64 FLRA No. 147

NATIONAL AIR
TRAFFIC CONTROLLERS
ASSOCIATION
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

0-AR-4522

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DECISION

May 25, 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 an exception to an award (the fee award) of Arbitrator Kathy L. Eisenmenger filed by the Union under § 7122 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 exception.

The Arbitrator denied the Union's request for attorney fees under the Back Pay Act, 5 U.S.C. § 5596. For the reasons discussed below, we deny the Union's exception.

II. Background and Arbitrator's Award

In her original award on the merits (merits award), the Arbitrator found that the Agency had suspended the grievant for ten days for failure to follow procedures. Merits Award at 16, 19. Addressing what information the Agency considered in deciding to suspend the grievant, the Arbitrator found that the Agency: (1) reviewed tape recordings that demonstrated the grievant's conduct; (2) considered the fact that the grievant was a controller in charge; (3) took into account the fact that this was the grievant's second offense, as he had been suspended earlier the same year for inappropriate behavior; and (4) conducted an investigatory interview of the grievant, in which the grievant apologized for his actions, asserted that he took responsibility for any unauthorized transmissions, and claimed that the non-air traffic related comments he made were "minor offenses." *Id.* at 16-19. The Arbitrator determined that the grievant "crossed the line of acceptable exchanges" and that his actions "warrant[ed] appropriate corrective action." *Id.* at 33-34. In so finding, the Arbitrator determined that the grievant had not responded to prior counseling. *Id.* at 34. Accordingly, the Arbitrator sustained the charges against the grievant. *Id.* at 16, 34, 37. However, the Arbitrator determined that the ten-day suspension was excessive "in consideration of all the *Douglas* factors and the Agency's [t]able of [p]enalties and that a letter of reprimand was the appropriate penalty." *Id.* at 37. As neither party filed exceptions to the merits award, that award became final.

The Union then petitioned the Arbitrator for attorney fees, claiming that fees were warranted in the interest of justice under *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980) (*Allen*).[1] Fee Award at 3. As relevant here, the Union asserted that attorney fees were warranted under the fifth *Allen* factor because the Agency "knew or should have known that it would not prevail on the merits when it brought the proceedings, including the choice of penalty imposed."[2] *Id.* In the fee award, the Arbitrator analyzed whether attorney fees were warranted under the fifth *Allen* factor, asking if "the [A]gency had acted 'irresponsibly or unreasonably' in selecting an excessive penalty[.]" *Id.* at 7 (quoting *Dunn v. U.S. Postal Serv.*, 49 M.S.P.R. 144, 147 (1991), *rev'd* 960 F.2d 156 (Fed.

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. *AFGE, Local 3020*, 64 FLRA 596, 597 n.* (2010). The Authority also has 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. *Id.*

2. We note that before the Arbitrator, the Union also argued that attorney fees were warranted under the second *Allen* factor because the discipline was "clearly without merit or was wholly unfounded, or the employee was substantially innocent of the charges[.]" Fee Award at 3. However, as the Union excepts only to the Arbitrator's resolution of the fifth *Allen* factor, we address only that factor.

Cir. 1992) (nonprecedential decision)). In this connection, the Arbitrator found that the Agency "presented credible, probative evidence to support the charge and that discipline was warranted in the [g]rievant's case." Fee Award at 7-8.

The Arbitrator stated that from her "review of the record and the parties' arguments, I cannot find that . . . the Agency knew or should have known that the ten-day suspension would be mitigated at arbitration[.]" *Id.* at 7. In this connection, the Arbitrator found the Agency's actions to be understandable, noting that the grievant's work as an air traffic controller presented "safety related matters" that "constitute extremely sensitive issues" for the Agency that may have led to the Agency's "exaggeration of the seriousness of the offense and the Agency's reliance on a prior suspension action for a different form of misconduct to enhance the penalty." *Id.* at 8. However, the Arbitrator stated, "an agency's overstatements do not rise to a finding of bad faith, malice against the employee, irresponsibility in taking discipline or gross procedural error. Moreover, the Arbitrator found that "there was no evidence or showing that the Agency enhanced the penalty . . . as a punitive measure or in bad faith." *Id.* In this connection, the Arbitrator acknowledged that "[t]hird-party adjudicators" such as herself "approach misconduct situations oftentimes with greater objectivity than the employer agency." *Id.* The Arbitrator also rejected the argument that the mitigation of the grievant's penalty demonstrated that the Union was entitled to an award of attorney fees, stating that the Merit Systems Protection Board (MSPB) has cautioned that its precedent "does not . . . establish a *per se* rule providing that where all the charges are sustained but the penalty is mitigated, mitigation of the penalty, in itself, is a circumstance which warrants an award of attorney fees in the interest of justice." *Id.* at 7. The Arbitrator concluded that, while "the overall record shows that the Agency made some mistakes with regard to the application of progressive discipline standards[,] . . . it cannot be found that the Agency . . . should have known [that] the penalty of a suspension would not be sustained in arbitration." *Id.* at 8.

