

71 FLRA No. 38

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1633  
(Union)

and

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
MICHAEL E. DEBAKEY VA MEDICAL CENTER  
(Agency)

0-AR-5354

DECISION

July 10, 2019

Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Member Abbott concurring;  
Member DuBester concurring in part  
and dissenting in part)

**I. Statement of the Case**

In this case, the Authority reaffirms our reliance on the factors identified in *Allen v. U.S. Postal Service (Allen)*<sup>1</sup> to determine whether attorney fees are warranted in the “interest of justice” under 5 U.S.C. § 7701(g)(1). However, we clarify that, in arbitration cases where the grieved action is not disciplinary in nature, the “interest of justice” analysis should focus on whether (a) the agency “knew or should have known,” at the time that it denied the grievance, that it would not prevail at arbitration; or (b) prior to the close of the record at arbitration, compelling evidence that the agency’s position was “clearly without merit” made the agency’s prolonging of proceedings blameworthy.<sup>2</sup>

The grievants in this case are housekeepers at the Agency’s hospital who regularly dispose of bio-hazardous waste and clean areas where patients are treated for contagious diseases. The question before Arbitrator Fred K. Blackard was whether their exposure to micro-organisms entitles them to environmental-hazard pay. The Arbitrator found that the housekeepers worked in close proximity to

micro-organisms, thereby entitling them to environmental-differential pay, sustained the grievance, and awarded backpay. He denied the Union’s request for attorney fees because there was no provision for attorney fees in the parties’ agreement.<sup>3</sup> Both parties filed exceptions to the award.

We issued a Federal Register notice soliciting briefs from the parties as well as amici briefs from other interested persons regarding the issue of whether and how the Authority should reevaluate its reliance on the “Allen” factors in attorney fee cases<sup>4</sup> and we received ten briefs in response to the notice.<sup>5</sup>

First, the Agency argues that the award is contrary to 5 U.S.C. § 5343(c)(4), 5 C.F.R. Part 532, Subpart E, Appendix A (Appendix A), and Authority precedent. Because the Arbitrator’s conclusion is consistent with the applicable standard of law and Authority precedent, we deny the Agency’s exception.

Second, the Agency argues that the award is contrary to management’s right to assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (Statute).<sup>6</sup> Because the Agency does not demonstrate that an award of environmental-differential pay under § 5343 and Appendix A is contrary to the right to assign work under § 7106(a)(2)(B), we deny the Agency’s exception.

Last, the Union argues that the award is contrary to the Back Pay Act (BPA).<sup>7</sup> Because the Arbitrator erroneously found that he did not have the authority to render an award of attorney fees under the BPA, the award lacks a fully articulated, reasoned decision as required by the BPA.

<sup>3</sup> Member Abbott observes that the Arbitrator in this case, by finding that the housekeepers are entitled to environmental-differential pay, reached the opposite conclusion as the arbitrator in another recent case – *AFGE, Local 933*, 70 FLRA 508 (2018) (*Local 933*). These cases illustrate the limitations of pursuing every possible complaint through the negotiated-grievance procedure to be decided ultimately by a lay, third party arbitrator. When employees are concerned about serious hazards and workplace safety, it may be more effective and efficient to have those concerns addressed by expert adjudicators at the Occupational Safety and Health Administration (OSHA), a government entity designed to address workplace safety.

<sup>4</sup> Notice of Opportunity to Submit Amici Curiae Briefs in an Arbitration Appeal Pending Before the Federal Labor Relations Authority, 84 Fed. Reg. 7053 (Mar 1, 2019) (Notice) (Member DuBester dissenting).

<sup>5</sup> We thank the amici for their invaluable assistance.

<sup>6</sup> 5 U.S.C. § 7106(a)(2)(B).

<sup>7</sup> *Id.* § 5596.

<sup>1</sup> 2 M.S.P.R. 420 (1980).

<sup>2</sup> *Id.* at 434-35.

We grant the Union's sole exception and remand the case to the Arbitrator for further proceedings consistent with this decision.

## II. Background and Arbitrator's Award

The Union filed a grievance seeking environmental-differential pay for housekeepers at the Agency's medical center. The matter was not resolved, and the parties submitted the matter to arbitration.

The Arbitrator framed the issue as whether the Agency violated the parties' agreement or appropriate laws, rules, or regulations when it denied the housekeepers environmental-differential pay, and, if so, what is the proper remedy.

The Union argued that the housekeepers are entitled to environmental-differential pay because they work in close proximity to hazardous micro-organisms. The Agency argued that the housekeepers' duties do not meet the standards governing such pay under Appendix A. Further, the Agency maintained that the housekeepers received adequate training and protective equipment to minimize any potential exposure to hazardous micro-organisms.

On January 24, 2018, the Arbitrator issued an award finding that the housekeepers—whose duties include collecting and transporting bio-hazardous waste and cleaning areas where patients are treated for contagious diseases—worked in close proximity to potentially infectious micro-organisms within the meaning of Appendix A, entitling them to environmental-differential pay. The Arbitrator also considered the effectiveness of the provided protective equipment and found that it was insufficient to “practically eliminate[] the potential’ for injury.”<sup>8</sup> Accordingly, the Arbitrator found that the Agency violated Article 29 when it failed to provide environmental-hazard pay in accordance with Appendix A. The Arbitrator sustained the grievance and awarded backpay, but denied the Union's request for attorney fees because he found that “such relief [was] not provided for” in the parties' agreement.<sup>9</sup>

By February 28, 2018, both parties filed exceptions to the award; neither party filed an opposition.

