

64 FLRA No. 106

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3020
(Union)

and

UNTIED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MINERSVILLE, PENNSYLVANIA

(Agency)

0-AR-4318

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DECISION

March 24, 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 award of Arbitrator Charles J. Coleman 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 sustained the Union's grievance on the ground that the Agency did not have just cause to impose a three-day suspension upon the grievant for a failure to follow instructions. While the Arbitrator awarded the grievant back pay for the days he was improperly suspended, the Arbitrator did not award the \$17,335.84 in attorney fees sought by the Union. The Union contends that the failure to award the requested attorney fees is contrary to law. For the following reasons, we remand the portion of the award regarding attorney fees to the parties, absent settlement, for resubmission to the Arbitrator for clarification of the award.

II. Background and Arbitrator's Award

In May 2005, the Chief Correctional Officer (CCO) sent the grievant a letter, informing him that he was on sick leave restriction and that all subsequent use of sick leave would require medical certification upon his return to duty. Award at 2, 4. The CCO specified

that the required documentation was to be provided to him. *Id.* at 5-6.

A few weeks later, the grievant requested sick leave for July 3. The request was granted. When he returned to work on July 6, the grievant did not present any medical documentation because the CCO was not working on that date. *Id.* at 2, 5. When the CCO returned to work on July 11, the CCO informed the grievant that he had not submitted the required documentation and gave him until July 15 to do so. *Id.* at 2. The grievant provided the documentation within that time period. *Id.* at 2.

Ten months later, the grievant was notified that the CCO was proposing a five day suspension for failing to follow the instructions given in the May 2005 letter and for being absent without leave (AWOL) on July 3. *Id.* at 2. After reviewing the proposed disciplinary action, the Warden dropped the AWOL charge and reduced the penalty for failing to follow instructions to a three-day suspension. *Id.* at 2, 3. A grievance was then filed, and the matter was submitted to arbitration. Just prior to the arbitration hearing, a new warden reduced the grievant's penalty to a one-day suspension. *Id.* at 3. The Arbitrator framed the issue as "whether management had just cause to suspend the grievant for failing to turn in medical documentation on the day that he returned to work from one day of sick leave." *Id.* at 4.

Although characterizing the grievant's arguments as "specious and hair splitting," the Arbitrator found that, because the grievant had followed the instructions that he had been given, the Agency did not have just cause to discipline him. *Id.* at 5-6. The Arbitrator concluded that the grievant had followed these instructions "to the letter" because, prior to his use of sick leave on July 3, the grievant was told to give his medical certification to the CCO; that individual was not present when the grievant returned to duty on July 6; the CCO informed the grievant that he had not submitted the requested certification and gave him until July 15 to do so; and the grievant provided the material to the CCO by that date. *Id.* at 6. The Arbitrator denied the attorney fees requested by the Union without analysis. *Id.*

III. Positions of the Parties**A. Union's Exceptions**

The Union contends that the award is deficient because the failure to award attorney fees is contrary to the Back Pay Act, 5 U.S.C. § 5596. According to the Union, the Arbitrator's cursory conclusion on this issue failed to comply with Authority precedent that requires an arbitrator to set forth specific findings supporting his

or her determinations regarding each of the statutory requirements of 5 U.S.C. § 7701(g). Exceptions at 6-7.

The Union claims that the grievant was affected by an unjustified or unwarranted agency personnel action, which resulted in the withdrawal of his pay for the term of the suspension. The Union also asserts that the grievant was the prevailing party and that an award of fees is in the interest of justice because the factors set forth in *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980) (*Allen*) have been met.* *Id.* at 5-7.

The Union contends that the record is sufficient to allow a determination that it was entitled to the attorney fees expended on the grievant's behalf without a remand to the Arbitrator because the facts of the case demonstrate that the fee request was reasonable and that the interest of justice requirement was satisfied. The Union asserts that two of the *Allen* factors were met because the Agency committed a prohibited personnel action and the grievant was substantially innocent of the charge, and argues that either is sufficient to make an award of attorney fees proper under § 7701(g). *Id.* at 7-13. Finally, the Union contends that, if the Authority finds the record insufficient for a determination on the attorney fees question, the award should be remanded to the Arbitrator for further clarification. *Id.* at 13-14.

