64 FLRA No. 196

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
(Union)

0-AR-4144

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DECISION

July 28, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Anna DuVal Smith filed by both the Agency and the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union did not file an opposition to the Agency's exceptions. The Agency filed an opposition to the Union's exception.

The Arbitrator ruled that the Agency had just cause to discipline the grievant, but mitigated the two-day suspension to a reprimand. For the following reasons, we grant the Agency's exception that the award fails to draw its essence from the parties' collective bargaining agreement and set aside the award.

II. Background and Arbitrator's Award

The grievant, a claims representative, was suspended for two days for inappropriate and discourteous behavior toward a manager and disruption of the workplace. She filed a grievance alleging that the discipline was not for just cause under the parties' collective bargaining agreement. The grievance was unresolved and was submitted to arbitration. The parties stipulated the issue as follows: "Was the [g]rievant disciplined for just cause and, if not, what is the remedy?" Award at 2.

The Arbitrator found that "[t]he Agency had just cause to discipline the [g]rievant" and that "[d]iscipline was warranted." *Id*. However, the Arbitrator found that the Agency imposed the two-day suspension based, in part, "on two undocumented counseling [sessions] as part of a pattern of discourteous conduct." *Id*. The Arbitrator found that considering the counseling sessions was inappropriate because the manager who counseled the grievant relied on "second hand" information provided by "a person who did not identify her informants." *Id.* According to the Arbitrator, "[m]anagement may take such reports as warning signs of problems or potential problems with an employee[']s behavior," but it may not base "formal discipline [on] hearsay alone[.]" *Id.*

Accordingly, the Arbitrator granted the grievance in part and denied it in part. As a remedy, the Arbitrator reduced the two-day suspension to a reprimand and awarded the grievant backpay with interest. As to the Union's request for attorney fees, the Arbitrator found that "the Union did not identify which, if any, of the [appropriate] criteria it believes were met" to justify such an award. *Id.* The Arbitrator also found that the grievant had provided "unsupported testimony . . . suggesting bad faith," but determined that this testimony was "too little" to support an award of attorney fees. *Id*. at 2-3. Consequently, the Arbitrator denied the Union's fee request.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is deficient because the Arbitrator exceeded her authority and because the award fails to draw its essence from the collective bargaining agreement.

The Agency claims that the Arbitrator exceeded her authority by addressing an issue that was not properly before her. Specifically, the Agency asserts that the parties' stipulated issue was whether there was just cause to discipline the grievant, not "whether the Agency had just cause for issuing a two-day suspension." Agency's Exceptions at 5. Moreover, according to the Agency, the Arbitrator made an "unequivocal finding that the Agency had just cause to impose discipline[.]" *Id.* at 4. Therefore, the

1. The concurring opinion of Member DuBester and the dissenting opinion of Chairman Pope are set forth at the end of this decision.

Agency claims that the Arbitrator was not authorized "to fashion a remedy based on the propriety of the two-day suspension." *Id*. at 5.

The Agency also claims that the award fails to draw its essence from Article 23 of the parties' agreement for several reasons. First, the Agency disputes the Arbitrator's interpretation of the agreement to preclude it from considering the undocumented counseling sessions. Second, the Agency asserts that, even absent the two counseling sessions, the two-day suspension was consistent with the concept of progressive discipline under Article 23 of the parties' agreement because the grievant had already received a reprimand the previous year. In any event, the Agency maintains that "nothing in the wording of Article 23 . . . requires the Agency to rely on a pattern of discourteous conduct to support a short term suspension." *Id.* at 6. Finally, the Agency claims that Article 23 permits it to bypass steps of progressive discipline when "management determines by the severe nature of the behavior that a lesser form of discipline would not be appropriate." *Id*. at 7.