On March 1, 2019, the Authority issued a Federal Register notice<sup>10</sup> inviting the parties and other interested persons to submit briefs addressing the question of how the Authority should determine whether

an award of attorney fees under the BPA is warranted in the “interest of justice,” as required under 5 U.S.C. § 7701(g)(1). Specifically, the notice requested that the briefs address the question of whether the Authority should reconsider its reliance on *Allen* and fashion interest-of-justice guidelines that are better adapted to the federal collective bargaining context and to the types of cases that the Authority is called upon to review. Several unions and agencies filed amicus briefs in response to the notice.

## III. Analysis and Conclusions

A. The award is not contrary to 5 U.S.C. § 5343(c)(4), Appendix A, or Authority precedent.<sup>11</sup>

The Agency alleges that the award is contrary to § 5343(c)(4), Appendix A,<sup>12</sup> and the Authority's decision in *NAGE, Local R-184 (NAGE)*.<sup>13</sup> According to the Agency, the Arbitrator erred when he found an entitlement to environmental-differential pay without determining whether the Agency had provided the housekeepers with adequate protective equipment and training or that their job descriptions had failed to specify the hazard associated with their jobs.<sup>14</sup>

Section 5343(c)(4) requires environmental-hazard pay for duties involving severe hazards, and Appendix A specifically provides for “low[-]degree” hazard pay for employees working in close proximity to micro-organisms.<sup>15</sup> Deferring to the Arbitrator's factual findings, which the Agency has not

<sup>11</sup> Chairman Kiko observes that the Agency's limited presentation of the arguments against awarding environmental hazard pay here has considerably narrowed the scope of our review.

<sup>12</sup> When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo. *Local 933*, 70 FLRA at 510 n.13 (citing *AFGE, Local 12*, 70 FLRA 348, 349-50 (2017)). In reviewing de novo, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* In making that assessment the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *Id.* (citing *AFGE, Local 2302*, 70 FLRA 256, 260 (2017)). Section 7122(a)(1) of the Statute provides that an arbitration award will be found deficient if it conflicts with any rule or regulation. 5 U.S.C. § 7122(a)(1). For purposes of § 7122(a)(1), the Authority has defined rule or regulation to include both government-wide and governing agency rules and regulations. *Local 933*, 70 FLRA at 510 n.13 (citing *AFGE, Local 1203*, 55 FLRA 528, 530 (1999)).

<sup>13</sup> 67 FLRA 32 (2012).

<sup>14</sup> Agency's Exceptions Br. at 6-7.

<sup>15</sup> 5 U.S.C. § 5343(c)(4); Appendix A; *see also U.S. Dep't of VA, San Diego Healthcare Sys., San Diego, Cal.*, 65 FLRA 45, 49 (2010) (VA).

<sup>8</sup> Award at 9-10.

<sup>9</sup> *Id.* at 12.

<sup>10</sup> 84 Fed. Reg. 7053-01 (Mar. 1, 2019) (Member DuBester dissenting).

challenged as nonfacts, we conclude that low-degree environmental-hazard pay is warranted because the housekeepers collect and transport bio-hazardous waste and clean areas where patients are treated for contagious diseases.<sup>16</sup>

The Agency's argument that its training and protective equipment are sufficient to eliminate the threat of potential injury merely challenges the weight that the Arbitrator gave to the evidence and does not establish that the award is contrary to § 5343(c)(4) or Appendix A.<sup>17</sup> Moreover, contrary to the Agency's contention, nothing in § 5343(c)(4) precludes payment of environmental-hazard pay if the position description specifies the hazard associated with the job.<sup>18</sup>

We also find the Agency's reliance on *NAGE*—to support its argument that a “three[-]prong test” must be satisfied in order for the housekeepers to qualify for an environmental-differential—unpersuasive.<sup>19</sup> In *NAGE*, unlike here, the arbitrator denied environmental-differential pay for three reasons, but the union only challenged one of those reasons.<sup>20</sup> Therefore, in that case, the Authority denied the union's exception because the other two findings supported the award.<sup>21</sup> However, *NAGE* did not establish an Authority standard for evaluating employees' entitlement to environmental differential pay under § 5343(c)(4). Consequently, the Agency's reliance on *NAGE* does not demonstrate that the award violates § 5343(c)(4) or Appendix A.<sup>22</sup> And, because we deny the Agency's contrary to law exception, we also reject the Agency's essence exception<sup>23</sup> based on the same arguments.<sup>24</sup>

B. The award is not contrary to management's right to assign work.<sup>25</sup>

The Agency argues that the award violates its right to assign work under § 7106(a)(2)(B) of the Statute because the award affects its authority to determine the personnel by which it conducts its operations.<sup>26</sup>

We need not reach an analysis under our management-rights framework, recently announced in *U.S. DOJ, Federal BOP*, because the Agency has provided us with no reason not to conclude that 5 U.S.C. § 5343 and Appendix A are “applicable laws” within the meaning of § 7106(a)(2).<sup>27</sup> Because we have already found that the Arbitrator's award of environmental-hazard pay is consistent with 5 U.S.C. § 5343 and Appendix A, those provisions are “applicable laws” that are fully enforceable, external limitations on management's rights in this case. And so, we deny this exception.

