "reduced the requested fees and expenses by 50%." *Id.* at 19.

As to the requested hourly billing rate, the Arbitrator stated that the rate set forth in the retainer agreement between the Union's attorney and the grievant -- $330 per hour -- is the "presumed reasonable rate[.]" *Id.* at 17. However, the Arbitrator found that the Union's attorney "rebutted that presumption" by submitting evidence that the requested rate of "$440/465" (hereinafter "the $465 hourly rate") was the prevailing market rate for attorneys who, like the Union's attorney, ordinarily practice in Washington, D.C.[3] *Id.* at 16-17. This evidence included declarations from the Union's attorney and two other attorneys with employment law practices in the Washington, D.C. area, a copy of the *Laffey* matrix and the retainer agreement.[4] The Arbitrator cited the retainer agreement, which states that the Union's attorney would request attorney fees at "prevailing market rates." Exceptions, Attach., Ex. 3, Retainer Agreement at 2 n.2. Based on these factors, the Arbitrator found that the requested $465 hourly rate was the prevailing market rate for attorneys who, like the Union's attorney, ordinarily practice in Washington, D.C. Fee Award at 16-17. Therefore, the Arbitrator found that the $465 hourly rate was reasonable. *See id.* at 17.

3. The record indicates that the Union's attorney sought to charge a $440 hourly rate from June 1, 2007 through May 31, 2008, and a $465 hourly rate from June 1, 2008 through May 31, 2009. *See* Exceptions, Attach., Ex. 3, May 12, 2009 Decl. Additionally, we note that at one point, the Arbitrator refers to the rate of "$440/$460[,]" but this appears to be a typographical error. Fee Award at 17.

4. The *Laffey* matrix is a document prepared by the United States Attorney's Office for the District of Columbia reflecting prevailing market rates for attorneys in Washington, D.C. *See U.S. Dep't of the Treasury, IRS*, 48 FLRA 931, 932 n.* (1993).

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the Arbitrator's conclusion that the Agency "knew or should have known" is "based on non-fact, as it is undercut by the Arbitrator's own factual findings" in the Original Award that the grievant's conduct "was more than 'salty language'" and was "'too personal.'" Exceptions at 11-12 (quoting Original Award at 16).

Additionally, the Agency contends that the Fee Award is contrary to Authority and the Merit Systems Protection Board (MSPB) precedent because the Arbitrator erroneously found that the Agency knew or should have known that it would not prevail on the merits. Specifically, the Agency argues that it could not have anticipated that the Arbitrator would have viewed the grievant's offense as being less serious than the Agency viewed it. Exceptions at 12. In this connection, the Agency asserts that the table of penalties is an Agency regulation, and that the Agency expected the Arbitrator would defer to the Agency's interpretation of it. *See id.* at 12-13. Further, the Agency asserts that the Arbitrator erroneously relied on the Agency's alleged disparate treatment, despite the fact that the Arbitrator acknowledged that the Agency could not have known about it. *Id.* at 11.

The Agency also contends that the awarded $465 hourly rate is contrary to law, arguing that the Union's attorney should be paid at the $330 hourly rate in the retainer agreement, and that the $465 hourly rate results in a "prohibited windfall" to the Union's attorney. *Id.* at 7.

Moreover, the Agency asserts that the number of hours awarded is contrary to law because the number of hours billed was "exorbitant" and ran "contrary to the 'billing judgment'" that the Agency claims is required of a fee request. *Id.* at 8-9. In this connection, the Agency contends that: (1) the number of hours was "unnecessary for an experienced litigator[;]" (2) the fees were "excessive" because they charged "partner rates for things like 'proof reading' and reading and responding to logistical/administrative emails[;]" and (3) "a substantial number of hours must be billed at a 'clerical' rate." *Id.* at 8, 10.

Finally, the Agency claims that the Arbitrator's awarding of fees for copying and transcription costs is contrary to law. *Id.* at 7-8.

