

71 FLRA No. 39

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2076
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
(Agency)

0-AR-5372

DECISION

July 10, 2019

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

I. Statement of the Case

In this case, the Authority clarifies how *Allen* factor (5)—i.e., whether the Agency “knew or should have known” that its action would not be sustained—applies in the context of minor disciplinary actions.¹

This case is before the Authority on the Union’s exceptions to Arbitrator William Croasdale’s supplemental award, which denied the Union’s request for attorney fees under the Back Pay Act (BPA).² The request for attorney fees followed a merits award in which the Arbitrator sustained the Agency’s charge against the grievant but mitigated the penalty from a

¹ In *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980), the Merit Systems Protection Board (Board) identified five broad categories of cases in which an award of attorney fees would be warranted in the interest of justice: (1) where the agency engaged in a prohibited personnel practice; (2) where the agency action was clearly without merit or wholly unfounded or the employee was substantially innocent of charges brought by the agency; (3) where the agency initiated the action in bad faith; (4) where the agency committed a gross procedural error; and (5) where the agency knew or should have known that it would not prevail on the merits when it brought the proceeding. *Id.* at 434-35.

² 5 U.S.C. § 5596.

fourteen-day suspension to a five-day suspension. The main issue before the Authority is whether payment of attorney fees is warranted in the interest of justice because the Agency knew or should have known that its original penalty determination would not be upheld. For the reasons that follow, we set aside the supplemental award and remand the matter to the parties for resubmission to the Arbitrator—or a different one—absent settlement.

II. Background and Arbitrator’s Award

The Agency suspended the grievant for fourteen days because she violated its timekeeping policy repeatedly over a two-year period. The Union filed a grievance challenging the suspension. The grievance proceeded to arbitration. In the merits award, the Arbitrator sustained the charges, but mitigated the penalty to a five-day suspension. Neither party filed exceptions to the merits award.

The Union subsequently filed a request for attorney fees under the BPA. In its request, the Union argued that an award of fees was warranted in the interest of justice under *Allen* category (5), because the Agency knew or should have known that the fourteen-day suspension was too severe.

On April 4, 2018, the Arbitrator issued a supplemental award denying the Union’s request for attorney fees. The supplemental award is nearly incomprehensible, and it is difficult to ascertain which portions of the analysis represent the Arbitrator’s own findings of fact and conclusions of law, and which portions are restatements of the parties’ positions or summaries of the facts and holdings of various Merit Systems Protection Board (Board) and court decisions. In the closing paragraph, the Arbitrator states that “the Agency met the *Allen* [f]actor . . . 5 and the ‘interest of justice’ was met.”³ Although this statement could be interpreted as a determination that an award of attorney fees was warranted in the interest of justice, the context of the statement suggests the Arbitrator meant the opposite. Ultimately, the Arbitrator found that the Agency was the prevailing party,⁴ and he denied the Union’s request for attorney fees. The Arbitrator did not make findings as to whether fees were incurred or the reasonable amount of those fees.

³ Award at 29.

⁴ *Id.* As noted below, this finding was in error. *See infra* n.14.

The Union filed exceptions to the supplemental award on May 2, 2018. Among other exceptions, the Union contends that the denial of attorney fees was contrary to law.⁵ On August 2, 2018, the Agency filed an opposition to the exceptions.⁶

III. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews de novo any questions of law raised by the exception and the award.⁷ In a case such as this one, where the decision to award backpay was not based on a finding of discrimination, the BPA requires that an award of fees be in accordance with the standards set forth at 5 U.S.C. § 7701(g)(1).⁸ The Authority looks to decisions of the Board and the U.S. Court of Appeals for the Federal Circuit for guidance in interpreting those standards.⁹

As relevant here, § 7701(g)(1) requires that payment of fees is "warranted in the interest of justice." When, as in this case, the underlying grievance concerns a disciplinary action, the Authority determines whether the interest of justice requirement is satisfied by applying the criteria set forth by the Board in *Allen*.¹⁰ Here, the Union contends that payment of fees warranted in the interest of justice under *Allen* category (5), because the Agency knew or should have known that it would not prevail on the merits when it disciplined the employee.¹¹