C. We remand the award for further findings consistent with the BPA.

The Union argues that the award is contrary to law because the Arbitrator failed to make specific findings to support his denial of attorney fees, as required by the BPA and 5 U.S.C. § 7701(g)(1).<sup>28</sup>

Here, the Arbitrator denied the Union's request for attorney fees because he found that attorney fees were not provided for in the parties' agreement.<sup>29</sup> The Union argues that entitlement to attorney fees under the BPA

<sup>16</sup> Award at 9; see *VA*, 65 FLRA at 48 n.5; *IAMAW, Dist. Lodge 725, Local Lodge 726*, 60 FLRA 196, 199 (2004).

<sup>17</sup> See *Local 933*, 70 FLRA at 510.

<sup>18</sup> 5 U.S.C. § 5343(c)(4); see also *VA*, 65 FLRA at 49.

<sup>19</sup> Agency's Exceptions Br. at 6 (citing *NAGE*, 67 FLRA at 32).

<sup>20</sup> 67 FLRA at 32.

<sup>21</sup> *Id.* at 33.

<sup>22</sup> See *Local 933*, 70 FLRA at 510.

<sup>23</sup> The Agency argues that the Arbitrator's interpretation of Article 29 is unreasonable and not plausible. Agency's Exceptions Br. at 4.

<sup>24</sup> See *SSA, Office of Disability Adjudication & Review, Springfield, Mass.*, 68 FLRA 803, 806 (2015) (citing *U.S. DOD, Def. Contract Mgmt. Agency*, 66 FLRA 53, 58 (2011) (when the Authority denies an essence exception, and an exceeded-authority exception repeats the same argument, the Authority also denies the exceeded-authority exception)).

<sup>25</sup> We note that had we considered the Agency's exception under the three-part framework recently articulated in *U.S. DOJ, Federal BOP*, 70 FLRA 398, 405-06 (2018) (*DOJ*) (Member DuBester dissenting), we also would have denied the exception. Although the Agency argues that the award excessively interferes with its right to assign, it does not explain why, and it is not otherwise apparent how, awarding environmental differential pay excessively interferes with the right to assign work. In this case, the Arbitrator only required that the Agency abide by the parties' agreement that entitles employees to be paid in accordance with Appendix A. Consequently, the remedy does not excessively interfere with management's right to assign work under § 7106(a)(2)(B).

<sup>26</sup> Agency's Exceptions Br. at 3-6.

<sup>27</sup> See *DOJ*, 70 FLRA at 401-02 (discussing with approval U.S. Supreme Court's holding that “there are no ‘external limitations’ on management rights, insofar as union powers under § 7106(a) are concerned, other than the limitations imposed by ‘applicable laws’” (quoting *IRS v. FLRA*, 494 U.S. at 931)); *NTEU*, 42 FLRA 377, 390 (1991) (discussing “applicable laws”).

<sup>28</sup> Union's Exception Br. at 4-5.

<sup>29</sup> Award at 11-12.

does not require the parties' agreement to authorize an award of attorney fees.<sup>30</sup> We agree.<sup>31</sup>

Accordingly, because the Arbitrator erroneously concluded that he did not have the authority to render an award of attorney fees, we grant the exception and remand the award to the parties for resubmission to the Arbitrator to make specific findings resolving the Union's attorney-fee request, consistent with the legal standards required by the BPA and § 7701(g)(1), as outlined below.<sup>32</sup>

We take this opportunity to clarify the standards for determining when an award of attorney fees in an arbitration proceeding is warranted under the BPA and § 7701(g)(1).<sup>33</sup>

- D. We clarify how the legal standards for attorney fee awards under the BPA and § 7701(g)(1) apply to arbitration awards in which the grieved action is not disciplinary in nature.

Title 5 U.S.C. § 7122(b) provides that an arbitrator's final award may include an award of backpay under 5 U.S.C. § 5596. Section 5596 in turn provides, in relevant part:

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive . . . .

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title . . . shall be awarded in accordance with standards established under section 7701(g) of this title[.]<sup>34</sup>

Thus, the threshold requirement for an award of attorney fees under the BPA is a finding that the employee was affected by an unjustified or unwarranted personnel action,<sup>35</sup> which resulted in a withdrawal or reduction of the employee's pay, allowances or differentials.<sup>36</sup> The BPA further 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>37</sup>

Section 7701(g) in turn sets forth the requirements for an award of attorney fees by the Merit Systems Protection Board (the Board):

- (1) [The] Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

<sup>30</sup> Union's Exception Br. at 5 (citing *NAGE, Local R14-52*, 45 FLRA 830, 833 (1992)).

<sup>31</sup> See *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 39 FLRA 1215, 1221 (1991) (arbitrator's denial of request for attorney fees on the basis that the parties' agreement did not specifically authorize the granting of attorney fees is contrary to the BPA).

<sup>32</sup> See *AFGE, Local 1592*, 66 FLRA 758, 759 (2012). Here, because the arbitrator denied the attorney fees without providing a fully articulated, reasoned decision, the award does not contain the necessary findings for the Authority to make an assessment and those findings cannot be derived from the record.

<sup>33</sup> While the case before us involves exceptions to an arbitrator's award, we note that the BPA also serves as authority for attorney fee awards in unfair-labor-practice proceedings in which the union was the charging party. See 5 U.S.C. § 7118(a)(7).

<sup>34</sup> 5 U.S.C. § 5596.