B. Union's Opposition

The Union alleges that the exceptions should be dismissed as interlocutory because the Arbitrator "has not yet ruled on the pending motion for enforcement" of the Original Award, and because it is likely the Union will file an additional attorney-fee request. Opp'n at 4-5. On the merits, the Union argues that the Arbitrator did not err by finding that the Agency knew or should have known that it would not prevail on the merits. *Id.* at 11. With regard to the hourly rate, the Union asserts that the "relevant community for the purposes of determining the appropriate market rate for attorney fees is the community in which the attorney ordinarily practices[,]" Washington, D.C., and, as such, the $465 hourly rate is appropriate. *Id.* at 7. As to photocopying and transcription costs, the Union argues that "it must [be] presumed that the amount finally approved did not include [those] costs[,]" or, if it does, then the Authority should either find the amount to be "*de minimis*" or direct the Arbitrator to clarify the Fee Award on remand. *Id.* at 8, 9 n.8.

IV. Analysis and Conclusions

A. Preliminary Matters

As noted above, the Union argues in its opposition that the Agency's exceptions are interlocutory. Opp'n at 4-5. In response, the Agency moved for permission to submit a supplemental submission, *see* Agency Motion, and attached a supplemental submission to the Agency Motion (Agency Submission). In the Agency Motion, the Agency requests an opportunity to respond to the Union's argument that the Agency exceptions are interlocutory. Agency Motion at 2. In the Agency Submission, the Agency argues that its exceptions are not interlocutory because the Fee Award is final. *See* Agency Submission at 1-3.

Subsequently, the Union submitted a Union Motion to Strike. There, the Union argues that the Agency Motion should be denied because the Union did not raise a new issue when it asserted in its opposition that the Agency's exceptions are interlocutory. *See* Union Motion to Strike at 1-2. In addition, the Union claims that the Agency Submission should be stricken because it refers to arguments that pertain to a withdrawn filing, the Union Motion for Clarification. *See id.* The Agency then responded to the Union Motion to Strike, arguing that the Union Motion to Strike is baseless. *See* Agency Response at 1.

1. Consideration of the Supplemental Submissions

Section 2429.26 of the Authority's Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate. *Cong. Research Employees Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004). The Authority has granted such leave where, for example, the supplemental submission responds to arguments raised for the first time in an opposing party's filing. *See id.* Although the Union asserts that the Agency should have known that its exceptions would be "premature[,]" Union Motion to Strike at 1, the Union does not claim, and the record does not indicate, that the Union had alleged, prior to the filing of its opposition, that the Agency exceptions are interlocutory. *See id.* at 1-2. Accordingly, we grant the Agency Motion and consider the Agency Submission.

As the Union Motion to Strike responds to the Agency Submission, we consider it as well. *See NAGE, Local R3-77*, 59 FLRA 937, 940 (2004), *recons. den.* 60 FLRA 258 (2004) (party's response to opponent's supplemental submission considered). Additionally, we grant the Union Motion to Strike insofar as it removes from consideration the Agency's arguments that pertain to the withdrawn Union Motion for Clarification. *Cf. AFGE, Council 236*, 56 FLRA 136, 137 n.3 (2000) (Authority did not address agency's withdrawn assertion). Finally, we do not consider the Revised Exceptions, because the Agency did not request leave under § 2429.26 to file that supplemental submission. *See AFGE, Local 2145*, 63 FLRA 78, 79 n.3 (2009) (refusing to consider revised exceptions).

2. The exceptions are not interlocutory.

Section 2429.11 of the Authority's Regulations provides: "[T]he Authority . . . ordinarily will not consider interlocutory appeals." In arbitration cases, this means that the Authority normally will not resolve exceptions filed to an arbitration award unless the award constitutes a complete resolution of all issues submitted to arbitration. *U.S. Dep't of Veterans Affairs, W. N.Y. Healthcare Sys., Buffalo, N.Y.*, 61 FLRA 173, 174 (2005). An award that postpones the determination of a submitted issue does not constitute a final award. *AFGE, Local 12*, 38 FLRA 1240, 1246 (1990).

Here, the Union claims that the exceptions are interlocutory because the Arbitrator "has not yet

ruled on the . . . motion for enforcement of" the *Original Award*. Opp'n at 4-5. However, the Union does not claim, and there is no basis in the record for finding, that the award at issue here -- the Fee Award -- is not final. Therefore, we find that the exceptions are not interlocutory.