B. Agency's Opposition

The Agency contends that the award is not contrary to the Back Pay Act. The Agency contends that the Arbitrator was acting within his discretion in denying the Union's fee petition. Opp'n at 4. In addition, the Agency argues that the Union's argument must fail because the record does not demonstrate "that the Agency knew, or should have known, it would not prevail at hearing, or that the Agency acted in bad faith in its actions against [the] [g]rievant." *Id.* at 4. According to the Agency, without this evidence, the Union cannot

*. 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. 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 or there is a benefit to the public derived from maintaining the action. *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 39 FLRA 1215, 1222-23 (1991) (citing *Naval Air Dev. Ctr., Dep't of the Navy*, 21 FLRA 131, 139 (1986)).

establish that an award of attorney fees would be warranted in "the interest of justice." *Id.* The Agency also contends that the existing record does not provide a sufficient basis on which to determine whether the requested fees are reasonable. *Id.* at 4-5.

IV. Analysis and Conclusions

The Union contends that the Arbitrator's denial of attorney fees is contrary to the Back Pay Act. When a party's exceptions involve an award's consistency with law, the Authority reviews the question of law and the arbitrator's award *de novo*. *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 a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's findings of fact because it was the arbitrator's evaluation of the record for which the parties bargained and not the Authority's evaluation. *See AFGCE Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1275 (1998) (citing *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987)).

The threshold requirement for entitlement to attorney fees under the Back Pay Act is a finding that the grievant was affected by an unjustified or unwarranted personnel action which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *See U.S. Dep't of Defense, Defense Distribution Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995). The Back Pay Act further requires that an award of fees must be: (1) in conjunction with an award of backpay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with the standards established under 5 U.S.C. § 7701(g). *See id.* The prerequisites for an award of attorney fees under § 7701(g) are 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 Arbitrator did not articulate his reasons for denying the Union's request for attorney fees, and the record does not contain any evidence that would assist the Authority in determining the Arbitrator's basis for denying the Union's request for attorney fees. In such situations, the Authority "take[s] the action necessary to assure that the award is consistent with applicable statutory standards." *See U.S. Dep't of Agric., Animal &*

Plant Health Inspection Serv., Plant Prot. & Quarantine, 53 FLRA 1688, 1695 (1998) (*Animal & Plant Health Inspection Serv.*) (citing *NAGE, Local R5-188*, 46 FLRA 458 (1992)).

The record clearly reveals that the grievant was the prevailing party. However, the Arbitrator made contradictory and conflicting factual findings with respect to whether the requested fees were “warranted in the interest of justice.” Although the Arbitrator stated that the grievant’s arguments were “specious and hair splitting,” he also found that the grievant “did nothing wrong” and “followed the instructions given to him.” Award at 4-5. The Arbitrator failed to explain how these dissimilar findings led to the conclusion that the interest of justice requirement was not met. The Arbitrator also failed to address any of the other interest of justice factors. Moreover, the Arbitrator also failed to determine if the amount of fees requested was reasonable under the circumstances.

Because the Arbitrator has not sufficiently explained the determination of a pertinent statutory requirement and the record does not permit the Authority to resolve the Union's exception, we remand this portion of the award to the parties, absent settlement, for resubmission to the Arbitrator to clarify, consistent with the foregoing standards, the reasons for the denial of attorney fees. See *Animal & Plant Health Inspection Serv.*, 53 FLRA at 1695; see also, *AFGE, Council 220*, 60 FLRA 1 (2004) and *AFGE, Local 3239*, 61 FLRA 808 (2006).

V. Decision

We remand the portion of the award involving the issue of attorney fees to the parties, absent settlement, for resubmission to the Arbitrator for clarification of his award, consistent with this decision.