<sup>35</sup> An "unjustified or unwarranted personnel action" may include an act of omission, i.e., failure to take an action or confer a benefit. 5 C.F.R. § 550.803. The determination that a personnel action is unjustified or unwarranted must be made by an appropriate authority—which includes arbitrators and the Authority—and may be based on applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. *Id.*

<sup>36</sup> The term "pay, allowances, and differentials" includes pay, leave, and other monetary benefits payable by the employing agency to the employee during periods of Federal employment, with the exception of contributions to the Thrift Savings Plan. *Id.*

<sup>37</sup> *NAIL, Local 5*, 69 FLRA 573, 575 (2016) (*Local 5*).

Hence, the Board will award attorney fees under the BPA only if the requirements of § 7701(g)(1) are satisfied. The requirements of § 7701(g)(1) include the following: (1) the employee must be the prevailing party;<sup>38</sup> (2) the employee must have incurred attorney fees pursuant to an existing attorney-client relationship; (3) an award of attorney fees must be warranted in the interest of justice; and (4) the amount of fees claimed must be reasonable.<sup>39</sup>

The legislative history of the Civil Service Reform Act reflects that Congress considered and rejected an alternative provision that would have granted the Authority discretion to establish its own regulatory standards for determining what fees should be awarded in unfair labor practice cases and arbitration awards.<sup>40</sup> Considering as well the plain language of 5 U.S.C. § 5596(b)(1)(A)(ii), the Authority has concluded that it is not free to fashion its own standards for attorney fees under the BPA, but is constrained to follow the same standards applied by the Board under § 7701(g), including the “interest of justice” requirement of § 7701(g)(1).<sup>41</sup> The Authority looks to decisions of the Board and its reviewing court, the U.S. Court of Appeals for the Federal Circuit, for guidance in interpreting these standards.<sup>42</sup>

<sup>38</sup> Under the definition set forth in *Buckhamton Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001), and adopted by the Board, a grievant is a prevailing party when he or she obtains an enforceable judgment that benefited him or her at the time of the judgment. *AFGE, Local 1592*, 65 FLRA 921, 922 (2011). The degree of success obtained is not a consideration in determining whether an employee is a prevailing party. *Farrar v. Hobby*, 506 U.S. 103, 113-14 (1992); *AFGE, Local 3310*, 53 FLRA 1595, 1600 (1998).

<sup>39</sup> *Caros v. DHS*, 122 M.S.P.R. 231, ¶ 5 (2015). The Authority has recognized these same requirements, though sometimes stated in a different order. See, e.g., *Local 5*, 69 FLRA at 575. In addition to the requirements spelled out in § 7701(g)(1), the Authority has held that an award of fees under that section must be supported by a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement. *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollack, La.*, 70 FLRA 195, 196 (2017) (*BOP*); see also 5 C.F.R. § 550.807(c)(2) (requiring a specific finding by the appropriate authority setting forth the reasons payment of fees is in the interest of justice).

<sup>40</sup> See *Naval Air Dev. Ctr., Dep’t of the Navy*, 21 FLRA 131, 152-56 (1986) (*NADC*) (Concurring Opinion of Member Frazier).

<sup>41</sup> *Id.* at 157. Similarly, in cases where a backpay award is based on a finding of discrimination, the Authority must apply the standard set forth at § 7701(g)(2). See, e.g., *FDIC, Chi. Region*, 45 FLRA 437, 454-56 (1992).

<sup>42</sup> *AFGE, Local 2002*, 70 FLRA 812, 814 (2018) (Member DuBester dissenting).

In *Allen*, an appeal of a removal action, the Board introduced guidelines for determining when the “interest of justice” requirement of § 7701(g)(1) has been satisfied. Considering the language of § 7701(g)(1), its legislative history, and court precedent applying the “interest of justice” standard in other contexts involving attorney fees, the Board compiled a list of five circumstances in which an award of attorney fees may be warranted in the interest of justice:

1. Where the agency engaged in a prohibited personnel practice;
2. Where the agency’s action was clearly without merit, or was wholly unfounded, or the employee is substantially innocent of the charges brought by the agency;
3. Where the agency initiated the action against the employee in bad faith, including:
  - a. Where the agency’s action was brought to harass the employee;
  - b. Where the agency’s action was brought to exert improper pressure on the employee to act in certain ways;
4. Where the agency committed a gross procedural error which prolonged the proceeding or severely prejudiced the employee;
5. Where the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.<sup>43</sup>

The Board stressed that the five listed categories were “not exhaustive, but illustrative,” and were intended as “directional markers” rather than a “catalogue of litmus paper tests for award or denial of attorney fees.”<sup>44</sup> The Federal Circuit subsequently endorsed the *Allen* guidelines, while also recognizing that the five categories are not exhaustive.<sup>45</sup>

The Authority has traditionally relied on *Allen*, finding that the interest of justice requirement is satisfied if any of the five categories applies.<sup>46</sup> In addition, the Authority has held that an attorney fee award is warranted in the interest of justice when there is service

<sup>43</sup> *Allen*, 2 M.S.P.R. at 434-35.

<sup>44</sup> *Id.* at 435; see *Montalvo v. U.S. Postal Serv.*, 122 M.S.P.R. 687, ¶ 12 (2015) (observing that the *Allen* guidelines are not exhaustive); *Local 5*, 69 FLRA at 577 (noting that “to the extent that the Authority has sometimes implied that attorney fees are warranted only if they satisfy one of the five *Allen* factors, that is inconsistent with *Allen* itself”).