In disciplinary actions,¹² "the penalty imposed by the agency is an aspect of the merits of the agency's

case."¹³ Hence, in a case such as this one, where the agency prevails on the charges¹⁴ but the penalty is mitigated, an award of fees may be warranted in the interest of justice under *Allen* category (5) if and only if the agency knew or should have known that its choice of penalty would not be sustained.¹⁵ However, mitigation alone does not create a presumption that payment of fees is warranted.¹⁶ The critical question is whether the agency acted unreasonably by imposing a penalty that it knew or should have known would not be sustained.¹⁷

The Union argues that under *Lambert v. Department of the Air Force (Lambert)*,¹⁸ fees must be awarded here in the interest of justice because the Agency knew or should have known that its chosen penalty would not be upheld. In *Lambert*, the Board held that payment of fees is generally warranted under *Allen* category (5) when the Board sustains the charges in an adverse action appeal but mitigates the penalty, provided the decision to mitigate was based on information available to the agency at the time it took the action.¹⁹ The Board reasoned that, under *Douglas v. VA*,²⁰ the Board will not mitigate a penalty unless it finds that the agency failed to consider the relevant factors or that its chosen penalty is outside the bounds of

analysis is generally limited to categories (2) and (5). *AFGE, Local 1633*, 71 FLRA 211 (2019) (Member DuBester dissenting).

¹³ *AFGE, Local 3294*, 66 FLRA 430, 432 (2012) (*Local 3294*) (Member Beck dissenting).

¹⁴ We acknowledge that, contrary to the Arbitrator's finding, the grievant was "the prevailing party" within the meaning of 5 U.S.C. § 7701(g)(1) even though the Arbitrator sustained the underlying charges. See *Dunn v. Dep't of VA*, 98 F.3d 1308, 1311 (Fed. Cir. 1996) (*Dunn*) ("Because the arbitrator mitigated [the petitioners'] removals to thirty-day suspensions, [the petitioners] qualify as prevailing parties."); *AFGE, Local 987*, 64 FLRA 884, 886-87 (2010) (finding that, where the arbitrator's award resulted in a mitigation of the grievant's suspension and an award of backpay, the grievant was the prevailing party, having received an enforceable judgment that benefited him at the time of the judgment). In the everyday sense of the word, however, the Agency may be said to have "prevailed" on the most important issue, namely the merits of the charge.

¹⁵ *Local 3294*, 66 FLRA at 432.

¹⁶ *Dunn*, 98 F.3d at 1313.

¹⁷ *Id.*

¹⁸ 34 M.S.P.R. 501 (1987).

¹⁹ *Id.* at 505-07. The Board has clarified that where only some of the charges are sustained and the penalty is mitigated, attorney fees may also be warranted. *Brunning v. GSA*, 63 M.S.P.R. 490, 494 (1994). The Board and the Authority have recognized that *Lambert* is consistent with *Dunn*, as it does not establish a per se rule that mitigation alone warrants a fee award. See *Payne v. U.S. Postal Serv.*, 79 M.S.P.R. 71, 74 (1998); *Local 3294*, 66 FLRA at 432.

²⁰ 5 M.S.P.R. 280 (1981).

⁵ Exceptions at 4-8. The Union further contends that the award is incomplete, ambiguous, or contradictory; that it is based on nonfact; that it fails to draw its essence from the parties' collective bargaining agreement; that it is contrary to public policy; and that the arbitrator is biased. *Id.* at 8-18.

⁶ Although the Union initially filed its exceptions on May 2, 2018, it did not cure its procedural deficiencies of service until July 12, 2018. Accordingly, we find the Agency's opposition was timely filed, and we have considered it.

⁷ *AFGE, Local 933*, 70 FLRA 508, 510 n.13 (2018). 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. *Id.*

⁸ See 5 U.S.C. §§ 5596, 7701(g).

⁹ *AFGE, Local 2002*, 70 FLRA 812, 814 (2018) (Member DuBester dissenting).

¹⁰ *U.S. DHS, U.S. CBP*, 70 FLRA 73, 74 (2016). In addition to the categories listed in *Allen*, the Authority has held that an award of fees is in the interest of justice when there is a service to the federal workforce or a benefit to the public derived from maintaining the action. *NTEU*, 69 FLRA 614, 618 (2016).