B. The Fee 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. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, 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. *See id.*

Here, the Agency claims that the Arbitrator's conclusion that the Agency "knew or should have known" that it would not prevail on the merits is "based on non-fact, as it is undercut by the Arbitrator's own factual findings" in the Original Award that the grievant's conduct was "more than 'salty language'" and was "'too personal.'" Exceptions at 11-12 (quoting Original Award at 16). Although the Agency claims that the Arbitrator's conclusion is "undercut" by his factual findings, Exceptions at 11, the Agency does not demonstrate that his conclusion, or his characterization of the grievant's statements, is a central fact underlying the Fee Award that is clearly erroneous, but for which the Arbitrator would have reached a different result. As such, the Agency has failed to demonstrate that the Fee Award is based on a nonfact, and we deny the exception.

C. The Fee Award is contrary to law in part.

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. DOD, 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 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 U.S. DOD, Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995) (*Def. Distrib.*). 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.* The standards established under § 7701(g) require a fully articulated, reasoned decision setting forth the arbitrator's specific findings supporting the determination on each pertinent statutory requirement, including the basis on which the reasonableness of the amount was determined when fees are awarded. *Id.* When exceptions concern the standards established under § 7701(g), the Authority looks for guidance to precedent of the MSPB and the United States Court of Appeals for the Federal Circuit. *AFGE, Local 1061*, 63 FLRA 317, 319 (2009).

The requirements in dispute here are that the award of fees be in the interest of justice and that the amount of the fees be reasonable. Accordingly, we address only those requirements. *See NAGE, Local R5-188*, 46 FLRA 458, 465 (1992) (addressing the issues raised by excepting party).

1. Interest of Justice

As relevant here, an award of attorney fees is warranted in the interest of justice where an 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-settled that the penalty imposed by an agency is an aspect of the merits of an agency's case. *See U.S. GSA, Ne. & Caribbean Region, N.Y., N.Y.*, 61 FLRA 68, 70 (2005) (*GSA*). Thus, attorney fees are warranted in the interest of justice if an agency knew or should have known that its choice of penalty would be reversed. *Id.* at 70.

A determination that an agency knew or should have known that it would not prevail on the merits

"requires evaluation of the nature and weight of the evidence available to the agency at the time of its disputed action." *Laborers' Int'l Union of N. Am., Local 1376*, 54 FLRA 700, 703 (1998). Specifically, it "requires an arbitrator to determine the reasonableness of an agency's actions and positions in light of what information was available to it in the case." *Id.* For example, the Authority has upheld an arbitrator's finding that an agency knew or should have known that it would not prevail on the merits when the agency conducted its investigation negligently and failed to consider mitigating circumstances. *See GSA*, 61 FLRA at 70-71. In this regard, an arbitrator's assessment of whether an agency "knew or should have known" it would not prevail is primarily factual because "the arbitrator evaluates the evidence and the agency's handling of the evidence." *Id.* Consequently, when the factual findings support the arbitrator's legal conclusion, the Authority will deny exceptions to the arbitrator's determination. *Id.*

Here, the Arbitrator found that: (1) the Agency relied on the wrong category of offenses in its table of penalties when it selected a penalty; (2) the Agency's reliance on the wrong category was a "mistake [that] was avoidable based on the evidence the Agency had before it when it made its decision[;]" (3) the Agency failed to consider "mitigating factors" such as an Agency witness' regret reporting the grievant's statement and that he was pressured to report it; and (4) the Agency failed to justify its enhancement of the penalty by failing to demonstrate that the grievant had a record of prior discipline. Fee Award at 13-14. These factual findings support the Arbitrator's conclusion that the Agency knew or should have known that it would not prevail on the merits. *See GSA*, 61 FLRA at 70-71. Contrary to the Agency's assertion, the Arbitrator did not rely on the Agency's disparate treatment to reach his conclusion. Fee Award at 14.

Finally, the Agency asserts that the Arbitrator failed to account for the Agency's expectation that the Arbitrator would defer to the Agency's interpretation of its table of penalties, which the Agency claims is an Agency regulation. Even assuming, without deciding, that the table of penalties is an Agency regulation, the parties' agreement governed the dispute, as both applied. *See U.S. Dep't of Transp., FAA, Mike Monroney Aeronautical Ctr.*, 58 FLRA 462, 464 (2003) (Chairman Cabaniss concurring). Thus, the Agency had no reasonable basis to expect that, if challenged, its interpretation of the table of penalties would be given deference by, or result in the Agency prevailing before, an arbitrator.[5]

For the foregoing reasons, we deny this exception.