B. Union's Exceptions

The Union contends that the Arbitrator's denial of an award of attorney fees is deficient as contrary to the Back Pay Act, 5 U.S.C. § 5596. The Union asserts that the Arbitrator did not provide a fully articulated decision to support her denial of attorney fees. Union's Exceptions at 6. The Union also asserts that the Arbitrator's denial is deficient because the grievant was the prevailing party and was affected by an unjustified or unwarranted personnel action that resulted in a loss of pay under the Back Pay Act. *Id*. at 5-6. The Union further asserts that attorney fees are warranted in the interest of justice under 5 U.S.C. § 7701(g)(1). Specifically, the Union claims that the Agency did not demonstrate that the grievant engaged in a "pattern of discourteous conduct" and that, therefore, the grievant was substantially innocent of charges brought by the Agency. *Id*. at 5. The Union also claims that the Agency's action was taken in bad faith because the Agency "attempt[ed] to justify the level of discipline with undocumented and unverified anonymous hearsay[.]" *Id.* at 6. Finally, the Union claims that the Agency knew or should have known it would not prevail on the merits when it brought the proceeding based on such unreliable evidence. *Id*.

C. Agency's Opposition

On the issue of prevailing party, the Agency contends that the Arbitrator's denial of attorney fees is not deficient because the issue of whether the grievant is the prevailing party is still unresolved in view of its pending exceptions to the award. Agency's Opp'n at 5-6. On the issue of whether fees were warranted in the interest of justice, the Agency contends that the Arbitrator sufficiently supported her denial of fees. *Id*. at 11-12. In any event, the Agency argues that attorney fees are not warranted in the interest of justice. *Id*. at 6-11.

IV. Analysis and Conclusions

A. The award fails to draw its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See, e.g., AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See, e.g., U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id*. at 576.

The Agency argues that the award fails to draw its essence from Article 23, Section 1 of the parties' agreement. The Agency claims that the two-day suspension was proper, even if relying on the counseling sessions was not, because the grievant already had been officially reprimanded for discourteous conduct a year earlier and the two-day suspension was within the "'common pattern' of progressive discipline" under Article 23. Agency's Exceptions at 6.

We agree that the award fails to draw its essence from the parties' agreement. Article 23, Section 1, provides, in relevant part, that the "parties agree to

the concept of progressive discipline which is designed to correct and improve employee behavior. A common pattern of progressive discipline is reprimand, short term suspension, long term suspension and removal." *Id.*

It is undisputed that the grievant received a written reprimand for discourteous conduct less than a year before this incident. Further, the Arbitrator found that "[t]he Agency had just cause to discipline the [g]rievant" and that "[d]iscipline was warranted" for the grievant's conduct here. Award at 2. Under the terms of the parties' agreement, the next step of discipline was a short term suspension, such as the two-day suspension ordered here. The Agency, accordingly, followed the "common pattern of discipline" set forth in the parties' agreement.

As a result, we find that the Arbitrator's interpretation of the agreement as precluding the Agency from imposing the two-day suspension is in manifest disregard of the parties' agreement. *See Soc. Sec. Admin., St. Paul, Minn.*, 61 FLRA 92, 93-94 (2005) (holding that arbitrator's interpretation of the agreement as precluding Agency from imposing penalty that Agency had determined was appropriate evidenced manifest disregard of the parties' agreement).

The dissent suggests that our decision is inconsistent with Authority and Supreme Court precedent. We disagree. It is true that, under Supreme Court precedent, the deference given to arbitrators regarding their interpretation of a parties' collective bargaining agreement is broad. Contrary to the dissent's characterization of this precedent, however, this deference "is not the equivalent of a grant of limitless power." *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674,* 916 F.2d 63, 65 (2d Cir. 1990); *see also Beacon Journal Publishing Co. v. Akron Newspaper Guild, Local Number 7*, 114 F.3d 596, 599 (6th Cir. 1997) (noting that, despite great amount of deference accorded an arbitrator's decision, court's "review is not toothless").

The dissent asserts that, under Supreme Court precedent, the only question asked, in determining whether an arbitrator has properly interpreted a parties' agreement, is whether "the arbitrator is even arguably construing or applying" the parties' agreement. Dissent at 9. Under the dissent's standard, as long as an arbitrator mentions a provision of the parties' agreement, his interpretation of that provision will be upheld, regardless of how absurd that interpretation might be. This standard appears to make a court's "power of review a nullity, so long as the arbitrator has the wit to point to some language in the contract as supposedly supporting his decision." *Lattimer-Stevens v. United Steelworkers of Am., AFL-CIO*, 913 F.2d 1166, 1171-72 (6th Cir. 1990) (Boggs, J., dissenting).