¹¹ 2 M.S.P.R. at 435. Because the Union relies exclusively on *Allen* category (5), we do not address the remaining *Allen* categories. See *NAIL, Local 5*, 69 FLRA 573, 575 (2016).

¹² The Authority has recently clarified that when the grieved action is not disciplinary in nature, the interest-of-justice

reasonableness.²¹ Consequently, if the Board mitigates a penalty, and does so based on information that was available to the agency at the time of its decision, this amounts to a finding that the agency acted irresponsibly or unreasonably in selecting the penalty, which in turn implies that the agency knew or should have known that its penalty would not be sustained.²²

On several occasions, the Authority has applied *Lambert* in cases involving minor disciplinary actions—e.g., suspensions of 14 days or less, written reprimands, and oral counselings.²³ We conclude, however, that the Board’s rationale in *Lambert* should not apply in this context, because *Lambert* applies to adverse actions—e.g., suspensions of more than 14 days, demotions, and removals. First, when arbitrators review minor disciplinary actions, they are not required to apply the same substantive standards that the Board applies in its review of adverse actions under 5 U.S.C. § 7512.²⁴ Second, while the Board must defer to the agency’s penalty determination, provided the agency considered all of the relevant factors and the penalty is within tolerable limits of reasonableness, arbitrators, however, may mitigate penalties using their own sense of fairness. Thus, in the grievance context, mitigation of a penalty does not necessarily imply that the agency knew or should have known that its penalty would not be sustained, even if the evidence on which the arbitrator relied was available to the agency at the time of its decision.

Accordingly, the Authority will no longer follow *Lambert* in cases where the arbitrator mitigates a minor disciplinary action. In other words, the fact that the evidence on which the arbitrator relied was available to the agency at the time it made its decision will not serve as a sufficient basis for finding that the agency knew or should have known that its penalty would not be sustained. Rather, in determining whether an award of fees is warranted in the interest of justice under *Allen* category (5), arbitrators must evaluate the nature and strength of the evidence that was available to the

agency and assess whether its penalty determination was reasonable in light of that information. To hold otherwise would effectively require an agency to “have a crystal ball to predict precisely how an arbitrator will view the grievance.”²⁵ Circumstances such as this, where all of the charges were sustained and the Agency’s choice of penalty was consistent with its table of penalties, strongly support a finding that the Agency’s penalty determination was reasonable, and that *Allen* category (5) does not apply.²⁶

Here, the Arbitrator appears to have mitigated the penalty based on his opinion that the Agency’s choice of a fourteen-day suspension was punitive, rather than corrective.²⁷ However, the supplemental award does not contain clear and consistent findings as to whether the Agency acted reasonably based on the information that was available to it at the time of its decision. Hence, to the extent the Arbitrator found that that an award of fees was or was not warranted in the interest of justice under *Allen* category (5), he failed to provide an adequate explanation that supports his conclusion.²⁸

The Authority has held that an award of fees under the BPA and § 7701(g)(1) must be supported by a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement.²⁹ The Authority’s approach to attorney fee decisions that are not sufficiently explained is to “take the action necessary to assure that the award is consistent with applicable statutory standards.”³⁰ Where, as here, the record does not permit the Authority to determine the proper resolution of the matter, the Authority will remand the case for further

²¹ *Lambert*, 34 M.S.P.R. at 507 (citing *Douglas v. VA*, 5 M.S.P.R. 280, 306 (1981)).

²² *Id.*; see also *Rose v. Dep’t of the Navy*, 47 M.S.P.R. 5, 10 (1991).

²³ See *Local 3294*, 66 FLRA at 432; *AFGE, Local 1923*, 66 FLRA 22, 24 (2011) (*Local 1923*) (Member Beck dissenting); *U.S. Dep’t of the Army Medical Activity (MEDDAC), Fort Drum, N.Y.*, 65 FLRA 575, 578-79 (2011); *U.S. Dep’t of the Air Force, 355 Fighter Wing, Davis-Monthan Air Force Base, Tucson, Ariz.*, 65 FLRA 219, 221-23 (2009) (Member Beck dissenting).

²⁴ *AFGE, Local 522*, 66 FLRA 560, 563 (2012) (noting, for example, that arbitrators are not required to consider the *Douglas* factors in cases involving suspensions of fourteen days or less).

