

**70 FLRA No. 2**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
COUNCIL OF PRISON LOCALS  
LOCAL 1010  
(Union)

and

UNITED STATES  
DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF PRISONS  
BEAUMONT, TEXAS  
(Agency)

0-AR-5203

DECISION

October 13, 2016

Before the Authority: Carol Waller Pope, Chairman, and  
Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

Arbitrator Robert Costello issued an award finding that the Agency violated Article 18 of the parties' collective-bargaining agreement (Article 18) by failing to equitably rotate overtime assignments and by failing to retain certain overtime records. With respect to the remedy, the Arbitrator found that there was insufficient evidence to award backpay under the Back Pay Act (the Act).<sup>1</sup> The Arbitrator also denied the Union's request for attorney fees, finding that such fees were not warranted in the interest of justice.

The main question before us is whether the Arbitrator's denial of the Union's attorney-fee request is contrary to the Act because he failed to "engag[e] in the required interest[-]of[-]justice analysis"<sup>2</sup> under 5 U.S.C. § 7701(g). Because the Arbitrator did not award backpay (a finding to which the Union does not except), he could not award fees under the Act. Thus, the answer is no.

**II. Background and Arbitrator's Award**

The Union filed a grievance alleging that the Agency violated the overtime provisions in Article 18. In particular, the Union claimed that the Agency had failed to equitably distribute overtime assignments and had failed to retain overtime records for a period of two years. The parties submitted the grievance to arbitration.

As relevant here, the issue before the Arbitrator was whether the Agency violated Article 18 "by failing to equitably rotate . . . overtime [assignments] and/or failing to maintain [the] required records relating to . . . overtime[.] [And, i]f so, what is the appropriate remedy?"<sup>3</sup>

The Arbitrator sustained the grievance, finding that the Agency had violated Article 18, as alleged. As a remedy, the Arbitrator directed the Agency to "develop and implement a plan" to assign make-up overtime to the affected bargaining-unit members.<sup>4</sup> However, the Arbitrator did not award backpay because he was "unable to determine . . . what amounts of backpay to award, or to whom [backpay] should be directed."<sup>5</sup> Additionally, the Arbitrator denied the Union's request for attorney fees. In this regard, the Arbitrator stated that the "interests of justice [do not] require[,] or even support[,] [such] an award."<sup>6</sup>

The Union filed an exception to the award, and the Agency filed an opposition to the Union's exception.

**III. Analysis and Conclusion: The Arbitrator's denial of the Union's attorney-fee request is not contrary to the Act.**

The Union argues that the Arbitrator's denial of its attorney-fee request is contrary to the Act.<sup>7</sup> Specifically, the Union claims that the Arbitrator did not "engag[e] in the required interest[-]of[-]justice analysis"<sup>8</sup> under 5 U.S.C. § 7701(g) and failed to consider the interest-of-justice criteria under *Allen v. U.S. Postal Service (Allen)*<sup>9</sup> and related Authority precedent.<sup>10</sup>

When an exception involves an award's consistency with law, the Authority reviews any question

<sup>3</sup> Award at 3.

<sup>4</sup> *Id.* at 26.

<sup>5</sup> *Id.* at 25.

<sup>6</sup> *Id.*

<sup>7</sup> Exception at 2.

<sup>8</sup> *Id.*

<sup>9</sup> 2 M.S.P.R. 420 (1980).

<sup>10</sup> Exception at 2 (citing *Naval Air Dev. Ctr., Dep't of the Navy*, 21 FLRA 131 (1986) (*NADC*)).

<sup>1</sup> 5 U.S.C. § 5596.