Yet, applying Supreme Court precedent, many federal courts have determined that an arbitrator's interpretation failed to draw its essence from the parties' agreement. *See, e.g.,*:

- *Spero Elec. Corp. v. Int'l Bhd. of Elec. Workers, AFL-CIO*, 439 F.3d 324 (6th Cir. 2006) (arbitrator's award failed to draw its essence from the parties' agreement where award permitted modification to the agreement in a manner that was inconsistent with the agreement's "method-of-modification" clause)

- *Citgo Asphalt Refining Co. v. The Paper, Allied-Indus., Chem. & Energy Workers Int'l Union*, 385 F.3d 809, 820 (3d Cir. 2004) (arbitrator's award failed to draw it essence from parties' agreement where arbitrator determined company's zero tolerance drug abuse policy was unreasonable, despite provision of the parties' agreement permitting the company "to make and enforce rules for the maintenance of discipline and safety")

- *United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383 (4th Cir. 2000) (arbitrator's award failed to draw its essence from the parties' agreement where arbitrator issued an award without holding an evidentiary hearing, despite an express provision of the agreement requiring a hearing in such circumstances)

- *Sterling Fluid Sys. (USA), Inc. v. Chauffeurs, Teamsters, & Helpers Local Union #7*, 322 F. Supp. 2d 837 (W.D. Mich. 2004) (arbitrator's award failed to draw its essence from the parties' agreement where arbitrator construed employer's decision to close plant under provisions of the agreement governing subcontracting, rather than the provisions governing management's rights)

- *Lourdes Med. Ctr. of Burlington County v. JNESO*, 2007 WL 1040961 at *11 (D.N.J.)

> (arbitrator's award failed to draw its essence from the parties' agreement where arbitrator's determination that a small reduction in employees' work hours constituted a "layoff" was inconsistent with the parties' agreement, which defined layoff as "a permanent reduction in force and/or a reduction in force of unlimited duration")

As these cases illustrate, "[r]are though they may be, there will be instances when it is appropriate for a court to vacate the decision of an arbitrator." *Matteson v. Ryder Sys., Inc.*, 99 F.3d 108, 114 (3d Cir. 1996). The same proposition holds true when the Authority reviews arbitral awards.

Moreover, the Supreme Court has held repeatedly that, for an arbitrator's award to draw its essence from a parties' agreement, an arbitrator may not ignore the plain language of the agreement. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). When an arbitrator's award is clearly inconsistent with the terms of the parties' agreement, such as the arbitrator's award here, the award cannot be said to "draw its essence" from the agreement.

Accordingly, we grant the Agency's exception.[2]

V. Decision

The exception is granted, and the award is set aside.

Opinion of Member DuBester, concurring:

I agree with my colleague's finding that the Arbitrator's interpretation of the agreement as precluding the Agency from imposing a two-day suspension is in manifest disregard of the parties' agreement. I also agree with much of my dissenting colleague's recitations of principles and case law regarding application of the "essence" standard.

For me, this matter is rather straightforward. The parties have incorporated the principle of progressive discipline into their collective bargaining agreement. The grievant had received a reprimand for a similar offense within the prior 12 months. In the circumstances presented, granting the Agency's exception is appropriate. Conversely, given similar facts and a similar offense, if the Agency had imposed a more severe discipline, such as a long-term suspension, that was upheld by the Arbitrator, it is likely that I would similarly conclude that such a determination was in manifest disregard of the agreement.

Moreover, in my view, there is a serious question, also raised by the Agency in its exceptions, as to whether the Arbitrator should have addressed the remedy question at all.[*] It is axiomatic that the statement of the issue, along with the agreement, define the jurisdiction and authority of the Arbitrator. Here the stipulated issue was as follows: "Was the [g]rievant *disciplined* for just cause and, *if not*, what is the remedy?" Award at 2 (emphasis added).

