64 FLRA No. 152

UNITED STATES
DEPARTMENT OF THE AIR FORCE
DAVIS-MONTHAN AIR FORCE BASE
TUCSON, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2924
(Union)

0-AR-4168
(63 FLRA 241 (2009))

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DECISION

May 28, 2010

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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 of Arbitrator Barbara Bridgewater filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator denied the Union's application for attorney fees and expenses. For the reasons that follow, the Authority denies the exceptions.

II. Background and Arbitrator's Award

In an earlier decision on the merits, the Arbitrator ordered the Agency to rescind its three-day suspension of the grievant, issue a written reprimand in its place, and make the grievant whole. Fee Award at 1. This was based on the Arbitrator's finding that there was not just and sufficient cause for the three-day suspension because of evidence that another employee who committed a similar offense received only a notation in his file. *Id*. at 1, 3.

Subsequently, the Union submitted a petition for an award of attorney fees in the amount of $34,367.50 and attorney expenses in the amount of $342.93 under the Back Pay Act[1] and 5 U.S.C. § 7701(g).[2] Union's Petition for Attorney Fees and Expenses at 2. The Union claimed that the grievant was entitled to an award of attorney fees and expenses because he was the prevailing party and such an award would be warranted in the interest of justice. *Id*. at 5. The Agency opposed the Union's petition. Fee Award at 1.

In resolving the petition, the Arbitrator found that the grievant was the prevailing party. *Id*. at 5. However, the Arbitrator also found that, under the criteria set out in *Allen v. USPS*, 2 M.S.P.R. 420 (1980) (*Allen*), an award of attorney fees would not be warranted in the interest of justice. *Id*. at 3-5. In particular, the Arbitrator found that the Union failed to establish the existence of any of the *Allen* criteria, which are that: (1) the Agency committed a prohibited personnel practice; (2) the Agency's action was clearly without merit or wholly unfounded, or the grievant was substantially innocent; (3) the Agency acted in bad faith; (4) the Agency committed a gross procedural error; or (5) the Agency knew or should have known that it would not prevail on the merits. *Id*. (citing *Allen*, 2 M.S.P.R. at 434-35). Therefore, the Arbitrator denied the petition. Fee Award at 5.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the Arbitrator's finding that payment of attorney fees is not warranted in the interest of justice is contrary to law. Exceptions at 3. Specifically, the Union contends that the Arbitrator erred in finding that the Agency did not commit a prohibited personnel practice and that the Agency could not reasonably have known that its charge would fail on the merits. *Id*. at 1-2. In this regard, the Union contends that the Arbitrator improperly based her determinations on a reexamination and alteration of her factual findings in the merits

1. The Back Pay Act, at 5 U.S.C. § 5596(b)(1)(A)(ii), provides that "reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed . . . shall be awarded in accordance with standards established under [5 U.S.C. § 7701(g)] . . . ."

2. Section 7701(g)(1) provides, in pertinent part, for an award of "reasonable attorney fees incurred by an employee" provided "the employee . . . is the prevailing party" and payment "is warranted in the interest of justice[.]"

decision. *Id*. at 5, 8. The Union is not relying upon the second, third, or fourth *Allen* criteria as a basis for its contrary to law exceptions.

In support of its argument that the Agency committed a prohibited personnel practice, the Union notes that in her merits award, the Arbitrator found that the three-day suspension violated the provision in the parties' collective bargaining agreement that employees be treated in a fair and equitable manner. *Id*. at 5-6. The Union claims that in *Department of Health and Human Services, Health Care Finance Administration, Region IV, Atlanta, Ga.*, 21 FLRA 910, 913 (1986) (*DHHS*), and other decisions, the Authority has held that a party's violation of a collective bargaining agreement can constitute an "unwarranted or unjustified personnel action" warranting an award of attorney fees. Exceptions at 5-6. With regard to the Arbitrator's finding that the Agency could not reasonably have known that its charge against the grievant would fail, the Union contends that this contradicts the Arbitrator's earlier finding in her merits award that a three-day suspension was not warranted in light of the fact that when another employee had committed a similar offense, the supervisor had not disciplined the employee but, instead, only made a notation in the employee's file. *Id*. at 7.