<sup>2</sup> Exception at 2.

of law raised by the exception and the award de novo.<sup>11</sup> 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<sup>12</sup> but defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are based on nonfacts.<sup>13</sup>

Under the Act, the threshold requirement for an award of attorney fees is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in a withdrawal or reduction of the grievant's pay, allowances, or differentials.<sup>14</sup> Once such a finding is made, the Act then requires that an award of attorney fees 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).<sup>15</sup> The Authority has analyzed one of the § 7701(g) standards – whether attorney fees are warranted in the interest of justice<sup>16</sup> – by considering the criteria established in *Allen*.<sup>17</sup>

Here, it is undisputed that the Arbitrator did not award backpay because he was “unable to determine . . . what amounts of backpay to award, or to whom [backpay] should be directed.”<sup>18</sup> And, as the Agency notes,<sup>19</sup> the Union does not except to that finding. Because the Arbitrator did not award backpay, he could not award attorney fees under the Act.<sup>20</sup> Thus, contrary

to the Union's contention, it was unnecessary for the Arbitrator to address whether the interests of justice warranted an award of attorney fees.<sup>21</sup>

We acknowledge – as the Union notes in its exception<sup>22</sup> – that the Arbitrator denied the Union's request for attorney fees because the “interests of justice [did not] require[,] or even support[,] an award.”<sup>23</sup> To the extent that the Union is alleging that the Arbitrator's statements concerning the interest of justice are contrary to law,<sup>24</sup> those statements do not provide a basis on which to find the award deficient. In assessing whether an arbitrator's award is contrary to law, the Authority assesses the arbitrator's legal conclusions, *not his or her underlying reasoning*.<sup>25</sup> And, as demonstrated above, the Arbitrator's denial of the Union's request for attorney fees – in the absence of an award of backpay – was consistent with the Act.

Based on the foregoing, we deny the Union's exception.

#### IV. Decision

We deny the Union's exception.

<sup>11</sup> *AFGE, Council of Prison Locals 33, Local 3690*, 69 FLRA 127, 130 (2015) (*Local 3690*) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

<sup>12</sup> *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*DOD*)).

<sup>13</sup> *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 66 FLRA 737, 739 (2012) (citation omitted); see *Local 3690*, 69 FLRA at 130 (citing *DOD*, 55 FLRA at 40).

<sup>14</sup> 5 U.S.C. § 5596(b)(1); see *Local 3690*, 69 FLRA at 131 (citations omitted); *NAGE, SEIU, Local 551*, 68 FLRA 285, 289 (2015).

<sup>15</sup> *E.g., Local 3690*, 69 FLRA at 131-32 (citing *U.S. DOD, Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995)).

<sup>16</sup> 5 U.S.C. § 7701(g)(1).

<sup>17</sup> See *NADC*, 21 FLRA at 136-39 (Member Frazier concurring); *AFGE, Local 2583*, 69 FLRA 538, 539 (2016) (citation omitted); but see *NAIL, Local 5*, 69 FLRA 573, 577 (2016) (stating that the Authority may, in an appropriate case, reconsider its reliance on the *Allen* factors and “fashion interest-of-justice guidelines that are better adapted to the collective-bargaining context”).

<sup>18</sup> Award at 25.

<sup>19</sup> Opp'n Br. at 8 n.1.

<sup>20</sup> *E.g., U.S. Dep't of VA Med. Ctr., Detroit, Mich.*, 60 FLRA 306, 310 (2004) (stating that “attorney fees may not be awarded if backpay is not awarded” (citation omitted)).

<sup>21</sup> See, e.g., *Local 3690*, 69 FLRA at 132 (after the arbitrator found that backpay was not warranted, the Act did not require the arbitrator to analyze the requirements in § 7701(g) (citing *AFGE, Local 15*, 63 FLRA 89, 90 (2009); *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004))).

<sup>22</sup> Exception at 1-2, 5.

<sup>23</sup> Award at 25.

<sup>24</sup> See Exception at 1-2 (stating that the Arbitrator's denial of fees was a “summary determination” and an “erroneous determination”); see also *id.* at 5-6 (alleging that the Arbitrator's statements were “inconsistent”).

<sup>25</sup> See, e.g., *NTEU Chapter 137*, 60 FLRA 483, 487 n.11 (2004) (“[T]he question . . . is whether the [a]rbitrator's award is contrary to law; the question is not whether the [a]rbitrator's reasoning is correct.” (citation omitted)).