<sup>45</sup> *Sterner v. Dep’t of the Army*, 711 F.2d 1563, 1569-70 (Fed. Cir. 1983). The court observed in *Sterner* that other relevant considerations may include, for example, the de minimis nature of an appellant’s victory or, in an appropriate case, extraordinary financial hardship. *Id.* at 1567-68, 1570.

<sup>46</sup> See, e.g., *U.S. DHS, U.S. CBP*, 70 FLRA 73, 74 (2016) (*CBP*); *Local 5*, 69 FLRA at 577.

rendered to the federal work force or there is a benefit to the public derived from maintaining the action.<sup>47</sup> However, the Authority has also observed that the categories listed in *Allen* were developed in the context of an adverse action appeal and are not necessarily well adapted to the types of cases the Authority is called upon to review.<sup>48</sup> This is especially apparent when, as in this case, the grieved action is not disciplinary in nature.<sup>49</sup>

The Board has itself recognized that the *Allen* guidelines were developed in the adverse action context, and require modification for use in other types of cases in which attorney fees may be awarded under § 7701(g)(1).<sup>50</sup> Most helpfully for our purposes, these include cases in which an applicant for retirement benefits<sup>51</sup> successfully appeals an unfavorable reconsideration decision by the Office of Personnel Management (OPM).<sup>52</sup>

The Board has held that in such appeals, the most relevant considerations in determining whether an attorney fee award is warranted in the interest of justice are whether OPM knew or should have known when it made its decision that it would not prevail on appeal, and whether OPM's decision was clearly without merit.<sup>53</sup> In this context, the "knew or should have known" standard requires an evaluation of the evidence that was available to OPM at the time it made the reconsideration decision.<sup>54</sup> In determining whether a fee award is warranted under this category, the Board considers whether OPM was negligent in its processing of the

application, lacked a reasonable and supportable explanation for its position, or ignored clear, un rebutted evidence that the appellant satisfied the criteria for a benefit.<sup>55</sup>

Where OPM's reconsideration decision would not have been reversed absent evidence introduced during the appellate process, the attorney fee request is analyzed under the "clearly-without-merit" standard.<sup>56</sup> The "clearly[-]without[-]merit" standard focuses on the result of the case before the Board.<sup>57</sup> To award fees under this category, the Board must determine that, at some point prior to the close of the record on appeal, OPM's failure to acknowledge the appellant's entitlement to the benefits he or she sought was blameworthy.<sup>58</sup> In making that determination, the Board considers the totality of the evidence.<sup>59</sup> Factors to be considered include the extent to which the appellant produced evidence that was so compelling that reasonable minds could not differ as to the appellant's eligibility for an annuity and OPM's continued refusal to approve the annuity prolonged the proceedings.<sup>60</sup>

In reexamining our reliance on the Board's interest-of-justice criteria, we find that the Authority may, without departing from Board and Federal Circuit precedent, adapt these modified guidelines to arbitration awards in which the grieved action is not disciplinary in nature, such as when the grievance centers around a question of the interpretation of the parties' collective-bargaining agreement. In doing so, we analogize the grieved agency action to OPM's denial of a retirement benefit, the denial of the grievance to OPM's reconsideration decision, and the arbitration to the Board appeal. Like most analogies, this analogy is imperfect, and not every aspect of the Board's analysis in retirement cases has a clear counterpart in the collective bargaining context, or vice versa. However, we may reasonably draw the following conclusions.

First, in assessing whether a fee award in a non-disciplinary case is warranted in the interest of justice, it is unnecessary to address each *Allen* category. Rather, the most relevant considerations will generally be

<sup>47</sup> See, e.g., *NTEU*, 69 FLRA 614, 618 (2016); *Local 5*, 69 FLRA at 575; *NADC*, 21 FLRA at 139 (Opinion of Chairman Calhoun) (citing *Wells v. Harris*, 2 M.S.P.R. 409, 424-14 (1980)).

<sup>48</sup> *Fraternal Order of Police, Lodge No. 168*, 70 FLRA 338, 340 (2017) (*FOP*); see also *CBP*, 70 FLRA at 76 (citing *Local 5*, 69 FLRA at 577-78).

<sup>49</sup> *FOP*, 70 FLRA at 340.

<sup>50</sup> *Simmons v. OPM*, 31 M.S.P.R. 559, 564-65 (1986) (*Simmons*).

<sup>51</sup> See generally 5 U.S.C. §§ 7701, 8347(d)(1); *Bronger v. OPM*, 740 F.2d 1552 (Fed. Cir. 1984) (federal employees seeking entitlement to nondisability and disability retirement benefits may appeal adverse determinations to the MSPB).

<sup>52</sup> See *Simmons v. MSPB*, 768 F.2d 323, 326-27 (Fed. Cir. 1985) (holding that § 7701(g)(1) governs attorney fee awards in retirement cases).

<sup>53</sup> *Holmes v. OPM*, 99 M.S.P.R. 330, ¶ 6 (2005) (*Holmes*); *Kent v. OPM*, 33 M.S.P.R. 361, 366 (1987) (*Kent*). These criteria derive from *Allen* categories (5) and (2), respectively. See *Kent*, 33 M.S.P.R. at 366. However, the "substantially innocent" subcategory of *Allen* category (2) has no application to retirement appeals or other cases not involving disciplinary actions. *Simmons*, 31 M.S.P.R. at 565 (1987); see also *Johnson v. U.S. Dep't of the Interior*, 24 M.S.P.R. 209, 213 (1984) (finding the substantial innocence criterion irrelevant to an appeal of a reduction-in-force action).