2. Reasonableness of Fees

The computation of a reasonable attorney fee award "begins with an analysis of two objective variables: The attorney's customary billing rate; and the number of hours reasonably devoted to the case." *Stewart v. Dep't of the Army*, 102 M.S.P.R. 656, 662 (2006). *See also Dep't of the Air Force Headquarters, 832d Combat Support Group DPCE, Luke Air Force Base, Ariz.*, 32 FLRA 1084, 1100 (1988) (*Luke Air Force Base*). We address these two variables separately below.

i. Reasonableness of Rate

With regard to the Agency's exception as to the claimed hourly rate, there is a presumption that an agreed-upon fee between client and counsel is the "maximum reasonable fee which may be awarded absent clear evidence to the contrary." *Fort McClellan Educ. Ass'n*, 56 FLRA 644, 645 (2000) (*Fort McClellan*) (quoting *Luke Air Force Base*, 32 FLRA at 1108). This presumption is "rebuttable by convincing evidence that the counsel's customary rate for similar work is higher and either that the agreed-upon rate was not based on marketplace considerations or was provided only because of the client's inability to pay." *Fort McClellan*, 56 FLRA at 645-46 (citing *Gensburg v. Dep't of Veterans Affairs*, 85 M.S.P.R. 198, 206 (2000) (*Gensburg*)). Affidavits stating the prevailing rate in the community do not demonstrate that an hourly rate that is higher than the hourly rate in a fee agreement is reasonable. *Kennard v. Dep't of Def.*, 33 M.S.P.R. 231, 236 (1987) (*Kennard*).

As noted by the Arbitrator, the retainer agreement in this case sets forth a billing rate of $330 per hour, but also states:

5. To the extent that the Agency's argument constitutes a contrary-to-law exception to the Arbitrator's reduction of the penalty in the Original Award, dated April 29, 2009, the exception, filed December 21, 2009, was untimely, as it was filed long past the thirty-day deadline under § 7122(b) of the Statute and 5 C.F.R. § 2425.1(b) of the Authority's Regulations.

> These billing rates [$330 an hour] are at or below the "prevailing market rates, . . . charged in this legal community. In this legal market, it is the usual and customary practice for law firms like mine to ordinarily charge clients at reduced hourly rates to reflect non-economic goals . . . . Thereafter, if and when we are in a position to seek recovery of legal fees, we apply for such fees . . . at the highest allowable prevailing market rates.

Exceptions, Attach., Retainer Agreement at 2 n.2.

The Arbitrator found that the retainer agreement set forth a $330 hourly rate, and that the rate set forth in the retainer agreement is the "presumed reasonable rate[.]" Fee Award at 16-17. The Arbitrator then determined that the Union's attorney rebutted this presumption by showing that the requested $465 hourly rate was consistent with the prevailing rate for Washington, D.C.-based attorneys. On this basis, the Arbitrator concluded that the $465 hourly rate was reasonable. *See id.* at 17.

In concluding that the $465 hourly rate is reasonable, the Arbitrator did not find, and the record does not indicate, that the Union's attorney charged a rate higher than the $330 hourly rate listed in the retainer agreement for similar work. As Authority and MSPB precedent require such a finding to rebut the presumption that the fee listed in the retainer agreement is the maximum reasonable fee, the Arbitrator's conclusion that the $465 hourly rate is reasonable is inconsistent with Authority and MSPB precedent. *See Fort McClellan*, 56 FLRA at 645; *Gensburg*, 85 M.S.P.R. at 206. Further, declarations from the Union's attorney and two other attorneys with employment law practices in the Washington, D.C. area, that the $465 hourly rate is consistent with the prevailing market rate, do not establish that the Union's attorney is entitled to receive an hourly rate higher than the rate listed in the retainer agreement. *See Kennard*, 33 M.S.P.R. at 236.