Given the Arbitrator's finding that there *was* just cause for discipline, I do not believe that the second question as to remedy was within the Arbitrator's authority to address.

2. Having found that the award fails to draw its essence from the parties' agreement, we need not resolve either the Agency's exception alleging that the Arbitrator exceeded his authority or the Union's exceptions regarding the Arbitrator's denial of attorney fees.

[*] Given our disposition of the "essence" exception, my colleague properly notes that it is unnecessary to resolve the "exceeded authority" exception. *See supra* note 2. Nonetheless, I offer these comments.

Chairman Pope, dissenting:

The majority sets the award aside on essence grounds. In doing so, the majority ignores our statutory mandate to afford arbitrators substantial deference in interpreting collective bargaining agreements. Accordingly, I dissent.

From its earliest days, the Authority has looked to Supreme Court precedent in applying the essence standard. In this regard, in *United States Army Missile Materiel Readiness Command*, 2 FLRA 432, 437 (1980) (*Missile Command*), the Authority (citing *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (*Enterprise Wheel*)), recognized that an award is deficient if it fails to draw its essence from the parties' collective bargaining agreement and set forth the current test for making that determination. In so doing, the Authority stated:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Missile Command, 2 FLRA at 438 (quoting *Enterprise Wheel*, 363 U.S. at 599).

Subsequently, the Authority again looked to the Supreme Court's application of the essence standard in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (*Misco*). *E.g., U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 576 (1990) (*OSHA*). In *Misco*, the Court held that "as long as the arbitrator is even arguably construing or applying the contract . . . , that a court is convinced he committed serious error does not suffice to overturn his decision." 484 U.S. at 38. Citing *Enterprise Wheel*, the Court emphasized that "a court should not reject an award on the ground that the arbitrator misread the contract." *Id.* (citing *Enterprise Wheel*, 363 U.S. at 599). In reliance on *Misco*, the Authority stated in *OSHA* that, as long as the arbitrator is arguably construing the collective bargaining agreement, serious error in doing so does not establish that the award is deficient. *OSHA*, 34 FLRA at 576. (citing *Misco*, 484 U.S. at 38); *accord U.S. Dep't of Veterans Affairs Med. Ctr., Tuscaloosa, Ala.*, 64 FLRA 379, 380 (2009) (Member Beck dissenting as to application); *Soc. Sec. Admin., Balt., Md.*, 55 FLRA 1063, 1069 (1999).

The Supreme Court reiterated the principles set forth in *Enterprise Wheel* and *Misco* in *Eastern Associated Coal Corp. v. United Mine Workers of Am. District 17*, 531 U.S. 57, 62 (2000) (*Mine Workers*). In this regard, after finding that the arbitrator was authorized by the parties to interpret the collective bargaining agreement, the Court concluded that it "must treat the arbitrator's award as if it represented an agreement between [the employer] and the union as to the proper meaning of the contract's [disputed] words." *Id.* (citing Theodore St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny*, 75 Mich. L. Rev. 1137, 1155 (1977)). According to the Court, "the award is not distinguishable from the contractual agreement[.]" *Mine Workers*, 531 U.S. at 62. Thereafter, in *Major League Baseball Players Association v. Garvey*, 532 U.S. 504, 509-10 (2001) (*Garvey*), the Court held that, while "irrational" actions may constitute "serious error[,]" even such "serious error" by arbitrators does not justify overturning an award when the arbitrator is construing the collective bargaining agreement.[1] *Garvey*, 532 U.S. at 510.