B. Agency's Opposition

The Agency contends that the Union did not establish that the Agency's actions met the requisites of any of the twelve prohibited personnel practices that are defined in 5 U.S.C. § 2302(b) and that, therefore, its claim that the Agency committed a prohibited personnel practice amounts to a bare assertion. Opp'n at 5, 6. In addition, the Agency contends that the Union erroneously equates an "unwarranted or unjustified personnel action" with a prohibited personnel practice in an effort to claim fees. *Id*. at 4. With regard to whether the Agency knew or should have known that the charge against the grievant would fail, the Agency contends that this analysis is "primarily factual, because the arbitrator evaluates the evidence and the agency's handling of the evidence." *Id*. at 6 (quoting *NTEU, Chapter 50*, 54 FLRA 250, 254 (1998). As such, the Agency contends, the Arbitrator's factual findings are entitled to deference. *Id*. at 7. Here, the Agency notes, the Arbitrator made factual findings in her merits award that other employees were suspended for 14 days for similar offenses, that the three-day suspension was based on the deciding official's proper consideration of the relevant *Douglas* factors,[3] and that it was within the range of penalties for the type of offense that the grievant committed. *Id.*[4]

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. NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying the standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusion is consistent with the applicable standard of law. *U.S. Gen. Servs. Admin., Ne. & Caribbean Region, N.Y., N.Y.*, 61 FLRA 68, 69 (2005) (*GSA*). In making that assessment, we defer to the arbitrator's underlying factual findings. *See, e.g., NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

Under the Back Pay Act, an award of attorney fees must be in accordance with the standards established under 5 U.S.C. § 7701(g). The prerequisites for an award of attorney fees under § 7701(g) are that: (1) the employee is the prevailing party; (2) the award of fees is warranted in the interest of justice; (3) the amount of fees is reasonable; and (4) the fees were incurred by the employee. *U.S. Dep't of the Treasury, IRS, Phila. Serv. Ctr., Phila., Pa.*, 53 FLRA 1697, 1699 (1998).

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 a 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. *Allen*, 2 M.S.P.R. at 434-35. The Authority has also stated that an award of attorney fees is warranted in the interest of justice when there is either a service rendered to the federal workforce

3. 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).

4. The Agency also argues that attorney fees are not warranted under the "substantially innocent" prong of the second *Allen* criterion. Opp'n at 7-8. However, because the Union raised this argument only in its petition for fees but not in its exceptions, it will not be addressed here.

or there is a benefit to the public derived from maintaining the action. *See AFGE, Local 3020*, 64 FLRA 596, 597 n.* (2010) (citing *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 39 FLRA 1215, 1222-23 (1991)). An award of fees is warranted if any of these criteria is satisfied. *U.S. Dep't of Veterans Affairs, Med. Ctr., Asheville, N.C.*, 59 FLRA 605, 609 (2004).

In its exceptions, the Union contends that an award of fees is warranted in the interest of justice under the first and fifth *Allen* criteria.