²⁵ *Local 1923*, 66 FLRA at 25 (Dissenting Opinion of Member Beck) (“Arbitrators may choose to mitigate a penalty for myriad reasons that do not imply negligence, bad faith, or overreaching by the agency – none of which necessarily indicates that the agency knew or should have known the arbitrator would mitigate the penalty.”).

²⁶ See *Adeleke v. U.S. DHS*, 551 F. App’x 1003, 1006 (Fed. Cir. 2014); but see *Seligson v. Dep’t of the Air Force*, 39 M.S.P.R. 260, 263 n.5 (1988) (finding *Allen* category (5) satisfied where the removal penalty was mitigated to a demotion and 60-day suspension, although the charge was sustained and a full range of penalties from reprimand to removal was available to the agency).

²⁷ Award at 28-29.

²⁸ See *AFGE, Local 3020*, 64 FLRA 596, 598 (2010) (remanding where the arbitrator made “contradictory and conflicting” factual findings as to whether the requested fees were warranted in the interest of justice).

²⁹ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 70 FLRA 195, 196 (2017); 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).

³⁰ *USDA, Animal Plant & Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1695 (1998).

proceedings to assure that the resolution of a request for attorney fees is consistent with law. Accordingly, we remand the matter for further proceedings consistent with this decision and the standards set forth at § 7701(g)(1).

IV. Decision

We set aside the supplemental award³¹ and remand the case to the parties for further proceedings, absent settlement. On remand, either party may object to resubmission of this matter to the original Arbitrator. Should such an objection arise, the parties are directed to mutually select a different arbitrator.³²

Member DuBester, concurring in part and dissenting in part:

I agree with the decision to remand the award for resubmission to the Arbitrator because he failed to make specific findings as to whether an award of attorney fees is appropriate. However, I disagree with the majority's decision to modify the standard governing whether attorney fees are warranted under *Allen* category (5).

Although I have previously suggested that the Authority reconsider the *Allen* factors because they are unnecessarily cumbersome and impractical for practitioners and arbitrators, this reconsideration should not occur in a case, such as the one before us today, where our decision does not even require application of the *Allen* factors.¹ And rather than *clarifying* the standards pertaining to *Allen* category (5), the majority's decision will require arbitrators to determine whether an agency's penalty was "reasonable" without providing a coherent explanation as to how that determination should be made.² Indeed, the only guidance the majority provides in this respect suggests that it will not affirm an arbitrator's award of attorney fees in *any* case where an agency's choice of penalty is consistent with that agency's table of penalties. But this position is inconsistent with Authority precedent.³

As with its decision in *AFGE, Local 1633*, the majority's decision today is not grounded on the facts of any case actually before us, and will only generate greater uncertainty regarding how arbitrators should apply *Allen* category (5) to future cases. Accordingly, I dissent.

³¹ Because we set aside the award, we do not reach the Union's remaining exceptions, nor do we find it necessary to consider the Union's motion seeking leave to file a reply to the Agency's opposition. See *U.S. Dep't of the Navy, Naval Supply Sys, Command, Fleet Logistics Ctr.*, 70 FLRA 817, 818 n.14 (2018) (Member DuBester dissenting).

³² In unusual circumstances, in fulfilling its statutory mandate to "take such action and make such recommendations concerning [an arbitration] award as it considers necessary, consistent with applicable laws, rules, or regulations," the Authority has permitted the parties to choose a different arbitrator upon remand. 5 U.S.C. § 7122(a)(2); *AFGE, Local 1992*, 70 FLRA 313, 315 (2017). The incoherence of the reasoning of the supplemental award presents such a circumstance.

¹ See *AFGE, Local 1633*, 71 FLRA 211, 219-20 (2019) (Dissenting Opinion of Member DuBester).

² See Majority at 5 (requiring arbitrators to evaluate the "nature and strength of the evidence that was available to the agency and assess whether its penalty determination was reasonable in light of that information").

³ See, e.g., *U.S. Dep't of the Treasury, U.S. Customs Serv., N.Y.*, N.Y., 51 FLRA 743, 746 (1996) (citation omitted) ("The Agency's exception assumes that application of its table of penalties, an Agency regulation, is dispositive of the issues before the Arbitrator. However, it is well established that collective bargaining agreements, rather than agency regulations, govern the disposition of matters to which they both apply.").