65 FLRA No. 121

UNITED STATES
DEPARTMENT OF THE ARMY
MEDICAL ACTIVITY (MEDDAC)
FORT DRUM, NEW YORK
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 400
(Union)

0-AR-4690

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DECISION

February 28, 2011

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award (fee award) of Arbitrator Mona N. Glanzer 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 granted the Union's application for attorney fees and gave the Agency thirty days to submit any objections to the amount of fees requested. None were filed and the amount requested was awarded.

For the reasons discussed below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

A. Merits Award

The Agency suspended the grievant, a physician's assistant, for his failure to control an incident in an examination room to the satisfaction of the patient's mother. Merits Award at 4-5; Fee Award at 2. The grievant was initially suspended for two weeks but prior to the arbitration the Agency reduced the suspension to seven days. Merits Award at 5.

The Arbitrator found that the grievant, who was hearing impaired, had past difficulties with the nursing staff, which was not accommodating to his disability. *Id.* at 3. The incident at issue involved a pediatric patient whom the grievant determined needed a catheterization procedure. The mother concurred but was apprehensive about the procedure. When the grievant left the room to attend to other patients, a nurse who had not followed the grievant's instructions before, decided unilaterally not to use the catheter and suggested another procedure to the mother. *Id.* at 4. When the grievant returned, he became visibly upset that his orders were not followed. He spoke to the mother, who agreed to go forward with the procedure, although she and the child were both upset. *Id.* The situation was described as chaotic and the procedure was eventually stopped. The next day a physician performed the catheterization on the first attempt. *Id*.

Finding that open frustration and anger does not promote patient care, and consequently, the Agency's reputation, the Arbitrator found that the Agency had reason to discipline the grievant. *Id.* at 7. She found, however, that the seven-day suspension was unreasonable. Balancing the Agency's interests with the "equity of the penalty imposed," the Arbitrator concluded that an anger management course was the proper penalty. *Id.* 7-8. The Arbitrator based her decision, in part, on the following facts: the grievant was an eight-year employee with excellent evaluations; his medical skills were never called into question; this was his first offense; a prior incident was written up and counseling recommended but never pursued; the nurse involved exacerbated the situation; and the penalty exceeded the guidelines. *Id.* Additionally, the Arbitrator found that the grievant's demeanor at the hearing indicated that his professional reputation was important to him and that any penalty would be taken seriously. *Id*. at 8. The Arbitrator therefore concluded that an anger management course would serve a purpose beyond being punitive in order to preserve a valued employee and enable him to better serve the Agency's mission. *Id*.

Accordingly, the Arbitrator found that the Agency did not have just cause to impose the seven-day suspension and ordered the grievant to take an anger management course as the remedy. *Id.* at 8. As neither party filed exceptions to the merits award, that award became final and binding.

B. Fee Award

Subsequent to the issuance of the merits award, the Agency imposed the seven-day suspension on the grievant, causing him to lose pay and benefits. The parties submitted a joint petition for clarification and the Arbitrator issued a supplemental award in which the Arbitrator repeated that the sole penalty imposed by the merits award was the anger management course. Fee Award at 2 (discussing supplemental award).

In the fee award at issue here, the Arbitrator granted the Union's request for attorney fees. *Id.* at 8. The Arbitrator addressed whether a fee award was warranted in the interest of justice under the criteria established by the Merit Systems Protection Board (MSPB) in *Allen v. USPS*, 2 M.S.P.R. 420 (1980).[1] *Id.* at 3. Recognizing that a fee award is warranted if any one of the *Allen* criteria is satisfied, the Arbitrator considered whether the Agency knew or should have known that it would not prevail on the merits when it suspended the grievant under *Allen* criterion 5. *Id.* at 4-7. The Arbitrator concluded that attorney fees were warranted because the Agency should have known that the seven-day suspension would be excessive under the circumstances. *Id.* at 7. In support of her conclusion, the Arbitrator noted that she had found the penalty unreasonable because "the penalty exceeded the guidelines, the behavior of a nurse exacerbated the problem, [the grievant's] medical judgment was correct, [the grievant] was an eight-year employee with excellent evaluations[,]" and this was "the first formal disciplinary action against him." *Id.* at 2.