A. No prohibited personnel practice was involved.

The first *Allen* criterion is whether the agency engaged in a prohibited personnel practice. *Allen*, 2 M.S.P.R. at 434. Citing *DHHS*, *supra*, and other Authority decisions, the Union asserts that the first *Allen* criterion is met because the Arbitrator found in her merits decision that the Agency committed an "unwarranted or unjustified personnel action" when it violated the provision in the parties' collective bargaining agreement that employees be treated in a fair and equitable manner. Therefore, according to the Union, the Arbitrator's finding in the fee award that the Agency did not commit a prohibited personnel practice is inconsistent with her earlier factual finding in the merits decision. However, in *DHHS*, the Authority held only that violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action for purposes of a retroactive temporary promotion and backpay under the Back Pay Act. *DHHS*, 21 FLRA at 913. The Authority did not hold that breach of the parties' agreement was a prohibited personnel practice under the first *Allen* criterion. Instead, the Authority found there that attorney fees were warranted in the interest of justice because the Agency knew or should have known that it would not prevail on the merits. *Id.* at 914. Likewise, in the second decision that the Union cites, attorney fees were awarded based on other than the first *Allen* criterion. *See U.S. Dep't of Def., Dep't of Def. Dependents Sch.*, 54 FLRA 773, 790 (1998) (attorney fee award based on second *Allen* criterion). In the third decision that the Union cites, *U.S. Dep't of Def., Dep't of Def. Dependents Sch., Bulzbach Elem. Sch., Bulzbach, Germany*, 56 FLRA 208 (2000), attorney fees were not even sought.

Moreover, the Union neither identifies which of the twelve types of prohibited personnel practices set out in 5 U.S.C. § 2302(b) it believes took place, nor explains how the Agency's actions constitute a prohibited personnel practice. Therefore, the Union's claim that the Agency committed a prohibited personnel practice amounts to a bare assertion. *See AFGE, Council 220*, 61 FLRA 582, 585 (2006).

Accordingly, the Authority denies the exception.

B. The Agency did not know, nor should it have known, that it would not prevail on the merits.

The fifth *Allen* criterion is whether 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. A determination of whether an agency knew or should have known it would not prevail on the merits requires an arbitrator to determine the reasonableness of the agency's actions in light of the information available to the agency at the time it imposed discipline. *GSA*, 61 FLRA at 70. This determination 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 the exceptions to the arbitrator's determination. *Id.*

In addition, the Authority has held 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." *AFGE, Local 12*, 38 FLRA 1240, 1253 (1990) (citations omitted). Attorney fees are warranted in the interest of justice where all charges of misconduct against an employee are sustained but the agency-imposed penalty "exceeds the bounds of reasonableness." *Ciarla v. USPS*, 43 M.S.P.R. 240, 244 (1990).

In the instant case, the Arbitrator found that the grievant committed the offense, based on the grievant's own admission, and that disciplinary action was warranted. She determined that, in light of testimony that several employees were given 14-day suspensions for similar offenses, and her factual finding that the Agency was not aware, at the time it imposed the penalty, that an employee who committed an offense similar to that of the grievant received no discipline, she could not find that the Agency knew or should have known that a three-day suspension for the grievant would not be upheld. Fee Award at 5.

Contrary to the Union's contention, the Arbitrator did not err by basing her determination regarding the fifth *Allen* criterion on a reexamination

and alteration of the factual findings in her merits award. Instead, in her merits and fee awards, she applied the legal standard appropriate to each stage of the proceeding and independently evaluated the pertinent facts. As the Union acknowledges, the Arbitrator applied the *Douglas* factors to determine the appropriate penalty for the grievant's misconduct. *See* Exceptions at 7. In contrast, when determining whether the Union was entitled to attorney fees, the Arbitrator applied the *Allen* criteria.

For example, in her decision on the merits, one of the *Douglas* factors that the Arbitrator applied was the consistency of the penalty with penalties imposed upon other employees for the same or similar offenses. Having found that a similarly situated employee was given a lesser penalty, the Arbitrator decided to reduce the grievant's penalty.

In her fee award, when applying the fifth *Allen* criterion, the Arbitrator considered the same fact but also considered what other facts revealed about whether the Agency knew or should have known that its penalty would not be upheld. Therefore, the Arbitrator's finding that the grievant's penalty should be reduced was not inconsistent with her subsequent finding that the Agency did not have reason to know that its penalty would not be upheld. Accordingly, the Authority finds that, under these circumstances, the Union has not demonstrated that it is entitled to attorney fees under the fifth *Allen* criterion.

Accordingly, the Authority denies the exception.

V. Decision

The Union's exceptions are denied.