As the Union's attorney did not demonstrate, and the record does not indicate, that the $465 hourly rate is reasonable, we find that the Arbitrator's conclusion, that the $465 hourly rate is reasonable, is contrary to law. As such, we modify the amount of the Fee Award to reflect a $330 hourly rate.

ii. Reasonableness of Hours

The Authority requires that fee requests "be closely examined to ensure that the number of hours expended was reasonable[,]" because "the number of hours expended are not necessarily those 'reasonably expended.'" *U.S. Dep't of Def., Def. Fin. & Accounting Serv.*, 60 FLRA 281, 286 (2004) (quoting *Luke Air Force Base*, 32 FLRA at 1101). Additionally, an arbitrator must support his or her determination as to the reasonableness of a fee request. *See Def. Distrib.*, 51 FLRA at 158.

The standard of review as to the reasonableness of the number of hours awarded is deferential. In this connection, the MSPB has stated that the fact-finder is "in the best position to determine whether the number of hours expended is reasonable[.]" *McKenna v. Dep't of Navy*, 108 M.S.P.R. 404, 411 (2008). "[A]bsent a specific showing that the [fact-finder's] evaluation was incorrect," the fact-finder's evaluation will not be second-guessed. *Id.* at 411. Consistent with this approach, the Authority has rejected an agency's "unsupported" exception to the number of hours that an arbitrator awarded a union attorney. *U.S. Dep't of Def., Educ. Activity, Arlington, Va.*, 57 FLRA 23, 26 (2001) (Chairman Cabaniss concurring in part and dissenting in part).

Here, the Agency does not claim, and there is no basis in the record to find, that the Arbitrator's conclusion is contrary to the requirements of the above-cited precedent. Specifically, the Arbitrator closely examined the request to ensure that the number of hours expended were reasonable and supported his determination as to the reasonableness of the fee request. *See* Fee Award at 17-18. The Agency's claim that the Arbitrator dismissed its concerns regarding "proportionality or time spent[,]" Exceptions at 9, or its claim that many of the hours should be billed at a clerical rate, *id.* at 10, does not indicate that the Arbitrator's conclusion is inconsistent with Authority precedent. Further, in view of the fact that the Arbitrator reduced the hours requested by fifty percent, the Agency's claim that the hours requested were "unnecessary" does not demonstrate that the Fee Award is contrary to law.

With regard to the Agency's argument that the Fee Award is disproportionate to the amount of backpay, the Agency concedes that this consideration is merely one "*factor*[] relevant to the determination of a fee award[,]" and does not explain why, applied here, this one factor renders the Fee Award deficient. *Id.* at 9 (emphasis added). This is consistent with Supreme Court precedent holding that, with regard to

another federal fee-shifting statute, the amount of damages recovered, while relevant to the amount of attorney fees to be awarded, is "only one of many factors that a court should consider in calculating an award of attorney's fees." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality) (*Rivera*). *Rivera* applies here. *See City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) (Supreme Court's case law construing what is a "reasonable" fee applies uniformly to all federal fee-shifting statutes). As such, we find that the Agency has failed to show that the Fee Award is deficient on this ground.

Based on the foregoing, we find that the Agency has not demonstrated that the number of hours the Arbitrator awarded renders the amount of the Fee Award unreasonable.

3. Photocopying and Transcription Costs

It is well settled that taxable costs such as photocopying and transcription costs may not be awarded under § 7701(g)(1). *E.g.*, *SSA, Dep't of HHS v. Balaban*, 33 M.S.P.R. 309, 323-24 (1987) (citing *Koch v. Dep't of Commerce*, 19 M.S.P.R. 219, 221-22 (1984)). Here, the Arbitrator awarded one-half of the entire amount listed in the billing record, even though it included costs for photocopies and transcripts. *See* Fee Award at 15, 19; Exceptions, Attach., Ex. 3, May 26, 2009 Billing Record. There is no evidence that, in reducing the amount of the entire Fee Award by half, he intended to exclude any specific items such as photocopies or transcripts. Thus, we modify the amount of the Fee Award to exclude any costs granted for these items.

V. Decision

The Fee Award is modified to reflect a $330 hourly rate and to exclude any costs granted for photocopies and transcripts, and the remaining exceptions are denied.