Moreover, the Arbitrator found that the evidence at the hearing established that the Agency knew its decision would not stand because the Agency's reasons for exceeding the penalty guidelines were "suspect, particularly since there was no attempt throughout the process to look at relevant mitigating circumstances." *Id.* at 6.

Specifically, the Arbitrator found that the Agency had access to all witnesses and documents yet it failed to make any attempt to review the reasons for the grievant's failure to control the situation in the examination room. *Id.* at 6-7. The Arbitrator further found that "[w]ith minimal inquiry, [the Agency] would have to know that there were relevant mitigating circumstances." *Id.* at 7. In the Arbitrator's view, a minimal investigation would have revealed a single prior event in which the grievant had a previous conflict with the nurses but no disciplinary procedure was instituted and no one considered the nurses' failure to cooperate with the grievant as a contributing factor. The Arbitrator concluded that the same "limited vision" existed in this proceeding: although the grievant failed to maintain control, no one considered exonerating facts including the nurse's failure to follow the grievant's instructions, causing the patient's mother to question his medical judgment. *Id.* at 6-7. The Arbitrator further concluded that if the Agency had made any effort to investigate and evaluate mitigating circumstances, it would have discovered that even though the nurse took the mother to the patient advocate, no charges were filed against the grievant and no action was taken regarding his credentials. Because no attempt was made by the Agency to consider any mitigating factors, the Arbitrator determined that in the interest of justice, attorney fees were warranted under *Allen* criterion 5. *Id.* The Arbitrator found, however, that the fees were not warranted under *Allen* criterion 2 because the grievant was not "substantially innocent" of the charges against him and therefore the Agency's actions "were not wholly unfounded." *Id.* at 4.

In addition, the Arbitrator found that the Agency had no basis for continuing to impose the suspension in addition to the penalty imposed in the merits award. Consequently, the Arbitrator found that the matter had been unduly prolonged by the Agency. *Id.* at 7. Therefore, unlike the Agency's principal actions against the grievant, the Arbitrator found that this action was unfounded and without merit meeting both *Allen* criteria 2 and 5. In conclusion, the Arbitrator found that "[i]t is the magnitude of the injustice to the employee in light of all the facts and circumstances that justifies an award of attorney's fees." *Id.* (citation omitted).

1. Under *Allen*, an award of attorney fees is warranted in the interest of justice if: (1) the Agency engaged in a prohibited personnel practice; (2) the Agency's actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency; (3) the Agency's 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. *See, e.g.*, *AFGE, Local 3020*, 64 FLRA 596, 597 n.* (2010). An award of attorney fees is also warranted in the interest of justice when there is either a service rendered to the federal workforce or there is a benefit to the public derived from maintaining the action. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the Arbitrator's fee award is contrary to law because the requested attorney fees are not warranted in the interest of justice. Specifically, the Agency argues that neither the fee award nor the record establishes that the Agency knew or should have known that it would not prevail on the merits. *See* Exceptions at 11.[2] In this regard, the Agency argues that penalty mitigation, as here, where the suspension was reduced by an agency, does not create a presumption that fees are warranted. Instead, the fee award must be based on a specific factual finding that the Agency acted unreasonably. *Id*. The Agency further argues that the determination of what it "should have known" must be made in light of the information available to the Agency at the time the penalty was imposed and that the Arbitrator improperly considered the grievant's behavior after the initiation of the grievance in deciding that the penalty was unreasonable. *Id*. at 4, 12. Recognizing that what the Agency knew or should have known is primarily a factual determination in which the arbitrator evaluates the evidence, *id.* at 12, the Agency disagrees with the Arbitrator's interpretation of the record and argues that she either "ignored or gave no weight to" the Agency's witnesses, *id*. at 7. *See also id*. at 12-13, 17.