Consistent with the foregoing, and as the Authority's application of the essence standard is to be informed by Supreme Court precedent, the dispositive question is the following: Is the arbitrator "even arguably construing or applying" the collective

1. More recently, the United States Court of Appeals for the D.C. Circuit concluded that it was compelled to apply the essence standard as formulated by the Supreme Court in determining whether the contested award drew its essence from the collective bargaining agreement. *See Mail Handlers v. Postal Workers*, 589 F.3d 437, 441-42 (2009). Assessing all of the above-cited Supreme Court decisions, the court concluded that the "[c]ourts do not review the substantive reasonableness of a labor arbitrator's contract interpretation." *Id.* at 441 (citing Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash between the Public Policy Exception and the Duty to Bargain*, 64 CHI. KENT L. REV. 3, 3-8 (1988)). Instead, the court held that the essence standard requires a court to "ascertain whether the arbitrator . . . was 'even arguably construing or applying the contract[.]'" *Id.* at 442. If "the arbitrator was at least 'arguably construing or applying' the [a]greement in reaching [the] decision[,]" then, "under the Supreme Court precedents, the courts may not overturn the arbitrator's award." *Id.* at 444 (quoting *Mine Workers*, 531 U.S. at 62).

bargaining agreement?[2] *Misco*, 484 U.S. at 38. If the answer is "yes," then the award is not deficient on essence grounds.

Applying the Supreme Court's standard here, the answer is as simple as the question: Of course, the Arbitrator was construing/applying the parties' agreement. In this connection, Article 23, Section 1 of the parties' agreement provides, in pertinent part, that the "parties agree to the concept of progressive discipline which is designed to correct and improve employee behavior. A common pattern of progressive discipline is reprimand, short term suspension, long term suspension and removal." Agency's Exceptions at 6. The majority relies on this contractual wording to find that because the grievant had a previous reprimand, the Arbitrator could not find that another reprimand, rather than two-day suspension, was warranted. However, with the issue specifically stipulated to be whether the grievant was disciplined for just cause and, if not, what should the remedy be, the award is precisely the Arbitrator's interpretation of the agreement -- nothing more, nothing less. The majority is not empowered to substitute its interpretation for that of the Arbitrator.

Moreover, the court decisions cited by the majority do not support the majority's conclusion; in those decisions, the arbitration award either directly conflicted with or wholly ignored the wording of the collective bargaining agreement. *Spero Elec. Corp. v. IBEW, Local 1377*, 439 F.3d 324 (6th Cir. 2006) (award contradicted express terms of agreement); *Citgo Asphalt Refining Co. v. Paper Allied Indus., Chemical & Engery Workers Int'l Local 2-991*, 385 F.3d 809 (3d Cir. 2004) (award ignored agreement); *United Mine Workers of Am. Local 93 v. Marrowbone Dev. Co.*, 232 F.3d 383 (4th Cir. 2000) (award conflicted with plain language of agreement); *Sterling Fluid Sys. (USA), Inc. v. Chauffeurs, Teamsters & Helpers, Local Union #7*, 322 F. Supp. 2d 837 (W.D. Mich. 2004) (award conflicted with express terms of agreement); *Lourdes Med. Ctr. of Burlington County v. JNESO Dist. Council I*, 182 L.R.R.M. 2438 (D. N.J. 2007) (award ignored plain wording of agreement).[3] Here, by contrast, the wording of the agreement identifies a "*common*" pattern of progressive discipline, not a "*required*" pattern.[4] Consequently, there is no support for finding that the award directly conflicts with or wholly ignores this wording.

Finally, application of the Supreme Court's essence standard is far from "a grant of limitless power." Majority Opinion at 4 (citations omitted). Consistent with that standard, I previously have found, and will continue to find, that an arbitration award fails to draw its essence from a collective bargaining agreement where the award is directly contrary to the plain wording of that agreement. *See, e.g., U.S. Dep't of the Air Force, U.S. Air Force Academy, Colo. Springs, Colo.*, 59 FLRA 540, 541 (2003) (award was "totally unrelated to, and manifestly disregard[ed], the clear mandate for equal sharing of [arbitration] costs"). What I will not do -- and what the majority does here -- is disregard an arbitrator's broad authority to interpret contract language.

I would also reject the Agency's remaining arguments.

First, the Agency claims that the Arbitrator's finding that the Agency could not rely on unrecorded counseling sessions in determining appropriate discipline also fails to draw its essence from Article 23 of the agreement. Contrary to the claim, however, the relevant contract wording states only that counseling sessions "are informal and not recorded[,]" not that the Agency may rely on unrecorded counseling sessions in determining discipline. Agency's Exceptions at 6.