<sup>54</sup> *Holmes*, 99 M.S.P.R. 330, ¶ 9.

<sup>55</sup> *Id.*

<sup>56</sup> *Barron v. OPM*, 47 M.S.P.R. 607, 615 (1991).

<sup>57</sup> *Kent*, 33 M.S.P.R. at 367.

<sup>58</sup> *Holmes*, 99 M.S.P.R. 330, ¶ 11; *Kent*, 33 M.S.P.R. at 365-67.

<sup>59</sup> *Kent*, 33 M.S.P.R. at 369.

<sup>60</sup> *Holmes*, 99 M.S.P.R. 330, ¶ 11. Other factors include whether the appellant was misled by OPM to his or her detriment, or whether OPM's initial decision was insufficient under the circumstances to permit a reasonable person to identify the kind of evidence needed to prevail on reconsideration, and the extent to which the reversal was based on evidence that the appellant did not present to OPM, but that nevertheless was readily available to OPM. *Id.*

whether the agency knew or should have known at the time it denied the grievance that it would not prevail at arbitration, or whether, given the result of the arbitration, the grieved action was clearly without merit. There may be exceptional circumstances in which other considerations are relevant,<sup>61</sup> but in most cases it will be sufficient to apply the “knew or should have known” or the “clearly without merit” criteria.

The “knew or should have known” standard requires an evaluation of the evidence that was available to the agency at the time it denied the grievance. Attorney fees may be warranted under that criterion if it is found that the agency was negligent in taking the grieved action, that it lacked a reasonable and supportable explanation for its position, or that it ignored clear, un rebutted evidence that the grieved action was contrary to law, regulation, or negotiated agreement provisions.

The “clearly without merit” standard focuses on the result of the arbitration, and may be satisfied if, at some point prior to the close of the record before the arbitrator, the agency’s failure to reverse its position was blameworthy. In applying that standard, the arbitrator should consider the totality of the circumstances. Relevant considerations include the extent to which the grievant produced evidence that was so compelling that reasonable minds could not disagree that the grieved action was unwarranted or unjustified and, if such compelling evidence was introduced, the extent to which the agency’s intransigence needlessly prolonged the arbitration process.

We observe that in many arbitration cases in which the grieved action is not disciplinary in nature, the dispute arises not because the agency acted in disregard of the facts or its legal obligations, but rather because the parties disagree in good faith over the most reasonable interpretation of a CBA provision or a statutory or regulatory requirement. In such circumstances, it can seldom be said that the agency knew or should have known at the time it denied the grievance that it would not prevail on the merits at arbitration.<sup>62</sup> Nor will an

action be deemed clearly without merit merely because the arbitrator ruled in the grievant’s favor.<sup>63</sup> Even in cases where the grievant prevails based on compelling evidence introduced during arbitration, a fee award will be warranted under the clearly without merit standard only to the extent the agency took actions that caused the grievant to incur additional fees after the dispositive evidence was introduced.<sup>64</sup> Ordinarily, an agency does not needlessly prolong the proceeding merely by awaiting the arbitrator’s decision.<sup>65</sup>

Finally, as with any request for attorney fees under the BPA and § 7701(g)(1), the arbitrator must make a specific finding setting forth the reasons payment of fees is or is not warranted in the interest of justice.<sup>66</sup>

#### IV. Order

We deny the Agency’s exceptions. We grant the Union’s exception and remand the attorney-fee issue to the parties for resubmission to the Arbitrator, absent settlement, for further findings consistent with this decision.

<sup>61</sup> For example, § 7701(g)(1) expressly contemplates that the interest of justice requirement will be satisfied where the agency engaged in a prohibited personnel practice. It should be borne in mind, however, that this provision refers specifically to prohibited personnel practices as defined at 5 U.S.C. § 2302(b), and does not encompass every situation in which the agency’s action is found to be an unjustified or unwarranted personnel action for purposes of the BPA. *U.S. DHS, U.S. CBP*, 69 FLRA 412, 415 (2016).

<sup>62</sup> In contrast, retirement appeals more frequently turn on factual disputes, and it is not out of the ordinary for the Board to find a fee award warranted in the interest of justice where OPM failed to properly assess the evidence that was available to it at the

time it issued its reconsideration decision. *See, e.g., Duke v. OPM*, 78 M.S.P.R. 578 (1998).

<sup>63</sup> *See Kent*, 33 M.S.P.R. at 368 (“[T]he fact that the appellant finally prevails does not end the inquiry into whether the agency’s denial of the appellant’s entitlement to disability retirement was clearly without merit.”).

<sup>64</sup> *See Short v. OPM*, 71 M.S.P.R. 136, 143 (1996) (*Short*); *see also Kinard v. OPM*, 39 M.S.P.R. 265, 271 (1988) (holding that the “compelling evidence” test requires that the agency unnecessarily prolonged the proceedings after the dispositive evidence was introduced).

<sup>65</sup> *Compare Holmes*, 99 M.S.P.R. at 336-37 (“[T]he Board has found that OPM does not needlessly prolong the proceeding merely by awaiting the [Administrative Judge’s (AJ’s)] decision rather than vacating its decision and granting the annuity immediately.” (citing *Short*, 71 M.S.P.R. at 143 (where OPM took no other action after the submission of dispositive evidence, OPM did not needlessly prolong the proceeding merely by awaiting the AJ’s decision))), *with Ortiz v. OPM*, 34 M.S.P.R. 47, 53 (1987) (OPM “unduly prolonged the adjudication by submitting a brief after the appellant presented compelling evidence of his entitlement to an annuity”).