Finally, the Agency asserts that the Arbitrator did not base her fee award on the merits award. Rather, the Agency argues, the fee award is based solely on the delay brought about by the request for clarification and supplemental award. As such, the Agency asserts that the fee award is contrary to law because it is not based on a decision that the Agency acted unreasonably at the time it imposed the suspension. *Id*. at 8-9.

B. Union's Opposition

The Union contends that the Arbitrator used the proper legal standards when she determined that the Agency knew or should have known that the penalty was unreasonable because it failed to investigate the matter and consider mitigating factors. Opp'n at 21. The Union also argues that the Agency's exceptions do not demonstrate that the fee award is contrary to law because they only challenge the Arbitrator's factual conclusions and not the interpretation of the applicable law. *Id.* According to the Union, the Agency's claims that the Arbitrator misinterpreted the record are based on the Agency's disagreement with the Arbitrator's factual findings and credibility determinations. *Id*. at 13-16.

Additionally, the Union argues that the fee award is not based on the supplemental award, but rather is a correct decision in law and fact, based on the merits award in which the Arbitrator found the grievant at fault but the penalty to be unreasonable. *Id*. at 12. Therefore, the Union asks the Authority to deny the Agency's exceptions.

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews any question 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 682-87 (D.C. Cir. 1994)). In applying the standard, 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*. In addition, the award in this case must be in accordance with the standards established under § 7701(g)(1).[3] *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010). The Agency contends that the award is not in accordance with these standards because, according to the Agency, the award of fees is not in the interest of justice. As such, we address only this requirement. *Id.*

The Authority resolves whether an award of fees is warranted in the interest of justice in accordance

2. The Agency also argues that neither the fee award nor the record establishes that the Agency committed a prohibited personnel action or that the action was wholly unfounded and the employee was substantially innocent of the charges under *Allen* criteria 1 and 2. Exceptions at 9-11. In its opposition, the Union withdrew its contention that the fees are warranted under these criteria and relies exclusively on *Allen* criterion 5. Opp'n at 11.

3. Section 7701(g)(1) provides, in pertinent part, that the MSPB "may require payment by the agency involved of reasonable attorney fees incurred by an employee . . . if the employee . . . is the prevailing party and the [MSPB] . . . determines that payment by the agency is warranted in the interest of justice[.]" 5 U.S.C. § 7701(g).

with § 7701(g)(1) by applying the criteria established by the MSPB in *Allen*. As recognized by the Arbitrator, an award of fees is warranted in the interest of justice if any one of the criteria is satisfied. *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 819, 820-21 (2010).

Under *Allen* criterion 5, an award of fees is warranted in the interest of justice when 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. This determination requires an evaluation of the nature and weight of the evidence available to the agency at the time of the disputed action. *Soc. Sec. Admin., Balt., Md.*, 63 FLRA 550, 552 (2009) (*SSA*). Accordingly, arbitrators must determine the reasonableness of the agency's actions and positions in light of the information available at the time of the disputed action. *Id.* The assessment of whether an agency knew or should have known that 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 that evidence. *Id.* Consequently, when the arbitrator's factual findings support the arbitrator's legal conclusion, the Authority denies an exception to the application of criterion 5. *Id.*

Here, the Arbitrator held that "in light of all the facts and circumstances[,]" "[a]n award of attorney fees is warranted in the interests of justice." Fee Award at 7, 8. Specifically, the Arbitrator found that the Agency failed to consider any mitigating factors, which were readily available at the time of the disputed action, such as: the grievant's excellent eight-year employment record with no other formal discipline; the accuracy of the grievant's medical judgment; the nurse's conduct, which exacerbated the situation; and the penalty being in excess of the guidelines. *Id.* at 6-7. The Arbitrator determined that "[t]here was no evidence that [the Agency] considered these mitigating factors." *Id.* at 7. Finding that there was no investigation into these "exonerating" facts, the Arbitrator concluded that "[w]ith minimal inquiry [the Agency] would have to know that there were relevant mitigating circumstances." *Id.*