III. Positions of the Parties

A. Union's Exception[3]

The Union contends that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because the Arbitrator's conclusion as to the fifth *Allen* factor -- whether the Agency knew or should have known that its choice of penalty would be reversed -- was not supported by the findings required under Authority and MSPB precedent. *See* Exception at 2. According to the Union, the Arbitrator erroneously considered only whether the Agency "acted in 'bad faith' or with malice toward the employee, or [whether] the Agency committed ['']gross procedural error,'" *id.* at 4, factors that the Union claims relate only to the second *Allen* factor. *See id.* at 6. The Union argues that, instead, the Arbitrator should have considered "whether the [A]gency had before it . . . at the time it issued the . . . suspension the same evidence that the [A]rbitrator considered when she reduced the penalty to a reprimand." *Id.* at 5.

B. Agency's Opposition

The Agency claims that the Arbitrator adequately supported her conclusion and argues that the Union's exception is "merely a disagreement with the Arbitrator's well stated" determination that the Agency could not have known that its choice of penalty would be reversed. *See* Opp'n at 3-5.

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*. *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. 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.*

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

3. We note that the Agency alleges that the Union failed to submit "supporting documents" to its exception, as required by 5 C.F.R. § 2425. Opp'n at 2. This allegation relates to a deficiency that the Union cured shortly after the Agency filed its opposition. As such, we consider the Union's exception.

unjustified or unwarranted personnel action that resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *See U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995) (*Defense 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) (§ 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.* An arbitrator's decision as to whether an award is warranted in the interest of justice under § 7701(g)(1) requires a "fully articulated, reasoned decision setting forth the [a]rbitrator's specific findings supporting the determination on each pertinent statutory requirement[.]" *Id.*

Here, the parties dispute only whether fees were warranted in the interest of justice under the fifth *Allen* factor, i.e., 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. 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. Gen. Servs. Admin., Ne. & Caribbean Region, N.Y., N.Y.*, 61 FLRA 68, 70 (2005) (*GSA*) (citing *AFGE, Local 12*, 38 FLRA 1240, 1253 (1990)). Attorney fees are thus warranted in the interest of justice if an agency knew or should have known that its choice of penalty would be reversed. *GSA*, 61 FLRA at 70. In this connection, the Authority has explained that the "the 'critical point' is that 'an agency should not act irresponsibly or unreasonably in imposing a penalty if it either knows or should have known that the penalty would not withstand . . . scrutiny[.]" *Id.* (quoting *AFGE, Local 12*, 38 FLRA at 1253).

Additionally, a determination of whether an agency knew or should have known 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. *GSA*, 61 FLRA at 70. This criterion essentially requires an arbitrator to determine the reasonableness of an agency's actions and positions in light of what information was available to it at the time discipline was imposed. *Id.* The 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 the exceptions to the arbitrator's determination. *Id.* In this regard, the party seeking attorney fees has the burden of demonstrating its entitlement to such fees. *See, e.g., Stewart v. Dep't of Army*, 102 M.S.P.R. 656, 660 (2006) (appellant bears burden of providing entitlement to attorney fees).

Here, the Arbitrator made specific factual findings to support her legal conclusion that attorney fees were not warranted in the interest of justice. In this connection, the Arbitrator demonstrated that it could not be said that the Agency knew or should have known that its choice of penalty would be reversed, as the Agency had not acted irresponsibly or unreasonably when imposing discipline on the grievant. *See* Fee Award at 7-8. In support of this conclusion, the Arbitrator cited the record, where, in the merits award, she had noted the substantial evidence that the Agency had in support of its actions. Specifically, as discussed previously, the Arbitrator found in the merits award that, in deciding to impose the suspension, the Agency listened to tape recordings that reflected the grievant's misconduct, considered the facts that the grievant was a controller in charge and that this was the grievant's second offense, and conducted an investigatory interview in which the grievant admitted that he engaged in the charged conduct. *See* Merits Award at 16-19.

Additionally, the Arbitrator found that the Agency's response was understandable in light of its obligation to ensure safety, and found that the Agency acted erroneously, but not unreasonably in its determination as to progressive discipline. The Arbitrator's consideration of the reasonableness of the Agency's actions was consistent with Authority precedent, *see GSA*, 61 FLRA at 70, and was supported by specific factual findings. Further, although the Union disputes the Arbitrator's method of analysis, the Union does not demonstrate that the Arbitrator's legal conclusion is erroneous, and as such, does not meet its burden of demonstrating its entitlement to attorney fees. *Cf. NAGE, Local R4-6*, 56 FLRA 1092, 1095 (2001) (union failed to establish arbitrator erred) (*NAGE*).

Therefore, we find that the Union has not demonstrated that the Arbitrator's denial of attorney fees is contrary to law.

V. Decision

The Union's exception is denied.