<sup>66</sup> *BOP*, 70 FLRA at 196 (2017); 5 C.F.R. § 550.807(c)(2).

**Member Abbott, concurring:**

Our decision today clarifies when and under what circumstances attorney fees may be warranted in the context of an aggrieved action that is not disciplinary in nature, such as a contract-interpretation grievance pursued through the grievance-arbitration process. This clarification is long overdue.

I write separately to discuss two matters. First, a central premise of this decision rests on two plausible, but precarious, definitional foundations. Second, important questions, that must be addressed on another day and may well return to us on remand, remain unanswered.

As our decision reiterates,<sup>1</sup> the threshold upon which an award of attorney fees may be made in the context of grievance-arbitration is by our Statute's reference to the Back Pay Act in § 7122(b) and the BPA's definition of "unjustified or unwarranted personnel action" in § 5596(b)(1).<sup>2</sup> At the time Congress enacted the BPA (in 1966), the legislative history indicates that Congress understood that the definition of personnel action was limited in scope "to provide a monetary remedy for wrongful reductions in grade, removals, suspension, and 'other unwarranted or unjustified actions affecting pay or allowances that could occur in the course of reassignments and change from full-time to part-time work.'"<sup>3</sup> According to the Supreme Court, the term "personnel actions" only applied to employees who are "subjected to a reduction in their duly appointed emoluments or position."<sup>4</sup> Although the legislative history of the CSRA indicates that Congress *considered* a broader definition, the final version of the retained the original, limited definition with only slight modifications.<sup>5</sup>

It is, thus, only OPM's regulatory definition of the term "unjustified or unwarranted personnel action" which extends the BPA to matters other than pay matters.<sup>6</sup> While I believe it is clearly within the mandate of OPM to interpret and define the BPA

(an interpretation we are constrained to follow),<sup>7</sup> I remain unconvinced that OPM's regulatory definition is consistent with Congress's intent.

Our decision also defers to the MSPB's interpretation of § 7701(g)(1) and the multiple factors it uses to determine when attorney fees are warranted in the interest of justice. Although Section 7701(g)(1) enumerates two circumstances in which attorney fees may be awarded -- "*including* [those] in which a prohibited personnel practice was engaged in by the agency *or* any case in which the agency's action was clearly without merit"<sup>8</sup> -- the MSPB in *Allen* found *five* circumstances. On this matter, as with OPM, we defer to MSPB's interpretation of § 7701(g)(1). I note, however (as did several amici), that Congress did not incorporate the phrase -- *but not limited to* -- following the word "including" as it often has in other contexts when it establishes a non-exhaustive list of criteria or requirements.

It is not just the U.S. Supreme Court that has called for a narrow interpretation of those circumstances under which attorney fees are warranted. For example, the U.S. Civilian Board of Contract Appeals has determined that the legislative history of the BPA indicates that Congress did not intend for its attorneys-fee provisions to apply to pay actions *unrelated to personnel actions*.<sup>9</sup> The Comptroller General arrived at a similar conclusion and found that "*personnel actions*", as the term is used in the BPA, is restricted to "reductions in grade, removals, suspensions, and other unwarranted or unjustified actions affecting pay or allowances that could occur in the course of reassignments and change from full-time to part-time work."<sup>10</sup> And, the Authority recently held that attempts by an Agency "to recoup moneys that it actually overpaid . . . do not constitute *unwarranted and unjustified personnel actions* that result in the withdrawal or withholding of pay under the BPA."<sup>11</sup>

These definitional conundrums are not for us to resolve but are most appropriately left to Congress to resolve or for the Courts to provide additional clarification and guidance.

<sup>1</sup> Majority at 6-7.

<sup>2</sup> *Id.* (citing 5 U.S.C. § 5596(b)(1)).

<sup>3</sup> *U.S. v. Testan*, 424 U.S. 392, 405 (1976) (quoting S. Rep. No. 1062, 89th Cong., 2d Sess., as reprinted in 1966 U.S.C.C.A.N. 2097, 2099). The exact language of § 5596(b)(1) is "an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowance, or differentials of the employee."

<sup>4</sup> *Testan*, 424 U.S. at 406-07.

<sup>5</sup> S. Rep. No. 969, 95th Cong., 2d Sess., pp. 114-115; H.R. Rep. No. 1403, 95th Cong., 2d Sess., pp. 60-61 (no reference to broadening BPA application beyond acts of omission).

<sup>6</sup> See 5 C.F.R. § 550.803.

<sup>7</sup> See *U.S. Dep't of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957 (D.C. Cir 2016).

<sup>8</sup> *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420, 434-35 (1980) (emphasis added).

<sup>9</sup> *In the Matter of Jeffrey E. Koontz*, Civilian Board of Contract Appeals, No. 3436-Trav (7/23/2013).

<sup>10</sup> See B-205373, \*3 Comp. Gen. 1984, *Matter of Leland M. Wilson*.

<sup>11</sup> *U.S. DOD Educ. Activity, U.S. DOD Dependents Schs.*, 70 FLRA 718,720 (2018) (Member DuBester dissenting) (emphasis added).