In view of the Arbitrator's factual findings, the legal conclusion that the Agency "should have known" that it would not prevail is not contrary to law. *See U.S. Gen. Servs. Admin., Ne. & Caribbean Region, N.Y., N.Y.*, 61 FLRA 68, 71 (2005) (agency's failure to consider mitigating circumstances such as grievant's superior employment record and misconduct of agency employee support arbitrator's legal conclusion that agency knew or should have known that it would not prevail); *U.S. Army Headquarters, XVIII Airborne Corps, Fort Bragg, N.C.*, 35 FLRA 390, 394 (1990) (citing *Yorkshire v. MSPB*, 746 F.2d 1454, 1457 (Fed. Cir. 1984)) (knew or should have known requirement satisfied when agency is negligent in conducting investigation). Therefore, although the Agency disagrees with the Arbitrator's factual findings and interpretation of the record, it has not established that the Arbitrator erred.[4] *See SSA*, 63 FLRA at 552 (agency's disagreement with arbitrator's factual findings does not establish that arbitrator erred in awarding attorney fees where agency failed to conduct thorough review of appropriate penalty for employee with excellent employment and flawless disciplinary records).

Further, the cases on which the Agency relies are inapposite. Although in each case the request for attorney fees was denied, there was no finding by the arbitrator, as there was here, that the agency should have known that the penalty it imposed would not prevail. In *Dunn v. Department of Veterans Affairs*, 98 F.3d 1308, 1313 (Fed. Cir. 1996), the court held that there was no presumption of a fee award based on a mitigation of the penalty. Similarly, *Sterner v. Department of the Army*, 711 F.2d 1563, 1570-71 (Fed. Cir. 1983), held that a finding of economic hardship does not create a presumption that a fee award is warranted.

Here, the Arbitrator did not base the fee award on a presumption that it was warranted because the penalty was mitigated. Rather, she concluded that with minimal investigation, the Agency should have known that the penalty imposed would not prevail. Moreover, the *Dunn* decision supports the Arbitrator's finding. There, the court noted that a negligently conducted investigation might give rise to an affirmative finding under *Allen* criterion 5. *Dunn* 98 F.3d at 1313; *cf. Nat'l Air Traffic Controller's Ass'n* 64 FLRA 799, 801 (2010) (Authority confirmed arbitrator's legal conclusion that fees were

4. The Agency also argues that the Arbitrator considered facts after the penalty was imposed; notably, that the conflict between the grievant and the nurses disappeared after the nurse involved in the incident left. Exceptions at 3-4. The Arbitrator recognized that the reasonableness of the penalty must be considered at the time it was imposed and stated that subsequent events were not the basis of the penalty but were mentioned as confirmation of the decision. Fee Award at 7. Thus, we conclude that the basis for the fee award was the Agency's actions at the time of the suspension. *Id.*

unwarranted where arbitrator made factual findings that agency conducted a thorough investigatory review before it imposed penalty). Finally, the Arbitrator distinguished *Department of the Air Force, Monthan Air Force Base, Tucson, Arizona*, 64 FLRA 819 (2010), and found that, unlike the arbitrator in *Monthan* who did not find that the agency knew or should have known the penalty it imposed would not prevail, the facts in this case "indicate that the [A]gency was aware that the penalty it imposed was problematic[.]" Fee Award at 5.

For the reasons set forth above, the Authority denies the exception because the award satisfies Allen criterion 5 and therefore is not contrary to the 5 U.S.C. § 7701 (g)(1).[5]

V. Decision

The Agency's exceptions are denied.

5. As noted, an award of fees is warranted in the interest of justice if any one of the criteria is satisfied. Thus, we find it unnecessary to resolve the Agency's exceptions regarding criterion 2 on which the Arbitrator also relied.