Second, the Agency argues that the Arbitrator exceeded her authority because, after finding that the grievant was disciplined for just cause, she proceeded to assess the propriety of the Agency's selected penalty. However, the Authority has long recognized that "the enforcement of a contractual just cause standard presents two questions: whether discipline was warranted, and if so, whether the penalty assessed was appropriate." *SSA*, 61 FLRA at 93 (citing *U.S. DOJ, INS, N.Y. Dist. Office*, 42 FLRA

2. This is not my essence standard, as the majority suggests; it is the Supreme Court's standard.

3. I note that the court in *Matteson v. Ryder Sys., Inc.*, 99 F.3d 108 (3d Cir. 1996), cited by the majority, vacated an award because the arbitrator had decided an issue that was not submitted to arbitration. As a result, that decision does not inform application of the essence standard. I also note that the majority relies on a *dissenting* opinion in *Lattimer-Stevens v. United Steelworkers of Am.*, 913 F.2d 1166, 1171-72 (6th Cir. 1990). *See* Majority Opinion at 5. The *majority* opinion in that decision, which found that an award did not fail to draw its essence, directly contradicts the majority.

4. I note that I dissented in *SSA, St. Paul, Minn.*, 61 FLRA 92 (then-Member Pope dissenting), *recons. den.*, 61 FLRA 256 (2005) (*SSA*), cited by the majority. I continue to adhere to the views stated in that dissent.

650, 658 (1991)). Thus, the issue of the propriety of the penalty was directly related to the stipulated issue regarding just cause, and the Arbitrator did not exceed her authority by assessing that issue. In addition, the decisions cited by the Agency are inapposite. *See Wash. Plate Printers Union, Local 2, IPPDSPMEU & Graphic Commc'ns Int'l Union, Local 4B, AFL-CIO*, 59 FLRA 417, 421 (2003) (then-Member Pope dissenting in part) (arbitrator found agency did not commit alleged violation but nevertheless awarded remedy); *U.S. Dep't of HHS, FDA, New Orleans, La.*, 54 FLRA 90, 95 (1998) (arbitrator awarded remedy based on resolution of an issue that was only "tangentially related" to the issue before him).

Turning to the Union's exception to the Arbitrator's denial of attorney fees, the parties dispute only two legal requirements for awards of such fees: (1) whether the grievant was the prevailing party; and (2) whether fees are warranted in the interest of justice.

As to whether the grievant is the prevailing party, under 5 U.S.C. § 7701(g)(1), an employee is a prevailing party if he or she has received "an enforceable judgment or settlement which directly benefitted [the employee] at the time of the judgment or settlement." *U.S. DOD, DOD Dependents Schs.*, 54 FLRA 773, 788 (1998) (quoting *DiGiulio v. Dep't of the Treasury*, 66 M.S.P.R. 659, 663 (1995)). There is no dispute that the award benefitted the grievant, as it rescinded a two-day suspension and awarded the grievant backpay with interest. As to the interests of justice, the Union claims that attorney fees are warranted because: (1) the Agency's actions were clearly without merit or wholly unfounded, or the grievant was substantially innocent of the charges brought by the Agency; (2) the Agency actions were taken in bad faith or to harass or exert improper pressure on the grievant; and (3) the Agency knew or should have known that it would not prevail on the merits when it brought the proceeding. Union's Exception at 5-6. The Arbitrator did not articulate the reasons for denying the attorney-fee request and the record, as submitted to the Authority, does not contain any evidence that would assist the Authority in resolving this issue. In these circumstances, I would remand the award for the Arbitrator to explain the basis for her denial of attorney fees. *See, e.g., AFGE, Local 3239*, 61 FLRA 808, 810 (2006). *See also AFGE, Council 220*, 60 FLRA 1, 4 (2004).

For the foregoing reasons, I would deny the Agency's exceptions and would remand the award to the parties for resubmission to the Arbitrator, absent settlement, to explain the basis for her denial of attorney fees.