Additionally, other questions concerning attorney fees in the context of grievance-arbitration need not be addressed today but were questioned recently by the United States Court of Appeals for the District of Columbia Circuit<sup>12</sup> and were raised as concerns by various amici – i.e., the applicability of the *Laffey* matrix, proportionality of fees when balanced against results achieved or the value of the matter in dispute, and the reasonableness of fees when representation is provided by union in-house attorneys.

In *DL et al. v. District of Columbia*, although not directly rejecting the *Laffey* Matrix, the Court called into question its long-term viability.<sup>13</sup> The Court distinguished between cases that involve “complex federal litigation” (such as *DL* that involved a novel issue concerning the scope of the Individuals with Disabilities Education Act as well as a protracted dispute regarding class certification) which “presumptively” warrants fees that are supported by the *Laffey* Matrix as opposed to those cases which involve “non-complex cases [litigated] primarily before an administrative body.”<sup>14</sup> The case before the Court was of such a complex nature that the parties on remand had to “work together and think creatively about how to produce a reliable assessment of fees charged for complex federal litigation in the District.”<sup>15</sup>

Of particular note, the majority and the dissent in *DL* recognized that many cases, particularly those that are litigated before an administrative body, are not sufficiently complex to warrant the elevated rates of the *Laffey* Matrix. The majority put it this way – administrative cases “sometimes fall within a submarket characterized by below-*Laffey* rates ... [which] may not have discovery and pre-trial exchanges of the sort found in other federal litigation.”<sup>16</sup> The dissent was even more blunt when he concluded that every case does not require “the most specialized or the most expensive counsel in order to receive competent legal services.”<sup>17</sup>

It is thus imperative that the parties and the Arbitrator address on remand how reasonable attorney fees in matters arising before the Authority (an administrative body) should be assessed following the Court’s guidance in *DL*.

The questions that I raise above are several that beg for answers.

<sup>12</sup> *DL et al. v. D.C.*, 924 F.3d 585 (D.C. Cir. 2019).

<sup>13</sup> *Id.* at 594 (“... as time passes, the *Laffey* matrix may well ... be losing its shine”).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 595 (emphasis added).

<sup>16</sup> *Id.* at 594 (emphasis added).

<sup>17</sup> *Id.* at 597.

### **Member DuBester, concurring in part and dissenting in part:**

I agree with the decision to deny the Agency’s exceptions and to remand the award to the parties for resubmission to the Arbitrator to make specific findings as to whether an award of attorney fees is appropriate. But I strongly disagree with the majority’s modification of the standards used to determine entitlement to attorney fees in arbitration awards in which the grieved action is not disciplinary in nature.

While I have previously suggested that the Authority should reconsider the *Allen* factors because they are unnecessarily cumbersome and impractical for practitioners and arbitrators, reconsideration of such an important doctrine should not take place without a material basis for doing so. As I stated in my dissent to the Federal Register notice soliciting amici curiae briefs, this is not an ideal case in which to address the Authority’s reliance on the *Allen* factors because its “disposition does not even require application of the *Allen* [f]actors.”<sup>1</sup> Indeed, the Arbitrator did not make any of the findings required by the Back Pay Act (the BPA) and 5 U.S.C. §7701(g)(1) to support his denial of attorney fees.<sup>2</sup> Moreover, neither party addressed, or even raised, the appropriateness of the *Allen* factors in its exceptions to the Arbitrator’s award.

Nevertheless, today the majority creates new standards for attorney fee awards which it has already “observe[d]” will not be met in “many arbitration cases.”<sup>3</sup> Notably, the majority crafts these new standards without even a passing reference to the views of parties that submitted briefs on the matter, thereby dissolving any pretense that modification of these standards was necessary to our decision today. And because the majority’s creation is not grounded on the facts of any case actually before us – and is instead derived from an analogy to appeals from Office of Personnel Management decisions involving retirement benefits<sup>4</sup> – our decision today will only generate greater

<sup>1</sup> Notice of Opportunity to Submit Amici Curiae Briefs in an Arbitration Appeal Pending Before the Federal Labor Relations Authority, 84 Fed. Reg. 7053, 7054 (Mar. 1, 2019) (Dissenting View of Member DuBester).

<sup>2</sup> See Majority at 2 (finding that the “award lacks a fully articulated, reasoned decision as required by the BPA”); see also *id.* at 6 n.32 (“Here, because the arbitrator denied the attorney fees without providing a fully articulated, reasoned decision, the award does not contain the necessary findings for the Authority to make an assessment and those findings cannot be derived from the record.”).

<sup>3</sup> Majority at 11; see also, e.g., *id.* (“it can seldom be said that the agency knew or should have known at the time it denied the grievance that it would not prevail on the merits at arbitration”).

<sup>4</sup> *Id.* at 9.

uncertainty regarding how these standards apply to arbitration awards.

Again, because the Arbitrator – the appropriate authority to resolve attorney-fee requests in the first instance<sup>5</sup> – has not decided the attorney-fee request under the BPA, reconsideration of the *Allen* factors is not ripe for review.<sup>6</sup> Accordingly, I dissent.

---

<sup>5</sup> *NAIL, Local 17*, 68 FLRA 279, 282 (2015) (finding arbitrator appropriate authority to resolve attorney-fee request under the BPA's implementing regulations).

<sup>6</sup> *Cf. AFGI, Local 2382*, 58 FLRA 270, 272 (2002) (finding award not ripe for review where arbitrator made no ruling on union's request for attorney fees under the BPA).